CP-53/KCS-39

BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS, OPPOSITION TO RESPONSIVE APPLICATIONS, AND REBUTTAL IN SUPPORT OF THE APPLICATION

VOLUME 1 OF 3

William A. Mullins
BAKER & MILLER PLLC
Suite 3000
1105 S Street NW
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Email: wmullins@bakerandmiller.com
Telephone: (202) 663-7823

Adam J. Godderz
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335
Email: agodderz@kcsouthern.com
Telephone: (816) 983-1387

Counsel for KCS

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

SULLIVAN & CROMWELL LLP
Adam S. Paris
1888 Century Park East, Suite 2100
Los Angeles, California 90067-1725
Email: parisa@sullcrom.com
Samantha F. Hynes
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006-5215
E:mail: hyness@sullcrom.com

Jeffrey J. Ellis
CANADIAN PACIFIC
7550 Ogden Dale Road S.E. Calgary, AB
T2C 4X9 Canada Email: Jeff_Ellis@cpr.ca
Telephone: (888) 333-6370

Counsel for CP

Attorneys for Applicants

July 12, 2022

MASTER TABLE OF CONTENTS

VOLUME I OF III
NARRATIVE

I. INTRODUCTION 4

II. MANY COMMENTERS PAY INSUFFICIENT ATTENTION TO THE GOVERNING LEGAL STANDARD 16

A. The Board Has Established that this Transaction Will Be Reviewed Under the Pre-2001 Merger Rules and Related Board Precedents 16

B. Pre-2001 Precedents Require that Conditions Be Linked to Concrete Transaction-Specific Harms 18

III. THE TRANSACTION WILL RESULT IN SIGNIFICANT PUBLIC BENEFITS 21

A. There Is No Merit to Claims by Class 1 Rivals that CPKC Will Not Provide Valuable New Competitive Options 23

1. The Class 1 Critique of CPKC Traffic Estimates Misses the Fundamental Point that the Stronger Competition that Comes with the Transaction Is What Really Matters 24

2. Applicants' Estimates of the Traffic CPKC Will Attract Are Reasonable and Sound 26

3. Applicants' Estimates Are Validated by the Transaction's Extensive Shipper Support and Real-World Developments 34

4. The KCS Board's Highly Conservative Pre-Agreement Synergies Estimates Do Not Undermine Applicants' Anticipated Benefits 39

B. There is Zero Risk to CPKC's Financial Viability and Continued Investment, Regardless of How Much New Traffic Is Attracted to the CPKC System, or at What Rates 40

C. The Class 1 Critique of the Operating Efficiencies Generated by the Transaction Is Invalid 41

D. CN's Continuing Criticisms of the Operating Plan Lack Merit and Are Irrelevant to the Board's Evaluation of the Transaction's Impacts 42

IV. THERE ARE NO VALID COMPETITIVE CONCERNS 45

A. There Is No Basis for Concern About "Vertical" Competition 47

1. The Board Has Extensive Experience with End-To-End Mergers and the Net Benefits They Have Brought 52

2. Commenters Offer No New Economic or Other Learning that Calls into Question the Board's Consistent Precedents and Factual Conclusions 59

3. KCS Has Not Used Its Control of Tex Mex and KCSM to Foreclose UP or BNSF Routings Through the Laredo Gateway, and Neither Will CPKC 68

4. The Same Forces that Ensured There Was Not Foreclosure Following *KCS/Tex Mex* and Other Cases Will Apply Here 90

5. Applicants' Commitments – Enforced as Appropriate By Shippers – Are the Tried-And-True Way To Address Concerns About Vertical Foreclosure 95

6. The Rate-Setting Mechanism Proposed by UP and BNSF Is Both Unnecessary and Would Be Affirmatively Anticompetitive 97

B. Shipper Group Desires for "Open Access" and Other Reregulatory Remedies Are Not Merger-Related 109

1. Certain Requests Relating to "Gateways" and "Bottlenecks" Represent an Improper Effort to Revisit the Board's Bottleneck Rate Rules 109

2. Requests for "Reciprocal Switching Access" Are Similarly Unrelated to this Transaction 116

V. APPLICANTS ARE DEDICATED TO ENSURING THAT THE TRANSACTION WILL BE IMPLEMENTED WITHOUT SERVICE DISRUPTION 119

A. The Transaction Will Not Lead to Service Disruption 120

B. Applicants' "CP/KCS Service Promise" 124

C. Additional Service-Related Conditions Would Unduly Burden CPKC's Competition for No Valid Purpose 127

VI. THE "CAPACITY CONCERNS" ADVANCED BY UP, BNSF, AND CN HAVE NO MERIT 130

A. Basic Features of the Transaction Will Prevent CPKC Traffic Growth From Overwhelming Rail Capacity 131

B. The Transaction Will Not Cause Disruption on the Lines KCS Shares with UP and BNSF in Texas 133

1. UP and BNSF Proceed from the False Premise that CPKC Needs Their Permission to Use Shared Trackage to Compete Against Them 135

2. The Facts Show that CPKC's Potential New Trains Will Not Exceed Capacity on UP/BNSF Trackage Rights Segments in Texas 137

a) There Will Be No Capacity Shortfall in the Houston Terminal Complex 138
b) There Is Adequate Capacity on the UP-Owned Lines Between Houston and Beaumont 144
c) Concerns About the Neches River Bridge at Beaumont Are Unwarranted 146
d) There Is Adequate Capacity on the UP-Owned Lines Between Victoria and Robstown 148

3. UP and BNSF Demands that CPKC Fund 100 Percent of Any New Infrastructure Is Overreaching and Inappropriate. 149

C. There Will Be Adequate Capacity for the Traffic that CPKC Hopes to Attract Elsewhere on Its Network 150

VII. METRA'S CONCERNS ARE UNFOUNDED 152

A. The Transaction Will Not Adversely Impact Metra's Commuter Services..... 155

1. The Transaction Will Not Meaningfully Increase Freight Traffic on Lines Shared with Metra. 155

2. Metra Further Misunderstands the Transaction's Impacts Because Its Expert's RTC Model Is Fundamentally Flawed.....159

3. The MD-W Line West of Bensenville Yard Has Ample Capacity to Accommodate Eight Additional Daily Freight Trains. 165

4. Developments Independent of the Transaction Will Further Improve the Performance of Metra's Trains on Lines Shared with CP.....167

B. CP Values Its Partnership with Metra and Regrets that Metra's Comments Have Mischaracterized Metra's Solid Performance on Lines Shared with CP 168

1. Metra Has Consistently Performed Well on CP's Lines 169

2. CP Leadership Is Committed to Supporting Metra's Operations, Consistent with Its Contractual Obligations.....180

C. None of Metra's Complaints About CP Are Related to the Transaction 185

1. Most of Metra's Pre-Transaction Dispatching Concerns Relate to Operations that Will Be Unaffected by the Transaction.....185

2. Dispatching Metra Trains on the "Wrong Track" Is A Pre-Transaction Concern Without Merit 188

3. Metra's Disagreement with CP About Changes to Its Off-Peak MD-N Line Schedules in 2019 Are

Pre-Transaction Issues Having No Bearing on this Proceeding....190

4. Metra's Complaints About PTC Implementation Issues Are Irrelevant and Unfair....191

D. Applicants Are Committed to Reassure Metra and Its Ridership that the Transaction Will Not Impact Metra's Passenger Service.... 192

1. Metra's Requests to Force a Shift of Dispatching to Metra Would Override CP's Contractual Rights and Undermine Rather Than Improve the Handling of Metra Trains....193

a) The Trackage Agreements Allocate to CP the Right to Operate and Dispatch Traffic on the MD-W and MD-N Lines 194

b) Metra Has Long Sought Control of Dispatching on the MD-W and MD-N Lines 195

c) The Board's Precedents Sharply Disfavor Forced Shifts in Dispatching 197

d) Transferring Dispatching Control to Metra Would Create More Issues Than It Resolves 198

2. Metra's Request to Alter the Compensation Terms of the CP-Metra Agreement Are Overreaching....201

3. Demands for Hundreds of Millions in New Infrastructure Are Either Wildly Overreaching or Already in Progress....203

4. Metra's Request For a Binding Standard and Process For Schedule Changes and New Trains Improperly Seeks to Improve Its Contractual Rights....205

5. Metra's Requested Oversight Conditions Are Inappropriate and Unnecessary....207

VIII. OTHER DEMANDS BY CLASS 1 RAILROADS FOR PROTECTION AND OTHER RELIEF SHOULD BE REJECTED 208

A. The Board Should Reject CN's Proposed "Inconsistent" Purchase of CPKC's Springfield/East St. Louis Line.... 208

1. CN's Gambit Is Yet Another Round in CN's Effort to Disrupt or Delay the CP/KCS Transaction....210

2. There Is No Competitive Harm to Address....212

3. Any Divestiture of the Springfield/East St. Louis Line Would Harm the Public Interest, Not Enhance It....229

4. If CN Is Right About the "Truck Diversion" Potential of Joint Investments in the Springfield Line, a Divestiture Would Not Be Necessary to Achieve It....241

5. Were the Board to Conclude that a Remedy is Required, It Should Not Order a Sale of the Line, Much Less Specify CN as the Buyer....244

B. NS's Requested Relief Is Based on a Misreading of the Operating Plan and Would Inappropriately Alter Pre-Existing Contractual Rights to NS's Commercial Advantage.... 246

1. CPKC Will Be Highly Motivated to Continue to Reap the Rewards of the Successful MSLLC Joint Venture....248

2. The Facts Contradict NS's Concerns About Service Impacts....249

3. The Wylie Intermodal Terminal Has Ample Capacity to Support Applicants' Projected Traffic Increases....253

4. NS's Proposed Contingent Trackage Rights Make No Sense as a "Remedy" for Potential Service Concerns....256

5. NS's Request for Contingent Trackage Rights Would Improperly Convey to NS Commercial Rights that NS Did Not Negotiate or Pay for in 2006....258

C. The Board Should Reject the Relief Requested by CSX.... 263

1. CSX's Arguments about the Meridian Speedway Are Unrelated to the Transaction and Should Be Ignored....263

2. CPKC Will Be Eager to Maintain or Explore Efficient Interline Relationships With CSX Via All Available Gateways, and There Is No Need for Relief Protecting CSX....265

D. BNSF's Veiled Threats to Demand Future Trackage Rights It Chose Not to Seek in this Proceeding Should Be Rejected with Prejudice.... 268

1. BNSF's Desire for Board Intervention in Support of Its Quest for a Future Mexican Concession Is Not Merger-Related and Would Improperly Involve the Board in Mexican Affairs....270

2. BNSF's Proposed Rights Between Dallas and Shreveport Would Grant Commercial Rights BNSF Chose Not to Acquire....273

3. BNSF's Proposed Rights Between Savanna, IL and Clinton, IA Would Grant Commercial Rights BNSF Has Previously Sought....275

E. The Board Should Not Grant UP's Demand for Conditions Granting Compulsory Access to KCS's Self-Funded New Bridge at Laredo.... 277

IX. COMMENTS FROM RAIL LABOR.... 280

X. THE BOARD SHOULD NOT IMPOSE CONDITIONS TO ADDRESS COMMENTERS' ALLEGED ENVIRONMENTAL CONCERNS 280

A. The Coalition Communities Demand Mitigation Measures Disproportionate to the Likely Effects on the Community 282

B. Hennepin County Concerns Fail For Similar Reasons 287

C. The Sierra Club's Requested Conditions Have No Nexus to the Transaction, Which is Expected to Lower Greenhouse Gas Emissions 289

XI. OTHER ISSUES 291

A. Concerns About CP's Tariff Provisions Applicable to Hazardous Shipments Are Not Competitive Issues or Transaction-Related and Should Be Rejected 291

B. Concerns of Certain Wheat Growers' Associations About Potential Competition from Canadian Grain Suppliers Reflect More Competition, Not Less 298

C. Conditions Are Not Needed to Protect Evergy's Service Levels 302

D. Texas International Terminals' Concerns Are Not Transaction-Related 304

E. LyondellBasell's Proposed Reciprocal Switching Conditions Should Be Rejected 306

F. The Late-Submitted Concerns of Certain FMC Commissioners About Diversions to Canadian Ports Are Meritless 310

XII. THE BOARD SHOULD RESIST ALL CALLS TO HANDICAP CPKC'S POTENTIAL NEW COMPETITION WITH BURDENSOME CONDITIONS 312

APPENDICES

APPENDIX A: PRIOR CLASS 1 RAILROAD MERGERS OF THE PAST 40 YEARS WERE CONSISTENTLY APPROVED BASED ON THE BENEFITS OF NEW SINGLE-LINE SERVICES AND A LACK OF COMPETITIVE CONCERN ABOUT "GATEWAY FORECLOSURE"

APPENDIX B: STATEMENTS OF CLASS 1 RAILROADS EXTOLLING VIRTUES OF THE SINGLE-LINE BENEFITS THEIR MERGERS BROUGHT

APPENDIX C: SELECTED EXCERPTS FROM SHIPPER SUPPORT STATEMENTS REGARDING PROCOMPETITIVE BENEFITS OF CP/KCS TRANSACTION

VOLUME II OF III
SUPPORTING VERIFIED STATEMENTS

REPLY VERIFIED STATEMENT OF KEITH CREEL ..... A
REPLY VERIFIED STATEMENT OF PATRICK OTTENSMEYER ..... B
REPLY VERIFIED STATEMENT OF JOHN BROOKS C
REPLY VERIFIED STATEMENT OF NADEEM VELANI AND CHRIS DE BRUYN ..... D
REPLY VERIFIED STATEMENT OF JONATHAN WAHBA AND MICHAEL A. NAATZ ..... E
REPLY VERIFIED STATEMENT OF MICHAEL A. NAATZ ..... F
REPLY VERIFIED STATEMENT OF JOHN F. ORR ..... G
REPLY VERIFIED STATEMENT OF RAYMOND A. ELPHICK AND JOHN F. ORR ..... H
REPLY VERIFIED STATEMENT OF RAYMOND A. ELPHICK I
REPLY VERIFIED STATEMENT OF STEVE SIMMONS ..... J
REPLY VERIFIED STATEMENT OF JASON WILKERSON ..... K
REPLY VERIFIED STATEMENT OF NICK WALKER L
REPLY VERIFIED STATEMENT OF ADOLPH GAMEIRO ..... M
REPLY VERIFIED STATEMENT OF OSCAL DEL CUETO ..... N
REPLY VERIFIED STATEMENT OF W. ROBERT MAJURE ..... O
REPLY VERIFIED STATEMENT OF RICHARD BROWN AND NATHAN ZEBROWSKI ..... P
REPLY VERIFIED STATEMENT OF MICHAEL BARANOWSKI ..... Q
REPLY VERIFIED STATEMENT OF BENGT MUTÉN ..... R

ADDITIONAL SUPPORTING STATEMENTS OF THIRD PARTIES

VERIFIED STATEMENT OF BISON TRANSPORT ..... S
VERIFIED STATEMENT OF CENTRAL MISSOURI AGRI-SERVICE LLC ..... T
VERIFIED STATEMENT OF CHS INC. ..... U
VERIFIED STATEMENT OF HAPAG LLOYD (AMERICA) LLC V
VERIFIED STATEMENT OF HARDISTY ENERGY TERMINAL LIMITED PARTNERSHIP ..... W
VERIFIED STATEMENT OF NEW COOPERATIVE INC. X
VERIFIED STATEMENT OF RAY CARROLL COUNTY GRAIN GROWERS, INC. ..... Y
VERIFIED STATEMENT OF RICHARDSON INTERNATIONAL LIMITED ..... Z
VERIFIED STATEMENT OF SPARX LOGISTICS INC. ..... AA
VERIFIED STATEMENT OF TERNIUM MEXICO S.A. DE C.V. ..... AB
VERIFIED STATEMENT OF U.S. DEVELOPMENT GROUP, LLC ..... AC

VOLUME III OF III
DOCUMENTARY EXHIBITS

Verified Statement of Samantha Hynes (authenticating documentary exhibits)

Exhibit 01	*Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1), Comments of BNSF, Verified Statement of Richard J. Pierce, Jr. (filed Nov. 17, 2000) (excerpts)
Exhibit 02	Verified Statement of John P. Lanigan in BNSF's Reply Comments in Competition in the Railroad Industry, Ex Parte No. 705 filed on May 27, 2011
Exhibit 03	Verified Statement of Paul Tellier of CN's Application in *CN/WC*, Finance Docket 34000 filed on April 9, 2001
Exhibit 04	Memorandum opinion *FTC* v. *Peabody Energy Corp.*, No. 4:20-cv-00317-SEP, (E.D. Mo. Oct. 5, 2020)
Exhibit 05	Document produced by CN bearing production number CN0000185-HC
Exhibit 06	Document produced by BNSF bearing production number BNSF0001598 (excerpts)
Exhibit 07	Comments of the Burlington Northern and Santa Fe Railway Co. in *Major Rail Consolidation Procedures – Advance Notice of Proposed Rulemaking*, STB Ex Parte No. 582 (Sub-No. 1) filed on Nov. 17, 2000
Exhibit 08	Document produced by BNSF bearing production number BNSF0001135
Exhibit 09	NS's Comments in *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) filed on May 16, 2000
Exhibit 10	UP's Comments and Initial Proposals in *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) filed on May 16, 2000
Exhibit 11	Document produced by BNSF bearing production number BNSF0001235
Exhibit 12	Union Pacific Railroad Company's Comments in *KCS/Tex Mex*, Finance Docket No. 34342 filed on August 4, 2003
Exhibit 13	Comments of the Burlington Northern and Santa Fe Railway Company in *KCS/Tex Mex*, Finance Docket No. 34342, filed on August 4, 2003
Exhibit 14	Document produced by BNSF bearing production number BNSF0000932
Exhibit 15	Document produced by BNSF bearing production number BNSF0003021

Exhibit 16	Document produced by BNSF bearing production number BNSF0003279
Exhibit 17	Document produced by BNSF bearing production number BNSF0003606
Exhibit 18	Document produced by BNSF bearing production number BNSF0003550.
Exhibit 19	Document produced by BNSF bearing production number BNSF0003355
Exhibit 20	Document produced by BNSF bearing production numbered BNSF0003331
Exhibit 21	Document produced by BNSF bearing production numbered BNSF0002814.
Exhibit 22	Document produced by BNSF bearing production numbered BNSF0002839
Exhibit 23	Document produced by BNSF bearing production numbered BNSF0003304
Exhibit 24	Document produced by BNSF bearing production numbered BNSF0002804
Exhibit 25	Document produced by BNSF bearing production numbered BNSF0002798
Exhibit 26	Document produced by BNSF bearing production numbered BNSF0002910
Exhibit 27	Document produced by BNSF bearing production numbered BNSF0000166
Exhibit 28	Document produced by NS bearing production numbered NS00006614
Exhibit 29	Document produced by UP bearing production number UP-HC-001106.
Exhibit 30	Document produced by UP bearing production number UP-HC-001387
Exhibit 31	Final Brief of Defendant The Burlington Northern and Santa Fe Railway Company in *Public Service Company of Colorado d/b/a Xcel Energy* v. *The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057, served on Sept. 8, 2003
Exhibit 32	Reply Comments of BNSF *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), filed May 31, 2006
Exhibit 33	Document produced by BNSF bearing production number BNSF0002691

Exhibit 34	Joint Comments of Alliance for Rail Competition, et al. in *Competition in the Railroad Industry*, Ex Parte No. 705 filed April 12, 2011 (excerpts)
Exhibit 35	Brief for Respondent NITL in Support of Petitioner filed with the United States Supreme Court in *Western Coal Traffic League* v. *Surface Transportation Board, et al*. (No. 99-135) on August 9, 1999
Exhibit 36	Comments of the National Association of Wheat Growers in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1) filed on February 14, 2022
Exhibit 37	Testimony of the U.S. Wheat Associates in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1) filed on February 14, 2022
Exhibit 38	Testimony of the Industrial Minerals Association—North America filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1) on February 14, 2022
Exhibit 39	Comments of the National Grain and Feed Association filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1) on February 14, 2022
Exhibit 40	Testimony of the Private Railcar Food and Beverage Association filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1) on February 14, 2022
Exhibit 41	Supplemental Submission of the National Grain and Feed Association filed in STB Docket No. EP 761 and STB Docket No. 722 on February 13, 2020
Exhibit 42	Written statement of The Fertilizer Institute filed in STB Docket No. EP 738 on July 24, 2017
Exhibit 43	Written Comments of the National Industrial Transportation League filed in STB Docket No. EP 761 and STB Docket No. EP 722 on November 26, 2019
Exhibit 44	Comments of the Industrial Minerals Association filed in STB Docket No. EP 761 and STB Docket No. EP 722 on November 25, 2019
Exhibit 45	Terms for Texas Mexican Railway Company Trackage Rights between Houston Belt & Terminal Railway Company and The Texas Mexican Railway Company, dated January 1997
Exhibit 46	Document produced by UP, bearing production number STB-FD36500-UP-HC000092
Exhibit 47	Document produced by UP, bearing production number STB-FD36500-UP-HC000521

Exhibit 48	Attached as Exhibit 48 is a true and correct copy of Metra's Public Workpaper Summary of CP Delay Events 2016 – 2021, produced by Metra, bearing production number METR_FD36500_001156.01
Exhibit 49	Metra's December 2021 On-Time Performance report, available at https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December_2021.pdf (last accessed July 12, 2022)
Exhibit 50	Metra's January 2019 Ridership Trends report, available at https://metra.com/sites/default/files/assets/planning/ridership/jan_2019_ridership_report_standalone.pdf (last accessed July 12, 2022)
Exhibit 51	Comments of Metra filed in *Canadian Pacific Ry., et al. – Control – Dakota, Minnesota & Eastern R.R., et al.*, Finance Docket No. 35081 on March 4, 2008 (excerpts)
Exhibit 52	Metra's Response to Applicants' Interrogatories, Requests for Production and Requests for Admission (Apr. 11, 2022) (excerpts)
Exhibit 53	Document produced by CN, bearing production number CN0000187
Exhibit 54	Document produced by CN, bearing production number CN0000049
Exhibit 55	Document produced by CN, bearing production number CN0000037
Exhibit 56	Canadian National Railway Company, et. al—Control—Kansas City Southern, et al.'s Motion to Withdraw (CN-28) filed in *CN/KCS*, Finance Docket 36514 (September 16, 2021).
Exhibit 57	Document produced by CN, bearing production number CN0000071
Exhibit 58	Document produced by CN, bearing production number CN0000137
Exhibit 59	Document produced by CN, bearing production number CN0000147
Exhibit 60	Document produced by CN, bearing production number CN00000185
Exhibit 61	Document produced by CN, bearing production number CN00000167
Exhibit 62	Document produced by CN, bearing production number CN0001142
Exhibit 63	Document produced by CN, bearing production number CN0000783
Exhibit 64	Document produced by CN, bearing production number CN0000708
Exhibit 65	Document produced by CN, bearing production number CN0000415
Exhibit 66	Document produced by CN, bearing production number CN0001255
Exhibit 67	CN investor deck (April 2021), titled "CN-KCS Will Create the End-to-End USMCA Rail Network."
Exhibit 68	Verified statement of Jean-Jacques Ruest to CN and KCS's Joint Motion for Approval of Voting Trust Agreement (CN-18 KCS-1), filed in *CN/KCS*, Finance Docket 36514 on May 26, 2021(excerpts)

Exhibit 69	Verified statement of Jean-Jacques Ruest to CN and KCS's Reply to Comments on Proposed Voting Trust Agreement (CN-26 KCS-9), filed in *CN/KCS*, Finance Docket 36514 on May 26, 2021 (excerpts)
Exhibit 70	Document produced by NS, bearing production number NS00000001 (excerpts)
Exhibit 71	Document produced by NS, bearing production number NS00000991 (excerpts)
Exhibit 72	Document produced by NS, bearing production number NS00000018 (excerpts)
Exhibit 73	Document produced by NS, bearing production number NS00000954 (excerpts)
Exhibit 74	document produced by NS, bearing production number NS00002011 (excerpts)
Exhibit 75	document produced by NS, bearing production number NS00002982 (excerpts)
Exhibit 76	"New Norfolk Southern Operating Plan to Blend Traffic and Build Longer Trains," Trains (Feb. 12, 2019), available at https://www.trains.com/trn/news-reviews/news-wire/12-new-norfolk-southern-operating-plan-to-blend-traffic-and-build-longer-trains/ (last accessed July 12, 2022)
Exhibit 77	Document produced by BNSF, bearing production number HC BNSF0003265
Exhibit 78	Document produced by NS, bearing production number NS 00004912
Exhibit 79	Notice of Exemption in the Meridian Speedway transaction, filed in Finance Docket No. 34822 on January 17, 2006
Exhibit 80	BNSF Network Map, BNSF Railway, available at https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/network-map.html (last visited May 12, 2022)
Exhibit 81	Gateway & Connections, BNSF Railway, available at https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/gateway-and-connections.html (last visited June 28, 2022)
Exhibit 82	Document produced by BNSF bearing production number BNSF0000151
Exhibit 83	document produced by BNSF, bearing production number BNSF0003259
Exhibit 84	CP Response to Information Request No. 1, EI 31352 (Oct. 28, 2021) (excerpts)

Exhibit 85	Attached as Exhibit 85 is a true and correct copy of the CREATE webpage, available at https://www.createprogram.org/about-create/ (last visited on July 12, 2022)
Exhibit 86	Letter from C. Anne Ergo to A. Giordano (May 24, 2022)
Exhibit 87	CP's Commitment to Fight Climate Change, CP Sustainably Driven (2020), available at https://sustainability.cpr.ca/downloads/CP_Rail_2020_Climate_Statement.pdf (last accessed on July 12, 2022)
Exhibit 88	CP's Climate Strategy, CP Sustainably Driven (2021), available at https://sustainability.cpr.ca/downloads/CP_Rail_Climate_Strategy.pdf (last accessed on July 12, 2022)
Exhibit 89	Email from D. Meyer to A. Hirschkorn (Feb. 25, 2022)
Exhibit 90	Document produced by the Joint Associations, bearing production number JA-HC-000001 (excerpts)
Exhibit 91	Comments of LyondellBasell in *Reciprocal Switching*, Ex Parte No. 711, filed Feb. 14, 2022
Exhibit 92	Document produced by NS bearing production number NS00005474
Exhibit 93	Document produced by NS bearing production number NS00004912

DEPOSITION EXCERPTS

Exhibit 94	Deposition of Paul Hirsch (June 3, 2022)
Exhibit 95	Deposition of Greg Godfrey (June 9, 2022)
Exhibit 96	Deposition of David Rodriguez (June 8, 2022)
Exhibit 97	Deposition of Rich Oppenheim (June 7, 2022)
Exhibit 98	Deposition of Patrick Ottensmeyer (February 2, 2022)

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BEFORE THE
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FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS, OPPOSITION TO RESPONSIVE APPLICATIONS, AND REBUTTAL IN SUPPORT OF THE APPLICATION

Applicants submit this response to the Comments, Amended Comments, and Amended Responsive Applications filed in this and all related dockets. As we demonstrate in the Application and the evidence and argument submitted herewith, the Application is compellingly in the public interest and should be approved without conditions beyond those embodying the commitments Applicants are making – summarized herein – to ensure that the public interest benefits of the combination of CP and KCS come to pass.[1]

The Transaction is supported by hundreds of shippers, shortlines, passenger rail interests, labor organizations, and others. No shipper or shipper association requests that the Transaction be denied. The Federal Railroad Administration endorses Applicants' Safety Implementation Plan. Amtrak and other passenger rail interests support the Transaction. Amtrak stresses "CP's excellent record as an Amtrak host railroad and CP's commitments to Amtrak's efforts with

[1] To avoid confusion, we refer herein to "unconditioned approval" to encompass the conditions Applicants have stated that they will accept, as summarized in Section I and the Reply Verified Statement of Keith Creel.

states and others as detailed in the agreement" reached between Amtrak and CP, and believes that the CP/KCS Transaction "promises significant public benefits for the U.S. rail network."[2] What opposition there is comes principally from the five Class 1 railroads. The protection these Class 1 railroads seek is itself evidence that they see the CP/KCS Transaction an injecting new competition into the North American rail network.

As the record reflects, the Transaction will deliver extraordinary public benefits, both quantified and unquantified, but all of tremendous value to shippers, the U.S. rail network, and the broader public interest. Among them:

- Competition will be strengthened and intensified by the new, single-line service offerings unlocked by the Transaction;
- Shippers will have new, better options and alternatives to the Class 1 services on which they depend today;
- CPKC's investments in its network to support the Transaction will further strengthen the U.S. rail network, adding capacity and enabling new, more robust transportation arteries;
- CPKC's improved network will uniquely support North American trade, better connecting the United States with both Mexico and Canada and supporting vital and evolving trade patterns;
- CPKC's new capabilities will shift tens of thousands of trucks off the Nation's roads, bringing emissions, infrastructure and economic benefits;
- The integration of CP and KCS will deliver concrete and quantifiable cost savings, enabling them to do more with less;
- CPKC's anticipated growth will deliver new jobs to America's heartland; and

[2] Amtrak Letter to Board (filed Feb. 2, 2022) at 1. Numerous communities across CP's and KCS's service territories echo Amtrak's support, expressing excitement about the transaction and CPKC's commitment to constructive cooperation with efforts by Amtrak and others to expand passenger services that may use parts of the CPKC network.

- CPKC will facilitate the expansion of passenger rail service on the CPKC network by being a good partner for Metra and the other commuter agencies that share CPKC lines and being an "A+" Amtrak host.

As we demonstrated in the Application and reinforce herein, the Transaction will deliver all of this without any offsetting public interest harms: no reduction in competition, no adverse impact on rail service or passenger operations on lines CPKC will use; and no material unmitigated impacts on local communities.

We are submitting this response in three volumes. Volume I (this volume) provides a narrative response to the comments and responsive applications, with citations to supporting verified statements and other evidence. In Volume II we provide Reply Verified Statements from a number of witnesses – including shippers – supporting approval of the Application. Volume III provides a number of additional documentary exhibits, including deposition excerpts and documents produced by other parties in discovery, for including in the record of this proceeding. Those exhibits are authenticated by the accompanying Verified Statement of Samantha Hynes.

In the sections that follow, we explain why the Board should reject the pleas of the parties seeking to have conditions imposed on the Transaction – or in CN's case seeking to undo a significant part of it through an unprecedented divestiture of an important part of the KCS network, a divestiture that no shipper on that line supports. We also explain why conditions are *not necessary* and why they would *do affirmative harm* by uniquely burdening CPKC in its quest to provide shippers and the U.S. rail network with robust and improved new transportation options connecting the North American continent.

I. INTRODUCTION

The most vehement opposition to the Transaction comes not from shippers, but rather from the Class 1 railroads who will compete most directly with the new transportation services that the CP/KCS Transaction will enable. Their opposition, and the self-serving conditions they seek, are not motivated by any need to protect the public interest from harm but by desire to protect themselves from change – i.e., the new, more intense competition CPKC will provide – or to get something valuable for themselves in the process. The Board should reject their efforts. The Board and its predecessor agency have recognized for a half century or more that the hard competitive truth is that "[n]o carrier is entitled to its existing level of traffic simply because it presently serves a given market."[3]

One of the most vigorous condition-seeking Class 1s in this proceeding, BNSF, warned the Board in 2000 when the agency was considering whether to change its rules governing Class 1 mergers that the Board should not use its merger rules to create "opportunities for competitors and other third parties to *abuse the merger approval process by using it to stop or to delay a pro-competitive merger* or to use it as *a means to extract special favors unrelated to the proposed merger*."[4] BNSF was right then, and little did it know then that its words would describe perfectly its own efforts in this proceeding, along with those of its Class 1 brethren and many of the other participants here.

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[3] *Guilford Transp. Inds., Inc. – Control – Delaware & Hudson Ry. Co.* ("Guilford/D&H"), 366 I.C.C. 396, 403 (1982); *see also Norfolk Southern Corp. – Control – Norfolk & Western Ry. Co.* ("*N&W/Southern*"), 366 I.C.C. 173, 213 (1982) (same) (citing *Burlington Northern Inc. – Control & Merger – St. Louis-San Francisco Ry.* ("*BN/Frisco*"), 360 I.C.C. 788 (1980); *Great Northern Pacific – Merger – Great Northern* ("*Great Northern Pacific/Great Northern*"), 331 I.C.C. 228 (1967); and *Detroit, Toledo & Ironton R.R. Control*, 275 I.C.C. 455 (1950)).

[4] *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1), Comments of BNSF Railway Company, Verified Statement of Richard J. Pierce, Jr. (filed Nov. 17, 2000), at 12 (emphasis added) (Vol. 3, Exh. 1).

The Application demonstrated that the proposed CP/KCS Transaction would be procompetitive and serve the public interest in numerous other ways. The Class 1 railroads' response to the Application – and especially their efforts to seek delay and to restrain or prevent the competition that CPKC will bring to them as a result of the Transaction – strongly reconfirms its procompetitive character. As we demonstrate in this response to Comments and the two Responsive Applications, the Board should approve the Transaction without conditions beyond those that are customary in end-to-end merger cases such as this.

Applicants will demonstrate the following:

- ***Under the pre- 2001 Merger Rules, Conditions Must Be Narrowly Tailored to Remedy Proven Harm Caused by the Transaction***

In Section II, we show that many of the commenters have not met the standards for merger relief under the Board's pre-2001 Merger Rules, which govern this proceeding. Under the pre-2001 Merger Rules, the Board has long emphasized that, in determining whether a transaction is in the "public interest," the focus is on competition, not harm to individual competitors, and the Board has thus consistently rejected competitors' arguments that they should be protected from the new competition generated by a transaction.[5] To grant any condition, the condition must be predicated on a showing of harm caused by the Transaction. Any relief must be narrowly tailored to remedy any such harm, and relief that would upend

[5] *N&W/Southern*, 366 I.C.C. at 213 ("In assessing the probable impacts of consolidation, and evaluating any harm arising from the consolidation, our concern is the preservation of essential services, not the survival of particular carriers."); *see, e.g.*, ***Error! Main Document Only.****Wisconsin Central Transp. Corp., et al. – Continuance in Control – Fox Valley & Western Ltd.*, Finance Docket No. 32036, 1992 I.C.C. LEXIS 279, at *10 (ICC served Dec. 4, 1992) ("**Error! Main Document Only.**A showing of expected substantial harm to a particular competitor as a result of a transaction is not equivalent to a showing of harm to competition.").

pre-Transaction relationships and provide the Commenters (and Responsive Applicants)[6] with rights that that they never previously had.[7]

The pre-2001 Rules do not require CPKC to "enhance" competition in the form of grants of trackage rights, divestitures, mileage pro-rate schemes, or by rewriting privately negotiated agreements to provide even rights to the large Class 1s others that they do not have in the pre-Transaction world. Nonetheless, this Transaction *does affirmatively enhance competition* by unlocking new single-line services and major new investments in CPKC's North-South transportation artery. The conditions sought by the Class 1 railroads would blatantly undermine the competition they would face from CPKC. And worse, many of the proposed conditions would in effect restructure the rail industry, with the unpredictable effects except insofar that they would be certain to hobble the future competitive initiatives of the CPKC network that this Transaction will unlock.

- ***The Application Provides Ample Evidence of the Transaction's Public Interest Benefits***

In Section III we respond to criticisms directed at the Application's public benefits showing. First, we note that hundreds of shippers, shipper associations, passenger rail interests, labor organizations, and others support approval of the Transaction. Next we demonstrate that,

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[6] For convenience, references herein to "Commenters" is intended to encompass all parties who have filed comments addressing the Application, including Responsive Applicants CN and NS.

[7] *See, e.g.*, *Canadian National Railway Co. & Grand Trunk Corp. – Control – EJ&E West Co.*, Finance Docket No. 35087, 2008 STB LEXIS 220, at *10 (STB served Apr. 25, 2008) ("*CN/EJ&E*") (must be a sufficient nexus between the condition imposed and the transaction; mitigation is not imposed to correct pre-existing conditions, and the condition imposed must be reasonable.); *Union Pacific Corp, Union Pacific R.R., & Missouri Pacific R.R. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Ry., SPCSL Corp., & The Denver & Rio Grande Western R.R.* ("*UP/SP*"), 1 S.T.B. 233, 418 (1996) (STB served Aug. 6, 1996) (internal citations omitted) (conditions must be narrowly tailored, operationally feasible, produce net public benefits and "will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate").

contrary to the assertions of the opportunistic Class 1s, Applicants' forecasts of the traffic that CPKC's new, competitive offerings are likely to attract were reasonable and derived from a thorough evaluation. Applicants reasonably expect to attract traffic from other Class 1s and from other modes by offering customers services that will meet their needs, including new single-line options that customers have never had before. Applicants' rail-to-rail and truck-to-rail traffic studies are one reflection of the implications of the more efficient and improved new single-line services CPKC will be able to offer, and CPKC's new traffic gains will be a product of that affirmative new competition and not a disabling – through "foreclosure" – of any existing interline options. CPKC will not – and need not – resort to "foreclosure" to win that traffic, and CPKC would shoot itself in the foot if it tried.

Applicants have also demonstrated that CPKC will be financially healthy and capable of making the significant new investments in its rail network while simultaneously repaying Transaction-related debt. That health – and prompt debt repayment – is not at all dependent on realizing any of the traffic growth or revenue gains anticipated from the Transaction, and thus CPKC will have no incentive to act irrationally by engaging in foreclosure to try to force short-run shifts in traffic to the CPKC network.

Finally, we demonstrate that the specific criticisms of the Operating Plan and Applicants' operating efficiency calculations – mostly from CN witnesses – are without merit. Applicants have presented reliable evidence of the traffic and operational changes arising from the Transaction and the efficiencies that those changes will generate.

This evidence strongly supports multiple compelling categories of public benefits: the concrete and quantifiable efficiencies generated by the combination of CP and KCS, and the less quantifiable but much larger, and no less real, benefits to competition and the public interest

from the new, more robust single-line offerings the Transaction will enable, backed up by hundreds of millions of dollars of new investment in critical rail infrastructure. In short, the Transaction is a once-in-a-lifetime opportunity to bring to the U.S. railroad industry new, market-based competition, which the other Class 1 railroads sadly appear to fear and seek to limit.

- ***The Transaction Will Not Cause Harm to Competition; It Will Increase Competition***

In Section IV, we respond to various arguments about the competitive effects of the Transaction.[8] We start with the settled fact that the Transaction will not reduce the number of independent rail transportation options for any shippers, period. Nobody disputes that. In fact, the Transaction, will deliver substantial new competition, which hundreds of shippers note in their support.

The arguments that Commenters make about harm to competition are premised almost entirely on "vertical" concerns about "gateway foreclosure." Ironically, these arguments are put forward most vociferously by the same Class 1 railroads – UP and BNSF especially – who have loudly and consistently extolled the procompetitive virtues of their own end-to-end combinations. The Board's precedents, including its decision approving KCS's acquisition of Tex Mex where UP and BNSF made the same arguments they seek to retread here, show the way to address these concerns: to reject them in light of the economic facts, as backed up by the commitments Applicant are making to keep gateways open on commercially reasonable terms. Section IV reviews the extensive evidence – economic and otherwise – showing that there has been, and will be, no anticompetitive foreclosure, whereas the conditions UP and BNSF demand

[8] We address CN's spurious argument about the "parallelism" of KCS's Kansas City-Springfield line in Section VIII.

would themselves be highly anticompetitive, serving to tax CPKC's own aggressive competition and subsidize UP and BNSF.

Section IV also addresses a variety of other claims by shipper associations and others that, while couched in terms of "competition," in fact seek relief having nothing to do with this Transaction. Their calls for open gateways, reciprocal switching, and other sweeping remedies echo their longstanding efforts to seek re-regulation on an industry-wide basis, and are untethered to this Transaction.

- ***The Transaction Will Not Disrupt Rail Service***

In Section V, we respond to concerns voiced by some – likely based on bad memories of the *UP/SP* and *CSX/NS/Conrail* mergers – that the Transaction will cause disruptions to the service levels customers receive today. As we explain, this will not happen, not just because of the core features of the Transaction (especially its purely end-to-end character), but because of Applicants' dedication to careful and methodical merger implementation. As we summarize in Section V, and John Brooks explains in more detail in his Reply Verified Statement, Applicants are making several commitments that go beyond what merging parties have offered in the past – and which they anticipate would be conditions of the Transaction – to help assuage concerns about the effect of the Transaction on future service levels.

- ***CPKC's Implementation of the Transaction Will Not Outstrip Available Rail Capacity***

In Section VI, we respond to Comments from the three Class 1 railroads most threatened by the new competition CPKC will bring – UP, BNSF, and CN – contending that CPKC's growth will outstrip capacity and cause congestion.[9] UP and BNSF focus on the lines in Texas

[9] We address the capacity issues raised by Metra in Section VII.

where they share (primarily UP) trackage with KCS, and seek a condition forcing CPKC to get their permission, and pay for whatever UP and BNSF claim is necessary, before adding a single carload to these line. Such a condition has never before been imposed in any merger, and it ignores the many existing trackage rights provisions that already govern when, how, and who pays for capacity required by increased traffic volumes on the shared lines.

As we demonstrate, there will be no capacity shortfall. Many of these lines have successfully handled more trains than the Transaction anticipates in the past using less robust infrastructure than exists today (even before additional infrastructure will be added by CPKC and others). With the capacity expansion projects already underway along with the additional investments CPKC will make to expand capacity, the lines CPKC uses will support CPKC's added trains alongside all of the other uses of that trackage, including UP, BNSF, Amtrak, Metra, and others. It would be particularly unwarranted to expand the contractual rights of UP and BNSF given that under the trackage rights agreement imposed on UP by the Board, it is UP's responsibility to install the infrastructure necessary to support the needs of all of the users of that trackage, with KCS obligated to share in the cost alongside the other users. CPKC will be a cooperative partner in supporting whatever new infrastructure may end being needed over time, as well as supporting the good operating practices necessary to get the most out of today's infrastructure. But it would be contrary to the public interest to give UP and BNSF a veto over CPKC's new competition.

- ***The Transaction Will Not Cause Harm to Metra's Passenger Operations***

In Section VII, we address the concerns raised by Metra, which are based on a fundamental misunderstanding of the Transaction's impacts on the lines shared by Metra and CP in the Chicago area. As we demonstrate, the Transaction will not outstrip CPKC capacity along

the Mississippi River, and it will not drive CPKC trains between Kansas City and St. Paul over Metra's lines. Train counts will increase (by eight trains a day) on one portion of one of Metra's lines (the MD-W line west of Bensenville) – and nowhere else on Metra. On that one line, there is more than enough capacity to support that growth without any adverse impact on Metra's passenger operations. Applicants back up these conclusions with comprehensive RTC modeling, built by correcting the many fatal flaws in the model presented by Metra's own expert.

Most of Metra's concerns, which form the predicate for a request to override existing agreements and force a transfer of dispatching from CP to Metra, reflect complaints about various practices that pre-date the Transaction. We demonstrate that those concerns are extraordinarily exaggerated, and that CP in fact performs quite well for Metra. We also make clear, however, that CPKC is determined to be an even better partner for Metra than CP has been, and Creel communicates several commitments that Applicants are making to ensure that CP follows though in that objective.

- ***No Class 1 Railroad Is Entitled to the Self-Serving Relief It Seeks***

In Section VIII, we address the additional self-serving requests for relief put forward by the Class 1 railroads, none of which has offered any valid predicate for that relief. Their requests for conditions are transparent attempts to lock in what they have today or to produce windfalls for themselves rather than go out to the market to fight for it. The Board should reject the Class 1 railroads' invitations to stifle competition at the public's expense.

CN requests that the Board require divestiture of the Springfield Line to CN's U.S. subsidiary, Illinois Central. But there is no competitive reason for why such a drastic remedy is

necessary, especially since divestiture of a line in the merger context has never been ordered, at least not since the Staggers Act. That line is not an active parallel route.[10]

Equally significant, the divestiture CN proposes would do violent harm not only to Transaction benefits, but to the single-line KCS service that on-line shippers (who account for almost all of the line's traffic) have come to rely upon. Tellingly, those shippers overwhelmingly oppose CN's request.

CN's call for a divestiture is on its face predicated on a 2001-Rules principle (and even then a faulty one) that the Board has authority to impose whatever conditions it wishes to "enhance competition." But far from enhancing competition, that relief would harm the competition that CPKC will provide, to the advantage of CN alone. Were CN right about the unique truck-diversion potential of the investments it proposes, CPKC would be an eager participant in working with CN to pursue them. A divestiture would be unjustified and counterproductive.

NS has requested various conditions meant to change the commercial terms of the Meridian Speedway agreements, all to favor NS. These are longstanding and negotiated agreements. NS wants changes to improve its profit at the expense of CPKC and expand the scope. NS seeks these conditions even though the CP/KCS Transaction has no adverse effect at all on the Meridian Speedway traffic carried by NS.

BNSF "reserves the right" to seek to have the Board impose on CPKC a host of new trackage rights that BNSF has long coveted, that would be unrelated to any Transaction-related harm, and would interfere with CPKC's operation of its own network. BNSF should be told no

[10] *See infra* Section VIII.A.2.

now, so that it is not given incentives to look for ways to cause problems as an excuse to ask for those rights later.

CSXT asks the Board to alter long-settled contracts to its advantage. CSX's desire to unwind aspects of the long-established Meridian Speedway agreements is unconnected to the Transaction and unwarranted, as is its demand that the Board make permanent a temporary pre-Transaction arrangement entered into between CSX and KCS regarding their interchange at New Orleans.

For its part, UP requests access to the to-be-built second rail bridge across the Rio Grande River at Laredo Bridge on the "same terms" as its access to the current bridge even though the new bridge will be privately funded by KCS and will increase the efficiency of cross-border traffic movements. Like all of the rest of the Class 1 requests, UP's request for the Board to override whatever terms the parties might negotiate has no nexus to the Transaction.

Without exception, these are requests untethered to any Transaction related harm that would give these railroads more rights than they have today. Also without exception, these request would give these railroads something they may have also wanted but were unable to negotiate. The complaints from Class 1 railroads show their fears that a CP-KCS transaction will improve service, provide better options for shippers, and increase competition. But as the Board has repeatedly recognized, arguments that a transaction's overall benefits to competition will, like virtually any marketplace event, be detrimental to some individual competitors is not relevant to the question of whether the Transaction is in the public interest.

- ***Applicants Have Accepted Standard Labor Protective Conditions***

Section IX briefly addresses the comments filed by rail labor organizations. As we demonstrate, Applicants are making good progress entering the implementing agreements with

affected labor organizations, and they reconfirm their acceptance of standard labor protective conditions.

- ***Other Requests for Conditions Should Be Rejected***

In Sections X and XI, we demonstrate that there is no merit to other miscellaneous request for relief.

In Section X, we show that requests for conditions from commenters raising environmental issues are being addressed through the Board's environmental review process, and in any event are not supported by any evidence of actual environmental harm. The "Coalition to Stop CPKC's" demand for more than nine billion dollars in infrastructure investments to address the addition of only eight additional freight to lines that daily host upwards of 70 total trains (including Metra passenger trains), and have historically hosted more freight trains than CPKC will operate, is particularly egregious. They are happy to have CPKC's anticipated freight traffic foisted on other communities but not in their backyards. CPKC is determined to be a good neighbor to all of the communities in which it will operate – even those that make outrageous demands – but the Board should recognize that the interest of the broader public would not be well served by policies that encourage a handful of communities to hold the competitive benefits of this Transaction hostage to their local demands.

Finally, in Section XI, we take on a handful of miscellaneous requests for relief that have no actual relationship to the Transaction: efforts by some TIH shippers to obtain a long-sought the rollback of CP's tariff covering TIH/PIH shipments; concerns expressed by various wheat associations about the possible effects on certain of their members of competition from other producers who will benefit from the Transaction, even though they have nothing to fear; Evergy's concern about its post-Transaction service levels; Texas International Terminal's effort

to resuscitate a dormant set of rights granted to KCS in 1986; LyondellBasell's effort to create new competitive access for BNSF and UP out of whole cloth; and the misguided comments of three individual FMC commissioners, who apparently do not desire for CP to continue offering efficient intermodal services from the Ports of Vancouver and St. John to the U.S. Midwest, none of which will be materially affected the Transaction.

- ***Applicants Accept a Discrete Set of Conditions Aimed at Confirming that the Transaction Will Serve the Public Interest***

Applicants have made – and discuss in this Response – a number of specific commitments that reflect Applicants' confidence that their proposed Transaction is in the public interest. Applicants understand and accept that they will be held to those commitments, specifically:

- Applicants' commitment to keep gateways open on commercially reasonable terms, as spelled out in greater detail in the Reply Verified Statement of John Brooks;
- Applicants' "Service Promise" and the other specific commitments respecting post-Transaction service protection set forth in the Reply Verified Statement of John Brooks;
- Applicants' representations to the Board and FRA set forth in their Safety Implementation Plan, which the FRA has accepted;
- Applicants' Voluntary Mitigation Measures filed with OEA on May 3, 2022; and
- As referenced above, Applicants' acceptance of the Board's standard labor protective conditions.

In addition, Applicants have entered into a number of agreements with parties in this proceeding that address concerns raised by those parties or reflect commitments that Applicants have made that have led those parties to support the Transaction. Applicants anticipate that the Board may impose their compliance with those agreements as a condition of the Transaction. Those agreements include:

CP's agreement with {{ }}

- CP's agreement with Amtrak committing to support Amtrak's previously-planned expansion of Amtrak service between Chicago and St. Paul in exchange for Amtrak's commitment to add certain infrastructure that would support those operations;

- CP's agreement with Bayer CropScience LP committing to provide three years advance notice to Bayer's chloring suppliers of a change in certain of KCS's tariff provisions relating to IH transportation, provided that those shippers make use of the safest railcars available; and

- CP's agreements with certain communities relating to their environmental concerns.

Applicants acknowledge the Board's view that all of these commitments should become part of the Transaction that Applicants are asking the Board to approve.

* * *

In sum, the Transaction as presented in the Application promises to bring extraordinary benefits to the US rail network, its shippers, and other beneficiaries. It should be approved as promptly as possible so that CPKC can get started delivering those benefits.

II. MANY COMMENTERS PAY INSUFFICIENT ATTENTION TO THE GOVERNING LEGAL STANDARD

A. The Board Has Established that this Transaction Will Be Reviewed Under the Pre-2001 Merger Rules and Related Board Precedents

The Board has provided clear direction that the Transaction will be reviewed under the pre-2001 Merger Rules set forth at 49 C.F.R. part 1180 (2000). On April 23, 2021, following fervent efforts by most of the other Class 1 railroads to have the 2001 rules applied to this

Transaction,[11] the Board issued Decision No. 4, finding "the waiver provision under 49 C.F.R. § 1180.0(b) should apply to this Transaction" and that the Board's "review of this Transaction will be governed by the regulations contained in 49 C.F.R. part 1180, subpart A in effect before July 11, 2001." Decision No. 4 (served Apr. 23, 2021) at 2. The Board based this determination in part on its conclusion that "a merger of the CP and KCS networks would appear to result in the fewest overlapping routes when compared to a merger between KCS and any other Class I carrier" and that the "interrelationship between the CP and KCS networks in fact appears to be end-to-end in nature . . . which likely raises fewer competitive concerns than a transaction that is not end-to-end." *Id.*

Decision No. 4 did not end the efforts by the Class 1 railroads and others to persuade the Board to change its mind and apply the more onerous requirements of the 2001 merger rules to this Transaction. Indeed, the procedural history of this proceeding has been littered with efforts by the Class 1s to delay the Transaction and interpose further procedural hurdles and costs. Throughout, however the Board has been steadfast, emphasizing again and again that the review here will be conducted under the pre-2001 rules and related precedents. *See, e.g.*, Decision No. 8 (served Sept. 30, 2021) at 2, 9 n.9; Decision No. 11, (served Nov. 23, 2021) at 3; Decision No. 13 (served Feb. 18, 2022) at 2 n.3, 5 n.10.

Unfortunately, many of the Comments (and all of the Responsive Applications) continue to ignore that the pre-2001 rules apply. They predicate requests for relief – in some cases extraordinary relief – on principles that have no grounding in Board precedent under the pre-

[11] One Class 1 has acknowledged that the pre-2001 rules properly apply to this Transaction. CSX advised the Board that "it expects the Transaction will be reviewed under the 2000 Rules and not the undefined, untested 2001 Rules which do not appear to have application to a consolidation involving KCS." CSX Comment with Respect to Rules Applicable to this Proceeding (CSXT-1) (filed Apr. 1, 2021) at 1.

2001 rules, but emanate instead from requirements established in the 2001 rules – most notably the notion the Board might impose conditions to "enhance" competition relative to the pre-merger status quo and mandate the preparation of a formal "Service Assurance Plan." As Applicants will explain when they address each of these overreaching requests below, they reflect an unabashed unwillingness to accept the Board's repeated rulings that its "review of this Transaction will be governed" by the pre-2001 rules.

B. Pre-2001 Precedents Require that Conditions Be Linked to Concrete Transaction-Specific Harms

The Board's pre-2001 rules and the many precedents under those rules establish a well-understood set of ground rules for this proceeding. The Board has extensive discretion in assessing whether the Transaction as proposed is in the public interest, but if it serves the public interest the Board's precedents require its approval. Under 49 U.S.C. § 11324(c), of course, the Board "may impose conditions governing the transaction." *See* Decision No. 13. But the Board's pre-2001 precedent – as reviewed extensively in the Board's Decision No. 13 – makes clear that this authority is not an untethered power to regulate Applicants (or their Transaction) in service of the public interest. Instead, that conditioning power applies only to remedy specific Transaction-related harms.

As the Board has held over and over again, the Board "will not impose public interest conditions on a railroad consolidation" unless, at a minimum, four elements are satisfied: "[1] that the consolidation may produce effects harmful to the public interest (such as an anticompetitive reduction of competition in an affected market), [2] that the conditions to be imposed will ameliorate or eliminate the harmful effects, [3] that the conditions will be operationally feasible, and [4] that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing their harm to the merger." *Union Pacific Corp.*

– *Control -- Missouri Pacific R.R., Western Pacific*, 366 I.C.C. 462, 565 (1982) ("*UP/MP/WP*").[12] As the Board summarized in Decision No. 13 herein (at 4), it "will not impose conditions on a railroad consolidation unless it finds that the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate."

The Board's precedents have developed several important corollaries to this core principle that have significant bearing on the conditions sought in this proceeding.

First, because the predicate for any condition is a finding of Transaction "effects harmful to the public interest," *UP/MP/WP*, 366 I.C.C. at 565, the Board "will not normally impose conditions on a consolidation to protect a carrier," *N&W/Southern*, 366 I.C.C. at 235 (1982). The only exception to this rule is when "essential services are threatened and the condition: (1) is shown to be related to the impact of the consolidation; (2) is designed to enable shippers to receive adequate service; (3) would not pose unreasonable operating or other problems for the consolidated carrier; and (4) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits." *Id.* No carrier makes a claim in this proceeding that the CP/KCS Transaction would threaten essential services.

Second, because conditions "must address an effect of the transaction," *UP/SP*, 1 S.T.B. at 418, the Board "will not impose conditions 'to ameliorate longstanding problems which were not created by the merger,' nor will [it] impose conditions that 'are in no way related either

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[12] The ICC and Board have repeated or cited this set of elements in nearly every Major Merger decision since 1982. *See, e.g.*, *Burlington Northern Inc., et al. – Control & Merger – Santa Fe Pacific Corp., et al.* ("*BN/Santa Fe*"), 10 I.C.C.2d 661, 729 (1995); *UP/SP*, 1 S.T.B. at 418 ("[c]onditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate"); *CSX Corp. & CSX Trans., Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail, Inc. & Consolidated Rail Corp.* ("*CSX/NS/Conrail*"), 3 S.T.B. 196, 277-78 (1998); *Canadian National Ry., et al. – Control – Illinois Central Corp., et al.* ("*CN/IC*"), 4 S.T.B. 122, 141 (1999).

directly or indirectly to the involved merger.'" *Id.* (citing *BN/Santa Fe*, 360 I.C.C. at 952); *see also CSX/NS/Conrail*, 3 S.T.B. at 278; *UP/MP/WP*, 366 I.C.C. at 562-65. Likewise, the Board rejects conditions that "would put the proponent of a condition in a better position than before the merger," *UP/SP*, Finance Docket No. 32760 (Decision No. 103, STB served May 1, 2008) at 6, such as conditions that would "offset revenue losses by competitors." *BN/Santa Fe*, 10 I.C.C. at 730.

Third, the mere presence of some public interest concern associated with the Transaction is "*by no means sufficient"* to warrant imposition of a proposed condition. Decision No. 13 at 4 (citing *UP/SP*, 1 S.T.B. at 419) (emphasis added). "The condition must also be, among other things, narrowly tailored to remedy those effects." Decision No. 13 at 4. The Board will "closely scrutinize conditions that could alter the competitive balance otherwise to be realized from the merger, including whether those conditions could have unpredictable effects." *Id.* (citing *UP/SP*, 1 S.T.B. at 418); *see also* Decision No. 13 at 4 (citing *UP/MP/WP*, 366 I.C.C. at 564 for the proposition that the agency "should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring").

Fourth, potential adverse impacts of the condition on the public interest – and on the Transaction itself – are central to the Board's assessment whether a particular condition is warranted. The Board "will consider evidence demonstrating the operational and competitive impacts of a requested condition on the primary transaction." Decision No. 13 at 4 (citing *CN/IC*, Finance Docket No. 33556 (Decision No. 7, STB served Sept. 18, 1998); *see also UP/MP/WP*, 366 I.C.C. at 564 (discussing the effects of conditions on the potential consummation of a transaction, and under certain circumstances, net public benefits).

Finally, the Board's precedents emphasize that the central focus of any consideration of potential conditions is on the Transaction's impact on competition. Although competition is not the sole consideration the Board may consider in assessing the public interest, it is the dominant one. As the Board said when approving the *CN/IC* transaction: "Conditions will generally not be imposed unless a merger produces effects harmful to the public interest that a condition will ameliorate or eliminate. The principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services." *CN/IC*, 4 S.T.B. at 141; *see also CSX/NS/Conrail*, 3 S.T.B. at 277-78.

As we explain in this response, the requests for conditions fail under these governing principles. They are not required to overcome any public interest harm from the Transaction as proposed (including the commitments that Applicants are making with respect to the Transaction's implementation, as set forth below); they would reach far beyond any conceivable impact of the Transaction, with unpredictable consequences; in many cases they are designed to address pre-existing grievances having nothing to do with the Transaction; and they would do affirmative harm to the Transaction and the public interest (and in particular the new competition the Transaction would bring). The standards governing CN's extraordinary divestiture request are even more onerous – and even more clearly not satisfied, as we address in Section VIII.A below.

III. THE TRANSACTION WILL RESULT IN SIGNIFICANT PUBLIC BENEFITS

As recognized by many hundreds of shippers, this Transaction will deliver extraordinary benefits for rail customers, the robustness of the U.S. rail network, and the broader public interest. The Application contains extensive evidence of those benefits, which we need not rehash in this Response.

At the core of the Transaction's public benefits is its role in stimulating – without the need for any Board regulatory intervention – new competition in U.S. (and international) transportation markets. Some of those benefits are readily quantified, such as the concrete efficiencies the Transaction will achieve by combining the CP and KCS networks. Others flow from the improved competitive capabilities of the combined network, the new single-line services the Transaction will enable, and the further improvements in CPKC services through the virtuous cycle of investment and innovation that Transaction-related traffic growth will support. The full measure of these competitive benefits will be much more extensive than just the new traffic that CPKC attracts from other railroads, from other modes, and by generating entirely new marketing opportunities. CPKC will bring the benefits of greater competition to its existing customers, as well as to those of other railroads who end up deciding (perhaps as a result of competitive responses from CPKC's rivals) to keep these traffic where it is today.

The Comments of interested parties largely take these benefits as a given, with many acknowledging them outright.[13] The critics of Applicants' benefits evidence are, perhaps not surprisingly, CPKC's future Class 1 commenters. Some, led by UP, mock CP's new single-line services, asserting that they are unlikely to be particularly attractive to shippers, especially when measured against UP's supposedly shorter and faster routes. UP suggests that for CPKC to achieve its forecasted traffic growth, it will surely have to resort to foreclosure strategies that degrade UP's own existing interline routing options. UP and its allies are wrong. New CPKC single-line services will be attractive to customers, as the Board (and even UP itself) has consistently recognized in evaluating the benefits of end-to-end mergers in the past. CPKC will

[13] *See* Appendix C, Selected Excerpts from Shipper Support Statements Regarding Procompetitive Benefits of CP/KCS Transaction.

be a stronger and better competitor to these other Class 1s, and they know it. It is resoundingly in the public interest that CP and KCS be allowed to come together to achieve that goal.

Other Class 1 commenters, led by CN, quibble with some of the technical details of Applicants' quantifications of Transaction-related cost savings and data underlying the base year CP and KCS traffic that the Transaction will augment. None of these critiques have any merit either, and even if valid could not change the fact that the Transaction is in the public interest.

A. There Is No Merit to Claims by Class 1 Rivals that CPKC Will Not Provide Valuable New Competitive Options

Several of the Class 1 commenters take issue with Applicants' estimates of the traffic they will attract from other railroads or from trucks, and the revenues associated with those traffic gains.[14]

All of these critiques lack merit. Fundamentally, the combination of the end-to-end CP and KCS networks will serve the public interest by injecting new competition into the industry. Competition is a dynamic and fluid process, and it is obviously never possible to predict the outcome of that process with the precision of a diamond cutter. Now are the specific traffic gains that CPKC realizes the only measure of the public benefits of that competition: all shippers benefit whether or not they choose to shift their traffic to CPKC.

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[14] UP and CN contend that Applicants have overestimated the projected traffic diversions. *See* Union Pacific Railroad Company's Comments and Request for Conditions (UP-10), Verified Statement of Thomas C. Haley ("Haley V.S.") (filed Feb. 28, 2022); CN's Comments on Application and Request for Conditions, Verified Statement of David T. Hunt ("Hunt V.S.") (filed Feb. 28, 2022). While BNSF, on the other hand, contends that Applicants *understate* the attractiveness of the combined CPKC networks. *See* Comments of BNSF Railway Company (filed Feb. 28, 2022) ("BNSF-9"), Verified Statement of Benton V. Fisher ("Fisher V.S.") at 13 (claiming "applicants' estimated diversions and growth traffic likely understate the additional volumes that will traverse the CPKC network"). This disagreement alone likely confirms the reasonableness of Applicants estimates.

Nonetheless, the Application has presented thorough, sophisticated, and reasonable estimates of the traffic that CPKC anticipates it will attract from other railroads and other modes of transportation, as well as the new traffic that its improved services and accompanying investments will generate. Those estimates are sound and fully consistent with Board precedent. Those estimates are validated in significant part by the groundswell of shipper support for the Transaction, and excitement about the specific new opportunities it will create.

The fact that CPKC's network will in some corridors require CPKC to move freight somewhat farther than its larger rivals will not hinder CPKC's new competition. CPKC will be capable of providing reliable, economical, and compelling new alternatives even where it may have a modest disadvantage in route length.

1. The Class 1 Critique of CPKC Traffic Estimates Misses the Fundamental Point that the Stronger Competition that Comes with the Transaction Is What Really Matters

Some of the Class 1 railroads criticize the precise quantification of traffic that CPKC will attract, often emphasizing their own views that their services are faster, more efficient, or otherwise superior to the CPKC routes.[15] Those critiques are unfounded. To start, estimating with precision the exact amount of traffic that CPKC will win away from other transportation options is not a precondition to finding that the Transaction will serve the public interest – nor

[15] *See* CN-13 at 18 (claiming that "the majority of the CPKC single-line routes that will be created by the merger are substantially longer than the already-existing route options available to shippers."); UP-10, Rocker/Turner V.S. at 2 (claiming that "Applicants' plans require CPKC to divert significant volumes of traffic from both UP and BNSF using longer, less efficient routes."); *id.*, Haley V.S. at 5.

even possible.[16] As described in detail below, Applicants developed their estimates based on a thorough assessment of the marketplace, and they are reasonable and sound.

But more fundamentally, the Class 1s are missing the forest for the trees: whatever measure of success CPKC achieves, the combination of the end-to-end CP and KCS networks will be a catalyst for investment in a new and improved North-South rail option that will inject new competition into the industry. If it really were the case that CPKC's estimates were wildly off base, and the Class 1 railroads did not expect much of their own traffic to be diverted to the CPKC network, they would not be objecting so vigorously. It is telling that the Class 1 railroads say nothing about their own competitive responses to CPKC. Their preferred strategy is to prevent new competition from CPKC from ever getting off the ground, using regulatory tools, rather than meeting CPKC in the marketplace.

It is also curious that the principal critics of the benefits available from Applicants' proposed end-to-end merger have themselves previously lauded the very same benefits when advancing their own end-to-end mergers, as recounted in detail in Appendix B. For example, BNSF has claimed that its formative transaction enabled it to "improve its service and grow the combined railroads' business in every major traffic category."[17] And CN has described how own U.S. origin story – the *CN/IC combination*, a transaction quite similar to CP/KCS – "was implemented with real gains in efficiency," and allowed CN to "offer new and improved

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[16] *See* 49 C.F.R. § 1180.7 (1999) (requiring Applicants to prepare analyses of the "anticipated effects of the transaction on traffic patterns, market concentrations, or transportation alternatives available to the shipping public."). Of course, whether the CPKC diversions are underestimated or overestimated is not a factor in the Board's review of the competitive effects of the Transaction, which is the primary focus of the public interest standard under the pre-2001 Merger Rules. Diversion analysis prove nothing about potential competitive harm.

[17] *Competition in the Railroad Industry*, Ex Parte No. 705, BNSF Reply Comments, Verified Statement of John P. Lanigan (filed May 27, 2011) at 2, 8 (emphasis added).

services."[18] These critics have unanimously failed to provide a coherent explanation of why these same kinds of benefits cannot be achieved or would be of a lesser value in the context of this Transaction.

2. Applicants' Estimates of the Traffic CPKC Will Attract Are Reasonable and Sound

Contrary to the insinuation of some Class 1 commenters, Applicants' estimates of the traffic that CPKC will attract from other railroads and other transportation modes was thorough, sophisticated, and reasonable. It was based on a rigorous and holistic assessment of the marketplace and the capabilities CPKC will bring to the market. Those estimates were based, in part, on the work of Richard W. Brown and Nathan S. Zebrowski of FTI Economic Consulting, who analyzed 2019 traffic flows reported in CP and KCS internal traffic tape data and the Carload Waybill Sample, and the potential for CPKC to attract traffic now handled by other Class 1 railroads in lanes where CPKC will offer significantly improved capabilities relative to the separate offerings of CP and KCS. In addition, Bengt Mutén of IHS performed a thorough analysis of the traffic moving by truck today in highway lanes.

The conclusions reached by Brown, Zebrowski, and Mutén were then validated by Jonathan Wahba (CP's Vice President of Commercial Integration) and Michael J. Naatz (KCS's Chief Marketing Officer), both of whom have extensive familiarity with the commodity flows and customer opportunities in the affected markets. Wahba and Naatz confirmed the analysis and supplemented it with a detailed examination of new opportunities for rail traffic growth, identifying movements that were not included in the rail-to-rail diversion analysis based on 2019

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[18] *Canadian National Railway Company, Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corp., Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd. ("CN/WC")*, Finance Docket No. 34000, Application, Verified Statement of Paul Tellier (filed Apr. 9. 2001) at 3 (Vol. 1) (Vol. 3, Exh. 3).

data (primarily because these moves did not exist in 2019, and would not exist but for the Transaction occurring).

Applicants' findings show that customers will be attracted to the new service options, including more competitive intermodal services that CPKC will provide. Together, these five witnesses present a reasonable and reliable view of the likely degree to which CPKC will offer a compelling value proposition that attracts large volumes of rail traffic. Of course, none of these witnesses – including those of the Class 1 objectors – purport to predict exactly which carloads shippers will choose to ship on CPKC routes. No analyst possesses that kind of crystal ball. But the analysis of Applicants' witnesses and their process and conclusions are sound, reasonable, and fully consistent with methodologies previously approved in transactions involving the Class 1 opponents.

The Class 1s' criticisms of Brown's and Zebrowski's analysis are lacking in substance and reveal that the Class 1 railroads really do not know how to attack a Transaction that produces the positive benefits that their mergers created. On the one hand, most railroads simply assert, without any analytical support, that Applicants' rail-to-rail diversion estimates as provided in the Brown/Zebrowski Verified Statement are overstated because the CPKC routes are longer than the routes from which traffic is expected to be diverted, and thus diversion would only occur by foreclosure. BNSF, on the other hand, claims the diversion estimates are understated.[19] The fact that one railroad argues the estimates are overstated and others argue the estimates are understated may itself reveal that CPKC's middle-ground estimates are reasonable (where the goal of estimates is not perfection).

- ***Modest Route Length Disadvantages Will Not Disqualify CPKCS from Offering Shippers Value They Find Attractive***

[19] BNSF-9, Fisher V.S. at 13-14.

We begin with UP's attack because it aims at the heart of CPKC's competitive benefits – contending that shippers will not much value CPKC's new offerings. UP wonders why "customers would willingly choose longer CPKC routes over existing interline routes."[20] But UP widely misses the mark. The hard data underlying Applicants traffic analyses shows that UP's effort to equate "route length" or even "simulated run times" with the best service option is fundamentally wrong, and UP should know it. Shippers routinely choose transportation options based on a wide array of factors that are entirely unrelated – or only loosely related – to the variables upon which UP fixates. Applicants marketing witnesses and traffic analysts thoroughly debunk UP's false premise. Reply Verified Statement of Jonathan Wahba and Michael J. Naatz ("Wahba/Naatz R.V.S.") at ¶¶ 8-18; Reply Verified Statement of Richard W. Brown and Nathan S. Zebrowski ("Brown/Zebrowski R.V.S.") at ¶¶ 33-47.

At the outset, Applicants note that the decisions as to whether CPKC routes will be competitive will not be for UP to make. Those decisions will be made by rail customers, whom CPKC will have to attract to CPKC's offerings by meeting their needs for reasonable rates, reliable service, and cycle times that enable equipment savings. CPKC is confident that many customers will find CPKC's offers compelling. The history of railroading and CP's own success in delivering value to customers shows that CPKC will certainly not be disqualified from consideration because of longer routes, which is merely one factor that rail customers consider.

But the hard data drives an even more powerful stake through the heart of UP's simplistic assertions. As Brown and Zebrowski show, mileage alone does not actually have very much to say about the overall competitiveness of a route or shippers' choices among competing

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[20] *See, e.g.*, UP-10 at 25.

alternatives. Longer routes can be more efficient and can provide faster, or more reliable, service. Brown/Zebrowski R.V.S. at ¶¶ 34-47; *see also* Wahba/Naatz at ¶ 13.[21] Longer routes, even supposing they have somewhat higher costs, can still be rate competitive and have relatively low prices where railroads are motivated to compete, as CPKC will be here. Brown/Zebrowski R.V.S. at ¶¶ 49-52; Wahba/Naatz R.V.S. at ¶¶ 13-18.

Brown and Zebrowski based their traffic on data presented with the Application showing the relatively low influence of route mileage (within a reasonable range) on shippers' actual routing choices, and that analysis was not seriously challenged. *See* Brown/Zebrowski R.V.S. at ¶ 24; Verified Statement of Richard W. Brown and Nathan S. Zebrowski at Appendix B (App. Vol. 2 at 175-184).

In response to UP's attack, these witnesses took a harder look at data obtained in discovery from UP and BNSF, and they confirmed without a doubt that UP's simplistic assumptions about the role of route length in driving transit time differences is incorrect. In fact, the data confirm that CPKC's somewhat longer routes in some corridors will not make CPKC's routing options unattractive to shippers as new competitive alternatives.

Again, all of this is beside the point because shippers value reliability and many other attributes, not just speed. But even taking UP's claims about speed at face value, the actual data (drawn from UP and BNSF's own car event and waybill data records) show:

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[21] "This poses both challenges and opportunities for each railroad contending to provide the ideal service parameters demanded by shippers in a myriad of individual circumstances. Many elements of CPKC's operating plan, including train schedules, line capacity and velocity, planned maintenance outages, switching frequency, and intermediate handlings, will affect the transit times and service levels CPKC is able to provide to customers. It is unfounded to discount CPKC's opportunities to compete on the narrow basis of relative route length." Brown/Zebrowski R.V.S. at ¶ 41.

- For UP's movements via the Laredo gateway, {{[redacted]}} Brown/Zebrowski R.V.S. at ¶¶ 39-40 & Figure 2 (emphasis added).
- Narrowing the focus to the specific corridor between Laredo and Chicago yields the same conclusion. The variation in UP's carload and intermodal shipments on this one corridor is {{[redacted]}}. Brown/Zebrowski R.V.S. at {¶¶ 43-46 & Figures 3-4.
- Examining the performance of UP and BNSF intermodal shipments in the Chicago-Laredo lane confirms that CPKC offerings are fully capable of competing successfully. UP witness Haley points to a 14-hour transit time differential between UP and CPKC for Laredo-Chicago lane, but the data show that that modest differential is {{[redacted]}} the amount of time UP (and BNSF) trains actually take to traverse those networks between Laredo (or Robstown) and Chicago). Brown/Zebrowski R.V.S. at ¶ 47-48 & Figure 5.
- UP's own evidence about market outcomes also contradicts UP's claims. UP witness Haley suggests that CPKC will not be competitive because of a route-length disadvantage that is no greater than the disadvantage that BNSF already possesses relative to UP, yet BNSF historically has attracted {{[redacted]}} of traffic on this route. Brown/Zebrowski R.V.S. at ¶ 47.

CN witness Hunt attacks Applicants' traffic analyses with a somewhat similar, more technical assertion that Brown and Zebrowski's analysis should have given greater weight to route-length (i.e., "circuity").[22] Hunt is equally wrong.

As already shown, Brown and Zebrowski conducted detailed traffic distribution analyses that revealed that circuity is not determinative of traffic shares at the relevant distance thresholds. Their approach used that data to reasonably and reliably estimate the impact of CPKC's new single-line routes, taking into account the degree to which relative distance influences shipper choices, and they explicitly excluded from consideration potential traffic shifts where CPKC routes would be more than 500 miles (or 50%) longer than the shortest available route. Brown/Zebrowski R.V.S. at ¶¶ 24. Moreover, as Applicants' witnesses demonstrate, Hunt's analysis is contradicted by his own work. His estimates of the traffic that CN would attract away from CPKC were it to purchase KCS's Springfield/St. Louis Line demonstrates that relative route-mileage is not dispositive:

First, Hunt's core methodology treats single-line routes as equivalent in "impedance" (or relative attractiveness to shippers) to interline routes that are 350 to 650 miles shorter. Brown/Zebrowski R.V.S. at ¶ 25; *see* CN-13, Hunt V.S. at 8.[23] Applying those parameters, the CPKC single-line diversion routes that Hunt states are 217-miles longer on average than existing interline routes, would, in fact, be *more efficient than* and highly competitive with existing interline routes. Brown/Zebrowski R.V.S. at ¶ 25.

Second, unlike Applicants' witnesses, Hunt's analysis concluded that traffic would shift to new CN single-line routes that would be more than 500 miles longer that existing alternatives

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[22] *See* CN-13 at 18; *id.*, Hunt V.S. at 8.

[23] Canadian National Application (CN-14), Verified Statement of David T. Hunt in Support of Springfield Line Divestiture to CN ("Hunt Application V.S.") (filed Feb. 28, 2022) at 37.

(*e.g.*, in the Kansas City-Calgary lane). Brown/Zebrowski R.V.S. at ¶ 24. Applicants do not credit this analysis, but it shows that CN's claims that CPKC's single-line routes will be competitively disadvantaged is not credible.

Third, Hunt's insistence that Brown and Zebrowski should have used diversion percentages that vary with route length is contrary to his own use of diversion percentages that *barely change* in response to changes in route length, and in some cases even *increase* precisely because the diversion route is longer. Brown/Zebrowski R.V.S. at ¶¶ 26-28.

CN's own evidence thus confirms the reasonableness (and indeed superiority) of the data-driven approach taken by Applicant witnesses in this case.

- ***Other Attacks on Applicants' Traffic Estimates Are Equally Insubstantial***

CN's smattering of additional criticisms of Applicants' traffic analyses are likewise and easily rejected.

Hunt asserts that Brown and Zebrowski should not have identified potential shifts of lumber traffic from Canada to Dallas or grain traffic from the Midwest to Mexico because those diversions are not tied directly to station moves in the 2019 traffic data is also easily discarded. Hunt overlooks the detailed explanations as to why each of these traffic shifts are likely following CPKC's creation of single-line service connecting destinations with existing demand to additional origin supply. Brown/Zebrowski R.V.S. at ¶¶ 15-18; Wahba/Naatz V.S. at ¶¶ 21-31, 96-101 (App. Vol. 1 at 253-258, 288-292). Specifically, CPKC's lumber and grain diversion estimates were based on Wahba's and Naatz's knowledge of the dynamics and trends in those markets, and were quantified and validated with the support of Brown and Zebrowski. Brown/Zebrowski R.V.S. at ¶ 16.

Hunt's own work in support of CN's Responsive Application reveals Hunt's self-serving inconsistency. He too recognizes that it may be appropriate to find that new single-line routes

could shift traffic currently moving in one origin-destination corridor to another. In his analysis, 15% of volumes currently moving through New York and New Jersey ports to Kansas City would instead move through the Port of Montreal were CN to gain a single-line route to Kansas City. Brown/Zebrowski R.V.S. at ¶ 18 n.26. Applicants do not endorse the correctness of this conclusion – in fact, Hunt provides significantly less detail and support for his assumption than Brown and Zebrowski. But it shows that consideration of such shifts is appropriate in a rail traffic impact analysis. *Id.* at ¶ 18.

- ***CPKC's Revenue Estimates Are Reasonable***

The Class 1s also criticize Applicants for not providing more details concerning the prices CPKC will charge in the marketplace, suggesting that Applicants have not reliably estimated the revenues they will earn in the post-Transaction world. Brown and Zebrowski explain why these criticisms are unwarranted. Brown/Zebrowski R.V.S.at ¶¶ 57-62.

The Class 1 railroads take Applicants to task for not precisely cataloguing the rates that they will earn from each carload of traffic they anticipate attracting to the CPKC network, or telegraphing exactly what rate discounts they may offer in competition with customers' existing transportation alternatives. UP even suggests, falsely, that CPKC's competitive strategies would necessarily entail charging the same rates as shippers pay today.[24] But it would be exceedingly inappropriate for Applicants to be required to develop and divulge to these Class 1s every detail of their strategies to bring new competition to the market. Applicants have not telegraphed – and should not telegraph – the customer-by-customer marketing plans that they will be rolling out to the marketplace if they are allowed to combine. To do so would undermine the very competition that the CPKC transaction is intended to enhance. Applicants recognize that they will need to

[24] UP-10 at 27.

present shippers with a package of rate and service terms that better meet their needs. Those packages will vary shipper-by-shipper, market-by-market, and will encompass a broad array of attributes from rate levels, equipment availabilities, cycle time expectations, reliability, transit times, and many other variables.[25]

3. Applicants' Estimates Are Validated by the Transaction's Extensive Shipper Support and Real-World Developments

Were the thoroughness of Applicants' market analyses and the track-record of end-to-end railroad combinations not enough to support Applicants' traffic forecasts, they would be validated by the extensive shipper support – and in many cases excitement about concrete new potential CPKC services – and real-world developments, including plans that many shippers are making to invest alongside CPKC to take advantage of the improved transportation linkages made possible by the Transaction.

Appendix C recites numerous examples of from the extensive record of shipper support for the Transaction,[26] which Applicants are augmenting with a number of additional verified statements from shippers targeting specific ways in which the Transaction will bring better rail transportation options, stronger competition, and likely resulting traffic growth opportunities for CPKC. These shippers understand the multi-faceted benefits of the new CPKCS single-line routes that will be created by the Transaction.

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[25] Brown and Zebrowski also explain why the specific criticisms of their revenue estimates levied by CN witness Hunt are incorrect. They show that (a) their use of a "segment approach" to revenue estimation was superior to "end to end approach" (Brown/Zebrowski R.V.S. at ¶ 58); (b) Hunt's claim that certain estimates exceeded actual historical non-CPKC revenues failed to account for re-billing (*id.* at ¶ 59); and (c) a minor currency conversion error identified by Hunt affects a total of 21 units of traffic and would impact revenues by less than 0.01% (*id.* at ¶ 61).

[26] For a complete list, see the Application (Volume 3-4 and the Table of Contents herein (Exhibits S-AC).

Real-word developments since last October and other concrete market facts further underscore the reasonableness of Applicants' estimates of the Transaction's potential.

First, numerous shippers have been developing their own plans to make investments to take advantage of the new, more efficient transportation linkages made possible by the transaction. CP's Chief Marketing Officer John Brooks and KCS's Chief Marketing Officer Michael Naatz separately summarize what KCS and CP are hearing from their current and future customers. Brooks R.V.S. at ¶¶ 5-6; Naatz R.V.S. at ¶105. Several of these shippers are communicating their plans directly to the Board. *See* Verified Statement of Mr. Bob Knief, President of Bartlett Grain Co. ("Knief V.S.") (filed June 22, 2022) at ¶ 15.[27]

Second, post-Application developments and other real-world facts further confirm precisely those new opportunities about which Applicants' Class 1 rivals are most skeptical. For example, CN witness Hunt claims that Applicants' forecasts of intermodal traffic from the Port of Lazaro Cardenas are "implausible because they fail to account for the reality of global supply chains or the circuity of the longer rail and maritime routes that would make it difficult for CPKC to capture that traffic."[28] Hunt also opines that "[t]he Port of Lazaro Cardenas is simply

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[27] *See also* Reply Verified Statement of NEW Cooperative, Inc. (Vol. II, Ex. X) ("I write today to advise the STB of a potential investment that is contingent on the approval of the CP-KCS combination. This combination provides us the possibility to build a greenfield grain elevator to ship corn and soybeans in Northern Iowa, to capitalize on new, efficient single-line routes on CP-KC from Iowa to grain destinations on the KCS, including Mexico."); Reply Verified Statement of Kevin Hall, Vice President, Supply Chain & Continuous Improvement, Agriculture for CHS Inc. (Vol. II, Ex. U) ("The increased efficiencies and market access created by the CP-KCS merger would be an impetus for rail-using companies, such as CHS, to make the most of those benefits by considering making new investments in supply chain infrastructure to be served by CPKC."); Reply Verified Statement of Ray Carroll County Grain Growers, Inc. (Vol. II, Ex. Y) ("We are pleased to support the CP-KC transaction and believe that it opens up more possibilities for us. In fact, we anticipating making new investments in this corridor in the foreseeable future.").

[28] CN-13, Hunt V.S. at 27-31; *see also* UP-10 at 24-25 ("Applicants describe aspirations to draw substantial quantities of new traffic to their combined system, anchored by vague plans to attract international intermodal traffic to the Port of Lazaro Cardenas…").

not a realistic alternative to Los Angeles/Long Beach, given the increased distances and the presence of more competitive alternatives, such as the Port of Vancouver."[29] However, the reality of this opportunity has been proven by shipper interest in this transportation option and CP and KCS's now-proven ability to deliver service levels meeting customer needs even *before* the benefits of their combined network have been unlocked. Wahba/Naatz R.V.S. at ¶¶ 34-35.

Working on an interline basis, CP and KCS demonstrated the capabilities of their route between Lazaro Cardenas and Chicago, enabling steamship companies and intermodal shippers to bypass the congested Southern California ports. As one of those shippers – Sparx Logistics – testifies here:

> "We have proven through our actions that we believe ocean shipping from Asia to Lazaro Cardenas is a viable way to reach destinations in the Central and Eastern United States. We believe that the CP-KCS Transaction can only strengthen this exciting new option, making it better for our shippers and their customers."[30]

The president of the steamship line that handled those containers via Lazaro and the CP-KCS inland rail route similarly testifies that:

> "The combined CP-KCS network . . . will create efficient, single-line service from Lazaro Cardenas to those U.S. and Canadian population centers, making Lazaro a valuable relief value for freight that would otherwise further clog other ports."[31]

As this testimony confirms, UP and CN simply have their facts wrong. Maritime distances are not a barrier to Lazaro's competitiveness, especially for trade from Southeast Asia (Vietnam, Singapore, etc.), where vessel routes are not more circuitous. Nor is the modest

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[29] CN-13, Hunt V.S. at 32.

[30] Verified Statement of Markus Heiken, VP Global Ocean Procurement, Sparx Logistics Inc. (Vol. II, Ex. AA).

[31] Reply Verified Statement of Uffe Ostergaard, President of Hapag-Lloyd (America) LLC, at 1 (Vol. II, Ex. V).

differential in rail route mileage as compared to UP's and BNSF's rail routes from Southern California to Chicago. Other Pacific Coast ports will remain viable – indeed, dominant – options for containerized cargo moving to the U.S. Midwest, but Lazaro Cardenas has real and yet-untapped potential to prove efficient transportation options for many shippers' needs. Wahba/Naatz R.V.S. ¶ 28-31.

UP and CN are also critical of Applicants' anticipated ability to attract additional DRUbit traffic moving between Canada and the Gulf, supporting the transition of crude-by-rail to this non-hazardous form. Citing a 2019 press release announcing the first phase of the Hardisty project, they assert that this opportunity does not require the Transaction to be achieved.[32]

Those assertions, however, don't relate to the real-world market facts, as presented here by the rail shippers involved in this project. As the Chief Commercial Officer of USD Group explains in his Reply Verified Statement, CPKC's new routes promise to incentivize further investment in DRUbit infrastructure, thereby speeding up the transition to more efficient, safer DRUbit:

> "We believe the Transaction will create more efficient, new single line routes from origins near the Alberta oil sands, on CP's network, to destination refineries on KCS's network, without which new DRUbit traffic is much less likely to arise. We understand that CPKC will support new investment in capacity (longer sidings, etc.) on the CP-KCS North-South route connecting Canada with the Gulf Coast, enabling improved cycle times and reliability and the ability to move more product on the same number of trains, which impacts cost, efficiency, and capacity. These efficient new routes promise to incentivize further investment in DRUbit infrastructure, thereby speeding up the transition to more efficient, safer DRUbit."[33]

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[32] *See* UP-10 at 24-25; CN-13, Hunt V.S. at 25-27.

[33] Reply Verified Statement of Brad Sanders, Executive Vice President, Chief Commercial Officer, USD Group LLC, at 3 (Vol. II, Ex. AC).

As Wahba and Naatz explain, UP and CN are confusing the first phase of the Hardisty project with the second and third phases, which have not been undertaken and which may not be undertaken without the transportation benefits that the Transaction will bring. The improved cycle times and service reliability made possible by the CP/KCS Transaction will support the new investments necessary to unlock this traffic and displace more hazardous forms of crude-by-rail moving across North America's rail network. Wahba/Naatz R.V.S. at ¶¶ 43-46.

Similarly devoid of connection with market facts is CN's assertion that Wahba and Naatz "claim approximately $122 million in diversions that were apparently 'missed' by Applicants' diversion experts in LPG, grain, and perishable commodities."[34] As Applicants' witnesses explain, there are clear and compelling opportunities in each of these commodity groups to support rail movements to alternative destinations, or from alternative origins, that would not have been captured by a narrowly focused analysis only of 2019 origin-to-destination rail flows, and recent experience confirms the validity of these forecasts. For LPG, CP gained new business after 2019 from specific customers that would benefit from the new capabilities of single-line CPKC routes. The same is true of grain, where CP has identified concrete new opportunities for CP origins to supply a major KCSM grain customer in Mexico. Brown/Zebrowski R.V.S. at ¶ 64; Wahba/Naatz R.V.S. at ¶ 39. And for perishables, CN ignores the fact that the CP/KCS combination would not merely replicate existing highway movements, but shift perishables that move by truck form a two-stage route via warehouses in the south to a longer-haul rail movements directly into the U.S. Midwest closer to end consumers. Wahba/Naatz R.V.S. at

[34] *See* CN-13, Hunt V.S. at 32.

¶ 41; Mutén R.V.S. at ¶¶ 10-11.[35] The concrete potential of these and other new marketing opportunities underscores the procompetitive potential of the CP/KCS transaction.

4. The KCS Board's Highly Conservative Pre-Agreement Synergies Estimates Do Not Undermine Applicants' Anticipated Benefits

Finally, the fact that KCS's board of directors was presented with a "more conservative" assessment of revenue synergies and operating savings in the course of its consideration whether to enter into a merger agreement with CP does not undermine the magnitude of benefits that Applicants now anticipate. As Naatz explains, it made sense for KCS's board to view potential future synergies conservatively, for they were deciding whether to accept consideration in the form of shares the value of which would be based in part on those synergies. Naatz R.V.S. at ¶¶ 108-112. Further, the KCS team developing those conservative estimates – which nonetheless showed extraordinary potential for new growth from a CP/KCS combination – had not yet had the benefit of the more detailed, collaborative analysis of that potential undertaken in conjunction with CP, and ultimately informed by the analysis of Applicants' traffic experts with the benefit of confidential data sources. *Id*. at ¶ 112. As the passage of time has shown, moreover, the desire of the marketplace for the transportation and competitive benefits that CPKC will unlock has only grown stronger. *See* above at Section III.A.3.

[35] These witnesses demonstrate that Applicants traffic analyses did not double count any of these new market opportunities, contrary to CN's assertions. Brown/Zebrowski R.V.S. at ¶ 64.

B. There is Zero Risk to CPKC's Financial Viability and Continued Investment, Regardless of How Much New Traffic Is Attracted to the CPKC System, or at What Rates

Echoing UP's false suggestion that CPKC's somewhat longer routes will compel it to "foreclose" UP interline routes in order to achieve forecasted traffic gains, CN contends that CPKC will be under financial pressure to do the same thing. CN is equally wrong.

As Velani and De Bruyn explain, CPKC will be financially strong and fully capable of rapidly repaying its Transaction-related debt regardless of how much new traffic it attracts – or how much revenue it reaps from that traffic. They demonstrate that CPKC will have ample free cash flow to pay down debt and invest in the railroad even in the absurdly unrealistic scenario where CPKC attracted no new traffic at all as a result of the Transaction. Reply Verified Statement of Nadeem Velani and Chris De Bruyn, ("Velani/DeBruyn R.V.S.") at ¶¶ 23-29.

CN's suggestion that Velani's analysis of CN's failed 2021 bid to acquire KCS has a bearing on the financial pressures CPKC will face here is also incorrect. CN claims that, "[i]n opposing CN's proposed merger with KCS, CP conducted a financial analysis of the transaction" and concluded that "CN's targeted rate of return will not be achieved based on the synergies CN forecasts, which will place pressure on CN to boost returns in other ways, such as through cost-cutting, or—more plausibly—reaping the benefits of reduced competition . . . ."[36] As Velani and De Bruyn explain, however, the facts of this Transaction are quite different:

- CN was offering substantially more cash consideration, which in turn would have driven substantially higher levels of debt;
- CN's public statements to investors and the public established that it was sharply focused on hitting "return-on-invested-capital" (ROIC) targets, which would have been challenging with the KCS transaction absent sharp revenue increases; and

[36] *See* CN-13 at 59-60, citing Exhibit 4, Verified Statement of Mark E. Zmijewski ("Zmijewski V.S."), at ¶ 5 (quoting Verified Statement of Nadeem Velani at 11).

- CN's proposed transaction involved combining two railroads with substantial amounts of competitive traffic and overlapping routes, creating very real risks that had a voting trust been authorized, it would have had to be unwound via divestiture, with attendant financial risks.

Velani/DeBruyn R.V.S. at ¶¶ 36-41.

None of these factors are at play with CP's acquisition of KCS.

C. The Class 1 Critique of the Operating Efficiencies Generated by the Transaction Is Invalid

Several of the Class 1s critique the magnitude of the operating efficiencies the CP/KCS Transaction will generate.[37] UP's critique is insular, focusing on static and narrow interchange cost savings without appreciating the rippling effect of operational redesign coupled with traffic growth and investment. These opportunities for greater efficiency extend well beyond the narrow body of traffic currently interchanged at Kansas City and cannot be achieved without the Transaction. CPKC's ability to re-optimize operations across a broader network will be the foundation for growth. Reply Verified Statement of Raymond A. Elphick and John F. Orr ("Elphick/Orr R.V.S.").

CN's quibbles with Applicants' estimates of operating efficiencies are no less meritorious, as Michael Baranowski explains in his Reply Verified Statement. Baranowski R.V.S. at ¶¶ 11-13. As Baranowski explains, Applicants have based their estimates on the same approaches that are used in the ordinary course in the railroad industry and that undergird the Board's regulatory processes. Baranowski R.V.S. at ¶ 38. They are entirely reliable.

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[37] *See, e.g.*, UP-10 at 23 ("CPKC would not generate significant merger benefits through cost savings"); UP-10, Haley V.S. at 5-14 (claiming that "applicants' projected operating cost savings are very small, and almost all could be achieved without a merger"); CN-13, Zmijewski V.S., at 59 (claiming claimed mechanical savings "are not cognizable efficiencies, or, at best, cognizable for a limited time period).

CN's witness on this subject, Dr. Mark E. Zmijewski, is a prolific testifying expert for parties in merger litigation seeking to attack the merging parties' efficiencies estimates. Courts considering his testimony have recognize that it is impossible to predict the future with certainty, such that efficiencies cannot be rejected based on the parties' inability to provide precise quantification with certainty. As recently as 2020, a district court judge considered Dr. Zmijewski's testimony on behalf of the Department of Justice and stated:

> "While Dr. Zmijewski's testimony identified several flaws with Defendants' process, and the Court commends his rigor, the Court also has no doubt that there is truth to Defendants' claim that the JV is likely to achieve significant efficiencies" and "[t]he Court is, of course, concerned about the fundamental unverifiability of efficiencies that are grounded in the business judgments of Defendants' employees. Also, as the FTC's examples make clear, some portion of Defendants' projected efficiencies are unrealistic or oversimplified. But Defendants have shown that they used a process substantially similar to that used in the ordinary course of business to determine the anticipated efficiencies arising from this transaction, and they have supported their claims with evidence from past transactions. Thus, the issues identified by the FTC *do not render Defendants' efficiencies wholly unverifiable*."[38]

Applicants' estimates of the efficiencies the Transaction will generate are likewise well founded in experience and the tools of the railroad industry. Baranowski R.V.S. at ¶¶ 36-38. There is no doubt that the CP/KCS Transaction will generate material efficiencies, to the benefit of the U.S. rail network, CPKC's customers, and the competitive process.

D. CN's Continuing Criticisms of the Operating Plan Lack Merit and Are Irrelevant to the Board's Evaluation of the Transaction's Impacts

CN continues its pattern of attacking the traffic density data reported in Applicants' Operating Plan. Applicants' prior submissions have thoroughly addressed CN's spurious claims

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[38] *FTC* v. *Peabody Energy Corp.*, No. 4:20-cv-00317-SEP, Memorandum Opinion (E.D. Mo. Oct. 5, 2020) (Vol. 3, Exh. 4) at 82-83 (emphasis added).

that Applicants' methodology for developing and presenting density data was invalid.[39] As the Amended Operating Plan shows, Applicants' approach in fact provides the best and most reliable means of assessing the *impacts of the Transaction*, which is the purpose of the Board's review in this proceeding. The data presented in the Amended Operating Plans supports a reliable assessment of the changes in traffic volume – in terms of train counts and tonnage – resulting from the traffic and operating changes associated with the Transaction.

CN's new volley of attacks appears to acknowledge this key fact thus turns its sights on criticisms of Applicants "base period" data, most centrally CN witness Van Dyke's assertion that "Applicants' *base year* operating plan is based on traffic density data that is conceptually flawed and demonstrably incorrect."[40] None of this matters for purposes of determining how many more trains (or fewer trains in some instances), or how much more tonnage, the Transaction will result in CPKC handling on the various segments of its post-Transaction network. Instead, CN's new criticisms go only to the degree of precision associated with the base Operation Plan as a perfect measure of exactly what one would see if you stood trackside during 2019 and counted trains or weighed the passing railcars.

In any event, Elphick and Orr explain in detail why Van Dyke is simply wrong in suggesting that building a 2019 base the Van Dyke claims to prefer would have enabled more reliable – or even reliable at – assessments of the transaction's impacts.

First, Van Dyke criticized Applicants for using data "to construct a '2019 base year' [that] does not actually include *any* data from 2019."[41] As explained in the Reply Verified

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[39] *See* Applicants' Response to Decision No. 16 (CP-43/KCS-30) (filed Mar. 21, 2022); Applicants' Amended Operating Plan (Exhibit 13) (CP-47/KCS-34) (filed May 13, 2022).

[40] CN-17, Verified Statement of Carl Van Dyke ("Van Dyke V.S.") at 6 (emphasis added).

[41] *See* Van Dyke V.S. at 7-8 (emphasis added).

Statement of Raymond A. Elphick and John F. Orr, CN's criticisms are based on the mistaken premise that it would have been realistic, or even possible, to use FY2019 reported data to build a base that could have been used as the starting point for layering on Transaction-related changes. Elphick/Orr R.V.S. at ¶¶ 6-9. Applicants' approach, by enabling apples-to-apples comparisons between the pre- and post-transaction periods, was more reliable, not less.

A FY 2019 train plan was neither available nor representative of current operations, so Applicants reasonably chose the most current design at the time, and applied it to October 2020 traffic. That period was chosen because it was the nearest peak month to the period covered by the current design and because its volume levels were representative of the typical monthly range experienced in full year 2019. As discussed by Elphick and Orr, the operating statistics generated by that approach provide the best available and most accurate reflection of current pre-Transaction levels. Elphick/Orr R.V.S. at ¶ 4.

Van Dyke also criticizes CP's decision to use KCS data for the period from February to early May 2021 data to develop pre-Transaction demand train levels (*e.g.,* unit trains carrying grain and other bulk commodities). That choice made sense for many reasons, including because it was aligned with KCS's current train design and also representative of KCS's pre-Transaction operations and 2019 average traffic levels. This period is not skewed due to seasonality. Elphick/Orr R.V.S. at ¶ 13.

Additionally, KCS reported segment density data available for FY2019 did not include corresponding train counts, so it could not have been used by Applicants to develop counts of trains per day ("TPD") or cars per day ("CPD"). As a result, Van Dyke's proposed approach would have left Applicants with no ability to develop an accurate assessment of Transaction-related operating changes, much less one linked to the pre-Transaction base plan. Elphick/Orr

R.V.S. at ¶ 6, 11. As discussed by Elphick and Orr, an apples-to-apples measure of base and synergy TPD/CPD counts was critical. *Id.* at 11. Applicants' methodological choice was thus made consciously and appropriately, weighting the tradeoffs associated with modeling 2019 operations rather than relying on 2019 data, which would simply not have supported the analysis that the Operating Plan was designed to advance, or the role it plays in the Board's assessment of the Transaction's true impacts.

Van Dyke's other criticisms are equally without merit, as Elphick and Orr explain. Elphick/Orr R.V.S. at ¶¶ 5, 13-19.[42] CN's quest to defeat Applicants' merger on a set of "data technicalities" is both misguided and ultimately just wrong. It is also disingenuous: Van Dyke's workpapers show that his preferred method for modelling segment densities produces results that are less aligned with CP and KCS 2019 reported segment densities than the Applicants' planned for the operations of CPKC the same way they would plan for any future traffic and operational changes in the ordinary course. They used the best data available, and the best analytical tools available, to analyze the impacts of those plans, assure their feasibility, and present the resulting statistics to the Board. The Board has all the information it needs to form and support reliable judgments that the operating impact of the Transaction will serve the public interest.

IV. THERE ARE NO VALID COMPETITIVE CONCERNS

Despite the end-to-end character of the proposed Transaction, and extensive evidence of its competitive effects – covered in small part in the preceding section – a number of commenters

[42] Had Applicants followed Van Dyke's proposed methodologies, moreover, the resulting differences in operating statistics would have been trivial in scope and magnitude. Elphick/Orr R.V.S. at ¶¶ 17-18.

seek to articulate competitive concerns. They do this because they understand that the Board's precedents demand that a transaction "produce[]effects harmful to the public interest (such as a significant loss of competition)" in order to justify any "condition [to] ameliorate or eliminate" that harm.[43] However, there will be no such harm, and thus no predicate for any competition-preserving conditions. The Transaction will not reduce the number of serving railroads for any shipper or in any corridor (CN's claims notwithstanding), and CPKC will not eliminate any existing interline option that shippers would prefer to use over CPKC's new single-line alternatives. CPKC will have strong incentives to preserve those options, which is why Applicants did not hesitate to make robust commitments at the outset of this case to keep all gateways open both operationally and commercially for traffic that might be affected by the Transaction. With these commitments, which Applicants accept may be enforced by the Board, the public is assured that the Transaction will be every bit as procompetitive as Applicants foresee.

In this Section we address in detail the claims – primarily by a handful of opportunistic Class 1s seeking protection from CPKC's competition – that the Transaction will have anticompetitive vertical effects. We also explain why the requests of numerous shipper associations for open access, reciprocal switching, and other sweeping regulatory strictures predicated on their dissatisfaction with the level of competition in the industry have no place in this proceeding. The only threat to competition here is from the overreaching condition requests—by Class 1s and shipper associations alike – that would hobble CPKC's efforts to inject new competitive alternatives into the rail industry.

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[43] Decision No. 13 at 4 (quoting *UP/SP*, 1 S.T.B. at 418).

A. There Is No Basis for Concern About "Vertical" Competition

The Transaction is undeniably an end-to-end merger, a form of a vertical merger that "by its very nature, is not likely to generate the kinds of competitive problems that often arise in connection with a 'parallel' consolidation."[44] Apart from one self-motivated commenter – CN – no party has even suggested that the Transaction would reduce head-to-head competition among CP and KCS, and we demonstrate in Section VIII.A below that CN's contentions regarding the competitive role of KCS's Kansas City-Springfield Line are contradicted by the facts. The resounding support of hundreds of shippers extolling the procompetitive virtues of the Transaction and urging its approval speak loudly, and arrayed against them are precisely none that assert any true loss of competitive rail options – zero. Even CN's own communications with its shippers currying support for its divestiture proposal have readily acknowledged that {{ }}[45]

Given the Board's decades of consistent precedents – and the Class 1s own decades of (nearly) consistent advocacy – regarding the procompetitive virtues of end-to-end mergers and the lack of any basis for thinking that competition is likely to be harmed rather than intensified, our Class 1 opponents have painted themselves into a bit of a corner, especially given that they all acknowledge that this Transaction is fundamentally a pure end-to-end transaction.[46] The Class 1 opponents must answer a number of questions: What has changed to warrant a departure from the Board's consistent precedents? What has changed to motivate an about face by the

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[44] *Kansas City Southern – Control – The Kansas City Southern Railway Company et al.*, Finance Docket No. 34342 ("*KCS/Tex Mex*") (Decision No. 12 served Nov. 29, 2004) ("KCS/Tex Mex Decision") at 17.

[45] CN0000185-HC, {{ }} (Vol. 3, Exh. 6).

[46] *See, e.g.*, BNSF-9, Verified Statement of David Reishus ("Reishus V.S.") at ¶ 10; UP-10, Rocker/Turner V.S. at 8.

Class 1 railroads in their attitude toward end-to-end consolidations? And, what if anything is different about this particular end-to-end Transaction to bring it outside the Board's consistent findings that transactions like this one – such as *CN/IC* – actually do intensify rather than harm competition in the transportation marketplace?

The answer to all of these questions, unfortunately for Applicants' opponents, is that *nothing has changed*, except that in this particular case – as in the *KCS/Tex Mex* proceeding of 17 years ago – UP and BNSF in particular feel threatened by the potential (indeed, likelihood) of new, more intense competition from CPKC single-line routes and want protection. As the Board's precedents establish, however, they are not entitled to protection.[47] Only harm to *competition – not harm to competitors – is entitled to* the Board's protection. Here, competition will be strengthened, not reduced.

The procompetitive nature of the CP/KCS Transaction is thoroughly addressed throughout the evidence in this case. That evidence encompassed the testimony of CP and KCS personnel regarding how they plan to bring new competitive options to rail customers, the analysis of Applicants' experts showing those new options likely will entice significant numbers of shippers to choose CPKC over other available alternatives, the testimony of hundreds of shippers who look forward to the day when CPKC operations become available, and the thorough economic testimony of Applicants' economic witness, Dr. W. Robert Majure, who has reviewed countless mergers in his prior role as a senior economist at the Department of Justice Antitrust Division, and concludes in this case that "a CP/KCS combination is a vertical

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[47] KCS/Tex Mex Decision at 17-18 ("harm to a competitor (UP, BNSF)" is not the same as "harm to competition"). Neither UP nor BNSF, nor any other railroad has raised any hint of concern about harm to their essential services, nor could they, particularly given the financial and network strengths of CPKC's much larger Class 1 rivals.

transaction of two complementary networks that would create opportunities for procompetitive benefits throughout the CP/KCS network and would not substantially lessen competition."[48]

In this Section, we demonstrate that the arguments regarding potential vertical competitive harm – and vaguer concerns of some about the potential loss of existing interline options in cases where CPKC will have a new single-line or longer potential haul – are not valid. In particular, the arguments of the Class 1 opponents are contradicted by:

- The Board's consistent conclusions, arrived at in case after case assessing the concrete factual contexts presented by the end-to-end aspects of specific railroad industry consolidations, that vertical foreclosure is unlikely to occur and that end-to-end merger create new opportunities for shippers, not less;
- The consistent and sworn testimony of Applicants' opponents on the exact same issues in their own proposed consolidations;
- The Board's considered conclusions in a prior case that is factually indistinguishable from this one: KCS's acquisition of Tex Mex and TFM in 2005, in which UP and BNSF advances exactly the same arguments they retread here regarding the likelihood of foreclosure at the Laredo gateway. Their predicted foreclosure did not come to pass then, and it will not come to pass in this case either; and
- The Board's consistent and successful reliance on conditions enforcing prior applicants' commitments to "keep gateways open on commercially reasonable terms" in lieu of more formalistic – and anticompetitive – mechanisms for regulating the interline rates of merging parties. Applicants here have made even

[48] Reply Verified Statement of W. Robert Majure ("Majure R.V.S.") at ¶ 11.

> more robust commitments in this regard, which far exceed what would truly be necessary (nothing) to ensure that they have incentives to maintain existing interline options that shippers may prefer in the future despite the advent if new, more efficient CPKC single-line routes.

UP and BNSF have very little to say about these issues that has not been said many times before, and thoroughly rejected by the Board. As Dr. Majure explains, the basic economics have not changed at all. The railroad industry facts have not changed at all. This end-to-end merger will be every bit as (and Applicants believe) procompetitive as the end-to-end mergers that came before – such as the *CN/IC* transaction, which nobody, ever, has suggested led to anything but new, procompetitive single-line route options to the benefit of shippers and the U.S transportation network.

What do UP and BNSF try to argue beyond a rehash of the arguments that the Board has previously rejected? Three things, principally. One: that the Board's prior analysis was entirely beholden to a discredited economic theory known as the "one lump" doctrine, and that (they claim) more modern economists view vertical mergers with suspicion. As Dr. Majure explains in detail, this is nonsense. The Board never based its conclusions about the procompetitive effects of end-to-end mergers in the rail industry on abstract economic theories, but on an assessment of the hard facts, and the facts here line up with those in prior cases and the vertical integration of CP and KCS will create more competition, not less. Dr. Majure also shows that the Class 1 economists really have nothing new to offer beyond the same old arguments, except dressed up to sound and look different, but the conclusion should be the same: the arguments about the potential for harm in a vertical merger do not stand up to the facts of this

Transaction. As the Board has done, and the ICC before it, the Board should once again find that these "vertical competition is bad" theories do not support a finding of likely competitive harm.

Two: UP appears to contend (with some allies) that this case is somehow different because CPKC's new single-line routes add nothing of value – viewed from Omaha, they appear longer and slower than UP's routes via Laredo – so the only way CPKC could hope to succeed would be via foreclosure of UP's "better routes." This is hubris speaking rather than fact. As we have already demonstrated in Section III, CPKC will offer shippers real value and success in attracting customers on the merits, with no need – and no incentive – to try to disable UP's routes.

Three: BNSF makes the aggressive claim (never previously presented to the Board or KCS) that for the past 17 years KCS has been foreclosing it brutally at Robstown/Laredo, and things will only get worse under CPKC. This is egregiously false, as a sober analysis of the underlying facts, confirmed by the deposition testimony of the BNSF witness making this claim, establishes.

As Applicants have previously made clear, and as Brooks explains in further detail, they will not shut down any existing interline option that shippers seek to preserve. Stated in the terminology of the Board's well-established precedents, they will not close any affected gateways (commercially or otherwise) and they will keep those gateways open on commercially reasonable terms.

Against this backdrop, there is only one threat to competition here, and that is the overreaching demand for protective conditions put forward by both UP and BNSF (and echoed in the comments of ACC/NITL/TFI). Any requirement that CPKC provide interline rate factors (or Rule 11 rates) that are a fixed, mileage-based percentage of the single-line rates that CPKC

will offer in competition with other Class 1 railroads (or any other mandated linkage to those rates) would be truly anticompetitive. As Dr. Majure and other witnesses explain, it would disclose to CPKC's competitors the rates it was charging in the marketplace in an effort to win traffic from them. Further, it would impose a direct tax on CPKC in the form of compulsory reductions on CPKC's interline revenue divisions that would subsidize UP and BNSF. This would not help shippers, but simply transfer money from CPKC to its larger rivals. The exact same condition request was rejected in *KCS/Tex Mex* and it should be rejected here.[49]

At bottom, there is no vertical competitive concern in this case, and even if there were the tried and true solution would be enforcement of Applicants' commitment to keep gateways open, not a new regulatory mechanism that would interfere with precisely the new competition that this Transaction promises to bring shippers and the U.S. economy.

1. The Board Has Extensive Experience with End-To-End Mergers and the Net Benefits They Have Brought

Board precedent – developed over decades under the pre-2001 merger rules and applied in numerous non-major end-to-end transactions since then – teaches two things: vertical competitive issues are not a significant concern in these cases, and the appropriate way for the Board to assure the public of that is to hold applicants to their commitments that they will not close gateways, commercially or operationally. The Board's unbroken line of precedents, up to and including its most recent decision earlier this year in a merger case, establishes that the end-to-end character of the Transaction that certain commenters now assail is precisely what will make CPKC a more formidable competitor and what will lead to improved transportation options for shippers.

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[49] KCS/Tex Mex Decision at 24.

The Board recognized this fact in every one of the pre-2000 major merger decisions that built the systems of the five largest Class 1s. Appendix A recounts, chronologically and case-by-case, the extraordinarily consistent record developed by the Board's evaluation of the end-to-end aspects of those past mergers, starting with *BN/Frisco* in 1982. To be sure many of those transactions – like *UP/SP* – also had extensive horizontal overlaps (unlike here) that required trackage rights and other remedies, but the end-to-end aspects were uniformly regarded as procompetitive.

This precedent was founded on a recognition that, unlike in the pre-Staggers era, the public interest was best served not by protecting individual railroad rivals from change, but by allowing railroads to come together to offer new, better single-line services in the marketplace. In 1982, the Board's predecessor, the Interstate Commerce Commission ("ICC"), went so far as to eliminate the "protective conditions" that had been routinely imposed on past mergers, and that insulated competing railroads from having to compete harder against new single-line transportation options made possible by mergers. The ICC explained, relying on its conclusion on the record of the end-to-end *BN/Frisco* of earlier that same year:

> "[R]ailroads *do not have a proprietary right in the future to the traffic they have carried in the past*. Therefore, we need not protect railroads from the possible loss of traffic through diversion to a merged railroad. On the contrary, *protecting competing railroads tends to limit a shipper's ability to obtain the best service from the merged company and dampens the incentives for competitive response to the merged company from existing railroads*."[50]

As the precedents set forth in Appendix A demonstrate time and again, this core finding has stood the test of time in major merger after major merger up to and including *CN/IC*.

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[50] *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings* ("Traffic Protective Conditions"), 366 I.C.C. 112, 117-18 (1982) (quoting BN/Frisco) (emphasis added) (alterations in original). This rationale behind the decision to rescind the so-called DT&I conditions was described as "well reasoned and persuasive" by the court of appeals. *Detroit, Toledo & Ironton R. Co.* v. *United States*, 725 F.2d 47, 51 (6th Cir. 1984).

In the non-major mergers since 2001, the Board has reached exactly the same conclusion after having reevaluated deeply in the Major Merger Rules proceeding the record of prior mergers and their potential competitive effects. For example:

- ***CN/Wisconsin Central (2001)***: The "end-to-end configuration of the CN/WC control transaction will benefit shippers by enabling CN to secure, and to increase to the maximum extent possible the efficiency of, its Superior-Chicago NAFTA route connecting Western Canada and the Central United States" and allow CN/WC to "offer expanded single-line service and other large network advantages."[51]
- ***CP/Dakota, Minnesota & Eastern Railroad ("DM&E") (2008)***: "The evidence demonstrates that this essentially end-to-end transaction will benefit shippers by enabling CPRC/DM&E/IC&E to provide single-system service where none currently exists."[52]
- ***CSX/Pan Am (2022)***: The Board "has often recognized more efficient single-line service as a benefit of mergers."[53]

Even though the Board decided these cases against the backdrop of its having adopted the 2001 Major Merger Rules, the Board consistently rejected calls for conditions based on alleged vertical competitive effects. Instead, in every case – and indeed based on calls to carry out the spirit of the 2001 rules, the Board merely required compliance with the applicants' own

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[51] *Canadian National Ry., et al. – Control – Wisconsin Cent. Transportation Corp. et al.* ("*CN/WC*"), 5 S.T.B. 890 (2001).

[52] *Canadian Pacific Ry., et al. – Control – Dakota, Minnesota & Eastern R.R., et al.* ("*CP/DM&E*") Finance Docket No. 35081 (decision served Sept. 30, 2008).

[53] *CSX Corp. & CSX Transportation, Inc., et al. – Control & Merger – Pan Am Systems, Inc. et al.* ("*CSX/Pan Am*"), Finance Docket No. 36472 (Decision No. 9 served Apr.14, 2022) at 22.

commitments to keep gateways open and not create new regulatory bottlenecks – exactly the commitments Applicants have made here.

The ICC and the Board were not voices in the wilderness in assessing the competitive effects of end-to-end railroad mergers. Each of the Class 1 railroads that now seek protection in this case, in each of the mergers that build their current networks, told the Board that – as a matter of economics, fact, and law – there was no basis for competitive concern about end-to-end railroad combinations. They did so without exception when their own transactions were under Board (or ICC) review – in *CN/IC, CSX/NS/Conrail, UP/SP*, *BN/Santa Fe, UP/CNW*, and many other merger cases that preceded those, as shown in Appendix A.

In the *BN/Santa Fe* proceeding, for example, Applicants argued vociferously – and correctly – that the "vertical" aspects of their mergers were precisely what made them procompetitive, not anticompetitive. Applicants' economist Joseph Kalt explained: "the bulk of the impacts of the BN/Santa Fe merger on the merged company's traffic movements are 'vertical.' That is, *one of the primary benefits of the merger is the ability to provide expansions of single-line service*."[54] Professor Kalt elaborated:

> "In the case at hand, the term 'vertical foreclosure' is particularly inapposite. Not only are the traffic diversions from other carriers and other modes … *not* the consequence of any exercise of market power; they arise from improvements in service offerings to customers. The BN/Santa Fe merger does not portend the vertical foreclosure of competition. If anything, the merger promises the introduction of a more effective single-line competitor where previously the BN and Santa Fe were at a competitive disadvantage."[55]

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54 *BN/Santa Fe*, Verified Statement of Joseph P. Kalt. (filed Oct. 1994) at 97 (Vol. 3, Exh. 6).

55 *Id.* at 99.

This statement captures the core thesis of the CP/KCS combination almost precisely. To paraphrase: *If anything, the merger promises the introduction of a more effective single-line competitor where previously CP and KCS were at a competitive disadvantage*.

When the record of those prior mergers was being reviewed in 2000 and 2001 in connection with the Board's revisions to its major merger rules, the same Class 1s doubled down to extoll the procompetitive benefits that their end-to-end mergers had brought to the marketplace. There was not a whisper of "foreclosure" concerns from all these past mergers, for the simple reasons that the end-to-end aspects of these transactions were plainly procompetitive. They enabled new, more efficient routing options, and they gave shippers new choices to select the routes they preferred: efficient ones stayed open and available, and inefficient ones fell into disuse in preference to new single-line options. Appendix B provides a detailed catalogue of the testimony before the Board that was offered by Applicants' Class 1 opponents. A small sampling is provided below:

- ***BNSF***: "Economic analysis indicates that end-to-end mergers are unlikely to cause competitive harm."[56]
- ***BNSF***: "Because this is predominantly an end-to-end combination, situations in which there might be a potential reduction in competition have been limited from the outset."[57]
- ***NS***: Proponents of imposing conditions mandating trackage rights for another carrier when a railroad that exclusively serves a shipper merges with another

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[56] *Major Rail Consolidation Procedures – Advance Notice of Proposed Rulemaking,* Ex Parte No. 582 (Sub-No. 1), Comments of the Burlington Northern and Santa Fe Railway Co. (filed Nov. 17, 2000) ("BNSF Comments in Major Rail Consolidation Procedures") (Vol. 3, Exh. 7).

[57] BNSF0001135 (Applicants' Brief in *BN/SF*) (Vol. 3, Exh. 8).

connecting carrier "simply seek to use the fact of an end-to-end consolidation transaction as a convenient opportunity to force two-carrier rail access to exclusively served shippers whose situations would not change at all as a result of the transaction."[58]

- ***UP***: "UP does not share the view of many shippers that end-to-end mergers generally have anticompetitive vertical effects."[59]

Even more important, the record developed over multiple decades contains far more than mere argument by the Class 1 opponents about the benefits of end-to-end mergers. It is filled with *evidence* of their actual procompetitive effects.

The Class 1s themselves repeatedly extolled those benefits: in the *Major Rail Consolidation Procedures*, BNSF, CN, and UP praised end-to-end mergers at length. For example, BNSF stated: "Unlike parallel mergers, end-to-end mergers do not involve significant network overlaps, so that few or no shippers face a potential reduction in the number of railroads that serve them. Moreover, end-to-end mergers are the equivalent to vertically integrating the various routes served by railroads, and the overall impact of integrating and rationalizing the ownership of the rail network is pro-competitive through reduced costs and improved overall service."[60] And the Board's own merger oversight proceedings, in which it took evidence and carefully assessed whether prior mergers had achieved their procompetitive goals, consistently led to the same conclusion: end-to-end mergers invigorated competition and did not harm it.

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[58] *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) NS's Comments (filed May 16, 2000) (Vol. 3, Exh. 9) at 33-34.

[59] *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) UP's Comments and Initial Proposals (filed May 16, 2000) (Vol. 3, Exh. 10) at 11.

[60] *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1), Comments of the Burlington Northern and Santa Fe Railway (filed Nov. 17, 2000) at 15.

For example, in *CN/IC*, the STB stated that the merger "has been implemented successfully and without significant complaints" and found no "competitive or other problems stemming from the *CN/IC* combination."[61] In *CSX/NS/Conrail*, the STB found that as a result of the transaction, "[b]alanced rail competition ha[d] been brought to many points throughout the Eastern United States.[62] And in *UP/SP*, the Board noted in terminating oversight that "the record demonstrates that the conditions we imposed on the UP/SP merger have maintained and fostered rail competition in the Western United States."[63]

Arrayed against this unbroken wall of precedent, there is exactly zero evidence (at least over the past multiple decades) that mergers have even led merging railroads to shut down efficient routing options that shippers had preferred pre-merger by implementing "foreclosure" strategies. To be sure, they won traffic away from less-efficient interline routes by persuading shippers to switch, but in the decades-long history of oversight of end-to-end mergers there has *never* once been a finding that a gateway was closed, much less in the face of commitments made to the Board to keep those gateways open.

CN/IC illustrates this point. The Board has imposed a condition requiring CN to keep the Chicago gateway open for certain shipments of North Dakota grain. During the oversight process, the Board determined that CN had no incentive to ignore North Dakota grain traffic by closing the gateway and concluded that CN had in fact kept the gateway open.[64]

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61 *CN/IC*, Finance Docket No. 33556 (Sub-No. 4) (Decision No. 4 served Dec. 27, 2001) at 2.

62 *CSX/NS/Conrail*, Finance Docket No. 33388 (Sub-No. 91) (Decision No. 17 served Oct. 20, 2004).

63 *UP/SP*, Finance Docket No. 32760 (Sub-No. 21) (Decision served Dec. 20, 2001).

64 *CN/IC*, 5 S.T.B. at 332-33.

All of this learning has consistently led the Board to reject demands for conditions that railroads and others have sought to impose to insulate themselves against vertical competitive hard.

2. Commenters Offer No New Economic or Other Learning that Calls into Question the Board's Consistent Precedents and Factual Conclusions

The Commenters seeking to revisit these precedents – principally UP and BNSF – offer no legitimate basis for doing so. They proceed from the false premise that modern economics has moved on from the outdated ideas of yore, and now recognizes the grievous concerns with vertical mergers. For example, BNSF claims that while vertical rail mergers previously were presumed to cause "no harm," the "[a]dvances in the economic understanding of the potential harms that can arise from vertical mergers have led to a far more skeptical view of the presumption of no harm."[65]

They are wrong on multiple counts:

- First, as Dr. Majure explains, the Board's precedents were never based on rigid adherence to an abstract economic theory, but by a case-by-case assessment of the hard facts presented by specific proposed transactions, informed by the Board's (or ICC's) experience with the actual effects of previous transactions.
- Second, under the guise of "updating" the Board on the state of economic learning, the UP and BNSF economists provide an entirely vacuous set of theories of their own: namely, they want the Board to buy into the idea that the features of end-to-end railroad mergers that make them procompetitive (as Professor Kalt

[65] BNSF-9, Reishus V.S. at ¶ 12; *see generally* UP-10 at § 3.

testified for BNSF in 1995) instead make them inherently suspect and presumptively bad. That view may serve these railroads' new-found parochial interests in this case, but it is both at odds with the historical record and unhelpful in supporting any serious examination of the actual likely consequences of this or any other transaction, as Dr. Majure explains.

- Third, UP and BNSF ignore that the supposedly "new" theories they espouse here are in fact exactly the same ones that they tried, and failed, to convince the Board to adopt in *KCS/Tex Mex*.

The Board's Precedents Were Not Built on Abstract Theory. Certain Class 1 railroads suggest that the world of vertical merger analysis has suddenly changed from when their mergers were approved from one where such mergers presented no possibility of harm to one where all such mergers should be presumed to have anticompetitive concerns in every end-to-end case. That is false. The Board has long maintained that vertical mergers are never "per se" legal. Rather, the Board analyzes the facts presented by each case.

Dr. Majure explained in detail in his Verified Statement why this particular Transaction "would create opportunities for procompetitive benefits throughout the CP/KCS network." Verified Statement of W. Robert Majure ("Majure V.S.") App. Vol. 2 at ¶ 10. Dr. Majure described why in a vertical merger, one of the merging parties must have the ability and incentive to preclude or control a rival's ability to compete in order to foreclose, and explained the factual underpinnings of the Board's application of the "one-lump theory" in prior proceedings. *Id.* at ¶ 14. Dr. Majure further explained why neither CP nor KCS will have any incentive or ability to foreclose rivals or otherwise lessen competition as a combined firm, using

as an example UP's and BNSF's unfounded claims of foreclosure at Laredo post-*KCS//Tex Mex*. *Id.* at ¶ 12, Section III.2.[66]

Instead of attacking the foundations of Dr. Majure's findings that *this* vertical merger is procompetitive, the Class 1 railroads' economists hang their collective hats on the idea that the Board's findings in earlier proceedings were premised *solely* on a set of presumptions derived from the "one lump" theory. They aggressively attack the theory – which they had previously long supported – on the premise that if they poke holes in the "one lump" theory, the Transaction becomes ipso facto anti-competitive.

The Class 1 railroads' economists are attacking a strawman. As Dr. Majure explains in his Reply Verified Statement, the Board's decisions in prior merger proceedings did not rigidly apply a *presumption* derived from abstract economic theory. Majure R.V.S. at ¶ 19. Instead, the Board drew from the economic insights informing the "one lump" theory to address – on the particular facts – whether the merging railroads would have the incentive or ability to seek to expand their "lump" by foreclosing efficient interline options. *Id.* at ¶ 23.

Neither the Board nor the courts have said that application of the "one lump" theory creates a "no possibility of harm" standard.[67] As the D.C. Circuit explained, the Board (and its predecessor, the ICC) "do[] not treat the one-lump theory as an absolute, precluding the possibility of adverse effects from vertical integration," but rather "regard[] the theory as strong

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[66] *See* Section IV.A.3.

[67] As Dr. Majure's Reply Verified Statement explains, the Board discussing the "one lump" theory in prior cases did not assume an absolute ability to extract rents in those cases absent the relevant merger. The Board was simply using the theory to describe the issues in vertical competition. In addition, commenters' critique that the one-lump theory cannot apply here because Applicants do not have perfect information was squarely rejected by the D.C. Circuit, who stated the argument that Santa Fe did not have perfect information precluded the application of this theory left it "baffled." *Western Resources, Inc.* v. *STB*, 109 F.3d 782, 790 (D.C. Cir. 1997).

enough to create a presumption of bottleneck maximization of monopoly profits, subject to rebuttal."[68] But as explained by Dr. Majure and other Applicant witnesses, the facts here demonstrate that the Transaction is procompetitive.

Class 1 railroads also seem to suggest that new developments in world of antitrust law and economics call into question the Board's end-to-end merger precedents, as discussed *infra*. But the potential harms from vertical mergers were well known by the ICC and the Board when it was deciding merger cases over the past four decades. Antitrust merger cases outside the railroad industry in the 1970s and 1980s made clear that "vertical" did not automatically equate with "legal." *See, e.g., Fruehauf v. FTC*, 603 F.2d 345 (2d Cir. 1979) (rejecting the FTC's vertical merger challenge under a foreclosure theory and finding a lack of proof of likely anticompetitive effects); *see also Alberta Gas Chemicals Ltd*. v. *E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987) (finding no antitrust injuries from a vertical merger). The fact that the Board and ICC gave serious consideration to vertical theories in its past cases – and rejected them – demonstrates that the Board's precedents have never simply waved away the possibility of competitive harm in such cases.[69]

The Alternative Theories Put Forward by UP and BNSF Economists Merely Presume that Vertical Mergers Are Bad. In their efforts to upend the Board's longstanding approach to end-to-end railroad mergers, the UP and BNSF economists propose an alternative framework that is built entirely on abstract economic theory suggesting that some vertical mergers in some situations can, in theory cause competitive harm. As Dr. Majure explains, however, this counter-presumption (reflected most explicitly in the testimony of UP witness Salop) ignores many

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68 *Id.*

69 *See* Appendix A.

efficiencies stemming from vertical mergers and consequently, would find an anticompetitive concern in *every vertical merger across all industries*—an absurd result inconsistent with fact, law, and common sense. Majure R.V.S. at ¶¶ 46, 47.

In the new World Order these Class 1s propose, their status quo market positions would be protected because all end-to-end mergers would be seen as competitively "dangerous" in the precise circumstances where they are most likely to be good for shippers by offering new single-line options that encourage shipper to make different transportation choices. As Dr. Majure explains, Professor Salop's misguided framework would find that "any instance where CP and KCS have identified an opportunity to win business with the enhanced single-line service their combination allows would instead be an opportunity that CPKC would win through anticompetitive effects." Majure R.V.S. at ¶ 21; *see generally* Majure R.V.S. § 2.1.2. These commenters fail to show why CPKC would have the incentive to win traffic by foreclosing competitors instead of through competition. *See* Majure R.V.S. ¶¶ 26, 28. By contrast, Applicants have shown that CPKC would be incentivized to win traffic through competition. *See generally* Majure V.S. § 3.[70] And that is exactly what CPKC intends to do.

Professor Salop, among others, essentially argues that evidence that a vertical transaction has had pro-competitive benefits should *never* be credited because that same evidence could also be consistent with an anticompetitive effect. Importantly, Professor Salop's own academic work addressing vertical mergers (which dates back many decades) was debated and rejected in the *BN/Santa Fe* proceeding. Applicants' economic witness Richard Schmalensee took on Professor Salop's thesis directly, concluding that: "All of the theories of anticompetitive foreclosure agree

[70] Dr. Majure addresses specific critiques of his analyses by Class 1s' economists in the Majure R.V.S.

that it is extremely difficult, if not impossible to distinguish efficient from inefficient vertical mergers or practices."[71] In other words, Professor Salop is able to see competitive harm in procompetitive transactions because that is the presumption he starts with. Majure R.V.S. at ¶ Section 2.2.3. Professor Salop admits as much when he examines shifts in UP's share of northbound traffic via all U.S./Mexico gateways before and after the *KCS/Tex Mex* transaction, and acknowledges that the trends he found were "equally 'consistent'" with foreclosure and no foreclosure.[72] UP is well aware of its lack of any economic evidence in support of its foreclosure theory when its repeat critique of Dr. Majure's analysis is that it "is at least as consistent with anticompetitive foreclosure as with any procompetitive explanation."[73]

UP and BNSF Presented the Very Same Theories to the Board in KCS/Tex Mex, and They Were Correctly Rejected. Not only is there nothing new or helpful about UP's and BNSF's economic theories, the very same theories, nay the *same arguments*, about foreclosure at the Laredo and Robstown gateway, were presented and rejected in the *KCS/Tex Mex* case in 2005. The Board's findings in *KCS/Tex Mex* in 2005, based on an extensive economic record put forward by UP and BNSF in support of their predictions of dire foreclosure consequences if the board did not act to protect them, is the strongest evidence available that their retreaded arguments do not hold water.

In *KCS/Tex Mex*, there was abundant focus on gateway foreclosure issues, with UP and BNSF making the same arguments they advance here. For example, UP expressed concerns that

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71 *BN/SF*, Verified Statement of Richard Schmalensee at 34 (Vol. 3, Exh. 11).

72 UP-10, Verified Statement of Steven C. Salop at ¶ 90. Dr. Majure also explains why Dr. Salop's analyses are flawed in the Majure R.V.S.

73 UP-10 at 5.

there would be an "anticompetitive rate increase in rates [*sic*] or reduction in service levels" for competing carriers travelling through the Laredo Gateway, and "higher prices" for certain shippers "through evasion of the Mexican regulatory provisions prohibiting price discrimination."[74] BNSF similarly raised concerns about the Laredo gateway, stating that KCS could divert traffic to the KCS system by raising rates at Laredo for any traffic going over TFM that did not originate from the KCS/Tex Mex system, or "discriminate against competing carriers."[75] And both UP and BNSF advocated for a pricing scheme similar to the I-5 Agreement between UP and BNSF, where as part of a commercial quid pro quo BNSF agreed to a matrix of rate factors UP could use in making quote to shippers for movement to/from certain BNSF-stations in the Pacific Northwest.

Table 1 compares the arguments UP and BNSF made then with the ones they make now to demonstrate that the Board has already heard and rejected the positions they advance in this proceeding.

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[74] *KCS/Tex Mex*, Union Pacific Railroad Company's Comments (UP-7) ("KCS/Tex Mex, UP-7"), Verified Statement of Jerry Hausman at ¶ 14 (filed Aug. 4, 2003) (Vol. 3, Exh. 12).

[75] *KCS/Tex Mex*, Comments of the Burlington Northern and Santa Fe Railway Company (BNSF-4) ("KCS/Tex Mex, BNSF-4"), Verified Statement of Peter J. Rickershauser at 9-12 (filed Aug. 4, 2003) (Vol. 3, Exh. 13).

TABLE 1
COMPARISON OF BNSF AND UP POSITIONS IN 2004 AND 2022

BNSF	
2004	**2022**
KCS could "discriminate against its competitors" by "rais[ing] rates at Robstown for any traffic going over Tex Mex unless it originates from the KCS system or is routed to give KCS its longest haul," (ii) "raise rates at Laredo for any traffic going over TFM that again does not originate from the KCS/Tex Mex system or does not give the system its longest haul," (iii) "discriminate against competing carriers on TFM by charging higher bridge fees or by reducing the crossing access that it would charge itself," (iv) "cause TFM and Tex Mex to discontinue providing value-added services" to "KCS's competitors." (KCS/Tex Mex, KCS/Tex Mex, BNSF-4 at 11)	"This combination of Mexican law elements allows KCS to engage in the following obvious strategy: it could first raise rates in Mexico on movements that could be handled in the United States by both BNSF and KCS, and then lower KCS's U.S. portion of the rate, allowing the higher Mexican KCSM rate to subsidize the U.S. transportation." (BNSF-9 at 29)
"KCS' diversion analysis confirms KCS' intent to divert traffic from BNSF, even if that diversion results in inefficient routings of rail traffic."[76] (KCS/Tex Mex, KCS/Tex Mex, BNSF-4 at 11)	"[T]he combined CP-KCS will be incentivized to divert its traffic through rate manipulations away from competitive routings on BNSF and other railroads."[77] (BNSF-9 at 2)

[76] KCS/Tex Mex, BNSF-4 at 11.

[77] BNSF-9 at 2.

UP	
2004	**2022**
"Armed with control of both Tex Mex and TFM, however, KCS will have the incentive and ability to manipulate competitive outcomes to favor routes in which its U.S. railroads (KCS and Tex Mex participate)." (KCS/Tex Mex, UP-7 at 45)	"CPKC would have a significant incentive to manipulate competitive outcomes for crossborder traffic to favor routes in which it participates in the United States." (UP-10 at 22)
"In this case, however, KCS control of Tex Mex and TFM poses serious threats to the competitive process by undermining the transportation options available to shippers at the Laredo Gateway." (KCS/Tex Mex, UP-7 at 47.)	"However, CP control of KCS poses a serious threat to the competitive process because it would likely undermine the transportation options available to shippers for traffic moving via the Laredo Gateway." (UP-10 at 43)
"An even more serious threat to competition is the prospect that KCS would use its control of TFM to increase TFM rate factors in order to disable competition from UP-TFM offerings" by causing "TFM to raise its rates in relation to KCS rates north of the border which Mexican non-discrimination rules would allow." (KCS/Tex Mex, UP-7 at 49)	"CPKC could maintain the veneer of charging non-discriminatory KCSM rates in Mexico, while structuring KCSM-UP and CPKC single-line rates it offers to foreclose competition from UP." (UP-10 at 28)
"Once Tex Mex is under KCS control, Tex Mex and TFM will have greater incentives to prefer Tex Mex-TFM traffic over UP-TFM traffic. Preferential treatment would reduce service levels for UP customers and inefficiently divert traffic to Tex Mex-TFM routes." (KCS/Tex Mex, UP-7 at 56)	"CPKC could also reduce competition by giving preferential treatment to its own traffic moving over the International Bridge at Laredo." (UP-10 at 31)

The theories espoused by UP and BNSF have not changed in 17 years, and the Board systematically rejected each and every one of them, as well as UP's and BNSF's requested conditions predicated on those theories. The Board found that "approval of the KCS/TM application will not foreclose any horizontal competition, and therefore a 'competition-preserving' condition is not needed for the Laredo gateway." Instead, the Board acknowledged, and required KCS to adhere to the five pledges concerning the Laredo gateway that KCS has

made voluntarily, including its pledge to keep the Laredo gateway open on "commercially reasonable terms."[78]

The Board's decision was a thorough endorsement, on well-developed facts specific to the Laredo gateway, of the Board's longstanding approach to end-to-end mergers. The Board again reiterated that potential harm to a competitor does not equate to harm to competition, which is the touchstone of the Board's public interest inquiry. UP's and BNSF's concerns all went to the former, not the later. As the Board explained, if "control of TFM would lead KCS to favor its own routings for those few points that are served both by KCS and UP (or KCS and BNSF), KCS might earn more revenue than in the past, and UP (or BNSF) might earn less, but that is not going to result in higher costs to shippers. This could well mean some harm to a competitor (UP, BNSF), but not harm to competition."[79]

3. KCS Has Not Used Its Control of Tex Mex and KCSM to Foreclose UP or BNSF Routings Through the Laredo Gateway, and Neither Will CPKC

As we have shown, whereas both UP and BNSF predicted severe foreclosure consequences in *KCS/Tex Mex*, including that KCS/KCSM's "share" of "traffic moving via Laredo will be 100 percent," [80] the Board disagreed and specifically rejected the need for conditions of the sort UP and BNSF propose here. Time and experience have proven the Board right, and UP and BNSF wrong.

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[78] KCS/Tex Mex Decision at 6. Separately, KCS has embodied these commitments in an agreement with NITL, which incorporated an arbitration remedy. Naatz R.V.S at 68. ¶ __.

[79] *Id.* at 18.

[80] *KCS/Tex Mex*, Union Pacific Railroad Company's Comments, UP-7A ("KCS/Tex Mex UP-7A") (filed Aug. 4, 2003) at 8 (Vol. 3, Exh.12).

Recognizing the significance of the Board's ruling in 2005 rejecting their prediction that KCS would engage in foreclosure if allowed to control Tex Mex and TFM, UP and BNSF each attempt to come up with some explanation for what is different this time around. To UP it is largely that "economics" have somehow changed, which we addressed fully above. Beyond that, UP merely tries to deflect attention away from the magnitude of the concerns it expressed in *KCS/Tex Mex*, since UP's predictions demonstrably did not come to pass. UP implies that, really, KCS by itself *never* had the network reach to support real foreclosure concerns, but CP will fundamentally change the game. That is revisionist history, but is also a telling endorsement of the degree to which the combination of CP and KCS will dramatically extend the market reach of shippers served by both railroads, stimulating new competitive options. In 2005, UP extensively detailed the parade of horribles that would occur with "unconditioned KCS control of Tex Mex and TFM," including that KCS "will be eager to seize every available opportunity to shift traffic from UP-TFM routes to KCS-Tex Mex-TFM (or BNSF-Tex Mex-TF) routes" and that "KCS control of TFM will also allow" them "to circumvent" non-discrimination requirements imposed by Mexican law, which would "shift traffic away" in "anticompetitive ways by forcing shippers to pay more and accept poorer service."[81]

For its part, BNSF takes an entirely different approach. It argues, for the first time in 17 years and long after the fact, that KCS has been foreclosing BNSF line since 2005. The fact that UP builds no case of foreclosure at Laredo ought to end any serious debate about whether KCS foreclosed BNSF – in no world would KCS have an incentive and ability to drive away BNSF-KCSM interline traffic *in order to advantage UP*, BNSF's arch Western competitor.

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[81] KCS/Tex Mex UP-7A at 45, 47

Similarly, the complete lack of any complaint by any BNSF shipper (or any other shipper) should be dispositive. Shippers had not one but two separate fora in which they could have brought any bring complaints about KCS shutting down their preferred interline options: (a) the formal Board oversight process, where the Board could have enforced KCS's commitment to keep gateways open; and (b) KCS's agreement with NITL (which is still in effect), which provided for arbitration of any dispute about KCS's allege closure of those gateways. As KCS witnesses explain, however, there were no such complaints. BNSF has failed to present a single document, verified statement, support letter, or other shred of evidence that a *shipper* – as opposed to BNSF – believes that KCS's rate division between Robstown and Laredo for BNSF/KCS routings to Laredo is "commercially unreasonable." This is not surprising, as no KCS employee or officer has ever received a complaint that KCS was violating its commitments to provide "commercially reasonable" rates for BNSF or UP movements through Laredo to/from Mexico. Naatz R.V.S. at ¶ 4.

BNSF contends the fact that no shipper has ever voiced a concern about KCS's rates is "little more than recognition that KCS has exercised its enhanced market power in such a way as to forestall any complaints."[82] That is nonsense and an insult to shippers. If anyone would know whether KCS was charging commercially unreasonable rates, it would be the shippers. They would see the level of KCS's Rule 11 rates, and they would also see their preferred routing option becoming operationally or commercially infeasible. That not one shipper complained that KCS took action to force them to switch to KS single-line routes speaks volumes. In fact, several shippers – including KCS's largest, Bartlett Grain – have come forward to explain why they switched to KCS single-line routes between the United States and Mexico: because those

[82] BNSF-9 at 44.

routes offered better, more efficient single-line service, not because they were "forced to" by foreclosure of their other options. Knief V.S. at ¶ 14.

Unable to offer any affirmative evidence that the commitments are ineffective, BNSF asks the Board to infer that KCS must not be honoring its commitments because KCS did not produce in discovery documents reflecting that KCS has policies, protocols, or a compliance program in place to train its employees to ensure that KCS abides by the pledges.[83] KCS has not needed such formal policies or compliance programs because no shippers have complained – either to KCS or to the Board. But this does not mean that KCS is not cognizant of its obligations. As Ottensmeyer testified in his deposition, KCS has an "affirmative obligation to provide commercially reasonable rates"[84] and that "there is a general awareness of KCS's open gateway commitments."[85] Moreover, as discussed below, KCS could not charge "commercially unreasonable" rates even if it wanted to, because KCS lacks the market power that would be necessary to foreclose BNSF and UP efficient routings to and from Laredo.

Consistent with the lack of any complaint by a shipper (or even BNSF) in 17 years, BNSF's assertions about foreclosure beginning in 2005 are flatly contradicted by the cold hard facts. Even the BNSF witness who lobbed these allegations acknowledges that the issue boiled down to BNSF's unwillingness to accept any less contribution from Tex Mex interchange traffic, which led BNSF to shift its traffic to other gateways and away from Tex Mex.

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83 BNSF-9 at 46-47.

84 Deposition of Patrick Ottensmeyer on Feb. 22, 2022 ("Ottensmeyer Dep. Tr.") 39:8-21 (Vol. 3, Exh. E). While originally marked "Confidential" under the Protective Order, Applicants hereby reclassify that information as "Public."

85 Ottensmeyer Dep. Tr. 40:14-41:7. While originally marked "Confidential" under the Protective Order, Applicants hereby reclassify that information as "Public."

BNSF's Specific Allegations About Tex Mex Rate Increases. As its sole "evidence" of "foreclosure," relies on the testimony of Paul Hirsch, the Assistant Vice President of BNSF's Mexico Business Unit. Hirsch testifies that BNSF and its shippers were "effectively foreclosed" from access to certain Mexican markets through the Laredo gateway after KCS's 2004 acquisition of Tex Mex.[86] According to Hirsch, "when [BNSF] compete[s] head-to-head with KCS for a movement through Laredo, [BNSF] invariably lose[s] that competition to KCS despite offering competitive rates and service."[87] On that basis, Hirsch concludes that BNSF has been "foreclosed from effectively competing for carload traffic through Laredo because of the control that a combined KCS/KCSM has over pricing and routing."[88]

Hirsh was not at BNSF when this alleged foreclosure took place. He did not join BNSF until 11 years later, in 2015.[89] How is that he concludes that BNSF was foreclosed? He connects two dots: First, KCS decided to increase Tex Mex's rate for movement of BNSF interline traffic between Corpus Christi/Robstown and the Mexican border at Laredo; and, second, BNSF volumes at Laredo declined. From this he concludes that BNSF cannot compete. That is all there is to it. He does not identify any specific customer rate quote, routing, or origin and destination pair establishing that it is the KCS division that was "too high" or "commercially unreasonable" to prohibit BNSF from competing. Nor can he recall a single bid scenario where

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86 BNSF-9, Verified Statement of Paul M. Hirsch ("Hirsch V.S.") at 2.

87 *Id.* at at 8.

88 *Id.*

89 Hirsch admits that he "was not in [his] current position" at the time of KCS/Tex Mex, but states that he has "spoken with BNSF employees and former employees" who claim that KCS rate increases "were responsible for BNSF's loss of traffic." At his deposition, Hirsch admitted that this testimony is based on conversations with mainly one individual (of which there are no notes) and two charts in his verified statement that he did not prepare. Deposition of Paul Hirsch on June 3, 2022 ("Hirsch Dep. Tr.") (Vol. 3, Exh. A) at 51:22-52:18, 54:20-22, 55:1-22. Much later in the deposition and after conferring with counsel, Hirsch named additional individuals. Hirsch also admitted that he lacked "direct personal knowledge of the effect of the KCS/Tex Mex merger on BNSF." *Id.* at 48:20-49:8.

a shipper claimed that KCS had quoted it a joint-line rate for a Robstown interchange that was "commercially unreasonable" or was so high as to foreclose a more efficient BNSF routing so that the customer was forced to use a less efficient KCS routing. Hirsch also contradicts himself: his claims that BNSF has "no visibility into the pricing practices of KCS and KCSM" and "have not been able to challenge KCS's conduct or avoid foreclosure," is directly at odds with his claim that "BNSF employees and former employees who were involved in marketing efforts at the time" were aware of this alleged foreclosure.[90] He has no explanation for why, if BNSF was well aware of the alleged forclosure, {{ }},[91] and neither BNSF nor any shipper lodged a complaint.

Instead, his deposition confirmed that his testimony is based entirely on the assumption that, if BNSF lost a piece of business to KCS on a route where KCS's rate had increased from pre-merger levels, BNSF must have been the victim of "foreclosure," not competition.[92] That, of course, is not true.

Unfortunately for BNSF, its story does not hold up under even the slightest examination of the facts.

- ***First, the Tex Mex's rate increase was not "foreclosure."***

When asked about the Tex Mex rate increases that allegedly foreclosed BNSF from competing at Laredo, Hirsch could not state what the rate increases were, what the rates increased to, how often the rates were increased, or when the rate increases occurred.[93] As

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90 BNSF-9, Hirsch V.S. at 7, 10.

91 Hirsch Dep. Tr.at 91:13-94:2, 95:5-9.

92 Hirsch Dep. Tr.at 63:11-22.

93 Hirsch Dep. Tr.at 62:11-63:13.

KCS's witnesses explain in detail, KCS did increase Tex Mex's division requirements after the *KCS/Tex Mex* transaction. The reason was not to drive traffic away from BNSF interline routes, but to cover Tex Mex's costs. As Naatz explains, Tex Mex's rate prior to the merger was significantly below market, had not been raised in years, and was below URCS costs. Naatz R.V.S. at ¶¶ 12, 21.[94] Before *KCS/Tex Mex*, Tex Mex was charging $260 per car or less for grain, intermodal, and automotive traffic interlined with BNSF, or well below most switching charges to move BNSF's cars more than 150 miles. *Id*. After it obtained control, KCS increased Tex Mex's rate by about $265, to $525. *Id.* at ¶ 20. But even at this increased level, the Tex Mex rate barely covered variable costs, and was nowhere near the 180% threshold required to bring a rate complaint. Naatz R.V.S. at Table 2. Today, KCS's rate factors for BNSF interline moves Robstown and Laredo still barely cover variable costs. *Id.* at ¶ 19, Table 1.

It is no wonder that when KCS raised Tex Mex's rates to a compensatory level, and BNSF refused to lower its own division, BNSF shifted some of its traffic to the Eagle Pass and El Paso gateways. But one thing is clear: the shift of BNSF traffic was not the result of KCS using its control of Tex Mex to foreclose BNSF from using the Laredo gateway. KCS would have no incentive to discourage BNSF from using the Tex Mex route as using any other gateway further west eliminates KCSM from receiving traffic on the south side of the border.

Nothing about this rate increase forced BNSF or any shipper away from the Laredo gateway. BNSF could easily have absorbed the increase out of its own rate factors, which {{{ }}} *Compare* Baranowski R.V.S. at Table 6 *with* Naatz R.V.S. at Table 1. In fact, if anyone

[94] As Dr. Majure explains, a common benefit of mergers is that new management can lead to re-evaluations, such as benchmarking against the market. Majure R.V.S. at ¶ 103.

has the right to complain about increased prices, it is KCS. Beginning in 2005, BNSF has raised its grain rates by thousands of dollars per carload. Naatz R.V.S. at ¶ 22. Today, the BNSF single-line rates for grain to Eagle Pass are lower than the BNSF/Tex Mex rate to Laredo – thus favoring a BNSF single-line route to Eagle Pass. *Id.* at ¶ 23. KCS has requested BNSF to take a lower division to make a BNSF/Tex Mex route competitive to increase both BNSF's and Tex Mex's share of grain and other carload traffic to Laredo, but BNSF has refused to do so – favoring its single-line route to Eagle Pass. Naatz R.V.S. at ¶ 24. BNSF is in no position to criticize KCS for refusing to lower Tex Mex's division on routes where KCS has a competing single-line option, when BNSF is doing the same thing – favoring its single-line options by refusing to lower its division for movements through Laredo.

- ***Second, BNSF's volume shifts away from Laredo had nothing to do with "foreclosure."***

Hirsch points to two figures in his Verified Statement purporting to show that BNSF traffic over the Laredo gateway decreased from 2005 forward as evidence of foreclosure.[95] However, at his deposition, Hirsch admitted that he did not know the {{[redacted]}}, the year of the merger, or what the actual cause was.[96] He also did not know who prepared these two charts and did not review the data underlying these charts.[97]

In fact, the supposed trends Hirsch points to eviscerate BNSF's claims of foreclosure. As Dr. Majure demonstrates through detailed analysis of traffic data, and as we show below through

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95 BNSF-9, Hirsch V.S. at 6, 11.

96 Hirsch Dep. Tr.at 43:18-44:10.

97 Hirsch Dep. Tr.at 55:19-21.

a detailed review of BNSF's own internal documents, numerous marketplace developments were driving the trends that Hirsch points to as evidence of supposed foreclosure, not least of which was {{[redacted]}}

Pricing by KCSM Subsequent to the Tex Mex/KCSM Transaction. UP's theory of foreclosure, unlike BNSF's, is entirely dependent on the level of rates that KCSM charges south of the border on UP-KCSM interline moves. Despite asserting that CPKC will have an incentive to jack up KCSM rates so as to render UP interline moves less "competitive" (but in reality to force UP to reduce its divisions and thus its profit margins), UP undertakes no examination of what happened to KCSM rates after KCS took control of TFM.

Had it done so, it would have learned that their TFM rates went {[redacted]} than UP's own rates during the period after the *KCS/Tex Mex* transaction, a pattern that is fatal to UP's foreclosure thesis. Figure 1 below focused on rates for grain (which BNSF cites as the commodity flow most affected by KCS's supposed foreclosure). It shows that KCSM's rates for grain (measured as revenue per unit ("RPU")) increased at a {[redacted]} percent compounded annual growth rate since 2005. Over the same period, UP's public reports show that its growth rate for all traffic has been {[redacted]} percent while BNSF's has been {[redacted]} percent. KCSM prices to the market, not to foreclose. Naatz R.V.S. at ¶ 26.

FIGURE 1
KCS GRAIN REVENUE PER UNIT INCREASES ARE ON PAR WITH OTHER RAILROADS

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The same pattern emerges when examining overall RPU trends for all commodities. Figure2, below shows that post-2005 after taking control of KCSM and Tex Mex, KCS did not unreasonably raise rates or adopt commercially unreasonable divisions. Naatz R.V.S. at ¶ 27. In fact, KCSM rates {[redacted]} than rail rates charged by UP, BNSF, or other railroads in the United States.

FIGURE 2
KCSM RATES DID NOT INCREASE FASTER THAN OTHER RAIL RATES AFTER KCS ACQUIRED CONTROL[98]

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[98] KCS Consolidated and KCSM information before 2005 are based upon Pro-forma financial statements as KCSM and Tex Mex were not yet consolidated with KCSR.



There Are Many Reasons Unrelated to "Foreclosure" That Explain Declines in BNSF Traffic via Laredo. Although BNSF would have the Board assume the only possible explanation for why BNSF's traffic at Laredo declined after 2004 is that KCS foreclosed BNSF from the Laredo gateway, the truth is that there are many causes for that decline, none of which include foreclosure by KCS. Hirsch admitted at his deposition that {{ }}[99] We discuss just a few of those reasons here.

- ***First, Good Old-Fashioned Competition Affected Traffic Patterns at Laredo/Robstown.***

As Dr. Majure explains, it would not be surprising if BNSF's traffic volumes via Laredo would fluctuate as a result of competition with the two other railroads serving that gateway: UP

[99] Hirsch Dep. Tr.at 87:13-91:1.

and KCS. In this instance, of course, KCS was improving its services by offering single-line transportation across the gateway for the first time. Majure R.V.S. at ¶ 88. There is no question that single-line service is typically both less expensive and more efficient than an interline route. Any carrier, including BNSF and UP, can usually offer a lower rate on single-line service versus an interchange to another carrier. So it is to be expected that where KCS and BNSF both serve a U.S. destination or origin, there is a strong probability that the KCS system is going to be able to provide an efficient single-line rate that is better than the joint-line rate with BNSF. As Naatz explains:

> "KCS can provide a single-line service that shippers choose because it is both less expensive and a more efficient route. Any carrier, including BNSF, can usually offer a lower rate on single-line service versus an interchange to another carrier. So, yes, where KCS and BNSF both serve the U.S. destination or origin, the KCS/KCSM system is of course going to be able to provide an efficient single-line rate that is better than the joint-line rate with BNSF."

Naatz R.V.S. at ¶ 9. BNSF also faces strong competition from UP. {{ }}[100] In its comments in the *KCS/Tex Mex* proceeding, BNSF conceded that it had a "relatively small percentage of the traffic moving through Laredo" and that UP "carried 84% of the traffic at Laredo in 2001" because "UP enjoys a more direct route to Laredo."[101]

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[100] BNSF0000932 at -38 (Vol. 3, Exh. 14) ({{ }}). *See also* BNSF0003021 at -025 (Vol. 3, Exh. 15) {{ }}; BNSF0003279 at -087 (Vol. 3, Exh. 16) { }; BNSF0003606 at -616 (Vol. 3, Exh. 17) {{ }}

[101] *KCS/Tex Mex,* BNSF-9 at 3, 9.

The record in this proceeding illustrates these competitive forces in action. Bob Knief, President of Bartlett Grain, Co. LP, explains in his Verified Statement in support of the Transaction that in 2005, Bartlett Grain could choose to ship via UP, BNSF, or KCS, and ended up choosing to ship to Mexico via KCS single-line routes "because they best met our transportation needs by serving our end-markets best." Knief V.S. at ¶14. But Knief made clear that they were never "forced to choose [that] option." Knief V.S. at ¶14. As another example, a shipper decided in the 2009 time frame to transition all of its Mexican business from BNSF to UP. Naatz R.V.S. at ¶ 36. In another case, KCS simply won a contract (bidding against UP and BNSF). Naatz R.V.S. at ¶ 44. These losses of traffic, and similar losses of traffic, are due to *competition*, not foreclosure.

- ***Second, BNSF Chose to Shift Traffic to Eagle Pass and El Paso.***

Second, despite BNSF's claims of foreclosure by KCS, its witnesses and internal documents tell a different story. BNSF chose to deemphasize Laredo and shift traffic to Eagle Pass and El Paso. Hirsch explained that BNSF chose not to compete to keep traffic at Laredo because its profit margins would not be at BNSF's self-imposed {{[redacted]}}[102] As Hirsch conceded, the profitability of using a particular gateway impacts the decision to use a gateway, and BNSF would choose the most profitable gateway, assuming all other considerations were held equal.[103] Notably, the rate BNSF earns on Mexican traffic it does serve via Laredo is {{{[redacted]}}} for carload traffic, recovering on average {{{[redacted]}}} BNSF's URCS-based variable costs. Baranowski

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102 Hirsch Dep. Tr. at 149:11-150:11.

103 *Id.* at 162:19-164.

R.V.S. at Table 6. BNSF therefore has the ability to reduce rates if they truly wanted to compete and has chosen to direct traffic to other gateways, which are presumably more profitable.

KCS witness Naatz agrees with this view, testifying that BNSF is the party keeping its rates high, not KCS, and has steadfastly refused to lower its division requirements so as to make a joint BNSF/Tex Mex interline movement competitive with a UP or a BNSF single-line movement. Naatz R.V.S. at ¶ 6. BNSF has even offered a lower single-line rate than what the joint BNSF/Tex Mex rate would be to encourage shippers to use the Eagle Pass and El Paso gateways. *Id.* at ¶ 8. In short, BNSF was not foreclosed; it took a pass on competing for the business through the Laredo gateway.

Indeed, a review of the BNSF documents produced in discovery shows {{[redacted]}} That strategy continues to this day. Internal BNSF documents reveal that, {{[redacted]}}[104] BNSF {{[redacted]}}[105] and {{[redacted]}}[106] By {{[redacted]

[104] BNSF0003550 at -55 ({{[redacted]}}) (Vol. 3, Exh. 18).

[105] BNSF0003355 at -56 ({{[redacted]}}) (Vol. 3, Exh. 19); BNSF0003606 ({{[redacted]}}) (Vol. 3, Exh.16).

[106] BNSF0003331 at -33 ({{[redacted]}} (Vol. 3, Exh.20)); *see also*, BNSF0000932 at -38, the {[redacted]}} (Vol. 3, Exh.14); BNSF0003606 at -19

[redacted]}}[107] while {{[redacted]}}[108] {{[redacted]}}[109] {{[redacted]}}[110] Given all of these efforts, corporate goals, and investments, it is no wonder that today the substantial majority of BNSF traffic is now interchanged with FXE, not KCSM. And this strategy has proven to be quite profitable for BNSF. In fact, Hirsch admits that BNSF during the very years that KCS was allegedly foreclosing BNSF from using the Laredo gateway, {{[redacted]}}[111]

- ***Third, Other Market Developments Affected BNSF Gateway Volumes***

Third, there have been significant changes in the marketplace that have affected the traffic available for BNSF to move via Laredo, and BNSF incentives to pursue that traffic.

{[redacted]}} (Vol. 3, Exh.18).

107 BNSF0002814 at -26 ({{[redacted]}}) (Vol. 3, Exh. 21).

108 *Id.* at -28.

109 BNSF0002839 at -50 ({{[redacted]}} (Vol. 3, Exh.23)). In that year, {{[redacted]}} of BNSF's interchanges were with FXE. BNSF0003304 at -06 ({{[redacted]}} (Vol. 3, Exh. 23).

110 BNSF0002804 at -14 (Vol. 3, Exh. 24). *See also* BNSF0002839 at -52 (2010 KCSM volumes) (Vol. 3, Exh. 22); *Id.* at -53 (2010 FXE volumes); BNSF0002798 at -809 (2012 KCSM volumes) (Vol. 3, Exh. 25); *Id.* at -810 (2010 FXE volumes); BNSF0002910 at -23 (2014 KCSM volumes) (Vol. 3, Exh. 26); *Id.* at -24 (2014 FXE volumes).

111 Hirsch Dep. Tr. 152: 2-10, 153: 1-13.

Applicants and BNSF agree that the Mexican marketplace has changed dramatically since the *KCS/Tex Mex* transaction.[112] There has been significant investment into the Mexican markets by grain companies, automotive and intermodal companies, and energy companies. The Eagle Pass gateway has responded to that growth by investing in additional infrastructure and customs and brokerage houses that previously did not exist. All of these changes have resulted in market shifts in cars, equipment, routes, gateways, and shipper choices.

During that time, UP and BNSF have developed long-term relationships (many exclusive) with numerous automotive, intermodal marketing companies, trucking companies, third-party logistic providers, and large customers. Naatz R.V.S. at ¶ 61. These exclusive relationships mean that KCS cannot today, and CPKC will not be able to in the future, simply raise KCS's division in an attempt to force these shippers to choose CPKC options. Undertaking such a strategy would risk losing traffic to other UP and BNSF routes and/or to trucking and maritime transport options.

BNSF-KCSM Intermodal and Automotive Traffic. An examination of the intermodal and automotive traffic since *KCS/Tex Mex* further shows that KCS and BNSF have worked together to provide joint-line intermodal and automotive service to Mexico from BNSF origins, *see* Naatz R.V.S. at ¶ 40, a partnership BNSF itself admits has drawn support from KCS and has been fruitful for both parties.[113] CPKC has the same incentive to continue this partnership.

Grain Traffic. BNSF blames its loss of market share of grain traffic through the Laredo gateway on KCS's division requirement for the Tex Mex portion of a joint-line BNSF/Tex Mex movement through Laredo. According to BNSF, KCS's division prevents BNSF from

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112 *See, e.g.,* BNSF-9 at 19-20; Naatz R.V.S. at ¶ 45.

113 BNSF-9 at 21, 35-36.

competing with KCS's single-line option through Laredo.[114] The data tell the real story: the decline in market share of the joint BNSF-Tex Mex-KCSM routing through Laredo is the direct result of BNSF favoring its single-line route through Eagle Pass or El Paso, not foreclosure by KCS.

This result is exactly what neutral observers predicted would happen one day. As explained by the Railroad Commission of Texas, and as adopted by the Board in its review of the *UP/SP* merger in 1996, BNSF has always had little incentive to route its grain traffic to Mexico using joint-line service with TexMex via Laredo:

> "Were it not for the fact that Laredo currently enjoys a competitive advantage over the other gateways to Mexico because there is a larger infrastructure of customs brokers located at Laredo than at the other gateways, there would be little or no incentive for BN/SF to route traffic via TexMex. Certainly, there is no reason to assume that BN/SF would deliberately route unit trains of grain in joint-line service with TexMex via Laredo when it will have a comparatively direct shot in single-line service at Eagle Pass. Given the admitted concentration of BN/SF's traffic from the grain belt and the Pacific Northwest and the industrial Midwest, it is only logical to assume that BN/SF would favor the less circuitous, single-line routing via Eagle Pass."[115]

Of course in the 26 years since those findings, the customs infrastructure at Eagle Pass has been upgraded such that it is now comparable to Laredo, removing the only impediment to BNSF taking advantage of its own single-line routing via Eagle Pass. [116]

Today, it is BNSF, not KCS, that has the option of using multiple gateways to Mexico. BNSF can choose to direct traffic through Laredo, Eagle Pass, or El Paso, and BNSF leverages that flexibility during contract negotiations with KCS concerning intermodal traffic. For example, KCS understands BNSF has a long-term exclusive contract with {[redacted]} that

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114 BNSF-9, Hirsch V.S. at 7-8.

115 *UP/SP*, 1 S.T.B. at 423.

116 UP-10-17.

requires{ } to use BNSF service when shipping to a location on BNSF's network. Naatz R.V.S. at ¶ 29. When KCS and BNSF were in the process of re-negotiating an intermodal agreement that had expired on December 31, 2021, BNSF used the threat of switching its routings with all customers, including { }, to the Eagle Pass gateway as leverage to get KCS to agree to its demands. Naatz R.V.S. at ¶¶ 30-31. This example shows that BNSF possess the market power to foreclose KCS routings, not the other way around.[117]

As another example, BNSF recently requested through rates from KCS on the Mexico–St. Paul, MN route. After negotiations over the rates and divisions, KCS and BNSF were able to reach an agreement covering multiple customers' traffic to include this route, interchanging at Robstown. Naatz R.V.S. at ¶ 33. If KCS had requested too high of a division (or was in fact foreclosing BNSF from using the Robstown/Corpus interchange), BNSF would not have partnered with KCS and instead, would have used its own long-haul route to Kansas City and/or moved traffic through the Eagle Pass or El Paso gateways. The Naatz R.V.S. contains several other examples of how and why KCS partners with BNSF to provide a joint BNSF-KCSR-KCSM routing through Laredo for intermodal and automotive traffic, including movements with { }.

BNSF also attempts to blame its loss of market share of Mexican cross-border intermodal traffic after *KCS/Tex Mex* on KCS, when in fact its loss of business was due to market forces, such as changes in the types of equipment preferred by customers and aggressive competition by UP. Naatz R.V.S. at ¶ 34. As an example, { }, a U.S.-based intermodal shipper with

[117] Due to the potential of KCS losing all of this traffic and KCSM losing a substantial amount as well (some of this traffic would have to eventually be switched to a KCSM destination, but KCSM would have lost the long haul), KCS and BNSF, at the urging of the customer, agreed to a one-year extension of the existing agreement with no changes. This preserved the BNSF/KCSR/KCSM routing through Laredo, at least for the near term. Naatz R.V.S. at ¶ 32.

offices in Mexico, had a long-term contract with BNSF before *KCS/Tex Mex*, and routed traffic via the BNSF/Tex Mex interchange through Laredo. This service was part of and dependent upon the North American Container System ("NACS") box system, in which all Class 1s but UP participated. UP and NS started a competing box system, the Equipment Management Pool ("EMP"), in which {[redacted]} also participated. *Id.* at ¶ 35. After *KCS/Tex Mex*, BNSF began to partner directly with asset owners such as {[redacted]} for boxes, instead of participating in pool arrangements, such as NACS and EMP. *Id.* at ¶ 36. Around 2009, {[redacted]} decided to transition all of its western carrier business, including its Mexico business, to UP because it preferred the equipment available through the EMP pool arrangement over the equipment BNSF sourced directly from asset owners. *Id.* The decision had nothing to do with KCS or KCSM pricing.

Taken together, these examples show KCS has partnered with BNSF to develop Laredo interchange traffic, and CPKC will be incentivized to do the same. In fact, it is within KCS's self-interest to work with BNSF to provide a joint routings that would compete with UP, and these efforts thus far have been highly successful touting joint-line traffic gains, as shown in Figure 3 below.

FIGURE 3[118]

RAPID INCREASE IN BNSF-KCS CROSS-BORDER INTERMODAL TRAFFIC

[118] Naatz R.V.S. at ¶ 40.



KCS's network already connects Laredo with Dallas, yet KCS has partnered closely with BNSF via Laredo/Robstown because it has an interest in participating in the revenue from interline options that best meet shipper needs. For this traffic in particular, KCS would rather have a share of the revenue than none at all were BNSF (and its customers) to send the intermodal trains via another route that cut KCSM out entirely. Internal BNSF documents in fact show that that {{

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These marketplace dynamics will not disappear with the Transaction. CPKC will have no incentive to "foreclose" BNSF routings, especially given the success of the KCS/BNSF interline route. BNSF will continue to hold leverage over CPKC with the threat of shifting

[119] BNSF0000166 ({

}}) (Vol. 3, Exh. 27); *see also* Majure R.V.S. at fn.131.

routings to Eagle Pass via a BNSF/FXE route, and thus if CPKC charges a high division, it will risk losing BNSF as a partner, thus reducing CPKC's overall revenues. Accordingly, it remains in CPKC's self-interest to work with BNSF to continue to provide shippers with options, especially to and from origins and destinations that are served only by UP and BNSF. The only change will be a new single-line option for shippers, especially Chicago and Detroit/Eastern Canada shippers, to move traffic to and from Mexico via Laredo, which will *enhance* competition, not lessen it.

Energy. An examination of the petroleum and energy products markets in the Gulf region likewise shows that KCS is winning the traffic due to its customer relationships, its service, its efficient routings, and its single-line rates – not foreclosure.

For example, the Jefferson Energy Terminal is served by UP, BNSF, and KCS. ExxonMobil received bids from all three of those railroads for its movements from the Jefferson Energy Terminal to Mexico. KCS won the bid and continues to handle the entire movement today. Naatz R.V.S. at ¶ 44. ExxonMobil has made no allegations that KCS was using undue market power to price the KCSR portion of a BNSF routing at a commercially unreasonable rate or that KCS was using its control of KCSM to force a KCS routing over a UP move. Nor could it, given that KCSM has to give the same rate for the Mexico portion of the move to UP, BNSF, and KCS. Indeed, under its contract with KCS, ExxonMobil has the option to use the UP single-line rate to Laredo and at Laredo, KCSM must charge the same rate as it charges KCSR. KCSM does receive both UP and KCSR ExxonMobil traffic at Laredo. The simple fact is that ExxonMobil awarded the business to KCS given the single-line nature of KCS's move, KCS's

service focus, and KCS's willingness to undertake a long-term partnership with ExxonMobil. *Id.* at ¶ 46.[120]

Other Gulf Coast energy customers make the same choices. Where it is more efficient to move traffic over a single-line rail network, customers will do so. If the customer prefers a joint-line move, or a joint-line move is more efficient, that is the choice the customer will make. For example, the Entergy coal-fired electric plant in Lake Charles, Mississippi, is served by UP, KCS, and BNSF. Both UP and BNSF serve the coal origins and the destination and can provide single-line service. KCS can only serve the destination, and must interchange with either UP or BNSF to complete the route. In the past, KCS was able to provide routings, service, and division requirements that allowed for competitive joint-line service via UP/KCS or BNSF/KCS. However, in the two most recent rounds of bidding, the customer selected a single-line service over a joint-line move, even though KCS offered the same division to both UP and BNSF for a Kansas City interchange. Naatz R.V.S. at ¶ 47. KCS is certainly not contending, as BNSF seems to do here, that because it lost the traffic, BNSF or UP have exercised undue market power to "foreclose" a KCS routing option. Rather, KCS understands that the customer chooses the routes and rates, and, generally, a single-line option can be more competitive than a joint-line option and that KCS can only price its division so low before it drops below its costs.

[120] To further underline the competitive nature of the marketplace, ExxonMobil recently solicited bids from UP, BNSF, and KCS for various lanes of traffic, including both FXE and KCSM routings. ExxonMobil chose a UP/FXE routing over the BNSF/FXE routing for traffic to the west and chose KCS/KCSM for traffic to the Gulf and the Southeast. There was no allegation from ExxonMobil that KCS was manipulating the rates to disfavor a BNSF/KCSM routing. Naatz R.V.S. at ¶ fn.22.

4. The Same Forces that Ensured There Was Not Foreclosure Following *KCS/Tex Mex* and Other Cases Will Apply Here

The 17 years of post *KCS/Tex Mex* history tell a story of competition rather than foreclosure. All of the same marketplace realities that led KCS to continue to cooperate with UP and BNSF on interline services via Laredo will continue to apply with equal force to CPKC following this transaction:

- ***CPKC will continue to have strong incentives to provide shippers with the interline transportation options that best meet their needs.***

For many reasons, CPKC will have strong incentives to make sure that they maintain efficient interline routes over every gateway they serve, lest they lose traffic to other transportation options or simply drive remunerative rail traffic away. These incentives will apply no less strongly at Laredo and Robstown.[121]

First, the Transaction will not affect the options shippers have to choose FXE or other transportation modes for shipments between the United States and Mexico, and as any cursory examination will show UP and BNSF have extensive ability to tap U.S.-Mexico traffic opportunities via the Eagle Pass and El Paso gateways. Majure R.V.S. at ¶¶ 74-75. Even CN participates directly in U.S.-Mexico flows, via boat-to-train automotive service between the ports of Veracruz and Mobile. And the majority of Mexican freight still moves by truck across the border, including to UP's intermodal ramp in Laredo.

Any move by CPKC to foreclose efficient UP-KCSM or BNSF-KCSM options would be contrary to CPKC's incentives. Majure R.V.S. at ¶ 28. As the Board found in *KCS/Tex Mex*, "KCS's experts credibly explained that market conditions would prevent KCS from raising rates

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[121] Indeed, as one Class 1 railroad has observed: {{[redacted]}}(Vol. 3, Exh. 28).

to shippers or foreclosing UP and BNSF from the Mexican market, because the latter two carriers account for more than 90% of the rail traffic interchanged with TFM at Laredo, and it would be unprofitable for KCS to use its control of TFM to take actions that would foreclose this traffic."[122] The same logic applies here. In 2019, KCSM interchanged {{ }} of shipments with UP and BNSF at the Laredo gateway for which KCS can serve the final destination. Majure V.S. at ¶ 30. And as Naatz testifies, much of KCS's auto traffic is still interchanged with UP at Laredo. Naatz R.V.S. at ¶ 57. Given the amount of traffic interchanged with UP and BNSF at Laredo, efforts other than to compete on price and service could result in KCSM losing existing business it has with that shipper both on the lane in question to an FXE-routing and to many other locations where the CPKC system could not reach without interlining. Brown/Zebrowski R.V.S. at fn.75.

Put another way, just as it was not in KCS's self-interest to force BNSF-KCS-KCSM interline traffic away by setting commercially unreasonable rates for to Robstown, it would not in CPKC's interest either. BNSF would just divert its traffic away from KCS to one of its several alternative routing options into and out of Mexico.[123] UP and BNSF have the choice to use five different gateways into and out of Mexico and the choice to use FXE as an alternative to KCSM: Brownsville (KCSM), Laredo (KCSM), El Paso (FXE), Eagle Pass (FXE), and San Diego (FXE). KCSM faces extensive competition from FXE, of which UP owns 26 percent.[124] UP and BNSF connect with FXE at the Eagle Pass gateway, the "principal alternative" to the

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122 KCS/Tex Mex Decision at 17.

123 While BNSF and its customers have options if they don't like the rates offered by KCS, such choices and options being the definition of a competitive market, KCS has only one integrated gateway in and out of Mexico and also can interchange with BNSF and UP at Brownsville/Matamoros.

124 UP-10 at 17.

Laredo gateway.[125] Documents reveal that {{ }} For example, UP itself noted {{ }}[126] In addition, BNSF {{ }}[128] And BNSF notes that {{ }}[129]

CPKC's only real gateway option is Laredo. (Brownsville is not realistic as it does not connect the two halves of KCS's network). Naatz R.V.S. at Figure 1. If CPKC tried to undertake the foreclosure strategy hypothesized by UP and BNSF, UP and BNSF would simply shift gateways. Indeed, as BNSF's comments and evidence shows, BNSF can and does shift its Mexican traffic from Laredo to its other gateways (El Paso, Eagle Pass, and Brownsville) when it is in BNSF's economic interest to do so. In short, KCS lacks the market power to make foreclosure of UP or BNSF rational.

Naatz fully sets out why and how the marketplace prevents KCS from foreclosing BNSF routings. His statement shows that not only does KCS not foreclose BNSF routings, but that KCS works with BNSF to bring as much traffic over to the Laredo gateway as possible. This is

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125 *Id.* UP and BNSF also connect with FXE at the El Paso gateway. { }

126 UP-HC-001387 at -410 ({{ }}) ((Vol. 3, Exh.30)).

127 Hirsch Dep. Tr. at 36:14-21.

128 UP-HC-001106 ({{ }}) ((Vol. 3, Exh. 29).

129 BNSF0000932 at -34 ((Vol. 3, Exh. 14). {{ }} *See* Hirsch Dep. Tr. at 71:17-19.

true not only for traffic served by UP and BNSF that KCS cannot serve directly, but also for BNSF grain, automotive, and energy products traffic, all of which compete against KCS traffic. Naatz further shows that when BNSF does not use a BNSF/KCS routing, the reason is BNSF's deliberate choice to use its other gateways and its refusal to lower its division to make a BNSF/KCS routing through Laredo competitive, not foreclosure by KCS.

Even where KCSM's Mexican network may provide shippers with the only way to get their goods by rail to the U.S. border, the result would be no different. KCS today – and CPKC in the future – will have strong incentives to support efficient routes that meet shippers' needs. Majure R.V.S. at ¶ 17.

- ***The Mexican regulatory regime will inhibit the foreclosure that BNSF and UP advance.***

The regulatory regime that KCSM must abide by on movements *within Mexico* will help prevent the kinds of foreclosure theories that UP and BNSF advance. Those theories depend in the notion that KCSM would manipulate upwards the rate that BNSF or UP must imbed in its interline services. BNSF and UP both argue that CPKC might raise prices for movements within Mexico (disadvantaging UP and BNSF) and offset those higher prices by lowering CPKC's prices in the United States.[130] But Mexican rate regulation requires parity for like traffic to and from the border regardless of whether the movement is handled at the border by UP, BNSF, or KCS. Reply Verified Statement of Oscar Del Cueto ("Del Cueto R.V.S.") at ¶ 25; Naatz R.V.S. at 62. The same regulatory constraint would apply to KCSM after this Transaction. This means that if KCSM were to try to jack up its rate for movements to Laredo for ultimate deliver via UP

[130] BNSF-9, Reishus V.S. at ¶¶ 44-50; UP-10, Verified Statement of Luis F. de la Calle ("de la Calle V.S.") at 4-5.

to Chicago or St. Paul, it likely would have to raise rates for similar movements to the many more U.S. destinations that CPKC's network will not reach at all. This would be commercially counterproductive. Naatz R.V.S. at ¶ 62.[131]

Understanding the damage these Mexican regulations do to their foreclosure theories, UP and BNSF put forward the testimony of two witnesses who claim Mexican regulation is ineffective.[132] As Del Cueto explains, this perception of Mexican regulatory regime is not how KCSM sees the world. KCSM abides by those regulations, in no small part because it must do so to protect its extremely valuable government-issued concession in order to continue operating. Del Cueto R.V.S at ¶¶ 30, 40; Naatz R.V.S. at ¶ 62.

- ***CPKC will be bound by the "keep gateways open" commitment that has applied to KCS since 2005.***

Finally, as a backstop, just as KCS adhered to its commitment to keep the Robstown and Laredo gateways open, if any shipper feels that CPKC has acted in a way that forces them away form a pre-Transaction interline routing that would prefer, they will be free to bring that complaint forward to CPKC for efficient resolution, or if necessary to the Board in its oversight process.

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[131] BNSF witness Reishus also bases his analysis of Mexican regulation on a misunderstanding of the degree to which Mexican regulations allow KCSM to differentiate between unlike flows of traffic and thereby maximize profits without needing to force traffic cover inefficient routes in the United States. *See* Majure R.V.S. at ¶ 51.

[132] UP-10, de la Calle V.S. at 5; BNSF-9, Verified Statement of Aaron Dychter Poltolarek ("Poltolarek V.S.") at § 3.

5. Applicants' Commitments – Enforced as Appropriate By Shippers – Are the Tried-And-True Way To Address Concerns About Vertical Foreclosure

As in *KCS/Tex Mex*, in case after case the Board and shippers have been fully protected from theoretical foreclosure by exactly the kinds of commitments that Applicants are making in this case: to create no new bottlenecks and to keep gateways open on commercially reasonable terms. *See* Section I and Brooks R.V.S. at ¶ 15. In *CSX/Pan Am*, where serious concerns about foreclosure of competitive routings were raised, the Board endorsed the effectiveness of CRT commitments, stating that the "'commercially reasonable' requirement has been imposed as part of an open gateway condition by the Board in past merger decisions."[133] Similarly, in *CN/WC*, the Board denied more stringent conditions requested by other commenters and merely held CN/WC to its commitment to "keep all existing active gateways affected by the Transaction open on commercially reasonable terms."[134]

Given extensive experience and success with these kinds of commitments, it should come as no surprise that there is widespread support among shippers for that approach. NITL formally supported the approach in *CN/WC* and *KCS/Tex Mex*, and indeed the KCS-NITL agreement remains in full force (though it has never been used by a shipper to arbitrate any dispute). NITL is a participant here, and it has raised no issue or concern with ow well those prior agreements (and the related commitments they formalized) have worked. The National Grain and Feed Association has stated that it "commends CP and KCS for their commitments to keep existing gateways with other Class 1 railroads open."[135] And the Iowa Interstate Railroad ("IAIS") has

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133 *CSX/Pan Am* at 16 (internal citations omitted). *See also CN/EJ&E*, FD 35087 et al., slip op. at 16, 54; *CP-DM&E*, FD 35081, slip op. at 5, 27; *Kan. City S.—Control—Kansas City S. Ry.,* 7 S.T.B. at 938 (2004).

134 *Canadian Nat'l Ry.—Control—Wis. Cent. Transp. Corp.*, 5 S.T.B. 890, 894, 918 (2001).

135 Opening Comments of The National Grain and Feed Association (submitted Feb. 28, 2022) at 6.

{{[redacted]}}

This approach is more than sufficient to provide a reliable backstop to CPKC's already-strong incentive to maintain efficient interline routes because shippers will know if CPKC takes any action to shut off those options. Shippers will be able to demand a Rule 11 rate from CPKC and they will know if that rate is the reason why an interline route they previously relied upon is no longer viable. As noted above, following *KCS/Tex Mex* not a single shipper raised any concerns or complained about rates to/from Laredo or internal points in Mexico. Naatz R.V.S. at ¶ 4. Applicants expect the same result here. CPKC will be aggressive in demonstrating to shippers the benefits of CPKC's new single-line services, but they know that they must sell shippers on the advantages of those routes and will not be successful if they try to force shippers to switch by downgrading shippers existing options. *See* Brooks R.V.S. at ¶¶ 8-9.

Even UP, when it was not seeking to insulate its own traffic from competition, told the Board that commitments such as Applicants have already made in this case *far exceed* what would be necessary to preserve shipper routing options in an end-to-end merger setting. In the "Merger Rules" proceeding in 2000, UP proposed that transcontinental mergers be subject to concrete gateway protection rules that it viewed as sufficient to keep gateways open commercially without requiring "the merged carrier to short-haul itself, depriving the carriers of the returns upon which they depend to attract capital, reinvest in their rail networks and maintain and improve service."[136] Specifically, UP proposed a narrowly cabined rule applicable to affected traffic only (i.e., where the merged carrier would newly serve both the origin and

[136] *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1) Union Pacific's Comments and Initial Proposals (filed May 16, 2000) at 14.

destination) requiring that the merging carrier establish a segment rate applicable to the new "bottleneck" over the most-frequently used gateway for traffic to/from a solely served customer. UP observed that "such a condition would go somewhat beyond merely preserving the exclusively-served shipper's routing options." In some cases, as where the traffic is now moving under joint or proportional rates, the reasonableness of the rate between Point A and Gateway B is not separately challengeable today."[137]

Applicants' commitment to quote Rule 11 rates (or cooperate with connecting carriers on through rates) for affected traffic via gateways is *much broader than what UP proposed* apply to its own potential transcontinental merger under the new merger rules. As examples, Applicants do not (i) limit their commitment only to "exclusively-served" traffic, (ii) exclude intermodal, automotive and transload traffic, or (iii) limit their commitment only to the "most-frequently used gateway."[138] *Id.*

UP, BNSF, and others who demand more onerous gateway conditions in this case are motivated by the commercial and competitive advantages such conditions would convey to themselves, not to vindicate any valid public interest concern.

6. The Rate-Setting Mechanism Proposed by UP and BNSF Is Both Unnecessary and Would Be Affirmatively Anticompetitive

UP and BNSF seek to improve their position by asking the Board to constrain rates in a way that they would never accept and have opposed in the past. The "mileage prorate" mechanism both UP and BNSF ask for is, at its core, an attempt to preserve (or improve) their own financial returns in the face of the fierce new competition from CPKC. Specifically, UP and

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137 *Id.*

138 *Id.*

BNSF ask the Board to impose a condition that, any time CPKC offers a single-line price on a movement that crosses the Mexican border, UP and BNSF are entitled to use KCSM at a mileage prorated portion of the CPKC single-line price.[139] Though both Class 1 railroads may claim this proposal is narrowly tailored and competition enhancing, it is neither and should be rejected.[140]

- ***Revenue Divisions Set in the Marketplace Are Not Based on Any Mileage Formula***

First, UP and BNSF's "mileage prorate" mechanism would impose a rigidity on CPKC's ability to set rates that would have the effect of locking-in UP and BNSF's competitive position and hamstringing CPKC's ability to compete aggressively with its new single-line service. UP and BNSF's proposal might make sense if market rate for interline revenue divisions were based on mileage alone. Both BNSF and UP are well aware of how revenue divisions are determined in the marketplace and they both know that divisions are not set based on any mileage formula; they are set by market forces. To that end, they have repeatedly argued against mileage-based rules in Board proceedings. BNSF's testimony in opposition to a mileage-based rule in its own merger case speaks eloquently: such a condition would "uproot the existing revenue divisions, require[ing] that new ones be set on the basis of comparative mileage."[141] Likewise, in the *McCarty Farms* rate case, BN "object[ed] to a straight mileage proration, noting that railroad revenue divisions *are negotiated and are generally not based on mileage formulae*."[142] In *Public*

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139 *See* BNSF-9 at 46-47; UP-10 at 9.

140 In addition to its many obvious flaws, the proposed condition would explicitly involve the Board in the regulation of rates for transportation within Mexico, which is not appropriate given the Mexican government's role in regulating KCSM. *See* Del Cueto R.V.S. at ¶ 44.

141 *Burlington Northern, Inc. & Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry.*, Finance Docket No. 32549, Applicants' Response to Comments ("BNSF Response to Comments") (filed June 9, 1995).

142 *McCarty Farms, Inc., et al. v. Burlington Northern, Inc.*, 2 S.T.B. 460, 471 (1997) (emphasis added).

Service Company of Colorado D/B/A/ Xcel Energy v. The Burlington Northern And Santa Fe Railway Company,[143] BNSF claimed that a method other than a mileage prorate mechanism was "superior" because it can "cover both attributable and unattributable costs," citing a Board decision stating "[t]he revenue each carrier receives should cover the attributable costs of the service it provides and make some contribution to its unattributable costs." More recently, addressing the Board's tools for allocating cross-over traffic revenue in SAC rate cases, BNSF explained that mileage-based rules adopted in those cases were never intended to reflect "real-world negotiated divisions."[144] UP has similarly criticized the use of "mileage prorate" divisions in SAC rate cases as not accurately reflecting actual market-based divisions.[145]

So it is not surprising that actual revenue divisions bear no fixed relationship to the carrier's relative share of miles on the movement. Instead, revenue divisions set in the marketplace – and a carrier's revenue share as compared to its share of miles – vary widely from movement to movement based on a variety of factors. Majure R.V.S. at ¶¶ 146, 147; Brooks R.V.S. at ¶ 22; Naatz R.V.S. at ¶ 77. Those factors include the relative operating costs associated with the carrier's portion of the move, the costs associated with interchanging the

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143 *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057, Final Brief of Defendant The Burlington Northern and Santa Fe Railway Company (served Sept. 8, 2003) at 21-22 ((Vol. 3, Exh. 32).

144 *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1), Reply Comments of BNSF (filed May 31, 2006) (Vol. 3, Exh. 32) at 22. BNSF cited multiple Board precedents making the point that market-based divisions were not mileage-based: *Duke Energy Corp. v. Norfolk Southern R.R.*, Docket No. NOR 42069 (STB served Nov. 6, 2003) at 20 n.29 (real world divisions between NS and other carriers would not "be particularly instructive, as those divisions presumably reflect a wide range of commercial considerations across a broad spectrum or traffic and gateways"); *Bituminous Coal – Hiawatha, UT to Moapa, NV*, 10 I.C.C.2d 259, 280 (1994) ("market-based divisions result from the interaction of supply considerations (the relative costs incurred by carriers in providing the interline movement and demand considerations (the relative bargaining power of the two carriers").

145 *FMC Wyoming Corp. & FMC Corp. v. Union Pacific R.R.*, Docket No. NOR 42022 (STB served May 12, 2000) at 28, 30, 31.

traffic, potential equipment costs, the need for infrastructure investment (or lack thereof), the level of service (over the road and first mile/last mile), the commodity, the volume of traffic, the availability of capacity, and the carrier's role in attracting the traffic in the first place. *Id.*

Dr. Majure examined the available data – including 100 percent traffic data from CP, KCS, UP, and BNSF – to assess the potential impact of the rate-setting mechanism UP and BNSF propose. That analysis confirms that carriers' market-based revenue divisions for interline movements are not set based on mileage alone and do not align with the prorated mileage covered by the segment. *Id.* at ¶ 147. This finding is illustrated in Figure 4 below, which includes four panels – one each for CP, KCS, UP, and BNSF – showing how each carrier's share of interline revenues for movements within the U.S. or between the U.S. and Canada compares to its mileage across the full array of movements in which it participates. In each panel, the x-axis describes the share of miles for that carrier's portion of each route and the y-axis describes the share of total movement revenue earned by that carrier on the same movement. *Id.* at ¶ 149. Each dot is a separate interline movement.

FIGURE 5

KCS, UP, BNSF, AND CP INTERLINE REVENUE DIVISIONS DO NOT ALIGN WITH ANY MILEAGE PRORATE FORMULA

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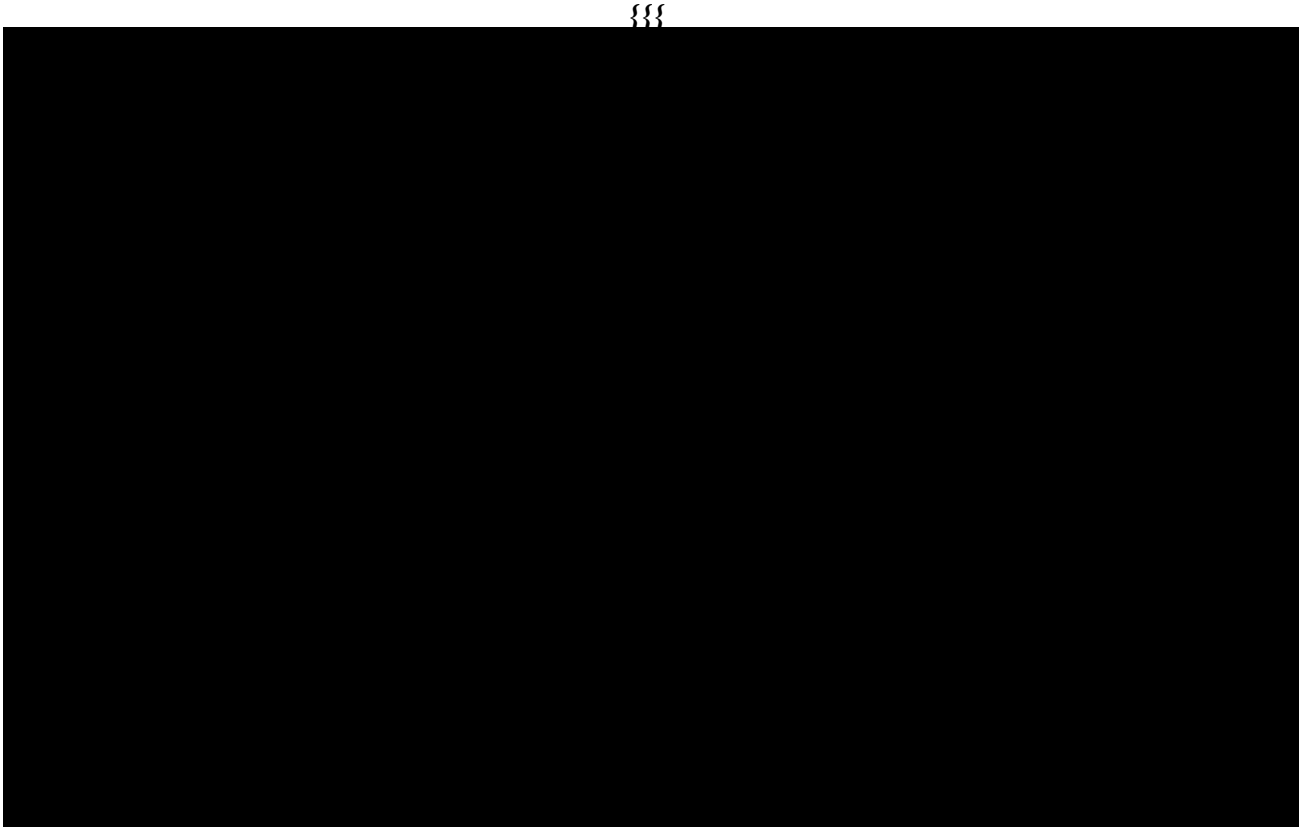

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If interline rates were typically set based on mileage, then the colored dots would tend to fall along the 45-degree line (where the share of revenues corresponds to the share of miles, *i.e.,* the "mileage prorate"). *Id.* at ¶ 150. Not surprisingly, that is not where they fall – confirming that market-based rates on interline movements do not vary in lockstep with the carrier's relative share of mileage. *Id.*

- ***The Fact That UP and BNSF Entered into a "Prop Rate" Agreement in 1996 Is Not a Reason to Impose One Here***

To be sure, interline partners from time to time do use "mileage prorate" allocation metrics as a simplifying tool to divide revenues for certain categories of interline traffic. In those

instances, as Naatz explains, the arrangements are negotiated, consensual, and often tightly cabined, such as to a specific group of new traffic opportunities. Naatz R.V.S. at ¶ 27.

UP and BNSF point to one such agreement, which they entered into in 1996 as part of the vast bundle of quid pro quos agreed to between those two railroads in connection with the proposed UP/SP merger, and they propose that it be used as a model for conditions they ask the Board to impose here. Specially, when UP agreed to give BNSF a bundle of rights (including trackage rights and the sale of a former Western Pacific line in California) to remedy competitive issues, it knew it would be giving BNSF a new single-line route between the Pacific Northwest (and Vancouver) and Southern California, which UP/SP would lack. UP therefore asked BNSF to negotiate the so-called "I-5 Prop Rate Agreement," pursuant to which BNSF would provide UP with a set of agreed rate factors allowing UP to quote rates for certain categories of traffic between BNSF stations in the Pacific northwest and certain parts of the UP/SP network.

The crucial point is that, contrary to UP's and BNSF's implication here, the I-5 Agreement (and all the other uses of mileage-prorate arrangements that UP cites)[146] were not imposed as a condition to remedy any vertical harm from UP/SP. It was a *commercial agreement* hammered out between UP and BNSF at arm's length as part of a set of agreements providing each with mutual commercial benefits. And as an internal BNSF document {{[redacted]}}. There is no simple "mileage prorate" principal established by this agreement, much less one that could be

[146] UP-10 at 74 (citing other examples).

imported into a Board mandate. Tellingly, even the BNSF witness who proposes a mileage prorate mechanism modelled on the I-5 Agreement fails to understand the complexities, and ramifications, of such a condition.[147]

The fact that the "I-5" framework represented a mutually agreeable commercial trade between UP and BNSF 25 years ago is no reason to impose it here, an in fact the Board has already rejected UP's request to do so in the *KCS/Tex Mex* proceeding, when it asked the Board to force KCS into agreeing to a "proportional rate agreement" that was "modelled on an agreement reached between UP and BNSF," *i.e.* the I-5 Agreement, as UP's favored method to "hold Applicants to their basic commitment to keep the Laredo Gateway open."[148] The Board did not require such a condition, finding a commitment to keep the Laredo gateway open on "commercially reasonable terms" sufficient.[149]

- ***The Mileage Prorate Mechanism Would Immediately Transfer Millions of Dollars from CPKC to UP and BNSF***

Were the Board to impose the UP/BNSF "mileage prorate" principle in this case, one immediate effect would be to transfer tens of millions of dollars of revenues into the pockets of UP and BNSF. Consider all CP and KCSM interline traffic for which, CP's and KCSM's existing interline division reflects a higher share of revenues than its share of miles on a potential CPKC single-line alternative. For any of this traffic in lanes where CPKC will set a new single-line rate, the immediate consequence (even if CPKCs single line rate is at the same level as existing interline rates rather than lower) will be a transfer to UP and BNSF as their share of

147 *See* Hirsch Dep. Tr. 186:21-187:4 {{[redacted]}}

148 UP-7A, Verified Statement of John Gray at 41-42.

149 KCS/Tex Mex Decision at 18-19.

revenue (i.e., their division) goes up and CPKC's is forced down. As Dr. Majure demonstrated the magnitude of this effect would be significant. Dr. Majure finds that the proposed mechanism would immediately impact approximately {{ }} of existing KCS single-line revenues via Laredo. Majure R.V.S. ¶ 159.

One concrete illustration of this involved the interline rates for intermodal traffic that KS and BNSF agreed to in 2016. As KCS witness Naatz explains, between KCSM-served terminals in Mexico and BNSF-served terminals in Texas and the West, KCS and BNSF negotiated interline rates covering joint-line KCS-BNSF intermodal services via the Laredo gateway in 50 different origin-destination lanes. Naatz R.V.S. at ¶ 40. As BNSF documents show and Naatz testifies, {{ }}[150]

BNSF's proposed mileage prorate condition would immediately upend this arrangement. As Naatz shows, KCS's share of revenues {{ }} As soon as CPKC puts single-line rates into the market, the mileage prorate condition would hand BNSF a {{ }} on moves in any lane where CPKC tried to compete. Naatz R.V.S. at ¶¶ 88, 29. This is, in a word, anticompetitive.

- ***The Mileage Prorate Mechanism Would Be a Tax on CPKC Competition and a Windfall Subsidy to UP and BNSF***

As Dr. Majure explains, moreover, the anticompetitive impacts of the proposed mileage prorate mechanism would not stop there. Majure R.V.S. at ¶ 151; *see generally* Majure R.V.S. at § 4.1.2. By linking CPKC's future interline revenue divisions to new CPKC single line rates, the

[150] *See, e.g.,* BNSF0002691({{ }}) (Vol. 3, Exh. 33); Naatz R.V.S. at ¶ 40.

UP/BNSF mechanism would operate on a tax on CPKC's competition, and a subsidy that would insulate UP and BNSF against that competition, and disable CKC from properly reflecting its single-line economics in its new rate offerings.

Dr. Majure explains this feature in detail, *see* Majure R.V.S. at § 4.1.2, but the simple illustrations below capture the basic point:

- Assume a KCSM-UP origin-to-destination rate today is $3,000, with KCSM collecting $1,200 and UP collecting $1,800, and that KCSM's share of the miles is one-third. KCSM's percentage of revenue is 40 percent, above the level that would be dictated by a strict mileage-prorate allocation (reflecting whatever the full array of cost and other market-based factors).
- Post-Transaction, if CPKC offered a single-line rate of $3,000, the UP/SP mechanism would cap CPKC's rate applicable to UP-KCSM or BNSF-KCSM interline moves at $1,000 (*i.e.*, 33 percent of $3,000, reflecting the mileage pro-rate allocation), $200 less than its pre-Transaction division. UP could maintain a $3,000 interline rate by pocketing the $200 (by increasing its division up to its two-thirds share of miles).

Now consider that CPKC would choose to take advantage of its new single-line economics to compete aggressively on price.

- If CPKC offered a single line rate that was $600 (or 20%) below pre-Transaction interline rate levels (creating an effective rate of $2,400), its share of interline revenues would now be capped at $800 (or $400 further below its pre-Transaction revenue share).

- With the subsidy of a forced reduction in CPKC's revenue division. UP could match CPKC's $2,400 single-line rate by only reducing its rate factor by $200, because CPKC would have in effect paid a $400 tax to subsidize UP's competition.

Naatz R.V.S. ¶¶ 85 and 86.

As Dr. Majure explains, this alleged "remedy" is "anticompetitive and would ensure UP and BNSF do not face the full competitive pressure they would otherwise face from a combined CPKC." Majure R.V.S. at ¶ 140.

The Board's own regulatory history shows that imposing regulatory mechanisms like these on post-merger rate-making is in fact anticompetitive experience. Despite UP and BNSF's protestations to the contrary, their proposed mechanism would resurrect key features of the long-discredited and anticompetitive "DT&I Conditions." As the Board is aware, in the pre-Staggers era the ICC developed a standard set of six conditions that it imposed almost automatically and identically in every merger proceeding, including (1) requiring "a consolidated carrier to 'maintain and keep open all routes and channels of trade via existing junctions and gateways unless otherwise authorized by the Commission'"; (2) "prohibit[ing] discrimination 'in the arrangement of schedules'"; (3) "requir[ing] a consolidated carrier to continue 'present traffic and operating relationships'"; (4) "prohibit[ing] discrimination . . . 'in promptness [and] frequency of service,'"; (5) "preclud[ing] a consolidated carrier from restraining 'the right of industries located on the acquired line to route traffic over any or all existing routes and gateways'"; and (6) "provid[ing] standing to seek later modification of the Conditions."[151] These

[151] *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Procedures*, 366 I.C.C. 112, 112-13 (I.C.C. 1982) (citing *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492 (1950)).

standard merger conditions drew their name from *Detroit, Toledo & Ironton R.R. – Control*, 275 I.C.C. 455 (1950), and were explicitly aimed at *protecting carriers from competition*, not *protecting competition*.

By 1982, the ICC's experience with these conditions had shown that these conditions were inhibiting competition and "must be removed." The ICC found that their "anticompetitive elements" limited carriers' ability to "compete both in service and price," with a "chilling effect on innovative rate and routing practices" that "discourage[d] price and service innovations and dissuade[d] carriers from pricing according to actual cost." *Id*.[152] As Dr. Majure explains, the mileage-prorate mechanism proposed by UP and BSNF would resurrect exactly the same kind of rigid regulation of interline pricing that would impede the new competition CPKC promises. Majure R.V.S. at ¶¶ 168, 171.[153]

The anticompetitive nature of the rate-setting mechanism UP and BNSF propose is well summarized by BNSF's own criticism of similar conditions proposed by IC when BN and Santa Fe combined to form BNSF. IC proposed a 15-year condition that would "prescribe, for a period of 15 years, mileage-prorated divisions or rates ensuring mileage-prorated revenue for all traffic interchanged by Applicants and IC moving between specific points in thirteen states."[154] BN and Santa Fe pointed out that this condition would "create the risk of inefficient, non-market-responsive revenue divisions and inflict harm on the public.[155] Indeed, they argued it would go

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152 *Id.* at 115-116.

153 As Dr. Majure also points out, the mechanism has a further anticompetitive feature. Implementation of, and UP and BNSF's auditing of CPKC's compliance therewith, the "mileage prorate" mechanism would inevitably give CPKC's competitors access to the single-line rate quotes it was offering its customers. *See* Majure R.V.S. at ¶ 141.

154 BNSF Response to Comments at 92-93.

155 *Id.* at 97.

beyond even the abandoned DT&I Conditions by requesting that the Commission "uproot existing revenue divisions, requir[ing] that new ones be set on the basis of comparative mileage."[156]

BNSF was right then and it is wrong now. As both BNSF and UP have repeatedly contended in past Board proceedings – and as the objective facts in this case conclusively demonstrate – revenue divisions established in the marketplace do not hew to any "mileage prorate" formula, and any effort to impose them by regulation would be anticompetitive.

- ***UP and BNSF Give Away Their Lack of Any True Remedial Goal By Seeking to Apply Their Mechanism to Traffic Unaffected by the Transaction***

The best evidence of what is really motivating UP and BNSF is their explicit effort to have their rate-setting mechanism applied to all interline traffic between them and CPKC, even traffic that would be entirely *unaffected* by the Proposed Transaction, such as traffic flowing over Laredo to parts of UP's and BNSF's networks that CPKC will not service, and where it will not gain any longer haul than KCS could achieve today.[157] The only conceivable purpose of this would be to transfer revenue from CPKC to these larger railroads. Any condition the Board might consider to "keep gateways open" should be limited – in the same way Applicants' commitments are – to the preservation of interline routing options for traffic that might conceivably be affected by the Transaction. Brooks R.V.S. at 10.[158]

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156 *Id.*

157 *See* UP-10 at 71-72 (asking that the mechanism be applied to routes not remotely impacted by the Transaction, when they ask for the mechanism on any "competitive" route, where competitive is defined as when "CPKC and another railroad are competing for the same traffic" even when "CPKC and the other railroad d[o] not serve the identical origin or destination facility"); BNSF-9 at 73 (not limiting the application of the mechanism to only affected traffic).

158 Even shipper groups recognize this. *See* Comments and Request for Conditions of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League ("ACC-6/TFI-5/NITl-3") (filed Feb. 28, 2022)at 7-8.

B. Shipper Group Desires for "Open Access" and Other Reregulatory Remedies Are Not Merger-Related

In addition to the overreaching requests by several Class 1 railroads, discussed above, a few shipper associations seek gateway and bottleneck-related relief that would extend well beyond any conceivable effect of the Transaction. They seek to capitalize on this Transaction to pursue long-standing efforts by these associations to reform the Board's "bottleneck" rate-making standards and further their open access crusade.[159] Their requests would unnecessarily and unfairly alter the regulatory landscape applicable to CPKC alone. There is no basis to award such drastic relief that does not relate to any Transaction-related harm, and they are inappropriately raised in this proceeding.[160]

1. Certain Requests Relating to "Gateways" and "Bottlenecks" Represent an Improper Effort to Revisit the Board's Bottleneck Rate Rules

Applicants have proactively committed to keep affected gateways open on commercially reasonable terms, and CPKC has specifically committed to waive its right to create new bottleneck segments by providing Rule 11 rates for the former-CP or former-KCS portions of origin-to-destination routings. *See* Section IV.5 above. These commitments are consistent with those made by participants in previous consolidations and accepted as sufficient to avoid any Transaction-related harm.[161] No further conditions should be required – especially under the pre-2001 merger rules.

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159 *See, e.g.*, ACC-6/TFI-5/NITl-3 at 13-19.

160 *See UP/SP*, 1 S.T.B. at 418.

161 *Kansas City Southern – Control – The Kansas City Southern Ry.*, 7 S.T.B. 933, 938 (2004) ("In addition, we are requiring KCS to comply with its commitment to keep the Laredo gateway open on commercially reasonable terms."); *Canadian National Ry. – Control – Wisconsin Central Transportation Co.*, 5 S.T.B. 890, 894 (2001) ("We are imposing a condition holding applicants to their representations:

Despite these commitments, ACC/TFI/NITL, in addition to seeking gateway protections where the Transaction "creates the opportunity for a longer haul" (*i.e.*, where Applicants' commitments would apply), seek to impose on CPKC a sweeping, five-pronged obligation, including that Applicants quote challengeable Rule 11 rates to/from "*all interchanges* with Class I and II railroads that were active at any time from January 1, 2018," regardless whether the Transaction affects the traffic in question.[162] Similarly, The Chlorine Institute appears to seek some form of condition maintaining "commercial neutrality at interchanges CP and KCS now maintain with other railroads."[163]

These proposals – if interpreted literally – would go far beyond keeping existing gateways open on commercially reasonable terms or ensuring that new bottlenecks are not created, which as discussed extensively above Applicants have committed to do. By definition, they would be untethered to any effect of the Transaction, and must be rejected for that reason alone.[164] The associations acknowledge that their arguments have long been rejected by the

(1) that the unified CN/WC will keep all existing active gateways affected by the transaction open on commercially reasonable terms; and (2) that applicants will waive defenses they might otherwise have (as a result of the transaction) under our bottleneck rates policy (where prior to the transaction a shipper would have been entitled to regulation of a bottleneck rate)."); *CSX/Pan Am* (Decision No. 9 served Apr. 14, 2022) at 15 ("CSX also commits 'to (a) keep all existing active gateways affected by the Proposed Transaction open on commercially reasonable terms, and (b) waive any right CSXT might otherwise have under the Board's rules to refuse requests by shippers to establish local, separately challengeable rates for movements on the PAR System to an interchange with another rail carrier.'").

162 *See* ACC-6/TFI-5/NITl-3 at 9-13 (emphasis added).

163 Amended Comments of the Chlorine Institute ("CI-3") (filed June 9, 2022) at 3-4.

164 *See, e.g.*, *Norfolk Southern Railway Co. – Acquisition & Operation – Certain Rail Lines of the Delaware & Hudson Railway Co.*, FD No. 35873, (Decision No. 6 served May 15, 2015) at 32 ("These requested conditions will be denied . . . . [T]he record indicates that this alleged bottleneck existed prior to this proceeding . . . . The condition requested . . . is thus unrelated to the competitive effects of the proposed transaction."). This proposal would be inappropriate even under the 2001 Merger Rules. *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 564 (June 7, 2001) (bottleneck rate relief should be denied where the requesting "parties have not shown that this [proposed bottleneck rate relief] has the requisite nexus to mergers.").

Board, observing that "[t]he Board also has rejected arguments that vertical integration would foreclose efficient through routes, summarily concluding that, 'there is no reason for a carrier to foreclose an efficient connecting carrier just to achieve a long-haul.'"[165]

Still more problematic, these proposed conditions would alter the regulatory landscape *applicable uniquely to CPKC* for no reason other than these associations' longstanding desire for open gateway routing options. To illustrate, these groups appear to be demanding that, for CP traffic to destinations that KCS's network could not reach (such as traffic moving between Canada and points in the West on the UP or BNSF networks, or in the Northeast on the CSX or NS networks), CPKC nonetheless must quote Rule 11 rates over every possible interchange. And CPKC would have to do the same for KCS traffic to destinations that CP's network could not reach (such as KCS traffic moving to points in the Southeastern United States on the NS or CSX networks, or in the West on the UP and BNSF networks). *See* Brooks R.V.S. at ¶ 28. But no other railroad in the United States would have to do the same.

Requiring Rule 11 rates to every interchange regardless of merger impact would upend the rules established by Congress as set forth in the Bottleneck rate cases and impose on CPKC alone a regulatory regime to which no other railroad in North America is subject. The *Bottleneck Cases* establish that the governing statutory framework generally gives to the originating carrier the initiative to quote rates over its own long haul, unless the chosen routing is inefficient, and limit the application of the Board's rate reasonableness review to the origin-destination rates in whole, not individual segments thereof.[166] The Board has consistently rejected calls to revisit the

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[165] ACC-6/TFI-5/NITl-3 at 15.

[166] *Central Power & Light Co.* v. *Southern Pacific Transportation Co.*, 1 S.T.B. 1059, 1064 (1996); *Central Power & Light Co.* v. *Southern Pacific Transportation Co.*, 2 S.T.B. 235, 238-39 (1997) (collectively the "Bottleneck Cases").

seminal interpretation of the governing statutory framework set forth in these precedents. Even when it adopted new merger rules in 2001, which do not apply to this Transaction, the Board refused to "overrule [its] *Bottleneck Decision* so as to permit separate rate challenges to all segments of through or joint rates" as the shipper groups request.[167]

This is the framework that will govern CPKC, except in those limited cases where the Transaction will give CPKC a longer haul (or new single-line route) as compared to pre-Transaction conditions. It is these situations, and only these situations, to which Applicants' commitments apply and where the Board has imposed conditions in the past protecting shippers' access to routes that might be affected by a merger. *See* Verified Statement of John Brooks ("Brooks V.S.") (App. Vol. 1 at ¶¶ 46, 48); Brooks R.V.S. at ¶ 13.[168] Applicants' commitments will fully preserve shippers' pre-Transaction options.[169]

Going even a step beyond seeking to require CPKC to provide Rule 11 rates to every interchange regardless of Transaction impact, ACC/TFI/NITL further overreach by making the unprecedented proposal that the Board violate the statutory scheme by limiting CPKC's statutory right to pricing freedom.[170] Like BNSF and UP, they seek to dictate how CPKC must set

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167 *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 564 (2001).

168 Contrary to ACC/TFI/NITL's implication (ACC-6/TFI-5/NITL-3 at 10), Applicants have not committed to quote Rule 11 rates for all traffic regardless of whether the Transaction provides a new longer or single-line haul. The Application made clear that the commitment to preserve gateways was limited to those affected by the Transaction. *See* Brooks V.S. at ¶ 46, App. Vol. 1 at 233; *see also* Brooks R.V.S. at ¶ 13.

169 As a result, for example, shippers will have the option of challenging the Rule 11 gateway rates offered by Applicants, as the NGFA has requested. Opening Comments of the National Grain and Feed Association ("NGFA-1") (filed Feb. 28, 2022) at 7-8.

170 49 U.S.C. 10701(a); *see also BN/Santa Fe*, 10 I.C.C.2d at 750 ("Each utility party has proposed a specific remedy to address the merger-related harm it alleges. The remedies . . . [including] some form of rate prescription . . . are generally broader than the harms . . . . [I]t would be inappropriate to grant relief that substantially exceeds the harm threatened by the merger.").

bottleneck rates, precluding Applicants from charging higher bottleneck rates on a per-mile basis than the corresponding long-haul rate costs per mile.[171] This restriction would not merely be unfair to Applicants, given that no other railroad is subject to it, but it would also be affirmatively anticompetitive and nonsensical as a matter of economic policy, for the reasons discussed in Section IV.A.3 above and in the testimony of Applicants' witnesses. *See* Majure R.V.S. at § 4.1.1 ("[M]arket rates for interline traffic generally are not set based on prorated mileage") and ¶ 186.[172]

In a similar vein, The Chlorine Institute seeks to impose upon CPKC a unique rule that it maintain "commercial neutrality at interchanges CP and KCS now maintain with other railroads."[173] Requiring "neutrality" among gateways – and giving unfettered choice to shippers – would prevent Applicants from aggressively competing using their single-line and longer-haul routes. The Board has already tried and rejected a similar "commercial neutrality" regime when it jettisoned the "commercial closing doctrine," under which "any rate differential [*i.e.*, *non-neutrality*] was deemed to close a gateway."[174] The Board found six reasons why the commercial closing doctrine was anticompetitive, and it took the extraordinary step of reversing

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171 *See* ACC-6/TFI-5/NITl-3 at 9-10.

172 It was Congress's goal in deregulating the railroad industry to "allow[] railroads to achieve revenue adequacy by competing on a free-market basis." *MidAmerican Energy Co.* v. *STB*, 169 F.3d 1099, 1104-05 (8th Cir. 1999). And "[t]he Board has recognized that an important part of achieving revenue adequacy is differential pricing," i.e., allowing carriers to "charge a higher mark-up on rail segments where demand elasticity is low, such as bottlenecks, to compensate for low mark-ups on competitive segments." *Id.* at 1106-07 (citing *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 526-27 (1985)).

173 CI-3 at 3-4.

174 *Major Rail Consolidation Procedures*, 5 S.T.B. at 563.

the doctrine retroactively, withdrawing conditions that were already in place on previously approved transactions given the competitive harm that they had caused.[175]

Of particular import here, the Board found that the commercial closing doctrine was anti-competitive because it prevented a "newly consolidated carrier from realizing potential cost savings from consolidation" and forced new carriers to compete solely on service quality instead of price. *Traffic Protective Conditions*, 366 I.C.C. at 123-24. As the Board explained, each carrier should be "free to compete both in service and price to establish the price-service combinations that best meet shipper needs." *Id.* Forcing carriers to compete solely on service keeps prices artificially high, and may make rail transport less attractive to shippers than truck or barge transport since such a "commercial closing" regime is not imposed on those carriers. *Id.* at 114, 123-24. Similarly, here, preventing CPKC from leveraging new efficiencies unlocked by the Transaction to offer lower prices hamstrings CPKC's ability to compete, keeping prices artificially high. As the Board has recognized, although "[r]ate equalization . . . is in the[] best interests" of "some shippers," – and perhaps CI is one of those shippers – "it is contrary to the public interest as well as that of carriers and shippers." *Id.* at 123.

It is perhaps not surprising that these shipper groups are trying to use this proceeding to undo the statutory framework governing "bottleneck" rate-making. These organizations have been unhappy with the bottleneck rate regime for many years and are well aware that it requires an industry-wide change in regulatory (indeed, statutory) standards.[176] This proceeding is not the

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[175] *Traffic Protective Conditions*, 366 I.C.C. at 114, 122-26, 130-32.

[176] *See, e.g.*, *Competition in The Railroad Industry*, Ex Parte No. 705, Joint Comments of Alliance for Rail Competition, et al. (filed Apr. 12, 2011)) (Vol. 3, Exh. 34) ("Shipper Ass'n EP 705 Comments") at 44-46 (comments of, inter alia, ACC, TFI, NITL, Chlorine Institute, NGFA favoring change in the Board's bottleneck rate standards); Brief for Respondent NITL in Support of Petitioner, *Western Coal Traffic League* v. *STB*, 120 S. Ct. 372 (1999) (No. 99-135) (Vol. 3, Exh. 35) at 1-4 (seeking Supreme

proper forum for consideration of these groups' regulatory agenda; that forum is Congress. There is no reason why CPKC should be subjected to conditions that the associations have failed to convince the legislature and regulators to implement on an industry-wide level.[177] Imposing such conditions on CPKC would effect an industry restructuring of the sort the Board has already said in this case is inappropriate.[178]

Such conditions are not merely unwarranted; they would be affirmatively harmful to CPKC's ability to compete effectively. Requiring "open routing" at the shipper's initiative – or worse, "neutrality" among gateways – would inject new inefficiencies into CPKC's combined network and impede efforts by CPKC to compete more effectively against other Class 1 railroads and other modes. The damage would not be limited to the new competition CPKC hopes to offer using its more efficient and more capable single-line routes, but would extend as well to traffic flows unaffected by this end-to-end combination Transaction. *See* Brooks R.V.S. at ¶ 29. The net result would be anticompetitive, and should be rejected for the same reasons that the ICC

Court review of Eighth Circuit opinion affirming Board's bottleneck rate precedent); *see also Major Rail Consolidation Procedures*, 5 S.T.B. at 564.

[177] *See Major Rail Consolidation Procedures*, 5 S.T.B. at 564, 793 (rejecting comments by shippers groups including NITL and ACC); *see also* Shipper Ass'n EP 705 Comments (Apr. 12, 2011) (Vol. 3, Exh. 34) at 44 (arguing unsuccessfully that "[t]he Board's 'Bottleneck Decisions' facilitate conscious parallelism and should be reversed" because "[a] shipper seeking a bottleneck rate from an origin to a destination served by the same carrier will almost always be rebuffed or have the quoted rate limited to a local movement with no combination rate beyond allowed.").

[178] *See* Decision No. 13 at 4 ("[T]he agency 'should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring.'") (quoting *UP/MP/WP*, 366 I.C.C. 462, 564); *see also UP/MP/WP*, 366 I.C.C., at 564 ("[U]s[ing] our conditioning powers to make consolidation proceedings vehicles for rail system restructuring . . . would not be consistent with the Congressional intent underlying the statutory scheme governing railroad consolidations.").

rescinded the "open-routing" and "gateway neutrality" conditions it had once imposed routinely in merger cases.[179]

2. Requests for "Reciprocal Switching Access" Are Similarly Unrelated to this Transaction

Certain shipper groups have used their comments in this proceeding to advance their longstanding efforts to have the Board order railroads to grant other railroads "reciprocal switching" access to on-line customers.[180] This relief is simply another chapter in the efforts of these groups to achieve industry-wide change in competitive access standards, most prominently in the pending Ex Parte No. 711 proceeding. The relief is untethered to any effect of the Transaction and should be rejected.

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[179] *See Traffic Protective Conditions*, 366 I.C.C. at 112; *CSX Corp. – Control – Chessie Sys., Inc.* 363 I.C.C. 518, 578 (1980) ("We have reappraised our policy in recent decisions and have examined the possibility that anticompetitive effects of the DT&I conditions outweigh any competitive benefits . . . . We have broadened our reappraisal of DT&I conditions by instituting a rulemaking to determine the advisability of eliminating DT&I-type conditions in all past and future rail consolidations."); *see also id.* at 536-37 ("DOJ opposes the DT&I traffic protective conditions requested by numerous railroads in this proceeding, as anticompetitive and without countervailing public benefits."). Among the rescinded conditions, "Condition 1" of the DT&I conditions had required a consolidated carrier to "keep open all routes and channels of trade via existing junctions and gateways' unless otherwise authorized by the Commission," while "Condition 5" had precluded such a carrier from "restraining 'the right of industries located on the acquired line to route traffic over any or all existing routes and gateways." *Traffic Protective Conditions,* 366 I.C.C. at 112-13.

[180] *See* NGFA-1 at 9 (condition "requiring the merged railroad to enter into reciprocal switching arrangements when circumstances require them to facilitate rail-to-rail competition post-merger"); Wheat Growers Comments at 2 (proposing "condition of guaranteeing captive shippers of the new CPKC open access to reciprocal switching"); Comments of U.S. Wheat Associates (filed Feb. 28, 2022) at 13 ("statutory competitive access as conditions on this transaction for use by any shipper on the new CP/KCS system that is subject to market dominance or receives inadequate service"); IMA Comments (filed Feb. 28, 2022) at 12 (identical to U.S. Wheat Associates Comments); Private Railcar Food and Beverage Association Request For Condition (filed Feb. 28, 2022) ("PRFBA Comments") at 12 ("reciprocal switching as a condition on this transaction for use by any shipper on the new CP/KCS system that is subject to market dominance or receives inadequate service"); North Dakota Wheat Commission Request for Conditions (filed on Feb. 28, 2022) ("North Dakota Wheat Commission Comments") at 16 (identical to U.S. Wheat Associates Comments).

Not one of these commenters offer any predicate evidence of *a single shipper* losing access to an existing rail option as a result of this Transaction, or any evidence at all of any adverse impact on competition. The "reciprocal switching" conditions they seek are precisely the kind of broad industry restructuring that the Board's precedents forbid.[181] Conditions of this sort are especially inappropriate in light of the Board's conclusion that the pre-2001 rules should apply,[182] under which the "competitive enhancements" these commenters propose are out of place.[183]

As these groups are well aware, the Board is presently considering the role of reciprocal switching access in Ex Parte No. 711, and that is where these issues should be addressed so that any regime of forced switching applies to all railroads, not just CPKC. All of these commenters (excepting only the North Dakota Wheat Commission) are among the participants in that case advocating industry-wide reciprocal switching.[184] The position of these shipper groups in favor

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[181] *See, e.g.*, *UP/MP/WP*, 366 I.C.C. at 564 ("[W]e should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring. To do so would not be consistent with the Congressional intent underlying the statutory scheme governing railroad consolidations."); Decision No. 13, at 4 ("[U]s[ing] our conditioning powers to make consolidation proceedings vehicles for rail system restructuring . . . would not be consistent with the Congressional intent underlying the statutory scheme governing railroad consolidations").

[182] Decision No. 4 at 3.

[183] *See, e.g.*, *Major Rail Consolidation Procedures*, 5 S.T.B at 547 (adopting the new rules and explaining they include "competitive enhancements" such as "reciprocal switching arrangements"). While some shippers have cited CP's proposal to offer a form of reciprocal switching access in connection with its interest in acquiring Norfolk Southern in 2016 (*see, e.g.*, North Dakota Wheat Commission Comments at 15, n.16), that prior proposal has no bearing in this proceeding. A potential CP-NS transaction would have involved much more complex competitive issues and also been subject to the Board's 2001 merger rules, which allow for such "competitive enhancements."

[184] *See, e.g.*, Ex Parte No. 711 (Sub-No. 1), Comments of National Association of Wheat Growers (filed Feb. 14, 2022) (Vol. 3, Exh. 36); U.S. Wheat Associates Testimony (filed Feb. 14, 2022) (Vol. 3, Exh. 37); Industrial Minerals Association-North America Testimony (filed Feb. 14, 2022) (Vol. 3, Exh. 38); National Grain and Feed Association Comments (filed Feb. 14, 2022) (Vol. 3, Exh. 39); Private Railcar Food and Beverage Association Testimony (filed Feb. 14, 2022) (Exhibit Vol. 3, Exh. 40).

of *industry-wide* changes to the Board's reciprocal switching rules dates back at least two decades.[185]

Applicants understand that these groups may be duty-bound to try to advance their preferred competitive-access framework in every available forum. Their requests, however, have no place in this proceeding.

Applicants have no hesitation in reiterating that CPKC will compete using whatever access tools might become available as a result of Board action in Ex Parte No. 711.[186] But no condition should be imposed on this Transaction.

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This is not the first time participants in the Board's merger proceedings tried to hijack those processes as a vehicle for imposing sweeping new competitive access relief. The Board resoundingly rejected those efforts before, and should so again.

As Board concluded in the Houston Gulf Coast Oversight proceeding, "[w]hatever the merits of the "more-competitors-enhance-infrastructure-investment" argument, they are more appropriately made in an open access debate before Congress involving the entire rail system

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185 *See, e.g.*, *Competition in the Railroad Industry*, Shipper Ass'n Comments, EP 705 (filed Apr. 12, 2011) (Vol. 3, Exh. 34) at 21-44 (comments of, *inter alia*, ACC, TFI, NITL, Chlorine Institute, and NGFA favoring change in Board standards for grant of reciprocal switching); *see also Hearing on Revenue Adequacy,* NGFA Supplemental Submission, EP 761 (filed Feb. 13, 2020) (Vol. 3, Exh. 41); *Regulatory Reform Task Force,* TFI Written Statement, EP 738 (STB filed July 24, 2017) (Vol. 3, Exh. 42); *Railroad Revenue Adequacy,* NGFA Comment, EP 722 (filed Feb. 13, 2020) (Vol. 3, Exh. 41); *Hearing on Revenue Adeqaucy,* NITL Written Comments, EP 761/722 (filed Nov. 26, 2019) (Vol. 3, Exh. 43); *Railroad Revenue Adequacy,* IMA North America Comments, EP 722 (filed Nov. 25, 2019) (Vol. 3, Exh. 44.

186 *See* Ex Parte No. 711, Hearing (Mar. 15, 2022 and Mar. 16, 2022) available at https://www.youtube.com/watch?v=jM0N1zkQYi8 and https://www.youtube.com/watch?v=VWwUIRf0hGo.

than in this case."[187] As the Board explained in that case: "Because the railroad industry is not an open access industry, and because some shippers may pay more than others under the law that we administer, merger proceedings are not used as vehicles to equalize the competitive positions of shippers generally."[188] The Board added that "we cannot determine here, and do not need to determine here, how the railroad system would evolve if open access were adopted in Houston and, ultimately, the rest of the Nation: it could have unknown but significant effects on infrastructure, employment, and traffic patterns."[189] Conditions untethered to Transaction impacts and with such unpredictable effects are not permitted under the Board's pre-2000 rules and precedents.

V. APPLICANTS ARE DEDICATED TO ENSURING THAT THE TRANSACTION WILL BE IMPLEMENTED WITHOUT SERVICE DISRUPTION

Several commenters – perhaps thinking back to a few bad experiences with large rail mergers in the 1990s – express generalized concerns about the potential for implementation of the Transaction to cause service disruptions, and seek a variety of conditions aimed at addressing these worries. As we explain in this Section,[190] there is no valid cause for concern about this particular railroad merger. As an end-to-end Transaction, like the *CN/IC* combination of 1998, there is no basis for thinking that implementation of the Transaction will cause disruption. Nonetheless, Applicants have taken, and will continue to take, extraordinary steps to plan ahead

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187 *Union Pacific Corp. – Control – Southern Pacific Rail Corp.*, Finance Docket No. 32760 (Sub-No. 26) (Decision No. 10 served Dec. 21, 1998) at 4.

188 *Id.* at 2.

189 *Id.* at 3-4.

190 We separately address (and refute) the particularized assertions by UP and BNSF that the Transaction might lead to congestion on portions of the CPKC network that overlap with or interconnect with the UP and BNSF networks (*see* Section VI), and by Metra that the Transaction would adversely impact service on lines in the Chicago area shared with Metra (*see* Section VII).

and prepare for the implementation so that no unexpected disruptions arise. To allay any residual concerns, Applicants are committed to – and accept as a condition – a program of rigorous monitoring, reporting and Board oversight. As with previous transactions reviewed under the Board's pre-2001 rules, any more onerous requirements relating to purely speculative service concerns would be inappropriate.

A. The Transaction Will Not Lead to Service Disruption

The Transaction is highly unlikely to lead to any service disruption warranting onerous service-related conditions. This is so for many reasons.

First, this is a *purely end-to-end Transaction*. Analogies to the service disruptions observed during the integrations of UP/SP and CSX/NS/Conrail, which led the Board to implement the Service Assurance Plan requirement of the Board's 2001 Major Merger Rules, are inapplicable. The UP/SP and CSX/NS/Conrail transactions involved complex integrations of networks that had numerous elements not present here: the frailty of SP's infrastructure, the immediate restructuring of internal routings among the extensive parallel routes of the UP and SP networks, the need to disintegrate the Conrail network on Day 1 and reallocate routes and traffic among NS and CSX, and many more. *See* Verified Statement of Keith Creel ("Creel V.S.") at ¶ 38. From the perspective of likely service impacts, the closest historical analog to the CP/KCS Transaction is the *CN/IC* transaction, as to which the Board terminated the oversight period prematurely because it was so clear that merger implementation was proceeding smoothly.[191]

[191] *CN/IC*, (STB Decision No. 4).

By comparison with *UP/SP* and *CSX/NS/Conrail*, integrating CP and KCS will be simple. CP and KCS already share the one and only and terminal where they both operate. There will no new terminal consolidations. Likewise, there will be no opportunity for internal re-routings; all traffic moving between the two networks will continue to move via Kansas City. As a corollary to this, and perhaps most fundamentally, the traffic changes occasioned by the Transaction will not result from CPKC flipping some sort of "merger integration switch" and hoping for the best. Rather, on Day 1 the traffic of CPKC be the same as the traffic on CP and KCS on Day 0, routed the same way in accord with these railroads' tried and true operational design. "Integration" of the two networks will begin immediately, of course, bringing the operational efficiencies that Applicants have detailed in the Application. But the new Transaction-related traffic Applicants anticipate will only come as – *and when, and if* – Applicants demonstrate to shippers that the service CPKC is able to deliver on its new single-line routes offers advantages as compared to shippers' existing rail and truck options. Traffic changes will occur incrementally over time, allowing CPKC to adapt its operation with the benefit of experience and learning. And traffic will not come at all if CPKC has not shown that it can provide reliable and disruption-free service in its new single-line routes. In a very real sense, the very same traffic changes that commenters worry will disrupt operations will in fact be a *barometer of CPKC's success in delivering improved operations*.

Second, this Transaction will bring together two railroads with ***excellent operational track records***. Both railroads have previous experience implementing consolidations that should give shippers and the Board confidence that integration here will be successful. CP combined with DM&E in 2009 and acquired CMQ in 2002, and both transactions proceeded smoothly.

Creel VS at ¶ 39. KCS acquired control of Tex Mex and TFM in 2005, and the implementation of those end-to-end transactions went smoothly as well. *Id.*

Both railroads' recent operational track records further demonstrate that their managements – and thus the management of the combined CPKC – will know what it takes to carry on reliable and effectively-resourced service during times of change. As reflected in the testimony and data presented in the Board's Ex Parte No. 770 proceeding, both CP and KCS have performed well through the post-COVID recovery, and their service is highly regarded by the shipper community (a point with which none of the commenters suggests any disagreement).

The consistency of CP's and KCS's operating performance explains in no small part why these two railroads have been among the most successful in growing their traffic bases over the past several years. From CP's perspective in particular, its successful PSR transformation (which began in 2013) allowed it to build a foundation of highly reliable service execution and resource utilization that created the foundation for attracting more traffic to the railroad. CP's industry-leading growth trajectory was the result. Brooks V.S. at ¶ 21.

CP has embraced that growth – as it will the growth unlocked by the CP/KCS Transaction – by allocating sufficient resources to its operations and deploying those resources efficiently and effectively. CP's operational success also stems in no small part to its unique culture of accountability, with operating personnel down to level of trainmaster expected to understand what the railroad has promised that customer, and given the responsibility to ensure that CP delivers on what it promised. Reply Verified Statement of Raymond A. Elphick ("Elphick R.V.S.") at ¶ 92; Clements V.S. at ¶ 17. This culture will empower CPKC no less than it does CP today.

Third, the operational integrations that will be implemented will only occur after Applicants have spent *countless hours and extraordinary care planning for that integration* and preparing their IT systems and other processes to ensure that it goes smoothly. These preparations were described in the Application (*see* Brooks V.S., Clements V.S., and the Operating Plan), and Brooks provides an update on the status of those efforts in his Reply Verified Statement.

Applicants agree with the observation in USDA's comment that it would be prudent for CPKC to proactively allocate locomotives, labor, and equipment to potential pain points to avoid any transitional service impacts.[192] This is exactly the kind of planning that Applicants already have well underway, and that work will continue to, and through, the day in 2023 when they begin the integration process.

Applicants also have fully embraced USDA's recommendation regarding the importance of investing over the longer term in their infrastructure to avoid (or relieve) any congestion that may arise from traffic growth on the CPKC network.[193] Such investment is not merely an afterthought or reactionary measure to avoid service disruption. For CPKC, it is an integral part of Applicants' plan to expand the capacity and capability of their North-South route. Applicants have detailed hundreds of millions of dollars of specific investments they will make starting on Day 1, which will augment extensive projects that the two separate railroads already have planned or underway. But Applicants are not stopping there. Consistent with their ordinary course approach to capital planning, they will constantly monitor traffic trends and devote

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192 Comments of U.S. Department of Agriculture ("USDA Comments") (filed Feb. 28, 2022) at 2.

193 *Id.*

sufficient resources to ensure that the capabilities of CPKC's future infrastructure (and other resources) stay ahead of the growth curve. Brooks R.V.S. at ¶ 35.

B. Applicants' "CP/KCS Service Promise"

Applicants well understand that their confidence about their ability to implement the CP/KCS Transaction without inadvertently undermining the levels of service that CP and KCS customers have come to expect may not be shared by everyone. As a result, as explained in Brooks's Reply Verified Statement, Applicants are making a "CP/KCS Service Promise" to every one of our customers. Brooks R.V.S. at ¶ 32. Excerpted below, that Promise has five key pillars that together provide an assurance that CPKC will not take its eye off the service ball, will communicate about Transaction-related changes in service openly with its customers, and will proactively address any issues that arise.

FIGURE 6
THE CP/KCS SERVICE PROMISE

OUR CP/KCS SERVICE PROMISE

Pillar 1 – We Will Plan Thoroughly for Transaction Implementation

- Our goal is for Transaction-related changes to yield service that provides each customer with as good as or better service overall than what our customers received pre-Transaction.
- Our planning for Transaction implementation is already well underway.
- We will not implement Transaction-related changes until we are prepared to do so without causing disruption.

Pillar 2 – We Will Monitor Our Post-Transaction Performance

- We will proactively monitor our own performance so as to identify areas requiring adjustment before problems arise.

Pillar 3 – We Will Transparently Report on Our Post-Transaction Performance

- During an oversight period of up to five years, we will report regularly to the Board and the public on our service levels, with metrics tailored to lines and facilities most affected by Transaction-related traffic growth.
- We will supplement this reporting with proactive engagement with our customers (on a confidential basis) regarding CPKC services that affect their shipments.

Pillar 4 – We Will Proactively Communicate and Consult with Customers About Our Post-Transaction Performance

- We will meet regularly with our customers to discuss progress on Transaction implementation.
- We will add customers served by the KCS network to CP's Customer Advisory Council.
- We will seek regular input from our customers on ways we can improve our service to better meet their needs, or make adjustments to address issues as they arise.

Pillar 5 – We Will Resolve Concerns and Promptly Fix Any Issues that Arise

- CPKC will have a cross-functional team with authority to step in to develop and implement solutions for issues that arise, including via adjustments to our resourcing or operating practices.
- When adjustments do not resolve concerns raised by our customers, we will provide for an escalation process to ensure that customer concerns are heard by decision makers empowered to address them.
- We will participate in independent mediation with our customers when these steps do not resolve Transaction-related concerns.

Applicants also understand that the issue of post-transaction service is not merely a matter between CPKC and its customers. The Board will play a role as well. In that regard, a significant thrust of the service-related comments of many commenters is to urge the Board to

impose an oversight condition and require Applicants to submit reports on post-Transaction service.[194] Applicants share the interest of these commenters in a disruption-free implementation process and welcome reasonable and appropriate oversight of their implementation of the Transaction.

Specifically, Applicants accept a period of formal oversight of up to five years, coupled with appropriate reporting during this period on the fluidity of the CPKC network as it implements its integration plans. Brooks details the reporting that Applicants commit to provide during the Board's formal oversight period, and we will accept the Board embodying this reporting in a formal condition of its approval. Brooks R.V.S. at ¶¶ 36-37. Applicants anticipate that this period may be curtailed – as it was in the *CN/IC* transaction – when experience with the new CPKC shows that there are no service disruptions or other adverse impacts of the transaction warranting a prolonged oversight period. Board precedent and experience under the pre-2001 merger rules shows that thorough, fair, and fully-informed oversight of the Transaction's implementation is the appropriate means of identifying and addressing any (unlikely and speculative) service issues that might arise from the Transaction's implementation.[195]

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[194] *See, e.g.*, Opening Comments of Evergy Metro, Inc. (filed Feb. 28, 2022) at 17-18 ("Evergy Comments"); NGFA-1 at 11; BNSF-9 at 73 (arguing the Board should "[r]equire Applicants to regularly report to the public and the Board on the status of the Transaction during an oversight period of at least five years, including in such reports information and data sufficient to enable the public and the Board to evaluate CP-KCS's compliance with the conditions imposed by the Board on its approval of the Transaction" and "require Applicants during the Board's oversight period to regularly report service metrics relating to traffic through Laredo and congestion metrics at locations potentially affected by traffic increases brought about by the Transaction."); CN-13 at 76-77 (stating the Board should impose an oversight period of "at least five years" which would include "required reporting on whether merger benefits have been achieved, compliance with conditions, and any merger-related harms").

[195] *See, e.g.*, *CN/IC*, 4 S.T.B. at 122 (up to five years of oversight imposed, only oversight of two years); CSX/NS/Conrail, Finance Docket No. 33388 (Sub-No. 91) (Decision No. 17 served Oct. 20, 2004) (general oversight terminated after five years); *UP/SP*, Finance Docket No. 32760 (Sub-No. 2) (Decision No. 21 served Dec. 20, 2001) (general oversight ended after five years).

C. Additional Service-Related Conditions Would Unduly Burden CPKC's Competition for No Valid Purpose

Some commenters seek conditions going well beyond the oversight and reporting obligations that Applicants are prepared to embrace. The Board should reject such conditions as inconsistent with the rules governing this Transaction, unjustified in the factual context of this Transaction, and likely to handicap the new competition that will be the hallmark of this Transaction's public benefits.

First, several commenters have suggested that Applicants should be required to prepare a formal "Service Assurance Plan" ("SAP") or its equivalent, and follow the plan for at least five years.[196] As a threshold matter, such a requirement would both impose the rigors of the Board's 2001 Major Merger Rules on a Transaction that the Board has explicitly said will not be reviewed under those rules,[197] and would interpose significant delay in the implementation of the Transaction (which no doubt is CN's motivation for making this proposal).

More fundamentally, a formal SAP is not necessary here because Applicants have already, on their own, been undertaking the kind of advance planning called for by a formal service assurance plan. Applicants have already made clear the steps they are taking to prepare for the integration of the CP and KCS networks, and Applicants have already detailed the kind of proactive monitoring and reporting they will undertake, all under Board oversight. CPKC has

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196 *See* CN-13 at 76; USDA Comments at 2.

197 *Major Rail Consolidation Procedures*, Ex Parte No. 582 (served June 11, 2001) ("EP 582 Final Rules") at 41. The genesis of the formal SAP was the Board's recognition of "the importance of service to shippers" and "that implementation of any merger plan necessarily has an element of uncertainty." Given these uncertainties, the Board determined that the formal plan "should provide certain essential information, such as their plans to deal with any potential adverse service effects during implementation and to accommodate such less-than-optimum operations ... Moreover, the plan should identify and discuss potential areas of temporary or longer-term service degradation, and appropriate mitigation [and] provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution."

identified metrics it will proactively monitor and report to ensure that there is no service degradation due to the Transaction. Brooks R.V.S. at ¶¶ 36-37. Additionally, as discussed above, Applicants' internal preparations and service protection measures will include proactive planning so that resources can be allocated to "less-than-optimum operations" and "potential areas of temporary or longer-term service degradation."[198] It is particularly telling that none of the advocates of a formal SAP point to anything in particular that Applicants have not already addressed in one form or another.

Applicants understand the Board's goals in instituting the formal SAP requirement and are confident that given the nature of this Transaction, their careful planning and past implementation experience will ensure that they avoid service disruptions during the integration process. Preparation and implementation of a formal service assurance plan that is otherwise unnecessary would accomplish nothing other than the further delay CN has consistently desired and sought.[199]

Second, in a quest for guarantees that nothing will change, some shipper groups have proposed – perhaps inadvertently – conditions that would inject operational rigidity and thereby undermine CPKC's ability to compete effectively. ACC/TFI/NITL seeks a condition requiring that CPKC provide shippers with at least 30 days prior written notice of any planned service changes at shipper facilities.[200] Such a condition would be both unprecedented and misguided. It would deprive CPKC of the flexibility it may need – and that all of its competitors would have

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198 EP 582 Final Rules at 41.

199 *See, e.g.*, CN's Nov. 10, 2021 Letter to the Honorable Cynthia T. Brown (CN-5) (filed Nov. 10, 2021); CN's Nov. 22, 2021 Letter to the Honorable Cynthia T. Brown (CN-7) (filed Nov. 22, 2021); CN's Feb. 23, 2022 Letter to the Honorable Cynthia T. Brown (filed Feb. 23, 2022); CN's May 20, 2022 Letter to the Honorable Cynthia T. Brown (CN-16) (filed Mar. 20, 2022).

200 ACC-6/TFI-5/NITl-3 (filed Feb. 28, 2022) at 23.

–to respond to evolving traffic patterns and other external events. As much as CPKC will seek to provide service that meets the needs of every one of its customers, operating a rail network that serves hundreds or thousands of customers would be untenable were each and every customer be given a 30-day hold on any change in network operations that may affect that one customer, even if it clearly improved network operations for customers as a whole.

The Transaction will not alter the fundamental interdependence of the service levels provided to different shippers on a rail network. For example, every manifest train serves on average more than 40 different customers, meaning that an adjustment (say, a schedule change) that improves service overall may well have implications that are not uniformly desirable for every single customer whose freight rides that train. Elphick R.V.S. at ¶ 93. Similarly, switching crews and locomotives might be more effectively deployed to a shipper with surging volumes (delivering an extra switch to avoid congestion) than to maintain switch cadence for one with declining volumes. A condition that intervened in this fluid process of network optimization and adjustment would prevent CPKC from honing its operations to provide more effective competition, and likely would contribute to causing rather than avoiding service disruption.

Third, some shipper groups have proposed a regime of monetary penalties for post-Transaction service issues. Specifically, ACC/TFI/NITL asks the Board to implement a sliding scale of charges based on CP's post-transaction performance,[201] and the National Grain and Feed Association requests that the Board impose financial penalties for service failures.[202] These conditions would be similarly unprecedented and counterproductive. Indeed, a system of

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201 *Id.*

202 NGFA-1 at 10.

monetary penalties for service failures "would put the proponent of a condition in a better position than before the merger," which is disqualifying under the Board's precedents.[203] Such a regime does not exist for any shipper in the pre-Transaction world, and none has ever been imposed in any merger, even in the aftermath of the UP/SP and CSX/NS/Conrail service disruptions.[204] In fact, a service guarantee penalty regime would be counterproductive and distort CPKC's service offerings, handicap CPKC from competing against other Class 1s not subject to this strict regime, and inject unhelpful adversity and rigidity into a set of customer relationships. *See* Brooks R.V.S. at ¶¶ 44-45. The Board should not impose such an extraordinary condition here, especially given Applicants have already committed to establishing collaborative processes for customer involvement, input, and proactive remediation of any escalation any Transaction-related service concerns. Brooks R.V.S. at § III.

VI. THE "CAPACITY CONCERNS" ADVANCED BY UP, BNSF, AND CN HAVE NO MERIT

As set forth in the Application and in the Reply Verified Statement of Elphick and Orr, Applicants have carefully assessed the degree to which the traffic gains they anticipate from the Transaction will require additional capacity on CPKC's rail network, using the same tools they would deploy in the ordinary course to assure that their operations would not overtax capacity available from infrastructure and other resources. Claims to the contrary, primarily by other Class 1 railroads, are incorrect. Applicants recognize that evolving traffic levels and operations of all carriers using elements of the rail network will call for careful and ongoing review of how these operations are impacting available rail capacity. Applicants' self-interest in serving its customers will demand no less. Where CPKC will share trackage with UP, BNSF, or others, it

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203 *UP/SP*, Finance Docket No. 32760 (Decision No. 103, served May 1, 2008) at 6.

204 *See CN/IC*, 4 S.T.B. at 122.

will be dedicated to working collaboratively to ensure operations are coordinated fully and effectively, and that capacity is added as necessary to accommodate the needs of all users.

UP and BNSF, two of the Class 1 railroads most threatened by the new competition they will face from CPKC's new single-line service, manufacture concerns about the capacity available to support this new competition as a basis for demanding that the Board impose unprecedented conditions that would effectively give UP and BNSF the right to pre-approve CPKC's competitive initiatives. These requests are blatantly anticompetitive and should be denied.

As we demonstrate in this Section, CPKC's proposed operations and anticipated traffic growth will not exceed available rail capacity or disrupt the operations of UP, BNSF, or any other carrier. In Section VI.A., we explain that the basic features of the Transaction ensure that new CPKC traffic will not overwhelm existing rail capacity. In Section VI.B., we address the concerns that UP and BNSF raise about the lines in Texas they will share with CPKC. And in Section VI.C., we address the remaining concerns raised about capacity on other parts of the future CPKC network by UP, BNSF, and CN. We address Metra's specific contentions in Section VII below.

A. Basic Features of the Transaction Will Prevent CPKC Traffic Growth From Overwhelming Rail Capacity

The same key features of the CP/KCS Transaction that will help assure that there are no service disruption concerns will also help assure that CPKC's traffic growth does not exceed available rail capacity.

First, Applicants have carefully planned ahead and assessed the capacity needs of the CPKC network. Applicants have proposed extensive new capacity infrastructure – on top of

work that CP and KCS are undertaking independently on their own networks.[205] These infrastructure improvements will be more than sufficient to ensure that the capacity needs of the CPKC network are met.

Second, there will be no all-at-once flip of a switch that sends new rail traffic pouring onto existing infrastructure. CPKC's trains on Day 1, and perhaps on Day 180, will be the same as they are today. Unlike in the merger transactions with which UP and BNSF are most familiar, CP/KCS will not unilaterally reroute a single train. Rather, CPKC will gradually add new trains over time if (and only if) CPKC is successful in attracting shippers to its new single-line network.

Third, because the only new traffic that shows up on the CPKC network will be traffic that shippers choose to put on CPKC's network – by shifting it away from existing routes – the limitations imposed by capacity constraints (were such constraints really to exist) would be self-regulating. CPKC's anticipated growth will depend on its ability to provide service that meets customer needs, and does so materially *better than their existing options*. Shippers will not choose CPKC if capacity constraints on the CPKC network lead to gridlock or extensive service deterioration. Applicants' careful analysis has confirmed service will not deteriorate because there is ample capacity throughout the network, and CPKC will be motivated to ensure that this remains the case.

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[205] UP and BNSF's claims that Applicants have proposed no new investments are just wrong, *See* BNSF-9 at 58 ("Applicants have proposed no new capacity improvements in order to handle the projected CP-KCS traffic volumes."); UP-10 at 10 ("Applicants failed entirely to address the impact of their transaction on infrastructure that they use but that is owned by other railroads."); Comments of Norfolk Southern Railway Company and Request for Conditions (filed Feb. 28, 2022) ("NS-9") at 69 (Applicants "make no commitment to invest in capacity or ability to handle the projected growth."). We have done so wherever warranted, but only where such investments are necessary to accommodate Transaction-related growth. CPKC will of course continue to make improvements to its own network – and support improvement in other lines it uses to support growth that occurs independent of the Transaction. Elphick/Orr R.V.S. at ¶ 30.

Fourth, for the same fundamental reason, if experience shows that infrastructure improvements would achieve desirable improvements in service or reliability, or if they proved necessary to accommodate greater-than-expected growth, CPKC will be *more motivated than anyone else* to identify and implement such capacity improvements. CPKC will not be reluctant to invest in capacity, as CP and KCS's recent track record and Applicants' plans ought to demonstrate. *See* Reply Verified Statement of Keith Creel ("Creel R.V.S.") at ¶3, 25.

B. The Transaction Will Not Cause Disruption on the Lines KCS Shares with UP and BNSF in Texas

UP and BNSF focus most of their attention on the UP lines in Texas over which CPKC must operate in order to compete with UP and BNSF. These railroads are quite transparent about their view that nearly every new carload, or intermodal container, that CPKC would haul across the UP trackage rights and through Houston would be traffic that is taken away from their own "superior routes." In their zeal to protect themselves and their supposed traffic "entitlements," UP and BNSF demand that the Board set aside the binding trackage rights agreements that govern KCS's (and following the Transaction, CPKC's) operations over UP trackage and grant them a unilateral veto on the new competition CPKC would generate:

- UP insists that CPKC *not move a single carload of new traffic* until UP gives the green light. UP requests that the Board require Applicants to "commit *not to increase CPKC operations* on affected lines above pre-merger CP or KCS levels *until the owners and users of the lines agree* sufficient capacity has been added to accommodate the traffic growth."[206]

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206 UP-10 at 76.

- BNSF's boldly asks that the Board impose a condition that would both require CPKC to "fully fund" all capital improvements on UP lines in Texas that BNSF also uses and "to not increase existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines . . . *until necessary capital improvements are identified, fully funded by Applicants, and implemented*."[207]

Applicants are not in the slightest dismissive of the need to evaluate capacity needs and work with other users of shared infrastructure to ensure that the operations of all users can be accommodated effectively and efficiently. They have already conducted extensive analysis, and they are committed to doing more in collaboration with UP and BNSF as to these lines as the traffic and operations of all users evolve. But the capacity concerns raised by these other Class 1s are vastly overblown. With appropriate attention to operational discipline, there is more than enough capacity to accommodate CPKC's relatively modest train count increases that are anticipated over the course of the three-year implementation period. Even if the traffic growth on these lines does end up requiring additional infrastructure, CPKC will be the first to suggest that those investments are made. The governing trackage rights agreements already provide the processes and mechanisms for adding and funding any such new infrastructure. Giving UP and BNSF a unilateral (or coordinated) veto over CPKC's new competition is not only unnecessary, but it would be affirmatively contrary to the public's interest in letting CPKC compete.

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[207] BNSF-9 at 73 (emphasis added) ("In the absence of a plan by Applicants to address how increased CP-KCS traffic will be handled on shared lines in Texas – and until necessary capital improvements are identified, fully funded by Applicants, and implemented – require Applicants to not increase existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines.").

1. UP and BNSF Proceed from the False Premise that CPKC Needs Their Permission to Use Shared Trackage to Compete Against Them

The principal thrust of the conditions requested by UP and BNSF, ironically, relates to trackage rights the Board required UP to grant to The Texas Mexican Railway Company ("Tex Mex") in *UP/SP* in order to "ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo."[208] UP and BNSF each overtly seek to impose a unilateral veto right that entitles them to hold up any new operation over their trackage until massive amounts of new capacity are added. And worse, UP and BNSF seek the Board's imprimatur to hold the Transaction hostage to whatever ransom demands UP and BNSF choose to make (measured in the currency of CPKC dollars spent on UP trackage), since any competitive traffic gains would turn on UP's and BNSF's agreement to let the cars pass.[209]

These demands are fundamentally at odds with KCS's existing rights to the use these lines in common with UP and BNSF, which will give KCS – and CPKC as KCS's successor – *equal rights* to the lines shared with UP and BNSF, including the contractual rights to increase traffic on those lines in competition with UP and BNSF. When granting those rights, the Board flatly rejected efforts by UP and BNSF – echoed in their current arguments – to prevent KCS from competing against UP. The Board made very clear that UP's desire to keep new Tex Mex traffic off of its lines did not justify limitations on Tex Mex's rights: "UP/SP is contending, in essence, that the SP route is already congested and that it would prefer to keep that route for itself alone. Neither contention provides any justification for keeping Tex Mex's trains off the

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208 *UP/SP*, 1 S.T.B. at 424.

209 BNSF-9 at 73 ("Require Applicants to fully fund any capital improvements that would not be required but for increased CP-KCS traffic on lines owned by BNSF or other railroads.").

SP route."[210] Similarly, the Board rejected BNSF's effort to veto Tex Mex's (now KCS's) rights by stepping in to replace Tex Mex's role in serving Mexican cross-border traffic, noting that Tex Mex "rights are not contingent upon BNSF's approval."[211] The Board should continue to reject UP's and BNSF's efforts to obtain a veto over KCS's newly invigorated competition.

KCS's existing rights unequivocally granted KCS – and will give CPKC – full and equal access to UP trackage. Specifically, the trackage rights terms imposed by the Board in 1996 granting Tex Mex (now KCS) access to UP trackage rights between Robstown and Beaumont, TX make clear that KCS has "access to and joint use of the Joint Trackage . . . *equal to that of [UP]*."[212] The same right of "equal access" is set forth in the terms covering other UP-owned trackage between Rosenberg and Beaumont, including the Houston lines of Houston Belt & Terminal Railway Company ("HB&T"), which are owned in equal shares by UP and BNSF, and UP's former-SP line between Houston and Beaumont, over which UP instituted directional running with which KCS complies.[213] The governing trackage rights terms likewise provide for

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210 *Id.* at 607.

211 *Id.* at 595.

212 Terms for Texas Mexican Railway Company Trackage Rights between Missouri Pacific Railway Company and Southern Pacific Transportation Company, on the one hand, and The Texas Mexican Railway Company, on the other hand (Dec. 12, 1996) ("KCS-UP Robstown-Beaumont Trackage Rights Terms"), Exhibit B (General Terms), § 2.4 (Simmons R.V.S. Exh. 2) (emphasis added).

213 *See* Houston to Beaumont, TX Trackage Rights Agreement between Southern Pacific Transportation Company and The Texas Mexican Railway Company (June 16, 1997) ("UP-KCS Houston-Beaumont Agreement"), § 1 & Exhibit B (General Terms), § 2.2 (covering rights over former-SP line between Houston and Beaumont to facilitate UP's directional running plan) (Simmons R.V.S., Exh. 4); Terms for Texas Mexican Railway Company Trackage Rights between Houston Belt & Terminal Railway Company and The Texas Mexican Railway Company (Jan. 28, 1997) ("HB&T-KCS Terms") § 1 & Exhibit B (General Conditions) § 2.2 (covering trackage in Houston owned by HB&T (in turn owned 50% by each of UP and BNSF) (Simmons R.V.S., Exh. 3)).

the equal treatment of KCS in all matters concerning "the management, operation (including dispatching) and maintenance of the Joint Trackage."[214]

In addition to having equal rights, these agreements place no restriction whatsoever on the *volume* of traffic that KCS is entitled to handle using these rights. Indeed any such limitation would be contrary to the Board's intention that the rights be used to compete against UP for Laredo gateway traffic, and the Board's specific determination that Tex Mex be able to "gain additional traffic" using those rights.[215] The Board should reject any suggestion that CPKC requires UP or BNSF permission to compete against them and thereby potentially increase the volume of traffic moving in CPKC trains over these trackage rights segments.

2. The Facts Show that CPKC's Potential New Trains Will Not Exceed Capacity on UP/BNSF Trackage Rights Segments in Texas

A careful assessment of the merits of UP's and BSNF's capacity claims shows there is no cause for concern. KCS's operations over the UP trackage rights segments have posed challenges for KCS in the past, and will continue to require close coordination among the three railroads, but with extensive recent infrastructure investments by both KCS and UP, there is now (or soon will be) infrastructure that is more than adequate to accommodate CPKC's planned operations. We review these facts below, beginning with (a) the Houston complex itself, from Rosenberg, southwest of Houston on UP's Sunset Line (where KCS's own line ends and trackage rights begins) through the Houston terminal, and we then address (b) the two

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214 KCS-UP Robstown-Beaumont Trackage Rights Terms, Exhibit B (General Terms), § 2.4 (Simmons R.V.S., Exh. 2) (UP has "exclusive direction and control" over the movement of equipment over the trackage, "but in the management, operation (including dispatching) and maintenance of the Joint Trackage, [UP] and [KCS] shall be treated equally."); *see also* UP-KCS Houston-Beaumont Agreement, § 1 & Exhibit B (General Conditions) § 2.4 (Simmons R.V.S., Exh. 4); HB&T-KCS Terms, § 1 & Exhibit B (General Conditions) § 2.4.

215 *UP/SP*, 1 S.T.B. at 410.

directionally-operated UP lines that KCS uses between Houston and Beaumont, (c) KCS's Neches River Bridge in Beaumont, which BNSF and UP (and Amtrak) also use, and (d) the UP trackage lines in south Texas over which KCS operates between Victoria, TX and Robstown, TX (some portions of which also host BNSF operations).

a) There Will Be No Capacity Shortfall in the Houston Terminal Complex

The focal point of UP's and BNSF's stated capacity concerns is the Houston Terminal, which all KCS (and future CPKC) trains must traverse in order to move between KCS lines south of Houston (including Mexico) and the remainder of the KCS network. Even though CPKC will have no interest in overburdening this infrastructure, and thereby interfering with its own efforts to attract traffic moving via other rail route today, UP and BNSF theorize that additional CPKC trains will be the straws that breaks the camel's back. This is nonsense. The Houston Terminal has extensive available capacity, provided it is managed efficiently, and extensive additional capacity is in the pipeline as a result of projects UP has underway today.

CPKC is committed to cooperating with UP and BNSF to ensure that the Terminal is operated effectively, and the capabilities of the Houston Terminal's extensive infrastructure is not sub-optimized. The Houston Terminal has accommodated many more trains than operate today, or will operate with the anticipated CPKC growth. To the extent there emerges any need – or even any benefit – to adding additional infrastructure, CPKS will not hesitate to support those initiatives.

The Houston Terminal Has Extensive Capacity. There is extensive rail capacity in and around the Houston Terminal. Massive investments in additional capacity have been made since UP and SP merged in 1996. Unlike many rail terminals, Houston is blessed with multiple alternative through routes, all with multiple (double or triple) tracks. As explained by Elphick

and Orr, and also by Wilkerson, who managed the Houston complex for UP from 2008 to 2013, the Terminal has ample capacity to handle the modest number of additional through freight trains (only about four in each direction) anticipated from the CP/KCS Transaction. Elphick/Orr R.V.S. at ¶¶ 46-54; Reply Verified Statement of Jason Wilkerson ("Wilkerson R.V.S.") at ¶¶ 7-13.

Even with the addition of CPKC's new trains, CPKC will continue to be a distinct minority user of Houston's rail infrastructure. Additionally, through train operations will impose (on a train-for-train basis) far less burden on that infrastructure than those of UP and BNSF, which change crews, enter and exit yards, and are otherwise impose considerably more complex demands on the terminal than KCS's (or CPKC's) trains – which need only move across Houston via the multiple tracks, and multiple routes available for those movements. Elphick/Orr R.V.S. at ¶ 13; Reply Verified Statement of John F. Orr ("Orr R.V.S.") at ¶ 13; Wilkerson R.V.S. at ¶ 14. UP (with the financial support of KCS and BNSF) has invested heavily in Houston rail capacity, and more work is underway, including on the routes used by KCS's trains. Elphick/Orr R.V.S. at 51-52; Orr R.V.S. at ¶ 19; Wikerson R.V.S. at ¶ 11.

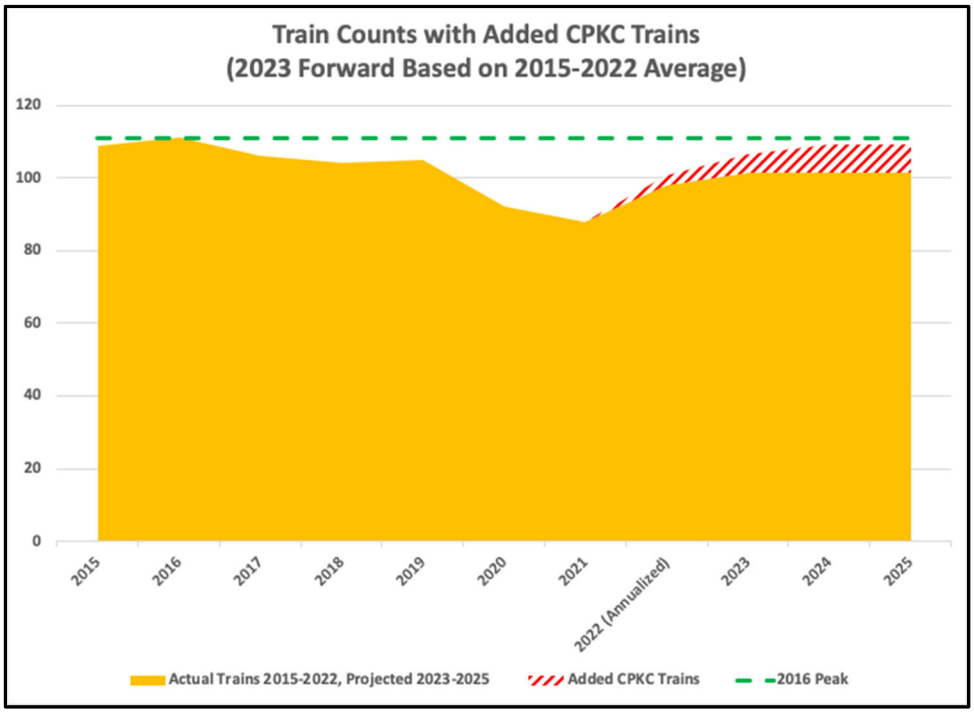
Elphick and Orr review in detail the capacity available to support CPKC's modest proposed increases in trains through Houston, which will be no different in character from KCS's existing operations. Those trains will impose minimal burdens in the infrastructure and be easy to accommodate, provided UP and BNSF are operating the Houston Terminal efficiently and appropriately. Elphick/Orr R.V.S. at ¶¶ 46-54; Orr R.V.S. at ¶¶ 7-12; Wilkerson R.V.S. at ¶ 22.

Comparisons to Historic Traffic Levels Prove that Houston Has Ample Capacity for CPKC's Anticipated Growth. Even before the recent capacity investments, the Houston

Terminal routinely supported train activity levels well in excess of current levels, and more than sufficient to sustain the modest increases in CPKC volumes. As Simmons explains, even with the anticipated additional CPKC trains, the total trains per day would be less than what Houston's rail infrastructure supported four to five years ago. Simmons R.V.S. at ¶¶ 10–14; *see also* Orr R.V.S. at ¶¶ 7-12. The additional infrastructure that has been installed in that area in the last four to five years will only further support operational fluidity.

Figure 7 below, drawn from Orr's testimony, shows that the projected train counts in the Houston Complex in 2025 will not reach the peak level that was supported in 2016 even with the anticipated CPKC volume increases.

FIGURE 7[216]
ADDITION OF CPKC TRAINS WILL NOT PUSH HOUSTON TRAIN COUNTS ABOVE LEVELS ACHIEVED FLUIDLY IN RECENT YEARS



216 Orr R.V.S. at ¶¶ 9-11.

UP's and BNSF's Transient Operational Challenges Are No Excuse for Their Attempted Veto of CPKC Competition. As Orr explains, UP's and BNSF's concerns about future Houston operations appear to stem in large part from the difficulties both are currently having managing their own operations there and elsewhere. Orr R.V.S. at ¶¶ 18-19. CPKC should not be punished for UP's and BNSF's operational difficulties. UP's operational choices and its lack of adequate resources – in terms of power and train crews – have contributed to congestion and significant delays to KCS trains in and around Houston. *Id.* These kinds of failures need to be fixed, and Applicants have every confidence that UP (and BNSF) will fix them. CPKC will stand ready to help by collaborating with all of the other users of the Houston Terminal to ensure that its available capacity is not squandered by sub-optimal operating practices. But UP and BNSF should first get their own houses in order before looking to CPKC to bail them out with unnecessary investments in expensive new infrastructure. *Id.*

There Is No Possibility of a Repeat of UP's 1997-98 Service Crisis. UP and BNSF repeatedly invoke the specter of the 1997-98 UP service crisis, which originated at Englewood Yard in Houston, to stoke fear that CPKC would cause similar problems if their conditions are not granted. This comparison is far wide of the mark. Nothing about the modest increase in through trains anticipated from the CP/KCS Transaction is remotely comparable to the extensive disruption to Houston operations that arose from the perfect storm of SP's collapsing infrastructure and the wholesale changes in Houston operation from UP's integration of UP and SP facilities and the addition of entirely new BNSF trackage rights operations. As the Board found, the Houston service crisis was prompted by many factors, including the dilapidated state

of SP's infrastructure in and around Houston.[217] And as the Board also found, all of that soon changed with the advent of directional running, the implementation of the joint Spring Dispatching Center, investments in Houston infrastructure, and many other developments. As Simmons explains, Houston today bears little resemblance to its condition leading into the service crisis of the late 1990s. Simmons R.V.S. at ¶ 41.

First, massive amounts of additional capacity has been added since the service crisis. In the *UP/SP Houston/Gulf Coast Oversight* proceeding, UP committed to invest $1.4 billion to add capacity in and around Houston to support traffic growth.[218] KCS paid its share of part of those investments. {{[redacted]}} Elphick/Orr R.V.S. at ¶ 19.[219] KCS itself has spent over $100 million on capital investments in the trackage rights lines since 2014, with UP investing a quarter of a billion dollars in Englewood and Settegast Yards in the last three years. Simmons R.V.S. at ¶ 41.

Second, as the Board noted in 1998, operational changes fundamentally altered the Houston railroad landscape and the productivity of the installed base of capacity. The joint Spring Dispatching Center gave Houston dispatchers visibility into trains heading toward Houston from all points, allowing them to plan in advance how to route those trains to their

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[217] *Western Coal Traffic League* v. *Union Pac. Ry. Co.*, Finance Docket No. 33726 (served Nov. 30, 2000) at ("[T]he expenses prompted by the service crisis here were not the result of any one event, but rather were caused by a confluence of several events and circumstances – derailments, maintenance, a major traffic embargo, severe weather, and traffic surges – not uncommon to railroading.").

[218] *See UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. 1030, 1033, Finance Docket No. 32760 (Sub-No. 26) (Decision No. 10 served Dec. 21, 1998) ("UP has promised to invest $1.4 billion in Houston area infrastructure if the Consensus Plan is not adopted.").

[219] *See also* {{[redacted]}}

destinations in Houston, of across the Houston terminal in KCS's case. Elphick/Orr R.V.S. at ¶ 61; Orr R.V.S. at ¶ 23; Simmons R.V.S. at ¶ 41. The Board's "clear route" directive, had it been fully complied with, would have further improved efficiency by ensuring that through trains (like KCS's) were not unnecessarily held up by congestion on their customary routes. Orr R.V.S. at ¶¶ 31-33. [220] In addition, as the Board touted in 1998, UP's then-recent implementation of directional running on its lines northeast and east of Houston (between Houston and St. Louis and between Houston and Beaumont) dramatically expanded capacity and helped overcome the service problems that occurred in 1998. Simmons R.V.S at 41.[221]

Third, train volumes in and around Houston are significantly lower now – and will continue to be even following the implementation of the CP/KCS Transaction – than they were in 1997/1998.[222] At that time, the Board noted that "Houston Terminal dispatchers handle roughly 150 trains per day in a complicated terminal." Today, the average is closer to 100-120 trains per day, as shown in Figure 7 above.

Finally, the impact of CPKC's operations through Houston will be nothing like that of *UP/SP* and the implementation of the sweeping UP-BNSF settlement agreement. There will be no "new" mode of operations, no terminal consolidations, and no introduction of a new trackage

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220 *See UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. at 1038 (explaining that the clear route condition is "to enhance efficiency and facilitate the smooth movement of traffic through the Houston Terminal," and noting that alternative routes should be used "when customary routings are unavailable or congested.").

221 *See UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. at 1053 ("Until UP implemented the merger, which involved designing and installing a new computerized information and management control system, designing and implementing new train operating systems, and consolidating under one set of rules the various employee functions involved in the running of the railroad, it could not put into effect the new operational changes such as 'directional running,' which played a major role in easing the service crisis.").

222 *See id.* at 1050 ("But as UP points out, Houston Terminal dispatchers handle roughly 150 trains per day in a complicated terminal area and, in carrying out their duties, must perform over 2,300 actions in a 24-hour period, roughly one every 40 seconds.").

rights tenant. CPKC will step into KCS's shoes and, to the extent its new single-line services are viewed as attractive by rail customers, it will attract additional traffic that supports additional through trains, none of which will perform work in Houston-area yards. Thus, in today's environment, adding a handful of through trains is incapable of causing the kind of disruption that occurred in 1997 and 1998.

b) There Is Adequate Capacity on the UP-Owned Lines Between Houston and Beaumont

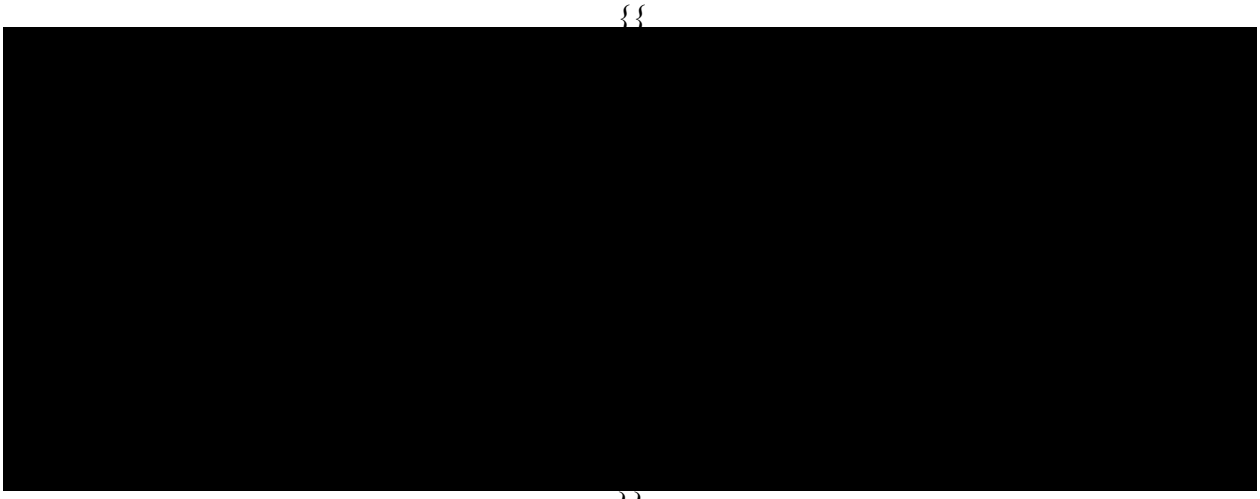
East of the Houston terminal, CPKC will operate over two separate directionally-operated UP lines between Houston and Beaumont. Eastbound trains will use UP's former-MP Beaumont Subdivision, and Westbound trains will use UP's former-SP Houston Subdivision, formerly known as the Lafayette Subdivision. UP's own assessment of capacity on these lines shows that there is ample available capacity (headroom, as measured by the difference between maximum fluid capacity and current train volumes) on these segments. That relationship is depicted in Figure 8 below.[223] Orr, who did not have the benefit of these confidential UP documents, reaches the same conclusion. Orr R.V.S. at ¶¶ 7-12.

[223] Figure 8 depicts the portion of the Lafayette (Houston) Subdivision with the greatest number of trains relative to fluid capacity; the portion east of Dayton would show {{[redacted]}}

FIGURE 8[224]

UP'S ASSESSMENT OF AVAILABLE CAPACITY ON BEAUMONT AND LAFAYETTE SUBDIVISIONS

{{



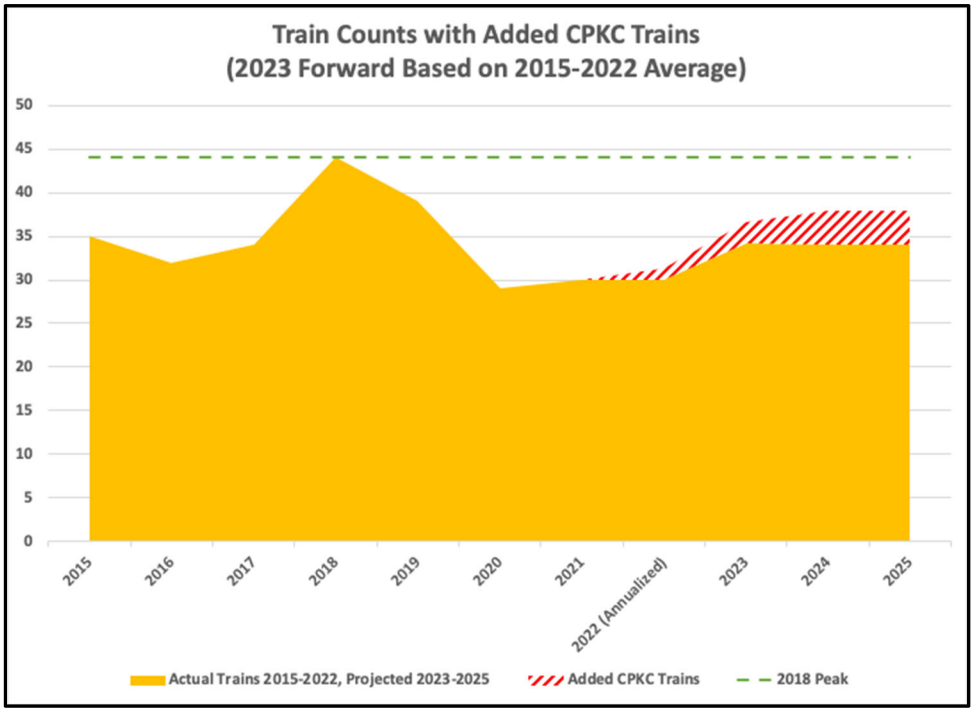
}}

This view is entirely consistent with, and corroborates, Simmons' assessment based on his comparison of current train counts with the historical volumes operated fluidly on the Lafayette Subdivision. Simmons R.V.S. at ¶ 14. Orr's Reply Verified Statement also supports this finding as reproduced in Figure 9 below. The headroom over and above the additional trains CPKC proposes is manifest. *See also* Orr R.V.S. at ¶¶ 10-14.

[224] *See* Workpaper "Workpaper Narrative Beaumont Lafayette.xlsx," Tabs "Beaumont Sub" and "Lafayette Sub."

FIGURE 9[225]

ADDITION OF CPKC TRAINS WILL NOT PUSH LAFAYETTE SUBDIVISION (HOUSTON-BEAUMONT) TRAIN COUNTS ABOVE LEVELS ACHIEVED FLUIDLY IN RECENT YEARS



c) Concerns About the Neches River Bridge at Beaumont Are Unwarranted

UP and BNSF express concern about the impact of the Transaction on operations over KCS's bridge across the Neches River at Beaumont, over which BNSF and UP operate, and over which Amtrak's Sunset Limited operates three days per week.[226] As explained by Simmons, a recent study undertaken jointly by KCS, UP, and BNSF has confirmed that the bridge has ample capacity to accommodate the incremental Transaction-related traffic. Thus, there is ample room for the 10.97 additional trains per day that CPKC anticipates by the end of the third year

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225 Elphick/Orr R.V.S. at ¶¶ 9-11.

226 UP-10 at 59-62; BNSF-9 at 59-61.

following Transaction implementation. Simmons R.V.S. at ¶¶ 44-51; Elphick/Orr R.V.S. at ¶ 56. In the words of the joint study, {[redacted]}[227] Controlling for outliers, the project found that the {[redacted]}[228] With appropriate cooperation among the three railroads on processes to make efficient use of the bridge, there is no obstacle to adding the additional trains that Applicants anticipate.

Additionally, the joint study of bridge capacity found that readily available operational adjustments – or just more focused attention – would be sufficient to achieve the bridge's full throughput capacity. Simmons R.V.S. at ¶¶ 49-51. In light of this conclusion, it is no surprise that UP and BNSF had previously declined to support proposals by the Texas DOT to build a second bridge across the Neches River to handle UP and BNSF traffic there.[229]

In addition to the KCS-led joint study, history shows that there is capacity to accommodate the levels of traffic anticipated from the CP/KCS Transaction. Elphick/Orr R.V.S. at ¶¶ 57-62. Elphick and Orr show that past traffic levels indicate that the bridge has handled 20-25 more trains than use the bridge today, leaving more than enough room for the 10-11 trains that the Transaction will bring to this segment. *Id.* at ¶ 56.

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227 *See* Simmons R.V.S., Exh. 9; ({[redacted]})

228 *Id.*

229 Ironically, UP once had its own bridge but abandoned it in favor of operating over KCS's bridge. In 2013 and 2016, both UP and BNSF opposed Texas DOT's ("TxDOT's") efforts to construct a new rail bridge over the Neches River. *See* Simmons R.V.S. at ¶ 44; {{[redacted]}}(Vol. 3, Exh. 47).

Finally, UP is wrong that Applicants' capacity analysis focused only on CPKC trains without considering the additional trains that UP, BNSF, and Amtrak operate over the Neches River Bridge.[230] The train counts reported in the Operating Plan Appendices focus on CPKC train operations, and in particular the effect of the Transaction on those train counts. But Applicants' analysis of available capacity considered all demands on the rail infrastructure CPKC will use, including in the case of the Neches River Bridge all of the trains UP says were not taken into account. *Id.* at ¶¶ 57-62.

d) There Is Adequate Capacity on the UP-Owned Lines Between Victoria and Robstown

There is also adequate capacity across the UP trackage between Robstown and Victoria, TX, despite the contentions of UP, BNSF, and CN.[231] This capacity can be shown through the past and ongoing capacity projects. Elphick/Orr R.V.S. at ¶¶ 36-45. For example, KCS is adding extensive capacity to allow for staging to and from the Border that will augment capacity on UP-owned lines between Robstown and Victoria. *Id.* at ¶ 39. Further, KCS is constructing a new siding at "Telferner," which is four miles north of Victoria, already has a siding and two staging tracks immediately west of Robstown, and is constructing an extension of its switching lead on the north end by 6,900 feet freeing the existing switching lead and allowing for the siding to be extended to 14,900 feet. *Id.* at ¶ 42.

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230 UP-10 at 11.

231 UP-10 at 556-57; BNSF-9 at 228-230; CN-13, Verified Statement of Hugh Randall ("Randall V.S.") at Ex. B, ("Randall V.S.").

3. UP and BNSF Demands that CPKC Fund 100 Percent of Any New Infrastructure Is Overreaching and Inappropriate

Even if there were any merit to UP's and BNSF's contentions that additional capacity infrastructure is needed on the trackage rights lines KCS uses, it would be inappropriate for the Board to override the governing trackage rights agreements in order to impose on CPKC an obligation to fund 100 percent of any new capacity on these lines. It would be even more inappropriate to give UP and BNSF carte blanche to spend CPKC's money on whatever additional capacity they might decide would be advantageous, which would be the inevitable result of giving them the right to hold up any incremental CPKC volumes.

As discussed above, CPKC is committed to working collaboratively with UP and BNSF to ensure that operations on these shared lines work for all users. That means that if new infrastructure investments are needed, CPKC will support the work needed to identify the optimal approach to capacity expansion (including using RTC analysis if that makes sense), install that capacity, and pay for that capacity, according to the provisions and processes already established in the governing agreements.

Of course, the starting point in those trackage rights agreements (the "Terms") place responsibility squarely on UP – as trackage rights landlord – to support the growth of all users, including KCS. For example, UP is obligated to make "[a]dditions to the Joint Trackage as shall be necessary to accommodate the traffic of [UP] and [KCS] while maintaining existing service standards (including transit times) in effect on the date of the Terms."[232] "Additions" include

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[232] KCS-UP Robstown-Beaumont Trackage Rights Terms, § 1 & Exhibit B (General Terms), § 2.2 Simmons R.V.S., Exh. 2) ("[UP] shall … be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms."); HB&T-KCS Terms, § 1 & Exhibit B (General Conditions) § 2.2 (Simmons R.V.S., Exh. 3).

such projects as "sidings, Centralized Traffic Control, [and] grade separations," and spell out a comprehensive framework for KCS's sharing in the costs of such Additions, with the cost of most Additions (unless made for the "sole benefit of one party") shared by KCS in proportion to its share of GTMs on the line.[233]

The funding of that infrastructure cannot be shifted by UP and BNSF to place 100 percent of infrastructure costs on KCS (in the future CPKC), contrary to BNSF's contention.[234] BNSF acknowledges that existing agreements cover capacity additions that might be required on shared lines.[235] UP and BNSF have also shown that they understand how the cost sharing provisions in the trackage rights agreements operate.[236] The parties have ample experience negotiating to allocate costs based on the anticipated benefit they will each receive as a result of the improvements and reaching mutually beneficial compromises. Simmons R.V.S. at ¶¶ 15-35.

In sum, UP's and BNSF's attempt to shift 100% of infrastructure costs to CPKC has no basis in precedent and would override the existing trackage agreement that the Board imposed to enable KCS to grow its traffic and compete against CP and BNSF. The Board should reject UP's and BNSF's attempt to hitch a free ride.

C. There Will Be Adequate Capacity for the Traffic that CPKC Hopes to Attract Elsewhere on Its Network

CN, CP, BNSF, and NS raise concerns about potential capacity shortfalls at a number of additional locations across the CPKC system. These attacks have no merit and overlook the

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233 KCS-UP Robstown-Beaumont Trackage Rights Terms, § 5(b) (Simmons R.V.S., Exh. 2);; HB&T-KCS Terms, § 5(b) (Simmons R.V.S., Exh. 3).

234 *See* BNSF-9, Verified Statement of Sarah Bailiff at 2.

235 *Id.*

236 {[redacted]}

substantial upfront and ongoing capital investments that CPKC will make on the North-South corridors where CPKC will seek to attract traffic.

CN, based on the analysis of its witness, Randall, raises concerns about the available capacity on (i) KCSM lines in Mexico, (ii) KCS's Laredo Subdivision (between Laredo and Robstown, TX), (iii) KCS's Rosenberg Subdivision (between Victoria, TX and Rosenberg, TX), (iv) KCS mainline between Beaumont and Kansas City, (v) CP's Laredo Subdivision (between Moravia and Powersville), (vi) CP's Ottumwa Subdivision, (vii) CP's Davenport Subdivision, (viii) CP's level crossing with BNSF at Savanna, IL, (ix) CP's Chicago Subdivision, (x) CP's Elgin Subdivision and other lines in the vicinity of Chicago, and (xi) CP's Marquette Subdivision. Elphick/Orr R.V.S. at ¶¶ 21-68. However, Randall makes a slew of errors in his analysis, which lead him to overstate the capacity utilization on KCSM's lines. Among other errors, Randall (i) confuses practical capacity and maximum capacity in his calculations, leading him to conclude that certain subdivisions are at or exceed practical capacity, when in fact, they fall well below, (ii) improperly omits from his analysis existing infrastructure and recent capacity expansion projects, and (iii) overcounts the number of 10,000 foot trains that CPKC intends to run. Elphick/Orr R.V.S. at ¶¶ 29-68.

Likewise, UP's suggestion that CPKC's anticipated traffic growth on CP's paired track between Airline Junction, MO and Polo, MO would push the line over capacity is incorrect because UP's witnesses, Kenny Rocker and John Turner, incorrectly treat the line as a single track. Elphick/Orr R.V.S. at ¶ 78. UP also complains that the railroad network in St. Paul can become congested, and asserts a possible need to add trackage on its own lines to hold its own

trains while waiting for access to trackage that UP shares with BNSF and CP.[237] But CPKC will be adding only about six trains per day at this location, and will remain the distinct minority user of these lines, which will still remain below historical capacity. *Id.* at ¶¶ 79-81.

BNSF expresses vague concerns about capacity on CP's Davenport Subdivision (between Davenport and Clinton, IA), over which BNSF has trackage rights allowing it to provide local service, noting the CP segment is "unsignalized."[238] BNSF expresses concern that this CP segment is "unsignalized."[239] However, BNSF does not take into account that this year (2022) CP is installing CTC across much of the Subdivision (between Deer Creek and Davenport) as part of a project unrelated to the Transaction, and will add CTC to the remainder as part of Transaction implementation. CTC will enhance capacity on this segment. Elphick/Orr R.V.S. at ¶ 89.

Finally, Norfolk Southern expresses concern about the capacity of KCS's Wylie intermodal facility. NS-9 at 23-25.[240] That issue is fully addressed in Section VIII.B.[241]

VII. METRA'S CONCERNS ARE UNFOUNDED

Metra requests that the Board impose a long list of extraordinary conditions on the Transaction, including extensive infrastructure investments and a re-writing of the contractual terms between CP and Metra to shift dispatching control to Metra and alter the financial

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237 UP-10 at 64-65. CN, while not actually claiming a problem exists, asserts that Applicants did not supply "information necessary to prove" sufficient mainline and arrival/departure tracks. CN-13, Randall V.S. Exh. A.

238 BNSF-9 at 66-67.

239 BNSF-9 at 67.

240 CN's witness Randall asserts that Applicants have not "prove[n]" that the facility will be able to handle the anticipate increase in volume. CN-13, Randall V.S. Appendix A.

241 *See* Section VIII.B.3; Elphick/Orr R.V.S at ¶¶ 116-117.

compensation owed by CP to Metra, all supposedly to mitigate potential adverse impacts on Metra's commuter service.[242] Metra's position appears to stem from its misunderstanding of the Transaction's impacts. That misunderstanding likely flows in part from the irredeemably flawed analysis conducted by Metra's outside consultants Thomas D. Crowley and Robert D. Mulholland.[243] Metra has been led far astray by its consultants, who have based their opinion in this proceeding on an RTC simulation that is so riddled with errors that it is demonstrably incapable of modeling the status quo,[244] much less the potential impact of the Transaction.

As demonstrated below – and as confirmed by Applicants' corrections to the RTC simulations undertaken by Metra's consultants, the Transaction *will not* adversely affect Metra's passenger services anywhere. *See* Reply Verified Statement of Raymond A. Elphick ("Elphick R.V.S.") at ¶ 24, 36. Indeed, the MD-N Line from Chicago north to Fox Lake, IL will see *zero* additional trains,[245] and train counts will not increase on the portion from which runs from Chicago west to Elgin and Randall Road east of Bensenville Yard. *See* Elphick R.V.S. at ¶¶ 7, 11, 1]. The existing infrastructure on the MD-W Line west of Bensenville will easily

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242 *See* Comments and Request for Conditions of the Commuter Rail Division of the Regional Transportation Authority ("METR-7") (filed Mar. 15, 2022) at 69-71.

243 *See, e.g.*, METR-7 at 18.

244 *See* METR-7 at 19-20; *see also* METR-7, Verified Statement of Thomas D. Crowley and Robert D. Mulholland ("Crowley/Mulholland V.S.") at 60-61 (explaining that they needed to move existing trains off the Marquette Subdivision to the Mason City Subdivision in the base case).

245 Metra implies that it views the potential addition of Amtrak trains on the MD-N line (i.e., Amtrak's expanded Hiawatha and Twin Cities services between Chicago and Milwaukee) as caused by the Transaction. *See* Metra Supplemental Comments (filed June 9, 2022) ("METR-8") at 4. That is incorrect. Amtrak has long aspired to add these services, and it has the contractual rights to force its way onto CP's (and Metra's) right of way (with Board approval, of course). CP's settlement with Amtrak did not create these services, it merely expressed CP's commitment to cooperate in their establishment.

In any event, Amtrak has committed that it will invest in new infrastructure that will add capacity on Metra's MD-N line. *See* Amtrak-Canadian Pacific Agreement (filed Feb. 2, 2022). As Applicants' corrected RTC modeling shows, with that capacity, the new Amtrak service has no adverse impact on Metra's operations. *See* Elphick R.V.S. at ¶¶ 50-51.

accommodate the modest increase of 8.0 trains on that segment without disruption to Metra's commuter service. *See* Elphick R.V.S. at ¶¶ 15-28. Properly understood, the Transaction will not harm Metra.

Metra is an important partner. Applicants are disappointed with Metra's portrayal of its working relationship with CP and CP's solid performance on the lines that it shares with Metra. As discussed below, Metra's retelling of history is belied by the record in this proceeding. CP has in fact performed quite well for Metra. Equally important whatever gripes Metra may have about the pre-Transaction world cannot form a basis for imposing conditions.[246]

Nevertheless, Applicants are committed to building upon CP's strong track record of on-time performance for Metra's service, working with Metra to improve the channels of communication between the parties and address any impacts caused by the Transaction in a manner consistent with each party's contractual rights and obligations. To that end, Applicants are making several commitments aimed at making Metra, its ridership, and the Board comfortable that none of the harms conjured by their consultants will come to pass. *See* Creel R.V.S. at ¶ 16. These commitments are the appropriate method for resolving any operating, dispatching or compensation matters that might arise between CPKC and Metra following the Transaction, as the Board has previously recognized.[247] The Board should reject Metra's invitation to impose more extreme conditions that would fundamentally change the contractual

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246 *See UP/SP*, 1 S.T.B. at 418.

247 *See CP/DM&E* at 15 ("Moreover, Metra seeks material changes to (or extensions of) existing agreements, or to compel new contractual commitments from CPRC to protect Metra from potential traffic increases that it might not have considered during prior contractual negotiations. We will not use our conditioning power here to compel resolution of potential differences between CPRC and Metra with respect to operating, dispatching, and compensation matters. Given the intimate details involved in coordinating freight and passenger rail operations, capital expenditures, and compensation, commercial negotiation seems to be the better avenue for resolving such issues.").

relationship between a freight railroad and a passenger railroad, just as it has done many times before.[248]

A. The Transaction Will Not Adversely Impact Metra's Commuter Services

1. The Transaction Will Not Meaningfully Increase Freight Traffic on Lines Shared with Metra.

Metra is under the misimpression that the Transaction will result in meaningful increases in the volume of freight traffic on the MD-W Line east of Bensenville Yard and on the MD-N Line.[249] Metra is mistaken. As illustrated by Figure 10 below, the Transaction will not appreciably increase the number of freight trains on these lines.

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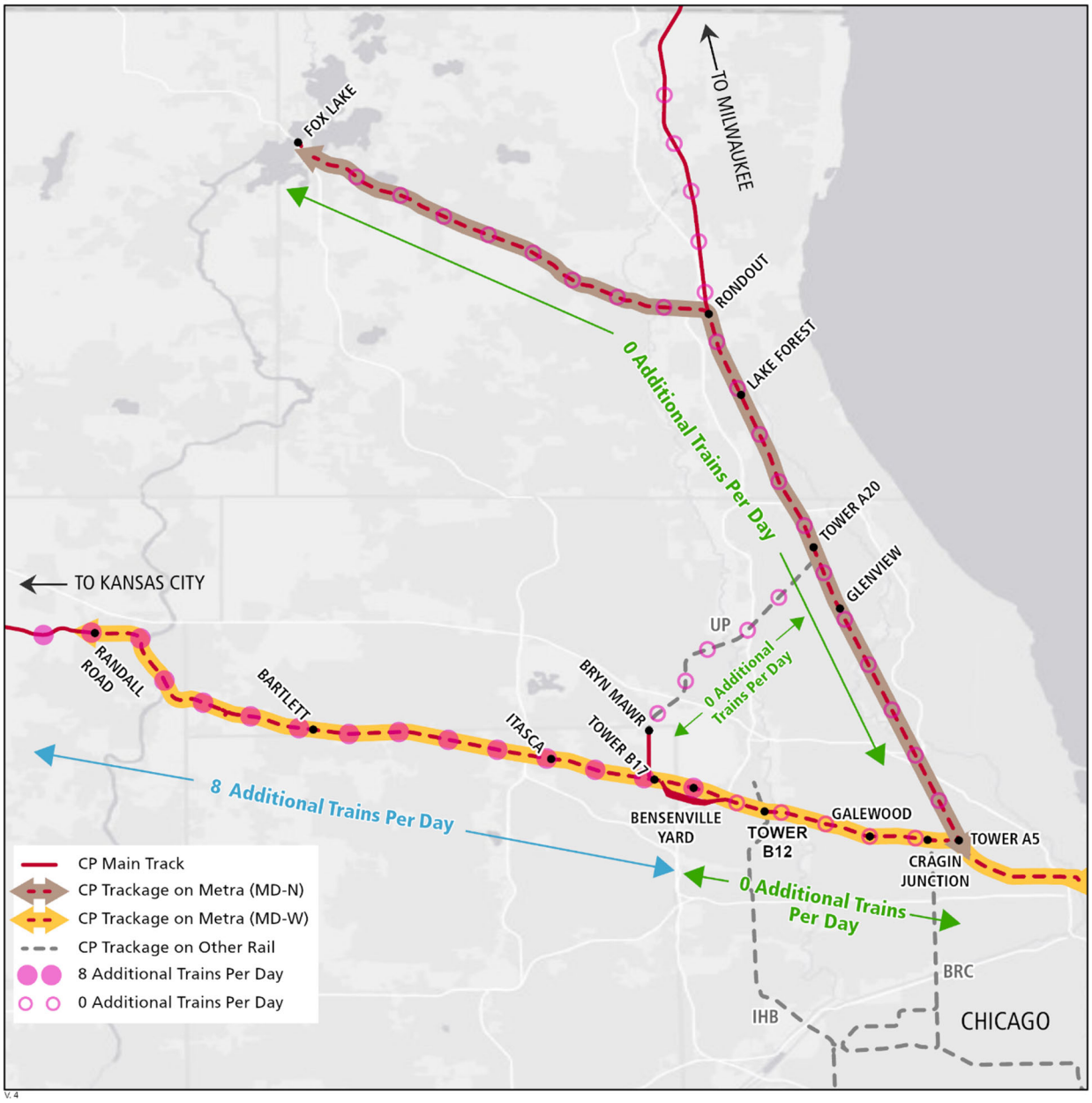
[248] *Major Rail Consolidation Procedures*, 5 S.T.B. at 564-65 (rejecting Metra's proposal to adopt a new rule that would allow the Board to override provisions of Metra's contracts with freight railroads); *CP/DM&E*, Finance Docket No. 35081 (Decision No. 11) at 15 (rejecting Metra's demand to condition approval on a transfer of dispatching from CP to Metra); *CSX/NS.Conrail*, Finance Docket No. 33388 (Decision No. 89, served July 20, 1998) at 297 ("[o]n review of specific requests for relief, however, it is apparent that most of the particular conditions sought by the passenger railroads are not directly related to effects of the transaction. Rather, these parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales by NS or CSX. We are reluctant to use our conditioning power to compel resolution of differences between freight railroads and passenger agencies with respect to operating, dispatching, and compensation matters.").

[249] *See, e.g.*, METR-7, Crowley/Mulholland V.S. at 19 ("In total, CP/KCS plan to add 7.53 total freight trains per day east of Bensenville"); METR-7 at 19 ("Not only will expected freight train increases on MD-W and M-N significantly deteriorate service…").

FIGURE 10
MAP DETAILING TRAIN COUNT CHANGES ON LINES SHARED WITH METRA



As shown above, and as spelled out in the Amended Operating Plan, the only Transaction-related increase in traffic to the lines CP and Metra share will be an 8.0 trains per day increase on the MD-W Line west of CP's Bensenville Yard.[250] *See also* Elphick R.V.S. at ¶¶

[250] *See* Amended Operating Plan at 90-91.

6-14. As explained by Mr. Elphick, the MD-W Line will readily accommodate this growth without impacting Metra's train performance. *See id.* at ¶¶ 15-25. CP's already underway reconfiguration of Bensenville Yard, made possible by its recent land agreement with the Illinois Toll Authority and UP will facilitate CPKC's anticipated Transaction-related growth by expanding the yard and improving access to it by CP, intermodal and manifest trains. *See id.* at ¶ 37.[251] The Transaction will not entail any meaningful increases in traffic on any other lines, or segments of lines, currently shared by CP and Metra. *See* Elphick R.V.S. at ¶¶ 7, 8, 13.

Metra's concerns about growth elsewhere are founded on Mr. Crowley's flawed analysis. His assertion that the Transaction will add 7.53 trains per day east of Bensenville is completely inaccurate.[252] In fact, the Transaction will add *zero* trains per day east of Bensenville, including the portion of this segment between the east end of the yard and Tower B12. *See* Elphick R.V.S. at ¶ 7.[253] All other CPKC traffic east of Bensenville to or from other railroads in Chicago, or traffic to or from east of Chicago (for example, Detroit or Eastern Canada), will be handled in existing trains as Mr. Elphick explains. Elphick R.V.S. at ¶ 10.[254] Indeed, train counts east of Bensenville may actually be *reduced* relative to pre-Transaction levels because, pursuant to the reconfiguration of Bensenville Yard, some trains will no longer need to move between Bensenville and Schiller Park, since the automotive and intermodal facilities at Schiller Park will be consolidated at Bensenville. *Id.* at ¶ 11.[255]

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251 *See also* Amended Operating Plan at 91.

252 METR-7, Crowley/Mulholland V.S. at 19.

253 *See also* Amended Operating Plan at 91-93.

254 *See also* Amended Operating Plan at 91.

255 *See also* Amended Operating Plan at n. 130.

Mr. Crowley is also incorrect that the Transaction will add 0.9 trains per day to the MD-N Line.[256] Applicants' original Operating Plan showed an average of 0.9 additional line-haul freight trains to that segment to account for organic growth on the system unrelated to the Transaction.[257] Applicants' Amended Operating Plan clarified that there is no Transaction-related train count increase for the MD-N Line. Elphick R.V.S. at ¶ 13.[258] While Applicants estimate the Transaction will lead to a small amount of additional carloads on the MD-N Line, that additional traffic will be handled in existing trains. Elphick R.V.S. at ¶ 13[259] Train counts on the MD-N Line in fact may *decline* as a result of the Transaction, as bulk trains that might have previously moved via the MD-N Line to interchange in Chicago are more likely to move via the Marquette Subdivision for movement on the former KCS portions of CPKC's system south of Kansas City.[260]

Finally, citing to Mr. Crowley's Verified Statement, Metra asserts that "Applicants' omission of passenger trains and certain classes of freight trains on Metra's lines from their assessment of the impacts of the Transaction result in undercounting trains by more than 500% while also not accounting for seasonal or daily variation in traffic that will mean that Metra's lines at times will see even higher counts."[261] This statement shows that Mr. Crowley fundamentally misunderstands Applicants' capacity analysis, which did not assume away the existence of any other traffic. Elphick R.V.S. at ¶ 27.

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256 METR-7, Crowley/Mulholland V.S. at 28.

257 *See* App. Vol. 2, Operating Plan, Appendix A at 365 (showing 0.9 trains per day change for the C&M subdivision, which Metra refers to as the MD-N Line).

258 *See also* Amended Operating Plan, Appendix A, at 3. The MD-N Line is referred to in Appendix A as the "C&M West" and "C&M" subdivisions.

259 *See* Amended Operating Plan at 93.

260 *See* Amended Operating Plan at 93.

261 METR-7 at 57-58.

2. Metra Further Misunderstands the Transaction's Impacts Because Its Expert's RTC Model Is Fundamentally Flawed

Metra concluded that Applicants' Operating Plan is "unworkable" because its expert, Mr. Crowley, conducted an RTC model that purported to show that the Transaction will "break the rail system," and force CP to re-route trains off of CP's Marquette Subdivision (along the Mississippi River) and onto Metra's lines in numbers that "cannot be accommodated on Metra's lines without causing significant additional interference with Metra's service."[262] That would be cause for concern were it not completely wrong. In fact, Mr. Crowley's RTC simulation is so grievously flawed that it is entitled to no weight in this proceeding.

One reflection of the errors laced throughout Mr. Crowley's analysis is the fact Metra has now corrected its RTC simulation not once but twice, the second time being provided to Applicants and the Board just days before replies to comments and request for conditions were due.[263] As illustrated below in Figure 11, the results of Metra's continually-revised submissions swing greatly, indicating their unreliability. Metra's initial submission concluded delays to Metra trains would increase 594% as a result of the Transaction, its next submission showed delays would increase approximately 1,200%, and its third submission found delays to increase around 299%.[264]

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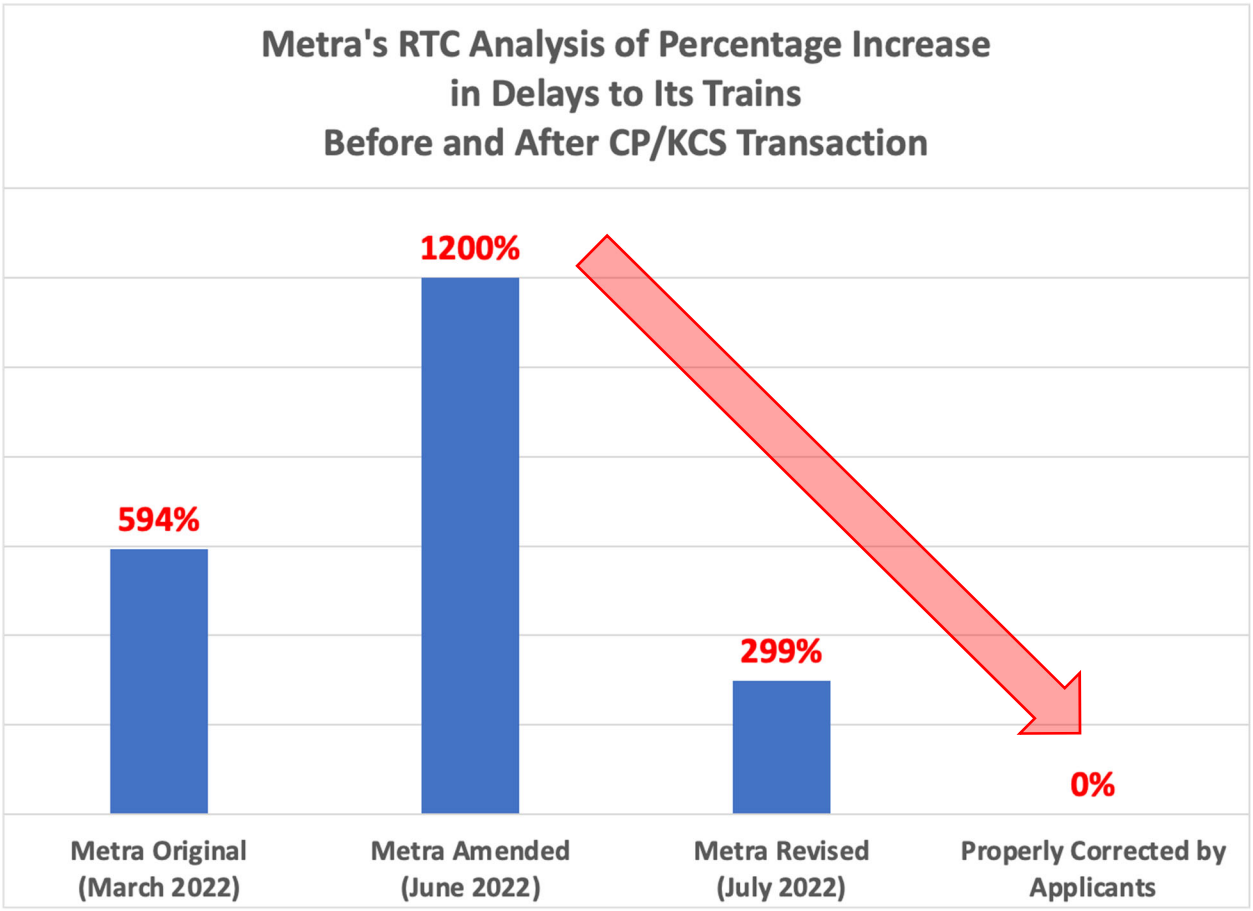
[262] METR-7 at 18.

[263] An initial review of this second submission did not appear to change our analysis of Metra's RTC simulation in any material manner because our corrected RTC simulation had already corrected the errors Metra identified in this supplemental submission. *See* Elphick R.V.S. at n.42. However, because we were not afforded adequate time to do a full review, we reserve the right to supplement or amend our analysis should a more fulsome review warrant any such changes.

[264] *See* METR-7 at 21; METR-8 at 3; Metra Correction and Supplemental Statement (filed July 8, 2022) ("METR-9"), Attachment B.

FIGURE 11
METRA'S CHANGING RTC ANALYSES



In fact, Metra's RTC simulation always was and remains fatally flowed. Were those errors corrected, the result is that CP's modest increase in trains west of Bensenville Yard will cause no increase in delays to Metra trains. To start, there is perhaps no better evidence that Mr. Crowley's model is useless in predicting the impact of the Transaction than the fact that it is incapable of accurately simulating existing, real-world operations.[265] When Mr. Crowley attempted to simulate the operation of current-day CP freight trains across CP's current-day

[265] *See* METR-7 at 19-20; *see also* METR-7, Crowley/Mulholland V.S. at 60-61 (explaining that they needed to move existing trains off the Marquette Subdivision to the Mason City Subdivision in the base case).

Marquette Subdivision, he falsely concluded, based on his flawed RTC simulation, that the Marquette Subdivision is *already* at capacity and would require CP to move trains off the Marquette Subdivision and on to the Mason City Subdivision.[266] Reality is quite different. CP has no trouble operating current train volumes without operational disruption and without using the Mason City Subdivision. Elphick R.V.S. at ¶ 40. This fact alone ought to have informed Mr. Crowley that there was something fundamentally wrong with his simulation.

Even had Mr. Crowley not overlooked his model's failure to simulate real-world conditions, he would have recognized the fundamental flaws of his model had he followed the standard RTC practice of conducting a validation of his base model, which he apparently did not do. *Id.* at ¶ 48. The quality of results produced by RTC analysis is entirely dependent on user-generated inputs. *Id.* at ¶ 46. If any input is not accurate, the simulation can produce results that diverge wildly from what would take place in the real world, rendering any conclusion derived from those results meaningless. *Id.* This is proven here by re-running Mr. Crowley's simulations without any CP freight trains at all. Even with zero CP freight operations on Metra's MD-W and MD-N Lines, Crowley's simulation shows 2.4 hours of delay to Metra trains per week, when it should have operated with 100% on-time performance since Metra's time-tested pre-COVID schedules should not cause passenger trains to interfere with one another. *See* Elphick R.V.S. at ¶ 50. The obvious conclusion: something is very wrong with Crowley's model.

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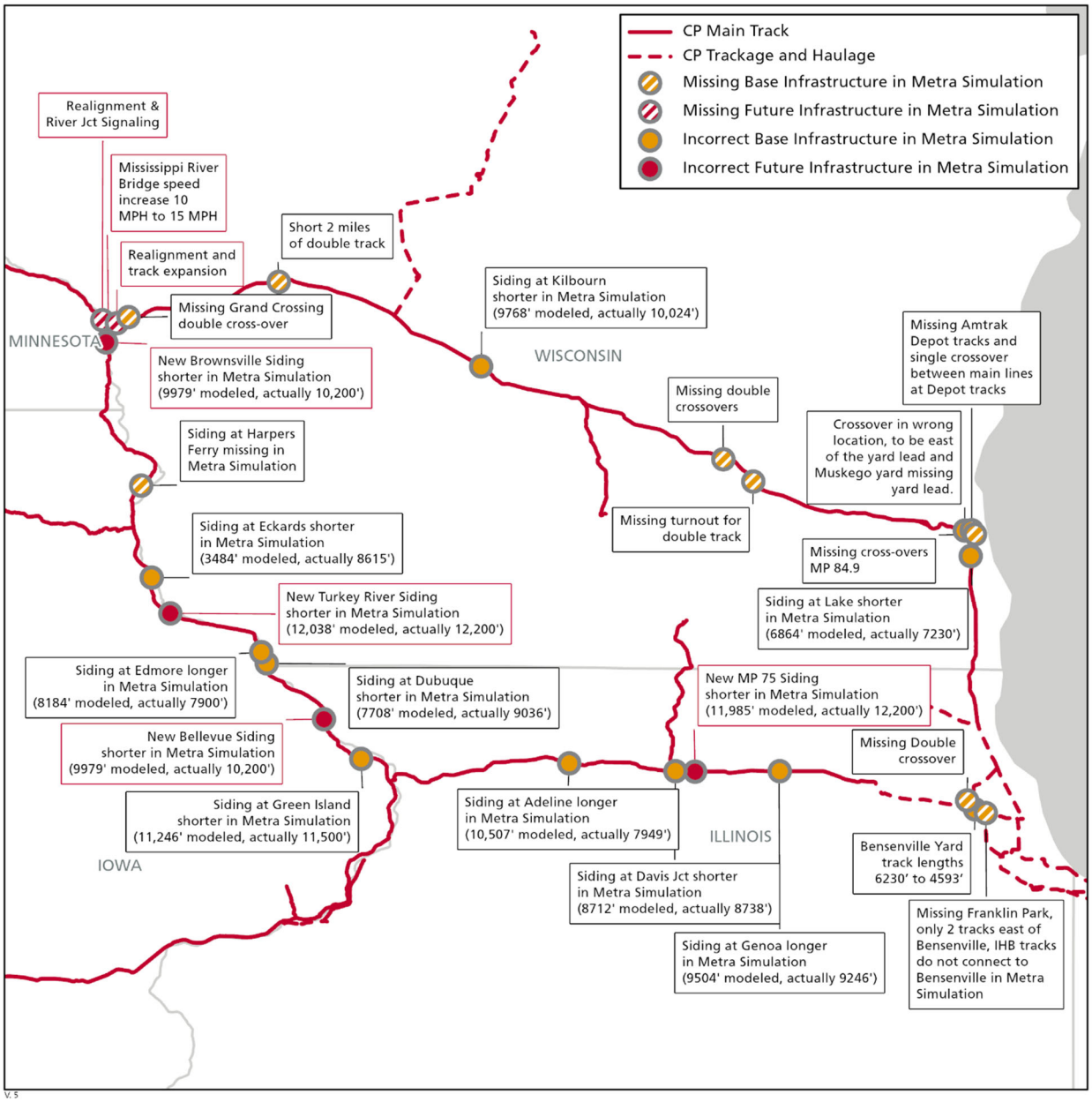
[266] Crowley explains that he was "forced to move trains off the Marquette Subdivision onto the Mason City Subdivision (at Marquette) to accommodate train meet/pass events in the RTC model." METR-7, Crowley/Mulholland V.S. at 60-61; CN also inaccurately raises concerns regarding the sufficiency of the capacity on the Marquette Subdivision. *See* CN-13, Randall V.S. Appendix B, Exh. B-1.

Upon examination of the inputs to Mr. Crowley's model, it is not surprising that it returns unreliable results, stemming from Mr. Crowley's fundamental misunderstanding of CP infrastructure and operations before the Transaction, as well as CPKC's plans post-Transaction. The complete list of those errors is addressed in detail in Mr. Elphick's reply testimony and the report prepared by CP and its consultants who have extensive experience conducting simulations using the RTC tool. *See* Elphick R.V.S. at ¶¶ 43-53. We highlight a few of the most egregious errors here.

First, Mr. Crowley's simulation omitted infrastructure causing results to deviate wildly from what would occur in the real world. *See id.* at ¶¶ 46, 50. Figure 12 below catalogs the most significant omissions. On the Marquette subdivision, along the Mississippi river, Mr. Crowley omitted key sidings that made it impossible for CP trains to operate in the way they do in the real world. This resulted directly in Mr. Crowley's incorrect conclusion regarding how CP would have to route its trains.

FIGURE 13
INFRASTRUCTURE OMITTED FROM METRA RTC MODELING



Second, Mr. Crowley's RTC Simulation incorrectly modeled CP freight trains by hard-coding actual departure times from the week of April 13, 2021, rather than using scheduled departure times, and allowing RTC's logic to dispatch trains, seriously contradicting real-world practices and eliminating the randomness of real-world operating events. Elphick R.V.S. at ¶ 50. *Third*, Metra's RTC model was forced to incur actual delay values from the April 2021 time

period, which drives the simulation to add delay over and above that incurred through its natural dispatching logic. *See id.* *Fourth*, Mr. Crowley incorrectly configured and applied dispatch settings by assigning incorrect rank and priority settings to different classes of freight trains, which led to incorrect meet/pass logic. *See id.* *Fifth*, Mr. Crowley's simulation completely omitted planned infrastructure changes to Bensenville Yard which, will contribute to smooth operations on the MD-W Line. *See id.* at ¶¶ 29-38, 50. *Sixth*, Crowley's simulation did not incorporate randomization, a key RTC attribute required by the FRA for RTC work in connection with FRA-sponsored projects, which means the simulation did not include any variation in freight train performance. *See id.* at ¶ 50. *Finally*, Mr. Crowley criticizes Applicants for using a "spreadsheet analysis" (i.e., a mathematical formula uses to estimate capacity) instead of an RTC model,[267] yet the TRB report Crowley cites acknowledges this type of analysis is entirely appropriate for use on single-track segments, like the Marquette Subdivision.[268]

CP's operating team, assisted by consulting experts with extensive expertise in RTC modeling, corrected all of these errors, and re-ran the RTC model. Elphick R.V.S. at ¶ 51. As Elphick explains, once the RTC model is corrected, the RTC model shows that there will be no issues on the Marquette Subdivision, Elgin Subdivision, or any other segment of the CPKC system that will have an effect on Metra. *See id.* at ¶ 52. Indeed, the results of CP's simulation prove both that the current infrastructure on the Marquette Subdivision supports existing freight volumes, and that the capital improvements to that subdivision that CP's plans will support continued fluidity with the addition of post-Transaction freight volumes. *See id.* The simulation

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267 METR-7, Crowley/Mulholland V.S. at 39.

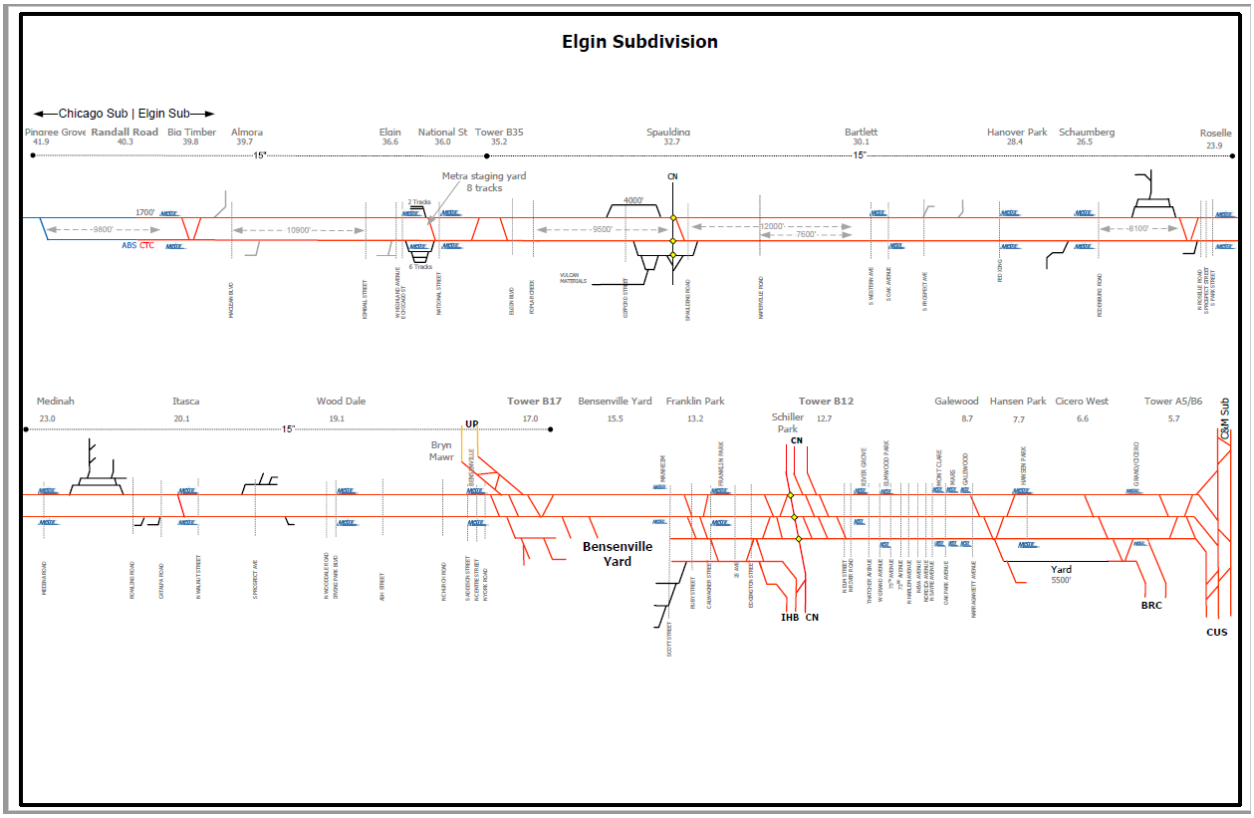
268 *Id.* at 46-47.

also shows there will be no additional delay to Metra passenger trains resulting from the modest number of additional freight trains that CP/KC will add to Metra's MD-W line. *See id.*

3. The MD-W Line West of Bensenville Yard Has Ample Capacity to Accommodate Eight Additional Daily Freight Trains

As noted, Applicants anticipate adding 8.0 trains per day to the Elgin Subdivision (or what Metra refers to as the MD-W Line) west of Bensenville but do not anticipate any other meaningful increases in traffic on the lines it shares with Metra. As Mr. Elphick explains an RTC analysis is not needed to conclude the Elgin Subdivision has ample capacity to handle eight additional daily trains. *See* Elphick R.V.S. at ¶¶ 15-25. The track schematics in Figure 14 below shows the Elgin Subdivision from Tower A-5 to Randall Road where Metra's operations stop entirely. That segment is double track with frequent crossovers and extensive capacity.

FIGURE 14
DIAGRAM OF MD-W LINE/CP ELGIN SUBDIVISION: TOWER A5 TO RANDALL ROAD



As Mr. Elphick explains in detail, this infrastructure provides exclusive ability to add additional freight trains without interfering with Metra's trains. *See* Elphick R.V.S. at ¶¶ 19-21. His analysis shows the ease with which CP's four additional trains each way could flexibly be slotted between Metra's tightly scheduled trains without touching Metra's peak operating windows. Metra witness Oppenheim confirmed in his deposition testimony that numerous such slots are available, as reflected in Mr. Walker's Reply Verified Statement.[269] Those slots occur and would support many more than the eight additional trains CP plans. Elphick R.V.S. at ¶ 19.[270]

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269 Oppenheim Dep. Tr. at 175:4-176:20.

270 *See also* "B17 and B12 – Freight windows-A – referenced in Deposition held on 06-07-2022.xls".

It bears mentioning that Metra's MD-W Line historically hosted many more freight trains than it does currently, and more than CPKC will operate post-Transaction. During the 1980s and 1990s, Mr. Oppenheim acknowledged at his deposition that the MD-W Line hosted between 13-14 trains on the low end and 15-16 trains on the high end depending on the number of bulk trains per day.[271] Applicants project just 11 trains on the MD-W Line post-Transaction.[272] In 2019, Metra acknowledged that the line had no trouble handling 10 additional freight trains, without affecting Metra traffic when an outage CP's, Marquette Subdivision required detouring.[273]

4. Developments Independent of the Transaction Will Further Improve the Performance of Metra's Trains on Lines Shared with CP

An examination of Metra's concerns regarding pre-existing conflicts between CP's freight trains and Metra's MD-W trains reveals that a focal point of those issues involved CP trains entering and exiting Bensenville Yard, and also moving between Bensenville Yard and CP's nearby Schiller Park intermodal and automotive terminal. In particular, approximately two-thirds of the non-cascading delays discussed in the emails Metra collected from Oppenheim's inbox (and compiled as Metra Exhibit B-2) involved the tracks around the Bensenville Yard.[274]

Work being undertaken by CP independent of the Transaction will go a long way to addressing these issues, and also ensure that the new trains CPKC plans to run into and out of Bensenville Yard from/to the west will not impact Metra's operations. As Walker and Elphick

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271 Oppenheim Dep. Tr. at 24:1-25:13; *see also* Reply Verified Statement of Adolph Gameiro ("Gameiro R.V.S.") at ¶ 27.

272 *See* Amended Operating Plan, Appendix A at 4 (showing 11.20 trains under the "Growth Plan Year 3 Train Count" column for Segment No. 81. For reasons explained above, only Segment No. 81 captures the projected train count increases to the mainline tracks of the MD-W Line).

273 METR-7, Verified Statement of Rich Oppenheim ("Oppenheim V.S."), Ex. B-7; *see also* "B17 and B12 – Freight windows – A – Referenced in Deposition Held on 06-07-2022.xls" (Elphick Exhibit 2); Oppenheim Dep. at 175:4-13.

274 *See* "Summary of CP Delay Event 2016-2021.pdf" (Vol. 3, Exhibit 48).

cover in more detail in their respective Reply Verified Statements, CP is embarking on a major reconfiguration of Bensenville Yard that will dramatically improve the ability of this facility to receive and depart trains efficiently. *See* Reply Verified Statement of Nick Walker ("Walker R.V.S.") at ¶¶ 54-58; *see also* Elphick R.V.S. at ¶¶ 29-38. The major reconfiguration of Bensenville Yard will eliminate or reduce the problem of trains doubling or tripling out of yard, which accounts for many of Metra's "complaints" and will improve the handling of intermodal (and automotive) traffic, allowing trains to move directly into the yard and eliminating moves to or from Schiller Park. *See* Elphick R.V.S. at ¶¶ 33-34. As such, CP expects the reconfiguration will greatly improve the performance of Metra's trains on MD-W. *See* Walker R.V.S. at ¶ [58].

To confirm this conclusion, one of Applicants' corrections to Metra witness Crowley's flawed RTC simulation was the inclusion in the model of the improved arrival and departure tracks for intermodal trains arriving and departing Bensenville. *See* Elphick R.V.S. at ¶ 51. As the simulation results confirm, those tracks will help the new CPKC trains – most of which will be intermodal – move to and from Bensenville without imposing incremental delay on Metra operations. *See id.* at ¶ 52. *Second*, as discussed below at page [ ], all of the other sources of Metra's pre-Transaction concerns about conflict between Metra trains and CP will be entirely unaffected by the Transaction.

B. CP Values Its Partnership with Metra and Regrets that Metra's Comments Have Mischaracterized Metra's Solid Performance on Lines Shared with CP

Metra's Comments attempt to give weight to its unfounded concerns about the Transaction's impact by dragging CP's pre-Transaction performance through the mud and suggesting that CP will be callously indifferent to the impacts of its new trains on Metra's operations. There is absolutely no valid foundation for this accusation. As a matter of objective fact, CP performs very well for Metra, and CP's senior leadership – from CEO Creel on down –

are committed to cooperation with Metra so that the needs of both railroads and their customers can be met on the lines the two must share.

1. Metra Has Consistently Performed Well on CP's Lines

Metra refers to on-time performance as a "keystone[]" of successful commuter service,[275] and the truth is that both MD-W and MD-N perform very well in that regard. According to Metra's own data, CP dispatching and freight operations are almost always successful in avoiding any delay to Metra trains. Walker R.V.S., at ¶¶ 32-35. Metra's allegations that CP is responsible for "continual" and "routine" delays[276] to Metra trains on the MD-W Line, and that CP's dispatching leads to "regular – weekly, and in some cases daily – interference with Metra's peak and non-peak train service,"[277] are simply not supported by Metra's own data.

Metra states that its goal is to achieve 95 percent on-time performance, reflecting its acknowledgement that perfect performance is unachievable because "there are scores of unpredictable variations from those perfect conditions that can have small but cascading impacts on Metra's schedule."[278] With over many dozens of trains running across the line Metra shares with CP every day, Metra's 95% on-time performance goal implies that one would expect a meaningful number of delays every week, month, and year.

In fact, the MD-W Line has consistently been above or close to the 95% performance goal, performing better than many of Metra's other lines, and helps Metra outperform its peer commuter railroads. *See* Walker R.V.S. ¶ 29. To illustrate, Figure 15 below, using Metra's own

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275 METR-7, at 23.

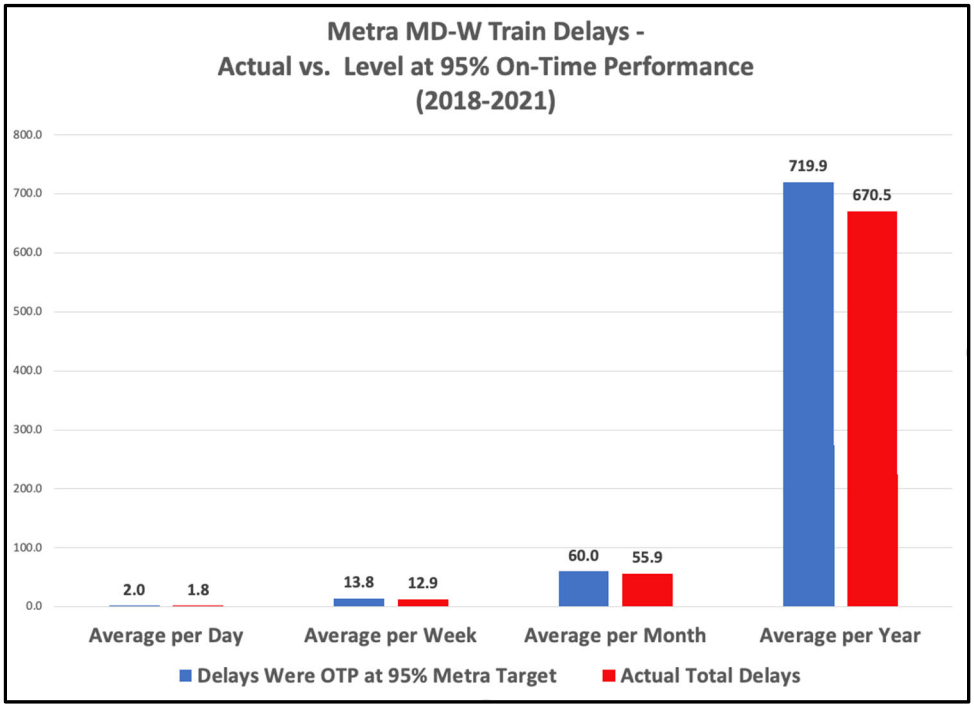
276 METR-7, at 21, 30-31; *id.* Exhibits C-5, C-6, C-7.

277 METR-7, at 2.

278 Metra Website, https://metra.com/time-performance-reports#Metra_and_On_Time_Performance (Vol. 3, Exhibit 49); METR-7, at 24.

data, shows that only 4.6% of the trains that operated in the MD-W Line between 2018 and 2021 experienced any delay for any reason at all.

FIGURE 16[279]
DELAYS TO METRA MD-W TRAINS 2018-2021 VS. DELAYS HAD OTP BEEN 95%

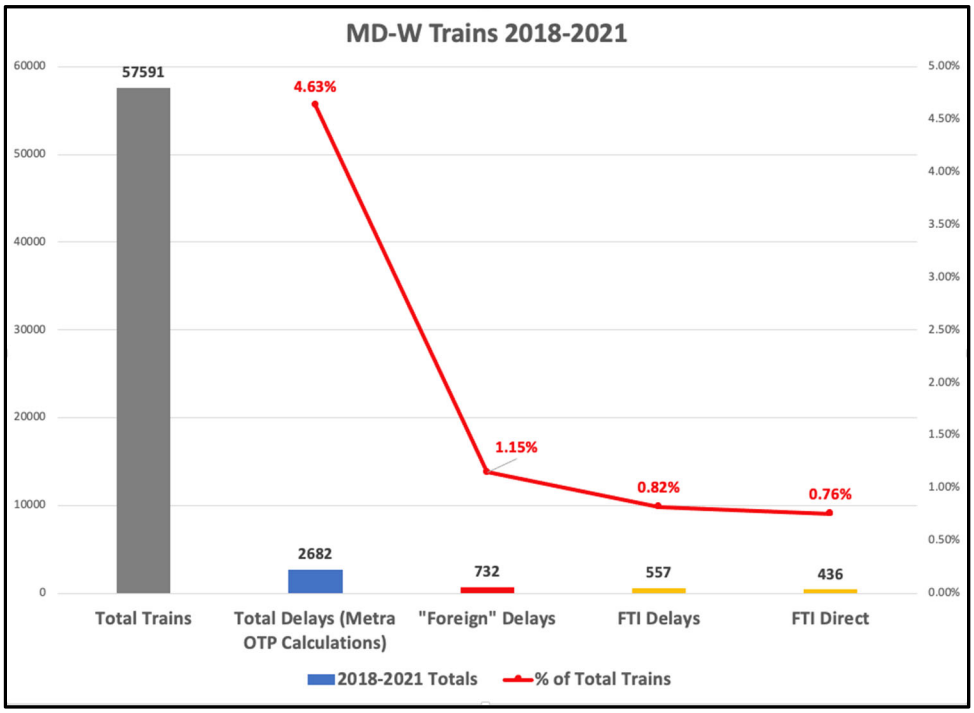


A closer look at these numbers reveals the number of delays caused by the presence of CP freight trains, as opposed to some other factor, is quite low. Metra's own data breaks down the sources of delays and which Metra trains were involved. As shown in the fourth columns of Figure 17, below, delays associated with "freight train interference" (the only delays related to CP dispatching) accounted for just 0.82% percent of all MD-W trains. Metra witness Oppenheim admitted that these data may even overstate CP's responsibility for delays, as "sometimes it's not clear what the cause was, or could be multiple causes, and somebody's got to

279 Walker RVS at n.36.

take the blame for it, essentially."[280] And even assuming the delays were due to "freight train interference," some of those delays may not have been avoidable, as David Rodriguez, Metra's Manager of Train Operations/CTCO and Greg Godfrey, Metra's Director of the Consolidated Control Center (train dispatching office) acknowledged.[281]

FIGURE 17[282]
A VERY SMALL PERCENTAGE OF METRA MD-W TRAINS ARE DELAYED



Even the 0.82% figure is an overstatement of CP-caused delays, as it includes "indirect" or "cascading delays," *i.e.*, delays that occur when a train that is directly delayed en route to destination by some event causes another train to be delayed because it uses the same

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280 Oppenheim Dep. Tr. at 109:7-10; *see also* Deposition of David Rodriguez dated June 8, 2022 ("Rodriguez Dep. Tr.") at 90:21-25, 91:1-25, 92:1-22.

281 *See, e.g.*, Deposition of Greg Godfrey on June 9, 2022 ("Godfrey Dep. Tr.") at 48:16-24 ("[W]e would like to minimize controllable delays) (emphasis added); Rodriguez Dep. Tr. at 91:6-7 ("There might have been no way for any dispatcher to avoid the interference.").

282 *See* "Metra Data Workpaper," Tab "Fig 5."

equipment.[283] As a result, a single dispatching decision that causes delay to Metra can result in multiple reported delays.[284] "Direct" delays are the better measure of how often CP's dispatching decisions may have caused a Metra train to be delayed, as Mr. Godfrey confirmed.[285] As shown in Figure 17, above, over the four years from 2018 through 2021 just 0.76% of all Metra MD-W trains incurred direct delays from freight train interference.

Annual data shows the same pattern. As Figure 17 shows, CP dispatchers consistently support Metra operations at very high levels of on-time performance, with 98-99% of trains receiving no direct freight-train interference delays according to Metra's own records (as shown by the green line in Figure 18 below, ranging from 98.9% to 99.7%).

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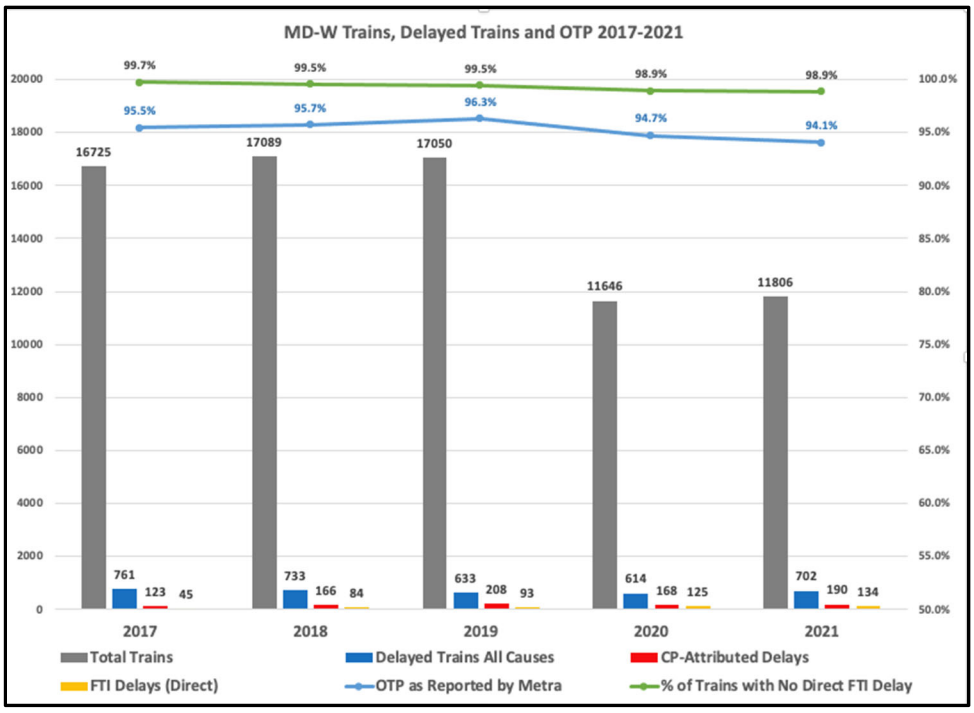
283 METR-7 at 32.

284 Metra, "On-Time Performance - December 2021," available at https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December_2021.pdf (Vol. 3, Exhibit 49).

285 Godfrey Dep. Tr. at 43:12-19.

FIGURE 18[286]
METRA MD-W DELAYS AND OTP 2017-2021



Metra alleges that CP dispatchers "regularly" prioritize freight trains ahead of Metra trains during agreed "peak" periods during the morning and afternoon commuter rush hours.[287] Metra's data undermines its own argument. As Figure 18 shows, again focusing on the trains that suffer "direct" delays due to freight train interference, CP performs incredibly well in dispatching Metra's peak-period train. In fact, only 0.57 percent of peak-period trains realize direct freight train interference delays, amounting to 126 total delays over the course of four years, or about *one delay every eight business days*.

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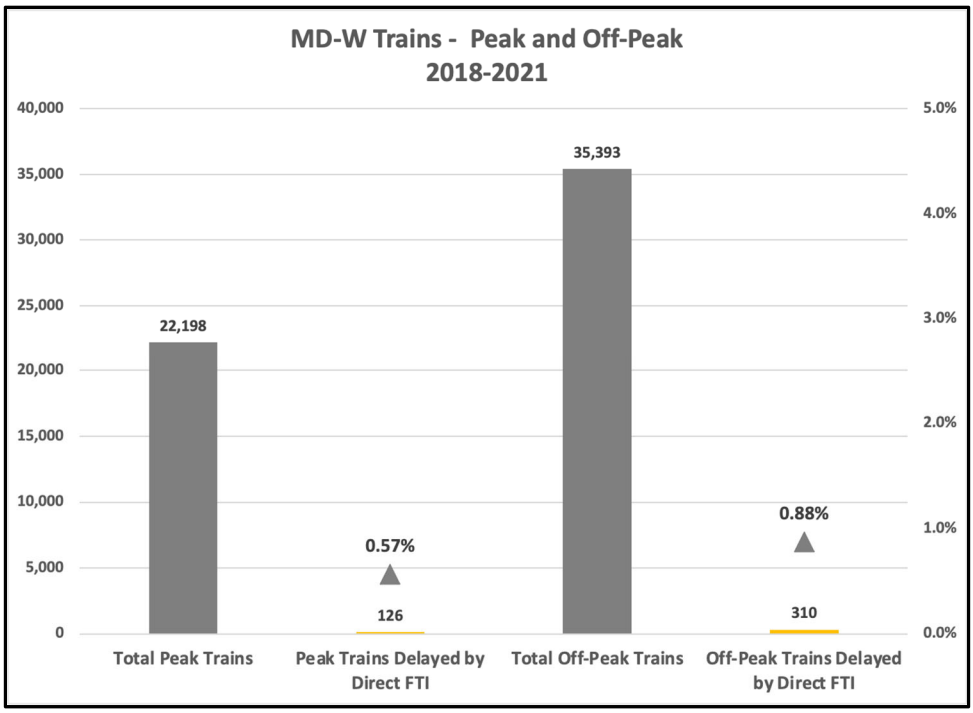
286 *See* "Metra Data Workpaper," Tab "Fig 6."

287 METR-7, Verified Statement of Greg Godfrey ("Godfrey V.S."), at ¶ 12.

FIGURE 19[288]
MD-W FREIGHT TRAIN INTERFERENCE DELAYS PEAK VS. OFF-PEAK

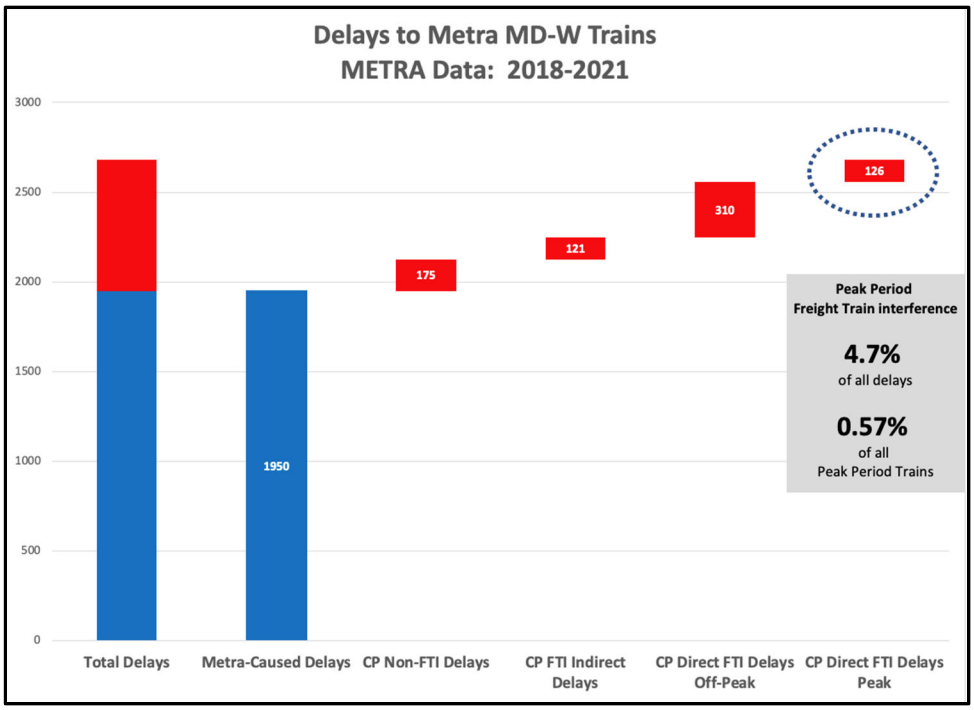


Another useful perspective is how the delays attributable to CP compare to the delays that Metra attributes to itself. As Figure 20 below shows, the small numbers of delays attributable to freight train interference are dwarfed by the delays caused by Metra's own actions. Metra's Comments unfairly lump all of these delays together and blame CP for all of them.[289]

288 *See* "Metra Data Workpaper" Tab "Fig 7."

289 *See, e.g.*, METR-7 at 34-35.

FIGURE 20[290]
SOURCE OF DELAYS TO METRA MD-W TRAINS 2018-2021



Other Metra data confirm that Metra performs well on the CP-dispatched MD-W Line relative to the lines used by Metra that are dispatched by other freight railroads. Only 21.3% of delays on MD-W from 2016 to 2021 were attributed to CP. This is a lower percentage of delays than on the nearby UP-West line or the BNSF line, where a greater portion of delays were caused by those other "foreign carriers."[291] Indeed, though Metra seeks to portray CP as though it were a particularly bad performer, Metra's witness Rodriguez testified that Union Pacific caused the most freight train interference with Metra's trains,[292] or as Mr. Godfrey described it: Union Pacific is "struggling tremendously right now."[293] Mr. Rodriguez was asked at what locations

290 *See* "Metra Data Workpaper," Tab "Fig 8."

291 *See* Walker R.V.S., Figure 10.

292 Rodriguez Dep. Tr.at 11:4-9.

293 Godfrey Dep. Tr. at 85:6-10.

CN causes freight interference with Metra trains, and he responded: "It's a long list."[294] NS, CSXT and BRC also cause freight trains to delay Metra trains as Metra witness Rodriguez acknowledged.[295]

By any measures then, CP's performance is strikingly good. In an attempt to sidestep the import of this data, Metra argues that its own on-time performance metric is not an accurate measure of CP's performance because it does not capture delays unless they result in a train arriving at its final destination more than five minutes and 59 seconds late.[296] Metra's argument is flawed for a number of reasons.

First, any suggestion by Metra that on-time performance data is a misleading measure of performance is belied by the fact that Metra itself reports its performance to its customers and the public in terms of on-time performance data.[297] It tells customers that on-time performance metrics provide "a truer reflection" of "how [Metra is] doing and where [it] need[s] to improve," and it asserts that the on-time performance goals it employs "have been standard in the railroad industry for longer than Metra has existed."[298] And it compares itself publically to other transit companies by touting its superior on-time performance.[299]

Second, the more comprehensive data that Metra says is a better reflection of delays caused by CP confirms that CP performs very well. Metra witnesses Godfrey and Rodriguez

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294 Rodriguez Dep. Tr. at 62:20.

295 *Id.* at 62-66.

296 *See, e.g.*, Metra Comments at 26.

297 *See* Metra Website, On-Time Performance Reports, https://metra.com/time-performance-reports (last accessed July 9, 2022).

298 *Id.*

299 *See* Walker R.V.S. at ¶ 30.

rely upon data compiled by Mr. Rodriguez purporting to show all delays to Metra trains on the MD-W and MD-N Lines caused by CP freight trains from February 2020 to October 2021.[300] Mr. Rodriguez's data shows that only 1.5 percent of Metra's trains experienced a delay during the period from February 2020 to October 2021. *See* Walker R.V.S. at ¶ 28.

On the MD-W Line, which is the only line CP and Metra share where train counts will increase as a result of the Transaction, Mr. Rodriguez's data identifies 273 freight-caused delays for a total of 2,394 minutes of delay.[301] Given the 19,914 total Metra trains that Metra operated on the MD-W Line during that period, this works out to just 7.2 seconds of delay per train.[302] But of those 273 freight-caused delays, 44 were "non-controllable" by CP, and had nothing to do with CP's dispatching.[303] Another 25 of these delays were attributed to cascading delays which, as discussed in this section, should be excluded when properly assessing the number of incidents where CP freight trains or dispatching decisions caused a delay.[304] Once these categories are removed, Mr. Rodriguez's data shows 204 total "controllable" delays caused by CP on the MD-W Line over the 21 month period from February 2020 to October 2021.[305] As Figure 21 below shows, this means *over 99 percent* of Metra trains operating on the MD-W Line during that period *did not* encounter a CP-caused freight interference or dispatcher-caused delay.[306]

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300 METR-7, Verified Statement of David Rodriguez ("Rodriguez V.S."), at ¶ 6.

301 Walker R.V.S., at ¶¶ 23, 26; "Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tab "Rodriguez Data."

302 Walker R.V.S., at ¶ 26; "Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tab "Rodriguez Data."

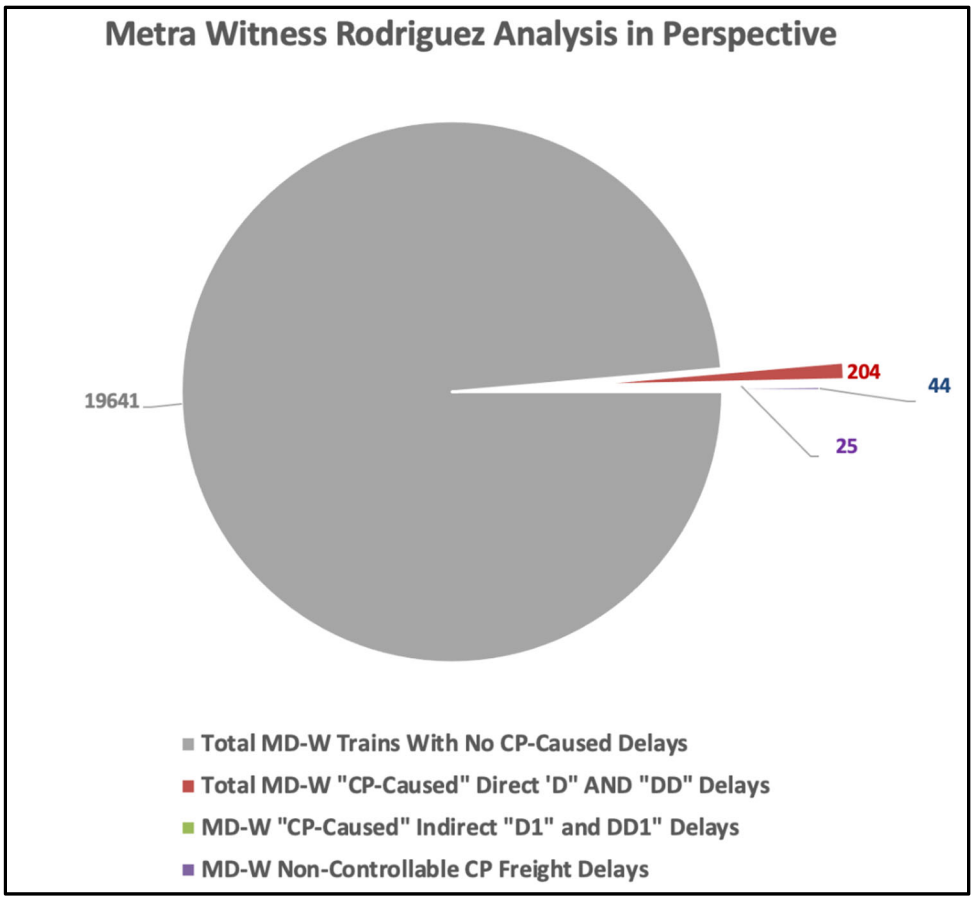
303 Walker R.V.S., at ¶ 23.

304 *Id.*

305 *Id.* at ¶ 21.

306 Oppenheim attempted to supplement Metra's official delay data with a compendium of emails discussing delays that he attached as Exhibit B-2 to his Verified Statement. After asserting that this compendium of emails was prepared with the goal of capturing "100 percent" of the delay issues he was

FIGURE 21[307]
NEARLY ALL OF METRA'S MD-W TRAINS INCUR NO CP-CAUSED DELAY



Rodriquez's criticism of CP is further undermined by his default to blame CP. Rodriguez admitted at his deposition that some of these delays had multiple causes but were attributed to CP.[308] He further admitted that some of the delays he captured in his data could not have been

testifying about, *see* Oppenheim Dep. Tr. at 135:18-22, Oppenheim testified that a CP 473 freight train delays a Metra 2225 passenger train "twice a month," *id.* 162:8. Confronted with the fact that this specific type of incident only appeared twice in Oppenheim's entire dataset, which spans from January 2016 to March 2022, *id.* 162:8-16163:11, Oppenheim then attempted to backtrack and stated that his dataset is "a representative sampling" and cannot be relied upon to be complete, *id.* 165:15. After conceding his dataset was incomplete, he referred Applicants back to the official TOPS data. This data, as Applicants demonstrate, does not remotely support Metra's contentions about the "continuous" nature of CP-caused delays.

307 *See* "Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tab "Rodriguez in Perspective."

308 *See* Rodriguez Dep Tr. at 34:17-35:15.

avoided by better dispatching decisions.[309] The more we whittle away delays that Rodriquez unfairly attributes to CP, the more Rodriguez's data paints the same picture – that CP has done a good job dispatching Metra's lines.

The delay statistics Mr. Godfrey cites paint the same picture. Mr. Godfrey reviews data from Metra's data warehouse, known as the "Train Operations and Performance System, " which is Metra's "most accurate count of reported delays, and which is the same data used to produce Metra's on-time performance statistics reviewed above.[310] He noted that this delay data can be misleading because it might attribute to CP a delay to a Metra train on the MD-W Line even if it was the responsibility of another railroad on an adjacent subdivision.[311] Nonetheless, he calculated the total number of delays to the MD-N and MD-W Lines for each year from 2000 to 2021 and found that, during that time, freight-related delays impacted 1.23 million Metra customers with delays totaling 57,048 minutes, or nearly 40 days and nights.[312] We can break that down for all Metra MD-W and MD-N trains combined like this:

TABLE 2
METRA DELAY HISTORY PUT IN PERSPECTIVE

	Over 21 Years	Per Year	Per Week	Per Day (assuming 5 days/week)	Per Train (assuming 122 weekday pre-COVID trains per weekday on MD-N and MD-W line)
Minutes	57,048	2,716	52	10.4	5.1 seconds
Passengers	1.23 million	58,571	4,880	976	8

309 *See id.* at 90:21-91:8, 91:23-92:7.

310 Godfrey V.S., at ¶ 7.

311 Godfrey Dep Tr. at 59:16-60:7.

312 Godfrey V.S., at ¶ 9.

Assuming a five weekday schedule, 57,048 minutes in delays amounts to about 10.4 minutes of delay per day total, including cascading delays, in an industry where delaying a train by fewer than six minutes is considered on-time performance. And given Metra's estimated ridership for the MD-W and MD-N Lines in January 2019, pre-pandemic, was estimated at 975,482,[313] that means the 4,880 customers impacted by delays in a month equates to just 0.5% of Metra's monthly ridership. Impacting only 0.5% of customers, including via cascading delays, in an industry where normal delays are expected, is quite remarkably good performance. Similarly, an average of *five-to-seven seconds of delay per weekday train* is a far cry from the "continual" and "routine" delays that Metra assails CP for delivering.

CP strives to minimize the delays it causes, but Metra's suggestion that any amount of delay to its trains delays proves malfeasance is simply wrong. While CP believes there is always room for improvement, and it regrets the rare occasions when its decisions have led to delay that could have been avoided, the record of Metra's performance on the lines it shares with CP – and CP dispatches – is one of which any railroad could be proud. It is certainly not a basis for fundamentally re-writing longstanding contractual rights.

2. CP Leadership Is Committed to Supporting Metra's Operations, Consistent with Its Contractual Obligations.

The track record confirmed by the hard data should leave no room for doubt about CP's commitment to supporting Metra's passenger service. Contrary to the overheated rhetoric of Metra's Comments, CP has strived to be a good partner to Metra. As CP CEO Keith Creel states

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[313] *See* Metra, Ridership Trends, (Jan. 2019), available at https://metra.com/sites/default/files/assets/planning/ridership/jan_2019_ridership_report_standalone.pdf (Vol. 3, Exhibit 50).

unequivocally: "The Transaction will not get in the way of our intention to be a good partner to Metra on the lines we share." Creel R.V.S., at ¶ 11.

CP is offended by the suggestion that there has been a lack of leadership commitment to supporting Metra, particularly the accusations that "senior leadership has actively refused to take action that would reduce Metra delays"[314] and that CP "dispatchers have been directed by senior management to move CP trains, regardless of the impact on the network."[315] To be clear: CP takes great care to help ensure Metra's trains perform well on the MD-W and MD-N Lines.[316] As Nick Walker, CP's Vice President of Operations for the Western Region, explains in his Reply Verified Statement, CP dispatchers understand the priority to which Metra trains are entitled. CP dispatchers consider all relevant factors and circumstances when dispatching passenger and freight trains alike, and no decision to move a CP train is made "regardless of the impact on the network."[317]

The truth is that it would be counterproductive for CP to make decisions that disregarded the impact on Metra trains, since blocking Metra's trains needlessly would clog up the network, undermining the movement of all trains.[318] Metra's own chief dispatcher Mr. Godfrey agrees, acknowledging all dispatchers, no matter by whom employed, have to make decisions based on the network as a whole, not solely in the interest of moving any individual train (*i.e.* a Metra train, as Metra would prefer), particularly in the Chicagoland network, which is "so

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314 METR-7, Oppenheim V.S., at ¶ 35

315 METR-7 at 38; *see also* METR-7, Oppenheim V.S., at ¶ 35.

316 Walker R.V.S. at ¶ 6

317 Walker R.V.S. at ¶ 10.

318 *Id.*

complicated."[319] Indeed, Mr. Godfrey has "directed [himself] and [his] staff to delay some passenger trains in order to keep other freight trains moving in order to help other passenger trains" to "keep the network healthy."[320]

The evidence that Metra has submitted to the Board in this proceeding directly contradicts Metra's condemnation of CP management. Most of the documents submitted by Metra as exhibits to the Verified Statement of Oppenheim demonstrate good faith attempts by CP employees to address operational issues that come up from time and to seek to minimize their recurrence and impact on Metra. For example, when notified of a set of issues, CP's Senior Vice President directed the team: "I also want you to ensure the 3 items below are implemented and executed!"[321] In another instance, CP reacted promptly: "I did discuss the implication with the Yardmaster/Train master after the fact."[322] Another example shows CP's responsiveness: "We are working back through the root cause and will update this morning."[323]

Other emails authored by Mr. Oppenheim himself demonstrate that, while delays do occur, CP has worked collaboratively with Metra to address them. For example, in one email recounting an unfortunate series of delays that occurred in January 2021, Oppenheim starts off: "Let me preface this by saying *how much we appreciate CP's recent willingness to discuss our respective operational concerns* and the need to work together to insure that our goals are

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319 Godfrey Dep. at 82:9-83:6.

320 *Id.* at 136:8-17; *see also id.* at 82:15-19 ("[N]ot delaying one Metra train, let's say at 9:00 a.m., could result in delaying six Metra trains at 1:00 p.m.").

321 METR-7, Oppenheim V.S., Exhibit B-2 at 322.

322 *Id.* at 332.

323 *Id.* at 334.

met."[324] Towards the end of the email, Mr. Oppenheim reiterates that "[a]s we have said repeatedly on our calls, we truly believe that CP's intentions are sincere in trying to protect Metra's schedules."[325] Mr. Oppenheim's contemporaneous sentiments are incompatible with the idea that "senior leadership has actively refused to take action that would reduce Metra delays."[326] And notwithstanding Mr. Oppenheim's incendiary remarks in his Verified Statement, he testified at his deposition that "a big Metra supporter, very high ranking at CP for a number of years . . . went so far as to fire some of the dispatchers that were moving freight trains in front of Metra."[327]

Metra tries to make much of a March 6, 2022 email sent by Mr. Oppenheim about an instance where a dispatcher in CP's Minneapolis Operations Control ("MOC") center made a game-time decision – with which Oppenheim disagreed – based on the best information available to him on the ground that CP's management must have known that "it was not possible for a successful outcome."[328] But that example merely illustrates that freight dispatching is complicated and, at times, dispatchers are faced with difficult choices, any of which would lead to a suboptimal outcome. CP does not dispute that, especially with the benefit of hindsight, some of the decisions its dispatchers made in these situations could be open to after-the-fact criticism. But that does not mean that they are bad at their jobs, much less that they seek to delay Metra trains. In fact, Mr. Rodriguez, who serves as a liaison between Metra and the freight railroads Metra interacts with, acknowledges the plain fact that there often may not be a way for

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324 METR-7, Oppenheim V.S., Exhibit B-2 at 204.

325 *Id.*

326 METR-7, Oppenheim V.S., at ¶ 35.

327 Oppenheim Dep. Tr. at 166:22-25.

328 METR-7, Oppenheim V.S., Exhibit B-2 at 331.

any dispatcher to avoid freight interference.[329] In any event, Mr. Oppenheim's emails *do not* show intent or direction by CP senior management to direct dispatchers to take actions adverse to Metra trains or to "move CP trains regardless of the impact of the network." {{[redacted]}},

In order to cultivate a false impression of malice, Metra also points to Mr. Godfrey's Verified Statement in which he claimed that "[o]n a number of recent occasions my staff and I have witnessed CP dispatchers who are able to prioritize or avoid delay to Metra being directly told by senior management to move CP trains, regardless of the impact on the network."[331] At his deposition, however, Mr. Godfrey readily admitted that he did not have first-hand knowledge of these occasions, and was merely told by Mr. Oppenheim.[332] In addition, Mr. Godfrey could also only recall one or two of these incidents—far from "a number of recent occasions"—and could not recall the identity of the person he identified as "senior management" or when these incidents occurred.[333]

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329 Rodriguez Dep. Tr. at 90:21-25, 91:1-25; *see also* Deposition of Greg Godfrey ("Godfrey Dep. Tr.") at 77:7-12.

330 Oppenheim Dep. Tr. at 168-72, 185-187. {{[redacted]}}

331 Godfrey V.S., at ¶ 16.

332 Godfrey Dep. Tr. at 123:1-25.

333 *Id.* at 125:5-126:16.

In sum, nothing in the record contradicts the simple truth that CP leadership has been and remains committed to supporting Metra's operations and honoring CP's obligations to dispatch Metra's trains well, with or without the Transaction. *See* Walker R.V.S. at ¶ 9.

C. None of Metra's Complaints About CP Are Related to the Transaction

As explained above, the Transaction's impact on Metra boils down to Applicants' adding 8.0 trains to the MD-W Line west of Bensenville. The existing infrastructure and available operating slots on Metra's MD-W Line will easily accommodate those trains.

Shorn of its flawed RTC simulation evidence – which when corrected actually confirms that there will be no adverse impact on Metra – the entirety of Metra's case boils down to a laundry list of pre-Transaction grievances and efforts to re-write the governing contracts and fundamentally alter the pre-Transaction relationship between CP and Metra. Even if everything Metra says were true, it would not support the conditions Metra desires to have imposed on the Transaction. But what Metra says is not true, and as set forth in the testimony of CP witnesses Walker and Elphick, CP desires to set the record straight about how it has interacted with Metra in the past, while simultaneously demonstrating that the issues Metra raises are unrelated to the Transaction and certainly not made worse by the Transaction.

1. Most of Metra's Pre-Transaction Dispatching Concerns Relate to Operations that Will Be Unaffected by the Transaction

Setting aside the irrelevance of a series of anecdotes about specific dispatching decisions against a mountain of evidence that almost every one of Metra's trains is dispatched without any delay whatsoever, the critiques that Metra lobs against CP's dispatchers are both unfair and completely irrelevant to the Transaction.

Dispatching Issues Relating to Freight Trains North and East of Bensenville Yard.

First, the focus of Metra's criticisms is on areas that will be unaffected by the Transaction, or addressed by developments unrelated to the Transaction. Metra witness Oppenheim lists seven categories of "issues" that he has had with CP's dispatching over the years.[334] Whatever the merit of his concerns about these issues, each and every one of them necessarily pre-dates the Transaction. And as Messrs. Walker and Elphick explain, none of those issues has any bearing on the Transaction's effects. The issues either involve operations associated with Bensenville Yard – which will be addressed by the reconfiguration already underway – or they involve train operations to the east or north of Bensenville that will not be impacted by the Transaction.

For example, Metra complains that a "typical example of CP-caused delays" occurs when CP makes a crew change on mainline tracks outside of Bensenville Yard.[335] As explained by Mr. Elphick., to the extent this occurs, it is usually for trains coming from Milwaukee on the MD-N Line seeking to enter Bensenville Yard at Tower B17, which cannot enter yard tracks in a fluid manner from that direction. Elphick R.V.S. at ¶ 44. None of the new CPKC trains fall into this category, and in any event CP is working to eliminate the need to make crew changes on

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334 METR-7, at 39-40; METR-7, Oppenheim V.S., at ¶ 36. Those categories are: (1) "Operation of trains over 10 thousand feet in length between Bryn Mawr and Shermer that arrive at Tower B17 or Tower A20 without a sufficient time window to allow them to move without interfering with scheduled Metra trains, and without sidings long enough to allow faster Metra trains to pass;" (2) "Lack of planning for routes through the Bensenville Yard that cause entering CP freight trains to stop and block B17 while throwing yard switches;" (3) "CP crew changes, power, marker light changes, or pick up, or set out of cars, or other activities that should be confined to yard tracks on Metra's main tracks;" (4) "Poor operational and dispatching control of freight trains entering and exiting Bensenville that result in use or fouling of Metra mainline;" (5) "Dispatching of CP freight trains between Rondout and Tower A20 in a manner that delays scheduled Metra traffic;" (6) "Failure of CP westbound freight trains to clear tower A20 a minimum of ten minutes ahead of scheduled Metra and Amtrak trains;" and (7) "Failure of CP eastbound trains to clear Rondout a minimum of fifteen minutes ahead of scheduled Metra and Amtrak trains." METR-7, Oppenheim V.S., at ¶ 36. Each of these categories is addressed by Mr. Walker in his Reply Verified Statement. Walker R.V.S. at ¶ 61.

335 METR-7 at 40.

mainline tracks for its existing trains as well.[336] Similarly, Metra complains that CP dispatches freight trains on the MD-N Line "between Rondout and Tower A20 in a manner that delays scheduled Metra traffic."[337] But the Transaction will have no effect on freight dispatching between Rondout and Tower A20 because, as discussed above, *no new trains* will be added to the MD-N Line as a result of the Transaction.

Dispatching Freight Trains During Peak Periods. Metra makes several claims throughout its Comments that CP "regularly" dispatches freight trains during Metra's "peak periods" (during the morning and evening rush hours) despite being contractually obligated to not interfere with Metra's peak period trains.[338] The facts do not support this claim.

First, CP *does not* schedule freight trains during Metra peak periods, and the new CPKC trains that Applicants anticipate will similarly be scheduled during the extensive periods of the day when they will not get in the way of Metra's passenger trains. Walker R.V.S., at ¶ 38; Amended Operating Plan at ¶ 209; Elphick R.V.S. at ¶¶ 16, 18, 22.[339]

Second, sometimes freight train operations do not proceed exactly as planned, but CP's dispatchers nonetheless strive to avoid creating any conflicts at all with Metra during its peak periods. Walker R.V.S., at ¶ 38. The objective historical data confirm that freight interference during Metra's peak periods almost never occurs. *Id.* at ¶ 31, Figure 5.

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336 *Id.*

337 METR-7 at 39; METR-7, Oppenheim V.S., at ¶ 36.

338 METR-7, Oppenheim V.S., at ¶ 64; *see also* METR-7, at 13

339 Importantly, CP is not prohibited outright from operating freight trains on Metra-shared lines during peak periods, a point Metra witness Oppenheim acknowledged. *See e.g.* Oppenheim Dep. Tr. at 307:13-17 (Q. "[Y]ou are not testifying today that . . . there should be no freight train operations during peak . . . periods." A. "Absolutely, I'm not saying that at all.").

Finally, CPKC's ability to avoid conflicts with Metra's operations during peak periods will be improved by the additional capacity the Transaction will bring between Davenport, and the west end of Metra's MD-W line. The additional sidings, including one being added west of Randall Road, will support the staging of CP's freights so they can be moved towards Bensenville when least likely to create a conflict during Metra's peak periods. Elphick R.V.S., at ¶¶ 22-25.

2. Dispatching Metra Trains on the "Wrong Track" Is A Pre-Transaction Concern Without Merit

Metra asserts that CP "regularly dispatches Metra trains on different mainline tracks from the ones that Metra has identified for use by its passengers heading in a specified direction."[340] According to Metra, this "regular" practice results in dangerous situations where "passengers must get to the opposite side of the tracks, often by darting across the tracks in the face of an oncoming freight train, or around a stationary one."[341] Again, this is a pre-Transaction complaint.

On the merits, however, Metra's assertions about safety are unfair and inaccurate. Metra does not to mention that most Metra stations are designed such that passengers *must* cross tracks at one end of their commute or the other (*e.g.*, between the station parking lot and the inbound or outbound platform). As Mr. Oppenheim admits, it is "designed into the system that passengers are crossing the tracks," and that "on a regular basis, passengers do cross the tracks" even when

340 METR-7, at 27.

341 *Id.* at 28.

no train is being operated on the "wrong" tracks.[342] Indeed, all four of the social media posts[343] that Metra cites as support for the claim that CP dispatches passenger trains on the "wrong" tracks depict locations that have level crossings over tracks that passengers must cross. None of the posts demonstrate that the passenger's train was on the "wrong" track. Walker R.V.S., at ¶ 42.

In addition, as Mr. Walker explains, even when Metra trains *are* operated on the opposite track from what commuters might expect, there are good reasons for it. For example, it is good dispatching to run an express Metra train around slower local trains or slower CP freight trains, allowing Metra trains to maintain their schedules while simultaneously accommodating other operations on the line. Mr. Oppenheim conceded as much as his deposition.[344] Prohibiting the use of both tracks would interfere with fluid operations and sacrifice capacity and cause unnecessary delays. Walker R.V.S., at ¶ 44. Indeed, Metra itself has advocated for adding crossovers on the MD-W line, meaning that Metra necessarily *supports* the use of both tracks, not just the "right" one.[345]

And there is nothing unsafe about this practice. Walker R.V.S., at ¶ 43. Metra's stations are equipped with loudspeakers that provide advance announcements regarding arriving trains

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342 Oppenheim Dep. Tr. at 151:18-24. In light of this acknowledgment, CP is offended that Metra used this merger proceeding to cast it as an unsafe rail operator, even going so far as to say CP causes Metra "to fear for the safety of its passengers." METR-7, at 23.

343 These posts depict freight trains operating outside Metra's peak periods; Metra's claim to the contrary failed to adjust the timestamps of the posts to account for local Chicago time.

344 Oppenheim Dep. Tr. at 252:4-9 (Q: "[T]he right dispatching move is to cross the Metra train from track 2 to track 1 to avoid delay; isn't that right?" A: "No, if that is the only way – the only option that you have to run, yes.").

345 *Id.*

and the tracks they will be on, giving passengers ample time to get to the correct platform.[346] It is standard operating procedure for trains to enter the station at slow speeds to ensure they can stop if needed to avoid pedestrians crossing the tracks at the last minute. If Metra viewed these practices as unsafe, most Metra stations would not be set up to cause commuters to cross tracks "on a regular basis."[347]

3. Metra's Disagreement with CP About Changes to Its Off-Peak MD-N Line Schedules in 2019 Are Pre-Transaction Issues Having No Bearing on this Proceeding

Metra dredges up a past discussions from 2019, unrelated to this Transaction, in which Metra and CP did not reach agreement to add additional non-peak Metra trains.[348] In an attempt to tie these episodes to the Transaction, Metra argues that despite denying its requests "presumably because there was no capacity," CP is now proposing to add trains "on the lines."[349] Metra evidently ignores the fact that in both instances the trains it proposed to add were to the MD-N Line, not the MD-W Line, and Applicants do not propose to add any Transaction-related trains to the MD-N Line.[350]

In any event, as explained in Walker's Reply Verified Statement, CP did not deny these requests because there was insufficient capacity on the MD-N Line. Walker R.V.S., at ¶¶ 85-90. Instead, Metra's request came at a time when the demands placed on the line were in flux

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346 *Id.* at ¶ 46; Oppenheim Dep. Tr. at 152:9-16.

347 Oppenheim Dep. Tr. at 151:18-24.

348 METR-7 at 41-43.

349 *Id.* at 41-42.

350 *See id.*; *see also* Amended Operating Plan, Appendix A, at 3. Potential additional Amtrak trains are not attributable to the transaction, and if Amtrak has committed to the addition of infrastructure on this line in connection with its new train services. *See* Amtrak-Canadian Pacific Agreement (filed Feb. 2, 2022) at §§ 1, 2.

(including the potential for Amtrak to add additional trains there), and CP was concerned that the particular changes Metra proposed would effectively expand the duration of its near-exclusive access to the line during peak periods. CP was not unwilling to consider Metra expanding its service on the MD-N line, but thought that the proposal required more thorough assessment of its consequences for CP and other users, and consideration of alternatives for Metra as well.

4. Metra's Complaints About PTC Implementation Issues Are Irrelevant and Unfair

Metra also raises grievances relating to the implementation of Positive Train Control that are unrelated to the Transaction. Metra states that "[b]oth Metra's MD-W and MD-N . . . are dispatched using Wabtec Train Management Dispatching Systems ('TMDS') computer-aided dispatch ('CAD') systems," which are "a critical component in Metra's operation," and "a requisite for implementing federally mandated Positive Train Control ('PTC') requirements."[351] Metra charges that "[i]n 2021, when upgrading new TMDS CAD software in Metra and CP systems, some Metra installations had to be delayed to accommodate interoperability with CP's other systems on non-Metra owned lines."[352] As Mr. Walker explains, this critique is "baffl[ing]" and "seems entirely contrived." Walker R.V.S., at ¶ 78. As Mr. Godfrey acknowledged, "CP and Metra spen[t] considerable time working together to provide for TMDS to function safely on CP's dispatching systems," and "CP invested significant resources in doing that."[353] Indeed, implementing PTC has been a challenge to every railroad company. Walker R.V.S., at ¶ 79. To the extent there may have been occasional delays or glitches, this is no

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351 METR-7 at 44.

352 *Id.*

353 Godfrey Dep Tr., at 33:22-34:2; *see also* Walker R.V.S., at ¶ 79.

different from the challenges other railroads have experienced, including that Metra itself has experienced. And more to the point, those challenges are essentially over, as the work of integrating TMDS into CP's dispatching systems is already substantially complete.[354]

D. Applicants Are Committed to Reassure Metra and Its Ridership that the Transaction Will Not Impact Metra's Passenger Service

Applicants desire to foster a strong relationship with Metra. To that end, while Applicants firmly believe that the Transaction will not cause any harm to Metra's commuter service, Applicants are making a number of commitments to provide reassurance the Transaction will not adversely impact Metra's operations or its passengers. As Mr. Creel outlines, *see* Creel R.V.S., at ¶ 16, CPKC has committed that:

- Will not route CPKC's Kansas City-St. Paul freight trains via Chicago (except in emergencies);
- Will not object to Metra's return to its pre-COVID passenger schedules;
- Will commit to a collaborative assessment of proposed Metra schedule changes outside peak windows; and
- Will put in place processes designed to improve real-time communication with Metra about the dispatching of its trains, accompanied by a formal escalation process to address any recurring performance issues that arise.

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[354] Walker R.V.S., at ¶ 80. To the extent Metra suggests that giving Metra dispatching authority could make Metra's own PTC implementation any easier, it is simply wrong. Aside from the fact that integrating TMDS with CP's dispatching systems is already substantially complete, even if Metra controlled dispatching over the MD-N and MD-W Lines, CP freight trains would still have to transition safely between CP-owned and Metra-owned trackage. The "challenges of efficient PTC implementation and maintenance would not be eliminated." *Id.*

CP (and CP/KC if the Transaction is approved) will work with Metra to reach mutually acceptable solutions to any issues that arise in their relationship, including any unforeseen issues caused as a result of the Transaction. As the Board has recognized, commercial negotiations between the parties are the best avenue to resolve any such operating, dispatching, and compensation matters, not the Board's conditioning powers.[355] That is particularly so where, as here, Metra seeks conditions to "to ameliorate longstanding problems [or issues] which were not created by the merger."[356]

E. The Relief Metra Requests Is Vastly Out of Proportion to the At-Most Minor Impacts of the Transaction

Setting aside that the Transaction will cause no adverse impacts to Metra's operations, and that no conditions whatsoever are warranted, the specific condition requests that Metra puts forward are both overreaching and likely to prove affirmatively counterproductive.

1. Metra's Requests to Force a Shift of Dispatching to Metra Would Override CP's Contractual Rights and Undermine Rather Than Improve the Handling of Metra Trains

First, Metra requests a condition requiring CPKC to transfer dispatching control of the MD-W and MD-N Lines to Metra.[357] Such a request is overreaching and would override CP's longstanding contractual rights without any foundation in harm from the Transaction. Metra's demand is ultimately founded on Metra's *pre-Transaction desire* to control dispatching on these

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355 *BN/Santa Fe*, 360 I.C.C.2d at 769.

356 *BN/Santa Fe*, 360 I.C.C.2d at 729-30; *BN/Frisco,* 360 I.C.C. at 952.

357 METR-7 at 70.

lines, which it has twice previously brought to the Board in the merger review context, only to be rejected both times. The Board should reach the same conclusion here.[358]

a) The Trackage Agreements Allocate to CP the Right to Operate and Dispatch Traffic on the MD-W and MD-N Lines

The contractual arrangement between CP and Metra governing the MD-W and MD-N Lines originated in the Milwaukee Road's bankruptcy and preserved CP's role as the freight common carrier on these vital lines connecting CP's network with Chicago, as explained in the Reply Verified Statement of Adolph Gameiro. CP's agreements with Metra preserved the traditional control that freight railroads have over dispatching – and that Milwaukee Road had historically when it operated commuter trains. Gameiro R.V.S. at ¶¶ 6-15. To summarize the pertinent history, when Metra acquired ownership of the MD-W and MD-N Lines, it did so subject to the terms of a 1985 Trackage Agreement entered into with CP in 1985 that expressly grants CP the right to (1) direct movement of all trains on the MD-W and MD-N Lines and (2) operate freight trains on the MD-W and MD-N Lines, with the limited exception of specified peak periods when Metra's commuter service operations and schedule are to receive priority over freight trains, except in an emergency.[359] Metra itself renegotiated this agreement in 1993 and reconfirmed CP's responsibility for the lines' dispatching.

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[358] For the same reasons, the Board should reject Metra's alternative request that the parties be required "to adopt clear, binding and enforceable dispatching standards that reflect and more clearly define CP's existing dispatching obligations." METR-7 at 80. Applicants have shown that the Transaction will not adversely impact Metra's operations. The existing contractual arrangement between Metra and CP adequately sets forth CP's dispatching obligations, including that CP not interfere with Metra's peak period trains. Thus, Metra's request for more defined and binding dispatching standards is unrelated to the Transaction but rather aimed at redressing its pre-Transaction concerns. In any event, as noted above, CPKC understands the priority to which Metra's passenger trains are entitled and is committed to working closely with Metra in the proper dispatching of all trains on the MD-W and MD-N lines, Metra's included. *See* Part VII.D above.

[359] *Id.* When Metra acquired ownership of Milwaukee's "commuter assets," it did not seek the Board's authorization, confirming that (under the State of Maine doctrine) Metra's role as owner would

The agreements give Metra important rights as well, including the creation of peak periods during which CP may not interfere with Metra's operations and when Metra is also free to add trains without limitation beyond the physical capabilities of the infrastructure (though CP is not prohibited from running freight trains).[360] Outside those peak windows, Metra is permitted to run only an agreed upon number of trains on a set schedule, and must seek CP's consent (not to be reasonably withheld) for changes to its schedule or the addition of new trains.[361]

b) Metra Has Long Sought Control of Dispatching on the MD-W and MD-N Lines

Metra's desire to use the Board to upend CP's contractual right to control dispatching on the MD-W and MD-N Lines and transfer that important right to Metra long predates this Transaction. In the Board's Major Merger Rules proceeding in 2000, Metra tried to persuade the Board to adopt a new rule that would enable the Board to override provisions of Metra's contracts with freight railroads.[362] Despite making sweeping changes to its Merger Rules (albeit ones not applicable in this proceeding), the Board nonetheless rejected Metra's proposal. The Board made clear that it did not view changes to the contractual relationship between freight and passenger railroads as warranted, even under the new rules:

> "Even though we will impose conditions where appropriate to protect passenger railroads from merger-related harm, *we will not impose remedies that are inconsistent with passenger service contracts*, and we will not require applicants to subsidize passenger service. As we have noted in prior merger decisions, most contracts with passenger authorities already include incentives and penalties for service performance. There is *no reason here to attempt to change the fundamental contractual relationship between freight and passenger carriers*. Adherence to these

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not interfere with CP's role as freight common carrier on the lines. *See State of Maine—Acquisition & Operation Exemption—Maine Central R.R.*, 8 I.C.C.2d 835, 837 (1991); Gameiro R.V.S., at ¶ 12.

360 Gameiro R.V.S., at ¶ 12; *see e.g.* Oppenheim Dep. Tr. at 307:13-17.

361 *Id.*

362 *Major Rail Consolidation Procedures*, 5 S.T.B. at 711.

> contractual terms is, in most instances, the best way to resolve the sometimes conflicting needs of these parties."[363]

Undeterred by this defeat, Metra sought to capitalize on CP's proposed acquisition of DM&E in 2008 to re-write the same set of contracts – and in the same way – that it now seeks in this proceeding. As it does here, Metra (1) complained about CP's dispatching of the MD-W and MD-N Lines, (2) argued that a transfer of dispatching would be the only way Metra could protect its own service, and (3) asked the Board to condition its approval on a transfer of dispatching from CP to Metra.[364] The Board rejected Metra's request, for reasons that compel the rejection of Metra's identical request in this proceeding:

> "Metra seeks material changes to (or extensions of) existing agreements, or to compel new contractual commitments from CPRC to protect Metra from potential traffic increases that it might not have considered during prior contractual negotiations. *We will not use our conditioning power here to compel resolution of potential differences between CPRC and Metra with respect to operating, dispatching, and compensation matters.* Given the intricate details involved in coordinating freight and passenger rail operations, capital expenditures, and compensation, commercial negotiation seems to be the better avenue for resolving such issues. CPRC has indicated that it remains committed to working cooperatively with Metra, and the Board strongly encourages both parties to work together to achieve a mutually acceptable arrangement to govern joint operations."[365]

This same rationale applies here. Just as it did in *CP/DM&E*, the Board should allow Applicants and Metra to work together to resolve dispatching issues, especially because Applicants "ha[ve] indicated that [they] remain[] committed to working cooperatively with Metra." *CP/DM&E* at 15; *see also infra* Section VII.E.

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363 *Major Rail Consolidation Procedures*, 5 S.T.B. at 564-65 (emphasis added).

364 *CP/DM&E*, Finance Docket No. 35081, Metra Comments (filed Mar. 4, 2008) at 4, 9, 13.

365 *CP/DM&E*, Finance Docket No. 35081 (Decision No. 11 decided Sept. 29, 2008) at 15 (emphasis added).

c) The Board's Precedents Sharply Disfavor Forced Shifts in Dispatching

The Board's decision in *CP/DM&E* rejecting Metra's request to shift dispatching control is not an outlier. The Board has consistently rejected requests by commuter agencies and freight railroads alike to force changes in dispatching responsibility established by contractual relationships. Most recently, in the *CSX/Pan Am* proceeding, the Board rejected a request by the Boston-area commuter agencies (MBTA and MassDOT) for a condition requiring CSX to cede responsibility for dispatching lines owned by MassDOT and used by CSXT.[366] As here, however, there was no evidence demonstrating that "CSX's or B&E's ability to dispatch will be less efficient than the dispatching that occurs today"[367] as a result of that transaction. Likewise, the CP/KCS Transaction will not alter CP's dispatching of Metra's MD-W or MD-N Lines.

The Board reached a similar conclusion in the *UP/SP Houston/Gulf Coast Oversight Proceeding*, where a coalition of commenters sought to have dispatching of UP-owned lines in the Houston area shifted from UP to PTRA (a neutral Houston switching railroad).[368] The Board rejected that condition, observing that "[i]t is the nature of dispatching decision-making that some dispute and delay will occur when multiple trains are moving over track."[369] The Board concluded that a forced transfer of dispatching would be "exceedingly disproportionate" and "too unpredictable" in comparison to status quo operations that appeared to be successful.[370] The same reasons apply fully to this case as well.

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366 *See CSX/Pan Am*, Finance Docket No. 36472 (Decision No. 9) at 29.

367 *Id.* at 30.

368 *UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. at 1042.

369 *Id.* at 1050.

370 *Id.* at 1054.

d) Transferring Dispatching Control to Metra Would Create More Issues Than It Resolves

Contrary to Metra's assertions, CP dispatches Metra-shared lines well and Applicants have shown that the Transaction will not adversely impact Metra's operations. Walker R.V.S., at ¶¶ 5-24, 54-55.[371] There accordingly is no justification to even consider a transfer of dispatching control to Metra. To the contrary, transferring dispatching control to Metra would be counterproductive and create more issues than it resolves. *See* Walker R.V.S., at ¶¶ 70-82.

First, it is no coincidence that the Metra lines that see the most freight traffic are uniformly dispatched by the freight railroads operating over those lines: BNSF, UP, CN, and CP. Walker R.V.S., at ¶ 69. Metra's dispatchers, on the other hand, only have limited experience dispatching freight and passenger trains on Metra's Rock Island Line and portions of the Southwest Service Line, where freight traffic levels are very light.[372]

CP dispatchers, who are trained and experienced to operate around the clock and are familiar with the complexities associated with dispatching freight trains alongside passenger trains, by placing them with Metra dispatchers, who are primarily focused on the operation of passenger trains between the early morning hours and late evening hours, would create a host of potential issues. *See* Walker R.V.S., at Section II. Metra does not operate trains on the MD-W and MD-N Lines around the clock, but instead goes dark between the last train of the night at 12:05 am and the first train of the following morning at 4:52 am on weekdays. On weekends and

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371 *See also supra* at Section VI.A.

372 *See* Walker R.V.S., at ¶ 68; *see also* Metra's Objections and Responses to Applicants' First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission ("Metra R&Os") (Exhibit 53), at 4 ("…Metra responds by stating that its dispatchers currently dispatch both passenger and freight trains on the Metra's Rock Island Line and portions of the Southwest Service Line.").

holidays, this dark period is even longer.[373] If Metra controlled dispatching of the MD-W and MD-N Lines, it would need to set up a dedicated staff to dispatch only CP's freight trains during the night hours. This would likely be a skeleton staff that would not have experience dispatching CP's freight trains. Walker R.V.S., at ¶ 66. Mr. Godfrey admits Metra's dispatchers lack the experience looking at the broader CP network on a day-to-day basis that is necessary to make appropriate dispatching decisions.[374]

Second, transferring dispatching control to Metra would undermine the efficient coordination of freight and passenger operations on the lines shared by CP and Metra, because it would squander the broader geographical and temporal perspective that CP's despatchers are able to bring to bear on their minute-by-minute dispatching judgments. Transferring dispatching control to Metra would effectively bifurcate responsibility for dispatching CP's lines to and from Chicago into two insular and separately-accountable groups: CP's dispatchers beyond the limits of Metra ownership and Metra dispatchers within those limits. But whereas Metra's passenger operations adhere to those boundaries, freight operations do not.

With Metra dispatchers responsible east of Randall Road (on the MD-W line) and south of Rondout (on the MD-N line), coordination between CP and Metra would be inherently less efficient and more difficult than coordination between different sets of CP dispatchers who bring a broader network perspective to their decision-making. *See, e.g.*, Walker R.V.S., at ¶ 76 (illustrating how dividing dispatching between Metra and CP would curtail efficiency). Efficiently dispatching these lines requires awareness in real time of conditions on other part of

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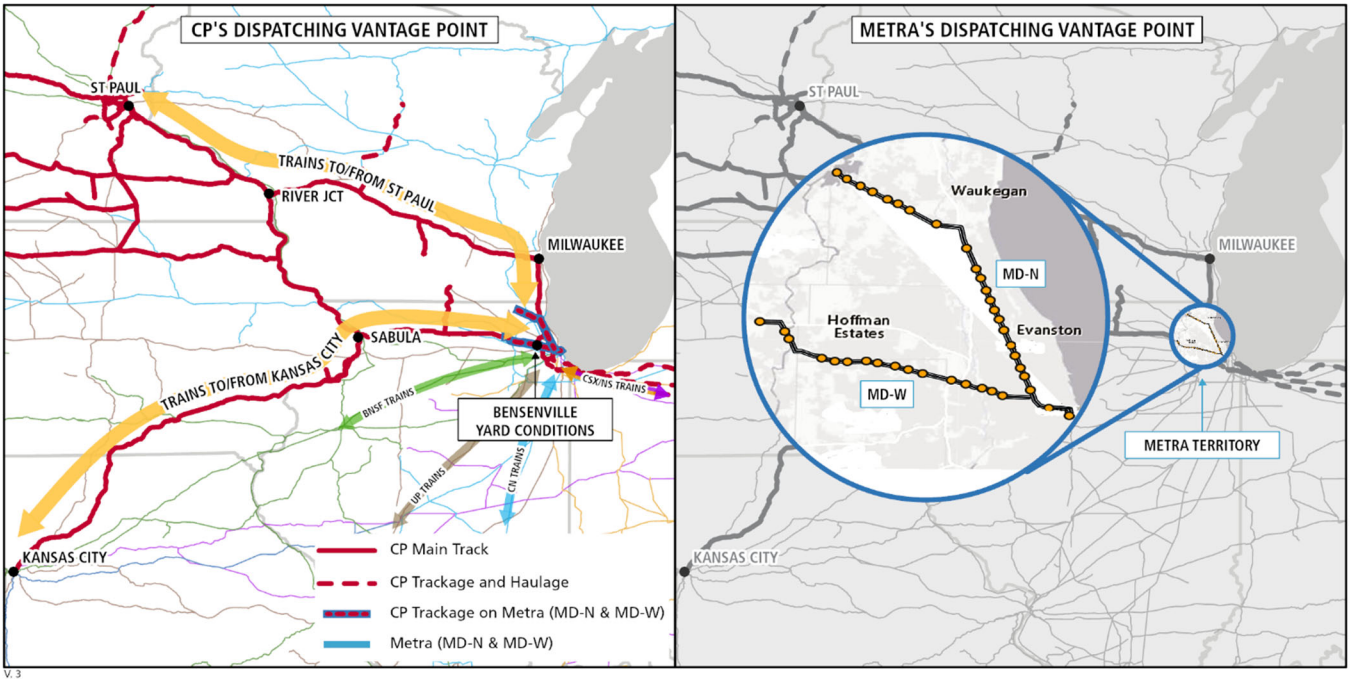
373 *See* Metra R&Os (attached as Exhibit 53) at 8 ("Metra operates dozens of passenger trains on MD-W and MD-N. None of Metra's inbound trains operate scheduled service for over seven hours between 9:45 pm and 4:52 am during the week, and none of its outbound trains operate scheduled service for over six hours between 12:05 am and 6:21 am during the week."); *see also* Walker R.V.S., at ¶ 65.

374 Godfrey Dep. Tr. at 83:25-84:21; 122:2-23.

the network well beyond Metra's operational boundaries including not only CPs own lines as far away as Kansas City and St. Paul, MN, and the inner workings of CP's important Bensenville Yard, but also lines controlled by UP, IHB, BRC and others. *See* Walker R.V.S., at ¶ 72. CP dispatchers have the experience, knowledge, and situational-awareness necessary to coordinate with the rest of the CP network and to juggle these moving pieces. Metra dispatchers almost certainly would not. Walker R.V.S., at ¶¶ 73-82.

Mr. Walker's Figure 13 illustrates how the different perspectives of CP and Metra's dispatchers would handicap efficient operation of the MD-W and MD-N lines. Metra's perspective would be focused on Metra's own lines and operations, and thereby sub-optimize the movement of all trains across the network. This would yield a greater potential to disruption to freight and passenger operations in the Chicago terminal, and beyond.

FIGURE 22[375]
DIFFERENT PERSPECTIVES OF CP AND METRA DISPATCHERS



375 Walker R.V.S., at ¶ 73.

In his Reply Verified Statement, Mr. Walker walks through three examples to illustrate how Metra control of dispatching likely would undermine the goal of both CP and Metra in the efficient co-existence of freight and passenger operations on the lines we share.[376] Each example clearly shows how the complexities of dispatching freight and passenger operations on the MD-W and MD-N Lines require intense coordination between Metra's passenger operations and CP's freight operations – both beyond Metra's lines and within CP's Bensenville Yard. That degree of awareness and coordination would not be possible were operational (*i.e.*, dispatching) responsibility bifurcated in the way Metra desires. Walker R.V.S., at ¶¶ 73-82.

2. Metra's Request to Alter the Compensation Terms of the CP-Metra Agreement Are Overreaching

Metra has tried unsuccessfully before to use the Board's review of a transaction to rewrite contract provisions between it and CP. As the Board has recognized, this is improper.[377] The Board held that using its conditioning power "to compel resolution of potential differences between CP and Metra with respect to . . . compensation matters" is inappropriate and that "given the intimate details involved in . . . capital expenditures, and compensation, commercial negotiation seems to be the better avenue for resolving such issues."[378] Ignoring this precedent, Metra requests several "[f]inancial" conditions to the Transaction, including conditions requiring CP to pay for the full cost of capital projects on the MD-W and MD-N Lines "if increases in its traffic volume, weight, and frequency, as well as the length of trains, is the reason that the capital project is pursued;" a requirement to "compensate Metra for maintenance … by changing CP's

376 *Id.* ¶¶ 75-80.

377 *See CP/DM&E* (Decision No. 11) at 15.

378 *Id.*

maintenance contribution from a flat fee based on train counts and gross ton miles;" and "a change in CP's rental terms from a flat fee to a dollar per car mile."[379] Metra also requests that the Board require CP to "compensate Metra for avoidable delay/interference events" and pay Metra "performance penalties" as well as penalties for non-compliance with any conditions imposed by the Board.[380] In other words, Metra seeks more compensation for the impact of potential increases in freight traffic on these lines than its contract with CP provides.[381]

There is no reason for the Board to depart from its precedent denying Metra's similar attempts to use merger proceedings to alter pre-existing contractual relations and thereby squeeze additional compensation out of CP.[382] As explained above, this Transaction will not adversely impact Metra's operations. The additional gross ton miles that Applicants project are modest, especially given that the nature of increased traffic from the Transaction is heavily intermodal. To the extent Metra is complaining that CP's flat fee should go up as train counts rise, that is not what the contract provides and in any event there will be no increase on the MD-N line and, as already explained, during the 1980s and 1990s, as many if not more trains than the traffic they will see post-Transaction operated on the MD-W line. Gameiro R.V.S. at ¶ 27. In fact, freight trains used to account for a higher share of traffic on the MD-W Line than CP's freight trains

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379 METR-7 at 78.

380 *Id.*

381 Metra's suggestion that that it should be excused from contractual terms it no longer likes because it did not negotiate the agreements that pre-dated its acquisition of Milwaukee Road's commuter assets is incorrect. As Gameiro explains in his Reply Verified Statement, Metra understood that it was acquiring those assets subject to the 1985 Trackage Agreement. *See* Gameiro R.V.S. at ¶¶ 12-14. And Metra itself renegotiated the compensation terms governing CP's uses of Metra-owned line in 2003. *Id.* at ¶ 15.

382 *See CP/DM&E* (Decision No. 11) at 15.

will account for post-Transaction because the number of Metra passenger trains have increased significantly as well.

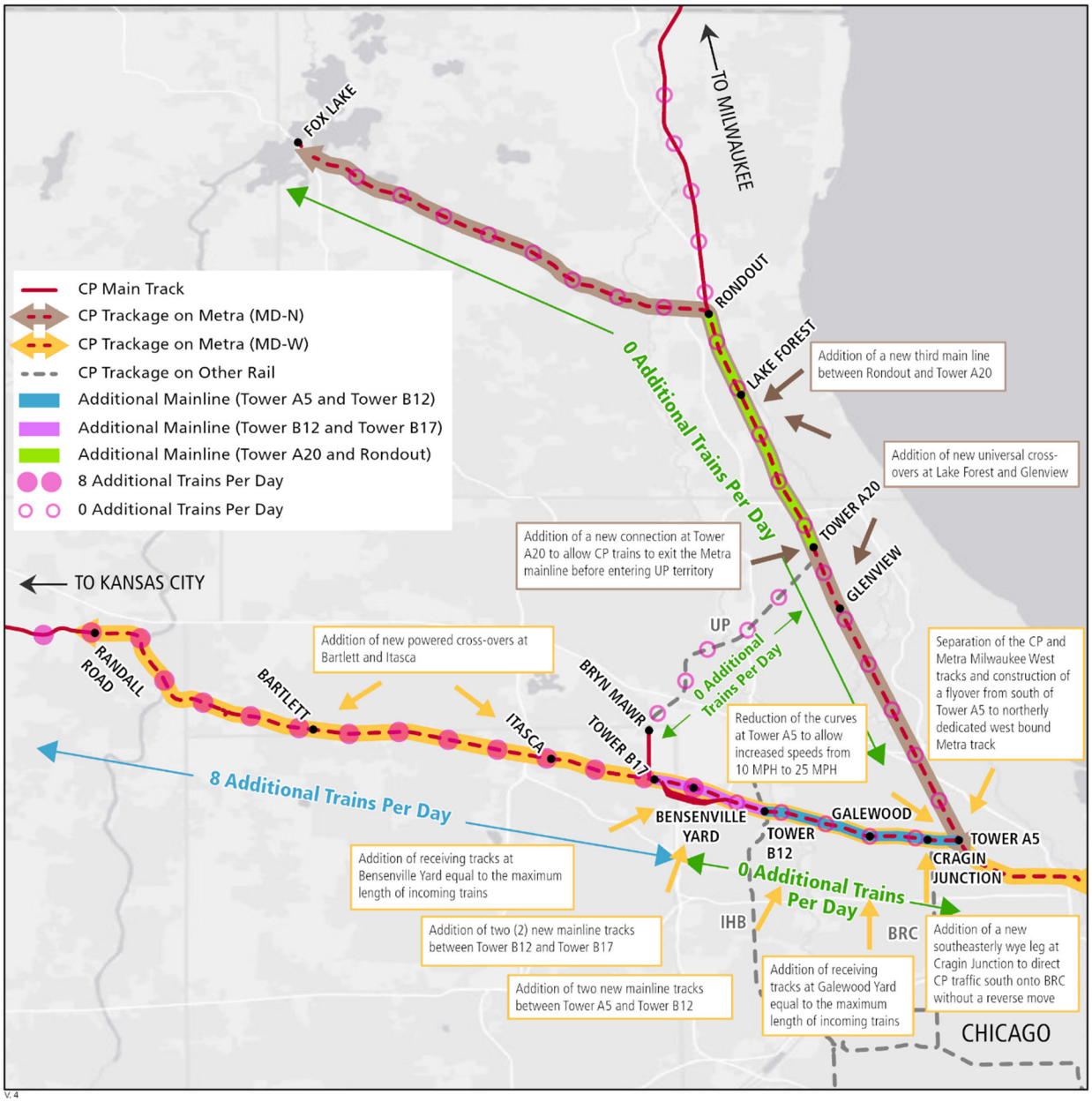
Metra's other request that the Board require CP to indemnify Metra for additional charges imposed by Amtrak for delays caused by CP dispatching is without merit and unrelated to the Transaction.[383] Of the lines CP and Metra share, Amtrak trains only operate on the MD-N Line. The Transaction will have no impact on CP's operations there, nor will it increase the number beyond Amtrak's already pre-existing plans.

3. Demands for Hundreds of Millions in New Infrastructure Are Either Wildly Overreaching or Already in Progress

Metra requests that Applicants be required to make 11 separate capital improvements to the MD-W and MD-N Lines, as detailed in Figure 23 below. As Mr. Elphick explains these projects would come at the prohibitive cost of over $1 billion. *See* Elphick, App. A.

[383] METR-7 at 79.

FIGURE 23
METRA PROPOSED INFRASTRUCTURE



Nine out of the 11 would improve portions of Metra's network untouched by Transaction-related train count changes namely on Metra's MD-N line, on its MD-W line from Tower A-5 to Tower B-12 (east of Bensenville yard), or at Tower A-5 on the MD-W line. Elphick RVS, at ¶ 59. None of these projects are needed to mitigate Transaction impact.

As further explained by Mr. Elphick, at least four of Metra's requested conditions are physically feasible. *See* Elphick R.V.S. It is not possible to add a new wye leg at Cragin Junction to direct CP traffic south onto BRC without a reverse move because there are a number of warehouses and other buildings and businesses in the way. Nor is it possible to construct a new third mainline track from Rondout to Tower A-20 because this would require adding 12 miles of new track, which could not be added without rebuilding four Metra stations and four grade separations. And adding a new dedicated double track alongside Metra's existing double track is not only unnecessary – especially east of Bensenville where CREATE Project work has already invested in making this segment triple – but also simply impossible east of Tower B-17 because of the Illinois Tollway, UP trackage, and O'Hare Airport. *Id.*

Some of Metra's handful of remaining requests involve locations where Applicants are already planning infrastructure expansion. Specifically, Metra's request that CP be required to construct receiving tracks equal to the length of incoming trains or equal to the maximum length possible at Bensenville Yard[384] is already being addressed through Applicants' planned reconfiguration of Bensenville Yard. Elphick R.V.S., at ¶ 62.

4. Metra's Request For a Binding Standard and Process For Schedule Changes and New Trains Improperly Seeks to Improve Its Contractual Rights

Metra's request for a condition imposing a process and substantive standard for proposed changes or additions to Metra's passenger schedules is both inappropriate and unnecessary. First, as shown above, Metra's concerns in this area are entirely derivative of its own re-Transaction dissatisfaction with CP's response to two proposals in 2019 that involved the MD-N

[384] METR-7 at 70.

Line, where the Transaction will have no effect. As to the MD-W line, where CPKC does anticipate a handful of new freight trains, there will be no impact on Metra's ability to add trains during its peak windows without the need for CPKC consent. Nor will there be any change in CP's contractual obligation to consider in good faith any scheduling changes or additions Metra might propose outside those peak windows, and to not to withhold consent unreasonably. Metra's requests are thus The requested condition would also be thus at odds with longstanding agreements governing CP and Metra's relationships for adding new trains or changing schedules. As explained above, the contracts set capacity-allocation rules based on two windows—peak periods and non-peak periods. Gameiro R.V.S., at ¶ 21.

Second, and just as important, Metra's proposed condition is also unnecessary because Applicants are committing that to engage with Metra in a collaborative assessments of proposed operational changes during the off-peak periods when Metra requires CP consent to adjust its schedules. Creel R.V.S. at ¶ 16. Against this backdrop, a condition would be unnecessary even if it were supported by Transaction-related harm.

Third, Metra's related request that CPKC be required to adopt Metra's RTC modeling or cooperate in refining RTC modeling for Metra's lines in order to objectively gauge capacity and assess the impact of future proposals is similarly unnecessary and would be inappropriate to impose as a condition. As shown above, CP has already performed extensive work correcting the make errors in RTC modeling. If during the collaborative process of addressing potential future schedule changes CPKC and Metra were to conclude that it would be productive to revisit that RTC modeling work, or develop new RTC simulations, to address the issues at hand, CPKC would be supportive. But RTC modeling is expensive and burdensome and likely would not be

necessary in every case, such that a condition giving Metra the right to demand such modeling in all circumstances would be inappropriate.

5. Metra's Requested Oversight Conditions Are Inappropriate and Unnecessary

Finally, Metra proposes two unnecessary oversight conditions. First, Metra asks that the Board "[i]mpose a 10-year STB oversight condition of CP dispatching practices . . . , including requirement agreement between Metra and CP to binding workable dispatching standards that do not interfere with Metra's service and that prioritize Metra's peak period service."[385] Second, Metra asks that the Board "[i]mpose a 10-year STB oversight condition of any other conditions imposed with respect to Metra's service."[386]

Applicants have assented to a five-year period of formal Board oversight, which is at the outer limit of what has been required in any major merger case. That period will be ample to ensure appropriate scrutiny of the (non-existent) impacts of Transaction-related changes on Metra. Again, the Transaction will not adversely affect Metra's commuter service, and conditions to address issues unrelated to the Transaction are inappropriate. *See supra* Part VII.B. Metra and CP already have an operating agreement governing issues like supposed "interference" by CP with Metra trains, and the Board oversight process would not be a suitable forum for revising the parties' contract rights or litigating noncompliance with that agreement. *See supra* Part VII.B, D.2.

Further, such drastic relief would be an unnecessary waste of Board resources. Metra has all the information it needs about CP's operations on Metra's lines to raise any contractual issues

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385 METR-7 at 71.

386 *Id.*

with the appropriate court. But more importantly, Applicants commit to close collaboration with Metra about evolving train service on their lines as Applicants implement the Transaction, and to work with Metra to mitigate material impacts of the Transaction on Metra's passenger service in the unlikely event any occur. *See infra* Part VII.E.; Creel R.V.S. 16.

VIII. OTHER DEMANDS BY CLASS 1 RAILROADS FOR PROTECTION AND OTHER RELIEF SHOULD BE REJECTED

A. The Board Should Reject CN's Proposed "Inconsistent" Purchase of CPKC's Springfield/East St. Louis Line

The Responsive Application filed by Canadian National ("CN") seeking an order requiring the divestiture of KCS's lines between Kansas City and Springfield, IL and East St. Louis, IL (the "Springfield/St. Louis Line"),[387] is yet another attempt by CN to disrupt and delay this Transaction and undermine CPKC's future competition against CN. After failing to generate sufficient revenue to justify continued operation, CN's predecessor sold off the Springfield/St. Louis Line years ago when it was near death.[388] KCS later acquired the line as part of the

[387] CN defines the Springfield/St. Louis Line as consisting of the following KCS lines: (1) The line from milepost ("MP") 192.4 at Cockrell (Springfield), IL through MP 482.0 at Rock Creek Jct. (Kansas City), MO (milepost equation at Murrayville, IL where MP 221.7=MP 226.7); (2) The line from MP 68.2 at Roodhouse, IL (MP 237.2 on the first segment) through MP 287.2 at Church (East St. Louis), IL, including KCS's interest in the UP/KCS Joint Facility between Godfrey, IL and Church, IL (milepost equation at Godfrey, IL where MP 28.0=MP 252.1); (3) The Jacksonville Branch from MP 226.7 at Murrayville, IL to MP 216.3 at Jacksonville, IL; (4) KCS's interest as lessor in the Fulton Branch from MP 0.0 to MP 3.0 at Mexico, MO, leased to Ozark Valley Railroad, Inc. CN-14 at 6.

[388] Illinois Central Gulf (ICG) sold the line to Chicago, Missouri & Western (CM&W), which went bankrupt within about a year. Gateway Western Railway Company (GWWR) was formed to acquire, and did acquire, from the CM&W bankruptcy trustee at the end of 1989 the line from Godfrey to Roodhouse, IL and from Cockrell, IL to Kansas City, MO, and a 50% ownership interest in a pair of largely parallel lines between Godfrey and East St. Louis. GWWR subsequently formed a subsidiary, Gateway Eastern Railway Company (GWER) that acquired from Conrail an approximately 13-mile segment of the parallel tracks that CM&W had not owned.

Gateway Western Railroad and invested heavily in it over the years, making it an integral and important part of the KCS system.[389]

In 2022, CN tried and failed to buy all the assets of KCS. Seeking another chance to acquire KCS assets, and motivated to undermine the intensified competition that CPKC will bring, CN is now pursuing this portion of KCS's system. When it withdrew its own Notice of Intent to acquire all of KCS (following KCS's decision to accept CP's bid and the Board's decision rejecting CN's proposed use of a voting trust), CN indicated that it would be an active participant in this proceeding. CN now seeks a Board order forcing KCS to sell a substantial part of its network to CN notwithstanding that it failed to persuade KCS's board of directors to enter into a transaction with CN.

CN's gambit should be rejected outright for at least five reasons:

- It is a transparent effort to delay, disrupt, or dismember the procompetitive CP/KCS Transaction;
- It is unsupported by any predicate harm to competition arising from the CP/KS Transaction;
- It would significantly harm the public interest by blocking the public benefits of the CPKCS Transaction and even depriving existing KCS shippers of single-line routes from which they have benefitted for years;
- It is unnecessary to achieve the posited "competitive enhancements" that CN suggests are its motivation for the relief it seeks; and

[389] KCS acquired control of GWWR in 1997, and GWWR was merged into KCSR in 2001, with GWER being a subsidiary of KCSR. Naatz R.V.S at ¶ 92.

- It is procedurally improper, in that divestitures are strongly-disfavored extraordinary remedies, and a divestiture specifically to CN would not be the only – or even a desirable – way of remedying the harm CN alleges *even if* CN's claimed harm (which is non-existent in fact) were accepted.

We address each of these issues in the sections that follow.

1. CN's Gambit Is Yet Another Round in CN's Effort to Disrupt or Delay the CP/KCS Transaction

CN has long sought to ensure that any transaction involving KCS would be to CN's benefit, and simultaneously to prevent its rival CP from becoming a stronger competitor. Documents produced in discovery in this case reveal that {{[redacted]}}[390] {{[redacted]}} KCS announced its agreement to be acquired by CP, CN's first step was to try to persuade the Board to impose the more-onerous 2001 merger rules to CP's proposal.[391] The Board rejected that position in Decision No. 4.

CN's next step was to put forward its own bid to acquire KCS out from under CP. Almost four months later, after the Board rejected a voting trust proposed by CN, KCS announced that its Board of Directors had unanimously determined that its acquisition by CP was a superior proposal to the proposal made by CN, and CN abandoned its effort.[392] CN's internal

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390 {{[redacted].}}

391 Canadian National Railway Company's Objection to 49 C.F.R. 1180.0(b) Waiver (CN-1) (filed Apr. 1, 2021) at 2-3.

392 "Kansas City Southern Terminates Canadian National Railway Merger Agreement and Is Entering Into Merger Agreement with Canadian Pacific Railway," Kansas City Southern (Sept. 12, 2021), https://investors.kcsouthern.com/news-releases/2021/09-15-2021-134522975.

documents obtained in discovery show that one of CN's motivations for seeking to acquire KCS was {{ }}. A key presentation addressing {{ }}[393] In the same vein, CN's {{ }}[394]

At that point, CN announced that it intended to remain an "active participant" in this proceeding,[395] and it doubled down on its efforts to delay or disrupt the completion of the CP/KCS Transaction. CN's strategy was plainly motivated by a judgement that even if it cannot own KCS and thereby keep KCS out of the hands of its arch-rival, it can at least delay and impose costs on CP's completion of the transaction.

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[393] CN0000187, {{ }} (emphasis added). The same presentation noted that {{ }}

[394] CN0000049-HC, { }. Similarly, {{ }}

[395] *Canadian National Railway Company, Grand Trunk Corporation, and CN's Rail Operating Subsidiaries – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company* ("*CN/KCS*"), FD 36514, CN Letter to the Honorable Cynthia T. Brown (CN-28), (filed Sept. 16, 2021) (Vol. 3, Exhibit 57) at 2 ("CN will participate actively in [the CP-KCS] proceeding…").

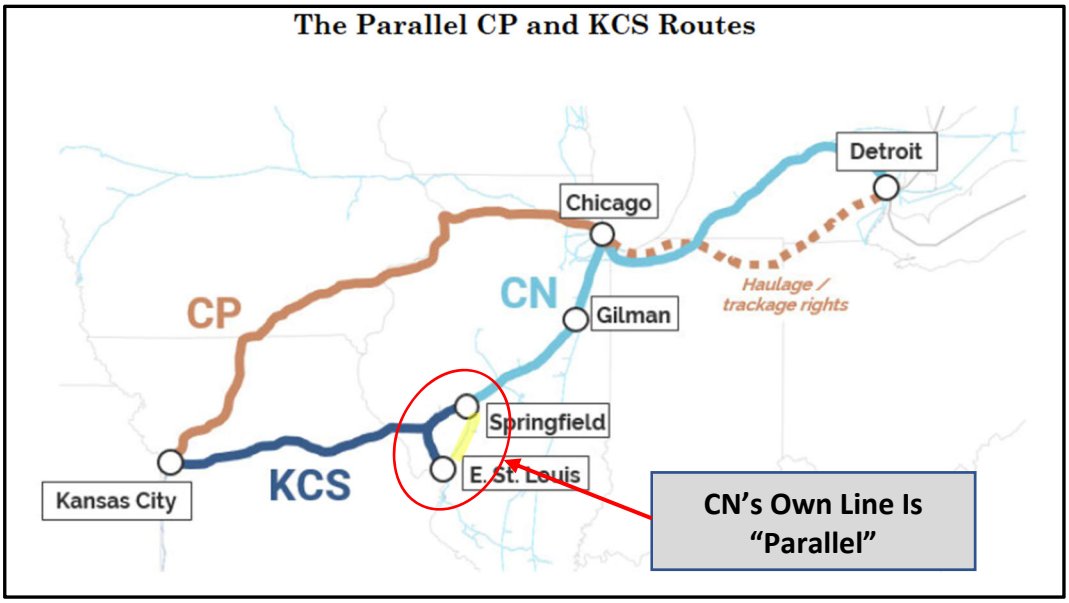
CN's Responsive Application is the pinnacle of this strategy, seeking an order from the Board compelling KCS to sell part of its network to CN notwithstanding the failure of CN's proposed bid to acquire all of KCS. If successful, this gambit would achieve two things for CN: it would deprive CPKC and the public of important public benefits, and diminish CPKC's ability to compete more effectively against CN, and it would give CN a windfall untethered to any Transaction-related harm. When CN evaluated its options in March 2021 in light of the CP/KCS announcement, one of the options it considered {{[redacted]}}[396] CN's goals here are not aligned with the public interest.

2. There Is No Competitive Harm to Address

The sole predicate offered by CN for its proposed relief is the thesis – based entirely on a simplistic map – that KCS's Springfield/St. Louis Line is "parallel" to CP's Kansas City-Chicago Line. This map is the centerpiece of CN's Responsive Application, and we reproduce it below.

[396] CN0000187-HC, [redacted]}}.

FIGURE 24[397]
CN'S "PARALLEL ROUTES" MAP



One take-away from this map is that, were CN correct that mere "parallelism" sufficed to warrant the extraordinary remedy of divestiture, CN's own proposal would be disqualified. As we have highlighted in yellow on CN's map, CN is proposing to acquire a KCS line (between Springfield and East St. Louis) that is *parallel to CN's own lines between those two endpoint*s.

A set of route diagrams prepared by CN for its "Connected Continent" website makes this parallelism unmistakable, as shown in Figure 25 below.[398]

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397 CN-14 at 10.

398 Other CN internal documents {{ }} (Vol. 3, Exh. 57). The CN and KCS Springfield-St. Louis routes fit this description precisely. {{ }} CN0000137, {{ }}

FIGURE 25[399]
CN AND KCS'S PARALLELISM EXTENDS TO THE SPRINGFIELD-EAST ST. LOUIS SEGMENT



Mere parallelism is not sufficient predicate for divestiture (or any other) relief. Under the Board' precedents, the Board must first find that the Transaction would cause some substantial competitive harm that the proposed relief would narrowly remedy.[400] CN does not even try to make a serious showing of any such harm. The sum total of its argument is that:

- Shippers *at some points in time* over the past 100 years "have moved freight" between Kansas City and Chicago over the Springfield Line,[401] and
- Referring to *CN's own proposal to acquire KCS*, that "[p]rior to agreeing to a merger with CP, KCS expressed interest in, and touted the benefits of, investing to increase track speeds on this line to create a "Kansas City Speedway."[402]

CN's factual assertions are the furthest cry from a demonstration of any competitive issue warranting a remedy. CN's own candid confidential communications with shippers give away the ghost: writing to one major customer in December 2021, CN explains: {{

399 Excerpt from CN0000147-HC, at 2 (Vol. 3, Exhibit 59).

400 *See* UP/SP, 1 S.T.B. at 433-34 (refusing to "impose conditions that will restructure the competitive balance among railroads with unpredictable effects, which is what divestiture to KCS or Conrail would result in here," when "divestiture would be greatly inferior to the remedy we have chosen.").

401 CN-14 at 10-11.

402 *Id.* at 11.

[redacted]}}[403]

Aware that the facts (which we discuss further below) conclusively disprove any contention that the KCS-CN route via Springfield plays a meaningful competitive role in the transportation marketplace, CN shifts gears and argues that there would be what CN calls a "significant competitive concern" "[e]ven if there were *no traffic being moved* between Kansas City and Chicago today over the Springfield Line." CN-18 at 12 (emphasis added). Why is this? Because, CN contends, "KCS previously touted the potential for this line to be upgraded to create a Kansas City Speedway." CN-18 at 12. The sole source of that "potential," however, was *CN's own proposal* to acquire KCS. CN's argument about competition thus boils down to a desire to bootstrap its own failed effort to buy KCS into support for a renewed effort to buy part of KCS. The Board should not condone this.

The incontrovertible facts show that the supposed "KCS-Springfield-CN" route plays no role at all – much less a meaningful one – in the transportation marketplace. As KCS's CEO and Chief Marketing Officers explain, the history of KCS-CN interline traffic via the interchange at Springfield shows that there is no realistic prospect of this route becoming the robust competitive option that CN describes for traffic moving between Kansas City and Chicago and beyond. The Line is a key part of the KCS network, servicing traffic to/from on-line shippers and the East St. Louis gateway, but is not part of a "speedway" in competition with the four other single-line routes between Kansas City and Chicago. Ottensmeyer R.V.S. at ¶ 12; Naatz R.V.S. at {[redacted] 94.

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[403] CN0000185-HC, {{[redacted]}} (emphasis added) (Vol. 3, Exhibit 60).

First and foremost, traffic data shows that the route is not a material competitive option. Brown and Zebrowski examine traffic data in the carload waybill sample and CN's and KCS's 100% traffic tapes, which demonstrate that there has been essentially zero interchange between KCS and CN at Springfield in recent years, and even less traffic via that route in lanes that include the Kansas City-Chicago corridor. The principal corridors in which – according to CN's hypothesis – the Springfield route could conceivably be an option are shown in Figure 26 below.[404] The shares of traffic moved by various routes are represented in different colors, with traffic using the CP-Springfield-Kansas City route shown in red. As can be seen by the almost complete absence of red, that route is not a meaningful, competitive option chosen by any shippers. Brown/Zebrowski R.V.S. at ¶ 93:

[404] The major corridors include Kansas City-Chicago, Mexico/Border Crossing-Chicago, Kansas City-Detroit, Mexico/Border Crossing-Detroit, Kansas City-Toronto, Mexico/Border Crossing-Toronto. Brown/Zebrowski R.V.S. at Figure 12.

FIGURE 26[405]
2015-2019 WAYBILL DATA SHOWS DE MINIMUS CP-KCS PARTICIPATION VIA SPRINGFIELD IN KANSAS CITY-CHICAGO LANES

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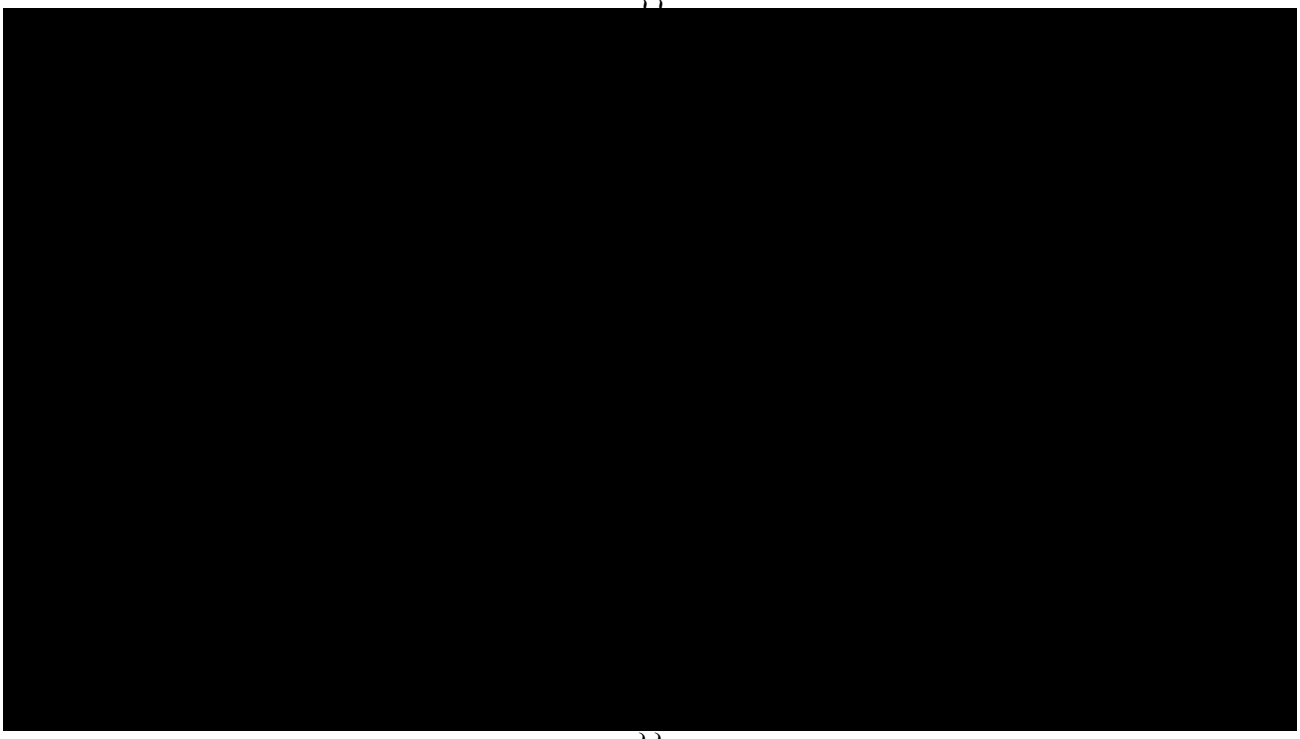

}}

Further, as Naatz explains, even these de minimus traffic figures overstate the role of the Springfield route. Much of the traffic waybilled as moving via Springfield is in fact physically interchanged between KCS and CN at East St. Louis. Naatz R.V.S. at 91. And that traffic is not using the KCS-CN route for overhead movement between Kansas City and Chicago; this is primarily local traffic moving to and from on-line KCS and CN shippers. *Id*.

This is not to say that KCS's Springfield/St. Louis line is moribund, it is not. It is just that it primarily services local traffic and overhead traffic to/from the East St. Louis gateway, *not* traffic moving in the Kansas City-Chicago corridor via Springfield. This is shown in Figure 27 below. Brown/Zebrowski RVS at ¶ 93:

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405 Brown/Zebrowski R.V.S. at {¶ 93 Figure {____

FIGURE 27[406]
2019 TRAFFIC ON KCS SPRINGFIELD LINE BY MOVEMENT CATEGORY

Movement Category	2019 Units	Percent
Traffic Locally Served on Springfield Line	{{ [redacted] }}	{{ [redacted] }}
Overhead Traffic to/from East St. Louis	{{ [redacted] }}	{{ [redacted] }}
CN-KCS Interchange Traffic Waybilled via Springfield	{{ [redacted] }}	{{ [redacted] }}
Total 2019 KCS Springfield Line Traffic	**{{ [redacted] }}**	**100.0%**

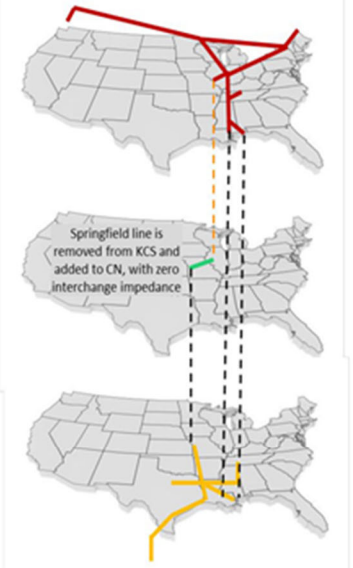
CN's own traffic analyst – Hunt – confirms the trivial importance of the Springfield interchange between KCS and CN. His analysis assigned "impedances" to various routes reflecting the degree to which a given route is viewed by shippers as a viable option. To illustrate how impedances work, he gave as an example his assessment of the CN-KCS route via Springfield. His conclusion was that this route should be assigned the highest possible impedance – with interchange being treated as the equivalent of 650 extra route miles, meaning that it was a highly disfavored route. This assessment was driven by the fact that "CN and KCS have low interchange volumes at Springfield/Cockrell," amounting to "< 2 loaded units/day." Hunt's graphic is reproduced below as Figure 28.

406 *See* Brown/Zebrowski R.V.S. at ¶ 97.

FIGURE 28[407]
CN'S ANALYSIS CONFIRMS IRRELEVANCE OF CN-KCS SPRINGFIELD ROUTE

Exhibit C-2: Defining the network-based scenarios

Post-Merger Network
Illustrative – does not show all railroads included in model



Pre and Post-Acquisition Network Scenarios

- **Pre-Acquisition**: CN and KCS have low interchange volumes at Springfield/Cockrell in the 2019 base year, therefore the impedance is set to 650 miles.
- **Post-Acquisition**: the Springfield line is considered part of CN, and there is a zero interchange impedance for CN to move traffic over this line to any location, including Kansas City and St. Louis.
- **Other Interchanges**: all other interchange locations between railroads are retained at the impedances reflecting 2019 base year interchange volumes. This has the effect of keeping the gateway open and operating as it did in 2019.
- **Example**: moving from Detroit to Kansas City on CN-KCS through Springfield has an impedance of 1404 (754 miles + 650 jct imp) pre-acquisition, and 754 (754 miles + 0 jct imp) post-acquisition

Exhibit C-3: Junction impedances are set based on historical volumes from waybill data

2019 Interchange Volume	Junction Impedance	Notes
Same Family	0	No impedance at the interchange
< 730	650	< 2 loaded units/day

The corridor CN gives the most attention to in its Comments is the route between Kansas City and Toronto, where CN claims that the Springfield Line would provide a competitive alternative to CP. Based on traffic data, however, it is clear than the Springfield Line plays *literally zero* competitive role in the lane today. CN participated in meaningful volumes of traffic in the Kansas City-Toronto corridor in 2019, *but with BNSF and UP and never with KCS,* as shown in Table 3 below.

407 CN-14, Hunt V.S. at 38.

TABLE 3[408]

KANSAS CITY AND TORONTO IN 2019 {{



}}

CN's assertions about the potential future competitive role of the Springfield line also ignore the significant disincentives KCS and CN have as separate companies in making investments in this route because there is already strong, single-line competition in the corridor. BNSF, UP, NS, and CP already have single-line routes between Kanas City and Chicago, and NS has a straight-arrow single-line route between Kansas City and Detroit, where it provides premium intermodal service today. Any effort to pull the KCS-CN route out of the weeds would have to confront this competitive environment.

A look at the ICCs decision in the *UP/MKT* case, decided under the pre-2001 merger rules, is instructive.[409] In that case, parties sought trackage rights—a far less intrusive and destructive condition than divestiture—based on an alleged reduction in competition in several corridors. The ICC rejected the relief, despite the "parallelism" of the merging parties routes. It "examine[d] carefully the competitive options that would remain in these corridors after a UP-MKT merger" and concluded that "rail competition will remain effective in the post-merger environment. Post-merger, four railroads (ATSF, BN, KCS, and SP) will continue to compete with the merged carrier. The particular array of competitors varies to a certain extent, corridor to

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408 Brown/Zebrowski R.V.S. at Exhibit 2.

409 UP-MKT, Finance Docket 30800, 4 I.C.C. 2d 409, 437 (1998).

corridor (this is considered more fully in our examination of the several corridors), but one basic fact remains constant: in each of the corridors in which MKT operates today, there will be effective post-merger rail competition. The four competitive railroads—ATSF, BN, KCS, and SP—will be able to compete, as they do now, for commodity flows moving in the corridors in which they operate." *Id.* at 436, 449.

Even if the Board were to imagine a competitively vibrant KCS-CN Springfield route which does not currently exist (and likely will never exist), it would still have to conclude that there is no competitive harm in the Kansas City to Chicago corridor where four effective competitors are already present. The same was true in *UP-MKT* for the Dallas to Chicago corridor:

> "In the Dallas—Chicago corridor, four railroads—BN, ATSF, KCS, and SP—will compete with the merged carrier in either single-line service (BN and ATSF) or joint-line service (KCS and SP). The mileages involved, at least for three of these competitors, are similar: 988 miles for UP/MKT; 1,028 miles for BN; 1,088 miles for ATSF; and 1,026 miles for the SP-CMW interline. Here, again, although the merged carrier will have the shortest route, the mileage discrepancies are insignificant in relation to the overall mileage and would not impede BN, ATSF, and SP in their Dallas—Chicago operations."

Id. at 451. Just as the Board found adequate competition in *UP-MKT*, here it should find that the competition provided by UP, BNSF, and NS between Kansas City and Chicago is more than adequate.

Second, a compelling reflection of the unimportance of KCS-Springfield-CN interline routes is the fact that just three years ago CN sought to *shut down interchange at Springfield entirely*. In July 2019, Rhonda Anderson, CN's Director-Service Design, wrote to Michael Wilkinson, KCS's Superintendent-Service Design, asking KCS to close the Springfield gateway. CN's reasoning: "[v]olumes are small and from what I can see, neither of us is doing a bang up

job of pulling. From our perspective, East St Louis looks like the best alternative gateway."[410] This is not the proposal of a railroad that regards the Springfield gateway as offering a viable competitive alternative for Chicago-Kansas City traffic flows.

Third, other CN documents consistently confirm CN's view that KCS's Kansas City-Springfield line is not part of a competitively viable through route *to anywhere*. For example:

- In the presentation CN prepared for delivery to ratings agencies in connection with its own proposal to acquire KCS in 2021 it CN described KCS's Springfield Line as a {{[redacted]}}[411]
- The slide deck that CN has used to persuade third parties to support the divestiture to CN of KCS's Springfield Line touts (as reproduced in Figure 29 below) that the proposed Springfield route {{[redacted]}}[412]

410 Email from Rhonda Anderson (CN) to Michael Wilkinson (KCS), "Cockrell interchange to be closed asap" (July 2, 2019), Naatz R.V.S.

411 *See* CN0000167-HC, {{[redacted]}} (Vol. 3, Exhibit 61).

412 *See, e.g.*, CN0001142-HC (Vol. 3, Exhibit 62) at 2.

FIGURE 29
KCS-SPRINGFIELD-CHICAGO ROUTE {{ }} {{



}

- As recently as this year, CN's internal documents relating to its proposed divestiture emphasis that there is no viable route between CN's network and Kansas City today, with one email acknowledging that {{ }}[413]
- Other CN documents recount CN's aim to {{ }} confirming that there is no viable interline route providing that access today.[414]

[413] CN0000783-HC, {{ }} (Vol. 3, Exhibit 63).

[414] CN0000708-HC, { }} (Vol. Exhibit 64).

In 1998, KCS and CN entered into a 15-year marketing alliance the goal of which was to pursue interline traffic opportunities via the gateways where CN and KCS connected, including Jackson, MS and Springfield, IL.[415] When it was announced, CN and KCS explained that "[t]he marketing alliance will offer shippers pro-competitive connections to new rail routes for their products and the ability to tap new markets through a coordinated rail network. Services will link points in Canada with the major U.S. Midwest markets of Detroit, Chicago, Kansas City and St. Louis, along with the key Southern markets of Memphis, Tenn., Dallas and Houston."[416] To implement the Alliance, KCS sought to improve its physical interchange with CN at Springfield by seeking in the *CN/IC* case terminal trackage rights over a UP line in Springfield, but that effort was denied by the Board.[417]

Despite the CN/IC/KCS Alliance's ambitious goals, it failed to generate meaningful business opportunities over the Springfield gateway. CN made no serious efforts to develop interline traffic via Springfield. Naatz R.V.S. at ¶ 99 CN tended to prefer its long-haul via the Jackson gateway, and there was no meaningful customer demand for routings via Springfield. Naatz R.V.S. at 98. The end of the marketing alliance in 2013 did not change CN's lack of interest in developing traffic over the Springfield/St. Louis Line, and in 2019, CN tried to close the interchange permanently. Naatz R.V.S. at ¶ 98-99.

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415 *CN/IC*,4 S.T.B. at 135 n.50 ("The Alliance will use two main gateways for interchange: Springfield, IL, for traffic moving between CN territory or northern IC territory, on the one hand, and, on the other, Midwest KCS territory.").

416 "Canadian Natl, Illinois Central, KCSR In Shipping Central," Bloomberg (Apr. 16, 1998), https://www.bloomberg.com/press-releases/1998-04-16/canadian-natl-illinois-central-kcsr-in-shipping-alliance.

417 *CN/IC*, 4 S.T.B. at 175 ("Applicants have not shown, nor do they even allege, anticompetitive conduct by UP or any other carrier at the Springfield interchange. Accordingly, the application in Sub-No.1 for terminal trackage rights will be denied.").

CN's internal documents confirm the competitive futility of this interline route, in part as a result of CN's own lack of interest. For example:

- An internal CN email from 2013 provides some insight into why CN had so little interest in traffic via Springfield: {{ }}[418]
- In March 2013, CN analyzed "potential traffic via Springfield" and concluded that "we are [] left with very little traffic that could switch over CN via Springfield…[v]ery little compared to the potential that originates on CN with the other carriers, although [*sic*] was quite small from CN as well."[419]
- In the same document, CN's former CEO Ruest noted, {{ }}[420]

418 *See* CN0000415-HC (Vol. 3, Exhibit 65).

419 CN0001255-HC (Vol. 3, Exhibit 66)

420 *Id.*

- {{[redacted]}}[421]

In light of its own decision to {{[redacted]}} it is a stunning display of hubris for CN to come before this Board to argue that allowing CP to acquire this line as part of the integrated KCS network would cause "significant competitive harm."

Fourth, CN confirmed again that KCS's Springfield line plays no viable competitive role in the pre-Transaction Kansas City-Chicago transportation marketplace when it represented to the Board (and investors) that the transformation of the line would be one of the important public benefits of CN's own proposed acquisition of KCS. CN consistently embraced the application of the 2001 merger rules to its KCS acquisition[422], and as CN knows, one of the precepts of those rules is that a benefit is not cognizable if it can be achieved without a full-blown merger.[423] By claiming that the CN/KCS transaction would create a "new" competitive option between Kansas City and Chicago, CN was thus acknowledging that no such option would emerge absent the CN acquisition.

CN made this claim consistently and repeatedly to investors and the Board, For example:

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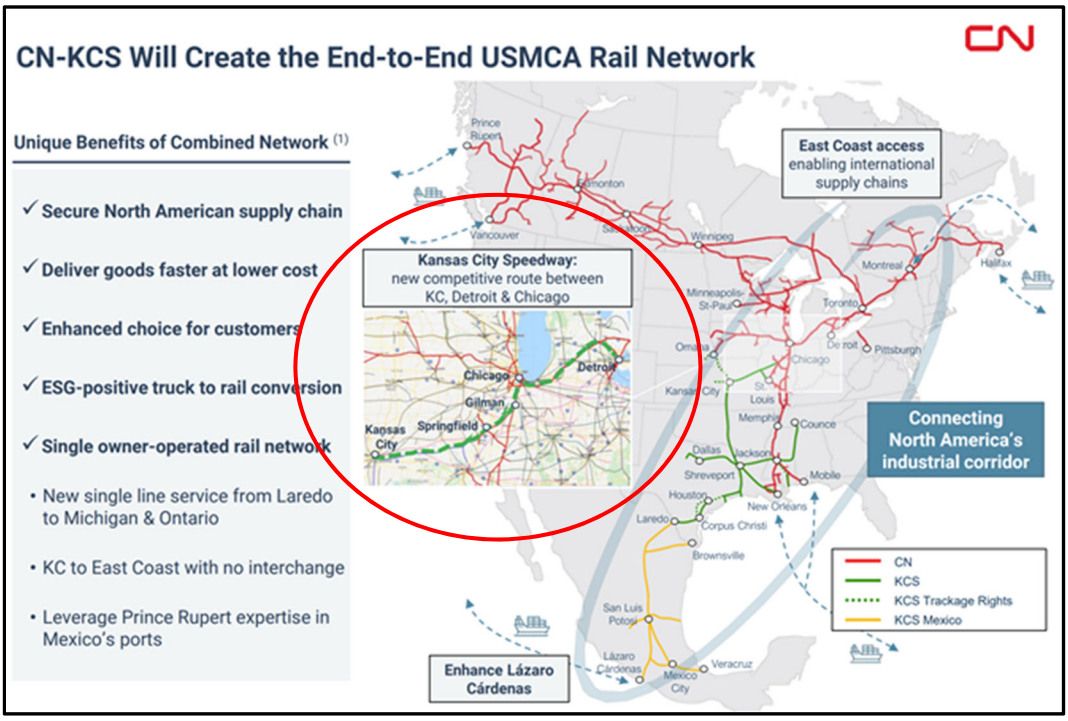
421 CN0000187-HC, {{[redacted]}}.

422 Finance Docket No. 36514, CN-14 KCS-1 at 2.

423 "In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation." 49 C.F.R. § 1180.1(C).

- In April 2021, CN touted to investors that the "Kansas City Speedway" –CN's moniker for its plan to invest in the KCS-CN route from Kansas City to Chicago via Springfield – would provide "new" competition between Kansas City, Detroit and Chicago, as shown in the slide replicated below.[424]

FIGURE 30[425]
CN INVESTOR PRESENTATION TOUTING SPRINGFIELD AS "NEW" COMPETITIVE OPTION



- In CN's application for a voting trust in Finance Docket No. 36514, CN touted the same alleged benefit. CN's then-CEO Jean-Jacques Ruest characterized the "Kansas City Speedway" as the "*new competitive route* between KC, Detroit & Chicago," and presented a map showing KCS's Kansas City-Springfield Line as

424 CN investor deck (April 2021), "CN-KCS Will Create the End-to-End USMCA Rail Network" at Slide 9 (Vol. 3, Exh. 67).

425 *Id.* (Vol. 3, Exhibit 67).

an important part of that "new competitive route."[426] Ruest went on to explain that CN would need to make "infrastructure investments in key areas across the new network, including Illinois, Missouri, Michigan, Louisiana, and Texas, [including] investments in the route between Kansas City, Missouri and Springfield, Illinois," which CN asserted were themselves merger benefits that would be unattainable otherwise.[427]

- In July 2021, CN reiterated that CN's planned "'Kansas City Speedway' … between Kansas City, Springfield, Gilman, Chicago, and Detroit" would be "*a new high-quality line* that will create faster, safer and more economical rail option. [sic]." It would "be the connection between the KCS and CN networks to offer *a new competitive alternative* to compete with trucks for traffic moving from Mexico, through the U.S. heartland to Canada."[428]
- In the same pleading, CN witness William Rennicke explained how the Kansas City Speedway would be a merger benefit: "The Meridian Speedway operated by KCS and NS provides an efficient route for traffic moving between points in Mexico and Texas served by KCS and points in the Southeast served by NS via a connection at Meridian, MS. CN and KCS have committed, as part of the proposed merger, to creating a similar 'Kansas City Speedway' linking points in Kansas, Missouri, and Illinois served by KCS with points in Indiana, Ohio, and

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426 *CN/KCS*, Finance Docket No. 36514, CN-18 KCS-1, Verified Statement of Jean-Jacques Ruest ("Ruest V.S.") at 4.

427 Ruest V.S. (Vol. 3, Exhibit 68) at 4.

428 *CN/KCS,* Finance Docket No. 36514, CN-26 KCS-9, Reply Verified Statement of Jean-Jacques Ruest ("Ruest R.V.S.") at 3 (filed July 6, 2021) (emphasis added).

> Pennsylvania served by NS and CSX. This *new, more efficient route* will enhance competition in this corridor and provide better options for shippers."[429]

CN's representations to the Board about the benefits of a CN/KCS transaction – made against the backdrop of their recognition that benefits are not cognizable if achievable absent the proposed transaction – make overwhelmingly clear that CN understood that the so-called Springfield Speedway (or more prosaically the joint-line KCS-CN route via Springfield) would not be a competitively viable option without the CN/KCS transaction.

3. Any Divestiture of the Springfield/East St. Louis Line Would Harm the Public Interest, Not Enhance It

Absent any predicate harm to competition, CN is left with the argument that its proposed use of KCS's Springfield Line would provide more benefits than allowing the line to stay part of the CPKC network. In substance, CN's argument is that its proposal would "enhance competition."[430] CN is wrong on two important counts: the law and the facts.

CN is wrong on the law.

The Board's rules and precedents provide the Board with no authority to attach to proposed transactions whatever bells and whistles some party may contend would "enhance" the public interest. A transaction as proposed either is or is not in the public interest. If it would cause some public interest harms, the Board may impose conditions aimed narrowly as overcoming those harms. But it has no authority to use a proposed transaction as free pass to

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[429] *Id.*; Reply Verified Statement of William Rennicke ("Rennicke R.V.S.") at 49 (emphasis added).

[430] CN's Responsive Application is unabashed about this: "CN is committed to making substantial investments" to "upgrade" the Springfield/St. Louis line "into a faster, more efficient route with enhanced intermodal and automotive traffic capacity." CN-14 at 3-4.

engage in whatever "industry restructuring" might be viewed as desirable. The Board's pre-2001 precedents quite definitively rule this out:

> "[W]e will not impose public interest conditions on a railroad consolidation *unless* we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger. We are also disinclined to impose conditions that would *broadly restructure the competitive balance among railroads with unpredictable effects*."[431]

> "A condition must address an effect of the transaction, and will generally not be imposed 'to ameliorate longstanding problems which were not created by the merger.' Finally, a condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation."[432]

CN plainly desires a do-over of the Board's decision that the pre-2001 rules apply to this proceeding so that it can try to foist upon Applicants CN's proposed "enhancement" to competition. But even under the 2001 rules, applicants' obligation to demonstrate that their "proposed transaction would enhance competition" applies only where "necessary to offset negative effects of the transaction, such as competitive harm."[433] No matter what rules are applicable here, absent such harm, there is no basis for CN's proposed divestiture.

Recently, the Board was asked by DOJ to consider a divestiture of Pan Am Southern lines in connection with CSX's acquisition of Pan Am Railways. The Board declined in words

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431 *Union Pacific Corp., et al. – Control – Missouri-Kansas-Texas R.R. Co., et al.*, 4 I.C.C.2d 409, 452-458 (1988) ("*UP/MKT*") (emphasis added).

432 *CN/IC*, 4 S.T.B. at 141-42.

433 *Major Rail Consolidation Procedures,* EP 582 Final Rules; *see also* Press Release dated June 11, 2001, Surface Transportation Board Issues New Rules Governing Major Railroad Mergers & Consolidations at 1, available at https://www.stb.gov/wp-content/uploads/archived-press-release/htmls/72AC2E784AE07A3485256A680050E630.html.

equally applicable here: "In rejecting divestiture here, the Board also notes that it closely scrutinizes conditions that could alter the competitive balance otherwise to be realized from a merger, including whether those conditions could have unpredictable effects. *UP/SP*, 1 S.T.B. at 418; *see also UP/MP/WP*, 366 I.C.C. at 564 (finding the agency "should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring.") *CSX/Pan Am* at 21 n.46.

CN is wrong on the facts.

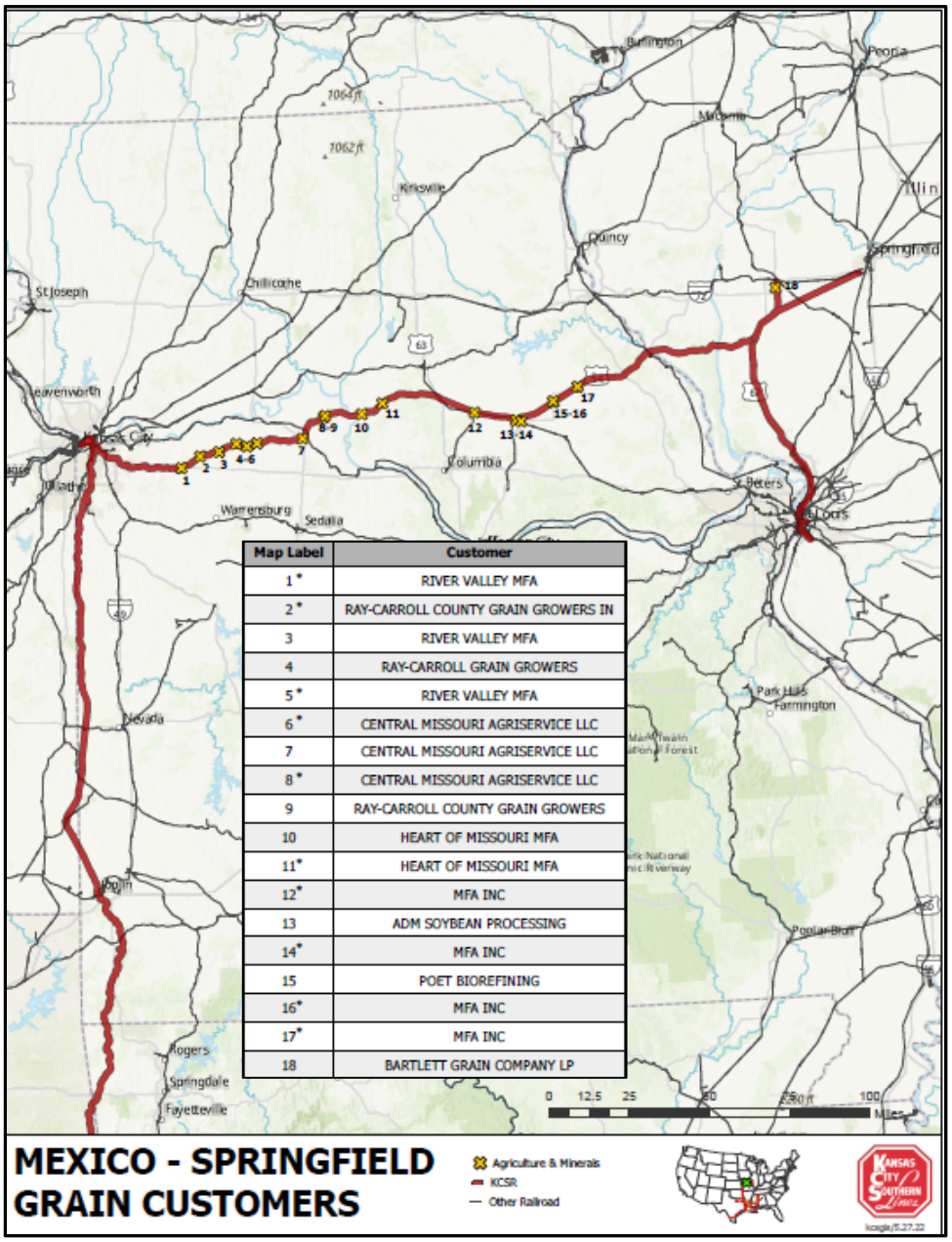
The facts demonstrate that CN's proposed divestiture would not be an "enhancement." It is a Transaction-killer – a "dagger aimed into the vital organs of the CP/KCS Transaction," as Brooks describes it. Brooks R.V.S. at 48. A forced divestiture of the Kansas City-Springfield/St. Louis Line would significantly undermine the public benefits of the proposed Transaction and also cause serious harm to existing KCS customers on the line.

A Divestiture Would Sever Existing KCS Customers From the Rest of KCS's Network. First, a divestiture of the line, even with the haulage rights that CN proposes to grant back to CPKC, would cause immediate *harm to existing KCS shippers*, which today benefit from KCS's single-line network access to markets in Mexico and elsewhere that would be severed were CN to take over the Springfield/St. Louis Line.

Numerous on-line KCS customers ship to and from parts of the KCS network that would be severed from the Springfield/St. Louis line were the Board to order a divestiture of that line. Focusing just on shippers with significant traffic to and from Mexico via KCS's existing single-line routes reveals the extensive web of existing shipping patterns that would be disrupted by CN's proposed relief. As Naatz and many of these customers explain in detail, they would be

harmed by a divestiture, deprived of the single line service that they have benefitted from and that undergirded significant investments they have made in their facilities.

FIGURE 31[434]
KCS GRAIN CUSTOMERS ON SPRINGFIELD/ST. LOUIS LINE
SHIPPING SINGLE-LINE TO MEXICO TODAY



Map Label	Customer
1*	RIVER VALLEY MFA
2*	RAY-CARROLL COUNTY GRAIN GROWERS IN
3	RIVER VALLEY MFA
4	RAY-CARROLL GRAIN GROWERS
5*	RIVER VALLEY MFA
6*	CENTRAL MISSOURI AGRISERVICE LLC
7	CENTRAL MISSOURI AGRISERVICE LLC
8*	CENTRAL MISSOURI AGRISERVICE LLC
9	RAY-CARROLL COUNTY GRAIN GROWERS
10	HEART OF MISSOURI MFA
11*	HEART OF MISSOURI MFA
12*	MFA INC
13	ADM SOYBEAN PROCESSING
14*	MFA INC
15	POET BIOREFINING
16*	MFA INC
17*	MFA INC
18	BARTLETT GRAIN COMPANY LP

434 Naatz R.V.S. at Exhibit 10.

Neither single-line access to the CN system nor the haulage rights CN proposes to grant back to CPKC would avoid this harm. CN does not reach the Mexican markets to which many of KCS's on-line customers ship, and haulage rights for CPKC would not be a substitute for the single-line services to which these shippers have been accustomed. Naatz R.V.S. at {107.

The haulage rights that CN proposes to grant would convert what are efficient single-line movements on KCS's network today into more complicated and less efficient multi-carrier shipments. CN would control all aspects of the on-the-ground service to on-line shippers, with KCS merely receiving cars and delivering cars at Kansas City via a new operational interchange there. KCS would not be able to customize service to these shippers, and would be entirely dependent on CN's performance. But with only a short haul to Kansas City, and an interest in undermining CPKC's competitiveness, CN would not be highly motivated to perform well.

KCS's experience with CN-provided haulage supports these concerns. KCS is currently dependent on haulage rights over CN to reach the port of Mobile, AL (via CN haulage between Jackson, MS and Hattiesburg MS). CN chooses, for its own operational convenience, to route Mobile-bound cars received from KCS at Jackson north to Memphis, and then back south to Mobile, taking these cars many hundreds of miles out of route and diminishing the competitiveness of KCS's service. Elphick/Orr R.V.S. at ¶ 103.

KCS's customers on this line speak very clearly to these concerns. KCS's largest single customer – Bartlett Grain – filed comments expressly opposing CN's proposed relief on this ground, explaining that "we do not want our Mexican investments stranded by a CN takeover of the KCS line that serves our Jacksonville facility, which would deprive us of the single-line service on KCS that we benefit from today."[435] Bartlett made major investments at its facility in

[435] Knief V.S. at 2.

Jacksonville, MO based on its expectation that KCS would be able to provide single-line access to Mexico, and it "does not want to jeopardize its substantial investments in delivering grain to the Mexican market."[436] Haulage rights with operations controlled by CN and a newly-created handoff to CPKC at Kansas City will not protect Bartlett's interest. Naatz R.V.S. at {107.

Other customers are similarly vocal. Central Missouri Agri-Service ("CMA"), with facilities at Marshall, Missouri expresses acute concern about a divestiture, which would undermine the "economics of our single-line hauls with KCS to serve customers to the south and west."[437] CMA explains that it is "concerned that haulage is not a real solution to allow us to continue to efficiently move our grain to our customers. Added interchanges between CN to CPKC would not be as efficient as our single-line haul on the KCS system."[438] Ray Carroll, another significant KCS grain customer, likewise explains that "[t]he markets that we serve are Mexico and other points reached via KCS's line via Kansas City to the west of our facility…If the line were divested to CN, we believe that the options for our grain would be constrained," and "Haulage, which would require CN to take our railcars towards Kansas City for interchange to CPKC, is a much less efficient process than what we have today with single-line service from KCS."[439] Another major grain shipper, Richardson International, recognizes that CN has asked the Board to "grant[] haulage operating rights back to KCS" but nonetheless "oppose[s] Canadian National's request that the Board divest the Springfield/St. Louis Line to it because it

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436 *Id.*

437 Central Missouri Agri-Service R.V.S. (Vol II, Ex. T) at 1.

438 *Id.*

439 Ray Carroll R.V.S. (Vol. II, Ex. Y) at 2.

would eliminate single-line service – both on routes that currently exist and routes that will become available as a result of the CP-KCS Transaction – that are important to us."[440]

CPKC Will Not Downgrade the Springfield-St. Louis Line. Second, contrary to CN's unfounded allegations,[441] the Springfield/St. Louis Line will be an integral and vital part of the CPKC network. It will not be "downgraded." Instead, it will help drive meaningful Transaction-related synergies and will continue to support organic traffic growth by on-line customers. It will also provide CPKC with access to the important East St. Louis gateways, where CPKC will be looking to grow traffic with CSX and other connections. And it will provide CPKS with access to important shortline connections capable of expanding customer routing options and extending the reach of the CPKC network.

Naatz and Brooks describe in detail the role this line will play as part of the CPKC network. Naatz R.V.S. at {¶¶92-94; Brooks R.V.S. at {¶¶ 49-54. A few highlights:

- As set forth in the Amended Operating Plan, Applicants anticipate that the line will see *increased traffic* as part of the CPKC system, some from organic growth independent of the Transaction, and some from the new traffic opportunities unlocked by the Transaction. Table 4 below shows the percentage increases in traffic for these line segments. These are relatively light-density segments and they will remain so, but Applicants anticipate continued traffic growth on them. They will not be downgraded.

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440 Richardson International R.V.S. (Vol. II, Ex. Z at 1).

441 *See* CN-14 at 2-3 (alleging that "the CP-KCS Application makes clear that CP will favor its existing Chicago-Kansas City route over potential routings involving the parallel Springfield Line").

TABLE 4[442]
TRANSACTION-RELATED CHANGES ON KANSAS CITY-SPRINGFIELD/ST. LOUIS SEGMENTS

Segment No.	Segment	Base mGTs	Organic Growth Increase in mGTs	Transaction-Related Increase in mGTs	Overall Percentage Increase in mGTs
Kansas City-St. Louis Segments					
119	Kansas City-Slater, MO	6.17	1.26	0.80	33.2%
120	Slater, MO-Mexico, MO	4.28	0.85	0.56	32.9%
121	Mexico, MO-Roodhouse, MO	4.02	0.79	0.52	32.6%
126	Roodhouse, MO-Godfrey, IL	1.05	0.21	0.18	37.1%
127	Godfrey, IL-East St. Louis, IL	6.84	1.37	1.18	37.3%
Roodhouse-Springfield Segments					
122	Roodhouse, MO-Murrayville, IL	1.00	0.20	0.00	20.0%
123	Murrayville, IL-Springfield, IL	0.17	0.04	0.00	23.5%
125	Murrayville, IL-Jacksonville, IL	1.33	0.25	0.00	18.8%

- KCS serves dozens of important customers on the Springfield/St. Louis Line that generate significant volumes of traffic, and CPKC will be eager to retain that traffic and improve the service these shippers receive. Naatz R.V.S. at {¶ 92.
- The strategic importance of the Springfield/St. Louis line as part of the CPKC network transcends its current traffic levels. The line will provide CPKC with its only access to the St. Louis gateway and important markets in the St. Louis area. Applicants see significant potential to attract new traffic to the CPKC network by linking the CP network to St. Louis, as Brooks explains. Brooks R.V.S. at {¶ 51.
- In addition, this line will provide strategic opportunities for CPKC, working with smaller railroads, to develop new routing options for shippers, such as a potential

442 Amended Operating Plan, Appendix T, pages 7, 11.

route lining CP's network with Springfield via a "shortcut" route over IAIS and other shortlines via Davenport and Peoria. Brooks R.V.S. at {¶ 57.

A Divestiture Would Undermine Transaction Benefits. Third, as a direct corollary to the importance of this line in the future CPKC system, CN's proposed divestiture would significantly undermine the benefits generated by the proposed CP/KCS Transaction. Those impacts will have at least three key dimensions: (a) precluding CPKC from offering new single-line services connecting CP territory with both shippers on the line and the St. Louis gateway; (b) depriving CPKC of full access to KCS's important International Freight Gateway terminal near Kansas City, in which CN would acquire a half interest; and (c) targeting other CPKC traffic moving between Kansas City and Chicago, potentially depriving CPKC of the density needed to support the efficient new services that the Transaction would otherwise unlock.

A divestiture would prevent CPKC from realizing the Transaction's promise to expand shippers' access to new markets :

- It would extinguish the Transaction's new single-line routes between points on the CP network in the Upper Midwest and Canada and shippers on KCS's Springfield's Louis line. As Brooks explains, CPKC will deliver better, single-line service to shippers on the Springfield/St. Louis line, generating traffic growth across numerous commodities including grains and fertilizers.
- Numerous shippers served by this line have expressed interest and excitement in these new services, with many planning to make significant investments in order to take advantage of improved access to market that the Transaction will generate. KCS customer Ray Carroll, for example, anticipates "making new investments in this corridor in the foreseeable future" because the Transaction "will open new

business opportunities for us."[443] Other important customers in the St. Louis area see similar benefits. Richardson International, a grain shipper with facilities across Canada and the Upper Midwest, "recently acquired St. Louis-based Italgrani USA, Inc." and "[t]he transaction assets included a milling facility in St. Louis."[444] Richardson "has reviewed the CP-KCS Transaction and believes it opens new markets to our company."[445]

CN's proposed operations would not be restricted to trackage it would acquire from Applicants. CN would operate its trains into and out of CPKC's Joint Agency in Kansas City, over CPKC's mainline between Kansas City and the IFG intermodal facility 24 miles south of Kansas City, where other shippers express worries about increased train traffic interfering with their service. As Elphick and Orr explain, these operations would unnecessarily complicate rail operations in and around the Kansas City terminal, degrading the efficiency of CPKC's operations and potentially coming at a cost to the service levels that CPKC can provide to its shippers. Elphick/Orr R.V.S. at ¶¶ 104-105.

CN's demand to acquire 50% ownership of KCS's International Freight Gateway terminal near Kansas City would also interfere with the procompetitive potential of the CP/KCS Transaction.[446]

- CN half-ownership of the IFG facility would inevitably interfere with CPKC's ability to use that facility to support the new intermodal services that CPKC will

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443 Ray Carroll RVS (Vol. II, Ex. Y at 1).

444 Richardson R.V.S. (Vol II, Ex. Z at 1).

445 *Id.*

446 CN-14 at 5.

be introducing in North-South lanes via Kansas City. Elphick/Orr R.V.S. at ¶¶ 104-105.

- In addition, the IFG facility offers extraordinary opportunities for CPKC to support the development of innovative new services, such as cold storage warehousing, seasonal transloading of fertilizer, and many other potential market-expanding opportunities, all of which would be jeopardized by CN's half-ownership of this facility. Brooks R.V.S. at ¶ 61.

CN's proposed divestiture of the Springfield/St. Louis Line also would threaten CPKC's planned investments in its core North-South corridor. Although CN's rhetoric implies that it would be targeting truck traffic that would stay on the highways unless CN is allowed to buy this line, in actuality CN's ambitions are far broader. CN witness Hunt makes clear that CN is not just thinking about taking truck off the highway. More than a third of the new traffic CN claims it will attract will be diverted from other railroads. CN-14, Hunt V.S. at Exhibit 3-3. The testimony of CN marketing personnel supporting the Responsive Application express exuberance about going after whatever traffic might be available, and the traffic diversion estimates of CN's witnesses are by no means limited to truck diversions. Were CN to acquire the Springfield/St. Louis Line, it would be targeting traffic opportunities between Kansas City and Chicago that CPKC will also be seeking to serve via CP's routes north of Kansas City – essentially turning KCS's own past investments in the Springfield Line against CPKC's future success. The result could well undermine CPKC's incentives and ability to build density north of Kansas City and make the investments necessary to drive the service improvements that Applicants contemplate. At the very least, a transfer of this line to CN would amount to an industry restructuring with unpredictable consequences for the future of the rail network.

4. If CN Is Right About the "Truck Diversion" Potential of Joint Investments in the Springfield Line, a Divestiture Would Not Be Necessary to Achieve It

As noted, the centerpiece of CN's case for its proposed divestiture is a claimed "enhancement" to competition that will take thousands of trucks off the highway and generate hundreds of millions of railroad revenues that would otherwise lie dormant despite there *already* being four single-line routes to Chicago from Kansas City: BNSF's, UP's, NS's, and CPKC's. A CN "Springfield Speedway" would be the fifth entry into this lane.

Applicants do not regard CN's assessment of the future potential of the so-called Springfield Speedway as credible. As Brown and Zebrowski explain, the traffic diversion analysis of CN's witnesses is riddled with errors (Brown/Zebrowski R.V.S. at {¶ 66), and as explained by Mutén, CN's estimate of truck diversions is particularly flawed. Reply Verified Statement of Bengt Mutén ("Mutén R.V.S.") at {¶¶ 8-9, 16. The lack of credibility inherent in CN's forecasts is strongly undergirded by the futile experience of KCS in seeking to develop interline traffic opportunities with CN over Springfield, as we discuss above and Naatz explains. *See* Naatz R.V.S. at {¶¶ 98-99.

There are extensive and credible reasons for the Board to doubt CN's estimates of potential truck traffic diversions, as Mutén summarizes:

- Many of CN's posited truck diversions are movements from St. Louis to points north and east, but CN already serves St. Louis (illustrating again the competitive reductions associated with a CN purchase), and CN would improve its route from St. Louis to Chicago by only about 50 miles, a trivial distance in railroad intermodal terms. Mutén R.V.S. at {¶ 17 .

- Many of CN's posited truck diversions make no sense form the standpoint of shipper economics, as they would require extensive truck drays in the opposite direction from the route of travel, sacrificing reliability for marginal-at-best improvements in cost. Mutén R.V.S. at {¶¶ 14-15.

The unreliability of CN's truck-to-rail diversion estimates is corroborated by its sloppy and unreliable analysis of the potential for other rail traffic to divert to the new CN routes via Springfield. Brown and Zebrowski examine CN's analysis of rail traffic shifts and conclude that they are badly flawed and unreliable. For example:

- Fully a third of Hunt's rail-to-rail diversions involve intermodal traffic already moving between Kansas City and Chicago or between Kansas City and Detroit via single-line rail routes. A majority of those diversions involved shifts of traffic away from NS traffic between Kansas City and Detroit to the new CN route. As Brown and Zebrowski explain these NS movements involve NS's specialized Triple Crown RoadRailer service between Kansas City, and it is simply not plausible that CN would have any chance of attracting nearly as much of this traffic as Hunt forecasts. Brown/Zebrowski R.V.S. at ¶ 72.
- Another significant portion of Hunt's forecasted new traffic involved CN achieving a marginal improvement in its route between Chicago and St. Louis by using the parallel KC route between Springfield and East St. Louis. As Brown and Zebrowski explain, however, Hunt {"does not calculate diversions associated with the effect of this route improvement, but instead calculates diversions based on the notion that the transaction would convert an *interline CN to* a single-line route via Springfield." *See* Brown/Zebrowski RVS at ¶ 74. The fact that CN

already has a single-line route to St. Louis blows these estimates out of the water. *See id.*

- For this and other traffic that Hunt forecasts for diversion to CN's supposed new route, he used random and unreliable diversion percentages. As explained by Brown and Zebrowski, Hunt "estimates on models that use coefficients that are statistically insignificant and produce diversion percentages that contradict real-world expectations (for example, by diverting more traffic as relative route length becomes longer)." Brown/Zebrowski R.V.S. at ¶ 67.

Brown and Zebrowski catalog many other errors in CN's estimates of the traffic likely to be prompted by a divestiture to CN of the KCS's Springfield/St. Louis line.

At bottom, however, the Board need not adjudicate the precise amount of traffic that a divestiture of the Springfield/St. Louis line would shift to CN. First, there is simply no basis for any relief involving that line, no matter how much potential it would have under CN ownership, because as part of the future CPKC network there will be no reduction in competition whatsoever, and no public interest harms to remedy. Instead, the Springfield/St. Louis Line will be an integral part of the procompetitive benefits generated by the CP/KCS Transaction. As such whether or not CN's acquisition of the Springfield/St. Louis line would enable new services that take trucks of the highways is irrelevant, as the line is not for sale.

Second, if it turns out that CN is right about the truck diversion potential of the Springfield/St. Louis Line, CPKC will have strong incentives to cooperate with CN to achieve that potential. As Creel explains, and as he has told CN's CEO directly, he would not hesitate to set aside any bitterness between CP and CN to {consider a joint investment with CN in the corridor were there potential to take 80,000-plus trucks off the highways and participate in nearly

a billion dollars of new rail freight revenues. A divestiture of the Springfield/St. Louis Line is not remotely necessary to unlock this potential, nor is it in any meaningful respects a real one. {Creel R.V.S. at {23. That cooperation could take many forms, including a joint venture, haulage rights for certain traffic, or trackage rights for a discrete train pair. All of those solutions can be pursued by private parties without the need for a divestiture.

5. Were the Board to Conclude that a Remedy is Required, It Should Not Order a Sale of the Line, Much Less Specify CN as the Buyer

Even were the Board to conclude that there was sufficient potential for significant competitive harm to warrant a remedy – though such a conclusion would be devoid of evidentiary support – the proper procedural path *would not* be to order a divestiture, much less one specifying CN as the only permissible purchaser.

Under Board precedent, divestiture is an extreme and disfavored remedy, especially when alternatives short of divestiture would suffice (such as limited purpose overhead trackage where some subset of traffic would lose an existing competitive option). Divestiture is fundamentally disruptive, and is "to be imposed only under extreme conditions, when no other less intrusive remedy would suffice."[447] In its decision in *UP/SP*, the Board gave detailed consideration to whether a divestiture of SP liner should be ordered and, rejected that remedy despite the need in that case for some remedy to prevent the elimination of head-to-head competition between UP and SP.[448] The Board concluded that, "while divestiture of certain of applicants' lines may have a surface appeal, it also entails its own very substantial problems[.]"[449] A divestiture would (1) "add an additional railroad, reducing volume efficiencies, despite the fact that the merger as

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447 *UP/SP*, 1 S.T.B. at 434.

448 *Id.* at 433-435.

449 *Id.* at 433.

conditioned will not result in competitive harm," (2) "transfer large volumes of business at exclusively served points to the acquirer, without any competitive justification," and also (3)"take the railroad system backwards by destroying, rather than creating, single-line service. Many shippers who would have received new single-line service, or who would see existing single line service eliminated, would no longer share in the merger's benefits."[450] The same is true here. Furthermore, here, even if there was any justifications at all for giving railroad rights between Kansas City and Springfield – which there is not – such a remedy would not necessitate giving anyone rights between Roodhouse and St. Louis, much less severing any of these lines from the future CPKC system in a forced sale.

Finally, were the Board to conclude that divestiture was the only option – despite its adverse consequences for on-line shippers and the CP/KCS Transaction – the proper path would not be to order a sale to CN specifically, much less on the specific terms CN has put forward. Board precedent instead would entitle Applicants to take the initiative in finding a suitable acquirer – subject of course to the need for Board approval of any sale transaction (as required by the terms of the Voting Trust Agreement).[451] Indeed, there are reasons to think that CN would be a uniquely poor choice of acquirer, given that it already reaches St. Louis and would compete with CPKC for traffic between there and Canada and the Upper Midwest. A divestiture to CN would itself involve a combination of "parallel lines" in both a narrow sense (*i.e.*, CN's line between Springfield and St. Louis with KCS's "parallel" line between Springfield and St.

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450 *Id.* at 435.

451 *See RGI/Soo,* 4 I.C.C.2d 834, 837 (1988) *("*We said in our divestiture order in Finance Docket No. 30400, *Santa Fe Southern Pacific Corp. -Control-SPT Co*., 3 I.C.C.2d 926 (1987), (SPSF II) that we would not direct a sale to any particular buyer as long as a proposal is in the public interest and constitutes a valid divestiture"); *see also Santa Fe Southern Pacific Corp. – Control – Southern Pacific Transportation Co.*, 2 I.C.C. 709, 834-35, 852 (1986).

Louis) and a broader competitive sense (restricting CPKC's future head-to-head competition with CN for East St. Louis traffic).

B. NS's Requested Relief Is Based on a Misreading of the Operating Plan and Would Inappropriately Alter Pre-Existing Contractual Rights to NS's Commercial Advantage

NS's Amended Comments and Request for Conditions ("NS-12") and its accompanying Amended Responsive Application ("NS-13") describe a purported solution in search of a problem. NS's stated problem – speculative worries about the Transaction impacting service to NS intermodal traffic moving on the KCS line between Shreveport, Louisiana and Wylie, Texas, and at KCS's Wylie Intermodal Terminal near Dallas – is nonexistent, as NS's own internal documents {{[redacted]}} concede. And NS's proffered solution – re-writing the terms of the contractual arrangements entered into between NS and KCS when the Meridian Speedway joint venture was formed – is unwarranted and overreaching.[452] The Board should deny NS's requests.[453] [454]

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[452] Specifically, NS opportunistically asks the Board to "[g]rant NS contingent trackage rights for intermodal traffic, the rail movement of which originates or terminates at the Wylie Intermodal Terminal, over the Shreveport-Wylie Section, exercisable in the event that NS elects to purchase the Wylie Intermodal Terminal and CPKC fails to meet established service standards for haulage service for NS intermodal shippers." NS-12 at 8 (emphasis in original).

[453] One of NS's requests seeks conditions to keep Meridian and other gateways open on commercially reasonable terms. *See* NS-12 at 42-46. To the extent there is traffic today moving via interchange points between KCS and NS (or CP and NS) for which the Transaction would give CPKC a longer or single-line haul, Applicants' gateway conditions will apply and there is no need for further relief. In addition, as discussed below, NS has ample contractual protections with respect to traffic that uses the Meridian Speedway.

[454] Applicants note that, despite having served the vast majority of their discovery requests upon NS over three months ago between Feb. 28, 2022 and March 31, 2022, NS untimely produced over 15,000 pages of documents on July 5, 2022, just seven days before Applicants' response to all Comments and Responsive Applications was due. This left Applicants little to no time to review NS's production before the July 12, 2022 deadline and Applicants therefore reserve the right to supplement the record.

In short, NS seeks to use the Board to renegotiate a commercial arrangement to receive expanded rights for which it did not bargain or pay for when it entered into the Meridian Speedway deal with KCS. NS and KCS engaged in extensive negotiations and entered into voluminous, detailed documentation of their agreements regarding the Meridian Speedway and related segments (collectively, the "MSLLC Agreements"). *See* Simmons R.V.S. at ¶¶ 61, 69. NS's rights under those agreements include: a revenue split for certain traffic moving over the Meridian Speedway, trackage rights over certain segments, and haulage rights for other segments.[455] They also include the rights to certain, limited remedies in the event of service failures (as described in those agreements).[456] NS and its customers receive, and will continue to receive, the benefits of that bargain because they are unchanged by this Transaction. There is no harm to remedy: the Transaction does not change anything, much less in an anticompetitive way.

As we demonstrate in this section, (1) NS's fears of service decline due to projected traffic changes are unfounded; (2) granting NS's request would be operationally disruptive and counterproductive; and (3) NS's proposed relief would unjustifiably re-write in NS's favor the carefully-negotiated terms of the MSLLC Agreements, giving NS a windfall that it neither negotiated nor paid for when the parties forged their relationship. NS's opportunistic condition requests are particularly egregious given that NS knows full well that the Transaction will cause no cognizable harm. NS's internal documents {{[redacted]

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455 *See, e.g.*, Limited Liability Company Agreement of Meridian Speedway LLC (Simmons Exh. 13) § 3; NS Joint Use Agreement (Simmons Exh. 10) § 2(a)(ii); Dallas Intermodal Marketing Agreement (Simmons Exh. 10) § 5(a)(i).

456 *See, e.g.*, NS Joint Use Agreement (Simmons Exh. 12), Appendix B, §§ 2, 4; Western Haulage Agreement (Simmons Exh. 11) § 2(c); NS Joint Use Agreement (Simmons Exh. 12) §§ 2(a)(ii); *see also* Simmons R.V.S. at ¶ 69.

[redacted]}}[457] Other internal NS documents {{[redacted]}}[458]

1. CPKC Will Be Highly Motivated to Continue to Reap the Rewards of the Successful MSLLC Joint Venture

NS spends considerable time extolling the success of the Meridian Speedway joint venture in generating traffic growth and attracting rail traffic from the Nation's highways. As NS acknowledges, the MSLLC Agreements governing that joint venture were designed to be "pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service" between the growing Southeastern and Southwestern regions of the United States.[459] And there

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[457] *See, e.g.*, HIGHLY CONFIDENTIAL NS00000001 (Vol. 3, Exh. 70) at -09 (noting that {{[redacted]}}), -10 (noting on a slide titled {[redacted]}), and -16 (noting that {{[redacted]}}).

[458] HIGHLY CONFIDENTIAL NS00000991 (Vol. 3, Exh. 71) at -996 ({{[redacted]}}) and at -1003 (noting under a section titled {{[redacted]}}). Other NS documents {{[redacted]}}. *See* HIGHLY CONFIDENTIAL NS00000018 (Vol. 3, Exh. 72) at -28 (noting that [redacted]}}); HIGHLY CONFIDENTIAL NS00000954 (Vol. 3, Exh. 73) (noting that {{[redacted]}}).

[459] NS-12 at 10; Growth is also inherent in those agreements as they anticipate capacity constraints and the future need for additional capacity. For example, Section 6(b) of the Kansas City Southern Ry. Co. – Meridian Speedway LLC – Joint Use Agreement (Simmons Exh. 16) provides: " . . .the Parties acknowledge that there may be capacity constraints from time to time for traffic covered under this agreement. Whenever capacity of the Subject Trackage is insufficient to handle the total traffic demands of KCSR and NSR, the following capacity allocation rules apply: . . ." Further, Subsection (iii) of that agreement contemplates that that growth could lead to the need for "additional incremental daily overhead train starts." Section 2(a) of The Dallas Terminal Marketing Agreement (Simmons Exh. 10) also provides: " . . . KCSR and NSR shall jointly work to market the movement of Dallas Intermodal Terminal

is no dispute that the joint venture has been successful: NS itself notes that investments to the Meridian Speedway "continue to support NS's ability to deliver the premium service intermodal customers demand and help achieve the public benefits supported by the Board."[460]

As the operator of the Meridian Speedway, KCS has delivered reliable, high-quality service that has supported this traffic growth. Ever since the Major Service Standard Failure provision of the NS Joint Use Agreement took effect, KCS has never even been close to triggering it. *See* Simmons R.V.S. at ¶ 58. And, of course, KCS shares directly in the financial rewards that flow from this success as 70% owner of the MSLLC joint venture and thus is highly incentivized to continue delivering such a high-quality service.[461] As NS notes, CP will "{{ }}" and as a result it too will have a strong incentive to support the continued success of the line from Wylie to Meridian.[462] When Applicants forecast Transaction-related increases in traffic on this route – albeit modest ones – on top of the organic growth that KCS forecasts, they reveal that supporting high-quality service on this route. Neither NS nor the Board has any reason to be concerned that CPKC will be a good steward of service on this route.

2. The Facts Contradict NS's Concerns About Service Impacts

The evidence in the record confirms NS's {{ }}[463]

Traffic on an interline basis with the intent that both Parties can receive greater benefits than handling the traffic over alternate routes. . ."

460 NS-12 at 7.

461 *See* Transaction Agreement (Vol. 3, Exh. 74) §§ 2.1(a) and 3.1(a).

462 *See* supra at n. 458.

463 *See* supra at n. 458, 459.

As a starting point, Applicants' anticipated Transaction-related operational changes on the Meridian Speedway are almost trivial. As set forth very clearly in the Amended Operating Plan, Applicants anticipate that the Transaction will result in very small percentage increases in traffic on the KCS segments between Shreveport and Meridian and *reductions* in the number of trains over the Meridian Speedway, all as reproduced in Table 5 below.[464]

TABLE 5[465]
TRANSACTION-RELATED CHANGES ON WYLIE-MERIDIAN SEGMENTS

Segment No.	Segment	Transaction-Related Train Count Increase	Transaction-Related Percentage Increase in mGTs
138	Wylie-Greenville	1.29	49.9%
139	Greenville-Shreveport	1.28	38.7%
162	Shreveport-Sibley	-1.43	14.4%
163	Sibley-Gibsland	-1.43	14.3%
164	Gibsland-Monroe	-1.43	14.0%
165	Monroe-Vicksburg	-1.43	12.4%
166	Vicksburg-Jackson	-1.43	9.8%
167	Jackson-Newton	-1.43	7.5%
168	Newton-Meridian	-1.43	15.8%

These changes will have no effect whatsoever on the service levels that CPKC will provide for NS intermodal traffic moving on this line. In an effort to concoct a basis for concern where there is none, NS focuses on three phantoms: the claim that CPKC will run too many additional trains on the Wylie-Shreveport segments; the speculation that such trains will be burdened by "[l]arge increases in bulk traffic"; and the observation that CPKC plans to operate

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464 Applicants' Operating Plan contemplates a reduction in the number of trains over the Meridian Speedway because of operating efficiencies and new train design achieved by Applicants' Optimized Plan. *See* Amended Operating Plan, Appendix H, at 2.

465 *See* Amended Operating Plan, Appendix A at 6-8 and Appendix T, at 10-11. For the second time in this proceeding, NS mischaracterizes Applicants' Operating Plan. NS Exhibit 7 (*see* NS-12 at 22 & n.67) purports to rely on the Amended Operating Plan, Exhibit T, but the figures in NS Exhibit 7 are nowhere to be found there. The precise reason behind NS's miscalculations is unclear, but it appears to involve NS ignoring the effect of organic growth. Regardless, Applicants reiterate that the appropriate way to measure merger-related growth in mGTs is by comparing the "2027 No Merger" and "2027 With Merger" columns in Appendix T; this information is included in the "Merger-Related Growth Percentage" column of Appendix T and reproduced here in Table 5.

certain trains with "mixed" blocks of both NS intermodal traffic and manifest traffic on them.[466] None of these points provides a valid basis for concern.

One extra train per day between Wylie and Shreveport. NS asserts that Applicants anticipate Transaction-related traffic increases averaging "53%" for the Wylie-Shreveport Section.[467] First of all, as explained in the Elphick/Orr R.V.S. Elphick/Orr R.V.S. at ¶ 114. NS is incorrect. Though NS says this figure is derived from Appendix T of Applicants' Amended Operating Plan, the figures that NS quotes in NS Exhibit 7 are nowhere to be found in Appendix T. The correct figure is 44.3%.[468]

In any event, these modest traffic increases will have no impact on the operation of NS intermodal traffic between Wylie (or Shreveport) and Meridian. As NS acknowledges, the Transaction-related traffic growth will not cause a significant increase in the number of trains on the line. NS states that there will be "approximately one net train *pair* per day on the line."[469] But this is double Applicants' actual forecast – of just *one* additional daily train operating over the Wylie-Shreveport Section. Elphick/Orr R.V.S. at ¶ 107. A single additional train will not adversely affect service levels. *Id.* Even with the organic growth in existing traffic volumes that KCS forecasts on this line, the number of additional trains will be *fewer than 1.5 per day*.[470] There is nothing for NS to worry about here.

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466 NS-12 at 23.

467 NS-12 at 22-23.

468 *See* Amended Operating Plan, Appendix T, at 11, Segments 138 and 139, "Merger Related Growth Percentage" column (showing 49.9% and 38.7% merger-related growth percentages, for an average of 44.5%).

469 NS-12 at 23 (emphasis added).

470 *See* Amended Operating Plan, Appendix T, at 10, Segments 138 and 139 (2027 With Merger compared to Base).

No transaction-related increase in bulk traffic. NS next objects that the Transaction will add bulk traffic, asserting that "[l]arge increases in bulk traffic can strain the current capacity of the Shreveport-Wylie Section and would have adverse impacts on the speed and reliability of intermodal traffic moving over the Meridian-Wylie Route."[471] But NS is incorrect. The Transaction will not increase the volume of bulk traffic on this segment. Elphick/Orr R.V.S. at ¶ 106. Any increase in bulk traffic will be from organic growth, which as NS concedes is not Transaction-related because it "would have occurred in the ordinary course of business absent the CP-KCS Transaction." *See* NS-12 at 22 n.67.

Mixed Trains. NS's expression of concern about the possibility that CPKC will operate certain trains between Wylie and Meridian with blocks of both intermodal and manifest traffic "to the detriment of current shippers" is disingenuous at best.[472] CPKC will apply this practice in order to *increase* train frequency and *improve* service, to the benefit of both NS and intermodal shippers.

Mixing intermodal and manifest traffic on the same train is a well-recognized way to improve railroad operations. Elphick/Orr R.V.S. at ¶ 108. In fact, NS uses the same approach under its recently announced NS ("TOP/SPG") operating plan, and it has previously explained the benefits of the practice, with manifest traffic having no difficulty moving at the higher speeds typical for intermodal trains.[473] *Id.* As explained the Elphick/Orr R.V.S., Applicants' Optimized

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471 NS-12 at 23.

472 NS-12 at 23; NS's lack of a genuine concern with Applicants' plan to operate mixed trains { [redacted] }

473 *See* "New Norfolk Southern Operating Plan to Blend Traffic and Build Longer Trains," Trains (Feb. 12, 2019), available at https://www.trains.com/trn/news-reviews/news-wire/12-new-norfolk-southern-operating-plan-to-blend-traffic-and-build-longer-trains/ (Vol. 3, Exh. 76).

Plan will alter improve service on the Meridian Speedway by increasing the day-of-week frequency of intermodal service while reducing the overall number of trains by operating intermodal and manifest traffic (in separate blocks) in the same trains. *See* Elphick R.V.S. at ¶¶ 109-112. This will reduce the number of trains operating between Wylie and Meridian, benefit shippers with more frequent service and significantly less dwell, allow for higher velocity, and improve overall transit times and services for the intermodal and manifest traffic moving over that route. *See id*. NS is consequently incorrect that Applicants' plan to utilize mixed trains will increase transit times.[474] Applicants' plan will do precisely the opposite. CP has used this approach efficiently and effectively for years and there is no reason to doubt CPKC will do so effectively for trains between Wylie/Shreveport and Meridian. Elphick/Orr R.V.S. at ¶ 108.

NS expresses a different concern about the length of these mixed trains, suggesting that they will exceed the length of sidings on the Wylie-Meridian route.[475] Again, NS is incorrect, and again its error stems from a basic misunderstanding of Applicants' planned operation. As Elphick and Orr explain, CPKC will not simply tack manifest traffic on the end of existing intermodal trains. Instead it will be increasing the day-of-week frequency of trains and spreading traffic across a greater number of trains (which NS's miscalculations ignored), meaning that there no issue with excessive train length. *See* Elphick/Orr R.V.S. at ¶¶ 108-112.

3. The Wylie Intermodal Terminal Has Ample Capacity to Support Applicants' Projected Traffic Increases

NS expresses a separate concern about the impact of the Transaction on KCS's Wylie Intermodal Terminal, which supports NS intermodal traffic that KCS interchanges with NS at

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474 NS-12 at 24.

475 NS-12 at 24-25.

Meridian.[476] NS correctly notes that Applicants anticipate increased intermodal volumes at Wylie, as CPKC develops new services between Dallas and Chicago and Lazaro Cardenas and the U.S. Midwest (supporting expanded service to Dallas). In other words, Applicants plan to put the Wylie Intermodal Terminal to more competitive use. But NS is wrong when it asserts that Applicants' planned intermodal services "threaten[]to exceed capacity at the Wylie Intermodal Terminal."[477]

NS's assertion is premised on a faulty, overly-static assessment of the Wylie Intermodal Terminal's capacity. NS claims that "[t]he Wylie Intermodal Terminal has an annual capacity of 342,000 lifts," which is exceeded by the {{ }} lifts needed to accommodate NS intermodal traffic alongside planned CPKC traffic.[478] What NS ignores is the ease with which intermodal terminal capacity can be expanded in a variety of ways short of adding trackage. The throughput of an intermodal terminal does not depend solely on its physical footprint and track length, but on the interplay of a variety of assets and operating practices that contribute to the facility's productivity. To the extent traffic volumes call for more capacity there, CPKC will have ample ability to add it as necessary.

As explained by Elphick and Orr, CPKC's options will include:[479]

- Increasing the number of working track cycles per day from 1.0 to 1.9, a change that would require no capital investment, only minor operating adjustments and increased switching resources. This step would enable the terminal to process

476 *See, e.g.*, NS-12 at 6.

477 *See* NS-12 at 25-27.

478 *See* NS-12 at 7, 26.

479 *See* Elphick/Orr R.V.S. at ¶ 116.

approximately 640,000 annual handlings. This operating adjustment, alone, is more than sufficient to accommodate the {{ }} lifts that NS cites.

- Completing track work – already in advanced planning stages – to add two new pad tracks at the south edge of the property, which would provide capacity for 320,000 additional handlings and, in addition the 640,000 additional handlings made available by increasing work track cycles as explained above, allow the terminal to process approximately 960,000 total handlings per year.
- Investing in additional cranes to increase the pace of container handling. Each additional crane would add capacity for approximately 90,000 annual handlings.
- Implementing planned paving projects, which have already been planned. CPKC could create 285 additional parking stalls (which could also be used for stacking of containers depending on the needs of the operation), supporting approximately 60,000 additional handlings. Another option, which involves creating 1,500 parking stalls in the Northeast corner of the yard, would enable 330,000 additional annual handlings.
- Shifting the destination terminal for intermodal containers moving from Mexico to Central Texas to KCS's lightly-utilized Kendleton Intermodal Facility.

In short, the Wylie Intermodal Terminal will have more than enough capacity to allow CPKC to respond flexibly and effectively to any reasonably foreseeable traffic growth.[480] NS's capacity concerns are unjustified.

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[480] On top of all the foregoing options, CPKC will also have the ability (assuming NS does not exercise its option to acquire the Wylie Intermodal Terminal) to greatly expand the physical footprint of the Wylie Intermodal Terminal – or build an entirely new facility in the event NS exercises its contractual option to purchase the Wylie Intermodal Terminal – by developing the 220 acres of land that KCS owns

4. NS's Proposed Contingent Trackage Rights Make No Sense as a "Remedy" for Potential Service Concerns

The contingent trackage rights that NS is seeking do not make sense as a remedy for the (non-existent) service concerns that NS raises, and would in fact exacerbate any service concerns that might trigger them.

As noted above, CPKC would continue KCS's practice of handling intermodal traffic moving between Dallas and the NS interchange at Meridian in dedicated intermodal service. *See* Elphick/Orr R.V.S. at ¶ 108-112. In the event of a "Major Service Standard Failure," converting these trains to trackage rights trains will do nothing except require that NS supply its own crews and locomotives at the Wylie Intermodal Terminal. *See* Elphick/Orr R.V.S. at ¶ 118-120. The identity of the locomotive engineer's employer will not "remedy" whatever service issues might have led to a conversion to trackage rights.

Also as noted above, CPKC will also handle some intermodal traffic between Dallas and Meridian in mixed trains, carrying a block of NS intermodal traffic along with other blocks of manifest traffic. Were NS to trigger its contingent trackage rights, doing so would disrupt this operation and add more trains to a line which – in NS's hypothetical – would already be suffering service issues. *See* Elphick/Orr R.V.S. at ¶¶ 118-120. Again, giving the (figurative) keys to the train to an NS engineer instead of a KCS engineer, while forcing CPKC to add an entirely new train for the non-NS traffic, would be counterproductive at best.

Even if the Transaction were to pose a threat to service levels for NS intermodal traffic between Wylie/Shreveport and Meridian (it does not), the NS conditions would not be the proper

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adjacent to the intermodal yard (outlined in yellow in Figure 21 of the Elphick/Orr R.V.S.). *See* Elphick/Orr R.V.S. at ¶ 117. (If NS does exercise the purchase option, NS would continue to be obligated to support CPKC intermodal services there, and CPKC could also augment its capacity by building its own facility on the adjacent land. *See* Elphick/Orr R.V.S. at ¶ 117).

remedy. Instead, NS's own submission makes clear that NS bargained for the appropriate degree of protection against such a contingency. Between Shreveport and Meridian, where NS invested in the Speedway, NS has the bargained-for protections the MSLLC Agreements. As NS witness Michael R. McClellan acknowledges, NS's pre-existing contingent trackage rights over the Meridian Speedway "protect NS's investment in the Meridian Speedway, kicking in, for example, in the event KCSR degrades service to NS's traffic over the route."[481] On the segment between Wylie and Shreveport, where NS made no such investment, NS did not obtain any similar protection, and it instead is safeguarded by KCS's – and now CPKC's own interest in avoiding any service failure. Simmons RVS at ¶¶ {60-61. All of the concerns that NS outlines in its Comments – no matter how fanciful – are ones that NS consciously contemplated in its negotiations with KCS: the risk that KCS would develop non-intermodal traffic that moves over the Wylie-Meridian route, the potential for future traffic growth on the Meridian Speedway and at KCS's Wylie Intermodal Terminal, the potential need for additional capacity, the possibility of future KCS service failures, and even the possibility of a change in control of KCS. Simmons R.V.S. at ¶ 69.[482] All of these eventualities and more were anticipated and the extensively-negotiated agreements between KCS and NS provide NS with its bargained for (and ample) protection against these risks. *Id.*[483] Given the extensive negotiations between NS and KCS that

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[481] NS-12, Amended Verified Statement of Michael R. McClellan at 3. In its negotiations with KCS in 2006, NS obtained contingent trackage rights over the Meridian Speedway, which vest upon the occurrence of a Major Service Standard Failure, yet did not obtain a similar provision for KCS's segment from Wylie to Shreveport. *See* NS Joint Use Agreement §§ 2(a)(ii); *see also* Simmons RVS at ¶ 61.

[482] *See, e.g.*, NS Joint Use Agreement (Simmons Exh. 12), Appendix B, §§ 2, 4; Western Haulage Agreement (Simmons Exh. 12) § 2(c); NS Joint Use Agreement (Simmons Exh. 11) §§ 2(a)(ii), 6(b); Limited Liability Company Agreement of Meridian Speedway, LLC (Simmons Exh. 13) § 5.12; Dallas Terminal Marketing Agreement (Simmons Exh. 10) § 4(m).

[483] NS Joint Use Agreement (Simmons Exh. 12), Appendix B, §§ 2, 4; Western Haulage Agreement (Simmons Exh. 12) § 2(c); NS Joint Use Agreement (Simmons Exh. 11) §§ 2(a)(ii), 6(b); Limited

resulted in the MSLLC Agreements governing traffic moving over the Wylie-Meridian route, it logically follows from such recognition that NS did not deem contingent trackage rights from Wylie to Shreveport as necessary to protect its investment.[484]

5. NS's Request for Contingent Trackage Rights Would Improperly Convey to NS Commercial Rights that NS Did Not Negotiate or Pay for in 2006

Given the absence of any bona fide concerns about the Transaction's impact on intermodal service, and the ineffectiveness of NS's contingent trackage rights as a service remedy in any event, the unavoidable conclusion is that NS's true motivation in seeking these rights is to gain valuable commercial rights that it did not negotiate or pay for when it entered the MSLLC Agreements in 2006. Granting NS such rights in this proceeding would be unjustified and inappropriate. After the Transaction, NS will continue to receive the same exact benefits for which it bargained and there is no harm warranting an expansion of NS's contractual rights.

First, NS is quite up front that the new contractual rights it wants the Board to grant (for free) would expand the scope of the rights that NS obtained in 2006. NS is explicit that what it wants is to apply to the KCS-owned Wylie-Shreveport Section – in which NS made no investment whatsoever – the exact "same standard" as contained in the agreement covering only the Meridian Speedway.[485] NS effectively complains that the rights it did negotiate did not extend far enough, because (it claims) without contingent trackage rights for the Wylie-Shreveport segment similar to those it currently possess for the Meridian Speedway, it will not

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Liability Company Agreement of Meridian Speedway, LLC (Simmons Exh. 12) § 5.12; Dallas Terminal Marketing Agreement (Simmons Exh. 13) § 4(m).

484 *See* Simmons RVS at ¶ 61.

485 NS-12 at 48.

be able to "effectively hold[] CPKC to a service standard" because trains would traverse the Wylie-Shreveport segment "with KCS's (or CPKC's) power, crew, and train composition."[486] Yet, that is simply the pre-Transaction state of affairs under the MSLLC Agreements to which NS agreed in 2006.

NS cannot suggest that the parties failed to address this issue in their negotiations. In 2005, {{ }}[487] In January 2005, an {{ }}[488] Documents obtained in discovery from NS and BNSF show that {{ }}[489] Moreover, documents produced in this proceeding {{ }}.[490]

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[486] NS-12 at 49.

[487] NS00005474-82 at -5482, {{ }} (Vol. 3, Exh. 92).

[488] NS00004912-15 at -4913, {{ }} (Vol. 3, Exh. 93).

[489] *See* Simmons RVS at ¶ 71.

[490] { }}

NS now attempts to obtain from the Board the "contingent trackage rights" that it declined to obtain from KCS. Just as it denied requests in the *CP/DM&E* proceeding to overwrite a contract with CP, the Board should deny NS's attempt to "compel new contractual commitments from [CPKC] to protect [NS] from potential traffic increases it might not have considered during prior contractual negotiations."[491]

Second, in addition to granting NS operating rights that it did not negotiate, the relief NS seeks would fundamentally alter the economic relationship between NS and KCS, giving NS a significant financial windfall. NS's proposal is really about changing the amount of money NS pays KCS for traffic moved between the Wylie Intermodal Terminal and Shreveport.[492] A key component of the commercial arrangement entered into between NS and KCS involved an option for NS to purchase the Wylie Intermodal Terminal, and its related option to convert interline intermodal traffic between Wylie and Shreveport from interline traffic (for which KCS is the line haul carrier) to haulage traffic. Simmons R.V.S. at ¶ 61. But the existing MSLLC Agreements are clear that the haulage fees that NS would become obligated to pay KCS upon exercising that option for movements of NS's traffic between Wylie and Shreveport must preserve "the economics" of KCS's line-haul rates. *Id.*[493]

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491 *See CP/DM&E*, Finance Docket No. 35081 (Decision No. 11) at 15.

492 That NS's requested rights are a pure money grab is belied by NS's acknowledgement that nothing will change except the economics: "the same traffic that should have been moving in haulage service on the trains of CPKC would instead move along the exact same route via trackage rights on the trains of NS." *See* Letter To Danielle Gosselin, Director of the Office of Environmental Analysis of the Surface Transportation Board, From Brianne Kucerik, Counsel for NS (filed Mar. 8, 2022), at 3.

493 Specifically, § 5(a)(1) of the Dallas Terminal Marketing Agreement (Simmons Exh. 10) provides that "all NSR Dallas Intermodal Terminal Traffic shall move between Shreveport and the Terminal pursuant to terms and conditions substantially in conformance with that of the Western Haulage Agreement, except as to compensation (which shall be at a price that does not fundamentally alter the economics of the traffic moving pursuant to this Agreement at the time of the conversion from an interline relationship to a haulage relationship and which takes into account change in the identity of the

Under the trackage rights agreement that NS asks the Board to impose on CPKC, however, NS would not be so obligated to preserve KCS's line-haul economics. Indeed, under NS's proposed "Shreveport-Wylie Section Trackage Rights Agreement," NS would pay a trackage rights fee of {{[redacted]}}, which is a far cry from the level of KCS's existing line-haul revenues that NS's agreed-upon haulage rate would have to preserve. Simmons R.V.S. at ¶ 68.[494] As Simmons explains, NS would stand to gain {{[redacted]}} on every intermodal container moved between Wylie and Shreveport, as compared to the compensation arrangement under the parties' existing agreement. *Id.* This is a windfall to which NS is not entitled in light of the fact that, as illustrated above, the Transaction poses no threat to service for NS intermodal traffic traversing the Wylie-Shreveport Section or any portion of the Wylie-Meridian Route.

In substance, then, NS's proposed contingent trackage rights amounts to a request that the Board amend the MSLLC Agreements in NS's favor, granting NS rights it did not bargain for. Table 6 below summarizes the ways in which NS's proposal would alter the bargain struck in 2006.

party then absorbing the terminal charges and other charges associated with the movement of the traffic) and duration (which shall be until terminated by mutual agreement of the Parties)." (Emphasis added.)

494 *See also* NS-13 at 28 (Art. 4.1).

TABLE 6
NORFOLK SOUTHERN'S REQUEST FOR RIGHTS IT DID NOT NEGOTIATE

Topic	Negotiated NS Rights	NS's Request for Board Grant (if NS Acquires Wylie Terminal)
NS Operating Rights Wylie-Shreveport	No operating rights. Haulage rights only if NS acquires Wylie Intermodal Terminal[495]	Trackage rights springing from Major Service Standard Failure[496]
Concept of a "Major Service Standard Failure"	Limited to Shreveport-Meridian segment for Defined "NS Traffic" and "Dallas Intermodal Terminal Traffic"[497]	Expanded to (1) Include Wylie-Shreveport segment; and (2) Encompass *all* intermodal traffic to/from Wylie[498]
Compensation to KCS for "NS Traffic" and "Dallas Intermodal Terminal Traffic" Moving Between Wylie and Meridian (*if NS Acquires Wylie Intermodal Terminal*)	*Between Wylie and Shreveport*: Haulage Fee that does not alter economics relative to KCS's Line Haul Divisions[499] *Between Shreveport and* Meridian: Agreed Haulage Fee;[500] Agreed Trackage Rights Fee in event of Major Service Failure[501]	*Between Wylie and Shreveport*: Board-Imposed Trackage Rights Fee at {{[redacted]}}s in the event of a Major Service Failure[502] *Between Shreveport and Meridian*: Same

One important upshot of these changes – all of which would be contingent on NS's decision to exercise the option it has to purchase the Wylie Intermodal Terminal[503] – would be to create for NS a new set of incentives to exercise its option, above and beyond whatever incentives might exist in the pre-Transaction environment.[504] An NS acquisition of the Wylie Intermodal Terminal could have unpredictable effects for CPKC's use of the terminal for the

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495 Dallas Intermodal Marketing Agreement (Simmons Exh. 10) § 5(a)(i).

496 NS-13 at 27 (Art. 1.3).

497 NS Joint Use Agreement (Simmons Exh. 12) § 2(a)(ii).

498 NS-13 at 28 (Art. 3).

499 Dallas Intermodal Marketing Agreement (Simmons Exh. 10) § 5(a)(i).

500 NS Joint Use Agreement (Simmons Exh. 12) § 2(a)(ii).

501 NS Joint Use Agreement (Simmons Exh. 12) § 2(a)(vii).

502 NS-13 at 28 (Art. 4.1).

503 *See* NS-12 at 8.

504 One might doubt whether NS would exercise that option were NS unable to connect the Wylie terminal with NS's network via NS train service.

new intermodal services that the Transaction will enable CPKC to offer. Although NS would have an obligation as owner of the terminal to handle CPKC's intermodal traffic "on a nondiscriminatory basis,"[505] NS's single-minded focus on its own traffic gives Applicants some concern that NS might interpret this obligation narrowly, potentially jeopardizing Transaction benefits. The Board should resist NS's call to expand NS's pre-Transaction rights under these circumstances. The Board has repeatedly declined invitations to "compel new contractual commitments … to protect [a party] from potential traffic increases it might not have considered during prior contractual negotiations," and it should do so again here.[506]

C. The Board Should Reject the Relief Requested by CSX

1. CSX's Arguments about the Meridian Speedway Are Unrelated to the Transaction and Should Be Ignored

CSX argues that a set of pre-existing agreements between KCS and NS regarding the Meridian Speedway (the "Meridian Speedway Agreements"), which the Board authorized KCS and NS to carry out, are anticompetitive and should be undone.[507] CSX is wrong.[508] When it exempted KCS's and NS's formation of the Meridian Speedway LLC ("MSLLC") venture in 2006, the Board was well aware of the contractual provisions affording NS exclusive commercial

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505 Dallas Terminal Marketing Agreement (Simmons Exh. 10) § 5(a)(ii).

506 *See CP/DM&E*, Finance Docket No. 35081 (Decision No. 11) at 15. As explained above, Applicants project a reasonable and manageable level of traffic growth across the Wylie-Meridian Route and will not result in deteriorated service along the Wylie-Meridian Route. Thus, the Transaction will not result in any extraordinary risks or harms for which NS did not, nor could not, foresee at the time it entered into the contractual and operational arrangement that it agreed to with KCS.

507 CSX Transportation, Inc.'s Comments and Request for Conditions ("CSXT-8") (filed Feb. 28, 2022) at 7-21.

508 Applicants do not belabor the many reasons why CSX is also incorrect in arguing that the Meridian Speedway Agreements are anticompetitive. Applicants direct the Board's attention to the discussion in NS's amended comments of the procompetitive traffic growth generated by the joint investments in this high-service route. *See* NS-12 at 9-21.

rights with respect to certain traffic using the Meridian Speedway – tightly-defined flows of transcontinental intermodal traffic – in exchange for its considerable investment in the Speedway and ongoing obligations to share in the cost and risks associated with the venture.[509]

For purposes of the CP/KCS proceeding, however, the merits of CSX's arguments are beside the point. The contractual provisions about which CSX complains do not arise from the Transaction. Because they "[are] not a consequence of the merger and will not be exacerbated thereby … this proceeding is not the proper forum for considering the merits of [the] solution" proffered by CSX. *UP/SP*, 1 S.T.B. at 472.

CSX's suggestion that unconditioned approval of this Transaction might insulate the pre-existing terms of the Meridian Speedway Agreements from future challenge is equally wrong.[510] The Board's disposition of this proceeding will not affect any claims CSX might wish to pursue, one way or the other. The Meridian Speedway Agreements were exempted by the Board in 2006, which thereby also exempted KCS and NS – as participants "in that approved or exempted transaction" – "from the antitrust laws and from all other law, including State and municipal law, as necessary to let [them] carry out the transaction." 49 U.S.C. § 11321(a).[511]

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509 The parties' Notice of Exemption in the Meridian Speedway transaction could not have been clearer: "NSR will be the sole provider of service for transcontinental intermodal traffic over the Line. Specifically, NSR will be the sole provider, via haulage and trackage rights over the Line, of service for transcontinental intermodal container traffic moving on the Line that does not originate or terminate on KCS's current system and that both (a) originates or terminates in the United States at or east of Meridian and enters or exits the Line at Meridian, and (b) originates or terminates in the United States west of Fort Worth, Texas, and enters or exits the Line at Shreveport." *See* Finance Docket No. 34822, Notice of Exemption (filed Jan. 17, 2006) at 6 (excerpts are Vol. 3, Exh. 79).

510 CSXT-8 at 7.

511 Courts have confirmed that Section 11321(a) immunity applies to transactions exempted under Section 10502. *See UTU* v. *Burlington Northern Santa Fe R. Co.*, 528 F.3d 674, 679-80 (9th Cir. 2008).

CSX boldly acknowledges that its goal is not to address any adverse impact of the Transaction, but to instead "*re-establish the competitive status quo before 2006*."[512] CSX's transparent efforts to improve its position relative to its pre-Transaction position – and to "ameliorate longstanding problems not caused by the merger"[513] – should be rejected.[514]

2. CPKC Will Be Eager to Maintain or Explore Efficient Interline Relationships With CSX Via All Available Gateways, and There Is No Need for Relief Protecting CSX

Apart from its misguided effort to raise antitrust concerns with the Meridian Speedway Agreements, CSX's comments seek conditions that would impose new obligations on CPKC to protect or expand interline traffic opportunities at three gateways served by KCS: East St. Louis, IL, Meridian, MS, and New Orleans. CSX needs no such protection. Applicants have every incentive to work with CSX wherever feasible and efficient to compete hard for traffic moving to and from CSX's network, including via the three gateways CSX identifies. Imposing such protections via conditions would be unjustified and counterproductive.

East St. Louis. CSX requests an order requiring CPKC to maintain commercially reasonable rates and to provide service at or above current service levels on the KCS line between Kansas City and East St. Louis, IL.[515] CSX's assertion that Applicants propose to downgrade this line – which echoes CN's false assertions – is completely unfounded for reasons we address at length in Section VIII.A above. Nor is there any risk that the Transaction would

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512 CSXT-8 at 20.

513 *UP/SP* (Decision No. 103, STB served May 1, 2008) at 6.

514 At the same time, Applicants certainly agree with the sentiment of CSX's request that the Board reject NS's "responsive application seeking to expand its rights under the Meridian Speedway Agreements." CSXT-8 at 6. Although NS chose not to pursue all of its proposed modifications to the Meridian Speedway Agreements, the Board should reject any effort by NS to expand its rights thereunder relative to those negotiated and approved in 2006. *See* Section VIII.B above.

515 CSXT-8 at 22-23.

give CPKC incentives to shift traffic away from this gateway. To the contrary, by creating new single-line connections between CP's network and KCS's network, the Transaction will increase opportunities for interchange between CPKC and CSX at East St. Louis. Creel R.V.S. at ¶ 21; Wahba/Naatz R.V.S. at ¶ 5. Ironically, KCS's Kansas City-St. Louis line formerly hosted daily intermodal service via East St. Louis interchange with CSX, but CSX chose to discontinue that service in 2017 as part of its PSR-based network reconfigurations. Brooks R.V.S. at ¶ 50. CPKC would be eager to explore reinstituting that service if CSX were interested. *Id.* The only threat to efficient interline service between CPKC and CSX via East St. Louis is CN's request to force the removal of this line from the CPKC network. Accordingly, there is no basis whatsoever for a condition protecting CSX's rights via this gateway.

Meridian, MS. CSX requests an order requiring CPKC to "establish" an interchange at Meridian and to keep that gateway open.[516] This request is overreaching for several reasons. First, as confirmed by CSX's use of the word "establish," KCS has no interchange with CSX at Meridian. To the extent traffic flows between the two carriers via Meridian, it moves in KCS trains to Artesia, MS, and then via Watco's Alabama Southern Railroad, which leases most of KCS's Tuscaloosa Subdivision, to a connection with CSX between Tuscaloosa and Birmingham, AL. Traffic moving between KCS and CSX could also be delivered to the Meridian & Bigbee Railroad ("MNBR") at Meridian and moved via MNBR to a connection with CSX at Montgomery, AL.[517]

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[516] CSXT-8 at 20-21.

[517] CSX previously had a haulage agreement with MNBR between Meridian and Montgomery, but CSX cancelled that agreement in 2007. {{ }} *See* Simmons R.V.S. at 87.

Second, even if Meridian was an existing gateway for KCS-CSX interline traffic, that gateway would be unaffected by the Transaction. The CP-KCS combination will not give CPKC a longer haul for any traffic moving via Meridian as compared to the pre-transaction KCS systems. Brooks R.V.S. at ¶¶ 16, 88-90. Accordingly, the Transaction will *not* incentivize CPKC to divert traffic from Meridian to other "less efficient" routes.

Were it ever to become possible and efficient to "establish" a direct interchange with CSX at Meridian, CPKC would have every incentive to do so, but a condition requiring this alteration to the pre-Transaction status quo would be overreaching.

New Orleans. Finally, CSX asks the Board to modify an existing agreement between KCSR and CSX regarding the allocation of responsibility for interchange costs at New Orleans.[518] This is yet another overreach unrelated to any Transaction-related impact.

As background, the New Orleans Public Belt ("NOPB") recently imposed a substantial increase in the fee it charged for handling interchange traffic between CSX and KCS, whose lines do not connect directly in the New Orleans terminal. Simmons R.V.S. at ¶ 84. In response, KCS and CSX discussed each being responsible for the fees associated with its own deliveries to the other carrier, but CSX balked at paying NOPB's charges and threatened to shift the interchange from New Orleans to Gulfport, MS, or Birmingham, AL (via a third carrier between there and Artesia), which would be far more costly and degrade the service levels for traffic interchanged at New Orleans. *Id.* KCS had no choice but to relent, and it agreed to absorb the NOPB's increased charge on a temporary basis. *Id*. at ¶ 86. CSX and KCS specifically agreed that either party could terminate that agreement on 30 days' notice. *Id.* & Simmons Exh. 15.

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[518] CSXT-8 at 21-22.

CSX's demand in this proceeding to require that KCS absorb those costs permanently is an unjustified grab with no nexus to the Transaction. The Transaction will have no effect on CPKC's interest in connecting with CSX via the New Orleans gateway. Brooks R.V.S. at ¶¶ 12-13. There is no legal justification behind CSX's demand to alter mutually agreed-upon contractual terms governing the allocation of NOPB charges as these conditions are wholly unrelated to the Transaction. The fact (touted by CSX) that the NOPB charges CSX seeks to avoid sharing were occasioned by a series of transactions in 1985 and 2006 (to, among other reasons, facilitate state highway projects),[519] only underscore that CSX's effort to extract commercial advantage through conditions imposed on this Transaction are egregiously without merit.

Finally, CSX's miscellaneous requests are otherwise unrelated to the Transaction. *See* Ottensmeyer R.V.S. at ¶¶ 16-25.

D. BNSF's Veiled Threats to Demand Future Trackage Rights It Chose Not to Seek in this Proceeding Should Be Rejected with Prejudice

BNSF filed a Notice of Intent outlining three separate requests for trackage rights it anticipated seeking in this proceeding. BNSF ultimately opted not to file a Responsive Application, and it is thus disqualified from seeking that relief in connection with the Transaction, whether now or at some future time. Like CSX and UP, BNSF has waived its right to seek these rights by not presenting a Responsive Application. *See* Decision No. 12 (served

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[519] These transactions were undertaken with Board approval. *See The Kansas City Southern Ry. – Abandonment Exemption – in Jefferson Parish, LA*, Docket No. AB-103 (Sub-No. 20X) (served June 5, 2006); *Louisiana & Arkansas Ry. – Trackage Rights Exemption –Illinois Central Gulf R.R. & New Orleans Terminal Co*., Finance Docket No. 30639 (ICC served Apr. 17, 1985).

Jan. 26, 2022) (rejecting waiver sought by CSXT, and joined in by UP, from obligation to provide notice of potential conditions requiring Board approval/exemption).[520] Any trackage rights that BNSF might seek following Applicants' consummation of the Transaction would also be precluded by Applicants' inability to decide whether to proceed with the Transaction in the face of a potential grant of such rights.[521] Applicants nonetheless address BNSF's proposals because BNSF's comments repeatedly threaten to renew those requests in the future. In its comments, BNSF slips in a general request that the Board "[r]eserve jurisdiction to impose further conditions, including trackage rights, during the oversight period."[522] And BNSF's witnesses testify about the need for trackage rights to further BNSF's business objectives in Mexico.[523] While BNSF's failure to present a Responsive Application forecloses it from pursuing such relief, BNSF's proposals also fail on the merits; accordingly, BNSF's trackage rights requests should be rejected with prejudice.

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[520] This requirement is equally applicable to requests for "contingent" trackage rights of the sort BNSF indicated it would propose. *See Rio Grande Industries, Inc. – Purchase & Related Trackage Rights – Soo Line R.R. Line Between Kansas City, MO & Chicago, IL*, Finance Docket No. 31505, 1989 WL 246976 (ICC Decision No. 8, served Dec. 11, 1989) at *2 ("[T]he requirement for a responsive application is not only to determine the impact of proposed relief upon the transaction, but to ascertain whether the responsive applicant's proposal meets the statutory qualifications for the relief sought. KCS is seeking contingent trackage rights, should Soo discontinue operations. This requires an application.").

[521] *Guilford Transportation Industries, Inc. – Control – Boston & Maine Corp.*, 5 I.C.C.2d 202, 206 (1988) ("Even though the Commission has the power to impose trackage rights as a condition to a rail consolidation, the transaction is still dependent upon an agreement. If the carriers do not accept the conditions imposed by the Commission, they need not consummate the transaction. Now that the . . . consolidation transactions have already been consummated, the imposition of a trackage rights condition would lack the element of agreement.").

[522] BNSF-9 at 78.

[523] BNSF-9, Poltolarek V.S. at 16.

1. BNSF's Desire for Board Intervention in Support of Its Quest for a Future Mexican Concession Is Not Merger-Related and Would Improperly Involve the Board in Mexican Affairs

The Board should reject with prejudice BNSF's aborted application for Robstown-Laredo trackage rights and any other effort by BNSF to use the Transaction as a mechanism for improving BNSF's standing in connection with its revealed desire to participate in potential future Mexican rail concessions.[524] The Transaction has no impact whatsoever on BNSF's ability – or inability – to seek a Mexican rail concession at some speculative future point. If BNSF wants to pursue some future opportunity to obtain rights from the Mexican government, it will remain free to do so. CPKC may well oppose such a request, just like KCS almost certainly would have. But the Transaction does not preclude BNSF from doing whatever it might have done in the absence of the Transaction.

BNSF witness Dychter testifies that BNSF's lack of direct access to Laredo may handicap BNSF in its quest for a concession involving trackage over which KCSM operates,[525] but again this shortcoming is not the result of the Transaction. BNSF has never had direct access to Laredo. Quite simply, BNSF's lack of direct access to Laredo is a pre-existing condition unrelated to the Transaction.

Any contention that BNSF would need access to Laredo in order to participate in future Mexican rail regulatory matters also ignores the extensive *and direct* access to Mexico that BNSF already has – none of which will be affected whatsoever by the Transaction. BNSF

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[524] BNSF asserts that it might request that the Mexican government grant it rights to operate the nationally owned trackage in 2027 "when the exclusivity provision of KCSM's concession expires." BNSF-at 54.

[525] BNSF-9, Poltolarek V.S. at BNSF-16 ("To obtain such a concession, BNSF would need to be able to demonstrate to the Mexican government that it has a credible plan for accessing Mexico, which would require direct access to Laredo.").

already has *direct* (rather than interline) access to multiple Mexican gateways, including Brownsville (via UP trackage rights), El Paso, Eagle Pass (via UP trackage rights), and San Diego.[526] At El Paso and Eagle Pass, BNSF connects with FXE; at Brownsville, BNSF connects with KCSM.[527] BNSF has no need for trackage rights to Laredo to forge a connection with the Mexican rail network.

As discussed above, moreover, BNSF handles the vast majority of its Mexican traffic through El Paso and Eagle Pass – not Laredo or Brownsville. *See* Section VIII above; Majure R.V.S. at ¶ 75. As BNSF's internal documents reveal, BNSF itself {{[redacted]}},[528] and sees those other gateways as providing BNSF with more efficient access to Mexico given its network configuration.[529]

To be sure, BNSF undoubtedly *would like to have direct rather than interline access to Laredo*, but a desire to improve its lie is not a justification for a grant of trackage rights, a

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[526] BNSF Network Map, BNSF Railway, https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/network-map.html (last visited May 12, 2022) (Vol. 3, Exh. 81). BNSF's website touts that "BNSF Mexico is here to facilitate your Mexico transborder shipping with five key United States Gateways: San Diego, El Paso, Eagle Pass, Laredo and Brownsville." Gateway & Connections, BNSF Railway, https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/gateway-and-connections.html (last visited June 28, 2022) (Vol. 3, Exh. 82).

[527] In *UP/SP*, BNSF was granted trackage rights to provide a competitive alternative to UP in the Brownsville area and to connect with TFM (now KCSM) at the Brownsville/Matamoros gateway. UP/SP, 1 S.T.B. at 409-10, 422, 562. BNSF chose to negotiate haulage rights over these UP lines that it could convert into trackage rights, but thus far BNSF has apparently opted not to exercise its conversion rights.

[528] *See* BNSF0000932 (Vol. 3, Exh. 15).

[529] *See* BNSF0000166 (analyzing intermodal traffic between the United States and Mexico and concluding that BNSF {{[redacted]}}) (Vol. 3, Exh. 28); BNSF0000151 (concluding that {[redacted]}) (Vol. 3, Exh. 83).

principle BNSF itself persuaded the ICC to apply in its own merger case.[530] BNSF's desire for trackage rights to Laredo in fact long predates the CP/KCS Transaction. Long before KCS's acquisition of control of Tex Mex and TFM (what is now KCSM), BNSF petitioned the Board for such rights, and KCS successfully opposed BNSF's effort. In the 1998 *UP/SP Houston Gulf Coast Oversight* proceeding, BNSF sought overhead trackage rights over UP between San Antonio and Laredo to address the alleged "influence of KCS on Tex Mex's ability to work with BNSF at Laredo, and the unexpected lack of direct competition in the privatized Mexican rail system."[531] The Board rejected this request, finding that "none of the developments complained of by BNSF has caused any diminution of competition relative to the pre-merger period. Therefore, there is no basis for BNSF's request for a direct access to Laredo that SP never had."[532] That remains true today.

Finally, holding open the potential for BNSF to seek the trackage rights it claims to desire would affirmatively undermine the benefits of the Transaction and cause harm to the public interest:

- A reservation of potential future trackage rights would leave Applicants uncertain about the future commercial landscape, undermining their incentives to make investments in the future CPKC network.
- To the extent BNSF claims that trackage rights may be needed as a remedy for the failure of other conditions – or other developments arising from implementation

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530 *BN/Santa Fe*, 10 I.C.C.2d at 777 (denying request for trackage rights where they "would undoubtedly make GNBC's operations more efficient and allow GNBC access to an expanded traffic base, but they are not necessary to ameliorate any harm caused by BN/Santa Fe common control.").

531 *UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. 622, 629 (1998).

532 *UP/SP Houston/Gulf Coast Oversight*, 3 S.T.B. 1030, 1060 (1998).

of the Transaction – the Board will have inherent authority to assess what steps, if any, would be appropriate during the oversight period. Granting BNSF the option of seeking trackage rights between Robstown and Laredo (or anywhere else) would not be a constructive path, however, because it would give BNSF a powerful incentive to invent problems (and seek trackage rights as the reward) rather than working collaboratively to resolve any operating or other challenges that might arise.

- Any grant of trackage rights would also inject new operational complexity on the lines over which BNSF would operate, consuming CPKC network and terminal capacity and potentially contributing to congestion. Elphick/Orr R.V.S. at ¶ 90.

2. BNSF's Proposed Rights Between Dallas and Shreveport Would Grant Commercial Rights BNSF Chose Not to Acquire

BNSF similarly signals that it may renew its effort to seek trackage rights between Dallas and Shreveport, LA that it opted not to seek in this proceeding. BNSF initially says that it was considering seeking these rights to "address[] the impact of likely congestion on its route to New Orleans by filing a responsive application for trackage rights on a KCS line that would have allowed BNSF to shift its interchange location with Eastern railroads further north to Shreveport, La."[533] "BNSF now believes that it would be more appropriate for the Board to reserve jurisdiction to address this issue as it may arise during the oversight period. Many of the details that the Board would need to review to evaluate a request for trackage rights necessarily will be dependent on the conditions in effect when congestion occurs."[534]

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533 BNSF's Description of Anticipated Responsive Applications (BNSF-7) (filed Jan. 12, 2022).

534 BNSF-9 at 65 n.23

The Board should close the door that BNSF seeks to hold open. The rights BNSF desires are not tailored to address any potential impact of the Transaction, they would improve BNSF's position relative to the status quo, they would be vastly overreaching, and they would undermine the Transaction and public benefits.

BNSF's description of its request was disingenuous from the beginning. There are no eastern carriers at Shreveport. Simmons R.V.S. at ¶ 74 n.46. BNSF has limited rights to operate through Shreveport over UP trackage rights, but it does not have the right to interchange with other carriers there. *Id*. BNSF could route any traffic it wishes over the Meridian Speedway via interchange with KCS at Dallas, but BNSF has opted not to do so, preferring instead to take its transcontinental intermodal traffic to Memphis for interchange with NS and CSX there, bypassing KCS. *Id*. Similarly, if BNSF desired to bypass the lines that CPKC will use between Houston and New Orleans, it already can reach Shreveport via its trackage rights over UP. Simmons R.V.S. at ¶ 40 n.20.

What is really behind BNSF's aborted request is a desire to obtain for free valuable commercial rights that it opted not to acquire when the Meridian Speedway venture was formed. KCS (and NS) invested heavily in the Meridian Speedway east of Shreveport, and KCS invested in its own line connecting Dallas to the Speedway. As Simmons explains, and as reflected in {{ }} when KCS was negotiating with NS over joint investments in the route between Shreveport and Meridian, it was simultaneously discussing with BNSF the possibility of joint investments in KCS's route between Dallas and Shreveport, which would have resulted in BNSF obtaining certain rights over that line. BNSF never reached an agreement with KCS on such a transaction, and so KCS proceeded to make investments in the

Dallas-Shreveport line on its own. Simmons R.V.S. at ¶ 73, 77.[535] Perhaps BNSF regrets its decision now in light of the success of the Meridian Speedway, and in particular, the UP-NS transcontinental traffic that flows over that route.

In this context, a grant of trackage rights between Dallas and Shreveport would have nothing to do with service on lines BNSF shares with CPKC in Texta, and everything to do with a desire to obtain for free rights BNSF now covets. Such a grant would be utterly inappropriate.

Even holding open the potential to consider such a grant would interfere with the Transaction. As noted above, BNSF would be encouraged to invent rather than help solve potential service problems in the hopes of triggering its desired windfall. And the possibility of a future effort to obtain these rights would create uncertainty that could undermine investments by CPKC in this line, which will play a vital role in CPKC's plan to compete head-to-head with BNSF in the Dallas-Chicago intermodal lane.

3. BNSF's Proposed Rights Between Savanna, IL and Clinton, IA Would Grant Commercial Rights BNSF Has Previously Sought

BNSF's Notice of Responsive Application indicated that BNSF planned to seek rights between Savanna, IL and Clinton, IL, but BNSF chose not to file the Responsive Application that would have been necessary to enable a grant of such rights. But BNSF has tried to leave the door cracked open, asking the Board to "reserve jurisdiction to address this issue."[536] The Board should also close this door.

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535 *See* BNSF0003259 ({{ }}) (Vol. 3, Exh. 84); BNSF0003265 ({{ }}) (Vol. 3, Exh. 78).

536 BNSF-9 at 65 n.23.

First, as discussed above, BNSF's decision not to file a Responsive Application has consequences, and it is now foreclosed from seeking to impose a condition on the Transaction relating to trackage rights it chose not to see.

Second, the rights BNSF contemplated seeking would be unwarranted because they would grant commercial rights BNSF has long sought from CP but has failed to negotiate at arm's length. As explained in the Reply Verified Statement of Adolph Gameiro, in 1995 BNSF and CP exchanged rights on opposite sides of the Mississippi River north of Davenport, IA. Gameiro R.V.S. at ¶ 28. BNSF operates over CP between Davenport and Clinton, and CP operates over BNSF on the east side of the river. *Id.* BNSF tried to persuade CP to allow it to connect its Davenport-Clinton rights to the BNSF network by operating over 19.6 additional miles of CP lines from Clinton to Savanna – the same rights BNSF said it would seek from the Board. CP declined, for reasons Gameiro explains. *Id.* at ¶¶ 29-31. BNSF should not be permitted to obtain through Board fiat rights it long coveted but never possessed.[537]

Third, though BNSF postulated that the rights it demands would serve to overcome "congestion" on the Davenport-Clinton line, they would manifestly do no such thing. They would not take away BNSF's local service between Davenport and Clinton, and would instead add new train operations – and new congestion – on the 19.6 additional miles of CP trackage north of Clinton. Elphick/Orr R.V.S. at ¶¶ 90-91.

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[537] *See UP/SP*, Finance Docket No. 32760 (Decision No. 103, STB served May 1, 2008) at 6 ("The Board would not ordinarily impose a condition that would put the proponent of a condition in a better position than before the merger [because] [c]onditions were not imposed to ameliorate longstanding problems not caused by the merger."); *Guilford/D&H*, 366 I.C.C. at 415–16 (emphasizing the idea that the Board should not use its "merger conditioning powers" to release the parties from commercial arms-length agreements and noting that it "would be extremely reluctant to negate contracts which [the parties] apparently entered freely.").

Fourth and finally, as with other trackage rights that BNSF wants the Board to "reserve jurisdiction" to grant — holding open the option for BNSF to seek Savanna-Clinton rights in the event of operational issues would create new incentives for BNSF to invent problems rather than working collaboratively to solve them. The Board should make clear that, if BNSF ever wishes to seek these rights, it would need to do so either through negotiations with CP or under some other statutory provision entitling BNSF to relief.

E. The Board Should Not Grant UP's Demand for Conditions Granting Compulsory Access to KCS's Self-Funded New Bridge at Laredo

In addition to its sweeping demand for unneeded protection from new CPKC single-line competitive initiatives for traffic moving via the Laredo gateway, UP ask the Board to protect it from potential operational changes at the Laredo gateway as well.[538]

The conditions UP requests are not necessary, however, because CPKC will step into the shoes of KCS's previous commitments – embodied in the Board's approval of the *KCS/Tex Mex* combination – to, among other things:

- treat all carriers fairly at the Laredo Bridge;
- not change the basic structure and operations of KCSM except through negotiations;
- abide by the existing dispatching and operating practices over the Bridge and not make any unilateral changes in the way the Bridge is dispatched and operated;
- continue to be bound by the contracts and agreements that now govern operations over the Bridge;[539]

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538 UP-10 at 15.

539 UP acknowledges that the numerous private agreements governing joint use and operations of the Laredo Bridge, including (a) the May 23, 1951 Agreement between Guy A. Thompson, Trustee, International Great Northern Railroad and The Texas Mexican Ry.; (b) a settlement agreement entered into in Feb. 1998, among UP, KCSR, Tex Mex, and Mexrail, which settled outstanding issues regarding the compensation paid by UP for the use of the Bridge and requires UP to pay $13.50 per car, subject to annual adjustments; and (c) a Memorandum of Understanding among UP, Mexrail, Tex Mex, and KCSR

- provide interline services such as pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through train service, providing excellent service, and promptly quoting rates; and
- ensure safety remains a top priority with regard to CPKC operations at the Laredo Gateway.

Those commitments have been honored by KCS and supported efficient operations at Laredo for more than 17 years (and UP makes no contention otherwise). There is no reason why they will not suffice to address all of UP's concerns about operations at the Laredo gateway into the future. Quite simply, CPKC will have no desire, no incentive, and – in light of the commitments by which it must and will abide – no ability to undermine the operational efficiency of UP trains at Laredo. UP's trains, after all, will be carrying important freight for important CPKC customers reached by CPKC's Mexican rail network. In addition, anything that hindered efficiency at the gateway would also interfere with CPKC's own plans to move freight smoothly across the border.[540]

In one crucial respect, however, UP's demands about Laredo are overreaching and should be rejected. UP asks the Board not only to preserve the pre-Transaction status quo, but to affirmatively grant UP access to any new railroad bridge constructed in Laredo *on the same terms* as UP's access to the existing bridge.[541]

First, there is no need for his condition. To the extent that moving UP's trains across a new bridge would improve the overall efficiency of Laredo gateway operations, CPKC will have

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entered into in 2002 that superseded the 1998 settlement agreement. UP acknowledges that these agreements require KCS to perform service "impartially" with "no preference . . . to movements of cars by one of the parties." UP-10 at 31.

[540] Indeed, any effort by CPKC to prefer its trains or to degrade UP operations at the Laredo Bridge risks tit-for-tat retaliation by UP on the trackage rights lines KCS depends on to reach Beaumont, but which UP dispatches. If any party has operational and service power over another, it is UP's over CPKC.

[541] The fact that UP desires for the terms of its access to a new bridge to be the "same as" those governing its use of the existing bridge proves that UP is amply protected by these contracts today.

compelling incentives to move UP-KCSM interchange trains via that route. As UP notes, KCS has obtained a Presidential Permit to construct a new rail bridge at Laredo, and KCS has begun the construction process. Upon completion, CPKC has every incentive to divert CPKC trains away from the existing Laredo Bridge and onto the new bridge, freeing-up capacity for UP's trains on the existing bridge. And if operating UP trains on both bridges makes more operational sense for the gateway, CPKC will have strong incentives to do that instead.

Second, UP's request is overreaching. Allowing CP access – if operationally expedient – is one thing, but the financial and other terms for that access are quite another. By asking the Board to impose access to a new bridge in which KCS is investing {[redacted]} on the "same terms" as UP's access to the existing bridge, UP is seeking to leverage this proceeding to obtain rights and privileges that should be obtained through commercial negotiations, not through government fiat. UP would be piggybacking on ancient agreements, providing for compensation reflecting conditions many decades ago, and providing for no contribution to the construction costs of building a new bridge.

Whether UP is granted formal contractual rights to use the second, privately-funded Laredo bridge should be at the discretion of CPKC, and on terms that are operationally efficient and economical to CPKC. If it is efficient and economical to provide UP with access to the second bridge, the parties will negotiate those terms. *See* Naatz R.V.S. at ¶{ 69. The combination of CP and KCS has no bearing on this issue whatsoever, much less the appropriate, arm's-length commercial negotiations between UP and KCS regarding contractual access terms.

IX. COMMENTS FROM RAIL LABOR

Applicants have read and considered the many filings by labor interests.[542] Applicants are pleased that these labor organizations recognize the job-creating features of the Transaction. Applicants have been engaged in ongoing discussions with these and other labor organizations on appropriate implementing agreements. *See* Creel R.V.S. As Applicants have previously indicated they do not object to (a) the Board's imposition of standard *New York Dock* protective conditions where applicable, and (b) being held to their representations regarding the applicability of the "Cramdown Agreement." *See also* Verified Statement of Myron Becker, (App. Vol. 2 at 240).

X. THE BOARD SHOULD NOT IMPOSE CONDITIONS TO ADDRESS COMMENTERS' ALLEGED ENVIRONMENTAL CONCERNS

Three interested parties, Itasca and the Chicago Coalition to Stop CPKC (together the "Coalition Communities"), Hennepin County, and Sierra Club, Delta Chapter (Sierra Club of Louisiana) (the "Sierra Club"), raise concerns about the potential environmental and safety impacts that increased freight traffic west of Bensenville Yard near Chicago will have on their communities.[543] As discussed below, many of their concerns are misguided, as they are based on

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[542] *See* Comments of ARU, BLET, IAM District Lodge 19, IBEW, and SMART-TD/ATDA (filed Feb. 28, 2022).

[543] *See* Opening Comments and Request for Conditions of the Coalition to Stop CPKC ("ITAS-1") (filed Feb. 28, 2022) at 7; Comments and Request for Conditions of Hennepin County, MN, and the Hennepin County Regional Railroad Authority ("Hennepin County Comments") (filed Feb. 28, 2022) at 7, 11; Sierra Club Letter to the Board ("Sierra Club Comments") (filed Mar. 2, 2022) at 1. Applicants note that the Coalition Communities make new arguments and assertions in their Supplemental Comments, filed on June 9, 2022. Applicants object to the extent any of these arguments or assertions are unrelated to the revisions the Board ordered Applicants to make in the Amended Operating Plan and Accompanying Workpapers, given that the Coalition Communities may only revise their Comments to address these revisions. See Decision No. 17, at 6 (Apr. 27, 2022).

overstated estimates of increased traffic and fail to appreciate that the Transaction is projected to actually *reduce* greenhouse gas emissions, not increase them.

In any case, the commenters' concerns, along with Applicants' Environmental Impact Statement ("EIS") and Safety Integration Plan ("SIP"), will be fully considered as part of the Board's Office of Environmental Analysis ("OEA") process. *See* 49 C.F.R. §1180.1(f). Applicants are confident that when the Board evaluates OEA's report and recommendations and the environmental and safety impacts of the Transaction, it will conclude that none of the conditions that the Coalition Communities, Hennepin County, and the Sierra Club request are based on well-founded concerns nor warrant any condition other than those recommended by OEA.

CP has the strongest safety record of any railroad in North America and expects to continue to work effectively with the OEA to address any safety and environmental issues.[544] Applicants have also attempted, in good faith, to engage with these communities to discuss potential reasonable mitigation measures that might alleviate any minor effects that Applicants' modest traffic growth plans might have on their communities. But the "anywhere but here" mentality that pervades the comments of some localities must not be allowed to undermine the substantial public benefits of this Transaction for shippers across North America and strength and resilience of the national rail network.

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[544] *See* Safety Integration Plan, FD No. 36500, at Part III.A.1, 3 (filed Dec. 28, 2021).

A. The Coalition Communities Demand Mitigation Measures Disproportionate to the Likely Effects on the Community

The Coalition Communities assert that the Transaction will substantially increase freight traffic on the MD-W Line west of Bensenville Yard, which "would literally shut down . . . communities from functioning and cause severe safety, environmental, and other issues."[545] These concerns are drastically overblown, and the Coalition Communities' proposed mitigation efforts exceed what is necessary to remedy any concerns.

To start, the Coalition Communities overstate the impact of the Transaction on their communities. CPKC traffic accounts for only a small percentage of traffic through the Coalition Communities. The Coalition Communities see over 55 Metra trains every weekday and on average more than 20 per day on weekends, amounting to a total of 332 Metra trains every week. Elphick R.V.S. at ¶ 65.[546] By contrast, even accounting for Applicants' plan to add eight trains per day on the MD-W Line west of Bensenville following approval of the Transaction,[547] the Coalition Communities will see just 78.4 freight trains per week.[548] Thus, even after the Transaction is approved, CPKC traffic will remain a relatively small percentage of traffic through the Coalition Communities, as shown in Figure 32 below. Elphick R.V.S. at ¶ 66.

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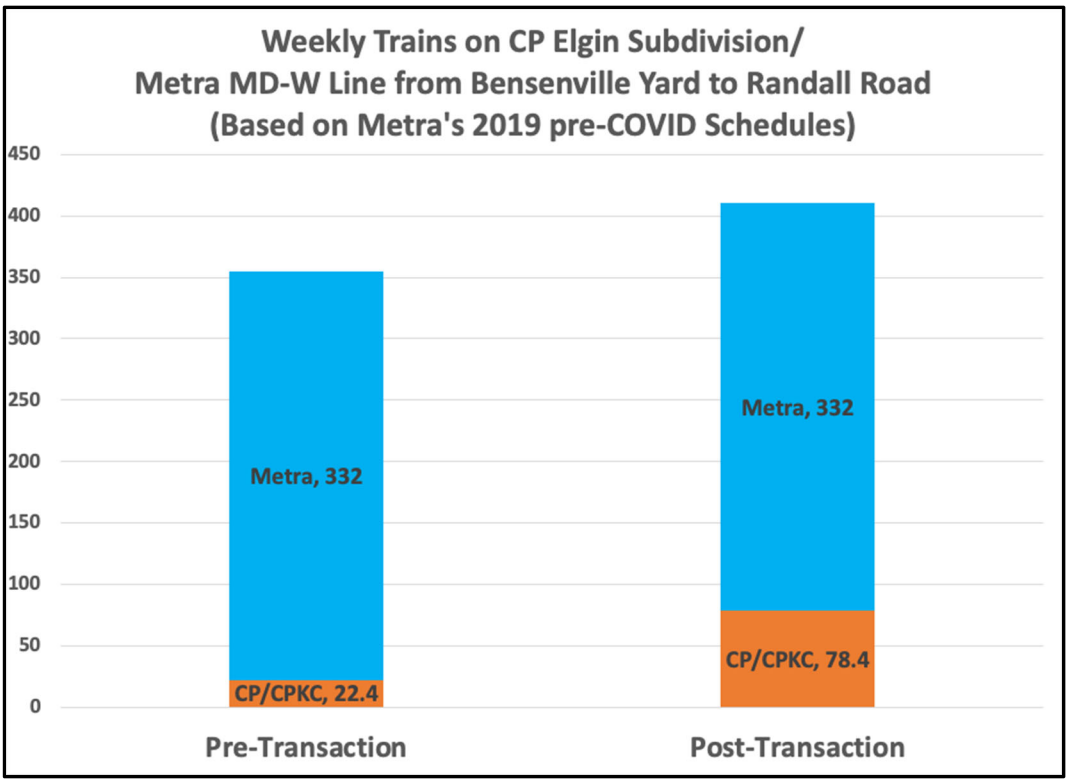
[545] *See* ITAS-1 at 14; Supplemental Opening Comments and Request for Conditions of the Coalition to Stop CPKC (ITAS-4)) (filed June 9, 2022) at 3.

[546] While these traffic levels are down somewhat due to the pandemic, Metra anticipates a return to pre-COVID-19 levels. METR-7 at 6.

[547] *See* Amended Operating Plan, App. A. The Coalition Communities' assertion in their Supplemental Comments that Applicants increased the number of trains from 7.1 to 8.0 in their Amended Operating Plan, *see* Coalition Communities Supplemental Comments at 7, is based on a misreading of Applicants' Original Operating Plan, which like the Amended Operating Plan, relied on a projected increase of 8.0 trains per day. *See* Amended Operating Plan, Ex. U, at 5; *see also* CP Response to Information Request No. 1, EI 31352, (Vol. 3, Exh. 84) at 2-3 (Oct. 28, 2021) (also projecting an increase of 8.0 trains per day). Accordingly, the Board should disregard the Coalition Communities' demand that Applicants be directed to explain "why the additional train was excluded from the Original Operating Plan." *See* ITAS-1 at 8.

[548] *See* Metra Data Workpaper, "All Trains" tab.

FIGURE 32[549]
TRAINS THROUGH THE COALITION COMMUNITIES



The Coalition Communities have seen similar levels of freight traffic than this in the past, and it did not "shut down" their communities.[550] For example, the Village of Bartlett – one of the Coalition Communities – noted in 2016 that it receives about 10 freight trains (in addition to 58 Metra trains) per day.[551] During the 1980s and 1990s, there were approximately 12 scheduled freight trains on the MD-W line west of Bensenville Yard daily, plus locals. Gameiro R.V.S., at ¶ 27.

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549 *See* Metra Data Workpaper.

550 *See* ITAS-1 at 14;ITAS-4 at 3.

551 Village of Bartlett, Downtown TOD Plan (Oct. 18, 2016), available at https://rtams.org/sites/default/files/digital_documents/4099_Bartlett_TODPlan_2016.pdf.

Nor do the Coalition Communities provide any evidence that the Transaction will materially increase emissions locally or to some level that exceeds applicable emission standards.[552] CPKC's plan to add eight freight trains to the MD-W Line west of Bensenville CPKC will attract freight traffic that would otherwise be moved by trucks (which emit higher emissions) on highways or by other rail companies (many of which have worse environmental records)[553] through other communities. Thus, even if increases in traffic through the Coalition Communities result in higher (but still legal and safe) emissions levels in the Coalition Communities, emissions likely will decline overall. Verified Statement of Glen Wilson ("Wilson V.S.") at ¶ 22 (App. Vol. 1 at 311).

The relief the Coalition Communities seek to redress these modest traffic increases is simply untenable and disproportionate to any possible impact the Transaction will have on their communities. For instance, the Coalition Communities have asked for $5.5 to $9.5 *billion* dollars in infrastructure mitigation (more than $1 billion for each potential new freight train),[554] which is more than is spent across the CREATE Program—a public-private partnership that is investing $4.6 billion dollars in approximately 70 different vital projects across the entire Chicago railroad network.[555] As the map in Figure 33 shows, the MD-W Line on which the Coalition Communities are found will have relatively light rail traffic post Transaction when compared to many other communities in and around Chicago. Elphick R.V.S. at ¶ 70.

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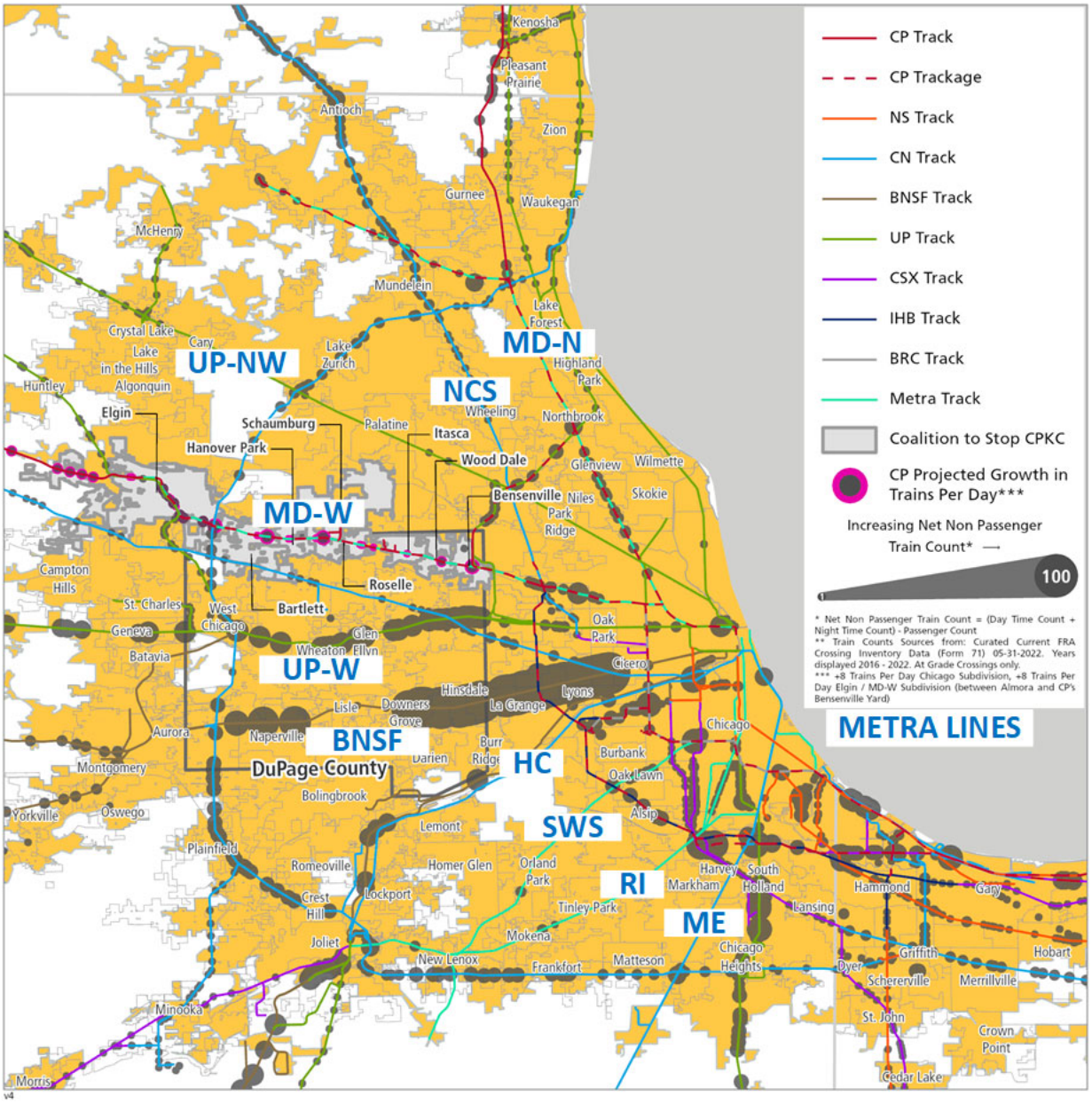
552 *See, e.g.* ITAS-1 at 14,

553 Wilson V.S. at 3.

554 ITAS-1 at 3.

555 CREATE: Keeping the Go in Chicago, https://www.createprogram.org/about-create/ (last visited Apr. 26, 2022) Vol. 3, Exh. 85).

FIGURE 33
COMPARATIVE TRAIN COUNTS FOR RAIL LINES IN CHICAGO AREA



Much of the relief the Coalition Communities seeks is not only overreaching, but also infeasible. Taking just one example, their proposal to "eliminate *any* additional freight rail traffic from traversing the western end of the Elgin Subdivision post-merger and to find other

routings for such traffic,"[556] would cut the CPKC network off from the rail network at and beyond Chicago, precluding competition for traffic moving to Detroit, eastern Canada, and the eastern United States. Moreover, it would send the same traffic through more circuitous routes – spanning hundreds of unnecessary miles, traversing dozens of other communities, and resulting in a myriad of additional costs and emissions. Elphick R.V.S. at ¶¶ 73-76. This is quintessential "not in my backyard," never mind the impact on the public as a whole.

Finally, the Coalition Communities' proposed condition "that (1) holds Applicants to their statement that average train size will be reduced over the Elgin Subdivision and (2) requires that the reductions shall not be accompanied by an increase in the number of trains"[557] would be inappropriate and counterproductive to operational efficiency and flexibility. First of all, these two conditions are contradictory because Applicants' projection of a decreased average train length is directly tied to a modest increase in the number of trains. Elphick R.V.S. at ¶ 79. And as previously explained, the Coalition Communities request that there be no "increase in the number of trains" traveling through its communities is unreasonable, comes at the expense of other communities, and disserves the public interest. Elphick R.V.S. at ¶ 78. Further, it would be inappropriate to condition approval of the Transaction on any guarantee that train sizes will not increase over the Elgin Subdivision, notwithstanding Applicants' projections, because it would deprive Applicants' of the flexibility they need respond to changing circumstances and match network conditions on a day-to-day basis. Elphick R.V.S. at ¶ 79.

In prior cases where mergers brought modest increases in freight train counts, the Board has at most imposed a condition requiring the Applicants to consult with the locality. Even then,

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556 ITAS-1 at 4 (emphasis in original).

557 ITAS-4 at 11.

it has terminated the condition when, after meeting, it was shown that "it is unlikely that additional consultation would result in mitigation that would be mutually acceptable to the parties."[558] Even that condition is not justified here, given that Applicants have indeed already consulted with the Coalition Communities, and it is clear that no reasonable, mutually acceptable mitigation is available.[559]

B. Hennepin County Concerns Fail For Similar Reasons

Hennepin County asserts that the Transaction "will bring more freight traffic to and through the County, bringing adverse impacts to the County's infrastructure" and "creat[ing] a greater risk of incidents involving hazardous materials."[560] Similar to the Coalition Communities, these concerns are overstated and do not warrant conditions.

Hennepin County notes that it is particularly concerned that "the diversion of the long-haul trucks . . . to reach CP's Minneapolis Intermodal Terminal at Shoreham Yard will aggravate existing problems and concerns."[561] But the anticipated additional daily volume of intermodal traffic to/from this facility is actually quite minimal. Applicants project that daily volume at the facility will increase by significantly less than one trainload per day. Elphick R.V.S. at ¶ 86. This increase is well within the range of seasonal traffic fluctuations at this terminal, and will return the facility to a level of volumes roughly comparable to what it saw in 2012-14. Elphick R.V.S. at ¶ 85.

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558 *BN/Santa Fe*, Finance Docket No. 32549, (decision No. 47 served Feb. 20, 1996).

559 *See* Letter from C. Anne Ergo to A. Giordano (May 24, 2022)) (Vol. 3, Exh. 86)) (asserting that Applicants' offered ten million dollar investment was "clearly not a serious attempt to reach a mutually acceptable settlement" in light of the Coalition Communities' demand for more than $9 billion dollars of mitigation).

560 Hennepin County Comments, at 5-6.

561 *Id.* at 7-8.

Outside of this one intermodal facility, the traffic projected increases about which Hennepin County complains are not even large enough to meet the Board's established thresholds for triggering environmental review. Under those thresholds, increases in rail traffic of less than eight trains per day in attainment areas or three trains per day in nonattainment areas – or comparable changes in gross ton mileage – normally do not require environmental review. *See* 49 C.F.R. §§ 1105.6(c)(1); 1105.7(e)(5). If Hennepin County wants OEA to depart from its precedent and study traffic changes that do not exceed these thresholds, it must make that case to OEA as part of the EIS process. This is not the proper place for such an argument.

In any event, none of these other projected traffic increases are cause for concern or conditions. Hennepin County asserts that it may experience increased "blocked crossings" as result of "more trains and longer trains, if industry trends continue."[562] The concern for continuing industry trends shows that Hennepin County's concern is not related to the Transaction. Indeed, Hennepin County calls the Board's attention to 14 crossings in particular that it is most concerned will be "directly and materially impacted by merger-related traffic increases,"[563] but issues with blocked crossings at this location are unlikely to result from the Transaction. Elphick R.V.S., at ¶ 90. *Second*, Hennepin County overstates the amount of additional hazardous traffic that will pass through Hennepin County, as it is counting empty tank cars returning for another load of the same commodity in its hazardous shipment volumes. Applicants informed Hennepin County of the error in its analysis,[564] but it did not adjust its

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562 *See* Hennepin Comments, at 13.

563 *Id.* at 14.

564 *See* Email from D. Meyer to A. Hirschkorn (Feb. 25, 2022) (Vol. 3, Exh. 89).

figures.[565] In fact, the volume of hazardous commodities routed through Hennepin County will not be large, and will be only slightly more than the hazardous materials that traversed Hennepin County in 2018 and 2019.[566] More importantly, CP is the safest railroad in North America based on FRA reportable incidents for Class 1 railroads, and the safety concerns relating to hazardous traffic are fully addressed in Applicants' Safety Integration Plan, which will be implemented in coordination with FRA.[567]

Finally, even after the Transaction, CPKC will remain a minority participant in the Hennepin County rail network, with BNSF having considerably more traffic in this region. *See* Elphick R.V.S. at ¶ 88. Taken in context, then, any concerns by Hennepin County about projected traffic levels after the Transaction are much more tied to BNSF traffic, which Applicants have no control over, than any traffic increases resulting from the Transaction.[568]

C. The Sierra Club's Requested Conditions Have No Nexus to the Transaction, Which is Expected to Lower Greenhouse Gas Emissions

The Sierra Club requests that the Board impose two conditions, neither of which is remotely related to the Transaction. Both should be denied, as "[t]he Board does not require

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565 *See* Hennepin Comments, Amfahr V.S., at ¶ 24.

566 *See* Elphick RVS.

567 *See* supra Part XI.A; Safety Integration Plan, FD No. 36500, at Part III.A.1 (filed Dec. 26, 2021).

568 *Canadian National Ry. & Grand Trunk Corp. – Control – EJ&E West Co.*, Finance Docket No. 35087 (Decision No. 18 served Jan. 16, 2009) ("Finally, it is worth noting that the EJ&E line is an active rail line today; thus, the current owners, as well as any carriers using that track pursuant to a trackage rights arrangement, could increase train traffic on that line at any time without Board approval and without any federal action triggering NEPA review or Board-imposed mitigation measures.").

mitigation for existing environmental conditions, such as the effects of current railroad operations."[569]

First, the Sierra Club requests that Applicants be "required to make climate commitments that meet the standards of the Intergovernmental Panel on Climate Change's recommendations and that KCS/CP and Amtrak make tangible, public-facing commitments to electrification of routes nationwide and any new routes in our state."[570] This request has no "nexus" to the Transaction, which has no impact on the feasibility of electrification.[571]

Second, the Sierra Club requests that Applicants be "required to make climate commitments that meet the standards of the Intergovernmental Panel on Climate Change's recommendations."[572] But the Sierra Club makes no attempt to demonstrate that the Transaction will raise greenhouse gases or otherwise harm to the environment in some way that justifies imposing such a commitment. In fact, Applicants project that the Transaction will *lower* greenhouse gas emissions overall. *See* Wilson V.S., Part II.A. Linking the CP and KCS networks and upgrading them through added sidings will make both portions of the network more efficient, which in addition to benefiting shippers, will also benefit the environment given that trains are more environmentally efficient when they move than when they idle, stop or switch. *Id.* at ¶ 17. This improved network will also result in the diversion of almost 64,000

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569 *Can. Nat'l. Rwy. Co. – Control – EJ&E W. Co.*, Finance Docket No. 35087 (Decision No. 16 served Dec. 24, 2008) at 38.

570 Sierra Club's Comments, at 1.

571 Canadian National Ry. – Control – EJ&E West Co., Finance Docket No. 35087, at App. A, n.2-3 (Notice of Intent to Prepare an Environmental Impact Statement, STB served Dec. 21, 2007) ("[T]he Board's power to impose conditions is not limitless: there must be a sufficient nexus between the condition imposed and the transaction before the agency, and the condition imposed must be reasonable . . . . The Board . . . has not imposed mitigation to remedy preexisting conditions.").

572 Sierra Club's Comments, at 1.

long-haul truck shipments to rail transport, which is four times more fuel efficient and results in a 75% drop in greenhouse gas emissions. *Id.* at ¶¶ 21-22. The result of all of this will be to eliminate more than 389,000 tons of greenhouse gas emissions annually by the third year after the Transaction is approved. *Id.* at ¶ 15.

Additionally, CP intends to apply its robust climate commitments across the CPKC system.[573] CP "already outperforms industry averages for locomotive fuel efficiency—over 11% better than the North American Class I freight average." Wilson V.S., at ¶ 8 (App. Vol. 1 at 306). Its fuel efficiency has improved by more than 40% since 1990, and it is committed to continue improving fuel efficiency, including expanding use of fuel trip optimizer technology. *Id.* at ¶¶ 8-9. CP expects to align with a "well-below 2°C pathway" by 2030 in line with the recommendations of the Intergovernmental Panel on Climate Change, and to remain a leader in the industry in pushing further decarbonization after 2030.[574]

XI. OTHER ISSUES

In this section we respond to a variety of miscellaneous comments, some styled as raising competitive issues or service issues, but none legitimately related to impacts of the Transaction.

A. Concerns About CP's Tariff Provisions Applicable to Hazardous Shipments Are Not Competitive Issues or Transaction-Related and Should Be Rejected

Several commenters express concerns relating to the tariff provisions CPKC might choose to adopt governing the transportation of a subset of extraordinarily hazardous

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573 *See id.* at ¶¶ 10-12; *see also* Canadian Pacific, CP's Commitment to Fight Climate Change, CP Sustainably Driven (2020), available at https://sustainability.cpr.ca/downloads/CP_Rail_2020_Climate_Statement.pdf (Vol. 3, Exh. 87).

574 *See also* Canadian Pacific, CP's Climate Strategy, CP Sustainably Driven (2021), available at https://sustainability.cpr.ca/downloads/CP_Rail_Climate_Strategy.pdf (Vol. 3, Exh. 88).

commodities classified as "toxic" or "poison" inhalation hazards and referred to as "TIH/PIH" commodities.[575] The concerns relate specifically to two aspects of CP's existing tariffs: Item 53, pertaining to insurance requirements, and Item 54, pertaining to the allocation between CP and the shipper of potential liability to third parties arising from a release of TIH/PIH commodities being transported by CP when CP is not at fault.[576]

Fundamentally, the requests of these commenters arise from their dissatisfaction with these two aspects of CP's existing TIH/PIH tariff provisions, which were in place long before this Transaction was contemplated. Some of these commenters are looking to avoid having CP's terms *ever applied* to the KCS network, via an inappropriate and permanent freeze of KCS's existing terms. Others go farther, asking the Board to impose conditions that would roll back CP's pre-existing tariff terms to match KCS's existing terms. No such conditions are justified, for reasons we explain below.

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[575] Comments of Bayer CropScience LP ("Bayer-2") (filed Feb. 28, 2022) at 10; Comments of Occidental Chemical Corporation and Oxy Vinyls, LP ("OxyChem Comments") (filed Feb. 28, 2022) at 2 (joining the Joint Associations' and The Chlorine Institute's request for conditions regarding CP's TIH/PIH tariff provisions); ACC-6/TFI-5/NITl-3 at 24-25; CI-3 at 4; Letter from the U.S. Department of Agriculture to the Surface Transportation Board ("USDA Letter") (dated Apr. 22, 2022) at 2. In its Amended Comments, the National Association of Wheat Growers (the "Wheat Growers") joined these commenters. *See* Amended Comments of National Association of Wheat Growers (filed June 9, 2022) ("Wheat Growers' Amended Comments") at 1-2. The Wheat Growers' Amended Comments did not "address the new information in the amended Application and use the modeled traffic density data in the resubmitted workpapers," as required by the Board, *see* Decision No. 18 (served May 27, 2022) at 2, and instead, addressed the topic of TIH/PIH tariffs for the first time. While Applicants believe the Wheat Growers' Amended Comments were improperly submitted, its Amended Comments fail to articulate any competition concerns. Further, as we discuss below, Bayer has subsequently withdrawn its comments in light of CP's agreement to provide advance notice of certain post-Transaction tariff changes affecting TIH/PIH shipments on the pre-Transaction KCS network. *See* Joint Notice of Settlement Agreement by CP and Bayer ("CP-51/Bayer-3") (filed May 25, 2022).

[576] Canadian Pacific, Hazardous Commodities Tariff 8 at 7, *available at* https://www.cpr.ca/en/customer-resources-site/Documents/tariff-8-hazardous-commodities-apr-07-2022.pdf [cpr.ca].

Applicants understand that certain shippers and receivers of TIH/PIH commodities – like Bayer – may reasonably be concerned about the potential that they would want to adjust their shipping patterns in the event CP's terms become applicable to shipments on the pre-Transaction KCS system and would value advance notice of any such change before it becomes effective. As set forth in CP's settlement with Bayer, CP committed to providing Bayer with three-years' notice before revising the indemnity provisions applicable to TIH/PIH shipments on KCS's pre-Transaction U.S. network to conform with the provisions of CP's tariff, in exchange for the commitment of Bayer and its suppliers to use the safest-available rolling stock for shipments of these commodities. Bayer withdrew its comments on the strength of this undertaking. *See* CP-51/Bayer-3. As Brooks explains, CP is prepared to negotiate comparable arrangements with any shipper that may wish to use KCS's pre-Transaction network to ship these commodities. Brooks R.V.S. at ¶ 74. Especially in light of this reasonable accommodation, the Board should reject the conditions requested by these commenters.

Even without Applicants' accommodation, however, there is no merit to the requested conditions relating to CPKC's future TIH/PIH tariffs, for the following reasons.

To the extent the TIH/PIH commenters take issue with CP's existing tariff terms and seek conditions designed to roll them back as to movements on the pre-Transaction CP network,[577] there is no doubt that any such condition would be unjustified. The tariff terms applicable to shipments on the pre-Transaction CP network will be unaffected by the Transaction. Although CP regards its terms as entirely reasonable (as Brooks explains in his Reply Verified Statement

[577] Bayer's now-withdrawn request had sought such a condition expressly. *See* Bayer-2 at 10. The Chlorine Institute's request is ambiguous as to the scope of the prohibition of applying CP's terms. *See* CI-3 at 4. USDA likewise suggests that the Board "investigate CP's tariff language itself." USDA Letter at 2.

at ¶ 70), shippers are fully aware that they may challenge the reasonableness of those terms before the Board if they wish, and some have done so.[578] The Transaction will not affect the availability of regulatory oversight for these terms. Board precedent prohibits using this merger proceeding as a vehicle for regulating commercial activity unaffected by the Transaction.[579] Doing so would deny CPKC the right to establish reasonable terms for shipments on its network and defend those terms in appropriate regulatory fora.

All of the TIH/PIH commenters seek a condition precluding CP from applying its terms to shipments on the pre-Transaction KCS network. That request is similarly inappropriate, for the following reasons.

First, the conditions would not truly address any impact of the Transaction. The Transaction is not responsible for the possibility that KCS's tariff terms might change. In the pre-Transaction world, KCS has complete freedom – subject to the Board's regulatory backstop – to set whatever TIH/PIH tariff terms it wishes, and to change those terms in response to evolving conditions and judgments about the risks posed by those shipments. Nothing would prevent KCS from choosing to adopt terms that mirror those in CP's public tariffs.

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[578] As Bayer's now-withdrawn comments note, Agrium (whose successor, Nutrien, is a member of TFI), challenged CP's TIH/PIH tariff provisions on non-competition grounds before the Board in 2015 in Docket No. NOR 42145, arguing that CP's Tariff 8, Item 54, unreasonably shifts defense and liability responsibilities for train accidents to Agrium even in accidents caused by third-parties. Bayer-2 at 9, n.5; *see also* Complaint, *Agrium Inc. and Agrium U.S. Inc.* v. *Canadian Pacific Railway Company*, Docket No. NOR 42145 (May 15, 2015) at 1-2. The Agrium challenge led to a confidential settlement. Brooks R.V.S. at ¶ 69. Item 54 was also challenged on non-competition grounds in Canada and it was upheld by the Federal Court of Appeal. Brooks R.V.S. at ¶ 68.

[579] *See UP/SP*, 1 S.T.B. at 418 (making clear that "[a] condition must address an effect of the transaction" and that the agency "will not impose conditions 'to ameliorate longstanding problems which were not created by the merger,' nor will we impose conditions that 'are in no way related either directly or indirectly to the involved merger.").

Some of the TIH/PIH commenters imply that a change in terms applicable to the pre-Transaction KCS network would flow from an impact of the Transaction on competition.[580] But this is just wrong. As Naatz explains, KCS's current terms are the product of KCS's own assessment of the risks, and have nothing at all to do with competition with CP. Naatz R.V.S. at ¶ 114. Indeed, the very notion that KCS's terms have anything to do with competition from CP is belied by these commenters' own commentary: in their eyes, CP's terms are distinctly inferior, and thus not a source of competitive pressure for KCS to maintain more favorable terms, much less one that would be affected by the Transaction.[581] These commenters do not like the fact that CP managers might apply a different set of judgments about the appropriate level of risk to bear in connection with TIH/PIH shipments, pure and simple. That is not a competitive issue, as Dr. Majure explains. Majure R.V.S. at ¶ 179. Nor is it an effect of the Transaction that different business people's judgments about these matters may differ.[582]

An email among certain of the TIH/PIH commenters that was produced in discovery shows that they are well aware that their request for conditions has no real nexus to the Transaction. In a November 22, 2021 email from the ACC to OxyChem (one of ACC's members), the ACC representative observed that {{[redacted]

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580 *See* OxyChem Comments at 2; ACC-6/TFI-5/NITL-3 at 24; Wheat Growers' Amended Comments at 2.

581 The discussion of "competition" in Bayer's now-withdrawn comments underscores why there is no competitive issue here. Bayer's suppliers have already chosen not to use CP to ship TIH/PIH commodities and in the future they might choose not to ship to Bayer's facility in Kansas City via the pre-Transaction KCS portions of the CPKC system. That is not a reduction in competition, but a choice that those shippers might make to use other railroads for shipments for which they have already decided CP is not a viable option. Bayer-2 at 3-5, 9.

582 The different approaches that KCS and CP each respectively take towards TIH/PIH shipments reflect each railroad's own experiences and judgments of the risks posed by TIH/PIH shipments. Indeed, as explained in the Naatz R.V.S., KCS's TIH/PIH tariff terms reflect its assessment of the risks from TIH/PIH shipments as they relate to KCS's business. *See* Naatz R.V.S. at ¶ 114.

[redacted]}}[583]

Second, even if the Board attributed the possibility of a change in the tariff terms applicable to the pre-Transaction KCS system to the Transaction, the conditions sought by these commenters would be an egregious overreach. They would in substance freeze KCS's tariff terms permanently in their pre-Transaction state. The USDA says this expressly, asking that the Board "require KCS to *retain its tariff language*" for "traffic originating on, terminating on, or traversing the KCS network." USDA Letter at 2 (emphasis added). Such a freeze would impermissibly give these commenters rights they do not possess today, and in the process prevent CPKC from adapting to changes in conditions bearing on the risk profile of TIH/PIH shipments on the CPKC network. *See* Brooks R.V.S. at ¶ 71; Naatz R.V.S. at ¶ 115.

Third, the appropriate mechanism for shippers and receivers to voice their concerns about the future CPKC tariff terms applicable to shipments of TIH/PIH commodities on the pre-Transaction KCS network would be the opportunity to challenge the reasonableness of those terms before the Board or to negotiate these provisions with CPKC. The Transaction will have no impact on the availability of Board regulatory processes to oversee the reasonableness of whatever tariff terms CPKC might choose to adopt. By contrast, the conditions these commenters seek would inappropriately supplant those processes with a per se rule of invalidity applicable uniquely to CPKC and no other railroad. The law affords railroads the right to set

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583 *See* JA-HC-000001 at -05-06 (emphasis added) {{([redacted])}} (Vol. III, Exh. 90) (Vol. 3, Exh. 90).

reasonable tariff terms subject to review through a reasonable practices challenge at the STB. *See* 49 U.S.C. § 11324(c). KCS is therefore free today to change the terms of its tariffs so long as they are reasonable. CPKC would also be free to set its own tariff terms, subject to reasonable practices evaluation if such a case is filed.

A rigid prescription of CPKC's future tariff terms under the guise of a merger condition would not be consistent with the Board's merger precedents. And it would also be inconsistent with the Board's other regulatory precedents. Under no circumstances would the Board prescribe a set of tariff terms that KCS or CP must maintain without regard to the circumstances in a particular case. When it has evaluated proposed tariffs governing TIH/PIH shipments, the Board has emphasized that "it is prudent to tread carefully in this area, avoiding broad pronouncements and relying instead on narrow adjudications of specific tariffs."[584] The Board should reject the proposed conditions and remind these commenters of the appropriate legal avenues for voicing their concerns about CP's tariff terms.[585]

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[584] *Union Pacific R.R.–Petition for Declaratory Order*, Finance Docket No. 35504 (Decision served Apr. 30, 2013). In this proceeding the Board denied a petition for declaratory order sought by UP regarding the reasonableness of its tariff provisions relating to indemnification, but at the same time declined to rule that UP's tariff was unreasonable, as many shippers had requested. *Id.* at 6 n.12.

[585] Although not germane to the question whether any condition is warranted, the TIH/PIH commenters' concerns about CP's Items 53 and 54 applying to the pre-Transaction KCS portions of the CPKC network are overblown. Item 53, which requires that a shipper maintain $100 million of liability insurance, is not onerous for shippers of TIH/PIH materials, because the extreme hazards associated with these materials already requires them to maintain high insurance limits. Brooks R.V.S. at ¶ 70. Item 54, which requires that shippers indemnify and defend CP except to the extent that liabilities arise from the negligence or willful misconduct of CP, merely calls for a reasonable allocation of responsibility for liability outside of the railroad's control to the party responsible for the shipment without which there would no liability exposure. That provision is comparable to the terms established by other major railroads. Brooks R.V.S. at ¶ 67. And CP's liability terms merely differ from KCS's terms in that KCS does not explicitly require shippers to share in whatever liability might be imposed on KCS in the event of a release for which the railroad is not responsible. Naatz R.V.S at ¶ 114. KCS does not hold shippers harmless for liability that may arise from their shipments. Naatz R.V.S at ¶ 114.

B. Concerns of Certain Wheat Growers' Associations About Potential Competition from Canadian Grain Suppliers Reflect More Competition, Not Less

Three associations representing certain segments of the wheat industry in the United States (the "Wheat Growers Associations")[586] ask the Board to impose conditions on the Transaction to address vague concerns about the ability of U.S. wheat growers to compete with Canadian wheat growers currently served by CP, and the regulatory benefits that Canadian wheat growers allegedly enjoy due to pre-existing Canadian regulatory policy.[587] The Wheat Growers Associations' concerns are neither supported by evidence nor related to the Transaction. Neither CPKC nor Canadian regulatory policy will disadvantage wheat shipments from U.S. origins to Mexico and other KCS-served destinations relative to Canadian origins. Even if Canadian wheat growers did have some sort of competitive advantage over U.S. growers, that advantage would have nothing to do with the Transaction.

As a starting point, the supposed "concerns" of the Wheat Growers Associations in fact support unconditioned approval of the Transaction, because they proceed from the premise that the Transaction will provide *better, more competitive transportation options*. NDWC acknowledges this directly: "North Dakota wheat shippers and producers that are directly served by CP elevators certainly should benefit from some further destination single-haul rates and capabilities, that are being touted by the Applicants."[588] Likewise, "a more competitive CP with

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[586] As used in this Reply, "Wheat Growers Associations" refers to US Wheat Associates ("USWA") and the North Dakota Wheat Commission ("NDWC"). The National Association of Wheat Growers ("NAWG") initially filed Comments making substantially the same arguments as the other Wheat Growers Associations, *see* NAWG Comments at 2, but subsequently decided (wisely) to abandon those arguments, perhaps realizing that the Wheat Growers Associations' concerns are without merit.

[587] *See* NDWC Request for Conditions (filed Feb. 28, 2022) at 5; USWA Comments and Request for Conditions (filed Feb. 28, 2022) at 3-4; NAWG Comments (filed Feb. 28, 2022) at 2.

[588] NDWC Comments at 5.

a longer reach should offer *more competition to the BNSF* which is the more dominant railroad operating in North Dakota."[589] The other Wheat Growers Associations are concerned that the Transaction will make other shippers more "rail-advantaged," or give them a more "direct line into Mexico," which are just other ways of saying that the Transaction will yield transportation benefits.[590] Yet the same advantages will also extend to U.S. wheat growers along with other agricultural shippers. Dozens of agricultural shippers support the Transaction precisely because of these sorts of benefits.[591]

Second, and equally fundamentally, the concern of the Wheat Growers Associations that some of their members might have to face stiffer competition as a result of improved rail transportation options is not a valid objection to a rail merger. It has long been the case that Canadian wheat competes with U.S. wheat, particularly for destinations in Mexico, and the Transaction will not change that fact. And CP (along with CN) have long served both U.S. and Canadian origins. This already-extent competition was highlighted by BNSF witness William W. Wilson: "The northern origins [of the United States] supply Hard Red Spring (HRS) wheat which ultimately competes with similar wheat grown and shipped from Canadian origins."[592] In prior merger cases the Board has underscored that the public's interest in competition is best served by expanding access to competitive transportation options, not by protecting the

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589 *Id.* at 5.

590 USWA Comments at 4; NAWG Comments at 2.

591 *See, e.g.*, Reply Verified Statement of NEW Cooperative, Inc. ("This combination provides us the possibility to build a greenfield grain elevator to ship corn and soybeans in Northern Iowa, to capitalize on new, efficient single-line routes on CP-KC from Iowa to grain destinations on the KCS, including Mexico…We believe this investment will bring further benefits to our members and the supply chain as a whole, but is only viable in light of opportunities created by the CP-KCS combination"); Richardson International Limited Comment ("Richardson has reviewed the CP-KC Transaction and believes it opens new markets to our company. More specifically, we expect to be able to access new markets for our grain handling facilities located in North Dakota to ship grain to the Gulf area as well as Mexico.")

592 BNSF Comments, Verified Statement of William W. Wilson ("Wilson V.S.") at 8.

advantages that one group or another may have had in the past. In *CN/IC*, for example, the Board explained that greater competition from Canadian growers would be a public benefit rather than a public harm: "Even if North Dakota's competitive positions vis-a-vis Canadian producers on CN is harmed because these latter shippers will gain single-line service to the Gulf, that harm results from greater, not less, competition." *CN/IC* (Decision No. 37 served May 29, 1999) at 123.

Third, the factual premises of the Wheat Growers Associations' concerns are simply incorrect. Neither CPKC nor Canadian regulation will advantage Canadian origins over U.S. origins. For example, NDWC claims that "Canadian producers pay less to move wheat similar distances . . . by as much as 30% for similar moves." *See* NDWC Comments at 5. But the facts contradict this misperception. CP's rates for wheat shipped from Canadian origins are higher than rates from U.S. origins, proving that it does not favor Canadian origins over U.S. origins. *See* Brooks R.V.S. at ¶ 84. For destination markets in Mexico, CP's public tariffs show that Canadian shippers pay *substantially more* for rail transportation than U.S. wheat growers, not less. Table 7 illustrates this point by comparing CP's published rates for movement from U.S. and Canadian origins, both on a Rule 11 basis to the Kansas City gateway and a through rate basis to destinations in Tlalnepantla, Mexico.

TABLE 7[593]
CP WHEAT RATES TO MEXICAN DESTINATIONS FROM U.S. AND CANADIAN ORIGINS
EFFECTIVE AUGUST 1, 2022

	Rule 11 over Kansas City		Tlalnepantla, EM	
	25s/Split Train	**All-in w/fuel**	**110s**	**All-in w/fuel**
Hazel MN	$4,751	$5,455	$7,489	$9,622
Makwa MB	$5,162	$5,987	$7,723	$9,976

[593] *See* Brooks R.V.S. at 32, Table 7; Brooks' Workpapers: CP Tariff 4444, Item 14105; CP Tariff 4444, Item 16007; Tariff 4444, Item 17500; Tariff 4444, Item 17505, Tariff 4445, Item 14117.

Difference in CP Revenue for U.S. Origins	($411)	($532)	($234)	($354)
Bowbells ND	$5,970	$6,844	$7,716	$10,018
Weyburn SK	$5,999	$6,942	$8,027	$10,399
Difference in CP Revenue for U.S. Origins	($29)	($98)	($311)	($381)

The Wheat Growers Associations' are also mistaken about the advantages conferred by Canadian regulatory policy. The relevant policies have *no effect at all* on transportation rates charged by CP or anyone else in or through the United States. The Canadian maximum revenue entitlement ("MRE") policy, which is "designed to make sure railways are compensated fairly for the volume of grain they transport in a crop year [ ] and the distance they carry it," applies only to grain shipped from the Western Canadian Prairies to the Canadian export ports of Vancouver, Thunder Bay, and the Thunder Bay leg of the route to Montréal. It does not apply to wheat shipped by rail to destinations in the United States or Mexico.[594] As is evident from CP's public tariffs, shipments to U.S. and Mexico destinations fall outside the MRE.[595]

Because there is no Transaction-related harm, granting the Wheat Growers Associations' requests for conditions[596] would inappropriately burden the Transaction and affirmatively

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[594] *See* Canadian Transportation Agency, The Maximum Revenue Entitlement: A Guide ("MRE Guide"), available at https://otc-cta.gc.ca/eng/publication/maximum-revenue-entitlement-a-guide?msclkid=ec143571c10f11ec8f99bf0aaf7bc6a4 ("The MRE applies anytime CN or CP moves western grain in certain cars by rail in Canada's Western Division.").

[595] MRE Guide ("Any part of a movement [that] is outside of Canada's Western Division" is "not covered by MRE.").

[596] USWA and NDWC request that the Board "impose [] three forms of statutory competitive access as conditions on this transaction for use by any shipper on the new CP/KCS system that is subject to market dominance or receives inadequate service," where the three competitive access remedies available to shippers and carriers are: "the prescription of through routes, terminal trackage rights, and reciprocal switching." *See* USWA Comment at 13; NDWC Comment at 16.

interfere with the new, more competitive transportation environment it will enable. Efforts to impede more competitive cross-border transportation options is inconsistent with Board precedent, contrary to the spirit of the United States-Mexico-Canada Agreement (USMCA), and harmful to the public interest.

C. Conditions Are Not Needed to Protect Evergy's Service Levels

Evergy Metro, Inc. ("Evergy") expresses no competitive concerns about the Transaction, but instead is worried about potential service issues affecting its coal-fired La Cygne Generating Station in Amsterdam, MO, about 60 miles south of Kansas City.[597] Evergy characterizes the Transaction as posing a "systemic threat…for bulk commodity shippers reliant on the KCS lines from Kansas City south" and seeks conditions relating to oversight and reporting.[598]

Applicants have addressed in Sections I and V above the appropriateness of the Board imposing conditions (a) requiring Applicants to honor their representations in this proceeding and (b) establishing a five-year period of oversight, coupled with reporting obligations relating to Applicants' post-Transaction service levels. Such conditions would fully address any legitimate concerns Evergy has about the Transaction, and no further conditions are warranted.[599]

Evergy's concerns about service levels on the KCS line south of Kansas City are wrong on the facts. First, Evergy mistakenly asserts that CPKC will increase traffic south of Kansas

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[597] Opening Comments of Evergy Metro, Inc. ("Evergy Comments") (filed Feb. 28, 2022) at 4.

[598] Evergy Comments at 14, 17-18.

[599] Applicants note, however, that Evergy's request (Evergy Comments at 17) that Applicants honor their "representations … regarding the preservations of gateways" would not apply to Evergy's traffic, since CP cannot serve the origins of Powder River Basin coal that Evergy ships via the Kansas City gateway and the Transaction will thus not create the opportunity for a longer haul for this traffic on the CPKC network. CPKC's incentive to continue participating in this important traffic via Kansas City will be unaffected by the Transaction. *See* Section I and Brooks R.V.S. at ¶¶ 12, 13.

City without adding any "new sidings."[600] That is not accurate. KCS's trains deliver unit trains of coal to Evergy's La Cygne Generating Station at Amsterdam, MO, from interchange at Kansas City and then return the empty trains in the reverse direction. Applicants will in fact be adding capacity on this segment. As shown in the Application, and as illustrated in more detail the Elphick/Orr R.V.S, Applicants will be adding new double track near Kansas City as well as extending the siding at Blue Valley, MO.[601] As explained in the Elphick/Orr R.V.S., with these additions, there will be ample capacity on this segment to maintain Evergy's pre-Transaction cycle times. Elphick/Orr R.V.S. at ¶ 75.[602]

Second, Evergy acknowledges that KCS provides transportation services to Evergy under a transportation contract.[603] That contract {{ [redacted] }}. Naatz R.V.S. at ¶ 119. This contractual commitment would continue to bind CPKC for the duration of the contract. These protections, taken together with the service and oversight commitments Applicants have made generally, eliminate any justification for further conditions benefiting Evergy.

600 *See* Evergy Comments at 7, 9, 18.

601 *See* Amended Operating Plan (Exhibit 13) at ¶ 296.

602 Evergy's concerns about KCS's pre-Transaction service issues during 2021 (*see* Evergy Comments at 10-11) obviously do not stem from the Transaction.

603 *See* Evergy Comments at 4.

D. Texas International Terminals' Concerns Are Not Transaction-Related

Texas International Terminals Ltd. ("TxIT") seeks a condition requiring CPKC to "effectuate (as necessary) and maintain the access rights that KCS was granted in UP-MKT to Galveston" and to "actively and cooperatively work with rail shippers and TxIT to reasonably market and enable such rights to be actively utilized."[604] The haulage rights to which TxIT refers were granted to KCS more than 30 years ago but never exercised by KCS. This request is utterly unconnected to the Transaction and should be summarily denied.

TxIT operates an export terminal in Galveston, TX, to which KCS was granted haulage rights over UP in connection with UP's 1988 merger with Missouri-Kansas-Texas Railroad.[605] The rights were designed to provide destinations for grain originated using other rights granted in *UP/MKT*, the so-called "North End" rights, which gave KCS access to grain-origination points in the Omaha/Council Bluffs area.[606] Although KCS's use of the "North End" rights proved very successful (with KCS originating large volumes of grain in the Omaha/Council Bluffs area), as TxIT points out KCS "has not effectuated or sought to aggressively market those rights with respect to rail service to TxIT to date."[607] This is because KCS found those rights to be commercially disadvantageous as compared to other ways for KCS to get grain to destination markets, including other Gulf ports served directly by KCS (such as Port Arthur and New

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604 *See* Comments and Request for Conditions of Texas International Terminals Ltd. ("TxIT Comments") (filed Feb. 28, 2022) at 8.

605 *See UP/MKT.*

606 KCS inherited MKT's North End haulage right for grain traffic originating in Omaha/Council Bluffs, and also obtained haulage rights on UP between Beaumont and Galveston KCS to deliver North End grain to Galveston. *UP/MKT*, 4 I.C.C.2d at 452-458.

607 *See* TxIT Comments at 4.

Orleans). Naatz R.V.S. at ¶ 117. KCS has not turned away any traffic. Instead, grain traffic to TxIT's Galveston facility moves by rail via UP and BNSF. *Id*.[608]

The Transaction will not affect the existence of KCS's haulage rights.[609] Nor is the Transaction to blame for KCS's long-preexisting decision not to exercise those rights. Given the history, TxIT's suggestion that the Transaction will create a new incentive for KCS to favor other Gulf ports (ones it already services directly) is obviously without merit.[610] In these circumstances, TxIT's desire to impose on CPKC a new, affirmative obligation to "actively" market service to that terminal is unwarranted. There simply is no Transaction-related harm to address.

TxIT also echoes multiple other parties in requesting that the Board require Applicants to adhere to their pledge to maintain open gateways and interchanges and to impose conditions allowing for enforcement of those commitments.[611] These requests are addressed in depth in other sections of Applicants' Reply. *See*, *e.g.*, Sections I and VIII.B. TxIT's Comments add nothing that would warrant any relief beyond the commitments that Applicants have already made to address these issues. Indeed, some of the specific conditions TxIT seeks would be particularly inappropriate, and affirmatively anticompetitive. TxIT's insistence on "non-

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608 *See also Texas Railway Exchange LLC – Construction & Operation Exemption – Galveston County, TX*, Finance Docket No. 36186 (STB served Jan. 17, 2020) (TxIT is served by UP and BNSF).

609 Although TxIT's proposed condition is plainly inappropriate, Applicants have no plans to extinguish whatever rights CPKC would have to access Galveston via UP haulage.

610 *See* TxIT Comments at 5.

611 *Id.* at 9. Specifically, TxIT says "this would include requiring: (1) the preservation and maintenance of all existing CP gateways on traffic to TxIT in interchange with UP and BNSF; (2) the provision of competitive rates to those gateways for interline service that maintain existing, non-discriminatory competitive routing and service offerings that an independent CP and KCS are able to currently provide; and (3) quarterly reports to the Board providing information on rail traffic being diverted to CP/KCS from competing routes, including to/from Gulf Coast ports. The Board should also retain jurisdiction post-Transaction to provide adequate oversight and a method for parties to raise potential issues to ensure compliance with these conditions."

discriminatory competitive routing and service offerings," for example, would stifle CPKC's ability to compete more effectively in the transportation marketplace using its new single-line services. *See* Section VIII.B, above. Nor is there any justification for the kind of detailed reporting TxIT requests concerning competitively-sensitive details about the new traffic opportunities that CPKC attracts as a result of the Transaction. Such reporting would likewise undermine CPKC's ability to provide stronger competition against the larger Class 1 railroads. Brooks R.V.S. at ¶ 38.

E. LyondellBasell's Proposed Reciprocal Switching Conditions Should Be Rejected

LyondellBasell ("LYB") seeks conditions requiring that KCS provide UP and BNSF with new reciprocal switching access to three LYB-owned plants served by KCS: two in the Lake Charles, LA area and one in Corpus Christi, TX.[612] The relief LYB seeks is unwarranted, overreaching, and designed to address pre-existing conditions that are unrelated to the Transaction.

LYB's requests are not predicated on any purported competitive concerns about the Transaction, nor could they be. The Transaction will not have any effect whatsoever on the number of rail carriers with access to these KCS-served facilities. Instead, LYB is seeking to use the Transaction as a means to expand rail-carrier access relative to pre-Transaction conditions, which is reason enough to deny LYB's requested conditions.

LYB's own Comments explain that the UP or BNSF access it desires does not exist today. For both of LYB's Lake Charles area facilities, LYB makes no secret of the fact that –

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612 *See* LyondellBasell Opening Comments and Requests for Conditions (LYB-3) (filed Feb. 28, 2022).

wholly apart from the Transaction – BNSF has actively been attempting to gain access to these facilities but that "KCS has resisted BNSF access."[613]

- At the Sasol plant in Westlake, LA (near Lake Charles), LYB acknowledges that prior to the Transaction, KCS has declined to grant those rights.[614]
- At LYB's plant on the Rosebluff Lead in Lake Charles, LA, LYB acknowledges that BNSF's rights are subject to separate litigation before the Board, with the compensation owed to KCS for BNSF's access to LYB's facility currently pending before the Board.[615]
- At LYB's facility at Corpus Christi – which in any event "does not actively ship by rail today" – LYB acknowledges that UP has never had access to that facility.[616]

Accordingly, LYB's requests for forced competitive access arise out of its frustration with the status quo, not out of any competitive impact of the Transaction, and they are not appropriately addressed in this proceeding. The appropriate venue for LYB's requests for BNSF and UP reciprocal switching access is either (a) a petition for reciprocal switch access under the Board's existing competitive access rules, which LYB has not brought; (b) an effort to expand

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613 LYB-3 at 6, 10–13.

614 LYB-3 at 8.

615 LYB-3 at 9. The Board granted BNSF terminal trackage rights over the Rosebluff Lead in *BNSF Ry. – Terminal Trackage Rights – Kansas City Southern Ry.*, Finance Docket No. 32760 (Sub-No. 46) (Decision No. 3, served July 5, 2016), but it has not yet determined how much BNSF must pay KCS for that access. *BNSF Ry. – Terminal Trackage Rights – Kansas City Southern Ry.*, Finance Docket No. 32760 (Sub-No. 46) (Decision No. 8 decided Feb. 20, 2020); *BNSF Ry. – Terminal Trackage Rights – Kansas City Southern Ry.*, Finance Docket No. 32760 (Sub-No. 46) (Decision No. 10 decided Apr. 12, 2022).

616 LYB-3 at 10.

such access through Ex Parte No. 711 (where, not surprisingly, LYB has been an active participant),[617] or (c) an effort to enforce conditions imposed *on UP* in the *UP/SP* proceeding, where LYB likewise has actively been seeking BNSF access.[618] None of this has any place in this proceeding.

Lacking any competition-related justification for its proposed conditions, LYB attempts to bootstrap new competitive access by arguing that the Transaction will cause "traffic levels [to] increase substantially along the Gulf Coast . . . without commensurate investment."[619] As discussed in Section V above, there is no basis for concern about post-Transaction service levels along the lines used by KCS to access the LYB plants, but even if there were LYB's conditions would still be inappropriate and overreaching.

First, there is no basis for service-related concern on the lines serving LYB's plants in the Lake Charles area (and the Corpus Christi facility is not active in any event). The Transaction will not materially affect traffic levels on KCS's line serving Lake Charles.[620] To the extent that LYB is concerned about lines between Houston and Beaumont used by other future CPKC traffic, CPKC traffic will remain a small minority of the traffic on these UP-owned lines.[621]

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617 Ex Parte No. 711, Comments of LyondellBasell (filed Feb. 14, 2022) (Vol. 3, Exh. 91).

618 *See Union Pacific Corp. – Control – Southern Pacific Rail Corp.*, Finance Docket No. 32760 (Sub-No. 46) (Decision No. 10, served Apr. 13, 2022).

619 LYB-3 at 3.

620 Elphick/Orr R.V.S. at 70.

621 *See* Elphick/Orr R.V.S. at 70. LYB misconstrues the Transaction's effect on these lines by focusing solely on CPKC traffic rather than the UP and BNSF traffic that also uses those lines. *See* LYB-3 at 5 nn.7, 8. As Elphick and Orr show, when UP and BNSF traffic is considered, the relevance of the incremental Transaction-related traffic is greatly reduced. *Id.*

Those lines between Houston and Beaumont are directionally operated and have ample capacity for future traffic volumes, as discussed extensively in Section V above.[622]

Second, if LYB's traffic nonetheless is affected by Transaction-related service issues, the proper mechanism for addressing those matters would be the service assurance processes and Board oversight that Applicants discuss in Section V above and the Reply Verified Statement of John Brooks.

By contrast, the competitive access conditions sought by LYB are both untethered to the service concerns LYB espouses and overreaching in their scope. They are untethered for at least two reasons: (a) the two Lake Charles area facilities are already served by a second railroad (UP), already providing the service outlet LYB claims it lacks; (b) granting BNSF (or UP at Corpus Christi) new access would not overcome any putative service issues that might emerge on the lines in question, because BNSF or UP would both need to use those same lines along with KCS (*see* Simmons R.V.S. at ¶ 92);[623] and (c) and the reciprocal switching access LYB seeks at all three locations would address pre-existing competitive conditions; giving LYB a windfall out of all proportion to any potential transitory service issues that might arise.

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[622] In addition, contrary to LYB's assertion about investments in capacity, as discussed in Section IV above, KCS has recently made or is in the process of participating in, extensive investments in rail capacity on the UP- and KCS-owned lines over which it operates between Beaumont and Robstown, TX. *See also* Elphick/Orr R.V.S. at ¶ 43.

[623] For example, LYB's assertion (at 10) that UP routing traffic to/from Corpus Christi would involve "minimal travel on the Tex Mex line" is incorrect – that traffic would traverse the same UP lines between Robstown and Placedo and probably between Houston and Beaumont that LYB complains would be congested. Likewise, BNSF traffic to/from Lake Charles must traverse the same UP-BNSF joint line between Houston and New Orleans and the Neches River Bridge. Simmons R.V.S. at ¶ 92.

F. The Late-Submitted Concerns of Certain FMC Commissioners About Diversions to Canadian Ports Are Meritless

Finally, Applicants respond to the Comments filed recently (and out of time) by three individual commissioners of the Federal Maritime Commission. As those individuals make clear, their comments do not "do not constitute an official position of the Federal Maritime Commission." These commenters are expressing concerns that have no relationship to the Transaction being proposed.

First, the CP/KCS Transaction will not have any effect on intermodal traffic volumes moving between the Port of Vancouver, the Port of St. John (or any other Canadian port) and the United States. CP's network already serves the Upper Midwest and offers highly-efficient intermodal service between Vancouver and Chicago, and independent of the Transaction CP is developing improved intermodal service between the Port of St. John and Chicago. The Transaction does not have anything to do with this service. In fact, limitations on the capacity at the Port of Vancouver itself also limit the potential for growth in this traffic.[624] The concern of these commissioners that the Transaction is "explicitly aimed at continuing to build on policies to use Canadian ports and Canadian railroads to carry U.S.-destined cargo" is thus founded on a misunderstanding.

Second, the Canadian government's policies respecting ports likewise have nothing to do with – and are obviously unaffected by – this Transaction. The concerns raised by these individuals ultimately reflect a complaint about Canadian port policy and the existence of an international transportation marketplace that has allowed ports in Canada to compete for transcontinental intermodal traffic (like CN's very successful investment in Prince Rupert). To

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624 *See* Wahba/Naatz R.V.S. at ¶ 28.

the extent they believe Canadian or U.S. port policies render Canadian ports more efficient than U.S. ports in certain respects, as these commissioners seem to believe, the commissioners should take the matter up with the relevant maritime policy makers (over which we would presume they have some influence), but it is not a matter relevant to the public interest effects of this Transaction.

Third, even if it were the case that the Transaction did improve the transportation options available to receivers of freight in the U.S. Midwest that is shipped to North America via Pacific or Atlantic steamship routes, and then moved inland via rail, that effect would be procompetitive and plainly benefit the U.S. economy and U.S. consumers who would have more economical access to imported goods. Under the Board's public interest test, the parochial concerns of U.S. longshoreman would not be entitled to weight any more than the railroad competitors of new CPKC single-line routes.

Finally, the suggestion that that U.S. intermodal ports might somehow be materially threatened by improvement in the transportation routes from Canadian ports to the United States is belied by hard data. Figure 34 below compares the intermodal volumes handled by U.S. Pacific ports in comparison with the volumes handled by Canadian ports. Even if one imagined (counterfactually) that Canadian ports could attract *25 greater volumes*, and do so entirely by shifting those volumes away from U.S. ports, that would still not put a dent in U.S. Pacific port container volumes.[625]

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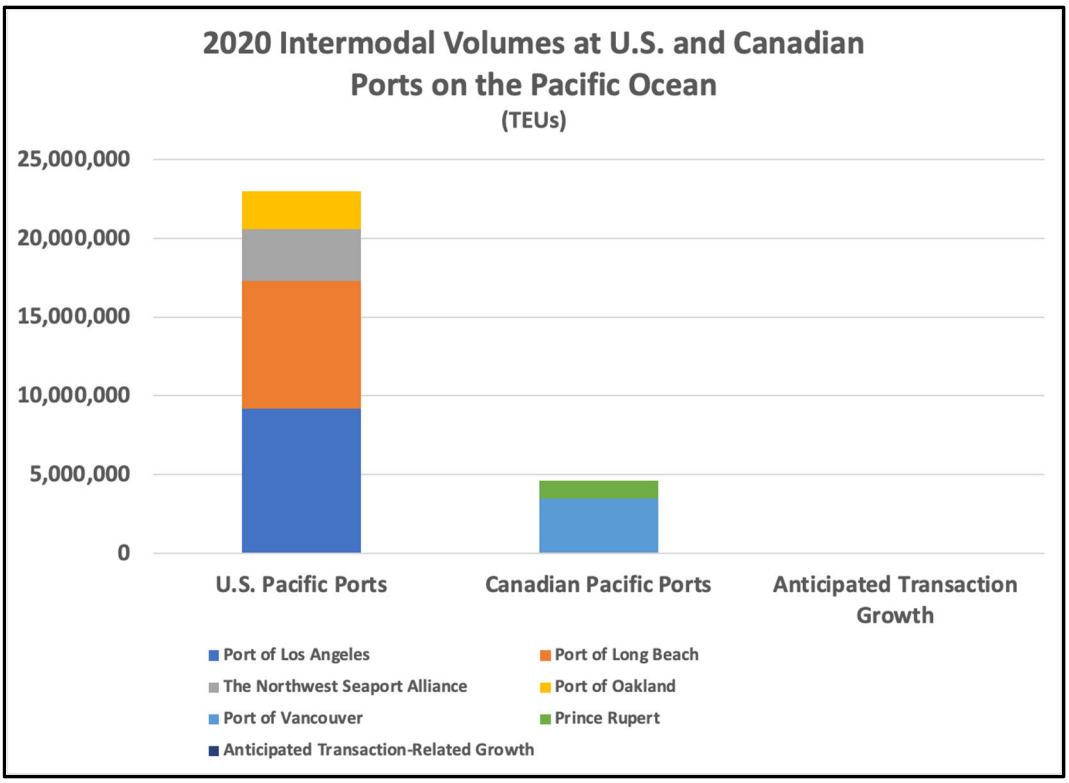
[625] Applicants anticipated new Vancouver-U.S. intermodal volumes of approximately 5,600 TEUs would (even if diverted entirely from U.S. ports) amount to only to one-hundredths of one percent (i.e., 0.02%) of U.S. West Coast container volumes, and are invisible on Figure 34. *See* Wahba/Naatz R.V.S. at 19.

FIGURE 34
COMPARISON OF U.S. AND CANADIAN PORT INTERMODAL VOLUMES



XII. THE BOARD SHOULD APPROVE THIS APPLICATION AND RESIST ALL CALLS TO HANDICAP CPKC'S POTENTIAL NEW COMPETITION WITH BURDENSOME CONDITIONS

As Applicants reply witnesses explain again and again, there is only one threat to competition and the public interest in play in this merger proceeding, and that is the calls by Class 1 railroads and others for extensive conditions that would burden CPKCs new competitive initiatives and be destructive of the Transaction's public interest benefits. All of the requests have this core feature:

- CN's demand to dismember the KCS network;
- UP and BNSF's demand to be given a veto over CPKC's competition until CPKC has paid for everything they might desire in Texas;
- UP's and BNSF's demand for regulated revenue divisions that would subsidize their own efforts to resist CPKC's new single-lien service offerings;

- Calls by shipper organizations to impose uniquely on CPKC an asymmetrical set of "competitive access" regulatory strictures that would be applicable to no other railroad;
- Calls by self-interested communities to stop all of CPKC's trains dozens of miles west of Chicago;
- And on and on they go.

None of these conditions is justified, as we have demonstrated at length. But all of them would in fact be a dagger aimed at the heart of the Transaction's benefits, hampering CPKC's ability and flexibility to provide the very benefits that the Transaction promises. As put by Creel: "The many hundreds of shippers who have supported the Transaction recognize it for what it is – a once in a lifetime opportunity to make competition stronger without the need for new regulation. CPKC will be a catalyst for a more competitive rail industry, with more capacity to serve shipper needs, and a commitment to bring a customer-first mindset to the marketplace."

As Applicants' economic expert, drawing form his years of experience analyzing mergers across countless industries while at the DOJ Antitrust Division warns:

> "[A] a particularly end-to-end railroad merger, the CP-KCS combination presents opportunities to enhance competition with improved options to shippers and enhanced competition through new single-line service. The Comments reflect these shippers' perception that past railroad mergers have generally been associated with a trend of reduced competition and worse options for shippers, but a CP-KCS combination is the kind of merger that goes against the trend. It is, indeed, a chance to mitigate that history and enhance the competition for affected shippers. To the extent that past railroad mergers may have reduced competition and harmed shippers, *the solution is not to burden the CPKC with unwarranted conditions that would limit CPKC's ability to enhance competition. Doing so would run counter to the interest of these shippers and undermine the Board's objective of fostering rail competition*."

Majure R.V.S. at ¶¶ 185-186 (emphasis added).

Because the Transaction is demonstrably in the public interest, and will cause no public interest applicants request that the Board grant unconditioned approval and reject the Responsive Applications of CN and NS.

Dated: July 12, 2022

Respectfully submitted

/s/ /s/

William A. Mullins
Erin A. Glavich
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7820
Facsimile: (202) 663-7849

David L. Meyer
Law Office of David L. Meyer
1105 S Street NW
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

Adam J. Godderz
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Telephone: (816) 983-1360
Facsimile: (816) 983-1227

Counsel for KCS

Adam S. Paris
Sullivan & Cromwell LLP
1888 Century Park East
Los Angeles, CA 90067-1725
Email: parisa@sullcrom.com
Telephone: (310) 712-6663

Samantha F. Hynes
Sullivan & Cromwell LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006-5215
Email: hyness@sullcrom.com
Telephone: (202) 956-7500

Jeffrey J. Ellis
Canadian Pacific
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Jeff_Ellis@cpr.ca
Telephone: (888) 333-6370

Counsel for CP

APPENDICIES

APPENDIX A

PRIOR CLASS 1 RAILROAD MERGERS OF THE PAST 40 YEARS WERE CONSISTENTLY APPROVED BASED ON THE BENEFITS OF NEW SINGLE-LINE SERVICES AND A LACK OF COMPETITIVE CONCERN ABOUT "GATEWAY FORECLOSURE"

FIGURE 1
THE MERGERS THAT BUILD BNSF, CSX, NS AND UP

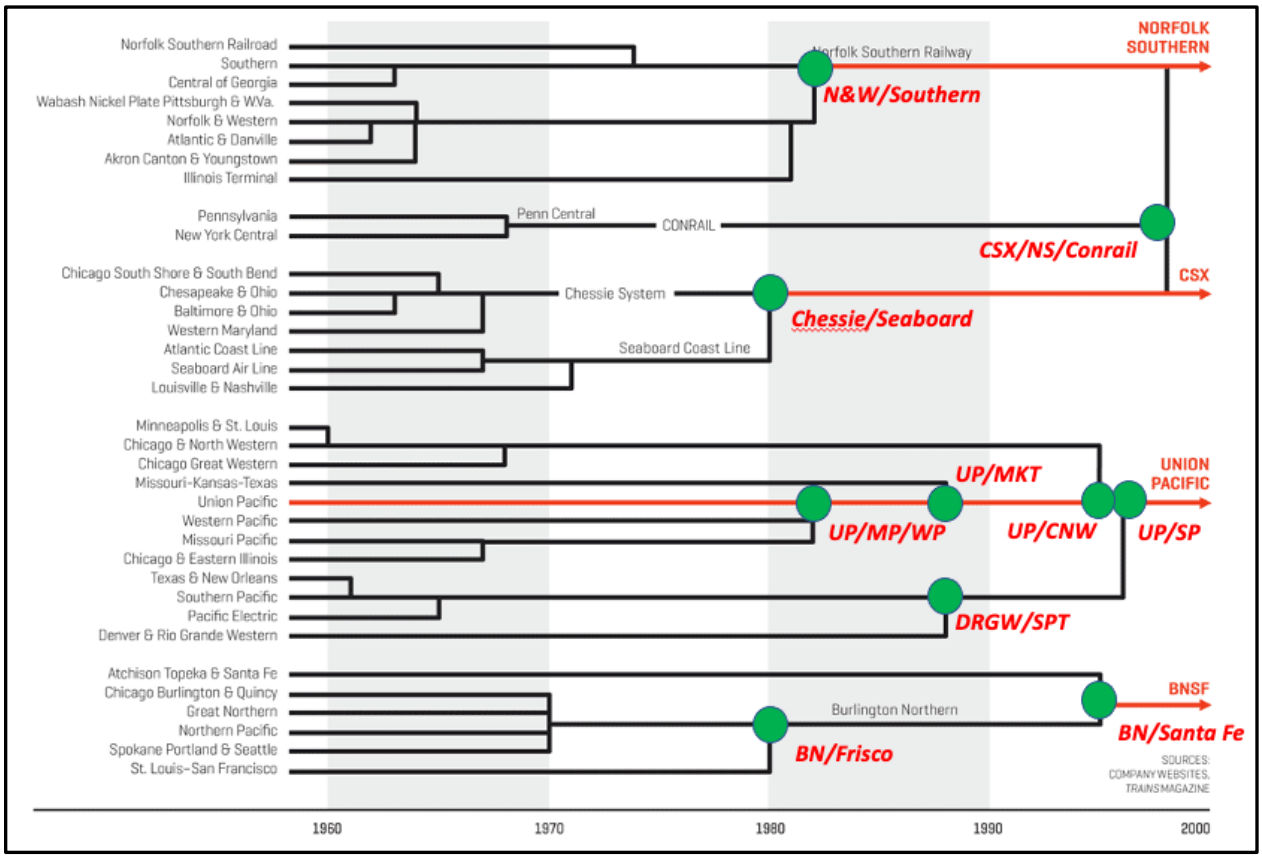
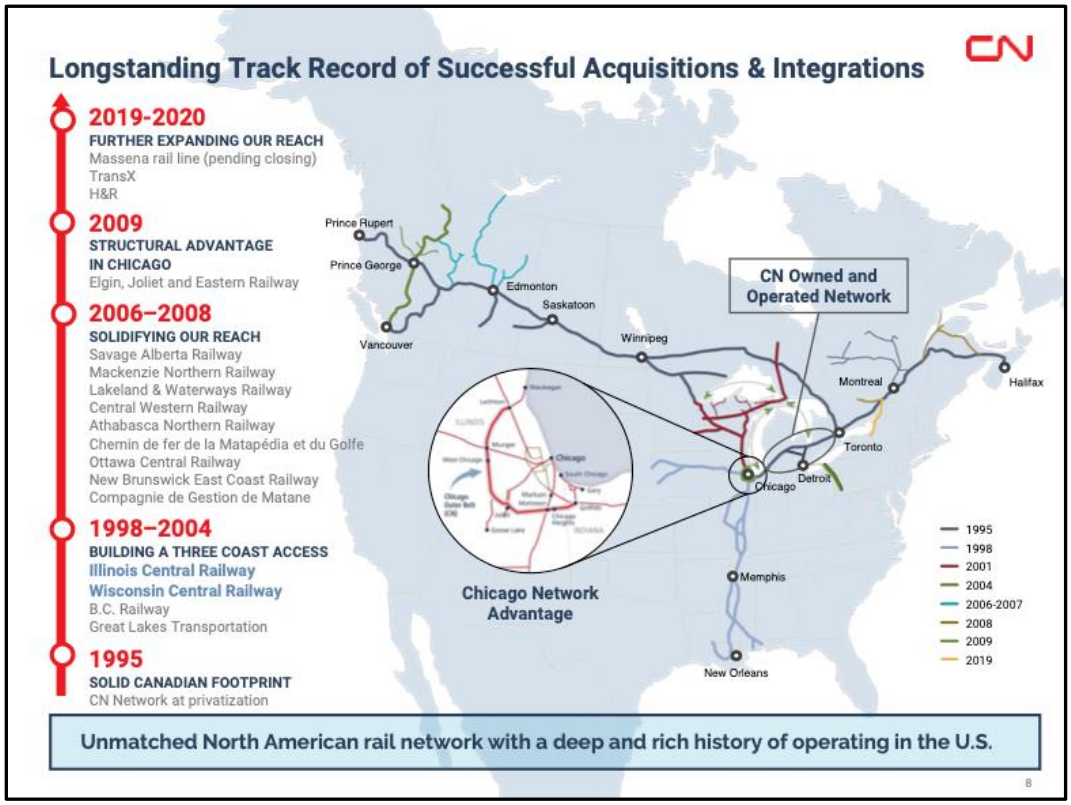


FIGURE 2[1]
THE ACQUISITIONS THAT BUILT CN



SELECTED EXCERPTS FROM ICC AND BOARD MERGER DECISIONS 1980-1999

1980

BN/FRISCO

Decision Approving Transaction: *Burlington Northern, Inc. – Control & Merger – St. Louis-San Francisco Ry.*, 360 I.C.C. 788 (1980)

- "Applicants believe that the merged company would offer substantial service improvements to both its on-line customers and to many of the customers of its connecting railroads. The merged company would provide single-line service from such major southeastern traffic generating points at Birmingham, Memphis, and Mobile to the northwestern points of Portland, Seattle, and Vancouver (British Columbia); and from the Chicago gateway to Tulsa, Oklahoma City, Dallas-Fort Worth, Houston, and Galveston. Consolidations of traffic flows would

[1] Source: CN Investor Presentation, "*Superior Proposal to Combine With Kansas City Southern*" (Apr. 2021), Slide 8 (Exhibit __ hereto), *available at* https://www.cn.ca/en/investors/events/-/media/Files/Investors/Presentations/CN-Makes-Superior-Proposal-to-Combine-With-KCS.pdf.

enable the movement of trains over longer distances with no need for interchange and with minimal en route switching." (360 I.C.C. at 812).

- "Applicants acknowledge that they will exert their best efforts toward obtaining longer hauls over the merged single-line routes where possible. Nonetheless, they expect to maintain existing gateways and joint routes with connecting carriers, and anticipate that traffic will continue to move via such gateways and routes where service considerations dictate. For example, applicants believe that certain traffic moving in connection with UP at Kansas City between the Pacific Northwest and Memphis and beyond will continue to be so routed because this route will be shorter and involve less transit time than the proposed BN-Frisco single-line route via Minot, ND. However, applicants will not guarantee premerger traffic levels." (360 I.C.C. at 812).
- *"DOJ conclusion*.—Based upon its analysis, DOJ concluded that if single-line service is implemented, the public could benefit from reduced transit times, improved freight car supply, and increased service reliability without a reduction of the number of carriers in relevant corridors." (360 I.C.C. at 919).
- "We have weighed the benefits of this merger to applicants and shippers versus the injury to other railroads and found the public interest considerations favoring the applications." (360 I.C.C. at 935).
- *"Adequacy of transportation*.—Approval of this merger, as conditioned, will have a beneficial effect on the adequacy of transportation to the public. Not only will the services of the merged company be significantly improved, but other railroads will be able to continue providing essential services. The merged company will be able to provide new single-line service, reduced transit times, more efficient and frequent service, and improved car utilization." (360 I.C.C. at 935).
- "Single-line service will be available between the gulf coast and the Midwest and Northwest. This new service will be available between Seattle, Portland, and Vancouver, on the one hand, and Birmingham, Memphis, and Mobile on the other. Another direct route is between Minneapolis-St. Paul, Duluth-Superior, and Chicago, on the one hand, and, on the other, Tulsa, Oklahoma City, Dallas-Fort Worth, and Houston. Pre-blocked trains will be able to move over long distances without interchange and with minimal switching. The elimination or reduction of switching or interchange at Kansas City and St. Louis will also save time and resources in carrying freight." (360 I.C.C. at 935).
- "Shippers support this merger because reduced transit time, ease of tracing shipments, control of loss and damage, possible expansion into new markets, and improved car utilization and availability will result from the new single-line service that will be available after the merger. When shippers who spend billions of dollars annually for transportation services state that a service created by a merger will benefit them, we must weigh such evidence heavily in our decisionmaking process. (360 I.C.C. at 935-36).
- "Railroads compete with each other for the longest haul and maximum revenue on traffic. At the same time they must cooperate when and where traffic is

interchanged. Because of this 'Balkanization' of the railroad industry, BN and Frisco independently have not taken steps to develop single-line service or innovative rates. Since railroads compete for any traffic that can be handled by more than one railroad, railroad management should not be expected to sacrifice potential revenue on which that railroad's facilities and investors could rely. Without a merger this single-line service could not be provided without bringing into question management's duty to investors and the public." (360 I.C.C. at 936).

- "A direct result of single-line service will be faster transit times (*e.g.*, transit time between Minneapolis and Memphis will be reduced by 49 percent, from 94 hours to 49 hours) due to reduced intermediate switching. With reduced switching, handling of shipments and incidental loss and damage also will be reduced." (360 I.C.C. at 936).
- "One of the major benefits from this merger will be a reduction in the number of currently interlined shipments. Interchanging traffic adds to the total cost of handling traffic, including operational cost (car-switching) and clerical cost (recordkeeping). Interchanging freight also adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars. Superior service should not be penalized because weak carriers cannot meet the competition." (360 I.C.C. at 940).
- "Another benefit to shippers would be the ability to control and trace shipments through one railroad where the shipments are being handled in single-line service. Shippers are attracted to a sole source of carrier responsibility for loss and damage, along with single carrier responsibility for expediting shipments when necessary." (360 I.C.C. at 940).
- "The merger presents the opportunity for innovative ratesetting. Standing alone, a bridge carrier like Frisco has neither the financial ability nor sufficiently long hauls to take these actions on a scale equivalent to that of the merged company. However, in conjunction with BN, Frisco will create a new system with financial strength, long hauls, a great proportion of origin and destination traffic, and access to numerous gateways. A company of this size can initiate imaginative or aggressive pricing." (360 I.C.C. at 940).
- "The increased competition will result from the combination of BN and Frisco routes and existing traffic flows into a system which greatly increases the territorial penetration of both carriers. The traffic flows for BN and Frisco are complementary: each a natural extension of the other. It is not surprising that the protestants are those carriers (including those having reached stipulated agreements with applicants) which have routes paralleling routes of one or both applicants. These carriers in most instances have provided end-to-end interline service in connection with one applicant in competition with the other applicant. For example, ICG has provided interline service to and from Birmingham in connection with BN via the Centralia gateway in competition with Frisco and its connections (including BN). After merger, ICG's Centralia-Birmingham service will clearly face increased competition from single-line BN-Frisco routes to and

from several geographic markets formerly served by BN but not by Frisco. ICG will compete by connecting elsewhere with others." (360 I.C.C. at 943-44).

- **"**We conclude that applicants after merger will have the *potential* to become much stronger competitively for traffic handled by other modes. It clearly is up to the unified management to take advantage of the potential. We consistently have encouraged the rail industry to be both more cooperative (*e.g.*, handling long-haul TOFC) and competitive (*e.g.*, providing comparable service) intermodally, and approval of the proposed transaction provides a major tool to achieve these goals, to the benefit of the merged company, its shippers, and other carriers both rail and nonrail." (360 I.C.C. at 944).
- "Several railroads potentially impacted competitively by the proposed merger have entered into stipulated agreements with applicants. Details of these agreements are set forth in appendix K. Although these carriers have anticipated traffic diversion as a result of the proposed merger, they believe that they have adequately protected themselves from any increase in competition beyond that which normally can be expected in the marketplace." (360 I.C.C. at 944).
- "The railroads which have remained as active protestants in these proceedings (Soo Line, Rock Island, Milwaukee Road, ICG, and Katy) fear the increased competition resulting from the proposed merger and have pressed strongly for protection from the impacts of the new competitive strength of BN and Frisco." (360 I.C.C. at 944).
- "We will not protect impacted carriers simply because they find themselves in a situation where they must actively compete for traffic more strenuously. As stated in our policy statement, we look only to preservation of essential rail service when imposing protective conditions, not to the protection of corporate entities. We have found that no corporate entity will be so adversely affected by the merger that it will be unable to provide essential services. Affected carriers must compete more vigorously and develop new interline rates and services to meet the new competitive abilities of a merged BN-Frisco." (360 I.C.C. at 944).

CHESSIE/SEABOARD (TO FORM CSX)

Decision Approving Transaction: ***CSX Corporation – Control – Chessie System, Inc., & Seaboard Coast Line Industries, Inc.,*** **363 I.C.C. 521 (1980)**

- "CSX's largely end-to-end consolidation would create the first major railroad system extending from the northeast industrial center and many of the industrial centers of the Great Lakes region to the Southeast. The affiliation will create first-time single-system service over many major interregional corridors, such as Jacksonville-Philadelphia, Atlanta-Philadelphia, Detroit- Jacksonville, Pittsburgh-Birmingham, Toledo-Atlanta, Detroit-Savannah, and Jacksonville-Baltimore." (363 I.C.C. at 553).
- "The new single-system service will benefit the shipping public. Although single-system service will not provide all the advantages associated with single-line service (traffic must still be interchanged among the affiliated carriers),

single-system service does offer opportunities for significant improvements over present joint-line operations. Opportunities will exist for more efficient routing of traffic, simplified car tracing, improved customer information, greater car supply, improved car utilization, and improved service by virtue of systemwide run-through trains, systemwide blocking, and terminal consolidations." (363 I.C.C. at 529).

- "The consolidation of interchange partners should provide faster, more efficient service to a wider geographic area, to the public benefit. This would be to the carriers' collective self-interest if the system's profitability is increased by measures taken to cooperate, across-the-board, at all points of interchange. The trade-offs a carrier may make in one area presumably would be reciprocated by the partner in another. The CSX proposal is an example of how consolidations can enable carriers to work together with a common purpose to provide better service to more shippers." (363 I.C.C. at 552-53).
- "It is generally thought that single-line service has many advantages over joint-line service for both shippers and carriers. Interchange operations can be eliminated, reducing both operating and overhead costs and transit time; transaction costs are reduced; and incentives to provide less than efficient service (arising from per diem charges for railcars, rate divisions, or production externalities) are reduced. Thus, speed, reliability, and handling are enhanced. For these reasons, shippers tend to prefer single-line service over joint-line service." (363 I.C.C. at 553).

1982

N&W/SOUTHERN (TO FORM NORFOLK SOUTHERN)

Decision Approving Transaction: ***Norfolk Southern Corp. – Control – Norfolk & Western Ry. & Southern Ry.*****, 366 I.C.C. 173 (1982)**

- "We are granting the primary application and the directly related applications because we find the transaction to be consistent with the public interest. The consolidation will enable NS to control two railroad systems which generally meet end-to-end. The resulting operations will provide single-system rail service connecting the Southeast with the Midwest and Northeast." (366 I.C.C. at 176).
- "The new single-system service will benefit the shipping public in that it offers opportunities for significantly improved routings, more efficient operations (including run-through and interroad trains), improved car utilization and terminal consolidations. The new system will also be in a position to provide greater competition to the existing CSX Corporation (CSX) system and to provide greater intermodal competition." (366 I.C.C. at 176).
- *"Service improvement and marketing opportunities*.—One of the primary benefits of the proposed consolidation is the creation of a single railroad system positioned to meet the growing demand for interregional rail transportation service between points in the Northeast and Midwest and points in the Southeast. Production and

consumption patterns and the flow of commodities between markets in the eastern United States have changed significantly in recent decades, but the rail system has not been adequately structured to react to these changes. While the Northeast and Midwest continue to be important suppliers of industrial and consumer goods, the Southeast has emerged as a significant economic force and, as a region, is now the largest domestic supplier of such commodities as textiles, furniture, pulpboard, and paperboard. The economic growth of the Southeast has generated increased demand in the region for a number of commodities, including industrial machinery, coal, and grain products. The Southeast has also developed as an important market for consumer goods, such as automobiles, produced in the Northeast or Midwest.

"The economic interdependence of the Northeast, Midwest, and Southeast regions has created a need for improved interregional rail transportation. Until our recent approval of the CSX consolidation, north-south rail service in the East depended primarily upon interline movements. In 1979, 54 percent of Southern's total tonnage and 56 percent of NW's total tonnage was interlined.

"Shippers, however, prefer single-system service. Single-system service offers the opportunity to improve speed and reliability of service and equipment utilization and distribution. It also focuses responsibility for an entire movement on a single carrier, improving shippers' ability to control and trace individual shipments and to expedite shipments when necessary. Additionally, single-system responsibility facilitates prompt settlement of loss and damage claims.

"The NS consolidation will create a single system serving numerous points in the Midwest and Northeast, including Chicago, Cleveland, Detroit and Buffalo, and numerous points in the Southeast, including Atlanta, Birmingham, Chattanooga, and Jacksonville. The new system also will connect NW grain origins in the Midwest with grain consumers on Southern; NW coal origins with Southeastern utilities; and South Atlantic and Gulf ports with points in the Midwest and Northeast. The improved rail service which single-system operation between these points offers is clearly a public benefit of the consolidation."
(366 I.C.C. at 194-95).

- "In addition to the inherent benefit of single-system service, the NS consolidation will limit the adverse impact of the 'gateway- watershed' problem on service to shippers located near the common borders of the component Southern and NW systems. This 'gateway-watershed' problem is explained as follows. Given the loss of responsibility and control associated with interline traffic and assuming current divisions are not easily adjusted, railroads can lack sufficient incentive to undertake marketing initiatives for traffic moving beyond their lines. The most severe constraint on traffic flow is encountered where an origin or destination point of one rail carrier is located relatively close to its interchange point with another railroad. Since the carrier serving the site near the gateway receives only the short haul of what may be a movement of considerable distance, its share of a competitive rate may be insufficient to warrant its participation even though the

total revenue associated with the movement may be remunerative. Factors apart from revenues – such as varying traffic balances on the two systems, so that a given movement balances the traffic flows of one carrier but increases an imbalance for another – can also prevent otherwise competitive movements from taking place."

"The geographic juxtaposition of NW and Southern presents a good example of the watershed problem between rail systems. NW is basically an east-west railroad while Southern is oriented primarily on a north-south axis. Consequently, NW has historically been concerned with maximizing its east-west long haul and Southern its north-south long haul. There are few incentives for carriers with such diverse traffic patterns to coordinate operations in contiguous areas. The management of each railroad has generally found it more profitable to use its resources in carrying traffic over its long haul than by participating in short-haul, joint-line movements. The examples set forth in appendix F clearly illustrate the impact of the gateway- watershed problem upon present NW and Southern operations and the difficulty of solving this problem using means other than consolidation. *See CSX, supra*, at page 555." (366 I.C.C. at 195-96).

UP/MP/WP

Decision Approving Transaction: ***Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R. – Control – Missouri Pacific Corp. & Missouri Pacific R.R.,*** **366 I.C.C. 462 (1982).**

- "The significant service improvements resulting from the proposed consolidations are derived from the ability to provide efficient single system rail service between regions and markets which either have no such service at present or which have no competitive alternatives to the service that already exists. The consolidated system will provide new single system service between the Pacific Northwest and the Gulf, in direct competition with BN; between northern California, the Midwest and Gulf, between southern California and the Midwest and the Gulf, and between the Rockies and Plains and the Midwest and the Gulf. Interlining will be reduced in the transcontinental markets, which the consolidated system will reach via the St. Louis, Memphis and New Orleans gateways.

  "Shippers prefer single line or single system service because it improves reliability and transit times, and equipment availability. Norfolk Southern. Shippers can more efficiently use their resources by dealing with and relying on one carrier instead of several on questions of schedules, special service requirements, car tracing, and loss and damage claims. Shippers benefit from improved equipment availability which results when unified rail management implements a plan for the efficient use of its equipment, resulting in more reliable service. Shippers also benefit from improved transit times and resultant reduced equipment costs made possible when single rail systems are able to minimize interchange delays by increasing the use of preblocking and run-through trains.

"The proposed operating changes implementing single system service are discussed in the following section. As an example of the benefits expected due to the new service, applicants propose to save a day or more in transit time between Omaha/Council Bluffs and the South Central States by avoiding reclassification in Kansas City.

"The proposed consolidation will open new markets to shippers located on one of the applicants' lines by providing efficient single system access to the Pacific Northwest, northern and southern California, the Rockies and Plains States, the Midwest, South and the Gulf Ports, Mexican border crossing points, and the St. Louis and Memphis gateways to the east. In 1979, over 70 percent of both UP and MP's traffic was interlined, and those shippers after consolidation will be positioned to take advantage of efficient single system service to many new markets." (366 I.C.C. at 489-90).

1988

UP/MKT

Decision Approving Transaction: ***Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Missouri-Kansas-Texas R.R.,*** **et al., 4 I.C.C.2d 409 (1988)**

- "Applicants seek to provide shippers with new single-system service be- tween points served by UP and MKT. For example, the merger would promote single-line movement of export grain from MKT points to UP- served Mexican gateways, UP-served points on the West Coast and in the Southwest, and UP-served ports." (4 I.C.C.2d at 430).
- "A significant, though less tangible, benefit also will be realized by providing single system service to shippers served by the consolidating carriers." (4 I.C.C.2d at 417).
- "[C]ompetition will increase through pitting a single-line route against a joint-line one. The OKT-SP routing will continue if it is efficient." (4 I.C.C.2d at 460).
- "Applicants estimate that the merged system would divert over $18.2 million in traffic from other carriers. … [S]ome of this diversion is tied to the 'qualitative' public benefit of new or improved single-line service sought by shippers … It is not possible from the record to extract from these diversion estimates a figure representing public benefits. Applicants themselves make no attempt to do so, and their figure of $60.9 million represents significant public benefits regardless of any public benefits resulting from diversion. Private benefits from traffic diversion are generally not of concern to us unless diversion from another carrier would threaten that carrier's ability to provide essential services. … Because more accurate diversion figures are not needed to conclude either that sufficient public benefits exist or that diversion would harm essential services, resolution of this discrepancy is unnecessary." (4 I.C.C.2d at 429 n.15).

DRGW/SPT

Decision Approving Transaction: ***Rio Grande Industries, Inc., SPTC Holding, Inc., & The Denver & Rio Grande Western R.R. – Control – Southern Pacific Transportation Co.,*** **4 I.C.C.2d 834 (1988)**

- "The public benefits of a DRGW/SPT merger are improved, more efficient single-line service for shippers in both the Central and the Southern Corridors, a strengthened competitive alternative to the UP/MP system in the Central Corridor, and the ability to alleviate congestion and over-capacity in the Southern Corridor. … Because this is substantially an end-to-end merger, adverse competitive effects are few, if any." (4 I.C.C.2d at 837).
- "The public benefits of this consolidation are attributable to service improvements, cost reductions resulting from operating efficiencies, enhanced competition, and a stronger financial position for the consolidated system. Many of these benefits stem from the operating plan. They are discussed in detail below. Other benefits-those derived from enhanced competition and a stronger financial position-are more difficult to separate and quantify, but are nevertheless real. A combined DRGW/SPT, able to provide single- line service, as compared to the present joint haulage agreement, will allow the consolidated system to compete more effectively with the single line UP/MP system over the Central Corridor. This will enure to the benefit of shippers." (4 I.C.C.2d at 876).
- "In this, as in other cases, it is evident that shippers prefer single-line, or single-system, service because it improves reliability and transit times, and equipment availability. Shippers can more efficiently use their resources by dealing with and relying on one carrier instead of two or more on questions of schedules, special service requirements, car tracing, and loss and damage claims. Shippers benefit from improved equipment availability which results when unified rail management implements a plan for the efficient use of its equipment, resulting in more reliable service. Shippers also benefit from improved transit times and resultant reduced equipment costs made possible when single rail systems are able to minimize interchange delays by increasing the use of preblocking and run-through trains. The record in this case demonstrates strong support for the DRGW/SPT combination and the anticipated single-line service benefits from the consolidated operations." (4 I.C.C.2d at 878).
- *"The Proposed DRGW/SPT Consolidation: A New Single-Line Route In the Central Corridor.* The fundamental change to be effected by the pro- posed DRGW/SPT consolidation will be the establishment of a new single-line SPT/DRGW Central Corridor route, extending from southern Oregon and northern California, on the west, through the present inter- change at Ogden, across DRGW's present route to Kansas City, and thence to St. Louis over SPT's (SSW's) Kansas City-St. Louis line." (4 I.C.C.2d at 894).
- "The Primary Applicants have built a large part of their case upon the claimed advantages of this new single-line route. While these claimed advantages cannot be quantified, they are unquestionably real. We agree with the Primary

Applicants that a single-line route generally has a natural superiority over a multi-line route, in terms of: (1) equipment use; (2) quality of service; and (3) marketing. Each of these is discussed below." (4 I.C.C.2d at 894).

- "Shippers will benefit because improved efficiency and shorter transit times will allow them to reduce their inventories and thereby lower their operating costs and increase their efficiency. Shippers will also benefit because their products will be able to reach their markets with more consistency and reliability, thereby providing a basis for improving future business prospects. The consolidated system and its shippers will benefit from improved transportation economics (i.e., lower costs), because single-line operation is more efficient than multi-line operation. The benefits to shippers and the participating railroads also affect the public generally, through increased economic activity, greater efficiency, and increased prosperity; and the increased economic strength of the consolidated company means that it will be better able to provide competition for other rail carriers, thus preserving and enhancing for the public the benefits of competition." (4 I.C.C.2d at 896).
- "Although we could condition the proposed DRGW/SPT consolidation to protect UP/MP against the loss of traffic moving consolidation to protect UP/MP against the loss of traffic moving over the Ogden inter- change, in the absence of any showing of a loss of essential services, we would not condition the proposed consolidation to protect UP/MP against the loss of single-line traffic attracted to the consolidated system by the new DRGW/SPT single-line routing across the Central Corridor. ***Such a condition would protect only the competitor, not competition. In fact, it would reduce the beneficial effects of the new, stronger competition.***" (4 I.C.C.2d at 918) (emphasis added).
- "The approval of the RGI application will enable the consolidated carrier to produce substantial public benefits. DRGW/SPT as a single entity will produce efficiencies that are not being realized by the two carriers today under their separate operations. There are also no discernible harms to competition or essential services. The effect on adequacy of transportation to the public has been analyzed, as well as the impact of including, or failing to include, other carriers. By creating a new single-line transcontinental route across the Central Corridor, a DRGW/SPT consolidation will have a positive and pro-competitive impact in the Central Corridor." (4 I.C.C.2d at 971).

1995

UP/CNW

Decision Approving Transaction: ***Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Chicago & North Western Transportation Co. & Chicago & North Western Ry.,*** **Finance Docket No. 32133, 1995 WL 141757 (ICC Decision No. 25, decided Feb. 21, 1995).**

- "The primary applicants contend that, today, UP and CNW are end-to-end connections that cooperate closely in competing against the BN, Santa Fe, and SP

systems, all of which offer single-line service in both the West Coast–Chicago and Chicago–South Central markets, as well as against long-haul trucking.18 UP and CNW, the primary applicants add, also cooperate closely in competing against BN in moving coal from Wyoming's PRB. The fundamental purpose of the UP/CNW common control application, the primary applicants claim, is to permit UP and CNW to work even more closely together to compete against their major single-line rivals. The closer alignment of UP and CNW, they contend, holds the promise of significant public benefits in the form of efficiency savings and service improvements, which will be achieved through agreed-upon marketing and operating coordinations well short of full integration of UP and CNW. Additional significant public benefits, the primary applicants indicate, would depend upon full integration, which (they concede) may never occur." (1995 WL 141757 at 6).

- "Approval of the UP/CNW application, the primary applicants assert, would allow UP and CNW to achieve a number of additional marketing and operating coordinations that have not been attempted heretofore. The primary applicants maintain that, although these coordinations would not enable the two railroads to offer a full-fledged single-line service, they would enable the two railroads to offer something approaching a single-line service equivalent. These coordinations include: improvements such as closer cooperation in train and yard operations, dispatching, data systems, crew management, and locomotive management in the UP/CNW run-through train service through Fremont; further investment in such things as terminals, locomotives, and track capacity in connection with the UP/CNW PRB operations; consolidation of the information systems now operated by the two railroads, by installing UP's Transportation Control System (TCS) on CNW; simplification of the customer service function (by servicing important portions of UP/CNW joint-line business from a single point), thus offering shippers one-stop shopping; closer coordination of key personnel of the two railroads in an effort to promote joint UP/CNW traffic; optimization of use of the four intermodal terminals that the two railroads now operate in the Chicago area (CNW's Global I and Global II facilities and UP's Canal Street and Yard Center facilities); institution of a joint UP/CNW intermodal service between the Twin Cities, on the one hand, and the West Coast and the South Central region, on the other hand (for significant portions of these markets, no single-line service now exists); and elimination of some or all of the various restrictions (such as commodity limitations) that now hinder the full development of UP's haulage arrangement over CNW's east-west main line." (1995 WL 141757 at 9).
- "Existing UP/CNW east-west interline services, such as UP/CNW run-through train service via Fremont, will be upgraded and made more competitive as a result of common control. Closer coordination between UP and CNW will lead to further improvements in service quality, speed, and frequency. UP's present haulage rights over CNW's east-west mainline, by way of example, are subject to various commodity and geographic restrictions, including the exclusion of most coal traffic and traffic to and from CNW points outside of Chicago. With common control, some or all of these restrictions are likely to be eliminated, thereby

enhancing the ability of UP and CNW to offer a close equivalent to single-line service for more movements via Fremont (or via Omaha/Council Bluffs). As a result, shippers in long-haul corridors such as the Chicago–West Coast and Twin Cities–North Platte markets are likely to experience better service and lower rates. Finally, common control is likely to stimulate continued joint investment to improve UP/CNW service in transporting Powder River Basin coal. UP and CNW will be positioned to improve terminals, acquire new locomotives, and add track capacity as they intensify their head-to head competition with BN for this traffic." (1995 WL 141757 at 61).

- "First, common control will allow UP and CNW to achieve better coordination of train and yard operations. The primary applicants have identified several specific operations which will be improved. These include eliminating the current interchange of east-west trains, including blocked car segments, at Council Bluffs/Fremont; coordination of yards at Kansas City, St. Louis and Omaha; making greater use of UP's advanced computer-based dispatching system by adding CNW to the system; and using the shortest, most efficient routings of both carriers"

  "Second, common control will permit UP and CNW to manage their freight car fleets jointly. Several coordinating activities have been identified which are designed to improve equipment utilization. These include: sharing of UP's TCS; greater yard coordinations; and more run-through trains. The greatest efficiency gains, however, can be realized by taking advantage of differences in seasonal demand patterns between the two railroads. Each of these activities has the practical effect of increasing effective car supply through improved utilization. In combination, they will permit UP and CNW to realize large cost savings through reduced investment in equipment. Overall, UP and CNW expect to save 3,115 freight cars, 25 through-freight locomotives, and three road switcher and yard locomotives. Shippers will also benefit because improved utilization will reduce car shortages."

  "Third, common control will permit effective coordination of the four Chicago-area UP and CNW intermodal terminals. Coordination of these yards will result in substantial savings by reducing highway cross haulage (trailering intermodal units from one yard to another so that they can be placed on the correct train)."

  "Fourth, common control will enable the combined system to provide shippers with additional information and improved services. Current UP/CNW joint-line service is disadvantaged with respect to transit time and locational information. UP's TCS will facilitate such coordination. Although CNW has its own information system, control will permit the two carriers to merge their information systems and make uniform use of TCS. In addition, operating as a near-single-line carrier, UP and CNW will be positioned to provide price quotes more expeditiously than they can as separate entities which must first concur. Although the two carriers currently have several pre-existing haulage arrangements, there are numerous exceptions; common control would permit

unified marketing and pricing decisions on all movements. This will permit highly efficient, near-single line service wherever it is feasible." (1995 WL 141757 at 62).

- Common control of UP and CNW notwithstanding, CC & P, if it is more efficient than CNW, will not be excluded from the long-haul coal market. A commonly controlled UP/CNW, acting in its own best interests, will use the most efficient routing available. If CC & P is indeed more efficient than CNW, that will be the routing that is chosen. Vertical (end-to-end) integration of UP and CNW will not, in and of itself, result in the inefficient foreclosure of an interline carrier like CC & P, because a bottleneck carrier (CNW, if it has exclusive access to a particular utility) cannot increase its market power through such foreclosure. (1995 WL 141757 at 80).
- "We acknowledge that common control may well result in some changes in revenue divisions and/or traffic flows. Relative to independent connections such as CC & P, a commonly controlled UP/CNW will gain bargaining power due to efficiency gains. If common control alters the relative efficiencies of CNW and CC & P (by making CNW more efficient, and thereby making CC & P relatively less efficient), it is indeed possible that CC & P may be excluded from the market or may have to accept a revised joint revenue division. This, however, would not be an anticompetitive outcome of common control; rather, it would simply be a natural consequence of the efficiencies that common control may allow." (1995 WL 141757 at 80).
- "We agree that common control is likely to have a negative impact on CC & P. Common control will make UP/CNW joint-line service more efficient, which naturally means that common control will make UP/CC & P joint-line service relatively less efficient. Common control can therefore be expected to result in diversions of traffic from CC & P to CNW, assuming, of course, that other factors are held constant. The crucial issue, however, is not whether common control will have a negative impact on CC & P. The crucial issue, rather, is whether the negative impact will be so severe as to endanger such essential services as CC & P now provides. As we now show, common control of UP and CNW will not have an adverse impact on essential services." (1995 WL 141757 at 84).

1995

BN/SANTA FE

Decision Approving Transaction: ***Burlington Northern Inc. & Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry.,*** **1995 WL 528184 (ICC Decision No. 38, decided Aug. 16, 1995).**

- "[A]pplicants seek to create an expanded rail system with broader geographic coverage than either of the applicant carriers' existing systems, with new single-line service between points on the BN system and points on the Santa Fe system. … These new routes would include the following: (a) between points in central and southern California (including California ports) served by Santa Fe and points

in the Midwest and Southeast served by BN; (b) between Seattle and other points in the Pacific Northwest served by BN and points in the Southwest served by Santa Fe; (c) between points in the Southwest served by Santa Fe and points in the Southeast served by BN; (d) between points in the Northern Tier states served by BN and points in the Southwest served by Santa Fe; and (e) between points in Western Canada served by BN and points in the Southwest served by Santa Fe." (10 I.C.C.2d at 670 n.15).

- "Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly. A single-line railroad route is becoming more important for carriers wanting to compete for service-sensitive freight. As a result of the new single-line service capability of the combined BN/Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange." (10 I.C.C.2d at 741).
- "We agree with applicants that where, as here, two railroad networks are integrated, the possibilities for longer hauls increase. While the utilities' witnesses note that in the past the proportion of interlined BN/Santa Fe movements has been low, we expect that the merger will bring about a significant number of new single-line BN/Santa Fe movements." (10 I.C.C.2d at 742).
- "We have also dealt with end-to-end aspects of rail mergers in a series of cases involving our imposition of rate and routing conditions that were intended to require railroads to maintain open gateways post-merger with unaffiliated interline partners. In *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *aff'd in relevant part, Detroit, Toledo & Ironton R. Co. v. U.S.*, 725 F.2d 47 (6th Cir.1984), we rejected the notion that new single-line movements created through merger would lead the merged carrier to "vertically foreclose" competition over efficient routes by refusing to cooperate with unaffiliated carriers. In *Seaboard Air Line Railroad Company – Merger – Atlantic Coast Line Railroad Company (Petition to Remove Traffic Protective Conditions)*, Finance Docket No. 21215 (Sub-No. 5) (ICC served Mar. 27, 1995) (*CSX/FEC*), we recently reaffirmed that "merged railroads – regardless of whether they maintain bottleneck facilities or market dominance – have the incentive to encourage full use of the most efficient routing, even when it entails a joint-line alternative to a single system route." *CSX/FEC*, slip op. at 5." (10 I.C.C.2d at 748-49).
- "We do not think that the one lump theory requires the series of perfect conditions that the utilities claim must be present for the theory accurately to represent the coal transportation markets at issue here. Our focus here is properly on substantial harm to competition. Our experience has been that where a single rail carrier controls a destination segment, and no transportation alternatives are available, the shipper will be captive and the single rail carrier will be able to capture the preponderance of the economic profits. Conversely, when certain factors are present that limit a carrier's ability to take full advantage of a bottleneck, those factors will remain in place as effective safeguards after the

merger. We have consistently adhered to these principles in assessing harm in merger cases and in making market dominance determinations in rate cases. The fact that a bottleneck carrier might not have sufficient information to execute a perfect price squeeze or to extract the last penny of economic profits does not mean that substantial benefits to shippers will be lost when the bottleneck carrier merges with a connecting carrier." (10 I.C.C.2d at 751).

1996

UP/SP

Decision Approving Transaction: ***Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry., SPSCL Corp., & The Denver & Rio Grande Western R.R.,*** **1 S.T.B. 233 (1996).**

- "As a result of this merger, every shipper served by UP, but not by SP, will gain single-line service to all SP points, and vice versa. More than 350,000 cars, trailers, and containers, carrying 26 million tons of freight, will gain single-line service each year. The BNSF agreement will add single-line service for another 120,000 cars a year. See Appendix D at 2 (Expanded Single-Line Service)." (1 S.T.B. at 381).
- "Moreover, the expanded coverage that common control promises will have numerous beneficial impacts on many markets – international, intermodal, food products, forest products, autos, chemicals, grain, coal, metal and minerals. See Appendix D at 3 (Expanded Market Coverage)." (1 S.T.B. at 381).
- "*Pacific Northwest-Texas.* BNSF now has the only direct route between the Pacific Northwest and Texas. The merged carrier will link the UP and SP route networks in Texas with SP's route from Ft. Worth to Denver and UP's routes from Denver to Utah, Idaho, Montana, Oregon and Washington. This will make UP/SP a real competitor for this traffic and provide entirely new single-line services to shippers in the Intermountain West." (1 S.T.B. at 564).
- *"Canada/Pacific Northwest-California/Mexico.* Western Canada will receive much-improved rail links with the United States and Mexico. Substantial parts of the Pacific Northwest, including Seattle/Tacoma and the Vancouver/Alberta Canadian gateways, have never been connected to California by a direct single-line rail route. The merger and BNSF agreement will create both a UP/SP through route and a BNSF through route in the I-5 Corridor, offering new rail options to shippers and a competitive alternative to water and truck transportation.

  "UP/SP will offer new single-line service between many UP points in the Northwest and many UP and SP points throughout California, Arizona, New Mexico, and West Texas (including the Mexican gateways of Calexico, Nogales, and El Paso). Eastbound traffic will also gain a shorter route, via Colorado and the Texas Panhandle, to Dallas, Houston and New Orleans. BNSF will have new single-line routes from the Vancouver and Sumas gateways to California, the

Southwest, and the San Diego and El Paso gateways to Mexico.

"Competition will also be stronger for traffic moving in interchange with CN via Duluth/Superior and CP via the Twin Cities because all SP points will now be accessible on a single-line basis from those interchanges." (1 S.T.B. at 564-65).

- "*International Markets.* The UP/SP merger transaction will foster the goal of North American economic integration embodied in the NAFTA agreement by greatly strengthening competition for traffic to and from both Canada and Mexico. The proportional rate arrangement will allow UP/SP to compete via Portland for traffic to and from BNSF's Western Canada gateways, including lumber originating on BC Rail and Alberta grain and chemicals originating on CN. There will be stronger rail competition at every UP and SP gateway to Mexico as a result of the merger and the BNSF agreement, and the Tex Mex trackage rights we have imposed. Overall, BNSF's much-expanded access to Mexico, as well as within Texas and at New Orleans, will bring greater balance to the competition for Mexican rail traffic, which at present is largely handled by SP to and from points to the west and UP to and from points to the north and east."

  "The more efficient Mexican routings for both UP/SP and BNSF will help improve the rail share of traffic to and from Mexico. Today, trucks dominate this traffic. Even at Laredo, the most efficient Mexican rail gateway, trucks handle approximately 86% of the cross-border traffic. Upgrading the Southern Corridor lines, instituting new Laredo-California intermodal service, and greatly improving the efficiency of operations in the Laredo-Memphis-St. Louis-Chicago corridor will give rail a much better ability to capture a larger share of this market." (1 S.T.B. at 565-66).

Final Oversight Decision: *UP/SP (General Oversight*), 5 S.T.B. 1159 (2001).

- "*Competition Has Been Strengthened*." The evidence submitted by UP demonstrates that the merger has resulted in strengthened competition for 2-to-1 shippers, 3-to-2 shippers, shippers of key commodities affected by the merger, and shippers in every rail corridor and region affected by the merger. The evidence submitted by UP further demonstrates: that the public benefits that the UP/SP applicants predicted have been achieved; that rail competition has been enhanced; that UP rates (adjusted for inflation) have either declined or remained unchanged in every relevant market; and that BNSF, Tex Mex, and Utah Railway Company (URC) have competed and are continuing to compete effectively against UP. And, as UP notes, no one has presented any evidence of competitive harm or any evidence that our conditions have been less than fully effective." (5 S.T.B. at 3-4).
- "UP's evidence demonstrates that the merger, with the conditions we imposed, has strengthened competition in the three major West Coast-Midwest/Northeast corridors (the corridors that run between the Pacific Northwest, Northern California, and Southern California, on the one hand, and, on the other hand, the Midwest gateways of Chicago, Kansas City, and St. Louis and the regions served via those gateways); in the Houston-Memphis-St. Louis corridor; and in the

Houston-New Orleans corridor. UP's evidence further demonstrates that the merger, with the conditions we imposed, has strengthened competition for international traffic to and from Canada and Mexico. And, as UP notes with respect to Mexico, our condition that UP afford The Texas Mexican Railway Company (Tex Mex) trackage rights between Robstown and Beaumont, TX, has resulted in the creation of a third competitive rail route to and from Eastern Mexico." (5 S.T.B. at 4 n.10).

1998

CSX/NS/CONRAIL

Decision Approving Transaction: ***CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*** **("*CSX/NS/Conrail*"), 3 S.T.B. 196 (1998)**

- "With very minor exceptions, the combination of NS and Conrail and of CSX and Conrail lines will be end-to-end and not parallel. It has been our experience that end-to-end restructurings of this kind rarely result in a diminution of competition. We have adopted a presumption, known as the one-lump theory, that vertical combinations will not result in competitive harm. We have also established a test for parties to show that the theory does not apply in a particular circumstance. Although several parties have attempted to argue that we should not apply the one-lump theory to rail mergers, repeating arguments that have been raised and rejected in previous merger proceedings, no party has rebutted the application of the theory here. Our use of the one-lump theory has been judicially approved, and we will not go back over that ploughed ground here. *See Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997)" (3 S.T.B. at 248).
- "The division of Conrail's lines, roughly half to each carrier, permits both CSX and NS to offer new and efficient single-line service in competition with motor carriers and with each other to thousands of shippers that received only joint-line service before. The transaction should lead to improved service and reduced transit times for thousands of shippers throughout the Eastern United States. This will permit these two carriers to divert a significant amount of traffic from the nation's highways." (3 S.T.B. at 248).
- "[W]e have acknowledged that, as a general matter, single-line service is superior to joint-line service." (3 S.T.B. at 258).
- "Kalt has correctly explained that Kahn/Dunbar are wrong in their assertions that the one-lump theory predicts: (1) that there be equal profits to the bottleneck carrier regardless of whether a movement is single-line or joint-line; (2) that there can be no profit earned by the origin carrier in a joint line movement with a destination monopolist; and (3) that origin competition has no effect on the size of the economic profit or the rail rate, relative to other routes." (3 S.T.B. at 268 n.106).

- "Finally, Kahn/Dunbar are simply wrong in asserting that the general applicability of the one-lump theory to mergers requires a set of explicit and rather implausible assumptions, and thus "the circumstances in which the pure one-lump theory is likely to hold represent an 'extreme example."' They appear unaware that this very argument has been considered and rejected by the ICC, with the ICC's reasoning specifically affirmed by the court. We conclude that the Crowley and Kahn/Dunbar testimony falls far short of providing a basis for altering our basic economic analysis of the vertical aspects of railroad mergers." (3 S.T.B. at 269).
- "As [Martin Marietta Materials (MMM)] points out, applicants' witnesses have acknowledged that going from single-line service to joint-line service is less efficient and tends to be more costly. MMM-3 at 8-10 and 19-21 (citing to Snow Dep. Tr. at 169-170, and Gaskins Dep. Tr. at 15-16). Applicants explain that '[c]harging a single-line rate for a joint-line service, where obvious extra handling (to effect the interchange) is involved, is clearly apt to be uneconomic for the participating railroads'. CSX/NS-190 at 26." (3 S.T.B. at 311).
- "In addition, the expansion of the NS and CSX systems will enable them to provide more competitive single-line service over more direct routes, to render improved service, and to use equipment more efficiently.

  "These features of the transaction will improve operating efficiency, reduce transit times and terminal delays, and provide logistics savings associated with single-line service that will make these companies more competitive with trucking and should, within 4 years of the transaction, shift over $400 million worth of traffic each year from highways to rail lines." (3 S.T.B. at 333).
- "Unquantified Public Benefits . . . The transaction will also increase competition between railroads and other modes due to the expansion of single-line service throughout the new NS and CSX systems. CSX's traffic studies project annual truck-to-rail diversions that will eliminate 438,000 truck trips per year, and NS has predicted that its expanded operations will remove an additional 589,000 truck trips. Together, applicants estimate that they will divert sufficient truck traffic to remove a million line-haul truck trips per year from our nation's highways." (3 S.T.B. at 336).

Final Oversight Decision: *CSX/NS/Conrail General Oversight*, Finance Docket No. 33388 (Sub-No. 91) (Decision No. 17, served Oct. 20, 2004).

- "The evidence submitted in this fifth annual oversight round, like that submitted in the first four rounds of annual oversight, demonstrates that the conditions imposed are working as intended and that the transaction has not resulted in competitive or market power problems." (*CSX/NS/Conrail*, Dec. No. 17 at 10).
- "CSX states that the Conrail Transaction enabled CSX to increase the efficiency of its railroad operations. CSX explains that the new single-line service made possible by the elimination of interchanges between CSX and Conrail has resulted in reduced costs and reduced transit times, and the development of more direct routes has resulted in increased commercial opportunities for many shippers. CSX

also explains that the expansion of its network and the development of more direct routes have made CSX competitive with trucks in the intermodal, TRANSFLO, waste products, produce, and many other markets. And, CSX adds, gateway optimization projects made possible by the Conrail Transaction have enabled CSX to improve its car handlings, by reducing handlings between CSX and its western connections." (*CSX/NS/Conrail*, Dec. No. 17 at 24).

- "The Conrail Transaction, NS explains: greatly expanded the single-line reach of NS and CSX in the Eastern United States; brought new two-carrier service to the SAAs and the Monongahela coal fields; and resulted in two competitively balanced rail systems serving the Eastern United States. NS and CSX, NS reports, are now engaged in strong and vigorous competition not only with each other, but also with other modes of transportation, particularly trucks, a factor that, though important even at the outset, has become much more important due to increasing highway congestion. And, NS adds, the Conrail Transaction has led to improvements at NS in safety, service, and competition (NS cites: the Safety Integration Plans prepared by NS and CSX; the "best ever" service metrics on NS; and the vigorous new rail-to- rail competition that now exists throughout the former Conrail territory). NS advises that the expanded reach of the NS system and the new rail-to-rail competition brought about by the Conrail Transaction has allowed NS to achieve a variety of noteworthy results in addition to the overall improvement in its service metrics." (*CSX/NS/Conrail*, Dec. No. 17 at 25-26).

1999

CN/IC

Decision Approving Transaction: ***Canadian National Ry., Grand Trunk Corp., & Grand Trunk Western R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., & Cedar River R.R.*** **("*CN/IC*"), 4 S.T.B. 122 (1999)**

- "This transaction will create a highly efficient rail transportation system spanning the central part of the United States from the Canadian border to the Gulf of Mexico. CN operates a 14,150-mile system throughout Canada, connecting with its 1,150-mile system in the United States, which operates mainly in Minnesota, Wisconsin, Michigan, and Northern Illinois and Indiana. IC operates a profitable 3,370-mile system between Chicago and the Gulf of Mexico." (4 S.T.B. at 142).
- "Qualitative public benefits include enhanced opportunities for single-line service preferred by shippers and more vigorous competition that may result from a transaction." (4 S.T.B. at 140).
- "The chief benefit of the merger is that it will make possible a new, single-line service alternative for many shippers. Applicants will thus be positioned to provide stronger competition to UP, BNSF, CSX, and NS in certain markets. In particular, the merger should significantly intensify competition for the north-south traffic that has achieved greater significance due to NAFTA. As detailed below, the transaction should also generate quantifiable public benefits of more than $100 million a year. These are made possible mainly through integration of

support functions, and more efficient use of equipment and crews." (4 S.T.B. at 142).

- "Quantifiable and Unquantifiable Public Benefits. The record indicates that this transaction should result in many qualitative benefits to the shipping public, including more single-line service, new and improved routes, more gateway choices, more reliable service, and reduced terminal delay." (4 S.T.B. at 167).
- "This transaction is entirely end-to-end, with no overlapping routes. The number of independent railroads currently serving particular shippers is not reduced at any location." (4 S.T.B. at 142).
- "It will not diminish competition among rail carriers either in the affected region or in the national rail system. Indeed, the transaction should enhance competition, especially for north-south traffic." (4 S.T.B. at 143).
- "The transaction will make possible significantly improved single-line service for many shippers, and will result in merger synergies that should allow the carriers to provide service at lower cost. A substantial portion of these savings should be passed along to shippers in terms of reduced rates or improved service. Finally, the ability of these carriers to provide quality service will not be impaired, and should be enhanced." (4 S.T.B. at 144).

Final Oversight Decision: *CN/IC, General Oversight,* Finance Docket No. 33556 (Sub-No. 4) (Decision No. 3, served Nov. 7, 2001) ("*CN/IC General Oversight*")

- "CN's progress report submitted in the second oversight year demonstrates that the CN/IC transaction has been successful to date and that the carrier has added new transportation services and improved transit times throughout its system." (*CN/IC General Oversight*, Dec. No. 3 at 3).
- "CN states that rail shippers are benefitted by its improved routing through Chicago, advanced traffic management systems, and seamless single-line service. CN states that it is a significant carrier of petroleum, chemicals, metals, minerals, forest products, automobiles, and grain, and that its intermodal business is expanding through faster transit times and the introduction of new services such as RoadRailer. According to CN, it has continued to focus on providing top quality service and avoiding any service disruptions." (*CN/IC General Oversight*, Dec. No. 3 at 5).

APPENDIX B

LOOKING BACK AT THEIR OWN MERGERS, OTHER CLASS 1 RAILROADS HAVE TOUTED THEIR SINGLE-LINE BENEFITS AND PROCOMPETITIVE EFFECTS

BNSF

Burlington Northern Inc. & Burlington Northern R.R. – Control and Merger -- Santa Fe Pacific Corporation & the Atchison, Topeka & Santa Fe Ry., ICC Finance Docket No. 32549, Applicants' Brief (BN/SF-48) (filed June 29, 1995) at 1.

- "Because this is predominantly an end-to-end combination, situations in which there might be a potential reduction in competition have been limited from the outset."

Public Views on Major Rail Consolidations, STB Ex Parte No. 582, Statement of Robert D. Krebs, Burlington Northern Santa Fe Railway Company, Before the Surface Transportation Board on March 7, 2000 at 12 (emphasis added).

- "***Our customers have benefited tremendously from the expanded network and increased options for single line service that resulted from the BNSF merger***, as demonstrated by the growth in intermodal units across selected major routes between 1995 and 1999 – up 40% between Chicago and the Pacific Northwest, up 54% between Chicago and Texas, and up 170% between Minnesota and California, Arizona, and New Mexico."

Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), Comments of the Burlington Northern and Santa Fe Railroad (filed May 16, 2000) at 27.

- "The 'one-lump' theory has been extensively litigated before the Board. The theory is based on sound economics, and there is no reason for reconsidering or revising it at this time."

Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), Reply Comments of the Burlington Northern and Santa Fe Railway Co. (filed June 5, 2000) at 34.

- "BNSF, along with other carriers, believes that meaningful service improvements can occur when railroads achieve greater concentration of traffic operating on run-through trains, through fewer – not more – interchanges."

Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) Comments of the Burlington Northern and Santa Fe Railway Co., Verified Statement of Jose A. Gomez-Ibanez and Joseph P. Kalt (filed Nov. 17, 2000), at 11-12, 15.

- "The Board's merger policy should continue to favor mergers because mergers can still produce public benefits. . . They can encourage new investment, as evidenced by the investments triggered by recent mergers in the industry, and enable enhanced services to be offered to shippers. . . By expanding the scope of networks, mergers can help railroads meet a greater range of shippers transportation needs, thereby attracting new business and improving their overall competitive position in the national transportation market."

Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), Comments of the Burlington Northern and Santa Fe Railway (filed Nov. 17, 2000).

- "…[S] ingle-line service can offer shippers more reliable service, while enabling railroads to craft new services that can attract traffic from competitors and other transportation modes. An expanded, integrated rail network can provide shippers with access to new markets. A merged railroad also can benefit from the different commodity and product expertise of the pre-merger railroad. If a merged railroad become a better competitor and shippers gain access to new markets and services, there will be beneficial effects for the railroad, shippers and the Nation." *Id.* at 25.
- "Single-line service enhances efficiency by eliminating costs and uncertainty associated with making and managing interline movements. In addition, expansion of single-line service typically represents a dramatic improvement in quality of service a railroad offers its shippers. As railroads expand their offerings of single-line service, they can increase the speed of their service, make more service more reliable, reduce damage and loss, and reduce capital requirements by making more efficient use of rail (and shipper) facilities. In the past, the Board has recognized that single-line service is a major source of public (and shipper) benefits." *Id.* at 10.
- "Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly. As a result of the new single-line service capability of the combined BN-Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange. The transaction costs shippers incur in initial rate negotiations, in arranging equipment supply, tracking shipments, and in billing and payment procedures, will likely be reduced." *Id.* at 11 (citations omitted).
- "The Board's view that extension of single-line service is an important source of benefit is confirmed by experience. Evidence reviewed below indicates that railroads have been notably successful in attracting substantial volumes of traffic to expanded single-line service options following merger." *Id.* at 11.
- **"**Most recent railroad mergers involve railroads whose route networks connect end-to-end rather than running parallel to one another. Economic analysis indicates that end-to-end mergers are unlikely to cause competitive harm. Unlike parallel mergers, end-to-end mergers do not involve significant network overlaps, so that few or no shippers face a potential reduction in the number of railroads that serve them. Moreover, end-to-end mergers are the equivalent to vertically integrating the various routes served by railroads, and the overall impact of integrating and rationalizing the ownership of the rail network is pro-competitive through reduced costs and improved overall service. Indeed, the ability to reduce costs by making the most of economies of scale and scope and offering improved single-line service has motivated recent mergers." *Id.* at 15.

Competition in the Railroad Industry, STB Ex Parte No. 705, BNSF Reply Comments, Verified Statement of John P. Lanigan (filed May 27, 2011).

- "The BN/ATSF merger contributed substantially to BNSF's competitive capacity and significantly improved BNSF's ability to compete in the marketplace for transportation

services. Shippers have benefitted from the enhanced service BNSF has been able to provide, as well as the enormous investment BNSF has made improving our system." *Id.* at 2.

- "The claim of some shippers that competition was reduced as a result of certain end-to-end mergers ignores the vast diversity of market conditions and competitive options in different transportation markets. Those shippers also ignore the benefits produced by those mergers that have allowed railroads to compete more effectively for business. … ***[R]ailroads combining end-to-end, like BN and ATSF, do have the opportunity to create more efficient networks and compete more effectively for ling-haul service. And that is exactly what transpired as a result of the BN/ATSF merger. BNSF was able to improve its service and grow the combined railroads' business in every major traffic category***." *Id.* at 8 (emphasis added).

CANADIAN NATIONAL

Canadian National Ry. et al. – Control – Illinois Central Corp. et al., Finance Docket No. 33556, Application (CN/IC-6) (filed July 15, 1998) at 10.

- "Given the end-to-end nature of the Transaction, the integration of the CN and IC rail systems would cause no reduction in competition."

Canadian National Ry. et al. – Control – Illinois Central Corp. et al., Finance Docket No. 33556, Application (CN/IC-6), Verified Statement of Paul M. Tellier and John D. McPherson (filed July 15, 1998) at 1.

- "CN/IC, the end-to-end combination of two highly complementary railroads, will strengthen the U.S. and North American transportation system. It will be strategically important for shippers. It will promote the growth of north-south trade. It will help assure that our railroads can respond to market challenges through growth and increased financial strength. Yet it portends no anti-competitive effects, abandonments, service reductions or interruptions, capacity constraints, or significantly adverse labor, safety or environmental effects."

Canadian National Ry. et al. – Control – Wisconsin Central Transportation Corp. et al., STB Finance Docket No. 34000, Application, Verified Statement of Paul Tellier, Finance Docket No. 34000 (filed Apr. 9. 2001) at 3.

- "CN has shown in the recent past that it can increase efficiency and offer new and improved services through an effective merger with another railroads. The CN/IC Transaction was implemented with real gains in efficiency and, we are proud to say, without any significant service quality problems."

CSXT

Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), Comments of CSX Corporation and CSX Transportation, Inc., (filed November 17, 2000) at 8.

- "Efficiencies, such as those achieved from extended hauls, from the elimination of interchanges and from reduced costs and other service improvements, along with elimination of remaining inefficient redundancy, should be included among the procompetitive impacts of a proposed merger."

NORFOLK SOUTHERN

Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), Comments of Norfolk Southern (filed May 16, 2000) at 33-34.

- "NS insists that the 'one lump' theory is correct and should be continued. NS contends: that when a shipper is exclusively served by one railroad, the shipper will not suffer a reduction in competition for its traffic if the serving railroad merges with one of several connecting railroads; that, therefore, there is no merger-related justification for granting another railroad trackage rights access to that shipper; and that, in any event (i.e., even if there were a merger-related loss of competitive options), the grant of trackage rights access would go far beyond simply restoring pre-merger competitive options."

UNION PACIFIC

Union Pacific Corp. et al. – Control & Merger -- Southern Pacific Rail Corp. et al., STB Finance Docket No. 32760, Application Vol. 1 (filed Nov. 30, 1995) at 17.

- "The UP/SP merger, together with the settlement agreement with BN/Santa Fe, will greatly intensify rail competition in the West. The merger will yield shorter routes, expanded single-line service, greater capacity, better equipment supply, faster and more reliable service, and lower costs – all of which will enhance the competitiveness of the merged system."

Union Pacific Corp. et al. – Control & Merger – Southern Pacific Rail Corp. et al., STB Finance Docket No. 32760, Verified Statement of Richard B. Peterson (filed Nov. 30, 1995) at 74.

- "For access to end markets and supply sources, shippers on shortlines depend on fast, efficient, single-line service by the Class I railroad or railroads with which those shortlines connect."

Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No. 1), Union Pacific's Comments and Initial Proposals, (filed May 16, 2000) at 11.

- "UP does not share the view of many shippers that end-to-end mergers generally have anticompetitive vertical effects, and the Board must retain the basic economic and legal principles that guided its *Bottleneck* decisions."

Competition in the Railroad Industry, Ex Parte No. 705, Comments of Union Pacific Railroad Company (filed Apr. 12, 2011).

- "Thousands of shippers enthusiastically supported [post-Staggers Act rail] mergers, recognizing that they would enhance competition by creating more single-line service, shorter routes, shorter transit times, lower costs, and many other efficiencies. … [I]n every merger involving Union Pacific since 1980, the ICC or Board emphasized the benefits of single-line service and expected us to achieve them. … For three decades, Union Pacific has invested its capital to achieve the single-line benefits that the ICC and this Board (and a wide range of shippers) sought." *Id.* at 8-9.
- "[A] basic premise of each of the agency's consolidation decisions was that single-line service was superior to the service provided by separate carriers using interchange and would benefit shippers if expanded. UP undertook the series of consolidations that created the current UP system and invested tens of billions of dollars to improve, reconfigure, and upgrade its system to deliver the benefits of single-line service. … [T]he result of this continuing effort to expand single-line service has been to dramatically improve service to customers." *Id.*
- "Union Pacific's merger with Southern Pacific created new rail-to-rail competition in the Seattle-Los Angeles 'I-5 Corridor' through a settlement that gave BNSF Railway a single-line route that it could use to compete with the new Union Pacific." *Id.* at n.4.

Competition in the Railroad Industry, Ex Parte No. 705, UP Reply Comments (filed May 30, 2013) at 8-9.

- "[A] basic premise of each of the agency's consolidation decisions was that single-line service was superior to the service provided by separate carriers using interchange and would benefit shippers if expanded. UP undertook the series of consolidations that created the current UP system and invested tens of billions of dollars to improve, reconfigure, and upgrade its system to deliver the benefits of single-line service. … [T]he result of this continuing effort to expand single-line service has been to dramatically improve service to customers."

ALL AMERICAN CLASS 1 RAILROADS

Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB EP No. 711 Opening Comment of Association of American Railroads, Verified Statement of William Rennicke (filed Mar. 1, 2013) (joined by BNSF, CSX, KCS, Norfolk Southern, UP).

- "Simplification of operations: The reduction in the number of Class I railroads, combined with the reduction of inefficient/unnecessary routes and efforts to close redundant and little-used interchange locations, reduced the amount of traffic interchanged between railroad operators. This is illustrated in Exhibit III-3, which shows a steady decline in the average number of interchange events per railcar through the late 1990's and the maintenance of these historically low interchange event levels thereafter. 10 Between 1972 and 2011, the average number of interchange events per railcar declined from 0.86 to 0.28. This reduction greatly simplified railroad operations, making them more reliable." *Id.* at 12

- "Improved reliability: Single-line service grew as merged railroads closed less efficient parallel routes and interchange locations. These changes not only permitted the railroads to concentrate traffic on efficient high-density routes, it also allowed them to reduce the number of times a car is handled. This reduction was achieved in two ways: First, each avoided interchange event eliminated at least one car handling. Second, concentrating traffic on fewer, high-density routes permitted railroads to build more blocks that bypass intermediate classification yards. Each intermediate switch that can be avoided through bypass blocks eliminates one car handling. Eliminating car handlings is critical, because each time a car is handled at an interchange location or in an intermediate classification yard there is the possibility of a delay that would cause the car to misconnect, delaying its planned arrival time. In some cases, the arrival time is contractually guaranteed to the shipper but, even when it is not, the reliability of the car's arrival is the factor of greatest concern to shippers. Even when a railroad's reliability at each car handling event is very high – more than 90 percent – introducing additional events materially degrades the railroad's probability of meeting the service plan and delivering a car on time." *Id.* at 16.
- "There are many advantages to using single-line routes, including greater system efficiency, improved use of equipment, and faster turnaround times: 'A single-line route can make more efficient use of equipment. By improving the use of both system-owned equipment and foreign cars, a single-line system can have a more efficient fleet exhibiting faster turnaround time and improved loading ratios. These efficiencies are achieved by the elimination of interchanges, a common equipment placement program, more accurate and responsive monitoring of the fleet, and the pre-blocking of cars, as well as a quicker response to equipment supply problems that may develop.'" *Id. at* 21-22 (citing *Grande Industries, Inc. – Control – Southern Pacific Trans. Co.*, 4 I.C.C. 2d 834, 895 (I.C.C. Served Aug. 25, 1988)).

APPENDIX C

SELECTED QUOTES FROM SHIPPERS SUPPORTING TRANSACTION

Aeropres Corporation

- "One of our major challenges lies in trying to obtain raw materials from the various producers across the United States and delivering products to our customer base in the United States, Canada, and Mexico. Many times, we are unable to participate in certain markets due to challenges in moving our core products via rail at a rate that is competitive." (Letter Dated March 29, 2021, in CP-27/KCS-15, Application Volume 3 at 161).

Ag Processing

- "We ship our products on the CP throughout the U.S. and Canada, however, we are quite limited to Mexico. The prospect for our soy CP crushing facilities to move on a single line haul into Mexico with this merger should enhance our market access. Currently we have to move on 2-3 railroads to reach the same markets." (Letter Filed March 30, 2021 in CP-4/KCS-4, Applicants' Initial Submission of Statements Supporting Proposed Transaction at 76 (also included in Application Volume 3 at 162)).

Appro Development

- "As we have mentioned in our March 24th, 2021 letter, the end-to-end CP-KCS transaction will improve service options, with new single-line hauls and broader access to markets across North America. Our experience shows us that single-line rail service options are far superior to public and private fleets." (Letter Dated April 19, 2021, Appro Development Submission of Statement Supporting Proposed Transaction, at 1)

Bentonite Performance Minerals (BPM)

- "CPKC's new single-line haul offerings will expand market reach and offer new competitive transportation options for our shipments of bentonite and barite from Wyoming to Texas/ Mexico and from Louisiana into Canada." (Letter Dated April 1, 2021 in CP-27/KCS-15, Application Volume 3 at 248).

Berkshire Home Solutions

- "A CP-KCS merger would increase access to new markets by connecting the U.S., Mexico, and Canada through a single-line route. This would help increase competition and possibly drive down transportation costs - savings that could be passed onto consumers and homeowners." (Letter Dated June 28, 2021 in CP-27/KCS-15, Application Volume 3 at 250).

BioUrja

- "Rail service is vital to our terminal's survival, and more efficient access to additional markets will likely make our facility more competitive. For example, CPKC's new single-line haul offerings will expand market reach and offer new competitive transportation options for our shipments of propane from New Town, ND to Mexico." (Letter Dated March 30, 2021 in CP-27/KCS-15, Application Volume 3 at 256).

Bison Transport

- "Bison is a North American transportation company that specializes in full truckload, intermodal, logistics & less-than-truckload. Bison moves goods between Canada, the USA, and Mexico and believes that the CP-KCS merger will create efficiencies for our transportation network. Because of that, we are writing to express our support for the merger." [Filed with this Reply].

Bulkmatic de Mexico

- "Bulkmatic de Mexico is transloading commodities that rely on the first and second CP's lines of business after lntermodal. Bulkmatic de Mexico will expect to grow when such carloads shift to the single-line haul CPKC into Mexico." (Letter Filed March 30, 2021 in Applicants' Initial Submission of Statements Supporting Proposed Transaction at 76 (also included in Application Volume 3 at 280)).

Canpotex Ltd.

- "CPKC's new single-line haul offerings will expand market reach and offer new competitive transportation options for our shipments of potash from mines in Saskatchewan to international customers in Brazil, Mexico, and other countries in Central and South America. The proposed CPKC network would allow us to have additional port optionality in the Gulf and potential competitive rail direct options into the Mexican market." (Letter Dated March 30, 2021 in CP-4/KCS-4, Applicants' Initial Submission of Statements Supporting Proposed Transaction at 128 (also in Application Volume 3 at 298)).

Central Missouri AgriService, LLC.

- "We support of [sic] the Canadian Pacific (CP-Kansas City Southern (KCS) Transaction and urge the Board to approve it without granting the CN responsive application." [Filed with this Reply].

Ceres

- "In addition, a single line haul provides the carrier with control of logistics from origin to destination, which would enable the carrier to provide shippers with more consistent monitoring, timing of arrival and pricing. Ceres is particularly enthusiastic about the role the new CP/KCS single-line routes will play in expanding access to U.S. ports and

Mexico. Today, farmers in the upper Midwest lack efficient access to the U.S." (Letter Dated March 29, 2021 in CP-27/KCS-15, Application Volume 3 at 323-24).

- "Gulf and Mexico, which forces them to lower the price of their products in order to compete globally. In recent years this has proven costly as cheaper logistics from other countries have made it difficult for U.S. farmers and their products to be price-competitive into the world market. A CP/KCS railroad, with its north to south connections, would open new markets for U.S. and Canadian farmers." (*Id.* at 324).

CHS Inc.

- "The increased efficiencies and market access created by the CP-KCS merger would be an impetus for rail-using companies, such as CHS, to make the most of those benefits by considering making new investments in supply chain infrastructure to be served by CPKC." [Filed with this Reply].

CIG Logistics

- "CPKC's new single-line haul offerings will expand market reach and offer new competitive transportation options for our customers' shipments of products" (Letter Dated March 25, 2021 in CIG Logistics Submission of Statement Supporting Proposed Transaction, at 2)
- "We are particularly enthusiastic about the role new CPKC single-line routes will play in expanding access to growing markets across the United States, Mexico and Canada under the USMCA trade agreement. It is important that there be a true USMCA railroad option." (*Id.* at 2).

CF Industries

- "We know from experience (both our own and our competitors) that single-line rail service options are usually more competitively priced and have faster transit times than a route utilizing two railroads." (Letter Dated April 6, 2021, CP-27/KCS-15, Application Volume 3 at 326).

Forest River Bean Co.

- "The economy in the US Upper Midwest depends on agriculture production, and 80% of agricultural products leaving the region moves by railroad. Being a CP Served shipper we have to use multiple railroads to our biggest markets in the southern United States, Ports, and Mexico. A CN acquisition of the KCS would not give us one-line shipments for all our agricultural products in the Midwest. When we must compete against BNSF shippers we are in a huge disadvantage." (Letter Dated April 23, 2021, Forest River Bean Co. Submission of Statement Supporting Proposed Transaction, at 1).

Fullerton Farmers Elevator

- "The economy in the US Upper Plains depends on grain production, and 80% of the grain leaving the region moves by railroad. At present, our CP-served grain handling facility in

this area is limited by its destination access. This puts our CP-served elevator at a disadvantage because it lacks the same market access to destinations that BNSF-served competing facilities have on a single line haul. For example, BNSF-served facilities have access to markets in Texas and the Gulf region but our CP-served facility is simply not competitive in shipping to these markets as it must interline with other railroads to reach these destinations, which increases costs and reduces efficiency. A CP-KCS combination would place us on a more even playing field and greatly expand access to growing markets across the United States, Mexico, Canada, and even internationally." (Letter Dated April 29, 2021, Fullerton Farmers Elevator Submission of Statement Supporting Proposed Transaction, at 1).

Greenlight Traffic and Distribution Inc.

- "Utilizing the service of a single rail line will open a whole new prospective and bring business opportunities that we can now orrer our current and new customers." (Letter Dated March 24, 2021 in CP-27/KCS-15, Application Volume 3 at 505).
- "For example: An existing customer of Greenlight Trattic and Distribution Inc. requested a shipment be moved from Halifax, NS to Mexico City, MX. It was a huge challenge to move this freight. After many hurdles, we were able to accomplish the task. It would be a huge advantage to have a carrier like CPKCS that is integrated and who could have accomplished this as a single move." (*Id.* at 505).

Hapag-Lloyd, LLC

- "We believe this strengthening of Lazaro Cardenas and thus of the global supply chain is a very likely outcome of the CP-KCS Transaction. For this reason, and the reasons expressed in our earlier letter, we support the CP-KCS Transaction." [Filed with this Reply].

Hardisty Energy Terminal GP Ltd.

- "The efficiencies created by the transaction, including improved cycle times and more reliable service, will enhance the DRUbit by Rail Network value proposition for our joint customers, which will allow us to commercialize the increased volumes needed to justify further capacity investment. Put simply, we believe that our goal of additive Dilbit to DRUbit shipment transition is substantially more likely to increase in a world with CPKC than in one without." [Filed with this Reply].

JEI, Inc.

- "Currently our customers ship some via truck into Mexico, now with this merger the rates should be a little better where our customer will choose rail over trucking." (Letter Dated March 28, 2021 in CP-27/KCS-15, Application Volume 3 at 570).

J.W. Scott Farm

- "Only one Class I railroad in ND has single-line access to grain markets in Texas and Gulf of Mexico, the BNSF. The other Class I, the Canadian Pacific, does not, and this

inhibits competition in our local market. Despite the current imbalance, the CP-KC merger has the possibility of bringing more competition into our local marketplaces, to the benefit of ND farmers such as myself." (Letter Dated April 30, 2021, J.W. Scott Farm Submission of Statement Supporting Proposed Transaction, at 1).

Kruger

- "Historically, CP has provided us with good service, but its market reach is limited today, as its lines only go as far south as Kansas City. CP must interline with other railroads to reach destinations beyond Kansas City that we ship to (or that could expand the markets we serve effectively). And we know from experience (both our own, and that of our competitors who have single-line rail options at their origins) that single-line rail service options are far superior." (Letter Filed March 30, 2021, in CP-27/KCS-15, Application Volume 3 at 616).
- "At the same time, the entirely complementary nature of CP's and KCS' networks - connecting only at Kansas City and not overlapping anywhere - means that the transaction will not have any adverse effects on competition. It will only make these carriers a better alternative relative to the other options that already exist, since CPKC will continue to interchange with all of their other existing interline partners." (*Id.* at 616).

Midwest Bulk Transload

- "CPKC's new service offerings will improve transit times and reliability, which will reduce our equipment costs and improve our efficiency by ship containers of feed to Mexico whereby this service has never been offered in the past." (Letter Dated March 29, 2021 in CP-27/KCS-15, Application Volume 3 at 686).

NEW Cooperative Inc.

- "[W]e support the CP-KCS combination. We believe that the combined CPKC network will provide substantial benefits to our 8,000 member owners. We believe that those benefits will enable us to make an investment that we otherwise could not. I write today to advise the STB of a potential investment that is contingent on the approval of the CP-KCS combination. This combination provides us the possibility to build a greenfield grain elevator to ship corn and soybeans in Northern Iowa, to capitalize on new, efficient single line routes on CP-KC from Iowa to grain destinations on the KCS, including Mexico. We estimate that this project will cost $30,000,000." [Filed with this Reply].

Ray-Carroll County Grain Growers, Inc.

- "We are pleased to support the CP-KC transaction and believe that it opens up more possibilities for us. In fact, we anticipate making new investments in this corridor in the

foreseeable future. If this transaction is approved it will open new business opportunities for us." [Filed with this Reply].

Richardson International Ltd.

- "Richardson has reviewed the CP-KC Transaction and believes it opens new markets to our company. More specifically, we expect to be able to access new markets for our grain handling facilities located in North Dakota to ship grain to the Gul area as well as Mexico." [Filed with this Reply].

Rocanda

- "CP has provided us with good service, but its market reach is limited today, as its lines only go as far south as Kansas City. CP must interline with other railroads to reach destinations beyond Kansas City that we ship to (or that could expand the markets we serve effectively). Rocanda has manufacturing facilities in Texas, Wyoming, and Alberta, and has suppliers based across Canada, USA, and Mexico. We know from experience (both our own, and that of our competitors who have single-line rail options at their origins) that single-line rail service options are far superior. The greater access that we have to single-line rail options, the more likely it is that we can expand operations and work more seamlessly with our suppliers." (Letter Filed March 30, 2021, in CP-27/KCS-15, Application Volume 3 at 841).
- "In addition, we have had very negative experiences with rail lines where lots of switches occur between different rail companies. Lines that went from UP to BNSF to CP have been notorious for us in causing delays, and even lost cars. We have never experienced any of these issues on singleline routes, and intend to stick with single-lane routes whenever possible. A combined CPKC will assist in this goal." (*Id.* 3 at 841).

Simpson Seeds

- "Currently, the Mexican Market imports approximately 40-60,000 MT of lentils annually over the rail. As it stands, while CP does provide us with good service, their market reach has been limited as any service farther south than Kansas City must connect with other railroads. With this merger, we expect CP's rates to be more competitive into Mexico due to the elimination of interchange fees." (Letter Dated April 15, 2021 in CP-27/KCS-15, Application Volume 3 at 871).
- "For Simpson Seeds to access CNs' lower rates, we have to load product in trucks, ship it into North Dakota or Montana, and trans-load it onto the BNSF, resulting in more low prices paid to our farmers. Additionally, the environmental impact of running trucks three trucks on 14 hours round trip to load a single hopper car is not sustainable." (*Id.* at 871).
- "CP's ability to directly access the Mexican market would have an immediate positive impact on both our facilities and the farmers we represent. Our exports to Mexico has dropped from 12,000 he current rates. Based on today's price for lentils, the drop in exports represents millions in lost revenue by us and the farmers we represent." (*Id.* at 872).

SPARX Logistics

- "The CP-KCS Transaction promises to substantially increase the value of routings through the port Lazaro Cardenas by extending efficient, single-line intermodal service to Chicago, New York, Toronto, and other important destinations." [Filed with this Reply].

Sun Transportation Systems

- "Sun Transportation Systems ships freight of all kind (FAK) via intermodal containers between Toronto, Montreal, Calgary, Vancouver, Chicago, Los Angeles and Mexico. We currently interchange between CP, BNSF and KCS for freight to travel between Canada and Mexico. A single rail service would remove our cost of interchanging over the road between 3 different railroads. Service would be improved because containers would not need to be moved from railcar to chassis and back to railcar. A single rail service would provide much more superior rail service." (Letter Dated March 24, 2021 in CP-27/KCS-15, Application Volume 3 at 913).

Ternium Mexico S.A. de C.V.

- "[W]e expect that the CPKC Transaction will boost the existing rail network and provide new routing and interchange options for rail users, generating competition with other large rail and truck carriers." [Filed with this Reply].

TIMIRON LLC

- "Our business requires single line service and the resulting more affordable freight rates to access southern markets and Mexico." (Letter Dated April 21, 2021, TIMIRON LLC Submission of Statement Supporting Proposed Transaction, at 1).

USD Group LLC

- "We understand that CPKC will support new investment in capacity (longer sidings, etc.) on the CP-KCS North-South route connecting Canada with the Gulf Coast, enabling improved cycle times and reliability and the ability to move more product on the same number of trains, which impacts cost, efficiency, and capacity." [Filed with this Reply].

WTC Group Inc.

- "CP has provided us with excellent service, but its market reach is limited today, as its lines only go as far south as Kansas City. CP must interline with other railroads to reach destinations beyond Kansas City that we receive from or ship to. Right now, the only way we can execute those shipments is to interchange with BNSF, UP or CSX and beyond." (Letter Dated March 29, 2021in CP-27/KCS-15, Application Volume 3 at 1079).

CP-53/KCS-39

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS, OPPOSITION TO RESPONSIVE APPLICATIONS, AND REBUTTAL IN SUPPORT OF THE APPLICATION

VOLUME 2 OF 3

William A. Mullins
BAKER & MILLER PLLC
Suite 3000
1105 S Street NW
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Email: wmullins@bakerandmiller.com
Telephone: (202) 663-7823

Adam J. Godderz
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335
Email: agodderz@kcsouthern.com
Telephone: (816) 983-1387

Counsel for KCS

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

SULLIVAN & CROMWELL LLP
Adam S. Paris
1888 Century Park East, Suite 2100
Los Angeles, California 90067-1725
Email: parisa@sullcrom.com
Samantha F. Hynes
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006-5215
E:mail: hyness@sullcrom.com

Jeffrey J. Ellis
CANADIAN PACIFIC
7550 Ogden Dale Road S.E. Calgary, AB
T2C 4X9 Canada Email: Jeff_Ellis@cpr.ca
Telephone: (888) 333-6370

Counsel for CP

Attorneys for Applicants

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF KEITH CREEL

TABLE OF CONTENTS

I. THE COMMENTS AND RESPONSIVE APPLICATIONS SHOW WHY CPKC IS IN THE PUBLIC'S INTEREST 2

II. APPLICANTS REMAIN COMMITTED TO RESOLVING REASONABLE CONCERNS ABOUT THE IMPACT OF THE TRANSACTION 4

III. CP HAS SUPPORTED, AND WILL CONTINUE TO, SUPPORT METRA 5

IV. THE BOARD SHOULD REJECT CLASS 1'S EFFORTS TO IMPROVE THEIR PRE-TRANSACTION POSITION AT THE EXPENSE OF CPKC AND THE PUBLIC 7

- A. CN's Proposed "Inconsistent' Purchase of CPKC's Springfield/East St. Louis Line 7
- B. UP and BNSF's Coordinated Effort to Re-Write KCS Contract Rights and Have a Veto on CPKC Competition 9
- C. NS's Proposed Re-Writing of Meridian Speedway Contracts 10
- D. CSX's Position in this Proceeding Lacks Merit 11

V. WE ARE COMMITTED TO BEING A GOOD NEIGHBOR TO THE COMMUNITIES WE SERVE 11

VI. WE ARE WORKING DILIGENTLY TO NEGOTIATE IMPLEMENTING AGREEMENTS WITH AFFECTED LABOR ORGANIZATIONS 12

VII. CP AND KCS WILL COME TOGETHER AS TWO WELL OPERATED AND WELL-FUNCTIONING RAILROADS, AND WE ARE EAGER TO MOVE SWIFTLY TO ACHIEVE THE PUBLIC INTEREST BENEFITS THAT THE TRANSACTION OFFERS 13

I. THE COMMENTS AND RESPONSIVE APPLICATIONS SHOW WHY CPKC IS IN THE PUBLIC'S INTEREST

1. I have read with interest the comments and responsive applications submitted regarding our "old rules" merger application, and was struck by how much they confirm and reinforce the ways in which the proposed CP/KCS Transaction would be strongly in the interest of the public and the strength of the U.S. rail network.

2. First and foremost, I was gratified that shippers see the potential for CPKC to deliver better transportation solutions and stronger competition. A handful of individual shippers have voiced specific concerns, which our reply comments address fully. And many shipper associations have used this proceeding – forgetting perhaps that this proceeding is under the old rules – as another occasion to advance their quest for industry-wide regulatory change.

3. But for an industry characterized by shippers alienated and embittered by railroad performance, the lack of any meaningful shipper opposition, to me, speaks volumes. The many hundreds of shippers who have supported the Transaction recognize it for what it is – a once in a lifetime opportunity to make competition stronger *without the need for new regulation*. CPKC will be a catalyst for a more competitive rail industry, with more capacity to serve shipper needs, and a commitment to bring a customer-first mindset to the marketplace.

4. Second, and equally compelling, is the response of the Class 1 railroads. It is as if they have never seen a railroad merger proceeding in which they could not advance their own competitive position at the expense of others. I discuss each of their positions in more detail below, but my key takeaway is this: their desire to impose roadblocks and seek concessions would seem a pretty strong indication that they feel threatened by stronger competition from CPKC. From the beginning, I have been eager to listen to concerns expressed by interested parties, and to address those concerns with reasonable measures that preserve the fundamentals

of the Transaction. But I will not countenance efforts to gut the Transaction by dismembering KCS, granting much-larger railroads rate protections that transfer dollars from CP and KCS directly into the pockets of UP or BNSF, or compelling a grant of contractual rights that these railroads did not negotiate or pay for. Any such conditions would work against the competitiveness of CPKC and harm the public interest, and I ask the Board not to grant them.

5. The bottom line, about which I have spoken often and at length, is that the CP/KCS Transaction will unlock investments in the CP and KCS North-South route network that would otherwise never be possible, strengthening the U.S. rail network from the perspective of its capacity to accommodate future transportation needs, as well as from the perspective of the competitive options available to future rail customers. All of this will provide public interest benefits that could not be achieved in any other way.

6. These benefits could not come at a more important time in the evolution of the North American economy. A combined and strengthened CPKC network will help companies across North America pursue more efficient "nearshoring" options, building a more robust supply chain and lessening their dependence on far-away sources of supply and demand that have contributed to instability we have seen in the recovery from the COVID pandemic. The flurry of other global developments – from energy shocks to the war in Ukraine – show the value of a more capable rail network better able to respond to unpredictable economic shocks. I am confident that CPKC will make an important contribution to a more integrated, de-risked supply chain connecting the United States, Mexico, and Canada, and there is no better time than now to unlock that potential.

II. APPLICANTS REMAIN COMMITTED TO RESOLVING REASONABLE CONCERNS ABOUT THE IMPACT OF THE TRANSACTION

7. CPKC will unambiguously strengthen competition and yield a U.S. rail network more capable of meeting America's transportation needs. This should be an easy case under the Board's public interest standard.

8. Because the fundamentals of the Transaction line up so nicely with the public interest, we have not been bashful about making commitments that provide comfort and assurance to interested stakeholders that we will deliver what we have promised. We do not make commitments to overcome problems that the Transaction will create, but to make clear that we will not be causing any public interest harms.

9. From the outset, I have personally committed that CPKC will be a good neighbor to the communities where we operate, and we have followed through on that promise as I discuss below.

10. From the outset, I have personally committed that CPKC will not eliminate any existing competitive options that shippers might prefer to new CPKC offerings. This means that we will be keeping affected gateways open on commercially reasonable terms, as Mr. Brooks explains in more detail. It does not, however, mean that we will be "protecting" UP, BNSF, or any other Class 1 railroad from having to compete like they never have been required to before to stay relevant in the lanes that CPKC will serve.

11. From the outset, I have voiced CP's commitment to supporting passenger rail service on the lines where we operate. We are Amtrak's consistent "A Student," and I am proud of Amtrak's support for the CP/KCS Transaction. I would be delighted if Metra (the Chicago-area commuter agency) saw things the same way. The Transaction will not get in the way of our intention to be a good partner to Metra on the lines we share.

12. Our reply comments outline a wide array of other reasonable undertakings we have made to interested stakeholders – to rail customers interested in our tariffs governing certain hazardous commodities, to smaller railroads interested in preserving interchange options, and to communities interested in help with measures to address increased freight train volumes. We have been reasonable with all comers, and we look forward to continuing the dialogue with others.

III. CP HAS SUPPORTED, AND WILL CONTINUE TO, SUPPORT METRA

13. CP prides itself on good relationships with passenger rail. Our agreement with Amtrak, which was filed at the Board in February, is indicative. It is built on the trust we have earned as Amtrak's number one host railroad.

14. CP has a long relationship with Metra, and we are disappointed that Metra's Comments reveal that we need to work harder to build a relationship of trust with that commuter agency. I am determined to do so.

15. Our relationship with Metra is founded on binding contractual rights and obligations – flowing from Metra to us and from us to Metra. Those contracts ensure that we have the freedom to operate freight trains – and to grow along with the competitive potential of our network. They also give Metra assurances that their trains will not be interfered with during peak windows and that CP's dispatching will support Metra's operations throughout the day. Those rights and obligations will not be affected by the Transaction. We believe we have honored our obligations to Metra. In particular, as Mr. Walker explains in more detail, we have always tried to discharge our responsibility for dispatching the lines we share with Metra in a responsible manner that gives Metra commuter trains the priority they deserve.

16. The impact of the Transaction is limited and will not harm Metra or its ridership base. The bottom line is that while we will increase the number of freight trains on just one portion of one of the two lines Metra shares with CP, the Transaction will not hurt Metra's operations, as Mr. Walker and Mr. Elphick explain in detail. I have personally communicated with Metra's President James Derwinsky, and CP personnel have communicated extensively with their counterparts at Metra. Because we are so sure that our Transaction will not interfere with Metra's passenger service, we are willing to provide concrete commitments that protect Metra's operations over and above what our contracts require, including:

- Not forcing CPKC freight trains operating between Kansas City and St. Paul. MN over the lines we share with Metra (except in emergency detour situations);
- Not objecting to Metra's resumption of its full pre-COVID schedules on Metra's MD-W and MD-N lines;
- Committing to work collaboratively with Metra on improved real-time communications about dispatching decisions that might have an impact on Metra's scheduled trains;
- Supporting collaborative assessments of proposed Metra operational changes outside peak windows (when Metra needs our consent to add trains); and
- Committing to an escalation process aimed at avoiding or resolving disputes when Metra perceives that we have created performance issues for their passenger operations.

17. Metra's analysis of the Transaction, unfortunately, is not grounded in reality, and the conditions it requests would fundamentally alter core provisions of the contracts between CP and Metra and threaten our ability to use Metra's MD-W line for competitive freight service. Most importantly, responsibility for dispatching needs to stay where the contracts place it – with CP. The lines we share with Metra are just a small slice of the network over which CP's freight trains operate, and balkanized dispatching would ensure that overall operational coordination was made worse, not better – to the disadvantage of CP's freight customers as well as Metra's

passengers. I have personally redoubled CP's commitment to do right by Metra when we dispatch their trains, but shifting dispatching away from CP would be overreaching and counterproductive.

IV. THE BOARD SHOULD REJECT CLASS 1'S EFFORTS TO IMPROVE THEIR PRE-TRANSACTION POSITION AT THE EXPENSE OF CPKC AND THE PUBLIC

18. Metra's comments appear to flow out of a sincere misunderstanding of the effects of the Transaction. The comments (and responsive applications) of the Class 1 railroads, on the other hand, appear to be based on very good understanding of the new competition they will face if the Transaction is approved. Applicants have been open to reasonable accommodation of the concerns the Class 1s have articulated, but each of them appears determined to extract its own pound of flesh from CPKC, or try to handicap CPKC's future competitiveness. None of these conditions should be seriously considered, much less granted.

A. CN's Proposed "Inconsistent' Purchase of CPKC's Springfield/East St. Louis Line

19. I understand why CN might be unhappy that CP prevailed in our effort to acquire KCS. CN's effort to force a "divestiture" of KCS's Kansas City-Springfield/St. Louis line strikes me as a "sour grapes" response aimed at undermining CPKC's future while simultaneously achieving a partial acquisition of KCS that CN could not accomplish in the marketplace. It would dismember KCS in a way that would not serve the public interest.

20. I understand that KCS witnesses are addressing whether the KCS-Springfield-Chicago route was ever a real alternative for rail shippers. During my time in CN's operating department, I never thought of CN's connection with KCS at Springfield as creating a through route for any traffic, much less one that was competitive with the UP and BNSF single-line routes between these cities, or with NS's single-line route between Kansas City and Detroit.

21. What I know is that the premise of CN's Responsive Application – that CPKC will downgrade this line, or stop investing in it – is just not true. We value the shippers on this line, as well as the access the line provides to the St. Louis gateway, where we hope to grow our traffic with CSX and other interline partners. In fact, the Transaction will not only preserve the single-line services that on-line shippers have today (to KCS destinations in Mexico, for example), but will create new opportunities for better single-line services connecting those shippers and receivers with CP's network north of Kansas City.

22. CN makes a big deal about the huge potential for investments in the line to support new intermodal services that would take trucks off the highways. I love the idea of converting truck traffic to rail traffic, and CPKC will enable significant progress in that regard. But I am skeptical that CN's forced sale proposal is really based on developing traffic opportunities that CPKC could not exploit. I suspect that CN is instead looking to hurt CPKC and poach some of the traffic opportunities that CPKC would otherwise pursue in the Kansas City-Chicago lane. Were CN successful, it would surely make it more difficult for CPKC to develop the traffic density necessary to support the planned investments in new capacity and the new, more-competitive intermodal and other options that CPKC plans.

23. However, if I am wrong, and a CPKC-Springfield-CN corridor would uniquely unlock the kind of potential that CN describes, I do not see a reason why the CP/KCS Transaction would get in the way of the potential to invest in this route. If CPKC-CN cooperation were necessary to unlock a billion dollars of new business, we would be there with enthusiasm. Indeed, I have spoken directly with CN's new CEO to express a willingness to consider investing along with CN in building out this corridor were it ever a reality that doing so could shift more trucks from our Nation's highways onto the rail network. A divestiture to CN

(or anyone else) is not necessary to ensure that the potential of this route – however speculative – is fully realized.

B. UP and BNSF's Coordinated Effort to Re-Write KCS Contract Rights and Have a Veto on CPKC Competition

24. The demands of UP and BNSF are also extreme. CPKC will not prevent shippers from choosing KCSM-UP or KCSM-KCS-BNSF routes via the Laredo gateway. John Brooks explains in detail how our own incentives – backed up by our commitments – will ensure that this is true. UP and BNSF go much further, however, demanding conditions that would give them rate protections that do not exist today and that would affirmatively handicap CPKC's new, stronger competition against UP and BNSF. If every aggressive single-line rate offer CPKC made to attract traffic to its new single-line routes required that we also give away revenues to UP or BNSF, that would be a strong disincentive to compete as hard as we intend to. I know shippers would not want that, and the Board should not want that outcome either.

25. Potentially even more problematic is UP's and BNSF's coordinated demand to re-write KCS's trackage rights over UP lines in Texas to give UP or BNSF the right to veto any new, competitive CPKC traffic unless and until they both are satisfied that CPKC has not only agreed to add new capacity but has installed and paid for that capacity. In a word, this is "ridiculous." We believe these lines have sufficient capacity – if operated efficiently – to support all of the trains CPKC hopes to add as we implement the Transaction over time. If capacity turns out to be required, CPKC will be supportive and pay its fair share. I understand that the trackage rights agreements giving KCS rights over these lines require that UP add sufficient infrastructure to support *all of the traffic* of *all of the carriers* that use the lines. And each of them is required to pay its appropriate share of the cost of that capacity.

26. We have no qualms about committing to abide by this process. But there is absolutely no justification for a condition that would give UP and BNSF the right to veto CPKC's new competition until CPKC paid for whatever UP and BNSF might insist upon. That kind of one-sided, blank-check condition would put the foxes in charge of the henhouse.

27. The premise of UP's and BNSF's proposal is that CPKC will force through Houston more traffic than the infrastructure will support. We think the infrastructure will be sufficient to accommodate the additional trains that we hope CPKC will attract. But the notion that we will attract traffic even if we lack the ability to support good and reliable service is not realistic. CPKC will have every incentive to ensure that we can provide reliable service through Houston, and if we cannot then we will not succeed in winning the traffic that we hope to attract,

C. NS's Proposed Re-Writing of Meridian Speedway Contracts

28. The Transaction will not harm NS. If anything, it will create new opportunities for traffic growth over the Meridian Speedway lines in which KCS and NS are joint investors. And contrary to NS's concerns, CPKC's anticipated operations will not degrade the service levels for intermodal traffic moving between Shreveport and Meridian. CPKC would shoot itself in the foot if we did anything to drive this traffic back onto the highways.

29. Given the lack of harm to NS, it should not come as a surprise that I reject NS's demands to extract financial concessions as the price of its support for the CP/KCS Transaction. NS's proposed "springing trackage rights" between Dallas and Shreveport are yet another example of overreach by the Class 1s. NS did not negotiate rights between Shreveport and Dallas, much less a "major service failure" provision that would convey such rights. If NS felt it needed trackage rights and emergency provisions covering KCS's line between Shreveport and Dallas, it should have negotiated those rights in 2006 when it entered into the MSLLC venture.

Had NS done so, of course, it would have had to pay for the rights it desires, rather than seeking them for free though a misuse of the Board's merger review process.

D. CSX's Position in this Proceeding Lacks Merit

30. The Transaction will not hurt CSX at all. In fact, CPKC is looking to cooperate more closely with CSX to reap the full potential of a CPKC network. CSX stands to benefit from CPKC's improved capabilities of a combined network and our interest in growing traffic to/from the East via gateways served by CSX, particularly East St. Louis and (to the extent consistent with our contractual obligations) Meridian, MS. In this context, CSX's requests for conditions aimed at protecting itself or improving its contractual position in New Orleans are unwarranted. And CSX's apparent desire to undo – or fundamentally rewrite – the terms of the Meridian Speedway joint venture between KCS and NS (as to which CP will merely step into the shoes of KCS) is unrelated to the CP/KCS Transaction and should be rejected.

V. WE ARE COMMITTED TO BEING A GOOD NEIGHBOR TO THE COMMUNITIES WE SERVE

31. As I said at the outset of this proceeding, CP is committed to being a good neighbor to the communities we serve. We have followed through on that promise, communicating openly with those communities and engaging in good faith negotiations to address the potential impacts of increased rail traffic.

32. That engagement has been productive, at least where the communities have been interested in addressing the issues in good faith. CP has entered into agreements addressing environmental concerns with several communities, and we remain actively engaged with other communities between Laredo and Chicago where the Transaction is anticipated to increase freight traffic above applicable environmental thresholds.

33. Unfortunately, not all of the communities on this route are interested in constructive solutions. Some would rather derail the Transaction entirely or force CPKC to send

its freight through other communities instead of their own. Applicants understand that their Transaction must serve the public interest, and it does. The communities that would seek to hold the Transaction hostage with demands for "over $9 billion" in new investments – or a reroute of traffic on to highways or over longer rail routes through other communities – do not have the public's interest at heart. They want improvements to the U.S. rail network anywhere other than their own back yard, and their tactics should not be rewarded. CPKC will continue to be a good neighbor to the citizens of those communities, as a responsible operator in their backyards. But the politicians that seek to block the Transaction should not be allowed to stand in the way of the public's interest in an improved, more competitive freight rail network.

VI. WE ARE WORKING DILIGENTLY TO NEGOTIATE IMPLEMENTING AGREEMENTS WITH AFFECTED LABOR ORGANIZATIONS

34. The employees of CP and KCS will be indispensable to the success of the Transaction and the future of CPKC. Since last fall CP and KCS have been working closely with the labor organizations representing the employees whose jobs may be affected by the Transaction, with the aim of negotiating agreements that bring together these two valued workforces. Throughout this process we have worked hard to build trust – particularly for the KCS employees who will be new to the CP family. Our goal is to build a strong foundation for CPKC's future by fostering a safe and productive workforce.

35. I am happy to report that we have made great progress already. We are actively engaged with all of the labor organizations representing the potentially affected employees of CP's Soo Line and DM&E affiliates and KCS's KCSR affiliate, with the aim of having such agreements in place so that CP and KCS can integrate their networks under common control.

36. As an indication of our progress to date, the Brotherhood of Locomotive Engineers and Trainmen ("BLET"), representing DM&E train and engine employees, has

ratified by a wide margin a new collective bargaining agreement that will assist in accommodating the consolidation with KCS. Similarly CP (through DM&E) and KCSR have been in discussions with SMART-TD, the labor organization representing KCSR conductors who may be affected by changes in operations in the "Consolidated Territory" should the STB approve CP's application to control KCS. These discussions have resulted in a new collective bargaining agreement, subject to ratification, for KCSR conductors represented by SMART-TD in the Consolidated Territory. We are optimistic this new agreement will be approved; it will further assist in satisfying all requirements of the *New York Dock* conditions to the extent they may apply the contemplated operational changes.

VII. CP AND KCS WILL COME TOGETHER AS TWO WELL OPERATED AND WELL-FUNCTIONING RAILROADS, AND WE ARE EAGER TO MOVE SWIFTLY TO ACHIEVE THE PUBLIC INTEREST BENEFITS THAT THE TRANSACTION OFFERS

37. It is impossible to ignore the challenges that have confronted the North American rail industry over the past several years, ranging from the traffic collapse early in the COVID pandemic, the dramatic changes in labor markets during and coming out of that pandemic, and the strong rebound in freight traffic volumes. The challenges and disruptions those events have brought to railroading have been much noted by the shipper community and the Board.

38. I am gratified that throughout this challenging period, both CP and KCS have fared extraordinarily well. We have done a good job retaining the human talent that is necessary to run our railroads efficiently, and we have kept pace with burgeoning demand by putting in place the resources needed to handle our customers' shipments efficiently.

39. As a result of our solid operational performance, coupled with the hard work that we have been engaged in to plan for post-control integration (which other witnesses describe in their statements), CP and KCS will come into the Transaction in terrific shape to move quickly to begin unlocking the benefits that the Transaction promises. We will move aggressively to

compete harder against our Class 1 rivals, and we redouble our efforts to bring our customers – and new customers – transportation services that better meet their needs.

40. I have already addressed some of the scare tactics of larger Class 1s that suggest that CPKC's competitive success will bring rail traffic increases to some parts of the CPKC network that will overtax available capacity. As Mr. Elphick explains in detail, these assertions are false. CP's success implementing PSR was achieved with a constant eye towards planning and up-front investment that ensures that we do not force operational change – whether longer trains, more traffic, or anything else – onto infrastructure that is not capable of handling it. Some of the stumbles of the other Class 1s show that they may not have taken these lessons to heart in their rush to implement PSR. I can assure the Board that CPKC will be laser focused on the reliable operations and supporting investments upon which our future growth and competitive success will depend. We will not allow our growth to overtake the capabilities of our network.

41. From the day in 2020 when I read about the interest of private equity investors in acquiring KCS – with such gravely uncertain consequences for CP and the U.S. rail network – to now, has been a long and tortuous road. I am proud that the whole CP team has persevered, with our eyes firmly fixed on the transformative potential of this Transaction for both CP and the industry. Now so close to the finish line, I can speak for the entire team in saying that we are eager to put our planning to work and start delivering on the promise of CPKC. I urge the Board to let us do exactly that as quickly as possible so that the public need not wait any longer than necessary to receive those benefits.

VERIFICATION

I, Keith Creel, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this ___ day of July, 2022.

Keith Creel

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF PATRICK J. OTTENSMEYER

TABLE OF CONTENTS

I. OUR COMPETITORS SEEK CONDITIONS ON THIS TRANSACTION TO ADVANTAGE THEMSELVES AND TO DAMPEN THE COMPETITION THAT THE COMBINED CPKC WILL BRING 2

A. CANADIAN NATIONAL RAILWAY COMPANY (CN) 2

B. CSX TRANSPORTATION, INC. (CSX) 6

C. NORFOLK SOUTHERN RAILWAY COMPANY (NS) 9

D. BNSF RAILWAY COMPANY (BNSF)
UNION PACIFIC RAILROAD COMPANY (UP) 10

II. CPKC WILL BE A NEW, VIGOROUS COMPETITIVE FORCE AGAINST THE OTHER CLASS 1'S 12

1. My name is Patrick J. Ottensmeyer. I am President and Chief Executive Officer of Kansas City Southern. My statement included in the merger application (Application Volume 1, pages 187-210) contains a brief synopsis of my background.

2. The purpose of this statement is to briefly address the condition requests put forward to the Surface Transportation Board (STB or Board) in this proceeding by our various major competitors and why those are merely attempts by those carriers to advantage themselves and to hobble the competition that they know that the new CPKC will bring. I will also recap why this merger is strongly pro-competitive. While I will only touch briefly on each of these topics, statements by other KCS personnel submitted along with this one, including those by Oscar Del Cueto, Mike Naatz, John Orr and Steve Simmons, provide greater detail, and I endorse those statements as well.

I. Our Competitors Seek Conditions on This Transaction to Advantage Themselves and to Dampen the Competition That the Combined CPKC Will Bring

3. The Class I competitors of Canadian Pacific Railway Company (CP) and The Kansas City Southern Railway Company (KCSR) each seek some form of change to this merger proposal, either in the form of a responsive application or in terms of proposed conditions. These proposals are all merely opportunistic attempts by CP's and KCS's competitors to gain something for their private benefit while dampening competition that will benefit the public.

A. Canadian National Railway Company (CN)

4. CN's responsive application is physically the most far-reaching proposal by our competitors. The basic pieces of CN's application are a forced sale of KCSR's line between Cockrell, IL[1] and Kansas City, MO, including branches at Jacksonville, IL and Mexico, MO;

[1] Cockrell is southwest of Springfield, and is several miles over track of UP and NS from Springfield.

acquisition of KCSR's line from Roodhouse to Godfrey, IL, and KCSR's one-half ownership of the paired track between Godfrey and East St. Louis, IL (plus attendant yards); acquisition of KCSR's subsidiary Gateway Eastern Railway Company (GWER) and its ownership of several important tracks in the East St. Louis area; one-half interest in KCSR's International Freight Gateway yard about 20 miles south of Kansas City; an interest in the Kansas City Terminal Railway equal to those currently held by KCSR and CP; and access over various connections between these tracks.

5. CN's argument for the proposed massive forced sale is that the Kansas City-to-Cockrell line is a competing route to CP's current route from Kansas City to Chicago, and that CP should not control both of those routes. History contradicts this competing route theory.

6. As historical background, Illinois Central Gulf Railroad Company (ICG; now Illinois Central Railroad Company -- ICRR -- the CN-proposed purchaser) once owned the Cockrell-Roodhouse-Kansas City line and most of the Roodhouse-East St. Louis line[2] that CN's application seeks to acquire. In April 1987, ICG sold those lines and some others to Chicago, Missouri & Western Railway Company (CM&W).

7. Less than a year later, CM&W was in bankruptcy, and in late 1989/early 1990, CMW Acquisition Corp., later renamed Gateway Western Railway Company (GWWR), acquired the Cockrell-to-Kansas City and Roodhouse-to-Godfrey lines, along with a one-half interest in the Godfrey-to-East St. Louis line. Anecdotally, I have heard that GWWR had both

[2] The portion of the paired track owned by Gateway Eastern Railway Company (GWER) between Wann and WR Tower was owned by Conrail when ICG sold the surrounding track to CM&W. GWER subsequently acquired from Conrail the Wann-WR Tower track, along with track connecting to Conrail's (now CSX's) Rose Lake Yard in 1994 and, after protracted legal battles, built the Jug Handle track to connect the paired track to Rose Lake Yard.

operational challenges due to track conditions and financial challenges due to lack of business until it solidified its relationship with, and later was acquired by and merged into, KCSR.

8. This historical background is to say that if the Kansas City-to-Cockrell route was so competitive with CP's Kansas City-to-Chicago route as CN now claims, I doubt that ICG would have sold the line to CM&W in the first place.

9. CN's attitude over the years in response to KCSR's efforts to develop business with CN over Cockrell, also belies CN's current claim of the competitiveness of Kansas City-to-Cockrell as an alternate Chicago routing. As laid out in greater detail in Mike Naatz's individual Reply Verified Statement (RVS) in this filing, CN has consistently lacked interest in cooperating to move traffic over Cockrell. Indeed, Mike's statement includes 2019 e-mails from a CN representative proposing to close the Cockrell interchange. Again, this history does not indicate that CN sees Cockrell-to-Kansas City as part of a realistic alternative route between Kansas City and Chicago.

10. The Cockrell-to-Kansas City line would, however, be a much more lucrative opportunity now for ICRR than the line was for CM&W when ICG sold it to them years ago, but this is only because of considerable investments in the line under KCS ownership. Due to substantial work and investment by both KCSR and its customers, particularly in the past ten to fifteen years, KCSR's customers -- especially grain customers -- have grown their businesses on the Cockrell-Kansas City line tremendously. Indeed, Bartlett Grain Company, L.P. (Bartlett), KCSR's largest customer, built an entirely new elevator on KCSR at Jacksonville, IL about 10 years ago, and has been shipping huge volumes from Jacksonville to Bartlett's customers ever since. Bartlett has filed its statement in this proceeding, supporting the CP-KCS merger and strongly opposing CN's responsive application.

11. Bartlett is not alone in having prospered from working with KCSR to develop business on the Cockrell-Kansas City line. KCSR and its customers such as River Valley MFA, Ray-Carroll Grain, Central Missouri Agriservice, MFA, Ray-Carroll County Grain Growers, ADM Soybean Processing, Heart of Missouri MFA and Poet Biorefining all have benefitted from working together to grow ag business on the Cockrell-Kansas City line. There's no doubt that the Cockrell-Kansas City line is a much better opportunity now than the one that ICG sold to the ill-fated CM&W.

12. CN's application would reduce competition in the St. Louis area by eliminating KCSR direct access there while giving CN a second route to East St. Louis. CN already accesses the East St. Louis area from the south, through Belleville, and connects to KCSR. While CN proposes to provide CPKC haulage to East St. Louis if CN's responsive application is granted, I am skeptical that CN would eagerly provide CPKC quality haulage that would compete with CN's own service. This less robust service resulting from CN's responsive application would reduce competition in the East St. Louis/St. Louis market. Essentially, CN's responsive application would do to the East St. Louis/St. Louis market what CN is complaining that the CP-KCS merger would do to the Chicago-Kansas City market -- put two different routes between the same points in the hands of the same company, but in the case of a CN divestiture that loss would be real rather than imagined.

13. The history of the Cockrell-Kansas City line belies CN's now-claimed belief in the line as an alternate Kansas City-Chicago route. CN has never worked seriously with KCSR in the past to develop such a potential, so why would that supposed potential be apparent to CN only now? CN might say the potential is apparent because if CN's responsive application were granted, Chicago to Kansas City via Cockrell would be a single carrier route. But if that's the

case, what does that say about CN's offer of haulage for CPKC, a service that would involve two carriers? Clearly CN's application calls into question CN's own assertion that KCSR could maintain access to KCSR's major customers on the line that was adequate for KCSR and its customers to compete.

14. The KCS "single line" option from the Cockrell-Kansas City line to destinations in Mexico has been critical to opening Mexican markets to midwestern U.S. corn producers. That market would be jeopardized by CN's proposed forced sale, subjecting current KCS shippers to pricing of CN favoring its long-haul markets or pricing from UP and BNSF from Kansas City favoring those carriers' longer haul West Coast options. Losing quality single-line access to Mexican markets would be highly disruptive to the customers on the Cockrell-Kansas City line who depend on that market, which is why those customers, such as Bartlett, oppose CN's application.

15. The Board should deny CN's responsive application.

B. CSX Transportation, Inc. (CSX)

16. CSX's pleading contains several asks. Some, such as keeping gateways open on commercially reasonable terms, have already been dealt with in Applicants' commitments in this proceeding.

17. Another -- the request to "require CPKC to provide shippers with sufficient information about CPKC's pricing and service plans for movements to and from points in Mexico served directly or indirectly by KCSM to, from, or through the U.S." – is convoluted, unclear, and therefore difficult to respond to. Obviously it will be in CPKC's interest to make its rates and services known to potential shippers. But to the extent that CSX is asking the Board to place requirements on KCSM -- a Mexican railroad that is regulated by Mexican authorities under Mexican law – I would respectfully suggest that the Board seriously consider the Ottensmeyer R.V.S. at 6

Applicants' legal presentation about the statutory and prudential limits about reaching into another country to regulate a company there.

18. With respect to CSX's request that the Board protect CSX's ability to interchange traffic in East St. Louis destined for the Kansas City market, I would suggest that the best way for the Board to do that would be to deny CN's responsive application so CPKC retains direct access to East St. Louis.

19. Further, I would say that CSX misinterprets the Applicants' filings as indicating a downgrade in the Kansas City-East St. Louis line. Given the many valuable customers on that line as I discussed above, downgrading service is not what is anticipated. CSX's projection of CPKC downgrading service on the line that serves KCS's single largest cross-border grain origin is a completely baseless claim.

20. CSX's request that the Board lock CPKC into paying interchange costs for shipments moving both to and from CSX in New Orleans should be denied. This request is completely unrelated to any effect of the CP-KCS merger.

21. In late 2020/early 2021, the New Orleans Public Belt, CSX and KCSR renegotiated agreements covering handling of the CSX-KCSR interchange in New Orleans. The agreement between CSX and KCSR arising from those negotiations allows either party to terminate the agreement on 30-days' notice. Information available to me indicates that the parties knowingly agreed to that provision.

22. CSX offers no reason for the Board to accept CSX's bait and switch on this issue; that is, the bait and switch of CSX knowingly agreeing in 2021 to the mutual right to terminate, and then in 2022 asking the Board to cut that part out of the agreement. The agreement was the product of tough negotiation and each party entered the agreement based on the total effect of all

of its parts. CSX should not now be allowed a unilateral right to jettison one of those parts while keeping the rest.

23. My high-level understanding of the Board's decisions in the past few years about which interchanging party controls the terms of interchange is that the party receiving interchange has a greater degree of control about how interchange occurs than the party delivering the interchange. CSX's ask on this issue seems to go against those Board decisions by giving CSX a veto to any change in the interchange in either direction. The Board should deny that ask.

24. The Board should also deny CSX's asks to abrogate the MSLLC agreements or to require CPKC to interchange with CSX at Meridian, MS. First, CSX's requests seem to be much too late. The Board exempted the MSLLC transaction from the Board's application procedures in 2006. If CSX objected to the transaction, it should have made its case then and in the docket containing the full information supporting the Board's exemption decision. Now that investments have been made in reliance on the Board's exemption, it would be unjust to try to unwind the transaction somehow. CSX may have a right to try to get the STB to reconsider its 2006 exemption, but it seems that request belongs in the exemption proceeding, not here.

25. CSX's request that CPKC be required to interchange with CSX at Meridian is perplexing. CSX does not serve Meridian; indeed, it probably does not have track within 100 miles of Meridian. That makes direct interchange impossible. {{[redacted]}}

[redacted] }} Accordingly, interchange with CSX can occur, just not in the fashion CSX asks.

C. Norfolk Southern Railway Company (NS)

26. NS's ask is that the Board grant NS contingent trackage rights on KCSR's track between the end of MSLLC's ownership and KCSR's intermodal yard at Wylie, Texas. NS argues that because it has a year-long option to acquire the Wylie Intermodal Terminal beginning on the 18th anniversary of the closing under the MSLLC agreements, the Board should grant NS contingent trackage rights over about 200 miles of KCSR track like NS has over MSLLC's track.

27. For several reasons, the Board should reject NS's request. First, the MSLLC agreements are voluminous and, as stated in Steve Simmons' RVS at paragraph 69 in this filing, were negotiated over a several-month period. Given all of that, the parties' failure to provide NS contingent trackage rights on KCSR track while providing such rights on MSLLC track very likely was a considered and deliberate decision.

28. As NS says in its filing, it acquired contingent trackage rights on MSLLC to protect the investment NS made to increase the capacity of that line. By contrast, NS did not invest in, and is not offering to invest in, KCSR's Wylie-Shreveport track. This is particularly important because if a "Major Service Standard Failure"[3] occurred, triggering NS's proposed trackage rights, NS's operating its own trains, in addition to CPKC's, between Wylie and Shreveport would worsen congestion between Wylie and Shreveport, perpetuating the service

[3] As defined in Appendix B to the Norfolk Southern Railway Company – Meridian Speedway LLC Joint Use Agreement.

failure. NS should not be able to "have its cake and eat it, too" – not investing in capacity, but gaining additional rights it did not negotiate.

29. There are other problems as well with NS's proposal. As explained in Steve Simmons' accompanying RVS at paragraphs 62 - 63, NS proposes trackage rights for a wider array of intermodal traffic than KCS and NS agreed to in the Dallas Terminal Marketing Agreement and the Western Haulage Agreement.

30. Also, again as explained by Steve Simmons' RVS, at paragraphs 64 - 68, NS's proposed trackage rights fee would transfer {{[redacted]} from CPKC to NS. Again, this contradicts the carefully-constructed, NS-authored Dallas Terminal Marketing Agreement, which says that the haulage KCSR is required to provide NS {{[redacted]}}.

31. In short, NS is requesting that it be given trackage rights equivalent to those it paid for as part of its rights on MSLLC, but without paying for them. The rights requested would contradict the provisions of the Dallas Terminal Marketing Agreement. NS's request should be denied.

D. BNSF Railway Company (BNSF)Union Pacific Railroad Company (UP)

32. Finally, much of what has been said above applies to the asks by BNSF and UP. As with CSX's asks, the Board should not attempt to reach across the border to regulate a railroad in Mexico. Mexican shippers or receivers are on one end or the other of each cross-border shipment, and the Mexican government has an interest in protecting them and, as Oscar Del Cueto explains, has the regulatory tools to do so. BNSF's request for contingent trackage right is, like NS's, unrelated to any effect of this Transaction, and is unnecessary.

33. UP's and BNSF's requests that CPKC be required to fund agreed upon capacity improvements on the Robstown-Beaumont trackage rights lines as a prerequisite to competing for additional traffic over that route is an obvious attempt to stifle competition from CPKC. First, as discussed in John Orr's accompanying individual RVS at paragraphs 16 - 26, UP particularly has substantially changed its Houston operating practices in recent months, especially around Englewood Yard. Those changes went forward while work at Englewood Yard was in process. UP did not delay its own traffic changes until its infrastructure was completed. There is no reason that CPKC should do so.

34. Second, as shown by the combined testimony of Ray Elphick and John Orr (*see* Elphick-Orr RVS at 19-25), adequate infrastructure capacity exists on the trackage rights lines, but even if it did not, the trackage rights agreements themselves provide how infrastructure additions are to be funded if additional infrastructure is needed. This situation is not like the UP-SP merger where initially there were no trackage agreements like those accompanying Steve Simmons' RVS (Simmons' Exhibits 2 – 4) to set standards for how to pay for infrastructure needs. The fact that BNSF and UP agreed between themselves that UP would fund certain merger-related capital projects – such as connections between UP and SP's largely parallel lines -- was part of UP's undertaking to BNSF, through the BNSF settlement, and to the Board that UP would pay for the infrastructure improvements that UP said that it needed. That arrangement is not, as BNSF suggests, a necessary part of every merger. While CPKC will pay for capital projects that Applicants' filings show, the trackage rights agreements provide the means to fill any need that may arise on those lines in the future.

35. The mileage prorate proposal is similarly meritless. Mike Naatz's RVS does an excellent job of explaining why. Moreover, the proposal's attempt to get a U.S. federal agency to control rail rates in Mexico appears clearly improper.

II. CPKC Will Be a New, Vigorous Competitive Force Against the Other Class 1's

36. Finally, I would be remiss if I did not reiterate my strong belief that this transaction is good for competition and good for shippers. Shippers often talk to the Board about how more competition is needed. And over 450 shippers have submitted their support for this transaction, evidencing their belief in the invigorated competitive options that CPKC will be able to provide. I also agree with Keith Creel that the lack of substantial shipper opposition in the current context of industry service issues speaks volumes.

37. The merger of CP and KCS will support improved service and investment opportunities that would not be possible without bringing the two companies together. Capital investments between two separate companies are often harder to justify due to separate operating and investment priorities and different operating visions of separate companies. Bringing KCS and CP together as one company with one vision and unified priorities will eliminate these differences and create opportunities for greater coordinated actions to improve the fluidity and function of the combined CP-KCS network. This will create a stronger platform for improving customer service.

38. To say that CPKC will compete is not to say that CPKC will improperly refuse to work with other carriers, as UP, BNSF, and others allege. There will still be many large and important markets which will not be directly served by the CPKC, including the southeastern, Mid-Atlantic, and U.S. West Coast markets. CPKC, while stronger together, will still be the smallest Class 1 and will still need to work with other carriers to serve customers' complete array of needs. But the combined CPKC will be able to serve a larger portion of those needs and to

serve them better, putting pressure on our Class 1 competitors to be better themselves. CPKC will work with other carriers, including to and from Mexico, if for no other reason than that it will be in KCSM's interest to do so, to generate more traffic and more revenue for the combined company.

39. I also reject BNSF's assertion that KCS has discriminated against BNSF unfairly since acquiring control of Tex Mex. So far as I can tell, that assertion is mostly based on an increase in the KCS/Tex Mex division for grain shipments moving from BNSF over our line from Robstown to Laredo. My belief is that Tex Mex's pre-change-of-control rate division was abysmally low and needed to be raised, as addressed in Mike Naatz's individual RVS. As context, at about this same time, Tex Mex had obtained a $50 million federal loan to make essential track repairs that, Tex Mex, under its prior ownership could not afford to make. That very low rate division on BNSF grain traffic was one of the reasons for that situation, and in retrospect clearly needed to be changed. Seeking an adequate return to keep the track together is not unreasonable or discriminatory. BNSF's foreclosure argument is ill-founded, and ridiculous in the context of BNSF's access to multiple Mexico gateways, including its trackage rights to Brownsville that it doesn't exercise.

40. I strongly believe that CPKC will be a competitive force that will serve shippers and the public interest. I urge the Board to approve the Transaction without the conditions and inconsistent applications that future CPKC's competitors hope to use to protect themselves, not the public interest.

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VERIFICATION

I, Patrick J. Ottensmeyer, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this ___ day of July, 2022.

DocuSigned by:
Patrick Ottensmeyer
ACF48868608649E...

Patrick J. Ottensmeyer
President and Chief Executive Officer
The Kansas City Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF JOHN BROOKS

TABLE OF CONTENTS

I. CPKC WILL OFFER COMPELLING VALUE TO SHIPPERS 4

II. THERE IS NO NEED FOR CONDITIONS TO PROTECT GATEWAYS BEYOND THE COMMITMENTS APPLICANTS HAVE OFFERED 6

- A. Applicants' Gateway Commitments Provide a Robust Backstop to CPKC's Strong Incentive to Support the Existing Interline Options that Shippers May Prefer 8
- B. The "Mileage Prorate" Rate-Setting Mechanism Proposed by UP and BNSF Would Be Anticompetitive and Harmful 10
- C. Open Routing and Reciprocal Switching Conditions Would Handicap CPKC's Ability to Compete 13

III. CONDITIONS RELATING TO SERVICE ASSURANCE ARE UNNECESSARY 13

- A. The CP/KCS Service Promise 14
- B. Formal Service Penalty Conditions Would be Counterproductive 19

IV. A FORCED SALE OF KCS'S SPRINGFIELD LINE WOULD REDUCE THE BENEFITS OF THE TRANSACTION AND HARM ON-LINE SHIPPERS 20

- A. KCS's Springfield/St. Louis Line Will be an Important and Integral Part of the CPKC Network 21
- B. A Forced Sale to CN Would Interfere with the Transaction's Public Interest Benefits 22
- C. Severing KCS's Springfield/St. Louis Line from the Rest of the KCS Network Will Reduce Shippers' Existing Transportation Options 24

V. CP'S TIH/PIH TARIFF PROVISIONS HAVE NOTHING TO DO WITH THIS TRANSACTION....25

VI. THE TRANSACTION WILL NOT HAVE ANY ADVERSE IMPACT ON U.S. WHEAT GROWERS....29

VII. CPKC WILL CONTINUE TO HAVE STRONG INCENTIVES TO SUPPORT TRAFFIC GROWTH AND SERVICE LEVELS ON THE MERIDIAN SPEEDWAY....33

1. I am John Brooks, Canadian Pacific's Executive Vice President and Chief Marketing Officer "(CMO"). I submitted a Verified Statement in support of the Application filed last October, and I am submitting this Reply Verified Statement to respond to certain comments and requests for conditions filed by other Class 1 railroads and certain other interested parties, as well as the request by CN for a forced divestiture of KCS's line between Kansas City and Springfield, IL and East St. Louis, IL.

2. My statement focuses on seven topics:

- I first address certain critiques put forward by a few Class 1 railroads regarding Applicants' estimates of the traffic gains anticipated from the Transaction, including complaints that we did not give our competitors a specific-enough roadmap of how CPKC plans to attract traffic away from them to new CPKC single-line routes;
- I explain why requests for "gateway protection" beyond what Applicants have already committed to is unnecessary and would undermine the pro-competitive benefits of the Transaction;
- I explain the steps Applicants are committing to take to ensure that the Transaction does not degrade the quality of service CP and KCS customers receive, and why the additional conditions relating to post-Transaction service that some have sought are not necessary and would undermine the competitive benefits of the Transaction;
- I explain the many ways in which a forced divestiture of KCS's Springfield/East St. Louis Line would undermine important benefits of the Transaction and even undercut the existing rail options that shippers on this line have today;
- I explain why requests for conditions relating to CP's TIH tariff terms relating to "toxic-by-inhalation hazard" commodities have no proper place in this proceeding;
- I explain why U.S. wheat growers need not be concerned that CPKC will favor wheat originated in Canada; and
- Finally, I explain why Norfolk Southern need not be concerned about CPKC's interest in growing traffic over the Meridian Speedway between Shreveport and Meridian, where NS interchanges traffic with KCS.

I. CPKC WILL OFFER COMPELLING VALUE TO SHIPPERS

3. Other Applicant witnesses are addressing in more detail the critiques offered by certain Class 1 railroads of the traffic growth Applicants anticipate from the Transaction. Many of those critiques come from the railroads that will have to face the new competition that CPKC will bring to the North American transportation marketplace. Those critiques primarily come in two flavors: (1) CPKC routes will not be attractive in comparison with the interline routes involving other Class 1 railroads, such that CPKC would have to resort to "foreclosure" strategies to win traffic to CPKC interline routes, and (2) Applicants have not provided detailed, opportunity-by-opportunity rate and service plans showing exactly what terms they will offer shippers to attract traffic away from other railroad (and truck) options. Neither critique is valid.

4. First, as I and other Applicant witnesses have already explained, CPKC will not have any incentive to foreclose existing interline options, and doing so would in fact be counterproductive to CPKC's growth strategy. (I address Applicants' formal commitments to preserve those options in the next section.). Instead, Applicants anticipate attracting traffic from existing transportation options because, relative to the status quo, the new CPKC services we will be offering will be considerably better than what most shippers have seen from CP and KCS in the past. The fact that some interline routes might be somewhat shorter, or under ideal conditions somewhat faster, will not impede CPKC's success in persuading shippers of the value to them of new, reliable CPKC single-line routes.

5. As other witnesses recount in more detail, every month that passes brings further confirmation of the enthusiasm that shippers have about future CPKC options. Both railroads are in constant contact with their customers, and we hear this excitement on a daily basis. We also know that dozens of shippers are considering making substantial investments of their own on the foundation of the new transportation options CPKC will bring: investments in grain

origin elevators and processing facilities in the Upper Midwest and destination terminals in the Gulf and Mexico; fertilizer sheds for expanded distribution to key growing regions; export terminals in the Gulf; transload and warehousing facilities from Chicago to Mexico, and many, many more. Shippers are eager for the CP and KCS to be able to come together and achieve the promise of the new CPKC network. Indeed, many of those shippers have already filed in support of CPKC precisely because they see the value the Transaction will unlock.

6. All of this enthusiasm confirms to Applicants that our own assessments of the likely range of new traffic opportunities CPKC will attract are reasonable and can be achieved. We know that CPKC's traffic mix three years after the Transaction is consummated will not look exactly like what we have forecasted, for myriad reasons including changing economic circumstances and the ebb and flow of competition both in the rail industry and in the countless industries CPKC will serve. But we have seen nothing that suggests that CPKC cannot succeed in attracting large volumes of traffic from existing truck and rail transportation alternatives.

7. Second, there is no valid basis for the complaints that Applicants have not been specific enough about the rates and other terms we will offer to prospective customers to entice them to use CPKC services. For starters, in many cases we have not developed the specific terms we would propose to offer to attract this new traffic (and retain existing traffic). Those offers will be driven by the competitive marketplace and the specific circumstances applicable to the customer's transportation needs – including the specifics of their existing options.

8. Even if we had developed a blueprint for the competitive terms we would offer customers to win traffic from trucks and other Class 1 railroads, it obviously would not be appropriate to share it with our competitors. I am aware that Applicants' consultants assumed that certain of the traffic CPKC would attract would come at a reasonable discount relative to

existing interline rate levels. That makes sense from my commercial perspective. But let me be clear: Applicants have set no arbitrary floor on how aggressive they will be in competing to attract traffic from other Class 1s – whether or not the traffic is affected by the Transaction. Competitive marketplaces are dynamic marketplaces, and the rates we offer will be ones that make sense for CPKC and that are designed to meet the needs of our customers and be successful in the competitive marketplace.

9. I am more than happy to put the other Class 1s on notice of what to expect from CPKC, however. CPKC will be an innovative and aggressive new competitor. CPKC will strive to develop reliable services tailored to the needs of our customers, for fair and competitive prices. And CPKC will not be intimidated by the much greater size and scope of the other Class 1s' U.S. networks. The other Class 1s should plan to up their game if they want to retain traffic that could be served by new CPKC single-line routes. We think rail customers will respond favorably to this new competition, benefitting the whole competitive process, not just CPKC.

II. THERE IS NO NEED FOR CONDITIONS TO PROTECT GATEWAYS BEYOND THE COMMITMENTS APPLICANTS HAVE OFFERED

10. A number of commenters, including other Class 1s, have expressed unfounded concerns that Applicants' commitment to keep open existing gateways and thereby preserve existing interline options potentially affected by the Transaction do not provide an adequate assurance that those existing options will be left in place. Other witnesses explain in more detail why CPKC will not have an incentive to undermine the existing options that shippers have demonstrated best meet their needs given the options they have today. I firmly believe that CPKC will not be well served if we attempt to force shippers to switch to single-line CPKC routes, and I know we have no intention of doing so.

11. Applicants in fact have been consistent and clear about our commitment not to shut off or degrade existing interline options that shippers might prefer to new CPKC single-line routes. Some of the comments suggest that dissatisfaction with these commitments may stem in part from confusion about the scope of what we are committing to do. I will try to clear up that confusion. I will also explain why the "mileage-prorate" proposal made by BNSF and UP as a way of "keeping gateways open," and echoed in some of the other comments, would in fact undermine CPKC competition and is calculated by those larger, Class I railroads to protect themselves from having to compete to retain the business they have today.

12. First, however, I'd like to say a few words about gateway concerns expressed by some Class 1 railroads and shipper organizations about interchange traffic that will not be affected at all by the Transaction. In many cases, concerns about gateways have nothing to do with the Transaction at all. For example, CSX expresses concern about the New Orleans gateway, where KCS and CSX interchange some traffic. Likewise, NS expresses concern about the Meridian, MS gateway, where KCS and NS interchange considerable intermodal and other traffic.[1]

13. In cases like these, CP's control of KCS will not change anything about the incentives to continue routing interline traffic via these gateways. Adding the CP network to KCS's network will not create any new single-line route for such traffic, nor create the potential for CPKC to carry the traffic farther by keeping it on CPKC to another gateway. These existing interline routes will be unaffected by the Transaction and thus there is absolutely no reason for any conditions aimed at preserving those options. Any such conditions would only impose new

[1] In addition, considerable volumes of NS intermodal traffic move over the joint KCS/NS Meridian Speedway via Meridian, with KCS moving that traffic in haulage service and exchanging it with NS at Meridian.

regulatory burdens on CPKC, and provide unwarranted protection for our connecting carriers, hobbling the competitive process. For clarity, the commitments Applicants have made to preserve existing gateways apply only to situations where the traffic moving via those gateways *would be affected by the Transaction* – because CPKC would either gain a new single-line route, or the Transaction creates a new potential to carry traffic farther on the CPKC system, bypassing the existing gateway. The joint comments of ACC, TFI and NITL do a good job of describing what it means for interline traffic over an existing gateway to be affected by the Transaction: they proposed "bottleneck" conditions applicable "to any bottleneck movement that originates or terminates (including via reciprocal switch or inter-switching) on Applicants or a connecting Class II or III railroad for which the merger of Applicants creates the opportunity for a longer haul on their combined network than either Applicant would have by itself." *See* ACC-6/TFI-5/NITL-3 at 9.

14. There are many other examples raised in the Comments of parties seeking protection for interline movements that will not be affected by the Transaction, such as Evergy's concerns about the Kansas City gateway, which are misguided because CP cannot serve the origins of Powder River Basin coal that Evergy ships via the Kansas City gateway and the Transaction will thus not create the opportunity for a longer haul for this traffic on the CPKC network.

A. Applicants' Gateway Commitments Provide a Robust Backstop to CPKC's Strong Incentive to Support the Existing Interline Options that Shippers May Prefer

15. The commitments Applicants made in the Application (and expressed publicly on numerous other occasions) at their core are what the Board has repeatedly accepted as the appropriate way to keep gateways open. In short, CPKC will not create new bottlenecks for

purposes of rate-setting, and CPKC will keep existing gateways open on commercially reasonable terms.

16. Some claim to be confused about what this means. It is pretty straightforward. Where the CP/KCS combination would give CPKC a new single-line route, or a longer haul than what either CP or KCS could offer today, Applicants have committed that CPKC will waive any right it would otherwise acquire under the Board's "bottleneck rate" standards to decline to quote an interline rate, and CPKC will not foreclose existing interline options over that gateway by closing the gateway operationally or economically. In other words, we will not *force* "affected traffic" over longer-haul CPKC routes.

17. To provide further clarity, I have set forth as Appendix A to this statement specific language that Applicants are prepared to accept as a condition to the Transaction that would implement our commitment to keep gateways open. This language is drawn from concrete proposals Applicants have made to shipper organizations to codify our commitments.

18. As I stated in my initial Verified Statement, Applicants are prepared to enter into formal agreements with shippers and shipper organizations providing for an efficient dispute resolution mechanism for those situations – which we would hope would never arise – where our customers had a concern that the interline rates and other terms CPKC was offering were not commercially reasonable and instead effectively foreclosed their continued use of an interline option that they preferred. As a practical matter, this situation should not arise, because – again – CPKC would be better off preserving existing interline traffic than forcing shippers onto routes that do not meet their needs. Were CPKC ever to propose interline terms that shippers thought were foreclosing their access to pre-existing options, I expect we would hear from them loud and

clear, and we would sort things out without the need for any formal litigation or dispute resolution process.

19. Together, the gateway preservation commitments we have made – and are willing to have codified into a formal condition on Board approval – are more or less exactly what NITL agreed to with the applicant carriers in the KCS/Tex Mex and CN/WC cases, and what the Board has deemed sufficient to address "foreclosure" concerns in numerous other cases, like CSX/Pan Am, CN/EJE, and CP/DME. I know that CPKC will not have an incentive to shut down options shippers prefer, and I also know that if we nonetheless tried to do that shippers would see it immediately and have no hesitation speaking up and enforcing our commitment.

B. The "Mileage Prorate" Rate-Setting Mechanism Proposed by UP and BNSF Would Be Anticompetitive and Harmful

20. The concern the Class 1s claim to have about Applicants' gateway preservation commitments is entirely self-serving. Incredibly, they want to expand it to every interline rate they have with CP and KCS – not just situations where the Transaction has a potential effect on that traffic. And they want to replace Applicants' flexible commitment to quote reasonable rates that will keep existing interline options available (consistent with standard interline rate-setting processes) with a hard-and-fast regulatory mechanism that would prescribe the maximum revenue division that CPKC could earn on an interline rate based on a "mileage pro-rate" formula keyed to the single-line rates that CPKC quotes to customers. The proposal is dramatically out of step with conditions imposed in their own mergers and with how market-based divisions work in the real world, and it would effectively transfer millions of dollars that CP or KCS earn today into the pockets of these much-larger Class 1 railroads. Far from protecting existing interline options, this demand would give UP and BNSF (and other

connecting carriers) a windfall and create a disincentive for CPKC to offer attractive rates for its new single-line routes. To my mind, that is blatantly anticompetitive.

21. First, as I have already explained, there is no basis for the Class 1s' demand to extend "rate protections" to traffic that will not be affected by the Transaction, like KCSM-UP traffic moving between Mexico and Los Angeles or Denver. The fact that these railroads want such protection should reveal that they are not being transparent about the motivation for their demands for conditions. They want a revenue windfall, not the preservation of competition.

22. Second, the notion that the Board should regulate CPKC's interline divisions based on a rigid "mileage-prorate" formula is flatly contrary to how revenue divisions are established in the real world, and these larger railroads know that. The relationship between an interline carrier's rate and the total revenue on an origin-to-destination move is determined in the marketplace by a wide array of factors, and its revenue share may differ greatly from its share of the miles. Those factors include the relative operating costs associated with the carrier's portion of the move, the costs associated with interchanging the traffic, potential equipment costs, the need for infrastructure investment (or lack thereof), the level of service (over the road and first mile/last mile), the commodity, the volume of traffic, the availability of capacity, and the carrier's role in attracting the traffic in the first place. No mathematical formula, much less one based solely on relative mileage, can capture these factors, and keying the formula for interline rates to rates for single-line movements would make the mismatch problem worse, not better.

23. I am generally familiar with CP's revenue divisions in its interline moves with UP, BNSF, and other partners. CP's existing divisions – in today's pre-Transaction marketplace – are all over the map, and often higher, relative to what would be dictated were we to share revenue on a flat mileage-prorate split. That means that imposing such a split on CP would give

our connecting carrier a windfall – allowing those carriers to maintain the same rate level while pocketing revenue that previously would have been paid to CP. Such a condition would not preserve the pre-Transaction status quo or protect competition.

24. To be sure, there are situations where interline carrier may *agree* to share revenue on a mileage prorate basis. But these are consensual situations that apply in cases where such an arrangement makes sense from the perspective of both carriers, such as where they are seeking to simplify interline pricing for some discrete set of traffic opportunities to compete more effectively against single-line alternatives.

25. Third, any mechanism that would cap CPKC's interline rates based on some percentage of its single-line rate offers would inhibit aggressive competition by CPKC designed to attract shippers to routes they have not previously had available to them. Every time that CPKC proposed to give a discount designed to pass along the efficiencies of its new single-line routes, it would effectively have to pay over to UP, BNSF, or another carrier the mileage-prorate portion of that discount as a subsidy to their continued competition via pre-existing interline routes. This kind of subsidy to UP and BNSF would be highly anticompetitive, and it would effectively be a tax that disincentivizes CPKC from competing as aggressively as it otherwise would. No doubt that is UP's and BNSF's desire – to have the Board impose a pricing regime on CPKC that mutes the competition that CPKC stands ready to provide.

26. The fact is that there is no logical connection between CPKC's single-line rates and the level of CPKC's interline factors. Single-line and interline moves have different characteristics, including different cost structures. If one line has a short haul, for example, it often does not have the ability to spread its cost over a large number of miles, meaning it often requires a higher percentage of the revenue compared with their percentage of the mileage.

C. Open Routing and Reciprocal Switching Conditions Would Handicap CPKC's Ability to Compete

27. Some commenters go even farther than the opportunistic Class 1s and seek to impose on CPKC – and only CPKC – a new regulatory regime requiring that CPKC keep open all interchange points and allow open routing regardless of whether the Transaction will affect those routes, and even grant reciprocal switching access allowing the larger Class 1s to access solely-served CPKC customers.

28. To illustrate, these commenters are demanding that, for CP traffic to destinations that KCS's network could not reach (such as traffic moving between Canada and points in the West on the UP or BNSF networks, or in the Northeast on the CSX or NS networks), CPKC nonetheless must quote Rule 11 rates over every possible interchange. And CPKC would have to do the same for KCS traffic to destinations that CP's network could not reach (such as KCS traffic moving to points in the Southeastern United States on the NS or CSX networks, or in the West on the UP and BNSF networks).

29. These kinds of condition requests are untethered to any effect of the transaction and should be rejected under the pre-2001 Merger Rule standards. More importantly, they would inject new inefficiencies into CPKC's combined network and impede efforts by CPKC to compete more effectively against other Class 1 railroads and other modes. The damage would not be limited to the new competition CPKC hopes to offer using its more efficient and more capable single-line routes, but would extend to traffic flows unaffected by the Transaction.

III. CONDITIONS RELATING TO SERVICE ASSURANCE ARE UNNECESSARY

30. Several commenters have urged the Board to require Applicants to prepare something akin to a "new Merger Rules" service assurance plan or impose conditions establishing a new regulatory regime of monetary penalties for service-related issues that arise

post-Transaction. Such conditions are unnecessary and would be counterproductive. The 100-percent complementary nature of the CP/KCS Transaction is completely unlike that of the prior rail mergers – like *UP/SP* and *CSX/NS/Conrail* – that have led to serious service problems. CP/KCS is much more like *CN/IC*, which did not cause Transaction-related service issues.

31. In any event, Applicants have been and will remain laser-focused on doing the requisite planning and making the requisite investments to ensure that CPKC's service will provide better overall experiences than what shippers experience today, and certainly not worse. The success of our Transaction depends on our implementing it in a way that attracts traffic to the new, more capable CPKC network – and we will not achieve that goal if instead we drive traffic away with poor service.

A. The CP/KCS Service Promise

32. In light of these factors – the purely end-to-end nature of our Transaction and our incentives to provide stellar service to attract traffic to CPKC – there is no legitimate basis for imposing service-related conditions. Nonetheless, given the importance of these issues to shippers and the Board, Applicants are making a robust series of commitments that we fully expect will be made a condition of the Board's approval of the Transaction. Those commitments – which I refer to as the "CP/KCS Service Promise" – are set forth on the following page and I explain a bit more about how we will implement these promises in the paragraphs that follow.

OUR CP/KCS SERVICE PROMISE

Pillar 1 – We Will Plan Thoroughly for Transaction Implementation

- Our goal is for Transaction-related changes to yield service that provides each customer with as good as or better service overall than what our customers received pre-Transaction.
- Our planning for Transaction implementation is already well underway.
- We will not implement Transaction-related changes until we are prepared to do so without causing disruption.

Pillar 2 – We Will Monitor Our Post-Transaction Performance

- We will proactively monitor our own performance so as to identify areas requiring adjustment before problems arise.

Pillar 3 – We Will Transparently Report on Our Post-Transaction Performance

- During an oversight period of up to five years, we will report regularly to the Board and the public on our service levels, with metrics tailored to lines and facilities most affected by Transaction-related traffic growth.
- We will supplement this reporting with proactive engagement with our customers (on a confidential basis) regarding CPKC services that affect their shipments.

Pillar 4 – We Will Proactively Communicate and Consult with Customers About Our Post-Transaction Performance

- We will meet regularly with our customers to discuss progress on Transaction implementation.
- We will add customers served by the KCS network to CP's Customer Advisory Council.
- We will seek regular input from our customers on ways we can improve our service to better meet their needs, or make adjustments to address issues as they arise.

Pillar 5 – We Will Resolve Concerns and Promptly Fix Any Issues that Arise

- CPKC will have a cross-functional team with authority to step in to develop and implement solutions for issues that arise, including via adjustments to our resourcing or operating practices.
- When adjustments do not resolve concerns raised by our customers, we will provide for an escalation process to ensure that customer concerns are heard by decision makers empowered to address them.
- We will participate in independent mediation with our customers when these steps do not resolve Transaction-related concerns.

33. Together, the five pillars of Applicants' Service Promise go far above and beyond what is necessary for an end-to-end transaction reviewed under the pre-2001 merger rules.

34. I expect that most of these promises are self-explanatory. Applicants' planning for the implementation of the Transaction continues, and will continue up until and beyond the date when CP is authorized to assume control of KCS.

35. To implement Pillar 2, CPKC will stand up an interdisciplinary "Service Protection Team" with responsibility for daily and proactive monitoring of Transaction implementation steps: traffic changes, key operating metrics, progress on capacity investments, and the impact of operational adjustments such as new train services and blocking patterns, and adjustments to first-mile, last-mile service to accommodate new traffic. That Team will also monitor the interface with other railroads – including Metra – with which CPKC will share trackage or interchange freight. We will supplement these internal steps with feedback from our customers (including through Pillar 5 discussed below) and quarterly or more frequent business reviews that will touch on any service affecting these customers.

36. To implement Pillar 3, we are in the process of assessing the specific metrics, but we would agree to a framework that has two components. First, CPKC will continue to report the metrics required by the Board pursuant to Ex Parte Nos. 724 and 770 during the period of the Board's oversight in this proceeding, regardless of whether the Board terminates those reporting requirements. Second, CPKC will report metrics on specific corridors that have been raised by parties to this proceeding: (a) on the corridor between Laredo, TX and St. Paul, MN and Chicago, IL, and (b) the Meridian Speedway. Third, CPKC will provide metrics that address the following yards: Shreveport, Kansas City, Bensenville (near Chicago), and St. Paul, as well as the Wylie Intermodal Terminal near Dallas.

37. We will also report specifically on performance of traffic over trackage owned by third parties, including (a) Metra, over whose lines CPKC will operate in the Chicago area and (b) UP, over which CPKC will operate to traverse the Houston terminal and elsewhere in Texas. We encourage the Board to use its inherent authority over those operations to require that UP also report detailed information regarding the operating conditions on its lines, since UP's own operations (along with those of BNSF) have always been (and will remain) the most important contributor to potential congestion.

38. The Board should resist calls by some commenters – such as Texas International Terminals – to require reporting of competitively-sensitive information about CPKC's traffic opportunities. Any obligation to report about the competitive wins and losses CPKC experiences – or any other details of what traffic CPKC is taking on in lanes where it competes with larger Class 1 railroads – would uniquely handicap CPKC's ability to compete.

39. To implement Pillar 4, CPKC will work directly with its customers to effectuate our commitment to participate in a two-way dialogue about our service and how we can work together to improve CPKC's ability to meet our customers' needs. We will provide regular (confidential) updates tailored to individual customers, and we are committed to an open line of communication about any and all of our customers' post-Transaction concerns. One vehicle for facilitating this dialogue will be CP's very successful Customer Advisory Council, which we will expand to include multiple KCS shippers so that we can better understand and address service issues relating to this part of the future CPKC network. The Council fosters constructive dialogue across a wide array of issues through one-on-one direct interaction, annual workshops, customer surveys, and customer participation in prototyping and new product testing for the suite of systems that CP has used (and CPKC will further innovate) to facilitate efficient interaction

with our customers. CPKC will also establish a dedicated customer service hotline for Transaction-related service concerns.

40. To implement Pillar 5, CPKC will put in place a SWAT-team-like approach to think ahead about potential service issues and be empowered to take whatever action may be necessary to ensure that problems are averted before they arise. CPKC's Service Protection Team will be led by a dedicated and accountable senior manager who has the delegated authority to call upon corporate resources as required to protect post-Transaction service levels. To ensure alignment and sufficiency of authority, the Team and the dedicated senior manager will report directly to a senior executive lead team which reports directly to the CEO, and encompass all the disciplines necessary to assure that our customers' service is protected: operators, marketing, customer service and resource allocation. The Team's tools will not be mere band-aids and its mandate will not be to play "Whack a Mole," beating down service brushfires as they arise. Instead, the Team will be tasked with thinking ahead with a systemic, network-wide focus on adequate resourcing, planning, and preparation for operational changes needed to address evolving (and growing) traffic patterns and other developments.

41. In addition, to the extent issues or questions do arise that cannot be resolved, we will implement an escalation process that ensures that every unresolved issue gets the prompt attention of the most appropriate CP managers empowered to address the concern. If – despite our best intentions – this mechanism does not lead to the resolution of every potential concern raised by a customer that its service was adversely affected by the Transaction, CPKC will participate in non-binding mediation with an independent dispute-resolution professional with the aim of facilitating a mutually-acceptable resolution of the issue in a fair, timely, and cost-effective manner.

B. Formal Service Penalty Conditions Would be Counterproductive

42. Some shipper groups have proposed a regime of monetary penalties relating to service issues. I think that conditions of this sort would be counterproductive.

43. First of all, for the large portion of CPKC traffic that would move under contract, the bargains we strike with shippers over service guarantees (and every other term) are and should remain the product of negotiation.

44. Secondly, a service guarantee penalty regime would create incentives that would distort our service offerings, potentially interfering with our ability to compete against larger railroads that would not be subject to such a regime. For example, like UPS, Fed Ex and countless other businesses, we offer different tiers of service assurance in exchange for different levels of economic value. One example of this is CP's intermodal service offerings, which allow customers to secure increasingly robust service commitments in exchange for higher transportation rates. This basic structure applies both to contract shipments as well as shipments moving under common carrier tariff: we provide differentiated services for different levels of consideration. Any new regulatory regime that inserted a system of financial penalties into the equation would trample these market-based interactions between CPKC and our customers. We would have to adjust our terms to reflect whatever service guarantee penalty structure was forced upon us, and so doing would make it harder to compete directly against Class 1s that would not have to consider such a regime in their competitive calculus.

45. Third, the specific proposals made by certain shipper organizations would inject unhelpful adversity and rigidity into a set of customer relationships for which an ongoing and transparent dialog would be far more constructive. Providing customers with a set of concrete regulatory entitlements could create disincentives to participate in constructive and collaborative solutions to any issues that might arise.

46. For example, ACC/TFI/NITL's proposal would establish hard-and-fast penalties tied to pre- and post-Transaction transit times that would kick in even if the shipper's overall needs (in terms of car supply, cycle times, and other factors) were being met better than before the Transaction, the shipper had directed greater volumes to CPKC's new, more-competitive offerings, or the perceived "transit time" differential could more effectively be met with service adjustments unrelated to the transit time metric. A condition privileging one aspect of service – like certain shippers' pre-merger transit times – would inhibit CPKC's ability to adapt in ways that provide the best possible service to the most customers. CPKC will work with shippers on an individual basis to design service plans that best meet their needs, not necessarily the ones that always comply with a given artificial metric. It would be unfortunate for a mandatory new penalty to get in the way of more constructive engagement by CPKC with its customers in competition with other Class 1 railroads and trucks.

47. Fourth, ACC/TFI/NITL also requests a condition that would require CPKC to provide shippers with at least 30 days' prior written notice of any planned service changes at shipper facilities. CPKC will of course strive to keep shippers informed in advance of potential service changes that affect their operations. But a rigid advance-notice mandate would be counterproductive, as myriad real-world conditions can require railroads to be nimble in adjusting their operations to optimize fluidity on the network.

IV. A FORCED SALE OF KCS'S SPRINGFIELD LINE WOULD REDUCE THE BENEFITS OF THE TRANSACTION AND HARM ON-LINE SHIPPERS

48. CN's request that the Board mandate a "divestiture" of KCS's Kansas City-Springfield/St. Louis line (which I will refer to as the "Springfield/St. Louis Line") is a dagger aimed into the vital organs of the CP/KCS Transaction. Other witnesses are addressing the lack of foundation supporting CN's request. I am writing to advise the Board of the many significant

respects in which CN's proposal would interfere with the public benefits of the CP/KCS Transaction.

A. KCS's Springfield/St. Louis Line Will be an Important and Integral Part of the CPKC Network

49. CN has clouded the record with a good deal of rhetoric suggesting that CPKC would downgrade KCS's Springfield/St. Louis Line or stop investing to maintain the line. That is a strawman that CN has attempted to create, and it is absolutely and transparently false. The Springfield/St. Louis Line will be an integral part of the CPKC system, not only providing access to on-line shippers, but also connecting those shippers (and the important East St. Louis gateway) with the broader CPKC network and also providing key connections between CPKC's system and shortlines, like the Illinois & Midland Railroad at Springfield.

50. At the important East St. Louis gateway, I foresee increased opportunities to build interchange traffic with CSX, taking advantage of the broader base of traffic that will be able to reach East St. Louis directly from the CPKC network. For example, CPKC is willing to explore the potential to reestablish intermodal service between Kansas City and terminals on the CSX network reached via St. Louis. KCS formerly operated daily service in that lane, but CSX discontinued it in 2017, as part of its reconfiguration of its intermodal network.

51. Applicants' traffic forecasts provide one reflection of the importance of this Line. Contrary to CN's assertions, the Transaction will grow (not shrink) volumes on these lines. Applicants anticipate Transaction-related growth of approximately 4 percent on the line to St. Louis. These gains, while modest, arise from the synergies achieved by the CP/KCS Transaction, more effectively connecting the CP network with the KCS network via new single-line routes. To give just a handful of examples, this line will be instrumental in supporting more competitive routes between CP-served customers and the St. Louis gateway, between CP-served

grain customers and KCS-served receivers in East St. Louis, and between KCS-served shippers of fertilizer and CP-served receivers in the grain-growing regions of the Upper Midwest and Canada.

52. Earlier I mentioned that customers have begun to express an interest in further investments because of this Transaction. Some of these customers are located on the Springfield/St. Louis Line. CPKC is eager to support these growth opportunities, which are one of the major categories of Transaction benefits. We certainly do not want to undermine them in the way that CN's manufactured claim would suggest.

53. In addition, Applicants anticipate continued growth in rail traffic from existing customers on this line independent of the Transaction. Specifically, Applicants anticipate organic growth of approximately 22 percent on the line from Kansas City through to St. Louis, and approximately 24 percent on the line between Roodhouse and Jacksonville, MO.

54. With all of these traffic opportunities, there is no doubt whatsoever that CPKC will continue to invest in this line to support current and future traffic volumes.

B. A Forced Sale to CN Would Interfere with the Transaction's Public Interest Benefits

55. The forced sale of the Springfield/St. Louis Line that CN proposes would interfere with the benefits of the CP/KCS Transaction in multiple ways.

56. First, and most obviously, it would sever the new single-line routes that would otherwise be created between on-line points (and the St. Louis gateway) and the broader CP network north of Kansas City. Numerous shippers would lose the benefits of CPKC's new, more competitive transportation offerings. KCS's largest customer, Bartlett, would lose the benefits of its existing KCS single-line routes as well as the opportunities to expand its business through the connectivity of the CPKC network. Another example is Richardson, which is looking forward to

connecting its origination facilities with its plant in East St. Louis reached via new CPKC single-line service via the Springfield/St. Louis Line. These services will go away were the line divested to CN. Indeed, such a divestiture would actually reduce Richardson's transportation options for shipments from Canadian origins to East St. Louis, since CN already reaches East St. Louis via its own network.

57. Another example of the potential future benefits of keeping the Springfield/St. Louis Line part of the CP network is the possibility – which CP has recently been exploring – of {{ }} Without ownership of the Springfield/St. Louis Line, CPKC could not even consider exploring opportunities like this.

58. CN's proposal that it grant CPKC haulage rights over the lines it would acquire would not overcome the harm done to shippers who will lose new CPKC single-line services. CPKC haulage rights would not be a substitute for CPKC control of the Springfield/St. Louis Line. CN would control all operational design, local and through-train service levels, and investments on the line, depriving CPKC of the ability to design customized service offerings for these shippers. For example, CPKC would have no ability to support the investments needed to support 8,500-foot grain trains that shippers on this Line and elsewhere are eager to invest in.

59. Further, haulage rights would inject a new layer of operational complexity at or near Kansas City, requiring that CPKC traffic to/from points on the Line be handed off to and received from CN somewhere in the Kansas City terminal, with unknown amounts of extra cost and inefficiency, and the inevitability of unnecessary interchange dwell time.

60. Second, CN's proposal to force an acquisition of one-half of KCS's International Freight Gateway facility south of Kansas City would undermine and jeopardize new CPKC intermodal and other services. In a new CPKC network, that facility will support expanded CPKC intermodal services between Mexico and the Upper Midwest and Canada. Intermodal traffic between Canada and Kansas City will use the facility (as CP lacks a Kanas City-area intermodal facility today), as will traffic to/from Mexico handled in CPKC's much-expanded north-south intermodal services. For example, traffic from Lazaro Cardenas to the central Midwest – using dedicated train services that KCS could not support on a stand-alone basis – will be offloaded at IFG.

61. In addition, on the integrated CPKC network, IFG will provide a centrally located facility for a host of new manifest traffic opportunities. CPKC anticipates using available land surrounding IFG to support warehousing facilities for shippers of produce from Mexican origins, cross-dock operations to support the transfer of ammonia during seasonal fertilizer shipments, and the foundation for aggressive expansion of CPKC traffic opportunities in response to other market developments. Forcing CN into IFG as a half-owner would extinguish CPKC's ability to rely on this facility to support new competitive initiatives.

C. Severing KCS's Springfield/St. Louis Line from the Rest of the KCS Network Will Reduce Shippers' Existing Transportation Options

62. The divestiture to CN would not only prevent the realization of CP/KCS Transaction benefits – it will affirmatively hurt existing KCS shippers that use KCS single-line

services to reach markets beyond Kansas City. Michael Naatz explains in more detail how the transportation services KCS currently provides to shippers served by this Line would be adversely impacted by an order requiring CPKC to sell the line to CN or another purchaser.

V. CP'S TIH/PIH TARIFF PROVISIONS HAVE NOTHING TO DO WITH THIS TRANSACTION

63. A small group of commenters express concern about certain of CP's existing tariff terms applicable to a subset of hazardous commodities known as toxic-by-inhalation hazard and poison-by-inhalation hazard materials (or "TIH/PIH") shipments. Some of these commenters limit their concerns to the possibility that CPKC would apply certain of CP's tariff terms (relating to insurance requirements and indemnification) to shipments on the former-KCS network. Others appear to want to use this proceeding as a mechanism to roll back CP's existing terms even on the former-CP network. The Board should not impose any conditions in this area.

64. First, *as applied to the CP system*, the CP tariff terms at issue have nothing to do with the Transaction. CP first issued/published those terms in December 2010, and they became effective January 1, 2011, following CP's very bad experience with a derailment in 2002 near Minot, ND, which resulted in a release of anhydrous ammonia, a TIH commodity.[2] As the FRA's accident report summarizes: "Five tank cars carrying anhydrous ammonia catastrophically ruptured, and a vapor plume covered the derailment site and surrounding area. One resident was fatally injured, 11 people sustained serious injuries, and 322 people, including the 2 train crewmembers, sustained minor injuries." Had this event occurred in a more urban area, or under somewhat different circumstances, the release could have killed many more and potentially bankrupted CP.

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[2] The FRA accident report for this event is at https://www.ntsb.gov/investigations/AccidentReports/Reports/RAR0401.pdf

65. The Minot incident stimulated CP's attention to the extraordinary risks posed by shipments of TIH and PIH commodities and the importance of shippers of those commodities being incentivized by tariff terms to share in the responsibility to minimize those risks. CP did not take our tariff revisions lightly; we first explored other ways to mitigate against the potentially ruinous liability exposure that we had learned firsthand could arise from the transportation of TIH even when CP was not negligent.

66. CP's tariff revisions were designed to address these risks by requiring that TIH/PIH shippers maintain a Commercial General Liability Insurance Policy, with the current terms establishing an inclusive limit of not less than $100 million, and indemnify and defend CP against liabilities caused by or arising from certain enumerated situations, except to the extent that liabilities arise from the negligence or willful misconduct of CP. These two requirements, set forth in Items 53 and 54 of CP's Hazardous Materials Tariff 8, respectively, reflect CP's experience with TIH/PIH materials and the risks they present.

67. CP's TIH/PIH tariff Items 53 and 54 were not the product of "competition" with any other railroad, and certainly not KCS. In fact, these provisions were designed to bring CP's exposure to potential uninsured liability associated with TIH/PIH releases under control and more into line with the risk profile established by the railroad tariffs of larger U.S. Class 1s. The tariffs of several other U.S. Class 1s establish $100 million insurance requirements and similar liability allocation principles.

68. CP has on several occasions been called upon to defend the reasonableness of its TIH/PIH tariffs, and nothing about the Transaction will stand in the way of shippers pursuing such future challenges if they believe that CP's TIH/PIH tariffs are unreasonable. A number of Canadian shippers and one shipper association challenged Item 54 (the indemnity provision) at

the Canadian Transportation Agency, but CP successfully defended the reasonableness of that provision. In 2015 the Federal Court of Appeals of Canada unanimously held that "[s]imply put, Item 54 does not contain prohibited limitations of liability."[3]

69. In 2015, a U.S. shipper (Agrium) challenged the same provisions under the Board's regulatory regime, and in 2016 that matter was settled confidentially in a way that was mutually agreeable to CP and the shipper in question. *See Agrium Inc. and Agrium U.S. Inc. v. Canadian Pacific Ry.*, Docket No. NOR 42145, Joint Petition to Dismiss the Complaint without Prejudice and Discontinue this Proceeding (filed May 2, 2016).

70. In CP's view its insurance and indemnity provisions are entirely reasonable. CP's requirement that TIH shippers carry $100 million insurance policies is not an obstacle to any shipper using CP because shippers of these incredibly hazardous commodities maintain such insurance to support their own businesses. Nor is it unreasonable to require that shippers indemnify CP for the potential liabilities arising from their shipments – except where liability arises from negligence or willful misconduct of CP itself. If a catastrophic release ever occurs on CP's network – and CP sincerely hopes it never again will – it would only do so as a result of a shipper choosing to direct the shipment onto CP's network. There should be no reasonable objection to shippers internalizing the full measure of the potential costs associated with those decisions. But fundamentally these issues have no connection to this Transaction and should not be addressed here. Shippers remain free to challenge the reasonableness of these provisions or come to us to discuss whether there may be flexibility in light of their particular circumstances. The Board need not and should not override that process. And it would certainly

[3] *Canadian Pacific Ry. v. Canexus Chemicals Canada, LP, et al.*, 2015 FCA 283 (Federal Court of Appeals of Canada 2015) at 42 (¶ 128).

be inappropriate for the Board to order CP to roll back its tariff terms for shipments on the CP network.

71. *As applied to the KCS system*, the position of these commenters is equally without merit. Other witnesses explain the origin of KCS's tariff terms applicable to TIH/PIH shipments and why it would be inappropriate for the Board to freeze those terms in place just because KCS was participating in the CP/KCS combination.

72. CPKC should have complete freedom to decide what tariff terms best meet the needs of the CPKC system, including whether CP's Items 53 and 54 should apply to shipments on the former-KCS parts of our network. However, CP has considered the concerns expressed by the commenting TIH shippers and receivers and has been prepared to reach agreement to address legitimate concerns about the potential need for shippers and receivers to adjust in the event CP were to apply its terms to shipments on the KCS portion of CPKC.

73. As reflected in the settlement reached between CP and Bayer, filed with the Board on May 25, 2022, CP was willing to commit to give Bayer and the shippers that send TIH commodities to Bayer facilities three years' notice before enforcing the Item 54 indemnity requirements (to the extent those requirements exceed what is required under previously-applicable KCS tariffs), provided that Bayer and its shippers commit to using tank cars that meet the most advanced safety standards. CP believes that this compromise appropriately balances the interests of CPKC in having flexibility to adjust its tariff terms and protect the safety of the network and the communities we serve with the interests of TIH shippers in having a reasonable period of time to adjust their shipping patterns, should they wish to do so in the event KCS's tariff terms are revised to conform to CP's current terms.

74. CP is prepared to negotiate similar arrangements with any of KCS's existing TIH shippers, and especially in light of this willingness Board intervention here would be inappropriate and unwarranted.

VI. THE TRANSACTION WILL NOT HAVE ANY ADVERSE IMPACT ON U.S. WHEAT GROWERS

75. Certain organizations of wheat growers articulate concerns about the competition that U.S. wheat growers may face from Canadian wheat growers. Those concerns are misguided and in any event not at all connected to the Transaction.

76. First, a central thrust of the Transaction will be to give grain growers in parts of the Upper Midwest and Canada served by CP improved transportation options for shipments to destinations reached via KCS's network in the South Central United States and Mexico. U.S. wheat growers are no exception. Wheat grown in the United States will benefit from new single-line transportation options linking their origin elevators with Mexican milling markets via efficient shuttle trains and manifest service. This feature of the Transaction will *enhance competition to the benefit of U.S. and Canadian wheat growers alike*.

77. The commenting wheat associations appear to acknowledge these competitive benefits. For example, the U.S. Wheat Association suggests that Canadian shippers are "rail-advantaged" today. (USWA Comments at 4). They ignore the fact that the Transaction will help "rail-advantage" *more U.S. shippers* of wheat in regions served by CP's U.S. network.

78. Likewise, the National Association of Wheat Growers suggests (at 2) that the Transaction will give Canadian shippers a "direct line into Mexico" that they do not possess today. This organization ignores that the Transaction will do exactly the same for U.S. wheat growers, to the benefit of these shippers and the broader competitive process.

79. If these wheat organizations are concerned that the new transportation options created by the CP/KCS Transaction might diminish certain advantages that some U.S. growers (perhaps those that already have direct routes to the Gulf) enjoy in the pre-Transaction marketplace, then they are complaining about competition itself. Such complaints are not valid public interest concerns.

80. Second, to the extent these organizations are complaining about advantages that Canadian growers might have relative to U.S. growers as a result of the CP/KCS Transaction, they are just wrong.

81. One source of stated concern appears to be that certain Canadian regulations relating to grain shipments by rail in Western Canada favor Canadian growers. But those regulations obviously have nothing to do with the CP/KCS Transaction. Equally important, those regulations do not apply at all to shipments from Canadian origins to U.S. or Mexican destinations. Specifically, the referenced regulations – namely the "Maximum Revenue Entitlement" under Canada's Transportation Act – apply only to rail movements of grain from origins *in Western Canada* to Canadian ports for export (i.e., Vancouver, Prince Rupert, Montréal, and Thunder Bay), and in the case of Montreal the regulations only apply to the portion of the movement within Western Canada (west of Thunder Bay). As a result, any fear that the Canadian regulations would give Canadian wheat growers an advantage relative to U.S. growers for movements via CPKC to the United States or Mexico would be misplaced. Because these regulations do not apply to wheat shipped from Canada to U.S. or Mexican destinations, they could not possibly give Canadian growers a competitive advantage relative to U.S. growers.

82. Another concern appears to be that CPKC might somehow "favor" wheat grown in Canada over wheat grown in the United States. This is not the case. Like CP today, CPKC

will pursue transportation opportunities for wheat grown anywhere in its service territory and do so in response to market forces. The only change from the Transaction will be to make CPKC's transportation options more attractive, and more competitive, for U.S. and Canadian growers alike.

83. CP has a long history of serving wheat growers in both the United States and Canada. In recent years CP has worked hard to compete to move U.S.-grown wheat into additional destination markets across North America.

84. For shipments destined to destinations in the United States and Mexico, CP does not favor Canadian origins. To the contrary, CP sets prices to reflect evolving market conditions, and so will CPKC. CP's published tariffs reflect *higher pricing for* origins in Canada that are farther from the destination than U.S origins. Thus, for example, as shown in Table 1 below, CP has rates for wheat from U.S. and Canadian origins to Mexico. CP's rate from Bowbells, ND, is materially higher than that from Weyburn, Saskatchewan, 42 miles north of Bowbells across the Canadian border on CP's line via the Portal, ND gateway. This relationship holds for rates quoted on a through basis as well as Rule 11 over the Kansas City gateway.

85. Likewise, as also shown in Table 1 below, CP's rate for wheat moving from Hazel, MN, is materially lower than that from Makwa, Manitoba, 163 miles north of Hazel across the Canadian border on CP's line via the Emerson, MB/Noyes, MN gateway. This relationship similarly holds for rates quoted on a through basis as well as Rule 11 over the Kansas City gateway.

TABLE 1[4]
CP WHEAT RATES TO MEXICAN DESTINATIONS FROM U.S. AND CANADIAN ORIGINS AS OF AUGUST 1, 2022

	Rule 11 over Kansas City		Tlalnepantla, EM	
	25s/Split Train	**All-in w/fuel**	**110s**	**All-in w/fuel**
Hazel MN	$4,751	$5,455	$7,489	$9,622
Makwa MB	$5,162	$5,987	$7,723	$9,976
Difference in CP Revenue for U.S. Origins	($411)	($532)	($234)	($354)
Bowbells ND	$5,970	$6,844	$7,716	$10,018
Weyburn SK	$5,999	$6,942	$8,027	$10,399
Difference in CP Revenue for U.S. Origins	($29)	($98)	($311)	($381)

86. Nothing about the Transaction will change CP's (or CPKC's) incentives to move wheat from all origins to the array of destinations that the CPKC network will serve efficiently. It would be particularly irrational for CPKC to disfavor U.S.-sourced wheat for movements to destinations in Mexico. Wheat milling facilities in Mexico grind a variety of wheat types, including durum and hard red spring wheat from the north, hard red winter wheat from South Dakota and Kansas, as well as other wheat classes from other U.S. regions. The notion that CPKC could displace all these types of wheat even if it wanted to (which it does not) defies logic. In fact, Applicants see tremendous opportunity to increase wheat shipments from CP's origins in the United States, particularly in North Dakota.

87. Markets are dynamic and having access to additional destination diversity is important for U.S. wheat shippers, especially with global commodities like wheat. For example,

[4] *See* Brooks' Workpapers: CP Tariff 4444, Item 14105; CP Tariff 4444, Item 16007; Tariff 4444, Item 17500; Tariff 4444, Item 17505, Tariff 4445, Item 14117.

this year there is uncertainty about Ukraine's ability to export its winter wheat crop, which has driven up the price of hard red winter wheat in the United States. This in turn has made hard red spring wheat relatively cheaper and thus more economically attractive to Mexican receivers than before. CPKC's more capable single-line rail route connecting U.S. origins directly to Mexican destinations will only improve the market reach of U.S. wheat shippers in circumstances like this. Canadian-sourced wheat will of course continue to play a role in the marketplace just like it does today. But U.S. wheat shippers will unambiguously benefit as compared to the pre-Transaction world.

VII. CPKC WILL CONTINUE TO HAVE STRONG INCENTIVES TO SUPPORT TRAFFIC GROWTH AND SERVICE LEVELS ON THE MERIDIAN SPEEDWAY

88. Norfolk Southern expresses concern about the impact of the Transaction on traffic and service levels on the Meridian Speedway route between Shreveport, LA and Meridian, MS that KCS and NS jointly own. Other witnesses address NS's assertions in more detail. I would like to make very clear two things: First, NS is completely wrong to the extent it is concerned about CPKC's desires and incentives to continue to work closely with NS to grow traffic (intermodal and otherwise) via the excellent Meridian Speedway route. None of the NS haulage traffic or KCS-NS interline traffic on that route will be affected at all by the CP/KCS Transaction because CP's network does not efficiently reach the points served by NS's network via this route.

89. Second, consistent with CPKC's incentives to grow traffic via the Meridian Speedway, CPKC will have strong incentives to ensure that its operations do not degrade service on this route, much less to the extent that would drive intermodal traffic onto the highways. Witness Elphick explains why NS (or its counsel) have misunderstood Applicants' operating

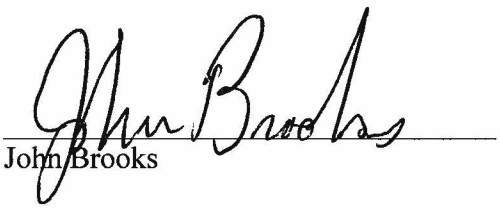
plan, but at a certain level those details are beside the point. We will not operate trains on this line in a way that drives traffic away, period.

90. Finally, let me be clear that CPKC's incentives to grow traffic that moves via the Meridian Speedway will not be limited to traffic interchanged with Norfolk Southern. To the extent permitted under the Meridian Speedway agreements with NS, CPKC will be eager to explore traffic opportunities with all of the railroads connecting to the Speedway at Meridian and elsewhere.

VERIFICATION

I, John Brooks, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 11th day of July, 2022.



John Brooks

APPENDIX A
SPECIFIC GATEWAY PRESERVATION CONDITION TERMS

1. Principles

- Conditions expressed here are intended to implement CP's previously stated commitments to keep gateways open on commercially reasonable terms.
- Conditions would be contingent on approval of control and CP exercise of control.
- Conditions would not override any requirement or limitation of Mexican or Canadian regulation.

2. Scope

- CP's commitment not to create new bottlenecks and to keep gateways open on commercially reasonable terms applies to "Affected Gateways/Affected Traffic." In other words, traffic that CP or KCS interchanged with another carrier for which CPKC created a longer haul than was available on the CP or KCS system pre-Transaction.
- The commitment applies only to the specific interchanges over which the traffic (or comparable traffic flows) previously moved, not to all possible gateways.
- This scope delimits all of the obligations set forth in (3)-(4) below and for convenience the traffic to which it applies is referred to as "In-Scope Traffic."

3. No New Bottlenecks

- At the request of a rail customer CPKC shall quote Rule 11 rates to/from affected gateways for In-Scope Traffic.
- If a shipper files a complaint at the STB challenging any such rate as unreasonable, CPKC will waive its right to assert that the challenge cannot be maintained by virtue of the effect of the CP/KCS Transaction to give CPKC a single-line route between the origin and destination of the traffic.

4. Obligation to Keep Gateways Open on Commercially Reasonable Terms/Arbitration of Same.

- CPKC will keep affected gateways open on commercially reasonable terms for In-Scope Traffic.
- To implement this commitment, with respect to In-Scope Traffic to/from an affected gateway, at the qualifying request of a rail customer for CPKC will (a) quote a Rule 11 rate to for In-Scope Traffic, or (b) participate with a connecting

carrier to offer a through rate that combines CP's and the connecting carrier's rate divisions. The economic terms CPKC offers to the customer or, as applicable, the connecting carrier, will be commercially reasonable. A qualifying request shall include customary "rate request" details, including ultimate origin and ultimate destination, commodity, equipment requirements, volumes, service requirements, etc.

- With respect to rates or factors offered under this commitment, CPKC will not take the position that economic terms offered by CPKC are commercially reasonable solely because they would be found reasonable under the STB's rate reasonableness standards.

- To address certainty in the shorter term, CPKC would honor all rates and rate factors in existing agreements through the date of termination of those agreements. CPKC will not be obligated to renew such rates.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF NADEEM VELANI AND CHRIS DE BRUYN

TABLE OF CONTENTS

I. CPKC'S FINANCIAL STRENGTH IS NOT DEPENDENT ON CP/KCS TRANSACTION SYNERGIES 4

A. There Is Strong Financial Market Validation that Applicants' Anticipated Synergies Will Be Realized 4

B. CP's Transaction-Related Debt Was Obtained on Very Favorable Terms 6

C. CP Has Already Made Progress Paying Down Debt While CP and KCS Have Continued Investing in Their Separate Networks 8

D. CP's De-Leveraging Strategy Is Not Dependent on Transaction Synergies 11

1. CPKC Would Generate Significant Free Cash Flow Even Absent Transaction Synergies 13

2. If Synergies Underperformed Expectations, CPKC Could Continue to Suspend Discretionary Shareholder Returns 15

3. Regardless of the Magnitude of Transaction-Related Traffic Growth, CPKC Will Promptly Return to Its Target Net Leverage Ratios 15

II. THE CP/KCS TRANSACTION HAS FUNDAMENTALLY DIFFERENT FINANCIAL IMPLICATIONS FROM CN'S PROPOSED USE OF A VOTING TRUST TO ACQUIRE KCS 18

A. CP Issued a Lower Quantum of Absolute Debt with a Higher Stock Mix 18

B. Unlike CN, CP Has Not Locked in on Achieving any Particular ROIC Target for Its Investments 19

C. CN's Proposed Use of a Trust Bore an Inherent Risk of Being Unwound.....20

EXHIBIT 1: S&P GLOBAL RATINGS, "*CP RAIL'S MERGER WITH KANSAS CITY SOUTHERN WOULD BE A GOOD FIT IF APPROVED*" (MAR. 22, 2021)

EXHIBIT 2: S&P GLOBAL RATINGS, *"CANADIAN PACIFIC RAILWAY LTD."* (NOV. 17, 2021)

EXHIBIT 3: MOODY'S INVESTOR'S SERVICE, "*MOODY'S DOWNGRADES CP RAIL TO BAA2 STABLE ON KCS ACQUISITION"* (Mar. 22, 2021)

EXHIBIT 4: MOODY'S INVESTOR'S SERVICE, "MOODY'S ASSIGNS BAA2 RATING TO CANADIAN PACIFIC RAILWAY'S NEW NOTES*"* (Nov. 17, 2021)

EXHIBIT 5: CP INVESTOR PRESENTATION, "*BUILT TO DRIVE GROWTH INVESTOR PRESENTATION*" (Mar. 2022)

EXHIBIT 6: CP PRESS RELEASE, "*CANADIAN PACIFIC AND KANSAS CITY SOUTHERN EXECUTE AGREEMENT TO COMBINE, CREATING FIRST SINGLE-LINE RAIL NETWORK LINKING U.S.-MEXICO-CANADA*" (Sept. 15, 2021)

EXHIBIT 7: CP RAIL'S EVENTS, "*CANADIAN PACIFIC RAILWAY AND KANSAS CITY SOUTHERN TO COMBINE*" (MAR. 21, 2021)

EXHIBIT 8: CN/KCS, FINANCE DOCKET NO. 36514, CP'S REPLY TO CN AND KCS JOINT MOTION FOR APPROVAL OF VOTING TRUST (CP-11), VERIFIED STATEMENT OF NADEEM VELANI (FILED JUNE 28, 2021) (EXCERPTS)

1. I am Nadeem Velani, Chief Financial Officer of Canadian Pacific Railway Limited ("CP"). I joined Canadian Pacific in March 2013 and served as Vice President – Investor Relations before becoming Chief Financial Officer in September 2016. Prior to CP, I spent 15 years at Canadian National ("CN") where I worked in a variety of positions in Strategic and Financial Planning, Investor Relations, Sales and Marketing and the Office of the President and CEO. Through the course of my 20-plus year career in the railroad industry I have developed deep familiarity with and expertise regarding the financial workings and incentives of Class I railroads. I hold a Bachelor of Economics degree from Western University and an MBA in Finance/International Business from McGill. On June 28, 2021, I submitted a Verified Statement in Finance Docket No. 36514 addressing several financial issues posed by Canadian National's proposed use of a voting trust to acquire Kansas City Southern.

2. My name is Chris De Bruyn. I am the Managing Director – Investor Relations and Treasury for Canadian Pacific ("CP"). I have been associated with CP's treasury operations since 2014. I have over ten years of experience in corporate finance. I hold a degree in Business Administration with a concentration in Finance from the State University of New York at Fredonia as well as a Master of Business Administration (MBA) with a specialization in Finance from the University of Calgary Haskayne School of Business. On October 29, 2021, I submitted a Verified Statement in this proceeding in support of the Application.

3. We are submitting this Reply Verified Statement to respond to testimony and argument by other Class 1 railroads, principally Canadian National and Union Pacific, that call into question whether the CP/KCS Transaction will achieve the revenue gains and efficiencies that Applicants anticipate, and in turn suggesting that the future CPKC would face financial pressure to engage in "foreclosure" and other strategies that we view as irrational. These

assertions are false. Other Applicant witnesses are addressing the reasonableness of the revenue and cost forecasts supporting the Application. As we explain in this statement, however, *whether or not CPKC attracts any new traffic,* CPKC will be under no financial strain. Both CP and KCS are financially healthy, and CP has already begun repaying debt with cash flow from ongoing operations. At the same time, both carriers' capital investments in their networks have continued – and will continue – unabated. CPKC will have no difficulty repaying Transaction-related debt while simultaneously increasing its network investment, even if none of the growth we forecast materializes (an outcome we regard as preposterous).

4. We also briefly address specific assertions made by CN witness Mark E. Zmijewski that the analysis that I (Mr. Velani) offered in June 2021 in Finance Docket No. 36514 of CN's proposed use of a Voting Trust has a bearing on the CP/KCS Transaction. As we demonstrate, it does not for several reasons, including that (a) CP acquired KCS shares for significantly less cash – and thus less new debt – than CN's proposal would have required; (b) unlike CN, CP has not put forward public "return-on-invested-capital" targets associated with the transaction, and thus would not be driven to irrational short-term actions designed to boost ROIC metrics; and (c), unlike CP/KCS, concerns about CN's proposed financial terms arose in a context where there appeared to be a material chance that CN would be forced to unwind its proposed trust and divest KCS.

I. CPKC'S FINANCIAL STRENGTH IS NOT DEPENDENT ON CP/KCS TRANSACTION SYNERGIES

A. There Is Strong Financial Market Validation that Applicants' Anticipated Synergies Will Be Realized

5. We begin by noting that the "skepticism" of CPKC's future Class I competitors about the CP/KCS Transaction is not shared by the investor community. The opportunities for CPKC to provide shippers with improved transportation options and thereby attract new traffic to

the North American rail network – and in the process compete better against rival railroads – is validated by the reaction of the financial community to the Transaction.

6. The major credit rating agencies have sustained CP's strong investment grade ratings even with the addition of Transaction debt incurred last year when CP acquired KCS shares and placed them into Trust.

7. When S&P Global Ratings evaluated CP's proposed acquisition of KCS in 2021, it "expect[ed] steady deleveraging over the next several years from earnings growth and free cash flow generation. In addition, the completion of the transaction should *strengthen CP's business risk profile notably from the combined larger transcontinental network, increased customer breadth, and enhanced service capability that add efficiencies.*"[1] In November when CP issued the debt to fund the cash consideration portion of the transaction, S&P noted that the "increased debt issued for the proposed KCS acquisition will lead to pro forma credit measures that are weak for the rating, but [they] expect steady improvement beyond this year."[2]

8. Moody's reached similar conclusions about the likely success of CPKC. It concluded that CP's credit profile "will benefit from a larger, more diversified business with greater exposure to higher margin merchandise business, increased customer diversity and breadth, the *potential for synergies from network and equipment efficiencies as well as greater revenue expansion*."[3] Although Moody's downgraded CP one notch to Baa2 from Baa1 in light of CP's increased leverage and uncertainties around regulatory approval, Moody's maintained a

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[1] *See* S&P Global Ratings, "*CP Rail's Merger With Kansas City Southern Would Be a Good Fit if Approved*" at 1 (Mar. 22, 2021) (Exhibit 1 hereto) (emphasis added).

[2] *See* S&P Global Ratings, *"Canadian Pacific Railway Ltd."* at 2 (Nov. 17, 2021) (Exhibit 2 hereto).

[3] *See* Moody's Investor's Service, "*Moody's Downgrades CP Rail to Baa2 Stable on KCS Acquisition*" at 1 (Mar. 22, 2021) (Exhibit 3 hereto) (emphasis added).

stable outlook on the Baa2 rating. This revised rating is still well within the investment grade rating band and is a stronger credit rating than CP had as recently as 2014. In November 2021, Moody's explained: "The stable outlook reflects Moody's expectation that CP's existing rail network will continue to operate well … [and] incorporates the expectation that the company will receive shareholder approval for the KCS acquisition in mid-2021, [which occurred] and will make steady progress in reducing its initial elevated leverage as a result of the acquisition toward 3x by 2023."[4]

9. As I (Chris De Bruyn) explained in my Verified Statement supporting the Application,[5] and as CP has consistently stated publicly to investors, CP is dedicated to maintaining investment grade ratings.[6] That expectation is based on Applicants' own analysis of the growth prospects of a combined CPKC network. The views of credit rating agencies and Wall Street analysts validate our internal views that we will meet this goal.

B. CP's Transaction-Related Debt Was Obtained on Very Favorable Terms

10. Events since the filing of the Application further validate CP's expectation that its financial future will be sound. CP completed its acquisition of KCS shares on December 14,

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4 *See* Moody's Investor's Service, "*Moody's Assigns Baa2 Rating to Canadian Pacific Railway's New Notes*" (Nov. 17, 2021) (Exhibit 4 hereto).

5 De Bruyn V.S. at ¶ 14 ("[W]e expect to retain a strong investment grade credit rating once we acquire KCS, despite the post-acquisition capital structure reflecting the revised transaction terms.").

6 *See* CP Rail's Events, "*Built to Drive Growth Investor Presentation*" (Mar. 2022) ("Committed to a strong, investment grade credit rating and target leverage") at 16 (Exhibit 5 hereto); Future for Freight's News, "*Canadian Pacific and Kansas City Southern Execute Agreement to Combine, Creating First Single-Line Rail Network Linking U.S.-Mexico-Canada*" (Sep. 15, 2021) at 4 (Exhibit 6 hereto) ("The combined company will remain committed to maintaining strong investment grade credit ratings…".); CP Rail's Events, "*Canadian Pacific Railway and Kansas City Southern to Combine*" (Mar. 21, 2021) (Exhibit 7 hereto) at 13 ("Continued commitment to maintain a strong balance sheet and investment grade rating.").

2021 and placed those shares into the Voting Trust established with the Board's approval. To finance the cash portion of the acquisition, CP incurred $8.5 billion (in U.S. dollars[7]) in new debt to finance the cash portion of the acquisition. That Transaction Debt was initially available through a committed loan provided by CP's banks.

11. In November, CP refinanced most of the Transaction Debt by issuing $8.5 billion in new bonds. The market response to this bond offering was extraordinary, and led to fixed interest rate terms that are quite favorable to CP. The extent of demand for bonds being offered is a key determining factor in setting the coupon rate (or interest rate) of the bonds, with greater demand driving lower interest rates. When there is interest in the market to purchase more in bonds than is being offered, that is known as oversubscription. The CP bond offering was extraordinarily successful, with significant oversubscription yielding highly favorable terms and thereby achieving a low cost of funding. The success of this offering validates the view that the CP/KCS transaction will be successful in attracting and supporting North American economic growth, and the belief of investors that CPKC will have no difficulty servicing the debt and returning to CP's target leverage range. It also means, as a practical matter, that CPKC will benefit from reduced borrowing costs and improved cash flow to support investments in its rail network while simultaneously repaying the Transaction debt.

12. The exceptionally strong bond execution in both US and Canada reflects broad-based bond investor support for the transaction:

- There was extraordinary investor participation in CP's marketing of its bond offering, with more than 140 investors attending question and answer calls and more than 200 viewing the pre-recorded presentation on the CP/KCS bond issuance.

[7] All dollar amounts referenced in this statement are U.S. dollars unless otherwise specified.

- The CP/KCS bond offering attracted record levels of demand, making it the third largest M&A Industrials transaction of 2021. In both the U.S. Dollar market and the Canadian Dollar market, the offering was significantly oversubscribed, meaning demand for the bonds was substantially higher than the amount of bonds issued into the markets. Specifically, in the U.S. Dollar bond market, investors were issued $6.7 billion of CP bonds, even though offers to purchase totaled $32 billion in demand from over 1,000 unique orders across five different durations (3yr, 5yr, 10yr, 20yr, and 30yr) to maturity. In the Canadian Dollar market (where investors were issued $2.2 billion CAD in bonds), there was almost $9 billion CAD in demand from more than 90 investors across two bond tranches.

13. The result of this strong demand for CP bonds was CP's lowest-ever U.S. Dollar coupon (5yr, 20yr, 30yr) and lowest ever spread (5yr, 10yr, 20yr) across multiple tranches. Investor oversubscription levels resulted in optimal pricing outcomes. Bonds traded 5-10 bps tighter following pricing, indicative of strong follow-on investor support for the offering. The newly-issued debt lowered the weighted average interest rate ("coupon") of CP's bond portfolio. For U.S. Dollar denominated bonds, CP's weighted average coupon decreased 128 bps from 4.70% to 3.42%. CP's weighted average coupon of CAD denominated bonds decreased 153 bps from 4.45% to 2.92%. A lower coupon means that CP pays less in annual interest per dollar of debt.

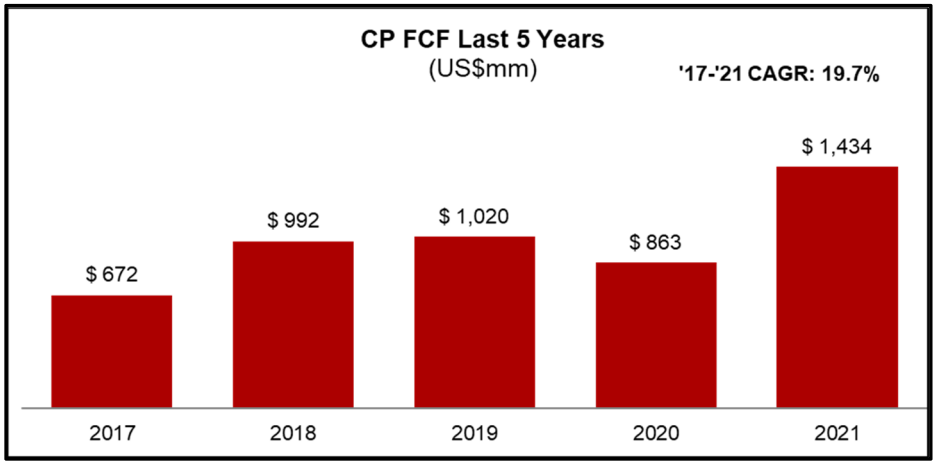
C. CP Has Already Made Progress Paying Down Debt While CP and KCS Have Continued Investing in Their Separate Networks

14. CP (and KCS) are already making strong progress in paying down debt, and we expect that to continue regardless of the extent to which Transaction synergies are realized. Even prior to CP and KCS first announcing their plans to combine in March 2021, CP paused share repurchases in order to support rapid repayment of its Transaction-related debt and thereby achieve its target leverage ratio of 2.5x more rapidly. This pause, coupled with the healthy financial performance of CP and KCS has enabled both railroads to pay down debt while the CP and KCS rail networks have operated independently. CP will continue to use its free cash flow to repay debt, along with any KCS free cash flow that KCS pays to CP in the form of dividends,

to bring its leverage ratio into its target range. In the first quarter of 2022, CP repaid more than $400 million in maturing debt and equipment financing.

15. CP continues to perform well financially. Figure 1 below shows the history of CP's healthy levels of stand-alone free cash flow (net of capital expenditures) since 2017. This cash flow will be available to repay CPKC's debt obligations. Despite a challenging first quarter of 2022, which included harsh winter operating conditions and a brief labor stoppage, CP generated $334 million USD in free cash flow, an increase of 43% year over year.

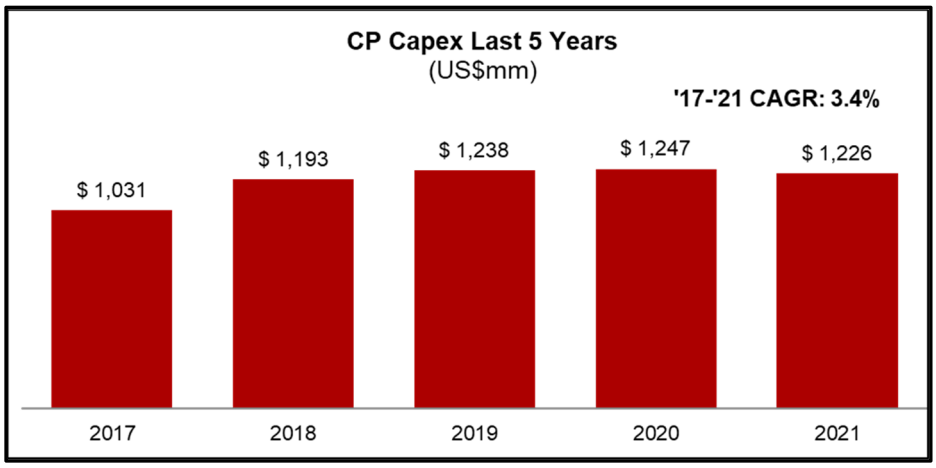
FIGURE 1[8]
CP HISTORICAL FREE CASH FLOW



16. Meanwhile, CP (again, on a stand-alone basis) has achieved substantial free cash flow without short-changing its investment in the rail network to support asset renewal and capacity expansion, as shown in Figure 2 below.

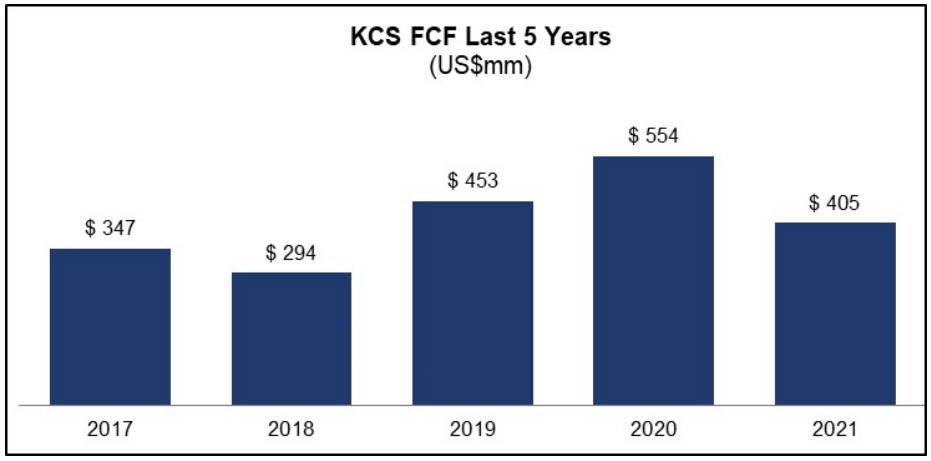
[8] CP 2021 Annual Report at 90, available at https://s21.q4cdn.com/736796105/files/doc_financials/2021/ar/CP_AnnualReport_2021.pdf. Note: Figures converted from CAD to USD using average exchange rate for year-ended as of 31-Dec for each year shown.

FIGURE 2[9]
CP HISTORICAL CAPEX



17. Likewise, KCS has been performing well. As shown in Figure 3 below, KCS generated free cash flow of $405 million in 2021. This cash flow will also be available to CPKC to repay Transaction-related debt.

FIGURE 3[10]
KCS HISTORICAL FCF

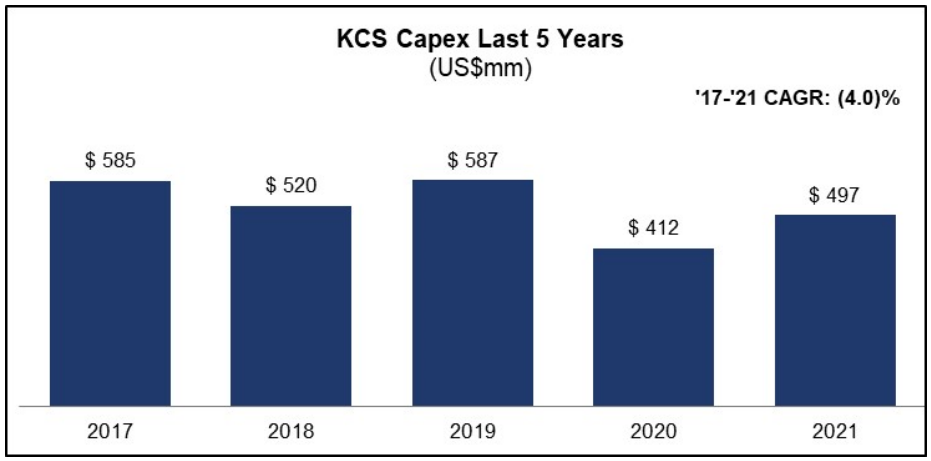


[9] *Id.* at 68. Figures converted from CAD to USD using average exchange rate for year-ended as of 31-Dec for each year shown. Free cash defined as cash provided by operating activities, less cash used in investing activities, adjusted for changes in cash and cash equivalents balances resulting from foreign exchange fluctuations, cash settlement of hedges settled upon issuance of debt and the operating cash flow impacts of acquisition-related costs associated with the KCS.

[10] KCS 2021 Form 10-K at 39, available at https://investors.kcsouthern.com/~/media/Files/K/KC-Southern-IR-V2/annual-reports/kcs-12-31-2021-10k.pdf. Free cash flow defined as cash provided by operating activities less cash used in investing activities.

18. As shown on Figure 4, KCS has achieved this case flow while simultaneously supporting significant investment in its network. KCS spent $497 million on capital expenditures in 2021.

FIGURE 4[11]
KCS HISTORICAL CAPEX



19. This strong cash flow through the end of 2021 enabled KCS to pay a cash dividend to CP following KCS's placement into voting trust, which CP used to pay down debt. Specifically, on January 27, 2022, pursuant to the Voting Trust Agreement, KCS paid a cash dividend of $265.0 million to a wholly-owned subsidiary of CP.[12]

D. CP's De-Leveraging Strategy Is Not Dependent on Transaction Synergies

20. As expected, the addition of Transaction-related debt has temporarily increased CP's leverage ratio – i.e., the relationship between adjusted debt and adjusted EBITDA. Figure 5 below shows the impact on CP's stand-alone leverage ratio in 2021 (at 4.8x),[13] along with CP's

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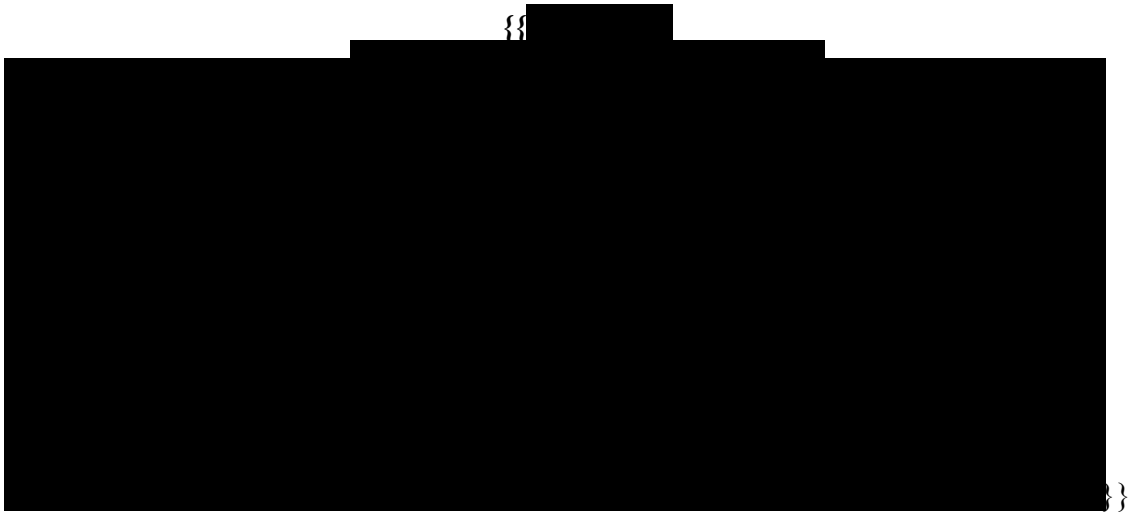
[11] KCS 2021 Form 10-K at 29.

[12] *Id.* at 91. KCS has separately made an independent judgment not to pay a dividend during the second quarter of 2022.

[13] These new leverage ratios are slightly higher than the initial estimates that CP anticipated when it filed its Application last October, because CP's EBITDA was lower than expected primarily because of a smaller than originally anticipated Canadian grain crop and because of the impacts to CP volumes of the historic flooding that occurred in British Columbia in November of 2021.

current forecast of the trajectory for leverage reduction as CP rapidly repays that debt in 2022-2024, achieving its 2.5x leverage target by 2024.



21. The 4.8x ratio shown in Figure 5 is based on CP stand-alone finances (*i.e.*, without KCS) and does not take into account the contribution of KCS's financial strength. Given that CP is now the beneficial owner of KCS shares (while those shares are held in Trust), a more appropriate perspective would consider CP and KCS on a consolidated basis. That is how third-parties – including CP's lenders, the investors that participated in the debt issuance, and both of the credit rating agencies (Moody's and S&P) – are evaluating CP's leverage. As reported in CP's 10-Q for the period ended March 31, 2021, CP-KCS consolidated leverage ratio is quite a bit lower, at approximately 4.1x.

22. Although the trajectory of leverage reduction shown in Figure 5 presupposes that the combined CPKC will achieve Transaction-related synergies, CPKC's rapid deleveraging is not at all dependent on those synergies, for two principal reasons: (a) CP and KCS will each

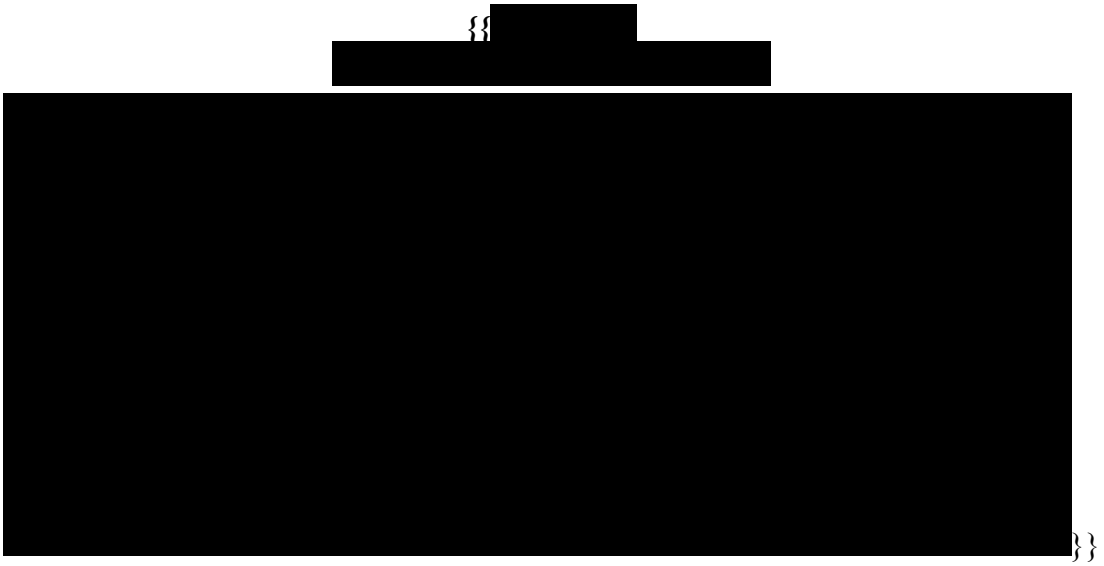
[14] De Bruyn V.S. at ¶ 11, Figure 1 (page 5) (2011-2013 EBITDA calculated as adjusted operating income plus depreciation and amortization).

bring to the combination its own strong stand-alone cash flows, as noted above; and (b) the trajectory shown in Figure 5 presumes that CPKC would resume discretionary shareholder returns (*i.e.,* buybacks and dividend increases). Were it necessary to achieve target leverage ratios, however, CPKC could continue to continue the suspension of those returns, thereby accelerating debt repayment.

1. CPKC Would Generate Significant Free Cash Flow Even Absent Transaction Synergies

23. With approval of CP control of KCS, CP and KCS would each bring into the combined CPKC entity strong financial performance, generating cash flow available to support debt repayment and ongoing capital investments without additional borrowing.

24. CP anticipates strong cash generation over the next three years even without the addition of Transaction-related synergies, as shown in Figure 6 below.



[15] *See* Velani De Bruyn Workpaper "CP Unlevered Free Cash Flow." These forecasts of unlevered free cash flow reflect management's updated financial forecasts.

25. CP expects to generate approximately $6.8 billion of unlevered free cash flow between 2022 and 2024, independent of the Transaction,[16] and with the pause in discretionary returns to shareholders all of these funds will be available to repay debt.

26. Further to this, CP management's long-term incentive compensation program was adjusted away from ROIC to focus on rewarding free cash flow generation and returning to target leverage.

27. Likewise, KCS anticipates similarly strong performance on a stand-alone basis, as reflected in Figure 7 below.



28. Under the base case KCS management forecast, KCS expects to generate approximately $2.6 billion of unlevered free cash flow between 2022 and 2024,[18] and expects to

[16] Calculated as EBITDA less depreciation and amortization plus other income, less other expenses, tax affected, plus depreciation and amortization, adjusted for changes in net working capital, less capital expenditures and less other investing activities.

[17] *See* Velani De Bruyn Workpaper "KCS Unlevered Free Cash Flow." These forecasts of unlevered free cash flow reflect management's updated financial forecasts.

[18] Calculated as stated in footnote 17 above.

spend approximately $410[19] million on interest payments on KCS standalone debt (assuming KCS maintains its pre-acquisition leverage while in voting trust). This leaves KCS with approximately $2.2 billion in excess cash flow over the 2022-2024 period, after capital expenditures, which in turn flows to CP in the form of dividend payments that can be used to further reduce CP (and CPKC) leverage.

2. If Synergies Underperformed Expectations, CPKC Could Continue to Suspend Discretionary Shareholder Returns

29. As discussed above, CP is already paying down debt with its own free cash flow supplemented by the dividend paid to it by KCS. After the Transaction, were CPKC to realize less growth than forecast, and thus have less free cash flow than anticipated available to use to repay debt, there would be no obstacle to its deciding to continue to suspend discretionary distributions to shareholders in the form of share buybacks and increased dividends.

30. In my (Mr. De Bruyn's) October Verified Statement, I highlighted the role that a continued pause in share buybacks would play in CP's strategy of bringing net leverage in line with historical levels by the end of 2024. That would remain true if cash flow lagged our projections. Although we do not anticipate that happening, if it did, we could and would continue to pause share buybacks to bring our net leverage in line with our target of 2.5x.

3. Regardless of the Magnitude of Transaction-Related Traffic Growth, CPKC Will Promptly Return to Its Target Net Leverage Ratios

31. To illustrate that rapid debt repayment is not dependent on the magnitude of Transaction-related synergies, we present a sensitivity analyses that examine the pace of deleveraging on the assumption (again, which we view as unrealistic) that Transaction synergies

[19] The calculation of KCS stand-alone interest payments based on updated financial forecasts of CP management.

end up being significantly lower than anticipated. These sensitivity analyses *do not reflect* our planned outcomes. Instead, they show that even if our plans are not realized, CPKC will easily achieve its 2.5x target leverage ratio by the end of 2024.

32. We start with a hypothetical scenario under which CPKC would realize only half of the revenue synergies anticipated from its combination with KCS. On that assumption, anticipated levered free cash flow (before debt repayment and discretionary shareholder returns) would be reduced in 2023E and 2024E by an aggregate of $298 million. By re-allocating $934 million from share repurchases in 2024, partially offset by a $6 million increase in shareholder dividends in 2024 (due to fewer shares being repurchased), CP would still achieve its below-2.5x target leverage ratio by the end of 2024.[20] The net result would be the same 2.3x leverage ratio shown in Figure 5 above.

33. As an additional sensitivity, even if CPKC were to achieve literally zero revenue synergies from the Transaction, CPKC would still have the financial flexibility to achieve target 2.5x leverage by 2024. With zero revenue synergies, 2023 and 2024 aggregate free cash flow would be reduced by an anticipated $598 million. In this sensitivity, CP could achieve the target leverage ratio by re-allocating $1,868 million from share repurchases in 2024.[21]

34. As illustrated in Figure 8 below, the result would be a trajectory of leverage reduction similar to that set forth in Figure 5. Net leverage in 2022 is the same for both scenarios, as anticipated revenue synergies do not begin until 2023. In 2023, net leverage is

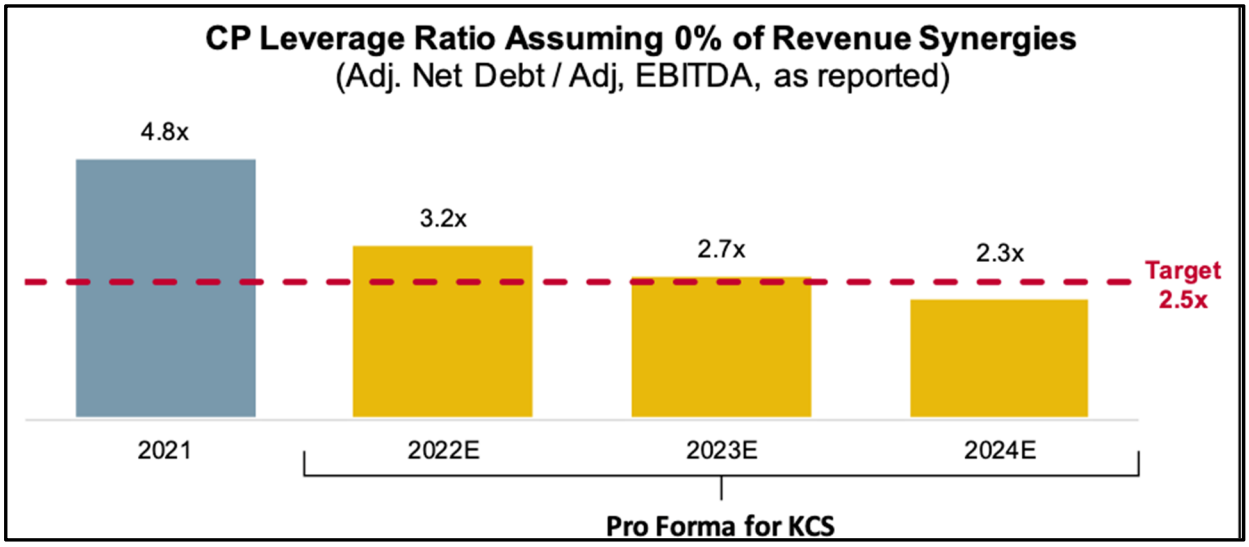
---

[20] The $934 million figure takes account of a {{ [redacted] }} *See* Velani De Bruyn Workpaper "50% Revenue Synergies."

[21] The $1,868 million figure takes account of a {{ [redacted] }} *See* Velani De Bruyn Workpaper "0% Revenue Synergies."

higher (2.7x) for the zero revenue synergies scenario (compared to 2.5x for the full revenue synergies scenario) because in the zero revenue synergies scenario, EBITDA is reduced by $273 million, implying that $203 million less debt has been repaid. Both scenarios achieve 2.3x leverage in 2024: the full revenue synergies scenario accomplishes this through the realization of $667 million EBITDA synergies in 2024; the zero revenue synergies scenario accomplishes this by re-allocating $1,868 million from share repurchases and repaying $1,460 million more debt.

FIGURE 8
CP LEVERAGE RATIO ASSUMING ZERO REVENUE SYNERGIES



35. Because CP's leverage objectives and financial strength are not dependent on any particular level of Transaction-related traffic growth, CPKC would have no incentive or need to engage in irrational short-term actions from a market or commercial perspective. For example, irrational strategies to "force" traffic to less efficient routes or artificially boost short term returns (such as by deferring important capital investments) would be both unnecessary and counterproductive to our long-term goals.

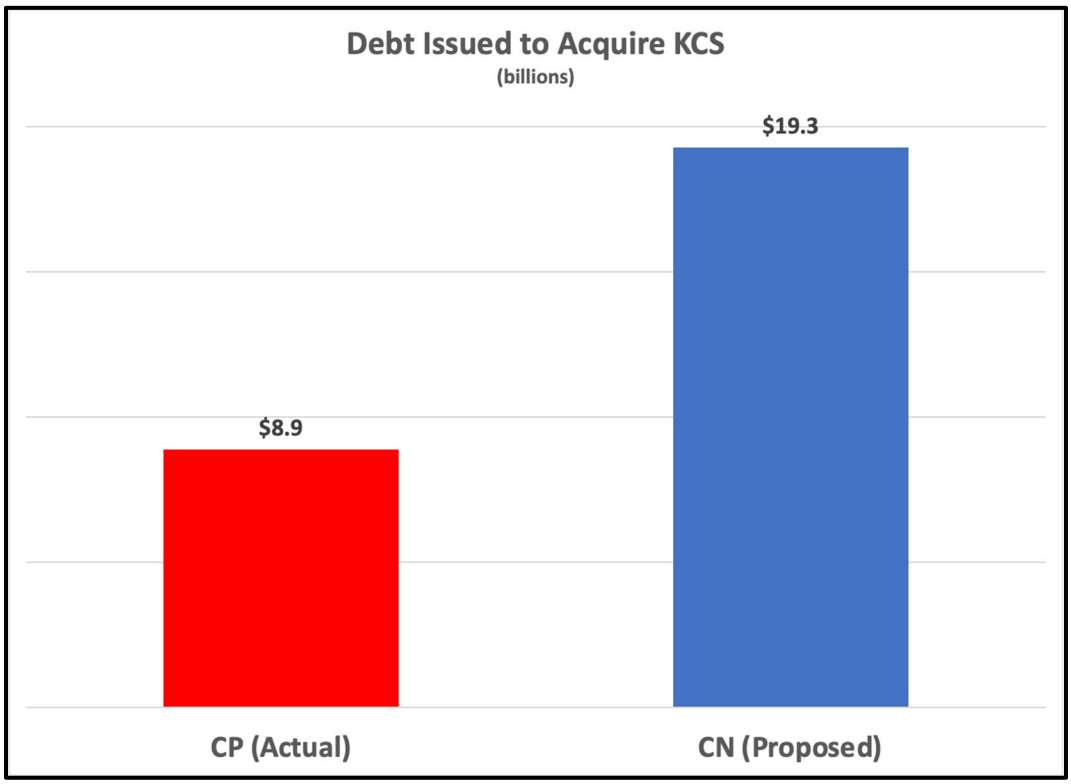
II. THE CP/KCS TRANSACTION HAS FUNDAMENTALLY DIFFERENT FINANCIAL IMPLICATIONS FROM CN'S PROPOSED USE OF A VOTING TRUST TO ACQUIRE KCS

36. Contrary to the assertions of CN's witness Zmijewski, Mr. Velani's 2021 analysis presented in the CN/KCS docket (Finance Docket No. 36514) of the financial risks of CN's proposed use of a voting trust has no application to the CP/KCS Transaction. This is so for several reasons, including that (a) CP acquired KCS shares for significantly less cash – and thus less new debt – than CN's proposal would have required; (b) unlike CN, CP has not publicly stated "return-on-invested-capital" targets associated with the deal, and thus would not be driven to irrational short-term designed to boost ROIC metrics; and (c) concerns about CN's proposed financial terms arose in a context where there appeared to be a material chance that CN would be forced to unwind its proposed trust and divest KCS.

A. CP Issued a Lower Quantum of Absolute Debt with a Higher Stock Mix

37. CP issued $8.5 billion of debt to fund the KCS acquisition in Q4 2021. This compares to CN, which would have issued $19.3 billion in debt (assuming a 1.27 CAD/USD exchange rate), reflecting a 2021 leverage ratio of 5.0x when accounting for CN's proposed debt. Instead, CP utilized far more stock in our transactions. Even when CP increased the price offered for KCS shares, we chose to do so by adding even more stock to the offer mix, not by increasing debt. We have issued a significantly lower quantum of debt than CN would have, and we have also achieved a lower standalone net leverage ratio than CN's failed proposal.

FIGURE 9
CP POST-ACQUISITION GROSS DEBT ISSUANCE
COMPARED TO WHAT CN PLANNED



38. As shown in Figure 9 above, CP issued $8.9 billion of debt to fund the acquisition of KCS shares in December 2021. This compares to CN, which would have issued more than twice as much debt (*$19.3 billion,* assuming a 1.27 CAD/USD exchange rate), reflecting a higher 2021 leverage ratio of 5.0x when accounting for CN's proposed debt.

B. Unlike CN, CP Has Not Locked in on Achieving any Particular ROIC Target for Its Investments

39. As Mr. Velani explained in detail in his Verified Statement in Finance Docket No. 36514 (excerpts of which are Exhibit 8 hereto), CN publicly communicated an ROIC target associated with its proposed KCS acquisition.[22] While we do not dismiss the validity of ROIC as a standalone financial metric for some purposes, it has its limitations. The ROIC target that CN

[22] *See* Velani V.S. at 12-15 & Exhs. A-D (Exhibit 8 hereto).

announced could have created pressure for CN to take harmful actions (such as price increases) in order to achieve CN's stated ROI targets.

40. By contrast, CP never put forward an ROIC target for its own KCS acquisition. CP made the conscious choice not to establish an arbitrary financial target in order to avoid creating any incentives that could distort sound business and operational decision-making during integration and beyond. From a financial perspective, the success of the CP/KCS Transaction has never been focused on deal ROIC, but rather on free cash flow generation and returning to target leverage so that CPKC can compete successfully in the future North American freight marketplace.

C. CN's Proposed Use of a Trust Bore an Inherent Risk of Being Unwound

41. Finally, Mr. Velani's analysis of the financial risks of a CN voting trust took into account that, in the unique context of CN's proposal, there would be an elevated risk that CN would not be able to acquire control of KCS because of the head-to-head competition between CN and KCS and the application of the 2001 merger rules to the Transaction. As a result, CN could have been required to divest KCS, with uncertain financial implications.

VERIFICATION

I, Nadeem Velani, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this ___ day of July, 2022.



Nadeem Velani

VERIFICATION

I, Chris De Bruyn, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 11 day of July, 2022.

Chris De Bruyn

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 1

S&P GLOBAL RATINGS, "CP RAIL'S MERGER WITH KANSAS CITY SOUTHERN WOULD BE A GOOD FIT IF APPROVED" (MAR. 22, 2021)

S&P Global
Ratings

Credit Research

Bulletin:

CP Rail's Merger With Kansas City Southern Would Be A Good Fit If Approved

March 22, 2021

TORONTO (S&P Global Ratings) March 22, 2021--S&P Global Ratings today said that its rating and outlook on Canadian freight railroad services provider Canadian Pacific Railway Ltd. (CP; BBB+/Stable/--) are currently unaffected by the proposed acquisition of Kansas City Southern (KCS; BBB/Stable/A-2). CP has offered approximately US$29 billion (enterprise value) for KCS, which will include US$8.6 billion in incremental debt, and the remainder in cash on hand and CP common shares. The deal has unanimous support from the boards of both companies, and would combine the two smallest Class 1 railways in North America. CP targets the transaction to close in mid-2022, but this is dependent on regulatory approval that we believe could delay the process.

In our view, the proposed acquisition will materially increase CP's leverage in the short term and could pose a headwind to credit quality. However, we expect steady deleveraging over the next several years from earnings growth and free cash flow generation. In addition, the completion of the transaction should strengthen CP's business risk profile notably from the combined larger transcontinental network, increased customer breadth, and enhanced service capability that add efficiencies. The deal is contingent on regulatory approval, notably from the U.S. Surface Transportation Board (STB), which presents a key source of uncertainty.

We do not ascribe a probability to regulatory approval. The company attempted to merge with Norfolk Southern (unsolicited offer) in late-2015 but faced opposition to certain aspects of the transaction. The previous proposed Class 1 merger (Burlington Northern Santa Fe and Canadian National Railway Co. in 1999) was blocked with a 15-month merger moratorium, after which the STB developed more stringent conditions for approving such mergers. However, the networks of CP and KCS do not overlap; we believe the impact on public interest and competition, and the potential benefits for key constituents (such as shippers) will be key considerations for regulators. The company intends to close the acquisition before regulatory approval, with the acquired KCS shares held in an independent trust (and insulate KCS from control by CP until the STB authorizes control). In the event the STB does not approve the acquisition, we understand the company would be required to divest its KCS shares.

We estimate CP will generate steady growth in earnings and cash flow over the next few years, with discretionary cash flow applied toward meaningful debt reduction. Share repurchases have historically been a significant use of cash flow. The curtailment of the company's buyback program during the review process, in tandem with earnings growth should primarily facilitate material deleveraging. On a standalone basis, we estimate CP's adjusted debt-to-EBITDA (leverage) in the low-4x area at end-2021 (inclusive of excess cash flow from KCS), but for this ratio to improve to below 4x at end-2022. On a pro forma consolidated basis at end-2023, we

PRIMARY CREDIT ANALYST

Jarrett Bilous
Toronto
+ 1 (416) 507 2593
jarrett.bilous
@spglobal.com

SECONDARY CONTACT

Madhav Hari, CFA
Toronto
+ 1 (416) 507 2522
madhav.hari
@spglobal.com

estimate this ratio approaches 2.5x and funds-from-operations to debt of approximately 30%, before potential synergies (estimated by the company at US$780 million over three years).

We believe the combination of CP and KCS would present opportunities for growth from a single-line network across Canada though the U.S. Midwest to Mexico. We would expect meaningful efficiencies beyond cost cutting, supported by an improved competitive position linked to enhanced operating breadth. CP already maintains the lowest operating ratio in the industry, but KCS is close (low-60% area versus the high-50% range at CP) and has adopted the precision scheduled railroading model in place at CP.

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REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 2

S&P GLOBAL RATINGS, "CANADIAN PACIFIC RAILWAY LTD." (NOV. 17, 2021)

S&P Global
Ratings

RatingsDirect®

Canadian Pacific Railway Ltd.

Primary Credit Analyst:
Faiz Saiyed, Toronto (44) 20-7176-0604; faiz.saiyed@spglobal.com

Secondary Contact:
Jarrett Bilous, Toronto + 1 (416) 507 2593; jarrett.bilous@spglobal.com

Table Of Contents

Credit Highlights

Outlook

Our Base-Case Scenario

Company Description

Business Risk

Financial Risk

Liquidity

Ratings Score Snapshot

Related Criteria

Related Research

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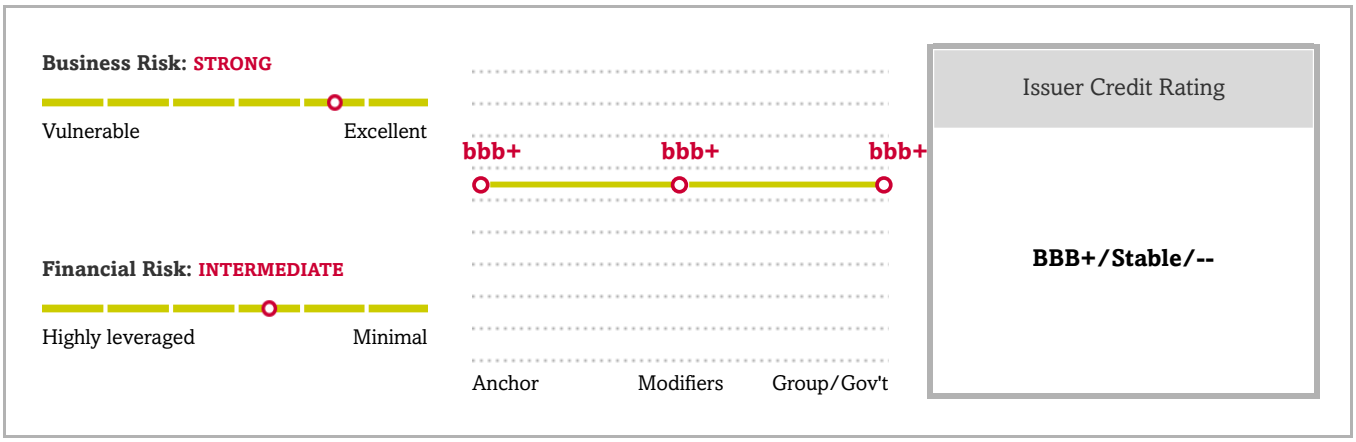
Canadian Pacific Railway Ltd.



Credit Highlights

Overview

Key strengths	Key risks
Strong market position in Canada and the U.S. Northeast and Midwest, with significant barriers to entry.	Materially higher debt from its pending KCS acquisition will increase reliance on free operating cash flow [FOCF] generation to improve prospective credit ratios.
Operating efficiency among the strongest of the North American railroads.	Smaller scale of operations relative to its North American Class 1 railways competitor.
Meaningful financial flexibility from consistently strong free operating cash flow (FOCF).	Exposure to bulk commodities, some of which are more sensitive to unpredictable changes in weather compared with its merchandise business.
Relatively well-diversified rail network by customer, end market, and region, which will be enhanced on completion of its pending Kansas City South (KCS) acquisition.	Freight volumes and margins are exposed to cyclical economic fluctuations.

The increased debt issued for the proposed KCS acquisition will lead to pro forma credit measures that are weak for the rating, but we expect steady improvement beyond this year. Canadian Pacific Railway Ltd. (CP) has issued about US$8.5 billion in debt (about double its total debt from the pre-acquisition level) in addition to equity used to fund its pending acquisition of KCS (BBB/Positive/--) for a total enterprise value of approximately US$31 billion. On a pro forma basis at year-end 2021, S&P Global Ratings estimates CP's credit measures will sharply weaken from current levels, including funds from operations (FFO) to debt in the mid-teens percent area (from about 33% in 2020) and an adjusted debt-to-EBITDA ratio in the low-4.0x area (from 2.3x in 2020). We view these ratios as weak for the current rating, including FFO to debt that breaches our downside threshold for the rating (below 23%).

However, CP is committed to debt reduction and we believe it will return to credit measures that are commensurate for the rating within the next few years. The company has ceased share repurchases since late 2020 and could receive distribution from KCS while in trust, which we believe will provide significant cash available for gross debt reduction. In addition, we believe the outlook for CP's earnings and cash flow is positive, with continued growth expected to contribute to progressively stronger credit ratios. Our forecasts are underpinned by a strong macroeconomic outlook for Canada and the U.S., which should underpin growth in volumes and prices, and we expect CP's capital expenditure (capex) will remain relatively stable. We also believe FFO to debt will improve to 25%-30% by 2023 and remain near

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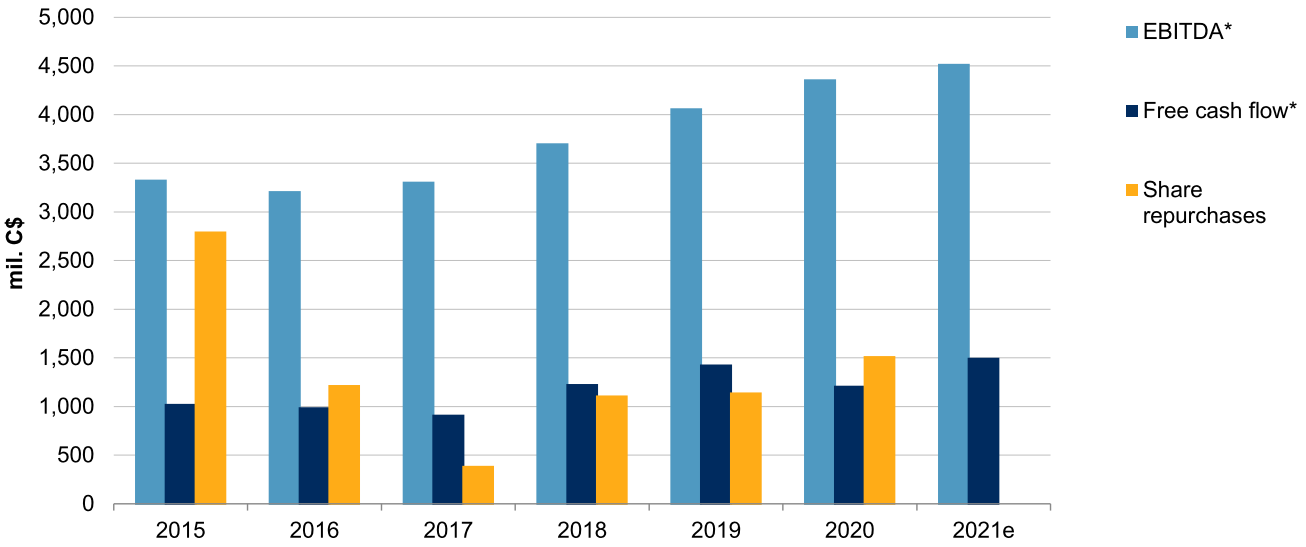
this level on a sustained basis.

Chart 1

Canadian Pacific Railway Ltd.--EBITDA And Cash Flow



*S&P Global Ratings adjusted. e--Estimate. Source: S&P Global Ratings.

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KCS is a good fit for CP and will enhance the company's competitive position and operating efficiencies. The completion of the CP-KCS merger should strengthen CP's business risk profile notably from the combined larger transcontinental network, increased customer breadth, and enhanced service capability that add efficiencies. We believe the combination of CP and KCS would present opportunities for growth from a single-line network across Canada though the U.S. Midwest to Mexico. We would expect meaningful efficiencies beyond cost cutting, supported by an improved competitive position linked to enhanced operating breadth. CP already maintains one of the lowest operating ratios in the industry, but KCS is close (in the low-60% area versus the high-50% area at CP) and has adopted the precision scheduled railroading model in place at CP. We have also not included in our forecasts potentially material synergies from the acquisition. That said, we believe it will take several years for CP to fully realize many of the positive merits of the transaction. In addition, the transaction will not affect our view of CP's business risk profile as strong, which is consistent with that of the company's larger peers.

Closing of the KCS acquisition is contingent on regulatory approval, which is uncertain. The KCS acquisition is predicated on regulatory approval, namely from the U.S. Surface Transportation Board (STB). CP received approval for its voting trust structure, whereby KCS shares owned by CP will be held in trust and KCS will operate independently until close of the deal. We currently assume the deal will close in early 2023, but this is a key source of uncertainty particularly due to the lack of recent precedent transactions.

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Outlook: Stable

The stable outlook reflects S&P Global Ratings' expectation that CP's adjusted FFO to debt will steadily improve to about 25%-30% by 2023 from low pro forma levels this year. We expect growth in earnings and solid FOCF generation that is used toward debt repayment will facilitate the improvement. Our estimates incorporate financial results from KCS in 2023, which also contribute to stronger prospective credit measures.

Downside scenario

We could downgrade CP within the next two years if we expect adjusted FFO to debt will remain below 23% on a sustained basis. In our view, this could occur if earnings are significantly weaker than we expect, potentially due to lower-than-expected volumes and prices related to weaker macroeconomic conditions or protracted operating disruptions that reduce the expected pace of deleveraging. In the event the company is not successful in acquiring KCS, and this results in sustainably higher debt levels, this could also lead to a downgrade.

Upside scenario

Although unlikely over the next two years, we could upgrade CP if stronger-than-expected earnings growth contributes to adjusted FFO to debt above 35% and adjusted FOCF to debt above 15% on a sustained basis. In this scenario, the company would generate much stronger-than-expected earnings and cash flow and adhere to financial policies that are more conservative than our current expectations.

Our Base-Case Scenario

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Assumptions

- Real GDP in Canada and the U.S. to increase 5.0%-6.0% in 2021, about 3.5%-4.0% in 2022, and about 2.0%-2.5% in 2023
- Canadian Consumer Price Index to increase about 3.0% this year, about 2.0%-2.5% in 2022, and about 2.0% in 2023
- An exchange rate of US$1.00 to about C$1.30
- Revenue ton miles (RTM) to increase in the low-single-digit area over the next few years
- Steady price increases above rail inflation, which is consistent with past price hikes and incorporates our view of favorable demand conditions (and temporary supply constraints)
- Average price per barrel of West Texas Intermediate crude oil of about US$55-US$60 in 2022 and US$50-US$55 in 2023
- Annual capex of C$1.5 billion-C$1.6 billion in 2021 and 2022
- No share repurchases over the next two years
- We consolidate KCS debt (about US$9.5 billion) in our 2021 pro forma ratios but KCS' earnings from 2023, when it is expected to close

Key Metrics

Canadian Pacific Railway Ltd.--Key Metrics

	--Fiscal year ended Dec. 31--			
	2020a	**2021f**	**2022e**	**2023e***
(Mil. C$)				
Revenue	7,710	8,000-8,200	8,500-8,700	13,800-14,000
EBITDA	4,353	4,500-4,600	4,700-4,900	7,600-7,800
EBIT margin (%)	43	41-43	42-44	43-45
FFO to debt (%)	32.9	15-18	17-20	25-30
Debt to EBITDA (x)	2.3	Above 4.0	3.5-3.8	2.5-2.8
FOCF to debt (%)	11.9	6-8	9-11	About 15

All figures adjusted by S&P Global Ratings. *Earnings from Kansas City South is consolidated. FFO--Funds from operations. FOCF--Free operating cash flow. a--Actual. e--Estimate. f--Forecast.

Our view of rail industry fundamentals in Canada and the U.S. over the next few years remains positive despite the emergence of volume and supply chain disruptions. We expect CP will generate steady growth in earnings and cash flow in 2021 and 2022, with material improvement in 2023 mainly related to the inclusion of KCS operating results. We assume steady volume and pricing growth will primarily contribute to the improvement through 2022. CP slightly tempered its volume growth guidance for this year, which incorporates lower Canadian grain volumes (thanks to a drought in Western Canada) and supply chain disruptions. However, we view this as temporary, and expect other parts of its business will mitigate the impact, led by more economically sensitive merchandise shipments. B.C. mudslides have led to operational disruptions, but they are temporary and the impact on CP's operating performance will be

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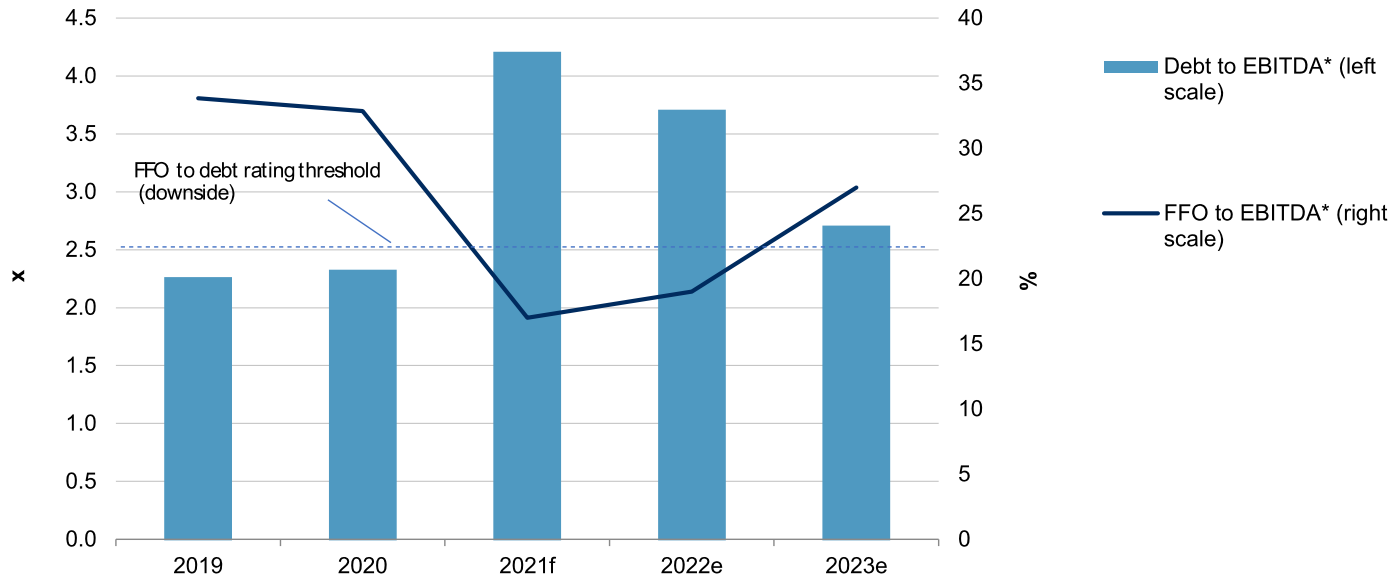
largely immaterial. Ongoing favorable demand should also continue to facilitate further price increases (about 25% of CP's business will re-price in fourth-quarter 2021) and, along with ongoing fuel surcharges, provide good visibility for stronger financial results next year.

Our pro forma credit measures in 2021 and 2022 include KCS debt but exclude its financial results until 2023 (though closing could potentially occur as early as late 2022). However, we assume CP will receive distribution from KCS, which are available for debt reduction. We assume CP will use its excess cash generation (after dividends to its shareholders) toward debt repayment. In tandem with stronger earnings and cash flow over the next few years, along with the inclusion of KCS in 2023, we believe CP's prospective leverage and coverage ratios will steadily improve to levels commensurate with the rating.

Chart 2

Canadian Pacific Railway Ltd.--Cash Flow/Leverage



*S&P Global Ratings adjusted. FFO--Funds from operations. f--Forecast. e--Estimate. Source: S&P Global Ratings.

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Company Description

CP is a Canadian Class I railway that primarily serves Canada and parts of the U.S. It operates a network of about 13,000 route miles serving the principal business centers of Canada, from Montreal to Vancouver, as well as the U.S. Midwest and Northeast. In 2020, the company generated close to C$7.7 billion of revenue, making it the second-largest railroad in Canada (about half the size of Canadian National Railway Ltd. [CN]) and the sixth largest in North America.

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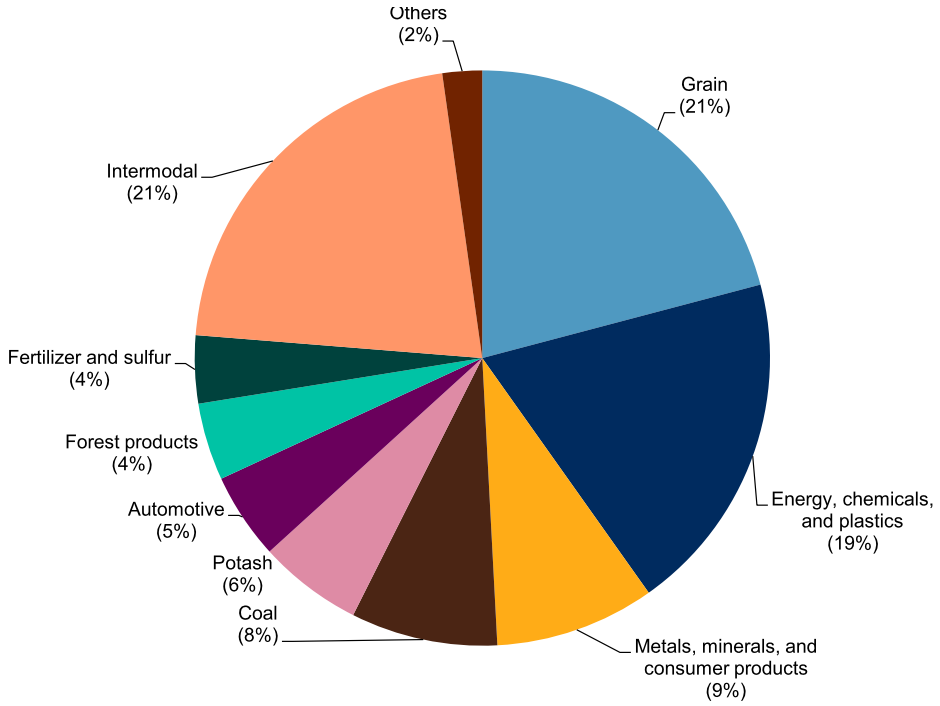
Chart 3

Canadian Pacific Railway Co. Ltd.--Percentage Of Revenue By Commodity Group
Nine months ended Sept. 30, 2021



Source: Company data.
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Business Risk: Strong

CP is one of two Class 1 railroads in Canada (the other being CN) with a favorable market position in Canada, as well as the U.S. Northeast and Midwest. We believe the company will continue to benefit from limited competition from alternate modes of long-haul commercial freight transport within the North American railroad industry. In our view, the significant barriers to entry to its business and moderate degree of cyclicality have contributed to steady increases in freight pricing in excess of rail inflation (including fuel costs). Trucking is a competitive alternative on short-haul routes and for time-sensitive freight, and barges and vessels offer competition on the Great Lakes-St. Lawrence Seaway. However, rail remains an attractive and cost-effective choice for bulk and long-distance commodity traffic, in our opinion.

We expect CP's operating efficiency will remain among the strongest of the North American railroads, underpinned by our forecast adjusted EBIT margins in the low-40% area, which we consider above average for Class 1 railroads. The company's profitability has steadily improved in the past several years, and CP now has the lowest operating ratio in the industry. In our view, CP should continue to generate strong profitability due in large part to its relatively well-diversified shipments and revenue by geography, customer, and product. This typically allows the company to

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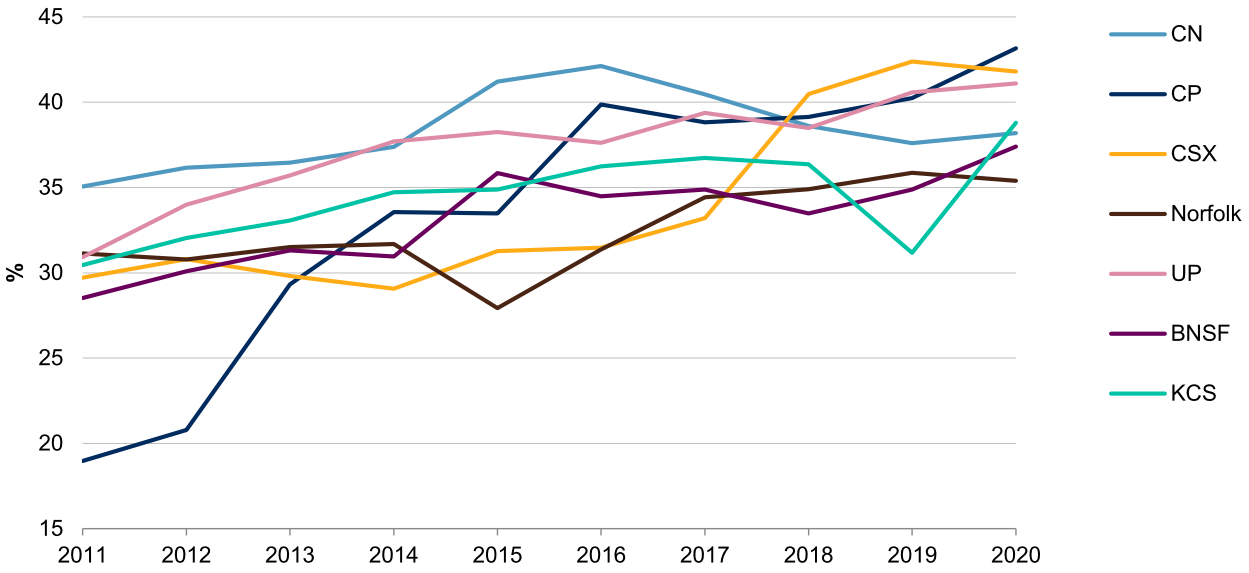
offset periods of weaker demand in certain sectors with strong performance in others. Moreover, fuel surcharge mechanisms are included in most of the company's freight contracts--as is common in the rail industry, albeit there can sometimes be a lag before rates reset. We believe these mechanisms should mitigate CP's cost exposure to volatile fuel prices, further supporting our view of the company's earnings stability.

Chart 4

S&P Global Ratings' Adjusted EBIT Margins



CN--Canadian National Railway Co. CP-Canadian Pacific Railway Ltd. CSX--CSX Corp. Norfolk--Norfolk Southern Railway. UP--Union Pacific Railway Co. BNSF--Burlington Santa Fe LLC. KCS--Kansas City South.

Sources: Company data; S&P Global Ratings' estimates.

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Peer comparison

We believe CP is less diversified than CN and some of its U.S. railroad peers due to the company's significant exposure to bulk commodities. Bulk commodities represented about 40% of CP's freight revenue compared with about 20% for CN. These include coal, grain, potash, and fertilizer products, which we believe generally exhibit greater volatility in freight volumes mainly due to higher relative exposure to unpredictable weather fluctuations and prevailing supply/demand fundamentals. CP's scale of operations is also smaller than that of CN and most of its U.S. competitors (other than KCS) on several measures. Mainly for these reasons, we view CP's business risk profile at the lower end of our strong business risk assessment. However, the disparity on several measures is moderate, particularly when considering the integration of KCS.

From a financial risk perspective, we believe CP compares favorably to most of the other Class 1 railroads. Our higher rating on CN reflects our comparatively stronger business risk profile assessment on the company (mainly owing to

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CN's greater operating breadth) in tandem with historically stronger credit measures.

Table 1

Canadian Pacific Railway Ltd.--Peer Comparison

Industry Sector: Railroads

	Canadian Pacific Railway Ltd.	Canadian National Railway Co.	CSX Corp.	Norfolk Southern Corp.	Union Pacific Corp.	Burlington Northern Santa Fe LLC	Kansas City Southern
Ratings as of Nov. 17, 2021	BBB+/Stable/--	A/Negative/A-1	BBB+/Stable/A-2	BBB+/Stable/A-2	A-/Stable/A-2	AA-/Stable/--	BBB/Positive/A-2
	--Fiscal year ended Dec. 31, 2020--						
(Mixed currency)	**Mil C$**		**Mil. US$**				
Revenue	7,710.0	13,819.0	10,583.0	9,789.0	19,533.0	20,869.0	2,632.6
EBITDA	4,353.0	7,059.0	5,864.0	4,678.0	10,398.0	10,667.0	1,430.2
Funds from operations (FFO)	3,317.0	6,140.1	4,423.8	3,759.0	8,070.4	8,264.9	1,093.7
Interest expense	499.0	568.9	780.3	656.0	1,204.6	1,116.1	154.0
Cash interest paid	454.0	565.9	776.3	608.0	1,113.6	1,124.1	154.2
Cash flow from operations	2,858.0	6,293.1	4,318.8	3,715.0	8,757.4	8,271.9	1,098.6
Capital expenditure	1,655.0	2,863.0	1,626.0	1,480.0	2,927.0	3,037.0	490.1
Free operating cash flow (FOCF)	1,203.0	3,430.1	2,692.8	2,235.0	5,830.4	5,234.9	608.5
Discretionary cash flow (DCF)	(773.0)	1,346.1	1,028.8	(164.0)	(500.6)	388.4	(432.7)
Cash and short-term investments	147.0	569.0	3,131.0	1,115.0	1,859.0	1,986.0	188.2
Debt	10,091.0	13,140.9	14,352.9	12,375.0	27,131.3	22,661.0	3,677.3
Equity	7,319.0	19,651.0	13,110.0	14,791.0	16,958.0	44,254.0	4,383.6
Adjusted ratios							
EBITDA margin (%)	56.5	51.1	55.4	47.8	53.2	51.1	54.3
Return on capital (%)	19.8	16.1	16.2	12.6	18.1	11.6	12.7
EBITDA interest coverage (x)	8.7	12.4	7.5	7.1	8.6	9.6	9.3
FFO cash interest coverage (x)	8.3	11.8	6.7	7.2	8.2	8.4	8.1
Debt/EBITDA (x)	2.3	1.9	2.4	2.6	2.6	2.1	2.6
FFO/debt (%)	32.9	46.7	30.8	30.4	29.7	36.5	29.7

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Table 1

Canadian Pacific Railway Ltd.--Peer Comparison (cont.)

Industry Sector: Railroads

	Canadian Pacific Railway Ltd.	Canadian National Railway Co.	CSX Corp.	Norfolk Southern Corp.	Union Pacific Corp.	Burlington Northern Santa Fe LLC	Kansas City Southern
Cash flow from operations/debt (%)	28.3	47.9	30.1	30.0	32.3	36.5	29.9
FOCF/debt (%)	11.9	26.1	18.8	18.1	21.5	23.1	16.5
DCF/debt (%)	(7.7)	10.2	7.2	(1.3)	(1.8)	1.7	(11.8)

Financial Risk: Intermediate

We expect CP's credit metrics to weaken in 2021, but to improve to levels commensurate with the rating by 2023. Materially higher debt associated with the company's pending acquisition of KCS is responsible for this weakening, including the US$9.5 billion in new debt funding and the consolidation of KCS debt. We estimate CP's pro forma 2021 adjusted FFO-to-debt ratio will be below 20% and adjusted debt-to-EBITDA ratio will be just over 4x, which are weak for our financial risk assessment and rating on the company. However, we assume steady growth in earnings and cash flow over the next two years, as well as solid discretionary cash flow used to reduce net debt over this period. With the consolidation of KCS' earnings and cash flow, which we assume in 2023, we expect CP's credit measures will improve to an extent that aligns with the rating. This includes FFO to debt in the 25%-30% area and adjusted debt to EBITDA of about 2.5x-2.8x in 2023.

Under our assumptions, CP should generate C$1.4 billion-C$1.7 billion of annual FOCF over the next couple of years after C$1.5 billion-C$1.6 billion of capex (equal to about 13%-17% of revenue). The company intends to continue to pay dividends to shareholders, and we expect this to increase in the next couple of years. We assume the remaining excess cash flow will be used toward debt reduction, with no share repurchases expected until 2023 at the earliest (and depending on the pace of deleveraging).

Financial summary

Table 2

Canadian Pacific Railway Ltd.--Financial Summary

Industry Sector: Railroads

	--Fiscal year ended Dec. 31--				
	2020	2019	2018	2017	2016
(Mil. C$)					
Revenue	7,710.0	7,792.0	7,316.0	6,554.0	6,232.0
EBITDA	4,353.0	4,055.0	3,693.5	3,300.0	3,205.0
Funds from operations (FFO)	3,317.0	3,092.8	2,890.3	2,362.0	2,343.4
Interest expense	499.0	486.2	508.2	514.0	524.6
Cash interest paid	454.0	456.2	485.2	513.0	539.6
Cash flow from operations	2,858.0	3,049.8	2,750.3	2,228.0	2,139.4

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Table 2

Canadian Pacific Railway Ltd.--Financial Summary (cont.)

Industry Sector: Railroads

	--Fiscal year ended Dec. 31--				
	2020	**2019**	**2018**	**2017**	**2016**
Capital expenditure	1,655.0	1,630.0	1,531.0	1,324.0	1,157.0
Free operating cash flow (FOCF)	1,203.0	1,419.8	1,219.3	904.0	982.4
Discretionary cash flow (DCF)	(773.0)	(126.2)	(231.7)	213.0	(482.6)
Cash and short-term investments	147.0	133.0	61.0	338.0	164.0
Gross available cash	147.0	133.0	61.0	338.0	164.0
Debt	10,091.0	9,137.6	9,161.9	8,243.8	8,976.5
Equity	7,319.0	7,069.0	6,636.0	6,437.0	4,626.0
Adjusted ratios					
EBITDA margin (%)	56.5	52.0	50.5	50.4	51.4
Return on capital (%)	19.8	19.6	18.8	18.0	18.2
EBITDA interest coverage (x)	8.7	8.3	7.3	6.4	6.1
FFO cash interest coverage (x)	8.3	7.8	7.0	5.6	5.3
Debt/EBITDA (x)	2.3	2.3	2.5	2.5	2.8
FFO/debt (%)	32.9	33.8	31.5	28.7	26.1
Cash flow from operations/debt (%)	28.3	33.4	30.0	27.0	23.8
FOCF/debt (%)	11.9	15.5	13.3	11.0	10.9
DCF/debt (%)	(7.7)	(1.4)	(2.5)	2.6	(5.4)

Reconciliation

Table 3

Canadian Pacific Railway Ltd.--Reconciliation Of Reported Amounts With S&P Global Ratings' Adjusted Amounts

	--Fiscal year ended Dec. 31, 2020--						
Canadian Pacific Railway Ltd. reported amounts (mil. C$)							
	Debt	**EBITDA**	**Operating income**	**Interest expense**	**S&P Global Ratings' adjusted EBITDA**	**Cash flow from operations**	**Capital expenditure**
Reported amounts	9,628.0	4,090.0	3,311.0	462.0	4,353.0	2,802.0	1,671.0
S&P Global Ratings' adjustments							
Cash taxes paid	--	--	--	--	(582.0)	--	--
Cash interest paid	--	--	--	--	(427.0)	--	--
Reported lease liabilities	454.0	--	--	--	--	--	--
Operating leases	--	83.0	11.0	11.0	(11.0)	72.0	--
Accessible cash and liquid investments	(147.0)	--	--	--	--	--	--
Capitalized interest	--	--	--	16.0	(16.0)	(16.0)	(16.0)
Share-based compensation expense	--	170.0	--	--	--	--	--
Asset-retirement obligations	63.2	10.0	10.0	10.0	--	--	--

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Table 3

Canadian Pacific Railway Ltd.--Reconciliation Of Reported Amounts With S&P Global Ratings' Adjusted Amounts (cont.)								
Nonoperating income (expense)	--	--	(4.0)	--	--	--	--	
Debt: Workers compensation/self insurance	92.8	--	--	--	--	--	--	
Total adjustments	463.0	263.0	17.0	37.0	(1,036.0)	56.0	(16.0)	
S&P Global Ratings' adjusted amounts								
	Debt	**EBITDA**	**EBIT**	**Interest expense**	**Funds from operations**	**Cash flow from operations**	**Capital expenditure**	
Adjusted amounts	10,091.0	4,353.0	3,328.0	499.0	3,317.0	2,858.0	1,655.0	

Liquidity: Strong

Our liquidity assessment incorporates our view that CP's sources of liquidity will exceed uses by more than 1.5x over the next 12 months. Our liquidity assessment is a standalone assessment of CP and excludes and proceeds or uses related to the CP-KCS merger. We also expect that the company will maintain sufficient liquidity to exceed its funding needs even in a stress scenario whereby our forecast EBITDA declines by 30%. Furthermore, we believe CP has the capacity to withstand a high-impact, low-probability event with limited need for refinancing; well-established and solid banking relationships; generally high standing in credit markets with great access to capital markets; and generally very prudent financial risk management.

We have a short-term rating of 'A-2' on Canadian Pacific Railway Co. (a subsidiary of CP), which reflects our 'BBB+' long-term issuer credit rating on the company.

Principal Liquidity Sources	Principal Liquidity Uses
• Cash and cash equivalents of C$210 million as of Sept. 30, 2021 • Full availability under CP's revolving credit facilities that include a US$1.0 billion tranche maturing Sept. 27, 2026, and a US$300 million tranche maturing Sept. 27, 2023 • Annual FFO of more than C$3.0 billion	• Annual capex of C$1.5 billion-C$1.6 billion • Annual dividend payments of about US$500 million in 2021 and US$750 million-US$800 million in 2022 • Seasonal working capital investments that typically peak in the first quarter

Ratings Score Snapshot

Issuer Credit Rating

BBB+/Stable/--

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Business risk: Strong

- **Country risk:** Very low
- **Industry risk:** Low
- **Competitive position:** Strong

Financial risk: Intermediate

- **Cash flow/leverage:** Intermediate

Anchor: bbb+

Modifiers

- **Diversification/portfolio effect:** Neutral (no impact)
- **Capital structure:** Neutral (no impact)
- **Financial policy:** Neutral (no impact)
- **Liquidity:** Strong (no impact)
- **Management and governance:** Satisfactory (no impact)
- **Comparable rating analysis:** Neutral (no impact)

Related Criteria

- General Criteria: Group Rating Methodology, July 1, 2019
- Criteria | Corporates | General: Corporate Methodology: Ratios And Adjustments, April 1, 2019
- Criteria | Corporates | General: Reflecting Subordination Risk In Corporate Issue Ratings, March 28, 2018
- General Criteria: Methodology For Linking Long-Term And Short-Term Ratings, April 7, 2017
- General Criteria: Methodology And Assumptions For Analyzing Letter Of Credit-Supported Debt, Feb. 20, 2015
- Criteria | Corporates | General: Methodology And Assumptions: Liquidity Descriptors For Global Corporate Issuers, Dec. 16, 2014
- General Criteria: Country Risk Assessment Methodology And Assumptions, Nov. 19, 2013
- General Criteria: Methodology: Industry Risk, Nov. 19, 2013
- Criteria | Corporates | General: Corporate Methodology, Nov. 19, 2013
- General Criteria: Methodology: Management And Governance Credit Factors For Corporate Entities, Nov. 13, 2012
- General Criteria: Principles Of Credit Ratings, Feb. 16, 2011

Related Research

Canadian Pacific Railway Co.'s Proposed US$8.5 Billion Senior Unsecured Notes Rated 'BBB+', Nov. 17, 2021

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Business And Financial Risk Matrix

Business Risk Profile	Financial Risk Profile					
	Minimal	Modest	**Intermediate**	Significant	Aggressive	Highly leveraged
Excellent	aaa/aa+	aa	a+/a	a-	bbb	bbb-/bb+
Strong	aa/aa-	a+/a	**a-/bbb+**	bbb	bb+	bb
Satisfactory	a/a-	bbb+	bbb/bbb-	bbb-/bb+	bb	b+
Fair	bbb/bbb-	bbb-	bb+	bb	bb-	b
Weak	bb+	bb+	bb	bb-	b+	b/b-
Vulnerable	bb-	bb-	bb-/b+	b+	b	b-

Ratings Detail (As Of November 17, 2021)*

Canadian Pacific Railway Ltd.	
Issuer Credit Rating	BBB+/Stable/--
Issuer Credit Ratings History	
04-Nov-2014	BBB+/Stable/--
16-Apr-2014	BBB/Positive/--
12-Mar-2014	BBB-/Watch Pos/--
Related Entities	
Canadian Pacific Railway Co.	
Issuer Credit Rating	BBB+/Stable/A-2
Commercial Paper	
Foreign Currency	A-2
Equipment Trust Certificates	BBB+
Senior Unsecured	AA-
Senior Unsecured	BBB+

*Unless otherwise noted, all ratings in this report are global scale ratings. S&P Global Ratings' credit ratings on the global scale are comparable across countries. S&P Global Ratings' credit ratings on a national scale are relative to obligors or obligations within that specific country. Issue and debt ratings could include debt guaranteed by another entity, and rated debt that an entity guarantees.

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REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 3

MOODY'S INVESTOR'S SERVICE, "MOODY'S DOWNGRADES CP RAIL TO BAA2 STABLE ON KCS ACQUISITION" (MAR. 22, 2021)

MOODY'S
INVESTORS SERVICE

Rating Action: Moody's downgrades CP Rail to Baa2 Stable on KCS acquisition

22 Mar 2021

Toronto, March 22, 2021 -- Moody's Investors Service, ("Moody's") downgraded Canadian Pacific Railway Company's ("CP") senior unsecured ratings to Baa2 from Baa1 following the announcement that its parent, Canadian Pacific Railway Limited, has agreed to acquire Kansas City Southern ("KCS") for approximately $29 billion, the funding of which includes raising approximately $8.6 billion in debt. CP's commercial paper rating has been affirmed at Prime-2 and its outlook remains stable.

Financing for the new debt has been committed. As part of the merger, CP will also assume KCS' outstanding debt of approximately $3.8 billion.

"The downgrade reflects the increase in adjusted leverage, which will exceed 3X through 2023" said Jamie Koutsoukis, Moody's analyst. "It also incorporates the regulatory and integration risks of the acquisition" she added.

The following rating actions were taken:

Affirmations:

..Issuer: Canadian Pacific Railway Company

....Senior Unsecured Commercial Paper, Affirmed P-2

Downgrades:

..Issuer: Canadian Pacific Railway Company

....Senior Unsecured Shelf, Downgraded to (P)Baa2 from (P)Baa1

....Senior Unsecured Regular Bond/Debenture, Downgraded to Baa2 from Baa1

Outlook Actions:

..Issuer: Canadian Pacific Railway Company

....Outlook, Remains Stable

RATINGS RATIONALE

CP's Baa2 credit rating benefits from 1) its well-positioned railway network, 2) a preponderance of stable commodity hauls, and 3) a track record of a very good operating margin. CP is constrained by 1) its small size versus its North American Class 1 peers, 2) uncertainties associated with regulatory approval for CP's recent announcement to acquire KCS (we expect shareholder approval will occur in mid-2021) which will result in adjusted leverage exceeding 4x in 2021, 3) its exposure to economic cyclicality, 4) adverse weather conditions and 5) increasing regulatory risks. Moody's believes the company has the ability and is committed to reducing its adjusted financial leverage towards the mid-point of its 2x to 2.5x public leverage target, however the time to achieve this will be protracted.

The acquisition of KCS will strengthen CP's rail network, creating a bigger continental network and expanding the reach of single hauls and service capabilities that can be provided to customers. In addition, its credit profile will benefit from a larger, more diversified business with a greater exposure to higher margin merchandise business, increased customer diversity and breadth and the potential for synergies from network and equipment efficiencies as well as greater revenue expansion. Offsetting these benefits however is the increase in adjusted leverage which will increase from 2.5x at year-end 2020 to 4.5x pro forma for the acquisition, and remain above 3x through 2023. There is also the economic risk to CP should they not be granted regulatory approval and be required to unwind its purchase of KCS at an unknown price.

CP has excellent liquidity. Excluding the announced acquisition, the company has CAD2.5 billion in expected sources of liquidity compared to about CAD770 million of uses over the next 12 months. Sources of liquidity include cash of CAD147 million and an undrawn US$1 billion credit facility (matures in September 2024) as of December 31, 2020. As well, we expect CP will generate about CAD1.1 billion of free cash flow in 2021. The company has C$320 million of debt due August 2021, and C$450 million due in January 2022. CP's revolving credit facility agreement has a maximum debt to EBITDA covenant and we expect they will maintain significant headroom under this covenant.

CP has secured US$8.6 billion of committed bridge financing for its announced acquisition of KCS.

The stable outlook reflects Moody's expectation CP existing rail network will continue to operate well, such that operating margins do not decrease below 37%. It also incorporates the expectation that the company will receive shareholder approval for the KCS acquisition in mid-2021 and will make steady progress in reducing its initial elevated leverage as a result of the acquisition towards 3x by 2023.

FACTORS THAT COULD LEAD TO AN UPGRADE OR DOWNGRADE OF THE RATINGS

A ratings upgrade would require clarity regarding regulatory approval for CP's acquisition of KCS. It would also require the company maintain adjusted debt/EBITDA below 2.75x and free cash flow/debt of more than 10%.

A ratings downgrade could occur if Moody's expects the company to sustain its adjusted debt/ EBITDA above 3.25x and free cash flow/debt of less than 5%.

The principal methodology used in these ratings was Surface Transportation and Logistics published in May 2019 and available at https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1113382 . Alternatively, please see the Rating Methodologies page on www.moodys.com for a copy of this methodology.

Canadian Pacific Railway Company, headquartered in Calgary, Alberta, Canada, provides rail freight transportation services over a 12,700 mile network. The railroad serves the principal business centers of Canada from Montreal to Vancouver as well as the U.S. Midwest and Northeast regions. Revenues in 2020 totaled CAD7.7 billion. KCS operates a Class I railroad in the central U.S., The Kansas City Southern Railway Company, and, through its wholly-owned subsidiary Kansas City Southern de Mexico, S.A. de C.V., owns a concession to operate Mexico's northeastern railroad. Revenues in 2020 totaled $2.6 billion.

REGULATORY DISCLOSURES

For further specification of Moody's key rating assumptions and sensitivity analysis, see the sections Methodology Assumptions and Sensitivity to Assumptions in the disclosure form. Moody's Rating Symbols and Definitions can be found at: https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_79004.

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Jamie Koutsoukis
Vice President - Senior Analyst
Corporate Finance Group
Moody's Canada Inc.
70 York Street
Suite 1400
Toronto, ON M5J 1S9
Canada
JOURNALISTS: 1 212 553 0376
Client Service: 1 212 553 1653

Donald S. Carter, CFA
MD - Corporate Finance
Corporate Finance Group
JOURNALISTS: 1 212 553 0376
Client Service: 1 212 553 1653

Releasing Office:
Moody's Canada Inc.
70 York Street
Suite 1400
Toronto, ON M5J 1S9
Canada
JOURNALISTS: 1 212 553 0376
Client Service: 1 212 553 1653



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 4

MOODY'S INVESTOR'S SERVICE, "MOODY'S ASSIGNS BAA2 RATING TO CANADIAN PACIFIC RAILWAY'S NEW NOTES" (NOV. 17, 2021)

MOODY'S
INVESTORS SERVICE

Rating Action: Moody's assigns Baa2 rating to Canadian Pacific Railway's new notes

17 Nov 2021

Toronto, November 17, 2021 -- Moody's Investors Service ("Moody's") assigned a Baa2 rating to Canadian Pacific Railway Company's ("CPR") seven new tranches of senior unsecured notes for total proceeds of approximately $8.5 billion. The tranches of notes are being issued in Canadian and US dollars and have maturities that range from 2 to 30 years. Proceeds will be used by CPR to indirectly finance the cash portion of the merger whereby Kansas City Southern ("KCS") will combine with CPR in a stock and cash transaction. CPR's existing ratings are unchanged, including the Baa2 senior unsecured notes rating, and the P-2 short-term rating. The ratings outlook remains stable.

Two tranches of the new notes due in 2031 and 2041 contain a Special Mandatory Redemption provision whereby if CPR determines in its reasonable judgment that the Surface Transportation Board ("STB") final approval for its proposed merger with KCS will not be sought, or has not or will not be received prior to March 25, 2023, then it will be required to redeem all of the $2.5 billion in outstanding under these notes at a mandatory redemption price of 101.

Assignments:

..Issuer: Canadian Pacific Railway Company

....Gtd Senior Unsecured Regular Bond/Debenture, Assigned Baa2

RATINGS RATIONALE

On September 15, 2021, CPR entered into a merger agreement, under which CPR agreed to acquire KCS in a stock and cash transaction representing an enterprise value of approximately $31 billion, which includes the assumption of $3.8 billion of outstanding KCS debt.

CPR's Baa2 credit rating benefits from 1) its well-positioned railway network, 2) a preponderance of stable commodity hauls, and 3) a track record of a very good operating margin. CPR is constrained by 1) its small size versus its North American Class 1 peers, 2) uncertainties associated with regulatory approval for CP's agreement to acquire KCS (we expect shareholder approval will occur in early December 2021) by the STB, which if not approved could require CPR to repay debt raised associated with the transaction, 3) adjusted leverage of 4.5x pro forma for the KCS acquisition in 2021, and expected to be about 4x in 2022 before falling below 3x in 2024, 4) its exposure to economic cyclicality and adverse weather conditions and 5) continued regulatory risks. Moody's believes the company has the ability and is committed to reducing its adjusted financial leverage towards the mid-point of its 2x to 2.5x public leverage target, however the time to achieve this will be protracted.

The acquisition of KCS will strengthen CPR's rail network, creating a bigger continental network and expanding the reach of single hauls and service capabilities that can be provided to customers. In addition, its credit profile will benefit from a larger, more diversified business with a greater exposure to higher margin merchandise business, increased customer diversity and breadth and the potential for synergies from network and equipment efficiencies as well as greater revenue expansion. Offsetting these benefits however is the increase in adjusted leverage which will increase from 2.5x for the twelve months ending September 2021 to 4.5x pro forma for the acquisition, and remain above 3x through 2023. There is also the economic risk to CPR should they not be granted regulatory approval and be required to unwind its purchase of KCS at an unknown price.

CPR has excellent liquidity. Excluding the announced acquisition, the company has CAD2.75 billion in expected sources of liquidity compared to about CAD450 million of uses over the next 12 months. Sources of liquidity include cash of CAD223 million and $731 (CAD 926) million available on its (unrated) credit facilities ($300 million matures in September 2023, $1 billion matures September 2026) as of September 30, 2021. As well, we expect CPR will generate about CAD1.6 billion of free cash flow over the next 12 months. The company has CAD450 million notes due in January 2022. CPR's revolving credit facility agreement has a

maximum debt to EBITDA covenant and we expect they will maintain significant headroom under this covenant.

The stable outlook reflects Moody's expectation that CPR's existing rail network will continue to operate well, such that operating margins do not decrease below 37%. It also incorporates the expectation that the company will receive shareholder and STB approval for the KCS acquisition and will make steady progress in reducing its initial elevated leverage as a result of the acquisition towards 3x by 2023.

FACTORS THAT COULD LEAD TO AN UPGRADE OR DOWNGRADE OF THE RATINGS

A ratings upgrade would require clarity regarding regulatory approval for CPR's acquisition of KCS. It would also require the company maintain adjusted debt/EBITDA below 2.75x and free cash flow/debt of more than 10%.

A ratings downgrade could occur if Moody's expects the company to sustain its adjusted debt/ EBITDA above 3.25x and free cash flow/debt of less than 5%.

The principal methodology used in these ratings was Surface Transportation and Logistics published in May 2019 and available at https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1113382 . Alternatively, please see the Rating Methodologies page on www.moodys.com for a copy of this methodology.

Canadian Pacific Railway Company, headquartered in Calgary, Alberta, Canada, provides rail freight transportation services over a 13,000 mile network. The railroad serves the principal business centers of Canada from Montreal to Vancouver as well as the U.S. Midwest and Northeast regions. Revenues in 2020 totaled CAD7.7 billion. KCS operates a Class I railroad in the central U.S., The Kansas City Southern Railway Company, and, through its wholly-owned subsidiary Kansas City Southern de Mexico, S.A. de C.V., owns a concession to operate Mexico's northeastern railroad. Revenues in 2020 totaled $2.6 billion.

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Jamie Koutsoukis
Vice President - Senior Analyst
Corporate Finance Group
Moody's Canada Inc.
70 York Street
Suite 1400
Toronto, ON M5J 1S9
Canada
JOURNALISTS: 1 212 553 0376
Client Service: 1 212 553 1653

Donald S. Carter, CFA
MD - Corporate Finance
Corporate Finance Group
JOURNALISTS: 1 212 553 0376
Client Service: 1 212 553 1653

Releasing Office:
Moody's Canada Inc.
70 York Street
Suite 1400
Toronto, ON M5J 1S9
Canada
JOURNALISTS: 1 212 553 0376
Client Service: 1 212 553 1653

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 5

CP INVESTOR PRESENTATION, "BUILT TO DRIVE GROWTH INVESTOR PRESENTATION" (MAR. 2022)

REDACTED PUBLIC RECORD VERSION



BUILT TO DRIVE GROWTH

Investor Presentation, March 2022

TSX/NYSE: CP

FORWARD LOOKING STATEMENTS

The following investor presentation contains certain forward-looking information within the meaning of applicable securities laws relating, but not limited, to Canadian Pacific's operations, priorities and plans, anticipated financial and operational performance, including our business prospects, market drivers and outlook, planned capital expenditures, anticipated revenues and the source thereof, programs and strategies (including financing strategies), the anticipated efficiency of the high efficiency product (HEP) train model and associated facilities, including growth in our high-capacity hopper car fleet in 2021 and beyond, shipment capacity, completion and the anticipated impacts on capacity and efficiency of the HEP qualification of CP-served train-loading facilities. This forward-looking information also includes, but is not limited to, statements concerning expectations, beliefs, plans, goals, objectives, assumptions and statements about possible future events, conditions, and results of operations or performance.

Forward-looking information may contain statements with words such as "anticipate", "believe", "expect", "plan", "financial expectations", "key assumptions", "outlook", "guidance", or similar words suggesting future outcomes. To the extent that CP has provided forecasts or targets using Non-GAAP financial measures, CP may not be able to provide a reconciliation to a GAAP measure without unreasonable efforts, due to unknown variables and uncertainty related to future results.

Undue reliance should not be placed on forward-looking information as actual results may differ materially from the forward-looking information. Forward-looking information is not a guarantee of future performance.

By its nature, CP's forward-looking information involves numerous assumptions, inherent risks and uncertainties that could cause actual results to differ materially from those expressed or implied by the forward-looking information, including but not limited to the following factors: changes in, or unanticipated outcomes of, business strategies and growth opportunities; general North American and global economic, credit and business conditions; risks associated with agricultural production such as weather conditions and insect populations; the availability and price of energy commodities; the effects of competition and pricing pressures; industry capacity; shifts in current and anticipated future market demand; changes in commodity prices; uncertainty surrounding timing and volumes of commodities being shipped via CP; inflation; geopolitical instability; changes in laws, regulations and government policies, including regulation of rates; changes in taxes and tax rates; potential increases in maintenance and operating costs; changes in fuel prices; uncertainties of investigations, proceedings or other types of claims and litigation; labour disputes; risks and liabilities arising from derailments; transportation of dangerous goods; timing, completion and impacts from capital and maintenance projects by CP and by third parties; currency and interest rate fluctuations; trade restrictions or other changes to international trade arrangements; interruptions in the availability of land and equipment; realization of certain operating and cost efficiencies; climate change; and the market and regulatory responses to climate change; ability to achieve commitments and aspirations relating to reducing greenhouse gas emissions and other climate-related objectives; various events that could disrupt operations, including severe weather, such as droughts, floods, avalanches and earthquakes, and cybersecurity attacks, as well as security threats and governmental response to them, and technological changes; the pandemic created by the outbreak of the novel strain of coronavirus (and the disease known as COVID-19) and resulting effects on economic conditions, the demand environment for logistics requirements and energy prices, restrictions imposed by public health authorities or governments, fiscal and monetary policy responses by governments and financial institutions, and disruptions to global supply chains; the timing and completion of the pending KCS transaction, including receipt of regulatory and shareholder approvals and the satisfaction of other conditions precedent; interloper risk to the pending KCS transaction; the realization of anticipated benefits and synergies of the pending KCS transaction and the timing thereof; the success of integration plans for KCS; the focus of management time and attention on the pending KCS transaction and other disruptions arising from the transaction; customer, shareholder, regulatory and other stakeholder approvals and support; regulatory and legislative decisions and actions; the adverse impact of any termination or revocation by the Mexican government of Kansas City Southern de Mexico, S.A. de C.V.'s Concession; estimated future dividends; financial strength and flexibility; debt and equity market conditions, including the ability to access capital markets on favourable terms or at all; cost of debt and equity capital; potential changes in the CP share price which may negatively impact the value of consideration offered to KCS shareholders; and the ability of management of CP, its subsidiaries and affiliates to execute key priorities, including those in connection with the pending KCS transaction.

The foregoing list of factors is not exhaustive. These and other factors are detailed from time to time in reports filed by CP with securities regulators in Canada and the United States. Reference should be made to "Management's Discussion and Analysis of Financial Condition and Results of Operations" in CP's annual and quarterly reports filed on Form 10-K and 10-Q, respectively.

Forward-looking information is based on current expectations, estimates and projections and it is possible that predictions, forecasts, projections, and other forms of forward-looking information will not be achieved by CP. Except as required by law, CP undertakes no obligation to update publicly or otherwise revise any forward-looking information, whether as a result of new information, future events or otherwise.

KEY GAAP AND NON-GAAP MEASURES

NOTE ON NON-GAAP MEASURES

Except where noted, all figures are in millions of Canadian dollars.

Financial information is prepared in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP), unless otherwise noted.

CP presents non-GAAP earnings and liquidity information in this presentation to provide a basis for evaluating underlying earnings and liquidity trends that can be compared with the prior periods results.

It should be noted that CP's non-GAAP measures as described in this presentation, have no standardized meanings and are not defined by U.S. GAAP and, therefore, are unlikely to be comparable to similar measures presented by other companies.

$ in millions of Canadian dollars, except per share data, percentages and ratios	2017	2018	2019	2020	2021
Total revenues	$6,554	$7,316	$7,792	$7,710	$7,995
Operating income	$2,519	$2,831	$3,124	$3,311	$3,206
Adjusted operating income[1]	$2,468	$2,831	$3,124	$3,311	$3,389
Operating ratio	61.6%	61.3%	59.9%	57.1%	59.9%
Adjusted operating ratio[1]	62.4%	61.3%	59.9%	57.1%	57.6%
Net income	$2,405	$1,951	$2,440	$2,444	$2,852
Adjusted income[1]	$1,666	$2,080	$2,290	$2,403	$2,565
Diluted earnings per share[2]	$3.29	$2.72	$3.50	$3.59	$4.18
Adjusted diluted earnings per share[1][2]	$2.28	$2.90	$3.29	$3.53	$3.76
Cash provided by operating activities	$2,182	$2,712	$2,990	$2,802	$3,688
Cash used in investing activities	($1,295)	($1,458)	($1,803)	($2,030)	($13,730)
Cash provided by (used in) financing activities	($700)	($1,542)	($1,111)	($764)	$9,936
Free cash[1]	$874	$1,289	$1,357	$1,157	$1,793

(1) For a full description and reconciliation of Non-GAAP Measures see CP's 2020 Annual Report on Form 10-K and CP's Q4 2021 Earnings Release on investor.cpr.ca.
(2) As a result of the five-for-one share split of the Company's issued and outstanding Common Shares, which began trading on a post-split basis on May 14, 2021, per share amounts and all outstanding Common Shares for comparative periods have been retrospectively adjusted.

FOUNDED IN PRECISION, BUILT FOR GROWTH

Our precision railroading model transformed how our entire company operates and allows us to deliver industry-leading service. It's a culture of excellence that we adhere to 24/7, 365. Today, this commitment to precision has us uniquely positioned to leverage our low cost base and best-in-class service to grow with our customers. By remaining disciplined, we will drive long-term sustainable, profitable growth for our customers and shareholders, alike.

WE REBUILT THE ENGINE

STREAMLINED ASSETS

Right-sized resources to optimize our network.

IMPROVED OPERATING PERFORMANCE

Longer, faster trains and less dwell time.

INVESTED IN THE NETWORK

Upgraded to improve performance and increase capacity.

CULTURE OF ACCOUNTABILITY

Railroader attitude:
Do what you said you'll do.

PRECISION RAILROADING

Precision planning and execution to optimize service and control costs.

CONSISTENT, RELIABLE SERVICE

Leveraging our strengths to deliver superior value to our customers.

LOWERED COST BASE

Unprecedented margin improvement.

DEVELOPED THE TEAM

Handpicked team.
Best in the business.

NOW WE'RE DRIVING GROWTH

DIVERSIFIED BOOK OF BUSINESS

Balanced portfolio of industries, regions and markets.

INCREASED CAPACITY

Efficiencies and network investments mean we have the ability to do more.

RIGHT CULTURE & TEAM

Accountable, collaborative, passionate team of railroaders.

VALUE DRIVEN

Disciplined approach to valuing service.
We won't commoditize ourselves.

POWERFUL FOOTPRINT

Strong network with shortest routes to major centers and ability to extend reach.

RESILIENT PERFORMANCE

Operating model performs in upturns and downturns.

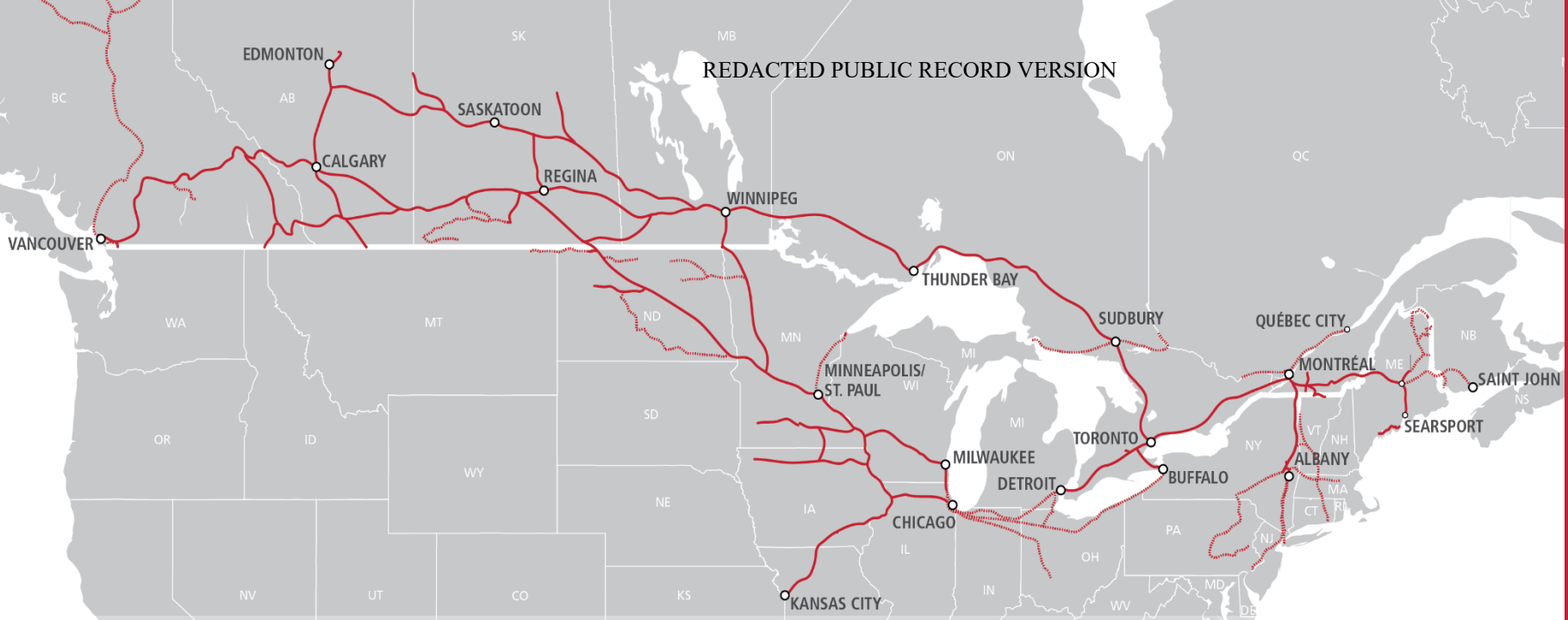
SERVICE INNOVATION

Supply chain collaboration to enhance our service offering.

DISCIPLINED APPROACH

Pursuing the right customers in the right lanes to grow our business.

REDACTED PUBLIC RECORD VERSION



POWERFUL FOOTPRINT

NETWORK OVERVIEW

- Competitive access to key markets in Canada and the U.S.
- Access to major ports on West and East Coasts.
- Most border crossings in Western Canada; provides routing optionality.
- Connections with Class 1 railroads and short-line partnerships extend the reach of our rail service.
- Shortest routes in key lanes including Vancouver to the U.S. Midwest, Chicago and Detroit, as well as between Eastern Canada and Calgary and Vancouver.
- Access to a network of over 100 transload facilities; extends our service reach to markets not directly served by rail.

OUR NETWORK

13,000 MILES
RAIL NETWORK

853 MILES
AVERAGE LENGTH OF HAUL

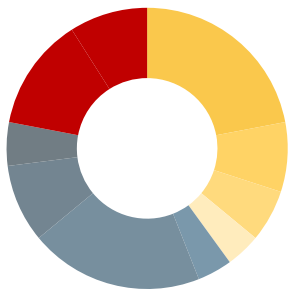
100+
TRANSLOAD FACILITIES

SHORTEST ROUTES
IN KEY LANES

DIVERSIFIED
BOOK OF BUSINESS

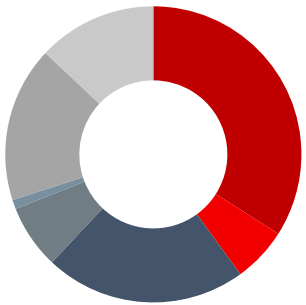
- Uniquely positioned with best-in-class service and capacity to grow.
- Our diverse book of business creates a powerful base to drive sustainable growth.
- Leveraging our strengths to grow with existing customers and bring on new business.
- Stronger margins allow us to compete for new opportunities.
- Continually innovating with long-term partners to help them win in the marketplace.

Business Mix
% of 2021 Freight Revenue



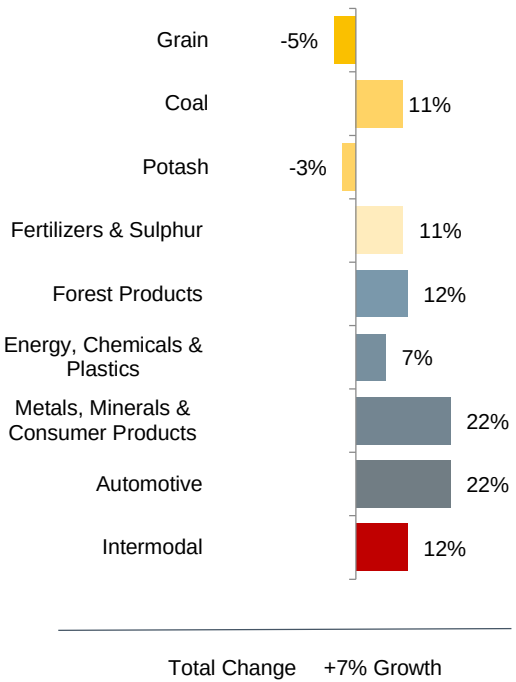
Bulk	**40%**
Grain	22%
Coal	8%
Potash	6%
Fertilizers & Sulphur	4%
Merchandise	**38%**
Forest Products	4%
Energy, Chemicals & Plastics	20%
Metals, Minerals & Consumer Products	9%
Automotive	5%
Intermodal	**22%**
Domestic	13%
International	9%

Geographic Distribution
% of 2021 Freight Revenue



Global	**34%**
Asia	30%
Europe	4%
Cross-Border	**32%**
Canada to U.S.	22%
U.S. to Canada	8%
Mexico	2%
Domestic	**34%**
Intra-Canada	21%
Intra-U.S.	13%

2021 Freight Revenue Variance
FX-adjusted[(1)]



(1) For a full description and reconciliation of Non-GAAP Measures see CP's 2020 Annual Report on Form 10-K and Q4 2021 Earnings release on investor.cpr.ca.

ROOM TO GROW



Locomotives available for future growth



Yard and **terminal capacity**



Network capacity through longer sidings, increased speed



Ability to further **increase train length**



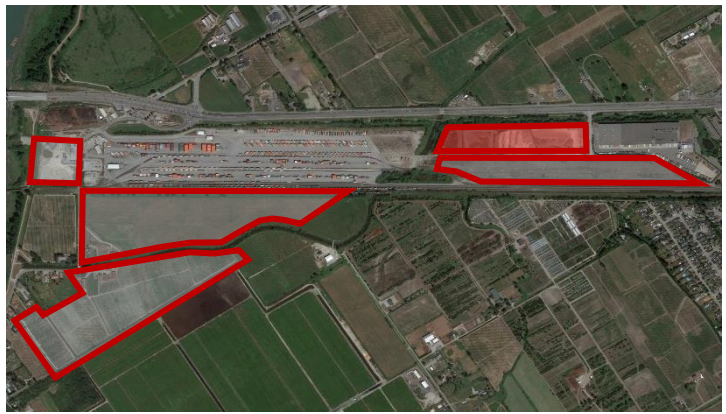
Surplus land gives us optionality

ROOM TO GROW

SURPLUS LAND PROVIDES OPTIONALITY & LOW COST CAPACITY

Vancouver

- Unmatched ability to expand footprint in Canada's largest trade gateway
- Existing intermodal facility operating well below capacity
- CP owns >100 acres of vacant land adjacent to existing facility
- Provides optionality: ability to grow existing operations and provide customer solutions



Chicago

Bensenville Yard

- Room to grow within existing footprint
- Q1 2021 agreement signed to add capacity, potential to build state-of-the-art intermodal facility

Schiller Park

- 75 acre site made surplus through consolidation of intermodal operations
- Potential to repurpose for growth opportunities or divest



ROOM TO GROW

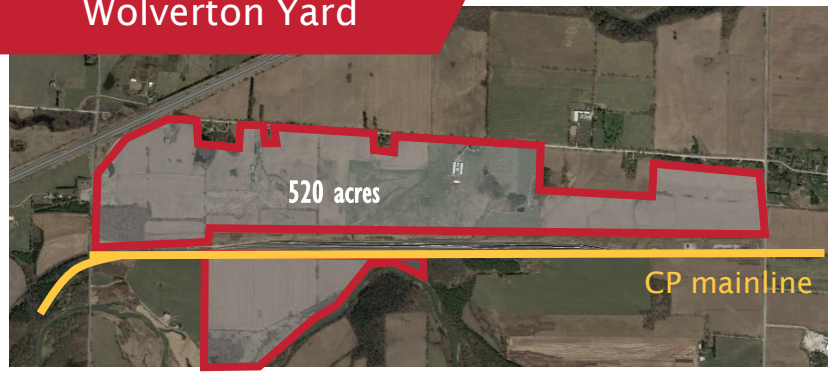
TORONTO & AREA

Vaughan Intermodal Facility

- 500 acre footprint; 150 acres vacant
- Ability to more than double operations with minimal capital
- Ability to co-locate customers



Wolverton Yard



Agincourt Yard



MORE ROOM TO GROW

Calgary (Dufferin)



Edmonton (Ellerslie)



Montréal (St-Luc)



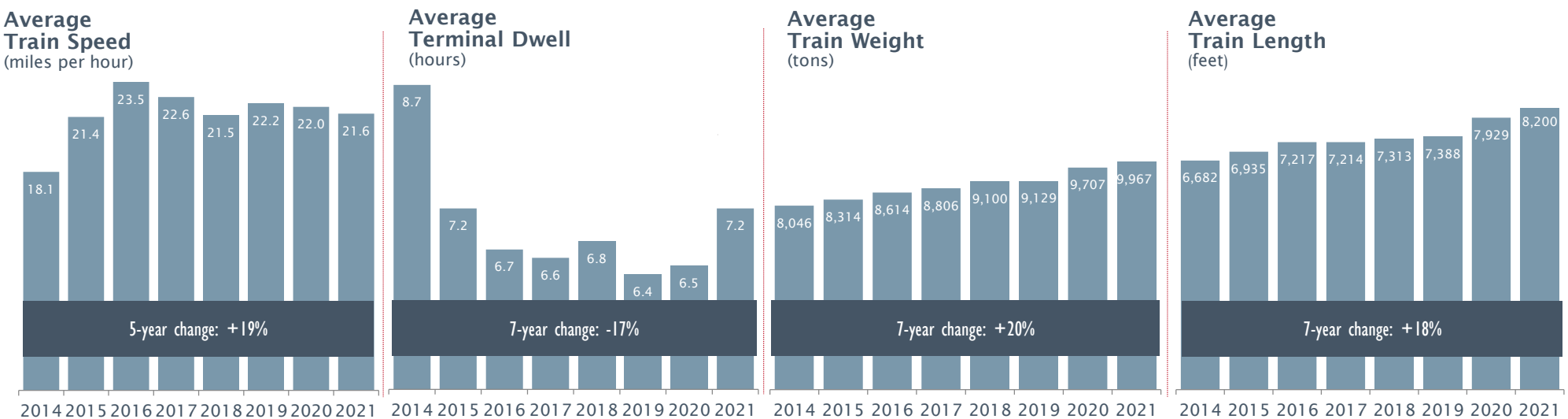
Montréal (Les Cèdres)



PRECISION PERFORMANCE

OPERATIONS

- The cornerstone of our industry leading performance is our precision railroading operating model and disciplined focus on planning and execution.
- Faster train speeds and reduced dwell means better asset utilization and reduced costs for CP and our customers.
- Longer, heavier, faster trains increase network capacity and reduce operating costs.



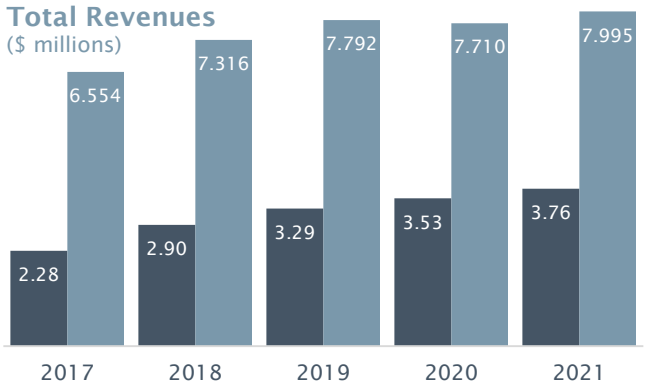
PRECISION PERFORMANCE

FINANCIAL

- Ability to generate earnings growth in various economic environments.
- Our focus: best-in-class service at lowest cost.
- Driving stronger margins and topline revenue growth.
- Opportunity to further improve margins. Targeting ~100 bps per year.
- Strong free cash generation and an opportunistic approach to shareholder returns.

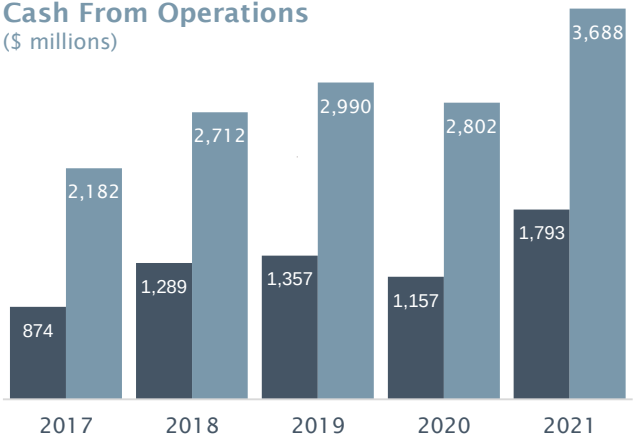
Adjusted Diluted Earnings Per Share[1][2]
($)

Total Revenues
($ millions)

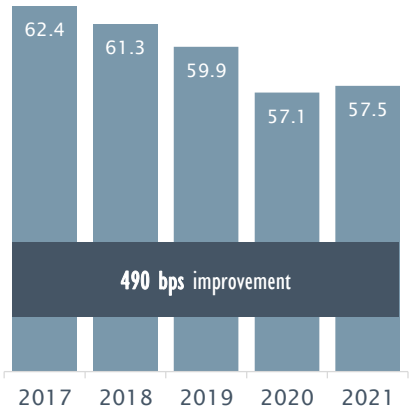


Free Cash[1]
($ millions)

Cash From Operations
($ millions)



Adjusted Operating Ratio[1]
(percentage)



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(2) As a result of the five-for-one share split of the Company's issued and outstanding Common Shares, which began trading on a post-split basis on May 14, 2021, per share amounts and all outstanding Common Shares for comparative periods have been retrospectively adjusted.

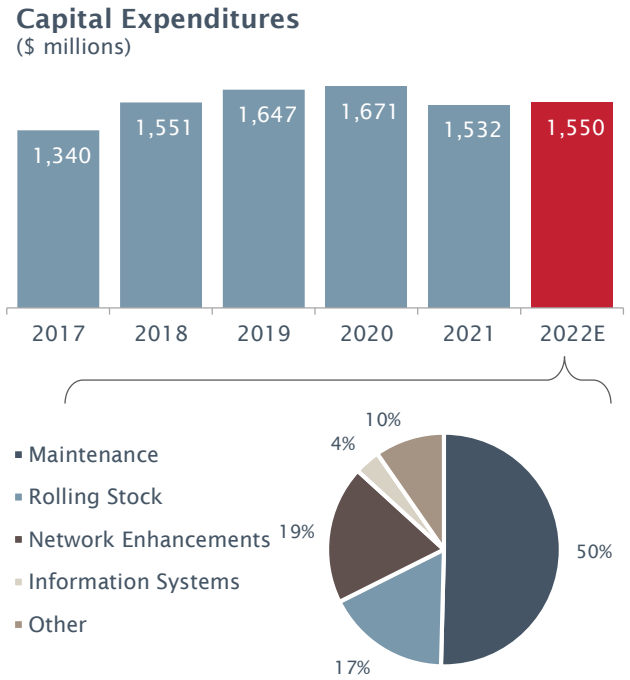
BUILDING FOR THE FUTURE

CAPITAL INVESTMENT

Our capital investments have everything to do with running the business better, including margin improvement, productivity and service reliability – all key ingredients of our precision railroad operating model.

Highlights

- Consistently investing ~$800M per year in maintenance capital.
- Strong pipeline of high return projects.
- Two unique rolling stock investments – locomotive modernization and hopper car acquisitions – are elevating capital spending in the near-term.



SPOTLIGHT

We didn't replace the locomotive, we replaced everything that slowed it down.

Locomotive modernizations upgrade aging units for better fuel efficiency, service reliability and safety – same productivity as a new locomotive but with a lower price tag. In 2021 we spent ~$80M in capital for modernizations.

Investing in the future of the grain supply chain.

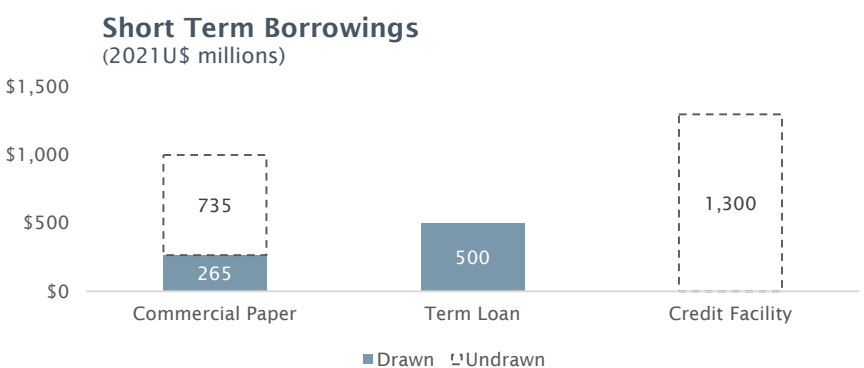
Over the past several years, CP invested a total of $500M to acquire 5,900 new covered hoppers. The new, high capacity cars, combined with our 8,500-foot grain model, will enable CP to move >40% more grain per train.

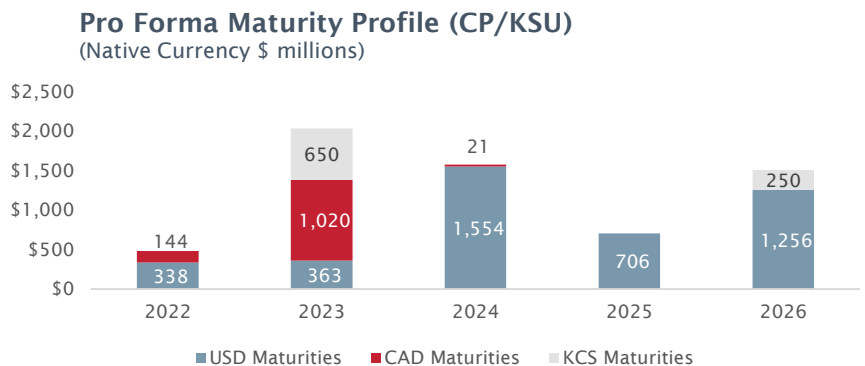
FINANCIAL FLEXIBILITY

LIQUIDITY AND LEVERAGE

Committed to a strong, investment grade credit rating and target leverage

- CP completed issuance of debt to fund cash consideration of KCS transaction in November 2021
  - Debt was issued to optimize ability to de-lever while also locking in attractive long-term financing rates
- Target an Adjusted Net Debt to Adjusted EBITDA[1] [2] ratio of 2.0-2.5x
- Significant liquidity available over de-leveraging period via $1.3B undrawn committed credit facilities, $1.0B commercial paper program, excess cash flows from KCS and pausing of share repurchases





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(2) Although CP has provided a target Non-GAAP measure (Adjusted Net Debt to Adjusted EBITDA), management is unable to reconcile, without unreasonable efforts, the target Adjusted Net Debt to Adjusted EBITDA to the most comparable GAAP measure (Long-term debt to Net Income ratio), due to unknown variables and uncertainty related to future results.

LEVERAGING TECHNOLOGY

INNOVATING FOR THE FUTURE

Utilizing track analytics, dashboard applications and mobile devices to create industry-leading technologies to advance customer service and operating performance.



- **In-house technologies** provide CP with hundreds of applications that track shipments, measure operational performance and provide financial information in real-time
- **Intermodal Demand Management**: through customized algorithms, we are creating capacity by smoothing demand over the week based on customer delivery requirements



- **Mobile Workforce**: using mobile devices to automate inventory reporting and provide required safety documents to train crews
- **CP FastPass**: self-serve kiosks and mobile apps for drivers coming and going from our terminals means shorter driver wait times, faster processing and lower terminal costs



- **Robotic Process Automation**: CP is using "bots" to automate high-volume manual activities to improve accuracy, reduce costs and improve customer service
- **Track Asset Management**: inspection application working off a central repository in conjunction with track inspection vehicles to create a consolidated view of track health

PREDICTIVE ANALYTICS

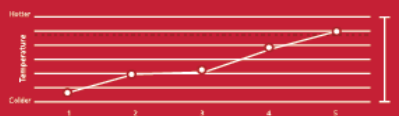
ENHANCING SAFETY AND EFFICIENCY

Leveraging Big Data to drive further improvements in safety and efficiency.

- Using patented technology, we accumulate valuable data on wheels, rails, cars, locomotives and trains in real-time, enabling us to anticipate issues and take preventative measures
- Predictive analytics have reduced online failures by 91% -- significantly reducing risk of derailments, rail fatigue and service interruptions
- Our patented algorithm improves safety and provides a competitive advantage: 86% of all equipment setoffs are confirmed defective versus an industry average of 65%

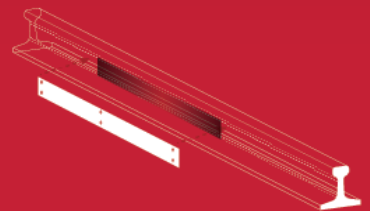
HOT BOX DETECTORS

Uses infrared technology to measure rail-car bearing and wheel temperatures to determine component failures and inoperative brakes.



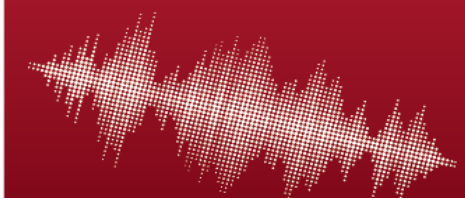
WHEEL IMPACT LOAD DETECTORS

Measures force applied by wheels on the track to identify wheel defects, protect rail integrity, and uncover weight imbalances to predict wheel failures.



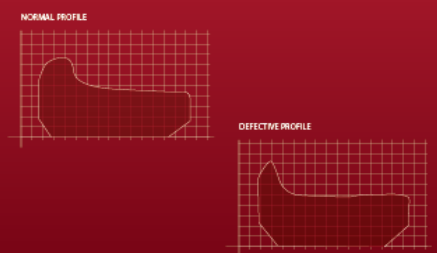
ACOUSTIC BEARING DETECTORS

Measures the sound emitted by rail-car wheels to predict internal rail-car roller bearing failures such as overheating.



WHEEL PROFILE DETECTORS

Automatically evaluates the geometry of rail-car wheel-sets for flange, tread and rim defects to identify failing wheel-sets for immediate or scheduled replacement.



OPERATING RESPONSIBLY

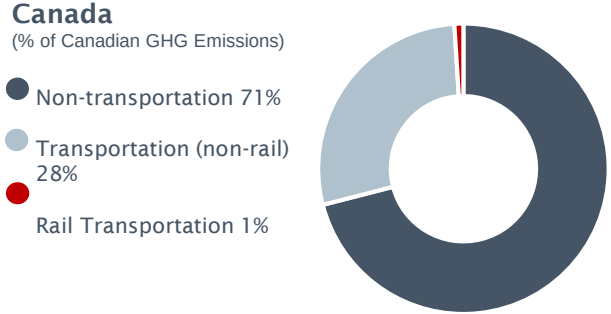
ENVIRONMENTAL SUSTAINABILITY

Transportation by rail is one of the most economical and environmentally responsible methods of moving freight.

- The transportation sector is responsible for 29% of Canada's annual GHG emissions, with the rail industry contributing only 1% to the country's total annual GHG emissions[1].
- Trains are 4 times more fuel efficient than trucks and produce 75% fewer GHG emissions[2].
- The transportation of freight by rail will continue to play an integral role in the low-carbon future for North America.

GHG Emissions by Sector in Canada

(% of Canadian GHG Emissions)



A SINGLE-UNIT TRAIN KEEPS MORE THAN

300

TRUCKS OFF OF PUBLIC ROADS

4x

MORE FUEL-EFFICIENT

75%

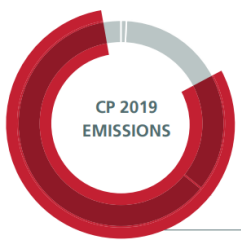
LESS GHG EMISSIONS

(1)Environment and Climate Change Canada (2019) National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada
(2)Association of American Railroads (2019). Freight Railroads Embrace Sustainability & Environmental Preservation. Whitepaper Fact Sheet.

SUSTAINABILITY LEADERSHIP

DEMONSTRATED RESULTS

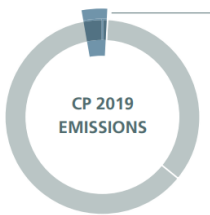
- Strong history of ESG disclosures and leading sustainability practices
- Issued our first TCFD Index in 2021
- Published our first Climate Strategy, including emissions reduction targets covering 100% of scope 1 & 2 emissions
- First “Say on Climate” vote at 2022 AGM



80% of CP’s TOTAL GHG EMISSIONS are addressed through our Locomotive Target, **INCLUDING 96%** of our Scope 1 emissions **PLUS 53%** of our Scope 3 emissions.

Locomotive Target

We will reduce our well-to-wheel GHG emissions intensity (grams per revenue ton-mile[10]) from locomotive operations by **38.3%** by 2030.



3.4% of CP’s TOTAL GHG EMISSIONS are captured by this target, **INCLUDING 100%** of our Scope 2 and 4% of our Scope 1 emissions.

Non-locomotive Target

We will reduce our absolute Scope 1 and 2 GHG emissions from non-locomotive operations (including emissions associated with our buildings and facilities) by **27.5%** by 2030.

BEST 50 CORPORATE CITIZENS 2021

CDP DISCLOSER 2021

Member of Dow Jones Sustainability Indices Powered by the S&P Global CSA

Railway Association of Canada

RIGHT TRACK

FTSE4Good

GLOBAL100 2022 THE WORLD'S MOST SUSTAINABLE CORPORATIONS ©

WORLD FINANCE MOST SUSTAINABLE COMPANY IN THE TRANSPORTATION INDUSTRY 2021 CANADIAN PACIFIC RAILWAY

CLEAN200™

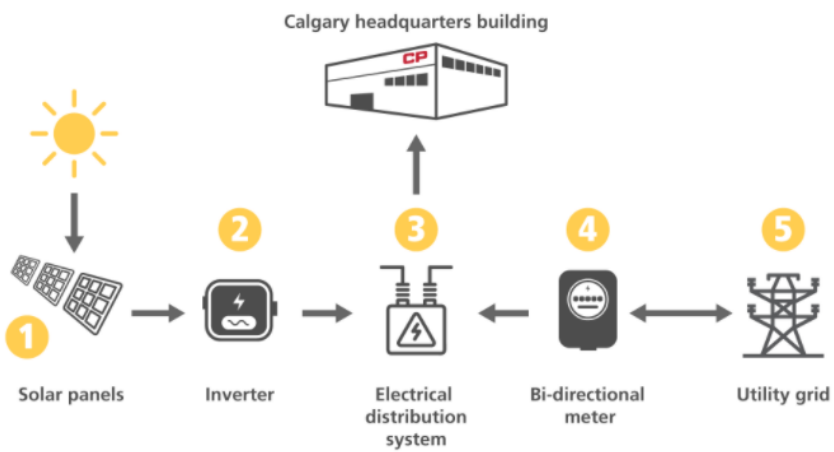
SCIENCE BASED TARGETS DRIVING AMBITIOUS CORPORATE CLIMATE ACTION

(1) Target reductions from a 2019 base year

POWERED BY THE SUN

OPTIMIZING OUR ASSETS

- CP's headquarters is powered by one of the largest private solar farms in Alberta
- Generates up to five megawatts of electricity while avoiding ~2,600 tonnes of carbon emissions annually
- The equivalent of taking ~570 cars off the road
- The project reduces CP's scope 2 GHG emissions





MOVING FORWARD

HYDROGEN LOCOMOTIVE PROJECT



- CP has a long history of implementing programs and technologies designed to improve fuel efficiency and reduce emissions
  - Early adopter and tester of low-emitting locomotive technologies (e.g. biofuels, CNG, battery powered solutions)
  - Over the last decade, CP has improved its locomotive fuel efficiency by more than 20%
- CP's Hydrogen Locomotive Program is on track to deliver North America's first hydrogen-powered line-haul freight locomotive – first unit moved of its own power in Q4 2022
- The program involves retrofitting a line-haul locomotive with hydrogen fuel cells and battery technology to drive the locomotive's electric traction motors
- The ability to retrofit diesel locomotives with a zero-emission technology provides a practical pathway to decarbonizing the freight-rail industry
- This project is all incremental to our GHG emission reduction targets

REDACTED PUBLIC RECORD VERSION

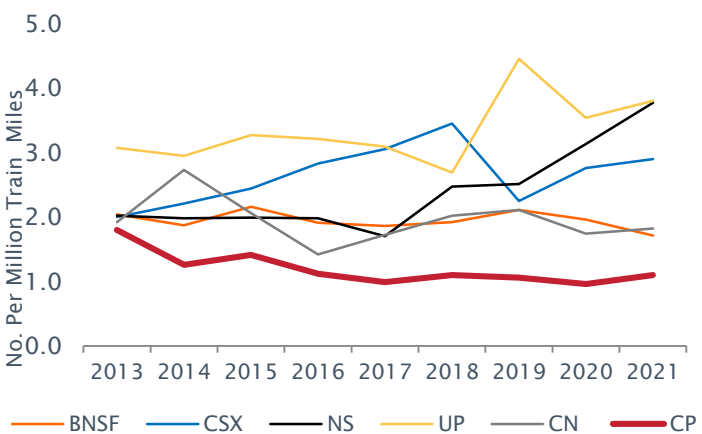
OPERATING RESPONSIBLY

SAFETY

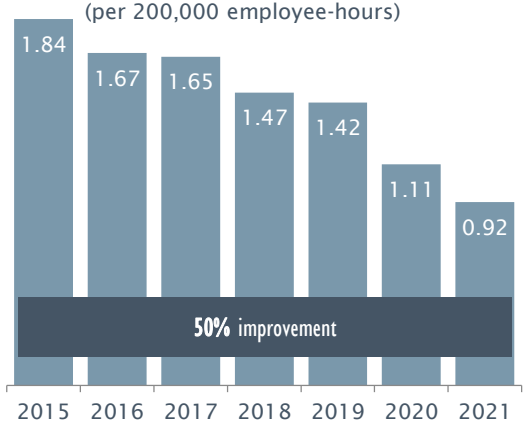
Safety is foundational at CP. We remain steadfast in our commitment to safety, across our entire operation.

- CP has been North America's safest railway for 16 consecutive years. Over the last decade, our train accident frequency has decreased more than 40%.
- Each year CP allocates over 50% of its capital investments toward safety and replacement initiatives to ensure our network remains safe and efficient.
- Management compensation is tied to safety performance: 20% of the short-term incentive program is weighted to safety.

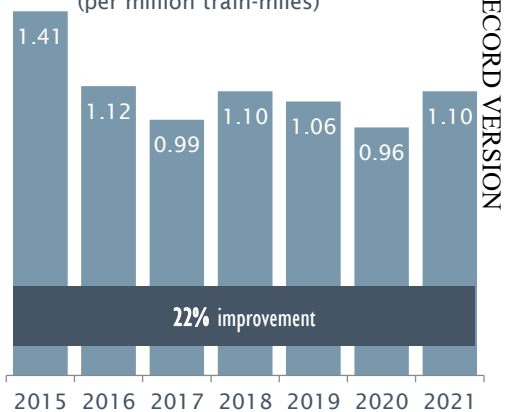
Class 1 Compare:
FRA Train Accidents Frequency
(2013 – 2021)



FRA Personal Injury Frequency
(per 200,000 employee-hours)



FRA Train Accident Frequency
(per million train-miles)

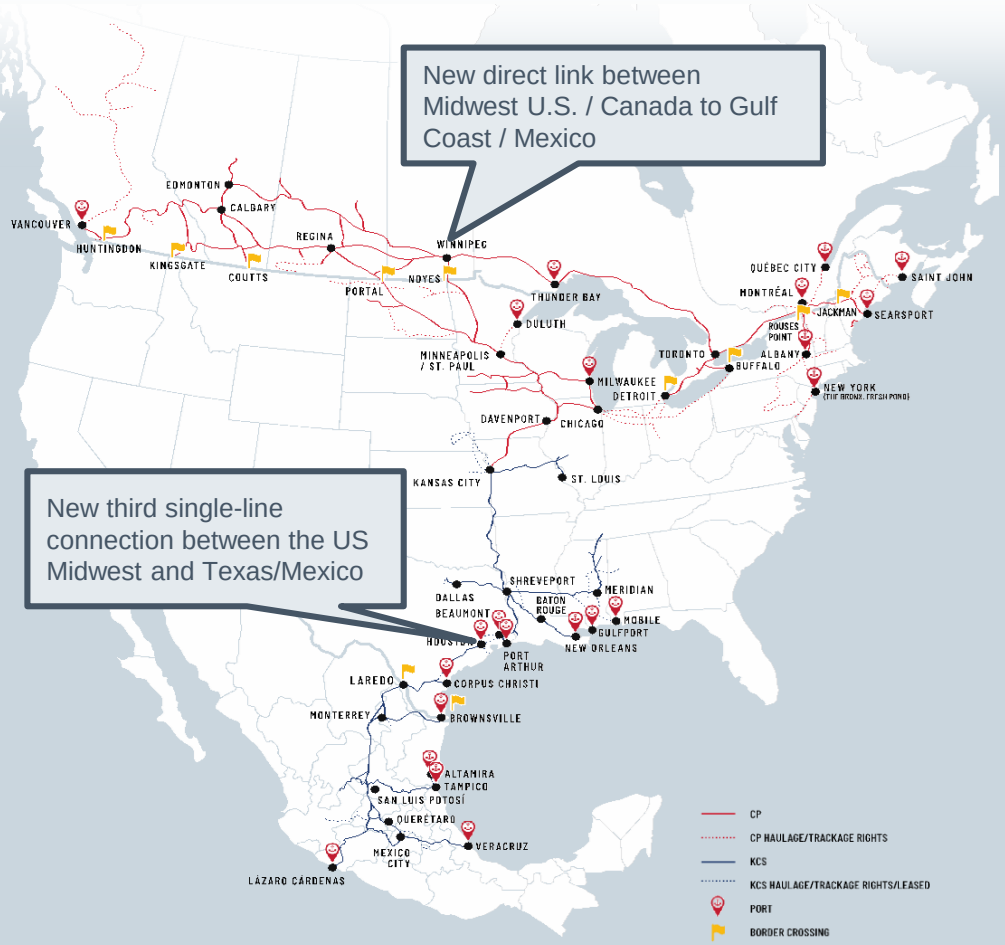


Certain statistical highlights and safety indicators figures have been updated to reflect new information or have been revised to conform with current presentation.

REDACTED PUBLIC RECORD VERSION

CREATING THE FIRST U.S.-MEXICO-CANADA RAIL NETWORK

REDACTED PUBLIC RECORD VERSION



ENHANCES COMPETITION BY CREATING NEW SINGLE-LINE HAUL ROUTES

UNLOCKS ANNUALIZED EBITDA SYNERGIES OF $1 BILLION

DIVERSIFIES CURRENT BUSINESS AND GEOGRAPHIC MIX WITH THE ADDITION OF NEW ROUTES

DRIVING USMCA GROWTH AND INVESTMENT OPPORTUNITIES

COMBINATION UNLOCKS $1BN IN EBITDA GROWTH OPPORTUNITIES

$820 MILLION
EBITDA GROWTH FROM MARKET OPPORTUNITIES

- Unique combination enables significant growth for our customers throughout North America
- Efficient new single-line routes and dramatically expanded market reach for customers
- Planned capital investments to support growth synergies, such as additional network sidings, siding extensions and investment in Centralized Traffic Control (CTC)

Increased from previous estimate of $600 million based on customer feedback and additional market insight, particularly in the Bulk and Intermodal segments



$180 MILLION
COST AND EFFICIENCY IMPROVEMENTS

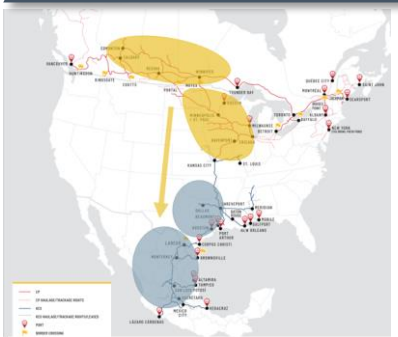
- Driven by a combination of improved fuel efficiency, lower G&A costs, equipment rents as well as facilities, IT spend and licensing
- CPKC to utilize best practices to support increased operating efficiencies

FOLLOWING COMPLETION OF THE TRANSACTION ANTICIPATED IN Q4 2022, CPKC EXPECTS TO GENERATE $1 BILLION IN ANNUALIZED SYNERGIES WITHIN 3 YEARS

Note: Synergy estimates in US$.

ENHANCES COMPETITIVE OPTIONS FOR CUSTOMERS AND ENABLES NORTH AMERICAN GROWTH

BULK



New single-line shipments for grain from Canada and the Upper Midwest to domestic and export markets in Southern US and Mexico

ECP & MERCHANDISE



New single-line competition for shipments of energy, chemicals & plastics and merchandise moving between Canada, the US and Mexico

INTERMODAL



New head-to-head single-line competition for intermodal shipments between Mexico and the Upper Midwest and Canada

AUTOMOTIVE



New head-to-head single-line competition for automotive shipments between Canada, US Midwest and Mexico

CPKC'S NETWORK TO BENEFIT CUSTOMERS ACROSS ALL BUSINESS LINES

CP-KCS DELIVERS SIGNIFICANT BENEFITS TO ALL STAKEHOLDERS

- ✓ COMBINATION OFFERS SIGNIFICANT BENEFITS TO RAIL SHIPPERS AND THE SUPPLY CHAIN
- ✓ KCS SHAREHOLDERS BENEFIT FROM CLEAR PATH TO CLOSING
- ✓ CONSERVATIVE BALANCE SHEET



CREATE THE FIRST U.S.-MEXICO-CANADA RAIL NETWORK –TRULY END-TO-END AND PRO-COMPETITIVE WITH NO OVERLAP



WELL POSITIONED FOR GROWTH, BRINGING TOGETHER TWO RAILROADS WITH HIGHEST 3-YEAR REVENUE CAGR



ANNUALIZED EBITDA SYNERGIES OF $1 BILLION CREATES SIGNIFICANT VALUE FOR ALL STAKEHOLDERS AND DRIVE ACCRETION TO CP'S ADJUSTED DILUTED EPS[1]



CP'S LEADING MANAGEMENT TEAM HAS CONSISTENTLY OUTPERFORMED AND DELIVERED SUPERIOR RESULTS FOR SHAREHOLDERS

1. The combination is expected to generate double-digit accretion to CP's adjusted diluted EPS upon the full realization of synergies following CP's acquisition of control of KCS.



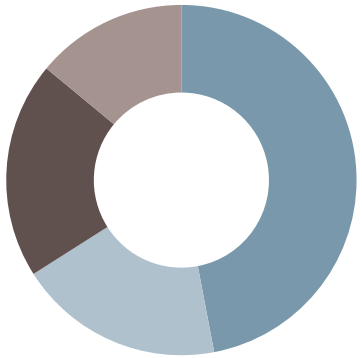
OUR MARKETS

(2021 Figures)

REDACTED PUBLIC RECORD VERSION

BULK

GRAIN



- **Canadian Grain 66%**
  Regulated 47%
  Non-regulated 19%
- **U.S. Grain 34%**
  Domestic 20%
  Export 14%

Grain is our largest market segment and we are the best at servicing it. CP is the only Class 1 railway with meaningful grain franchises in both Canada and the U.S. Our network is strategically positioned through the heart of the grain-producing regions of Western Canada and the Northern Plains of the U.S. We provide direct access from high-throughput unit train loading elevators to major export port terminals for shipments overseas.

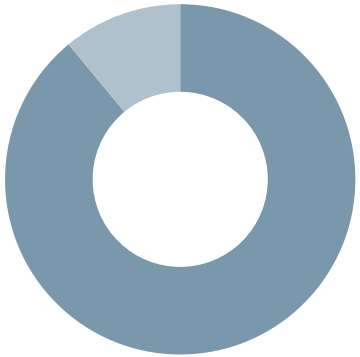
SPOTLIGHT

THE FUTURE OF GRAIN TRANSPORTATION

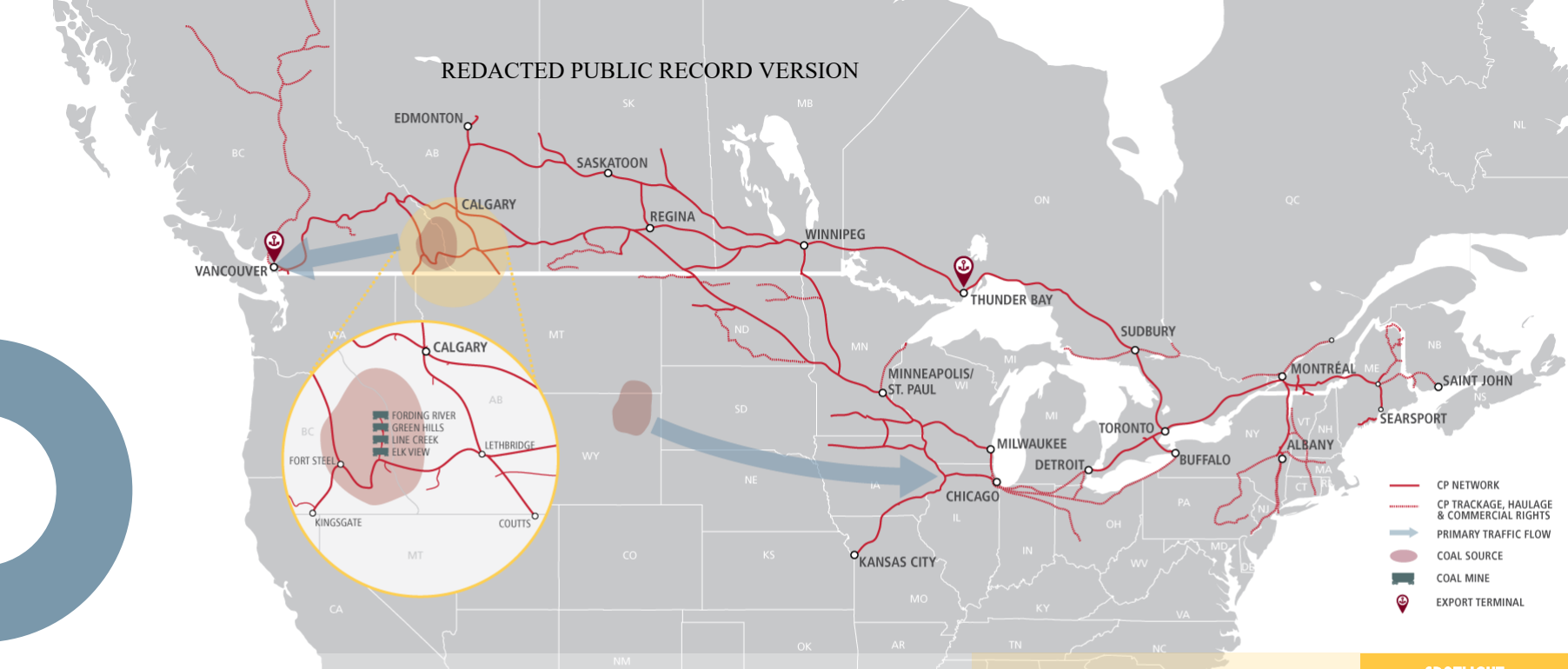
15% of the high-throughput elevators we service are 8,500-foot high efficiency product capable (“HEP”). By the end of 2021, more than 40% of CP-served train-loading facilities were HEP qualified. The 8,500-foot HEP grain train, when combined with our investment in new hopper cars, will enable >40% more grain to be moved per train.

REDACTED PUBLIC RECORD VERSION

BULK
COAL



- Canadian Coal 89%
- U.S. Coal 11%



Our Canadian coal business consists primarily of metallurgical coal. Leveraging our shortest routes to Vancouver terminals, more than 97% of our Canadian coal shipments, which originate in Southeast B.C., are exported through the West Coast with the remaining 3% moving through Thunder Bay terminals or Chicago.

For U.S. coal, CP receives coal from connecting railroads that serve thermal coal mines in the Powder River Basin region of Montana and Wyoming. The coal is them delivered to power generating facilities in the Midwest states of Wisconsin and Iowa.

SPOTLIGHT

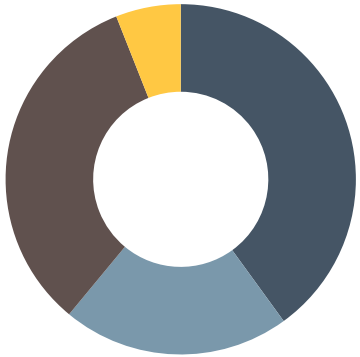
CONTINUOUS IMPROVEMENT IN THE COAL SUPPLY CHAIN

We have successfully implemented a pull-to-demand model that allows coal trains to run at evenly spaced intervals with a consistent flow to the ports. Our coal fleet cycle time has improved up to 20% since 2012.

REDACTED PUBLIC RECORD VERSION

BULK

POTASH & FERTILIZERS



- **Potash 61%**
  Export 40%
  Domestic 21%
- **Fertilizers 33%**
- **Sulphur 7%**

For export potash, our key competitive advantage stems from our shortest route to Vancouver and the U.S. Pacific Northwest, via connections with U.S. carriers. In our domestic market, potash moved primarily to the U.S. Midwest for local application, eventually reaching end markets in the Southeast U.S.

Our strong origin access to fertilizer producers in Western Canada and shortest routes to destinations in the U.S. Midwest support our growth in the fertilizer market.

SPOTLIGHT

THE LEADING CARRIER FOR EXPORT POTASH

CP has origin access to Canada's 11 potash mines and the shortest routes to Vancouver and Portland. We move approximately 70% of potash produced in North America.

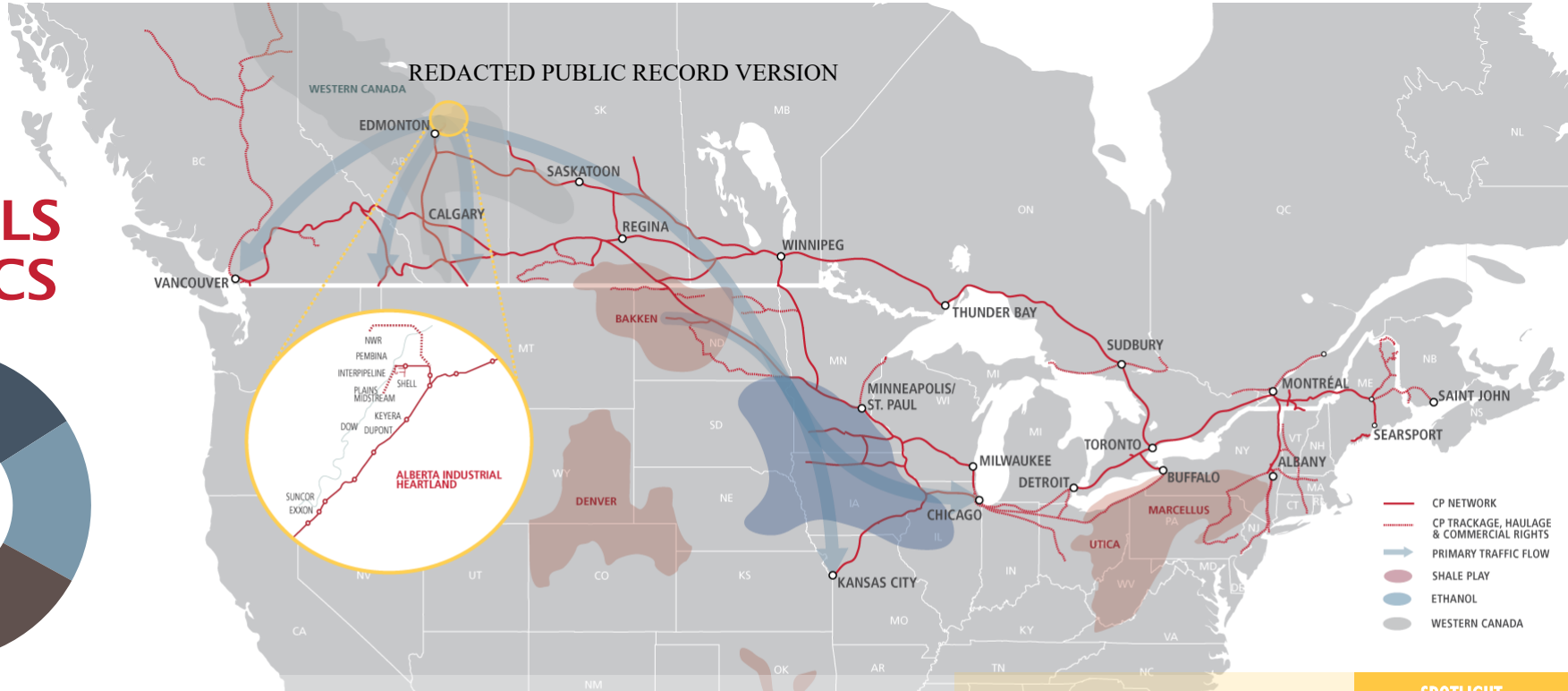
CP is now operating trains with upwards of 200 cars to Vancouver and 185 cars to Portland creating capacity and a more efficient potash supply chain.

MERCHANDISE

ENERGY, CHEMICALS & PLASTICS



- Biofuels 16%
- Chemicals 17%
- Crude 18%
- Petroleum Products 39%
- Plastics 10%



Our network is ideally located to serve a wide range of commodities: biofuels originate in the U.S. Midwest; chemicals originate in Eastern Canada, Alberta, the U.S. Midwest and Gulf of Mexico; crude originates primarily in Western Canada; petroleum products originate predominantly in Alberta, Saskatchewan and North Dakota; LPG and plastics originate mostly in Alberta.

SPOTLIGHT

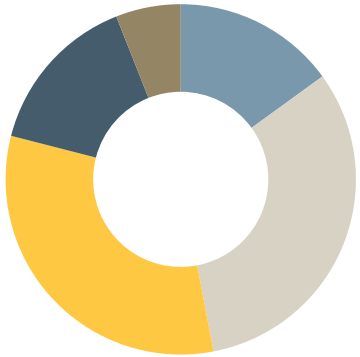
A DEDICATED TRAIN SERVICE

The CP Energy Train, a non-crude train, is a direct service connecting production areas in northern Alberta to Vancouver that runs faster than our competitor allowing customers to rationalize their fleets.

MERCHANDISE

METALS, MINERALS & CONSUMER PRODUCTS

REDACTED PUBLIC RECORD VERSION



- Frac Sand 15%
- Other Aggregates 32%
- Steel 32%
- Consumer Products 15%
- Mines & Metals 6%

This portfolio includes a diverse mix of input materials such as sand, cement, clay, gravel, salt, steel and non-ferrous metals. These materials typically originate on CP's network and are shipped across North America. CP's network of transload facilities enable CP to serve customers and facilities not located directly on our network.



SPOTLIGHT

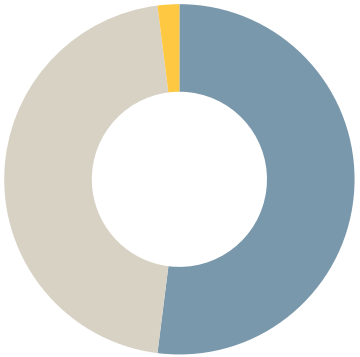
TRANSLOADS ENABLING GROWTH

Transcare Logistics, our wholly owned subsidiary, is a transload and distribution company that operates four locations in Canada: Montréal, Toronto, Mississauga and Hamilton. Our Hamilton facility is the largest and fastest rail-to-truck steel transload facility and the first automated rail-based transload operation in Canada.

REDACTED PUBLIC RECORD VERSION

MERCHANDISE

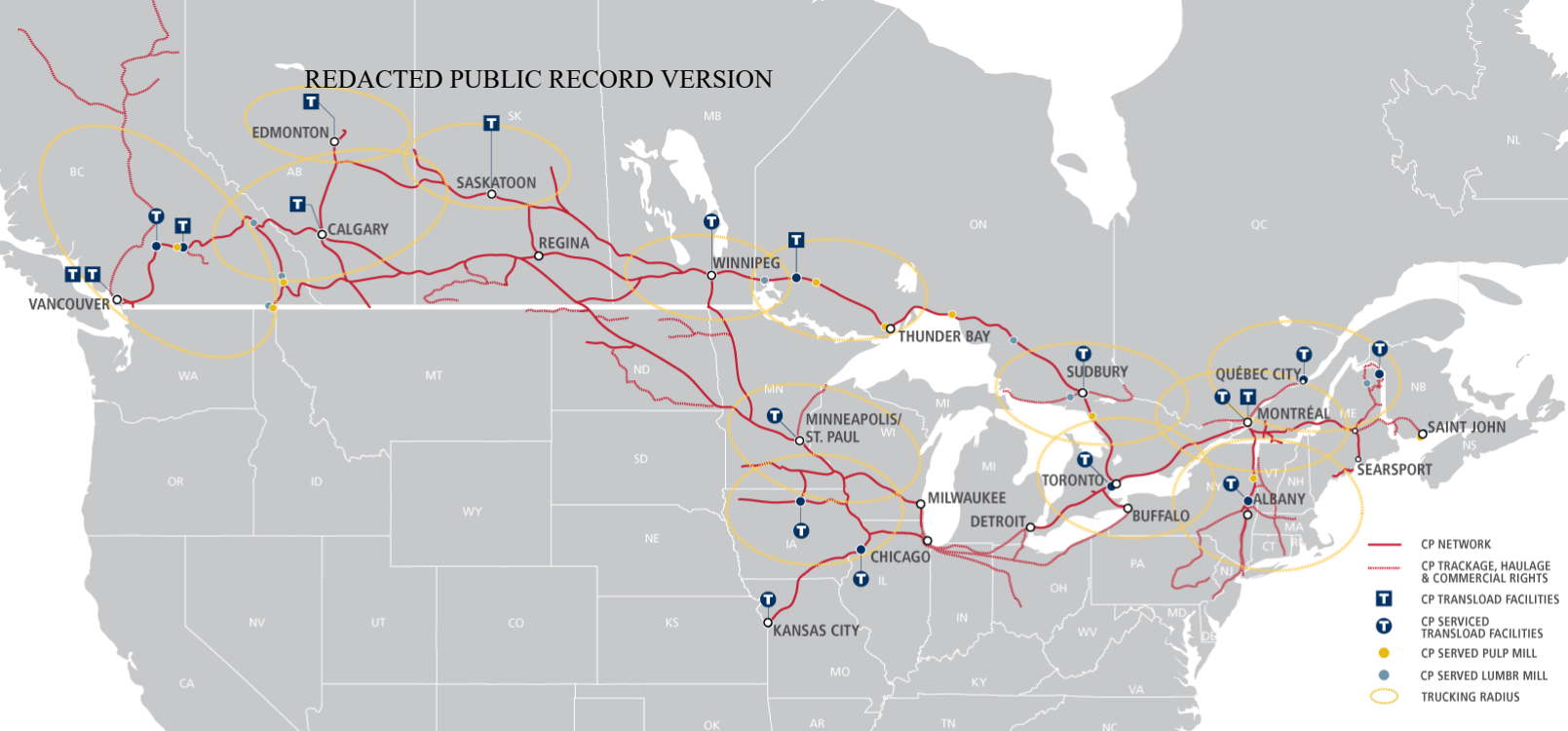
FOREST PRODUCTS



- Pulp & Paper 52%
- Lumber & Panel 46%
- Other 2%

Our network is ideally situated to connect raw materials and finished products to market. We have abundant railcar supply and network capacity to capture emerging growth opportunities in forest products.

Our portfolio includes lumber, wood pulp, paper products and panel transported from key producing areas in Western Canada, Ontario and Québec to various destinations in North America and for export overseas.



SPOTLIGHT

E-COMMERCE DRIVING ADDITIONAL GROWTH IN FOREST PRODUCTS

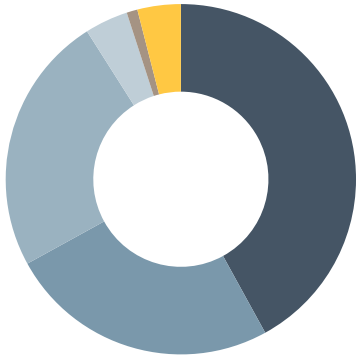
Our transload network extends our reach to non-rail served box and paperboard plants.

As e-commerce continues to gain in traction, CP's transload facilities and intermodal capabilities give us a competitive advantage to grow market share and benefit from increased demand for packaging materials.

REDACTED PUBLIC RECORD VERSION

MERCHANDISE

AUTOMOTIVE



- **Finished Vehicles 95%**
  - Origin Canada 42%
  - Origin U.S. 25%
  - Imports 24%
  - Origin Mexico 4%
- **Machinery 1%**
- **Parts & Other 4%**

We ship the whole value chain: domestically produced vehicles, imports, automotive parts and machinery. Our diverse portfolio includes Canadian-produced vehicles that ship to the U.S. from Ontario production facilities; U.S.-produced vehicles that ship within the U.S. as well as cross-border into Canadian markets; import vehicles that move through Vancouver to Eastern Canadian markets; and, Mexican-produced vehicles that ship to the U.S. and Canada.

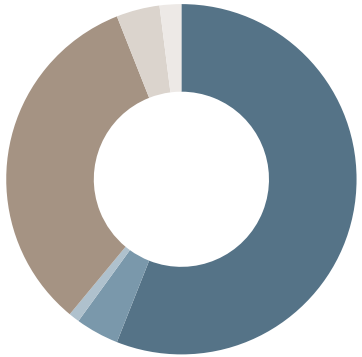
SPOTLIGHT

VANCOUVER AUTO COMPOUND

Vancouver is Canada's primary automotive gateway for Asian imports and one of the largest destination markets. Recognizing the significant opportunity for growth in this market and the ability to offer a unique solution in a deeply congested market, CP opened its Vancouver Auto Compound on 19 acres of CP-owned land.

REDACTED PUBLIC RECORD VERSION

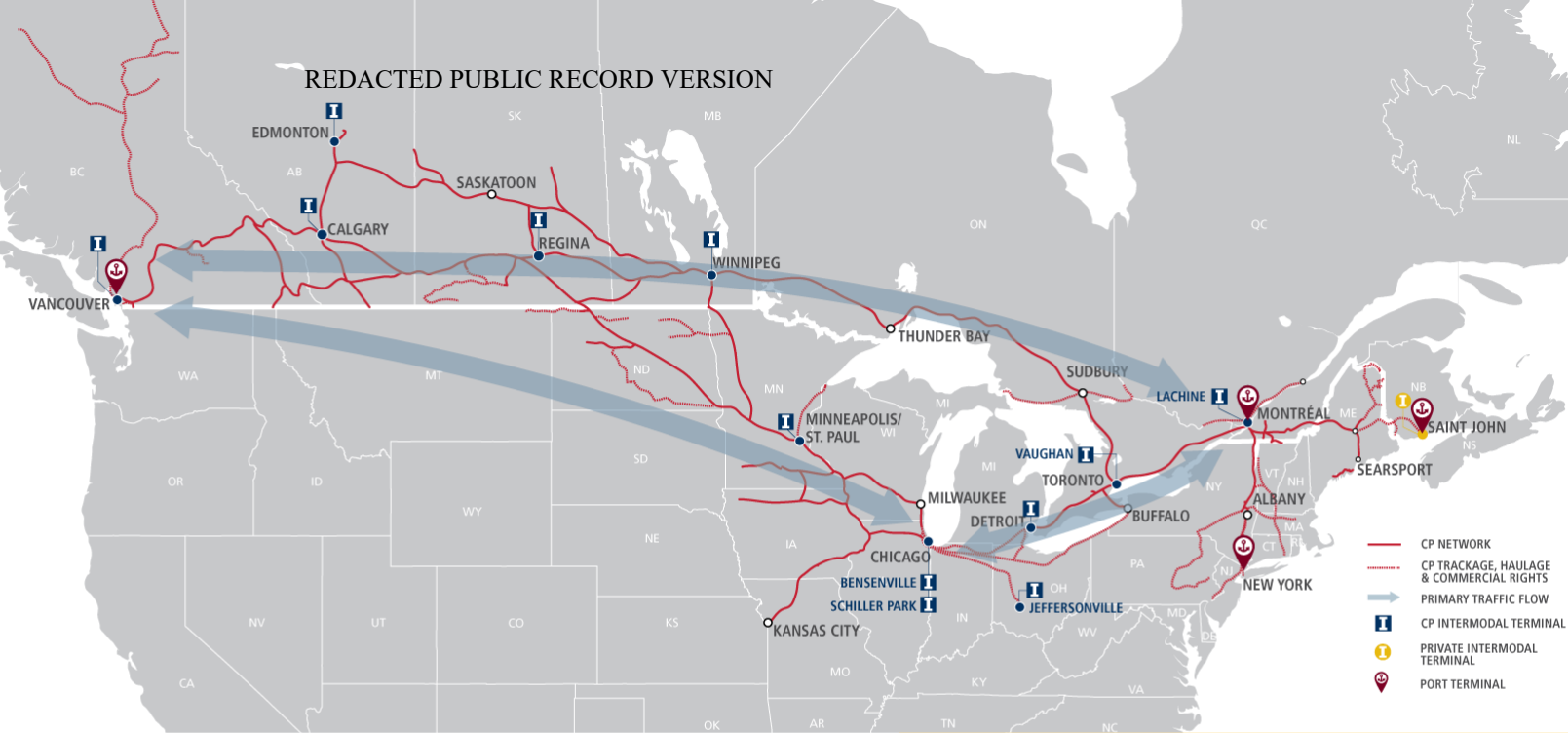
INTERMODAL



- **Domestic Intermodal 58%**
  Canada 53%
  Cross-border 4%
  U.S. 1%
- **International Intermodal 42%**
  Port of Vancouver 33%
  Port of Montréal 7%
  Other 2%

With industry-leading service performance, extended service reach, and an enhanced suite of product offerings, we're growing with existing customers and attracting new business. Our domestic intermodal provides truck-like service for transcontinental and cross-border service. International intermodal moves container volumes between the ports to inland destinations across Canada and the U.S.

CP has been leveraging our shorter route miles to provide transit time advantages to our customers in key lanes. Containerized traffic from the Port of Vancouver is primarily long-haul business destined for business centers across Canada and the U.S. Midwest.



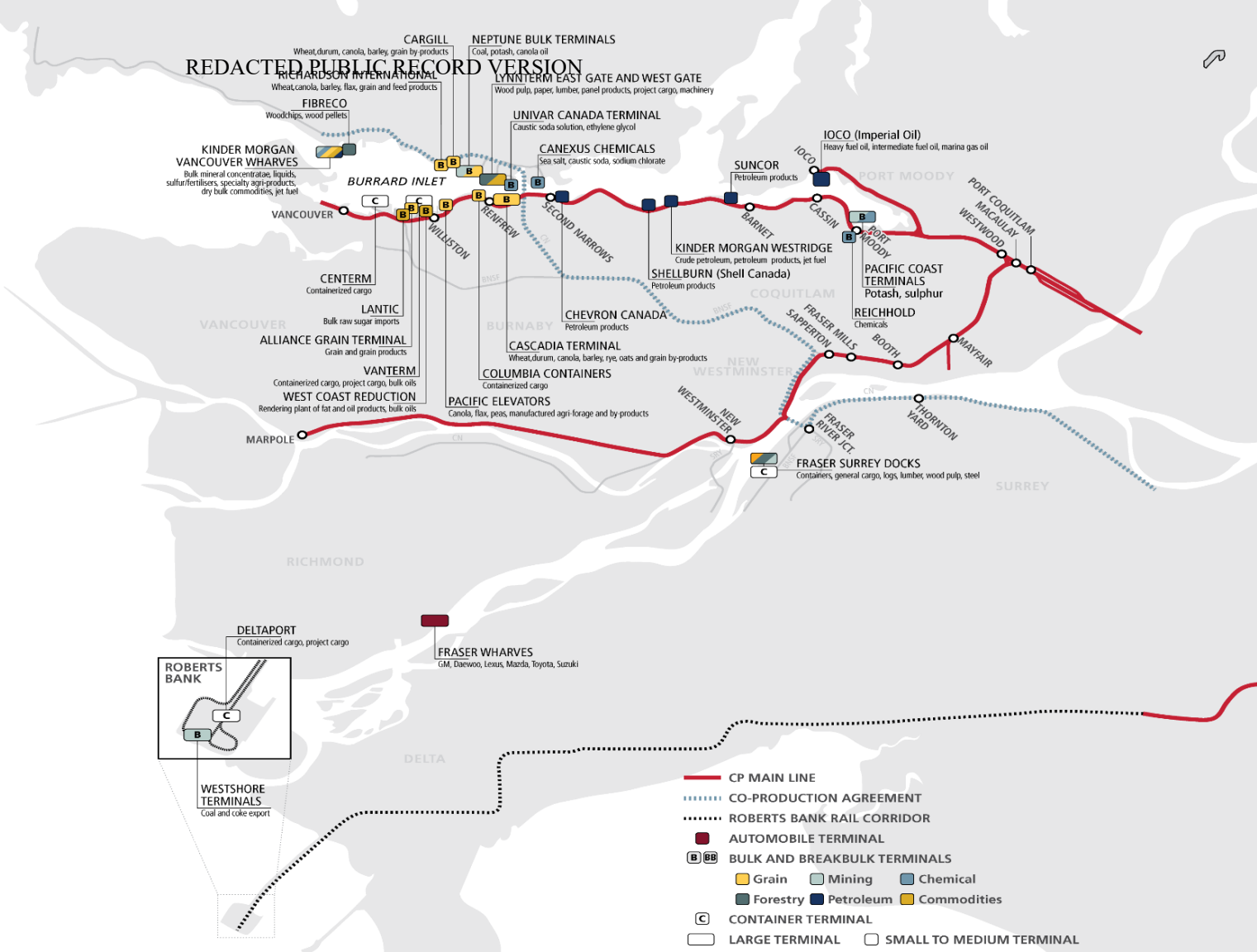
SPOTLIGHT

LEVERAGING OUR EXTENDED EAST COAST REACH

CP's recent acquisition of the Central, Maine & Québec (CMQ) presents additional growth opportunities in intermodal. CP can now offer the shortest route between Atlantic Canada and key North American markets.

PORT OF VANCOUVER

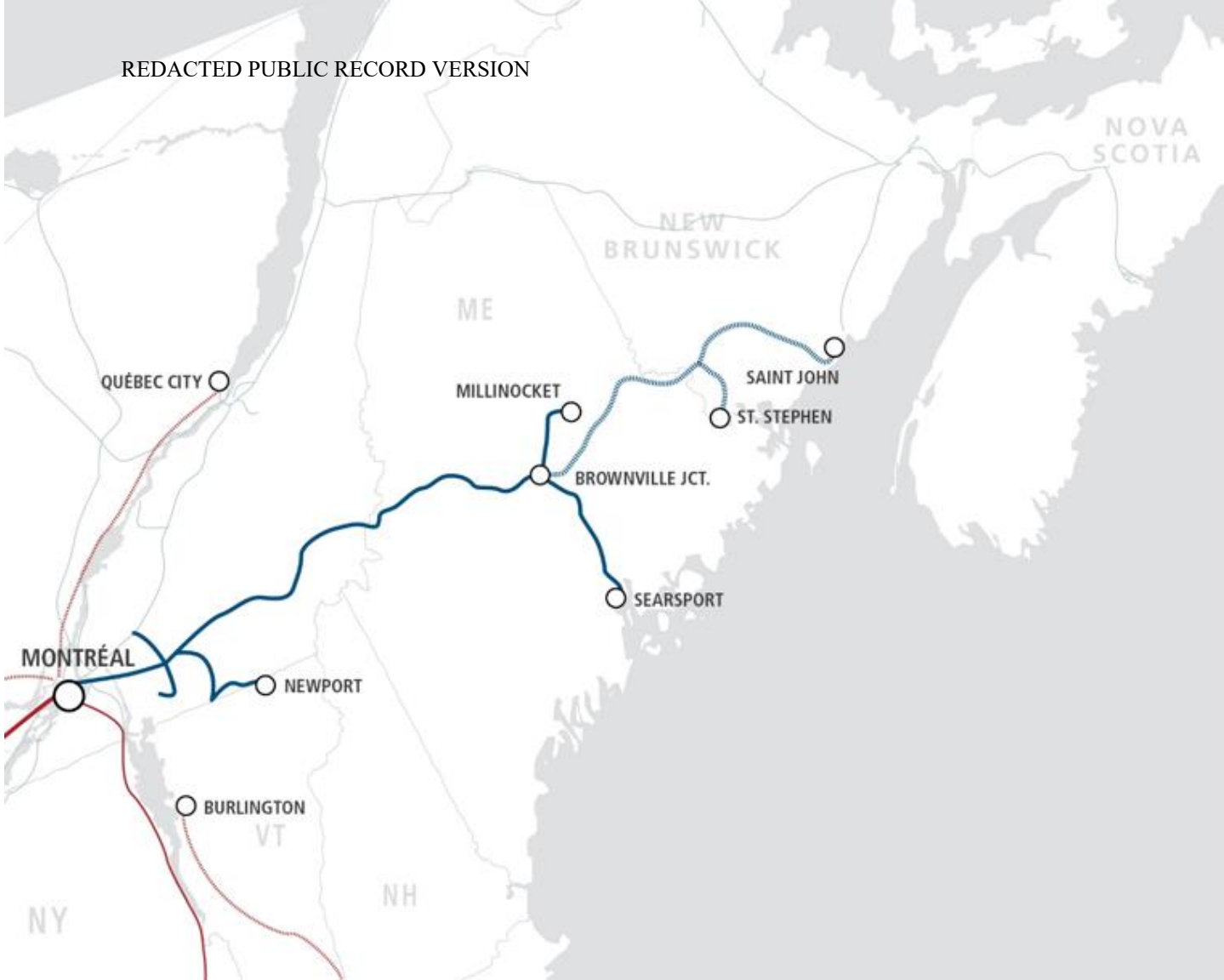
REDACTED PUBLIC RECORD VERSION



CENTRAL MAINE & QUÉBEC RAILWAY (CMQ)

STRATEGIC ACQUISITION

- **Deepwater port access** at Saint John and Searsport – provides CP with coast-to-coast access
- **Shortest routing** from the Maritimes to Montreal, Toronto, Chicago and Western Canada
- Opportunity to more than double revenues in 12-24 months
- **Investing in the CMQ network** to get it to CP safety and operational standards



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 6

CP PRESS RELEASE, "CANADIAN PACIFIC AND KANSAS CITY SOUTHERN EXECUTE AGREEMENT TO COMBINE, CREATING FIRST SINGLE-LINE RAIL NETWORK LINKING U.S.-MEXICO-CANADA" (SEPT. 15, 2021)

FOR IMMEDIATE RELEASE

Canadian Pacific and Kansas City Southern Execute Agreement to Combine, Creating First Single-Line Rail Network Linking U.S.-Mexico-Canada

Stock and Cash Transaction Represents an Enterprise Value of Approximately $31 Billion

Expected to Create Annualized Synergies of Approximately $1 Billion within Three Years

Historic Combination Enhances Competition, Creates New Options for Customers, and Supports Economic Growth in North America

Companies to Host Investor Conference Call Thursday at 8 a.m. ET

Calgary and Kansas City, Mo. – Sept. 15, 2021 – Canadian Pacific Railway Limited (TSX: CP, NYSE: CP) ("CP") and Kansas City Southern (NYSE: KSU) ("KCS") today announced they have entered into a merger agreement, under which CP has agreed to acquire KCS in a stock and cash transaction representing an enterprise value of approximately USD$31 billion[1], which includes the assumption of $3.8 billion of outstanding KCS debt. The transaction, which has the unanimous support of both boards of directors, values KCS at $300 per share, representing a 34% premium, based on the CP closing price on Aug. 9, 2021, the date prior to which CP submitted a revised offer to acquire KCS, and KCS' unaffected closing price on March 19, 2021[2].

"Our path to this historic agreement only reinforces our conviction in this once-in-a-lifetime partnership," said CP President and Chief Executive Officer Keith Creel. "We are excited to get to work bringing these two railroads together. By combining, we will unlock the full potential of our networks and our people while providing industry-best service for our customers. This perfect end-to-end combination creates the first U.S.-Mexico-Canada rail network with new single-line offerings that will deliver dramatically expanded market reach for CP and KCS customers, provide new competitive transportation options, and support North American economic growth."

"We are glad to be partnering with CP to create a railroad that is able to compete by providing the best value for the transportation dollar," said KCS President and Chief Executive Officer Patrick J. Ottensmeyer. "The CP-KCS combination will not only benefit customers, labor partners, and shareholders through new, single-line transportation services, attractive synergies and complementary routes, it will also benefit KCS and our

[1] Except where noted, all figures are in U.S. dollars.

[2] Based on KCS closing share price of $224.16 as of March 19, 2021 and CP closing share price of CAD$91.50 (at 1.2565 FX rate) as of Aug. 9, 2021.

employees by enabling us to become part of a growing and truly North American continental enterprise."

While remaining the smallest of six U.S. Class 1 railroads by revenue, the combined company would have a much larger and more competitive network, operating approximately 20,000 miles of rail, employing close to 20,000 people, and generating total revenues of approximately $8.7 billion based on 2020 actual revenues. The CP-KCS combination is expected to create jobs across the joined network. Additionally, the companies expect efficiency and service improvements to achieve meaningful environmental benefits.

Transaction to Expand Options and Efficiencies for Customers

A CP-KCS combination would provide unprecedented reach via new single-line hauls across a combined network, offering:

- New single-line competitive options for domestic intermodal shipments between Mexico, the U.S. Midwest, and Canada, providing a truck competitive product for time-sensitive shipments in the high-value parts, perishables, and expedited markets.
- New single-line hauls linking key automotive manufacturing and distribution centers in Mexico, the U.S. Midwest, and Canada, capitalizing on CP's best-in-class automotive compound network.
- New single-line routes linking energy, chemical, and merchandise shippers to more quickly and efficiently connect origin and destination facilities and reach new markets and global consumers.
- Unmatched access to Atlantic, Gulf, and Pacific ports, linking international intermodal shippers with North America's largest consumer markets providing new optionality, capacity, and resiliency.
- New single-line routes allowing the efficient flow of agricultural products from CP's origin-rich franchise to KCS' destination-rich franchise, generating new optionality for shippers and receivers.
- Extended reach for short line and regional railroads coupled with new optionality for non-rail served customers via our extensive transload network.

Importantly, customers would not experience a reduction in independent railroad choices as a result of the transaction. CP-KCS have committed to keep all existing freight rail gateways open on commercially reasonable terms, while simultaneously competing aggressively to attract traffic via new single-line north-south lanes between Canada, the Upper Midwest and the Gulf Coast, Texas, and Mexico.

A CP-KCS combination would preserve the six-railroad structure of the North American Class 1 rail network: two in the west, two in the east and two in Canada, each with access to the U.S. Gulf Coast. The two companies once combined would remain the smallest of the Class 1 carriers.

Improving Highway Traffic, Environmental Sustainability, and Safety

The new single-line routes made possible by the transaction are expected to shift trucks off crowded U.S. highways, lowering emissions and reducing the need for public investments in road and highway bridge repairs. Rail is four times more fuel efficient than trucking, and one train can keep more than 300 trucks off public roads and produce 75 percent less greenhouse gas emissions. The synergies created by this combination are expected to take tens of thousands of trucks off the highways annually.

CP is committed to sustainability and is currently developing North America's first line-haul hydrogen-powered locomotive. Additionally, the combined company would maintain both CP and KCS' pledges to improve fuel efficiency and lower emissions in-line with the Paris Agreement to support a more sustainable North American supply chain.

Creating Value for KCS and CP Shareholders

Following the closing into a voting trust, common shareholders of KCS will receive 2.884 CP shares and $90 in cash for each KCS common share held. Preferred shareholders will receive $37.50 in cash for each KCS preferred share held. The fixed exchange ratio implies a price for KCS of $300 per share, representing a 34% premium, based on the CP closing price on August 9, 2021 and KCS' unaffected closing price on March 19, 2021[3].

Immediately following the closing into trust, KCS common shareholders are expected to own 28 percent of CP's outstanding common shares, providing the ability to participate in the upside of both companies' growth opportunities. Following final regulatory approval by the U.S. Surface Transportation Board ("STB"), KCS shareholders would also reap the benefits of synergies resulting from the combination.

The combined growth strategies of the two fastest-growing Class 1s will result in new efficiencies for customers and improved on-time performance under their respective Precision Scheduled Railroading programs. The combined company is expected to create annualized synergies of approximately $1 billion over three years.

The combination is expected to be accretive to CP's adjusted diluted EPS[4] in the first full year following CP's acquisition of control of KCS, and is expected to generate double-digit accretion upon the full realization of synergies thereafter.

To fund the stock consideration of the merger, CP will issue 262 million new shares. Consistent with the previously announced transaction, the cash portion will be funded through a combination of cash-on-hand and raising approximately $8.5 billion in debt, for which financing has been committed. As part of the merger, CP will assume approximately $3.8 billion of KCS' outstanding debt. Following the closing into trust, CP expects that its outstanding debt will be approximately $20 billion.

[3] Based on KCS closing share price of $224.16 as of March 19, 2021 and CP closing share price of CAD$91.50 (at 1.2565 FX rate) as of Aug. 9, 2021.

[4] Accretion based on adjusted diluted EPS excluding one-time advisory, financing, and integration costs as well as incremental transaction-related amortization.

Pro forma for the transaction, CP estimates its leverage ratio against 2021E street consensus EBITDA to be approximately 3.9x with the assumption of KCS debt and issuance of new acquisition-related debt. In order to manage this leverage effectively, CP will continue to temporarily suspend its normal course issuer bid program, and expects to produce approximately $7 billion of levered free cash flow (after interest and taxes) over the next three years. CP estimates its long-term leverage target of approximately 2.5x to be achieved within 24 months after closing into trust. The combined company will remain committed to maintaining strong investment grade credit ratings while continuing to return capital for the benefit of shareholders.

Strong Stakeholder Support for CP-KCS

More than 1,000 stakeholders – including railroad labor unions, shippers, and community leaders – have written letters to the STB supporting CP's proposed combination with KCS. These letters emphasize the enhanced competition and unsurpassed levels of service, safety and economic efficiency that the transaction will bring for shippers and communities across the U.S., Mexico, and Canada that a CP-KCS combination offers.

Clear Path to Complete Transaction and Merger

On May 6, 2021, the STB approved the use of a voting trust for a planned CP-KCS merger, and the pertinent circumstances surrounding this new agreement between CP and KCS have not changed relative to those underlying the STB's decision approving a trust. To close into voting trust, the transaction requires approval from shareholders of both companies along with satisfaction of customary closing conditions, including Mexican regulatory approvals. CP would then acquire KCS and place the KCS shares into the voting trust, at which point KCS shareholders would receive 2.884 CP shares and $90 in cash for each KCS common share held. The companies expect the transaction to close and KCS shareholders to receive their consideration in Q1 2022.

CP's ultimate acquisition of control of KCS' U.S. railways is subject to the approval of the STB. In April, the STB decided that it would review the CP-KCS combination under the merger rules in existence prior to 2001 and the waiver granted to KCS in 2001 to exempt it from the 2001 merger rules. In August, the STB reaffirmed that the pre-2001 rules would govern its review of the CP-KCS transaction.

The STB review of CP's proposed control of KCS is expected to be completed in the second half of 2022. Upon obtaining control approval, the two companies will be integrated fully over the ensuing three years, unlocking the benefits of the combination.

Board, Management, and Headquarters

Following STB approval of the CP's control of KCS, Mr. Creel will serve as the Chief Executive Officer of the combined company. The combined entity will be named Canadian Pacific Kansas City ("CPKC").

Calgary will be the global headquarters of CPKC, and Kansas City, Missouri will be the U.S. headquarters. The Mexico headquarters will remain in Mexico City and Monterrey. CP's current U.S. headquarters in Minneapolis-St. Paul will remain an important base of operations.

Four KCS Directors will join CP's expanded Board at the appropriate time, bringing their experience and expertise in overseeing KCS' multinational operations.

Advisors

BMO Capital Markets and Goldman Sachs & Co. LLC are serving as financial advisors to Canadian Pacific. Sullivan & Cromwell LLP, Bennett Jones LLP and the Law Office of David L. Meyer are serving as legal counsel. Creel, García-Cuéllar, Aiza y Enríquez, S.C. are serving as Mexican legal counsel to Canadian Pacific. Evercore is serving as the Canadian Pacific Board's financial advisors and Blake, Cassels & Graydon LLP is serving as the Board's legal counsel.

BofA Securities and Morgan Stanley & Co. LLC are serving as financial advisors to Kansas City Southern. Wachtell, Lipton, Rosen & Katz, Baker & Miller PLLC, Davies Ward Phillips & Vineberg LLP, WilmerHale, and White & Case, S.C. are serving as legal counsel to Kansas City Southern.

Conference Call for Investment Community

CP and KCS will host a joint investor conference call Thursday, Sept. 16, at 8 a.m. ET to discuss this announcement. A live webcast of the call and the replay will be available on the CP website at https://investor.cpr.ca/events and the KCS website at https://investors.kcsouthern.com/events-calendar. Supporting materials will be posted on www.FutureForFreight.com. To listen to the live conference call, dial (877) 830-2586 in the U.S. or (785) 424-1734 internationally, passcode 74335.

A conference call replay will be available for one week following the call and can be accessed by dialing (800) 753-5212 (no passcode needed).

For information on the benefits of a CP-KCS combination, visit FutureForFreight.com.

FORWARD LOOKING STATEMENTS AND INFORMATION

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purposes. FLI is typically identified by words such as “anticipate”, “expect”, “project”, “estimate”, “forecast”, “plan”, “intend”, “target”, “believe”, “likely” and similar words suggesting future outcomes or statements regarding an outlook. All statements other than statements of historical fact may be FLI.

Although we believe that the FLI is reasonable based on the information available today and processes used to prepare it, such statements are not guarantees of future performance and you are cautioned against placing undue reliance on FLI. By its nature, FLI involves a variety of assumptions, which are based upon factors that may be difficult to predict and that may involve known and unknown risks and uncertainties and other factors which may cause actual results, levels of activity and achievements to differ materially from those expressed or implied by these FLI, including, but not limited to, the following: the timing and completion of the transaction, including receipt of regulatory and shareholder approvals and the satisfaction of other conditions precedent; interloper risk; the realization of anticipated benefits and synergies of the transaction and the timing thereof; the success of integration plans; the focus of management time and attention on the transaction and other disruptions arising from the transaction; changes in business strategy and strategic opportunities; estimated future dividends; financial strength and flexibility; debt and equity market conditions, including the ability to access capital markets on favourable terms or at all; cost of debt and equity capital; potential changes in the CP share price which may negatively impact the value of consideration offered to KCS shareholders; the ability of management of CP, its subsidiaries and affiliates to execute key priorities, including those in connection with the transaction; general Canadian, U.S., Mexican and global social, economic, political, credit and business conditions; risks associated with agricultural production such as weather conditions and insect populations; the availability and price of energy commodities; the effects of competition and pricing pressures, including competition from other rail carriers, trucking companies and maritime shippers in Canada, the U.S. and Mexico; North American and global economic growth; industry capacity; shifts in market demand; changes in commodity prices and commodity demand; uncertainty surrounding timing and volumes of commodities being shipped; inflation; geopolitical instability; changes in laws, regulations and government policies, including regulation of rates; changes in taxes and tax rates; potential increases in maintenance and operating costs; changes in fuel prices; disruption in fuel supplies; uncertainties of investigations, proceedings or other types of claims and litigation; compliance with environmental regulations; labour disputes; changes in labour costs and labour difficulties; risks and liabilities arising from derailments; transportation of dangerous goods; timing of completion of capital and maintenance projects; sufficiency of budgeted capital expenditures in carrying out business plans; services and infrastructure; the satisfaction by third parties of their obligations; currency and interest rate fluctuations; exchange rates; effects of changes in market conditions and discount rates on the financial position of pension plans and investments; trade restrictions or other changes to international trade arrangements; the effects of current and future multinational trade agreements on the level of trade among Canada, the U.S. and Mexico; climate change and the market and regulatory responses to climate change; anticipated in-service dates; success of hedging activities; operational performance and reliability; customer, shareholder, regulatory and other stakeholder approvals and support; regulatory

and legislative decisions and actions; the adverse impact of any termination or revocation by the Mexican government of Kansas City Southern de Mexico, S.A. de C.V.'s Concession; public opinion; various events that could disrupt operations, including severe weather, such as droughts, floods, avalanches and earthquakes, and cybersecurity attacks, as well as security threats and governmental response to them, and technological changes; acts of terrorism, war or other acts of violence or crime or risk of such activities; insurance coverage limitations; material adverse changes in economic and industry conditions, including the availability of short and long-term financing; and the pandemic created by the outbreak of COVID-19 and its variants, and resulting effects on economic conditions, the demand environment for logistics requirements and energy prices, restrictions imposed by public health authorities or governments, fiscal and monetary policy responses by governments and financial institutions, and disruptions to global supply chains.

We caution that the foregoing list of factors is not exhaustive and is made as of the date hereof. Additional information about these and other assumptions, risks and uncertainties can be found in reports and filings by CP and KCS with Canadian and U.S. securities regulators, including any proxy statement, prospectus, material change report, management information circular or registration statement to be filed in connection with the transaction. Reference should be made to "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations—Forward Looking Statements" in CP's and KCS's annual and interim reports on Form 10-K and 10-Q. Due to the interdependencies and correlation of these factors, as well as other factors, the impact of any one assumption, risk or uncertainty on FLI cannot be determined with certainty.

Except to the extent required by law, we assume no obligation to publicly update or revise any FLI, whether as a result of new information, future events or otherwise. All FLI in this news release is expressly qualified in its entirety by these cautionary statements.

ABOUT CANADIAN PACIFIC

Canadian Pacific is a transcontinental railway in Canada and the United States with direct links to major ports on the west and east coasts. CP provides North American customers a competitive rail service with access to key markets in every corner of the globe. CP is growing with its customers, offering a suite of freight transportation services, logistics solutions and supply chain expertise. Visit www.cpr.ca to see the rail advantages of CP. CP-IR

ABOUT KCS

Headquartered in Kansas City, Mo., Kansas City Southern (KCS) (NYSE: KSU) is a transportation holding company that has railroad investments in the U.S., Mexico and Panama. Its primary U.S. holding is The Kansas City Southern Railway Company, serving the central and south central U.S. Its international holdings include Kansas City Southern de Mexico, S.A. de C.V., serving northeastern and central Mexico and the port cities of Lázaro Cárdenas, Tampico and Veracruz, and a 50 percent interest in Panama Canal Railway

Company, providing ocean-to-ocean freight and passenger service along the Panama Canal. KCS' North American rail holdings and strategic alliances with other North American rail partners are primary components of a unique railway system, linking the commercial and industrial centers of the U.S., Mexico and Canada. More information about KCS can be found at www.kcsouthern.com.

ADDITIONAL INFORMATION ABOUT THE TRANSACTION AND WHERE TO FIND IT

CP will file with the U.S. Securities and Exchange Commission (SEC) a registration statement on Form F-4, which will include a proxy statement of KCS that also constitutes a prospectus of CP, and any other documents in connection with the transaction. The definitive proxy statement/prospectus will be sent to the shareholders of KCS. CP will also file a management proxy circular in connection with the transaction with applicable securities regulators in Canada and the management proxy circular will be sent to CP shareholders. INVESTORS, STOCKHOLDERS AND SHAREHOLDERS OF KCS AND CP ARE URGED TO READ THE PROXY STATEMENT/PROSPECTUS AND MANAGEMENT PROXY CIRCULAR, AS APPLICABLE, AND ANY OTHER DOCUMENTS FILED OR TO BE FILED WITH THE SEC OR APPLICABLE SECURITIES REGULATORS IN CANADA IN CONNECTION WITH THE TRANSACTION WHEN THEY BECOME AVAILABLE, AS THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT KCS, CP, THE TRANSACTION AND RELATED MATTERS. The registration statement and proxy statement/prospectus and other documents filed by CP and KCS with the SEC, when filed, will be available free of charge at the SEC's website at www.sec.gov. In addition, investors and shareholders will be able to obtain free copies of the registration statement, proxy statement/prospectus, management proxy circular and other documents which will be filed with the SEC and applicable securities regulators in Canada by CP online at investor.cpr.ca and www.sedar.com, upon written request delivered to CP at 7550 Ogden Dale Road S.E., Calgary, Alberta, T2C 4X9, Attention: Office of the Corporate Secretary, or by calling CP at 1-403-319-7000, and will be able to obtain free copies of the proxy statement/prospectus and other documents filed with the SEC by KCS online at www.investors.kcsouthern.com, upon written request delivered to KCS at 427 West 12th Street, Kansas City, Missouri 64105, Attention: Corporate Secretary, or by calling KCS's Corporate Secretary's Office by telephone at 1-888-800-3690 or by email at corpsec@kcsouthern.com.

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NON-GAAP MEASURES

Although this news release includes forward-looking non-GAAP measures (adjusted diluted EPS and earnings before interest, tax, depreciation and amortization (EBITDA)), it is not practicable to reconcile, without unreasonable efforts, these forward-looking measures to the most comparable GAAP measures (diluted EPS and Net income, respectively), due to unknown variables and uncertainty related to future results. Please see Note on forward-looking statements above for further discussion.

PARTICIPANTS IN THE SOLICITATION OF PROXIES

This news release is not a solicitation of proxies in connection with the transaction. However, under SEC rules, CP, KCS, and certain of their respective directors and executive officers may be deemed to be participants in the solicitation of proxies in connection with the transaction. Information about CP's directors and executive officers may be found in its 2021 Management Proxy Circular, dated March 10, 2021, as well as its 2020 Annual Report on Form 10-K filed with the SEC and applicable securities regulators in Canada on February 18, 2021, available on its website at investor.cpr.ca and at www.sedar.com and www.sec.gov. Information about KCS's directors and executive officers may be found on its website at www.kcsouthern.com and in its 2020 Annual Report on Form 10-K filed with the SEC on January 29, 2021, available at www.investors.kcsouthern.com and www.sec.gov. These documents can be obtained free of charge from the sources indicated above. Additional information regarding the interests of such potential participants in the solicitation of proxies in connection with the transaction will be included in the proxy statement/prospectus and management proxy circular and other relevant materials filed with the SEC and applicable securities regulators in Canada when they become available.

For more information, please contact:

Canadian Pacific
Media
Patrick Waldron
Tel: 403-852-8005
Patrick_Waldron@cpr.ca;
alert_mediarelations@cpr.ca

Investment Community
Chris De Bruyn
Tel: 403-319-3591
investor@cpr.ca

Kansas City Southern
Media
C. Doniele Carlson
Tel: 816-983-1372
dcarlson@kcsouthern.com

Investment Community
Ashley Thorne
Tel: 816-983-1530
athorne@kcsouthern.com

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 7

CP RAIL'S EVENTS, "CANADIAN PACIFIC RAILWAY AND KANSAS CITY SOUTHERN TO COMBINE" (MAR. 21, 2021)

REDACTED PUBLIC RECORD VERSION



Canadian Pacific Railway and Kansas City Southern to Combine

March 21, 2021

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Today's Participants

Keith Creel
President and Chief Executive Officer
Canadian Pacific Railway

Patrick J. Ottensmeyer
President and Chief Executive Officer
Kansas City Southern

Nadeem Velani
Executive Vice President and Chief Financial Officer
Canadian Pacific Railway

Michael Upchurch
Executive Vice President and Chief Financial Officer
Kansas City Southern

John Brooks
Executive Vice-President and Chief Marketing Officer
Canadian Pacific Railway

Michael Naatz
Executive Vice President and Chief Marketing Officer
Kansas City Southern

AGENDA

- Strategic Rationale
- Transaction Details
- Trust Structure
- Growth Opportunities
- Financials
- Safety & Environmental
- Conclusion



Compelling Strategic Combination

~20,000 miles
Rail Network

~20,000
Employees

$8.7bn
2020A of Combined Revenues

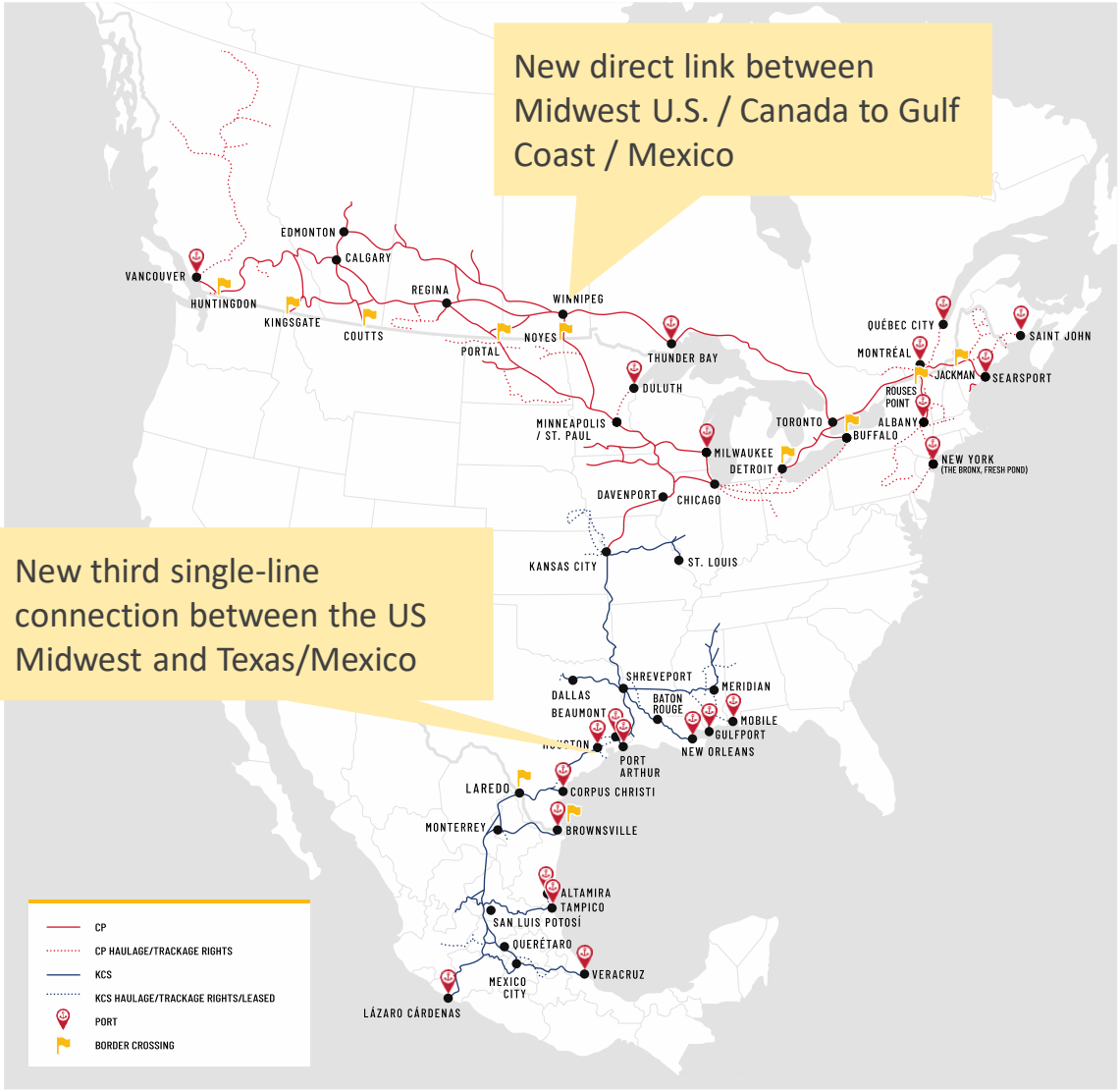
Investment Grade
Balance Sheet

- Creates the First U.S.-Mexico-Canada Rail Network
- Expands Competitive Options for Customers and Supports Strong Growth Going Forward
- Well Positioned for Growth, Bringing Together Two Railroads with Highest 3-Year Revenue CAGR
- Annualized Synergies of $780mm Drives Accretion to CP's Adjusted Diluted EPS[1]
- Shared Dedication to Quality Service, Safety and Efficiency to be Enhanced Across CPKC
- Both Companies Champions of Environmental Sustainability

1.The combination is expected to be accretive to CP's adjusted diluted EPS in the first full year following CP's acquisition of control of KCS, and is expected to generate double-digit accretion upon the full realization of synergies thereafter.

Creating the First U.S.-Mexico-Canada Rail Network

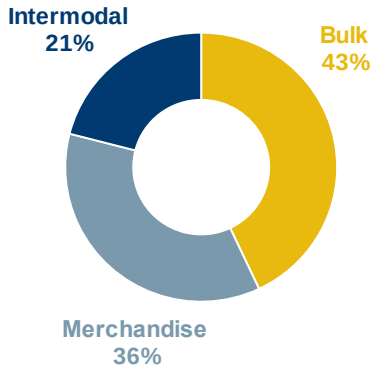
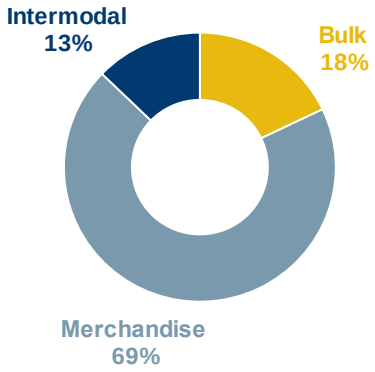
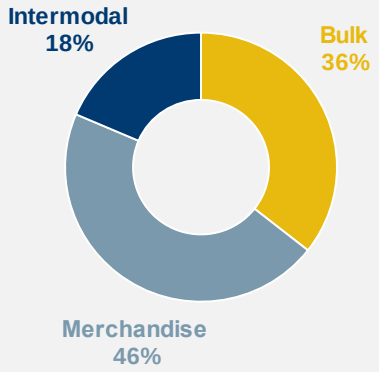
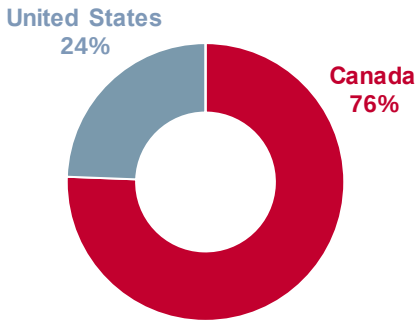
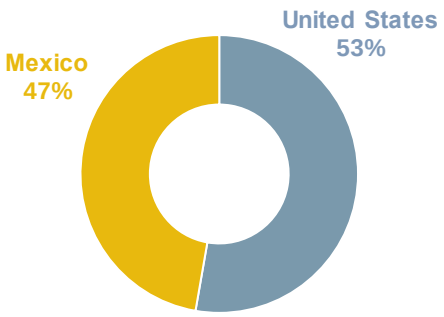
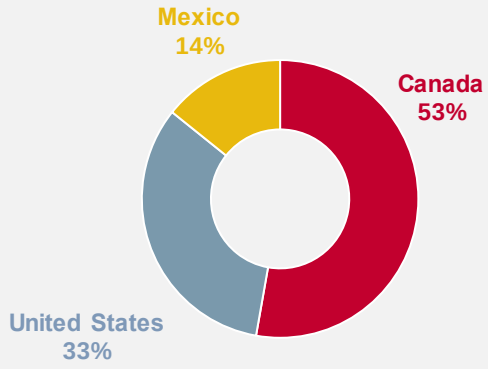
CPKC Network



- ***Enhances competition*** by creating new single-line haul routes
- Connects ***six of the seven*** largest metro regions in North America
- ***Diversifies*** current business and geographic mix with the addition of new routes
- Driving ***USMCA growth and investment opportunities***

Significantly Enhanced Scale with More Diversified Business Mix

Figures Expressed as a Percent of 2020 Freight Revenue

	Canadian Pacific	Kansas City Southern	CPKC[1]
Business Mix			
Geography			

Acquisition further diversifies mix of business and end market exposure, creating a strong base to drive sustainable growth

Source: Public Disclosure. Note: Figures in Canadian dollars converted to USD at a USD/CAD spot exchange rate of 0.80.
[1] Reflects pre-synergy revenues.

Transaction Details

Financial Terms

- Canadian Pacific Railway ("CP") has agreed to acquire Kansas City Southern ("KCS") in a stock and cash transaction representing an enterprise value of $29 billion, which includes the assumption of $3.8 billion of KCS' outstanding debt.
- The transaction, which has the unanimous support of both boards of directors, values KCS at $275 per share, representing a 23% premium[1], based on the CP and KCS closing prices on March 19, 2021 (and $270 per share, representing a 26% premium[2], based on the respective CP and KCS 30-day volume weighted average prices ("VWAP")).
- Following the closing into a voting trust, common shareholders of KCS will receive 0.489 of a CP share and $90 in cash for each KCS common share held. Preferred shareholders will receive $37.50 in cash for each KCS preferred share held.
- To fund the stock consideration of the merger, CP will issue 44.5 million new shares, resulting in CP shareholders owning 75% of CPKC. The cash portion will be funded through a combination of cash-on-hand and raising approximately $8.6 billion in debt, for which financing has been committed.
- The transaction provides KCS shareholders the ability to participate in the upside of CPKC, and KCS shareholders are expected to own 25% of the combined company.

Governance

- The combined business will be named Canadian Pacific Kansas City ("CPKC").
- Calgary, Alberta will be the global headquarters of CPKC.
- Kansas City, Missouri will be designated as the U.S. headquarters.
- Mexico headquarters will remain in Mexico City and Monterrey.
- CP's current U.S. headquarters in Minneapolis-St. Paul will remain an important base of operations.
- Keith Creel to serve as Chief Executive Officer of CPKC.
- Four KCS Directors will join CP's expanded Board at the appropriate time, bringing their experience and expertise in overseeing KCS' multinational operations.
- Shareholders of CP and KCS will vote on the transaction.

1. Based on KCS and CP closing share prices of $224.16 and CAD$474.27 (at 1.2506 FX rate), respectively, as of March 19, 2021.
2. Based on KCS and CP 30-day volume weighted average prices ("VWAPs") of $213.87 and US$368.22, respectively, as of March 19, 2021.

Trust Structure Overview

Trust Mechanics: A Two Step Process

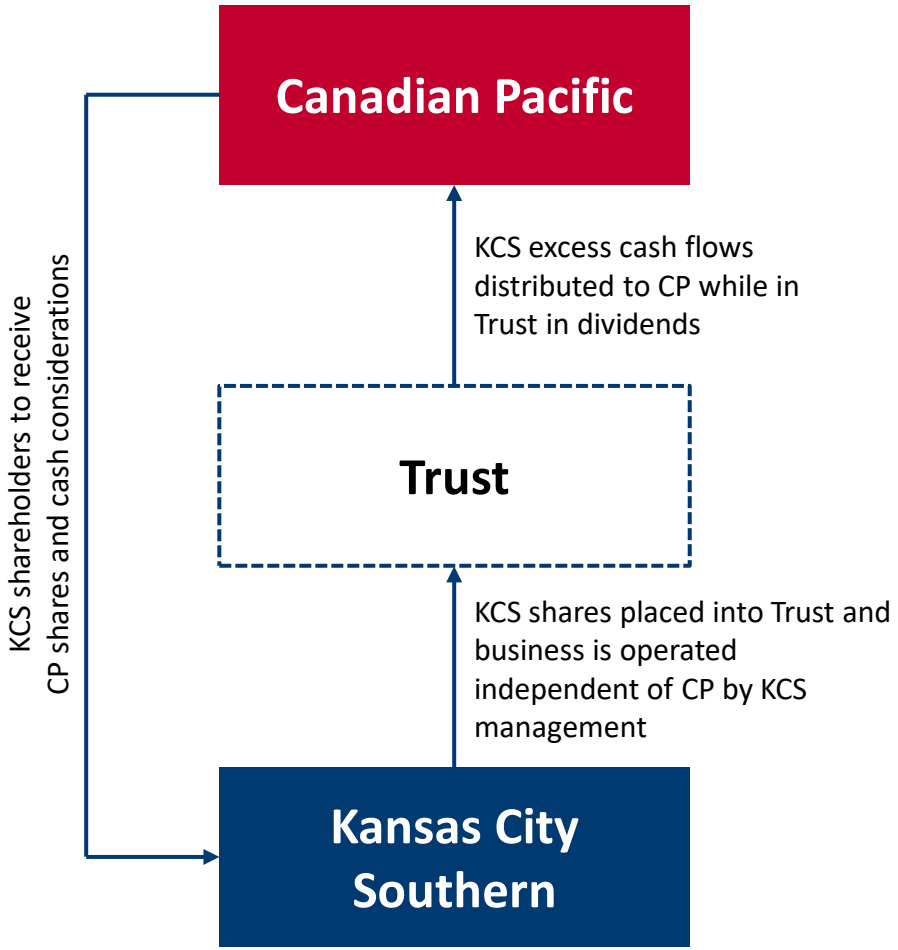
STEP 1

- First, CP will establish a ***"plain vanilla", independent voting trust*** to acquire the shares of KCS
- Upon shareholder approval of the transaction, and satisfaction of customary closing conditions, ***CP will acquire KCS' shares and place them into the voting trust***, which is expected to be completed in the second half of 2021, at which point KCS shareholders will receive their consideration
- CP's placement of KCS shares into the voting trust will ***insulate KCS from control by CP*** until the STB authorizes control
- KCS' ***management and Board of Directors will continue to steward the company*** while it is in trust, pursuing KCS' independent business plan and growth strategies
- CP will ***appoint an independent Trustee***, Dave Starling, to hold the KCS stock

STEP 2:

- ***Obtain control approval from the STB*** and other applicable regulatory authorities. The STB review is expected to be completed by the middle of 2022
- Upon obtaining control approval, ***the two companies will be integrated,*** unlocking the benefits of the merger

Trust Structure

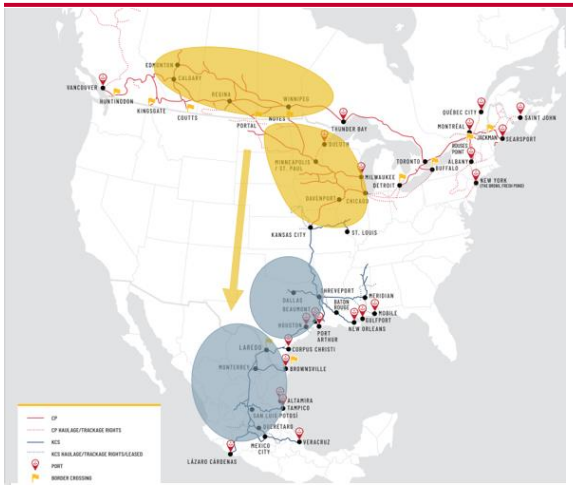


Closing KCS into a Trust prior to STB review of proposed change in control is a standard procedure, with numerous precedents[1]

1. Precedent rail transactions with voting Trust structures since 2015 include the acquisitions and/or mergers of (i) Canadian National and Illinois Central, (ii) UP and Southern Pacific, (iii) CP and Central Maine & Quebec Railway, (iv) Genesee & Wyoming and Brookfield Infrastructure Partners, and (v) Providence & Worcester Railroad and Genesee & Wyoming.

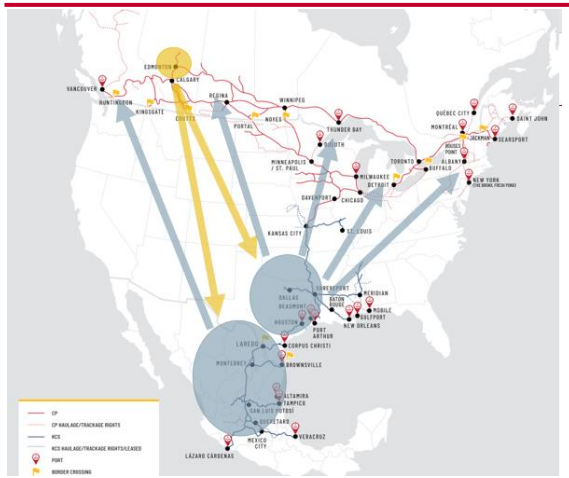
Enhances Competitive Options for Customers and Enables North American Growth

Bulk



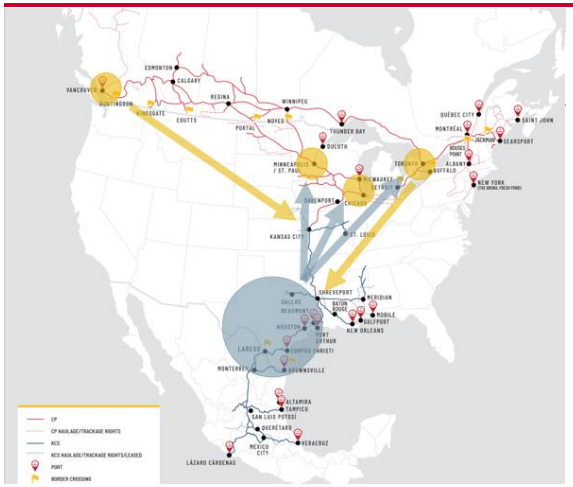
New single-line shipments for grain from Canada and the Upper Midwest to domestic and export markets in Southern US and Mexico

ECP & Merchandise



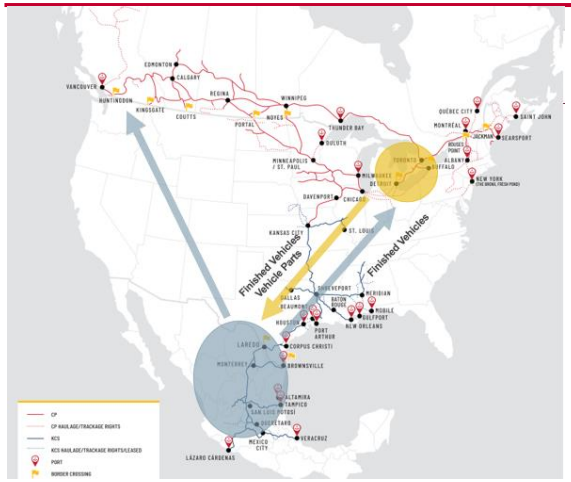
New single-line competition for shipments of energy, chemicals & plastics and merchandise moving between Canada, the US and Mexico

Intermodal



New head-to-head single-line competition for intermodal shipments between Mexico and the Upper Midwest and Canada

Automotive



New head-to-head single-line competition for automotive shipments between Canada, US Midwest and Mexico

CPKC's network to benefit customers across all business lines

Access to Mexico's Industrial Heartland Provides Unprecedented Growth Opportunities



Mexico Highlights

- ***47%*** of KCS 2020 Total Revenues[(1)]
- ***2,650 miles*** of main and branch line
- ***50-year operating concession*** with Mexican Government (expires in 2047; renewable for 50-year term)
- ***Laredo, TX gateway handles 44%*** of US / Mexico Surface Trade[(2)]
- ***GDP from both sides*** of the border constitutes the 3rd largest economy in the world

Mexico Unique Growth Drivers

Franchise Cross-border Growth	Refined Products	Port Access	Near-shoring
13% volume CAGR since 2009, driven by US/Mexico trade	• 2020 growth at 48% • $250M annualized run rate at exit 2020	• Exclusive access to Lazaro Cardenas • Recent direct access to Veracruz	• USMCA & COVID-19 reinforce nearshoring thesis • Lower transportation, overhead & network costs

Sources: Company Filings: 1. **KCS 2020 10K** 2. BTS Data, January 2020

CPKC Unlocks $780 Million EBITDA Growth Opportunities

$600 Million
in EBITDA Growth from Market Opportunities

- Unique combination enables significant growth for our customers throughout North America
- Efficient new single-line routes and dramatically expanded market reach for customers
- Planned capital investments to support growth synergies, such as additional network sidings, siding extensions and investment in CTC

$180 Million
in Cost and Efficiency Improvements

- Driven by a combination of improved fuel efficiency, lower G&A costs, equipment rents as well as facilities, IT spend and licensing
- CPKC to utilize best practices to support increased operating efficiencies

Following regulatory approval anticipated for mid-2022, we anticipate generating $780 million of annualized synergies within three years

Robust Cash Flow Generation Drives Rapid Deleveraging

~2.5x
Long-term leverage target to be achieved within 36 months, following the close into trust

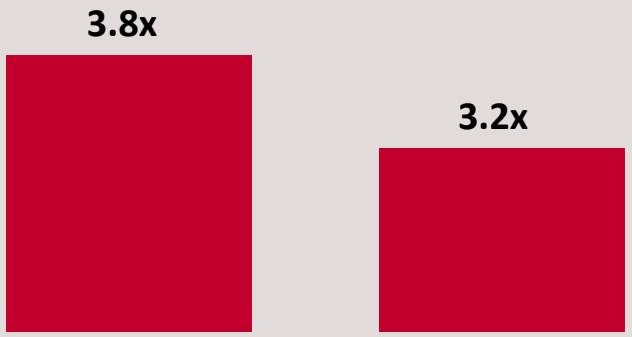
+$2 billion
Free cash flow per year expected to be generated, post synergies

Paused Share Repurchases
To resume once long-term leverage targets achieved

Maintain Dividend Policy
No changes to CP or KCS' current dividend

Projected Combined Leverage Ratio

Trust Period



- Close into Trust in mid-2021
- No synergies realized during trust
- De-leveraging not dependent on synergies
- Strong independent FCF generation

Post-Trust Period



- Trust eliminated and KCS is consolidated
- Begin realizing synergies

Continued commitment to maintain a strong balance sheet and investment grade rating

Committed to Environmental Leadership and a Safety-First Culture

Improving Highway Traffic & the Environment

Environmental Sustainability & Rail Transportation

- Rail is one of the most economical and environmentally responsible methods of moving freight
- New single-line routes will shift truck traffic off crowded U.S. highways
- Advances our shared science-based pledges to improve fuel efficiency and lower emissions in support of a more sustainable North American supply chain

Long-Term Commitment to Climate Change Action & Emissions Reduction

- Both CP and KCS have a track record of improvement:
  - Locomotive fuel efficiency by 9% and 11%, respectively, since 2014
  - Locomotive emissions intensity by 3%, from 2017 to 2019
- Developing North America's 1st line-haul hydrogen locomotive

Safety

- History of capital investment that supports safety & capacity
- CP & KCS share compatible cultures rooted in safety first
- Trip plan compliance and safety goals are key drivers of KCS and CP short-term incentives
- CP has been North America's safest railway for 15 consecutive years based on FRA-train accident frequency
- Significant combined investment in initiatives and technology underpins our commitment to safety, across our entire operation
  - Predictive analytics to reduce online failures
  - Real time data on wheels, rails, cars, locomotives and trains enable us to anticipate issues and take preventative measures
  - Investment in operators and equipment to support public safety
  - Potential investment in upgrading 'dark territory' to Centralized Train Control, which would further improve safety



4x more fuel efficient than trucks



75% less GHG emissions produced by trains than trucks



34% improvement in CP FRA Personal Injury Frequency ('16-'20)



300 trucks removed from public roads for each single unit train

Source: Corporate Disclosure

Unique and Compelling Combination

- Creates the First U.S.-Mexico-Canada Rail Network
- Expands Competitive Options for Customers and Supports Strong Growth Going Forward
- Well Positioned for Growth, Bringing Together Two Railroads with Highest 3-Year Revenue CAGR
- Annualized Synergies of $780mm Drives Accretion to CP's Adjusted Diluted EPS[1]
- Shared Dedication to Quality Service, Safety and Efficiency to be Enhanced Across CPKC
- Both Companies Champions of Environmental Sustainability

1.The combination is expected to be accretive to CP's adjusted diluted EPS in the first full year following CP's acquisition of control of KCS, and is expected to generate double-digit accretion upon the full realization of synergies thereafter.

REDACTED PUBLIC RECORD VERSION



Canadian Pacific Railway and Kansas City Southern to Combine

March 21, 2021

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VELANI AND DE BRUYN R.V.S. EXHIBIT 8

CN/KCS, FINANCE DOCKET NO. 36514, CP'S REPLY TO CN AND KCS JOINT MOTION FOR APPROVAL OF VOTING TRUST (CP-11), VERIFIED STATEMENT OF NADEEM VELANI (FILED JUNE 28, 2021) (EXCERPTS)

EXHIBIT 2

VERIFIED STATEMENT OF NADEEM VELANI

of CN's consideration would be paid in cash.[3] Whereas equity (stock price) valuations can fluctuate up and down without causing an immediate impact on a business's cash flows and liquidity, debt represents a fixed-value obligation that must ultimately be repaid. Mr. Houle's comment that CN is paying for the "premium" in stock rather than cash (Houle V.S. at 10) is thus misleading. Because CN is paying to acquire KCS at such an extreme valuation, it must borrow and ultimately repay $19 billion in new debt regardless of whether it attributes this debt to the "premium" or something else. Furthermore, issuing $11 billion of equity is not the antidote to an over-priced acquisition. All of that invested capital will come with CN's promise of a rate of return that does not appear to be achievable at this purchase price. That leads to the natural conclusion that either this acquisition is designed to achieve those returns in undisclosed anti-competitive ways, or material cost-cutting and capital spending reductions will be required to deliver an appropriate investment return.

II. UNLIKE THE TERMS OF CP'S PROPOSED ACQUISITION OF KCS, THE SIZE OF CN'S OFFER WAS NOT EXPLAINED BY A NEED TO BEAT A PRIVATE EQUITY BID

12. The extreme premium CN is offering to KCS shareholders is almost double the premium that CP offered KCS shareholders. CN's offer is much more heavily weighted towards cash consideration, which has important implications for the risks resulting from CN's offer. Whereas CP's offer entailed 67 percent CP stock and 33 percent cash (or $9 billion in cash), CN's offer is less than 40 percent CN stock and over 60 percent cash (or over $19 billion in cash).

13. CP's high bid was made in order to be able to succeed against a competing bid that KCS had received from non-rail private equity acquirers. CP took notice of public reports in

[3] Calculated as CN's offer of $200 in cash per KCS share out of $325 total offer.

the fall of 2020 that private equity had approached KCS about an acquisition of the company and began discussions with KCS about a potential CP/KCS combination, and those discussions continued though the fall of 2020 and the early part of 2021, culminating in our merger agreement announced March 21, 2021. CP understood that for the KCS Board of Directors to approve such a combination, the financial terms of CP's bid would have to exceed those offered by the private equity buyers by a margin that overcame the perceived regulatory risks of even CP's pro-competitive rail-rail consolidation. This competitive dynamic led us to make our offer of $275 per share,[4] which KCS's Board accepted.[5] CP's offer represented a 23 percent premium, which was in the middle of the range of control premia for other large acquisitions, as shown in Figure 2 above.

14. By the time CN proposed to acquire KCS, by contrast, CP had already won out over the private equity bid for KCS, and CP and KCS were parties to a binding merger agreement. As a result, CN's bid was designed to exceed CP's bid, not a private equity bid.

III. THE LARGE CASH COMPONENT OF CN'S OFFER REQUIRES IT TO INCUR $19 BILLION OF DEBT, INCREASING ITS DEBT BURDEN BY MORE THAN 180 PERCENT AND SUBSTANTIALLY INCREASING ITS FINANCIAL RISK

A. CN Will Take on a Very High Level of Debt

15. CN's total cash outlay upon the acquisition of KCS's shares (*i.e.*, as soon as the voting trust is formed) would be $19 billion. CN is proposing to spend $11 billion more in cash than CP is offering to acquire KCS. By including $19 billion of cash consideration in its offer

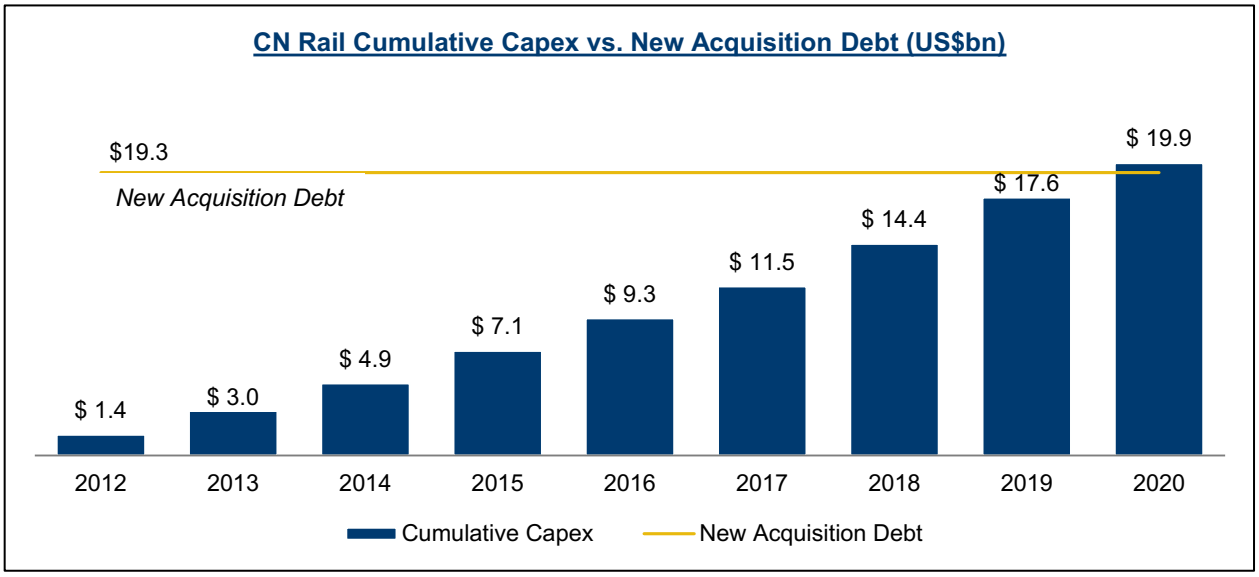
---

[4] Reflects offer of 0.489x CP shares and $90 in cash for every KCS share as of March 19, 2021 (the last trading day prior to the announcement of the CP / KCS merger).

[5] CN's F-4 Registration Statement, which was filed with the SEC on June 22, 2021, provides a blow-by-blow description of the competition CP was engaged in with "Party A" (which CP understood to be a non-railroad private equity bidder). In the final round of that competition, CP's bid was within 10 percent of the all-cash offer that Party A was offering (at $250 per share), along with a promise of zero regulatory delay or risk. *See* Registration Statement at 43-48 (excerpts are Exhibit 14 to CP's Reply).

for KCS shareholders,[6] CN is significantly increasing its debt burden to fund the proposed acquisition. To put this figure in context, consider that the incremental $19 billion in CN acquisition debt is comparable to the total sum of all of CN's capital expenditures spent on its own rail network over the past nine years. Figure 3 compares CN's level of capital expenditures since 2012 to the new acquisition debt being contemplated.

FIGURE 3[7]



CN's debt for the acquisition of KCS equivalent to all capex spent by CN from 2012 to 2020

16. CN's new acquisition debt would also sharply increase CN's leverage ratio. CN's net debt balance as of the end of 2020 of $9 billion represented approximately 1.7 times CN's 2020 EBITDA of $5.5 billion.[8] For the same period, pro forma for the impact of the proposed

---

[6] Includes $700 million break-fee payable to CP for terminating the signed CP/KCS merger agreement.

[7] US Dollars converted to Canadian dollars at a constant exchange rate of 1.22.

Source: Public Filings, CN Investor Presentation

[8] Mr. Houle's verified statement explains that its so-called leverage ratio – *i.e.,* "debt divided by EBITDA (or earnings before interest,, tax, and depreciation) is an appropriate metric to examine, and I

VELANI EXHIBIT A

CANADIAN NATIONAL 2020 ANNUAL REPORT EXCERPTS

Management's Discussion and Analysis

This Management's Discussion and Analysis (MD&A) dated February 1, 2021, relates to the consolidated financial position and results of operations of Canadian National Railway Company, together with its wholly-owned subsidiaries, collectively "CN" or the "Company," and should be read in conjunction with the Company's 2020 Annual Consolidated Financial Statements and Notes thereto. All financial information reflected herein is expressed in Canadian dollars and prepared in accordance with United States generally accepted accounting principles (GAAP), unless otherwise noted.

CN's common shares are listed on the Toronto and New York stock exchanges. Additional information about CN filed with Canadian securities regulatory authorities and the United States Securities and Exchange Commission (SEC), including the Company's 2020 Annual Information Form and Form 40-F, may be found online on SEDAR at www.sedar.com, on the SEC's website at www.sec.gov through EDGAR, and on the Company's website at www.cn.ca in the Investors section. Printed copies of such documents may be obtained by contacting CN's Corporate Secretary's Office.

Business profile

CN is engaged in the rail and related transportation business. CN's network of 19,500 route miles of track spans Canada and the United States of America (U.S.); the only railroad connecting Canada's Eastern and Western coasts with the U.S. South. CN's extensive network and efficient connections to all Class I railroads provide CN customers access to Canada, the U.S. and Mexico. Essential to the economy, to the customers, and to the communities it serves, CN safely transports more than 300 million tons of cargo, serving exporters, importers, retailers, farmers and manufacturers. CN and its affiliates have been contributing to community prosperity and sustainable trade since 1919. CN is committed to programs supporting social responsibility and environmental stewardship.

CN's freight revenues are derived from seven commodity groups representing a diversified and balanced portfolio of goods transported between a wide range of origins and destinations. This product and geographic diversity better positions the Company to face economic fluctuations and enhances its potential for growth opportunities. For the year ended December 31, 2020, CN's largest commodity group accounted for 27% of total revenues. From a geographic standpoint, 16% of revenues relate to U.S. domestic traffic, 31% transborder traffic, 17% Canadian domestic traffic and 36% overseas traffic. The Company is the originating carrier for over 85%, and the originating and terminating carrier for over 65%, of traffic moving along its network, which allows it both to capitalize on service advantages and build on opportunities to efficiently use assets.

Corporate organization

The Company manages its rail operations in Canada and the U.S. as one business segment. Financial information reported at this level, such as revenues, operating income and cash flow from operations, is used by the Company's corporate management in evaluating financial and operational performance and allocating resources across CN's network. The Company's strategic initiatives are developed and managed centrally by corporate management and are communicated to its regional activity centers (the Western Region and Eastern Region), whose role is to manage the day-to-day service requirements of their respective territories, control direct costs incurred locally, and execute the strategy and operating plan established by corporate management.

See *Note 23 – Segmented information* to the Company's 2020 Annual Consolidated Financial Statements for additional information on the Company's corporate organization, as well as selected financial information by geographic area.

ROIC and adjusted ROIC

Management believes ROIC and adjusted ROIC are useful measures of the efficiency in the use of capital funds. The Company calculates ROIC as return divided by average invested capital. Return is defined as net income plus interest expense after-tax, calculated using the Company's effective tax rate. Average invested capital is defined as the sum of total shareholders' equity, long-term debt and current portion of long-term debt less cash and cash equivalents, and restricted cash and cash equivalents, averaged between the beginning and ending balance over a twelve-month period. The Company calculates adjusted ROIC as adjusted return divided by average invested capital. Adjusted return is defined as adjusted net income plus interest expense after-tax, calculated using the Company's effective tax rate, excluding the tax effect of adjustments used to determine adjusted net income. ROIC and adjusted ROIC do not have any standardized meaning prescribed by GAAP and therefore, may not be comparable to similar measures presented by other companies.

The following table provides a reconciliation of net income and adjusted net income to return and adjusted return, respectively, as well as the calculation of average invested capital, which have been used to calculate ROIC and adjusted ROIC:

In millions, except percentage	*As at and for the year ended December 31,*	**2020**	2019	2018
Net income		**$ 3,562**	$ 4,216	$ 4,328
Interest expense		**554**	538	489
Tax on interest expense [1]		**(120)**	(120)	(116)
Return		**$ 3,996**	$ 4,634	$ 4,701
Average total shareholders' equity		**$ 18,846**	$ 17,841	$ 17,149
Average long-term debt		**11,931**	11,626	10,067
Average current portion of long-term debt		**1,420**	1,557	1,632
Less: Average cash, cash equivalents, restricted cash and restricted cash equivalents		**(844)**	(674)	(656)
Average invested capital		**$ 31,353**	$ 30,350	$ 28,192
ROIC		**12.7%**	15.3%	16.7%
Adjusted net income [2]		**$ 3,784**	$ 4,189	$ 4,056
Interest expense		**554**	538	489
Adjusted tax on interest expense [3]		**(137)**	(131)	(120)
Adjusted return		**$ 4,201**	$ 4,596	$ 4,425
Average invested capital		**$ 31,353**	$ 30,350	$ 28,192
Adjusted ROIC		**13.4%**	15.1%	15.7%

(1) The effective tax rate for 2020 used to calculate the tax on interest expense was 21.6% (2019 - 22.3%; 2018 - 23.8%).

(2) See the section of this MD&A entitled Adjusted performance measures for an explanation of this non-GAAP measure.

(3) The adjusted effective tax rate for 2020 used to calculate the adjusted tax on interest expense was 24.8% (2019 - 24.4%; 2018 - 24.5%).

VELANI EXHIBIT B

CN Q2 2020 EARNINGS CALL TRANSCRIPT EXCERPTS (JULY 22, 2020)

Corrected Transcript

21-Jul-2020

Canadian National Railway Co. (CNI)

Q2 2020 Earnings Call

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CORPORATE PARTICIPANTS

Paul A. N. Butcher
Vice President-Investor Relations, Canadian National Railway Co.

Jean-Jacques Ruest
President, Chief Executive Officer & Director, Canadian National Railway Co.

Rob Reilly
Executive Vice-President, Chief Operating Officer & interim Chief Information and Technology Officer, Canadian National Railway Co.

James B. Cairns
Senior Vice President-Rail Centric Supply Chain, Canadian National Railway Co.

Keith Reardon
Senior Vice-President-Consumer Product Supply Chain, Canadian National Railway Co.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

OTHER PARTICIPANTS

Fadi Chamoun
Analyst, BMO Capital Markets Corp. (Canada)

Ravi Shanker
Analyst, Morgan Stanley & Co. LLC

Cherilyn Radbourne
Analyst, TD Securities, Inc.

Ken Hoexter
Analyst, Bank of America Merrill Lynch

Chris Wetherbee
Analyst, Citigroup Global Markets, Inc.

Benoit Poirier
Analyst, Desjardins Securities, Inc.

Scott H. Group
Analyst, Wolfe Research LLC

Konark Gupta
Analyst, Scotia Capital, Inc.

Brian P. Ossenbeck
Analyst, JPMorgan Securities LLC

Walter Spracklin
Analyst, RBC Capital Markets

Brandon R. Oglenski
Analyst, Barclays Capital, Inc.

David Vernon
Analyst, Sanford C. Bernstein & Co. LLC

Seldon Clarke
Analyst, Deutsche Bank

Jonathan Chappell
Analyst, Evercore Group LLC

Jason Seidl
Analyst, Cowen Inc.

Allison M. Landry
Analyst, Credit Suisse Securities

Thomas Wadewitz
Analyst, UBS Securities LLC

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Brandon R. Oglenski
Analyst, Barclays Capital, Inc.

Q

Hey, good afternoon, everyone. Yes, thank you for taking my questions. Keith, you sounded – I should phrase it, relatively bullish about intermodal prospects we came into, I guess "peak season." Can you talk about some of the opportunities you mentioned in your prepared remarks, I think about your carriers adding back locations and that you are winning some of that incremental business?

Keith Reardon
Senior Vice-President-Consumer Product Supply Chain, Canadian National Railway Co.

A

Sure.

Jean-Jacques Ruest
President, Chief Executive Officer & Director, Canadian National Railway Co.

A

Keith? As I've said earlier, we believe in the strength of the consumer in North America and the market where that shows the most number one is intermodal, you see that a bit in lumber and automotive but where this is something to really exploit whether the product is really tailor made to drive the economy – consumer economy of intermodal. Keith?

Keith Reardon
Senior Vice-President-Consumer Product Supply Chain, Canadian National Railway Co.

A

Sure. You know, it wasn't fun going through the beginning of the second quarter and hearing about blank sailings and also the challenges that our customers were having and the fact that they thought that was kind of going into the third quarter as well. So, it's great that we've seen a lot of the blanks that they had for Q3. They've reinstituted those calls and right now on the West Coast, we have much less noise around the blank sailings than we did during Q2. In fact they're adding 11 extra loaders in Q3 on the West Coast, nine on the West Coast and two on the East Coast. Those types of things and the discussions that we have with our customers and the fact that our boots on the ground folks in Asia are telling us the strength of what's going on with orders from North America, those give us the confidence that I can sit and talk to Rob and ask him and have that discussion about being prepared. As I said, Rupert's probably going to have a record in July. And we see the same thing for August as far as the volume's solid on the West Coast.

Jean-Jacques Ruest
President, Chief Executive Officer & Director, Canadian National Railway Co.

A

Ghislain, maybe you want to add something about TransX and a year after the acquisition.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

A

Yeah, sure.

Jean-Jacques Ruest
President, Chief Executive Officer & Director, Canadian National Railway Co.

A

We've been able to accomplish with TransX.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

A

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That's another – sure, JJ, that's another piece of business that we're quite bullish. And I'm happy to report that after a year and I think Keith and the team is doing and did an outstanding job integrating TransX with our overall CN family. As you know, Brandon, big projects or investments we typically have internal auditor going in and auditing the business case and auditing the return and reporting directly to the board, so they are not all done yet but close and I'm happy to report that the turn of the investments both in TransX and H&R will deliver higher than our typical ROI threshold that we use at CN of 12%. So this is a good accretive acquisition and we are quite pleased and as I said before, Keith and the team, is doing a hell of a job managing this and frankly, their OR as we speak is now the best-in-class for these types of companies, like if you at J.B. Hunt or some of the others that are best-in-class, TransX is right there with them.

Jean-Jacques Ruest
President, Chief Executive Officer & Director, Canadian National Railway Co.
A

Yeah. The mandate for TransX is to compete with the best of best like J.B. Hunt [ph] in the OR (00:52:01), they are not a trucking firm, they are [ph] intermodal (00:52:05) firm and they're increasing the amount of rail they do since last year.

Thank you, Brandon.

Brandon R. Oglenski
Analyst, Barclays Capital, Inc.
Q

Yeah, thank you, JJ.

Operator: Thank you. The next question is from David Vernon from Bernstein. Please go ahead.

David Vernon
Analyst, Sanford C. Bernstein & Co. LLC
Q

Hey, good afternoon, everybody. Rob, I wanted to focus in on the train length and train weight gains that you had in the second quarter, could you talk to whether some changes in mix or maybe just lower volume in the network allowed you kind of extend that. And then what the outlook should be kind of from here, should we be expecting in this 9,500 feet length range for the rest of the year even through the winter months or should we be expecting this kind of to come off as volume comes back?

Jean-Jacques Ruest
President, Chief Executive Officer & Director, Canadian National Railway Co.
A

Rob?

Rob Reilly
Executive Vice-President, Chief Operating Officer & interim Chief Information and Technology Officer, Canadian National Railway Co.
A

Yeah, winter all bets are off. We will see what winter brings and then we can have that discussion at that point. As far as the changes we've made, we do view those as structural. And mix or no mix, what we've done is really take what has been delivered to us and make the best out of it. So, we are looking at a significant volume drop that we saw this quarter and we took action, part of that was increasing train size and reducing crew starts, and a lot of things come with that when you do that. The bigger trains lead to greater train fuel efficiency, leads to better utilization of your locomotives. We saw the train velocity improved all during this period as well, 5% year-over-year. So, we plan on keeping trains big and looking for more opportunities that are out there. Thanks for the question.

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VELANI EXHIBIT C

CN BAIRD GLOBAL INDUSTRIALS CONFERENCE
TRANSCRIPT EXCERPTS
(NOV 17, 2020)

Corrected Transcript

12-Nov-2020

Canadian National Railway Co. (CNI)

Baird Global Industrial Conference

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CORPORATE PARTICIPANTS

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

James B. Cairns
Senior Vice President-Rail Centric Supply Chain, Canadian National Railway Co.

Keith Reardon
Senior Vice President-Consumer Product Supply Chain, Canadian National Railway Co.

OTHER PARTICIPANTS

Garrett Anthony Holland
Analyst, Robert W. Baird & Co., Inc.

MANAGEMENT DISCUSSION SECTION

Garrett Anthony Holland
Analyst, Robert W. Baird & Co., Inc.

Great. Well, we're live now, so we're going to go ahead and start Day 3 of the Transportation and Logistics Section of this 2020 Baird Industrials Conference. My name is Garrett Holland, Senior Analyst covering Transportation and Logistics at Baird. We are very pleased to have Canadian National Railway participating on our industrials conference this year.

From the company, we have Ghislain Houle, Executive Vice President and Chief Financial Officer; James Cairns, Senior Vice President, Rail Centric Supply Chain; Keith Reardon, Senior Vice President, Consumer Product Supply Chain; as well as Paul Butcher and Lauren Benoit from Investor Relations. Management is going to review some prepared remarks with slides and then I'll return for Q&A.

So now, we'll turn things over to the company for the opening presentation.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

Yeah, thanks, Garrett, and thanks for having us and thanks for people listening to us on webcast. We're very pleased to be participating in your conference. I think it's the first year that we participate, certainly probably not the last. And as you said there, Garrett, what we'll do is we'll introduce CN a little bit with my two colleagues here, take a few minutes to do that and we've prepared a very short presentation to help people follow what we're saying and then after that obviously we'll open up for questions.

So if you turn to that small presentation on page 3, as you can see at CN, we do have a very unique three-coast network with a very well-diversified portfolio supported by solid base of customers and partners. We are well-diversified from a commodity standpoint with our biggest segment being intermodal at just over 25% of our book of business year-to-date at the end of Q3. Everything else is smaller.

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Sure. So there are expansions in the East. We are working very closely with PSA to extracting as much capacity out of the existing port there at Halterm and working with Ceres to extract as much value as we can out of that port as well. A recent proof point there is with their new crane and with the two new berths or the – in fact, we have two berths there now. We recently had a 15,000 TEU vessel come into Port of Halifax. I know it was a big deal in New York. It was fanfare and everything. But that vessel actually called on Halifax before it got to New York.

We also are working with our port operators, DP World in Saint John. They have some capacity plans. We've been servicing Saint John forever. It is one of our ports. And you look at what's going on in Quebec City, the plans that we have with Hutchison to create a terminal, over 750,000 TEUs at that, a fully automated terminal, I might add as well. But we're going through a lot of the permitting process right now.

And I would also add that we get to the US or we get to the US Midwest via those Canadian ports. But we also get into Canada via New York, New Jersey and Philly. And when the strike in Port of Montreal occurred, we actually used that gateway as a way to get into Montreal and Toronto as well. So we have the East Coast covered extremely well.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

A

And I would say, Garrett, on this one what's very exciting is that as much as our capacity is very precious in Western Canada, a new site on our geographic, we have Global West is 29%. Our Eastern Canadian franchise is actually underutilized. So all of the growth that Keith is talking about, we will actually be able to accommodate and support at very little, if not zero, CapEx. So that's quite exciting for us.

Garrett Anthony Holland
Analyst, Robert W. Baird & Co., Inc.

Q

Well, on that point I guess, what are your expectations and priorities for capital allocation and the implications for capital expenditures going forward?

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

A

Yeah. So again, our capital allocation has not changed throughout the years. I mean it's been the same. We like to be predictable and boring. So the first use of cash will always be towards the business. And we're looking for projects that will generate return on invested capital in the range of 12% to 15%.

Then the second use of cash is obviously we like to have a strong balance sheet. We saw the value of that going through the pandemic. I mean if you look – during the heart of the pandemic in Q2, we were able to continue to issue commercial paper at rates that are lower than LIBOR. We actually issued a $600 million 30-year bond, believe it or not, at a rate of 2.45%. That was actually the second lowest of any corporate in the US when we issued it. So we like to have a strong balance sheet. And then if we have strategic opportunities with a strong balance sheet then we can lock them in quickly.

Finally, we look at shareholder distribution first and foremost on dividends. I think that when we look at dividend growth, it's not the amount of growth in a given year that matters as much as the consistency of the growth. And as you know, this year we've increased our dividend by 7%. Through the pandemic, our dividend was never questioned. And so we like the consistency and we've increased our dividend since we've privatized by 16%. We're quite proud of that.

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And then, finally, we look at share buyback. We like share buyback because it's a flexible tool. You can raise it. You can speed it up. You can slow it down. As you know, we've slowed it down now with the pandemic. We've stopped buying back shares. And really the share buyback is a tool that we use to get to a targeted leverage level; targeted leverage level meaning when the rating agencies look at this, they look at adjusted debt to adjusted EBITDA.

When you look our target has been in the range of 1.7 to 1.9 times, call it 2 times, and we're already at – we will finish the Q3 at 2.17 times, hence why we continue to not buying back shares but stay tuned for next year we'll see what we do. But that's our capital allocation. We're very comfortable with this, and investors should think that this should continue. We question it on a regular basis internally and with our board. But as I've said, we'd like to be predictable and boring.

Garrett Anthony Holland
Analyst, Robert W. Baird & Co., Inc.

Q

That was helpful. I wanted to touch on domestic intermodal. As that franchise evolves, where do you see the strategic opportunities and how do you see electric driverless cars competing with rails over time? Obviously, investors want to know how can we move more volume from the road to rail.

Keith Reardon
Senior Vice President-Consumer Product Supply Chain, Canadian National Railway Co.

A

Sure. I'll start off on the domestic intermodal and maybe, Ghis, you could weigh in a little bit too on the driverless truck as we kind of look at that.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

A

Yeah.

Keith Reardon
Senior Vice President-Consumer Product Supply Chain, Canadian National Railway Co.

A

So on the domestic intermodal, we're focused on several pieces there. One, we want to drive more business to our US network, as Ghislain talked about the eastern network. We can grow in the states without having a whole lot of capital applied. We have a unique model versus most of the other railroads, especially the US roads. We have a retail product. We go door to door. We sell that service to the beneficial cargo owners. We also have a refrigerated product that we run ourselves door to door. So we're looking at those two markets to help us grow.

But we also work with the IMCs and the wholesalers in the states, especially when we're looking at e-commerce. It is a place where we know that there's opportunity to grow. We have multiple sales channels to sell into that. Our Canadian wholesale partners and our US wholesale partners are a key part of that strategy, multiple sales channels going into that e-commerce business. With regard to driverless trucks, I think we're keeping an eye on it, making sure we see what's going on.

Ghislain Houle
Chief Financial Officer & Executive Vice President, Canadian National Railway Co.

A

Absolutely. And I think that when you look at our franchise, Garrett, we're blessed with a long length of haul either on the international, which is close to like 1,900 miles, close to 2,000 miles and on the domestic at 1,700 miles.

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VELANI EXHIBIT D

CN 2021 MANAGEMENT INFORMATION CIRCULAR EXCERPTS (APR. 27, 2021)

ESSENTIAL.

MANAGEMENT INFORMATION CIRCULAR

AND NOTICE OF ANNUAL MEETING OF SHAREHOLDERS



APRIL 27, 2021

REDACTED PUBLIC RECORD VERSION

Notice of Annual Meeting of Shareholders

Our annual meeting of holders of common shares will be conducted solely via a live webcast meeting on **Tuesday, April 27, 2021 at 10:00 a.m.** (Eastern Daylight Time) at **www.virtualshareholdermeeting.com/CNI2021.** At this website, shareholders will be able to attend the meeting live, submit questions and vote their shares while the meeting is being held.

For the purposes of:

1. receiving the consolidated financial statements for the year ended December 31, 2020, and the auditors' reports thereon;
2. electing the directors;
3. appointing the auditors;
4. considering and approving, in an advisory, non-binding capacity, a resolution (the full text of which is set out on page 9 of the accompanying management information circular) accepting the Company's approach to executive compensation as disclosed in the "Statement of Executive Compensation" section of the accompanying management information circular;
5. considering and approving, in an advisory, non-binding capacity, a resolution (the full text of which is set out on page 9 of the accompanying management information circular) accepting the Company's Climate Action Plan as disclosed in the accompanying management information circular;
6. considering two shareholder proposals described in Schedule "D"; and
7. transacting such other business as may properly be brought before the meeting or any adjournment or postponement thereof.

The Board of Directors has fixed March 5, 2021 as the Record Date for the determination of the holders of common shares entitled to receive notice of the meeting and vote at the meeting.

By order of the Board of Directors

Sean Finn

Sean Finn
Executive Vice-President
Corporate Services and Chief Legal Officer and Corporate Secretary

March 9, 2021
Montreal, Quebec

Letter to Shareholders

March 9, 2021

Dear Shareholder:

On behalf of the Board of Directors ("Board" or "Board of Directors") and management of Canadian National Railway Company (the "Company" or "CN"), we cordially invite you to attend the annual meeting of shareholders, which will be held online on April 27, 2021 at 10:00 a.m. (Eastern Daylight Time). This management information circular ("Information Circular") describes the business to be conducted at the meeting and provides information on executive compensation and CN's environmental, social and governance ("ESG") practices. In addition to these items, we will discuss highlights of our 2020 performance and our plans for the future.

CN's front line workers and their colleagues admirably stood up to 2020, despite its unique challenges, by focusing on their mission. We are extremely proud of the essential transportation service they have provided and thank them for what they have accomplished throughout this most difficult year, marked by blockades on our tracks and the pandemic. Our transformational journey started a quarter of a century ago and continued to the point of CN becoming the successful transportation and supply chain leader and trade enabler we are today.

CN's transportation services are essential to keep the economy moving, for its customers to reach their markets, for retailers to get the goods the public rely on every day and for healthcare workers battling the pandemic to get critical supplies. Our key role in the North American supply chain was clearly demonstrated in the difficult circumstances of 2020.

CN has recently undertaken major new environmental, social and governance initiatives that will reinforce its status as a leader in ESG among North American Class I railroads and across the transportation sector. Our longer-term goal is to be at the leading edge of ESG best practices across North America and globally.

These new measures include the creation of the CN Indigenous Advisory Council, an independent body comprised of Indigenous peoples from across the country, with a mandate to advise CN's Board and senior management, and a commitment to a Board of Directors that has at least 50 percent of independent directors coming from diverse groups, including gender parity. They also encompass an annual advisory vote on CN's Climate Action Plan, and a reset of governance policies reducing the age limit and tenure of directors, setting a lower maximum of public boards on which directors can serve, and reducing the size of the Board. CN continues to strive to implement governance policies that reflect best-in-class ESG practices.

We would like to welcome our new Board nominees, Denise Gray and Justin M. Howell, as well as Margaret A. McKenzie who joined the Board in late 2020. These new directors come to us with extensive business, innovation, and strategic planning experience. The Board looks forward to their contribution as CN continues to play an essential role in the North American economy.

We also want to take this opportunity, on behalf of the entire CN family, to thank our distinguished directors who are not standing for re-election at this annual meeting: Don Carty, Maureen Kempston Darkes, Gordon Giffin, Edith Holiday and Denis Losier for their outstanding contribution, lending their wisdom, expertise and careful oversight to CN's success as it has grown and prospered. The Company is deeply indebted to them.

Your participation in the affairs of the Company is important to us. To that effect, we are pleased to embrace the latest technology to provide easy access, improved communication, and cost savings for our shareholders and the Company, all through a webcast Meeting again in 2021. This set up is imperative these days as it eliminates any health risks associated with large gatherings while enabling greater participation by our shareholders from any location around the world and aligning with our sustainability vision and belief. Similar to last year, through our webcast, you will have the opportunity to interact with members of the Board and senior executive officers of the Company.

We encourage you to vote on the internet or complete the enclosed proxy or voting instruction forms and return them in the envelope provided for this purpose, so that your views can be represented. Even if you plan to attend the meeting, you may find it convenient to vote your shares in advance of the meeting over the internet or by completing and returning the enclosed proxy or voting instruction forms, as applicable. Please consult the information on page 5 of the Information Circular to find out how to attend the meeting online and vote your shares.

We are looking forward to your virtual attendance at the Meeting. Please stay safe and healthy.





Robert Pace, D.COMM., C.M.
Chair of the Board

Jean-Jacques Ruest
President and
Chief Executive Officer

What's Inside

1 Letter to Shareholders	3 Proxy Summary	5 Delivery of Meeting Materials and Voting Information
8 Business of the Meeting	10 Nominees for Election to the Board	22 Board of Directors Compensation
27 Statement of Corporate Governance Practices	41 Climate Action Plan Report	44 Statement of Executive Compensation
48 Compensation Discussion and Analysis	77 Other Information	78 Schedule "A" – Mandate of the Board
79 Schedule "B" – Reports of the Committees	85 Schedule "C" – Additional Audit Committee Disclosure	87 Schedule "D" – Shareholder Proposals

This Information Circular is provided in connection with the solicitation of proxies by management of Canadian National Railway Company for use at the annual meeting of its shareholders or at any adjournment or postponement thereof (the "Meeting"). In this document "you" and "your" refer to the shareholders of CN and "CN", the "Company", "we", "us", or "our" refer to Canadian National Railway Company. The Meeting will be held on Tuesday, April 27, 2021, at 10:00 a.m. (Eastern Daylight Time) for the purposes set forth in the foregoing Notice of Meeting. The information contained herein is given as at February 26, 2021, except as indicated otherwise.

Shareholder Voting Matters and Recommendation

VOTING MATTER

Election of 11 Directors

BOARD VOTE RECOMMENDATION

FOR each nominee

FOR MORE INFORMATION SEE PAGE 10

VOTING MATTER

Appointment of KPMG LLP as Auditors

BOARD VOTE RECOMMENDATION

FOR

FOR MORE INFORMATION SEE PAGE 8

VOTING MATTER

Advisory Resolution on Executive Compensation

BOARD VOTE RECOMMENDATION

FOR

FOR MORE INFORMATION SEE PAGE 44

VOTING MATTER

Advisory Resolution on Climate Action Plan

BOARD VOTE RECOMMENDATION

FOR

FOR MORE INFORMATION SEE PAGE 40

VOTING MATTER

Shareholder Proposals

BOARD VOTE RECOMMENDATION

AGAINST

FOR MORE INFORMATION SEE PAGE 87

The following formula illustrates how an eligible executive employee's annual base salary (as at December 31, 2020), target payout (expressed as a percentage of base salary), corporate financial, corporate safety and individual performance factors interact in the determination of the actual annual bonus payout:

Annual Bonus Payout Formula

Corporate Financial Performance

ANNUAL BASE SALARY X TARGET PAYOUT X **70%** X CORPORATE FINANCIAL PERFORMANCE FACTOR

+

Corporate Safety Performance

ANNUAL BASE SALARY X TARGET PAYOUT X **10%** X CORPORATE SAFETY PERFORMANCE FACTOR X CORPORATE FINANCIAL PERFORMANCE FACTOR WHEN BELOW 100%

+

Individual Performance

ANNUAL BASE SALARY X TARGET PAYOUT X **20%** X INDIVIDUAL PERFORMANCE FACTOR X CORPORATE FINANCIAL PERFORMANCE FACTOR WHEN BELOW 100%

The average bonus payout for the NEOs, (consisting of the corporate financial performance factor, the corporate safety performance factor, and the individual performance factor) was 22% of target bonus in 2020. The actual payouts are reported in the Summary Compensation Table on page 65, under the column "Non-equity incentive plan compensation—Annual incentive plans".

Considering the commitment and relentless efforts of our management employees during this unprecedented year, the Board authorized an exception to the AIBP terms to not prorate the Corporate Safety and Individual payout level for management employees in 2020, excluding the NEOs who were not covered by the exception. As such, the Corporate Safety and Individual components, which have a combined weight of 30% at target in the AIBP, were paid independently of the Company's Corporate Financial component to all management employees with the exception of the NEOs.

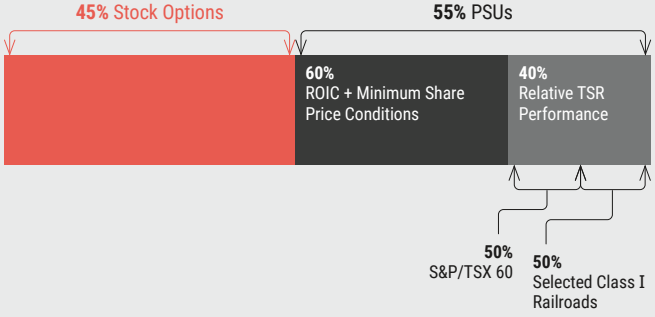
The Board authorized this exception to support greater engagement and retention, and to recognize the outstanding contribution of all management employees in the extraordinary circumstances of the pandemic. Moreover, this decision is aligned with the changes approved by the Board to the AIBP for 2021 and beyond to remove proration on the Corporate Safety and Individual payout levels at the same rate as the Corporate Financial payout level when payout is below 100%, all with a view to support employee engagement on safety and strategic initiatives.

Long-Term Incentives

The Board considers a number of factors to assess the Company's long-term incentive strategy, including the balance between long-term value creation and shareholder wealth protection, executive stock ownership position versus stock option holdings, executive retention risk, as well as the dilution impact of different long-term incentive vehicles. Since 2005, the Board has elected to grant a combination of stock options and PSUs to NEOs, as well as to executives and senior management employees.

LTI values disclosed in the Summary Compensation Table on page 65 are calculated using the Willis Towers Watson expected life binomial methodology. The same valuation methodology is also used for benchmark and grant purposes, ensuring consistency. This valuation methodology provides for precise and comparable compensation information. The Company uses a rolling three-year valuation factor to limit year-over-year fluctuations of the valuation factor for both stock options and PSUs.

PSUs and stock options are weighted 55% and 45% of the long-term incentive award value, respectively, except for the President and CEO position. The long-term award for the President and CEO has a smaller relative weight in stock option value, due to the 20% limitation on the number of stock options that can be awarded to any one individual in a particular year, pursuant to the terms of the Management Long-Term Incentive Plan ("MLTIP") and the stock exchanges rule (please refer to page 71 for a description of the plan).



As part of the review conducted in 2019, the Committee reviewed the compensation programs and the Board approved the following changes to the LTI Plan, effective January 1, 2020, thus impacting LTI awards made in 2020 and after:

- Increase the weighting of the Relative TSR component of the PSUs (increased from 30% to 40%), providing a balanced approach and reinforcing the link to shareholder return;
- Increase the vesting period for stock options from four years to five years to enhance retention; and
- Increase the time period during which stock options may be exercised upon retirement from three to four years following the retirement date to align with the extended vesting period of the stock options through retirement.

The annual grant of PSUs and stock options to NEOs and other eligible employees is reviewed and approved at the meetings of the Committee and the Board, which occur each year in January. In order to determine each NEO's LTI award, the Committee takes into consideration individual performance, retention risk and succession plans, as well as the Company's compensation policy and the value of LTIs granted by the applicable comparator group (please refer to section "Benchmarking Using Comparator Groups" on page 51). The Committee does not consider previous executive grants when setting the individual awards, as the LTI plans are inherently performance-based. The Board may also, at its discretion, approve additional grants of PSUs and stock options to NEOs during the year.

The exercise price of the stock options granted is equal to the closing price of the Company's common shares on the TSX or the NYSE on the grant date.

A minimum active service condition exists for stock options and PSUs to support the retention of key talent approaching retirement. An employee must remain in active service until December 31 of the year of the grant for stock options and until March 31 of the year following the year of grant for PSUs. Should an executive, including NEOs, or other management employees retire prior to the end of the minimum service condition in the award agreement, PSUs and stock options awarded pursuant to that agreement would be forfeited.

Performance Share Units: 2020 Award

The objective of the PSUs is to enhance the Company's ability to attract and retain talented employees and to provide alignment of interests between such employees and the shareholders of the Company.

PSUs vest after three years and the grant date fair value of the PSUs awarded to each NEO in 2020 is included in the Summary Compensation Table on page 65, under the Share-Based Awards column. The vesting of PSUs is subject to the achievement of performance measures defined at the beginning of the cycle and the payout can range from 0% to 200%. At the end of the performance cycle, the number of PSUs will be adjusted based on the achievement of the performance conditions detailed below. PSUs will be settled in CN common shares purchased on the open market.

PSUs awarded in 2020 are subject to the following two performance measures:

1. ROIC PSUs

Sixty percent (60%) of the PSU award value is subject to the achievement of a target related to the Company's average three-year ROIC over the plan period and the payment will be conditional upon meeting a minimum average closing share price during the last three months of 2022. The ROIC for each of the applicable plan years is generally calculated as net income before interest expense, divided by the total of the Company's average net indebtedness and the average shareholders' equity, and may, in certain instances, be adjusted for certain items as determined by the Committee. ROIC measures the Company's efficiency in the use of its capital funds and is viewed as a key measure of long-term value generation to its shareholders. ROIC performance objectives are based on CN's business plan. The 2020 ROIC objective considers the increased capital investments recently deployed increasing capacity and enabling growth, such as track infrastructure expansion and investment in technology to improve safety performance, operational efficiency and customer service. The above combined with the cumulative impact of prior years earnings and the average investment base resulted in a reduction of the expected average ROIC for the three-year period ending on December 31, 2022.

ROIC PSUs granted in 2020 to NEOs and other designated employees are subject to the attainment of the performance measures presented in the table below:

ROIC PSUs performance measure

	OBJECTIVE	PERFORMANCE VESTING FACTOR[1]
PERFORMANCE OBJECTIVE: Average ROIC for the three-year period ending on December 31, 2022	Below 12.5%	0%
	12.5%	50%
	13.5%	100%
	15.0%	125%
	15.5%	150%
	16.0% and above	200%
PAYOUT CONDITION: Minimum average closing share price for the last three months of 2022	C$118.56 on the TSX or U.S.$90.06 on the NYSE	

(1) Interpolation applies between objectives.

2. Relative TSR PSUs

Forty percent (40%) of the PSU award value is subject to CN's Relative TSR measured against two equally-weighted comparator groups: i) selected Class I Railroads, and ii) S&P/TSX 60 companies. Relative TSR performance measures CN's share price appreciation, inclusive of dividends, over the three-year plan period against the companies within each comparator group.

Relative TSR PSUs awarded in 2020 to NEOs and other designated employees are subject to the attainment of the performance measures presented in the table below:

TSR relative to S&P/TSX 60

CNR	PAYOUT[1]
75th Percentile and above	200%
50th Percentile	100%
25th Percentile	50%
Less than the 25th Percentile	0%

(1) Interpolation between points.

TSR relative to Selected Class I railways

CNR	PAYOUT
1st	200%
2nd	150%
3rd	100%
4th	50%
5th	0%

The grant date fair value of the PSUs awarded to each NEO in 2020 is included in the Summary Compensation Table on page 65, under the "Share-Based Awards" column.

Performance Share Units: 2018 Award Payout

The Committee reviewed the vesting of the 2018 PSU award against the performance targets for each measure: ROIC PSUs and Relative TSR PSUs. With respect to the payment of the 2018 awards (that vested at the end of 2020), the Board applied the same principle, as described in the AIBP section above, upon calculating the financial results pertaining to the ROIC performance measure, with an associated impact of less than 1% on the ROIC result.

ROIC PSUs: The Company achieved a three-year average ROIC to December 31, 2020, of 15.15%. In accordance with the plan rules and considering the achievement of the minimum average closing share price condition, a performance vesting factor of 110.8% (compared to 109.6% had the discretionary adjustments not been made) was applied for the ROIC PSUs awarded in 2018.

Relative TSR PSUs: The Company delivered a TSR of 43.68%[1] over the period from January 1, 2018 to December 31, 2020, resulting in an overall performance vesting factor of 99%, reflecting the weighted average performance vesting factor of both measures (0% for Class I Railways and 198% for S&P/TSX 60).

PSUs were settled on February 25, 2021 in CN common shares purchased on the open market to encourage share ownership among participants, subject to compliance with the other conditions of the award agreements.

(1) TSR performance is calculated using CNR 20-day share price average immediately prior to January 1, 2018 (including dividend reinvestment) and CNR 20-day share price average ending on December 31, 2020 (including dividend reinvestment). The same calculation is used for all companies part of both comparator groups.

Performance Objectives and Results – Performance Share Units – 2018 Award

ROIC PSUs – 70% of the grant value:

	OBJECTIVE	PERFORMANCE VESTING FACTOR (1)	RESULTS
PERFORMANCE OBJECTIVE: Average ROIC for the three-year period ended on December 31, 2020	Below 13.5%	0%	15.15% (2) translating into a payout factor of 110.8%
	13.5%	50%	
	14.5%	100%	
	16.0%	125%	
	16.5%	150%	
	17.0% and above	200%	
PAYOUT CONDITION: Minimum average closing share price for the last three months of 2020	C$102.88 on the TSX or U.S.$80.71 on the NYSE		C$140.62 U.S.$108.04

(1) Interpolation applies between objectives.

(2) The calculation of the Average ROIC, as per plan, removes deferred income taxes resulting from various tax enactments and the loss on assets for sale. Similar to the AIBP, all government support related to the pandemic received by CN and items outside management's control were removed from the calculation, the material ones being the benefits related to the U.S. CARES Act, the U.S. and Canadian payroll tax payment postponements, the financial impact from the illegal rail blockades and the direct expenses related to the Company's pandemic response. Consequently, the resulting ROIC was 15.15% (compared to 15.08% had the discretionary adjustments not been made, as per plan).

Relative TSR PSUs – 30% of the grant value:

TSR relative to S&P/TSX 60 (15% of the grant value)

CNR	PAYOUT (1)	RESULTS
75th Percentile and above	200%	43.68% (2) TSR resulting in the 74.5th percentile and translating into a payout factor of 198%
50th Percentile	100%	
25th Percentile	50%	
Less than the 25th Percentile	0%	

(1) Interpolation applies between objectives.

(2) TSR performance is calculated using CNR 20-day share price average immediately prior to January 1, 2018 (including dividend reinvestment) and CNR 20-day share price average ending on December 31, 2020 (including dividend reinvestment). The same calculation is used for all companies part of both comparator groups.

TSR relative to selected Class I Railways (15% of the grant value)

CNR	PAYOUT	RESULTS
1st	200%	43.68% (1) TSR resulting in the 5th place ranking and translating into a payout factor of 0%
2nd	150%	
3rd	100%	
4th	50%	
5th	0%	

(1) TSR performance is calculated using CNR 20-day share price average immediately prior to January 1, 2018 (including dividend reinvestment) and CNR 20-day share price average ending on December 31, 2020 (including dividend reinvestment). The same calculation is used for all companies part of both comparator groups.

The value vested during the year for each NEO is included in the table "Incentive Plan Awards — Value Vested or Earned During the Year", and under the "Share-Based Awards — Value Vested During the Year" column on page 70.

Stock Options

Stock options were granted in 2020 to NEOs and other designated employees pursuant to the MLTIP. Please refer to page 71 for details of the MLTIP. The stock options granted in 2020 vest over five years at a rate of 20% at each anniversary date and have a ten-year term. Grants were made in the currency of the recipient's salary.

Stock options are granted with the objective of rewarding NEOs and other designated employees for creating sustainable, long-term shareholder value. If the share price increases between the grant date and the vesting date, stock options will have a realizable value. Gains are realized once the stock options are exercised. The gain will be equivalent to the difference between the share price on the date of exercise and the grant date share price, multiplied by the number of stock options exercised.

The grant date fair value of the stock options awarded to NEOs in 2020 is included in the Summary Compensation Table on page 65, under the "Option-Based Awards" column.

Executive Perquisites

NEOs are eligible to receive perquisites and personal benefits in accordance with the Company's policy and in line with general market practice. These typically include the use of a Company-leased vehicle, parking, financial counselling and tax services, club membership, certain healthcare benefits and life insurance, and an annual executive physical exam. Other executives and senior management employees are also eligible to receive select perquisites; the type and value of the perquisites are generally determined by the grade of the employee's position. All executives must comply with the aircraft utilization policy, which restricts the usage of the corporate aircraft to business-related purposes only, save for exceptional circumstances and provided all incremental costs are fully reimbursed.

Employee Share Investment Plan

The Employee Share Investment Plan ("ESIP"), available to all Company employees, provides the opportunity to participate in CN's ownership through the purchase of CN common shares on the open market via payroll deductions. Employees may contribute between 1% and 10% of their gross base salary to the ESIP every pay period. The Company provides a 35% match on the first 6% of employee contributions. Since January 1, 2019, Company contributions to the ESIP are subject to a one-year vesting period and are forfeited should certain participant contributions be sold or disposed of prior to vesting. Over 80% of CN's employees are shareholders of the Company through participation in the ESIP, and in 2020, all NEOs participated in the ESIP.

On May 25, 2020, the Company suspended the 35% match in an effort to curb expenses during the pandemic. The 35% match was reinstated on October 1st, 2020.

The value of the Company match received by NEOs in 2020 under the ESIP is indicated in the "Details of the All Other Compensation Amounts" table on page 68.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF JONATHAN WAHBA AND MICHAEL J. NAATZ

TABLE OF CONTENTS

I. CRITICISM OF APPLICANTS' ESTIMATES OF TRANSACTION-RELATED TRAFFIC GROWTH ARE MISGUIDED 2

A. CPKC Growth Will Not Be Hindered by Longer Hauls as the Threatened Class Is Allege 3

B. Our Forecasts Are Bolstered by Shippers' Emerging Plans to Make Significant Investments, Capitalizing on the Value Unlocked by the CP/KCS Transaction 7

C. Ultimately, Rail Customers Will Decide How Successful CP/KCS Is in the Marketplace, and We Will Strive to Earn Their Trust and Business 9

II. SPECIFIC CRITIQUES OF CPKC'S ABILITY TO ATTRACT ADDITIONAL TRAFFIC ARE INCORRECT 10

A. Class I Critics Are Wrong to Conclude that CPKC Will Be Unable to Attract International Intermodal Traffic from the Port of Lazaro Cardenas to the U.S. Midwest 10

B. CN's Criticisms of Other CPKC Traffic Opportunities Are Not Well Founded 14

C. The CP/KCS Transaction Will Be a Vital Catalyst for Additional Investment in Conversion of Crude-by-Rail to DRUbit 16

1. We are Jonathan Wahba, CP's Vice President, Commercial Integration, and Michael J. Naatz, KCS's Chief Marketing Officer and Executive Vice President. We jointly submitted a Verified Statement supporting the Application, and we submit this Reply Verified Statement to address criticism of Applicants' estimates of Transaction-related traffic growth and specific critiques of CPKC's ability to attract additional traffic.

2. I, Mike Naatz, am submitting a separate Reply Verified Statement to address several issues raised by the Comments and Responsive Applications that are specific to KCS.

I. CRITICISM OF APPLICANTS' ESTIMATES OF TRANSACTION-RELATED TRAFFIC GROWTH ARE MISGUIDED

3. Several Class I railroads express a variety of conflicting disagreements with the estimates that we and other Applicant witnesses presented of the traffic growth and associated revenue gains that CPKC will realize as a result of the more effective competition it will deliver to the marketplace. Some assert that we have overestimated the potential for CPKC to win new traffic, and that CPKC will have to resort to foreclosure strategies to meet our forecasts. Others suggest that we underestimated the traffic gains that CPKC will realize.

4. These criticisms are without merit. We and other Applicant witnesses brought to bear significant market knowledge and experience in assessing the likely traffic shifts that CPKC will be able to attract. We carefully assessed the benefits that CPKC will bring to shippers as compared to the transportation services that CP and KCS are separately able to provide today, and we took account of what shippers value when choosing their transportation service provider. We incorporated feedback from the many, many customers we have engaged with since announcing the CP/KCS combination.

5. We recognize that CPKC will catalyze a more competitive transportation environment, so naturally our estimates are not a perfectly precise prediction of exactly how the

chips will fall out. But we are confident that CPKC single-line services will offer exciting new transportation options and succeed in attracting significant volumes of freight from other railroads and trucks, and in many cases will prompt shippers to adjust their shipping patterns to take advantage of the new options CPKC will introduce. For example, by creating new single-line connections between CP's network and KCS's network, the Transaction will increase opportunities for interchange between CPKC and CSX at East St. Louis.

6. Our outreach to customers since last October when we filed the Application shows great enthusiasm and interest in our new offerings. The views expressed by a number of shippers' submitting reply verified statements – along with the hundreds who previously submitted statements supporting the Transaction – are illustrative of the type of response we have received from CP and KCS's customers in the months since we submitted the Application. Many of those customers are planning to put their own money behind these views, with plans to invest in new facilities to take advantage of CPKC's new competitive potential.

7. As we explain below, the Class I railroads' criticism of our traffic estimates focus on an unduly narrow set of formulaic metrics and in the process miss the forest for the trees. They provide no basis for rejecting our traffic estimates, much less concluding that CPKC would irrationally be impelled to engage in foreclosure strategies to force traffic to CPKC. CPKC will instead attract traffic on the merits, while enabling shippers to keep their existing interline options if that is what they would prefer to do.

A. CPKC Growth Will Not Be Hindered by Longer Hauls as the Threatened Class Is Allege

8. The Class I railroads that criticize our traffic analysis behave as if their service and routes cannot be beat, such that shippers would never decide to shift to a CPKC option unless forced to do so. CPKC will show them otherwise.

9. These critics present a narrow and inaccurate views of the market and overlook important attributes of the enhanced services CPKC will offer. UP witness Thomas Haley, for example, expresses skepticism about revenues that CPKC projects from the new traffic attracted to the CPKC network on the grounds that CPKC's routes will in some cases be longer than UP and BNSF routes.[1] He alleges that "CP-KCS have a fundamental routing disadvantage – that is, their routes are longer, slower, and otherwise less efficient than available alternatives" and claims that "CPKC routes would be, *on average*, 217 miles longer than the existing movement."[2]

10. BNSF's witness Benton Fisher takes a similarly narrow focus when he points to the length of CPKC's routes as a basis for challenging our testimony that "[p]erhaps most compelling is the opportunity to open an entirely new corridor for containerized cargo moving between Asia and points in the Eastern United States and Canada via the Port of Lazaro Cardenas."[3] CN's witness David Hunt makes the same assertion.[4]

11. These perspectives ignore market realities and they ignore the attributes of CPKC's future service offerings.

12. Mr. Haley presents an overly simplistic analysis of distance and idealized minimum run times. These isolated metrics are out of sync with what we are hearing from our customers and what we know about competitive dynamics of the marketplaces CPKC will serve.

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[1] *See* UP-10, Verified Statement of Thomas Haley at 5 ("Applicants' routes between Mexico/Texas markets and Chicago/Twin Cities/Upper Midwest markets are significantly longer and less efficient than UP and BNSF alternatives.")

[2] UP-10, Verified Statement of Thomas Haley ("Haley V.S.") at 19 (emphasis in original).

[3] *See* BNSF-9, Verified Statement of Benton V. Fisher at 10 ("Such rail shipments would be among the longest on the North American continent, as Lazaro Cardenas is 900 miles south of KCS's Laredo gateway, and 2,500 miles from the Chicago gateway to connect with eastern US railroads.")

[4] *See* CN-13, Verified Statement of David T. Hunt at 6 ("For the Applicants' diversion estimates to be achievable, shippers would have to agree to use longer rail routes and pay higher rates.")

13. First, we know from experience that a shorter or *theoretically* "more efficient" route does not always mean that the route will be better at meeting shippers' service needs. UP's witness Haley claims, for example, that "a CPKC route from Chicago to Laredo would be substantially less efficient and slower than UP's existing route."[5] But this is just the output of counting of miles and measuring theoretical train performance using a train performance calculator.[6] Mr. Haley's theoretical speed estimates do not account for actual shipper experience, because real-world railroad service performance does not always track mileage or similar metrics.

14. Some (but not all) of CPKC's routes in these corridors will be somewhat longer, and perhaps *theoretically* somewhat slower, but only by a relatively small margin. And when real world experience is factored in, we expect CPKC's performance to be comparable if not better than what our rivals are able to offer. CPKC expects to offer transportation services that are not just timely and efficient, but *reliably so* (i.e., less variable), such that we consistently deliver transit times that meet our customers' needs. It would be unreasonable to expect CPKC will not succeed in attracting traffic with the improved new services we will be able to offer (and we know that "foreclosure" will never be a strategy that we would resort to, primarily because it would not work; it would instead drive traffic away from CPKC).

15. CP's experience in Canada is illustrative. CP's route from Toronto to Edmonton is longer and slower than the route of our principal rail competitor, yet we still compete quite effectively and win significant business with our intermodal and other services on this route. Similarly, CP's route from Vancouver to Detroit is shorter and slower than competitive

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5 UP-10, Haley V.S. at 21.

6 Id.

alternatives, and we still win business there as well. As our success has shown, reliability and consistency have value all their own. On the other side of the coin, CP's route from Vancouver to Toronto is faster and shorter than CN's route, yet CN still is able to compete effectively for traffic on those lanes.

16. Second, and equally important, even if it were lanes in which CPKC could not deliver quite the same speed of transit as BNSF or UP options, speed is not remotely everything in meeting customer needs. As these railroads know as well as we do, shippers make their transportation choices based on a wide array of factors. Modest disadvantages in any one parameter – speed included – will not disqualify CPKC (or any other option) from providing shippers with a valuable and important competitive option that many will choose.

17. We know from our extensive engagement with shippers across countless transportation markets (across commodities and geographies) that shippers consider an array of factors in assessing which transportation option best meets their needs: anticipated transit time is one, as is the variability/reliability of those transit time expectations. To many shippers other factors are equally or more important, including, in no particular order: equipment supply, loaded-to-empty cycle times, customization of service design, customer service, investments in loading or unloading facilities, service frequency, pricing, and many more. Different shippers weight these factors differently, and it is utterly wrong to suggest that a mere mileage or idealize transit time disadvantage would prevent a railroad – CPKC or any other – from competing successfully. The Class I witnesses who cherry-pick isolated metrics to support the alleged superiority of their existing routes provide no basis for invalidating our estimates, which are based on market reaction to the complete package we will put forward in our service offerings.

18. This is all the more the case with respect to the CPKC services the market impact of which we have assessed. We know how effectively both CP and KCS have been able to deliver reliable services that meet customer expectations. Both railroads will bring that acumen to CPKC, with a supercharged set of capabilities to compete more effectively against the larger Class Is. We do not doubt that they will try to respond, but our estimates of CPKC's likely traffic gains factor in that kind of competitive response. CPKC gains traffic and revenue, and more importantly from the Board's perspective, shippers will gain a more competitive transportation environment.

B. Our Forecasts Are Bolstered by Shippers' Emerging Plans to Make Significant Investments, Capitalizing on the Value Unlocked by the CP/KCS Transaction

19. Many shippers we have been in touch with since last October tell us that they are already planning significant investments to exploit the improved transaction options that CPKC will offer, including new grain investments in Mexico, Iowa, and Missouri, and new fertilizer investments. Some of them have submitted reply verified statements spelling out these plans and urging the Board to approve the Transaction. *See, e.g.*, Reply Verified Statement of NEW Cooperative, Inc. ("I write today to advise the STB of a potential investment that is contingent on the approval of the CP-KCS combination. This combination provides us the possibility to build a greenfield grain elevator to ship corn and soybeans in Northern Iowa, to capitalize on new, efficient single-line routes on CP-KC from Iowa to grain destinations on the KCS, including Mexico."); Reply Verified Statement of Kevin Hall, Vice President, Supply Chain & Continuous Improvement, Agriculture for CHS Inc. ("The increased efficiencies and market access created by the CP-KCS merger would be an impetus for rail-using companies, such as CHS, to make the most of those benefits by considering making new investments in supply chain infrastructure to

be served by CPKC."); Reply Verified Statement of Ray Carroll County Grain Growers, Inc. ("We are pleased to support the CP-KC transaction and believe that it opens up more possibilities for us. In fact, we anticipating making new investments in this corridor in the foreseeable future.").

20. We have also spoken to a number of other shippers who tell us privately that they plan to make similar investments. One such shipper is planning a $40 million investment in a grain elevator in the United States and a separate $15 million investment to enable a Mexican facility they operate to accommodate 8500-foot "HEP" grain trains. Another shipper has informed us of their interest in capitalizing on CPKC's new single-line service between their Canadian sources and the Gulf by investing in an export terminal option in Port Arthur, TX. Similarly, shippers of DRUbit have told us (and in some cases the Board) that further investment in the infrastructure necessary to remove diluent from Albertan heavy crude (and thus render it safer for rail transit) is unlikely to happen without the transportation service improvements unlocked by the Transaction. We have had ongoing discussions with others in the grain space about investments. The fact that these shippers, across a range of industries, are considering or planning substantial investments contingent on our Transaction provides further support for our estimation of the potential for new CPKC service to succeed in the market.

21. In addition to the customers who plan to invest, Applicants are encouraged by the support of shippers who rely on our offerings to expand facilities and investments. However, all of these new investments and their resulting benefits for shippers and the U.S. economy are contingent on CPKC coming to fruition.

C. Ultimately, Rail Customers Will Decide How Successful CP/KCS Is in the Marketplace, and We Will Strive to Earn Their Trust and Business

22. We recognize that our forecasts of CPKC's Transaction-related traffic gains will not dictate market outcomes. Ultimately, it is rail customers who will decide how successful CPKC will be in the marketplace. CPKC will compete hard and strive to earn our rail customers' trust and business. But, contrary to the assertions of railroads like UP, BNSF and others who are seeking the help of the Board to be protected from competition, CPKC has no ability to force any traffic to the CPKC lines.

23. Other witnesses are replying in detail to the claims by UP, BNSF and others that CPKC will have incentives or the ability to "foreclose" shippers' existing interline options and thereby force traffic to shift over to CPKC routes. Mr. Brooks, for example, explains why this is just not so, and how Applicants' commitment to keep gateways open will assure that it cannot happen.

24. Mr. Brooks and other witnesses also explain how the remedies proposed by certain commenters – especially UP and BNSF – would not only be unnecessary but a supposed "cure" that would be far worse than any disease. The mileage-prorate divisions mechanisms that UP and BNSF both seek to have the Board impose would be affirmatively anticompetitive, as would anything that discouraged CPKC from competing aggressively to attract traffic to its single-line routes, including lower single-line rates. The fact that UP and BNSF may have entered into an arm's-length agreement decades ago that incorporates certain mileage-prorate mechanisms into a divisional agreement that gave UP access to certain BNSF-served territory, in exchange for UP's sale to BNSF of a line that gave BNSF new single-line routes into UP territory, is not a justification for imposing such a regime in this case.

25. From the perspective of our assessment of the likely traffic gains that CPKC will achieve in the post-Transaction marketplace, let us be very clear. Our analysis took as a given that CPKC will have no incentive to degrade any of the interline options that CP or KCS shippers have chosen in today's marketplace. CPKC will not attract traffic by shutting down those options (or "closing" gateways). Our analysis reasonably anticipates that CPKC will attract traffic by providing shippers with improved new options that neither CP nor KCS could have delivered without the Transaction. CPKC will succeed – not always, but enough – through hard competition not foreclosure. Shipper choices will be what brings new traffic to CPKC, not anything else.

II. SPECIFIC CRITIQUES OF CPKC'S ABILITY TO ATTRACT ADDITIONAL TRAFFIC ARE INCORRECT

26. In addition to their claimed skepticism about CPKC's ability to compete against the lager Class Is, the Class I witnesses offer a handful of criticism of specific aspects of our traffic analysis. None have merit.

A. Class I Critics Are Wrong to Conclude that CPKC Will Be Unable to Attract International Intermodal Traffic from the Port of Lazaro Cardenas to the U.S. Midwest

27. CN witness David Hunt asserts that we have overestimated the potential for CPKC to attract international intermodal traffic moving from the Port of Lazaro Cardenas to the U.S. Midwest. Mr. Hunt's analysis is flawed. He claims that our estimates "fail to account for the reality of global supply chains or the circuity of the longer rail and maritime routes that would make it difficult for CPKC to capture that traffic," and that our analysis ignored that this new traffic would require "shifting international container traffic … to more complex and circuitous water and rail routes via the Port of Lazaro Cardenas (on the Mexican Pacific coast)

and KCSM/KCS/CP." *See* CN Comment, Hunt V.S. at 27. He is wrong. We considered all of these factors and our assessment is both reliable and realistic, as recent experience and shipper input corroborates.

28. First, the interest of international container shippers (steamship companies and their beneficial owners) in developing alternative paths from Pacific ports to the U.S Midwest is well established, and not at all about "replacing" the dominant ports of Los Angeles and Long Beach. Mr. Hunt fails to consider the important factor of supply chain reliability. Sustained growth at LA/Long Beach has been constrained by capacity limitations involving the whole supply chain infrastructure associated with the port, as evidenced by its chronic congestion in recent years. Vessel owners and trans-Pacific intermodal shippers have long looked for complements to the LA/Long Beach port, as CN's growth at the Port of Prince Rupert (which CP does not serve) has shown. (CP already serves Vancouver, of course, and we would have exploited opportunities to tap more Asian trade were it not for limitations facing Vancouver, particularly capacity to grow to serve new markets. The CP/KCS Transaction will not have any effect on our ability to attract traffic using the Port of Vancouver.)

29. Second, the Port of Lazaro Cardenas already has the efficient intermodal facilities necessary to support its use as a viable option for trans-Pacific container shippers, but it is restricted by the lack of single-line rail access to the U.S. Midwest, which every U.S. and Canadian container port on the Pacific already possesses (*i.e.,* Prince Rupert, Vancouver, Seattle/Tacoma, San Francisco/Oakland, and LA/Long Beach). The APM terminals facility, the "first semi-automated and most technological advanced container terminal in Mexico," offers

"consistent high levels of productivity."[7] Semi-automated capabilities result in faster, safer, and more robust service than manual terminals can offer. Shippers also have the option of Hutchison's terminal in Lazaro Cardenas. Hutchison, like APM terminals, is one of the three largest international intermodal container operators in the world. Both APM and Hutchison are known globally as sophisticated, efficient, and safe operating terminals.

30. Third, contrary to Mr. Hunt's assertion, the additional rail mileage between Lazaro Cardenas and Chicago, and additional vessel mileage on some trans-Pacific sailing routes, is not a barrier to Lazaro Cardenas playing a role in delivering containerized cargo to the U.S. Midwest. From a steamship perspective, Lazaro Cardenas is not materially farther from Asia, taking into account vessel string designs. Modest increases in maritime distances are no barrier to Lazaro Cardenas' competitiveness.

31. From a rail-route perspective, as we have discussed above and in our initial Verified Statement, modest mileage disadvantages will not prevent routes via Lazaro Cardenas from being competitively viable. Indeed, given the efficiency and lack of congestion at Lazaro Cardenas, in the time it takes a container on a vessel arriving off the port of LA/Long Beach to arrive in port, get offloaded and ultimately placed on a railcar destined for Chicago, a CPKC intermodal train would already be well on its way toward the U.S./Mexico border.

32. Our analysis of the potential for CPKC to handle additional traffic from the Port of Lazaro Cardenas is not purely hypothetical. It is backed up by the assessments of many other market participants and "proof of concept" testing by CP and KCS working together on an interline basis in corporation with a number of shippers eager for alternatives to LA/Long Beach.

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[7] *See* APM Terminals website, available at https://www.apmterminals.com/en/lazaro-cardenas/about/our-terminal.

33. First, Hapag-Lloyd, a major ocean shipper, addresses Mr. Hunts dismissive analysis head on. Uffe Ostergaard, President for Hapag-Lloyd (America) LLC explains:

> "[W]e expect the Transaction to generate efficient and effective intermodal service between the port of Lazaro Cardenas and destinations in the United States and Canada. Much ocean freight from Asia bound for the United States and Canada flows through various Canadian and United States ports, including Los Angeles and Long Beach. While it is undeniable that those ports will continue to be lynchpins in the global supply chain, it is also evidence that the volumes shipping through most ports often strain their capacity, creating delays. The port of Lazaro Cardenas could handle some of this ocean freight from Asia to the United States and Canada, reducing the strain on other key gateways."[8]

Many other shippers have also expressed to us their similar interest and enthusiasm in the potential represented by for this new CPKC intermodal route.

34. Second, we have concrete market-based evidence that shipper enthusiasm is real and not just hypothetical. In March 2022, CP and KCS cooperated on an interline basis in a demonstration of the capabilities of this new route for several intermodal shippers. CP and KCS were approached by a logistics company that had arranged for the trans-Pacific shipment of containers for Dollar General and other beneficial cargo owners on a vessel operated by Hapag-Lloyd to explore the possibility of an inland rail move from the Port of Lazaro Cardenas to Chicago, for drayage beyond to other U.S. Midwest destinations. Working closely with these parties, KCSM, KCSR, and CP demonstrated the ability to deliver a train carrying 198 individual containers for grounding at Chicago, each arriving only seven days after docking at Lazaro Cardenas. These test runs yielded significant time savings for the shippers, as shipments typically wait longer than seven days just to leave the Port of Los Angeles. As this experience shows, the distance on the water, like the rail mileage, is a far less useful metric than the overall

[8] Reply Verified Statement of Hapag Lloyd (Americas) at 1.

travel time and reliability. Although the investments necessary to make this kind of performance consistent and repeatable will have to await consummation of the CP/KCS Transaction, these test runs prove the capability of this logistical pipeline (the port, CPKC's route network, and CPKC's efficiently located intermodal terminal outside Chicago) to produce real shipper benefits for intermodal shippers.

35. Based in part on this experience, Hapag-Lloyd concludes that "[t]he key is reliability and efficiency, and the Port of Lazaro Cardenas, couple[d] with efficient CPKC single-line rail service, will offer a very attractive alternative for companies like Hapag-Lloyd and our many intermodal customers." *See* Hapag-Lloyd R.V.S. at 2. Mr. Hunt is simply uninformed when he asserts that increased CPKC intermodal traffic from Lazaro-Cardenas to the U.S. Midwest is a fantasy.

B. CN's Criticisms of Other CPKC Traffic Opportunities Are Not Well Founded

36. CN's witness David Hunt also attacks our estimates with respect to new traffic opportunities relating to LPG, grain, and perishables. *See* Hunt V.S. at 33-35. In each case, his critiques are unwarranted.

37. ***LPG.*** First, with respect to LPG, Mr. Hunt asserts that (a) we claim CPKC will attract traffic that does not currently exist; and (b) the new facilities necessary to handle this traffic are not reflected in CPKC's capital expense plans. With respect to the first point, Mr. Hunt's contention actually underscores a key benefit of the CP/KCS Transaction: by creating new, single-line routing options that do not exist today, the Transaction will expand the market reach of CPKC's shipper base and create new, more efficient linkages between market participants. As to these LPG opportunities, CPKC will better link significant origins of LPG in Alberta with significant destination markets in Mexico. The fact that there are volumes of LPG

that do not move between these points today is precisely the point: the Transaction will create opportunities for LPG shipments that do not currently exist.

38. With respect to Mr. Hunt's second point, CPKC will assess investment in new facilities across its entire network as customer response to CPKC's new initiatives develop and will assess the particulars such as potential sites, timing, and capex requirements. There are ample resources in the combined capital budgets of CP and KCS to support business development initiatives such as this one.

39. ***Grain.*** Second, with respect to grain, Mr. Hunt makes the same mistake when he complains that we provided no explanation or reconciliation for the opportunities for traffic shifts that we identified that had not been identified in the rail-to-rail traffic analysis of Messrs. Brown and Zebrowski. The key point is that we are looking at a different set of potential opportunities that are cumulative rather than mutually exclusive. As we explained, CP/KCS Transaction will expand the market reach of grain shippers served by CP and allow them to ship to different markets than they currently ship to, which they cannot do as efficiently today. For example, we identified opportunities where new CPKC routes would enable origins on CP to increase their shipping volumes by sending grain to a major receiver of grain and DDGs ({{[redacted]}}) served by KCSM in Mexico. Grain shippers are excited about these new opportunities, as we explained in our initial Verified Statement. *See* Wahba/Naatz V.S. at paragraph 25.

40. Messrs. Brown and Zebrowski, by contrast were identifying existing flows from the same or nearby origins to the same or nearby destinations, that likely would shift to new single-line CPKC transportation options. In short, the Transaction will achieve both sets of gains, and we carefully avoided double counting any of these traffic opportunities.

41. ***Perishables.*** Third, with respect to perishables shipments that we anticipate CPKC will be able to attract from trucks to CPKC intermodal service, Mr. Hunt asserts that Applicant's expert on truck-to-rail diversions, Bengt Mutén, found a smaller volume of diversions of perishables than we did. This criticism is invalid, for reasons Mr. Mutén explains in his Reply Verified Statement. Mr. Mutén's analysis was necessarily limited to examining truck movements in the specific lanes in which those shipments take place today. Our analysis of potential new CPKC marketing opportunities had a wider lens. With our knowledge of the market, we were able to identify the potential to convert two-stage truck flows – from origin in Mecxico to intemediaet destination, and then to Upper Midwest end markets – and assess the potential for direct service by CPKC to be highly competitive. The fact that Mutén did not include these diversions in his analysis is simply a matter of limitations in the data available to him, not any disagreement with our assessment.

C. The CP/KCS Transaction Will Be a Vital Catalyst for Additional Investment in Conversion of Crude-by-Rail to DRUbit

42. Finally, CN witness Hunt claims that "nearly $158.1 million (40 percent) of the revenue from additional traffic opportunities posited by witnesses Wahba and Naatz is attributable to traffic gains that are unrelated to the merger." *See* CN-—13, Hunt V.S. at 25. Mr. Hunt argues that "[t]he single largest 'opportunity' cited by witnesses Wahba and Naatz (accounting for $158.1 million in incremental revenue) is a crude oil movement from Hardisty, AB to Port Arthur, TX," and that the Gibson Energy press release indicates that this traffic opportunity "pre-dates the merger" and that "merger-related discussions could not have occurred with Gibson Energy at the time of the 2019 press release." *Id.*

43. Mr. Hunt is either confused or misinformed about the potential DRUbit traffic that we addressed in our initial Verified Statement. The press release Mr. Hunt cites related to

the first of three phases of a project undertaken by Gibson Energy and U.S Development Partners to build a diluent recovery unit (i.e., a "DRU") at Hardisty, AB, to support the rail movement of crude in non-hazardous DRUbit form to refineries in the United States. The rail traffic associated with Phase I, which is the only topic of the press release Hunt references, was *not part of our traffic forecast*.

44. The additional rail traffic that we anticipated would move via CPKC single-line routes from Hardisty is contingent on Phases II and III of the Hardisty project, which do not exist today and very well would never come to fruition absent the improvements in rail transportation economics – particularly improved equipment cycle times – that will be made possible by the CP/KCS Transaction.

45. Mr. Hunt may not understand these facts, but the shippers in question do. This is why the participants in the Hardisty DRU project have enthusiastically supported the Transaction. Josh Ruple, Executive Vice President, Chief Operating Officer of US Development Group, LLC, states that USD's "goal of additive Dilbit to DRUbit shipment transition is substantially more likely to increase in a world with CPKC than in one without."[9] This is because, as explained by Brad Sanders, Executive Vice President, Chief Commercial Officer of US Development Group ("USD Group"), "the single-line benefits and new investments made possible by the CP/KCS transaction will provide the improved rail efficiency and economics *necessary to support further investment* in our DRUbit by Rail Network."[10]

46. For DRUbit and so many other commodities, the benefits of CPKC's efficient new single-line services will change the calculus for companies evaluating their transportation

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[9] Reply Verified Statement of USD Group (Josh Ruple) at 2.

[10] Reply Verified Statement of USD Group (Brad Sanders) at 1.

options and considering investments that depend on efficient transportation options. CPKC, its shippers, and even shippers who choose to stick with their existing transportation providers, will all benefit from the new competition that the Transaction will bring, all to the clear benefit of the U.S public interest.

III. OTHER ISSUES

Applicants are aware that several individual U.S. Federal Maritime Commission commissioners have raised questions about the CP/KCS Transaction being targeted at diverting intermodal cargo from the U.S.[11] It is not. CP already serves those Canadian ports and connects them via efficient single-line intermodal services to the U.S. Midwest. Though the Transaction will enable CPKC to expand its single-line offerings to include Kansas City (where CP has no intermodal terminal today), we do not anticipate significant new intermodal between Kansas City and Canadian ports on the Atlantic or Pacific. Our estimate of the growth potential associated with the Transaction in these lanes is quite modest: only approximately 5,600 annual TEUs from the Port of Vancouver to Kansas City and approximately 2,800 annual TEUs from the Port of Saint John to Kansas City. And, if CPKC's new services were successful in achieving some gains in traffic it would be because they offered U.S. receivers and exporters better, more competitive transportation options, and in all likelihood would expand the total pie rather than divert traffic from other ports in the United States or elsewhere.

[11] *See* Comments of Commissioners Carl W. Bentzel, Louis E. Sola and Max M. Vekich of the Federal Maritime Commission (filed June 22, 2022) (alleging that "the proposed merger will adversely impact U.S. ports and the primarily U.S.-based intermodal railway systems that serve our ports, and would disproportionately benefit Canadian ports and the primarily Canadian-based intermodal railway systems that service Canadian ports for transportation of U.S.-bound cargo").

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VERIFICATION

I, Jonathan Wahba, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12 day of July, 2022

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Jonathan Wahba

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VERIFICATION

I, Michael J. Naatz, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12 day of July 2022.

DocuSigned by:
Mike Naatz
FD5BF2DEC92345C...

Michael J. Naatz

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF MICHAEL J. NAATZ

TABLE OF CONTENTS

I. INTRODUCTION 3

II. KCS HAS NOT USED ITS CONTROL OF TEX MEX AND KCSM TO FORECLOSE UP OR BNSF ROUTINGS THROUGH THE LAREDO GATEWAY 4

A. Grain Movements Are Illustrative of How KCS Has Not Foreclosed BNSF From the Mexican Marketplace 9

B. Intermodal And Automotive Traffic Is Also Illustrative Of How KCS Has Not Foreclosed BNSF From the Mexican Marketplace 17

C. Energy Is Another Commodity That Illustrates How KCS Has Not Foreclosed BNSF From the Mexican Marketplace 24

III. UP'S SIMILAR FORECLOSURE THEORY IS NOT SUPPORTED BY PAST PRACTICE AND IGNORES MARKET REALITIES 30

IV. THE MILEAGE PRO-RATE RATE SETTING MECHANISM PROPOSED BY UP, BNSF, AND OTHERS WOULD ADVANTAGE THE LARGER CLASS 1 CARRIERS AND HARM COMPETITION 37

A. The Mileage Pro-Rate Mechanism Does Not Reflect The Real World Or Market Economics 38

B. The Mileage Pro-Rate Mechanism Would Prevent CP/KCS from Pricing Competitively and Would Only Benefit UP And BNSF 41

V. CANADIAN NATIONAL'S (CN) PROPOSED FORCED SALE OF KCS'S SPRINGFIELD LINE IS NOT COMPETITIVELY JUSTIFIED AND WOULD NOT BE IN THE INTEREST OF SHIPPERS 45

A. The Line Plays An Important Role For KCS Grain Deliveries Into Mexico And It Would Not Make Economic Sense For A Merged CP/KCS To Walk Away From Years Of Investment 46

B. There Will Be No Loss of Competition in The Kansas City-Chicago Corridor 50

C. Divestiture Of The Line Would Be Disruptive and Harmful To Existing Service On The Line 54

VI. THE "CONSERVATIVE" ESTIMATES OF SYNERGIES PRESENTED TO KCS'S BOARD ARE NOT INCONSISTENT WITH THE ESTIMATES PRESENTED IN THE APPLICATION 56

VII. NO CONDITION SHOULD BE IMPOSED THAT FREEZES KCS'S TARIFFS OR TRANSPORTATION SERVICE TERMS RELATING TO PIH/TIH TRAFFIC 58

VIII. OTHER ISSUES RAISED BY COMMENTERS 59

A. The Conditions Sought by Texas International Terminals Are Not Related to Competition or This Transaction and Instead Seek to Improve TxIT's Commercial Position. 59

B. Evergy Metro, Inc.'s Request to Impose a Condition regarding Service Quality is an Attempt to Extend Board Jurisdiction to its Contractual Agreement with KCS. 60

EXHIBIT 1: HC – BARTLETT UPDATE -AUGUST 2014

EXHIBIT 2: P – PRESS RELEASE – CANADIAN NATIONAL, ILLINOIS CENTRAL, AND KCSR IN SHIPPING ALLIANCE

EXHIBIT 3: C - CN-KCS MAY 30 EMAIL "RE:_ RE_COCKRELL INTERCHANGE TO BE CLOSED ASAP"

EXHIBIT 4 C – CN-KCS JULY 2 EMAIL "RE_COCKRELL INTERCHANGE TO BE CLOSED ASAP"

EXHIBIT 5 P – MAP OF KCS'S AGRICULTURAL CUSTOMERS ON THE SPRINGFIELD LINE

I. INTRODUCTION

1. I am Michael J. Naatz, Executive Vice President and Chief Marketing Officer at Kansas City Southern (KCS). A substantial portion of my responsibilities involves pricing strategy, market access analysis, development of business opportunities, and competition analysis. I have served in my current role since October 2018. KCS is a non-carrier holding company that owns and controls The Kansas City Southern Railway Company (KCSR), The Texas Mexican Railway Company (Tex Mex), Gateway Eastern Railway Company, Kansas City Southern de Mexico (KCSM), S.A. de C.V., and other non-rail subsidiaries. I joined Kansas City Southern in 2012 as Senior Vice President and Chief Information officer. In 2014, I was promoted to Senior Vice President of Operations Support & Chief Information Officer. I held that position until being promoted to my current position. Before joining KCS, I was president of YRC Holland, a division of YRC Worldwide (YRC). Prior to that role, I served in a variety of executive leadership positions at YRC, including the role of YRC's chief customer officer. I hold a Master of Business Administration from Northwestern University's Kellogg School of Management and a Bachelor of Arts in economics from the University of Illinois.

2. I am submitting this Reply Verified Statement to address several issues that have been raised by the various comments filed in the proceeding. My testimony will address the following: (1) BNSF's allegations regarding KCS's acquisition and control of Tex Mex and KCSM, and whether KCS has used that control to foreclose BNSF traffic through the Laredo gateway; (2) KCS's approach to KCSM pricing and why such pricing does support efficient UP-KCSM and BNSF-KCS-KCSM interline services via the Laredo gateway; (3) why Canadian National's (CN) proposed forced sale of KCS's Springfield Line would not be in the interest of shippers; (4) why it would not be in the public interest to grant the anticompetitive "mileage

prorate" rate-setting mechanism proposed by BNSF and UP (and echoed in the comments of ACC/TFI/NITL); (5) KCS's initial synergy proposals and why those proposals underestimated the amount of synergies that are indicated in the Application; (6) the conditions requested by various shippers of toxic inhalation hazard and poisonous inhalation hazard (TIH/PIH) commodities; and (7) the non-competition related conditions requested by Texas International Terminal and Evergy Metro, Inc. Concurrent with this statement, I am submitting a separate Reply Verified Statement jointly with Jonathan Wahba, Vice-President of Commercial Integration at Canadian Pacific Railway Company (CP), to address comments made about our previous joint testimony in support of the Application.

II. KCS HAS NOT USED ITS CONTROL OF TEX MEX AND KCSM TO FORECLOSE UP OR BNSF ROUTINGS THROUGH THE LAREDO GATEWAY

3. As I understand, BNSF makes the same arguments as it did in the 2005-2006 KCSR/Tex Mex/KCSM proceeding, and now argues that CP (as opposed to KCS) will use its control of KCS to "foreclose" efficient BNSF routings into and out of Mexico via an interchange with KCS (formerly Tex Mex) at Robstown.[1] To the best of my knowledge, without any shipper support or contemporary evidence, BNSF argues that KCS's and KCSM's actions with respect to BNSF/KCS (Tex Mex)/KCSM routings through Laredo via the Robstown interchange[2] have not been "commercially reasonable" for the past fifteen years and that the KCS/Tex Mex open

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[1] Kansas City Southern – Control – The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, Decision No. 12, FD No. 34342 (STB Served Nov. 29, 2004) ("KCS/Tex Mex Decision"), at 30-34.

[2] Below, I set forth and explain the history of Tex Mex/KCSR's rights and interchange with BNSF at Robstown for movements through Laredo. Laredo is directly served by KCSR and UP via interchange with KCSM. BNSF has direct access to Mexico via a number of other gateways, including Brownsville and Eagle Pass, but interchanges with KCSR at Robstown to access Laredo. For purposes of this statement, I may use the "Robstown gateway" and "Laredo gateway" but both refer to this interchange connection at Robstown for BNSF traffic moving through Laredo by KCSR.

gateway condition remains ineffective.[3] According to BNSF, BNSF's ability to access Laredo was significantly diminished when KCS bought Tex Mex and the conditions imposed by the Board on KCS's acquisition of Tex Mex have not protected shippers from KCS pricing actions that have effectively frozen BNSF out of the Laredo gateway. The only "evidence" for such an argument is that BNSF's movements through the Laredo gateway declined dramatically after the KCS/Tex Mex merger and that BNSF shifted grain traffic to the Eagle Pass border crossing, where BNSF says it incurs greater costs for movements to several Mexican locations, including the areas that have the highest demand for grain.

4. To begin with, BNSF has failed to present the testimony, discovery document, letter, or any other statement from a single customer that any customer (as opposed to BNSF) believes that Tex Mex's[4] rate division between Robstown and Laredo for BNSF/KCS routings to Laredo (or any other KCSR or KCSM rate) was "commerically unreasonable." In my almost four years as KCS's Chief Marketing officer, no customer has ever once articulated to me that it believed that the KCSR Robstown to Laredo rate was "commerically unreasonable" or that the Tex Mex (KCSR) division of a rate to/from Laredo was preventing such customer from using the BNSF/Tex Mex routing.

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[3] BNSF 9-30

[4] Prior to KCS's acquisition of control of Tex Mex and for approximately two years following KCS control, Tex Mex provided overhead and local service over the Tex Mex lines and issued its own waybills, tariffs, and rates. KCSR eventually took over all operations and today, it is KCSR that operates over the entire Tex Mex line of railroad, provides local rail services to shippers on the Tex Mex rail line, and issues rate divisions, tariffs, and waybills for movements over the Tex Mex rail line. *See STB Finance Docket No. 34848, published in Federal Register on April 17, 2006, Vol. 71, No. 73, Page 19784*. As a result, Tex Mex is no longer included in the routing or bill of lading. For ease of discussion and because many of the allegations involve movements over the Tex Mex line, I use Tex Mex to refer to the KCSR movements and rates over the Tex Mex line.

5. While I was not employed by KCS in 2005 when KCS took control of Tex Mex, I have asked the very few KCSR marketing employees (mainly in the grain department) who have been with the company since then if they had ever heard of a customer complain that the Tex Mex division between Robstown and Laredo was "commerically unreasonable." None of them have ever received such a complaint. Likewise, no shipper (to my knowledge or that of our long term employees that I have spoke with on this topic) has ever invoked the NITL arbitration agreement (entered into as part of the KCS/Tex Mex/KCSM proceeding) to claim that KCSR's rate to/from Laredo or to/from internal points in Mexico (whether in interline or single-line service) were discriminatory or commercially unreasonable.

6. The fact that no shipper has complained does not surprise me. This is because KCS has not used its control of Tex Mex and KCSM to foreclose BNSF interchanges at Robstown for joint interline movements through the Laredo gateway. KCS remains willing and able to interchange with BNSF at Robstown for movements to and through the Laredo gateway. I also believe it is BNSF that has chosen not to use the Robstown gateway for many types of shipments, mainly because of a disagreement over divisions. It appears that BNSF has used its competitive options to shift traffic away from KCSR and the Laredo gateway, not the other way around. It is BNSF that is intentionally keeping its division requirement high and has steadfastly refused to lower its division requirements to make a joint BNSF/KCSR interline movement competitive with UP or the BNSF single-line movement. As such, it has been BNSF that has used its market power to favor its own single-line routes to the Mexican gateways.

7. As acknowledged by the Board in the KCS/Tex Mex/KCSM decision, KCS has no market power to force BNSF and its customers to continue to use a BNSF/KCSR/KCSM routing or to pay KCSR a commerically unreasonable rate. This is because, as shown in the

following figure, BNSF has several routing options into and out of Mexico via several gateways, and the choice to interchange with either KCSM or FXE:

FIGURE 1[5]

BNSF MEXICO GATEWAYS



8. While BNSF and its customers have options if they do not like the rates offered by KCS, such choices and options being the definition of a competitive market, KCS has only one gateway in and out of Mexico that connects KCSM with the rest of KCSs U.S. network.

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[5] http://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/gateway-and-connections.html

Indeed, as BNSF's own comments and evidence show, BNSF has shifted its Mexican traffic to its other gateways – especially, El Paso and Eagle Pass. This shift did not occur because KCS is charging "commerically unreasonable" rates so as to foreclose BNSF from the Mexican marketplace – KCS having no power to do so given BNSF's competitive options – but rather because, and especially with respect to grain movements, BNSF has not lowered its own division to make the BNSF/KCSR route competitive. Instead, BNSF has apparently offered a rate that encourages shippers to use BNSF through Eagle Pass and El Paso. BNSF is thus using its market power to discourage shippers from using a BNSF/KCSR joint line route.[6] With this context, BNSF's "evidence" of foreclosure, i.e., the shift of traffic from Laredo to Eagle Pass, is revealed for what it is: BNSF's commerical decision to refuse to lower its divisions in order to protect its margins and favor its single-line service through the other gateways .

9. There is another rational commercial reason for BNSF "losing" the traffic and it has nothing to do with KCS exercising market power to force shippers to use a less efficient and more expensive KCS route (which is what foreclosure really means): KCS can provide a single-line service that shippers choose because it is both less expensive and a more efficient route. Any carrier, including BNSF, can usually offer a lower rate on single-line service versus an interchange to another carrier. So, yes, where KCS and BNSF both serve the U.S. destination or origin, the KCS/KCSM system is of course going to be able to provide an efficient single-line rate that is better than the joint-line rate with BNSF.

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[6] All KCS grain shippers have benefitted greatly from KCS's single-line option through Laredo. This single-line option was only made possible through the KCS/Tex Mex/KCSM transaction. This proves exactly what KCS argued in the KCS/Tex Mex/KCSM proceeding – acquisition of Tex Mex/KCSM would provide shippers with a new single-line option to continued dominance by BNSF or UP.

A. Grain Movements Are Illustrative of How KCS Has Not Foreclosed BNSF From the Mexican Marketplace

10. When one examines the grain market, it represents exactly the concepts I note above. It is important to understand the historical context of the Tex Mex/BNSF relationship. Prior to the UP/SP merger in 1996, FD No. 32760, Tex Mex's primary interchange partner was Southern Pacific.[7] The SP/Tex Mex route was the only competitive route to UP's single-line route to Laredo. As a result, BNSF and KCSR had to interchange Mexican traffic with SP, which interchanged it with Tex Mex. As I understand it, Tex Mex had to rely upon SP as its lifeblood –making Tex Mex dependent upon SP feeding it traffic and at whatever division SP would dictate to Tex Mex.

11. Given that (1) UP was merging with its primary competitor (i.e., SP) for Laredo bound traffic; (2) BNSF expressed little interest in serving Mexico; (3) Tex Mex was financially unstable and likely would go bankrupt without additional connections and traffic densities; and (4) KCSR had expressed a strong interest in connecting with Tex Mex (of which, KCS owned 49 percent at the time of the UP/SP merger), the Board granted Tex Mex trackage rights to connect with KCSR at Beaumont. Tex Mex would, through the BNSF Settlement agreement, also have connections with BNSF at Robstown and Corpus Christi. The Board's grant of trackage rights provided Tex Mex with access to both BNSF and KCSR as a means by which to replace SP traffic and continue to provide a competitive route to/from Laredo.

12. The condition worked, and Tex Mex survived. The BNSF-Tex Mex interline relationship originated in this era. Even though Tex Mex had received trackage rights extending

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[7] See Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al., FD No. 32760. Background regarding Tex Mex's prior competitive position and request for trackage rights is explained in the Board's August 6, 1996 Decision No. 44. 1 S.T.B. 233, 1996 STB LEXIS 220. (the "UP/SP merger decision").

its network to Beaumont, as I discuss later, it nonetheless continued to give BNSF very low rate factors for BNSF-Tex Mex interline routes via Robstown/Corpus Christi. At the time KCS took control of Tex Mex, Tex Mex was offering BNSF a rate of $260 per car if BNSF hit certain volume requirements, which I am told they always did. Given that the Tex Mex portion of the move was approximately 150 miles, as I discus below, such a low rate was barely remunerative to Tex Mex, if at all.

13. When KCS acquired KCSM and Tex Mex, I understand BNSF vigorously opposed and sought numerous conditions, as they do here.[8] The Board rightly rejected those conditions finding that competitive harm would not result from the merger because the combined KCSR/Tex Mex/TFM rail network would not gain sufficient market power (nor have the incentive) to foreclose BNSF. In making this determination, the Board noted the distinction between protecting U.S. carrier's leverage over divisions versus protecting shippers from raised rates, and that the result may be that KCS earns more revenue at the expense of BNSF and UP, but this is not a harm to competition.

14. Here, BNSF makes much of the fact that KCS raised the division requirements for the rail movement over the Tex Mex rail lines after the merger. It is true that KCS did raise Tex Mex's division requirements. KCS did so because the then rates existing prior to the merger were not remunerative and had not been raised in years.

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[8] KCS/Tex Mex Decision Docket, at 32-33. One such condition was a five year "freeze" on Tex Mex divisions. As KCS explained in its October 15 .2004 Reply to Additional Comments filed September 30, 2004 ("2004 Reply Comments"), KCS and BNSF were in negotiations over the fact that Tex Mex's divisions were too low and Tex Mex was losing money. Id. at 17. During these negotiations, BNSF threatened to "simply shift its traffic to its other gateways" if Tex Mex's rates were too high. Supplemental Verified Statement of Gerald K. Davies, Executive Vice President and Chief Operating Officer of KCSR, at 60, attached to the 2004 Reply Comments. BNSF and Tex Mex extended the division agreement until December 31, 2004, BNSF and KCS came to a separate agreement, and BNSF did not renew its request for the freeze in supplemental comments filed in 2004.

15. BNSF points to the fact that its share of grain moves to Laredo via a BNSF/KCSR/KCSM move has consistently declined. BNSF argues that this is evidence of KCS exercising undue market power. It is not. It seems more likely than not that BNSF's market share decline via a joint BNSF/KCSR/KCSM routing through Laredo is a direct result of BNSF deciding to favor its own single-line move through Eagle Pass or El Paso.

16. This is exactly what was predicted back in the UP/SP merger. There, as explained by the Railroad Commission of Texas, and as adopted by the Board, BNSF had little incentive then (and even less of an incentive now) to route its grain traffic via Tex Mex to Laredo.

> "Were it not for the fact that Laredo currently enjoys a competitive advantage over the other gateways to Mexico because there is a larger infrastructure of customs brokers located at Laredo than at the other gateways, there would be little or no incentive for BN/SF to route traffic via TexMex. Certainly, there is no reason to assume that BN/SF would deliberately route unit trains of grain in joint-line service with TexMex via Laredo when it will have a comparatively direct shot in single-line service at Eagle Pass. Given the admitted concentration of BN/SF's traffic from the grain belt and the Pacific Northwest and the industrial Midwest, it is only logical to assume that BN/SF would favor the less circuitous, single-line routing via Eagle Pass."[9]

17. In the 26 years since those findings, there has been extensive investment by UP, BNSF, and governmental agencies in customs and other infrastructure at Eagle Pass and other Mexico gateways, making them much more comparable to Laredo. This provides BNSF with even less incentive to utilize KCS/Tex Mex. And as stated earlier, it is BNSF that is using its market power and its competitive options to not use the BNSF/KCSR/KCSM routing through Laredo.

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[9] UP/SP Decision, 1 S.T.B. 233, *423 (citing the Railroad Commission of Texas's submission, RCT-7 at 22-23).

18. BNSF's argument is simply a fight over the division of the rate so as to favor its single-line route to Eagle Pass. To illustrate why I say this is just a fight over the division, one only needs to compare the various rates in place since KCS acquired Tex Mex and KCSM. After control was implemented, KCS did raise its rate for movements over the Tex Mex rail lines, initially to $525 and now, with adjustements, it stands at $595.[10] Even at this rate, this is not a "commercially" unreasonable rate for the 150-mile move over the Tex Mex rail line.

19. Revenue to variable cost (R/VC) ratios, while not definitive in and of themselves, are generally indicative of revenue contribution to costs and usually reflect the market conditions that affect rates. I note that the R/VC ratio for the current rates for the Tex Mex portion of the move from the two interchange locations with BNSF – Robstown and Corpus Christi – are set forth below. Clearly, the division that BNSF complains about as foreclosing BNSF's use of the Laredo gateway barely covers variable costs (based upon 2020 URCS costs). There can be no argument, nor is there any evidence (and BNSF presents none) that shows that KCSR's rate is an attempt to exercise undue market power to foreclose BNSF's use of Laredo. Again, not one shipper has, nor has BNSF, presented any evidence or argument that this division requirement is "commercially unreasonable."

[10] It was explained to me by a long time KCS employee, that BNSF complained when KCs raised the rate from $260 to $525. KCS (Mike Bilovesky) informed BNSF (Al Virgine) that if he could identify any line-haul rate in a BNSF tariff lower than $525, KCS would lower its rate to that level. BNSF did not identify any such lower rate.

TABLE 1[11]
KCS R/VC LEVELS FOR CURRENT ROBSTOWN-LAREDO RATE FACTORS

	Robstown to Laredo	Corpus to Laredo
Miles	**145.1**	**161.6**
Freight Rate	**$611**	**$613**
Line Haul	*$595*	*$595*
Fuel Surcharge	*$16*	*$18*
URCS: Var Cost	**$536**	**$570**
R/VC	**114%**	**107%**

20. Indeed, when one examines the R/VC ratios (based upon 2006 URCS) that were in existence shortly after KCS took control of Tex Mex and KCSM, and after KCSR raised the rates for movements over the Tex Mex rail lines from $260 to $525, it shows a similar point: the KCSR post-control rates, even at the higher level following KCS's decision to increase them, still barely covered costs and were nowhere near the Board's jurisdiction threshold of 180 percent to even bring a rate complaint.

TABLE 2[12]
KCS R/VC LEVELS FOR 2005 ROBSTOWN-LAREDO RATE FACTORS

2006 Basis	Robstown > Laredo	Corpus > Laredo
Miles	**145.1**	**161.6**
Freight Rate	**$541**	**$543**
Line Haul	*$525*	*$525*
Fuel Surcharge	*$16*	*$18*
URCS: Var Cost	**$445**	**$472**
R/VC	**121%**	**115%**

21. I did not have access to the 2004 URCS costs, but the 2004 costs should not be that dissimilar to the 2006 costs. Assuming such 2004 URCS costs were like those in 2006, and

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[11] Workpaper – HC – Current Robstown-Laredo RVC Factors.

[12] Workpaper – HC – 2006 Robstown-Laredo RVC Factors.

when one considers that prior to 2005 Tex Mex was charging approximately $260 per car or less for grain, intermodal, and automotive traffic, Tex Mex *was charging hundreds of dollars less than URCS costs*.[13] This fact confirms what I have previously said – that Tex Mex was basically acting as the agent of BNSF, even charging below costs. This may explain why BNSF vigorously opposed KCS's acquisition of Tex Mex. It it also not surprising that when KCS raised Tex Mex's rates to a compensatory level, and BNSF refused to lower its division, that BNSF lost market share and shifted its traffic to the El Paso and Eagle Pass gateways.[14] But one thing is clear: the shift of BNSF traffic was not the result of KCS using its control of Tex Mex to foreclose BNSF from using the Laredo gateway. KCS would have no incentive to discourage BNSF from using the Tex Mex route and causing it to shift business to aother gateway, eliminating KCSM's role in handling traffic on the south side of the border.

22. Since the intitial rate increase to $525, which KCS imposed after taking control, KCS held Tex Mex's division level steady at that level until 2015. At that time, KCS did take a $70 increase (to $595), which has held steady for seven years. In contrast and based upon my discussions with my marketing personnel, we believe BNSF, beginning in 2005, has raised its grain rates by 1,000's of dollars. BNSF blames its inability to use the Laredo gateway on KCSR's division requirement, but as noted above, KCSR's rate continues to barely covers its variable costs for the movement of the freight over the Tex Mex rail lines. Clearly, KCS is not foreclosing BNSF from using the Laredo gateway.

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[13] I can only speculate as to why Tex Mex's and KCSM's prior owners allowed Tex Mex to charge non-compensatory rates. I suspect that the desire was to drive as much traffic as possible to the Laredo gateway and over KCSM's predecessor, TFM. I have been told that at the time, Tex Mex's and TFM's owner, Transportacion Maritima Mexicana SA ("TMM"), was struggling financially. Perhaps the goal was to generate as much traffic as possible even if such traffic barely covered costs on a Tex Mex/TFM through basis.

[14] Of course, BNSF threatened to do just that in negotiations, supra, fn. 9.

23. We understand from customers that BNSF's single-line rates to Eagle Pass at grain origins where BNSF, KCS, and/or UP compete are lower by approximately the difference between the current KCSR rate and the original $260 Tex Mex rate. In other words, it appears that BNSF has adopted a deliberate policy of maintaining a higher division for its portion of a BNSF/KCSR through rate to Laredo in an attempt to encourage shippers to use the Eagle Pass and El Paso gateways.

24. In this sense, it is BNSF that is foreclosing KCSR and KCSM from being able to effectively compete against UP. Indeed, at grain origins that are not served by KCS but are served by UP and BNSF, when KCS has requested BNSF to take a lower division so as to make a BNSF/KCSR route competitive so as to increase both BNSF's and KCSR's share of this traffic to Laredo, BNSF has refused to do so -- favoring the BNSF single-line to Eagle Pass or El Paso. It would appear that BNSF is unwilling to lower its division requirement by $260 in order to make a BNSF/KCSR routing to Laredo competitive with UP or BNSF to Eagle Pass.

25. Yet, BNSF criticizes KCS for refusing to lower KCSR's division at those locations where BNSF and KCS compete -- KCS offering lower rates for its single-line option, but, BNSF is doing the same thing -- favoring its single-line options by refusing to lower its division. This is the nature of competition – railroads usually can provide a single-line rate at lower costs than joint line rates. This is not evidence of KCS exercising any kind of foreclosure strategy, nor could it be given that KCSR's rate to Laredo over the Tex Mex rail lines barely covers its variable costs. Rather, this is called competition. It is exactly what KCS said would occur in the KCS/Tex Mex/TFM transaction, i.e., the combined KCS entity would be in a stronger position to compete against both UP and BNSF.

26. Besides examining R/VC ratios, as further evidence that KCS is not "foreclosing" BNSF from the grain market place through rate manipulation, we can examine the extent of KCSR's and KCSM's revenue per unit ("RPU") increases with respect to grain when compared to BNSF or UP RPU increases. If BNSF or UP were right about its foreclosure theories, it would have to be the case that KCS increased its rates south of the gateways after it obtained control of Tex Mex and KCSM as a way of defeating the competitiveness of UP-KCSM or BNSF-KCS-KCSM route options. But the facts show that nothing like this occurred. KCS's consolidated rates for grain have increased at {[redacted]} percent compounded annual growth rate since 2005 as shown below. Over the same period, UP's public reports show that its growth rate for agriculture and mineral traffic has been {[redacted]} percent while BNSF's has been {[redacted]} percent. KCSM's pricing is certainly not an outlier.

FIGURE 2[15]**{**

[redacted]

[15] Workpaper – HC – Class 1 Grain RPU 2005-2019

27. The same point can be made by examining overall RPU trends from 2003 until 2021. This includes the period before KCS took control of KCSM and Tex Mex, as well as the post-transaction period. The below chart shows that KCSR's and KCSM's rates, individually and on a consolidated basis, have actually risen less than UP's and BNSF's.

FIGURE 3 [16]{



B. Intermodal And Automotive Traffic Is Also Illustrative Of How KCS Has Not Foreclosed BNSF From the Mexican Marketplace

28. An examination of the intermodal and automotive traffic since KCS's acquisition of KCSM and Tex Mex also establishes that KCS has not foreclosed BNSF from use of the Laredo gateway. If anything, it is BNSF that can exercise its market power or adopt (or fail to

[16] Workpaper – HC – Average RPU 2003-2021.

adopt) operating practices to shift traffic away from a Tex Mex interchange at Robstown or Corpus Christi. I will use some specific shipper examples to illustrate my point, but the points I make are applicable to other shippers as well.

29. The first example involves multiple customers' traffic {[redacted]} that is originated and controlled by BNSF. It is my understanding that BNSF has a long-term exclusive contract with {[redacted]} so that if BNSF provides intermodal service to a point on BNSF's network, {[redacted]} is required to use BNSF to that location.

30. Since May 19, 2017, BNSF, KCSR, and KCSM have been parties to an Intermodal Service Agreement ("ISA") effective December 1, 2016.[17] The ISA provides the rates and service parameters for intermodal traffic through the Robstown interchange and into/out of Mexico. The agreement expired on December 31, 2021. Leading up to the expiration date, KCS was willing to extend that agreement under substantially similar terms and conditions for another five years. In contrast, BNSF would agree to another five-year term, but requested significant changes to the terms and conditions including insisting on a {{[redacted]}} clause. KCS was unwilling to accept those conditions because market conditions change over time and KCS does not enter into {{[redacted]}} clauses in the intermodal world.

31. Upon refusing to agree to BNSF's demands, in conversations, BNSF stated that it may switch its routings *with all customers* (not just {[redacted]} to favor its Eagle Pass gateway given they have a contract that would force {[redacted]} to switch to Eagle Pass and an FXE

[17] The existence of the Intermodal Service Agreement belies any notion that KCS is not interested in working with BNSF to facilitate a Robstown interchange and is using its ownership of Tex Mex and KCSM to "foreclose" efficient BNSF service to Laredo.

(KCSM's competitor in Mexico) routing.[18] {[redacted]} informed KCS that they preferred Laredo and the KCSM routing, but it would have no choice given its contract with BNSF.

32. Clearly, BNSF's intent is to imply a threat to switch all traffic subject to this contract to Eagle Pass and FXE. This shows that it is BNSF that possesses the market power to foreclose KCS routings, not the other way around. Due to the potential of KCS losing all of this traffic and KCSM losing a substantial amount as well (some of this traffic would have to eventually be switched to a KCSM destination, but KCSM would have lost the long haul), KCS and BNSF, at the urging of the customer, agreed to a one-year extension of the existing agreement with no material changes.[19] This preserved the BNSF/KCSR/KCSM routing through Laredo, at least for the near-term. The same discussion is already being undertaken for 2023.

33. Since signing the one-year extension, BNSF approached KCS to request through rates to Mexico from/to St. Paul, MN origin/destination be added to the Intermodal Service Agreement. After negotiations over the rates and divisions, KCS and BNSF were able to amend the one-year Intermodal Service Agreement covering multiple customers traffic to include St. Paul. Again, if KCS were attempting to foreclose BNSF from using the Robstown/Corpus interchange, it would have been uncooperative and would have refused to add St. Paul and instead taken the long-haul to Kansas City for itself. If KCS had requested too high of a division, BNSF would not have agreed to the arrangement. It is BNSF that can move this traffic to Eagle Pass and Brownsville. Unlike BNSF and UP, KCSR/Tex Mex's U.S. network only

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[18] BNSF made the same threat when Tex Mex attempted to raise its divisions to a compensatory level during the 2005 KCS/Tex Mex transaction, supra fn. 9.

[19] The Board predicted this outcome in the KCS/Tex Mex decision, at 17-18. ("Moreover, KCS's experts credibly explained that market conditions would prevent KCS from raising rates to shippers or foreclosing UP and BNSF from the Mexican market, because the later two carriers account for more than 90% of the rail traffic interchanged with TFM at Laredo, and it would be unprofitable for KCS to use its control of TFM to take actions that would foreclose this traffic.").

connects with the Mexican rail network via its link to KCSM at Laredo and Brownsville. As a result of BNSF's relationship with multiple customers, including {[redacted]}, and its ability to use other gateways and FXE, it is BNSF that has the market power with respect to this intermodal traffic. KCS has no ability to "foreclose" BNSF from such routings.

34. With respect to intermodal marketing companies, the evidence brought to my attention shows that any loss of Mexican cross-border business by BNSF was not due to actions undertaken by KCS, but rather changes in the types of equipment preferred by customers and by aggressive competition from UP. Prior to the KCSR/Tex Mex/KCSM transaction, BNSF/Tex Mex did have a significant amount of this business in competition with UP over the Laredo gateway. But after the KCSM/Tex Mex transaction, BNSF lost a significant amount of this business to UP. BNSF contends that this was due to the KCS post-transaction pricing policies. This is simply not true.

35. At the time, {[redacted]}, a U.S. Based intermodal shipper with offices in Mexico, used to have a long-term contract with BNSF and post-UP/SP merger would route {[redacted]} traffic via the BNSF/Tex Mex interchange and through Laredo. This service competed against UP. This BNSF/Tex Mex {[redacted]} service was part of and dependent upon the North American Container System ("NACS") box system. At the time, every Class I participated in the NACS program except UP. During this time, {[redacted]} also participated in the Equipment Management Pool ("EMP"), which was an interline pool arrangement and product started between UP and NS. EMP and NACS competed against each other. BNSF was not a part of EMP.

36. After the KCSR/Tex Mex/KCSM transaction, the NACS program was struggling and eventually, in 2006, BNSF leased almost all of its 53' NACS boxes to Swift Intermodal and a

few years later, NACS was dissolved. At this time, BNSF began to partner with asset owners (as compared to pool arrangements) like {[redacted].} In the 2009 time period {[redacted]} decided to transition all of its western carrier business to UP, including its Mexico business. I believe this was largely due to the dissolution of the NACS program. BNSF's loss of traffic was not related to KCS pricing BNSF out of the market, but due to its prior dependence upon NACS, the type and ownership of the boxes, and BNSF's shift to asset-based customers. I do not believe this was the result of KCS or KCSM pricing.

37. Contrary to the notion that KCS seeks to foreclose BNSF business, KCS works with BNSF today, as it has in the past, to provide a competitive KCS/BNSF routing to that of UP for automotive traffic. For example, currently, KCS works with {[redacted]} to provide a joint BNSF/KCSR/KCSM routing through Laredo for northbound automotive traffic out of {[redacted]'} Mexican plant. This is an example of how BNSF and KCS do continue to work together to route traffic through the Laredo gateway. KCS has no desire to "foreclose" such a routing option for {[redacted]} by charging a high KCSR division or by charging high KCSM rates. Either such action would reduce KCS's revenues – an action that would not be economical for either KCSM or KCSR. If KCS took such an action, {[redacted]} would simply shift its routings to a KCSM/FXE/BNSF routing through Eagle Pass. This is something KCS would not want to see as it would result in KCSM getting only a short-haul and an overall loss of revenue.

38. KCS's current interchange arrangements with BNSF at Robstown can only accommodate unit train traffic. KCSM gives the train to KCSR at Laredo, and KCSR in turn takes the unit train and eventually interchanges it at Robstown to BNSF via a mainline step on/step off interchange operation. There are no tracks available at Robstown to facilitate the interchange of less-than-unit-train traffic, so-called manifest traffic. Such an interchange of

manifest traffic would require yard or sidetracks necessary to store cars and build trains, which do not exist at the Robstown interchange with BNSF.

39. Recently, {[redacted]} and BNSF approached KCS about amending the existing contract to quote a rate for a Robstown interchange for {[redacted]} manifest traffic, not unit train traffic. Because adding revenue for such additional traffic is in KCS's economic interests (and incidentally also mindful of its obligations under the KCS/Tex Mex/KCSM decision to keep Robstown interchange open on commercially reasonable terms), KCS has quoted such a rate to {[redacted]} and is working with BNSF on developing an operating plan. Given there are no interchange tracks at Robstown for accommodating a manifest interchange, KCS is working with BNSF to develop a plan to bring such northbound manifest traffic to Corpus Christi.

40. The point of the above discussion is to disprove the notion that KCS has no interest in developing Laredo interchange traffic with BNSF through a Robstown interchange. Nothing could be further from the truth. Indeed, between KCSM-served terminals in Mexico and BNSF-served terminals in Texas and the West. KCS and BNSF negotiated interline rates covering joint-line KCS-BNSF intermodal services via the Laredo gateway in {[redacted]} different origin-destination lanes. KCS welcomes such traffic.[20] It is in KCS's self-interest to work with BNSF to provide a joint routing that would compete with UP. Indeed, the KCS/BNSF cross-border traffic in competition with UP has been a remarkable success, as the below chart shows. Since 2016, when the new partnership was announced, revenues have grown substantially.

[20] It is important to note that over 80% of KCS's shipments originate on the rail line of other Class I carriers.

FIGURE 4[21]



41. This self-interest will not change with the CP/KCS transaction. The only change will be that there will now be a new single-line option for shippers, especially Chicago and Detroit/Eastern Canada shippers, to move traffic to/from Mexico via Laredo. This is not foreclosing BNSF routings, but rather, the transaction will enhance competition by providing new options for shippers. To the extent a combined CP/KCS cannot provide an efficient single-line option that shippers prefer, it remains in CP/KCS's self-interest to work with BNSF to continue to provide shippers with options, especially in those origins and destinations that are served only by UP and BNSF.

[21] Workpaper – C – BNSF- KCS Cross Border Intermodal Offering.

C. Energy Is Another Commodity That Illustrates How KCS Has Not Foreclosed BNSF From the Mexican Marketplace

42. Another example of how KCS is not foreclosing BNSF is to examine the petroleum and energy products markets. BNSF's witness, Mr. Hirsch, notes that BNSF obtains business only where KCS does not serve the origin or where the movement is part of a larger contract where KCS does not serve some origins. The insinuation is of course that KCS is somehow foreclosing BNSF from opportunities. In his verified statement, Mr. Hirsch does not point to any specific customer rate quote, routing, or O/D pair establishing that it is the KCS division that is "too high" or "commercially unreasonable" that is prohibiting BNSF from competing. His argument is simply BNSF cannot compete and cannot win the traffic. Apparently, in his view, it cannot be BNSF's division that is too high, but rather, if BNSF loses the traffic, it is because KCS is "foreclosing" BNSF from competing.

43. An examination of the actual specific markets and customers for the energy market from the Gulf region to Mexico shows that KCS is winning the traffic due to its customer relationships, its service, its efficient routings, and its single-line rates. KCS is not forcing a Gulf Coast energy customer to use a KCS single-line route at a higher rate and less efficient routing because it was pricing the division over the Tex Mex rail lines at commercially unreasonable rates, but rather the customer is choosing KCS. And where KCS cannot provide a more efficient route or rate, KCS will work with BNSF to provide that customer with additional routing options.

44. One relevant example is traffic to/from Jefferson Energy Terminal, which is a public-private partnership between the Port of Beaumont Navigation District of Jefferson County, Texas and Jefferson Energy Companies located in Beaumont, Texas, which is owned by Fortress Investment Group LLC (certainly no stranger to the rail industry). In December 2017, and with logistics support from Jefferson, ExxonMobil became the first company to provide an

integrated product offering along the entire fuels value chain in Mexico. Unit trains of gasoline and diesel delivered to Central Mexican markets originated at the Jefferson Energy Terminal. The unit train loading was done under an agreement with ExxonMobil. These volumes originated at Jefferson Energy Terminal and were safely delivered through destination terminals in San Luis Potosi, Mexico and San Jose Iturbide, Mexico to retail gasoline stations in the Bajio region of Mexico. Jefferson Energy Terminal is served by UP, BNSF, and KCS. ExxonMobil received bids from all three railroads. KCS won the bid and handled the entire movement. In addition, until recently, ExxonMobil also originated traffic at loading facilities located on the Port Terminal Railroad Association (PTRA) shortline at the Port of Houston. All three carriers have had access to PTRA (in KCS's case only for traffic to/from Mexico and other points on Tex Mex's original Corpus Christi-Laredo mainline). BNSF was able to receive traffic from PTRA and move it to the border at Brownsville, to Laredo through Robstown interchange, or to Eagle Pass or El Paso, which are not KCS served.

45. The market and subsequent increase in rail traffic became possible due to changes to the Mexican Constitution that allowed for the importation of refined commodities into Mexico and commercialization of Mexico's gasoline and diesel markets. As a result of those changes, ExxonMobil tapped several of its existing relationships to develop a retail-based strategy that brought energy products to Mexico from the Gulf region. ExxonMobil's strategy focused on the eastern part of Mexico as its refinery base in Beaumont and Houston is aligned well to that geography, which corresponds with KCSM's existing rail infrastructure and KCS's connection to the Gulf region. Conversely, Valero, another large exporter of refined product to Mexico has primarily focused on markets in Western Mexico due to the locations of its refinery base, which are oriented further west. While BNSF, KCS, and UP all serve Jefferson Energy Terminal, one

of ExxonMobil's major Gulf fuel terminals, ExxonMobil, contracted with KCS to take advantage of the KCSM infrastructure and pricing offered by a single KCS/KCSM routing that matched ExxonMobil's commercial strategy.

46. ExxonMobil has made no allegations that KCS was pricing the KCSR portion of a BNSF routing at a commercially unreasonable rate or that KCS was otherwise using its control of KCSM to force a KCS routing in preference to a UP move, nor could it given that KCSM has to give the same rate for the Mexico portion of the move to UP, BNSF, and KCS. Indeed, under its contract, ExxonMobil has the option to use the UP single-line rate to Laredo and at Laredo KCSM must charge the same rate as it charges KCSR.[22] In fact, KCSM does receive both UP and KCSR ExxonMobil traffic at Laredo. The simple fact is that ExxonMobil awarded the business to KCS given the single-line nature of KCS's move, KCS's service focus, and KCS's willingness to undertake a long-term partnership with ExxonMobil. The relationship continues to this day, and to the extent ExxonMobil prefers KCS, or use KCS for related or similar moves, it is because of KCS's relationship with ExxonMobil, not because KCS is using market power to force ExxonMobil to use the KCS rail system.

47. The same is true with respect to other Gulf Coast energy customers. Where it is more efficient to move traffic over a single-line rail network, customers will do so. If the customer prefers a joint-line move, or a joint-line move is more efficient, that is the way the traffic will move. For example, the Entergy coal fired electric plant in Lake Charles, Louisiana, is served by UP, KCS, and BNSF. Both UP and BN serve the coal origins and the destination

[22] To underline the competitive nature of the marketplace, ExxonMobil recently solicited bids from UP, BNSF, and KCS for various lanes of traffic, including both FXE and KCSM routings. ExxonMobil chose a UP/FXE routing over the BNSF/FXE routing for traffic to the west and chose KCS/KCSM for traffic to the Gulf and the Southeast. There was no allegation from ExxonMobil that KCS was manipulating the rates to disfavor a BNSF/KCSM routing.

and can provide single-line service. KCS can only serve the destination. KCS must interchange coal with either UP or BNSF to complete the route. In the past, KCS was able to provide routings, service, and divisions requirements that allowed for competitive joint-line service via UP/KCS or BNSF/KCS. However, in the two most recent rounds of bidding, the customer selected a single-line service over a joint-line move, even though KCS offered the same division to both UP and BNSF for a Kansas City interchange. KCS is certainly not contending, as BNSF seems to do here, that because it lost the traffic, BNSF or UP must have "foreclosed" a KCS routing option. Rather, KCS understands that the customer chooses the routes and rates, and, generally, a single-line option can be more competitive than a joint-line option and that KCS can only price its division so low before it drops below its costs.

48. As noted above, sometimes joint-line routes and rates can win the traffic vis-à-vis a single-line rate, as KCS did for some time for the Entergy business. It just depends upon what division a connecting carrier is willing to take. In the existing situation, BNSF simply refuses to lower its division, even if doing so would win the business for the joint line move. Therefore, it is not KCS who is foreclosing BNSF's routings, but rather BNSF's refusal to lower its division to take less profit that underlies BNSF inability to complete against KCS.

49. The principle that carriers can find it in their economic interest to accept a lower division is illustrated by BNSF's and KCS's cooperation to serve the Luminant Martin Lake coal fired electric plant located in Tatum, TX. This facility can be directly served by BNSF origins in the Powder River Basin for subbituminous coal. However, despite BNSF's ability to serve the plant in single-line service from origin to destination, the most efficient route is through a BNSF/KCSR interchange at Kansas City. KCSR then moves the traffic to Shreveport, Louisiana, where it is interchanged back to BNSF for delivery at destination. The traffic has

moved this way for years. KCS is willing to offer a division that facilitates the customer's desire for the most efficient route and to avoid losing the business to a BNSF single line move.

50. KCS and BNSF will also work together to develop joint-line alternatives to UP single-line service for Gulf Coast energy moves as well, and I see no reason why that will change under a merge CP/KCS. A fact that BNSF admits with respect to intermodal and automotive traffic but is also true with respect to Gulf Coast energy products. For example, KCS has worked with BNSF to gain some liquified petroleum gas (LPG) business coming out of Mont Belvieu, Texas origins. The origin of Mont Belvieu, Texas has multiple terminals: Targa Transport and Enterprise Products. These terminals are served at origin by both UP and BNSF. Over the past year, working together, KCS and BNSF, via an interchange at Corpus Christi where BNSF gives the traffic to KCSR, were able to compete with UP direct to Laredo, Texas. The point of this is that we try to work together so that BNSF and KCS can be competitive. [23]

51. The overarching theme of the above discussion with respect to grain, intermodal, automotive, and the energy business is that at those locations where UP and BNSF compete, KCS does, and is more than willing, to work with BNSF or any other carrier to provide a competitive route and rate to Laredo, Texas. But BNSF is not always willing to work with KCS, preferring instead to favor its own single-line haul to Eagle Pass, even if that route is less efficient than the BNSF/KCS route. The same goes with those locations solely served by BNSF where the most efficient route is through Laredo, Texas via a KCSR Robstown interchange. KCS would strongly prefer to move this traffic over the Laredo Gateway and onto KCSM. It is

[23] For example, in 2021, BNSF/KCS moved 853 tank cars to the Laredo interchange, which is almost double from 2020. In fact, our records indicate that the BNSF/KCSR volumes from those origins exceeded the UP Laredo volumes by 70 percent in 2021. KCS is certainly not trying to "foreclose" BNSF business and it would not be in the economic interests of a merged CP/KCS to forego any such BNSF traffic.

in KCS's self-interest to do so. But clearly, BNSF prefers its own single line move to Eagle Pass and for interchange with FXE. Likewise, at those locations where BNSF and KCS compete, to the extent KCS does win the business, it is because the KCS single-line route and rate to Laredo, Texas is chosen by the customer.

52. To the extent BNSF claims it cannot compete because KCS is "foreclosing" a BNSF routing to Laredo, Texas that is simply not borne out by the facts. BNSF has not pointed to a single customer or single bid situation where the KCSR rate for a Robstown interchange was "commercially unreasonable" or was so high as to foreclose a more efficient BNSF routing so that the customer was forced to use a less efficient KCS routing. KCSR's division requirements for BNSF moves barely cover its URCS costs. Clearly something else is at play. That something else may be BNSF's desire to keep its division requirement to the Robstown interchange at levels that discourage use of the Laredo gateway and favor Eagle Pass, even if Laredo might be more efficient. Unfortunately, when it comes to a Robstown interchange, BNSF simply refuses to lower its division requirements so that a BNSF/KCS routing can work. Instead, choosing to maintain its rates at levels that ensure BNSF makes it contribution thresholds. In this sense, it is BNSF who is foreclosing KCS, not the other way around.

53. The Board should reject BNSF's self-serving arguments (and UP's similar arguments) that KCS is using its control of KCSM and Tex Mex to force customers to use inefficient and expensive KCS routings at the expense of more efficient BNSF and UP routings. KCS has not (as shown above), will not (CP and KCS have agreed to abide by the commitments set out in the KCS/Tex Mex/KCSM decision), and cannot (due to the lack of market power and BNSF's and UP's abilities to use other gateways) use its control of KCSM or Tex Mex, or even KCSR, to force customers to use KCS at commercially unreasonable divisions or to force less

efficient routings. There are no customers saying that we have or could do so. It is simply our competitors making these claims. As such, there is no basis to grant any of the conditions requested by BNSF or UP.

III. UP'S SIMILAR FORECLOSURE THEORY IS NOT SUPPORTED BY PAST PRACTICE AND IGNORES MARKET REALITIES

54. Like BNSF, UP argues that a combined CP/KCS will have both the incentive and ability to foreclose competition through the Laredo gateway. UP asks for conditions that require CP/KCS to provide mileage prorated rates in certain circumstances. UP also asks that CP/KCS not only be required to abide by the commitments made by KCS in the KCS/KCSM transaction, but that UP be granted access to the second Laredo, Texas international rail bridge that KCS is building solely with private KCS dollars.

55. UP's theory is premised on the notion that CP/KCS will have the ability and incentive to foreclose UP (and BNSF) through manipulation of U.S./Mexico rates as well as degradation of service and operations to force traffic from UP (and others) to CPKC. While I will leave it to the economists to debate the various economic theories, UP's comments, like those of BNSF, fundamentally misunderstand, or misrepresent, the realities of cross-border movements. Indeed, they are identical to the very same arguments that UP raised when KCS was acquiring KCSM and Tex Mex. UP argued then, as it does now (except this time it is with respect to CP rather than just KCS), that KCS (now CPKC) would use its control of Tex Mex and KCSM to raise KCSM's or Tex Mex's divisions to disadvantage UP-KCSM or BNSF-Tex Mex-KCSM routings and thus force shippers to use a less efficient CPKC routes

56. In reading the Board's decision in KCS/KCSM, I note that these issues were thoroughly reviewed and debated in the KCS/KCSM transaction and were rejected, as the Board should do again. There, the Board said:

> **"[**I]f KCS tried to raise rates on TFM movements that are not rail dependent, the traffic would shift to motor or water carriage. And on TFM movements that are rail dependent, if for some reason TFM is not presently extracting monopoly rents, then the connecting carrier within the United States could be doing so. Therefore, UP's argument seeks to protect the U.S. carrier's leverage regarding divisions of joint rates (that is, concerns over how the interline rail partners will divide the profit), not to protect shippers. KCS-22 (filed Oct. 15, 2004) at 37-38. Moreover, KCS's experts credibly explained that market conditions would prevent KCS from raising rates to shippers or foreclosing UP and BNSF from the Mexican market, because the latter two carriers account for more than 90 percent of the rail traffic interchanged with TFM at Laredo, and it would be unprofitable for KCS to use its control of TFM to take actions that would foreclose this traffic."

KCS/Tex Mex Decision at 17-18.

57. I believe the Board had it 100 percent correct. One only needs to review the automotive market as proof of the Board's findings. On the automotive side, 17 years later and notwithstanding UP's arguments that KCS was going to foreclose UP's routings, {{[redacted]}} of KCS's automotive business that originates in Mexico interchanges with UP at Laredo or BNSF at Robstown. Only {{[redacted]}} moves single line on KCS that KCS interchanges with CP or CN for Canada destinations. In the First Quarter of 2022, KCSM originated {{[redacted]}} automotive loads. {{[redacted]}} of those were interchanged to UP at Laredo, {{[redacted]}} with BNSF at Robstown, and {{[redacted]}} stayed on KCS for interchange to CP or CN. Yet, as it did before, UP and BNSF argue the same old vertical foreclosure arguments.

58. Over the past 12 months, the story is similar for intermodal traffic. Currently, there are four competing routes to/from Chicago for intermodal traffic: BNSF Chicago to/from Mexico with interchange at Robstown with KCSR; UP Chicago to/from Mexico with interchange at Laredo; KCS/CP Chicago to/from Mexico with interchange in Kansas City; and KCS/CN with interchange at Jackson. Over the past 12 months, the BNSF route totaled {{[redacted]}}. This does not count the fact that BNSF also has a routing via

El Paso and FXE. For the UP route, UP carloads totaled {{[redacted]}}. The KCS/CP route included a few test loads.

59. Clearly, what UP and BNSF are afraid of is not that CP/KCS will foreclose them, but rather that a combined CP/KCS may actually be able to provide a low-cost, efficient single-line alternative to UP's and BNSF's continued dominance for a select portion of U.S./Mexico automotive traffic. Indeed, if KCS had the ability to foreclose UP and BNSF routings, it would already be doing so. But KCS doesn't have this ability and neither will CP/KCS.

60. There are several reasons grounded in marketplace realities why KCS cannot foreclose UP and BNSF today (and could not over the past 17 years). Both UP and BNSF have the choice to use five different gateways into and out of Mexico and the choice to use FXE as an alternative to KCSM. Those gateways and the serving railroads are: Brownsville (KCSM), Laredo (KCSM), El Paso (FXE), Eagle Pass (FXE), and San Diego (FXE). CP/KCS will only have Laredo. If CP/KCS tried to undertake the foreclosure theory advanced by UP, UP and BNSF would simply shift gateways. BNSF has already used this competitive alternative, and although BNSF claims this is due to KCS foreclosure, as the above discussion on BNSF delineates, BNSF has made a deliberate choice to maintain high divisions and refuses to drop its division requirements below its targeted profit levels, while KCSR's division barely covers costs.

61. Other market factors also come into play. Shippers to and from Mexico may have multiple options. Trucks, ships, and air cargo all serve Mexico. Further, some shippers may have access to specialized transport such as the rail ferry from Mobile, Alabama to Coatzacoalcos, VL, Mexico, or short sea shipping of vehicles. Both UP and BNSF have long term relationships (many exclusive) with numerous automotive, intermodal marketing companies, trucking companies, third-party logistic providers, and large customers. KCS cannot

today, and CP/KCS will not be able to in the future, simply raise KCSM's division to force these shippers to use a CP/KCS system. Undertaking such a strategy risks losing traffic to other UP and BNSF routes, especially where such traffic is exclusive to UP and BNSF or served by both UP and BNSF, and/or to trucking.[24] It would also not be in CP/KCS's economic interests. UP and BNSF both serve origins and destinations that are not served by either CP or KCS. Why, given the alleged "aggressive synergy and growth predictions" would the combined CP/KCS risk losing the KCSM revenue? It would not. It is to CP/KCS's economic interest to feed as much traffic over KCSM as possible. Thinking that a combined CP/KCS would make up lost BNSF and UP revenues on just CP/KCS moves is not grounded in market realities.

62. UP's theory also ignores the Mexican regulations. Mexican regulations require KCSM to offer a Rule 11 rate to/from Laredo that is the same for similarly situated customers, and for each customer, KCSM cannot discriminate between a UP, BNSF, or KCS interchange at Laredo by offering different rates. The Rule 11 rates must be the same even if the customer or connecting carrier does not have visibility into the KCSM rate. KCS would be violating Mexican law if it did not issue rates in this manner. At those locations that theoretically could be served by UP, BNSF, and CP/KCS, if KCSM were to seek a commercially unreasonable division, i.e., a monopoly price, KCSM would also have to quote the same elevated KCSM rate for all the KCSM-UP traffic that CPKC had no hope of competing for. CPKC would have nothing to gain from such a strategy, and everything to lose – as that traffic could shift to another gateway, may shift to trucks, or may dry up altogether because of an above-market KCSM rate.

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[24] In 2021, trucks carried the bulk of freight passing through Laredo followed by rail. In 2021, truck's (loaded and empty) moved 2,568,471 containers through Laredo. In the same period, rail moved 508,192 containers through Laredo. https://explore.dot.gov/views/BorderCrossingData/Annual?%3Aembed=y&%3AisGuestRedirectFromVizportal=y . Clearly trucks provide the real competitive alternative, and any market analysis should not focus on rail vs. rail but rather be inclusive of trucking.

63. If such a commercially unreasonable rate made a UP/KCSM or BNSF/KCSR/KCSM routing too expensive, the customer would simply switch to other gateways or other transportation modes. And to the extent the customer does switch, this again would cause a loss of overall revenue to KCS as customers choose other UP or BNSF routings or switch to other transportation modes. Such customers are not "captive" to CP/KCS so as to be forced to use the CP/KCS system at monopoly rates. The customer would only use the CP/KCS single-line rate, as opposed to using UP, BNSF, or another transportation mode, if doing so produced an overall lower price, including the alleged elevated KCSM division. In that case, there is actually no harm to the customer.

64. UP's and BNSF's arguments also ignore the realities of the marketplace with respect to how pricing for cross-border traffic really works. Due to Mexican regulations, whether the shipper is seeking a Rule 11 rate to/from Laredo or a U.S./Mexico through rate, KCS must provide the shipper (or interline partner in the case of through rates) with the same KCSM rate or factor regardless of the interline partner. KCS cannot also provide itself with a lower KCSM rate. Thus, when a shipper is the negotiating party, it (not KCS) seeks Rule 11 rates and deal directly with each carrier for each individual leg. These rates are confidential to the shipper giving the shipper both transparency into all competitive options and the negotiating ability to select the route and pricing that best matches its needs. The shipper is free to compare rates and negotiate with each individual for better rates, service conditions, or other benefits. The tradeoff is the time and effort required to negotiate with multiple carriers.

65. With respect to through rates, they are negotiated between the shipper and one railroad, usually the originating carrier. The shipper seeks competitive total prices for a movement. The originating carrier and interline partners will negotiate the divisions and other

conditions among partners. A shipper could request a through rate using the same originating carrier and different interline partners. If a shipper requests a price decrease or other conditions, the carriers negotiate among themselves on how to respond. That may include developing counterproposals, renegotiated divisions splits, or other cost sharing divisions. As with any price negotiations, an interline partner can refuse to lower its divisions. The risk is, of course, lost business for one or more carriers.

66. The rate process is thus an iterative process and usually includes multiple rounds of discussion with the customer, or for through rates, with the negotiating carrier. Rate quotes are multidimensional and consider a variety of factors, such as volume, margin, cost, asset utilization, growth strategy, cycle times, route length and time, power needs, peak/off-peak needs, specific service conditions, equipment needs, multi-year or multi-lane agreements.

67. The point is that KCS does not, and will not, have the power to dictate rates or to foreclose UP or BNSF options. It is ultimately the customer that selects the rate and the route. For example, recently, KCS renegotiated a major contract with a large company for all cross-border movements carried by KCSM. The same rates applied regardless of the interchange partner. This negotiation went through multiple rounds and was competitive. In response to both outside factors and aggressive pricing by FXE, KCS modified its commercial strategy, again for all KCSM movements regardless of interchange partner, to retain the business. The customer separately negotiated with KCS and UP for the U.S.-side of the movements after interchange with KCSM at Laredo. In the end, because the customer has the option of using UP, BNSF, and KCS, and the option to use other gateways, KCS cannot exercise market power. Indeed, in the above example, KCS lost some volume because the UP/FXE route better aligned with the customer's business needs. There is nothing in the merger that will change this process.

68. The final factor that prevents KCS from engaging in any foreclosure strategy and will also prevent CP/KCS from doing so, is the fact that the shippers have both a regulatory remedy at the STB and a private remedy to arbitrate any rate dispute via the NITL Agreement. In KCS/TFM, KCS offered, and the Board imposed, five commitments/pledges on KCS. One of those pledges was to keep the Laredo gateway open on commercially reasonable terms for customers that desire to use BNSF and UP routings. The NITL Agreement also contains that condition and contains an arbitration provision as well. The NITL Agreement also involves Mexico pricing issues. In the 17 years since KCS took control of Tex Mex and KCSM, not one shipper has complained that KCS was not abiding by its commitments, nor has any shipper invoked the NITL Agreement. I don't see that changing. Indeed, CP has agreed to abide by all the KCS/TFM commitments. In addition, CP has committed to additional conditions, such as bottleneck pricing and the right to challenge bottleneck rates, which such conditions further protect cross-border shippers. Shippers will thus have transparency in the rates and will know whether such a rate is "commercially unreasonable."

69. In conclusion, all of the aforementioned factors discussed above will prevent CP/KCS from exercising any form of foreclosure: UP's and BNSF's abilities to use other gateways and FXE; the strong competition provided by other modes of transportation; UP's and BNSF's relationships (many, exclusive) with customers; the scope of the Mexican anti-discriminatory pricing laws and regulations; the dynamics of cross-border pricing; and KCS's commitments made in the KCS/TFM decision, which commitments CP has agreed to comply with and actually expanded upon, will not change as a result of the CP/KCS transaction. The only difference will be that a combined CPKC will be able to provide shippers with a stronger single-line competitor. In my opinion, there is no competitive harm due to the CP/KCS

transaction. UP's and BNSF's concerns are just concerns over divisions and rate factors couched in the form of concerns over shipper rates. As the Board did before with respect to KCS/TFM, given all of the above, there is no basis for imposing either a mileage pro-rate (I discuss below the problems with a mileage pro-rate system) or for granting UP access to KCS's second Laredo Bridge span, which is being built solely with KCS funds and is not covered by the existing agreements or decisions regarding the existing Laredo Bridge. Whether UP is granted access to the second privately funded Laredo bridge should be at the discretion of CPKC on terms that are operationally efficient and economical to CPKC. If it is efficient and economical to provide UP with access to the second span, the parties will negotiate those terms. The merger of CP and KCS has no bearing on the terms of the bridge access by UP nor does the merger create any competitive problems that would justify granting UP access over the new span.

IV. THE MILEAGE PRO-RATE RATE SETTING MECHANISM PROPOSED BY UP, BNSF, AND OTHERS WOULD ADVANTAGE THE LARGER CLASS 1 CARRIERS AND HARM COMPETITION

70. The mileage pro-rate mechanism proposed by UP, BNSF and others is a rather transparent attempt to thwart effective competition from CP/KCS. Billed as a "concrete" standard to enforce open gateway commitments, the mechanism would only constrain CP/KCS's ability to price competitively. The mechanism seeks to shift money to the pockets of UP, BNSF, and others at the expense of competition in general, as well as away from CP/KCS shippers who would benefit from lower single-line rates that the price mechanism would prohibit.

71. The proposed mechanism fails to account for how prices are set and the market economics that underlie those pricing decisions. Instead, it would constrain CPKC to rigid parameters divorced from the market factors that influence rate setting. The result undermines CP/KCS's ability to price competitively, innovate, and invest while protecting UP and BNSF's ability to price freely. In a perverse outcome, the mechanism may actually incentivize CP/KCS

to raise prices in order to maintain minimum revenues, while BNSF, UP, and others, reap the windfall.

72. I understand other witnesses will address the mileage pro-rate condition from an in-depth economics and future-looking CP/KCS perspective, but I will provide some background on how the proposed mileage pro-rate mechanism fails to consider pragmatic pricing concerns using current KCS/KCSM operations and the effects of this failure on a market-based pricing approach.

A. The Mileage Pro-Rate Mechanism Does Not Reflect The Real World Or Market Economics

73. Both UP and BNSF attempt to frame the mileage pro-rate mechanism as a "concrete" method to enforce Applicants' promise to keep gateways open on "commercially reasonable" terms. Both complain that "commercially reasonable terms" lacks a defined "check the box" like standard. Both dismiss the common sense (and prior Board-accepted explanations) by Applicants, their witnesses, and their attorneys that "commercially reasonable terms" is a context-specific determination. That is because all pricing decisions are context-specific and dependent on the interplay of a variety of factors, such as market conditions, regulatory requirements, volumes, overall business strategy, cost, special requirements, resource use, and asset availability.

74. Although the promise to provide commercially reasonable terms has been approved by the Board and successfully implemented in prior transactions, including the Laredo gateway at issue here, UP and BNSF seek to advantage themselves by asking the Board to go further and to define commercial reasonableness in a way that constrains CP/KCS and favors them. Specifically, UP suggests that "when a customer asks CP/KCS to provide rates for (i) CP/KCS service on only former-CP, former-KCS, and/or former-KCSM portions of an origin-to-

destination route, and (ii) CP/KCS "single line" service on a "competitive" route, CP/KCS must provide the customer with a Rule 11 rate for the former-CP, former-KCS, or former-KCSM portions that reflects a mileage-based prorate of the rate provided for the CP/KCS single-line service."[25]

75. BNSF proposes essentially the same mechanism but calls this concept a proportional rate.[26]

> "As explained by Dr. Reishus, the basic concept of such a proportional rate is that the railroad with the long-haul, single-line route (here, CP-KCS) must charge a rate for the sole-served portion of that single-line route (here, Mexico) that is proportional to the through rate it charges for single-line service based on the length of haul of the sole-served portion of the route (here, Mexico to a CP-KCS location). (*See* V.S. Reishus 49-50). Specifically, the through revenue for actual long-haul single-line movements provided recently by the single-line carrier should be calculated on a per ton mile basis, on metrics such as commodity and car type, over the single-line route. That per-ton mile factor should then be applied to the mileage of the movement on the sole served portion of the route (here, Mexico) to create a proportional rate."[27]

76. Although those parties make a mileage pro-rate sound simple – "CP/KCS would simply calculate its mileage-based share"[28] – the mechanism does not reflect the real world or market economics of railroad pricing. One problem with this proportional rate is obvious on its face: CP/KCS is prohibited from realizing the efficiencies of single-line service. Single-line and interline moves have different characteristics, including different cost structures that result from handlings and efficiencies in single-line movement.

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[25] Union Pacific Railroad Company's Comments and Requests for Conditions (filed Feb. 28, 2022) at 9.

[26] BNSF Comments and Requests for Conditions (filed Feb. 28, 2022) at 46.

[27] BNSF Comments and Requests for Conditions (filed Feb. 28, 2022) at n. 20.

[28] Verified Statement of Kenny Rocker and John Turner (filed Feb. 28, 2022) at 20.

77. The mechanism also disrupts normal interline division practice. Interline divisions do not adhere to a strict mileage prorate allocation of revenues between carriers. Rather, in the real world, revenue allocations between rail carriers participating in an interline movement depend on many things, including market conditions, resource availability, and relative costs. Interline partners may agree to reduce their divisions or agree on weighted cost sharing to secure a particular contract or develop business on a particular new route. Such divisions are negotiated based upon market forces and are not formulaic in nature.[29]

78. Such a mechanism inhibits CP/KCS's ability to price competitively because it ignores the numerous factors impacting interline rates. Pricing is a dynamic process based on a multitude of factors. For example, length of haul is a major consideration in pricing as the economics of how costs and revenue are weighted are different for short versus long haul. Longer hauls allow railroads to spread their costs out per mile whereas shorter hauls may have higher costs per mile and thus require more revenue per mile to make economic sense.

79. UP and BNSF both know that interline rates are not set on mileage-based proration and that rates are market dependent. The Verified Statement of Mr. Kenny Rocker does not say that UP prices this way because UP does not do so. Similarly, none of BNSF's verified statements say that BNSF prices based on mileage prorates, because it does not do so. They do not price this way because it does not make economic sense and does not reflect market conditions.

80. Further, the mileage pro-rate mechanism does not account for non-price factors that may be part of a price negotiation and ultimate differences in a single-line quote versus

[29] For example, KCS has agreed in the past to a take a shorter haul in an interchange partnership where its interline partner agreed to provide the customer locomotives and took on the higher power costs.

interline quote, such as additional service conditions, time commitments, volume commitments, switching location, equipment or assets usage, risk allocation, or added premiums. Nor does the mileage pro-rate mechanism account for the fact that the way prices are negotiated may account for differences in the ultimate contract term. Rule 11 rates are negotiated directly with the shipper and the ultimate considerations may be different (such as price per car, service conditions, cycle time) than when negotiating with an interline partner (such as revenue divisions, power and equipment, or switching location).

81. Finally, if a shipper is concerned that the interline quote is not commercially reasonable, the shipper is able to test its concerns by asking KCSM for a Rule 11 rate from the origin to the U.S. interchange point and by asking CPKC for a Rule 11 rate from the interchange point to the destination or the interchange point with the next interchange carrier, as applicable. These Rule 11 rates can be compared to the combined interline through-rate to determine whether the through-rate being quoted is commercially reasonable.

B. The Mileage Pro-Rate Mechanism Would Prevent CP/KCS from Pricing Competitively and Would Only Benefit UP And BNSF

82. The mileage prorate mechanism would be particularly distorting as applied to U.S.-Mexico traffic, because KCSM must and does abide by Mexican regulations, which prohibit price discrimination. The mileage pro-rate mechanism would prohibit KCS from passing on any cost savings from a single-line route unless it gives UP, BNSF, and others the same discount. This point bears repeating. To my knowledge, in no other situation have I heard of a pricing restriction that requires one railroad to subsidize its competition at that railroad's expense. This is a one-way street. There is no reciprocity. BNSF and UP do not have to reduce rates to shippers nor do they pass any discounts to KCS in any circumstance. If KCS cannot account for some of the competitively negotiated single-line or longer haul rates in the overall

CP/KCS/KCSM rate, then CP/KCS cannot price competitively nor pass along the benefits of single-line service to shippers.

83. Moreover, a mileage prorate mechanism would inhibit competition from new CP/KCS single-line services. With new single-line services, CP/KCS will be even more competitive with UP and BNSF in many lanes. Merger synergies will allow CP/KCS to compete hard for business, including on rates. To do that, however, CP/KCS will need flexibility in the face of market conditions, the precise opposite of the proposed conditions. A mileage prorate is intended by our future competitors to prevent us from bringing that competition to the market.

84. The condition also does not benefit shippers, but rather the interline railroads. If the condition is imposed, CPKC would have incentives to either (a) not pass on to shippers the lower rates generated by the cost efficiencies in providing a single-line rate; or (b) if CP/KCS did offer a lower single-line rate, those savings would have to be passed on to BNSF, UP, and others in the form of a mileage pro-rate that would not be passed onto shippers, but rather allow the carriers to absorb those savings while the shipper retains the higher costs associated with interline service.

85. For example, assume the KCSM-UP rate today is $3,000, with KCSM collecting $1,200 and UP collecting $1,800. KCSM's share of the miles is one-third while UP's is two-thirds, but KCSM's costs are higher for this move.[30] In the post-merger world, since CP/KCS knew $3,000 would move the traffic, CP/KCS could offer the same $3,000 as UP. But with the mileage pro-rate mechanism, KCSM's rate would be capped at $1,000 (33 percent of the miles

[30] Rail service in Mexico may require additional costs that UP does not incur in the United States, such as increased security, historically high fuel costs, and regulatory impositions such as taxes and concession fees. KCS has also had the incentive to invest in and develop Mexico-specific service options, such as proprietary seal tracking to enhance security, which it has made available to U.S. interline partners without their investment for KCS to maintain secure transport in Mexico.

times the rate of $3,000). Under Mexican law, KCSM must charge $1,000 to KCS and UP. It cannot discriminate. So, under the mileage pro-rate system, UP could charge the same $3,000 that it does today and pocket $200 more in revenue. The mileage pro-rate has not benefitted any party other than UP. The mileage pro-rate has simply shifted revenue from the pocket of KCSM to UP without any benefit to the shipper.

86. Let's say, however, that CP/KCS wants to offer a lower single-line rate than the $3,000 charged to the shipper today. CP/KCS offers a rate at a 20 percent discount -- $2,400. Under that scenario, KCSM's rate would be capped at $800 (a mileage pro-rate of 1/3 the miles times the rate of $2,400). UP can match the $2,400 CP/KCS single-line rate but still earn $1600 because CP/KCS has in effect subsidized UP. KCSM would receive $400 less than what KCSM had been receiving but UP only receives $200 less. While the shipper may benefit in that scenario in the form of an overall lower rate, that lower rate comes not at UP's expense, but rather at CP/KCS's expense. The mileage pro-rate system thus creates the perverse incentive of not encouraging CP/KCS to offer lower single-line rates. All the mileage pro-rate mechanism does is benefit one carrier at the expense of the other or act as a disincentive to offer lower-single line rates.

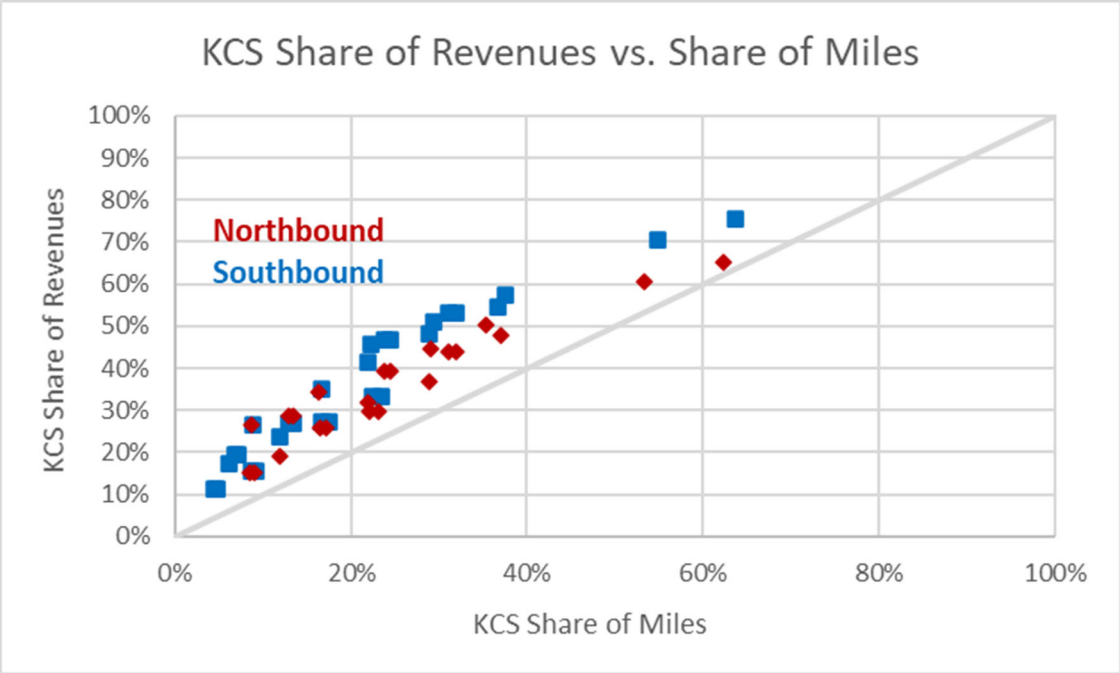
87. This principle is also illustrated by looking at how a mileage prorate would distort actual interline rates from BNSF and KCS if it were applied. Figure 5 below illustrates KCS's (including KCSR and KCSM) share of revenues for interline intermodal traffic it moves with BNSF via Robstown by KCS's share of miles.[31] The X axis shows KCS's share of miles for the movement. The Y axis shows KCS's share of revenue for the movement. As you can see,

[31] Workpaper – HC – BNSF KCS Intermodal Rates Compared to Mileage Prorate.

KCS's share of interline revenue is higher than its share of miles. The diagonal line represents what KCSM's rate would be if the mileage pro-rate was imposed.

88. The blue and red squares represent revenues realized in the marketplace and thus reflect what the shippers are willing to pay. A mileage prorate metric would force the KCSM portion of the rate down to the line shown on the graph. BNSF however has no incentive to reduce the overall rate to the shipper. The market already determined the competitive market rate at the original pre-prorated level. BNSF has every incentive to quote the original rate to the shipper and keep the windfall created by the artificial cap on CP/KCS's rate. UP would gain the same advantage.

FIGURE 5
BNSF-KCS INTERMODAL RATES COMPARED TO "MILEAGE PRORATE"



89. The bottom line is that a mileage pro-rate mechanism not tied to market conditions and factors is anti-competitive, not pro-competitive. The proposed mechanism fails to account for how prices are set in the marketplace and the idea that customers make value-based

decisions. Instead, mileage pro-rate pricing constrains CP/KCS to rigid parameters while providing a potential windfall to CP/KCS's connecting carriers. It is not narrowly tailored to remedy a specific competitive harm nor is it consistent with all prior precedent regarding gateway commitments. It should not be adopted.

V. CANADIAN NATIONAL'S (CN) PROPOSED FORCED SALE OF KCS'S SPRINGFIELD LINE IS NOT COMPETITIVELY JUSTIFIED AND WOULD NOT BE IN THE INTEREST OF SHIPPERS

90. As I understand it, CN requests that as a condition of the CP/KCS transaction, the Board require the divestiture of certain valuable KCS assets pertaining to KCS's rail line between Kansas City, Missouri and Springfield, Illinois, including track, terminal ownership, and related agreements and rights and have these assets (collectively I will refer to the bundle of assets CN seeks to acquire as the "Line") sold to CN. CN's justification for this drastic condition rests on the assertion that a post-merger CP/KCS will abandon the millions of dollars of investment and strong shipper relationships KCS has developed on this Line because CP is incented to promote its single-line Kansas City to Chicago service over the existing CP route and will thus ignore the somewhat parallel KCS line to Springfield, IL. CN's evidence seems to be the lack of new merger-specific investment in improving the Springfield Kansas City to Chicago route.

91. I believe the assertions on which CN relies are not accurate. First, I will provide a little background about KCS's purchase and investment in the Line and provide some details about the strong commercial relationships that have resulted from that investment and why the Line is such an important part of KCS service to Mexico that it would make no sense to walk away from those investments. Second, I will provide background into the failed efforts to develop a robust Kansas City to Chicago interline service with CN and make it clear that there is no successful CN/KCS route that would be lost in a CP/KCS transaction to justify CN's

divestiture request. This background also makes clear CN's likely purpose: it seeks divestiture to improve its position not to preserve competition. Finally, I will address how CN's request is not in the public interest and actually would harm post-merger CP/KCS service for the shippers on the Line.

A. The Line Plays An Important Role For KCS Grain Deliveries Into Mexico And It Would Not Make Economic Sense For A Merged CP/KCS To Walk Away From Years Of Investment

92. The Line today is a valuable asset because KCS invested significant amounts to make it so. KCS purchased the owner of the Line, Gateway Western Railway Company ("Gateway") in 1997 from CN's Illinois Central (the same entity that now seeks to buy it back at a significant discount and in improved condition).[32] At that time, the Line carried very little traffic because the tracks were in poor condition. Since that time, KCS has spent significant funds rehabbing this previously underutilized asset. For example, between 2012 and 2014, KCS spent over $50M on rehabbing the Line including customer specific projects, and KCS spends an average annual amount of $17.5M to maintain this track segment (based on the last 5 year history). These projects included upgrading the former Gateway track and ties in order to handle heavy grain trains, upgrading tracks connecting to shipper facilities to promote efficient connections, and upgrading sidings to handle longer trains. These investments and commitments attracted similar commitments and investments by customers. Likewise, customers invested in their facilities along the Line in order to utilize the upgraded track and improved transport options to their preferred destinations, in particular the growing grain market in Mexico. We have been advised that Bartlett Grain, Ray-Carroll County Co-op, and Central Missouri Agri

[32] Gateway was subsequently merged into KCSR on or about October 1, 2001.

Services invested over $95M in three new shuttle train loop track facilities on the Line. Bartlett built in Jacksonville, IL, Ray Carroll built in Corder, MO, and Central Missouri Agri Services built in Marshall, MO. Today, the Line serves as an important origination point for many customers shipping to/from Mexico. In 2021, grain shippers alone generated more than {{ }} in revenue for KCS with just under 90 percent originated on the Line and terminated in Mexico.

93. A prime example of how and why the Line has today become such an important part of the KCS U.S./Mexico service is seen by looking at just one customer served by the Line: Bartlett Grain ("Bartlett"). Bartlett is now KCS's largest customer on the Line,[33] but it was not always so. Bartlett's growth reflects an evolution in both KCS's business strategy, the dynamic cross-border grain market, and the symbiotic nature of KCS and Bartlett's investments. In the late 1990s, Bartlett had established a limited presence shipping grain, primarily to domestic feed mills. Over the following decade, both KCS and Bartlett invested significantly in their infrastructure and operations to grow the market independently and in response to each other's development. More broadly, in 2005, KCS purchased Tex Mex and KCSM and began developing U.S./Mexican traffic. Bartlett also developed substantial commercial opportunities in Mexico through partnerships, business agreements, and investments in facilities to open up new international markets for its grain origins. In the U.S., Bartlett invested significant sums in its grain facilities and elevators, including purchasing its Atchison facility in 2007, building the Jacksonville facility in 2013, and upgrading its facilities over time.[34] Some of these investments

[33] Bartlett is also KCS's largest grain customer across its entire network.

[34] Facilities that Bartlett upgraded include the Council Bluffs north facility in 2013, the Kansas City River Rail facility in 2014, the Council Bluffs south facility in 2016, and the Atchison, Kansas elevator in 2019.

were done in partnership and in response to investment from each other. For example, in the 2005-2006 time period, KCS adopted a shuttle train service for grain, in part because of the interest in a 75-car cross-border service by Bartlett. The introduction of shuttle service helped grow the Agriculture & Mineral business unit's revenue by 8.1 percent in 2006.[35] Additionally, much of the symbiotic investment made was directly associated with facilities and assets on the Line. While several of Bartlett's facilities were dual served, and thus Bartlett had the choices of rail routings, Bartlett and KCS nonetheless entered into a strategic alliance/contract in 2012 based on, among other things, KCS's rates, equipment, and single-line service to Mexican destinations. This long-term contract provided KCS and Bartlett with the stability and security to invest more in the upgrade of the tracks and facilities on the Line to handle the heavier and longer grain trains, which are beneficial to both parties. In 2013, Bartlett made further investments, building a major new grain facility in Jacksonville, Illinois, on the Line at a cost of over $25 million and acquiring destination facilities in Mexico.[36] As a result of this long term relationship and of KCS's single-line service, in 2021, Bartlett shipped on KCS almost 11,000 cars from its facility in Jacksonville to Mexico.[37] The value of this symbiotic investment can be seen in exponential growth of Bartlett traffic over the KCS system (the below figures represent Bartlett cars over the entire KCS system, not just on the Springfield Line):

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[35] KCS 2006 Annual Report, p. 6.

[36] Verified Statement of Mr. Bob Knief filed June 20, 2022, at 1 and 2; Exhibit 1 HC - Bartlett Update – August 2014.

[37] Verified Statement of Mr. Bob Knief filed June 20, 2022, at 2. This facility was built to have a loop track for efficient single-line service to Mexico.

FIGURE 6[38]



94. Beyond infrastructure, KCS has also invested in equipment and has developed a dedicated fleet of cars and locomotives for these grain shipments. These investments have not only benefited Bartlett but attracted other opportunities from other grain shippers, and shippers of other commodities as well, such as steel. As a result, this Line has become an important part of the KCS system and will continue to be so in a merged CP/KCS. The notion that this Line would be degraded or somehow currently provides a parallel competitive service to a CP service so that the merger would reduce horizontal competition requiring divestiture is simply not accurate. Given the investment from both KCS and shippers on the Line, it would not make sense for a merged CP/KCS to walk away from the Line or disinvest in it in order to favor CP

[38] Workpaper – HC – Bartlett Grain Shipped.

grain origins. CPKC will be committed to the Line and to continuing to serve the shippers on the Line. Furthermore, as discussed more below, divestiture of the Line to CN would harm shippers, and in fact, is not supported by any shipper currently using the Line. Divestiture would benefit only one party: CN.

B. There Will Be No Loss of Competition in The Kansas City-Chicago Corridor

95. CN asserts that the competition between the CP move between Chicago and Kansas City and the hypothetical KCS-CN move from Kansas City through Springfield would be eliminated in a post-CP/KCS merger environment and/or that a merged CP/KCS will no longer have any incentives to continue to interchange existing KCS/CN interline traffic over the Line. The problem with CN's argument is that the Springfield Line plays no competitive role in any such marketplace. Today, there is almost no traffic that moves over the Line on an interline basis with CN. Almost all of traffic on the Line is originated on the Line and moves on KCS single-line traffic to Mexico. In other words, there is no significant CN/KCS interline service that would be eliminated or "foreclosed" if the CP/KCS transaction went forward.

96. There is a tiny amount of CN-KCS interline traffic that gets billed via the Springfield gateway. Importantly, even though this traffic is listed as interchanged at Springfield, most of it is only "paper interchanged" there. That is, while the waybill data shows the interchange at Springfield, the rail cars are physically interchanged in East St. Louis. The cars are interchanged elsewhere in part because the operations in the Springfield area are complicated by the need for KCS to move cars over a segment of track owned by UP in order to interchange cars to CN. This operational challenge would remain even if the Board entertained the unreasonable idea of divesting the Line to another party, including possibly CN. This traffic does not compete against KCS traffic to/from Mexico.

97. The traffic levels showing CN/KCS interline traffic since 2019 are shown in the Table below.[39] The table shows the physical interchange, without regard to the destination to which the traffic was billed.

TABLE 3
KCS-CN INTERLINE TRAFFIC AT SPRINGFIELD AND EAST ST. LOUIS

Linehaul Only <> CN		
	COCKRELL	EAST ST LOUIS
2019	132	361
2020	0	214
2021	0	225

98. I believe the low levels of current interline traffic between CN and KCS reflects a lack of interest from both parties. Prior to my arrival at KCS, CN and KCS in 1998 entered into a 15-year alliance agreement to move traffic over this Line.[40] The parties touted the goal in a press release issued on April 16, 1998: "The marketing alliance will offer shippers pro-competitive connections to new rail routes for their products and the ability to tap new markets through a coordinated rail network. Services will link points in Canada with the major U.S. Midwest markets of Detroit, Chicago, Kansas City, and St. Louis, along with the key Southern markets of Memphis, Tenn., Dallas, and Houston." Springfield (along with Jackson, MS) was supposed to have been one of the principal interchange gateways for Alliance traffic. However, that Alliance was unsuccessful and did not produce any real traffic gains. The deal expired with no substantial gains. I have been told it was complete failure, mainly because each party

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[39] Workpaper – HC - CN Gateway Volumes.

[40] Exhibit 2, Press Release – Canadian National, Illinois Central, and KCSR in Shipping Alliance, Bloomberg Business, April 16, 1998_ available athttps://www.bloomberg.com/press-releases/1998-04-16/canadian-natl-illinois-central-kcsr-in-shipping-alliance

continued to favor its long haul and refused to adopt arrangements that would short haul one party in favor of a long haul on the other.

99. Beyond the Alliance, there have been no significant efforts to develop commercial opportunities between KCS and CN using the interchange at Springfield for movements to Kansas City and beyond to other destinations in the United States or Mexico. Over the years there has been minor interest floated in co-funded infrastructure projects, such as upgraded sidings, but to my knowledge none have passed the initial stages of discussion. In fact, in 2019, CN reached out to KCS to shut down the Springfield interchange entirely because of the low volumes. According to Rhonda Anderson, Director, Service Design at CN, in a May 30, 2019 email to Michael Wilkinson, KCS's Superintendent-Service Design, Ms. Anderson indicated that the desire to close Cockrell[41] (aka Springfield) came from CN's Regional VP. In a later July 2, 2019, email Ms. Anderson further explained that CN would "like to remove the service from the Cockrell interchange. Volumes are small and from what I can see, neither of us is doing a bang up job of pulling. From our perspective, East St. Louis looks like the best alternative gateway."[42] While it does not appear that the gateway was closed, I am unaware of CN proposing any new efforts to build business using this interchange.

100. Even if CN were able to theoretically establish that the KCS/CN route between Chicago and Kansas City provides a meaningful competitive alternative to CP's Kansas City-Chicago line, this would still not justify divestiture of the Line. This is because there would be no real reduction in competition for Chicago to Kansas City traffic as a result of the CP/KCS

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[41] The interchange location between KCS and CN is sometimes referred to as the Cockrell. KCS's Line ends in Cockrell, Illinois, where it connects to UP track over which KCS has trackage rights to connect with CN's line that runs through neighboring Springfield, IL.

[42] Exhibit 3 CN-KCS May 30 Email RE_Cockrell interchange to be closed asap; Exhibit 4 CN-KC July 2 Email RE_Cockrell interchange to be closed asap.

transaction. Indeed, there are multiple viable routes for rail traffic between Chicago/Detroit and Kansas City, including UP, BNSF, and NS's single-line route that stretches beyond Chicago to Detroit. The KCS-CN route via Springfield is simply not a competitive alternative. What limited CN interchange traffic there currently is with KCS at "Springfield" (really East St. Louis), the merged CP/KCS will have every incentive to continue this limited CN interlined traffic because such traffic does not currently compete, nor will it, in the future with CP/KCS.

101. CN claims that competition in this corridor will be "lost," but the only thing that would be "lost" should the transaction be approved is CN's chance to realize its vision of a CN-controlled "Kansas City Speedway." The purpose of CN's responsive application is not to "preserve competition" (which as I have explained does not exist and thus does not need preserving) but rather, as CN itself makes clear in its comments and inconsistent application, the real purpose of its request is to "foster" and "improve competition" through an improved competitive position as owner of a new CN single-line route from Mexico to Chicago and beyond. CN's proposed divestiture is not directed at remedying an anticompetitive impact of the merger.

102. Further, I find dubious CN's claims that it can generate two trainloads per day or intermodal traffic between Kansas City and Chicago. It is unrealistic to think that any CN route to Kansas City would attract this traffic in lanes already well served by single-line rivals. CN's claim that it would raises the questions of if this traffic were ripe for the picking, why has CN not developed this with KCS before (or at least tried)? The likely answer is that this traffic could materialize only if CN cannibalized the benefits of the CP/KCS transaction, which it seems is part of CN's objective by asking for 50 percent rights to the International Freight Gateway terminal.

103. The bottom line is that there is no justification for the divestiture because there is no loss of competition. The Transaction will not result in KCS neglecting the Line, downgrading service, or foreclosing interline movements with CN. A CP/KCS/CN interline partnership would be as viable a Kansas City to Chicago option as the KCS/CN route is today, should the market develop enough to make it worthwhile. Given the importance of the Line to KCS and its shippers, there is no economic incentive to abandon, degrade, or stop upgrading the Line. KCS has fostered valuable relationships with the shippers on the Line that benefit significantly from KCS's single-line service to Mexico and both shippers and KCS foresee them continuing and growing.

C. Divestiture Of The Line Would Be Disruptive and Harmful To Existing Service On The Line

104. As stated above, KCS has invested heavily in the Line and has developed strong commercial relationships with shippers in the region, particularly those seeking access to Mexico. It cannot be understated how important the Line is to some shippers for KCS's single-line service to Mexico. Before 2002, KCS shipped approximately {[redacted]} cars of grain to Mexico. Following KCS's acquisition of Tex Mex and TFM (now KCSM), and following KCS's and the customers' investments in the Line, today, KCS ships {[redacted]} carloads of grain to Mexico. Today, KCS has more than 20 agricultural customers on the Springfield Line, including many grain elevators. These customers have the ability to ship their grain east, to the Mississippi River or west to KCS domestic feed mills and to Mexico. All of the Line's customers' locations are shown in the map attached as Exhibit 5 to this statement.

105. KCS has 20 shippers on the Line, including three large grain shippers that rely on KCS service. KCS does move freight to and from grain handling facilities in the St. Louis area, but the majority moves West mainly to Mexico. These customers depend upon KCS to serve

markets to the West and in Mexico. Some of them have made substantial investments to support that business, such as Bartlett, Ray-Carroll, and Central Missouri Agri Services, as discussed above. Others are considering new investment because of the benefits that they see would result from the CP/KCS transaction. Let me mention two of these shippers (other than Bartlett, which is discussed in detail above) and the importance to the KCS system.

- Ray Carroll serves markets in Mexico and other points reached via the Line through Kansas City to the west of its facility. In 2021, Ray Carroll shipped in excess of {[redacted]} cars, of which {[redacted]} moved West or to Mexico on KCS.
- Central Missouri AgriService shipped only {{[redacted]}} of its shipments to the East. {{[redacted]}} of its grain shipped to Mexico from the Line.

106. It is particularly noteworthy that not one shipper who originates or terminates traffic on the Line has filed in support of CN's divestiture request. Ray-Carroll, Central Missouri Agri Services, and Bartlett Grain have all filed letters opposing the divestiture of the line. Ray-Carroll and Central Missouri Agri Services were originally neutral on the proposed CP/KCS merger. When CN filed for the forced sale of KCS's Springfield Line, both shippers have come forward to testify against CN's proposal and in support of the CP/KCS merger. For example, Ray-Carroll foresees both new opportunities resulting from the CP/KCS transaction as well as new investments in the corridor in the foreseeable future, but believes these opportunities will be constrained if the Line is forced to be divested.[43] Richardson International Limited recently purchased a St. Louis grain facility and has expressed concern that divestiture would

[43] Verified Statement of Beau Hepler, filed concurrently with Applicants' Reply Comments, July 12, 2022.

eliminate single-line service on routes that currently exist and those that may become available as a result of the CP/KCS transaction.[44]

107. KCS has worked hard to develop a competitive, efficient single-line service for shippers on the Line. KCS has worked to provide seamless services from the origin to destination, including local service. Each of the customers that I mentioned above would lose single-line service toward the West and Mexico from a divestiture of the Springfield Line – even if CP/KCS were granted back haulage rights as proposed by CN. Today, KCS designs the service from the origin to destination. If there were a divestiture, years of planning, strategic partnerships, and symbiotic relationships would be significantly changed and disrupted. These customers would have to rely on CN designing service at their location, and then moving the freight to Kansas City, where it would be interchanged to CP/KCS. With truck competition on the line, the economics play a very important part of rail competitiveness. Thus, customers would lose the benefits of the single-line service that they have today, which would make the transportation a less competitive option. Any forced divestiture of the Line to CN would substantially harm the interests of these shippers and would not be in the public interest.

VI. THE "CONSERVATIVE" ESTIMATES OF SYNERGIES PRESENTED TO KCS'S BOARD ARE NOT INCONSISTENT WITH THE ESTIMATES PRESENTED IN THE APPLICATION

108. I understand that some commenters have tried highlight the fact that an early KCS analysis of synergies is lower than the synergies Applicants presented in the Application. Those commenters simply overlook the context and nature of the two estimates.

109. The KCS Board of Directors expected to review and test all of the various ranges, from low to high, in order to understand the potential impact of either a CP or CN transaction.

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[44] Richardson International R.V.S. filed concurrently with Applicants' Reply Comments, July 12, 2022.

Based upon the information available at the time, the KCS board considered a range of synergy analysis from approximately $377 million to approximately $990 million (annualized EBITDA synergies for the combined company).[45]

110. A commonly accepted approach to valuation analysis typically presents a range of outcomes. Synergies are by design forecasts/estimates of future results based on assumptions, making it prudent to review a range of scenarios, both an upside case and a low side sensitivity case. Further, multi-year forecasts for the underlying businesses are .far more impactful to determining value in a merger decision than estimated synergies.

111. Additionally, due diligence performed by the KCS Board of Directors confirmed that the range of outcomes would likely lead to a strong financial position for a merged CP/KCS. Within the range of the business case, and accounting for the additional debt to help fund the transaction, CP/KCS is expected to earn a fair margin and produces enough free cash flow to safely fund planned investments in the network, support customer traffic, and grow the franchise.

112. The initial estimates mentioned above provided a solid range of scenarios for the KCS Board to consider and review. Six months of customer feedback from the first merger announcement with CP in March 2021 provided additional clarity on synergies that was not available at the date of the initial announcement before the proposed merger became public knowledge. This revised view was reflected in the Application and reflected work by the KCS and CP teams working together. Additionally, it also reflected a combined operating and marketing plan. This difference in purpose and difference in underlying information led to a

[45] Canadian Pacific SEC Form F-4 Registration Statement, KCS-CP PROXY STATEMENT, filed October 1, 2021.

different estimate of synergies in the Application than what was presented to the Board of Directors.

VII. NO CONDITION SHOULD BE IMPOSED THAT FREEZES KCS'S TARIFFS OR TRANSPORTATION SERVICE TERMS RELATING TO PIH/TIH TRAFFIC

113. Unlike many other carriers, KCS has not traditionally had complaints about the terms of its tariffs and rules publications specifically applicable to TIH/PIH traffic. Some of this may be limited to the relatively small amount of such traffic handled by KCS. Indeed, KCS handles very little such TIH/PIH traffic. In 2021, KCS handled {[redacted]} cars of TIH/PIH traffic, which is less than 1 percent of all traffic transported by KCS. Of this traffic, KCS originated almost {[redacted]} of these cars.

114. Some parties assert that KCS today uses its TIH/PIH to differentiate itself from the other Class I's to attract traffic and that this incentive will go away with the CP/KCS transaction. This is not an accurate assumption. In fact, the locations that receive TIH/PIH traffic on KCS are at locations that are singly-served by KCS, which means the terms of our tariffs and rules publications are not a means to differentiate our services and attract this business.[46] KCS has not had any adverse incidents that have forced us to revisit these terms or modify the terms to require explicit liability allocations (e.g., arising from insistence by our insurers). KCS's terms do not reflect an additional assumption of risk or liability by KCS as a commercial incentive. The terms of our tariffs and rules publications reflect our chosen way of dealing with a set of business risks.

---

[46] KCS also originates TIH/PIH shipments from dual-served locations, such as Chaison TX, and at joint operating facility locations, such as Lake Charles, LA. But KCS does not use the terms of its TIH/PIH tariff and rules publication as a marketing tool to differentiate itself from the other carriers also serving those locations.

115. I realize that parties have benefitted from what is seen as "customer friendly" tariffs and rules publications, but as noted, the policies are always subject to change and are certainly not actually intended to be a business or marketing tactic to encourage TIH/PIH shipments on KCS or to market KCS's TIH/PIH policies as "customer friendly." I can understand those customers who are concerned that a merged CP/KCS will cause KCS to change its policies, but those concerns do not justify the types of remedies proposed by some shippers. While there are no immediate plans to changes these tariffs and rules publications, I would note that KCS evaluates its tariffs and rules publications in the ordinary course of its business on a regular basis. KCS routinely makes changes to its tariffs and rules publications based upon market conditions. It would be overreaching to freeze KCS's tariffs and rules publications terms at their pre-Transaction state when absent the Transaction, KCS would have been free to change its terms at any time, subject to STB regulations and challenge.

VIII. OTHER ISSUES RAISED BY COMMENTERS

A. The Conditions Sought by Texas International Terminals Are Not Related to Competition or This Transaction and Instead Seek to Improve TxIT's Commercial Position.

116. I understand Texas International Terminals Ltd. ("TxIT") filed a comment and is requesting a condition requiring CPKC to "effectuate (as necessary) and maintain the access rights that KCS was granted in UP-MKT to Galveston" and to "actively and cooperatively work with rail shippers and TxIT to reasonably market and enable such right to be actively utilized."[47] TxIT complains that KCS "has not effectuated or sought to aggressively market those rights with respect to rail service to TxIT to date."

[47] Comments and Request for Conditions of Texas International Terminals Ltd. ("TxIT Comments") (filed February 28, 2022) at 8.

117. KCS was granted these rights in the UP-MKT merger, but KCS has not exercised them because it is not economically advantageous to do so. The haulage rights were granted as part of UP's 1988 merger with Missouri-Kansas-Texas Railroad and originally designed to give KCS haulage rights for grain traffic originating in the Omaha, Nebraska and Council Bluffs, Iowa region, and haulage rights over UP between Beaumont and Galveston to deliver the grain to Galveston.[48] However, KCS found alternative and more advantageous routes to get grain to destination markets, including through other Gulf ports that KCS serves directly, such as Port Arthur and New Orleans. Simply, KCS has not needed to exercise these rights because it has better economic options. But KCS has not turned away any traffic and I understand TxIT's Galveston facility is served by UP and BNSF. Moreover, there is nothing in this merger which would diminish these rights and should they become economically advantageous, CPKC may exercise them.

B. Evergy Metro, Inc.'s Request to Impose a Condition regarding Service Quality is an Attempt to Extend Board Jurisdiction to its Contractual Agreement with KCS.

118. I understand Evergy Metro, Inc. ("Evergy") filed Comments seeking a condition requiring five years of Board oversight and the formal submission of reports on a quarterly basis on, among other things, the service quality to Evergy and other bulk commodity shippers, and for the Board to retain jurisdiction to impose additional conditions to remedy any service shortfalls.[49]

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[48] See Union Pacific Corp., et al. – Control – Missouri-Kansas-Texas R.R. Co., et al., 4 I.C.C.2d 409, 452-458 (1988) ("UP/MKT").

[49] See Evergy Metro, Inc. Comments, filed February 28, 2022, at 17-18.

119. Evergy acknowledges that KCS provides transportation services to Evergy for the movement of coal pursuant to a contractual agreement that was negotiated between the parties. This agreement includes service protections against decreases in service levels, including {{[redacted]}}

120. Specific service conditions are a term that parties negotiate for, as Evergy did. The exact nature of these terms involves give and take as part of the overall private agreement. Evergy here is seeking to insert the Board into the private agreements between shippers and KCS and to impose additional service terms for which they did not negotiate. Evergy's conditions are not merger related, but an attempt to put itself in a better commercial position than it would otherwise be in.

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VERIFICATION

I, Michael J. Naatz, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.

Executed on this ___ day of July, 2022.

DocuSigned by:
Mike Naatz
FD5BF2DEC92345C...

Michael J. Naatz

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BEFORE THE
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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

NAATZ R.V.S. EXHIBIT 1

HIGHLY CONFIDENTIAL - BARTLETT UPDATE - AUGUST 2014

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NAATZ R.V.S. EXHIBIT 2

PRESS RELEASE – CANADIAN NATIONAL, ILLINOIS CENTRAL, AND KCSR IN SHIPPING ALLIANCE

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Business

CANADIAN NATL, ILLINOIS CENTRAL, KCSR IN SHIPPING ALLIANCE

April 16, 1998 at 7:23 AM CDT

(The following is a reformatted and edited version of a press release issued by Canadian National Railway Company.)

CANADIAN NATIONAL, ILLINOIS CENTRAL AND KANSAS CITY SOUTHERN RAILWAY FORM PRO-COMPETITIVE, 15-YEAR MARKETING ALLIANCE TO LINK KEY NORTH AMERICAN MARKETS WITH NEW RAIL FREIGHT SERVICES

Railways plan coordinated marketing and operations in fast-growing NAFTA transportation corridor

WASHINGTON, D. C., April 16, 1998--Canadian National Railway Company (CN), Illinois Central Corporation (IC) and Kansas City Southern Railway Company (KCSR) announced today a 15-year marketing alliance that will offer shippers new competitive options in a rail freight transportation network linking key north-south continental freight markets.

CN and KCSR have also signed a separate access agreement regarding certain haulage and trackage rights, which is contingent upon United States Surface Transportation Board approval of CN's previously announced merger with IC. The affected tracks are owned by IC and KCSR.

Neither CN nor KCSR will acquire equity interests or other financial holdings in the other.

CN-IC-KCSR plan to launch their marketing alliance immediately; it does not require approval by the STB.

The marketing alliance will offer shippers pro-competitive connections to new rail routes for their products and the ability to tap new markets through a coordinated rail network. Services will link points in Canada with the major U.S. Midwest markets of Detroit, Chicago, Kansas City and St. Louis, along with the key Southern markets of Memphis, Tenn., Dallas and Houston. In addition, this new marketing alliance will give shippers access to Mexico's largest rail system, Transportacion Ferroviaria Mexicana, S.A. de C.V. (``Grupo TFM'').

Under terms of the marketing alliance, the companies will coordinate sales and marketing, operations, fleets, and information systems, but not for traffic movements where any two of them provide the only direct rail service.

The railways will target new markets in key north-south international and significant domestic U.S. traffic corridors. They will also seek to increase rail business in existing markets, primarily in automotive and intermodal, but also in key carload markets, including those for chemicals and forest products.

CN-IC-KCSR expect the marketing alliance to generate revenue and earnings growth and position them as the pre-eminent

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north-south rail carriers in the NAFTA corridor, where north-south transborder railway traffic is growing annually at between 12 per cent and 14 per cent.

The carriers plan to utilize two main interchanges:

- Jackson, Miss., for traffic moving between southern KCSR territory or Mexico and CN or IC territory;

- Springfield, Ill., for traffic moving between CN and northern IC territory, and U.S. Midwest KCSR territory.

To improve customer service and operating efficiency at Jackson - a critical junction between IC and KCSR -- the railways have agreed to arrange for joint operation of yards, terminals, transload and intermodal facilities.

Under a separate access agreement, subject to STB approval of the CN-IC merger, CN and KCSR plan investments in automotive, intermodal and transload facilities at Memphis, Dallas, Kansas City and Chicago to capitalize on the growth potential represented by the marketing agreement. The railways' access to the proposed terminals would be assured for the 25-year life span of the facilities, regardless of any change in corporate control.

Under the terms of this access agreement, KCSR would also extend its rail system in the Gulf area. For traffic other than coal, KCSR would receive overhead trackage rights on the merged CN-IC in Mississippi between Jackson and Palmer, and overhead haulage rights between Hattiesburg and Mobile, Ala.

The merged CN-IC would reach the Port of Gulfport from Hattiesburg under overhead haulage rights in Mississippi granted by KCSR.

The access agreement would give KCSR access to three chemical plants at Geismar, La., now served by IC, with associated overhead haulage rights from Geismar to Baton Rouge and, for traffic moving to or from certain eastern centres, from Baton Rouge to Jackson. KCSR access to the three Geismar plants is expected to take effect in the fall of 2000.

CN President and Chief Executive Officer Paul M. Tellier said: ``The marketing agreement is good news for shippers. It's pro-competitive because of the new routing options and extended market reach that it offers shippers. Of significance to automotive and intermodal shippers, the agreement will permit CN to offer single-price, efficient service between points in Ontario and Michigan to Kansas City and Dallas and neighboring regions. It will give CN greater penetration of U.S. Southwest markets and the ability to develop a Canada-Mexico rail freight market. The access agreement would also pave the way for investments in important new terminal facilities and give CN broader reach in the southern U.S. States.''

KCSR President and Chief Executive Officer Michael Haverty said: ``The marketing agreement will improve service performance and reliability by providing increased routing options for shippers and reducing transit time by improving equipment and locomotive utilization. KCSR access to chemical producers at Geismar under the access agreement would certainly enhance rail competition.''

IC President and Chief Executive Officer John D. McPherson said: ``This new alliance builds on IC's history of working with other carriers. It builds on the strengths of the IC route structure and reliable service offering. Not only do we provide the link between Canada and Texas Mexico, IC will have opportunities to originate and terminate business to and from CN points and to and from KCSR points, immediately expanding the reach of shippers along our line.''

CN, IC and KCSR expect new jobs would be generated by increased revenue flowing from the extended network reach of the

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carriers' automotive and intermodal customers.

The previously announced merger of CN and IC will create the fifth-largest railway in North America, serving Canada from Vancouver to Halifax, and the rapidly growing north-south trade corridor, including service between Detroit, Chicago, St. Louis, Memphis and Jackson, New Orleans and Mobile.

KCSR's parent, Kansas City Southern Industries Inc. (NYSE: KSU) is a transportation and financial asset management company with headquarters in Kansas City. KCSR's 6,000-mile rail network of companies and affiliates include the Kansas City Southern Railway Company, the Texas-Mexican Railway, Transportacion Ferroviaria Mexicana (TFM), the wholly-owned Gateway Western Railway Company (GWWR) and the Panama Canal Railway Company, a joint venture with Mi-Jack Products Inc. KCSR's rail network, and those of its affiliates, extend from Kansas City, East St. Louis, Springfield, Ill., and Meridian, Miss., to Mexico City.

CN (NYSE: CNI, TSE/ME: CNR) is Canada's largest and North America's sixth-largest freight railway. Its network serves Canada, including the key ports of Vancouver, Montreal and Halifax, and Chicago and Detroit, with connections to all points in North America.

IC (NYSE: IC) is a holding company whose principal subsidiaries are the Illinois Central Railroad, a 2,600-mile system from Chicago south to the Gulf of Mexico, and the 850-mile Chicago Central system running west of Chicago through Iowa.

Contact:
For Canadian National:
Investors
Robert Noorigian
(514) 399-0052

Media
Mark Hallman
(416) 217-6390

Judy Wilkinson
Abernathy MacGregor Frank
(212) 371-5999

For Kansas City Southern
Investor
William H. Galligan
(816) 983-1372

Media
Kathy F. Simpson
(816) 983-1372

For Illinois Central:
Ann Thoma
(312) 755-7591

(fb)PN

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NAATZ R.V.S. EXHIBIT 3

CONFIDENTIAL - CN-KCS MAY 30 EMAIL "RE:_ RE_COCKRELL INTERCHANGE TO BE CLOSED ASAP"

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NAATZ R.V.S. EXHIBIT 4

CONFIDENTIAL - CN-KCS JULY 2 EMAIL "RE_COCKRELL INTERCHANGE TO BE CLOSED ASAP

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NAATZ R.V.S. EXHIBIT 5

MAP OF KCS'S AGRICULTURAL CUSTOMERS ON THE SPRINGFIELD LINE

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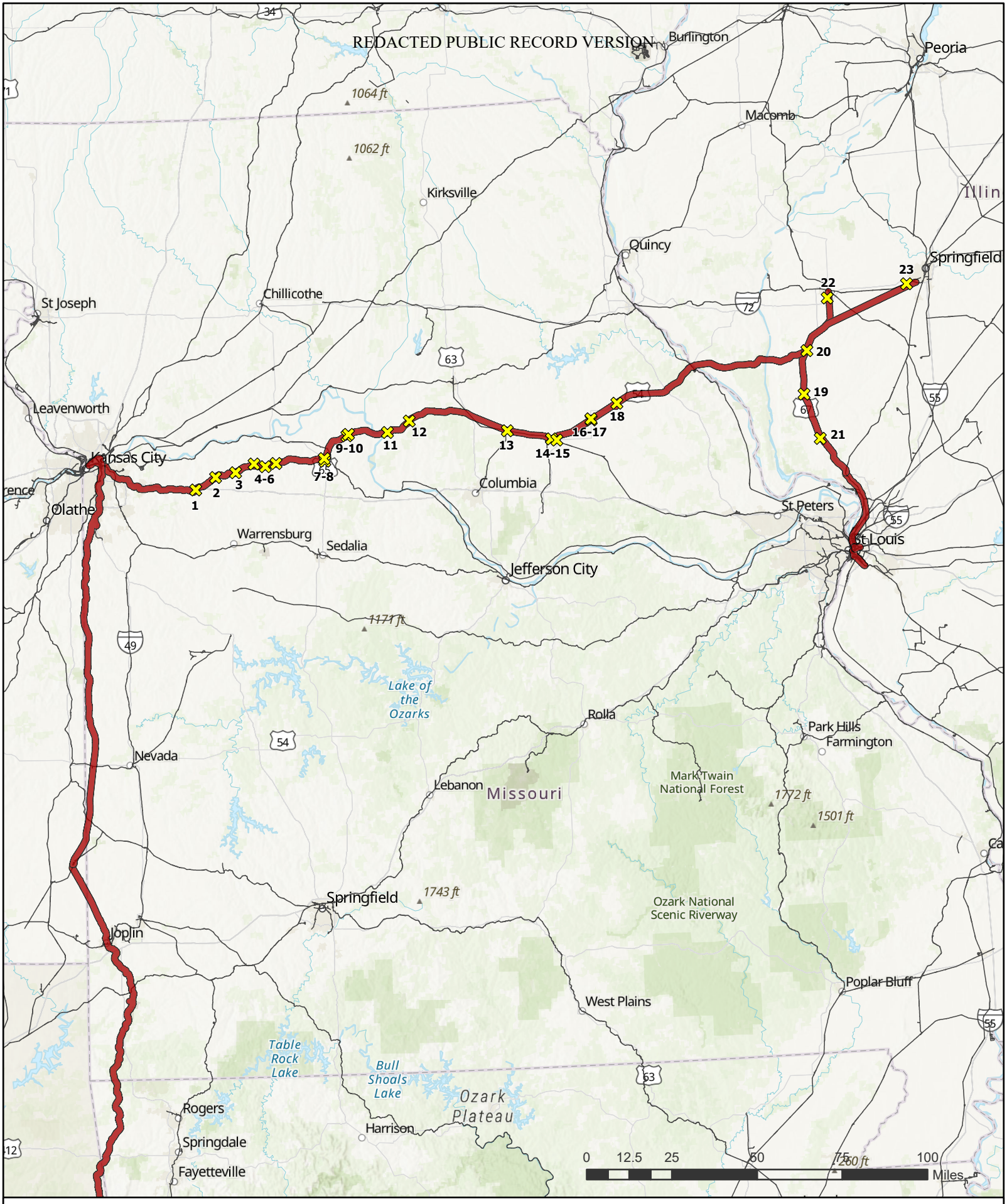

MEXICO - SPRINGFIELD GRAIN CUSTOMERS

- Agriculture & Minerals
- KCSR
- Other Railroad



Kansas City Southern Lines

kcsgis/6.22.22

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Map Label	Customer	Address	City	State	LAT	LNG
1	RIVER VALLEY MFA	110 NW RAILROAD	ODESSA	MO	39.003611	-93.951795
2	RAY-CARROLL COUNTY GRAIN GROWERS IN	110 N RAILROAD ST	MAYVIEW	MO	39.054544	-93.835087
3	RIVER VALLEY MFA	105 W 22ND ST	HIGGINSVILLE	MO	39.072887	-93.718461
4	RAY-CARROLL GRAIN GROWERS	26194 HWY 20	CORDER	MO	39.107841	-93.610282
5	RIVER VALLEY MFA	106 COLLINS ST	ALMA	MO	39.095192	-93.545302
6	CENTRAL MISSOURI AGRISERVICE LLC	215 W PARK ST	BLACKBURN	MO	39.107513	-93.48269
7	CENTRAL MISSOURI AGRISERVICE LLC	211 N LYON AVE	MARSHALL	MO	39.122393	-93.202001
8	KENT FEEDS INC	HWY 20 W	MARSHALL	MO	39.111192	-93.199089
9	CENTRAL MISSOURI AGRISERVICE LLC	227 INDUSTRIAL BLVD	SLATER	MO	39.216224	-93.066343
10	RAY-CARROLL COUNTY GRAIN GROWERS	ROUTE 2 BOX 4A	SLATER	MO	39.22191	-93.057032
11	HEART OF MISSOURI MFA	402 10TH ST	GLASGOW	MO	39.224475	-92.830169
12	HEART OF MISSOURI MFA	101 MILL ST	ARMSTRONG	MO	39.269764	-92.701167
13	MFA INC	202 N JEFFERSON ST	CENTRALIA	MO	39.212088	-92.133694
14	ADM SOYBEAN PROCESSING	400 E HOLT ST	MEXICO	MO	39.169418	-91.87943
15	MFA INC	2818 E LIBERTY ST	MEXICO	MO	39.163277	-91.848466
16	POET BIOREFINING	809 N PINE	LADDONIA	MO	39.24667	-91.645257
17	MFA INC	506 E 1ST ST	LADDONIA	MO	39.241707	-91.643704
18	MFA INC	411 W STATE ST	VANDALIA	MO	39.307629	-91.489825
19	ILLINOIS VALLEY SUPPLY	80 N MAIN ST	CARROLLTON	IL	39.302027	-90.399307
20	TRICOUNTY FS INC	US ROUTE 267	ROODHOUSE	IL	39.486063	-90.367037
21	TRICOUNTY FS INC	COUNTY RD E	JERSEYVILLE	IL	39.109942	-90.32103
22	BARTLETT GRAIN COMPANY LP	2350 S MAIN ST	JACKSONVILLE	IL	39.7039	-90.22916
23	ADM CURRAN	5848 OLD RTE 54	NEW BERLIN	IL	39.741891	-89.760101

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF JOHN F. ORR REGARDING HOUSTON AREA INFRASTRUCTURE CAPACITY

EXHIBITS

EXHIBIT 1: JOINT MEETING PRESENTATION, JUNE 29, 2022

EXHIBIT 2: HOUSTON TERMINAL PLAYBOOK, TERMINAL DISCIPLINE (UP)

EXHIBIT 3: PTRA HOUSTON RAILROAD MAP

EXHIBIT 4: EMAIL, TIMOTHY L. WOOLEY (UP) TO BRIAN E. GORTON (UP), APRIL 8, 2019

EXHIBIT 5: JOHN ORR LETTER TO ERIC GEHRINGER AND MATTHEW GARLAND, MAY 1, 2022

1. My name is John F. Orr. I am Kansas City Southern's Executive Vice President – Operations.

2. This statement describes why the rail lines utilized by The Kansas City Southern Railway Company ("KCS") between Beaumont and Robstown, Texas have adequate capacity for all users if properly operated and maintained.

3. My background includes nearly 40 years in all phases of railroad operations. I began my railroading career in 1984 as a conductor with Canadian National Railway ("CN"). Over the next 34 years, I progressed through many phases of CN's operating department, including service as senior vice president-operations for CN's U.S. (Southern) Region, CN's vice president-transportation for its network in Eastern Canada, and vice president-chief safety and sustainability officer for CN's entire North American network. I concluded my career with CN in 2019 as senior vice president and chief transportation officer, responsible for network assets and operations across CN's nearly 20,000-mile U.S. and Canadian network. From 2019 until early 2021 I worked as a top-level operations executive in railroading and transportation ecosystems across Europe, Asia, and North America. In February 2021 I joined KCS as a consultant, and moved to my current position in mid-April, 2021.

4. KCS operates between Beaumont and Robstown, Texas via trackage rights over track owned jointly by Union Pacific Railroad Company (UP) and BNSF Railway Company

(BNSF),[1] solely by UP, and by Houston Belt & Terminal Railway Company (HBT).[2] *See* Reply Verified Statement of Stephen D. Simmons (Simmons V.S.), paragraphs 15 - 17.

5. The trackage rights lines used by KCS, plus KCS's Laredo Subdivision and a portion of KCS's Beaumont Subdivision, are dispatched from the Spring, Texas Joint Dispatch Center (Spring Center). UP, BNSF and KCS all have dispatchers at the Spring Center. The theory behind the Spring Center is that having all 3 companies dispatching traffic over these shared lines from the same facility will improve communication, coordination and overall operating efficiency because the dispatchers can talk to each other. While that is true to some extent, each company dispatches its trains from its own system. The amount of information that KCS has about either UP or BNSF trains and operations is limited, is shared only at UP's and BNSF's convenience, and often is not shared timely enough for making or assessing decisions in near real time.

---

[1] In 1998, the STB granted UP and BNSF's petition for exemption for joint, equal ownership of the lines from Dawes, TX to Avondale, LA. *The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company--Acquisition Exemption—Lines Between Dawes, TX, and Avondale, LA*, STB Finance Docket No. 33630, 63 FR 51991-01 (Sept. 29, 1998). KCS operates over the Beaumont to Dawes portion of this joint line, which is part of UP's Houston Subdivision.

[2] UP and BNSF operate HBT's lines under trackage rights over all of HBT's tracks. *Southern Pacific Transportation Co.-Trackage Rights Exemption-The Houston Belt & Terminal Railway Co.*, STB Finance Docket No. 33461, *Union Pacific Railroad Co.-Trackage Rights Exemption-The Houston Belt & Terminal Railway Co.*, STB Finance Docket No. 33462, and *The Burlington Northern and Santa Fe Railway Co.-Trackage Rights Exemption-The Houston Belt & Terminal Railway Co.*, STB Finance Docket No. 33463, 62 Fed. Reg. 50049 (Sept. 24, 1997).

HBT is controlled by UP and BNSF. *See Southern Pacific Transportation Company—Trackage Rights Exemption—The Houston Belt & Terminal Railway Company*, et al., STB Finance Docket Nos. 33461, 33462 and 33463, and *The Texas Mexican Railway Company and Kansas City Southern Railway Company v. The Houston Belt & Terminal Railway Company, The Burlington Northern and Santa Fe Railway Company, Union Pacific Railroad Company, and Southern Pacific Transportation Company*, STB Finance Docket No. 33507 (served Dec. 21, 1998), slip op. at 15.

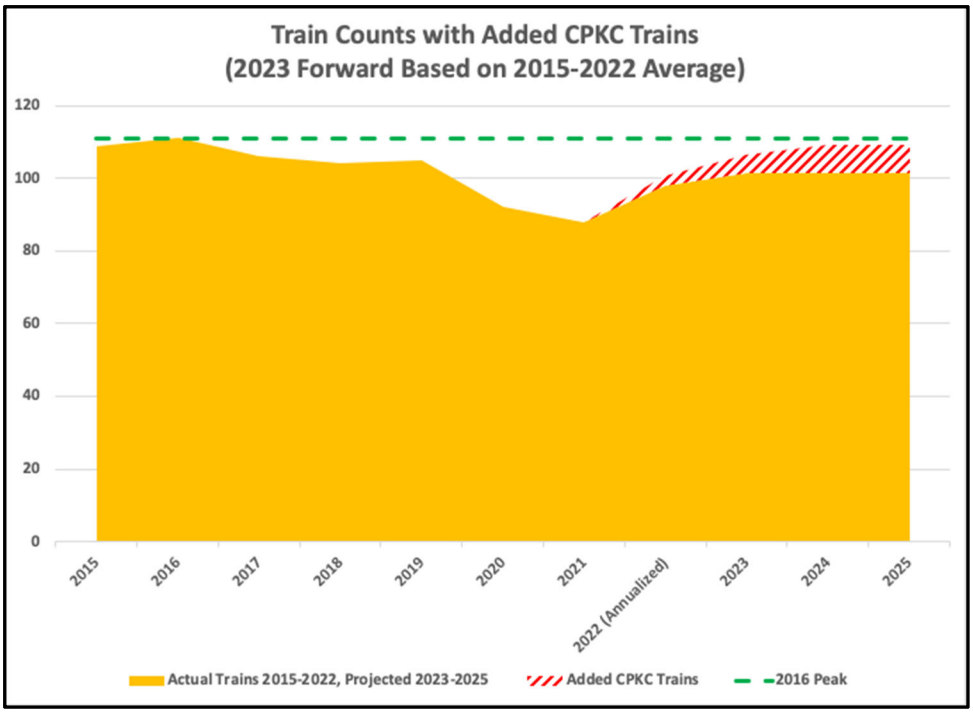
6. During my tenure with CN, I was involved with the Chicago Integrated Rail Operations Center (CIROC)**,** where all of the railroads serving Chicago—UP, BNSF, CN, Canadian Pacific, Norfolk Southern, CSX, the switching carriers IHB and BRC, and the passenger carriers Amtrak and Metra – all manage traffic in the Chicago area. CIROC provides much greater visibility than the Spring Center does for all participating carriers to understand actions affecting their traffic. I have proposed to my counterparts at UP and BNSF that we work together to move the Spring Center toward the CIROC model to improve all carriers' visibility of the operating environment from Beaumont to the border. I believe that change would allow better management of traffic on shared lines in south Texas.

7. The trackage rights lines are capable of accommodating more traffic than moves over them today. Historically, the portion of these lines in and east of Houston has accommodated more trains than are being operated today. The decline in the number of trains operated is due principally to operating practices of UP and BNSF, not to a lack of adequate infrastructure.

8. Each month UP, BNSF and KCS, along with PTRA,[3] meet to discuss operations over the jointly-used lines in and east of Houston. A copy of the report from the most recent of those meetings is attached as Exhibit 1. These reports are prepared by the Spring Center joint directors, currently Tim Wooley of UP and Robin Taylor of BNSF, to guide the meeting discussion.

[3] PTRA is the Port Terminal Railroad Association, which owns and operates lines along the Houston ship channel. UP, BNSF and KCS are members of the Association, along with the Port of Houston Authority of Harris County and Houston Belt & Terminal Railway Company (HBT). https://www.ptra.com/index.php/about-us/members-of-the-association.html .

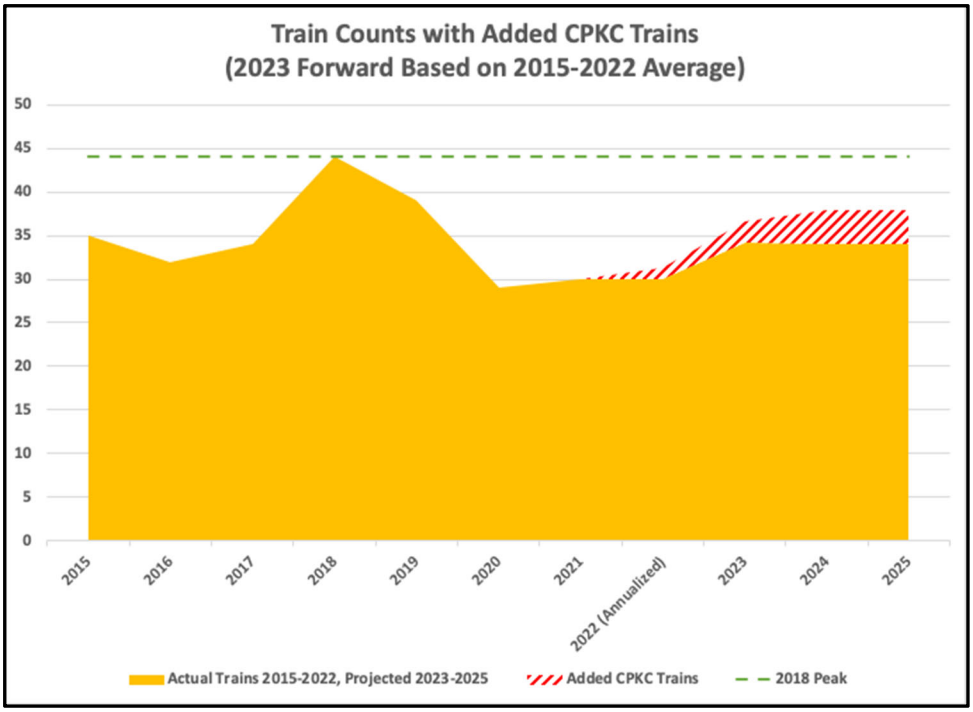
9. As shown on the third slide in the report, train counts in the Houston complex from 2015 through 2019 were well above current levels, up to 111 trains per day on average in 2016. On peak days, train counts range as high as 127 trains.[4] A simple graph shows that the projected additional CPKC trains can fit easily within the available capacity already shown by pre-pandemic train counts in Houston shown in the June 29 presentation:



10. Similarly, slide 5 shows that yearly average train counts on the "Joint Line" – the UP-BNSF Dawes, TX to Avondale, LA line – were as much as 14 trains per day higher pre-pandemic than they are today. Again, a simple graph shows that the demonstrated capacity of UP's Houston Subdivision[5] infrastructure can accommodate projected CPKC trains:

[4] *See* Exhibit 2, Houston Terminal Playbook, Terminal Discipline (UP).

[5] UP's 2020 timetable produced in discovery shows the line between Beaumont and Houston that UP formerly designated as its Lafayette Subdivision is now designated as UP's Houston Subdivision.



11. These historical data clearly show that the Houston complex and UP's Houston Subdivision have already handled as many or more additional trains than CPKC is projecting in Year 3 post-merger.

12. But even these data do not demonstrate the full capacity of the trackage rights lines to handle added traffic. The dotted green lines on the two graphs above represent only comparisons to past traffic volumes; that is, they represent only use, not capacity. Capacity of these lines may well have exceeded these prior traffic peaks because, as I understand it, Houston operations were generally fluid when these peaks occurred. Also, substantial infrastructure has been added to the Houston-area system since those past traffic peaks in 2016 and 2018, including the quarter billion dollars of infrastructure additions in the past 3 years to Englewood and Settegast Yards referenced by UP's Executive Vice President of Operations Eric Gehringer at the

STB's Ex Parte 770 hearing in April.[6] In short, the dotted green lines are only demonstrated use; they are not the maximum capacity of these lines. But even if the dotted green lines on the graphs were the current capacity of these sections of the trackage rights lines, the trackage rights lines could accommodate projected CPKC trains.

13. Importantly, almost all KCS trains and projected CPKC trains simply transit the "Joint Line" and the "Houston Complex" without blocking, switching, serving customer locations or other activities that slow the passage of trains through this area.[7] This allows KCS and CPKC trains to fit more easily into available capacity than do UP and BNSF trains. For that reason alone, any suggestion by UP or BNSF that CPKC should bear the cost of capacity expansion in these areas is clearly misplaced. And, as explained by Steve Simmons, *see* Simmons V.S., paragraphs 26-35, the Board-approved trackage rights agreements already provide for allocation of costs of any capacity expansions that may be needed in the future. As CPKC trains will be only a small portion of the volume of trains using any expanded capacity, under the trackage rights agreements, CPKC should bear a similarly small portion of the cost.

14. Attached as Exhibit 3 is a schematic representation of the lines in the Houston area over which KCS, UP and BNSF operate.[8] The schematic shows how the Lafayette Subdivision (since renamed by UP as its Houston Subdivision) runs through Dayton Yard, the connection to UP's Baytown Subdivision, and past the connections to and from Settegast Yard at

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[6] Testimony of Eric Gehringer, Executive Vice President, Operations, Union Pacific Railroad Company at Ex Parte No. 770, April 27, 2022 Public Hearing, Transcript STB Document ID 304765, posted June 15, 2022, page 906, line 13 through page 907, line 9.

[7] KCS does operate interchange trains to and from PTRA, currently at the rate of 4 times per week.

[8] This 2011 schematic, though slightly dated in some of its labeling (e.g., UP Houston Subdivision shows its former name, Lafayette Subdivision) remains an excellent representation of the main routes in and through Houston.

the northeast end of Englewood Yard. UP, BNSF and KCS all use these tracks to enter Houston from Beaumont and points east.

15. Slide 25 of Exhibit 2, a UP-prepared schematic, represents specifically the flow of KCS's traffic through the Houston complex. In that Exhibit, light blue arrows represent KCS's normal westbound route, while darker blue arrows represent KCS's normal eastbound route. There are numerous routes for trains through Houston and the green arrows represent the preferred alternate or clear route path for KCS.[9] Both exhibits demonstrate how operational impediments to moving trains past Englewood and Settegast Yards can impair all carriers' traffic moving from Beaumont to Houston.

16. Englewood Yard lies along UP's Houston Subdivision, the westbound trackage rights line into Houston. Settegast Yard lies about a half-mile north of Englewood Yard, between the Houston Subdivision and the Beaumont Subdivision, and connects to the Houston Subdivision at Englewood Yard. Even though Englewood and Settegast are massive yards,[10] adding a large amount of workload and additional switching, including arriving, departing and building longer trains at these two yards situated astride the entrance to and exit from Houston, has contributed to the increased challenges KCS has experienced traversing Houston.

17. What has changed from the pre-pandemic period to now is how UP and BNSF operate on these lines. In significant part this is due to UP closing yards elsewhere on its system, including curtailing construction in April 2019 of its Brazos Yard in Hearne, Texas, which was

[9] Green arrows represent some of the routes that the Spring Center could use to route KCS traffic under the STB's "clear route" condition. (*See* paragraph 23 below.)

[10] {[redacted]}.

slated to be one of the largest switching yards on UP's system.[11] In January 2021 UP announced a write-off of one half of the value of the Brazos Yard investment to date despite unchanged volume outlook for their Southern Region. At the time UP indicated that their network had been redesigned and that merchandise traffic in the Gulf Coast was growing and expansion was underway at Englewood Yard in Houston to increase processing capacity.[12] These changes have pushed more car switching activities into Englewood and Settegast Yards. For over two years, UP has been in the process of converting Englewood Yard from handling roughly 2700 cars per day to the largest hump yard on UP's system, intended to handle more than 3000 cars per day.[13] This has included major track, tie and rail replacements and substantial new construction activity which have disrupted yard operations.

18. The tracks in this area - from Dayton Yard past Settegast and Englewood Yards – are points where UP's and BNSF's current operational decisions often cause disproportionate delays to movement of KCS trains vis-à-vis their own. The graphic below represents KCS train delay data from February through May of this year, and shows that Dayton, Fauna and Tower 87/Settegast-Englewood are the largest contributors to delay of KCS trains attempting to transit Houston. These 3 locations – Dayton, Fauna and Tower 87/Settegast-Englewood, approximately Mileposts 327, 348 and 356.6 on UP's Houston Subdivision - all repeatedly impede KCS's westbound moves through Houston, largely due to yard-related activity of UP and BNSF.

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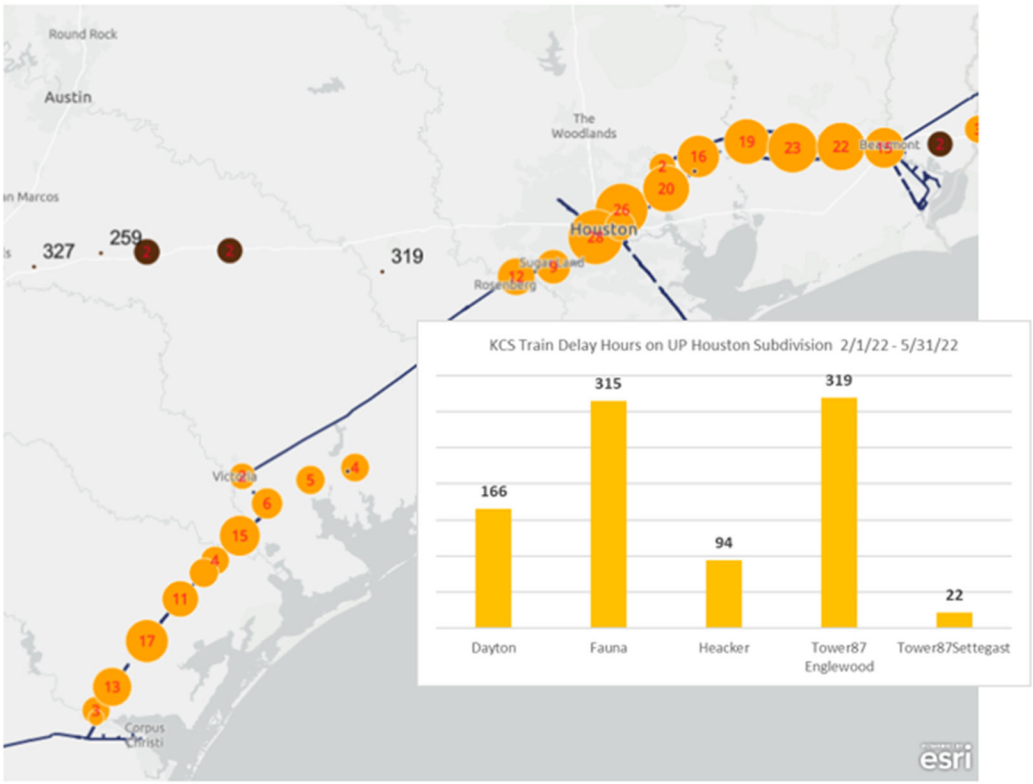
[11] *See* https://www.up.com/media/releases/180125-brazos-yard.htm.

[12] *See* https://www.trains.com/trn/news-reviews/news-wire/union-pacific-writes-down-brazos-yard-investment/.

[13] *See* https://www.up.com/aboutup/community/inside_track/englewood-yard-transformation-it-220324.htm.

KCS Train Delay Frequency – UP Houston Subdivision (2/22 – 5/22)



19. This is not an infrastructure problem - it's an operations problem. Nothing makes this clearer than UP's having invested a quarter billion dollars in its main Houston yards[14] - enough money to remedy virtually any localized infrastructure problem. Despite that investment, trains are being broken up and made up on the main lines outside these yards, congesting routes for through traffic like KCS trains that simply need to pass through the area. For example, trains entering and exiting the west end of Englewood Yard often occupy both Main Tracks 1 and 2. The "Houston Terminal Playbook"[15] that was developed and is maintained

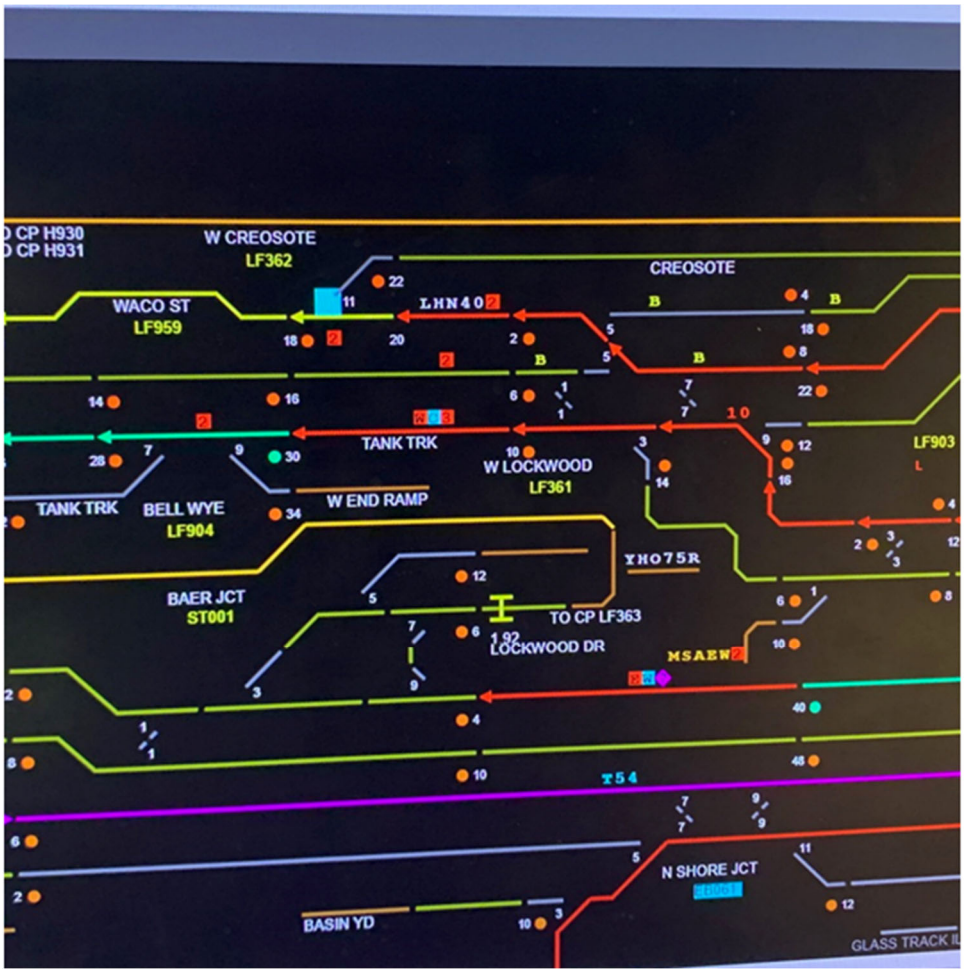
[14] Testimony of Eric Gehringer, Executive Vice President, Operations, Union Pacific Railroad Company at Ex Parte No. 770, April 27, 2022 Public Hearing, Transcript STB Document ID 304765, posted June 15, 2022, page 906, line 13 through page 907, line 9.

[15] Exhibit 2.

on an ongoing basis by UP to maintain fluidity throughout Houston, identifies Main 1 as the track that is supposed to be open for KCS westbound trains and other run through traffic to run by Englewood,[16] but it often is blocked by UP trains operating in and out of Englewood in opposition to prescribed departure and inbound routing protocol.

20. I was able to experience this first hand on June 8, 2022 while on an inspection and Town Hall meeting trip from Kansas City, MO to Laredo, TX on KCS's Southern Belle Executive Train. As seen from the dispatcher's screen below, both Mains at Englewood were occupied when the Executive Train approached Englewood. The screen shot below of the dispatcher's screen shows this situation with the train coming out of Englewood blocking both Main 1 and Main 2. Compare that to Exhibit 2, Slide 17, which is labeled "Incorrect Departure, Blocks routes, Should have used #2 main for MEWFPB."

[16] *See* Exhibit 2, Houston Terminal Playbook, slide 5.



21. The blockage of Main 1 necessitated alternate routing for the Executive Train. Because we could not bypass Englewood on Main 1, we were routed north at Tower 87 (on the northeast end of Englewood) onto the East Belt and through Pierce Yard to Belt Junction, then south to Tower 26 back onto the Houston Subdivision west of Englewood. This added about 45 minutes to our overall transit through Houston; however, it also demonstrated that there are numerous routing options through Houston that are available to each carrier.

22. At times, UP even allows yard crews to bring a train onto the main line before the over-the-road crew is available, resulting in a crew change on the main line. KCS regularly

experiences similar obstacles to eastbound trains, waiting for traffic to process in and out of the north end of UP's Settegast Yard.[17]

23. These are operational problems, not infrastructure problems. They can be remedied by using tools such as timely data, managing and maintaining the infrastructure more wisely, coordinated decision-making that includes all participating railroads, agreed standards and proper presentation of the trains operating in the complex, enabling the Spring Center to correct operating practices to conform to existing infrastructure, rather than trying to fit a square peg into a round hole. They can also be alleviated through alternate routing.

24. In addition, BNSF and UP have both been short of locomotives, so their ability to recover if a locomotive breaks down on line of road is limited. Shortages of power have led to some trains being underpowered, and if there is a problem with any of the locomotives on those trains, the train may not be able to move until new power is found and brought to the train, resulting in blocked track and delays. Both UP and BNSF told the STB at its Ex Parte 770 hearing in late April that they are bringing on locomotives.

25. BNSF and UP have also both been short of crews, and their ability to recrew trains is limited when a delay occurs. Both UP and BNSF told the STB at its Ex Parte 770 hearing in late April that they are short of crews but that, as with locomotive shortages, they are working hard to rectify their crew shortages.

[17] Another decision by UP that has exacerbated Houston area congestion has been UP's use of smaller-than-normal work gangs. These smaller work gangs do not accomplish as much work during a work curfew as a normal-sized work gang, leading to more work curfews to accomplish the same amount of work. Impactful examples of this were the recent tie program executed by UP on their Beaumont Sub from mid-March to late June where curfews ran a 5-on/5-off schedule for 5 hours a day, significantly impacting KCS eastbound flows through Houston and extending the period of time to remedy well over 100 Brownsville Sub track defects in early Spring after reports of rough track were submitted by KCS following an inspection train trip in February.

26. The shortage in timely availability of both crews and locomotives to move trains in and out of Englewood Yard has been one of the major factors that has led to the blockages that KCS has experienced entering Houston from Beaumont. UP and BNSF reports to the STB in EP 770 do confirm that UP and BNSF are adding locomotives and crews as promised.

27. To guard against potential crew needs on the trackage rights lines, KCS ramped up its hiring in 2021, so that we actually had more crews positioned to serve the trackage rights lines than we should need. That was a good decision. However, we have found that the Joint Director at the Spring Center, who is paid by UP and BNSF, will now hold our trains and direct us to recrew them while moving UP or BNSF trains because KCS has recrews available and UP and BNSF do not. This leads to higher cost for, and slower movement of, KCS trains, as compared to UP and BNSF trains.[18]

28. This certainly is not the only instance of inefficient, unequal treatment KCS has experienced on the trackage rights lines. For example, attached as Exhibit 4 is an email from Tim Wooley – the UP employee who serves as the Spring Center co-director – complaining to UP about the uneven impacts UP's unilateral decisions have on BNSF and KCS operating efficiency on the Beaumont to Dawes line:

> The BN and KCS have re-crewed their trains time over time trying to get through Beaumont - which fall short of Houston. What is the plan for the UP to reduce the work event time [at] Beaumont to provide parity to the other carriers?

[18] This certainly is not the first example of UP taking advantage of KCS forethought. I am told that before KCS rebuilt the Rosenberg-Victoria line, KCS operated over UP's entire Cuero Subdivision from Flatonia to Placedo to traverse between the Glidden and Brownsville Subs. KCS built a siding between Flatonia and Victoria on the Cuero Sub to improve fluidity by allowing trains to pass. UP refused to contribute to the cost of the siding, claiming that the siding was solely for KCS's benefit and therefore the cost was wholly attributable to KCS under the trackage rights agreements. Then, because the trackage rights agreement prohibited UP from using infrastructure it had not contributed to, UP would park KCS trains in the siding and then run multiple UP trains past the KCS train in the siding. When KCS rebuilt the Rosenberg-Victoria line, UP had to get KCS's permission to use the siding, even though KCS no longer used that route, because UP had not contributed to cost of the siding and was not entitled to use it under the trackage rights agreements.

29. This type of unequal treatment is one thing that a CIROC-type arrangement could help avoid. Based on KCS observation, there is no indication that either UP or BNSF experience recrews and train delays in the same proportion as KCS trains do. Again, the current problems in Houston do not result from infrastructure inadequacy; they result from bad, biased or inadequately-informed operating decisions.

30. Another current, and longstanding, failure of the Spring Center's dispatching of Houston area lines is the failure to implement the Board-imposed clear route condition on a more consistent basis. As a result of the 1997-1998 Houston/Gulf Coast service crisis, the Board imposed what it called a "'clear route' condition":

> [W]e have decided to adopt a so-called "clear route" condition to enhance efficiency and facilitate the smooth movement of railcars through the Houston Terminal. Under the "clear route" condition, the neutral and highly efficient joint Union Pacific Railroad Company (UP)/Burlington Northern Santa Fe Railway Company (BNSF) dispatching center at Spring, TX, will have the authority through its Joint Director to route traffic through Houston over any available route, even a route over which the owner of the train does not have operating authority.
>
> . . .
>
> We will impose a "clear route through Houston" condition to enhance efficiency and facilitate the smooth movement of traffic through the Houston Terminal, … To ensure, however, that the Joint Center staff do not feel constrained from making decisions necessary to efficient operations in the Houston Terminal due to trackage rights or other operational limitations, we are imposing a condition directing the Joint Center carrier-participants to authorize the Joint Director to use the best judgment in selecting alternative routings for train operations by UP, BNSF, and Tex Mex through the terminal, particularly when customary routings are unavailable or congested.[19]

31. Despite the Board's imposition of the clear route condition, UP largely refuses to use it. At times, KCS has had to contact UP's Director of Joint Facilities to get UP's

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[19] *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railway Company [Houston/Gulf Coast Oversight]*, 3 S.T.B. 1030, 1038 (1998).

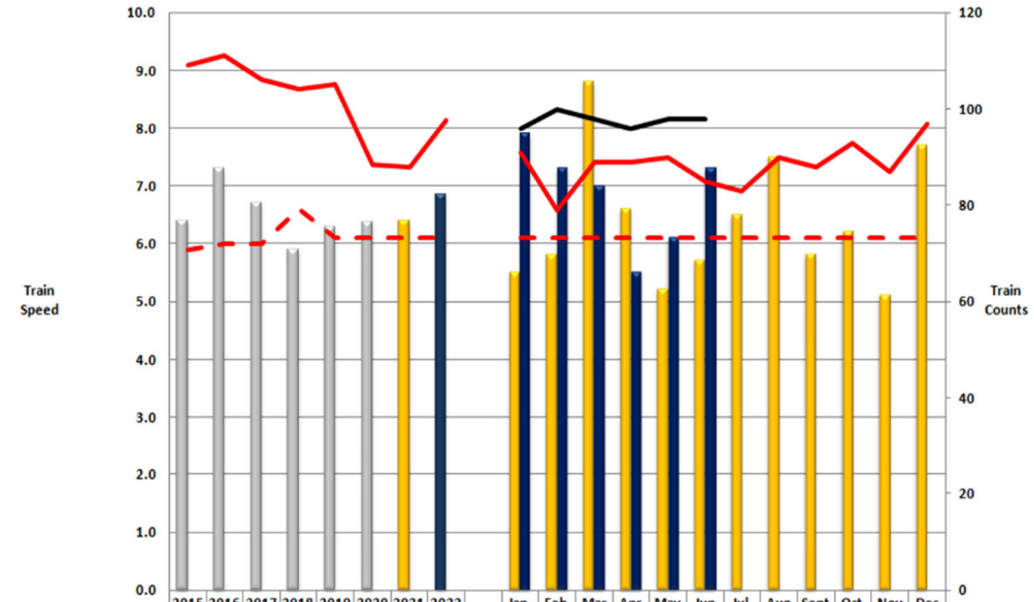
authorization for the Spring Center Director to utilize this Board-imposed efficiency maximizing authority. As indicated above, I was able experience first-hand on my June 8 Executive Train trip the flexibility and intended benefits of the clear route condition imposed by the Board. This is a very viable option to assist in handling current and future train movement through Houston given the vast routing options that exist.

32. KCS is not the only one adversely impacted by UP and BNSF operating practices. At the monthly Spring Center operations meetings, PTRA has spoken of problems with its interchange with UP, of UP's failure to communicate, UP's refusal to participate in daily coordination calls, and UP's bringing unscheduled, too-long trains to Englewood that affect all other carriers' operations.[20]

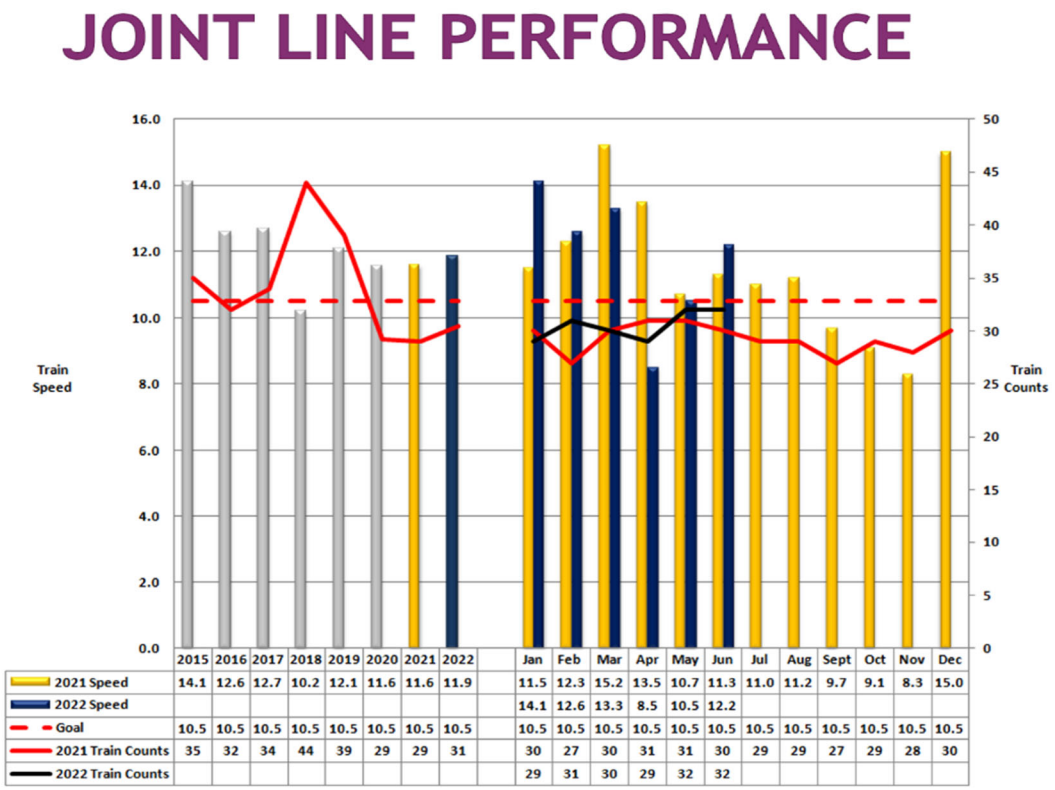
33. All of this is not to say that Houston is hopelessly bollixed up as happened in 1997-1998. There are some positive signs. For example, Exhibit 1 shows average train speeds in both the Houston Complex and on the "Joint Line" are trending up and are exceeding targets set for those areas.

[20] The standard practice of the Spring Center director is to limit KCS trains through Houston to less than 10,000 feet due to restrictions on their Beaumont and Brownsville Subdivisions. Although Eric Gehringer of UP testified April 27, 2022 at the STB's Ex Parte 770 hearing that when UP "build[s] our transportation plan, we restrict train length on certain corridors. So we don't take, for example, a 12,000-foot train and put it on a corridor that only has 8800-foot sidings", Testimony of Eric Gehringer, Executive Vice President, Operations, Union Pacific Railroad Company at Ex Parte No. 770, April 27, 2022 Public Hearing, Transcript STB Document ID 304765, posted June 15, 2022, page 900, lines 6-10. UP's Houston Area Timetable effective August 31, 2020, produced in discovery (UP-C-000205 – UP-C-000289), shows that the {{[redacted]}}. Nevertheless, KCS believes that UP does not limit its own trains to the same less-than-10,000-foot standard. Through communication within the Spring Center, KCS understands that UP will allow trains up to 15,000 and 12,000 feet on its Glidden and Houston Subdivisions, respectively, with both of those subdivisions feeding and receiving trains to and from UP's Englewood and Settegast Yards.

HOUSTON COMPLEX PERFORMANCE



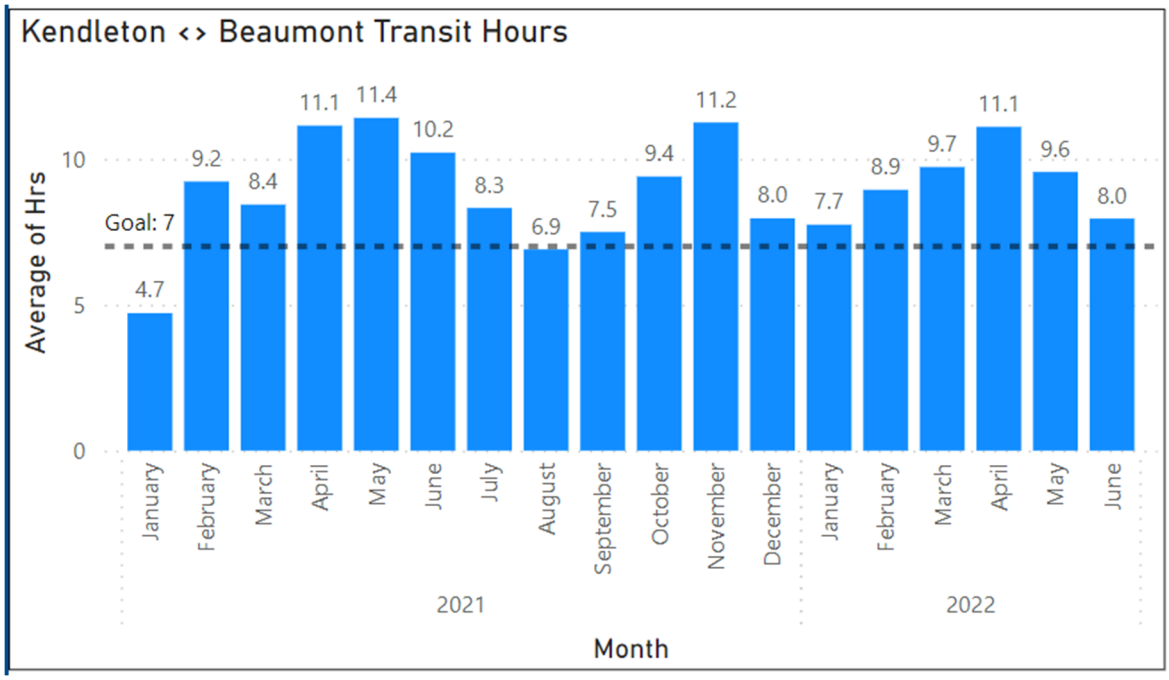
	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	6.4	7.3	6.7	5.9	6.3	6.4	6.4	6.9		5.5	5.8	8.8	6.6	5.2	5.7	6.5	7.5	5.8	6.2	5.1	7.7
2022 Speed										7.9	7.3	7.0	5.5	6.1	7.3						
Goal	5.9	6.0	6.0	6.6	6.1	6.1	6.1	6.1		6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
2021 Train Counts	109	111	106	104	105	88	88	98		91	79	89	89	90	85	83	90	88	93	87	97
2022 Train Counts										96	100	98	96	98	98						



	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	14.1	12.6	12.7	10.2	12.1	11.6	11.6	11.9		11.5	12.3	15.2	13.5	10.7	11.3	11.0	11.2	9.7	9.1	8.3	15.0
2022 Speed										14.1	12.6	13.3	8.5	10.5	12.2						
Goal	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5		10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5
2021 Train Counts	35	32	34	44	39	29	29	31		30	27	30	31	31	30	29	29	27	29	28	30
2022 Train Counts										29	31	30	29	32	32						

34. As shown by the graph below, KCS has seen improvement in overall transit times for trains operating between Beaumont and Kendleton, TX in May and June, after transit times peaked in April 2022 following overall Houston trends.

Orr R.V.S. at 18



35. In addition, infrastructure enhancement projects are currently in progress in the Houston area, including improvements in Englewood Yard,[21] north Basin crossovers, and second main tracks from Dawes to Fauna and Crosby to Dayton, the lattermost being completed in late June. The Englewood north "Creosote" bypass track extension should be completed this Fall, and should restore KCS's ability to bypass Englewood Yard that recently had been lost due to UP's blocking both Main 1 and Main 2 going in and out of Englewood.

36. Additional capacity expansion is also occurring on UP's lines southwest of Houston. Four additional or extended sidings underway on the UP Angleton Subdivision will improve the ability to get UP and BNSF trains out of Houston and to stage UP and BNSF trains entering the Houston complex without preventing trains from leaving the complex. KCS is also

[21] *See* UP customer announcements dated July 15, 2021, December 22, 2021, January 5, 2022 and March 16, 2022. *See* https://www.up.com/customers/announcements/customernews/index.htm.

aware of future planned projects over the next several years that would help with overall Houston fluidity and train transit once completed.

37. I have reached out to my counterparts at UP and BNSF to engage in a conversation about ways to improve the current situation and future operational efficiency. My letter to Eric Gehringer at UP and Matt Garland at BNSF following the STB's Ex Parte 770 hearing and proposing ways to work together for positive solutions for the trackage rights lines is attached as Exhibit 5. Both gentlemen have indicated a willingness to discuss the issues, which is a positive sign. Senior Operating representatives from KCS and UP recently met in Houston for the first time since pre-COVID to review performance trends and discuss process, planning and other improvement opportunities to work on together for Houston, Southern Border, and Kansas City rail operations.

38. What I have advocated to my UP and BNSF counterparts is the need for structural improvements in the way the trackage rights lines are operated, to improve the use of existing capacity. All users of these lines need a shared base of information, a common platform to use that information, joint maintenance and schedule planning, and an agreed set of standards to measure use of the facilities. That will enable all users to work together to stay ahead of capacity needs, whether through operational or infrastructure changes.

39. Unfortunately, the trend over the past three years has been for UP to share less information, to cut KCS off from UP information that KCS previously received. Joint planning activities have also been reduced over this timeframe, with the most recent example being extended simultaneous curfew periods on the UP Brownsville and Beaumont Subdivisions in 2022. KCS trains currently comprise the majority of the train count on the UP Brownsville Subdivision, and this traffic was impacted heavily in the Spring, driven by major curfews daily

on both the UP Brownsville and Beaumont Subs. These curfews on both ends of the KCS Beaumont-Robstown trackage right route added 24+ hours to the transit times of all trains since we could only advance from Robstown to Kendleton overnight before encountering the next curfew. Prior to 2020, work plans like these had been discussed and reviewed in bi-annual meetings between KCS and UP to ensure we were not independently planning production on key Subdivisions through south Texas and the Gulf Coast region.

40. Appropriate and equitable use of the trackage rights lines according to the STB-approved trackage rights agreements requires sharing more information, not less. The recent trend in reduced information sharing needs to be reversed.

41. Operational improvement on the trackage rights lines is needed, but it is within the power of the parties to make the right decisions to operate the trackage rights lines effectively. Infrastructure is adequate to meet the current KCS needs and projected CPKC needs. When added infrastructure becomes necessary, as it eventually will be if all carriers grow their traffic as they would like to do, the existing agreements provide how that infrastructure is to be paid for. KCS has demonstrated a willingness to invest in efficiency and capacity projects on the trackage rights lines, and has worked with UP in the past on process improvements. CPKC remains committed to doing so in the future.

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VERIFICATION

I, John F. Orr, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this ____ day of July, 2022.

DocuSigned by:
John F. Orr
37E7994A57084ED...

John F. Orr
Executive Vice President - Operations
Kansas City Southern

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ORR R.V.S. EXHIBIT 1

JUNE 29, 2022 JOINT MEETING PRESENTATION

JOINT MEETING
JUNE 29, 2022

JUNE DISCUSSION

Complex Workshop Success

YH387J: On Duty Change Working

YH185J: Round Tripping

Relief Crews (Complex/Joint Line)

Re-crews on downward trend

KCS GTB Automation

Timeline for Completion?

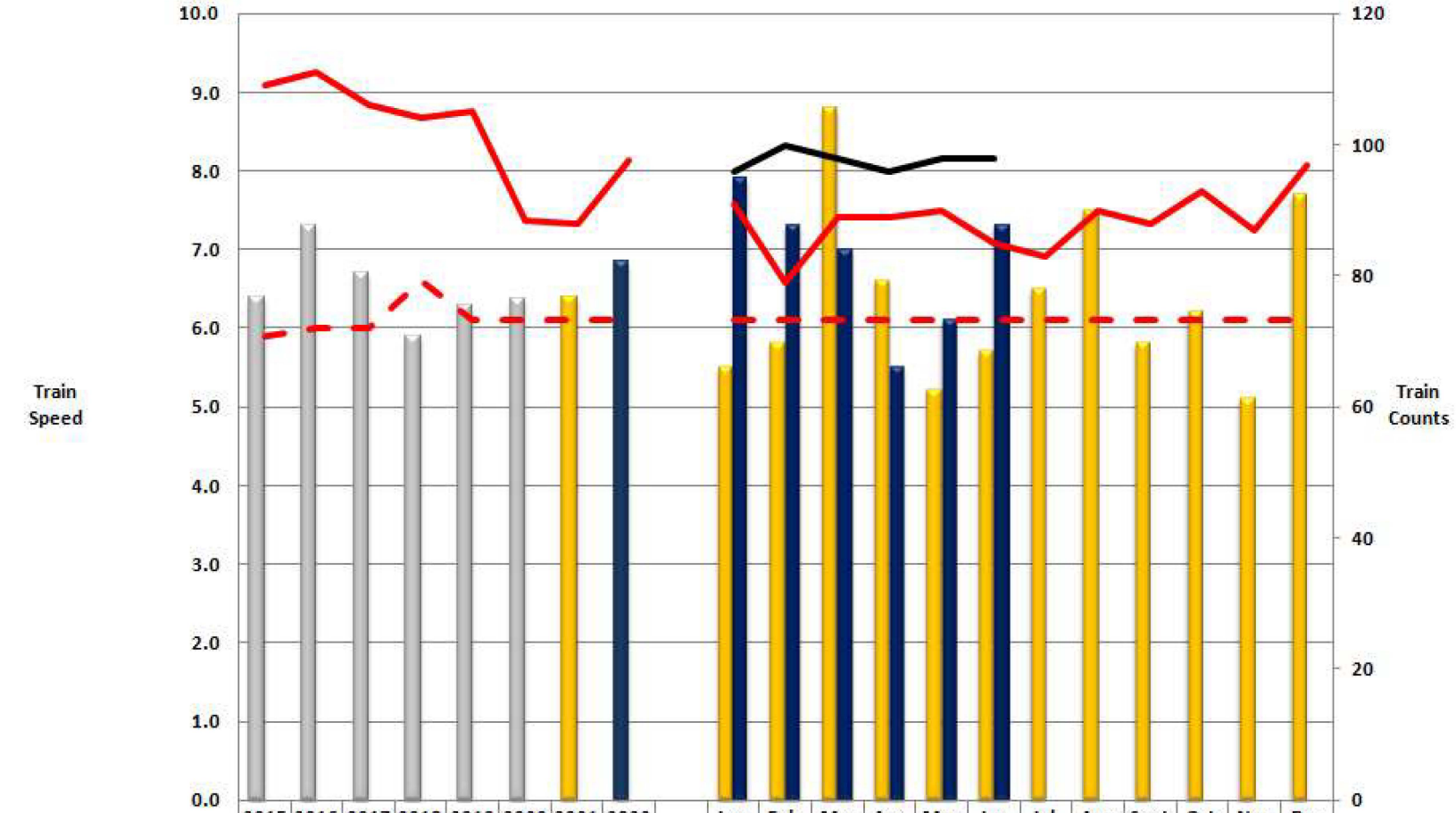
KCS

Kendleton Local Mon, Wed, Fri to discuss today

UP Beaumont

MLKBT/MBTLK time change to 0400

HOUSTON COMPLEX PERFORMANCE

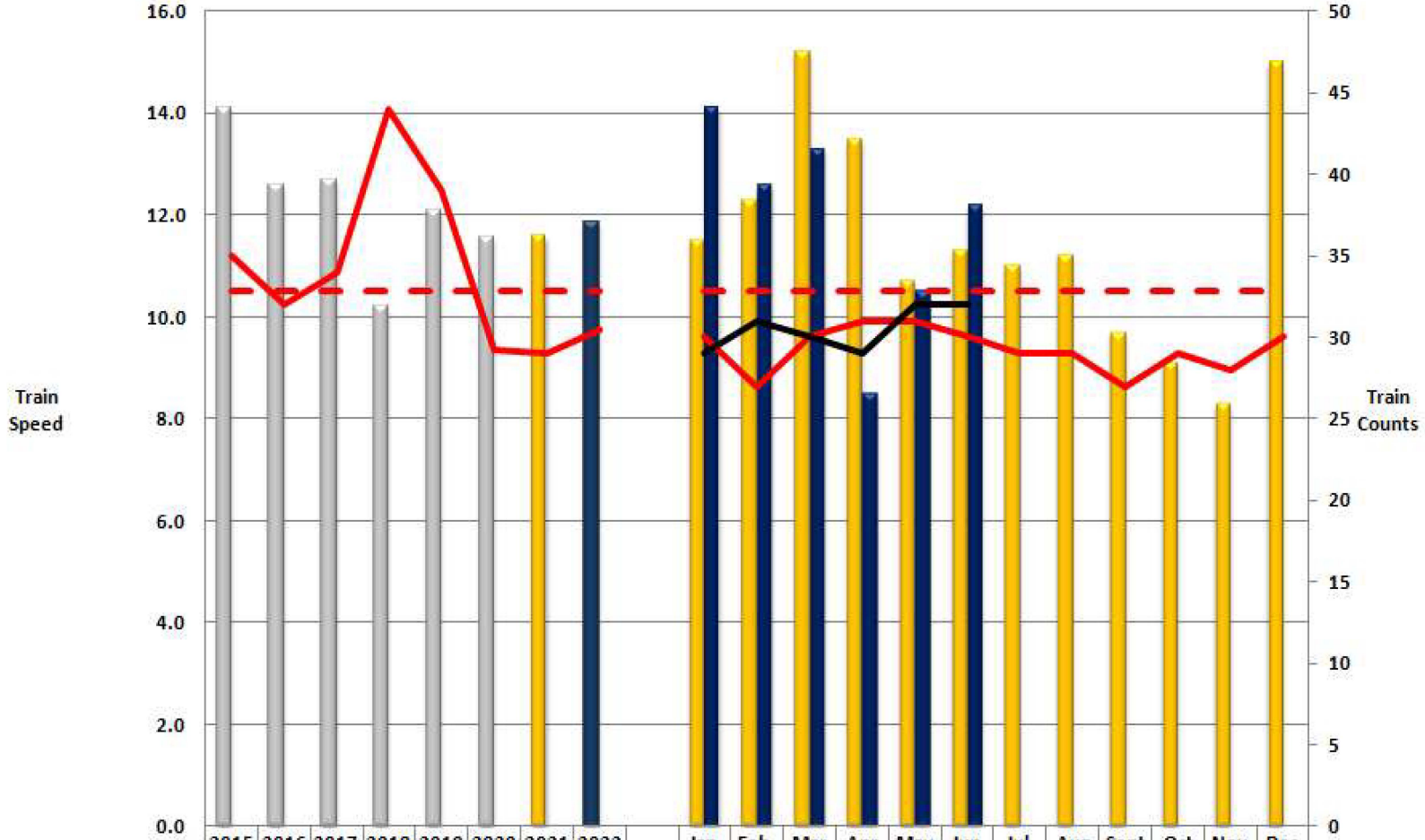


	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	6.4	7.3	6.7	5.9	6.3	6.4	6.4	6.9		5.5	5.8	8.8	6.6	5.2	5.7	6.5	7.5	5.8	6.2	5.1	7.7
2022 Speed										7.9	7.3	7.0	5.5	6.1	7.3						
Goal	5.9	6.0	6.0	6.6	6.1	6.1	6.1	6.1		6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
2021 Train Counts	109	111	106	104	105	88	88	98		91	79	89	89	90	85	83	90	88	93	87	97
2022 Train Counts										96	100	98	96	98	98						

HOUSTON COMPLEX MOW ACTIVITIES 2ND QUARTER 2022

- Glidden Road Crossing
  - Replacements in progress
    - Completion Date 07/28
- Englewood Bypass Track
  - In progress. ETO 4th Quarter 2022
- Glidden Tie Gang
  - ETA Sept. 28th, 2022

JOINT LINE PERFORMANCE



	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	14.1	12.6	12.7	10.2	12.1	11.6	11.6	11.9		11.5	12.3	15.2	13.5	10.7	11.3	11.0	11.2	9.7	9.1	8.3	15.0
2022 Speed										14.1	12.6	13.3	8.5	10.5	12.2						
Goal	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5		10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5
2021 Train Counts	35	32	34	44	39	29	29	31		30	27	30	31	31	30	29	29	27	29	28	30
2022 Train Counts										29	31	30	29	32	32						

JOINT LINE INFRASTRUCTURE ENHANCEMENTS 2ND QUARTER, 2022

- July 7th
  - 24’ Liberty Bridge Replacement “Final”
- July 28th
  - 12’ Double Bridge Replacement at West Lake
- Joint Elimination
  - UP Houston Sub
    - Weld out new Double Track

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ORR R.V.S. EXHIBIT 2

HOUSTON TERMINAL PLAYBOOK, TERMINAL DISCIPLINE (UP)

Houston Terminal Playbook

REDACTED PUBLIC RECORD VERSION



Terminal Discipline

HOUSTON TERMINAL MANAGEMENT

Senior Director: Kenny Gomez

Joint Director: Tim Wooley

Trains processed

"Corridor 38"

- Dispatchers move on average 110 trains a day with Peak days up to 127 trains with speeds ranging from 6.5 to 12 mph.

- CM manages 4 carriers, UP, BNSF, KCS and PTRA

- Complies with City of Houston Blocked Crossing and Quiet Zone initiatives.

REDACTED PUBLIC RECORD VERSION

Terminal Priority Trains

- All internal traffic must be protected to maintain Yard integrity
  - (MSRHO, MEWSR, MEWPT, MPTHO, YHO70, YHO70B, YEW64/YHO91, YH187J, YH185J, YH387, YH289)
- Run Through Traffic Must Remain on designated routes unless MOW or a Service Interruption exist
- Directional Flow is the **Standard** which maintains balance on Belts and Cross Traffic at Twr87 and Twr26
- Englewood North Side must be kept at 90 inbound spacing
- Use of the Bell Main for Inbounds to the South Side reduces conflict at the West End of Englewood
- Lufkin Sub Exit Plan must be followed to maintain fluidity on the Lufkin Sub

REDACTED PUBLIC RECORD VERSION

Terminal Sub Routing
Making Englewood 1st os

Preferred Routing

- Main #1 used for run through traffic
  - Reserved for through freight via Creosote Track
    - Used to run ZG4HO, AMT1, KCS and BNSF

- Main #2 used for the outbound process
  - All outbound traffic to enter main 2 at LF903 from the Tank Track, ET and WT allowing multiple departures during peak outbound times and limited inbounds.

REDACTED PUBLIC RECORD VERSION

Bringhurst Protocol

45” Minutes

45”

Minutes to Double Over, Crew on Train, Set and Release and Depart the Yard

If locomotive Issues develop, Car issues develop – Train is to shove Main #2, Double Back in the Yard or move to Pierce for resolution

This is an Absolute Must

Get a Broke Train Out of The Way

Next Level Management

REDACTED PUBLIC RECORD VERSION

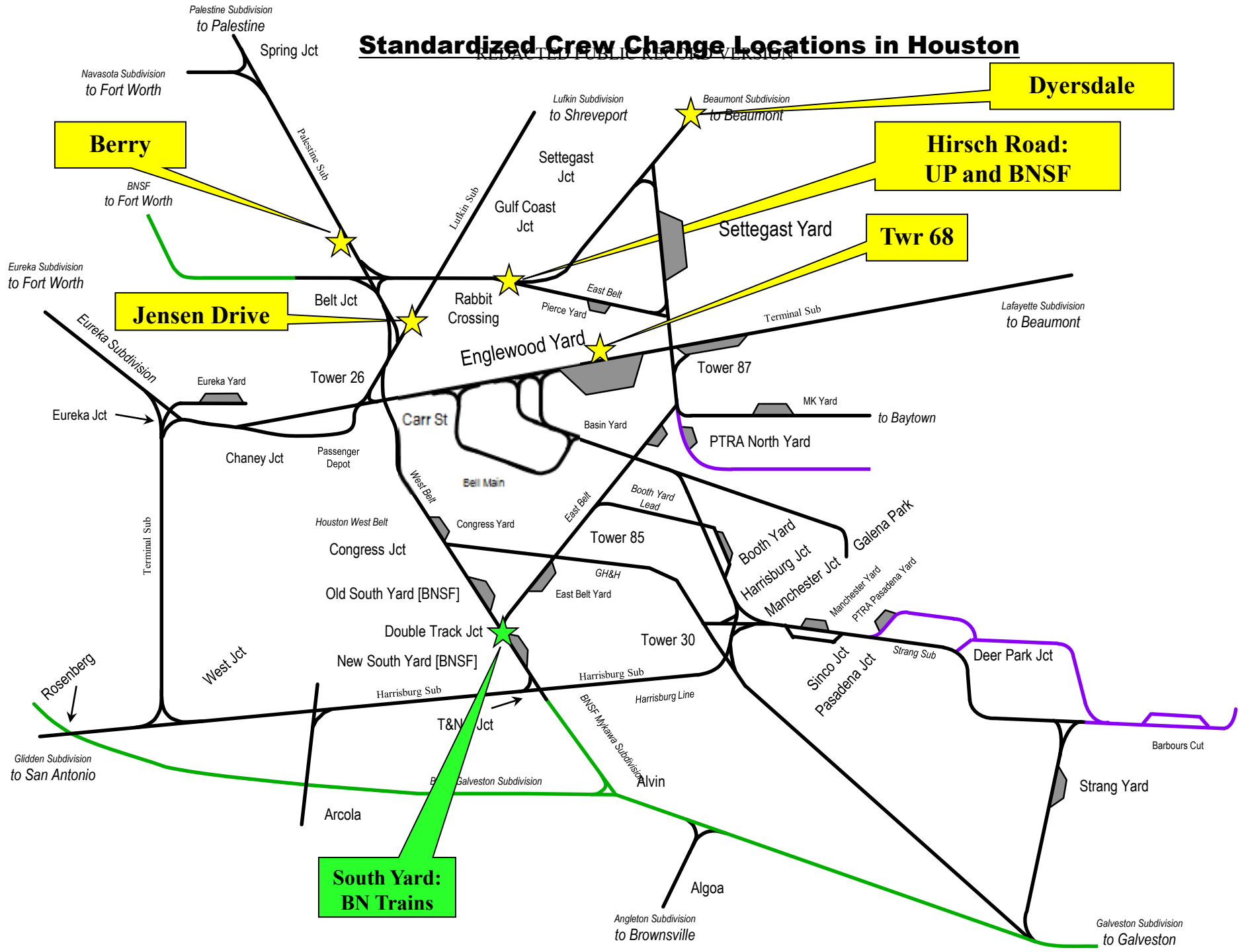
Improving Velocity and Reducing Recrews

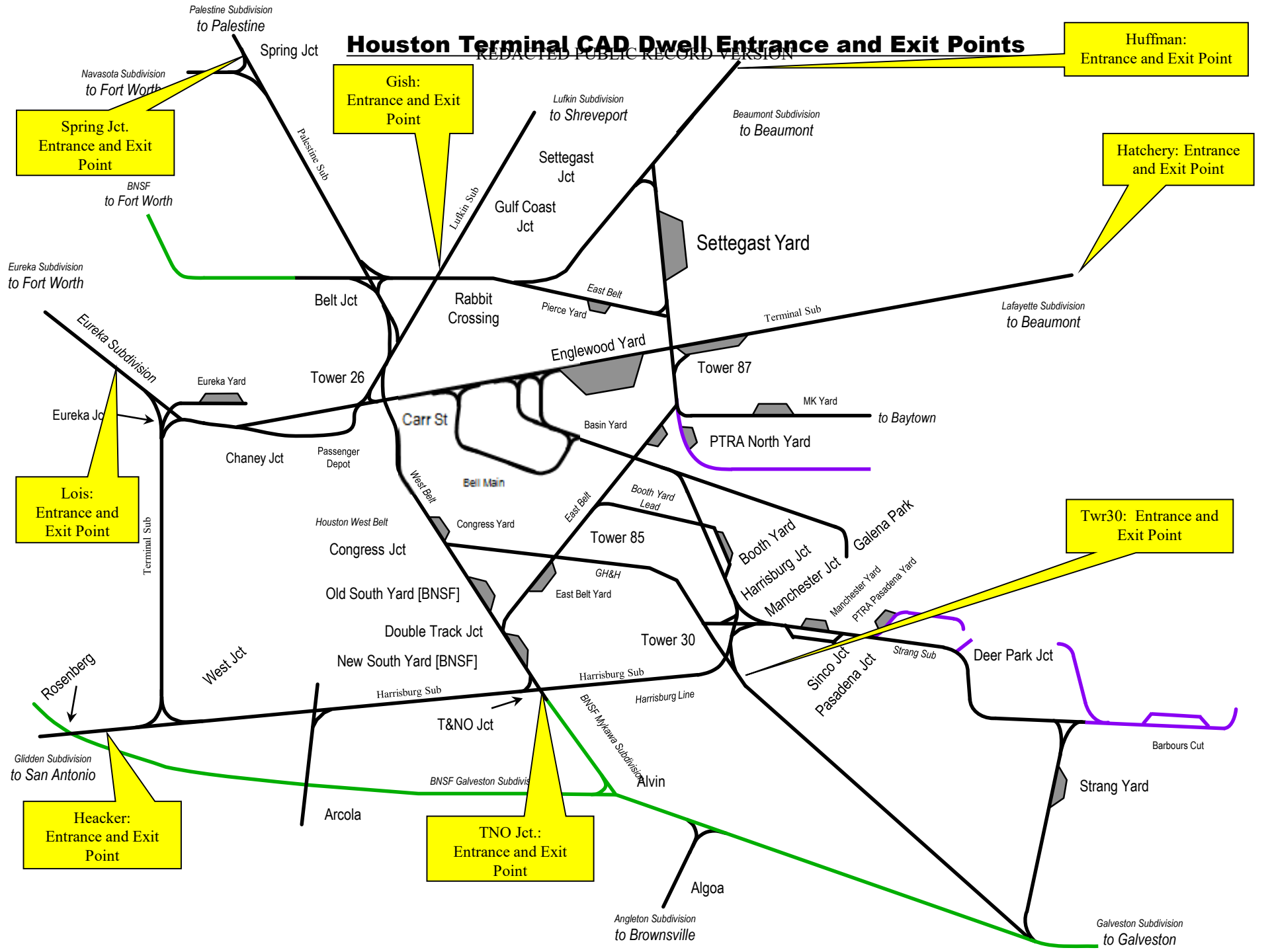
Locomotive Issues (L-Codes) 10 Step Process		Limo Issues (CT) 9 Step Process		Crew Issues (CR) 8 Step Process	
B.U. (is unit required ?)		Time Frame (acceptable)		Time Frame (acceptable)	
Contact Help Desk		Service Unit Mgmt		Other source (local)	
Can Road Truck repair ?		Alternate Vendor		Short Pool	
Main Line Cuts		CAB Company		Alternate route	
Reduce and Run		Scheduled Bus Service		Prioritization Down Line	
Piece Meal Train		Transport by Amtrak		Prioritize Trains (bump & run)	
Combo Opportunities		Transport by Train		Director Notification	
Director Escalation		Director Notification			
Pull Power					
Update Trains Held w/resolution		Update Trains Held w/resolution		Update Trains Held w/resolution	
Terminal Issues (YG) 9 Step Process		**Corridor Issues (TG) 6 Step Process**		**Incident Recovery (WA-DR-ETC) 7 Step Process**	
Escalate to Term. Mgmt. Team		Slotting requirements		Notifications (Go Team)	
Develop alternate switching plan		Alternative Open Routes		Crew Planning (Get crews)	
Notify S.U. Superintendent		Terminal Cooperation		Alternative Routes	
Reduce restricted block & run		Entry Point Plan		Crew Balancing (prior/to plan)	
Piece Meal Train		Director Escalation		Start Up Plan	
Combo Opportunities				Director Involvement	
Director Escalation					
Pull Power					
Update Trains Held w/resolution		Update Trains Held w/resolution		Update Trains Held w/resolution	
Bad Order Car Issues (BO) 8 Step Process		**Customer Holds - AQ / AE 6 Step Process**			
Notifications (Go Team)		Commodity Group Escalation			
Necessary to setout		Time Frame (acceptable)			
Can Road Truck repair ?		Slotting requirements			
Slotting requirements		Controlled Launches			
Alternative Routes		Director Involvement			
Entry Point Plan					
Director Escalation					
Update Trains Held w/resolution		Update Trains held w/resolution			

Superintendent _____ Corridor Manager _____

Standardized Crew Change Locations in Houston

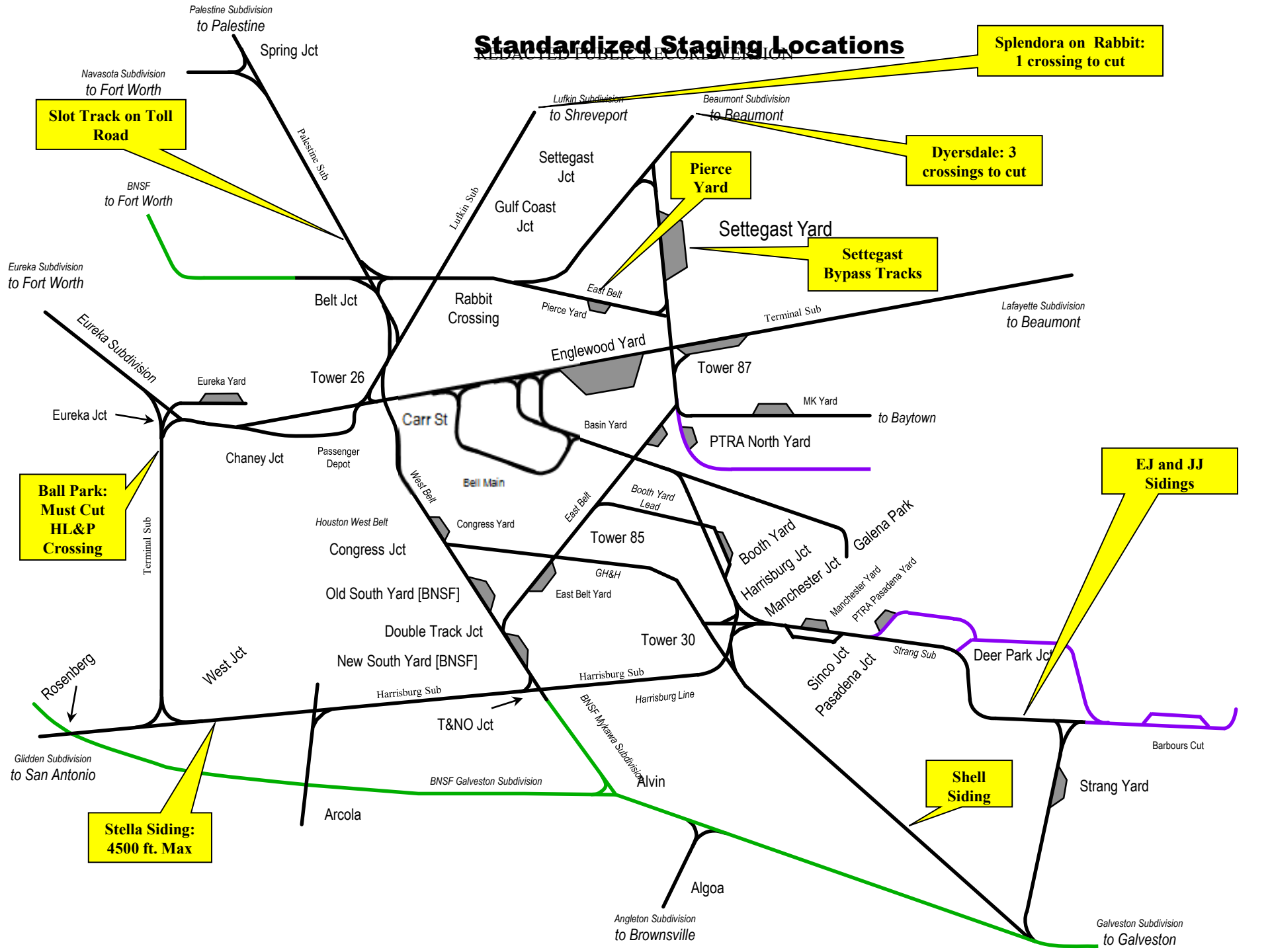
REDACTED PUBLIC RECORD VERSION




Houston Terminal CAD Dwell Entrance and Exit Points
REDACTED PUBLIC RECORD VERSION
Palestine Subdivision
to Palestine
Spring Jct
Navasota Subdivision
to Fort Worth
Spring Jct. Entrance and Exit Point
Gish: Entrance and Exit Point
Lufkin Subdivision
to Shreveport
Huffman: Entrance and Exit Point
Beaumont Subdivision
to Beaumont
Hatchery: Entrance and Exit Point
Palestine Sub
Lufkin Sub
Settegast Jct
Gulf Coast Jct
BNSF
to Fort Worth
Settegast Yard
Eureka Subdivision
to Fort Worth
Belt Jct
Rabbit Crossing
East Belt
Pierce Yard
Terminal Sub
Lafayette Subdivision
to Beaumont
Eureka Subdivision
Englewood Yard
Tower 87
Eureka Yard
Tower 26
MK Yard
to Baytown
Eureka Jct
Carr St
Basin Yard
PTRA North Yard
Chaney Jct
Passenger Depot
Bell Main
West Belt
Booth Yard Lead
Lois: Entrance and Exit Point
Houston West Belt
Congress Yard
East Belt
Twr30: Entrance and Exit Point
Terminal Sub
Tower 85
Booth Yard
Harrisburg Jct
Manchester Jct
Galena Park
Congress Jct
GH&H
Manchester Yard
PTRA Pasadena Yard
Old South Yard [BNSF]
East Belt Yard
Double Track Jct
Tower 30
Sinco Jct
Pasadena Jct
Strang Sub
Deer Park Jct
Rosenberg
West Jct
New South Yard [BNSF]
Harrisburg Sub
Harrisburg Sub
Harrisburg Line
T&NO Jct
BNSF Mykawa Subdivision
Barbours Cut
Glidden Subdivision
to San Antonio
BNSF Galveston Subdivision
Alvin
Strang Yard
Heacker: Entrance and Exit Point
Arcola
TNO Jct.: Entrance and Exit Point
Algoa
Angleton Subdivision
to Brownsville
Galveston Subdivision
to Galveston

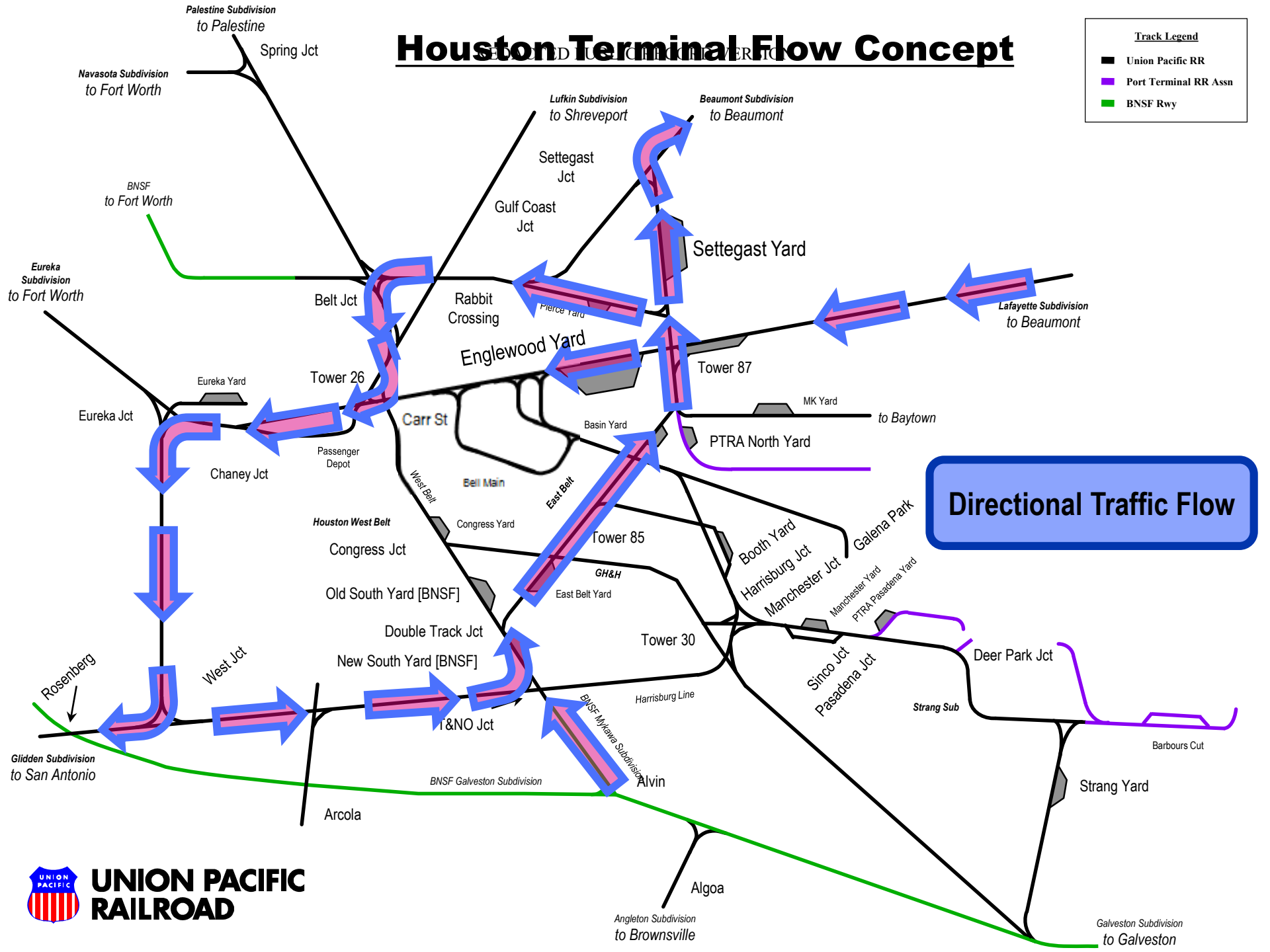
Standardized Staging Locations

REDACTED PUBLIC RECORD VERSION

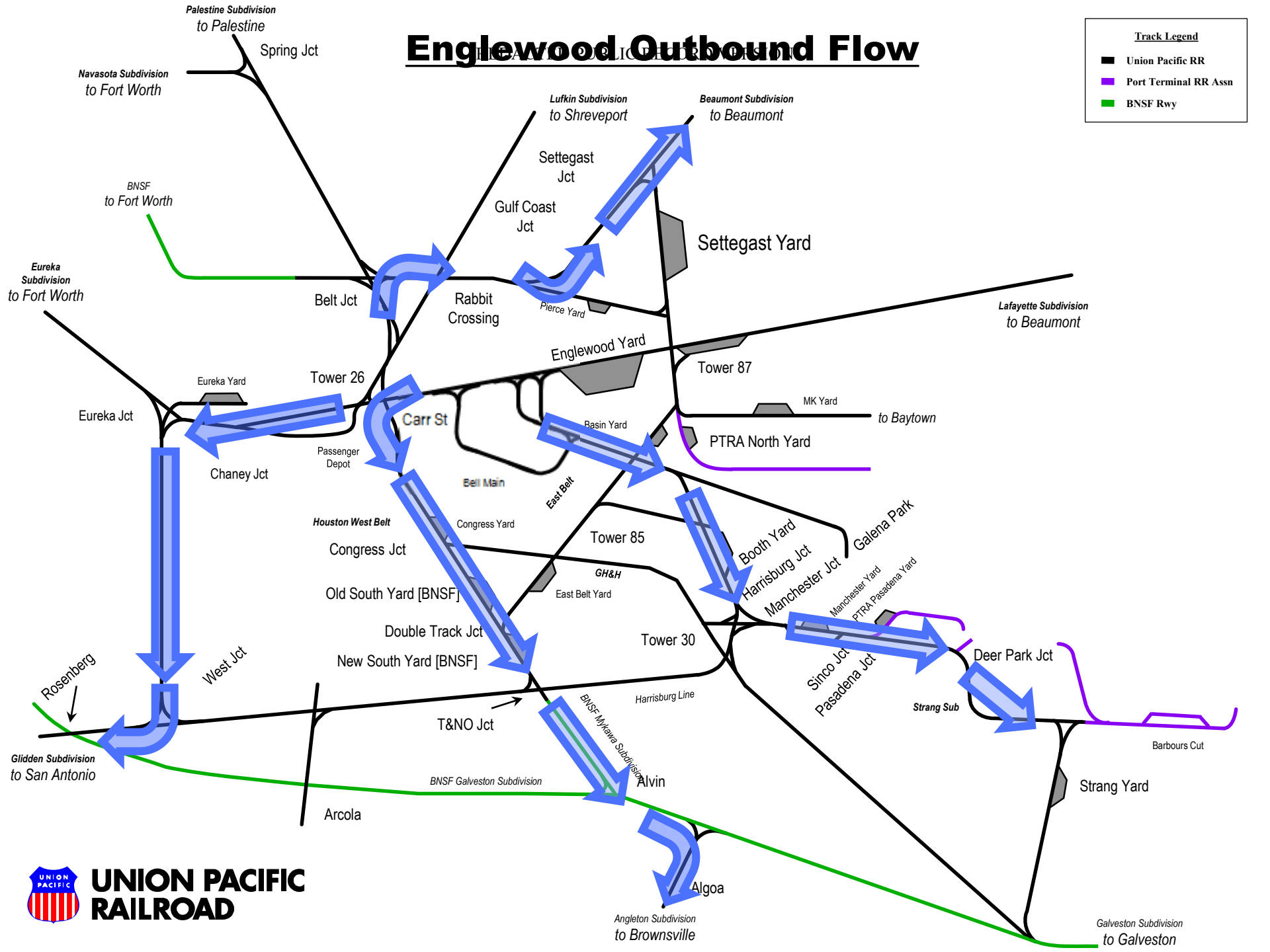


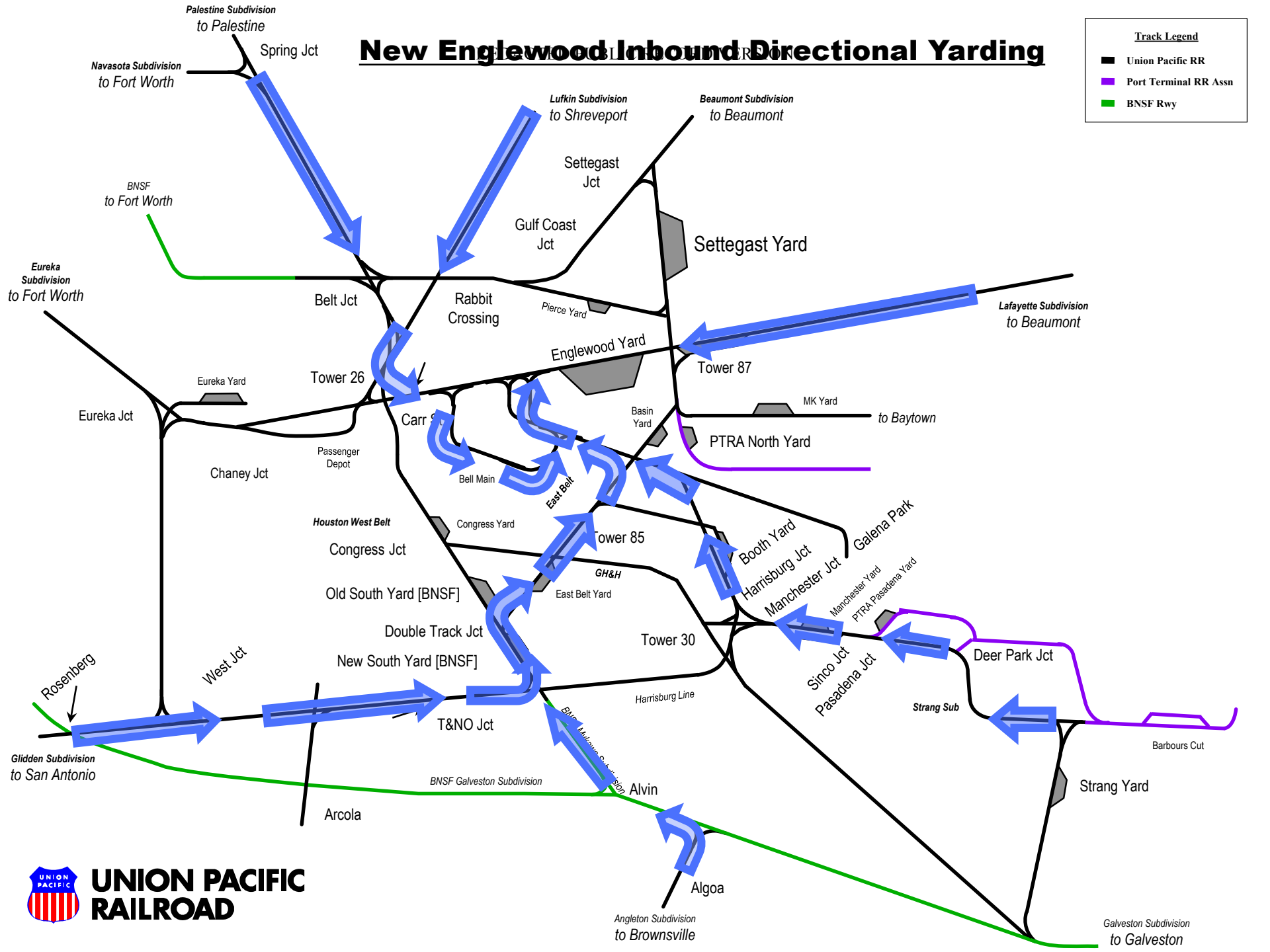
Houston Terminal Flow Concept

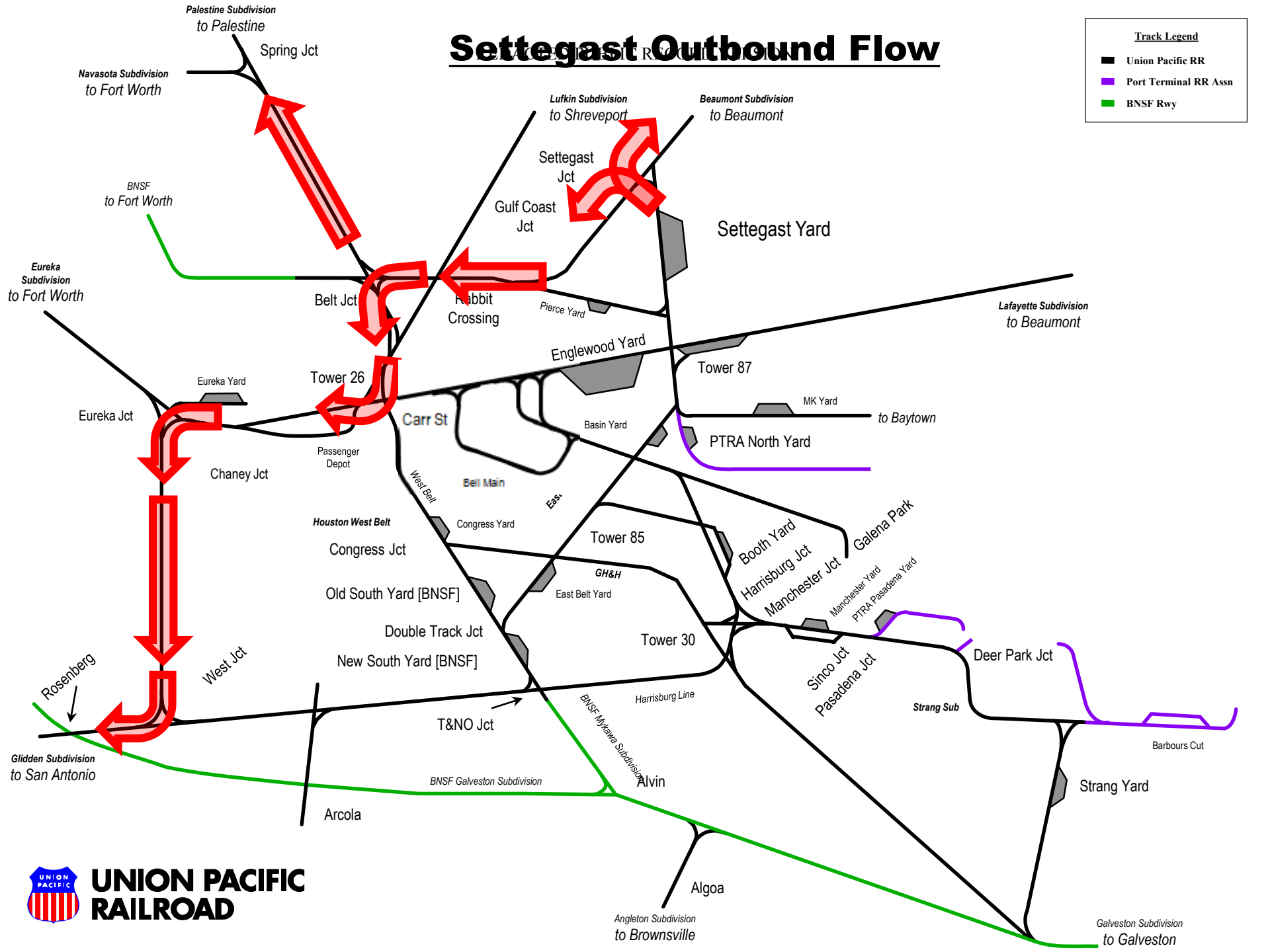
SECOND SUBDIVISION VERSION

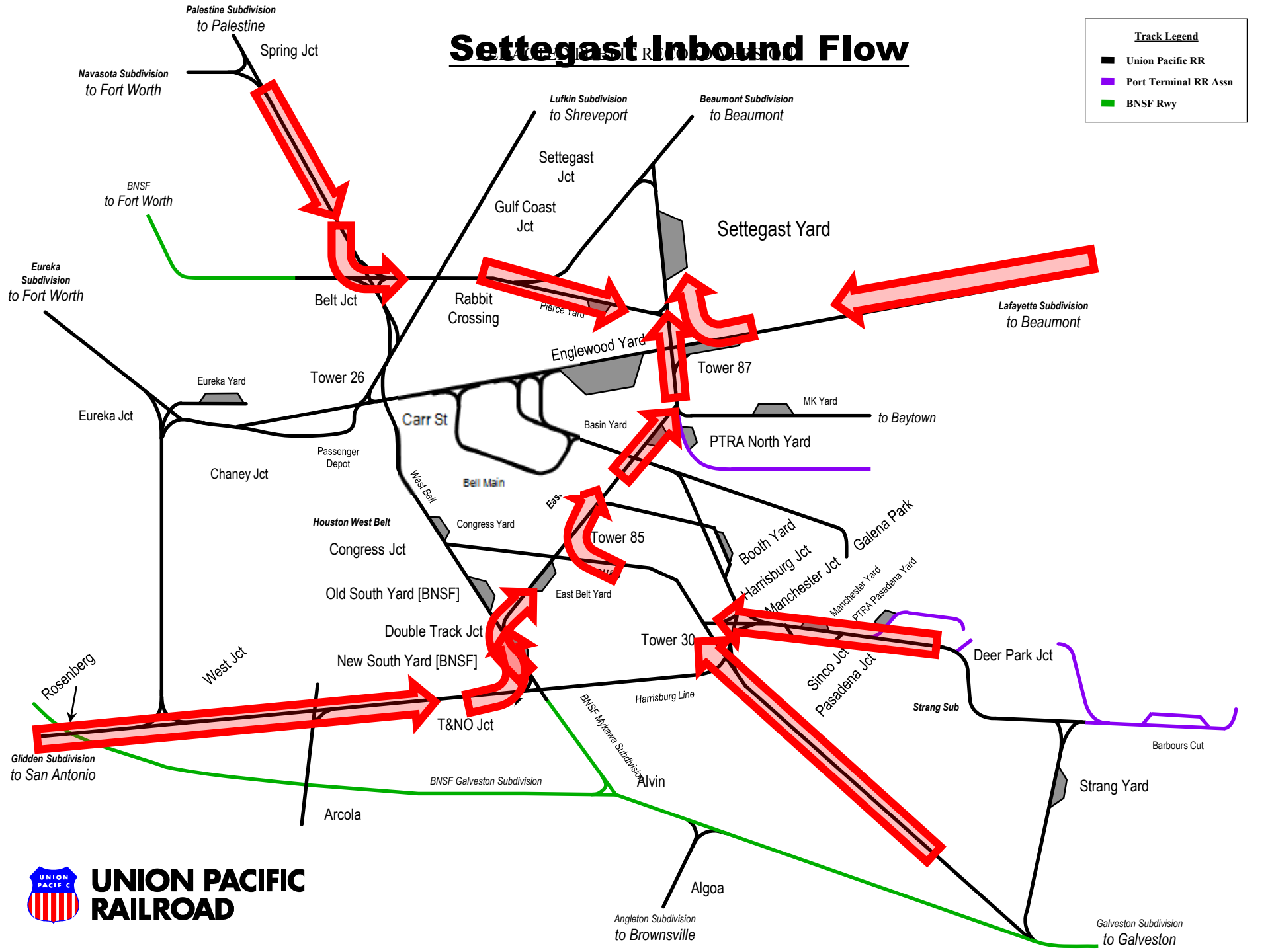


Englewood Outbound Flow

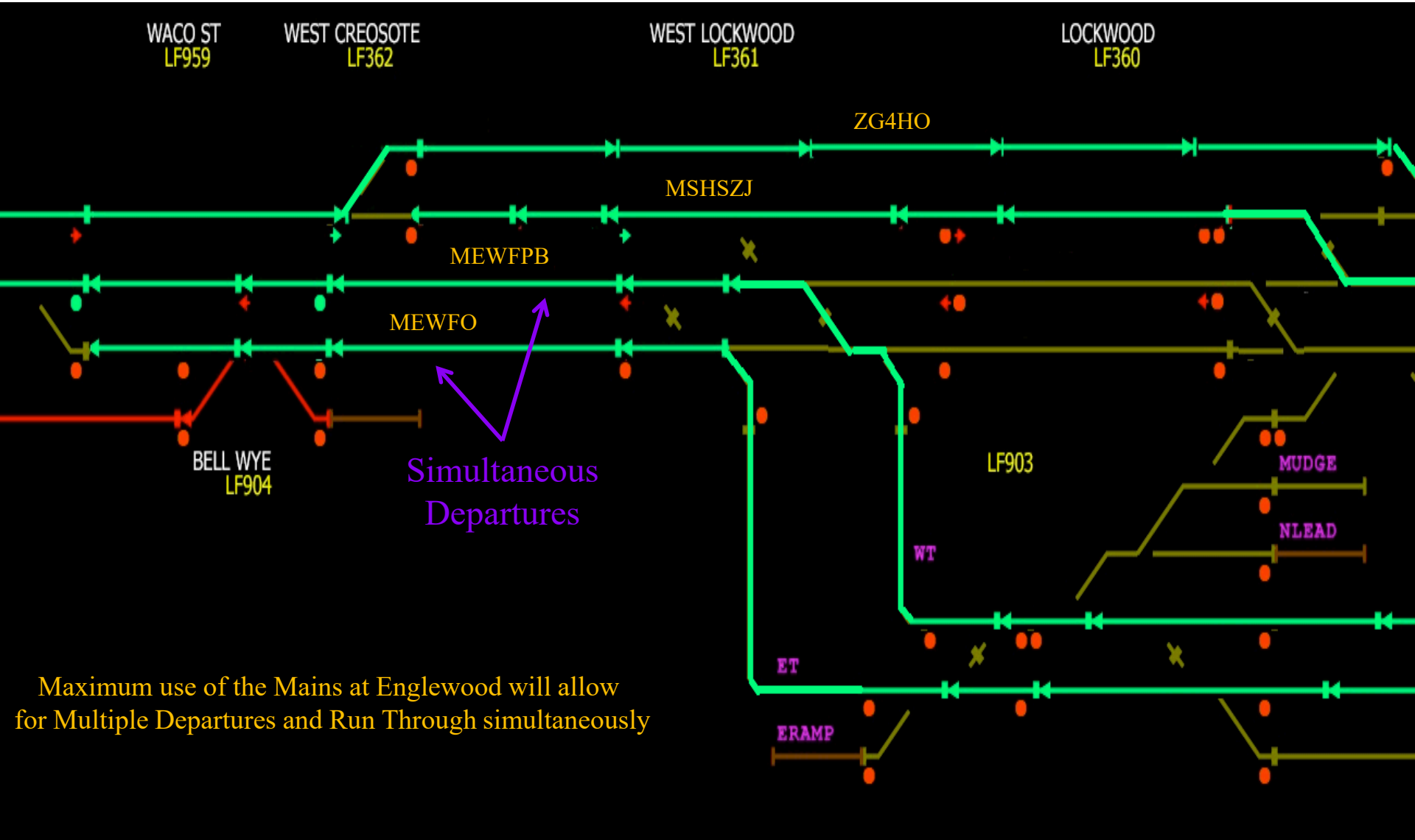



New Englewood Inbound Directional Yarding
Track Legend
Union Pacific RR
Port Terminal RR Assn
BNSF Rwy
Palestine Subdivision
to Palestine
Spring Jct
Navasota Subdivision
to Fort Worth
Lufkin Subdivision
to Shreveport
Beaumont Subdivision
to Beaumont
Settegast Jct
BNSF
to Fort Worth
Gulf Coast Jct
Settegast Yard
Eureka Subdivision
to Fort Worth
Belt Jct
Rabbit Crossing
Pierce Yard
Lafayette Subdivision
to Beaumont
Englewood Yard
Tower 87
Eureka Yard
Tower 26
Eureka Jct
Carr
Basin Yard
MK Yard
to Baytown
PTRA North Yard
Passenger Depot
Chaney Jct
Bell Main
East Belt
Houston West Belt
Congress Yard
Tower 85
Congress Jct
Booth Yard
Harrisburg Jct
Galena Park
Manchester Jct
GH&H
Old South Yard [BNSF]
East Belt Yard
Manchester Yard
PTRA Pasadena Yard
Double Track Jct
Tower 30
Deer Park Jct
Sinco Jct
Pasadena Jct
Rosenberg
West Jct
New South Yard [BNSF]
Harrisburg Line
Strang Sub
Barbours Cut
T&NO Jct
Glidden Subdivision
to San Antonio
BNSF Galveston Subdivision
Alvin
Strang Yard
Arcola
Algoa
Angleton Subdivision
to Brownsville
Galveston Subdivision
to Galveston
UNION PACIFIC RAILROAD


Settegast Outbound Flow
Track Legend
Union Pacific RR
Port Terminal RR Assn
BNSF Rwy
Palestine Subdivision
to Palestine
Spring Jct
Navasota Subdivision
to Fort Worth
BNSF
to Fort Worth
Eureka Subdivision
to Fort Worth
Lufkin Subdivision
to Shreveport
Beaumont Subdivision
to Beaumont
Settegast Jct
Gulf Coast Jct
Settegast Yard
Belt Jct
Rabbit Crossing
Pierce Yard
Lafayette Subdivision
to Beaumont
Englewood Yard
Tower 87
Tower 26
Eureka Yard
Eureka Jct
Carr St
Basin Yard
MK Yard
to Baytown
PTRA North Yard
Passenger Depot
Chaney Jct
West Belt
Bell Main
East
Houston West Belt
Congress Yard
Congress Jct
Tower 85
Booth Yard
Harrisburg Jct
Manchester Jct
Galena Park
Manchester Yard
PTRA Pasadena Yard
GH&H
East Belt Yard
Old South Yard [BNSF]
Double Track Jct
New South Yard [BNSF]
Tower 30
Sinco Jct
Pasadena Jct
Deer Park Jct
Strang Sub
Barbours Cut
Rosenberg
West Jct
T&NO Jct
Harrisburg Line
BNSF Mykawa Subdivision
Glidden Subdivision
to San Antonio
BNSF Galveston Subdivision
Alvin
Strang Yard
Arcola
Algoa
Angleton Subdivision
to Brownsville
Galveston Subdivision
to Galveston
UNION PACIFIC RAILROAD

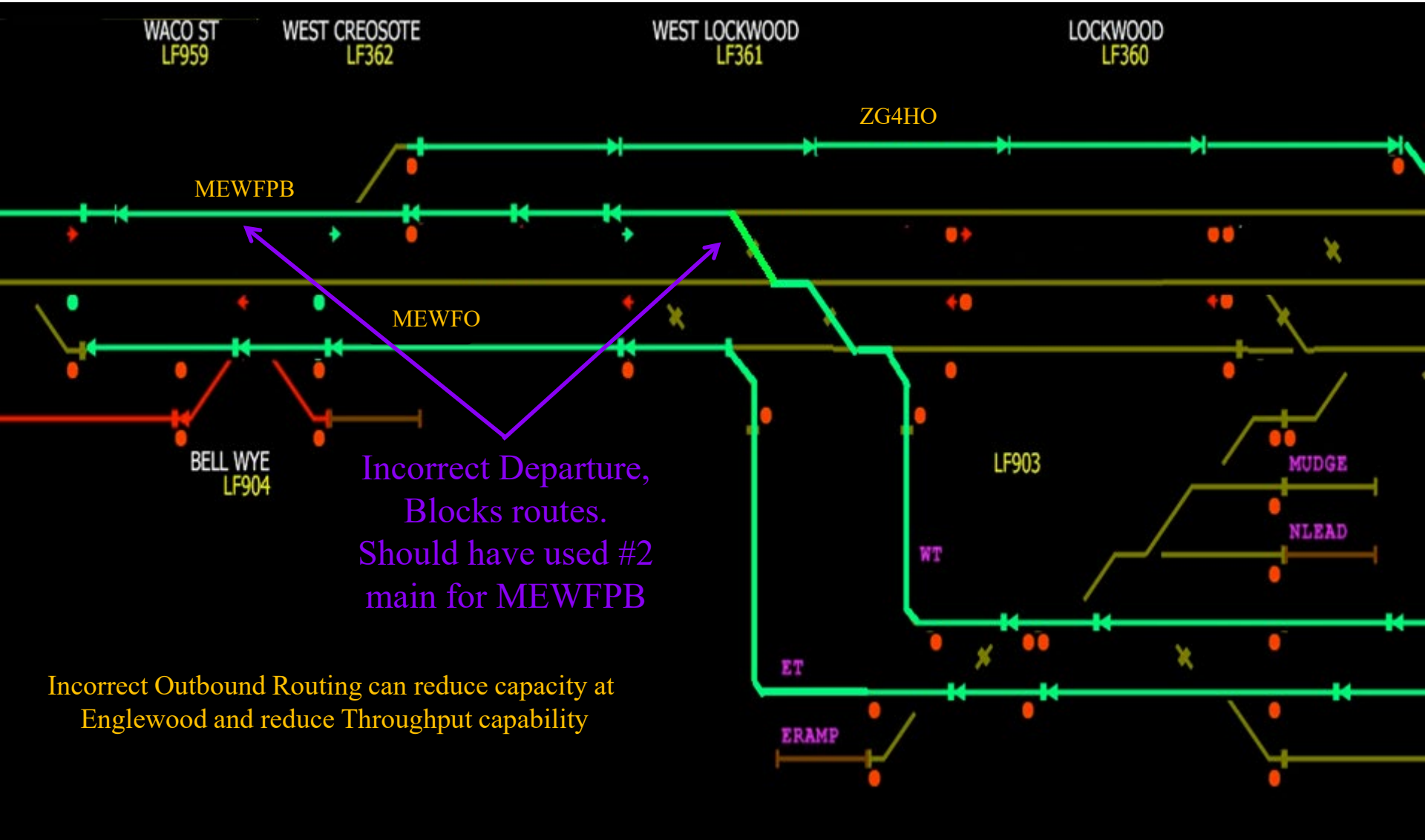

Settegast Inbound Flow
Track Legend
Union Pacific RR
Port Terminal RR Assn
BNSF Rwy
Palestine Subdivision
to Palestine
Spring Jct
Navasota Subdivision
to Fort Worth
Lufkin Subdivision
to Shreveport
Beaumont Subdivision
to Beaumont
Settegast Jct
Gulf Coast Jct
Settegast Yard
BNSF
to Fort Worth
Eureka Subdivision
to Fort Worth
Belt Jct
Rabbit Crossing
Pierce Yard
Englewood Yard
Tower 87
Lafayette Subdivision
to Beaumont
Eureka Yard
Tower 26
Eureka Jct
Carr St
Basin Yard
MK Yard
to Baytown
PTRA North Yard
Passenger Depot
Chaney Jct
West Belt
Bell Main
East
Houston West Belt
Congress Yard
Congress Jct
Tower 85
Booth Yard
Harrisburg Jct
Manchester Jct
Galena Park
Manchester Yard
PTRA Pasadena Yard
Old South Yard [BNSF]
East Belt Yard
Double Track Jct
New South Yard [BNSF]
Tower 30
Sinco Jct
Pasadena Jct
Deer Park Jct
Rosenberg
West Jct
Harrisburg Line
Strang Sub
Barbours Cut
T&NO Jct
BNSF Mykawa Subdivision
Glidden Subdivision
to San Antonio
BNSF Galveston Subdivision
Alvin
Strang Yard
Arcola
Algoa
Angleton Subdivision
to Brownsville
Galveston Subdivision
to Galveston
UNION PACIFIC RAILROAD

“Multiple Departures”



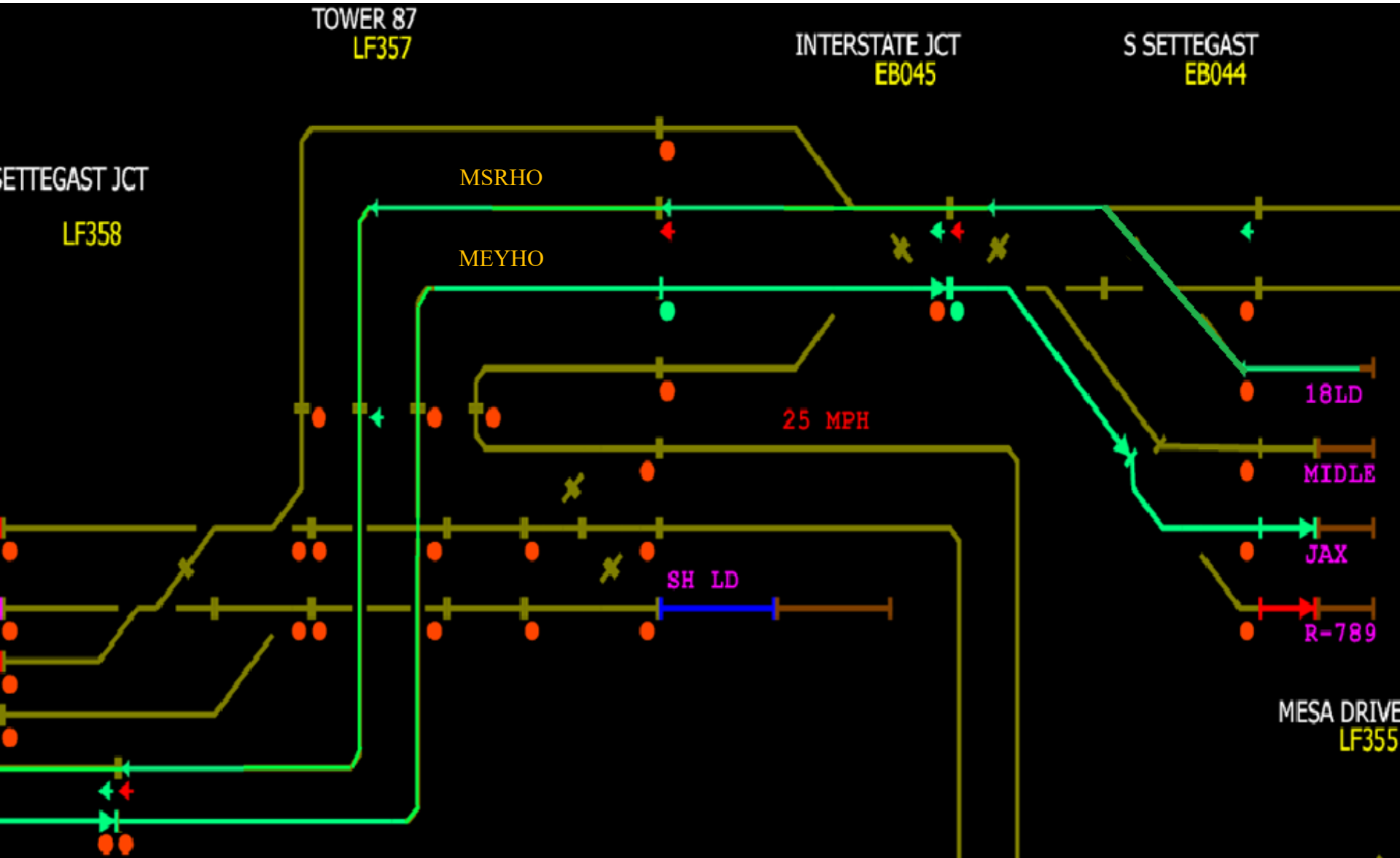
Maximum use of the Mains at Englewood will allow for Multiple Departures and Run Through simultaneously

“Incorrect Departure Routing”

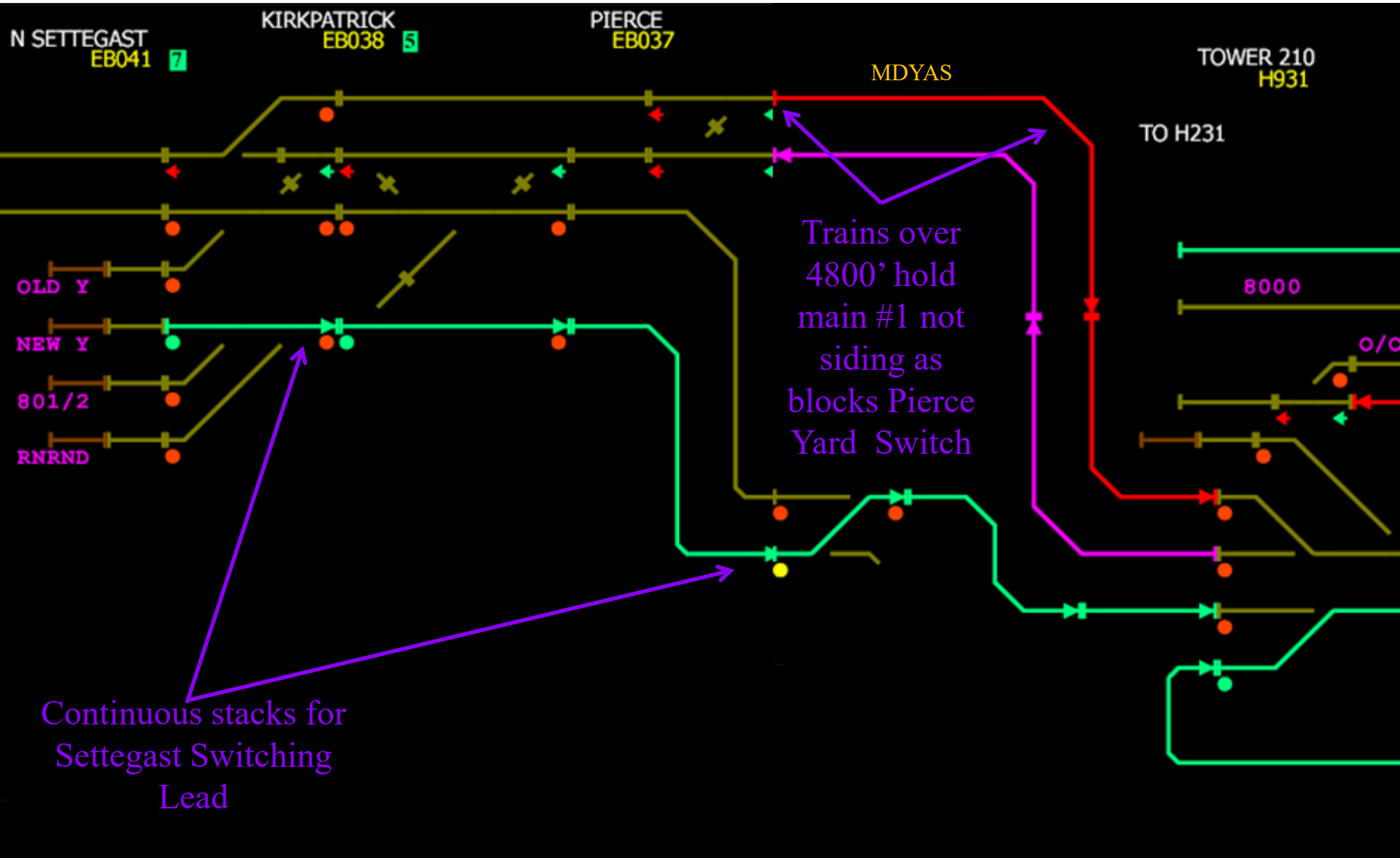


Incorrect Outbound Routing can reduce capacity at Englewood and reduce Throughput capability

“Correct Inbound Routing”

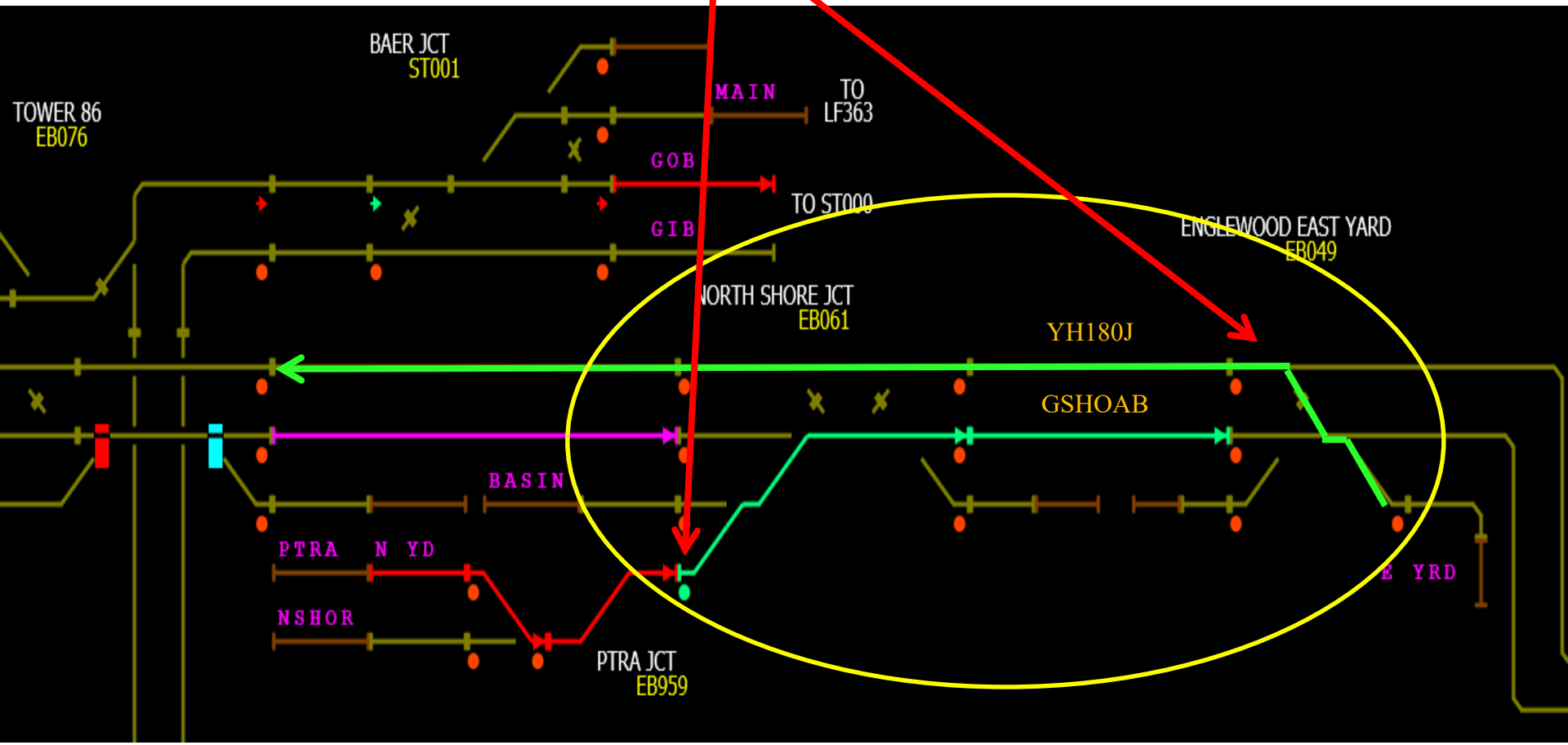


"Correct Routing"

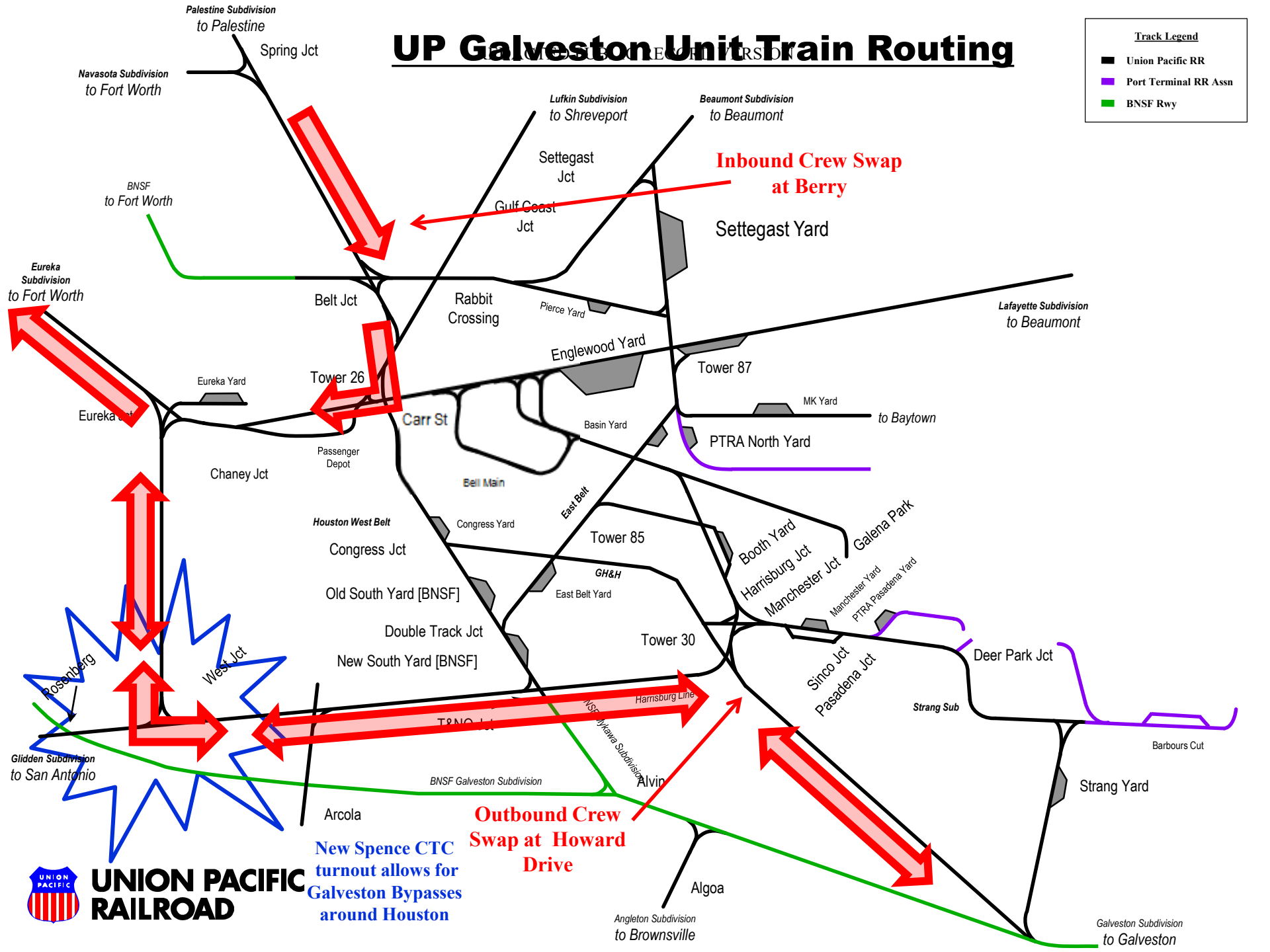


Eastbelt Routing for BNSF Inbound and PTRA North Yard

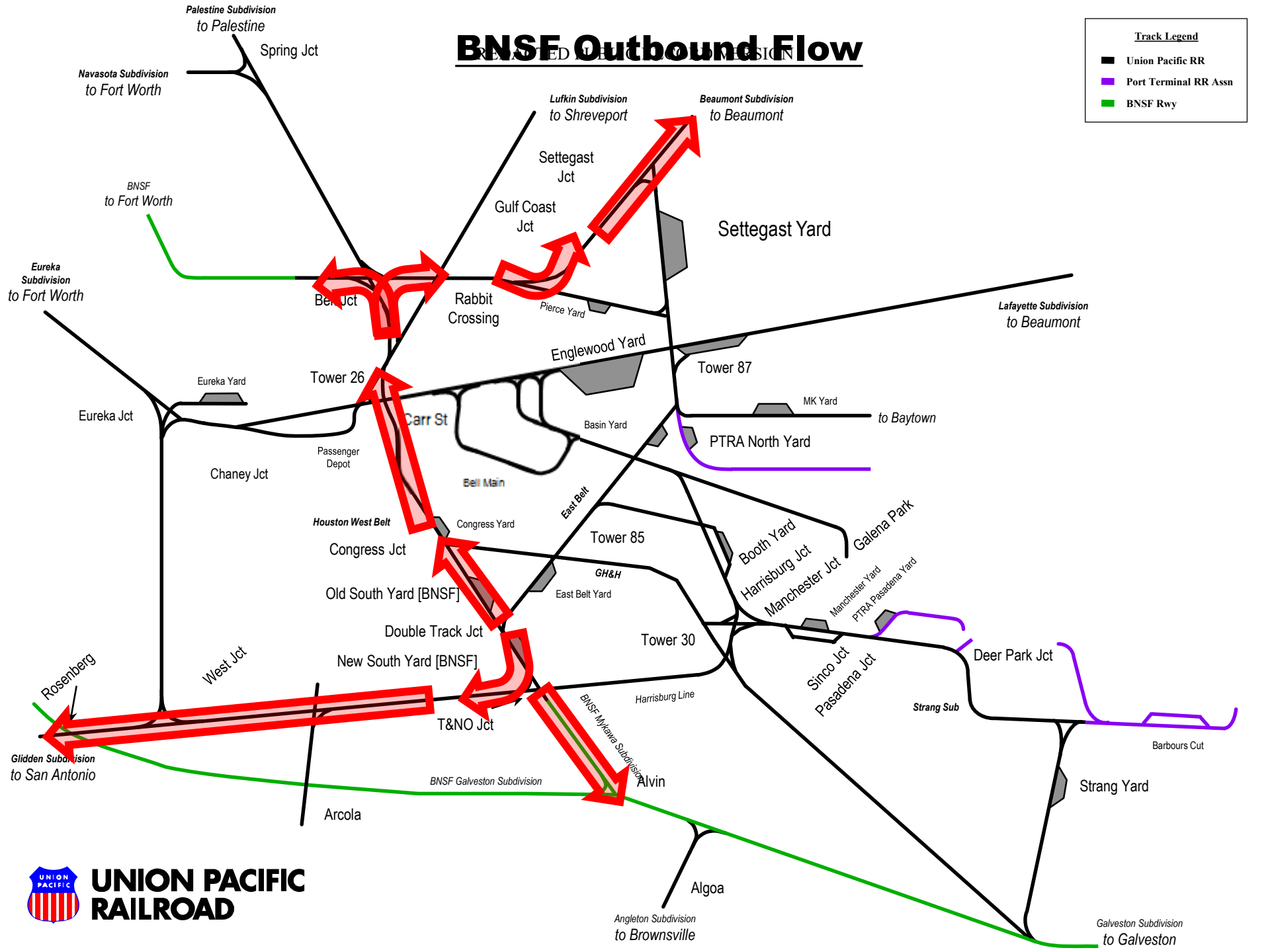
Correct Routing allows PTRA to Depart and BNSF Inbounds to arrive BN Yards

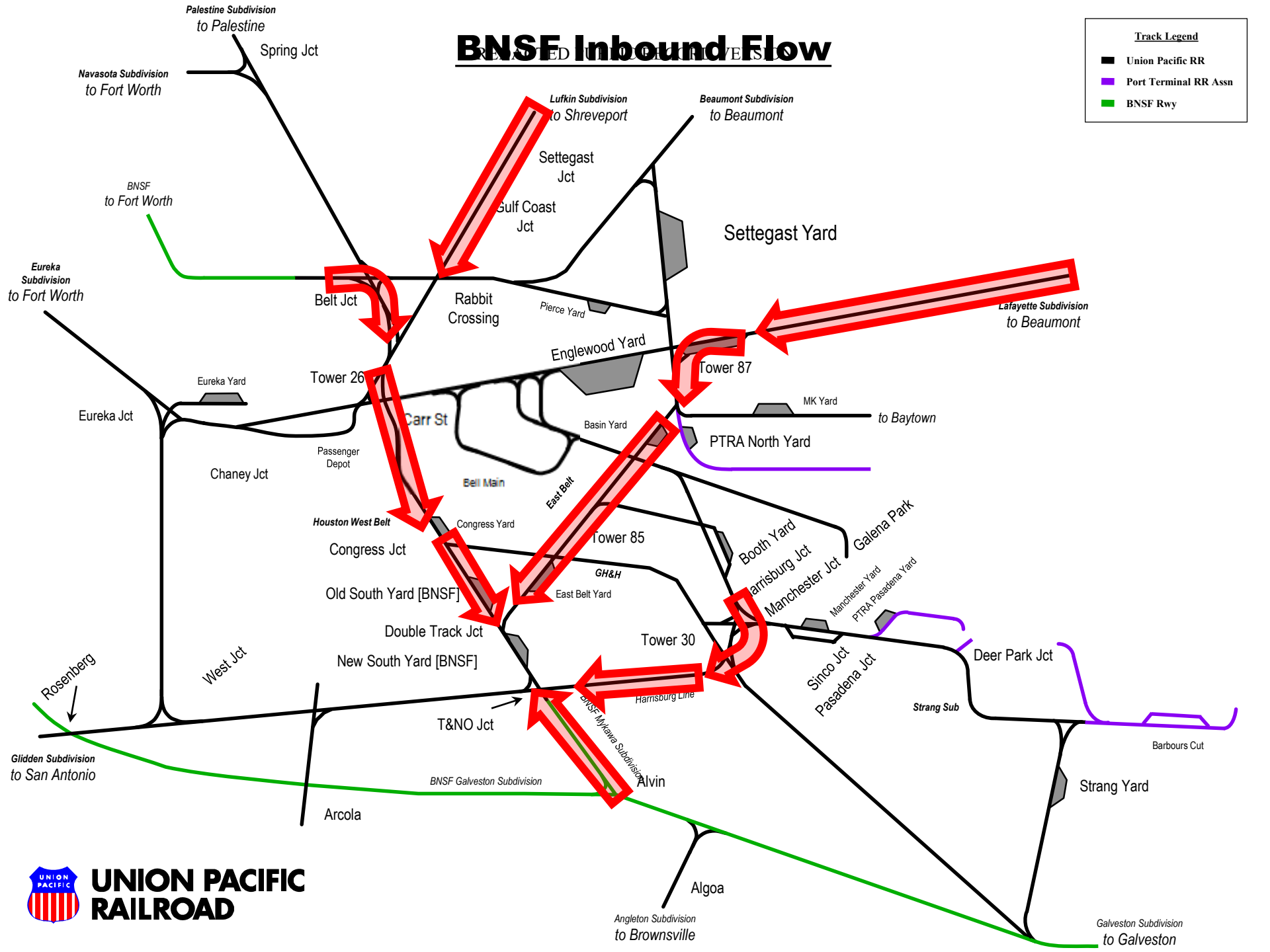


UP Galveston Unit Train Routing

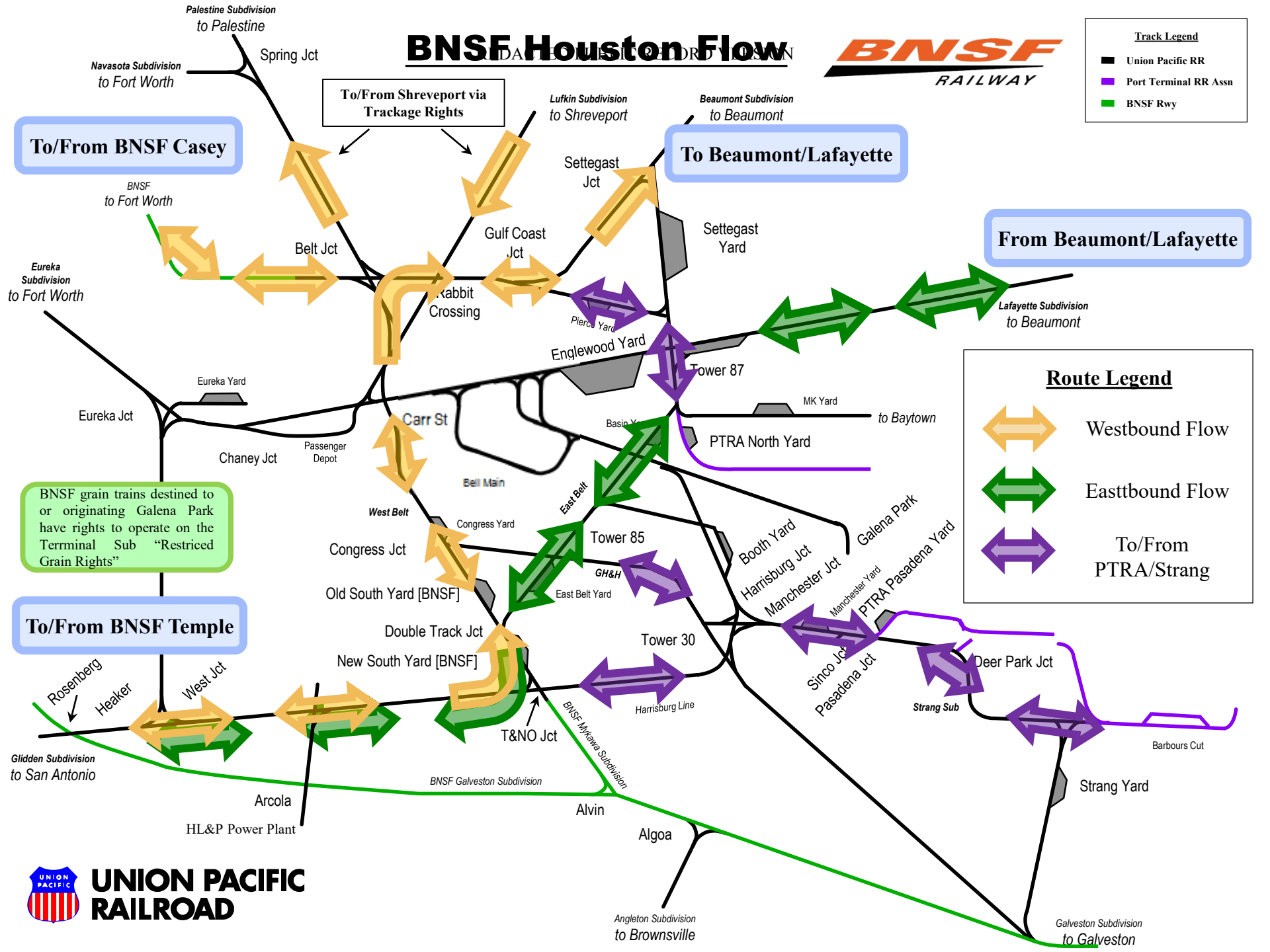


BNSF Outbound Flow

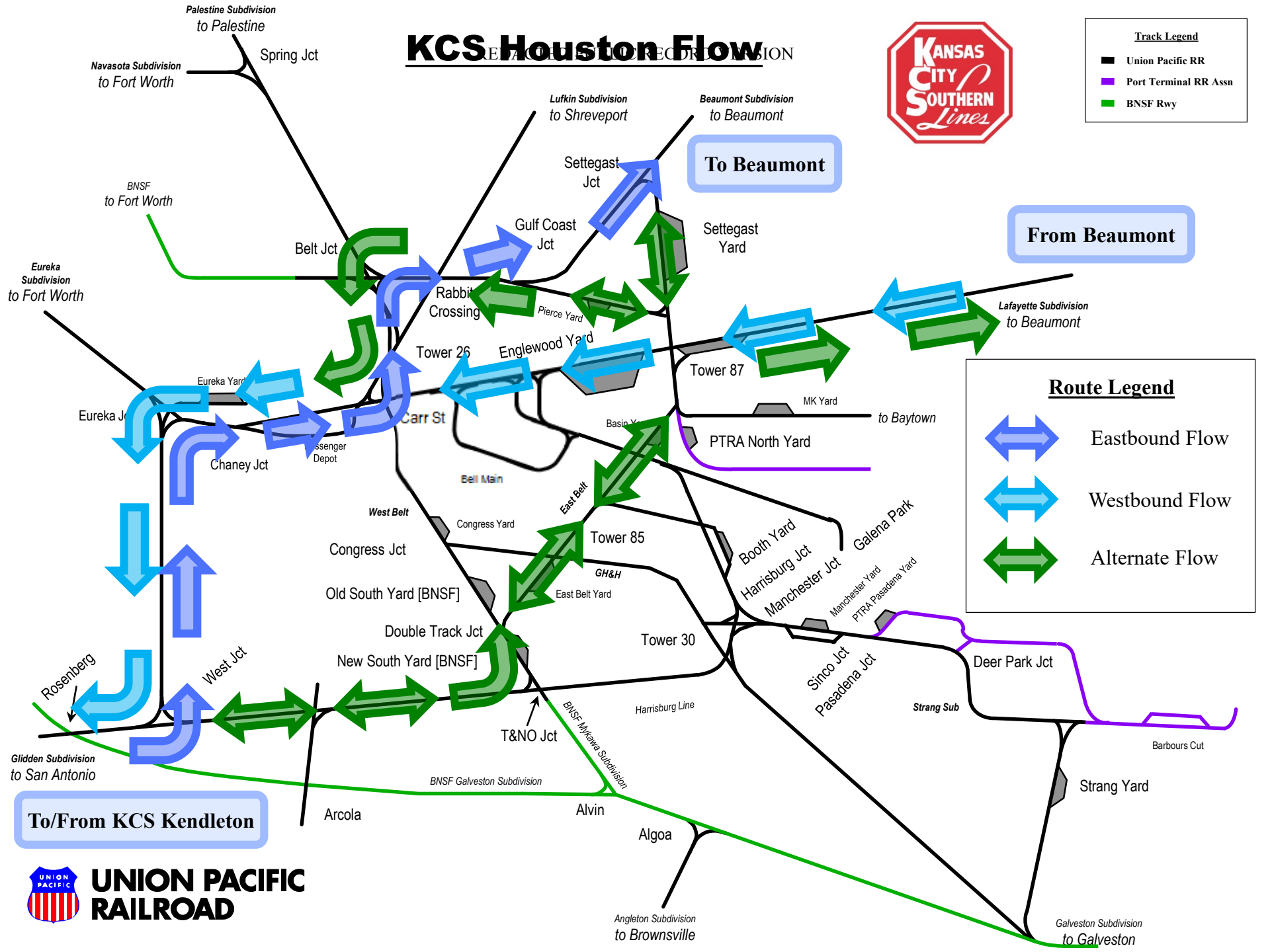



BNSF Inbound Flow
REVISED UP LOGISTICS WEST
Track Legend
Union Pacific RR
Port Terminal RR Assn
BNSF Rwy
Palestine Subdivision
to Palestine
Spring Jct
Navasota Subdivision
to Fort Worth
Lufkin Subdivision
to Shreveport
Beaumont Subdivision
to Beaumont
Settegast Jct
Gulf Coast Jct
Settegast Yard
BNSF
to Fort Worth
Eureka Subdivision
to Fort Worth
Belt Jct
Rabbit Crossing
Pierce Yard
Englewood Yard
Lafayette Subdivision
to Beaumont
Tower 87
Tower 26
Eureka Yard
Eureka Jct
Carr St
Basin Yard
MK Yard
to Baytown
PTRA North Yard
Passenger Depot
Chaney Jct
Bell Main
East Belt
Houston West Belt
Congress Yard
Congress Jct
Tower 85
Booth Yard
Harrisburg Jct
Manchester Jct
Galena Park
GH&H
Manchester Yard
PTRA Pasadena Yard
Old South Yard [BNSF]
East Belt Yard
Double Track Jct
Tower 30
New South Yard [BNSF]
Sinco Jct
Pasadena Jct
Deer Park Jct
Rosenberg
West Jct
Harrisburg Line
Strang Sub
T&NO Jct
BNSF Mykawa Subdivision
Barbours Cut
Glidden Subdivision
to San Antonio
BNSF Galveston Subdivision
Alvin
Strang Yard
Arcola
Algoa
Angleton Subdivision
to Brownsville
Galveston Subdivision
to Galveston
UNION PACIFIC RAILROAD

BNSF Houston Flow



UNION PACIFIC RAILROAD


KCS Houston Flow
Palestine Subdivision
to Palestine
Spring Jct
Navasota Subdivision
to Fort Worth
Lufkin Subdivision
to Shreveport
Beaumont Subdivision
to Beaumont
Settegast Jct
To Beaumont
From Beaumont
BNSF
to Fort Worth
Belt Jct
Gulf Coast Jct
Settegast Yard
Eureka Subdivision
to Fort Worth
Rabbit Crossing
Pierce Yard
Tower 26
Englewood Yard
Lafayette Subdivision
to Beaumont
Tower 87
Eureka Yard
Eureka Jct
Carr St
MK Yard
to Baytown
Basin Yard
PTRA North Yard
Chaney Jct
Passenger Depot
Bell Main
West Belt
East Belt
Congress Yard
Tower 85
Congress Jct
GH&H
Booth Yard
Harrisburg Jct
Manchester Jct
Galena Park
Manchester Yard
PTRA Pasadena Yard
Old South Yard [BNSF]
East Belt Yard
Double Track Jct
Tower 30
New South Yard [BNSF]
Rosenberg
West Jct
Sinco Jct
Pasadena Jct
Deer Park Jct
Strang Sub
Harrisburg Line
T&NO Jct
BNSF Mykawa Subdivision
Barbours Cut
Glidden Subdivision
to San Antonio
BNSF Galveston Subdivision
Strang Yard
To/From KCS Kendleton
Arcola
Alvin
Algoa
Angleton Subdivision
to Brownsville
Galveston Subdivision
to Galveston
Track Legend
Union Pacific RR
Port Terminal RR Assn
BNSF Rwy
Route Legend
Eastbound Flow
Westbound Flow
Alternate Flow
UNION PACIFIC RAILROAD

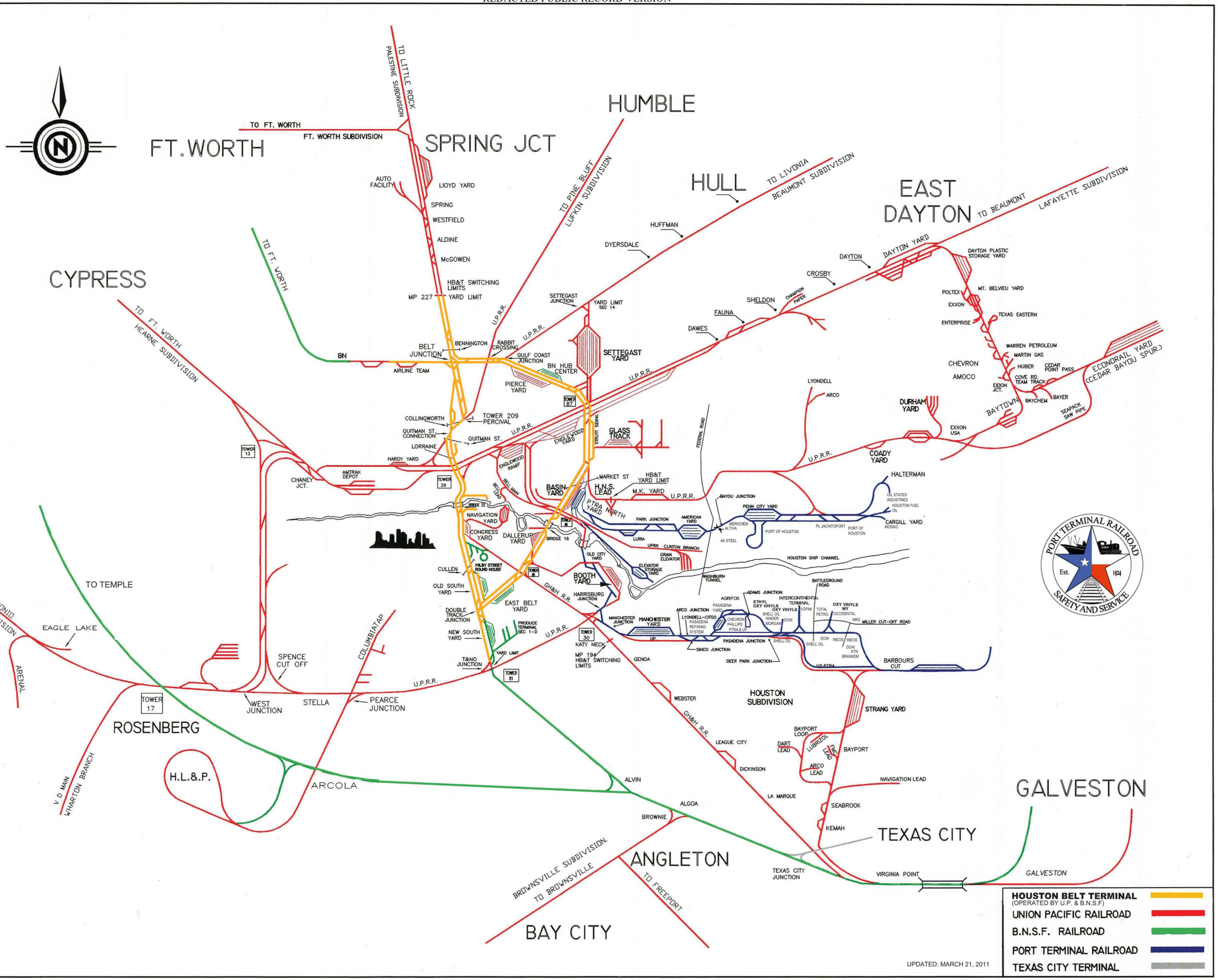
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ORR R.V.S. EXHIBIT 3

HOUSTON PTRA MAP RAILROAD MAP AE V4_EMAIL2 – FINAL


FT. WORTH
TO FT. WORTH
FT. WORTH SUBDIVISION
TO LITTLE ROCK
PALESTINE SUBDIVISION
SPRING JCT
HUMBLE
TO PINE BLUFF
LUFKIN SUBDIVISION
HULL
TO LIVONIA
BEAUMONT SUBDIVISION
EAST DAYTON
TO BEAUMONT
LAFAYETTE SUBDIVISION
CYPRESS
TO FT. WORTH
HEARNE SUBDIVISION
TO FT. WORTH
AUTO FACILITY
LLOYD YARD
SPRING
WESTFIELD
ALDINE
McGOWEN
HB&T SWITCHING LIMITS
MP 227
YARD LIMIT
HUFFMAN
DYERSDALE
DAYTON
DAYTON YARD
DAYTON PLASTIC STORAGE YARD
CROSBY
SHELDON
CHAMPION PAPER
FAUNA
DAWES
SETTEGAST JUNCTION
YARD LIMIT SEC 14
SETTEGAST YARD
BN
BELT JUNCTION
BENNINGTON
RABBIT CROSSING
GULF COAST JUNCTION
BN HUB CENTER
AIRLINE TEAM
PIERCE YARD
U.P.R.R.
TOWER 87
POLTEX
EXXON
ENTERPRISE
MT. BELVIEU YARD
TEXAS EASTERN
WARREN PETROLEUM
MARTIN GAS
HUBER
CEDAR POINT PASS
COVE RD. TEAM TRACK
EIDON JCT.
BAYTOWN
BAYCHEM
BAYER
SEAPACK SAW PIPE
CHEVRON
AMOCO
ECONORAIL YARD (CEDAR BAYOU SPUR.)
LYONDELL
ARCO
DURHAM YARD
EXXON USA
COLLINGWORTH
TOWER 209 PERCIVAL
QUITMAN ST. CONNECTION
QUITMAN ST.
LORRAINE
HARDY YARD
ENGLEWOOD YARD
ENGLEWOOD RAMP
STRUIT SIDING
GLASS TRACK
FEDERAL ROAD
TOWER 13
CHANEY JCT.
AMTRAK DEPOT
TOWER 26
BELL LEAD
BELL MAIN
BRIDGE 22
NAVIGATION YARD
CONGRESS YARD
DALLERUP YARD
BRIDGE 16
TOWER 18
BASIN YARD
MARKET ST
H.N.S. LEAD
HB&T YARD LIMIT
M.K. YARD
PTRA YARD NORTH
PARK JUNCTION
AMERICAN YARD
BAYOU JUNCTION
PENN CITY YARD
MERICHEM
ALTIVA
AK STEEL
PORT OF HOUSTON
PL JACINTOPORT
PORT OF HOUSTON
OIL STATES INDUSTRIES
HOUSTON FUEL OIL
CARGILL YARD
MOSAIC
HALTERMAN
COADY YARD
LURIA
UPRR - CLINTON BRANCH
GRAIN ELEVATOR
OLD CITY YARD
ELEVATOR STORAGE YARD
HOUSTON SHIP CHANNEL
WASHBURN TUNNEL
BOOTH YARD
CULLEN
MILBY STREET ROUND HOUSE
TOWER 19
OLD SOUTH YARD
HARRISBURG JUNCTION
GH&H R.R.
BATTLEGROUND ROAD
ADAMS JUNCTION
AGRIFOS
PASADENA YARD
ARCO JUNCTION
LYONDELL—CITGO
PASADENA REFINING SYSTEM
ETHYL
OXY VINYLS
SHELL OIL
KINDER MORGAN
CHEVRON PHILLIPS
PTRA & UP
INTERCONTINENTAL TERMINAL
VOPAK
TOTAL PETRO.
OXY VINYLS MY
OCCIDENTAL
NRG
MILLER CUT-OFF ROAD
DOW
INEOS
DOW KTN BRASKEM
MANCHESTER JUNCTION
MANCHESTER YARD
UP.
PASADENA JUNCTION
SINCO JUNCTION
DEER PARK JUNCTION
UP-PTRA
BARBOURS CUT
DOUBLE TRACK JUNCTION
EAST BELT YARD
PRODUCE TERMINAL SEC 1-D
NEW SOUTH YARD
YARD LIMIT
T&NO JUNCTION
TOWER 81
TOWER 30
KATY NECK
MP 194 HB&T SWITCHING LIMITS
GENOA
HOUSTON SUBDIVISION
WEBSTER
STRANG YARD
GH&H R.R.
BAYPORT LOOP
DART LEAD
LUBRIZOL
PMC LEAD
BAYPORT
ARCO LEAD
NAVIGATION LEAD
LEAGUE CITY
DICKINSON
LA MARQUE
SEABROOK
KEMAH
TEXAS CITY
TEXAS CITY JUNCTION
VIRGINIA POINT
GALVESTON
GALVESTON
TO SAN ANTONIO
GLIDDEN SUBDIVISION
TO TEMPLE
EAGLE LAKE
ARENAL
SPENCE CUT OFF
COLUMBIA TAP
TOWER 17
ROSENBERG
WEST JUNCTION
STELLA
PEARCE JUNCTION
U.P.R.R.
V D MAIN
WHARTON BRANCH
H.L.&P.
ARCOLA
ALVIN
ALGOA
BROWNIE
BROWNSVILLE SUBDIVISION
TO BROWNSVILLE
ANGLETON
TO FREEPORT
BAY CITY
PORT TERMINAL RAILROAD
Est. 1924
SAFETY AND SERVICE
HOUSTON BELT TERMINAL
(OPERATED BY U.P. & B.N.S.F)
UNION PACIFIC RAILROAD
B.N.S.F. RAILROAD
PORT TERMINAL RAILROAD
TEXAS CITY TERMINAL
UPDATED: MARCH 21, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ORR R.V.S. EXHIBIT 4

TIM WOOLEY E-MAIL

I have not seen a reply from Tim's question.

From: Timothy L. Wooley <TIMWOOLEY@UP.COM>
Sent: Monday, April 8, 2019 4:29 PM
To: Brian E. Gorton <BEGORTON@up.com>
Cc: Steven E. Truitt <STruitt@KCSouthern.com>; lance.brewer@bnsf.com; Lizabeth S. Brubeck <lsbrubeck@up.com>; Olivia.Templeton@BNSF.com; BDSTARR@up.com; kagomez@up.com; Robin.Taylor@BNSF.com; Wesley.Thompson@BNSF.com
Subject: Re: New Organizational Structure - Gulf Coast Service Unit

This email originated from outside the company. Please use caution when opening attachments or clicking on links. If you suspect this to be a phishing attempt, please report via PhishAlarm.

The BN and KCS has been getting screwed by the 10 Hrs worth of work events off main #2 at Beaumont. I agree with their complaints about throughput at Beaumont. The BN and KCS have re-crewed their trains time over time trying to get through Beaumont - which fall short of Houston. What is the plan for the UP to reduce the work event time a Beaumont to provide parity to the other carriers? About time to put the MBTLI, MBTHO, MBTEW back on - enough with the pick up of these trains! This is the 50/50 line! BN has no Trackage Rights - they own it and have a say so! Please provide explanation so I can explain to the other owner of the UP Lafayette Sub and Houston Sub what the plan is.

Tim

832-482-8959

Sent from my iPhone

On Apr 8, 2019, at 3:17 PM, Brian E. Gorton <BEGORTON@up.com> wrote:

> A couple of changes with the organizational structure since the note that I put out last Friday
>
> Brian Mcgavock has the responsibility of the Houston Complex which consists of the following:
>
> Englewood terminal, Settegast terminal, Houston Industries, Eureka, Eagle Lake, Strang, the Branch, Galveston, and Lloyd operations.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ORR R.V.S. EXHIBIT 5

JOHN ORR LETTER TO ERIC GEHRINGER AND MATTHEW GARLAND

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REDACTED PUBLIC RECORD VERSION

KANSAS CITY SOUTHERN www.kcsouthern.com

JOHN F. ORR
EXECUTIVE VICE PRESIDENT - OPERATIONS
TEL. (816) 983-1794
E-MAIL: JOrr2@KCSouthern.com

May 1, 2022

VIA E-MAIL: Ejgehrin@up.com
Mr. Eric Gehringer
Executive Vice President
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

VIA E-MAIL: Matthew.Garland@bnsf.com
Mr. Matthew Garland
Vice President, Transportation
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131

Re: Urgent Issues in Freight Rail Service, Houston

Dear Eric and Matt,

I am writing to follow up with you on issues raised in the Surface Transportation Board's hearing this week concerning service problems in Houston, and to offer to get together with you both at your earliest opportunities to jointly discuss short term and longer term solutions to operational problems in the Houston complex and the lines feeding into it.

As background, I have attached that portion of my letter to the STB dealing with our cross-border grain business and the headwinds it has faced in March and April, largely due to operational congestion in Houston. I am also attaching the presentations about Houston and the UP-BNSF Joint Line from the March and April Spring Center joint meetings. I would draw your attention particularly to the third and fifth pages of the April report, showing substantially-reduced train speeds in the Houston complex and on the Joint Line year to date.

I am also attaching a report that KCS presented at the April 2022 Spring Center joint meeting, showing the dramatic rise in KCS recrew rates and transit times through Houston and on the joint track since the beginning of this year. I would like to discuss in detail your evaluation of the reason for this marked deterioration of KCS train performance when you both indicated at the STB's hearing that Houston train fluidity is not a problem for either BNSF or UP. I would also like you to tell me why KCS train performance has been sacrificed in deference to UP and BNSF trains for the last two months: what has changed since March?

As stated in my letter to the STB, KCS has offered support to both UP and BNSF in terms of using KCS crews to move trains UP and BNSF could not move due to crew shortages. We have assisted a few BNSF trains in this way; while UP originally accepted this offer, it later declined, citing current work ownership rules as preventing alternate crew resourcing. I suggest that we undertake a review of train staffing with our labor stakeholders. I remain willing to discuss this and other possibilities, as Chairman Oberman suggested.

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Lending KCS crews to support UP and BNSF operations would be a short-term bandage to operational problems that, instead, need a long-term fix. In the near term, KCS, UP and BNSF need to figure out a way – in conjunction with PTRA and Amtrak - to improve operational coordination in Houston. Based on my experience, Chicago's CIROC model offers that capability.

As you both stated in the STB hearing, BNSF and UP work "hand-in-glove" in Houston. The same cannot be said from the KCS perspective.

CIROC has improved operations in the Chicago terminal because of a common operations platform: shared access to information and utilizing a regional overview of operations by all parties that operate in Chicago, with parties meeting as equals and operating according to a set of agreed principles and structured procedures to resolve the daily operational challenges in a major city. There are agreed measures, standards and response protocols ready to be put into action whenever conditions become problematic, and systems for advanced visibility and accountability to provide the architecture for working together to assess and solve operational constraints and impediments.

Houston already has the infrastructure for its own version – H-ROC – in the Spring Center. We also have provisions granted by the STB for routing optimization: the clear route condition that the STB imposed in 1998 to maximize terminal operating efficiency every day.

In its current use, the Spring Center falls short in terms of information sharing and full cooperation in management. For example, over the past 2 years, KCS has been cut off from the regular information about UP operations that we had for many years. We asked for that access back, and were denied, without reason and without substitution of data. Similarly, use of the clear route condition is withheld as only an emergency measure – we have had to elevate that issue to the level of calling UP's Director of Joint Facilities even when clear routing was obviously needed. The STB ordered clear route as a permanent solution in Houston – it must be integrated into dispatch planning more readily and rapidly. In the case of detour rights, they must be reasonable and available.

Eric, Matt: KCS is willing to do its part. We're willing to work with you on staffing strategies. We're willing to strategically deploy "stand-by" resources, and to make reasonable arrangements to create resilience and responsiveness where necessary. We've already made information on operations of our Rosenberg and Laredo Subs available to UP Spring dispatchers, and if we need to do more to make that useful, we will, along with information on the jointly-used portion of our Beaumont Sub. We will give you information on our operation equivalent to what we're asking from you.

We're willing to share equally with you (and PTRA and Amtrak if appropriate) in the costs of creating a CIROC-like Houston center, including the costs of Railinc involvement to set parameters on when problems loom and systems for resolving them. As a symbol of our commitment, we're willing to immediately take a one-third share of the costs of the Spring Joint Director's position, and to work out any agreements needed to do that. We want to be a partner

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in making everyone's operations better. We need access to information as we used to have in order to be able to participate fully with you.

I heard your testimony at the STB's hearing, Eric, that UP has poured money into its yards in Houston and does not believe that its yards are a problem. KCS knows that considerable money has been spent on Houston infrastructure – we've been billed for a share of that under the trackage rights agreements. While I'm not fully able to judge the adequacy of those expenditures from the information we've been given, we agree that this isn't an infrastructure issue. It's a matter of resolving operating challenges. KCS wants to help you fix those issues because they impact us all. If an infrastructure issue arises, the STB-approved trackage rights agreements provide the process for remedying those issues, assuming that we can return to sharing information about capacity and doing capacity planning in this area, as we used to do. But infrastructure isn't the problem, in our view.

Chairman Oberman said at Wednesday's hearing "Can we do something ….to ease the congestion in Houston at least in the immediate future as a temporary measure if not a permanent one?". I am writing you in that spirit. I offer to work with you to move quickly to keep Houston operating conditions from continuing to deteriorate as the joint meeting reports show that they have over the past 2 months, and to pull them back at least to where they were earlier in the year.

Eric, thank you for your call late last week to discuss border operations issues. I hope that we all can get together very soon to discuss Houston issues as Chairman Oberman requested that we all do.

Sincerely,

DocuSigned by:
John F. Orr
37E7994A57084ED...
John F. Orr

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SERVICE ISSUES

Generally, although we face challenges in several areas, in those areas that we can control, I am pleased to say that KCS has managed well and has avoided many of the problems others have experienced. Nevertheless, we are being adversely impacted due to problems on other roads. KCS is highly subject to service problems on other carriers' networks because a higher percentage of KCS's traffic (over 80%) is interlined with other carriers. Also, a large segment of KCS's cross-border franchise operates over trackage rights on track owned by UP or jointly by UP and BNSF. Thus, when those carriers have problems on their tracks that we use, as in Houston as explained below, KCS suffers those problems as well.

A good indicator of our operations is our cross-border unit grain train cycle times. Our cross-border unit grain train cycle times have shown steady improvement since 2019. Beginning in September 2021, our unit grain cycle times between the U.S. and Mexico were as consistently good as they have ever been.[1] While our cross-border unit grain train cycle times historically have averaged in the 24 – 27 day range, from September through March we averaged 17.25 days per cycle. That enabled us to carry more grain for our customers, averaging well over 70 trains per month from October through March.

Unfortunately, our grain business started to hit some headwinds in early April. Our last 20 unit train cycles averaged almost 24 hours longer per cycle than in the September – March timeframe. In addition to the essential annual track maintenance cycles occurring now on KCS's Heavener Subdivision and occurring now and into early summer on the UP trackage rights lines, these grain cycle time increases are due largely to (a) delays getting through Houston, where KCS operates via trackage rights and is dependent upon the dispatching and operating choices of others; and (b) interchange delays, particularly in Kansas City.

Houston Congestion

Due to the importance of its cross-border operations, it is KCS's objective to move over its trackage right lines through the Houston complex as quickly as possible. Due to congestion in Houston, however, this has become extremely difficult.

Because of congestion in Houston, KCS is currently averaging about one recrew per train moving through Houston. That means that essentially every train that should be able to move between Beaumont and Kendleton with a single crew requires a second, replacement crew to complete the trip due to exhaustion of the first crew's federally-mandated hours of service. The chart below shows our week-by-week recrew experience on trains moving over the UP Beaumont-Rosenberg and UP Victoria-Robstown trackage rights through the greater Houston area.

[1] *Kansas City Southern's Strong Operational Performance Drives Record Grain Performance*, https://www.kcsouthern.com/media/news/news-releases/kansas-city-southern-s-strong-operational-performance-drives-record-grain-performance

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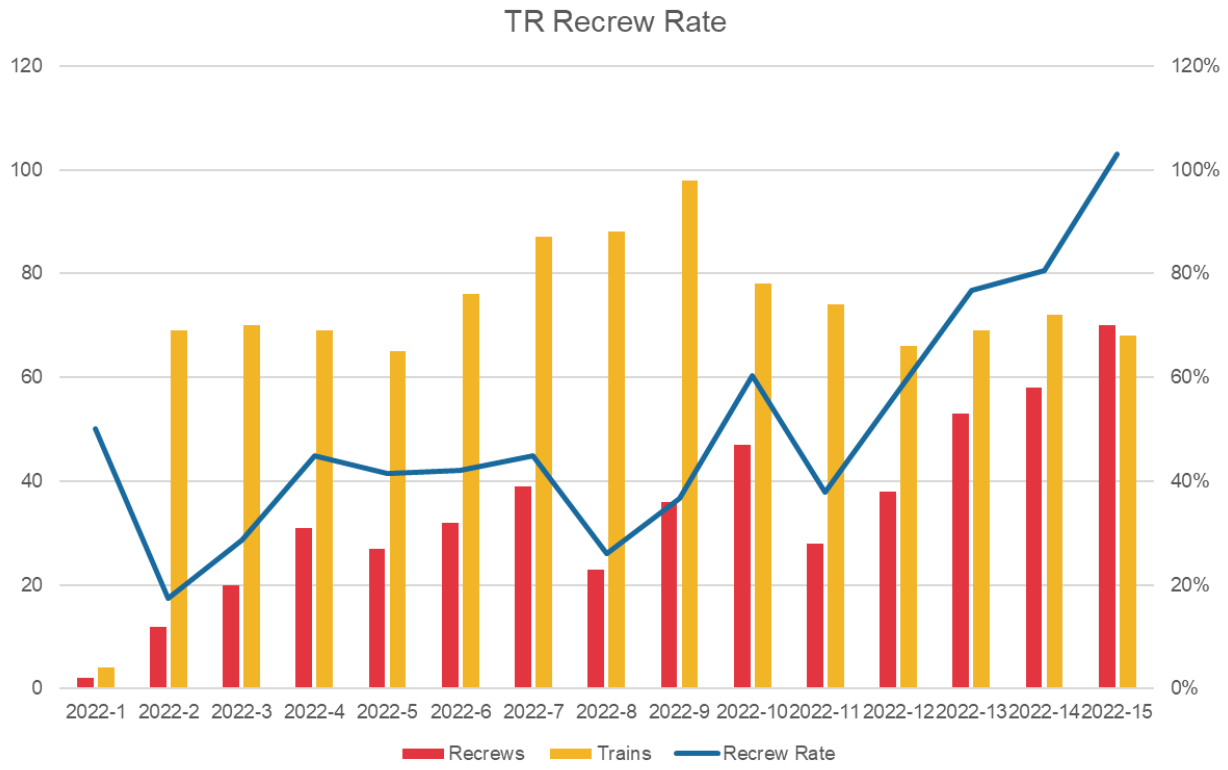

Recrews are needed primarily because of other carriers' shortages of crews and other resources in the Houston area. Those shortages delay movement of their trains and ours.[2] In addition, other carriers have made operational changes such as operating longer trains through the Houston area and shifting work from closed yards into the main yards in Houston. These changes have caused their trains to sit on the main line instead of in sidings because they no longer fit in the siding, or to be assembled and broken up on the main line because they are too long to clear the main completely without being split to move into and out of the yard.

Similar to our recrew issue, the congestion issues in Houston are having adverse impacts on our transit times. Transit times on the Beaumont-Houston portion of the trackage rights have exceeded the 12 hours on-duty allowed to each train crew by federal law at least half of the months in the past year:

[2] Other carriers are aware of and have spoken about their service and crew issues, often coupled with reports of excessive numbers of cars on their networks. See, for example, https://www.up.com/customers/announcements/customernews/generalannouncements/CN2022-15.html , and http://www.bnsf.com/news-media/customer-notifications/notification.page?notId=intermodal-network-update-for-thursday-april-14-2022.

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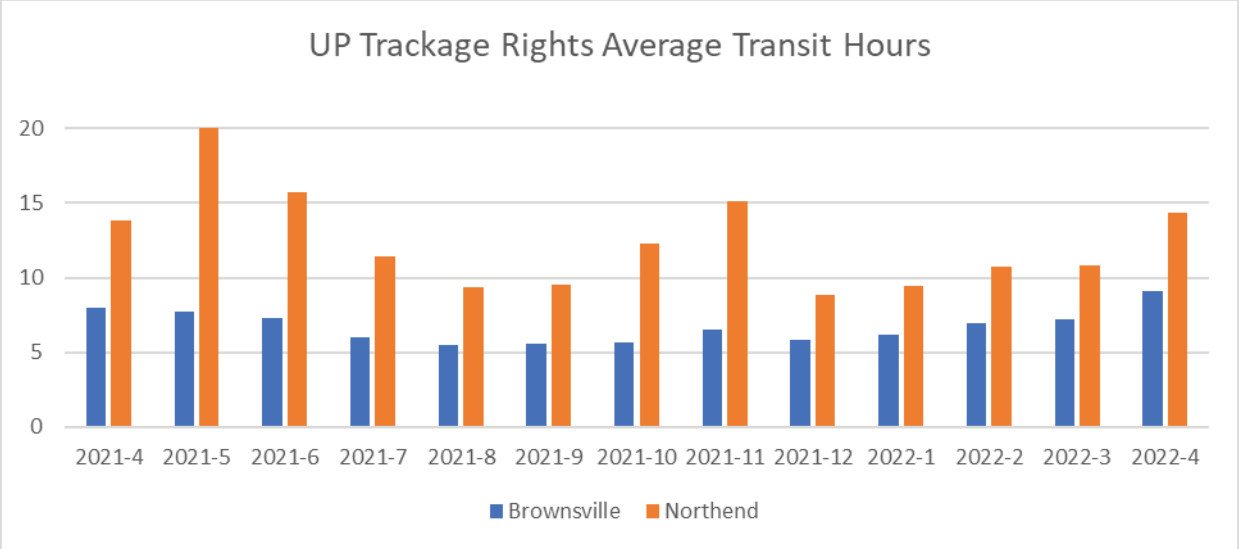

To help resolve the Houston congestion problems, KCS has actually offered its crews on several occasions to move BNSF and UP trains that lacked crews off the main line so that KCS trains can pass. We have also moved our interchange with BNSF for some auto traffic from the Robstown/Corpus Christi area to Rosenberg, just west of Houston, so BNSF has to expend fewer crews from their over-taxed crew base.

There may be other ways to help resolve the problems in Houston. For example, in the original Houston Gulf Coast service crisis, the Board imposed a so-called "clear route" provision. [3] Unfortunately, it is not clear to KCS to what extent the UP-BNSF Spring, TX dispatching director has been utilizing the clear route condition to enhance efficiency and facilitate the smooth movement of trains through the Houston Terminal. The Board might also consider granting temporary trackage rights or other routes so that KCS and others could bypass Houston to get to the Mexican gateways.

[3] See Union Pacific Corp., et al.-Control and Merger-Southern Pacific Rail Corp., et al. [Houston/Gulf Coast Oversight], STB Finance Docket No. 32760 (Sub-No. 26), 3 S.T.B. 1030, 1998 STB LEXIS 999, served Dec. 21, 1998. ("Under the "clear route" condition, the neutral and highly efficient joint Union Pacific Railroad Company (UP)/Burlington Northern Santa Fe Railway Company (BNSF) dispatching center at Spring, TX, will have the authority through its Joint Director to route traffic through Houston over any available route, even a route over which the owner of the train does not have operating authority. Thus, as a result of the Board's decision, a BNSF train may be permitted to operate over track of UP; a UP train may be permitted to operate over track of BNSF; and a Texas Mexican Railway Company (Tex Mex) train may be permitted to operate over track of either UP or BNSF.")

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF RAYMOND A. ELPHICK AND JOHN F. ORR

TABLE OF CONTENTS

I. INTRODUCTION 4

II. APPLICANTS' OPERATING PLAN AND THE TRAFFIC ASSUMPTIONS UNDERLYING IT PROVIDE A PROPER AND RELIABLE BASIS FOR ASSESSING TRANSACTION-RELATED CHANGES 5

- A. The Operating Plan Was Developed in the Same Way Applicants Would Design a Plan in the Ordinary Course to Flow Real-World Rail Traffic 5
- B. The Operating Plan Was Built on Proper Traffic and Other Data 5
- C. The Before-and-After Density and Train Count Outputs from the Operating Plan Are Reliable 12

III. THERE IS ADEQUATE CAPACITY FOR THE ADDITIONAL TRAINS THAT WILL HANDLE APPLICANTS' ANTICIPATED TRAFFIC GROWTH 14

- A. The Operating Plan Team Applied its Ordinary Course Tools for Assessing Whether New Infrastructure Would Be Needed to Support Anticipated Post-Transaction Traffic Growth 15
- B. As Traffic Is Attracted to the CPKC Network Over the Three Year Implementation Period, CPKC Will Assess Operations on an Ongoing Basis and Work With Entities that Share Lines Used By CPKC 17

IV. SPECIFIC CLAIMS THAT THE TRANSACTION WILL OVERTAX AVAILABLE CAPACITY ARE MISGUIDED 18

- A. KCSM's Lines in Mexico Have Ample Capacity 21
- B. The Lines KCS Uses in Texas Have Ample Capacity 25

C. The UP-Owned Line Between Robstown and Victoria Has Ample Capacity 30

D. There Will Be No Capacity Shortfall in the Houston Terminal Complex 33

E. The Neches River Bridge Has Ample Capacity 45

F. LyondellBasell's Concerns Regarding Westlake and Mossville, LA, Corpus Christi are Unrelated to the Transaction 51

G. KCS's Lines Between Beaumont and Kansas City Will Have Ample Capacity with the Proposed Capacity Projects 54

1. CN's Assessment of Capacity on these Lines Is Flawed 55

2. Evergy's Concerns About Fluid Operations Between Kansas City and Its La Cygne Plant Are Unwarranted 56

H. The Joint UP-CP "Polo Line" Between Airline Jct. and Polo, MO Has Ample Capacity 58

I. CP's Line Between Polo, MO and Sabula, IA/Savanna, IL Will Have Ample Capacity with the Proposed Capacity Projects 61

1. Mainline Capacity Will Be Ample 62

2. New CPKC Trains Will Not Adversely Impact BNSF Operations at Ottumwa 63

3. New CPKC Trains Will Not Adversely Affect Operations on the Davenport Subdivision 66

4. New CPKC Trains Will Not Adversely Impact BNSF Operations Between Davenport and Clinton 67

5. New CPKC Trains Will Not Adversely Affect Operations in Savanna, IL 67

6. New CPKC Trains Will Not Adversely Affect Operations on the Marquette Subdivision 68

J. New CPKC Trains Will Not Adversely Impact UP or BNSF Operations at St. Paul 69

K. CP's Chicago Subdivision 73

V. DIVESTITURE OF KCS'S KANSAS CITY-ST. LOUIS/SPRINGFIELD LINE WOULD LIMIT CPKC'S ABILITY TO OPERATE EFFICIENTLY 74

A. CN's Operations in Kansas City and Between Kansas City and IFG Would Complicate Terminal Operations, With Hard-to-Predict Consequences 75

B. CN's Proposed Forced Half-Ownership of IFG Facility Would Complicate Operations There and Limit the Facility's Ability to Support Innovative CPKC Offerings 75

VI. NORFOLK SOUTHERN'S CONTINGENT TRACKAGE RIGHTS REQUEST IS BASED ON A MISUNDERSTANDING OF CPKC OPERATIONS 76

A. Applicants' Projected Traffic Growth Will Not Adversely Impact Service Levels Between Wylie and Meridian 76

B. Applicants' Mixed Trains on the Wylie-Meridian Route Are Not Too Long, Contrary to NS's Assertions 81

C. There Will Be No Capacity Issues at KCS's Wylie Intermodal Terminal 82

D. In the Event of a "Major Service Failure," a Grant of Trackage Rights Between Wylie and Shreveport Would Be Counterproductive for Service Levels On That Segment 83

I. INTRODUCTION

1. My name is Raymond A. Elphick. I am the Assistant Vice President Service and Product Design for Canadian Pacific Railway Company ("CP").

2. My name is John F. Orr. I am the Executive Vice President – Operations of Kansas City Southern ("KCS").

3. We sponsored and verified Applicants' Operating Plan and Amended Operating Plan in this proceeding, which explained how the separate operations of CP and KCS will be integrated into a single consolidated CP/KCS network. This joint statement addresses the following topics:

- We first address certain critiques put forward by a few Class 1 railroads regarding Applicants' Operating Plan;
- We explain that adequate capacity exists to support the level of traffic growth anticipated from the Transaction;
- We address the specific critiques by certain Class 1s relating to the impacts of planned CPKC operations on capacity (and thus operations of all users of jointly used lines) over lines that are currently owned by CP or KCS;
- We explain that the Transaction will not threaten CPKC's ability to provide high quality service;
- We explain why divestiture of KCS's Kansas City-St. Louis/Springfield Line would limit CPKC's ability to operate efficiently; and
- Finally, we address Norfolk Southern's Contingent Trackage Rights Request.

II. APPLICANTS' OPERATING PLAN AND THE TRAFFIC ASSUMPTIONS UNDERLYING IT PROVIDE A PROPER AND RELIABLE BASIS FOR ASSESSING TRANSACTION-RELATED CHANGES

A. The Operating Plan Was Developed in the Same Way Applicants Would Design a Plan in the Ordinary Course to Flow Real-World Rail Traffic

4. Applicants undertook a sensible process to create the Operating Plan. The Operating Plan was built in the same way that CP would design a plan in the ordinary course to flow real-world rail traffic. The Operating Plan was also constructed in a way that would enable reliable assessments of the changes resulting from the Transaction for purposes of the Board's public interest review. Applicants built a base operating plan that—as best as possible using all available data—accurately and reliably reflects pre-Transaction conditions in a way that allows for apples-to-apples comparisons between the base and projected post-Transaction operations. As previously explained in our Amended Operating Plan, developing the Operating Plan involved tools, data, and service design processes that have been tested and proven over more than 20 years at CP, as well as the participation of top-tier service design personnel who are industry leaders and experts in railway service design.

B. The Operating Plan Was Built on Proper Traffic and Other Data

5. We have reviewed CN's Amended Comments, in which CN asserts various arguments to critique the data analysis underlying Applicants' Operating Plan. None of those critiques (many of which are trivial and/or immaterial to the analysis[1]) provide any reasonable basis to doubt the sufficiency or reliability of the Applicants' work in designing the Operating

[1] For example, Mr. Van Dyke alleges that yard activity measures are unsupported and alleges CP did not identify certain yards experiencing a 20% change. This is factually wrong. CP comprehensively identified changes in yard cars processed per day for all traffic (demand and scheduled trains) between the base and transaction-related growth scenarios, and derived from this analysis a complete list of yards which would experience increases in activity of at least 20% included in Appendix T. *See* Workpaper "Yard CPD Figures CP REPLY.xlsx."

Plan, or of the Operating Plan itself. In general, CN witness Carl Van Dyke notes that Applicants' Amended Operating Plan was prepared using CP and KCS traffic for the following time periods: (1) "CP and KCS non-unit train traffic from a single month, October 2020," (2) "CP unit train traffic from March-June 2021," (3) "KCS unit train traffic from February-May 2021," and (4) "Non-unit train service plans in effect on CP and KCS during the first quarter of 2021." CN criticizes Applicants' chosen time periods—claiming that it is "noteworthy" that "the data used by Applicants to construct a '2019 base year' does not actually include *any* data from 2019"—and criticizes Applicants' use of the data.[2]

6. CN's criticisms are based on the mistaken premise that it was realistic, or even possible, to use full year 2019 data as the basis for the Operating Plan Team's modeling of train operations and yard activity. As we will explain in the following paragraphs, there are several reasons why using full year 2019 data was not a viable option.

7. *First*, the starting point in CP's ordinary course operational planning is a base operating plan that reflects the current operational design (*i.e.*, active blocking patterns, train patterns, etc.). But as already explained in this proceeding, the KCS design for 2019 was not even available to the Operating Plan Team, because KCS/KCSM does not maintain an archive of past operating plans.[3] Needless to say, it would not have been possible for the Operating Plan Team to use a design that was not available.[4]

[2] *See* CN-17, Verified Statement of Carl Van Dyke ("Van Dyke V.S.") at 7-8.

[3] *See* Amended Operating Plan, ¶ 75.

[4] As explained earlier in this proceeding, attempting to reconstruct the KCS/KCSM blocking and train plans in place during 2019 would not have supported reliable analysis of pre-Transaction operations. *See* Amended Operating Plan, ¶ 76.

8. *Second*, even if the KCS 2019 design had been available, to develop a reliable basis for the Transaction-related changes associated with the Operating Plan, the Operating Plan Team had to use data relating to a base operational design for a period other than 2019 because the KCS design had changed since 2019.[5] Because a full-year 2019 train plan would not have been representative of current operations, it would not have made sense for the Operating Plan Team to use full year 2019 data as the basis for its forward-looking modeling exercise.

9. *Third*, with respect to the 2019 reported segment density data that was available, in addition to not disclosing the nature of the train operations (blocking patterns, train origins and destinations, etc.) that generated the density figures, the data itself was clearly not accurate, and we were unable to accurately derive train counts (much less the operating design relating to those counts) from it. For example, KCSM's 2019 reported segment density data shows 188 million daily gross ton-miles ("GTMs"), which is vastly different than KCSM's actual GTM level of 120 million daily GTMs.[6] Applicants have already explained in this proceeding how KCS's assignment of trains traveling short distances to the entire segment caused the mismatch in its calculations of segment densities.[7] We provide a separate illustrative example in the following paragraph, centered around the train L-AR101, to show why Mr. Van Dyke's critique has no merit.

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[5] *See* Operating Plan, ¶ 75 n.4 (explaining that "[b]ecause of changes in KCS's train plan from 2019 to 2020, particularly within Mexico, we made use of KCS traffic flow data for the peak month of October 2020 to provide a better match between the train plan design and the way the traffic actually flowed over the network."). Even CN witness Dr. Malkhom acknowledges this, in his discussion of "known and measurable changes." *See* CN-17, Verified Statement of Jeff D. Makholm, Ph.D. ("Makholm V.S.") at 6.

[6] *Compare* Reply workpaper KCSM 2019 density CP REPLY.xlsx (188 million KCSM GTMs) *with* CP Amended Operating Plan workpaper "Cost Metrics Growth Model.xlsx", tab "KCS OP Metrics" at cell F39 (120 million KCSM GTMs).

[7] *See, e.g.*, Amended Operating Plan, ¶ 187.

10. KCS's reported 2019 density data for the 85-mile segment in Mississippi between Meridian and Artesia would have included all of the tonnage associated with the train L-AR101 as if it traversed all 85 miles of the segment. However, this train starts near Artesia and heads *north* towards Aberdeen, rather than south towards Meridian, such that it operates only a trivial distance on the Meridian-Artesia segment. KCS's process for segment density calculations developed GTMs as though this train travelled the full distance between Meridian and Artesia, just because the train touches a small portion of track around Artesia that is technically counted as part of the Artesia-to-Meridian segment. Applicants' process likewise identified the L-AR101 train as travelling on the Artesia-Meridian segment initially. But through the Operating Plan Team's application of the "25% rule" – under which the Operating Plan Team's methodology properly excluded trains that do not generate GTMs by excluding from the trains per day count trains that passed by less than 25% of a subdivision's segment stations (nodes) – the Operating Plan Team recognized that this was not appropriate. Thus, the Operating Plan Team included L-AR101 only on the segments where the train actually operated over significant portions of the segment (in this case, Artesia to West Point, and West Point to Aberdeen), resulting in a more accurate train count.[8]

11. Even if the Operating Plan Team had attempted to use the flawed KCS reported segment density data that was available for 2019, this data would not have allowed Applicants to map any of the trains-per-day ("TPD") or cars-per-day ("CPD") statistics they might have derived from that data or obtained from other sources to the critical, but missing, KCS transportation plan for the corresponding period. In other words, if the Operating Plan Team had used the flawed KCS reported 2019 data and then developed an Operating Plan to handle post-

[8] MREE.TRAIN_EXPANDED_ROUTE_008.xlsx, at tab "Sheet 1", at rows 176,727-35 and "TPD Base MREE.xlsx", at tab "Base Trains at segment lvl", at rows 3224-5.

Transaction traffic flows, there would have been no reliable basis for comparing the pre- and post-Transaction operations on an apples-to-apples basis. In particular there would have been no way to derive a reliable assessment of the changes between base TPD/CPD and post-Transaction TPD/CPD, which is critical to an accurate assessment of Transaction-related changes.[9] This was one of the key considerations weighed by the Operating Plan Team in concluding that it would not be appropriate to use KCS's flawed 2019 data.

12. For all these foregoing reasons, the Applicants' Operating Plan Team reasonably chose to use the most current design at the time, and applied this design to October 2020 traffic. October 2020 was selected because it was the nearest peak month to the period covered by the current design. These volume levels were representative of the typical monthly range experienced in full year 2019.[10] The operating statistics developed using this approach are the most accurate reflection of current pre-Transaction levels possible.

13. With respect to demand trains, Mr. Van Dyke criticizes Applicants' use of KCS data from February to early May 2021 for developing pre-Transaction demand train levels. The use of this period was reasonable because it is aligned with the current train design that was used

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[9] It is important to note that density data is not used to create an operating plan itself, but rather to illustrate the level of activity on a given network. In the context of the CP/KCS Transaction, where the Operating Plan Team's goal in using density data was to isolate and forecast the changes in traffic levels *caused by the Transaction*, it was vital to avoid capturing differences that were caused by something else, such as methodological differences between CP and KCS/KCSM density figures or the inevitable differences in methodology between the Operating Plan approach to these calculations and the railroads' separate ordinary course approaches.

[10] *See* Amended Operating Plan at page 40, Table 1. Annualized October 2020 KCS GTMs of {{ }} billion are nearly identical to {{ }} billion FY 2019 GTMs for KCS, and October 2020 monthly GTMs of {{ }} GTMs are between the monthly low of {{ }} and monthly high of {{ }} in FY 2019. *See* Workpaper "Cost Metrics Growth Model.xlsx", tab "KCS OP Metrics" at cells B39 ({{ }}), B30 ({{ }}), B33 ({{ }}) B55 ({{ }}).

in our analysis, it is representative of pre-Transaction operations, and it is closely aligned with 2019 average levels. Contrary to Mr. Van Dyke's suggestion that this period may be skewed due to seasonality changes within the year or changes across years, there are no meaningful changes in bulk train-per-day levels by subdivision between the full year 2019 period and the February to April 2021 period.[11] In fact, if Applicants had measured using full-year 2019 data (which, as discussed above, would not have enabled full-year 2019 modeling because such data did not match up to KCS's current operational design) compared to February-April 2021 data, only three KCS subdivisions would have had more than one additional demand train per day. These three subdivisions are Laredo, Greenville, and Shreveport Terminal, none of which have overall train levels or capacity constraints that would be affected by such small variations. All other subdivisions would have effects of less than 1 train per day.

14. Mr. Van Dyke further asserts that "[i]f Applicants had taken the straightforward approach of using full-year 2019 traffic, including unit trains, within MREE, and producing all of their key line and yard metrics using MREE, none of the issues Applicants now confront would have arisen." CN-17, Van Dyke V.S. at 18. CN's criticisms are based on the mistaken premise that "using MREE for everything" is a singular cure-for-all. In fact, the process that the Operating Plan Team followed to develop segment volumes is equivalent to how Mr. Van Dyke uses MREE to generate segment volumes. Specifically, MREE is capable of generating output data tables that break down volumes by link and by train. Once out of the MREE environment, these links are assigned to segments, and then trains and carloads are counted across all segments. This is the same process followed in Mr. Van Dyke's calculations and in the calculations of Applicants' Operating Plan Team: the only difference is that Applicants

[11] *See* Workpaper TPD by Subdivision Period Comparison.xlsx

developed links for base demand trains outside of MREE, but incorporated the same network inputs and assigned the links to segments using equivalent processes.[12]

15. Regardless, Mr. Van Dyke's workpapers show that {{[redacted]}}[14]

16. Even assuming, for the sake of argument, (i) that CN's view that 2019 reported densities should be used as the basis *were* appropriate (to be clear, again, it is not), and (ii) that calibration and synergy factors Van Dyke criticizes should also be dismissed, this would not materially impact any metrics relevant to assessing the effects of the proposed Transaction. It is conceptually possible to start with flawed reported densities, and estimate the growth increment

[12] *Compare* HC Springfield Line – Applicants' VS ex 14 VS MultiRail.xlsx at Tab Base Multirail data table; HC-Operating Metrics Estimation of Line Density and Train Count Methodology.pdf at page 3 with CP amended operating plan workpapers "MREE.TRAIN_EXPANDED_ROUTE_008.xlsx" and "TPD MREE Base.xlsx".

[13] Workpaper HC Springfield Line - Applicant vs Ex 14 vs Multirail CP REPLY.xlsx.

[14] {{[redacted]}}

based on the difference between two modeled scenarios. This entails starting with 2019 reported densities, and running the same calculations to determine the change in GTMs as a result of Transaction-related growth traffic. {{ }} Leaving aside the question of the appropriate base, it is important to emphasize that the Transaction-related growth, which is the key driver to assessing impacts of the Transaction, would continue to be accurate under either CP's standard approach or the adjusted process described above using 2019 reported segment densities. This is independently verified by other calculations included in the Application and demonstrates the internal consistency of CP's calculations. Specifically, {{ }}[16] This {{ }} amount is closely aligned to corresponding figures of {{ }} daily GTMs developed for the system cost model and the {{ }} daily GTMs developed when computing incremental costs.[17]

C. The Before-and-After Density and Train Count Outputs from the Operating Plan Are Reliable

17. Van Dyke claims that there are "significant and varying fluctuations between the actual 2019 data that Applicants first presented in Exhibit 14 Part A and the Applicants'

[15] The Rosenberg to Kendleton segment would go from a 45% tonnage increase to 61%, and the Kendleton to Victoria segment would go from a 43% tonnage increase to 57%, but both of those segments had already triggered the OEA's assessment. *See* Workpaper "Trains Per Day and Gross Ton Miles CP REPLY.xlsx."

[16] *See* Elphick/Orr Workpaper "Trains Per Day and Gross Ton Miles CP REPLY.xlsx."

[17] Baranowski R.V.S; Amended Operating Plan Workpaper "1.Proposed Final FTI Rail to Rail Diversion Results for Merger Application 10_21_20 UPDAT_TRUCK_REV_RS.xlsx", tab "Volumes & TMs GTMs" at cells AR3+AX3+BD3.

proposed data that they now assert is a proper substitute for actual full-year 2019 densities." CN-17, Van Dyke V.S. at 55. In his Exhibit A-1, Van Dyke presents 5 sample line segments and compares "Applicants' proposed density calculations with those in the original Exhibit 14 Part A Density Data, adjusted to account for the inclusion of locomotives." CN-17, Van Dyke V.S. at 55.

18. Contrary to Van Dyke's assertions, Applicants' process is accurate, and CN zeroing in on isolated examples confirms the reliability of the overall process. The density fluctuations that Van Dyke identifies only affect a handful of the 178 segments relevant to this Transaction. Indeed, only the few examples he focuses on out of 178 segments exhibit signs of counter-intuitive variance. Of these, only the UP trackage segments from Victoria to Robstown and Beaumont to Rosenberg show a significant discrepancy, *i.e.*, more than a few percentage point changes either way which are simply reflective of underlying variance and complexity in the train operations being modelled. The reason for these isolated discrepancies is that KCS system average train weights were used because no train weight specific to this trackage segment was available. Applicants individually examined each of Mr. Van Dyke's so-called discrepancies and determined that they do not cause meaningful distortions, *i.e.*, even using the adjacent densities would not affect any of the results of analysis.[18] Review of the density maps

[18] Mr. Van Dyke apparently confronted troubles when developing densities for this segment, as his workpapers show he developed segment MGT values that differ more from KCS's 2019 reported segment densities than CP's process. *See* Elphick/Orr Workpaper "HC Springfield Line – Applicant vs Ex 14 vs Multrirail CP REPLY.xlsx" at tab "Summary", at cells H50, H55, I50, and I55. {{ [redacted]

provided by Applicants confirms that the estimated density levels are accurate and internally consistent across both the CP and KCS systems.

19. Applicants' analytical process is simple and rational. The computational effects related to hard-coding growth levels have minimal effects (overall, a 4% overstatement of synergy growth GTMS) and updating this calculation to flow through only causes increases of more than 1 MGT on 2 of 178 segments (Rosenberg to Kendleton and Kendleton to Victoria, both of which have already been identified for environmental review, and are thus not impacted by any revisions to the density calculation).[19] Contrary to Van Dyke's attempt to obfuscate with several pages of drawn out calculation tables, the fundamental calculations that Applicants use are simple and intuitive[20]:

- Base GTMs = segment miles x TPD x train weight x calibration
- Synergy GTMs = base GTMs x Synergy CPD/Base CPD x synergy factor x calibration

III. THERE IS ADEQUATE CAPACITY FOR THE ADDITIONAL TRAINS THAT WILL HANDLE APPLICANTS' ANTICIPATED TRAFFIC GROWTH

20. Traffic routinely grows and fluctuates over time and in different areas due to various factors, including as a result of changing market forces or the strategic initiatives of a particular company. When traffic grows in particular areas due to these factors, there is hardly

(although for the following segments from Clinton to Ottumwa his estimates differ significantly both from CP's modelled segment MGT and 2019 reported segment MGT, which are well aligned with each other). His other example related to the CP line from Sabula to Airline Junction serves to affirm the consistency in CP's underlying identification of train per day impacts, clearly identifying the 14.4 TPD increase due to Transaction-related growth. While certain local and yard trains appear on intermediate segments and cause some fluctuations in MGT calculations, they are immaterial to both capacity assessments (which are focused on TPD information) as well as identifying environmental review thresholds (because the 14.4 TPD increase already trigged this review).}}

[19] *See* Elphick/Orr Workpaper "Trains Per Day and Gross Ton Miles CP REPLY.xlsx", at tab "Summary."

[20] *See* Elphick/Orr Workpaper "Trains Per Day and Gross Ton Miles CP REPLY.xlsx", at tab "Summary Sheet," and columns BQ-BU.

ever cause for reflexively demanding costly capacity improvements on the rail lines that support them. To be clear, capacity should continually be assessed in response to changing market demands and traffic growth, but rail capacity is generally built with the understanding that the results of a dynamic, competitive market place may result in traffic growth. That traffic will grow in certain areas as a result of the Transaction is no different. Just as existing rail capacity is there to support changes in market forces that spur traffic growth, it too is there to support Transaction-related growth. As explained further below, to the extent such capacity may not exist to support the level of traffic growth anticipated from the Transaction, Applicants endeavored to identify those areas and propose needed infrastructure.

A. The Operating Plan Team Applied its Ordinary Course Tools for Assessing Whether New Infrastructure Would Be Needed to Support Anticipated Post-Transaction Traffic Growth

21. Applicants did not simply assume that capacity existed to support the traffic growth anticipated from the Transaction. To the contrary, Applicants' Operating Plan Team assessed all segments over which CPKC will operate. For single-track segments, the various single-line main track segments of the combined CPKC network were reviewed to determine what, if any, additional infrastructure would be required to support the merger-related growth. To do so, Applicants utilized the "grid time analysis" method to calculate capacity on each single-line main track segment and assess the capacity capital requirements related to the potential CP and KCS Transaction. Heavily utilized at CP, the Grid Time Analysis provides

strategic insights into smart capital investment over a long term horizon. CP is a leader in both service and return on capital, in part, due to the value of this approach in planning capital.[21]

22. At one level, the capacity formula is a simple one and commonly understood. NHCRP report 773 – Capacity Modeling Guidebook for Shared Use Passenger and Freight Rail Operations – paragraph 3.4.2.3 – Grid Time Analysis). CP utilizes the 65% threshold to measure and monitor capacity utilization across its corridors. Sixty-five percent provides buffer capacity for the network which, when coupled with a refined approach to planning buffers in train schedules, creates resilience for trains moving over long distances while also allowing for other railroad activities requiring track time to interlace.

23. CP runs an efficient operation with the vast majority of siding-to-siding sustainable (*i.e.* practical) capacities below 65%. Certain segments do operate efficiently above the 65% number depending on whether there is excess capacity in nearby segments.

24. Corridors, at CP, have the basic grid for expansion thought out years in advance: CP ensures the uniform distribution of sidings at varying lengths. It is critical to think through where the long sidings will lay 5, 10 or 15 years from today. Lengthening one siding in isolation of how you might lengthen or add future sidings, could ultimately lead to waste if future locations can't be built that are in-phase with the one presently being expanded.

25. The approach above along with a review of subdivision delays, locomotive downloads, train speed, train utilization, re-crew events and other measures help form the basis

[21] Per normal course of business, and to the extent data was available, the following was considered for double-track segments; time between trains, (headway) and train run times were reviewed – both optimal and recent historical; train counts, current and historical; field observations and discussions with local Operations; cross-over counts and locations to understand the resilience of the infrastructure. Grid time analysis (e.g. the Elgin sub) was developed to review slot capacities.

of multi-year planning for network capital. Of course, interviews with field operations, engineering, mechanical and dispatchers also provide input into decision making.

B. As Traffic Is Attracted to the CPKC Network Over the Three Year Implementation Period, CPKC Will Assess Operations on an Ongoing Basis and Work With Entities that Share Lines Used By CPKC

26. It is important to note that traffic growth resulting from the Transaction will not materialize overnight. Traffic growth depends first upon attracting new traffic from other railroads and from highways, which is a lengthy and gradual process. Additional capacity to support the new traffic Applicants project from the Transaction will not be required all at once but will be needed at a rate commensurate with the rate at which Applicants attract additional traffic.

27. With that understanding, Applicants will carefully monitor traffic as it gets added to the CPKC network, and will proactively adjust operations and/or infrastructure as needed to ensure that no disruptions occur to its operations, or the operations of other railroads, as a result of insufficient capacity. Indeed, Applicants are well aware that the entire Growth Plan depends upon being able to deliver a high quality product, which is impossible to deliver if lines are over capacity. If additional investments are necessary on the lines that CPKC trains will use to deliver this high quality product, CPKC will be eager to make those investments, consistent with the well-established processes and mechanisms for making such capacity improvements.

28. Further to this end, Applicants will work with other joint line users (particularly UP and BNSF in Texas, UP in Missouri, and Metra in the Chicago area) to identify and implement mutual adjustments needed to accommodate increased CPKC traffic. We address specific contractual arrangements in more detail in separate sections below.

IV. SPECIFIC CLAIMS THAT THE TRANSACTION WILL OVERTAX AVAILABLE CAPACITY ARE MISGUIDED

29. In this section, we address specific critiques by other Class 1s relating to the impacts of planned CPKC operations on capacity (and thus operations of all users of jointly used lines) over lines that are currently used by CP or KCS.[22]

30. Before analyzing each portion of the CPKC network, Applicants discuss the following generally applicable points.

a. CN witness Hugh Randall raises capacity issues in several subdivisions.[23] Below, we explain the specific flaw(s) in Mr. Randall's approach to each portion of the network, but first, Applicants discuss three general issues with Mr. Randall's analysis.

i. First, Applicants note that Mr. Randall at times neglects to clarify whether certain capacity calculations are percentages of practical, or maximum capacity.

ii. Second, in certain segments, Mr. Randall raises a deficiency in the number of 10,000-foot sidings, but has failed to recognize that not all trains on that particular segment are 10,000 feet long.

iii. Third, Mr. Randall utilizes the wrong run time within a segment, based on an average assumed speed rather than real-world run time observations.

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[22] In a separate Elphick Reply Verified Statement, Ray Elphick address specific arguments concerning lines that CP shares with Metra, as well as issues relating to CP's lines between Sabula and River Jct., between Savanna and Chicago, and between Chicago and River Junction. Similarly, John Orr addresses in a separate Orr Reply Verified Statement UP and BNSF's arguments related to capacity on the lines radiating from Houston, *i.e.*, where KCS operates over UP-owned lines between Rosenberg and Houston and between Houston and Beaumont, and over HB&T lines (jointly owned by UP and BNSF) in Houston.

[23] CN-13, Randall VS, Appendix B.

iv. Fourth, Mr. Randall's analysis does not take into account ordinary course capital work on the CP and KCS networks.

b. While Applicants will demonstrate that there are no concerns related to capacity, we also note that CPKC will of course continue to make improvements on its own network. Additionally, CPKC will support capacity improvements on other lines it uses to support growth that occurs independent of the Transaction.

c. In the Operating Plan, Applicants carefully analyzed the impact of the anticipated increase in traffic due to the Transaction and determined that there was sufficient capacity to accommodate the incremental traffic.

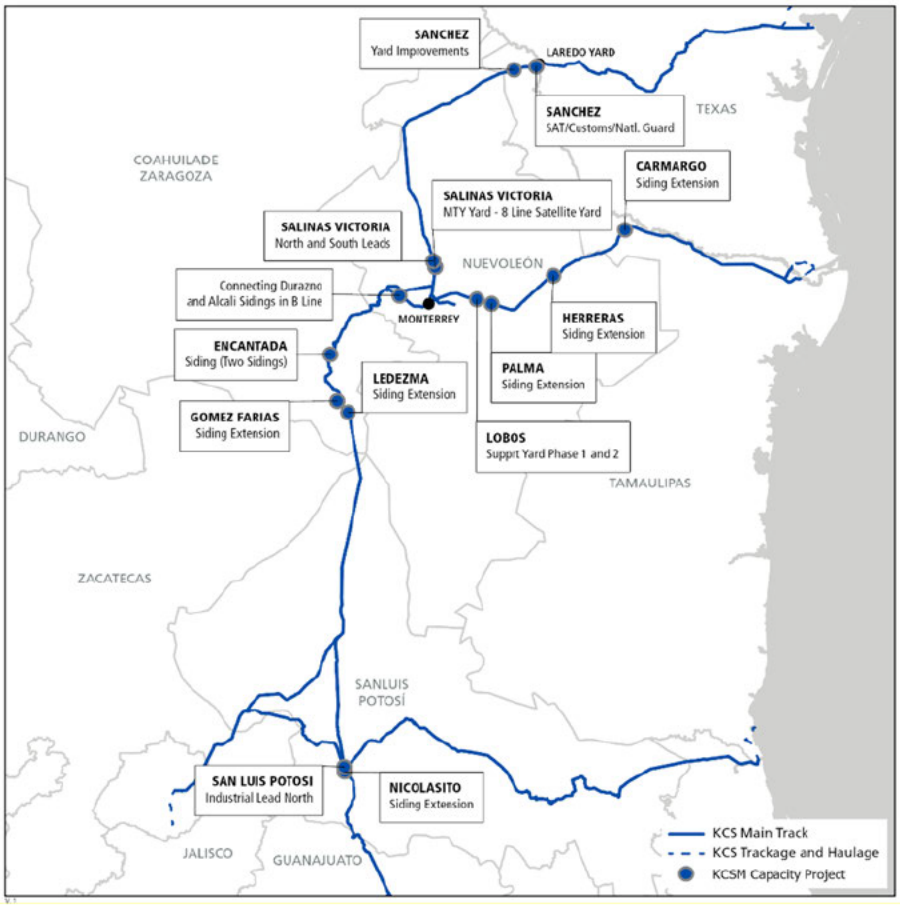
31. With those points in mind, we now proceed from south to north across the CPKC network, demonstrating that there is no basis for concerns about capacity. For ease of reference, Figure 1 below is an index map of the CPKC network, showing where in the Reply Verified Statements the capacity arguments regarding each location are addressed.

FIGURE 1
INDEX MAP OF CAPACITY ARGUMENTS



A. KCSM's Lines in Mexico Have Ample Capacity

FIGURE 2
RECENTLY COMPLETED KCSM PROJECTS
MAP OF MEXICO LINES WHERE CN (OR OTHERS) ASSERT CAPACITY CONCERNS



32. Figure 2 above shows the recently complete KCSM projects on lines in Mexico. Hugh Randall's verified statement raises capacity issues at three districts: Tula, Vanegas and Saltillo.[24] Mr. Randall's verified statement states that the Tula Subdivision is "orange" for capacity while the Saltillo and Vanegas Subdivisions are "red." Mr. Randall defines red to be most severe as exceeding practical capacity and orange to be at practical capacity. For the red subdivisions, he asserts that there is a need for several 10,000-foot sidings. In other words, Mr.

[24] CN-13, Randall VS, Exhibit B-4.

Randall contends that there will be insufficient 10,000-foot sidings for the number of trains that will run up to 10,000 feet.

33. First, CN suggests that on the Tula Subdivision the segment from Ahorcado to Puerto Carrozas is 55KM between viable passing sidings and is projected to be operating at 96% of capacity post-merger. Mr. Randall also contends that an additional siding may be needed. To reiterate, that 96% is of practical capacity, not maximum capacity.[25] There is a second significant issue in Mr. Randall's analysis; the actual number of trains is 8.5, and the actual amount of practical capacity therefore is 54%.[26] The Tula Subdivision begins at San Luis Potosi and traffic splits at a key junction at Buchanan Lopez where some trains move to the Celaya Subdivision and onto destinations like Toluca, Port of Lazaro Cardenas, and Escobedo, and other trains remain on the Tula Subdivision to Mexico City.[27] The 55KM segment CN references is south of the junction at Buchanan Lopez. The following chart, Figure 3, provides both the total train counts expected by segments on that subdivision as well as the number of scheduled trains that could operate up to 10,000 feet. Note, on the Tula subdivision south of Ing Buchanan Lopez, only two of the trains will run up to 10,000 feet. Based on this, there is more than sufficient capacity to handle anticipated volumes.[28]

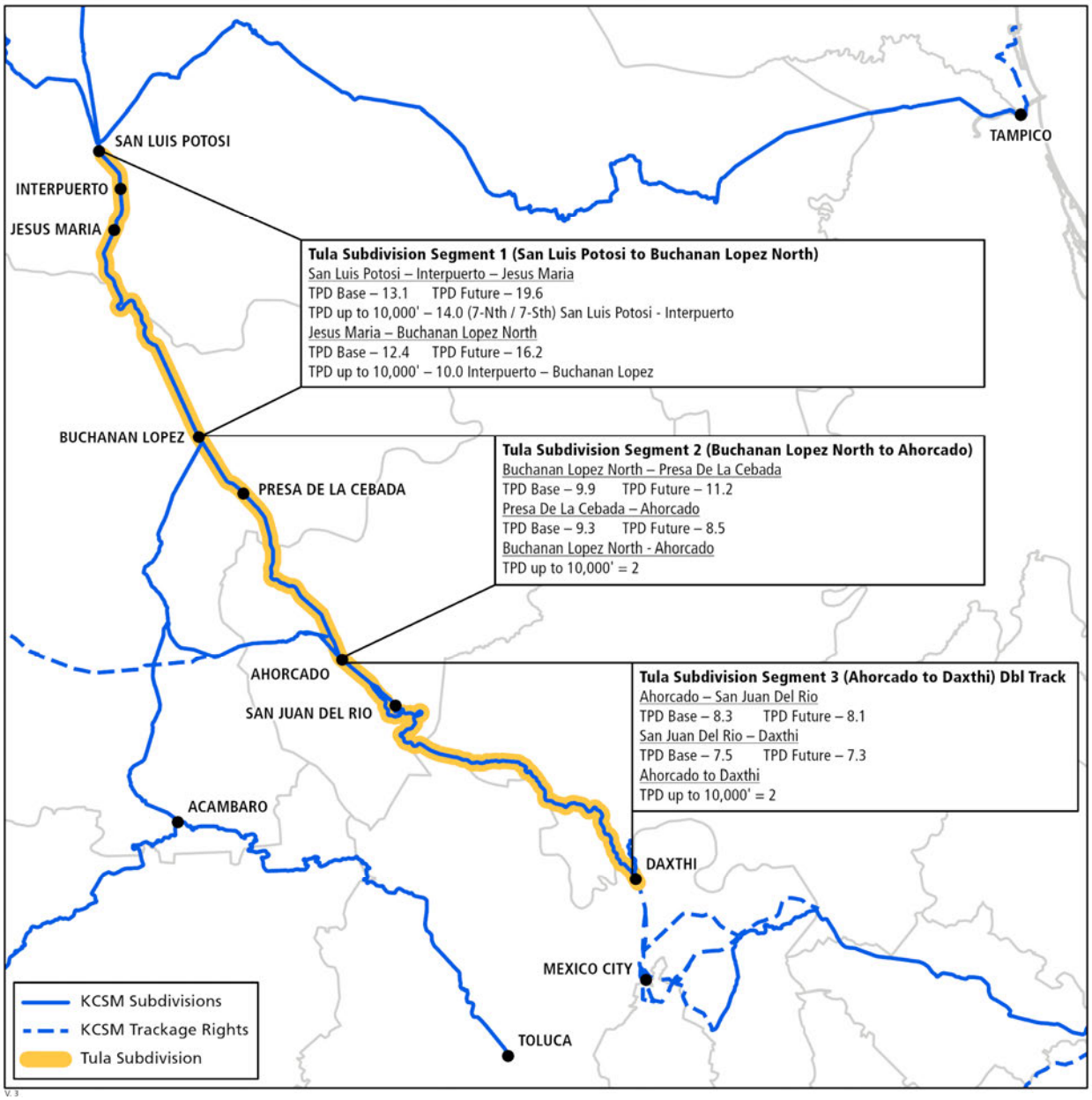
[25] Elphick/Orr Workpaper "KCSM Segment Capacity Calculations.xlsx."

[26] Elphick/Orr Workpaper "KCSM Segment Capacity Calculations.xlsx."

[27] *See* Amended Operating Plan, Appendices C, E, H, and I.

[28] Although additional capacity is not necessary based on estimates of Transaction-related growth, on the segment CN flags between Ahorcado and Puerto Carrozas, Applicants have the option to extend sidings, which could be executed at a relatively low cost of approximately $2.5 million per siding extension and with the capability to construct within four months.

FIGURE 3
MAP OF GROWTH ON THE TULA SUBDIVISION



34. Second, CN suggests that on the Vanegas Subdivision the current capacity for long trains is less than 12 (6 each way per day) compared to a projected total train demand of 20.8. From a review of Mr. Randall's working papers, the two segments referenced as lacking capacity are between Charcas and San Luis Potosi and between Benjamin Mendez and El Salado. In the first segment, between Charcas and San Luis Potosi, double track between Bocas

and Pinto was not considered. With the double-track factored, and now measuring between Charcas and Bocas, the practical capacity on the south-end is 15.7 trains per day and the anticipated trains running up to 10,000 feet in this segment is 16.[29] While just over 65%, applicants believe there is opportunity to monitor and schedule for more efficiency. In the second segment, between Benjamin Mendez and El Salado, Mr. Randall omits two sidings at 15,400 feet and 13,400 feet respectively. The practical capacity of trains up to 10,000 feet is 18.6 against demand of 16 trains of up to 10,000 feet as now measured between Ledezma and El Salado. This segment will again be monitored to optimize for efficiency and throughput.

35. Third, CN states that on the Saltillo Subdivision, current siding lengths limit the capacity for long trains to 16 per day. KCSM plans through normal course capital to extend Escobedo and construct a new siding near Soledad in 2023 well in advance of the uptick in volume brought on by the Transaction. The Saltillo train counts change at junction points. CPKC expects 22 trains up to 10,000 feet from Laredo to Leal.[30] From Leal to CP983, 16 trains will be up to 10,000 feet and from CP983 to Benjamin Mendez, there will be 18 trains up to 10,000 feet. With the new siding and siding extension, the practical capacity for 10,000-foot trains after the completion of projects in Escobedo and Soledad will be 18.7, and CPKC anticipates 18 trains will run up to 10,000 feet by the end of year 3.[31] While Mr. Randall notes 80% of overall capacity between Brazil & Rodriguez is utilized, in actual fact, the capacity utilization is well below that and there is sufficient capacity on the line.[32]

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[29] Elphick/Orr Workpaper "KCSM Segment Capacity Calculations.xlsx."

[30] Elphick/Orr Workpaper "KCSM Segment Capacity Calculations.xlsx."

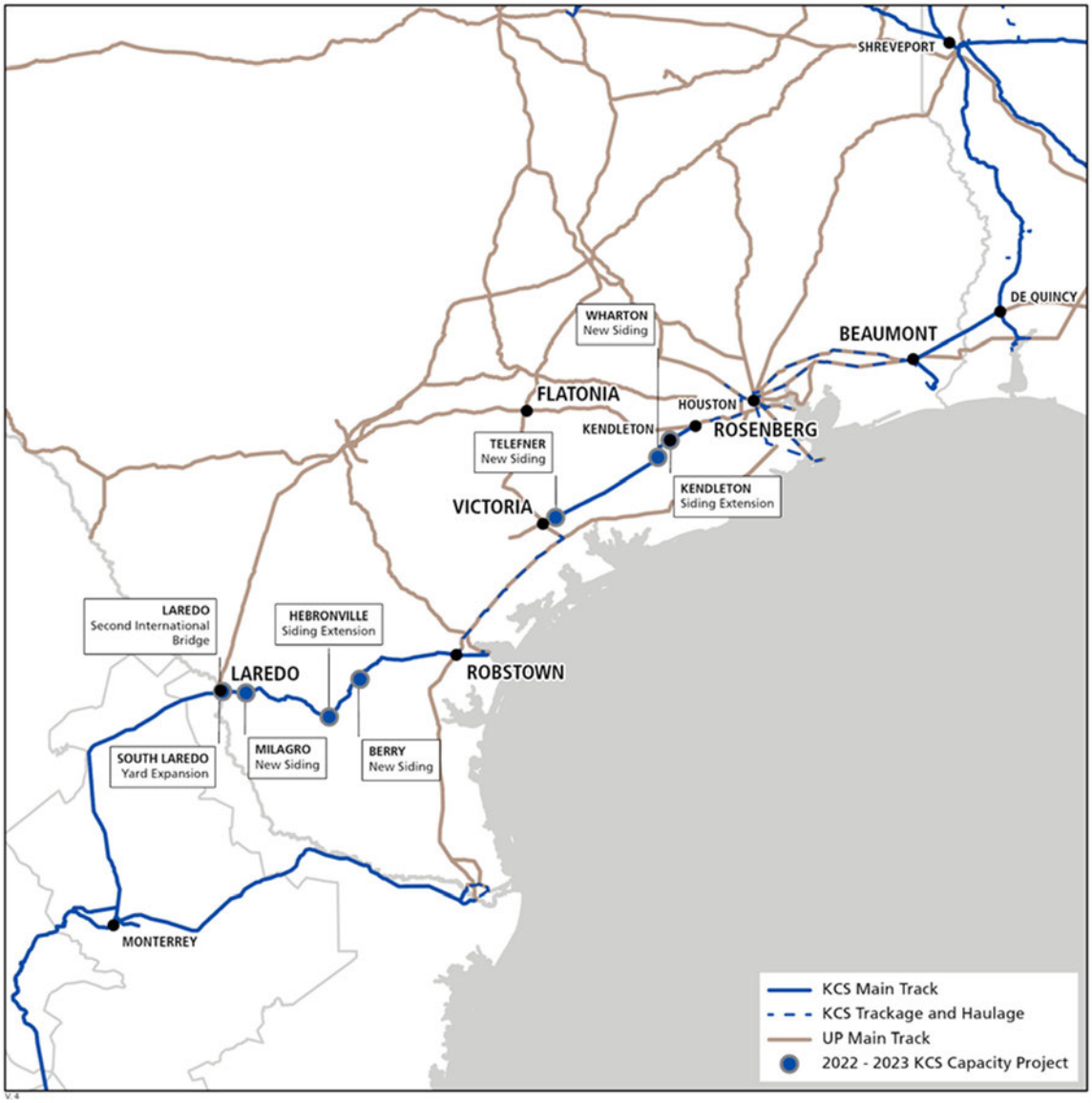
[31] Elphick/Orr Workpaper "KCSM Segment Capacity Calculations.xlsx."

[32] Elphick/Orr Workpaper "KCSM Segment Capacity Calculations.xlsx."

B. The Lines KCS Uses in Texas Have Ample Capacity

36. Here, we offer an overview of KCS's lines in Texas and describe the availability capacity on these lines. To facilitate that discussion, Figure 4 and Figure 5 below are maps of Laredo to Rosenberg lines. The first map illustrates KCS line investment ongoing in 2022. The second figure illustrates siding level detail for both KCS and UP as well as distances and run times between sidings. As we demonstrate below, KCS's network in Texas has ample capacity to handle future CPKC traffic.

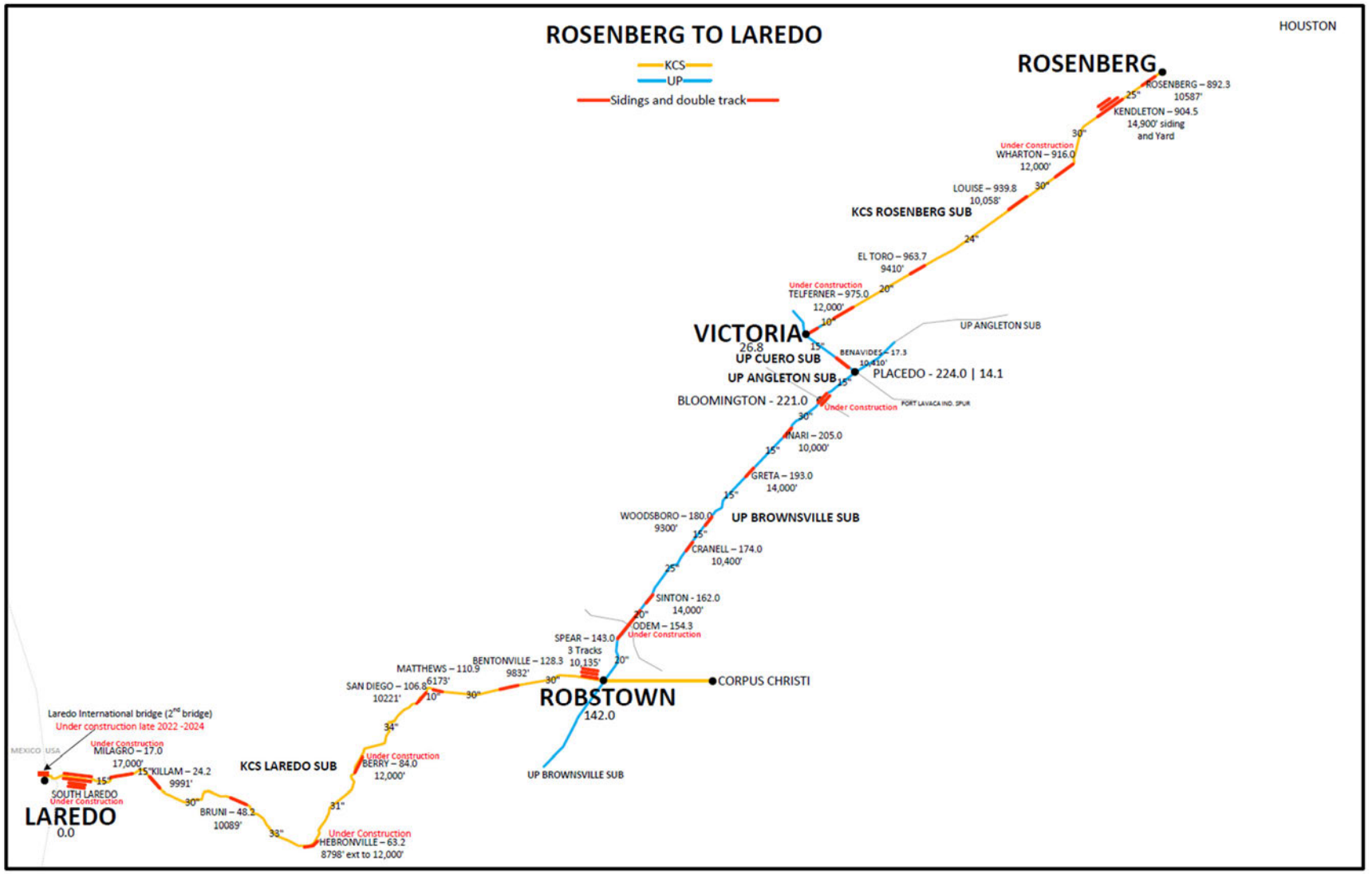
FIGURE 4
KCS CAPITAL ON KCS LINES IN 2022 VICTORIA TO ROSENBERG



37. Both of these figures also show that KCS is in the process of preparing to construct a second cross-border bridge at Laredo. KCS currently anticipates beginning construction late in 2022 and completing the construction in 2024. The addition of the new bridge will increase cross-border capacity at and traffic fluidity Laredo.

FIGURE 5

MAP OF LINES USED BY KCS BETWEEN ROSENBERG AND LAREDO WITH KNOWN CAPITAL PROJECTS



Elphick/Orr R.V.S. at 27

38. As shown through Figure 5 above, KCS routing between Laredo and Rosenberg is made up of three parts: (1) Laredo to Robstown, (2) Robstown to Victoria; and (3) Victoria to Rosenberg. All three sections are part of a corridor between Laredo and Beaumont which is dispatched centrally at the joint dispatching center in Spring, Texas. Since re-opening the Rosenberg Subdivision in 2009, KCS has invested in capacity between Laredo and Rosenberg, both on its tracks and on UP's tracks, including siding extensions, diamonds, and bypasses. Today, the entire route between Laredo and Rosenberg is CTC-controlled. KCS's investment on UP's line south of Victoria benefits other carriers operating on this portion between Victoria and Robstown. In addition, KCS's use of its Rosenberg Subdivision improves fluidity for the other carriers by removing KCS traffic from the UP line between Victoria and Flatonia and on UP's Glidden Subdivision to Rosenberg.

39. Figure 4 also demonstrates that KCS's Laredo and Rosenberg Subdivisions will be built to handle 10,000-foot trains by the end of 2022. KCS's Laredo Subdivision between Laredo and Robstown will have ample capacity to handle Transaction related trains by the end of 2022. As detailed below, KCS is adding extensive capacity to allow for staging to and from the Border that will support fluid movement on this line, and also augment capacity on UP-owned lines between Robstown and Victoria. KCS's Rosenberg Subdivision between Victoria and Rosenberg will see the benefit of two new sidings in 2022, Telferner and Wharton. A project to extend Kendleton siding to 14,900 feet and, in doing so, extend the switch lead is already under way.

40. We understand that CN suggests that the Laredo Subdivision will be above capacity. This is incorrect. First, CN's witness underestimates capacity on this segment because he fails to include KCS's 2022 capacity program. Specifically, KCS has six major projects

occurring on the Laredo Sub in 2022 including: (1) a new 12,000-foot siding, "Milagro", between MP 15.8 and 18.5, (2) extension of the Hebbronville siding to 12,000 feet from MP 64.1 to 65.15, (3) a new 12,000-foot siding, "Barry", between MP 83.5 and 85.8, (4) extension of the East switching lead at Laredo from MP 9.2 to 11.2, (5) building a double main through Laredo Yard between MP 7.4 and 9.2, and (6) extending three main tracks towards the border from Laredo Yard between MP 4.7 and 7.4. After this additional investment, the KCS Laredo Subdivision will have a practical capacity (*i.e.*, 65% of maximum capacity) of 24.0 trains per day.[33] Second, the trains that CPKC plans to run include twelve up to 10,000-foot trains per day on the Laredo Subdivision by Year 3; there are no capacity concerns with this incremental traffic.[34]

41. CN also suggests that the Rosenberg Subdivision will have a capacity limited to sixteen 10,000-foot trains per day, and that it will be above capacity even with a new 10,000-foot siding between Kendleton and Louise. However, CN's witness understates capacity on this segment again by assuming that all trains will be 10,000 feet. CPKC plans to run twelve trains of up to 10,000-foot length per day, and 18.1 trains total, on the Rosenberg Subdivision by Year 3.[35] In light of the fact that the Rosenberg Subdivision will have a practical capacity of 19.9 total trains per day, of which 12 are up to 10,000 feet, there are no capacity concerns with this incremental traffic.[36]

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[33] *See* Elphick/Orr Workpaper "Rosenberg to Laredo Capacity end 2022.xlsx."

[34] Elphick/Orr Workpaper "Rosenberg to Laredo Capacity end 2022.xlsx;" Amended Operating Plan, Appendices, A, H, I.

[35] Elphick/Orr Workpaper "Rosenberg to Laredo Capacity end 2022.xlsx."

[36] Elphick/Orr Workpaper "Rosenberg to Laredo Capacity end 2022.xlsx"

42. CN's witness states that there are no sidings on KCS's line at either Robstown or Victoria. However, KCS is constructing a new siding at Telferner between MP 973 and MP 975.3 on the Rosenberg Sub, which is 4 miles north of Victoria. KCS also already has a siding and two staging tracks at "Spear" MP 143 on the Laredo Sub, immediately west of Robstown. Finally, KCS is constructing a new siding on the Rosenberg Sub at Wharton, MP 916.0, between Kendleton and Louise in 2022 and as previously mentioned KCS is constructing an extension of its switching lead on the North end of Kendleton Yard by 6,900 feet, freeing the existing switching lead and allowing for the siding to be extended to 14,900 feet.

C. The UP-Owned Line Between Robstown and Victoria Has Ample Capacity

43. Here, we offer an overview of UP and KCS lines between Laredo and Rosenberg, with the UP lines between Robstown and Victoria highlighted in blue. Note UP 2022 projects are underway on the Brownsville Subdivision to create a runaround track at Bloomington and to extend the Odem siding. Table 1 below represents capacity calculations as well as available capacity remaining subsequent to the end of the 2022 construction season.[37] As Table 1 demonstrates, each of the segments are below 65% sustainable capacity.[38] As we demonstrate below, there are no capacity concerns with this line.

[37] Elphick/Orr Workpaper Rosenberg to Laredo Capacity end 2022.xlsx

[38] *Id.*

TABLE 1[39]

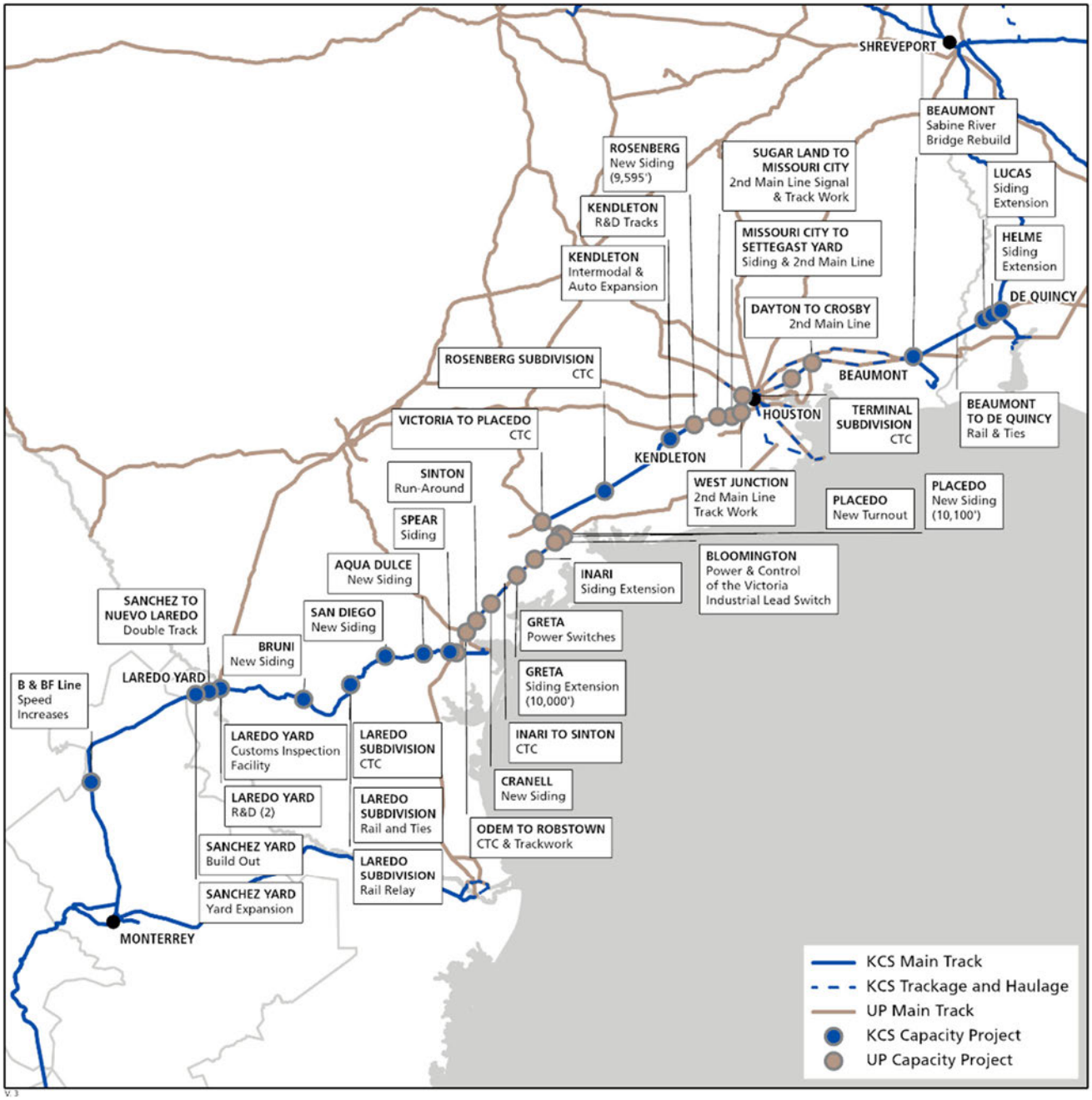
CAPACITY CALCULATIONS AND REMAINING CAPACITY – VICTORIA TO ROBSTOWN

Subdivision	Segment	Length	Time SB	Time NB	Capacity 100%	Capacity 65%	TPD at End of 2022 vs. 65%
UP Cuero	UP Victoria - UP Benavides	10,400	15	15	72.0	46.8	21.8
UP Angleton	UP Benavides - UP Bloomington	14,000	15	15	72.0	46.8	21.8
UP Brownsville	UP Bloomington - UP Inari	10,000	25	25	48.0	31.2	6.2
UP Brownsville	UP Inari - UP Greta	14,000	15	15	72.0	46.8	21.8
UP Brownsville	UP Greta - UP Woodsboro	9,300	15	15	72.0	46.8	21.8
UP Brownsville	UP Woodsboro - UP Cranell	10,400	15	15	72.0	46.8	21.8
UP Brownsville	UP Cranell - UP Sinton	14,000	25	25	48.0	31.2	6.2
UP Brownsville	UP Sinton - UP Odem	14,000	20	20	57.6	37.4	12.4
UP Brownsville	UP Odem - Robstown	10,135	20	20	57.6	37.4	12.4

44. As explained in Mr. Simmons' Reply Verified Statement, the STB-approved trackage rights agreements under which KCS operates between Beaumont and Robstown, Texas provide for UP to make the capital investments needed to maintain the capacity to accommodate traffic growth of CPKC. As shown through Figure 6 below and as Mr. Simmons further explains, KCS has collaborated with UP, and KCS has funded significant capacity on these lines in the past.

[39] See Elphick/Orr Workpaper "UP Brownsville Capacity.xlsx."

FIGURE 6
MAP OF UP LINE ROBSTOWN-VICTORIA
SHOWING HISTORY OF KCS-FUNDED CAPACITY EXPANSION



45. UP's witnesses Rocker and Turner state that after the extensions/new sidings at Greta, Inari, Cranell, and Placedo, Benavides, a runaround track at Sinton and CTC between

Elphick/Orr R.V.S. at 32

Robstown and south Odem, these projects will not be enough. They advise the Board to consider that all of these projects added capacity of only 3-4 trains per day. In the Rocker/Turner VS, there are multiple references to West Junction which may suggest the 3-4 trains per day calculation covers from Robstown through to Houston.[40] When looking at this larger corridor, UP's assertion of a limited 3-4 train capacity increase could fully be a function of constrained capacity between Victoria and Flatonia, where there are limited sidings. Considering only the line of road affected by the Transaction, and factoring in the added infrastructure and the siding being built at Odem in 2022, Applicants calculate the capacity of the segment to be 31.2 trains / day for trains up to 10,000 feet (see table 1 above). This capacity is adequate to handle CPKC trains, UP trains and BNSF trains.[41] KCS's holding capacity at Spear, immediately west of Robstown, enables the capacity off and onto the UP Brownsville subdivision. Note that even without having completed the projects referenced by Rocker and Turner, or Odem, we estimate that this line would have a practical capacity of 20.8 trains per day, of which up to 7.8 trains could be 10,000 feet long.[42] There is no indication of how witnesses Rocker/Turner measured what sections of track drove their capacity calculation, or verification in any way that the CPKC Transaction cannot be accommodated. Regardless, should additional capacity be required at some point in the future, there are existing mechanisms to address any shortfall.

D. There Will Be No Capacity Shortfall in the Houston Terminal Complex

46. UP and BNSF raise a number of capacity concerns related to the Houston Terminal. Applicants respond to these concerns in detail below, but Applicants emphasize that

[40] UP Comments, Rocker/Turner V.S. at 28.

[41] *See* Elphick/Orr Workpaper "UP Brownsville Capacity.xlsx."

[42] *See* Elphick/Orr Workpaper "UP Brownsville Capacity.xlsx."

the Transaction will add just e*ight* trains per day; this is a mere drop in the bucket compared to what is run in Houston.

47. Many other witness already address the Houston Terminal. John Orr addresses a number of these arguments in his standalone Reply Verified Statement, which shows that the rail lines utilized by KCS between Beaumont and Robstown, Texas, including the Houston complex, have adequate capacity for all users. Mr. Orr also makes clear that any capacity issues with the Houston Terminal are due to operations, not infrastructure. Additionally, Jason Wilkerson, who served as UP's Director of Transportation Services for the Houston complex from 2008 to 2013, confirms in his Reply Verified Statement that the Houston Terminal has tremendous capacity when operated effectively. Mr. Wilkerson also states that KCS's through trains impose only minimal stress on Houston area capacity and there are many opportunities to improve operations through the Houston Terminal. Here, we review the capacity available to support CPKC's modest proposed increases in trains through Houston, which will be no different in character from KCS's existing operations. CPKC will continue to change crews outside of the Houston terminal on CPKC property with no intermediate work.

48. The Houston Terminal has capacity to handle the incremental Transaction-related traffic. As noted above, the Transaction contemplates just over 8 trains per day or four through freight trains in each direction. CPKC will remain a minority user of Houston's rail infrastructure even after the Transaction-related traffic growth.

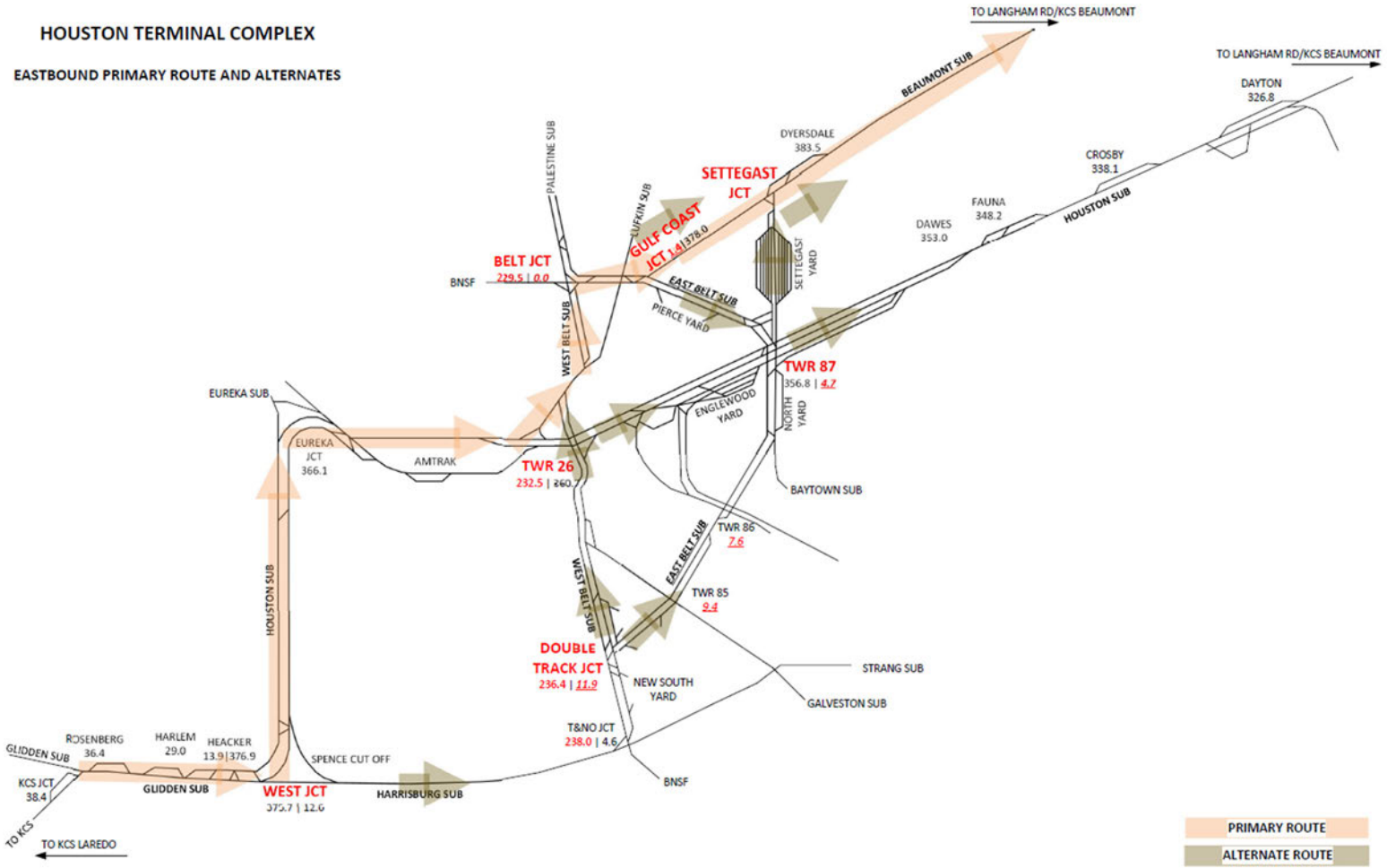
49. Furthermore, on a train-for-train basis, CPKC's through train operations will impose far less burden on the Houston-area infrastructure. While other trains may need to change crews or enter and exit yards, CPKC through trains move across Houston via the multiple tracks, and multiple routes available for those movements. Figure 7 below is a map of the

Houston Terminal. This figure shows that an eastbound train arriving at West Junction normally routes via Eureka Junction and avoids passing the middle of Englewood and Settegast Yards. These trains, however, can take a number of alternative routes through West Junction, Double Track Junction, Tower 26, Belt Junction, Gulf Coast Junction, Settegast Junction and Tower 87. Importantly, it is possible and permitted to run east on the Houston Subdivision.[43] UP's double tracking from Crosby to Dayton can support local operations and trains already running onto the Houston Subdivision towards Dayton. Beyond Dayton, three long sidings exist to Langham Road, a distance of 47.7 miles in total; these sidings provide capacity for eastbound trains for utilization against a predominantly westward train flow.

[43] *See* UP Houston Terminal Playbook, Terminal Discipline, slides 24 and 25.

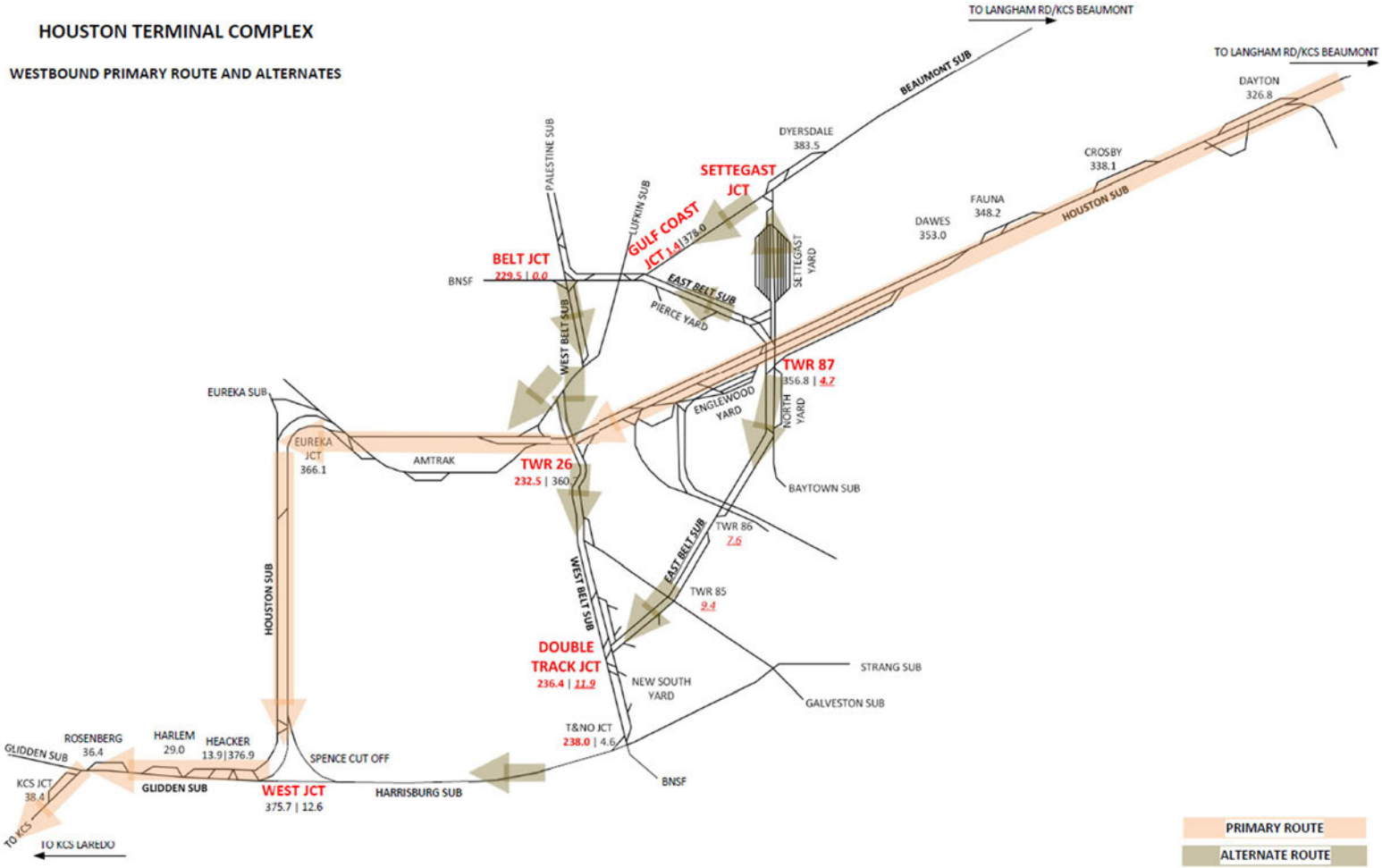
FIGURE 7

MAP OF KCS ROUTES OVER UP TRACKAGE RIGHTS THROUGH HOUSTON TERMINAL



50. A westbound train also has several routing options beyond Tower 87 and through Houston. Those options include heading towards Settegast Junction, Gulf Coast Junction, Belt Junction, Tower 26 and West Junction. Figure 8 below is a map of the Houston Terminal. This figure shows that a westbound train arriving Tower 87 has a primary and several alternate routes through Houston.

FIGURE 8
MAP OF KCS ROUTES OVER UP TRACKAGE RIGHTS THROUGH HOUSTON TERMINAL



Elphick/Orr R.V.S. at 38

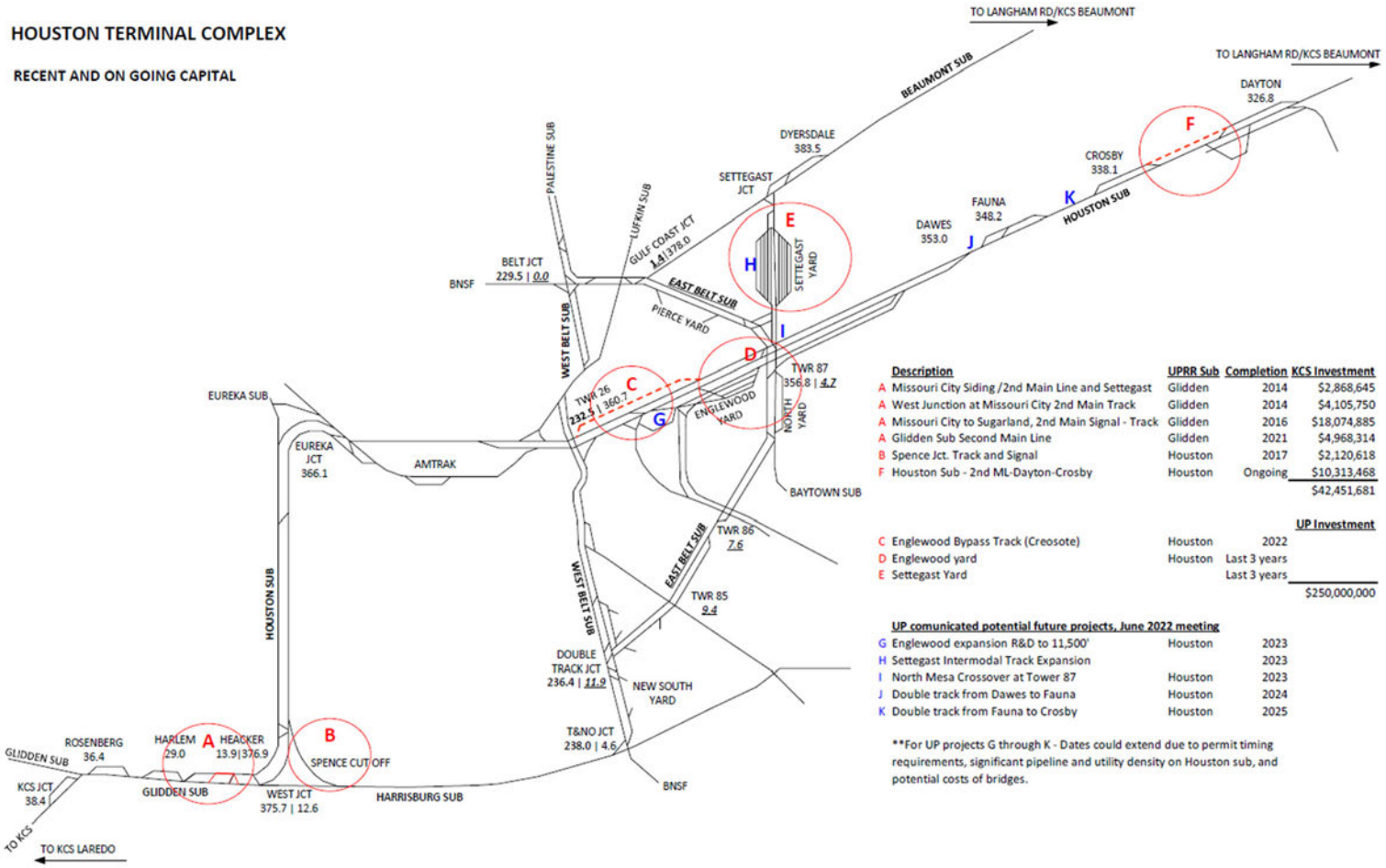
51. UP, supported by KCS and BNSF financially, has heavily invested in Houston in the past and continues to do so, including on the routes used by KCS trains. UP has continued to invest in Houston-area capacity, and has recently made or announced plans of significant investments at and around Englewood Yard, among many other locations. Steve Simmons discusses the considerable capacity improvement projects that have taken place in the Houston area in his Reply Verified Statement. Figure 9 below outlines this significant capacity investment in the Houston Terminal, by showing both KCS's investment and UP's investment, in the recent past. The below figure also includes future capacity investment in the Houston Terminal.

52. To-date, UP has invested significantly to expand operations and classification at Englewood Yard but the footprint for the yard is limited and requires trains to double away on arrival or, to double up two or more tracks on departure. UP's own brand of Precision Scheduled Railroading ("PSR"), which was part of UP's Unified Plan 2020, as discussed in John Orr's individual Reply Verified Statement, has increased train lengths and pushed work into the Houston terminal with classification concentrated at Englewood Yard. With those changes in UP operating practices, Main 1 is not always available for through trains. However, UP's Englewood bypass track (Creosote track), which is scheduled to be completed in 2022, will greatly relieve capacity pressure by reducing the frequent delays KCS experiences today because of UP trains entering and departing Englewood Yard. For this reason, the Englewood bypass track may be the most important piece of infrastructure underway in support of Houston through-freight operations. UP's future plans to increase receiving and departure track lengths would also significantly improve capacity in the Englewood area. Actual timing remains uncertain due to permitting, and a need to understand scope as determined through pre-engineering.

Contending with several pipeline crossings could, for example, extend timelines. Capital projects such as these will reduce the capacity pressures in the Houston Terminal that John Orr describes in his standalone Reply Verified Statement.

FIGURE 9

MAP OF RECENT CAPITAL THROUGH HOUSTON TERMINAL



Description	UPRR Sub	Completion	KCS Investment
A Missouri City Siding /2nd Main Line and Settegast	Glidden	2014	$2,868,645
A West Junction at Missouri City 2nd Main Track	Glidden	2014	$4,105,750
A Missouri City to Sugarland, 2nd Main Signal - Track	Glidden	2016	$18,074,885
A Glidden Sub Second Main Line	Glidden	2021	$4,968,314
B Spence Jct. Track and Signal	Houston	2017	$2,120,618
F Houston Sub - 2nd ML-Dayton-Crosby	Houston	Ongoing	$10,313,468
			$42,451,681

			UP Investment
C Englewood Bypass Track (Creosote)	Houston	2022	
D Englewood yard	Houston	Last 3 years	
E Settegast Yard		Last 3 years	
			$250,000,000

UP comunicated potential future projects, June 2022 meeting

G Englewood expansion R&D to 11,500'	Houston	2023
H Settegast Intermodal Track Expansion		2023
I North Mesa Crossover at Tower 87	Houston	2023
J Double track from Dawes to Fauna	Houston	2024
K Double track from Fauna to Crosby	Houston	2025

**For UP projects G through K - Dates could extend due to permit timing requirements, significant pipeline and utility density on Houston sub, and potential costs of bridges.

53. Additionally, the primary routes themselves are and will be high capacity routes, irrespective of the Clear Route Protocol.[44] On the primary eastbound route that KCS trains traverse, there is 21.8 miles total, of which 14.2 miles is double track, and 6 crossovers between West Junction and Settegast Junction. On the primary westbound route there will be 18.9 miles of double track (by end of 2022) and 12 crossovers between Tower 87 and West Junction. In other words, even if UP does not adhere to the Clear Route Protocol, the primary routes themselves are high capacity routes.

54. As stated earlier, the CPKC transaction proposes just over eight trains per day to run through Houston, or four trains per day in each direction. A train with a relatively clean run eastbound on the primary route as depicted in Figure 10 below, can transit from KCS Junction to Langham Road or Beaumont in 2 hours and 48 minutes.[45] A westbound on a primary route can transit from Beaumont/Langham Road in 2 hours and 34 minutes.[46] While it is possible to transit from Beaumont to the west side of Houston, or vice versa in roughly 2.5 hours, KCS would consider a good run to be four to five hours. However, performance has been significantly worse than 5 hours year to date, primarily due to operational issues, although this number is improving. In his standalone Replied Verified Statement, John Orr discusses various ways to improve the use of existing capacity and to improve this run time. In short, it is critical to get deep into the details on transit and issues driving transit. As John explains, "[a]ll users of these lines need a shared base of information, a common platform to use that information, joint maintenance and

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[44] *See UP/SP Houston/Gulf Coast Oversight,* 3 S.T.B. 1030, 1038, STB Finance Docket No. 32760 (Sub-No. 26) (Decision No. 10 served Dec. 21, 1998) (explaining that the clear route condition is "to enhance efficiency and facilitate the smooth movement of traffic through the Houston Terminal," and noting that alternative routes should be used "when customary routings are unavailable or congested.").

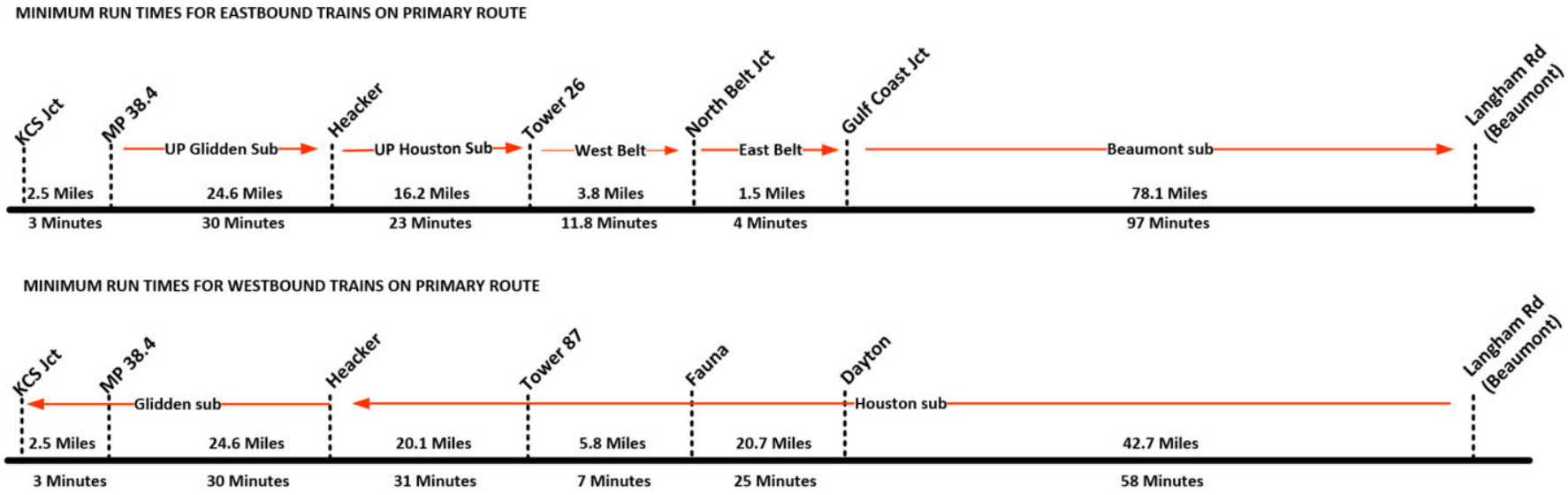
[45] *See* Elphick/Orr Workpaper "Houston-Area-Max-Speed-Table-w-TrainMix-AnalysisV2.xlsx."

[46] *See* Elphick/Orr Workpaper "Houston-Area-Max-Speed-Table-w-TrainMix-AnalysisV2.xlsx."

schedule planning, and an agreed set of standards to measure use of the facilities." Developing standards for transit in every segment is critical to both understanding performance and assessing appropriate actions. There is a need to compare a clean run to today's performance and have all teams aligned on continuously driving performance improvement. This stop-watch approach is fundamental to CPKC's brand of PSR.

FIGURE 10

MINIMUM RUN TIMES FOR HOUSTON TRAINS ON PRIMARY ROUTE



Elphick/Orr R.V.S. at 44

55. As the Reply Verified Statements of John Orr and Jason Wilkerson show, there is adequate capacity to efficiently run today's operation as well the additional trains brought on by the Transaction. Train counts remain lower than the historic highs. UP, BNSF and KCS have significantly invested in Houston, providing greater capacity. We expect the Englewood bypass (Creosote) track to significantly help through train operations, the precise type of train CPKC will run through Houston. This investment is required to deal with UP's operational changes and particularly longer UP trains arriving and departing Englewood. A solid process to set performance standards and measure every detail, cross-functionally and transparently, is the most important requirement, going forward, to make use of the capacity that is already available.

E. The Neches River Bridge Has Ample Capacity

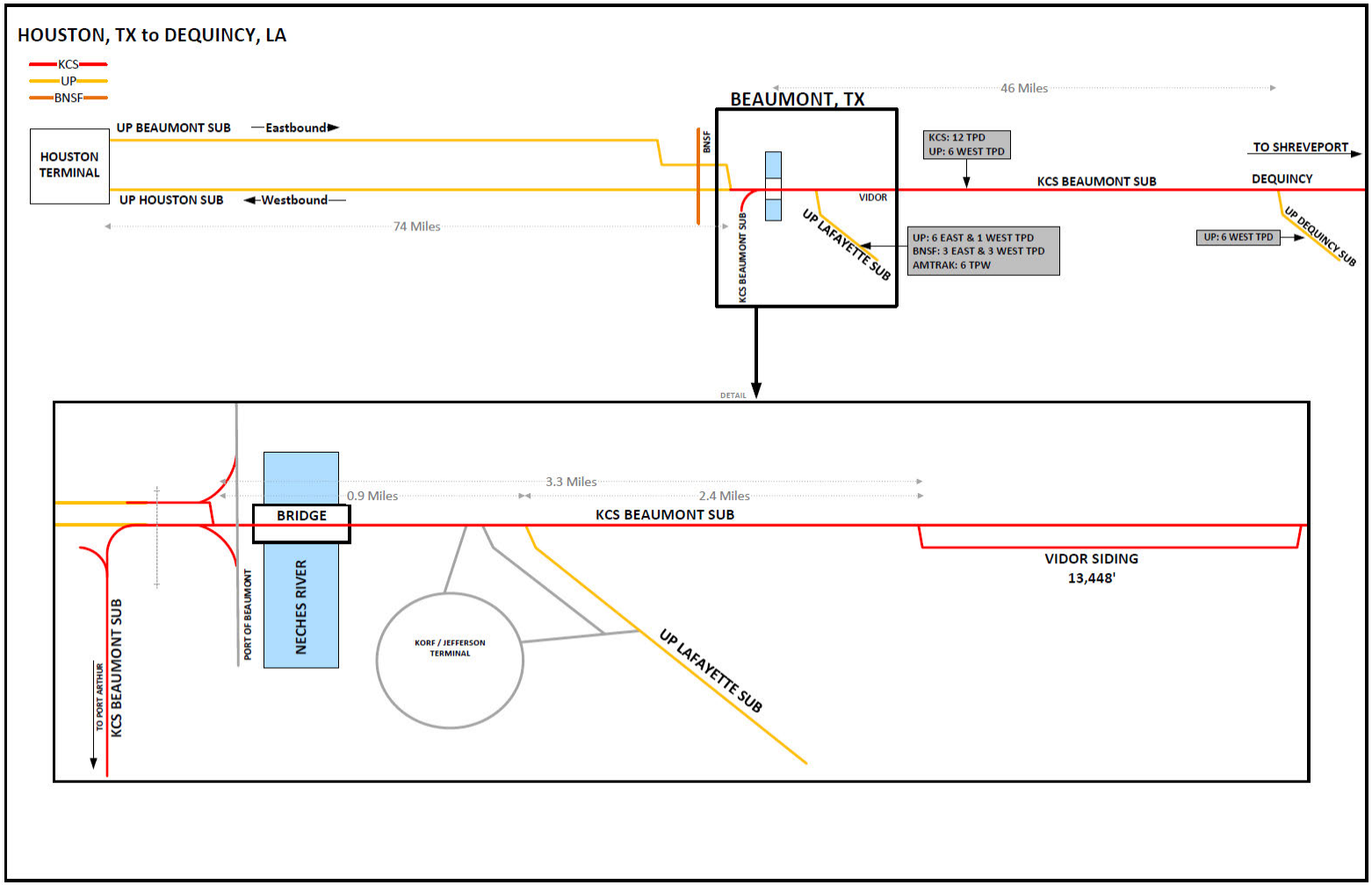
56. We understand that UP and BNSF raise concerns about operations over the Neches River Bridge; these concerns are unwarranted. As Mr. Simmons discusses in depth in his Reply Verified Statement, KCS recently conducted a study, in conjunction with UP and BNSF, which showed that the capacity of the bridge is fully adequate to accommodate the additional CPKC trains projected to result from the Transaction. Additionally, past traffic levels on the bridge show that adding CPKC's 10.97 daily trains (excluding organic growth) here will not overtax capacity, particularly when there is capacity for approximately 20-25 additional trains.[47] Past extensive cooperative work shows that there is enough capacity for fluid operation on the Neches River Bridge.

[47] Simmons R.V.S. Exhibit 9.

57. UP contends that Applicants' capacity modeling did not account for existing UP, BNSF, and Amtrak trains using the Neches River Bridge. We took a closer look at Neches River Bridge capacity, using recent train counts, and did another quantitative analysis, which showed that capacity at the Neches River Bridge is not an issue.[48] As shown in Figure 11 below, to understand capacity over the Neches River Bridge, one must consider run times required to clear the single main track between Beaumont and Vidor, or Beaumont and the UP's Lafayette Sub. The following analysis considers those transits and recent train counts over the bridge, and considers Transaction-related growth layered on top of current traffic levels.

[48] Elphick/Orr Workpaper "Beaumont Occupancy Data FINAL.xlsx."

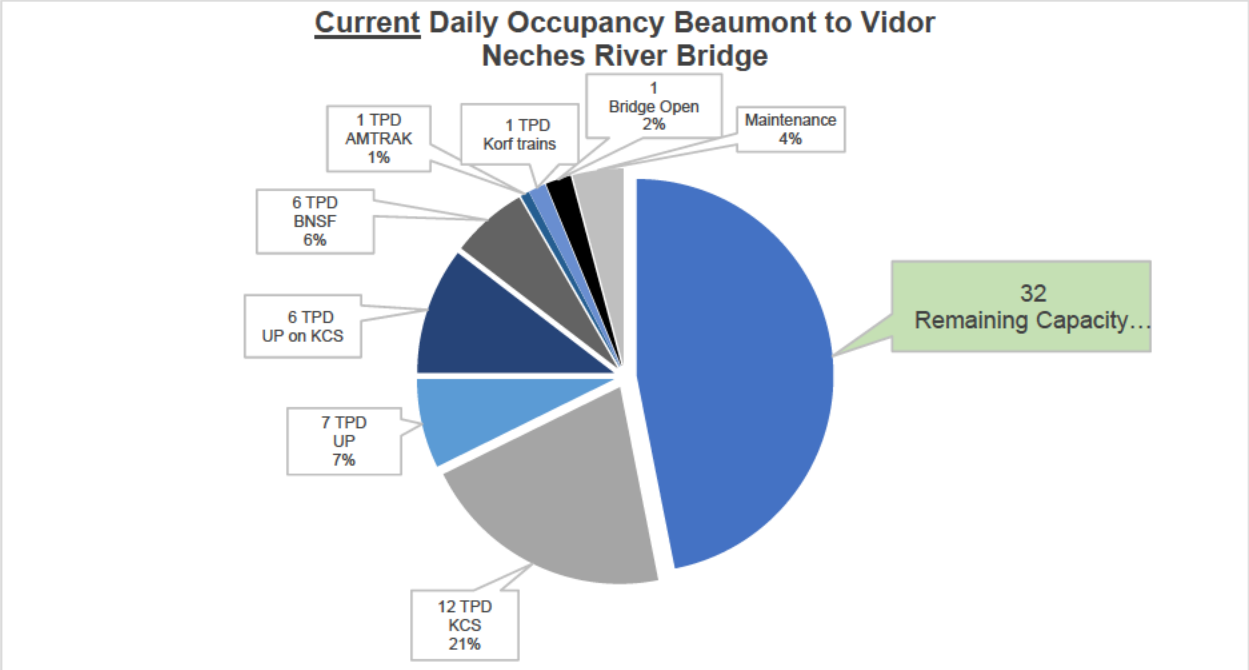
FIGURE 11
MAP OF NECHES RIVER BRIDGE



Elphick/Orr R.V.S. at 47

58. The following pie chart shows the split of train counts between KCS, UP, BNSF, and Amtrak, with the UP trains split between those taking the KCS routing to DeQuincy and those taking the UP-BNSF Lafayette Subdivision. Along with the pie chart (Figure 12), Table 2 below shows the average and total occupancy times calculated for each train category. The bridge openings and the Korf/Jefferson trains are also shown on Table 2. Note, UP trains heading from the West to Korf/Jefferson back into the Korf/Jefferson facility from the Lafayette Sub.

FIGURE 12[49]
CURRENT – DAILY OCCUPANCY BEAUMONT TO VIDOR NECHES RIVER BRIDGE



[49] Elphick/Orr Workpaper "Beaumont Pie Chart FINAL.xlsx."

TABLE 2
CURRENT OCCUPANCY OVER THE NECHES RIVER BRIDGE

Trains	KCS	UP	UP on KCS	BNSF	AMTRAK	Korf trains	Bridge Open	Main-tenance	Total Minutes per Day
Trains Per Day	12	7	6	6	1	1	1		
Average Occupancy time in minutes per	25	15	25	15	10	20	30	60	
Total daily occupancy in minutes	300	105	150	90	10	20	30	60	765

59. Union Pacific and BNSF trains, which run to and from the Lafayette Subdivision, occupy the single track between Beaumont and the junction with the Lafayette to a different extent than either the Amtrak trains on the same routing or the UP and KCS trains on the KCS Beaumont Subdivision route toward DeQuincy, as noted in Figure 11 above.

60. Table 3 and Figure 13 below show available capacity currently on the Neches River Bridge is calculated in contrast against the remaining capacity subsequent to the Transaction. It suggests that, as calculated, there is sufficient remaining capacity each day to allow for growth by any of the parties requiring utility of the Bridge.[50] The numbers presented here align with the study KCS completed in 2019, which was submitted as part of the Application process.[51]

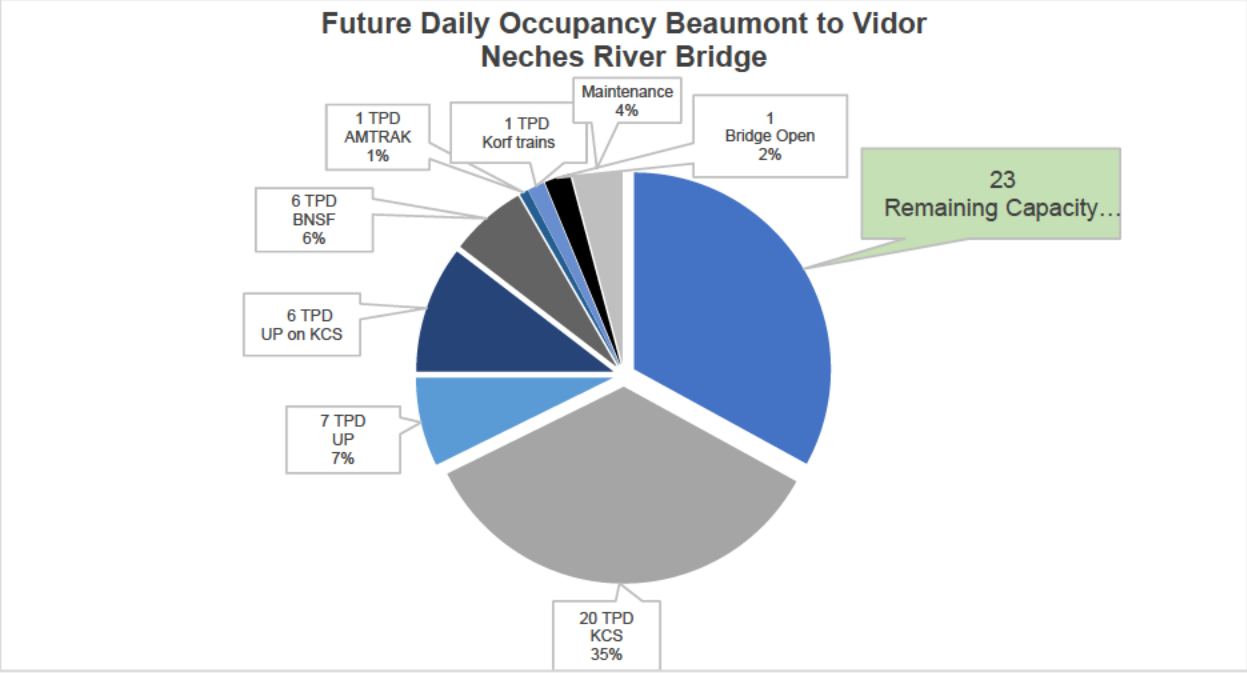
[50] Elphick/Orr Workpaper "Beaumont Pie Chart FINAL.xlsx."

[51] Simmons R.V.S., Exhibit 9.

TABLE 3
FUTURE OCCUPANCY OVER THE NECHES RIVER BRIDGE

Trains	CPKC	UP	UP on KCS	BNSF	AMTRAK	Korf trains	Bridge Open	Main-tenance	Total Minutes per Day
Trains Per Day	20	7	6	6	1	1	1		
Average Occupancy time in minutes per	25	15	25	15	10	20	30	60	
Total daily occupancy in minutes	500	105	150	90	10	20	30	60	965

FIGURE 13[52]
FUTURE – DAILY OCCUPANCY BEAUMONT TO VIDOR NECHES RIVER BRIDGE



61. With this, we reiterate the recommendation of KCS in their 2019 study on the importance of timing and coordination of all of the railroads operating over the Bridge. Additionally, our study's analysis described above, however, takes an overly conservative

[52] Elphick/Orr Workpaper "Beaumont Pie Chart FINAL.xlsx."

approach to train slotting, as it assumes that the full block must be cleared before the next train enters. Under this assumption, a KCS east-bound train must fully clear the west switch at Vidor before an eastbound UP train for the Lafayette Subdivision can occupy the Bridge. This is not how dispatching practices operate in the real world. Real world dispatching practices could allow for more throughput, as for example, cooperative dispatching out of the joint Spring Dispatching Center provides more flexibility for trains to move through the Bridge and optimizes today's capacity in the area studied. Thus, this study conservatively calculates capacity.

62. Should the capacity of the Bridge become a persistent issue due to further significant growth, above that of the CPKC Transaction, and which could be by any of the railroads, the parties will need to work together to consider appropriate solutions.[53] Next level capacity considerations for KCS would include extending Vidor to the West to further reduce run time required between Vidor and the Bridge. Actions like this could further delay well into the future a need for a second bridge.

F. LyondellBasell's Concerns Regarding Westlake and Mossville, LA, Corpus Christi are Unrelated to the Transaction

63. The conditions proposed by LyondellBasell are unrelated to the proposed CP-KCS merger. LyondellBasell seeks to force BNSF access to a recently-built facility at Mossville, Louisiana in which LyondellBasell acquired an interest in the past couple of years. That facility, and Mossville – a separate station from Lake Charles, Westlake and West Lake Charles - was not accessible by UP or SP at the time of the UP-SP merger, and the CP-KCS merger would not change the way that facility is served. LyondellBasell also provides no

[53] *See also* Simmons R.V.S. at ¶ ¶ 88-94.

evidence of the operational impact of BNSF's proposed access. LyondellBasell's request to expand the UP-SP merger conditions is not related to the CP-KCS merger.

64. LyondellBasell's request that the Board set terms for access to all shippers on the Rosebluff Lead in West Lake Charles likewise is not related to the CP-KCS merger. LyondellBasell's comment cites the ongoing terminal trackage rights proceeding before the Board involving the Rosebluff Lead. The Board is resolving the access issues about the Rosebluff Lead in that terminal trackage rights proceeding, which began well before and completely separate from the CP-KCS merger. LyondellBasell's request regarding the Rosebluff Lead is unrelated to the CP-KCS merger.

65. Even if BNSF were granted the rights at West Lake Charles and Mossville that LyondellBasell requests, doing so would not reduce congestion on any line used by CPKC traffic because BNSF already has access by UP haulage, and had been awarded terminal trackage rights as well, to the Rosebluff Lead traffic, and if BNSF gained access to Mossville, BNSF would move that traffic on the 50-50 UP/BNSF Lafayette and Houston Subdivisions, as UP does now.

66. LyondellBasell's request that CPKC be required to provide reciprocal switching to UP at Robstown for LyondellBasell's Corpus Christi plant that does not ship by rail now is difficult to assess. Rather, LyondellBasell's request would likely increase congestion on UP's Brownsville Subdivision and KCS's Laredo Subdivision by forcing interchange where there are no interchange facilities available.

67. The track to LyondellBasell's plant essentially ends just inside the plant fence. Without information on when the plant would begin shipping, how much traffic the plant would ship and where the traffic would go, it is not possible to assess the specific impacts of the plant's potential future traffic.

68. At the very least, the proposed switching would cause congestion at the critical Robstown interchange of KCS's Laredo Subdivision with UP's Brownsville Subdivision. There are no facilities at Robstown for interchange of traffic from KCS to UP. The nearest facilities where interchange would be possible are the sidings at Spear, which provide essential capacity for staging KCS trains moving on and off the Brownsville Sub. UP also has no rights on KCS's line to access Spear.

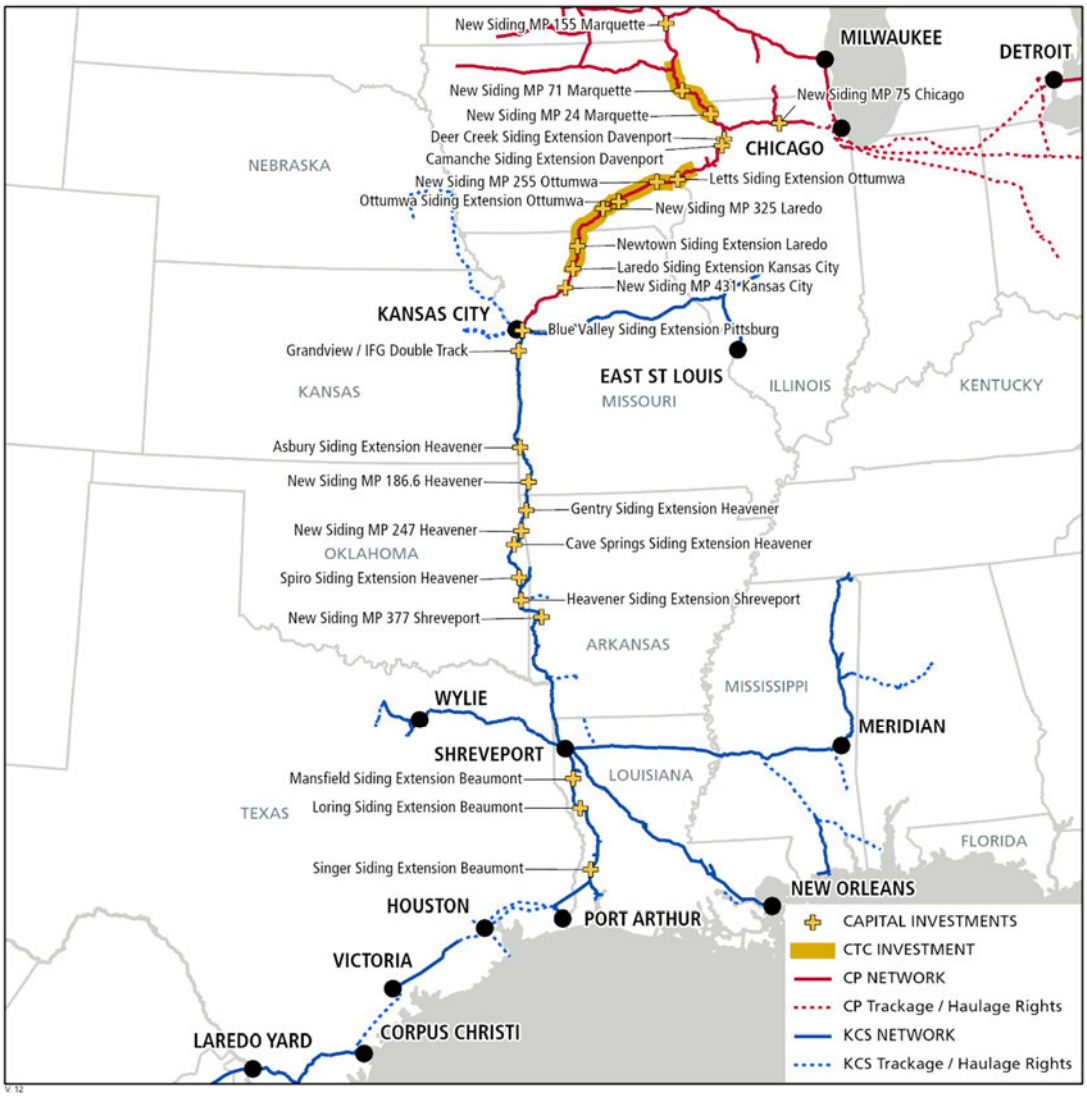
69. Even if interchange were possible, UP almost certainly would have to move any traffic it received at Robstown north over its Brownsville Sub and possibly over the Cuero Sub, the same path KCS trains follow between Victoria and Robstown. Alternatively, UP might handle traffic eastbound from the Brownsville Sub over UP's Angleton Sub, toward the southwest corner of the Houston complex. All of these possibilities would add more potential for congestion, not less as LyondellBasell suggests. In any event, there is no competitive harm to LyondellBasell's Corpus Christi plant from the merger because the plant does not use rail service.

70. Finally, the Transaction will not congest the lines that will be used by CPKC to serve the Lake Charles area. There is limited Transaction-related change in traffic levels on KCS's Lake Charles Subdivision. KCS's Beaumont Subdivision (Between DeQuincy and Beaumont) has sufficient capacity to handle additional Transaction-related traffic, and CPKC will not be a majority user of the UP and UP-BNSF lines between Houston and Beaumont, which have ample capacity as shown elsewhere in this statement, particularly because they are operated directionally.

G. KCS's Lines Between Beaumont and Kansas City Will Have Ample Capacity with the Proposed Capacity Projects

71. Here, we offer an overview of KCS's Lines Between Beaumont and Kansas City and describe the availability capacity on these lines. To facilitate that discussion, Figure 14 below is a map of the KCS lines between Beaumont and Kansas City, noting the capital investments. As we demonstrate below, there are no capacity concerns with these lines.

FIGURE 14
MAP OF KCS LINES BEAUMONT TO KANSAS CITY



1. CN's Assessment of Capacity on these Lines Is Flawed

72. CN witness Mr. Randall incorrectly states that KCS's Beaumont, Shreveport, Heavener, Pittsburg Subdivisions will be very close to capacity. CN's witness understates capacity on this segment by assuming that all trains on the corridor will run up to 10,000 feet long. In fact, only the scheduled services in the growth plan, including the incremental

scheduled trains from the Transaction, will be designed to run up to 10,000 feet.[54] In this corridor, therefore, Applicants assessed 12 trains to run up to 10,000 feet.[55] The remainder of the trains are assumed to be 8,500 feet or less.[56] The CPKC capital plan therefore intentionally lays out a grid separating 10,000 feet or longer sidings by a maximum of 65 minutes run time between those sidings.[57] That separation is within tolerances of practical capacity for trains of that length.[58] Further, capacity tolerances for the remainder of trains is within practical capacity.[59] Finally, CN's witness labels the Shreveport, Heavener and Pittsburg subdivisions as orange (at capacity) with the Shreveport at 87%, the Heavener at 96% and Pittsburg at 80%. However, Applicants remind the Board that these measures are a percentage of 65% (for example, Shreveport is 87% of 65%).

2. Evergy's Concerns About Fluid Operations Between Kansas City and Its La Cygne Plant Are Unwarranted

73. Evergy's concerns about service levels on the KCS lines south of Kansas City are also without merit, particularly given that CPKC plans to add capacity on the 65 miles immediately south of Kansas City.

74. Figure 15 below shows the planned capacity improvements on the lines where KCS trains service the La Cygne Generating Station in Amsterdam, MO.

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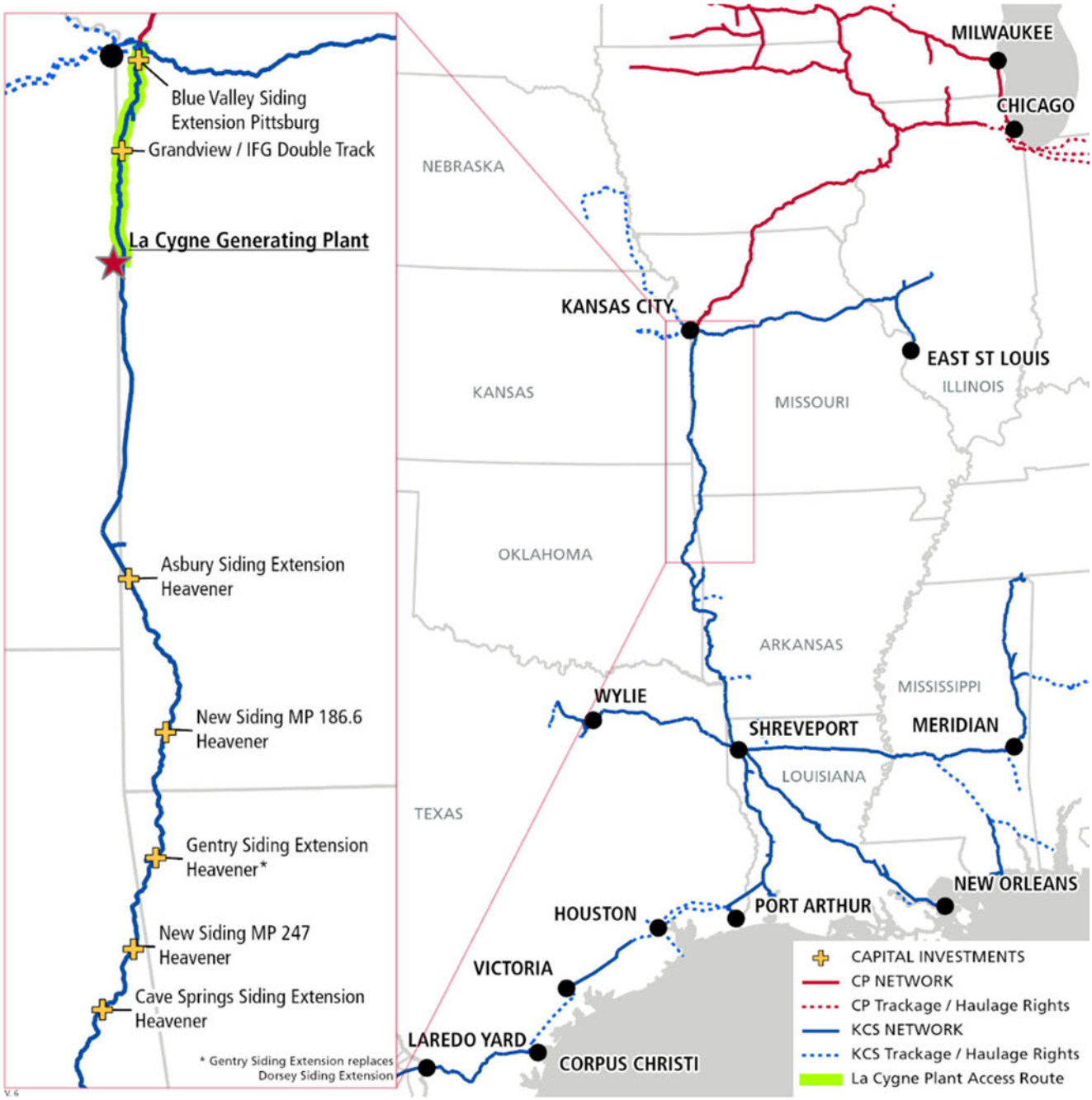
[54] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx."
[55] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx."
[56] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx."
[57] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx."
[58] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx."
[59] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx."

FIGURE 15
MAP SHOWING INFRASTRUCTURE SURROUNDING LA CYGNE



75. As seen above, CPKC plans major investments between where the coal trains interchange at Kansas City and where they terminate at the La Cygne Generating Plant. This includes the addition of new double tracks near Kansas City as well as the extension of the siding at Blue Valley, MO. These infrastructure improvements, together with long sidings already

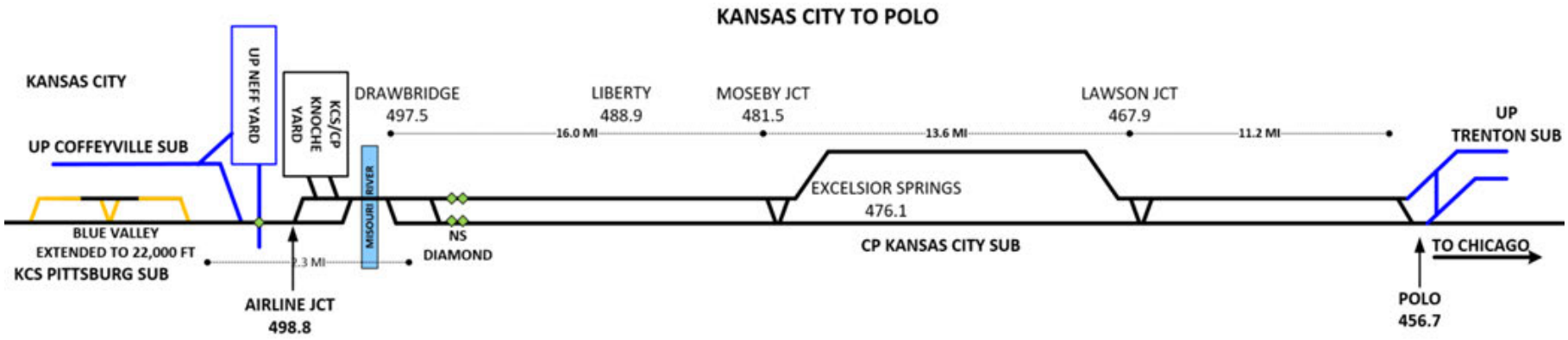
present at Jaudon and Drexel to the north of the La Cygne plant, as well as investments on the Heavener in total, will create a fluid operation overall south of Kansas City.

H. The Joint UP-CP "Polo Line" Between Airline Jct. and Polo, MO Has Ample Capacity

76. UP expresses concerns about the impact of the CP/KCS Transaction on its operations on a 42.1-mile stretch of paired track that it shares with CP just north of Kansas City. That line is known as the "Polo Line" and it extends between Airline Jct. and Polo, MO. To facilitate that discussion, Figure 16 below is a diagram of the Polo Line.

77. As we demonstrate below, this line is operated as double track and has substantial capacity. There will be no adverse impact on UP's operations here.

FIGURE 16
MAP OF CP LINES KANSAS CITY-POLO



Elphick/Orr R.V.S. at 59

78. The trackage between Airline Jct. and Polo, MO (the "Polo Line") will readily accommodate the combined post-Transaction volumes of UP and CPKC. UP witnesses Kenny Rocker and John Turner state that CP currently runs 2.9 trains per day, and UP runs eight trains per day on the Polo Line.[60] UP omits the fact that all eight of UP's trains on the Polo Line operate in the southbound direction (left to right in the diagram above) and proceed progressively onto the line from UP's Trenton subdivision north of Polo. Applicants anticipate that the Transaction will add 14.4 daily trains to this segment, but only half of those trains will operate southbound. CPKC and UP's combined southbound train counts will thus be in the range of 16-17 trains, which is well within the range of fluid capacity on this double-track segment. Even if UP and CPKC were able to run only a single southbound train every hour, there would be room to accommodate the total southbound flows in addition to any required maintenance and other work on the line. In fact, however, trains routinely run much closer together than this, enabling the Line to accommodate even more than 24 trains per day.

79. Supporting this conclusion is the fact that CPKC capacity investments and anticipated operating changes will further expand capacity on this segment. First, CPKC will be investing in additional capacity south of Airline Junction of Polo that will increase chambering capacity for northbound trains changing crews, reducing any need to run northbound in a manner that conflicts with the southbound flow of trains. Second, CPKC will further improve flow through by moving crew changes on its southbound trains off the Polo line IFG.

[60] UP-10, Rocker/Turner V.S. at 34 ("Applicants plan to increase traffic on CP's Kansas City Subdivision from 2.9 trains per day to 16.9 trains per day, an increase of 14 trains per day, or near 500%.").

80. A key misconception underlies UP's contention that the Transaction may overtax the Polo Line. UP contends that the track is not operated like double-track because the two mains geographically spread apart between Moseby Jct. and Lawson Jct.[61] It is true that trains cannot cross between tracks over this 13.6 mile portion of the Line given that the tracks are so far apart (as shown in Figure 16 above), but it is also true, as shown in the diagram, that there are double cross-overs at either end of this segment.[62] In fact, this spacing of crossovers is ideal for double-track operations. Even if UP's operations required the queuing of southbound trains (e.g., awaiting clearance to run into the Kansas City terminal), CPKC's southbound trains would be able to cross over at Moseby Jct. to run around those trains, avoiding any blockage in the Line's fluidity.

81. Finally, CN takes issue with capacity on a short stretch of single-track at the south end of the Polo Line, where CP crosses over the Missouri River on the Harry S Truman bridge. Our capacity analysis shows that this short segment, which trains pass across quickly, will have ample capacity to accommodate total post-Transaction volumes.[63]

I. CP's Line Between Polo, MO and Sabula, IA/Savanna, IL Will Have Ample Capacity with the Proposed Capacity Projects

82. There are no capacity issues on CP's other lines north of Kansas City. CP's lines between Polo, MO and Sabula, IA/Savanna, IL will have ample capacity in consideration of the ongoing CP capacity work, including adding new CTC and sidings to these lines.

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[61] UP-10, Rocker/Turner V.S. at 35. ("Although the Polo Line consists of two tracks, the tracks are not operated like double-track lines. Over a long portion of the joint facility, the two tracks are far apart, so trains cannot cross from one line to the other to maximize efficient use of both lines.").

[62] *See* Figure 16.

[63] Elphick/Orr Workpaper "Worksheet 4.11 in Capacity - Methodology KCS Segment Calculations.xlsx" tab "KCS run times All Trains."

1. Mainline Capacity Will Be Ample

83. CN witness Randall's analysis shows CP's Kansas City Subdivision (between Airline Jct MP 498.8 and Laredo MP 406.0) as green, meaning that train volumes will be within his measure of fluid capacity. This comports with Applicants' analysis, although we note that Mr. Randall's assessment of the line as having capacity of 18 trains per day is incorrect; the correct figure is 20.8 trains per day. It appears that CN erred by using a running speed of 33 miles per hour to derive a capacity of 18 trains per day, whereas Applicants based their calculation on the actual running speeds (approximately 36 miles per hour) observed in the real world – at those higher speeds, trains will clear the distance between sidings more rapidly, and thus unlock additional capacity.[64]

84. CN witness Mr. Randall suggests that CP's Laredo Subdivision (between Laredo North MP 405.1 and Ottumwa MP 302.8) will be "red" with train counts exceeding a practical capacity of 12.2 trains per day.[65] However, CN's analysis omitted the new 2022 siding at Seymour, at milepost 355. With the addition of the siding at Seymour, the Laredo Subdivision's capacity will increase to 20.8 trains per day at existing track speeds, which by itself provides adequate capacity for the Transaction.[66] In addition, Applicants plan to complete CTC installation on the Laredo Subdivision by 2025. With CTC, the timetable track speed is expected

[64] *See* Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[65] CN-13, Randall V.S. Appendix B, Exh. B-1.

[66] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

to increase from 40 to 60 miles per hour over almost half of the Laredo Subdivision, which will further improve capacity beyond that reflected in Mr. Randall's flawed calculations.[67]

2. New CPKC Trains Will Not Adversely Impact BNSF Operations at Ottumwa

85. CN witness Randall implies that there may be concerns associated with CP's need to cross BNSF's Lincoln, NE-Galesburg, IL mainline at Ottumwa, IA. He notes that there is "[a]n average of 26 BNSF trains and two Amtrak daily trains" that move over the Ottumwa crossing.[68] There is no issue here. There is more than enough operating capacity and flexibility at this location to operate BNSF and CPKC trains without interference, even with the addition of 14.4 CPKC trains here. BNSF's line is double-tracked through the diamond, with double track extending well beyond the diamond on either side. In light of that operating flexibility, CPKC's additional trains will not impinge capacity on BNSF's mainline at this location (where, in any event, BNSF controls the interlocker). Other planned changes will reinforce this conclusion. CPKC will be extending the existing siding at Ottumwa, further ensuring that its trains do not cause conflicts with BNSF trains at this location. And while CP has 5 miles of CTC today from Ottumwa to Rutledge (through the diamond), CPKC plans to add additional CTC by 2025 across the entire corridor between Laredo (MO) and Marquette, providing dispatchers with greater visibility and improving planning and coordination between CPKC and BNSF.

[67] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[68] CN-13, Randall V.S. Appendix C.

86. Further, the Iowa State Rail Plan Final ("Iowa DOT") December 2021[69] and February 2017,[70] which is based on trains per day estimates BNSF and HDR Consulting, LLC, provided, show adequate capacity in the BNSF Ottumwa Subdivision from Galesburg to Creston, particularly between the Creston and Iowa and Illinois state line. This study shows that BNSF had previously operated 40 to 45 trains per day and that the Subdivision has a "practical capacity" of 53 to 80 trains per day.[71] The transaction will add 14.4 trains per day to the 26 trains BNSF is currently running bringing the count to the previous proven range.

87. BNSF raises a different issue about operations in Ottumwa. BNSF witnesses Gabriel and Thowe express concern that CPKC will run longer trains southbound across the diamond at Ottumwa and worry that rear end of these train would block the BNSF Ottumwa Subdivision (and perhaps State Highway 23) while the trains change crews at Ottumwa.[72] There is no reason to worry. CPKC plans to move its crew change location from CP's Ottumwa Yard Office (which is 6,500 feet from the BNSF diamond) to the west end of Ottumwa siding. As shown in Figure 17 below, there is more than 16,000 feet of clearance between this location and the BNSF crossing (as well as State Highway 23), so CPKC's southbound crew changes will cause no interference at the diamond. CPKC also plans to extend Ottumwa southbound by 2,000 feet to 12,000 feet further increasing clearance for southbound trains.

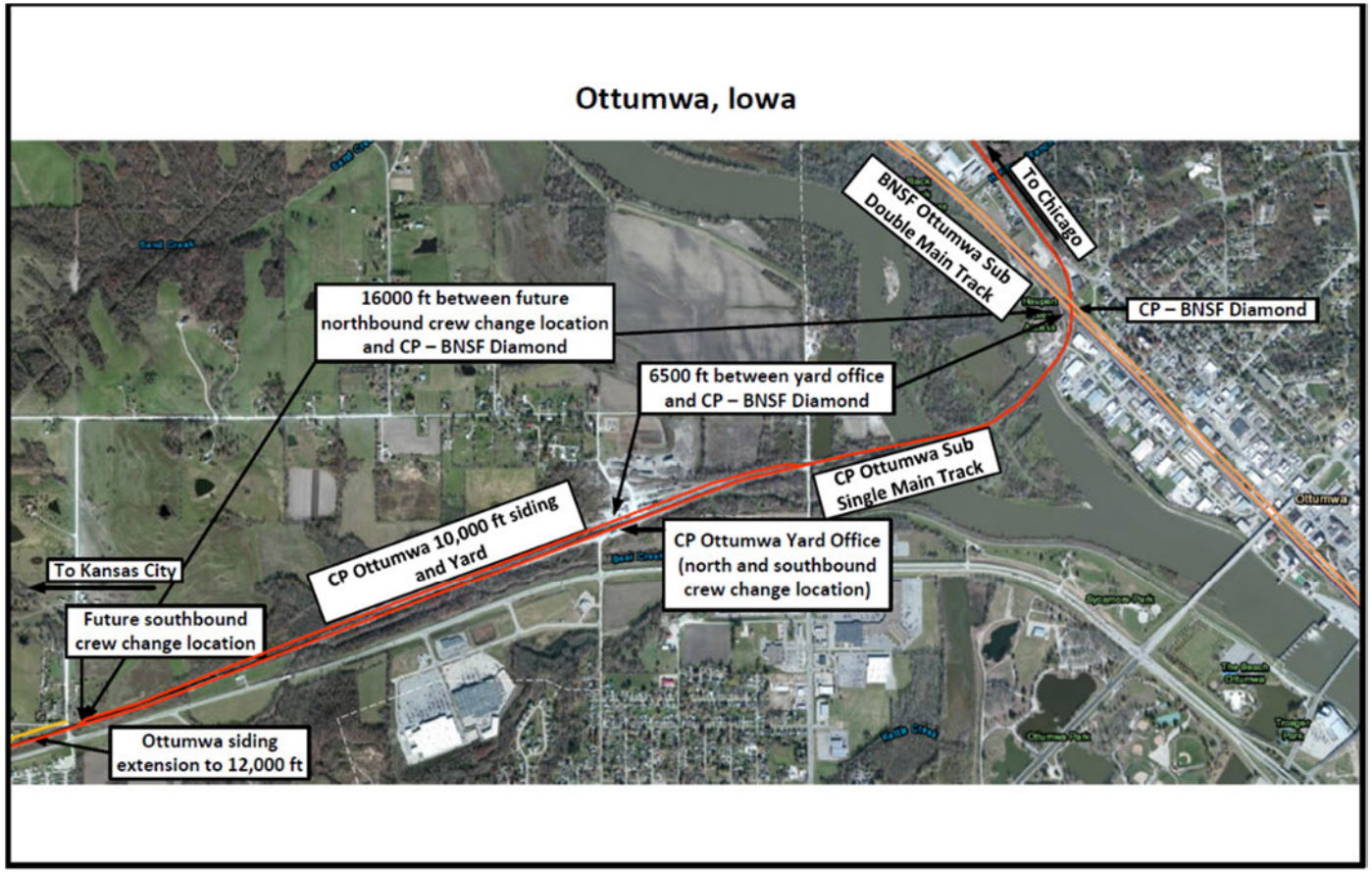
[69] Iowa State Rail Plan Final, Iowa DOT (February 2021).

[70] Iowa State Rail Plan Final, Iowa DOT (February 2017).

[71] Iowa State Rail Plan Final, December 2021, February 2017.

[72] BNSF-9, Gabriel/Thowe V.S. at 64-65.

FIGURE 17
DETAILED MAP OF SIDING EXTENSION AND CREW CHANGE IN OTTUMWA



Elphick/Orr R.V.S. at 65

3. New CPKC Trains Will Not Adversely Affect Operations on the Davenport Subdivision

88. We have studied capacity in CP's Davenport Subdivision, which is between Nahant MP 195.7 and Island MP 140.9, and confirmed that there is no basis for concern. The practical capacity between Camanche and Bettendorf is 18.7.[73] Mr. Randall communicates that the practical capacity between Camanche and Bettendorf is 13.7 trains per day.[74] In reviewing Mr. Randall's segment calculator, we believe he is actually communicating the practical capacity for 10,000-foot trains between Camanche and West Davenport or Nahant.[75] If this interpretation of Mr. Randall's 13.7 rating is correct, CPKC agrees with that practical capacity for up to 10,000-foot trains and notes the anticipated number of trains up to 10,000 feet is 14.[76] However, CP is installing CTC on this segment in 2022, which will increase track speeds to between 50 and 55 miles per hour. In other words, by the end of 2022, CPKC will have the capacity it requires for year 3 volumes between South Camanche and West Davenport.

89. While BNSF states that the line is currently "unsignalized,"[77] as noted above, CP is installing CTC on this segment in 2022. Separately, but related, Camanche siding is planned to be extended to 10,000 feet, and in Deer Creek siding, north of Clinton, will be extended to 12,000 feet.

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[73] The practical capacity between Bettendorf and Nahant is 37.4 and the practical capacity between Camanche and Nahant for trains up to 10,000 feet is 13.4. Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[74] CN-13, Randall V.S., Exh. B-1.

[75] CN-13, Randall V.S. Appendix C.

[76] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[77] BNSF-9 at 67.

4. New CPKC Trains Will Not Adversely Impact BNSF Operations Between Davenport and Clinton

90. We understand that in January 2022, BNSF stated that it may file responsive applications requesting that the Board grant BNSF overhead trackage rights between Savanna, Ill. and Clinton, Iowa, but never actually filed such a responsive application. Any grant of trackage rights to BNSF would inject new operational complexity rather than reduce it.[78] BNSF's other trackage rights requests, such as their request between Robstown and Laredo, would also add additional operational complexity.

91. Granting trackage rights between Savanna and Clinton would add BNSF trains to the Clinton-Savanna line without taking away any BNSF operations south of Clinton. This includes the UP crossing, which BNSF's operations do not cross. BNSF's operation with these trackage rights at Clinton would add trains where they do not operate today. In addition, it could add additional traffic over and above that which it uses its existing trackage rights to serve. For example, it could shift to the Savanna-Clinton Segment unit trains destined to the Muscatine area and Fruitland, Iowa that BNSF currently interchanges with CP at Ottumwa. BNSF does not use the UP-controlled interlocking at Clinton through either road today; BNSF serves Clinton area customers from the South. BNSF may have strategic reasons for making this trackage rights request, but granting such a request will only add unnecessary complications.

5. New CPKC Trains Will Not Adversely Affect Operations in Savanna, IL

92. There is no basis for any operational concerns at Savanna, IL, where CP's Chicago Subdivision crosses BNSF at grade. Both lines are double tracked at this location, and even with an additional eight CPKC trains, the total number of trains will not exceed capacity

[78] *See also* Gameiro R.V.S. at ¶ ¶ 28-31.

available. CPKC's new trains will only consume up to a total of 80 additional minutes, calculated as 10 minutes per train with 8 additional trains.

6. New CPKC Trains Will Not Adversely Affect Operations on the Marquette Subdivision

93. The Marquette Subdivision has adequate capacity to handle CPKC trains. CN witness Mr. Randall asserts that the 27 miles between Harpers Ferry and Eckards has a practical capacity of 13.3 trains per day.[79] CP calculates the practical capacity to be 11.7 trains per day in this segment.[80] The difference in the two calculations is a function of CP adding fifteen minutes for crew changes at Marquette. The 11.7 train per day calculation governs the practical capacity north of Marquette where CP anticipates, post transaction, 11.4 total trains.[81] Mr. Randall further assumes that all trains on the Marquette are 10,000 feet. The practical capacity for trains up to 10,000 feet north of Marquette is 8.1 and CP anticipates 4 trains will run up to 10,000 feet.[82] In summary, the Marquette subdivision will be below practical capacity. This result has been tested and verified in an RTC simulation built to address Metra's comments.[83]

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[79] CN-13, Randall V.S. Appendix C.

[80] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[81] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[82] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[83] Elphick R.V.S., Section I.D.

J. New CPKC Trains Will Not Adversely Impact UP or BNSF Operations at St. Paul

94. UP asserts that its concerns about increased train counts at St. Paul might lead it to build a staging track on its own line south of Hoffman Ave., as shown in UP's map reproduced as Figure 19. UP-10 at 64-66. Whether UP would gain an advantage from having such a track is not for us to judge, though it would appear to be quite beneficial for UP regardless of the Transaction. The Transaction, however, will not create the need for such a track, especially given that the additional CPKC trains will result in total trains here being below past levels. Instead, the possible staging track that UP desires is exactly the kind of infrastructure that every carrier considers in order to fine tune their operations in busy terminals like St. Paul, and we encourage UP to go ahead and make that investment (at their own expense) if it would prove beneficial in supporting UP's operations.

FIGURE 18
MAP OF ST. PAUL

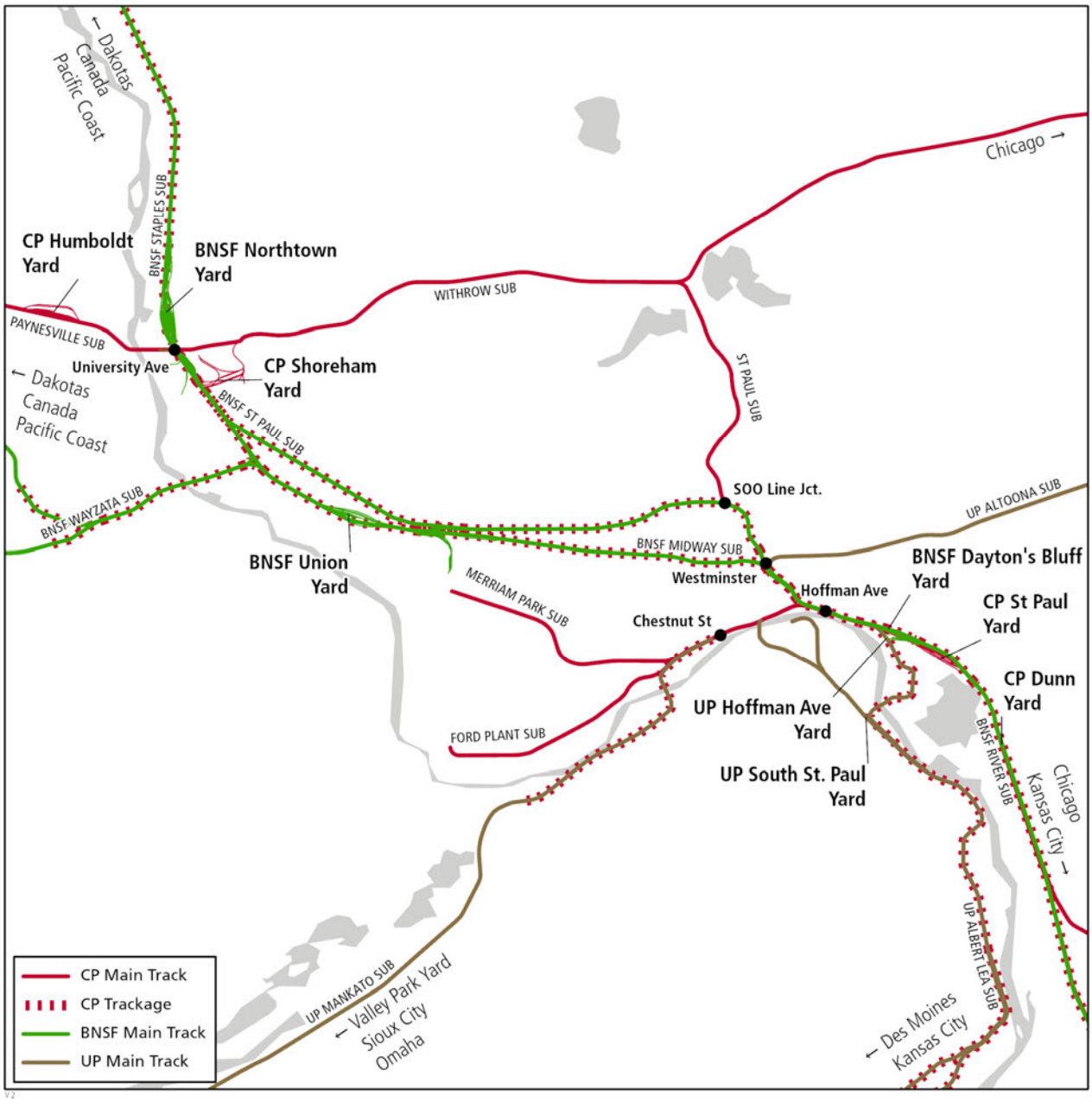
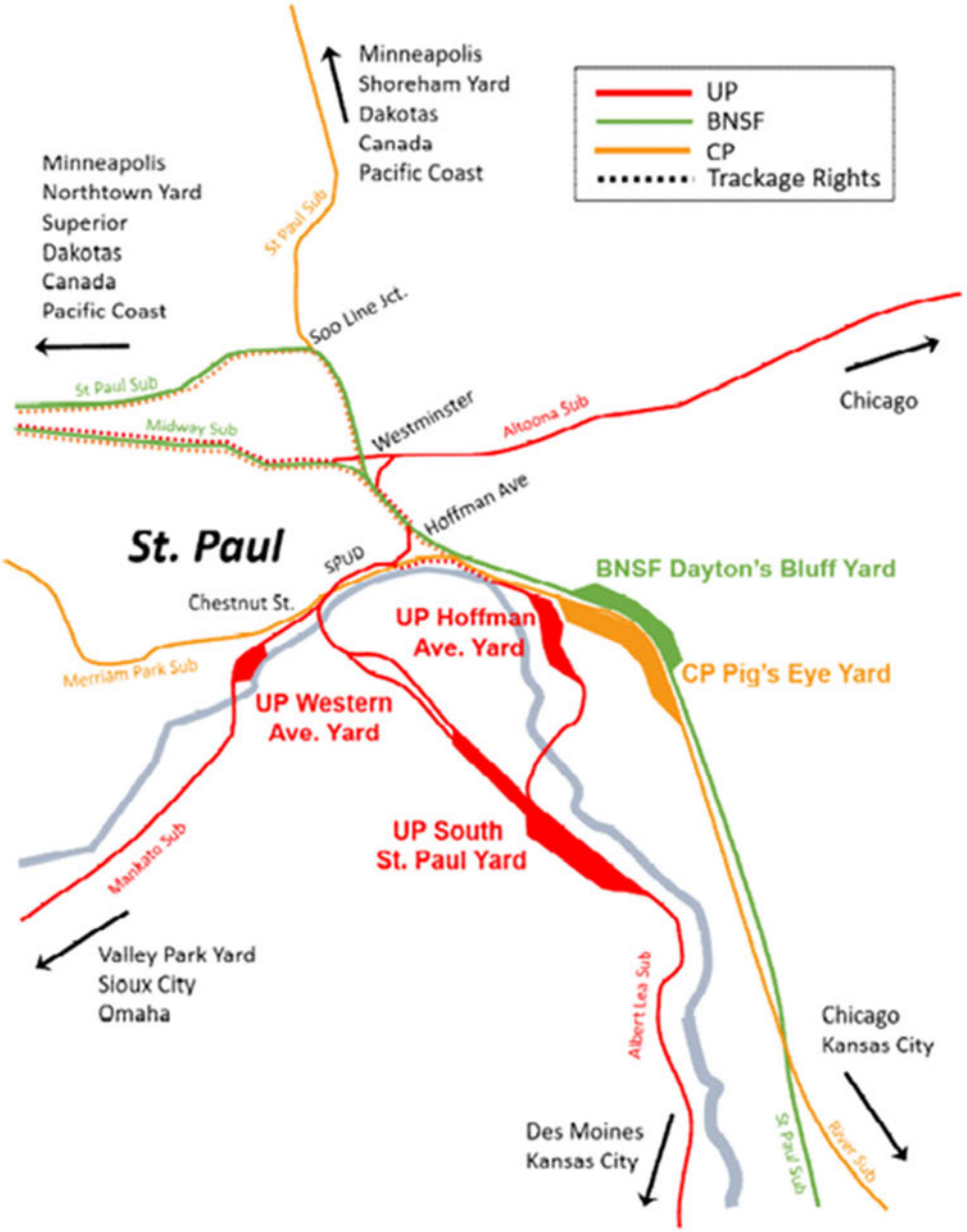


FIGURE 19
UP'S MAP OF ST. PAUL[84]



95. Additionally, with the modest six trains per day increase in this area, CPKC will still not be the majority user of St. Paul rail infrastructure where UP, BNSF, and CP operations

[84] UP-10 at 64-66.

converge north of CP's yard.[85] With a total post-Transaction related train count of 22 trains per day through Hoffman Avenue, CPKC is still below levels previously run through this location.[86]

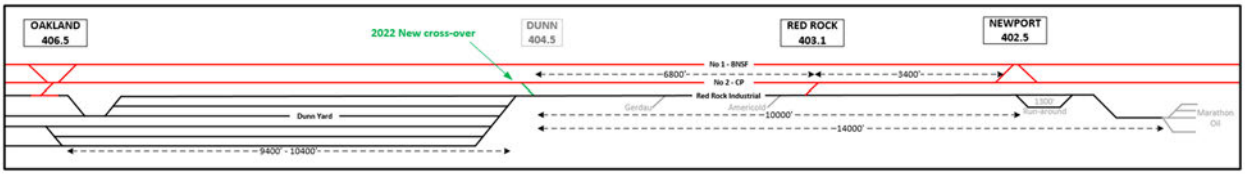
96. Further, since the 2012 East Metro Rail study, CP has executed the following initiatives improving fluidity through the St. Paul area:

- Moved westbound CP trains off the BNSF St. Paul subdivision and onto the CP St. Paul / Withrow subdivisions between Soo Line Jct. and CP University (Shoreham Yard). This initiative has included installing signals and a power switch at Soo Line Jct. This investment pulled all westbound CP trains off of BNSF's track between Soo Line Junction and University Avenue (not shown on UP map).
- Within CP's St. Paul Yard, to avoid doubling and tripling away trains from either side of St. Paul Yard, CP extended tracks at the south end of the yard (which CP calls "Dunn Yard") to 10,000 feet (2015) and added a new cross-over (2022) for receiving trains as shown in Figure 20 below, showing Dunn Yard track capacity. The cross-over will allow for further reduced interference on the paired mains (CP No. 2 track) between Dunn and Newport as trains will not have to pull past Newport and reverse through to the Red Rock Industrial. This amounts to approximately 45 fewer minutes of main track interference per terminating east/southbound train.

[85] Elphick/Orr Workpaper "St. Paul Area Train Counts by Railroad.xlsx."

[86] Amended Operating Plan, Appendix A, Segment 40; 2012 East Metro Rail Study.

FIGURE 20
DUNN YARD TRACK CAPACITY



97. Additionally, BNSF has executed a growth project to streamline access to the BNSF Midway Subdivision off the Paynesville Subdivision for eastbound trains – this allows for progressive move onto the BNSF Midway Subdivision bypassing University Avenue.

98. In addition to the above listed major projects, CP has also made other investments to strengthen the St. Paul terminal. CP has secured dual served electrical sourcing for both the north and south sides of the St. Paul Yard – this creates redundancy in the event of power outages. CP has also added back up power generators for St. Paul Yard to protect operational fluidity in case of power outages. Further, CP has invested in upgrading its hump control software to improve speed and processing capacity in the St. Paul terminal. CP has also changed the service design and terminal clock for trains to arrive directionally in operating windows to improve the speed of connecting to outbound trains.

K. CP's Chicago Subdivision

99. CN incorrectly suggests that CP's Chicago Subdivision (between Lake, Iowa and Randall Road, Illinois) will be at 100 percent of practical capacity.[87] However, this is not true. According to CN, the segment between Kittridge, at mile post 118.5, and the new siding at Monroe, at mile post 75.0, will be 79 minutes. CPKC calculates that this segment takes only 65

[87] *See* CN-13, Randall V.S. Appendix B, Exh. B-1 (providing that "11.1 trains/day = 100% of estimated practical capacity in this Subdivision").

minutes to traverse.[88] Thus, the segment between Kittridge and the new siding at Monroe has a practical capacity of 13.4 trains per day accounting for 10,000-foot trains.[89] CPKC plans to run up to 10 total 10,000-foot trains per day in this corridor by Year 3. Thus, the Chicago Subdivision will not reach 100 percent capacity as Mr. Randall suggests – instead, it will only reach 75 percent of practical capacity or 50 percent of maximum capacity.[90]

V. DIVESTITURE OF KCS'S KANSAS CITY-ST. LOUIS/SPRINGFIELD LINE WOULD LIMIT CPKC'S ABILITY TO OPERATE EFFICIENTLY

100. CN has asked the Board to condition any approval of the proposed CPKC Transaction on divestiture of the St. Louis/Springfield Line to CN, alleging that Applicants will "favor" CP's existing Chicago-Kansas City route and downgrade the Line. This proposed divestiture would limit CPKC's ability to operate efficiently. Applicants have no intention of downgrading the St. Louis/Springfield Line—which has not carried substantial volumes historically—after the transaction. Rather, CPKC intends to maintain the line's capabilities so that it can remain an important part of the CPKC system.

101. It is my understanding that CN proposes to grant back to CPKC haulage rights that will enable CPKC to access customers on the Springfield Line. The haulage rights that CN would have the Board grant back to CPKC would make what are efficient single-line movements into more complicated and less efficient multi-carrier shipments.

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[88] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[89] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains."

[90] Elphick/Orr Workpaper "CP Capacity Calculations Kansas City to River Jct and Chicago.xlsx" tab "CP run times All Trains." *See* Elphick R.V.S. at ¶ ¶ 15-28.

A. CN's Operations in Kansas City and Between Kansas City and IFG Would Complicate Terminal Operations, With Hard-to-Predict Consequences

102. CN's operations in Kansas City and between Kansas City and IFG would complicate terminal operations and result in hard-to-predict consequences.

103. Currently, CN is not using the most efficient routing on their network available to them. This means that with CN's proposed divestiture, even with CPKC haulage rights for traffic on the St. Louis/Springfield Line, CPKC traffic could be subject to additional handlings, out of route miles, and delayed transit. Because the railroad that designs local service would be CN and not CPKC, CPKC would be dependent on CN for its service, and CN would be incentivized to deliver the cars together with other cars without regard to carrier. This would result in operational inefficiencies. For example, KCS currently interchanges cars headed to Mobile, AL in Jackson, MS. There is no incentive for CN to switch KCS interchange traffic in Jackson, so current KCS Mobile traffic is sent 443 miles out of route northward to Memphis for processing and furtherance back through Jackson and south to Mobile. This results in additional car miles and car days that does cause harm to current KCS customers.

B. CN's Proposed Forced Half-Ownership of IFG Facility Would Complicate Operations There and Limit the Facility's Ability to Support Innovative CPKC Offerings

104. CN proposes that the Board force CPKC to give CN a 50% interest in KCS's IFG facility. Such a proposal would complicate operations at the IFG facility and limit the facility's ability to support innovative CPKC offerings. Currently, the IFG terminal is used for loading and unloading intermodal and automotive traffic for the greater Kansas City area. In addition, IFG is also used for connecting East St. Louis and Slater, Missouri area Kansas City destined manifest from train M-VNKC to transfer into Knoche for processing and handling to final destination on KCS and other carriers. With the Growth Plan, IFG will see seven additional

CPKC trains working at IFG daily, reflecting new Kansas City area traffic opportunities extending as far as Vancouver, Saint John and Lazaro Cardenas. IFG will also serve as a key mainline location for connecting overhead traffic including Minneapolis – Wylie intermodal traffic from 160/161 to the new Bensenville - Wylie train service 162/163.[91]

105. The increased number of CN trains and half ownership that CN proposes would increase the complexity with arrival/departure windows and facilities at IFG. In addition to the operational changes described in paragraph 75, CPKC needs IFG for its own future use to develop expanded intermodal and automotive operations, and also to enable expanded through train operations at Kansas City, which will require expanded crew change activity at IFG. If CPKC were required to sell any part of IFG to CN, that would undermine its potential growth, both North-South with CPKC as outlined in the Growth Plan and on the St. Louis/Springfield Line, including interchange with CSX in East St. Louis. CPKC operations at the IFG facility would be subject to CN crew availability. With CPKC proposing seven new trains a day serving IFG and CN proposing a train pair, CN's 50% footprint demand is completely out of proportion to CPKC's IFG utilization.

VI. NORFOLK SOUTHERN'S CONTINGENT TRACKAGE RIGHTS REQUEST IS BASED ON A MISUNDERSTANDING OF CPKC OPERATIONS

A. Applicants' Projected Traffic Growth Will Not Adversely Impact Service Levels Between Wylie and Meridian

106. I understand that NS argues that service levels may be impacted by an increase in bulk traffic on KCS's line from Wylie, Texas to Shreveport, Louisiana (the "Wylie-Shreveport

[91] *See* Appendix I: Growth Plan Train Changes in the Amended Operating Plan.

Section"), which NS asserts will be handled by the addition of one net train pair per day.[92] However, there will be no Transaction-related increase in bulk traffic on the Wylie-Shreveport Section. Any increase in bulk traffic on these segments will consist of organic growth, *i.e.*, growth that would have occurred in the ordinary course even without the Transaction.

107. Moreover, NS is incorrect that the additional traffic on the Wylie-Shreveport Section will be handled by approximately one net train *pair* per day.[93] The number of trains operating per day over the Wylie-Shreveport Section will only increase by roughly one train post-Transaction. This reflects the new CPKC train pair from Bensenville, Illinois to Wylie, Texas, minus consolidations of existing trains as explained in the paragraphs below.[94] There is ample capacity on the Wylie-Shreveport Section to accommodate one additional train and adding one additional daily train to that section poses no threat to existing service levels, contrary to NS's conjecture. To be clear, we explain below how Applicants' Operating Plan will only add one additional daily train to the Wylie-Shreveport Section.

108. In line with the recently announced NS ("TOP/SPG") operating plan, the CPKC Optimized Plan strives for repeatable, daily balanced service plans where possible.[95] This includes handling intermodal and manifest traffic in blended trains rather than select day-of-week specialized services. Mixing intermodal and manifest traffic on the same train is a well-recognized way to improve railroad operations. CP has operated mixed intermodal and manifest

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[92] *See* Amended Comments of Norfolk Southern and Request for Conditions (filed June 9, 2022) ("NS-12") at 23.

[93] *See id*.

[94] *See also* Amended Operating Plan, Appendices H and I.

[95] *See "New Norfolk Southern Operating Plan to Blend Traffic and Build Longer Trains*," Trains (Feb. 12, 2019), *available a*t https://www.trains.com/trn/news-reviews/news-wire/12-new-norfolk-southern-operating-plan-to-blend-traffic-and-build-longer-trains/.

trains efficiently and effectively for years, and there is no reason to doubt it will do so effectively on the Wylie-Shreveport Section as well as the Meridian Speedway. Applicants' Optimized Plan will alter current day operations on the Wylie-Shreveport Section from select day-of-week specialized services to daily balanced service plans, thereby reducing the number of trains operating on that section.

109. Looking first at the Wylie-Shreveport Section, under the Applicants' Base Plan, KCS runs a six day-a-week manifest train pair between Wylie and Shreveport. NS runs one intermodal train pair daily on that same segment and also runs an intermodal train five days-a-week westbound and two days-a-week eastbound. Altogether, KCS and NS run 15 scheduled eastbound trains against 18 scheduled westbound trains over the Wylie-Shreveport Section. Under Applicants' Growth and Optimized plans for scheduled trains, NS's train design will remain unchanged for the seven day-a-week balanced intermodal train pair. However, the imbalanced train pair that NS runs over that segment (*i.e.*, the intermodal train it runs five days-a-week westbound and two days-a-week eastbound) is proposed to move daily in a combined service with KCS's manifest traffic, also moving daily. This proposed change will enhance NS-KCS service because assets, including locomotives, railcars and containers, will move daily with significantly less dwell, higher velocity and improved service.

110. Expanding the discussion to the Meridian Speedway, the concept of mixing intermodal and merchandise traffic extends to Meridian and into Mexico and also produces a balanced seven day-a-week traffic flow to and from Mexico. The Applicants propose retaining current daily Meridian to Mexico service levels while increasing the reverse move from Mexico to Meridian from three days a week to daily. Consequently, instead of a complicated choreography of two trains per week out of Wylie and three trains per week out of Mexico

heading to Meridian, the Applicants' proposal is that the intermodal traffic would flow daily to and from both locations in blended service. To further illustrate, KCS currently operates less-than-daily intermodal service connecting Mexico with Meridian, handling some intermodal traffic interchanged with CN at Jackson and some interchanged with NS at Meridian. CPKC plans to take advantage of the improved traffic density of the broader CPKC system to convert these less-than-daily trains to a daily operation out of Mexico. As with the Wylie-Shreveport Section, this will increase the frequency of service and improve overall transit times for the intermodal traffic combined with manifest traffic to and from Mexico.

111. Note that, at Meridian, KCS currently operates two daily pairs of solid intermodal trains that move to and from Shreveport. The first pair extends through to Wylie and the second pair is interchanged with UP near Shreveport. UP also hands off to KCS one eastbound train daily for delivery to NS at Meridian. CPKC's operating plan does not touch any of these premium trains. They will continue to run intact, with no manifest traffic, as they do today. There will be no service degradation.

112. In short, CPKC will meld certain intermodal and manifest services to build daily trains on which traffic will flow more evenly over the week, with shippers benefitting from more frequent service. At the same time, premium services will remain intact.[96]

113. Finally, as with all locations where one railroad conveys another railroad's traffic, traffic levels will be constantly and jointly reviewed and train designs adjusted to accommodate growth, using the guiding principles of balance and seven day-a-week service.

[96] *See* Amended Operating Plan, Appendix H.

114. NS asserts that Applicants plan to increase traffic by an average of 53% Transaction-specific growth on the Wylie-Shreveport Section and seemingly assumes, without support, that this may cause service issues on that segment.[97] Not only is NS's assertion devoid of any analysis of the service benefits of Applicants consolidating trains or any explanation of how adding only one train per day over the Wylie-Shreveport Section will negatively impact service levels, each of which we address above, but is also simply incorrect. NS vaguely cites to the Amended Operating Plan without specifying which exhibit or explaining how they arrived at transaction-specific growth of 59% and 46%, respectively, for the two segments of the Wylie-Shreveport Section, resulting in an average transaction-specific growth of 53%. We can only assume NS was using Appendix T of the Amended Operating Plan. Despite Applicants clearly stating on page 11 of Appendix T that, for the two segments of the Greenville Subdivision (also known as the Wylie-Shreveport Section), the "Merger Related Growth Percentage" for each segment was 49.9% and 38.7%, respectively, NS apparently deemed its own math more accurate. NS seems to have divided the numbers listed in the "Merger Related Growth" column by numbers listed in the "Base" column to arrive at its transaction-specific growth of 59% and 46%, respectively. However, this completely ignores the effect of organic growth. The proper calculation is to divide the numbers listed in the "Merger Related Growth" column by numbers listed in the "2027 No Merger" column, the result of which is listed in the "Merger Related Growth Percentage" column. Using the correct numbers, the Wylie-Shreveport Section will see an average transaction-specific growth of 44.3%, much lower than what NS claims.

[97] *See*, *e.g.*, NS-12 at 22-23.

B. Applicants' Mixed Trains on the Wylie-Meridian Route Are Not Too Long, Contrary to NS's Assertions[98]

115. NS woefully miscalculates the lengths of the mixed trains that Applicants will operate from Wylie to Meridian.[99] NS's calculations did not take into account the select day-of-week operation in this corridor. With one train running six days-per-week (M-DASH) and the other train running two days-per-week (I-DAAT2), the total footage moved per week should be added and then divided by seven. Instead, NS took the average length of the two day-a-week train, having been divided by two, and the average of the six day-a-week train, having been divided by six, and summed those numbers.[100] In other words, NS treated the train operating six days-per-week and the train operating two days-per-week as if they each operated seven days-per-week, resulting in a significant overstatement of the total footage moved per week. Indeed, to further illustrate, NS simply took the average length of the I-DAAT2 train of 6,878 feet and added it to the average length of the M-DASH of 6,575 feet. The more accurate calculation is to sum the total footage for the trains for the week and divide by seven. Using this correct calculation shows only that the segments between Meridian and Jackson and between Jackson and Shreveport will calculate to slightly above 10,000 feet for one westbound train. However, that will not be an issue because a train service operating between Shreveport and Artesia and returning in the reverse direction will be used to alleviate the Jackson to Shreveport overage. In other words, KCS's traffic will move to the Artesia train. The Meridian to Jackson overage for one train is slight and will be addressed by having the eastbound trains and the other westbound trains fitting within siding capacities on that segment.

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[98] Elphick/Orr Workpaper "NS Train Weight Estimates.xlsx."

[99] *See* NS-12 at 24-25.

[100] *See id*.

C. There Will Be No Capacity Issues at KCS's Wylie Intermodal Terminal

116. NS wrongly assumes static capacity at Wylie.[101] In fact, there are several straightforward options to swiftly expand capacity at the Wylie Intermodal Terminal if needed:

- Performing already-planned track work at the south edge of the property (to add two new pad tracks) will provide capacity for 320,000 additional handlings. This work, which is currently in Phase 3, will allow the terminal to process approximately 960,000 total handlings per year (when combined with the increased working track cycles per day).
- If needed, increasing the working track cycles per day from 1.0 to 1.9—a change that would require no capital investment, only minor operating adjustments and increased switching resources—would enable the terminal to process approximately 640,000 annual handlings.
- If needed, as already stated in the Amended Operating Plan, KCS has the ability to direct traffic destined for Dallas from Mexico to the lightly utilized Kendleton Intermodal Facility.
- If needed, Applicants may invest in new cranes to increase the pace of container handling, and such investments will correspond to demand growth. Each additional crane would add capacity for approximately 90,000 annual handlings.
- If needed, CPKC will be able to expand capacity through planned paving projects. One option is for CPKC to create 285 additional parking stalls that can also be used for stacking based on the needs of the operation, which will create approximately 60,000 additional handlings. Another option, which involves creating 1,500 parking stalls in the Northeast corner of the yard, would create 330,000 additional handlings.

117. On top of all of these options, CPKC will also have the ability (assuming NS does not exercise its option to acquire the Wylie Intermodal Terminal) to greatly expand the physical footprint of the Wylie Intermodal Terminal itself by developing the 220 acres of land that KCS owns adjacent to the intermodal yard. If NS does exercise the purchase option, NS would to be obligated to support CPKC intermodal services there, and CPKC could also augment its capacity by building its own facility on the adjacent land. This 220 acres of available land is shown outlined in yellow in Figure 21 below:

[101] *See* NS-12 at 25-27.

FIGURE 21
OPPORTUNITY FOR EXPANSION OF WYLIE'S PHYSICAL FOOTPRINT



D. In the Event of a "Major Service Failure," a Grant of Trackage Rights Between Wylie and Shreveport Would Be Counterproductive for Service Levels On That Segment

118. The granting of contingent trackage rights to NS will add additional complexity to the existing operation which will inevitably negatively influence existing operations, which over time will result in an adverse impact on the service customers would otherwise benefit from as the result of the Transaction. CPKC will handle some intermodal traffic between Dallas and Meridian in mixed trains, carrying a block of NS intermodal traffic along with other blocks. Were NS to trigger its contingent trackage rights, doing so would disrupt this operation and add more trains to a line which – in NS's hypothetical – would already be suffering service issues. Giving control to an NS engineer instead of a KCS engineer, while forcing CPKC to add an entirely new train for the non-NS traffic, would be counterproductive at best.

119. Operationally, one would see additional complexity dispatching the line as what would today be a single train carrying CPKC and NS traffic in haulage under the Meridian Speedway agreement would now be two individual trains running in the same corridor. With CP

and NS having their own traffic carrying their own trains you would, at the very least, increase the number of scheduled intermodal trains operating on the corridor. With additional trains, there would be additional complexity in establishing integrated operations, including schedules that meet the operational needs of each respective railroad for crew turns, power cycles, asset turns, as well as traffic connectivity on their own networks. With this, NS would be required to establish a crew pool at Shreveport Yard and KCS operations, particularly at the Wylie Intermodal Terminal and Shreveport Yard, would be subject to NS crew availability from Wylie through to Meridian.

120. Looking specifically at traffic to or from the Wylie Intermodal Terminal, ultimately the arrival of two different companies, operating in different service, would force the facility to manage complexities associated with two different roads launching trains at the same location. This all in a corridor where the capital, terminal configurations and associated investments have been developed over time with the expectation that there would be a single company operating in the corridor. For example, Shreveport has not been built to hold NS trains for NS crews. Nor does the Wylie Intermodal Terminal contemplate building two railroad's trains at the same time.

VERIFICATION

I, Raymond A. Elphick, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12 day of July, 2022.

Raymond A. Elphick

DocuSign Envelope ID: 27D3251C-6AA2-42C4-9B75-60B692264748

VERIFICATION

I, John F. Orr, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this 12 day of July, 2022.

DocuSigned by:
John F. Orr
37E7994A57084ED...

John F. Orr
Executive Vice President - Operations
Kansas City Southern

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF RAYMOND A. ELPHICK

TABLE OF CONTENTS

I. METRA'S ANALYSIS OF THE IMPACTS OF THE CP/KCS TRANSACTION IS COMPLETELY MISTAKEN 3

A. Metra Ignores the Fact that the CP/KCS Transaction Will Not Increase CPKC Trains East of Bensenville Yard on Metra's MD-W Line or on Metra's MD-N Line 4

B. There Is Ample Capacity for Additional CPKC Freight Trains on Metra's MD-W Line 9

C. Metra's Analysis Does Not Take Into Account the Benefits of Ongoing Work to Expand and Reconfigure Bensenville Yard 19

D. Metra's Claim that CPKC Will Route Kansas City – St. Paul Trains Via Chicago is Wrong, and Built on Grievously Flawed Modeling 24

E. Metra's RTC Analysis is Fundamentally Flawed 28

F. Many of Metra's Concerns are Unrelated to the Transaction 36

G. The Vast Majority of Metra's Infrastructure Demands Address Areas That Are Not Impacted At All By The Transaction 38

II. THE CHICAGO COMMUNITIES' CONCERNS ABOUT INCREASED FREIGHT TRAFFIC ON CP'S ELGIN SUBDIVISION ARE MISGUIDED, AS ARE THEIR REQUESTS FOR "RELIEF" 40

A. The Chicago Communities Do Not Accurately Characterize the Impact of the Transaction 40

B. The Chicago Communities' Requests for "Relief" are Unworkable 42

1. The Requested Investment of $5.5 - $9.5 Billion is Wildly Out of Proportion 42

2. The Chicago Communities' "Anywhere But Here" Proposals, Which Seek to Prevent *Any* Increase in Freight Traffic Through Their Communities, are Unfair and Impractical 44

3. Turning Any Projection Regarding Train Lengths Into a Mandate Would Not Make Operational Sense 46

C. The Chicago Communities' Assertion that Projected Traffic Through Their Communities Changed as a Part of the Amended Operating Plan is Untrue.....46

III. HENNEPIN COUNTY'S CONCERNS ARE MISGUIDED 47

A. Hennepin's Concerns about Increase in Truck Traffic at CP's Minneapolis Intermodal Facility Are Unfounded.....47

B. Hennepin's Other Concerns Are Similarly Unfounded.....48

IV. TRANSACTION IMPLEMENTATION WILL FACILITATE, NOT THREATEN, CPKC'S ABILITY TO PROVIDE HIGH QUALITY SERVICE.....50

EXHIBIT 1: RTC REPORT

EXHIBIT 2: "B17 AND B12 – FREIGHT WINDOWS – A – REFERENCED IN DEPOSITION HELD ON 06-07-2022.XLS"

EXHIBIT 3: METRA MD-W SCHEDULE (NOV. 4, 2019)

EXHIBIT 4: VILLAGE OF BARTLETT, DOWNTOWN TOD PLAN (OCT. 18, 2016)

EXHIBIT 5: HENNEPIN COUNTY CROSSINGS

1. My name is Raymond A. Elphick. I am the Assistant Vice President Service and Product Design for Canadian Pacific Railway Company ("CP"). Together with John F. Orr, the Executive Vice President – Operations of Kansas City Southern ("KCS"), I sponsored and verified Applicants' Operating Plan and Amended Operating Plan in this proceeding.

2. This statement addresses certain assertions related to the CP network contained in (1) Metra's Comments and Request for Conditions, and its Supplemental Comments; (2) the Chicago Communities' Opening Comments and Request for Conditions, and Supplemental Opening Comments and Request for Conditions; (3) Hennepin County's Comments and Request for Conditions. As discussed below, the assertions raised by these interested parties reflect a misguided understanding of the CP/KCS Transaction (the "Transaction") and do not raise any serious concern regarding the Transaction's likely impacts. Finally, I explain that the Transaction will not threaten CP/KC's ability to provide high quality service.

I. METRA'S ANALYSIS OF THE IMPACTS OF THE CP/KCS TRANSACTION IS COMPLETELY MISTAKEN

3. I have reviewed Metra's analysis of the impact of the Transaction on the lines it currently shares with CP (referred to by Metra as the "MD-W Line" and "MD-N Line"). As I explain in this part of my testimony, Metra's analysis is fundamentally flawed. Contrary to Metra's assertions, the Transaction will not have any adverse impacts on Metra's operations on either the MD-W Line or the MD-N Line.

4. The only projected effect from the Transaction to any of Metra's lines is that eight daily freight trains will be added to the MD-W Line west of Bensenville Yard: four that travel eastbound towards Bensenville, and four that travel westbound from Bensenville. The current

infrastructure of the MD-W Line, plus a planned reconfiguration at Bensenville Yard itself, which I discuss herein, will provide adequate capacity to handle this increased traffic.

5. Metra's worry that CP's Marquette Subdivision will be over capacity (resulting, according to Metra, in CPKC re-routing trains through Chicago over Metra's MD-W and MD-N Lines) is also inaccurate.[1] As discussed in more detail below, the Marquette Subdivision has ample capacity to handle the projected traffic that Applicants plan to run through it. Applicants corrected the RTC modeling performed by Metra, which confirmed that Metra's fears are unfounded and that there will be no adverse impact to Metra's operations as a result of the Transaction.

A. Metra Ignores the Fact that the CP/KCS Transaction Will Not Increase CPKC Trains East of Bensenville Yard on Metra's MD-W Line or on Metra's MD-N Line

6. When I reviewed Metra's comments, it was immediately clear to me that Metra simply did not understand Applicants' Operating Plan. In particular, I was struck by Metra's confusion over the number of daily freight trains that the Transaction will add to the MD-W and MD-N Lines. To set the record clear, I explain in this section where the Transaction will and will not result in additional freight trains on Metra's lines.

7. Metra asserts that the Transaction will add 7.53 trains per day to the segment of the MD-W Line east of Bensenville Yard.[2] That is plainly incorrect. The Transaction will add *zero* trains per day east of Bensenville.[3]

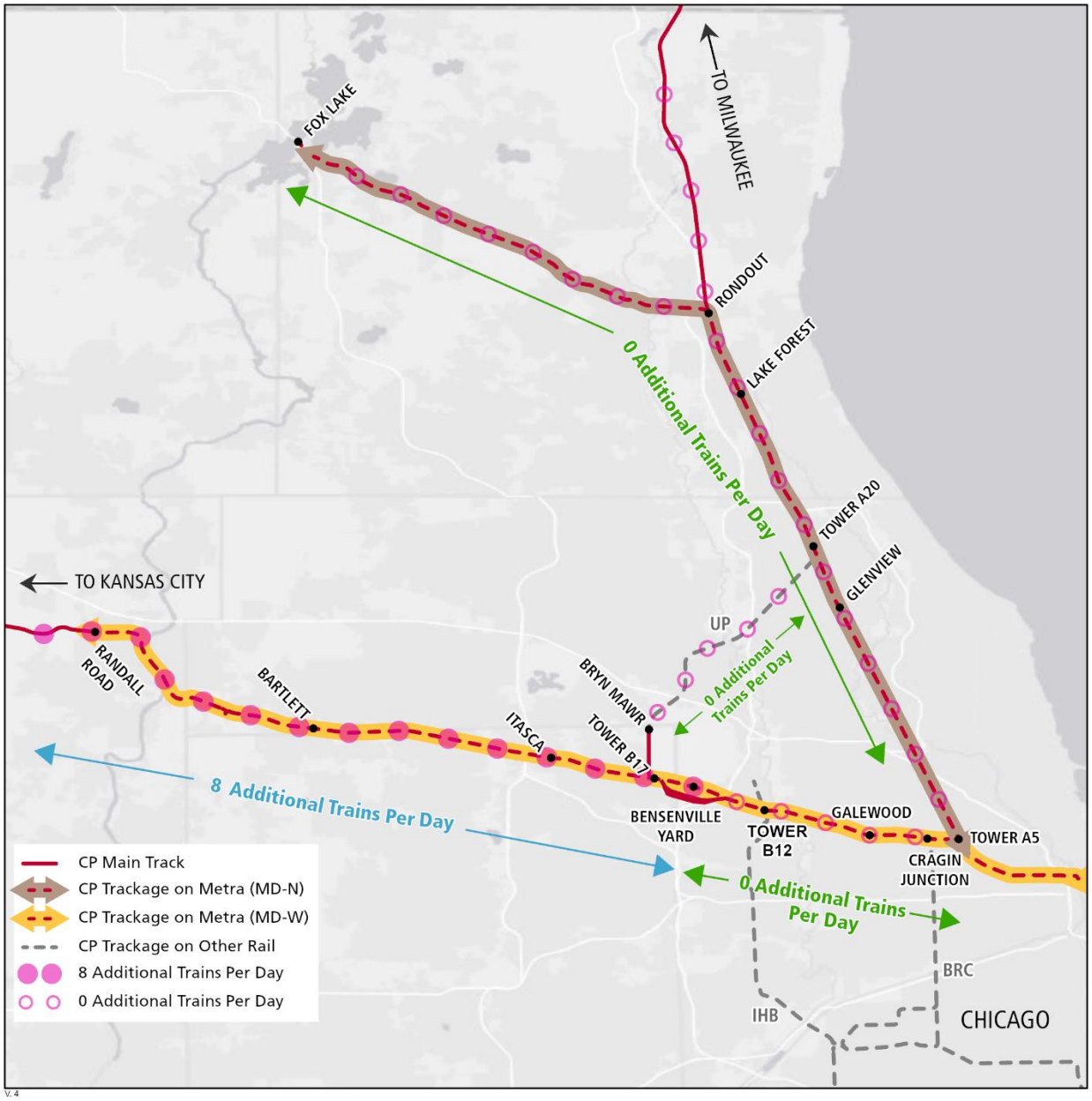
[1] *See* Metra Comments and Request for Conditions (filed March 15, 2022) ("METR-7") at 18.

[2] *See* METR-7, Verified Statement of Thomas D. Crowley and Robert D. Mulholland ("Crowley and Mulholland V.S.") at 19.

[3] *See* Amended Operating Plan, Table 8.

8. Metra's confusion may stem from the fact that Applicants' Operating Plan showed train count increases between Tower B17 and Tower B12. However, this was simply because trains were assigned to that segment if they were entering or departing Bensenville Yard to or from the west. Because Bensenville Yard is geographically situated between Tower B17 and Tower B12, trains moving *within Bensenville Yard itself* show up as moving between those towers, *even though they are not actually operating on the mainline tracks of the MD-W Line east of Tower B17*. To be abundantly clear, Applicants do not project any additional daily freight trains to travel on the mainline tracks of the MD-W Line east of Bensenville Yard. Figure 1 below illustrates this.

FIGURE 1
MAP DETAILING LOCATIONS WHERE FREIGHT TRAINS WILL *AND WILL NOT* INCREASE

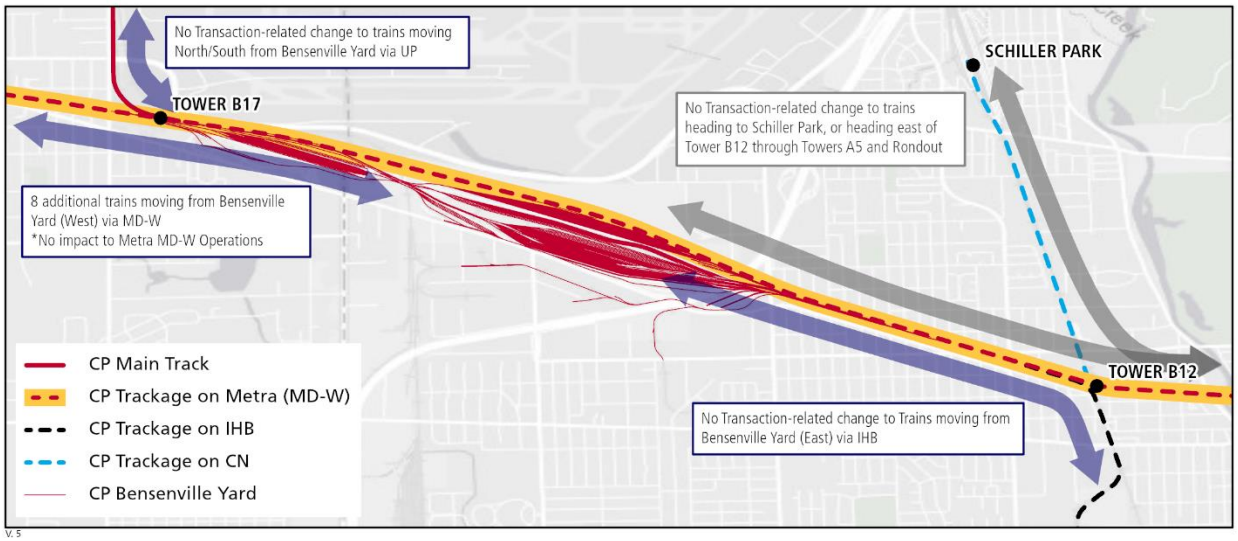


9. Mr. Oppenheim argues in his Verified Statement that Applicants cannot say there is no impact on Metra's operations east of Bensenville Yard just because freight trains are

entering or departing Bensenville Yard from the west.[4] Mr. Oppenheim claims such trains must travel through Chicago.[5] Respectfully, Mr. Oppenheim is incorrect. The additional freight trains Applicants plan to operate on the MD-W Line will travel no further east than Bensenville Yard. They will not, nor must they, travel through Chicago, as Figure 2 below illustrates.

10. Moreover, transfers to or from other railroads will not increase as a result of the Transaction.[6] All other additional CPKC traffic resulting from the Transaction that must travel east of Bensenville Yard (for example, traffic to or from areas east of Chicago, like Detroit or Eastern Canada), is modest and will be handled in existing trains.[7] Because such traffic will be handled in existing trains, there will be no impact on Metra's operations whatsoever.[8]

FIGURE 2
METRA CHICAGO CLOSE-UP



4 METR-7, Verified Statement of Rich Oppenheim ("Oppenheim V.S.") at 22.

5 *Id.*

6 As illustrated above by Figure 2, transfers to or from other railroads require trains to move to or from Bensenville Yard to or from Indiana Harbor Belt's lines south of Tower B12 or east of B12 to Cragin Junction and beyond to the BRC and NS.

7 *See* Amended Operating Plan at ¶ 210.

8 I note that one of the train symbols (170/171) from the east will be re-numbered. *See* Appendices G (at 1) and I (at 3-4) of Amended Operating Plan.

11. In fact, I anticipate that train activity east of Bensenville associated with Schiller Park may be reduced pursuant to the reconfiguration of Bensenville Yard, which I discuss more fully below. Trains 142 and 143 will no longer depart from or arrive at Schiller Park, which requires occupying the diamond at Tower B12, since the automotive and intermodal facilities will be consolidated at Bensenville Yard.

12. Again, to avoid any doubt, Applicants project that the Transaction will only add eight daily freight trains to the MD-W Line, all of which will travel on the portion of that line west of Bensenville Yard, and no more. While Applicants' Amended Operating Plan shows a Transaction-related train count change of 8.00 for the Bensenville Metra, IL – Randall Road, IL segment of the Elgin Subdivision (which is what Metra refers to as the MD-W Line) and a separate transaction-related train count change of 6.43 for the Bensenville, IL – Tower B12, IL segment of the Elgin Subdivision,[9] the former is inclusive of the latter for the reason explained above in paragraph 8.

13. Metra also appears to think the Transaction will result in meaningful increases in traffic to the MD-N Line. Respectfully, Metra is incorrect. The Transaction will do nothing of the sort. We made clear in Appendix A of the Amended Operating Plan that there is no Transaction-related train count increase for the MD-N Line.[10] While the Amended Operating Plan does show small Transaction-related increases in density data for that line,[11] these increases are modest and can be handled in existing trains, with no foreseen impact on Metra operations or Metra schedules.

9 *See* Amended Operating Plan, Appendix A at 4 (MST Seg Nos. 81 and 82).

10 *See id.* at 3 (MS Seg Nos. 69-71).

11 *See* Amended Operating Plan, Appendix T at 7 (Segment Nos. 69-71).

14. Metra also asserts that Applicants understated train counts between Milwaukee and Chicago by at least 6.28 trains per day.[12] Given the source they cite to, it is my understanding that Metra is referring to an additional 6.28 Amtrak trains that will travel on the MD-N Line. First, this is not Transaction-related. Applicants' settlement with Amtrak (which was publicly filed) makes clear that Amtrak was planning to add these trains regardless of the Transaction.[13] Second, the settlement agreement contains clear conditions requiring Amtrak to add capacity to allow for the additional trains to be added.[14]

B. There Is Ample Capacity for Additional CPKC Freight Trains on Metra's MD-W Line

15. Not only does Metra misunderstand the actual scope of the Transaction's impact on the lines it shares with CP, but it also incorrectly claims that the MD-W Line lacks sufficient capacity to accommodate eight additional daily freight trains without adversely impacting its operations.

16. First, I address Metra's numerous claims of errors with Applicants' capacity analysis. To satisfy itself that sufficient capacity existed on the Elgin Subdivision (of which Metra's MD-W Line is a part), CP's Operating Plan Team used its understanding of past history; its intimate knowledge of operations on its network; its understanding of the planned reconfiguration of Bensenville Yard; and ran various analyses *with an assumption that freight trains must be scheduled outside of Metra's peak periods*. CP is confident that its analyses, so informed by its expertise with its own network and wealth of experience, are reliable and accurate. In fact, CP reviewed and modified Metra's RTC simulation of operations starting at

12 *See* Metra Supplemental Comments (filed June 9, 2022) ("METR-8") at 4.

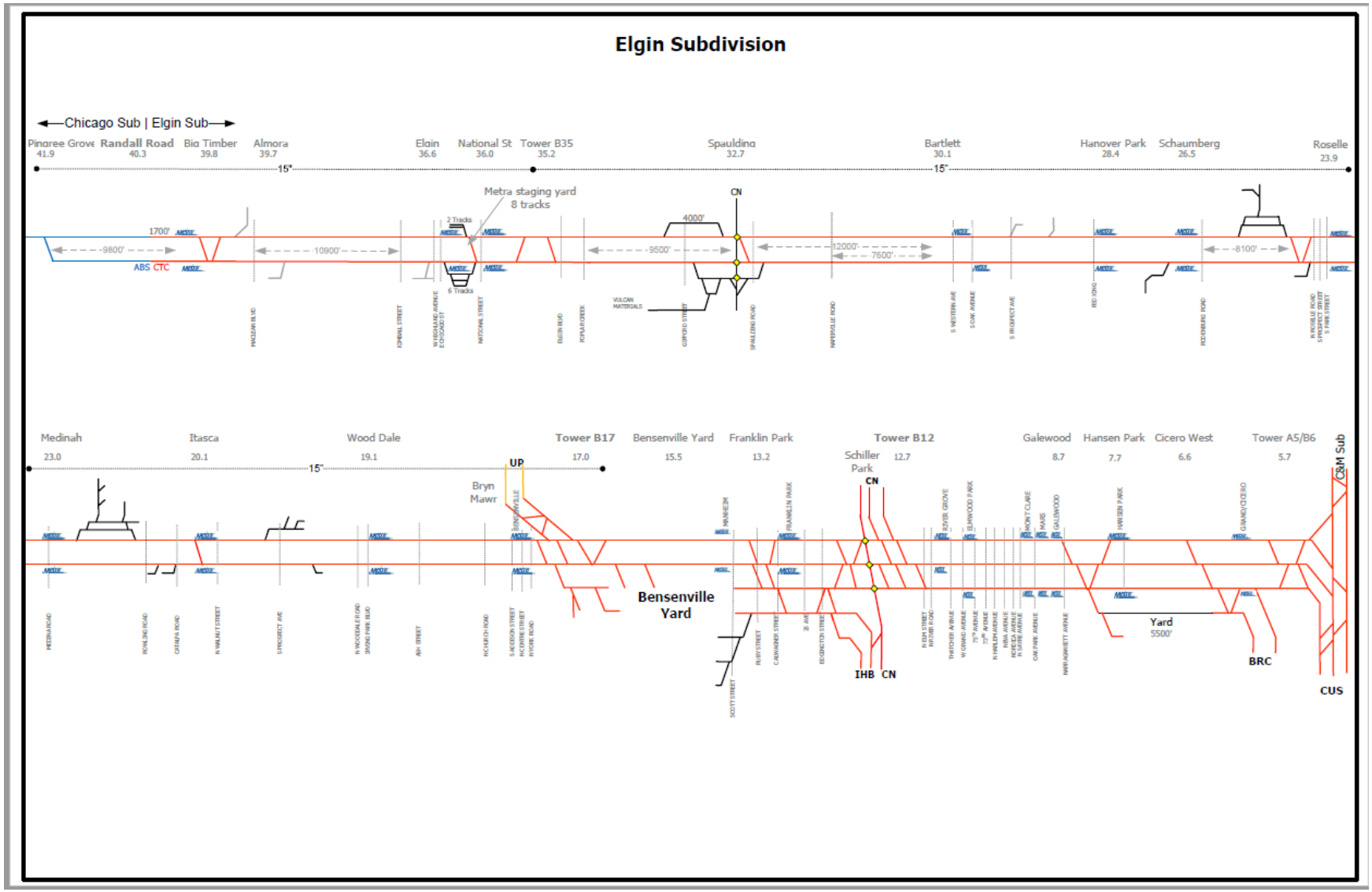
13 *See* Amtrak-Canadian Pacific Agreement (filed February 2, 2022).

14 *See id.*

River Junction through to Chicago and Sabula Junction and, as I explain more fully below in Section E, the RTC simulation, as corrected, confirmed what CP already knew—there is sufficient capacity on CP's Elgin Subdivision and Marquette Subdivision to accommodate Applicants' projected traffic increases without adversely impacting Metra's operations.

17. Second, I illustrate here how the MD-W Line has ample capacity to handle eight additional daily freight trains without adversely impacting Metra's operations. Figure 3 below illustrates the track turnouts and location of Metra stations on CP's Elgin Subdivision.

FIGURE 3
ELGIN SUBDIVISION TRACK SCHEMATIC



18. The Elgin Subdivision west of Bensenville, where Applicants anticipate adding eight daily freight trains, is 23 miles long west of Bensenville, double track, CTC-equipped, and features nine crossovers west of the interlocking at Tower B17. It has track speeds of 40 miles-per-hour for freight trains and 70 miles-per-hour for passenger trains. This leads to a typical run time of about 45 minutes for both freight trains and passenger trains (passenger is inclusive of stops).

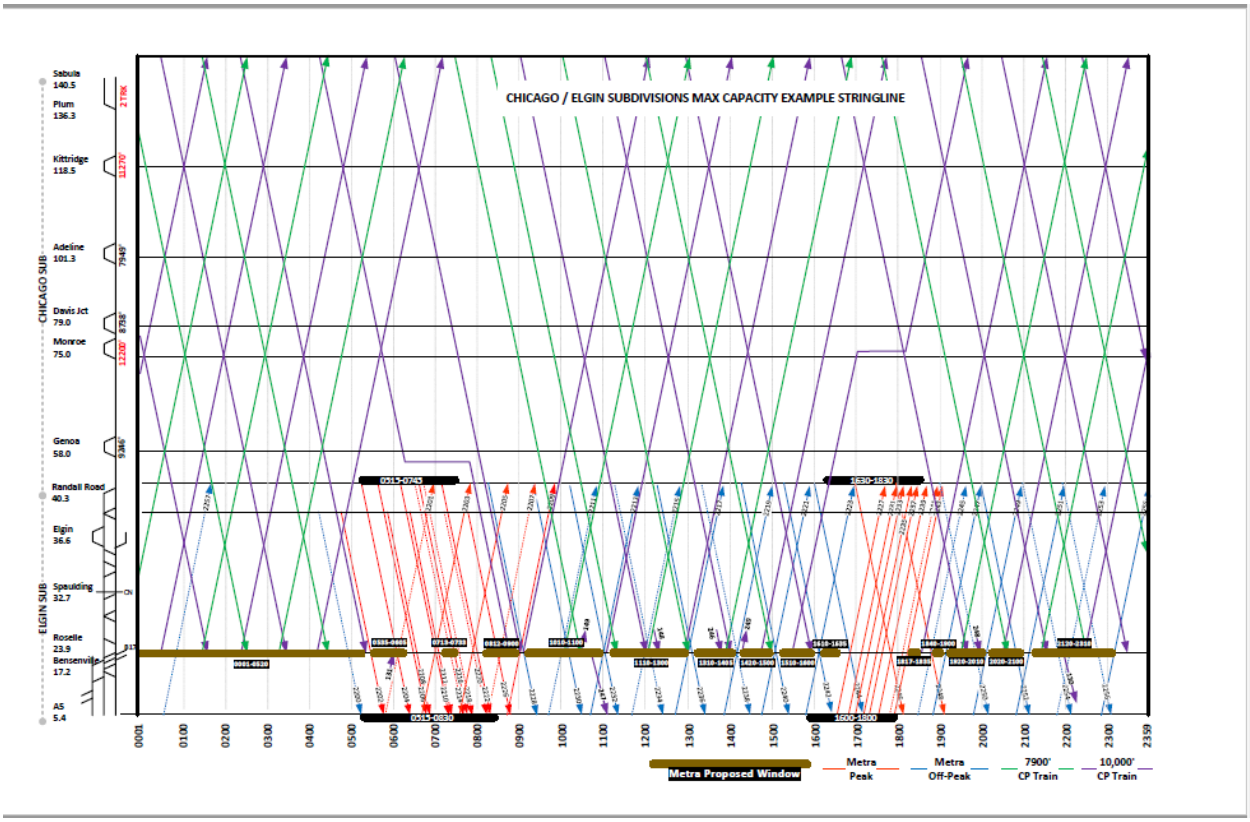
19. Figures 4 and 5 below are string-line graphics intended to help illustrate the available capacity on the MD-W Line and surrounding areas, and contextualize the Transaction. Figure 4 shows the maximum number of slots that are available for freight trains to run on CP's network near the greater Chicago area, while avoiding commuter windows. (To avoid any doubt, Figure 4 is simply hypothetical and is intended to illustrate the maximum available slots as a function of the existing and planned siding (Monroe) on the Chicago Subdivision, not any actual traffic flows foreseen as a result of the Transaction.) As the string-line in Figure 4 below shows, with freight trains running with similar transit times as passenger trains (as described above in paragraph 18), there are several slots available for freight trains in the non-peak windows. In fact, Mr. Oppenheim testified that he had previously analyzed the available windows between scheduled Metra trains.[15] The spreadsheet reflecting Metra's analysis shows that there are several available windows, which Mr. Oppenheim evidently acknowledged, both during peak and non-peak periods trains, in which freight trains can be run.[16] You will note that per the spreadsheet provided by Mr. Oppenheim and shown in brown in Figure 4, the slots we

[15] Oppenheim Dep. Tr. at 175:4-176:20.

[16] *See* "B17 and B12 – Freight windows – A – Referenced in Deposition Held on 06-07-2022.xls" (Exhibit 2).

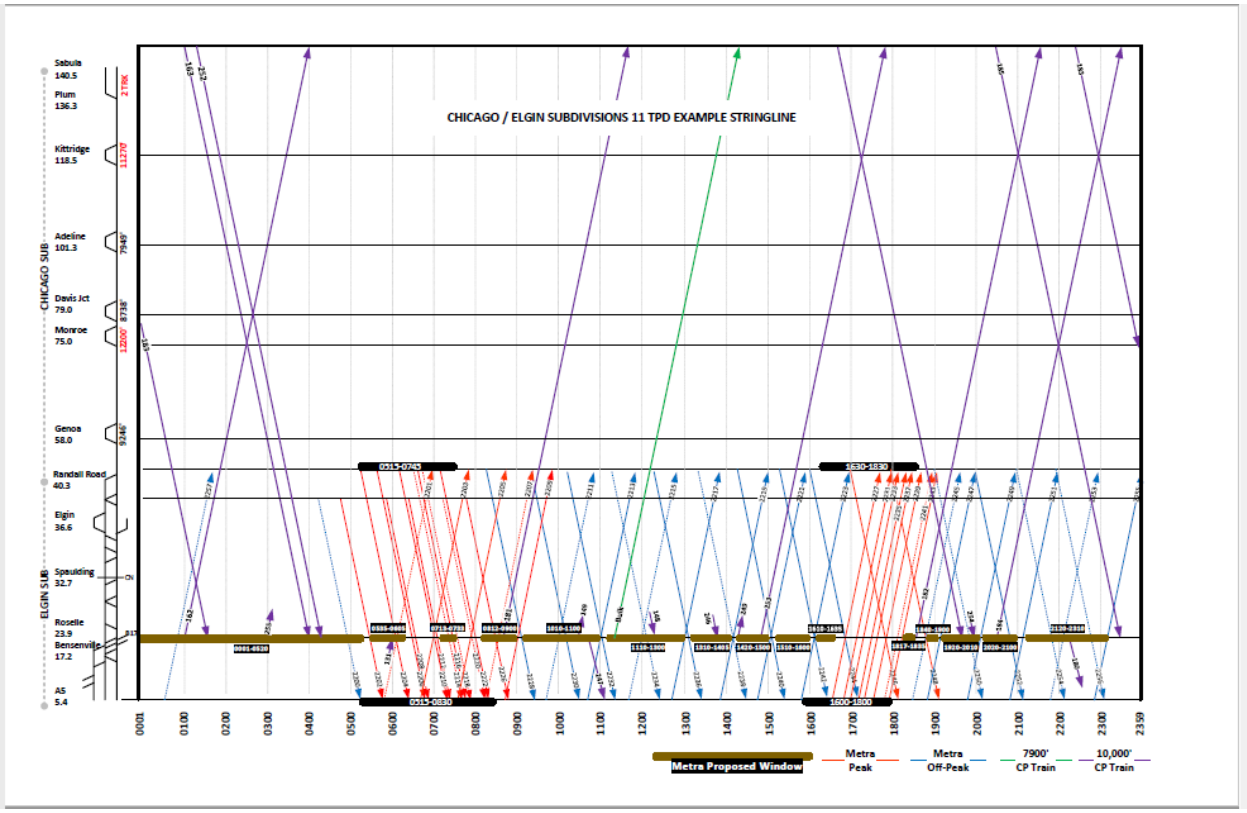
modeled here align with the available slots shown in his spreadsheet, and green lines represent slots where trains will fit in all the sidings and purple indicates slots that are designed to utilize longer sidings.

FIGURE 4
STRING-LINE OF AVAILABLE SLOTS ON CP NETWORK NEAR METRA'S LINES



20. Figure 5 below, meanwhile, is an illustrative graphic provided to demonstrate a potential grid of slots in which Applicants project they could realistically run the eight additional freight trains—again, avoiding commuter windows—by making use of siding capacity on that portion of CP's network. Even with the addition of eight additional daily freight trains owing to the Transaction, there is still capacity to accommodate reasonable requests from Metra to add trains or make schedule changes.

FIGURE 5
ILLUSTRATIVE STRING-LINE OF CP NETWORK SLOTTING EIGHT ADDITIONAL FREIGHT TRAINS



21. Further, as Adolph Gameiro more fully discusses in his Reply Verified Statement, by historic comparisons, there are currently low freight train frequencies on the MD-W Line and thus slots exist between existing peak and non-peak period operating windows in which Applicants' additional freight trains can be scheduled.[17] Our capacity analysis, described in the Application, showed that the MD-W Line has ample room for the anticipated increase in train volumes, in significant part because the additional freight trains would be scheduled to work with Metra's tightly scheduled operations.[18] And again, as discussed more fully below in

[17] *See* Reply Verified Statement of Adolph Gameiro at ¶ 27.

[18] Metra's claim that CP has been bad at complying with existing schedules is addressed by Nick Walker in his Reply Verified Statement. Walker R.V.S., at Section I.B.

Section E, CP's corrected version of Metra's RTC modeling confirmed that adequate slot capacity exists on the Elgin Subdivision without adversely impacting Metra's operations.

22. Metra also takes issue with the length and weight of the trains Applicants will run over the MD-W Line, arguing that the MD-W Line was never meant to accommodate such trains, and that there are no sidings on the MD-W Line, nor on CP's adjoining Chicago Subdivision, long enough to fit these trains. It similarly argues that CP's Chicago Subdivision (which is adjacent to Metra's MD-W Line) reduces from double track to single track two miles west of Metra's Big Timber Road stations, which causes delays toward the end of its MD-W Line.

23. However, Metra's focus is too narrow. As their witness Mr. Godfrey recognizes, it is important to assess the capability and flexibility that the broader network provides for slotting trains through Chicago.[19] Applicants plan to add a new siding at milepost 75, which is situated at Monroe, Illinois and located 33 miles west of the existing double track at Pingree Grove. With another long siding at milepost 118, CP's Chicago Subdivision will have two sidings greater than 10,000 feet and three sidings capable of handling bulk trains or scheduled trains that fit those sidings. The subdivision also has double track at either end. Coupled with investment in the Bensenville Yard reconfiguration and CP's line between River Junction and Davenport to add capacity, CP has designed a network with sufficient capacity, sidings and flexibility to allow for fluid train operations—including the flexibility to have freight trains in slots avoiding the commuter rush.

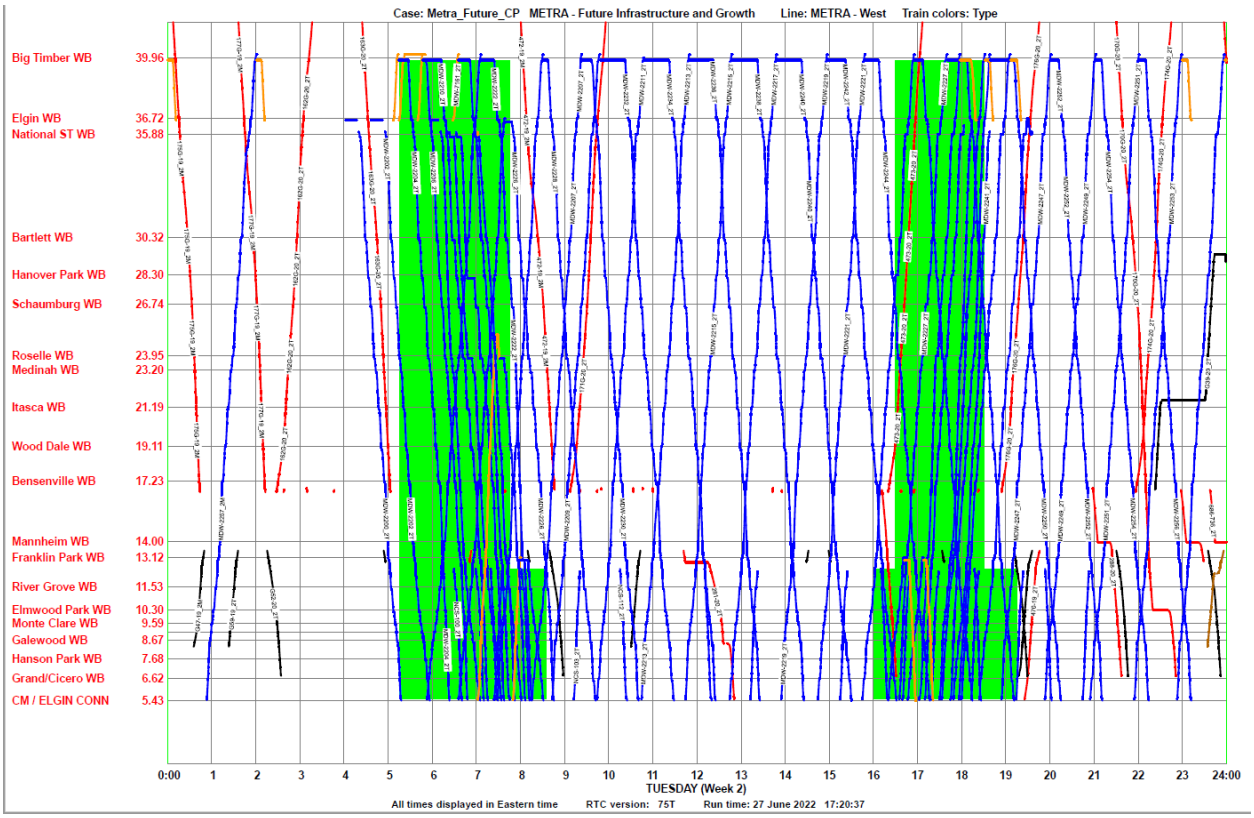
24. Further, Figure 6 below is the string-line graphic produced by CP's corrected version of Metra's RTC simulation that, as discussed in Section E, successfully dispatched the

[19] *See*, e.g., Godfrey Dep Tr. at 83:25-86:10.

St. Paul through to Chicago and Sabula Junction rail segments post-Transaction, which includes the Elgin Subdivision and the proposed additional trains to be dispatched on that subdivision. In Section E, we describe how the additional eight trains on the Elgin Subdivision had no impact on Metra's performance. The string-line below demonstrates what that simulation did to slot Applicants' proposed schedules after calibrating that model to the priorities and appropriate dispatching flexibilities with which CPKC would operate in delivering the additional eight freight trains, with no additional impact to Metra's services. After configuring the RTC model with the priorities and parameters as we operate today, the corrected RTC simulation dispatched the lines as we expected those lines to be dispatched based on our experience and understanding of our network's capacity, including our interactions with Metra.[20]

[20] As noted in the report summarizing the results of CP's review and corrections to Metra' RTC simulation, attached hereto as Exhibit 1, when examining stringline plots an expert can determine whether the operation is being managed in the same manner as a real dispatcher would or whether infrastructure, operating parameters or dispatch settings in the RTC model may not be configured properly. *See* CP RTC Report (Exhibit 1 at 3).

FIGURE 6[21]
RTC SIMULATION STRING-LINE



25. I recognize that CP makes several claims throughout its comments of CP interfering with Metra's trains during so-called "peak periods." However, freight trains are generally not dispatched on the MD-W Line during peak periods, as Nick Walker more fully discusses in his Reply Verified Statement.[22] Indeed, as data shows, this hardly ever actually occurs—between 2019 and 2021, only 17% of all CP freight trains on the MD-W Line operated at any point during peak windows[23] and many of these were active for only a small portion at one end of the window. CP's preference has been, and CPKC's preference will continue to be, that freight trains be dispatched outside of Metra peak periods whenever possible, in compliance with

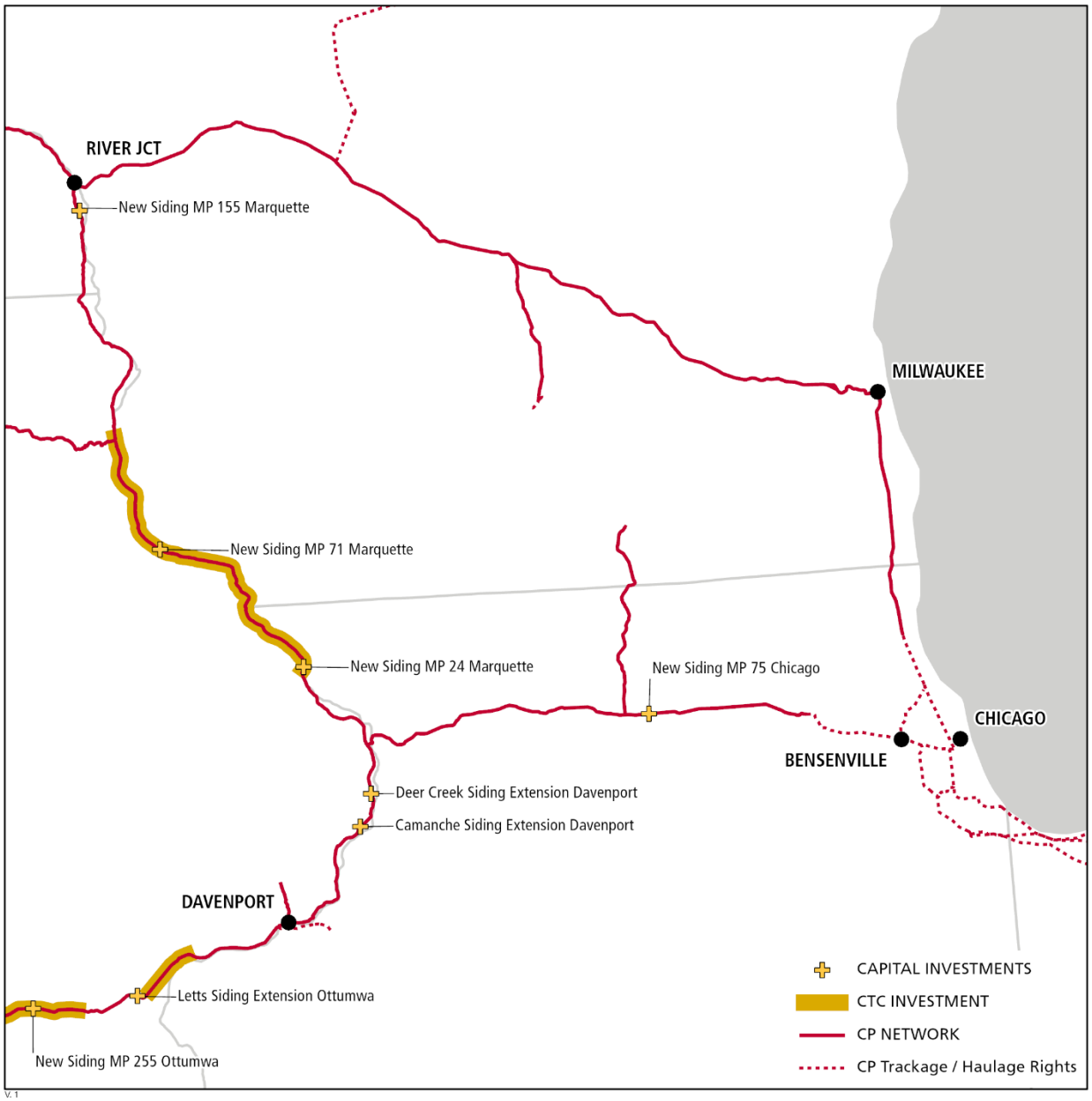
21 Ex. 1, at Ex. A-2.

22 *See* Reply Verified Statement of Nick Walker ("Walker R.V.S.") at ¶¶ 7-12, 38.

23 Workpaper "Train actuals Peak Windows.xlsx" at tab "Window Chart."

CP's contractual commitment to not interfere with Metra's peak period operations. Moreover, this is not a Transaction-related concern because new CPKC trains will be scheduled outside peak windows. Lastly, Metra ignores that Applicants plan to add capacity between Davenport and Chicago to flexibly slot trains to and from Chicago, as shown by Figure 7 below, which will allow CPKC to avoid interfering with Metra trains during these windows.

FIGURE 7
TRANSACTION-RELATED CAPITAL PROXIMAL TO CHICAGO



26. Throughout its comments, Metra incorrectly argues that Applicants understated the volume of trains moving over Metra's lines because the Application does not discuss passenger trains, other classes of freight trains, local trains, yard trains, work trains or foreign trains that traverse Metra's lines. Throughout its supplemental comments, Metra further argues that the Amended Operating Plan understates the volume of traffic because it does not consider organic growth. As I explain below, Metra is incorrect on both fronts.

27. Contrary to Metra's assertions, CP did consider the impact of other types of trains when assessing the impacts of the Transaction. In assessing whether a local train, foreign train, yard train or work train has an impact on capacity, CP anchors itself on methods and measures of capacity utilization. CP then builds on its understanding of local operations, yard and track maintenance activities, foreign train activities and how long it takes to traverse segments or diamonds. CP also enlists local experts to understand the nature and cause of operational interference as well as what can be done to remedy that interference. CP also calls upon its past experience on its own lines. Notably, in the case of the MD-W and MD-N Lines, CP considered the fact that these lines historically had heavier freight operations than there are currently.

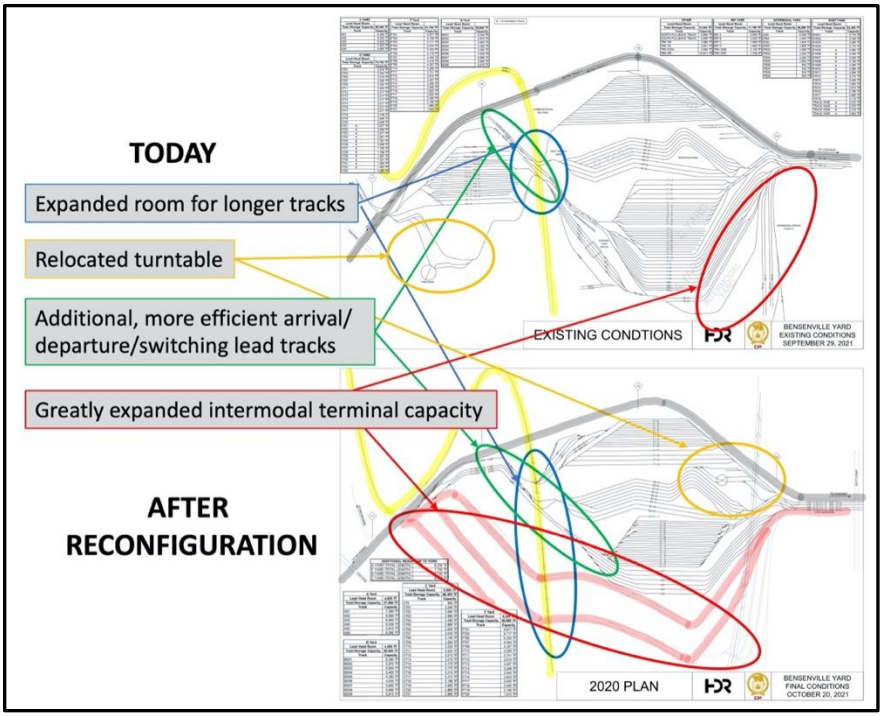
28. Further, as shown on page six under the "Organic Growth" column of Appendix T of the Amended Operating Plan, Applicants did take into account organic growth on the Elgin and C&M Subdivisions (of which Metra's MD-W and MD-N Lines are part).

C. Metra's Analysis Does Not Take Into Account the Benefits of Ongoing Work to Expand and Reconfigure Bensenville Yard

29. Metra's analysis of the Transaction is completely devoid of any consideration of the planned reconfiguration of Bensenville Yard, which is a significant project that will smooth operations on the MD-W Line. Instead, Metra simply pleads ignorance that they do not know the details of the reconfiguration and asserts that Applicants do not adequately explain how this

project will help resolve current operating issues as well as any future issues created by the Transaction.[24] To set the record straight, I explain in this section how the Bensenville Yard reconfiguration will substantially improve operations on the MD-W Line, helping to both resolve current issues and to accommodate the increased traffic from the Transaction. Figure 8 below is a map detailing the before and after conditions at Bensenville Yard, and the accompanying benefits for Metra.

FIGURE 8
MAP SHOWING BEFORE AND AFTER CONDITIONS AT BENSENVILLE AND BENEFITS FOR METRA



30. Nick Walker's Reply Verified Statement includes more detail on the planned reconfiguration of Bensenville Yard and its many benefits on fluid operations on the MD-W and

[24] *See* METR-7 at 12.

MD-N Lines.[25] I provide here additional insight on the Bensenville Yard reconfiguration from an Operating Plan point-of-view.

31. In Bensenville's current configuration, all switching and arrival departure activity is driven through a narrow "waist" in the middle of the yard as captured inside the blue and green circles in Figure 8 above. With all of the growth traffic being processed into trains heading west or arriving from the west, any interference in the "waist" of the yard has the potential to delay trains from clearing Tower B17 efficiently. However, as more fully described in Nick Walker's Reply Verified Statement, the reconfiguration will eliminate this bottleneck issue by removing a UP embankment in favor of a series of bridges that will unlock a wider footprint supporting longer yard tracks.[26]

32. Moreover, under the reconfiguration, CP will be able to yard a 10,000 foot train without delay. The reconfiguration will create longer receiving tracks that can accommodate a 10,000 foot train. CP has designed the additional trains resulting from the Transaction to run up to 10,000 feet with two principal drivers anchoring that assumption. The first being Bensenville Yard's arrival and departure capabilities, and the second being the Mexican train length restrictions with trains held to 3,000 meters (approximately 10,000 feet). With Transaction-related growth primarily anchored by either bulk unit trains of less than 10,000 feet or intermodal spanning the three countries, the design of Bensenville Yard has been further refined to ensure efficiencies associated to the Transaction.

33. The most important refinement of the reconfiguration is the ability of Bensenville Yard to directly receive and depart trains from the new intermodal yard configuration. By

[25] *See* Walker R.V.S. at ¶¶ 54-58.

[26] *See* Walker R.V.S. at ¶ 57.

relieving the "waist" of the yard through independent leads and also by developing the intermodal yard to arrive and depart trains directly, the reconfiguration will create capacity and flexibility within the yard, which will in turn reduce interference at Tower B17, the most critical location as it pertains to Metra's operations, and relieve pressure on Metra's mainline tracks.

34. CP ultimately intends that the reconfiguration of Bensenville Yard will eliminate the need to use Schiller Park for intermodal and automotive traffic. As previously noted, this may actually reduce train activity east of Bensenville associated with Schiller Park. Trains 142 and 143 will no longer depart from or arrive at Schiller Park, which requires occupying the diamond at Tower B12.

35. The Bensenville Yard reconfiguration will also help accommodate the increased traffic from the Transaction. Metra notes that there will be an 11% increase in processing demands and 112 additional daily cars at Bensenville.[27] Importantly, the removal of the UP embankment over Bensenville Yard will allow for the creation of independent leads and thereby remove interference and switching and processing activity between F-Yard, the classification yard, and the arrival/departure yard and support longer yard tracks. With the "waist" of the yard sorted out, CP will be able to focus its different yards on specific tasks or functions. For example, F-Yard will be dedicated to processing blocks for the east while the Class-Yard will be dedicated to processing blocks for the west and the arrival/departure yards will be dedicated to arriving and departing trains. As noted in paragraph 33, the expansion of the intermodal yard will allow for the direct arrival and departure of intermodal train services, which will reduce present day interference attributed to the frequent movement of intermodal traffic between the

[27] *See* METR-7 at 13.

various yards. The processing lift resulting from what is described above will easily surpass the incremental 112 cars per day and 4 new block demand resulting from the Transaction.

36. It is important to note that of the 112 additional daily cars at Bensenville Yard as a result of the Transaction, only 32 will go to Eastern Canadian destinations. This traffic will be handled in existing services as noted in Paragraph 213 in the Amended Operating Plan.[28] As a result, there will be no material impact on transfer operations in the Chicago terminal or yard processing demands at other carriers' facilities across the terminal.

37. I further note that CP's recent land agreement with the Illinois Toll Authority and the UP opens new options for expansion of container handling capacity at Bensenville Yard. As noted in Table 13 of the Amended Operating Plan, the Bensenville Intermodal facility is expected to see an increase of 586 handlings per day, by year three of the Transaction. When combined with 2019 volumes, total intermodal volumes by the end of year three, will be approximately 1273 handles per day, or 460,000 handles annually, as also noted in Table 13 of the Amended Operating Plan.

38. Today, the combination of CP's two Intermodal Facilities in Chicago at Bensenville Yard and Schiller Park provides sustainable capacity of approximately 420,000 handles per year, which is more than sufficient for existing volumes. Bensenville's expanded footprint will support the development of significantly greater intermodal capacity, adding longer intermodal servicing tracks, and increasing ground capacity for parking and storage. This design has the potential to more than double the combined capacity of Bensenville and Schiller Park

[28] Workpapers: "Base to Growth Bensenville Block Compare Including Eastern Canada and North Volumes"; "Optimized to Growth Bensenville Block Compare Including Eastern Canada and North Volumes."

compared to today, providing ample room for further growth, well beyond the current year three projections.

D. Metra's Claim that CPKC Will Route Kansas City – St. Paul Trains Via Chicago is Wrong, and Built on Grievously Flawed Modeling

39. Metra expresses a concern throughout its comments that the Marquette Subdivision is already at capacity and will be unable to handle the additional traffic Applicants plan to send over that subdivision. Metra hypothesizes that, as a result, CPKC will re-route that traffic through Chicago via the MD-W Line and then north towards Milwaukee via the MD-N Line.[29] Metra further claims that its RTC modeling confirmed this concern.[30] For the reasons I explain in this section, Metra's fears are unfounded, and its RTC modeling is grievously flawed and should be entitled no weight in this proceeding, as further explained below in Section E.

40. Metra argues that Applicants will add 6.6 daily freight trains over the Marquette Subdivision, which doubles existing conditions.[31] Metra asserts that the Marquette Subdivision is already near or at capacity under existing conditions, so doubling existing conditions is improbable.[32] Respectfully, Metra is incorrect—the Marquette Subdivision is not already near or at capacity. Today, CP operates on the Marquette Subdivision without issue. Moreover, that subdivision is more than capable of handling an almost 100% increase in traffic because CP is installing three new sidings on the Marquette Subdivision: one at Brownsville at milepost 155 by 2025, one at Turkey River at milepost 72 by 2024, and one at Bellevue at milepost 24 by 2024. When complete, the 159-mile Marquette Subdivision will have five sidings greater than 10,000

29 METR-7 at 18.

30 *Id.*

31 METR-7 at 15.

32 METR-7 at 20.

feet and four other sidings capable of handling expected bulk lengths. CP also plans to install CTC south of Marquette and broken rail protection north of Marquette, further enhancing the efficiency and safety of this subdivision. With a total year 3 demand up to 11.4 trains north of Marquette and 15.4 trains south of Marquette, the Marquette Subdivision is designed to support transaction related growth. Also, as further discussed below in Section E, Applicants' RTC modeling confirmed that Applicants infrastructure plan for the Marquette Subdivision will fluidly accommodate the anticipated traffic growth from the Transaction.

41. Metra also argues that the Marquette Subdivision has a challenging topography, such that Applicants' planned infrastructure improvements will be difficult to actually implement. CP deals with challenging topography throughout its network and CP's investment in the Marquette Subdivision reflects the unique characteristics of the topography of the Marquette Subdivision. CP will make significant investments between $13 million and $16 million for each of the three planned sidings discussed above in paragraph 19, for a total of $42 million, and additionally $30 million for CTC.[33] CP does not anticipate any obstacles to implementing these planned infrastructure improvements.

42. Metra further claims Applicants do not explain what will happen to operations while planned capacity improvements on the Marquette Subdivision are being constructed. Metra theorizes that traffic will be re-routed via Chicago while infrastructure is developed on the Marquette Subdivision. Respectfully, Metra is incorrect again. First, CP does not anticipate that all of the growth from the Transaction will materialize in the first year after the Transaction. In fact, the construction plan and sequencing reflects the currently anticipated timing in volume

[33] *See* Amended Operating Plan at 122 (Table 11).

growth.[34] CP would accelerate construction builds should volume growth materialize sooner. CP constantly monitors the 65% of maximum capacity threshold and adapts its network towards this threshold to allow for engineering track construction and other activities. CP would not so adapt the network by re-routing trains through Chicago, which would be substantially out of route. It would require additional crews, costs, and delays. Not to mention, it would burden CP's other (and Metra's) operations through Chicago, a fact of which we are well aware. Applicants are confident enough in the Marquette Subdivision, and in the impracticability of re-routing traffic through Chicago, to make a commitment that they will not take traffic circuitously 250 miles out of route, except for outages or in emergent conditions.

43. I more fully address the numerous flaws in Metra's RTC simulation in Section E below. Like the rest of its RTC simulation, the portion relating to the Marquette Subdivision was replete with errors and should be given no weight. The inability of Metra's models to dispatch existing CP freight trains should have been a clear indication that there was something wrong with their simulation.[35] Figure 11 referenced in Paragraph 49 below shows many of the infrastructure errors made by Metra in its RTC modeling, including those on the Marquette Subdivision.

44. The most notable errors Metra made in its simulation of the Marquette Subdivision are described in the CP RTC Report attached hereto as Exhibit 1. This included missing and undersized sidings at Harpers Ferry, Eckards and Dubuque, which incorrectly resulted in creating a 149-mile segment of single track with no meet location between Green

[34] *See* Amended Operating Plan at ¶ 298; *see also* "CP-KCS Capacity Projects.xlsx," at tab "CP-KCS Construction Planning."

[35] *See, e.g.*, METR-7 at 19 ("After imposing the restrictions on CP freight trains in the commuter peak periods, the RTC simulation would not run to completion.").

Island and Bluff for trains greater than 8,400 feet.[36] Metra's updated RTC simulation provided in June 2022 added the siding at Harpers Ferry and corrected the length of the Eckards siding but Dubuque and Green Island continued to be modeled at shorter, incorrect lengths.[37]

45. Metra's RTC simulation was so flawed that we corrected many of the major inputs and settings in Metra's RTC modeling, which proved what we know to be true—that the Marquette Subdivision will be able to handle the increased traffic we will run through it. [38] Figure 9 below is a table derived from the corrected RTC simulation, illustrating that the Marquette Subdivision was successfully dispatched with the increased traffic from the Transaction and without removing trains off the subdivision as Metra had done.[39] On a per train basis, the delays per train per day (as shown in the far right hand column) indicate equivalent performance to current operations on the Marquette subdivision.

FIGURE 9[40]
TABLE SHOWING MARQUETTE SUBDIVISION WILL FUNCTION

Line	Train Types	Case Name	Average Speed (MPH)	Delay %	Runtime Train Count (7/days)	Runtime Train Count (per day)	Delay Hours (7 days)	Delay Hours (per day)	Delay Minutes (per train)
Sabula-River Jct.	Bulks	Base	24.8	14.90%	22	3.1	2.4	0.35	6.70
		Future	22.3	27.40%	57	8.1	9.5	1.35	9.96
	Manifest	Base	19.8	13.30%	15	2.1	14.0	2.00	56.13
		Future	18.4	25.80%	15	2.1	26.0	3.72	104.16
	Intermodal	Future	25.6	9.00%	14	2.0	7.1	1.01	30.30
	Local	Base	23.4	9.90%	23	3.3	2.4	0.35	6.37
		Future	22.3	12.50%	23	3.3	4.1	0.59	10.71

36 CP RTC Report (Exhibit 1) at 7.

37 *See id.* at 8.

38 *See id*. at 2 ("The results of the Corrected Future Case simulation proved… CP's infrastructure plan for the Marquette Subdivision is sufficient to handle post-merger volumes).

39 *See* Crowley and Mulholland V.S. at 61-62.

40 *See* "RTC Summary Table.xlsx."

E. Metra's RTC Analysis is Fundamentally Flawed

46. It was clear from reviewing Metra's RTC simulation that it was fatally flawed with numerous errors and consequently it attempted to dispatch the operations of a rail network that does not exist in the real world. For that reason, Metra's RTC simulation should be afforded no weight in assessing the impacts of this Transaction in real world operations. RTC analysis is dependent on user-generated inputs and if even one input is not accurate, the simulation can diverge wildly from what would take place in the real world, rendering any conclusion derived from its results meaningless. CP conducted a review of Metra's RTC simulation and corrected the major errors in it. The results of that review and simulation are set forth in the CP RTC Report. I summarize those results here, noting the various and fatal flaws Metra made in its RTC simulation and illustrating that the corrected RTC simulation proves what CP knew to be true—that Applicants Operating Plan will work and not cause any adverse impacts to Metra's operations. Indeed, as described in the CP RTC Report, the simulation showed even at pre-COVID schedule levels and with the Transaction growth that the train delays to Metra's trains are not material on a train per day basis.[41]

47. I note at the outset that Metra corrected its RTC simulation not once but twice, the second time of which was filed just days before replies to comments and request for conditions were due.[42] As illustrated below in Figure 10, the results of Metra's threefold submissions swing

[41] *See* CP RTC Report (Exhibit 1) at 2 ("According to CP's corrected multiple simulation scenarios, there is no additional delay to Metra's trains between the Corrected Base and Corrected Future cases as a result of rising freight traffic levels.").

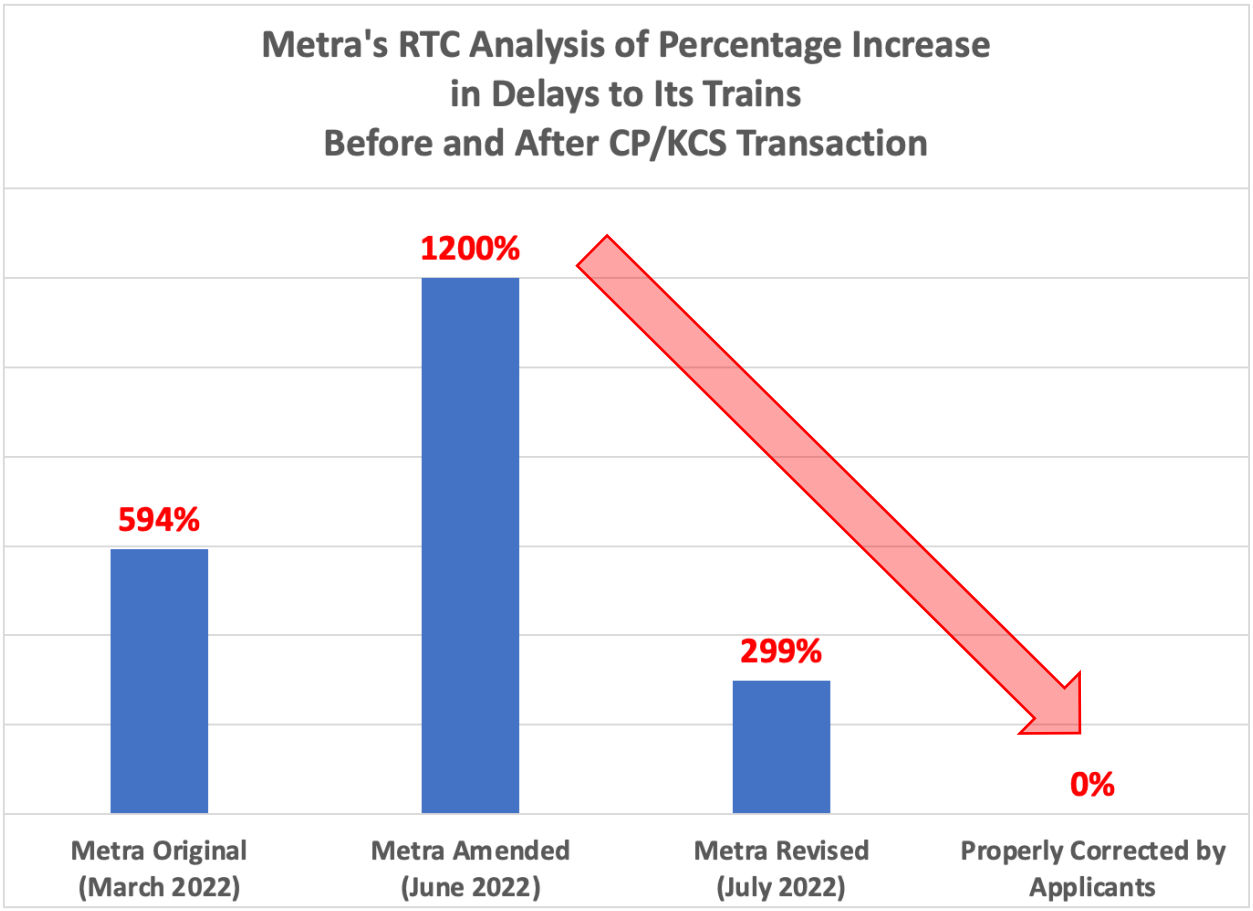
[42] An initial review of this second submission did not appear to change our analysis of Metra's RTC simulation in any material manner because, as noted in the CP RTC Report, our corrected RTC simulation had already corrected the errors Metra identified in this supplemental submission. CP RTC Report (Exhibit 1) at 1. However, because we were not afforded adequate time to do a full review, we

greatly, indicating the unreliability of their simulation. Indeed, Metra's initial submission showed delays to Metra were up approximately 594% as a result of the Transaction, while its corrected submission showed delays were up to approximately 1,200% and its third submission found delays to be around 299%.[43] This in and of itself is indicative of a faulty RTC simulation, as the corrections Metra made as outlined in their various submissions should not have caused such wild swings in results. In any event, for the reasons I explain below, there will be no additional delay to Metra's trains as a result of the Transaction.

reserve the right to supplement or amend our analysis should a more fulsome review warrant any such changes.

[43] *See* METR-7 at 21; METR-8 at 3; Metra Correction and Supplemental Statement (filed July 8, 2022) ("METR-9"), Attachment B.

FIGURE 10[44]
METRA'S EVOLVING RTC ANALYSES



48. First, Metra's RTC analysis was unable to even simulate actual *current-day* operations without reducing the number of trains on the Marquette Subdivision.[45] Metra even assumed the trains could make meets at Marquette, which is the junction at the Mason City Subdivision, by nosing on to the Mason City Subdivision and then backing on to the Marquette Subdivision after the meet. It should be noted there is no evidence in their simulation that any

[44] Sources: METR-7 at 21 (Metra Original, March 2022); METR-8 at 3 (Metra Amended, June 2022); Metra Correction and Supplemental Statement (filed July 8, 2022) ("METR-9"), Attachment B (Metra Revised, July 2022).

[45] Crowley and Mulholland V.S. at 60-61 (explaining that they needed to move existing trains off the Marquette Subdivision to the Mason City Subdivision in the base case).

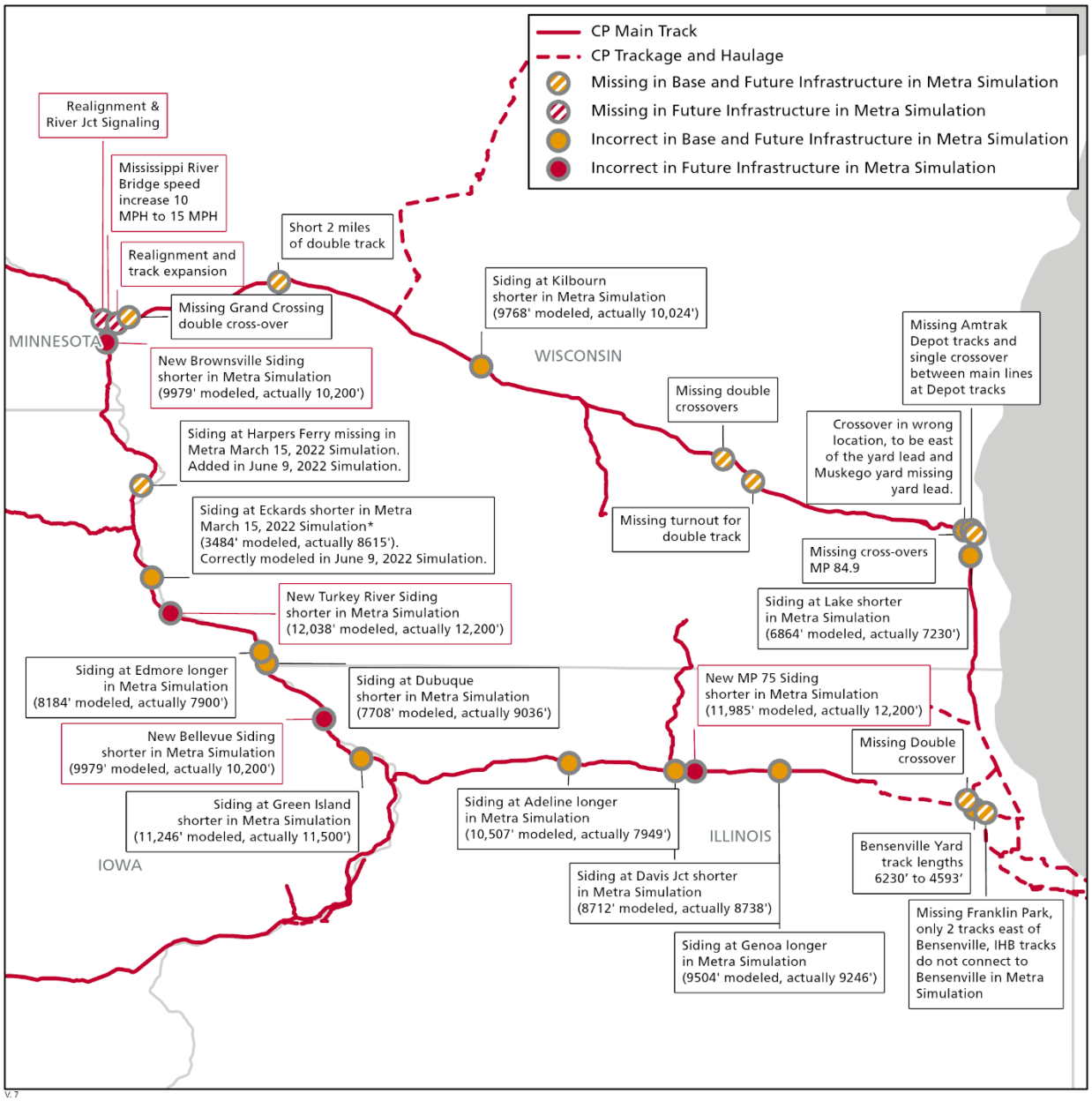
trains met in this way. Regardless, Metra should have been concerned with the quality of its work given that Applicants were running their operation over the Marquette Subdivision in the real world without reducing train starts. For example, Metra hard coded dwell in based on its sample data. Hard coding in this way compounds dwell and forces trains to hold for long periods on the main line, increasing subdivision congestion.[46] Moreover, as explained in the CP RTC Report, there is no evidence that Metra's consultants attempted to validate their base model with Metra personnel, despite standard practice being to validate base case models against known, real-world operating metrics to establish a baseline.[47] This type of basic validation process would have made clear that the model was flawed. Nonetheless, Metra asks the Board to find from its RTC analysis that the Transaction will so significantly impact Metra's operations that Metra should be afforded a long list of conditions and contractual alterations. For reasons explained in this section, the Board should give Metra's RTC analysis no weight.

49. Figure 11 below shows many of the infrastructure errors Metra made in its simulation.

[46] *See* Elphick Workpaper "METRA Simulation Review Final.pdf," at 10.

[47] *See* CP RTC Report (Exhibit 1) at 1, 4.

FIGURE 11
INFRASTRUCTURE FLAWS IN METRA'S RTC SIMULATION



50. Metra made the infrastructure errors noted above but made numerous other modeling errors in its RTC simulation, which are also described throughout the CP RTC Report. This includes, but is not limited to, the following, which are intended to highlight the most notable of these errors:

a. Modeling many siding lengths as shorter than actual dimensions;

b. Modeling the double track on the Tomah Subdivision at Raymore as two miles shorter than actual conditions;

c. Missing three crossovers on the Watertown Subdivision, which incorrectly converted nearly 23 miles of mainline double-track to single track;

d. Missing double crossovers between Tower B17 and Bryn Mawr;

e. Missing tracks within and to the east of Bensenville Yard, as well as the Indiana Harbor Belt Railroad's connecting tracks;

f. Various other missing and improperly constructed infrastructure, set forth in Table 4.1 of the CP RTC Report;

g. Incorrectly modeling CP freight trains by using actual departure times from the week of April 13, 2021, rather than scheduled departure times, which overrides RTC's dispatch logic and eliminates the randomness of real-world operating events;

h. Forcing the model to incur actual delay values from the April 2021 time period, which forced the RTC simulation to add delay over and above that incurred through its natural dispatching logic;

i. Incorrectly modeling Metra's own commuter trains. CP tested Metra's base model with only passenger trains operating to help determine the accuracy of the passenger train inputs and passenger operations. Without freight trains in the model, Metra passenger trains still registered 2.4 hours of delay per week, when it should have operated with 100% on-time performance since it used time-tested, reliable pre-COVID Metra schedules, thereby indicating the base model was

improperly constructed and compromising all results from the base and future models;

j. Incorrectly configuring and applying dispatch settings, including assigning incorrect Rank and Priority settings to different classes of freight trains, which leads to an incorrect meet/pass logic;

k. Not using any signaling system or other attributes related to train authority, leading the RTC simulation to dispatch with fewer operating restrictions and consequently operate trains closer together than current conditions might allow due to real-world signal spacing, which can bunch trains and create ripple delays;

l. Omitting planned infrastructure changes to Bensenville Yard (despite Metra's consultants having received the conceptual design from CP); and

m. Not incorporating randomization, one of RTC's key attributes, which injects typically experienced delays into the model. Consequently, the RTC simulation did not include any variation in freight train performance.

51. Second, a collaborative team of internal and external subject matter professionals endeavored to correct the many errors with Metra's RTC simulation and construct a proper simulation. This resulted in an iterative approach. First, corrective actions were applied to Metra's Base Case Model, then to its Future Model. This involved correcting the errors noted above and all other errors described in the CP RTC Report. After that, three new models were created: a Base Case with corrections to Metra's Base Model but adding Bensenville intermodal tracks, a Future Case with those same tracks included, and a Future Case with additional Amtrak operations and associated infrastructure as planned by Amtrak and contemplated in the agreement by CP to cooperate with those plans. Each model was dispatched twice, once without

freight and once with freight. Each scenario with freight was programmed to run 15 times over the course of seven days. Passenger-only scenarios were not randomized because CP did not discuss with Metra operations personnel which events should be randomized and where the parameters should apply.

52. The results of the simulation resulted in the following key findings[48]:

a. Unlike Metra's improperly built simulation, CP's Base Model was able to successfully dispatch 15 randomized, 7-day runs. Importantly, it did so without any need to move trains off the Marquette Subdivision, in stark contrast to Metra's Base Model;

b. The planned infrastructure improvements to the Marquette Subdivision will accommodate the increased traffic Applicants project from the Transaction. Indeed, without removing any trains from the train file, the updated Future Case successfully dispatched 15 randomized, 7-day runs;

c. Not only did the simulation results show that planned capital infrastructure improvements will prevent any additional delays to Metra's operations from the Transaction, certain simulation results showed there may actually be a *slight but noticeable reduction in delays to Metra trains* compared to the Base Model;

53. Because the corrected RTC simulation showed that there will be no material impact on Metra's operations as a result of the Transaction, one could assume that additional capacity exists to add even more CP and Metra trains to the lines that they share.

54. Finally, I want to emphasize that CP is open to working cooperatively with Metra in using RTC modeling as appropriate.

[48] *See* CP RTC Report (Exhibit 1) at 16.

F. Many of Metra's Concerns are Unrelated to the Transaction

55. Metra makes many claims throughout its comments that are simply unrelated to the Transaction. Nick Walker more fully discusses Metra's numerous claims of existing issues with CP's dispatching and delays to Metra's trains in his reply verified statement.[49] I provide here a few further operational comments on a couple of these issues as well as a response to the claim Metra makes concerning CP's acquisition and subsequent operation of the DM&E lines.

56. For instance, Metra complains that a typical example of CP-caused delays occurs when CP makes a crew change on the mainline tracks outside of Bensenville Yard.[50] This is entirely unrelated to the Transaction. Nonetheless, this occurs mainly for trains coming from Milwaukee on the MD-N Line seeking to enter Bensenville Yard at Tower B17, which cannot enter yard tracks in a fluid manner from that direction. This is partly due to the configuration of Bensenville Yard, which does not currently have an expedient path through Tower B17 into the current arrival tracks. As such, trains entering Bensenville Yard are required to stop and line switches. However, the Bensenville Yard reconfiguration includes power switches on the west-end, independent leads, and additional arrival/departure tracks supporting 10,000 foot trains, which together will allow for seamless entry into the yard for such trains and thus this will support both new and existing CPKC trains once the reconfiguration is completed.

57. Metra also complains throughout its comments that CP often dispatches Metra trains on the "wrong" side of the tracks from where Metra's passengers are normally picked up. Nick Walker more fully explains why this is occasionally necessary, that there is nothing unsafe about it and that Metra itself advocates for *more* cross-overs,[51] but I add that the Bensenville

49 *See* Walker R.V.S. at ¶¶ 6-53.

50 METR-7 at 40.

51 *See* Walker R.V.S. at ¶¶ 46-53.

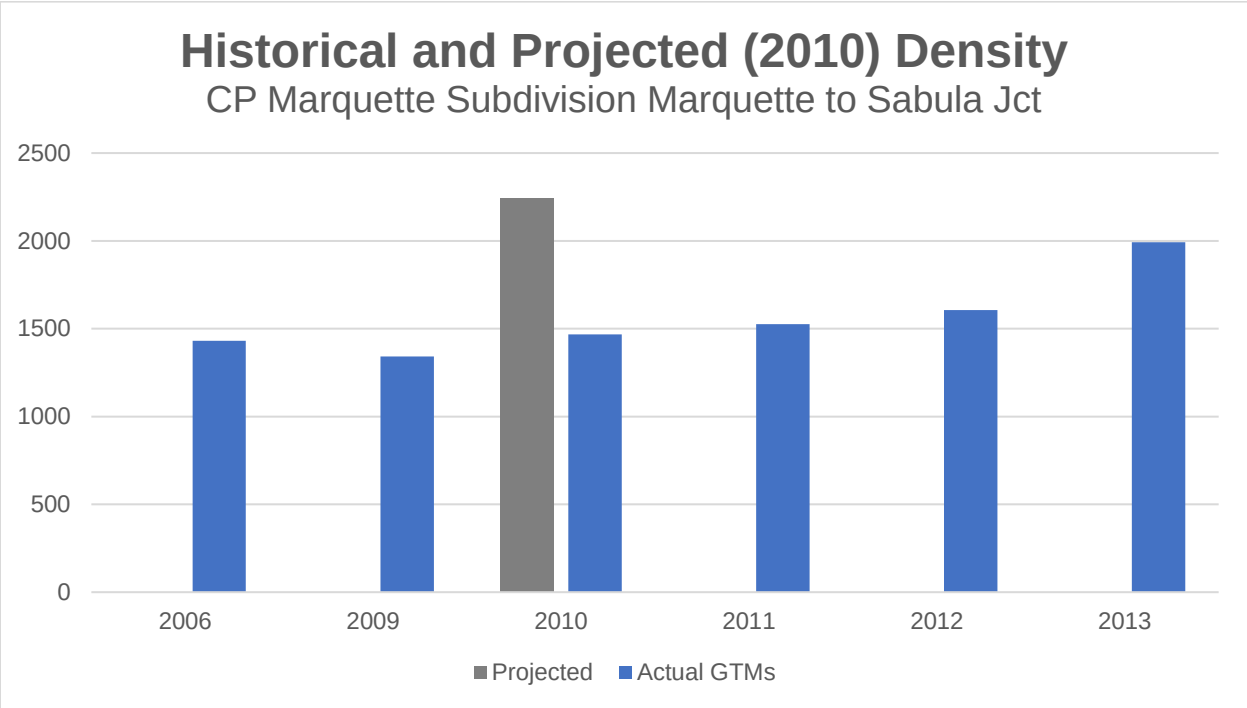
Yard reconfiguration, discussed above in Section C, combined with potential new cross-overs on the Elgin Subdivision aid in allowing for trains to either hold or revert to the normal platform side. Moreover, this issue will also not be exacerbated by the Transaction because new CPKC trains will be scheduled outside peak hours.

58. Metra also complains that CP's acquisition of the DM&E actually resulted in significant additional traffic that CP had not projected in its application at that time, seemingly with the desire that the Board will infer the same will occur with this Transaction.[52] Metra is not only incorrect on the facts of the DM&E implementation, as I explain, but its concern is entirely unrelated to this Transaction and lacks any explanation of how the DM&E implementation has any bearing on what will unfold with this Transaction. As Figure 12 below shows, traffic growth on CP's Marquette Subdivision from Marquette to Sabula Junction was actually significantly less than CP had projected in its Application at that time.[53]

[52] *See* Oppenheim V.S. at 23.

[53] Note that CP had only projected density data for 2010 in its Control Application for DM&E, which is why projections for other years are not included in Figure 12. CP takes a conservative approach when making projections due to the difficulty inherent in making projections. That CP's projection for 2010 was not met even in 2013 is a prime example

FIGURE 12[54]
ACTUAL V. PROJECTED DENSITY DATA FROM DM&E TRANSACTION



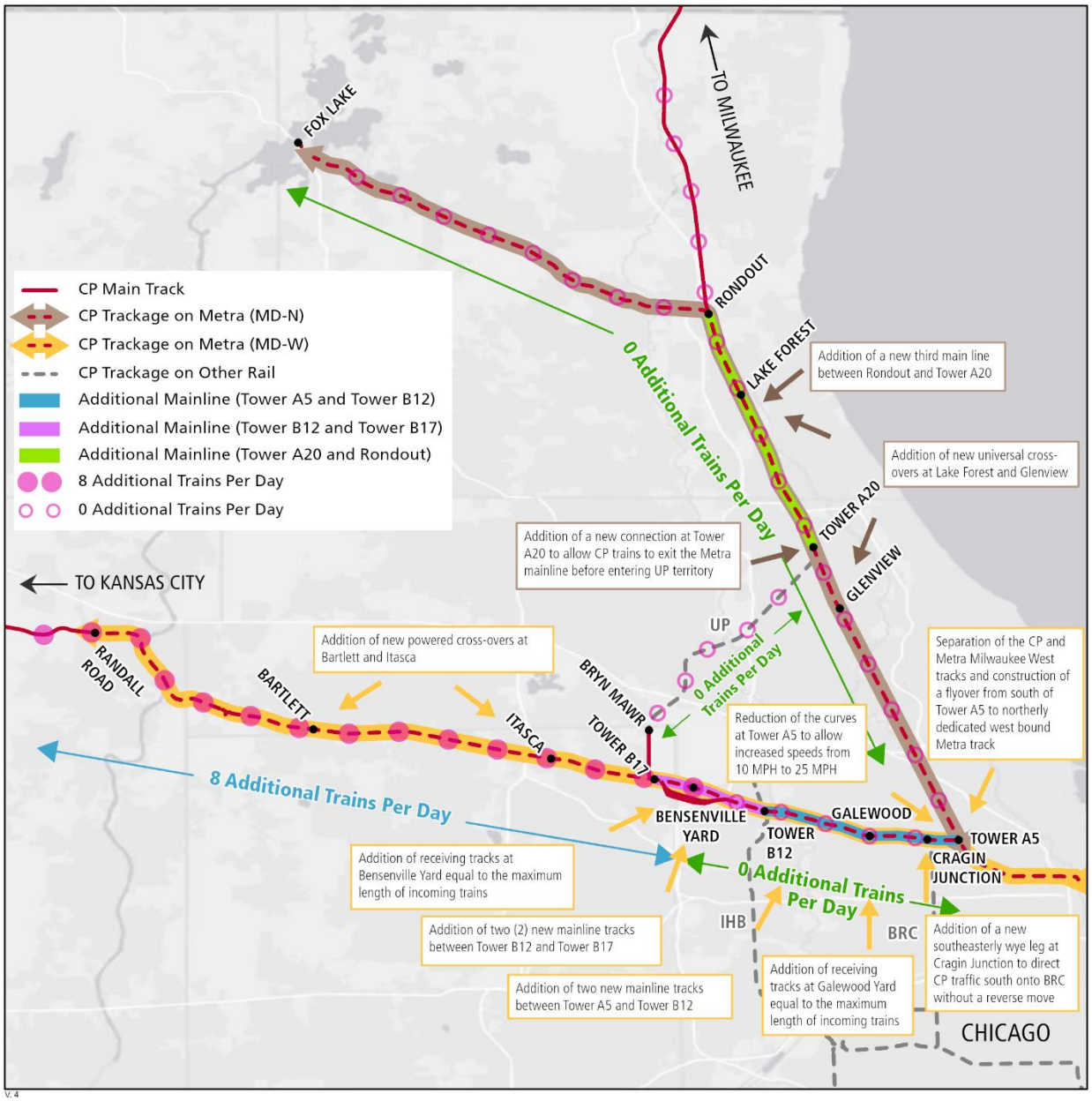
G. The Vast Majority of Metra's Infrastructure Demands Address Areas That Are Not Impacted At All By The Transaction

59. Metra requests that the Board order, as conditions to this Transaction, that CPKC pay for eleven different capacity improvements to the MD-W and MD-N Lines. For reasons I explain in this section, most of these capacity improvements are unnecessary, excessively costly, and would torpedo the Transaction.

60. *First*, most of Metra's requested capacity improvements are completely unnecessary considering that they address areas that are not impacted at all by the Transaction. Indeed, as illustrated in Figure 13 below, nine of its requested improvements are to areas of the MD-W and MD-N Lines where the Transaction will not increase train counts.

54 *See* "DME GTM Calculation.xlsx".

FIGURE 13
THE LOCATION OF METRA'S INFRASTRUCTURE DEMANDS



61. *Second*, the capital projects that Metra demands would render the Transaction uneconomical. Appendix A to this statement is a rough, tabletop cost estimate of all eleven capital improvements that Metra requests. The table below is intended to indicate that, on a conservative basis, Metra's requested infrastructure improvements could cost in the hundreds of millions of dollars in total.

62. *Third*, even if Metra's infrastructure demands were relevant to the Transaction and economically viable (to be clear, they are not), many of Metra's proposed infrastructure projects are simply impossible to construct. Indeed, as Appendix A notes, many of these requests have feasibility issues.

63. *Fourth*, as already discussed in Section C above, the Bensenville Yard reconfiguration will address Metra's request for longer receiving tracks at Bensenville Yard.

64. Lastly, I note again that CP has always been, and will remain, committed to working cooperatively with Metra. This includes working with Metra to evaluate operations and adjustment to support the coexistence of freight and passenger train operations on the MD-W and MD-N Lines.

II. THE CHICAGO COMMUNITIES' CONCERNS ABOUT INCREASED FREIGHT TRAFFIC ON CP'S ELGIN SUBDIVISION ARE MISGUIDED, AS ARE THEIR REQUESTS FOR "RELIEF"

65. I have reviewed the Chicago Communities' Comments and Supplemental Comments in this matter. I understand that they assert that the Transaction will nearly triple freight traffic through their communities, and then in their Supplemental Comments assert that the Transaction will nearly quadruple freight traffic through their communities based on a revised analysis. I understand they conclude that this supposed increase will shut down their communities and cause other serious issues. However, the Chicago Communities' assertions are untrue, and their requests are operationally untenable.

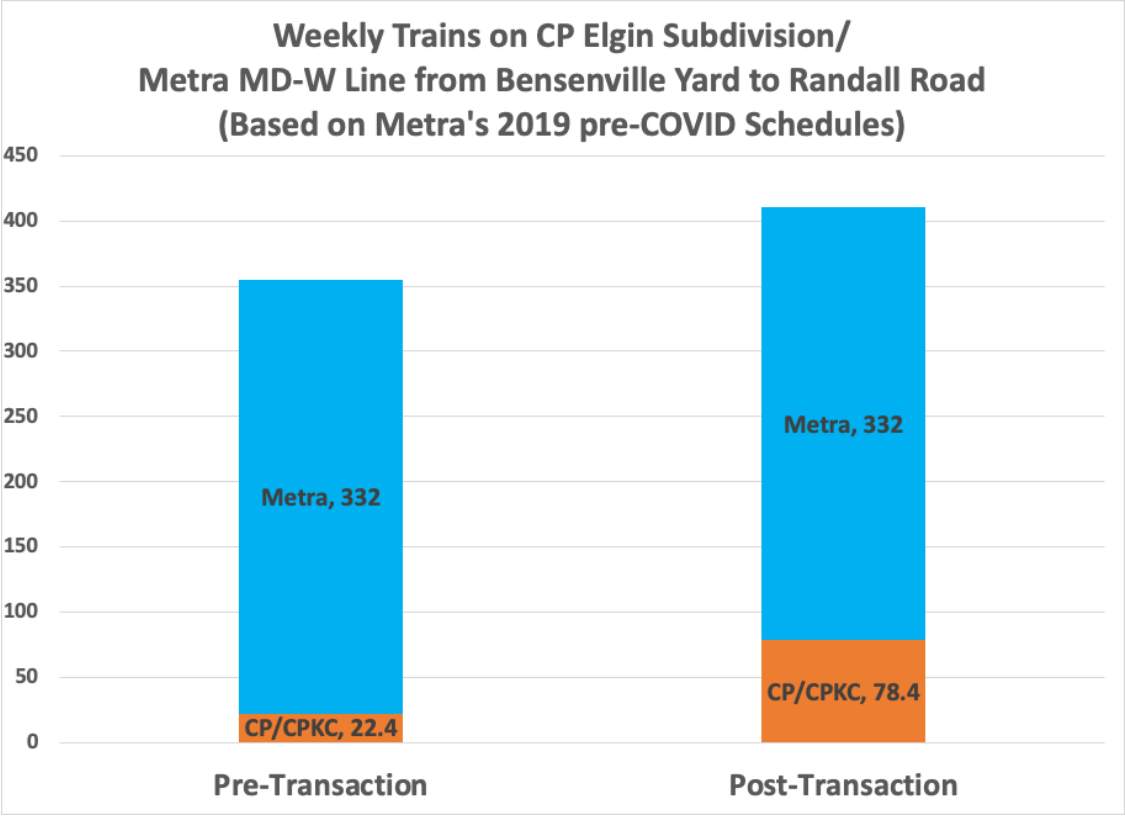
A. The Chicago Communities Do Not Accurately Characterize the Impact of the Transaction

66. The first serious problem with the Chicago Communities' assertions is that they appear to have understated the amount of traffic that presently flows through their communities. They suggest that 38 Metra trains operate per day during the week on the MD-W line, but in fact,

Metra has tended to operate 55 trains every weekday,[55] and while these traffic levels are down somewhat due to the COVID-19 pandemic, Metra anticipates a return to pre-pandemic levels.[56]

67. The second problem is that the Chicago Communities do not accurately characterize the impact of the Transaction on their communities. As set forth in Applicants' Amended Operating Plan,[57] Applicants only project an increase of eight trains per day on the MD-W line west of Bensenville as a result of the Transaction. Given the Metra traffic through these communities, CPKC traffic will remain only a small percentage of rail traffic through the Chicago Communities even after the Transaction, as shown in Figure 14 below.

FIGURE 14[58]



55 Metra MD-W Schedule (Nov. 4, 2019) (Exhibit 3).

56 METR-7, at 6.

57 Amended Operating Plan, Appendix V.

58 Metra Data Workpaper, at "All Trains."

68. Third, the Chicago Communities' assertion that this modest projected increase in freight traffic will shut their communities down is puzzling. The Chicago Communities have seen similar levels of freight traffic in the past, without issue. During the 1980s and 1990s, there were approximately 12 scheduled freight trains on the MD-W line west of Bensenville Yard daily, plus locals. Gameiro R.V.S., at ¶ 27. Further, the Village of Bartlett – one of the Chicago Communities – noted in 2016 that it receives about 10 freight trains (in addition to 58 Metra trains) per day.[59]

B. The Chicago Communities' Requests for "Relief" are Unworkable

1. The Requested Investment of $5.5 - $9.5 Billion is Wildly Out of Proportion

69. I understand that the Chicago Communities have requested $5.5 to 9.5 billion dollars in infrastructure mitigation to remediate the modest traffic increases I discussed above. Even if some amount of mitigation were justified (and I do not concede that it is), putting the request in context shows that it is wildly out of proportion for several reasons.

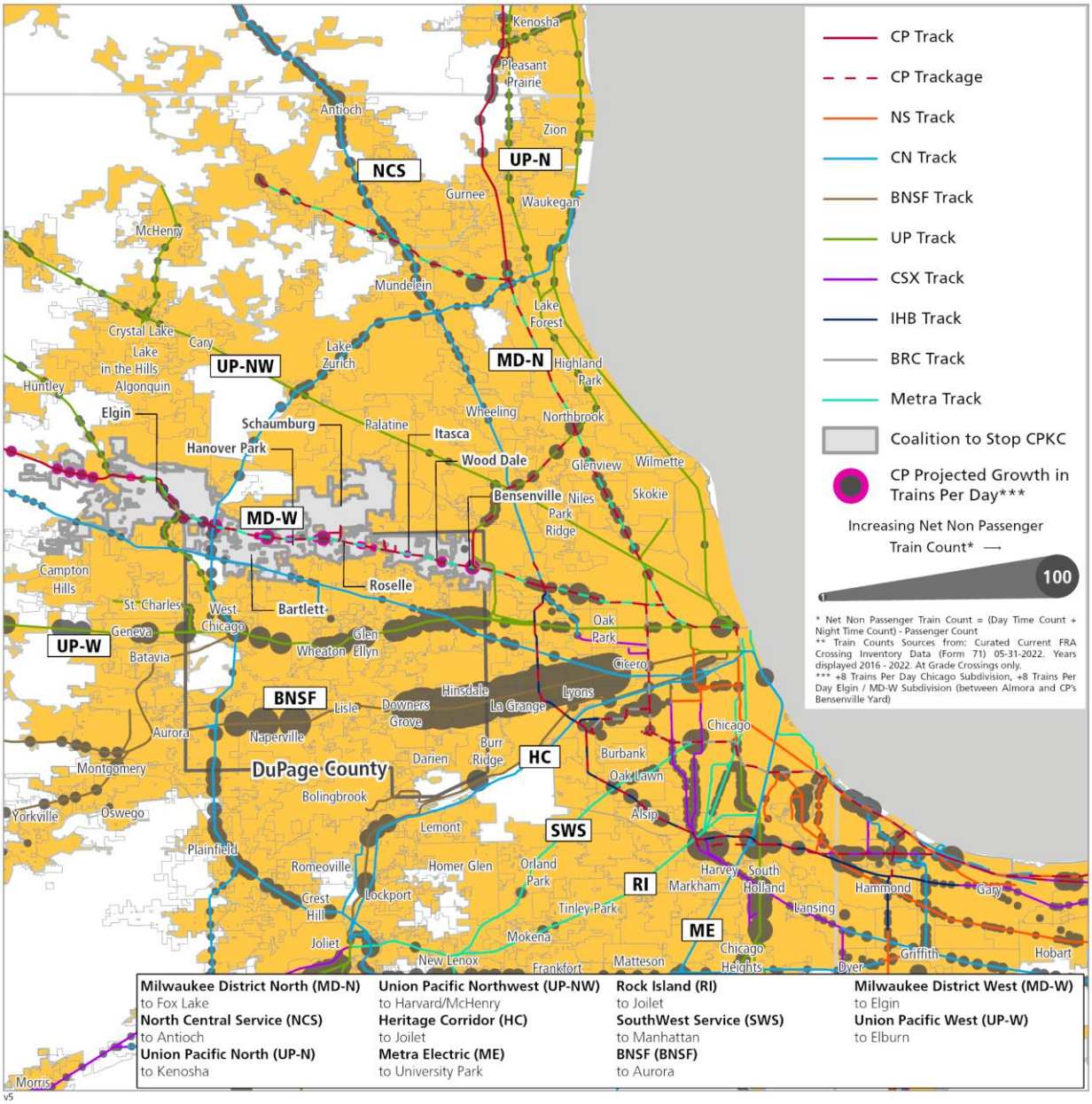
70. *First*, this proposed investment is more than is spent across the entire CREATE Program—a public-private partnership that is investing $4.6 billion dollars in approximately 70 different vital projects across the entire Chicago railroad network.

71. *Second*, the MD-W line, which is the line that extends through the Chicago Communities, is projected to receive relatively light traffic even after the Transaction by comparison to many nearby communities. However, other communities have not asked for or received the kinds of overreaching remedies that these particular Chicago Communities are demanding. For example, I understand that the Chicago Communities have asked for tens of

[59] Village of Bartlett, Downtown TOD Plan (Oct. 18, 2016) (Exhibit 4), available at https://rtams.org/sites/default/files/digital_documents/4099_Bartlett_TODPlan_2016.pdf.

millions of dollars to be invested in tunnel projects, but communities like Wheaton, LaGrange and Hinsdale get a lot more traffic than the Chicago Communities, and do not have such tunnels. Figure 15 below puts the Chicago Communities' arguments in context by showing comparative train frequency for key lines radiating from Chicago.

FIGURE 15
MAP SHOWING COMPARATIVE CROSSING OCCUPANCY FREQUENCY FOR KEY LINES RADIATING FROM CHICAGO



2. The Chicago Communities' "Anywhere But Here" Proposals, Which Seek to Prevent *Any* Increase in Freight Traffic Through Their Communities, are Unfair and Impractical

72. I understand that the Chicago Communities have also asked the Board to ensure that there is no increase in freight traffic through their communities. Considering this request from an operational standpoint reveals that the request is impractical and unfair.

73. As noted above, many nearby communities experience much *more* traffic than the select group of Chicago Communities that submitted filings in this proceeding. If the Board were to order that the Chicago Communities should be protected from *any* increase in freight traffic, this traffic would have to travel circuitous routes through other communities instead.

74. Further, prohibiting CPKC from sending more freight traffic through the Chicago Communities would cut the CPKC network off from the rail network at and beyond Chicago. This would preclude CPKC from competing for traffic moving to Detroit, eastern Canada and the eastern United States. It would make CPKC offerings non-competitive in the marketplace. And it would generate an increase in net emissions as the freight traffic traveled through longer, more circuitous routes instead. I address some of the Chicago Communities' specific proposals below.

75. ***Rerouting CPKC Trains Via LaCrosse and Milwaukee, WI.*** This would require the CPKC trains to traverse hundreds of unnecessary miles through dozens of other communities when a much more direct route through the Chicago Communities is available. Specifically, routing CPKC trains from Kansas City via LaCrosse to Chicago or Bensenville would add either 312 additional miles via Tower A-20 or 324 additional miles via Tower A-5 and two extra crew changes. Routing CPKC trains from St. Paul via LaCrosse and Milwaukee to Bensenville via Tower A-5 to Kansas City would add 252 additional miles and one extra crew change. These more circuitous routes would result in additional costs, crew resources, heightened emissions and

would strain infrastructure along the route. The extra freight traffic would adversely affect the MD-N lines and Amtrak. It would also have the potential to constrain Metra between Rondout, A20, A5, B12, and B17. And this less competitive offering would hurt CPKC in the marketplace and undermine the value of the Transaction.

76. ***Halting CPKC Trains West of Randall Road Through New Intermodal Facility.*** This would not allow connectivity with the rail network east of Chicago. It would require the costly construction of a new intermodal facility. Bensenville Yard is situated in the Northwest corner of Chicago, which reduces truck traffic in Chicago. This new intermodal facility would result in a huge number of additional trucks on I-20 between Chicago and there, just to get the traffic to the new facility. Finally, it is unclear how this proposed solution even alleviates the Chicago Communities' concerns because at the very least existing intermodal trains from eastern and western Canada would route via Bensenville and west. The non-intermodal portions from KCS and KCSM would also have to proceed through Chicago and beyond.

77. ***Trackage or Haulage on CN Chicago to Kansas City***. This request is simply not practical, because CP does not have rights over CN. In any event, it is illogical because it would deprive the CP network of density that supports investment and better train services. On trackage rights, this routing would not connect with Bensenville facilities without routing through the Chicago terminal to the southside or through the very Chicago Communities protesting to connect with the EJ&E. And on haulage rights, traffic would interchange to the CN at Spaulding or under the present ruling force significantly more traffic to be routed to the BRC. This routing would require a massive investment along the Springfield Line and Gilman Subdivision and likely on CN routes in between Chicago and the Springfield Line.

3. Turning Any Projection Regarding Train Lengths Into a Mandate Would Not Make Operational Sense

78. I understand that the Chicago Communities have asked the Board to freeze a projection that average train lengths will decrease on the Chicago and Elgin Subdivision into a condition of approving the Transaction. Respectfully, this would be unworkable. This would deprive CPKC of the operational efficiency and flexibility it needs to unlock public benefits from the Transaction. At present west of Bensenville, there are only two scheduled trains per day, and they do not meet between Bensenville and Savanna. Naturally, as train counts increase, CPKC's schedules, execution and train lengths would increasingly migrate to siding standard. On any given day however, conditions may be present to allow a train to move out onto the network and set off traffic downstream. For example, work activities or service interruptions may stem the flow in one direction allowing the other direction to run longer than siding standard. To restrict train length would take away the flexibility to provide service and recovery, and to match the conditions of the network.

79. Further, I understand that the Chicago Communities have also asked for a condition that the decrease in train length not be accompanied by an increase in the number of freight trains. This request is at odds with existing business/service and with our projection of a decrease in train length, as that projection is directly tied to a modest increase in the number of freight trains.

C. The Chicago Communities' Assertion that Projected Traffic Through Their Communities Changed as a Part of the Amended Operating Plan is Untrue.

80. I understand that the Chicago Communities have asserted that the projected increase of trains resulting from the Transaction west of Bensenville increased from 7.1 trains to 8.0 trains per day in our Amended Operating Plan, and that our Amended Operating Plan

attempted to conceal this fact. However, that is not true. Both the original Operating Plan and Amended Operating Plan projected an increase of 8.0 trains as a result of the Transaction.

81. The Chicago Communities appear to have zeroed in on two paragraphs in the original Operating Plan (App., Vol. II, ¶¶ 153, 185) that referred to an increase of 7.1 trains per day. However, this was a reference to a particular segment not the whole line west of Bensenville that appeared in two paragraphs of the original Operating Plan. The original Operating Plan itself, like the Amended Operating Plan, relied on projections of 8.0 additional trains on the Elgin Subdivision west of Bensenville.

82. I understand that the Chicago Communities have asked that the Board direct Applicants to provide details concerning the 8.0 trains' size and expected commodities. However, there is already substantial information on this topic available in the Application and accompanying Workpapers.[60]

III. HENNEPIN COUNTY'S CONCERNS ARE MISGUIDED

83. I have also reviewed the comments of Hennepin County ("Hennepin"), which assert various environmental and safety concerns. For the reasons described below, such concerns are misguided.

A. Hennepin's Concerns about Increase in Truck Traffic at CP's Minneapolis Intermodal Facility Are Unfounded

84. Hennepin has raised environmental concerns regarding a small projected increase in truck traffic at CP's Minneapolis Intermodal Facility at Shoreham Yard. Applicants project an increase in 53 trucks per day, and the OEA's review threshold is 50 trucks per day. Thus, this projected increase just barely triggers the OEA's review procedures. I understand that OEA is

[60] *See, e.g.*, Amended Operating Plan, ¶¶ 109-13, 159-61, Appendix I, Appendix T; Workpaper "Trains Per Day and Gross Ton Miles."

reviewing this issue and will make recommendations to the Board, meaning that Hennepin's concerns are not properly directed at this forum. Regardless, I make the following comments from an operational perspective.

85. *First*, the projected traffic increases are very modest. They amount to an increase of 86 container handlings per day – from a daily average of 373 in 2019 to a projected daily average of 459 per day.[61] This is very similar to the volume these facilities saw in 2012-14, when the facility averaged 438, 435 and 428 containers per day respectively.[62]

86. *Second*, the anticipated additional daily volume at the facility will amount to significantly less than one trainload per day (in the range of 39 containers originating and 47 containers terminating – amounting to approximately 53 additional drayage moves).[63]

87. *Third*, even after the Transaction, the majority of rail traffic through the Hennepin County rail network will not be CP traffic.

B. Hennepin's Other Concerns Are Similarly Unfounded

88. Outside of intermodal traffic increases as the Minneapolis Intermodal Facility, none of the other projected traffic increases Hennepin discusses are large enough even to trigger OEA's review. Regardless, I make the following points from an operational perspective.

89. Hennepin expresses concerns that recent "industry trends" towards increased train lengths may result in "longer delays at crossings."[64] Because this concern is based on "recent trends" that Hennepin perceives, this concern does not seem to actually be about the Transaction.

61 Amended Operating Plan, Table 13.

62 Minneapolis IMS Terminal Handlings 2002 – 2021 Workpaper.

63 Workpaper "IMS Trucks Final."

64 Hennepin Comments, at 13.

Hennepin calls the Board's attention to 14 crossings in particular that it is most concerned about being impacted by the Transaction. Hennepin also expresses concerns about impact on Humboldt Yard from the Transaction, and how this will affect crossings.[65] As I noted, projected traffic increases through Hennepin resulting from the Transaction are exceedingly modest. As illustrated in Hennepin County Crossings (attached as exhibit 5 hereto), Hennepin's concerns are unfounded.

- Two of the crossings Hennepin identifies are actually grade separated, meaning rail traffic and vehicle traffic will not intersect.

- A total of 10 crossings will only see four additional bulk trains as a result of the Transaction. However, these trains are not expected to depend on Humboldt Yard because they do not serve any of the relevant industries that use that facility.

- Further none of these 14 crossings have any notable problems with blocked crossings today. Only 2 of the 14 crossings have received complaints in the FRA Blocked Crossing Incident Reporting the past 2 years. The two crossing are Central Avenue NE and Humboldt Avenue. At Humboldt there were seven total reports in the last two years, and at Central Avenue NE there were three total reported incidents.[66] Humboldt activity will not change with the exception of the four added bulk trains. The impact of the change in containers as it pertains to Central Ave NE will be reviewed through the OEA analysis.

90. Hennepin also expresses concerns about increases in hazardous materials shipments through Hennepin County. Hennepin misunderstands the additional hazardous traffic that will pass through Hennepin County, as it is counting empty tank cars returning for another load of the same commodity in its hazardous shipment volumes. It is important to note that the volume of hazardous commodities routed through Hennepin will not be large, and is only slightly more than the hazardous materials that traversed Hennepin in 2018 and 2019.[67]

[65] Hennepin Comments, at 14-15.

[66] FRA Blocked Crossings Report, https://www.fra.dot.gov/blockedcrossings/ (last accessed July 11, 2022).

[67] *See* Workpaper "Hennepin County Hazmats – historical and projected volumes."

IV. TRANSACTION IMPLEMENTATION WILL FACILITATE, NOT THREATEN, CPKC'S ABILITY TO PROVIDE HIGH QUALITY SERVICE

91. Finally, I understand that certain commenters have raised concerns about whether Transaction implementation will have an impact on CPKC service levels. My close involvement in Applicants' Transaction implementation planning (which is already well under way) gives me confidence that CPKC will be in a position to hit the ground running and provide safe, reliable and competitive service to customers from day one and without disruption.

92. Applicants' Operating Plan was designed in the way the Operating Plan Team would design a railroad in the ordinary course of business, and Applicants' post-Transaction planning and systems development has been consistent with this approach. During the integration phase following the Transaction, CP's ordinary course operational approach and expectations will guide CPKC's commitment to its customers and its implementation of the Operating Plan outlined in the Application. CP's operating philosophy, which will guide CPKC after the Transaction, empowers on-the-ground operating team managers (at the trainmaster level) to meet customer needs. At CP, the trainmaster is expected to understand the train density and traffic patterns of every single customer not just in the local area, but over the entire run. The trainmaster is also given the responsibility to ensure that CP delivers on what it promised. CP's culture of accountability will facilitate meeting these plans.

93. The proposal of some commenters that there be rigid requirements not to make changes without advance notice, or a regime of monetary penalties, ignores the fundamentals of railroading. There will be external events that require adjustment and flexibility; railroading is an outdoor sport. Any rigid approach, or incentives to invent controversy, would be counterproductive. As just one example, every manifest train serves more than forty customers. The inability to make any quick changes in response to heavy traffic in one area could prevent

operations from being improved for thirty-five of those customers to serve the parochial interests of a small handful.

Appendix A
The Cost of Metra's Infrastructure Demands

Metra's Request	Feasibility	Number of additional merger-related trains	Potential cost in $USD (if even feasible)
Require construction of a new third mainline track from Rondout to A-20.	12 miles of new track This would impact 4 Metra stations that would need to be rebuilt. 4 grade separations that are only built for 2 tracks and would need to be rebuilt. Does not appear feasible.	0	$400,000,000
Require construction of new universal cross-overs at Lake Forest and Glenview.	Both of these locations are receiving universal cross-overs as part of the Amtrak Hiawatha agreement.	0	Part of Amtrak agreement
Require construction of new connection at A-20 to allow parallel moves to new extended connecting tracks to allow CP trains to exit Metra mainline tracks before entering UP territory.	This was looked at before as part of the Hiawatha expansion and citizens of Glenview were vocal in opposition to the construction of any additional track at this location.	0	$20,000,000
MD-W, Tower B-12 to B-17: Require construction of two new mainline tracks.	10 Miles of new track Impossible east of B-17 because of the Illinois Tollway, UP Trackage and O'Hare Airport, but also unnecessary because CREATE work has already made this triple track and train counts will not increase east of Bensenville from the Transaction	0	$50,000,000
Require construction of new powered cross-overs at Bartlett and Itasca.	Bartlett cross-overs with north platform would have to be relocated to accommodate	8	$10,000,000
At Bensenville Yard, require CP to construct receiving tracks equal to the length of incoming trains or equal to	Bensenville yard expansion in progress by CP	8	Currently under construction

Metra's Request	Feasibility	Number of additional merger-related trains	Potential cost in $USD (if even feasible)
the maximum length possible.			
MD-W Tower A-5 to B-12: Require construction of two new mainline tracks.	14 miles of new track Currently 3 mains between A5 and B12, there does not appear to be room to add any more track as there are 6 Metra stations between A5 and B12. As well as a number of road crossings and grade separations that do not appear to have room to construct any more tracks.	0	$250,000,000
Require CP to pay for new southeasterly wye leg at Cragin Junction to direct CP traffic south to BRC without a reverse move.	Does not appear feasible as there are a number of warehouses/buildings and businesses in the way	0	$100,000,000
At Galewood Yard, require CP to construct receiving tracks equal to the length of incoming trains or equal to the maximum length possible.	Potential to extend ~1500' to the west and ~500' to the east. This would appear to take out a Metra parking lot at the West end.	0	$15,000,000
MD-W, Tower A 5: Require reduction in curves to increase speeds from 10 MPH to 25 MPH for moves to the MD-W. ii. Require CP to separate CP and Metra MD-W tracks and construct fly-over from south of A-5 to MD-W dedicated Metra tracks and dedicated freight connection in NW quadrant interlocking to facilitate freight movements to and from MD-N to MD-W without a reverse move	Unable to determine if feasible	0	$250,000,000
Total			**$1,095,000,000**

VERIFICATION

I, Raymond A. Elphick, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12 day of July, 2022.

Raymond A. Elphick

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ELPHICK R.V.S. EXHIBIT 1

HIGHLY CONFIDENTIAL - CP RTC REPORT

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ELPHICK R.V.S. EXHIBIT 2

B17 AND B12 – FREIGHT WINDOWS – A – REFERENCED IN DEPOSITION HELD ON 06-07-2022.XLS

TOWER B17 - WEEKDAYS

PUBLIC VERSION

	MILW-E		MILW-W				WINDOWS		
		0113	**2725 (Mon only)**				**0001-0520**	**(Clear 0110 MON)**	
	2202	0528							
	2204	0611					**0535-0605**		
	2206	0628							
	2208	0636							
	2210	0656							
		0659	**2203**						
	2212	0709					**0713-0733**		
	2216	0737							
	2222	0756							
		0806	**2205**						
	2226	0809					**0812-0900**		
	2228	0905							
		0906	**2209**				**0910-1000**		
	2230	1005					**1010-1100**		
		1103	**2213**						
	2232	1105					**1110-1300**		
		1303	**2217**						
	2236	1305					**1310-1405**		
		1413	**2219**				**1420-1500**		
		1503	**2221**						
	2240	1505					**1510-1600**		
	2242	1605							
		1607	**2223**				**1610-1635**		
		1638	**2225**						
	2244	1705							
		1707	**2227**						
		1723	**2233**						
		1737	**2235**						
		1750	**2237**						
	2246	1805							
		1815	**2239**				**1817-1835**		
		1838	**2243**						
	2248	1905					**1840-1900**		
		1915	**2247**				**1920-2010**		
		2015	**2249**				**2020-2100**		
	2252	2105							
		2115	**2251**				**2120-2310**		
		2313	**2255**				**2320-0520**	clear 0110 MON	

TOWER B17 - WEEKDAYS

PUBLIC-RADIO VERSION

	MILW-E		MILW-W	B12-GW				WINDOWS		
		0108	**2725 (Mon only)**					**0001-0530**	**(Clear 0105 MON)**	
	2202	0535		**#3 MT**						
	2204	0616								
	NC-100	***0629***								
	2206	0635						**0540-0630**		
	2208	0643		**#3 MT**						
	NC-102	***0708***								
		0652	**2203**							
	2210	0701								
	2212	0716		**#3 MT**				***0720-0735***	*(15 min)*	
	NC-108	***0738***								
	2216	0743								
		0800	**2205**							
	2222	0801								
	NC-110	***0812***								
	2226	0816		**#3 MT**				**0820-0855**		
		0900	**2209**							
	2228	0911		**#3 MT**				**0915-1005**		
	2230	1011		**#3 MT**				**1015-1050**		
		1057	**2213**							
	2232	1111		**#3 MT**				**1115-1250**		
		1258	**2217**					**1315-1405**		
	2236	1311		**#3 MT**						
		1408	**2219**					**1410-1450**		
		1458	**2221**							
	2240	1511		**#3 MT**						
		1600	**2223**							
	2242	1605		**#3 MT**				**1610-1630**		
		1632	**2225**							
	NC-116	***1644***								
		1649	***NC-109***							
		1652	**2227**							
	2244	1705		**#3 MT**						
		1709	***2229***							
		1717	**2233**							
	2404	1723								
		1724	***NC-113***							
		1732	**2235**							
		1744	**2237**							
		1757	***NC-115***					**1835-1905**		
		1810	**2239**							
	2246	1811		**#3 MT**				**1915-2005**		
		1822	***NC-117***					**2015-2105**		
		1837	**2243**							
		1910	**2247**					**2115-2305**		
	2248	1912		**#3 MT**				**2300-0530**	clear 0105 MON	
		2010	**2249**							
		2110	**2251**							

TOWER B17 - WEEKDAYS

READ FROM PUBLIC-RAIL TIMETABLE

	2252	2112		**#3 MT**						
		2308	**2255**							

TOWER B17 - WEEKDAYS

RED = ADD PUBLIC-ROVER VERSION

	MILW-E		MILW-W				WINDOWS		
		0113	***Sun-Mon only***				**0001-0625**	**(Clear 0110 SUN)**	
	2700	0632							
	2704	0832					**0635-0825**		
		0903	**2703**				**0835-0855**		
	2708	1032					**0905-1025**		
		1103	**2707**				**1035-1055**		
	2714	1232					**1105-1225**		
		1303	**2709**				**1235-1255**		
	2716	1432					**1305-1425**		
		1503	**2711**				**1435-1455**		
	2718	1632					**1635-1655**		
		1703	**2715**				**1705-1825**		
	2720	1832					**1835-1910**		
		1913	**2719**				**1915-2040**		
	2722	2047					**2050-2105**		
		2113	**2721**				**2115-2240**		
	2724	2247					**2250-2310**		
		2313	**2723**				**2315-0110**		
Sun-Mon only		**0113**	**2725**				**0115-0525**	**0625 SUN, 0525 MON**	
							1817-1835		
							1840-1900		
							1920-2010		
							2020-2100		
							2120-2310		
							2320-0520	clear 0110 MON	

TOWER B17 - WEEKDAYS

PUBLIC-RADIO VERSION

	MILW-E		MILW-W				WINDOWS		
		0108	***Sun-Mon only***				**0001-0635**	**(Clear 0110 SUN)**	
	2700	0639							
	2704	0839					**0645-0830**		
		0858	**2703**				***0840-0855***	***15 min***	
	2708	1039					**0900-1030**		
		1058	**2707**				***1040-1055***	***15 min***	
	2714	1239					**1100-1230**		
		1258	**2709**				***1240-1255***	***15 min***	
	2716	1439					**1300-1430**		
		1458	**2711**				***1440-1455***	***15 min***	
	2718	1639					**1500-1630**		
		1658	**2715**				***1640-1655***	***15 min***	
	2720	1839					**1700-1830**		
		1908	**2719**				**1840-1905**		
	2722	2049					**1910-2040**		
		2108	**2721**				***2040-2055***	***15 min***	
	2724	2249					**2110-2240**		
		2308	**2723**				***2240-2255***	***15 min***	
Sun-Mon only		**0108**	**2725**				**2310-0105**		
							0110-0525	**0625 SUN, 0525 MON**	
							1510-1600		

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ELPHICK R.V.S. EXHIBIT 3

HIGHLY CONFIDENTIAL - METRA MD-W SCHEDULE (NOV. 4, 2019)

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ELPHICK R.V.S. EXHIBIT 4

VILLAGE OF BARTLETT, DOWNTOWN TOD PLAN (OCT. 18, 2016) (EXCERPT)

REDACTED PUBLIC RECORD VERSION



Village of Bartlett

Downtown TOD Plan

ADOPTED 10.18.2016

REDACTED PUBLIC RECORD VERSION



Legend

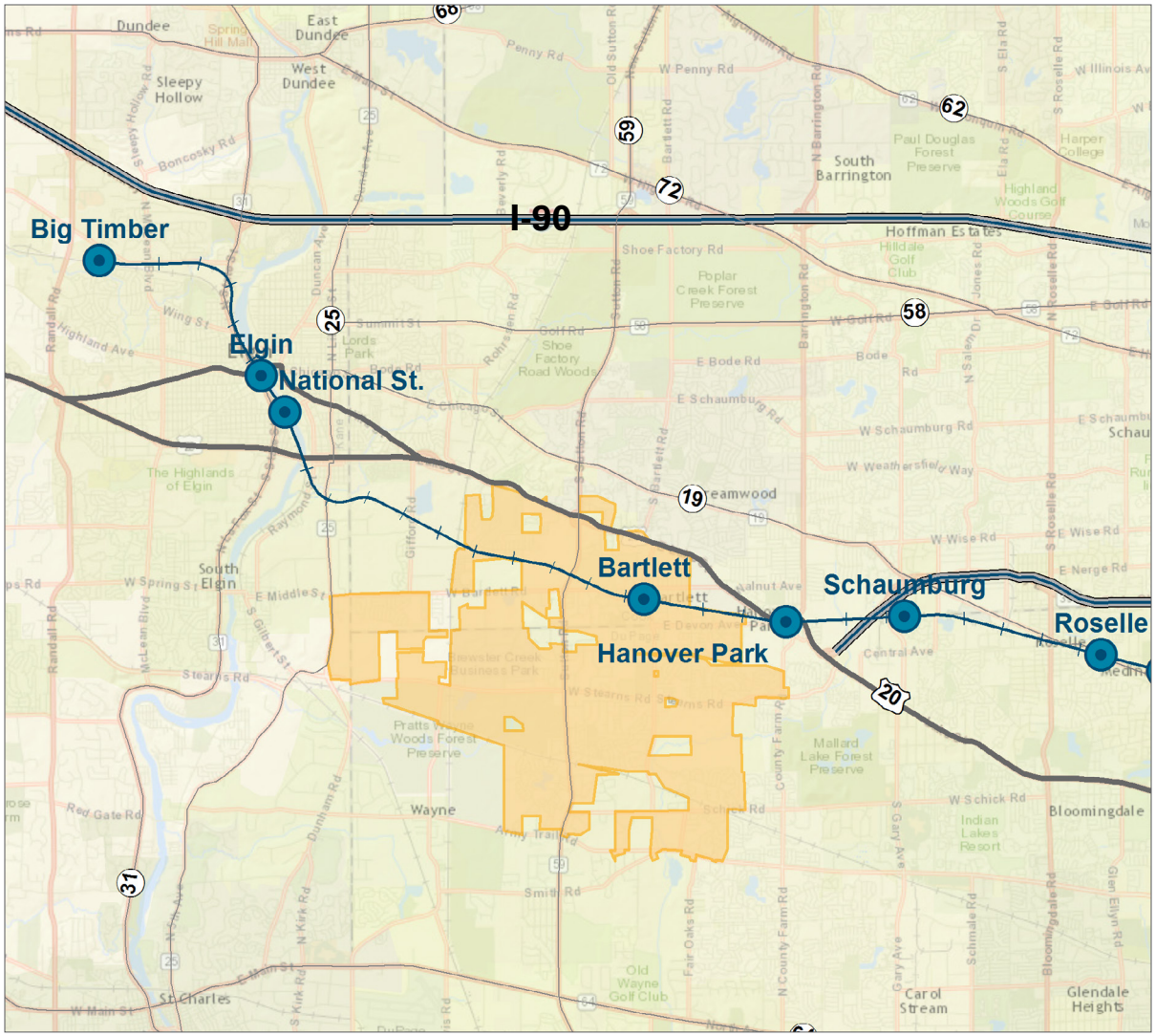
1. Senior Flexonics
2. Bartlett Plaza Shopping Center
3. US Post Office
4. CVS
5. BMO Harris Bank
6. American Charter Bank
7. V&V Paesano Pizzeria
8. Main Street Plaza Shopping Center
9. Village Hall
10. Police Department
11. Hanover Township Emergency Services
12. At&T Data Center
13. Platform 18
14. Banbury Fair
15. Dance Motions Inc.
16. Bartlett Smiles
17. Spin Doctor Cyclewerks
18. Associated Bank
19. JC's Mexican Restaurant
20. TI's Four Seasons
21. Town Center Shopping Center
22. Bartlett Elementary School
23. St. Peter Damian Catholic School

Study Area Overview

The study area for the TOD Plan is focused on the walkable district surrounding the Metra station which includes Bartlett's core Downtown retail and residential zone, as well as schools, professional offices, major employers, and park spaces. The TOD study area covers roughly 240 acres of land, and is bounded by Western Avenue, North Avenue, South Prospect Avenue and West Devon Avenue (shown on the facing page).

The Village of Bartlett is located roughly 35 miles northwest of Downtown Chicago, and includes portions of the Lake Street / Illinois Route 20 and Illinois Route-59 corridors. The Village is split between Cook, DuPage, and Kane Counties, and shares boundaries with the neighboring communities of Elgin, South Elgin, Streamwood, Hanover Park, Carol Stream, West Chicago, and Wayne.

Bartlett's Metra station is located on the Metra Milwaukee District West Line, that provides service from downtown Chicago – Union Station to Big Timber Road in Elgin. There are approximately 68 trains per day through Downtown Bartlett, of which 58 are Metra commuter trains (weekday trains) and about 10 are freight trains.



Metra Milwaukee District West Line Context Map
Source: ESRI

Study Area Overview

Demographics

The population of Bartlett in 2015 is estimated to be 41,299. It has grown by 12.5% in the past fifteen years, with the majority of this growth seen between 2000 and 2010. Since 2010, the population has remained steady, and is only projected to increase slightly by 2020.

An estimated 76.1% of the population in Bartlett identifies as White. Asians make up the largest minority, comprising 15% of the population. The Hispanic population of Bartlett has increased significantly since 2000. It now is estimated as 11% of the population.

Age Distribution

The median age of residents in the community has increased 15.9% since the 2000 Census, from 33.4 to 38.7 years. CMAP estimates the median age in the seven-county region is 36.0. As the population continues to age, the municipality will have to plan accordingly for these growing populations.

Three segments of the population in Bartlett are increasing:

- Individuals in their young 20's
- Those aged 45 – 54, who are typically in their peak earning years
- Seniors, both 55 -74 and 75+



Historic retail buildings along Bartlett Avenue



Existing condominiums in the Town Center

Housing Characteristics

Bartlett's housing stock, which has a total of 14,187 units, is predominantly made up of owner-occupied units (a total of 88.1%). The housing vacancy rate is only 2.9%, which is considered very low and a positive indicator by most standards.

More than 90% of homes within Bartlett were constructed in the decades spanning 1970 to 2009. The 1990s were the most significant decade for housing construction within the Village, with 5,327 homes built during this ten year period (37% of the housing stock).

As measured by the issuance of residential building permits, annual new home construction volumes over the last 10 years peaked in 2005 with 511 single family and 238 multi-family permits issued – then tumbled into a deep hole as the housing and financial market crises hit and the regional and national economies fell into recession. Construction volumes within the Village have yet to recover, having hovered near zero since 2008.

During the past few years, Bartlett has only permitted 20 single family residential units and no multifamily units. Streamwood has permitted a total of 150 single family and multifamily units during the same time frame.

Study Area Overview

The Downtown Bartlett Study Area encompasses a wide variety of housing types, including detached single family homes and multi-family rental apartments, townhomes, and condominiums.

Downtown Employment

Senior Flexonics, located on Devon Avenue, is Downtown's largest employer with 400 employees. They manufacture flexible mechanisms for exhaust, cooling, and fuel distribution systems. According to the Human Resources Manager for Senior Flexonics, most employees travel from neighboring suburbs to work at the location and the overwhelming majority commutes via personal vehicle.

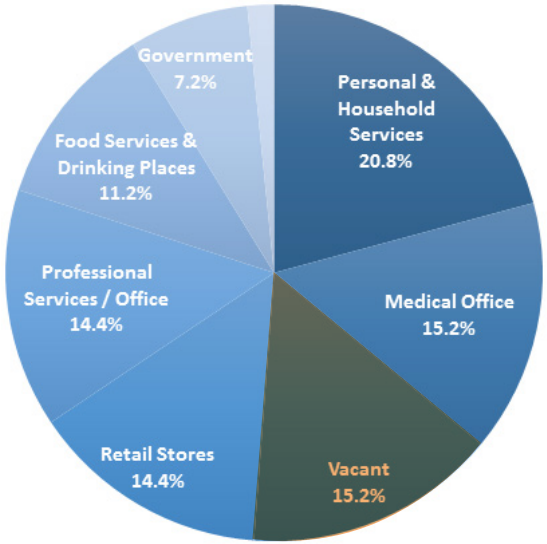
Many other Downtown employees work in Village Hall, the Fire Department, or Bartlett Elementary School. Together with the manufacturing jobs at Senior Flexonics, these industries comprise nearly two-thirds of the Downtown employment. Fourteen restaurants and 18 retail stores are located Downtown, employing 150 people.

Downtown Commercial

Nineteen storefronts in Downtown Bartlett are vacant, a relatively high percentage. Retail and Restaurants comprise of 25.6% of total establishments. Professional and medical offices and other service businesses together comprise 50.4% of the total businesses in Downtown Bartlett.

Bartlett does not have as much retail as its neighboring communities as measured by annual retail sales tax. It collected just over $2 million in retail sales tax in 2014 as compared to $7.9 million in Bloomingdale.

Downtown Business Inventory



Source: Goodman Williams Group



Town Center mixed-use building along Main St



Older vacant commercial along Main St

Study Area Overview

Metra Rail Ridership

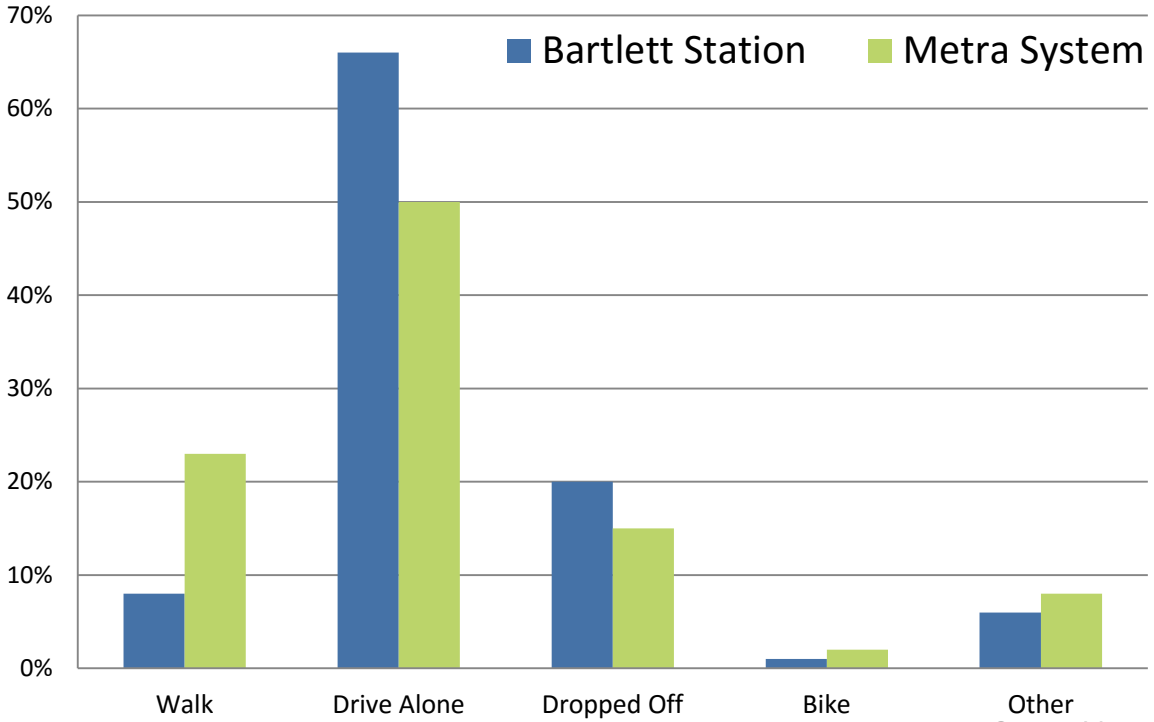
Per Metra's most recent ridership surveys (2014), there are 1,081 typical weekday boardings at the Bartlett station. Ridership at this station grew considerably in the 1980s and has been relatively stable since. Bartlett is appealing to commuters because it is the last station in Metra's Zone F, which is two fare zones lower than the next closest station to the west (Elgin, National Street).

Getting to the Station

Mode of access to the station is predominantly by driving alone/parking, followed by being dropped off as shown to the right. Bartlett has a higher drive alone access to the station and a much lower number of riders who walk compared to both the MD-W line and the Metra system as a whole.

The Bartlett Metra station attracts riders from a fairly wide area, drawing as far west as South Elgin, as far north as Schaumburg, and as far south as Army Trail Road. This could be attributable to the fare zone location and availability of daily fee parking spaces. Drawing from this large of an area also contributes to the higher percentage of drive alone access to the station.

How Commuters Get to the Metra Station



Source: Metra

Key Metra Commuter Considerations

Commuter parking: Existing parking is 85% utilized. This is the level at which additional parking resources may need to be considered.

Access to Metra station: The highest percentage of commuters who access the Bartlett station drive alone and park, while the walk access is very low. Improvements to the pedestrian/bicycle network should be a focus of future work to make walking and biking to the station more attractive.

Commuter Lot 11: The Village purchased this commuter lot, located north of the tracks and east of Western Avenue, in April 2009 with interest in redeveloping the parcel. As part of the sale of this property, the Village agreed that when the parcel is redeveloped, it will

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

ELPHICK R.V.S. EXHIBIT 5

HIGHLY CONFIDENTIAL - HENNEPIN COUNTY CROSSINGS

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF STEPHEN D. SIMMONS

TABLE OF CONTENTS

I. CAPACITY FOR CPKC TRAINS ON THE BEAUMONT-ROBSTOWN TRACKAGE RIGHTS ALREADY EXISTS, AND THERE ARE AGREEMENTS ALREADY IN PLACE FOR CREATION OF NEW CAPACITY IF NEEDED.....5

II. THERE IS AMPLE CAPACITY FOR ADDITIONAL CPKC TRAINS ON THE NECHES RIVER BRIDGE.....22

III. NS AND BNSF REQUESTS FOR TRACKAGE RIGHTS FROM THE DALLAS AREA TO SHREVEPORT ARE UNRELATED TO THE MERGER AND ARE INSTEAD ATTEMPTS TO GET COMMERCIAL RIGHTS FOR WHICH THEY HAVE NOT NEGOTIATED OR PAID.....27

IV. THE NEW ORLEANS INTERCHANGE AGREEMENT WAS ALWAYS MEANT TO BE TEMPORARY AND CSX'S REQUEST TO MAKE IT PERMANENT IS AN ATTEMPT TO HAVE THE BOARD IMPOSE COMMERCIAL RIGHTS THAT CSX HAS NOT NEGOTIATED OR PAID FOR AT THE EXPENSE OF CPKC.....39

V. LYONDELLBASELL'S PROPOSED RECIPROCAL SWITCHING AT LAKE CHARLES HAS NO NEXUS TO ITS STATED SERVICE CONCERNS.....42

EXHIBITS

EXHIBIT 1: JUNE 29, 2022 HOUSTON AREA JOINT MEETING REPORT

EXHIBIT 2: TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS, EXECUTED DEC. 12, 1996 (MP/SP-TM), AND

EXHIBIT 3:	TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS, EXECUTED JAN. 28, 1997 (HBT-TM)
EXHIBIT 4:	HOUSTON TO BEAUMONT, TEXAS TRACKAGE RIGHTS AGREEMENT (SP-TM)
EXHIBIT 5	EXCERPTS FROM UP-BNSF RESTATED AND AMENDED SETTLEMENT AGREEMENT, MARCH 2001
EXHIBIT 6:	LETTER FROM ONE OF OUR ATTORNEYS TO AN ATTORNEY AT UP
EXHIBIT 7:	KCS-UP CAPACITY PROJECT MAP, OCTOBER 2018
EXHIBIT 8:	NECHES RIVER BRIDGE FEASIBILITY STUDY, FINAL REPORT – JUNE 2013, RAIL DIVISION, TEXAS DEPARTMENT OF TRANSPORTATION
EXHIBIT 9(C):	NECHES RIVER BRIDGE PROCESS IMPROVEMENT PROJECT, 1/22/2019
EXHIBIT 10(HC):	DALLAS TERMINAL MARKETING AGREEMENT
EXHIBIT 11(HC):	NORFOLK SOUTHERN RAILWAY COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, WESTERN HAULAGE AGREEMENT
EXHIBIT 12(HC):	NORFOLK SOUTHERN RAILWAY COMPANY-MERIDIAN SPEEDWAY LLC JOINT USE AGREEMENT, MAY 1, 2006
EXHIBIT 13(HC):	LIMITED LIABILITY COMPANY AGREEMENT
EXHIBIT 14(HC):	MSLLC MEETING PRESENTATION BY NS REGARDING SIDING LENGTHS DALLAS TO ATLANTA (INCLUDING MSLLC) AND DESIRED SIDING EXTENSIONS ON MSLLC (WITH COST ESTIMATES)
EXHIBIT 15(HC):	KCS-CSX NEW ORLEANS INTERCHANGE ALLOWANCE AGREEMENT
EXHIBIT 16(HC):	THE KANSAS CITY SOUTHERN RAILWAY COMPANY – MERIDIAN SPEEDWAY LLC JOINT USE AGREEMENT, MAY 1, 2006

1. My name is Steve Simmons. I have been the Director of Border and Interline Operations for The Kansas City Southern Railway Company (KCS) since 2013. Prior to that, I served as Senior Manager of Network Planning for KCS from when I joined the company in 2010 until I assumed my current position. I report to Mike Walczak, the Vice President of Network Planning, who reports to John Orr, Executive Vice President - Operations.

2. My job entails being familiar with the various interline operating agreements that are most important to KCS's daily operations. Those include the trackage rights agreements for use of track owned by Union Pacific Railroad Company (UP), by Houston Belt & Terminal Railway Company (HBT),[1] or jointly by UP and BNSF Railway Company (BNSF)[2] between Beaumont and Robstown, Texas, and the Meridian Speedway, LLC (MSLLC) agreements with Norfolk Southern Railway Company and its subsidiary The Alabama Great Southern Railroad Company (together, NS).

3. I interface daily with personnel at other carriers on interline service and operations matters. Since 2011 I have attended and taken part in meetings of the MSLLC Management Committee, the executive committee that oversees MSLLC, and the MSLLC Joint Operations Committee, which handles more routine issues for MSLLC and serves as the day-to-day interface between KCS and NS on MSLLC matters.

4. At KCS, I also lead a team that manages all aspects of import/export compliance through the Laredo/Nuevo Laredo Gateway, the largest rail crossing between the United States and Mexico.

---

[1] HBT is jointly owned by UP and BNSF, and its lines are operated by them under trackage rights.

[2] This includes the Beaumont – Houston portion of the Dawes, TX to Avondale, LA track owned jointly by UP and BNSF.

5. In addition to my work at KCS, I serve as an appointed member of the 16th Commercial Operations Advisory Committee (COAC) of U.S. Customs and Border Protection (CBP). COAC advises the Secretary of the Treasury and the Department of Homeland Security on all matters involving the commercial operations of CBP, including advising with respect to significant changes that are proposed concerning regulations, policies, or practices of CBP. I am the Co-Chair of COAC's Secure Trade Lanes Subcommittee. I co-created the Secure Corridor Initiative with CBP and Mexican customs which included implementing the first Unified Processing Center for rail.

6. Prior to joining KCS, I held various transportation supply chain and operations management positions with Consolidated Freightways, Con-Way and Yellow Roadway Corp. I also served in the U.S. Army, and am a veteran of Operations Desert Shield and Desert Storm. I hold a Bachelor of Business Administration from the University of Missouri – Kansas City and am a member of the Council of Supply Chain Management Professionals.

7. The purpose of my statement is to provide context and clarity regarding KCS's operations, specifically relating to the rights and obligations of KCS and other railroads under various agreements. This statement provides further detail and context addressing –

- Assertions by UP and BNSF concerning the adequacy of rail infrastructure owned by UP or jointly owned by UP and BNSF between Beaumont and Robstown, TX that is utilized by KCS under existing trackage rights agreements;
- Comments by UP and BNSF about the capacity and operations of the KCS-owned Neches River Bridge in Beaumont, Texas;
- NS's request for springing trackage rights over 200 miles of KCS track between Shreveport, Louisiana and Wylie, Texas, as well as BNSF's request to reserve the right to seek trackage rights over the same tracks;
- CSX's comments concerning interchange with KCS at New Orleans; and
- LyondellBasell's comments on access issues that are unrelated to the merger.

I. CAPACITY FOR CPKC TRAINS ON THE BEAUMONT-ROBSTOWN TRACKAGE RIGHTS ALREADY EXISTS, AND THERE ARE AGREEMENTS ALREADY IN PLACE FOR CREATION OF NEW CAPACITY IF NEEDED

8. Both UP and BNSF complain that there is not sufficient capacity to handle the anticipated growth of CPKC over lines between Robstown and Beaumont, Texas. Yet, neither of them provide capacity information or any detail about the affected areas by which to judge their claims.

9. Adequate capacity for CPKC trains already exists. As addressed in greater detail by John Orr in his accompanying verified statement, there is sufficient infrastructure capacity over these routes, but operational behaviors by both UP and BNSF prevent efficient and full use of that capacity. Further, if additional capacity is needed, for CPKC growth or that of UP and BNSF, there are Board-approved contractual agreements already in place on how to meet the needs of all parties.

10. ***Sufficient Capacity Already Exists.*** There is already sufficient capacity on the UP, UP-BNSF and HBT lines that KCS operates between Houston and Beaumont to support the additional eight trains per day projected in the Applicants' operating plan. History shows this.

11. Below is a graph taken from a presentation delivered by the Spring Center director at the June 29, 2022 joint meeting among UP, BNSF and KCS regarding Houston area operations.[3] The bottom line of the graph shows Houston complex average daily train counts for the first 6 months of 2022. They average 97.7 trains per day.

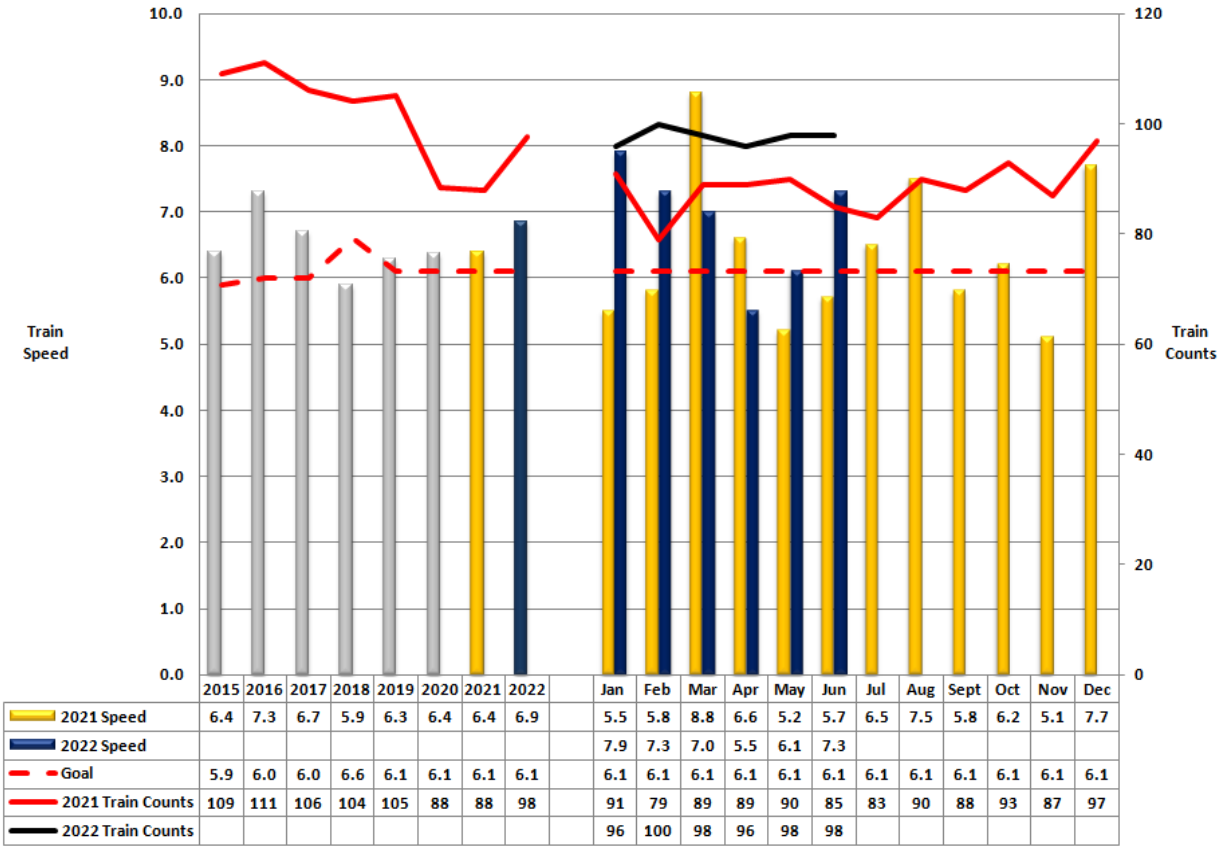
12. By contrast, the next to the bottom row in the left shows average daily trains in the Houston complex from 2015 through 2022. For the pre-pandemic years of 2015-2019, train counts averaged 107 per day, almost 10 more trains per day than current counts. The graph also

[3] A copy of this presentation is Exhibit 1 hereto.

shows that the train speeds during those five years were for the most part similar to what they are today. This graph, produced by the Spring Center directors, who are employees of UP and BNSF, clearly shows that Houston has previously accommodated more trains than the projected additional eight projected CPKC trains above current levels. It should also be noted that the projected CPKC trains present less burden to the Houston operation than most of the trains in the Houston complex because CPKC trains are through trains – they don't need to stop on the tracks to switch customers. So, history shows that the Houston complex has adequate capacity now to handle the projected eight additional CPKC trains.

13. As John Orr explains in his separate statement, current operating difficulties in the Houston complex now are a result of operating decisions which, when remedied, will free up the capacity to meet the CPKC trains projected for Year 3 post-merger.

FIGURE 1
HOUSTON COMPLEX PERFORMANCE
JOINT MEETING, JUNE 29, 2022

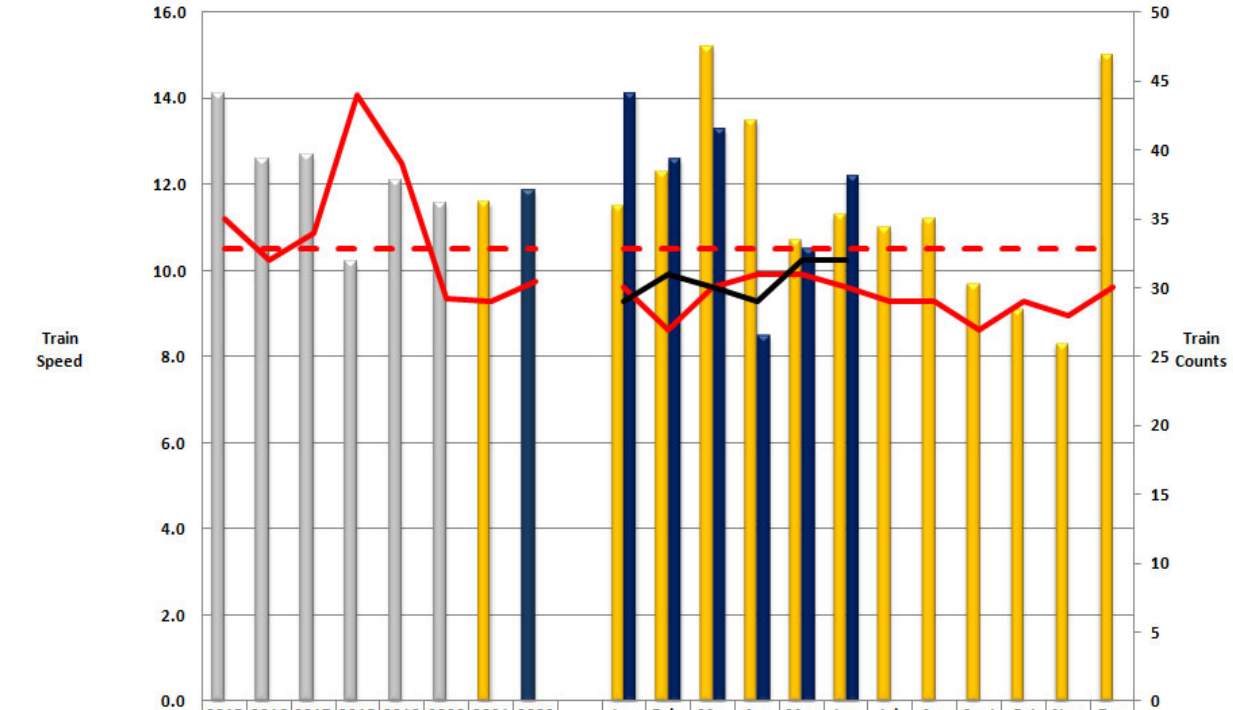


	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	6.4	7.3	6.7	5.9	6.3	6.4	6.4	6.9		5.5	5.8	8.8	6.6	5.2	5.7	6.5	7.5	5.8	6.2	5.1	7.7
2022 Speed										7.9	7.3	7.0	5.5	6.1	7.3						
Goal	5.9	6.0	6.0	6.6	6.1	6.1	6.1	6.1		6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
2021 Train Counts	109	111	106	104	105	88	88	98		91	79	89	89	90	85	83	90	88	93	87	97
2022 Train Counts										96	100	98	96	98	98						

14. A similar conclusion can be reached for the UP-BNSF jointly-owned Lafayette Subdivision and the portion of the Houston Subdivision to Dawes. Attached below is a chart from the same June 29 presentation, showing the performance of the UP-BNSF joint line between Avondale, LA and Dawes, TX (essentially New Orleans to Houston). The most recent six months show an average train count of 30.5 trains per day. The five pre-pandemic years show an average daily train count of 36.8 trains per day, with a high annual average of 44 trains per day in 2018. While the difference between the 6-month and 5-year figures is 6.3 trains, not 8, the data is less of an apples-to-apples comparison than the Houston data above, since the UP-BNSF joint line extends all the way to New Orleans, making it unclear how many trains actually

operate on the Beaumont-Houston portion of the line. But either way, there is ample capacity for the four westbound trains a day CPKC will add to this line, which is directionally operated. (CPKC's eastbound trains will use UP's Beaumont Subdivision, not the portion of the Houston Subdivision from Beaumont to Dawes.). In any event, this data shows that there is additional capacity on the Houston Subdivision to accommodate additional CPKC trains. And, as discussed below, to the extent that additional capacity is needed, the STB-approved trackage rights agreements provide for it to be built.

FIGURE 2
JOINT LINE PERFORMANCE
JOINT MEETING JUNE 29, 2022



	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	14.1	12.6	12.7	10.2	12.1	11.6	11.6	11.9		11.5	12.3	15.2	13.5	10.7	11.3	11.0	11.2	9.7	9.1	8.3	15.0
2022 Speed										14.1	12.6	13.3	8.5	10.5	12.2						
Goal	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5		10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5
2021 Train Counts	35	32	34	44	39	29	29	31		30	27	30	31	31	30	29	29	27	29	28	30
2022 Train Counts										29	31	30	29	32	32						

15. ***Existing, STB-Approved Trackage Rights Agreements Provide for Adding Capacity.*** KCS operates between Beaumont and Robstown, TX over a combination of track owned by UP and BNSF, HBT, and KCS. As a condition of the merger of UP with Southern Pacific Transportation Company (SP) in 1996, the STB granted The Texas Mexican Railway Company (Tex Mex) trackage rights between Beaumont and Robstown over track of UP (including Missouri Pacific Railroad Company (MP)[4]), SP and HBT to connect to KCS in order to supply a competitive alternative to the merged UP-SP.[5] Initially those trackage rights were embodied in two agreements, one granting Tex Mex access over certain SP and MP lines and the other granting Tex Mex rights on specified HBT tracks.[6] As directed by the STB, Tex Mex, UP and HBT submitted the agreements to the agency to settle certain disputes over the terms. In Finance Docket No. 32760, Decision No. 47, the STB resolved the disputes and approved the agreements.

16. Generally stated, the agreements allowed Tex Mex to operate over a combination of MP and SP tracks between the Neches River Bridge and GCL Junction in Beaumont and to the connection with HBT at Quitman Street in Houston; over the HBT East Belt and a series of SP and MP tracks to West Junction in the southwest corner of the Houston area; over SP's line

[4] MP was, at the time immediately prior to the UP-SP merger, a wholly-owned subsidiary of Union Pacific Corporation.

[5] Finance Docket No. 32760, Sub Nos. 13 and 14.

[6] Terms for Texas Mexican Railway Company Trackage Rights, executed Dec. 12, 1996 (MP/SP-TM) (excerpts are Exhibit 2 hereto), and Terms for Texas Mexican Railway Company Trackage Rights, executed Jan. 28, 1997 (HBT-TM) (excerpts are Exhibit 3 hereto) ("GLC Junction" corrected to "GCL Junction" per UP System Timetable No. 2, effective 0001 Sunday October 29, 1995, page 41 (Beaumont Subdivision).

from West Junction to Flatonia, Texas and from Flatonia to Placedo, Texas via Victoria, Texas; and via MP lines from Placedo, Texas to Robstown and from Odem to Corpus Christi, Texas.[7]

17. Subsequently, UP chose to implement directional running on its two lines between Houston and Beaumont, and SP granted Tex Mex rights on what is now UP's Beaumont Subdivision.[8] Together with the MP/SP-Tex Mex agreement, this allowed Tex Mex to operate with UP's directional flow, using UP's Lafayette Subdivision for traffic westbound from Beaumont to Houston, while using the Beaumont Subdivision for traffic from Houston to Beaumont.

18. In late 1997, UP, SP, and BNSF sought exemptions from the STB to operate under trackage rights on specified portions of HBT's lines, supplanting HBT's operation of those lines. Those exemptions were affirmed by the STB a year later.

19. Also in 1997, UP operations in the Houston area were severely crippled by congestion that spread through much of the western U.S. rail network. After a series of hearings, written submissions and decisions, in December 1998 the Board, despite concluding that Houston was again "fluid," imposed a so-called "clear route" condition, saying,

[7] In November 2007, KCS and UP clarified that the Odem-Corpus Christi trackage rights allowed KCS to connect from its yard in Corpus Christi and the Port of Corpus Christi's (POCC's) Savage Lane to POCC's Joe Fulton Corridor via UP's line, following POCC's removal of the Tule Lake Lift Bridge access from Savage Lane to POCC's track.

[8] Houston to Beaumont, Texas Trackage Rights Agreement, dated June 16, 1997 (SP-TM) Exhibit 4 hereto.

> "Among other things, we have decided to adopt a so-called "clear route" condition to enhance efficiency and facilitate the smooth movement of railcars through the Houston Terminal. Under the "clear route" condition, the neutral and highly efficient joint Union Pacific Railroad Company (UP)/Burlington Northern Santa Fe Railway Company (BNSF) dispatching center at Spring, TX, will have the authority through its Joint Director to route traffic through Houston over any available route, even a route over which the owner of the train does not have operating authority. Thus, as a result of the Board's decision, a BNSF train may be permitted to operate over track of UP; a UP train may be permitted to operate over track of BNSF; and a Texas Mexican Railway Company (Tex Mex) train may be permitted to operate over track of either UP or BNSF….
>
> "We will impose a "clear route through Houston" condition to enhance efficiency and facilitate the smooth movement of traffic through the Houston Terminal, a condition that was sought by both BNSF and the Consensus Plan Parties. We believe that the Joint Dispatching Center in Spring, Texas, has the authority to exercise discretion in choosing the most efficient routing for traffic moving through the Houston Terminal. To ensure, however, that the Joint Center staff do not feel constrained from making decisions necessary to efficient operations in the Houston Terminal due to trackage rights or other operational limitations, we are imposing a condition directing the Joint Center carrier-participants to authorize the Joint Director to use the best judgment in selecting alternative routings for train operations by UP, BNSF, and Tex Mex through the terminal, particularly when customary routings are unavailable or congested.[9]

20. In 1998, the STB approved UP and BNSF joint ownership of UP's Lafayette Subdivision from Dawes, TX, on the east side of Houston, to Iowa Junction, LA, and BNSF's line from Iowa Junction to Avondale, LA. Together with UP and BNSF's access over approximately 1.8 miles of KCS track between KCS MPs 764.9 and 766.7, including the Neches River Bridge, brought the line from Houston to New Orleans under UP-BNSF joint ownership.

[9] *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railway Company [Houston/Gulf Coast Oversight],* STB Finance Docket No. 32760 (Sub-No. 26), 3 S.T.B. 1030, 1038 (1998) at *1 and *6.

21. In 1999, Tex Mex reached agreement with UP to acquire 84.5 miles of the former SP Wharton Branch, along with trackage rights over the adjoining UP-owned 2.5 miles on the north end at Rosenberg and over the adjoining 3.8 miles at Victoria to connect to the lines over which Tex Mex was granted trackage rights in 1996. The STB approved the transaction in December 2000.[10]

22. In March 2001, Tex Mex and UP modified their trackage rights agreements to provide that when Tex Mex or KCS rebuilt the Rosenberg-Victoria line, traffic moving to or from shipper facilities on the line could also move over Tex Mex's trackage rights on UP. Also, the parties agreed that within three months after the Rosenberg-Victoria line was put in service, Tex Mex would stop using the 157-mile portion of UP's trackage rights from Rosenberg to Victoria via Flatonia, except on an emergency or detour basis subject to UP's approval.

23. In 2006, following KCS's acquisition of control of Tex Mex, Tex Mex assigned its trackage rights for operation between Beaumont and Robstown to KCS.[11]

24. In 2008-2009, despite the advent of the Great Recession, KCS rebuilt the Rosenberg-Victoria line at a cost of approximately $173.5 million and put it back in service. As a result, KCS shortly thereafter ceased operating between Rosenberg and Victoria via Flatonia, removing KCS traffic from UP's busy Glidden Subdivision.

25. As stated in the accompanying verified statement of John Orr, current Houston area rail infrastructure is capable of supporting not only current traffic levels but also growth in

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[10] *Texas Mexican Railway Company – Purchase Exemption – Union Pacific Railroad Company,* STB Finance Docket No. 33914 (served Dec. 11, 2000)

[11] *Kansas City Southern, The Kansas City Southern Railway Company, and The Texas Mexican Railway Company – Exemption for Transactions Within a Corporate Family*, Finance Docket No. 34849, 71 Fed. Reg. 19784-85 (Apr. 17, 2006).

traffic, if that infrastructure is well managed. Currently, management of that infrastructure needs improvement.

26. If additional capacity were needed, however, the STB-approved trackage rights agreements covering KCS's operations on lines owned by UP and jointly by UP and BNSF assign responsibility and provide procedures for providing the capacity needed to accommodate traffic of CPKC, UP and BNSF.

27. Each of the STB-approved trackage rights agreements by which KCS operates over UP and UP-BNSF track between Beaumont and Robstown contain a rate stated in mills per gross ton-mile, known as the GTM Rate. The GTM Rate was established by the STB in its Decision No. 47 in the UP/SP merger, along with resolution of other disputed terms of the trackage rights agreements. KCS currently pays UP approximately $39 million in trackage rights fees under this GTM Rate for the Beaumont-Rosenberg and Victoria-Robstown segments each year, in addition to sharing in the cost of infrastructure projects on track where KCS operates.

28. The STB-approved trackage rights agreements setting the GTM rate that KCS pays for the trackage rights from Beaumont through Houston to Robstown call for UP to use the GTM Rate to maintain adequate capacity to handle the CPKC traffic on those lines. Both the MP/SP-TM and the HBT-TM agreement state in Section 3(a) of the Terms (that is, the portion of the agreement prior to the exhibits) that the GTM Rate "shall be deemed to include ordinary and programmed maintenance of the Joint Trackage, Changes in and/or Additions to the Joint

Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes."[12, 13] (Underlining added.)

29. The first sentence of Section 2.2 of the General Conditions, Exhibit B to the agreements, provides that "Unless otherwise mutually agreed to by the parties in writing, Owner shall … (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms."[14]

30. Section 1.3 of the General Conditions identifies "Changes in and/or Additions to" as being capital projects: "'Changes in and/or Additions to' shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of the Terms."[15]

31. UP's position that CPKC should enter agreements to improve UP's lines before being allowed to move new traffic is part of a pattern of resistance by UP to meeting its obligations under the provisions of the STB-approved trackage rights agreements quoted above. Historically, UP has refused to acknowledge its responsibilities under Section 3(a) of the Terms to maintain adequate capacity of the trackage rights lines to accommodate traffic of KCS. Accompanying this statement as Exhibit 6 is a letter from one of our attorneys to an attorney at

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[12] *See* Exhibit 2, pages 5-6.

[13] Section 3(a) of the June 16, 1997, SP-TM agreement for Tex Mex use of UP's Beaumont Sub under directional running, Exhibit 4 hereto, in describing what is included in the GTM Rate, does not include the phrase "Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions)", indicating that inclusion in, or exclusion of, those costs in the GTM Rate was deliberate. *See* Exhibit 4 hereto, page 3.

[14] *See* Exhibit 2, page 16.

[15] *See* Exhibit 2, page 15.

UP, replying to UP's assertion that UP is not obligated to maintain adequate capacity of the trackage rights lines to accommodate KCS traffic except at additional cost to KCS above the GTM Rate. From the letter, it appears that UP's position is that because it and BNSF agreed that capital projects were not included in the GTM rate, that interpretation also applied to the MP/SP-TM and HBT-TM agreements.

32. I am aware that BNSF has a trackage rights agreement with UP dated June 1, 1996 for access between Houston and Beaumont that provides that "Changes in and/or Additions to" are covered in the GTM rate that BNSF was to pay UP under the agreement. But there are differences between BNSF's agreement and ours. As discussed in UP-SP Decision No. 47, BNSF pays a lower GTM rate than KCS pays. Also, Section 2.2 of both Exhibit B to BNSF's agreement and our MP/SP-TM and HBT-TM agreements begin with the phrase "Unless otherwise mutually agreed to by the parties in writing, Owner shall…" be responsible for capital projects needed to maintain capacity. In Section 9(c) of their Restated and Amended Settlement Agreement, filed with the STB March 4, 2002, UP and BNSF did just that – agreed in writing that the GTM rate would not cover capital projects other than those necessary to implement the UP-SP merger:

> "(c) Capital expenditures on the Trackage Rights Lines and on lines over which BNSF is granted Overhead Trackage Rights will be handled as follows:
>
> (i) UP/SP shall bear the cost of all capacity improvements that are necessary to achieve the benefits of its merger as outlined in the application filed with the ICC for authority for UP to control SP. The operating plan filed by UP/SP in support of the application shall be given presumptive weight in determining what capacity improvements are necessary to achieve these benefits.
>
> (ii) **Any capacity improvements other than those covered by subparagraph (i) above shall be shared by the parties based upon their respective usage of the line in question, except as otherwise provided in subparagraph (iii) below.** That respective usage shall be determined by the 12 month period prior to the making of the improvement on a gross ton mile basis.
>
> (iii) For 18 months following UP's acquisition of control of SP, BNSF shall not be required to share in the cost of any capital improvements under the provision of subparagraph (ii) above.

(Emphasis added.)[16]

33. KCS does not have any such agreement with UP waiving UP's responsibility to perform capital projects needed to maintain adequate capacity on the lines covered by the MP/SP-TM and HBT-TM agreements. Accordingly, under the MP/SP-TM and HBT-TM agreements with KCS, UP is required to perform capital projects on the trackage rights lines needed to maintain capacity without added payment by KCS. If UP cannot operate the Beaumont-Robstown infrastructure properly to maintain capacity for CPKC trains, UP is required to add capacity. It is not CPKC's responsibility to add capacity for UP or BNSF, as they contend.

[16] *See* excerpts of Joint Submission of Restated and Amended BNSF Settlement Agreement, UP/SP-393; BNSF-100, filed March 4, 2001 in STB Finance Docket No. 32760, Section 9(c) (Exhibit 5, page 17).

34. KCS also has the contractual right under the trackage rights agreements to require UP to add needed infrastructure on the trackage rights lines. In addition to UP's responsibility under the MP/SP-TM and HBT-TM agreements with KCS to perform capital projects on the trackage rights lines needed to maintain capacity, the trackage rights agreements require KCS and UP to share the cost of mutually-beneficial upgrades to the UP-owned trackage rights track beyond those for which UP is responsible under paragraph 3(a) of those agreements, and require UP to add infrastructure requested by KCS at KCS's sole cost if the project is for KCS's sole benefit.[17] As an example of mutually-beneficial upgrades, KCS contributed several million dollars to the cost of UP's installation of Positive Train Control infrastructure on portions of the trackage rights lines. As an example of KCS's ability to require infrastructure upgrades deemed by the parties to be for KCS's sole benefit, KCS paid approximately $7 million to upgrade two bridges at Mileposts 184.8 and 207.0 on UP's Brownsville Sub from 263,000 pound load rating to 286,000 pound load rating so KCS could move fully-loaded grain cars, and other traffic, over those bridges. After those upgrades were completed, UP exercised the right under the agreements[18] to pay 50% of the cost of those upgrades in order to be able to move UP and BNSF cars loaded to 286,000 pounds over those bridges.

35. In summary, the STB-approved trackage rights agreements under which KCS operates between Beaumont and Robstown, Texas provide for UP to make the capital investments needed to maintain the capacity to accommodate traffic growth of CPKC. Any

[17] Section 5(b) of the MP/SP-TM and HBT-TM agreements; Section 4(a) of the SP-TM agreement. *See* Exhibit 2, page 8, Exhibit 3, page 5 and Exhibit 4, page 4. Under these provisions, use of the joint track by BNSF is attributed to UP for purposes of cost allocation.

[18] Section 5(b) of the MP/SP-TM and HBT-TM agreements; Section 4(b) of the SP-TM agreement. *See* Exhibit 2, page 8, Exhibit 3, page 5 and Exhibit 4, page 4.

shortage of infrastructure capacity now or in the future is UP's responsibility to remedy as part of what KCS has paid UP tens of millions of dollars in trackage rights fees for each year. In addition, KCS has the ability to compel UP to add infrastructure if that infrastructure is for CPKC's sole benefit.

36. Despite disagreement with UP over its responsibility to maintain sufficient capacity to keep pace with traffic growth, KCS and UP have worked together successfully to spend well over $100 million on improvements to UP lines over which KCS has trackage rights. For instance, under agreements executed in 2012 and 2015, KCS and UP agreed on funding and installation of a number of important upgrades to improve capacity and traffic fluidity, including:

- Installing Centralized Traffic Control between Inari and Sinton on UP's Brownsville Subdivision;
- Building a new 10,000 foot siding with #15 power-operated turnouts at Cranell on UP's Brownsville Subdivision;
- Upgrading to power-operated #15 turnouts on the Placedo Siding on UP's Angleton Subdivision;
- Building a new 10,100-foot siding at Placedo (Benavides) on UP's Cuero Subdivision where the Cuero Subdivision joins the Angleton Subdivision;
- Installing Centralized Traffic Control between Victoria and Placedo on UP's Cuero Subdivision;
- Powering the switch to the Victoria Industrial Lead from UP's Brownsville Subdivision at Bloomington;
- Installing a crossing diamond at the intersection of the Victoria Industrial Lead, the Cuero Subdivision and the south end of UP's Rosenberg Subdivision connection to KCS's Rosenberg Subdivision;
- Installing Centralized Traffic Control between South Odem and Robstown on UP's Brownsville Subdivision;
- Building a runaround track at Sinton on UP's Brownsville Subdivision;
- Extending the siding at Greta on UP's Brownsville Subdivision to 14,044 feet;

- Extending the siding at Inari on UP's Brownsville Subdivision to 10,000 feet; and
- Building a 10,037-foot siding near Rosenberg, TX on UP's Rosenberg Subdivision.

37. For each of these projects, KCS and UP were able to develop an approach to funding that recognized both carriers' use of the facilities. Together, these and other improvements that KCS and UP have cooperated to install have significantly improved the efficiency and capacity of operations over the portions of UP's Brownsville and Angleton Subdivisions and elsewhere southwest of Houston where KCS has trackage rights on UP lines. A map indicating these projects is attached as Exhibit 7.

38. Unfortunately, since 2018-2019, UP's willingness to cooperate with KCS's efforts to increase capacity have faded. The 2015 agreement mentioned above called for UP and KCS to consider implementation of a set of additional projects after the first set. These included additional CTC installation; powering and providing remote control for certain switches; another runaround track and realignment of a section of main line to improve operational fluidity. UP has not engaged with KCS on moving forward with these projects. Perhaps that is due to UP's general withdrawal from providing KCS information about UP's capacity plans in the Beaumont-Robstown area. Obviously KCS is not well positioned to plan for capacity modifications on UP track without UP's information and input. UP's having gone quiet on that information in the past few years has stymied further efficiency improvements on some of the trackage rights lines. Nonetheless, KCS and, I expect, the future CPKC will be willing to pursue capacity work according to these established agreements at such time that additional capacity becomes necessary.

39. As can be seen from the list above, almost all of these cooperative projects occurred on UP's Brownsville Subdivision, the south end of KCS's trackage rights. UP has

engaged in considerable capacity expansion work on its lines closer to Houston (between Rosenberg and Houston, in the Houston terminal, and east of Houston to Beaumont), but UP almost never involves KCS in planning or advises KCS significantly in advance of those capacity projects. Instead, KCS generally just gets a bill for a project and has to investigate what the bill is for. KCS has asked to be more involved and more informed, but UP chooses not to share information, particularly since beginning implementation of UP's version of Precision Scheduled Railroading, UP's Unified Plan 2020, in 2018. To the extent that UP is critical of CP and KCS not providing in the Operating Plan a specific analysis of recent infrastructure upgrades in and north of Houston, UP has itself to blame due to its refusal to share capacity planning information, despite KCS's repeated requests.

40. With respect to BNSF's implication that the addition of CPKC's projected growth would cause problems similar to the conditions that disrupted Houston in 1997-1998,[19] nothing could be further from the truth. First, neither KCS nor CPKC would have any desire or incentive to create operating problems that contributed to congestion in Houston. Unlike UP and BNSF, KCS does not have any way to get from Mexico to the rest of the KCS network unless Houston is fluid.[20]

41. Second, there are many crucial differences between now and the situation in 1997-1998, as reflected in the various STB decisions. For one thing, substantial infrastructure

[19] BNSF-9 at 51-57.

[20] BNSF, unlike KCS, has access to routes that can bypass Houston. UP's and BNSF's routes from Mexico to Chicago bypass Houston completely. And for other traffic, if BNSF were concerned about congestion on the lines that CPKC will use between Houston and Beaumont, it already has trackage rights over UP from Houston on UP's line to Fair Oaks, AR via Shreveport, LA and Pine Bluff, AR, and UP's line between Houston and Valley Junction, IL via Palestine, TX.

has been added. KCS alone has spent over $100 million on capital investments in the trackage rights lines just since 2014. UP's Executive Vice President Operations testified on April 27 at the STB's recent Ex Parte 770 that UP had invested a quarter billion dollars in Englewood and Settegast Yards during just the last 3 years.[21] So the inadequate infrastructure referenced in STB decisions of 1997-1998 is no longer the case. There also have been operational changes like the clear route protocol imposed by the STB as a permanent relief measure as a result of the 1997-1998 service crisis; the Spring Center was established and KCS, BNSF and UP all participate, providing greater opportunities for operational coordination than before the service meltdown; UP promised as the 1997-1998 service crisis abated to invest $1.4 billion in Houston area infrastructure; and directional running was implemented on UP's lines between Houston and Beaumont.[22]

42. Furthermore, current KCS trains and future CPKC trains do not provide local service on UP and UP-BNSF track in Houston – the trackage rights agreements prohibit that except for traffic destined to Mexico (and other points on Tex Mex's original Corpus Christi-Laredo line). So KCS and future CPKC trains can be added to Houston infrastructure with much less operational impact than either UP or BNSF who maintain major yards and provide local service in the Houston complex.

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[21] Testimony of Eric Gehringer, Executive Vice President, Operations, Union Pacific Railroad Company at Ex Parte No. 770, Apr. 27, 2022 Public Hearing, Transcript STB Document ID 304765, posted June 15, 2022, page 906, line 13 through page 907, line 9.

[22] *See UP/SP [Houston/Gulf Coast Oversight]*, STB Finance Docket No. 32760 (Sub-No. 26) (served Dec. 21, 1998) (explaining why structural changes during the service crisis remedied the conditions that brought on the service problems in 1997).

43. In summary, the UP and UP-BNSF-owned lines to and through Houston have ample capacity, if operated efficiently, to handle the growth in CPKC traffic projected in the operating plan. Indeed, those lines have previously handled more additional trains per day than CPKC projects adding. But if added infrastructure is needed, the trackage rights agreements already in place enable KCS to require that capacity to be added, and KCS has been successful, despite UP's limited cooperation, in improving capacity to keep more trains running over the trackage rights.

II. THERE IS AMPLE CAPACITY FOR ADDITIONAL CPKC TRAINS ON THE NECHES RIVER BRIDGE

44. Another complaint voiced by UP and BNSF is that KCS's Neches River bridge in Beaumont has inadequate capacity to handle CPKC's projected additional trains, and that KCS needs to build a new bridge to handle the traffic. That assertion is contrary to the results of a recent and comprehensive KCS-led study conducted in conjunction with UP and BNSF. The fact that UP and BNSF did not get behind the Texas Department of Transportation's (TxDOT's) efforts in 2013 and 2016 to construct a new rail bridge over the Neches River belies their alleged concerns here.

45. Figure 3 below is a picture of the area surrounding the Neches River bridge, taken from a 2013 TxDOT final report on possible alternatives to the existing Neches River bridge.[23]

[23] Neches River Bridge Feasibility Study, Final Report – June 2013, Rail Division, Texas Department of Transportation. The study did not recommend a preferred alternative to the existing bridge. Study, page ES-1 (excerpts are Exhibit 8 hereto).

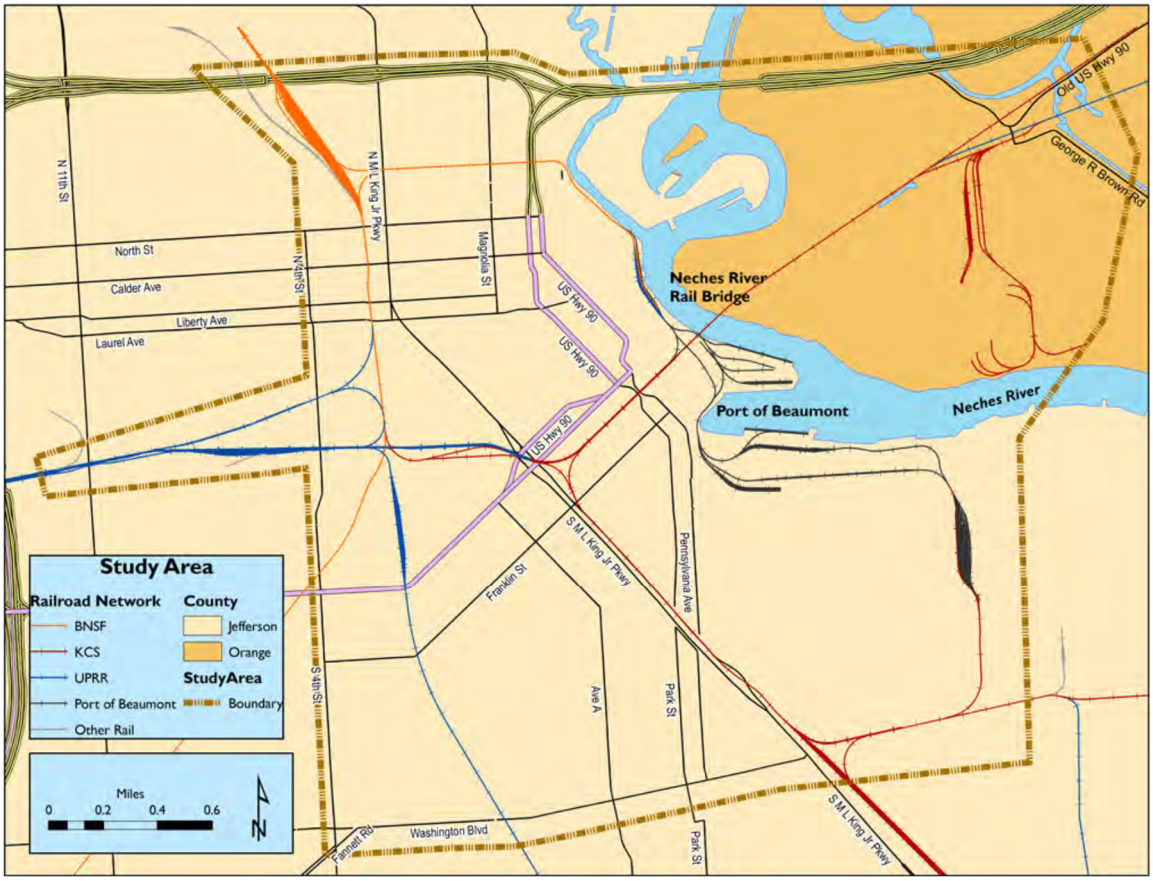
FIGURE 3
BEAUMONT, TEXAS, WITH PORT OF BEAUMONT IN FOREGROUND, KCS NECHES RIVER BRIDGE IN MID-GROUND AND INTERSTATE 10 BRIDGE IN BACKGROUND



46. In addition to the features noted in the caption, the site of the Jefferson Energy Terminal is the triangular-shaped graded area to the right of and below the Neches River bridge.

47. A second figure taken from that same TxDOT study (Figure 4 portion of the blue track west of the river and the blue track east of the river are actually the joint UP-BNSF Dawes, TX to Avondale, LA line), BNSF in orange and KCS in red:

FIGURE 4
NECHES RIVER RAIL BRIDGE FEASIBILITY STUDY AREA



48. As shown in the figure above, KCS's line ends a short distance west of the bridge where it connects to UP's line and is crossed by BNSF's line. UP and BNSF have trackage rights from that point over KCS's tracks leading to and from the bridge on both sides of the river.[24] The UP-BNSF joint line to Avondale breaks off from the KCS line immediately east the Jefferson Energy Terminal (which began operations just before the TxDOT study was completed and was not reflected on the graphic above).

[24] UP has had access over the bridge for decades, in conjunction with UP's removal of its own bridge across the Neches River. UP admitted Amtrak to use the bridge in conjunction with Amtrak's Sunset Limited operation over UP between New Orleans and Los Angeles. BNSF gained access over the bridge as part of the UP/SP merger.

49. In 2018-2019, KCS led a joint study of use of the bridge with its tenants UP and BNSF. The final report of that study is Exhibit 9(C) hereto, and includes the speaker notes associated with the presentation of the study's conclusions to UP and BNSF. (I understand that UP or BNSF produced a version of the presentation in response to Applicants' discovery requests.).

50. Among the study's findings were that:

A. The operational capacity of the bridge is 70 trains per day, while the average train count during the last 11 months of 2018 was 36 trains per day. Exhibit 9(C), Slide 10. The highest weekly average train count during 2018 was 41 trains per day, and the most trains crossed in a day was 49. Exhibit 9(C), Slide 11.

B. The study determined that the bridge itself is not the primary capacity constraint. Exhibit 9(C), Slide 11. Rather, it was the operations around the bridge that were the primary constraint.[25]

C. The study identified a need for improved communication between KCS and UP dispatchers. In response, KCS located dispatching of its Beaumont Subdivision, which includes the Neches River Bridge, to the Spring Center in Houston, where UP and BNSF dispatchers also work. Another issue identified as

[25] Bridge openings are not a primary constraint. As stated in TxDOT's 2013 feasibility study, "Data from KCS in 2012 indicates 7 lifts in a six day period which is consistent with the USCG's annual lifts. While requests for bridge openings can occur at any time, most occur during daylight hours. The bridge raising can result in some train delays. The delays are more pronounced when trains are traveling in the same direction across the bridge as adjacent trains must be separated by two signals in order to prevent a train from stopping on the bridge. Typically the bridge stays open to river traffic between 15 and 30 minutes. The daily train count across the Neches River bridge ranges between 40 to 50 trains based upon daily train movements in the FRA's crossing inventory." Study, page ES-3 (Exhibit 8).

impeding fluidity at the bridge was BNSF changing crews on the main line. BNSF has since remedied that practice.

D. While the 2018-2019 study shows that the capacity of the Neches River bridge is more than adequate to handle the projected additional CPKC trains, as in 2018 there currently are issues affecting the fluidity of operations over the bridge, including:

(1) UP and BNSF trains serving the Jefferson Energy facility adjacent to the east end of the bridge slow down as they are crossing the bridge in order to be able to stop on the UP-BNSF joint line just after leaving KCS track and to shove back into the Jefferson Energy facility. This slows crossing times for those trains.

(2) UP changes crews on its main line adjacent to its yard about 3 miles west of the bridge. That main line is the west end of the Lafayette Subdivision, operated with westbound directional running to Houston. Blocking the movement of trains on that main line backs up traffic moving west over the bridge seeking to reach Houston.

(3) BNSF accesses the Port of Beaumont south of the bridge via a crossover in the KCS main line near the bridge. Each time BNSF uses that crossover, it blocks access to and from the bridge. There is an existing connection that BNSF could use which would not block the KCS main near the bridge, but BNSF refuses to use it to avoid sharing in the cost of its construction and operation.

51. In summary, the Neches River bridge study shows that the capacity of the bridge is fully adequate to accommodate the additional CPKC trains projected to result from the merger. While expanded bridge capacity eventually may be needed,[26] new bridge capacity is not needed for the 8 trains per day that CPKC's operating plan projects in Year 3. And if more capacity is needed, operational changes such as reversing BNSF's refusal to use the new connection to the Port of Beaumont should be made to remedy it.

III. NS AND BNSF REQUESTS FOR TRACKAGE RIGHTS FROM THE DALLAS AREA TO SHREVEPORT ARE UNRELATED TO THE MERGER AND ARE INSTEAD ATTEMPTS TO GET COMMERCIAL RIGHTS FOR WHICH THEY HAVE NOT NEGOTIATED OR PAID.

52. In asking the Board to grant them contingent trackage rights over KCS's line from Dallas to Shreveport, both BNSF and NS seek a gift of rights that both chose not to acquire when Meridian Speedway, LLC (MSLLC) was created. In addition, in its settlement with UP in the UP/SP merger, BNSF deliberately gave up the right to connect at Shreveport to "eastern carriers" via the UP trackage rights over which it operates to reach Shreveport. BNSF offers no evidence supporting reversal of that STB-approved decision.

53. MSLLC is a joint venture created by KCS and Norfolk Southern in 2006 to improve the operation of the "Meridian Speedway" from Shreveport, LA to Meridian, MS. The basics of the joint venture as shown in the joint venture agreement were that KCS would contribute its Shreveport to Meridian line to MSLLC in exchange for MSLLC stock and NS would, over a period of time, contribute $300 million of capital (also in exchange for a minority

[26] The Draft Houston-Beaumont Region Freight Study dated August 2021 listed a double track rail bridge across the Neches River as having a long-range implementation timeframe for planning purposes. *See* BNSF-9, Verified Statement of Jon Gabriel and Travis Thowe, Exh. 1 at 5-67 ("The second track across the Neches River on the Beaumont Subdivision has a varied range of potential costs depending on the implementation strategy chosen. This project may be considered a long-range implementation timeframe for planning purposes.").

interest in MSLLC) to improve the infrastructure of the Meridian Speedway to bolster the line's competitive position as the most direct rail route for freight moving between western U.S. points (including West Coast ports) and Southeast points such as Atlanta. MSLLC was designed to be pro-growth and growth is inherent in those agreements.[27]

54. In exchange for its capital contribution, NS received – in addition to MSLLC stock – certain commercial rights. The principal commercial right was the exclusive right, in place of KCS, to move certain intermodal traffic from points west of Dallas/Fort Worth to points east of Meridian via the Speedway. This was called "NS Traffic." NS could receive NS Traffic at Shreveport from UP or KCS. NS Traffic would move over the Speedway in haulage operated by KCS on behalf of MSLLC for a fee set by agreement.[28]

55. For certain traffic handled by KCS from Dallas to Shreveport, NS and KCS entered into the Dallas Terminal Marketing Agreement (DTMA).[29] The DTMA provided, among other things, that the parties would {{[redacted].}}

[27] *See*, *e.g.*, Exhibit 15(HC), The Kansas City Southern Railway Company - Meridian Speedway, LLC, Joint Use Agreement (KCS Joint Use Agreement), § 6(b); Exhibit 10(HC), Dallas Terminal Marketing Agreement, as amended, § 2(a).

[28] *See* Exhibit 12(HC), Norfolk Southern Railway Company - Meridian Speedway, LLC, Joint Use Agreement (NS Joint Use Agreement).

[29] *See* Exhibit 10(HC), Dallas Terminal Marketing Agreement, as amended.

[30] The DTMA {{defines "Dallas Intermodal Terminal Traffic" as "domestic intermodal containers or trailers with an origin and destination in the United States, with a lift or drop at the Terminal [KCS's intermodal terminal in the Dallas area], that move[] over the [Meridian Speedway] and over KCSR's tracks between Shreveport and the Terminal, and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas/Ft. Worth, TX. Standard Metropolitan Statistical Area (SMSA)."}} DTMA, Section 1(b) (Exhibit 10(HC), 27th page), definition of Dallas Intermodal Terminal Traffic.

56. The DTMA also provided NS an {{ }}

57. The Western Haulage Agreement[35] {{ }}

[31] DTMA, Section 3 (Exhibit 10(HC), 29th page).

[32] In 2006, {{ }}

[33] DTMA, Section 1(b) (Exhibit 10HC, 27th page), definition of Notice Trigger Period.

[34] DTMA, Section 5(a)(i) (Exhibit 10(HC), 32nd page).

[35] *See* Exhibit 11(HC), Norfolk Southern Railway Company, The Kansas City Southern Railway Company Western Haulage Agreement.

[36] Exhibit 12(HC).

[redacted]

58. Importantly, not since the Major Service Standards Failure provisions of the NS Joint Use Agreement took effect, {{[redacted]}} has KCS service quality ever come close to triggering the "Major Service Standard Failure" provision defined in that agreement.

59. Section 3(b)(ii) of the Western Haulage Agreement simply specifies that:

[redacted][37]

60. This different treatment of KCS lines west of Shreveport as compared to the Meridian Speedway lines east of Shreveport makes sense. Unlike for the Speedway, NS did not agree to provide any capital contribution to maintain and upgrade KCS's Dallas-Shreveport track as it did for Meridian Speedway. That capital contribution was fundamental to the MSLLC agreement on the Meridian Speedway, yet NS now asks for rights like its MSLLC rights without any capital contribution.

61. Providing for NS to receive, in the event of its {{[redacted]}}, and not granting NS trackage rights, obviously was a deliberate departure from the structure of the Shreveport to Meridian rights that the parties carefully crafted. Given the prolonged negotiation of the MSLLC agreements, and the specificity with which the agreements

[37] Exhibit 11(HC), 6th page.

provide for NS to obtain trackage rights east of Shreveport under certain circumstances, there is no doubt in my mind that providing {{ }} was deliberate on the part of both KCS and NS. In other words, by incorporating the provisions of the {{ .}}

62. NS's Responsive Application also expands the types of traffic that NS could handle on the Wylie-Shreveport trackage beyond what NS and KCS agreed to {{ }} Exhibit 10(HC) at 32nd page (emphasis added).

63. NS's proposed trackage rights, however, are not limited to {{ }} but rather are broader, applying to "the movement of intermodal traffic, the rail movement of which originates or terminates at the Wylie Intermodal Terminal in Wylie, Texas." *See* NS-13, Exhibit 2, Article 3, Restrictions on Use. This broader language deletes limitations in the definition of {{ }} In other words, the traffic that NS seeks

trackage rights to haul is more expansive than {{ }}, contradicting NS's claim that, "[T]he contingent trackage rights, if exercised, *would merely maintain the same traffic* moving between the same origins and destinations. The *only effect* would be to change the nature of the movement from haulage to trackage rights."[38]

64. NS's statement that, "NS does not anticipate any increase in … revenues … or net earnings as a result of the Proposed Transaction"[39] also likely is not accurate. Indeed, the trackage rights NS seeks could transfer {{ }} of dollars in revenue from KCS to NS each year. As shown below, NS's attempt to pay a trackage rights fee in lieu of haulage would thus vastly change current economics of KCS's handling of Dallas Intermodal Terminal Traffic between Wylie and Shreveport, {{ }}

65. KCS and NS have not yet determined what the haulage fees called for by {{ }}[40] would be, and cannot do so until {{ }} The

[38] Norfolk Southern Railway Company's Reply to CSX Transportation, Inc.'s Motion to Reject Responsive Application of Norfolk Southern Railway Company as Incomplete, NS-11 at 8 (emphasis added).

[39] NS-11, Norfolk Southern Railway Company's Reply to CSX Transportation, Inc.'s Motion to Reject Responsive Application of Norfolk Southern Railway Company as Incomplete, page 8.

[40] As noted above, {{ }}

best comparison currently available, therefore, is the revenue per container that KCS currently earns on the Wylie to Shreveport move compared to NS's proposed trackage rights fee of [redacted]}}.

66. NS's proposed trackage rights cover about 207 miles – approximately 9 miles on the Shreveport Terminal Subdivision from approximately Texas Avenue, near the west end of MSLLC's ownership, to Texas Junction, and about 198 miles from Texas Junction to Wylie Yard. The distance from Texas Avenue in Shreveport to Meridian on MSLLC's line is about 310.5 miles; that is, 8.2 miles on the Shreveport Terminal Subdivision, 161.7 miles on the Vicksburg Subdivision, and 140.6 miles on the Meridian Subdivision. Combined with the trackage rights that NS seeks, the overall distance from Wylie to Meridian is about 517.5 miles.

67. In 2021, KCS earned line-haul revenue of {{[redacted]}} per container that KCS moves from Wylie to Meridian for interchange with NS. That's slightly over {{[redacted]}} per container per mile or, for the approximately 207-mile portion of the route where NS seeks trackage rights, [redacted]

68. NS's proposed trackage rights agreement would transfer over {{[redacted]}} of that revenue to NS. At NS's proposed trackage rights fee of [redacted]}}, and with {{[redacted]}}, KCS revenue for the 207 miles from Wylie to Shreveport for that car would drop from {{[redacted]}} to {{[redacted]}}, for a loss

[41] Article {{[redacted]}} of NS's proposed trackage rights agreement, Exhibit 2 to NS-13. Article {{[redacted]}} of NS's proposed trackage rights agreement says that, for purposes of calculating its trackage rights fee, [redacted] } Almost all intermodal cars currently operated by KCS between Wylie and Shreveport {{[redacted]}}.

to KCS of [redacted]}}. If the traffic moved in {{[redacted]}}, the calculation might be slightly different, but for the approximately {{[redacted]}} containers that KCS moved over the Wylie-Shreveport line in 2021, that equates to a revenue loss of {{[redacted]}} per year. This calculation is not perfectly precise – for example, this is only gross revenue – but the point is clear: there would be a revenue transfer from KCS to NS of {{[redacted]}} of dollars per year if NS had trackage rights from Wylie to Shreveport for intermodal traffic as it proposes, rather than using the haulage rights NS and KCS agreed to in the Dallas Terminal Marketing Agreement. NS's statement that, "NS does not anticipate any increase in traffic, revenues, earnings available for fixed charges, or net earnings as a result of the Proposed Contingent Trackage Rights Transaction," *see* Amended Responsive Application of Norfolk Southern Railway Company, NS-13 at 12, likely is not accurate.

69. NS's request for contingent trackage rights is nothing more than an attempt to get for free rights that it chose not to bargain for or pay for in the MSLLC agreement. The STB should not order such a giveaway to NS.[42] NS had the opportunity to negotiate for more or different rights from Dallas to Shreveport and did not. The MSLLC agreements were extensively negotiated. The original Memorandum of Understanding for MSLLC is dated July

[42] NS's assertions that there is insufficient capacity on MSLLC are likewise ill-founded. Under Section 6(b)(ii) of the NS Joint Use Agreement, NS is entitled, based on the infrastructure completed in the first four years of MSLLC to 13 daily overhead trains, but NS provides only five per day. KCS's Wylie to Shreveport segment has capacity for 14 trains per day, but hosts only seven now. Thus, capacity exists to host additional NS trains, but NS has not generated that much business, a fact that hurts MSLLC's profitability. What NS is really complaining about is that it wants to move 13,000-foot intermodal trains on the Speedway, but {{[redacted]}} *See* Exhibit 14(HC), MSLLC Meeting Presentation by NS Regarding Siding Lengths Dallas to Atlanta (including MSLLC) and Desired Siding Extensions on MSLLC (with cost estimates) at pages 1 and 3.

5, 2005, indicating that negotiations for the joint venture likely began well before that date. The Transaction Agreement itself is dated December 1, 2005, indicating five months of additional negotiation *after* the MOU negotiations were completed. In a negotiation of that length, the parties undoubtedly made efforts to consider almost every possible future fact situation. Indeed, the 50+-page MSLLC Transaction Agreement alone contains provisions showing that the parties contemplated all of the aspects of the transaction that NS complains of – a change of control of KCS,[43] service failures,[44] and capacity constraints.[45] The MSLLC agreements provide ample protection against these risks, including remedies in the event of a change of control and specific provisions triggered in the event of a carefully-defined major service failure. NS does not need additional protection beyond what it extensively bargained for.

70. BNSF's request for contingent track rights from Dallas to Shreveport is even more clearly undeserved than NS's. BNSF says that it "considered … filing a responsive application for trackage rights on a KCS line that would have allowed BNSF to shift its interchange location with Eastern railroads further north to Shreveport, La. [but] BNSF now believes that it would be more appropriate for the Board to reserve jurisdiction to address this issue…"

71. The MSLLC agreements indicate that BNSF likely was negotiating with KCS in 2005-2006 (or at least had the opportunity to do so) for trackage rights from Dallas to Shreveport. The recitals of the Western Haulage Agreement include the statement that,

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[43] Exhibit 13(HC), Limited Liability Company Agreement, Section 9; Exhibit 12(HC), Section 7(g).

[44] Exhibit 12(HC), Section 2(a).

[45] Exhibit 13(HC), Limited Liability Company Agreement, Section 5.12; Exhibit 12(HC), Section 6(b).

{{[redacted]}}. Also, Section 2(a)(ii) of the Western Haulage Agreement says:

{{[redacted]}}

72. Obviously, KCS was in commercial discussions with BNSF concurrently with negotiating the MSLLC agreements with NS. Obviously, NS knew that from this language. Just as obviously, BNSF never reached such an agreement. NS's and BNSF's awareness of the fact that rights between Dallas and Shreveport were up for negotiation in 2006 is yet another reason why the demands of both NS and BNSF for new rights west of Shreveport that they declined to negotiate and pay for is so overreaching.

73. Because the BNSF Shreveport Agreement fell through, KCS has made the investments in the Dallas-Shreveport line to support intermodal growth, including the Wylie intermodal terminal. NS benefits from these investments, which led to doubling of Dallas Intermodal Terminal Traffic since 2012.

74. BNSF does not even attempt to offer any substantial justification related to the merger for being granted trackage rights on KCS to Shreveport. Furthermore, according to the Board's website, BNSF did not submit any filings at all in the proceedings authorizing the creation of MSLLC, making no attempt to show a need to connect to "eastern carriers" at

Shreveport.[46] With BNSF having passed on entering an MSLLC-type of trackage or haulage rights with KCS in 2005-2006 and providing no justification for such a grant in the MSLLC proceeding or now, the STB should not grant BNSF any such rights, contingent or otherwise.

75. In the UP/SP merger, BNSF deliberately surrendered the right to connect to "eastern carriers" at Shreveport. On March 1, 2002, UP and BNSF filed their "Joint Submission of Restated and Amended BNSF Settlement Agreement" with the Board. Section 6.d of that agreement limited BNSF's right to connect to other carriers at Shreveport as follows:

> "BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Texarkana, TX/AR, and Shreveport, LA, to and from the Memphis BEA (BEA 73), but not including proportional, combination or Rule 11 rates via Memphis or other points in the Memphis BEA. . . . BNSF shall also have the right to interchange: with . . . KCS at Shreveport, LA and Texarkana, TX/AR, for movements of traffic originated by KCS at or delivered by KCS to shippers or receivers at Lake Charles, West Lake, or West Lake Charles, LA; with KCS (y) at Shreveport, LA for movements of loaded and empty coal trains moving to and from Texas Utilities Electric Company's Martin Lake generating station, and…"[47]

By this Board-approved settlement, BNSF surrendered any right to connect to KCS for traffic moving from Shreveport to Meridian and to "eastern carriers" beyond. Likewise, BNSF does not

[46] Despite BNSF's claimed desire to gain rights to connect to "eastern carriers" at Shreveport, there are no such carriers there. KCS, MSLLC, and UP have track in Shreveport. BNSF has limited rights to use KCS and UP track in Shreveport as a result of the UP/SP merger. Neither CSX nor NS owns track in Shreveport. NS has the right to interchange "NS Traffic" with UP in Shreveport under the MSLLC agreements. BNSF could route traffic over the Meridian Speedway via interchange with KCS at Dallas, but BNSF has opted not to do so, instead interchanging traffic with CSX at Memphis.

[47] *See* excerpts of Joint Submission of Restated and Amended BNSF Settlement Agreement, UP/SP-393; BNSF-100, filed March 4, 2001 in STB Finance Docket No. 32760, Section 6(d) (Exhibit 5, page 15). BNSF and KCS do interchange coal trains at Shreveport for the Martin Lake power plant. BNSF has not, to the best of my knowledge, ever utilized its trackage rights on UP's line through Shreveport to interchange traffic to or from Westlake or West Lake Charles, LA with KCS, likely because UP switches traffic from those locations to/from BNSF in Lake Charles.

submit any evidence in this case justifying a need to connect with "eastern carriers" at Shreveport.[48]

76. KCS currently interchanges traffic with BNSF in the Alliance Yard area north of Fort Worth. If BNSF wants to move intermodal traffic to NS, it can interchange that traffic to KCS at Alliance for movement east. In fact, however, BNSF does not do so because it interchanges its eastbound intermodal traffic to CSX in Memphis.

77. Granting BNSF trackage rights over KCS track from Dallas to Shreveport could be a large monetary gift to BNSF. Currently BNSF and KCS interchange a number of loaded coal trains each month in Kansas City, destined for Luminant's Martin Lake plant served by BNSF in Rusk County, Texas. KCS interchanges these trains back to BNSF at Shreveport for BNSF to deliver them to Martin Lake (using BNSF's trackage rights over UP). This routing saves probably hundreds of miles as opposed to an all-BNSF routing via the Houston area. BNSF interchanges the empty trains back to KCS at Texarkana, from which KCS moves them north to Kansas City for interchange back to BNSF. Allowing BNSF trackage rights on KCS between Dallas to Shreveport might allow BNSF to cut KCS out of the Martin Lake moves (by running these trains over those trackage rights over KCS between Dallas and BNSF's trackage rights lines used to reach the Martin Lake plant), diverting substantial revenue from KCS to BNSF. Not only that, but without a commitment to capital investment in the line by BNSF – a commitment BNSF avoided in 2005-2006 – addition of the Martin Lake trains to the Dallas-

[48] Even though BNSF was granted trackage rights to Brownsville, TX in the UP-SP merger to interchange with KCSM (*see* excerpts of Joint Submission of Restated and Amended BNSF Settlement Agreement, UP/SP-393; BNSF-100, filed March 4, 2001 in STB Finance Docket No. 32760, Section 4(a) (Exhibit 5, pages 9 – 11)), it has yet to use them over 25 years later.

Shreveport line would create substantial added wear to the track and add substantial congestion without funding the investments needed to compensate.

78. In making their requests, BNSF and NS seek a gift of rights that neither was willing to pay for and that both passed on in 2005. BNSF also passed on opportunities to connect to KCS at Shreveport for traffic moving to/from Meridian in the UP-SP merger and the MSLLC proceedings, and doesn't even attempt to present evidence justifying such a connection here.[49] The agency should not gift NS or BNSF such rights based on speculation unsupported by any evidence.

IV. THE NEW ORLEANS INTERCHANGE AGREEMENT WAS ALWAYS MEANT TO BE TEMPORARY AND CSX'S REQUEST TO MAKE IT PERMANENT IS AN ATTEMPT TO HAVE THE BOARD IMPOSE COMMERCIAL RIGHTS THAT CSX HAS NOT NEGOTIATED OR PAID FOR AT THE EXPENSE OF CPKC

79. CSX seeks to have the Board force KCS to incur most of the interchange costs between KCS and CSX at New Orleans in perpetuity by preventing KCS from exercising cancellation rights that KCS and CSX agreed to at the beginning of 2021.[50] There is no reason that the Board should undo CSX's recent contractual commitment to allow renegotiation of its agreement with KCS about allocation of interchange costs if either party desires a change.

80. As background for its complaint, CSX recited abandonments of small sections of KCS track in New Orleans in 1985 and 2006. I am not aware of CSX objecting in those proceedings that the abandonments would prevent continuation of competitive rail service at New Orleans, as CSX now claims. Indeed, CSX's predecessor Seaboard System Railroad, Inc., was one of several signatories to an agreement including KCS's predecessor Louisiana &

[49] Among other evidence that would be needed, BNSF's failure to present evidence of the impact of congestion its operation would cause on CPKC's service to customers is a glaring gap.

[50] *See* Exhibit 15(HC).

Arkansas Railway Company (L&A), the New Orleans Terminal Company, and others that allowed L&A trackage rights on a few hundred feet of the Back Belt to connect from CN's track back to L&A's track to reach what is now KCS's New Orleans Yard.

81. KCS and CSX do not have a direct physical connection in New Orleans for interchange of traffic, and have not since approximately 1985. It is my understanding that prior to 1985, the Louisville & Nashville Railroad (now CSX) used trackage rights over the New Orleans Terminal Railroad's (NOT's) Back Belt to reach the interchange tracks with Louisiana & Arkansas Railway Company (L&A, since merged into KCS) located around Airline Drive.

82. In the early 1980's, KCS and Illinois Central Gulf Railroad Company (ICG) and the NOT entered a series of agreements with the State of Louisiana and Jefferson Parish to facilitate elimination of highway grade crossings on L&A's line by relocating L&A's operation to ICG's line and removing a corresponding section of L&A's. The agreement called for L&A to be allowed to operate over ICG's line from Orleans Junction (later changed to Frellsen Junction) to ICG's junction with the Back Belt at East Bridge Junction. The agreement allowed L&A to traverse ICG's line and then to traverse a short section of the Back Belt back to return to the remainder of L&A's line near the L&A yard. The agreements also called for construction of a new NOT interchange track on ICG property. However, that interchange track apparently was not constructed. In any case, CSX's implication that this change was a commercial decision on KCS's part is incorrect; rather, the move to ICG's line was necessary for the State to complete its highway project for the benefit of the public.

83. Because the new NOT interchange track was not built, L&A lost the ability to interchange with NOT near East Bridge Junction. Furthermore, NS acquired NOT's Back Belt, essentially nullifying use of the Back Belt by L&N (CSX). As a consequence, L&N (CSX) and

L&A (KCS) no longer had direct interchange in New Orleans, and were forced to use the New Orleans Public Belt Railroad (NOPB) to handle their interchange.

84. During the past few years, NOPB has undergone a number of changes. One of those was a significant increase in switch costs for intermediate switches by NOPB between linehaul carriers. In response, KCS and CSX discussed each being responsible for delivering interchange from themselves to the other carrier. Having no rights on track that connected to CSX, KCS planned to have NOPB handle KCS's interchange to CSX, and have CSX be responsible for handling its interchange to KCS. However, when CSX discovered that it did not have direct access to interchange with KCS, CSX balked at paying NOPB's charges. Instead, CSX threatened to tender traffic previously interchanged to KCS at New Orleans – largely for customers on KCS's line between New Orleans and Baton Rouge – to KCS at Gulfport, MS or Birmingham, AL.

85. Neither Gulfport nor Birmingham would have been a suitable interchange. KCS receives only local traffic for interchange from CSX at Gulfport. For KCS to route traffic to a customer between Baton Rouge and New Orleans from Gulfport would have required KCS moving the traffic north to Hattiesburg, CN providing KCS haulage from Hattiesburg to Jackson, KCS moving the traffic west from Jackson to Shreveport, and then KCS moving the traffic south from Shreveport to destination. This would have added hundreds of miles to the move and been wasteful and costly. Similarly, interchange of New Orleans area traffic at Birmingham would have involved a third railroad – Watco's Alabama Southern from Tuscaloosa to Artesia, and then KCS from Artesia south to Meridian, across the Speedway from Meridian to Shreveport, and south from Shreveport to the destination. Depending on the traffic's origin on CSX, this routing also might have added hundreds of miles and been wasteful and inefficient.

86. To avoid all of these problems from CSX's refusal to be responsible for handling its interchange to KCS, KCS agreed reluctantly to {{ }}[51] It certainly is not the case that CSX unwittingly agreed to the termination provision. Now, CSX wants the STB to take away that termination right, saddling CPKC perpetually with the majority of the cost of interchanging with CSX serving New Orleans area customers. There is no justification for freezing this uneven allocation of interchange costs as CSX requests.

87. Another alternate interchange between KCS and CSX for some traffic would be via the Meridian & Bigbee Railroad, L.L.C. (MNBR), which connects to KCS in Meridian, MS and to CSX at Montgomery, AL. CSX and KCS do not have an interchange at Meridian. CSX previously had a haulage agreement with MNBR between Meridian and Montgomery, but CSX cancelled that agreement in 2007. {{ }}

V. LYONDELLBASELL'S PROPOSED RECIPROCAL SWITCHING AT LAKE CHARLES HAS NO NEXUS TO ITS STATED SERVICE CONCERNS.

88. Finally and briefly, LyondellBasell (LYB) asks the STB to grant BNSF immediate access to a facility LYB owns on the Rosebluff Lead and to a facility that LYB partly

[51] Exhibit 15(HC), page 2, paragraph 6.

owns and manages at Mossville, LA; that the Board establish conditions for BNSF access to all shippers on the Rosebluff Lead; and that the Board order KCS to provide UP reciprocal switching between LYB's plant in Corpus Christi to interchange with UP at Robstown. None of these requests are justified.

89. First, the Rosebluff Lead and Mossville facilities addressed by LYB's comments are already served by both KCS and UP.[52] Both have direct rail competition. LYB has not shown that the Transaction has any effect at all on service to these facilities.

90. Further, as to facilities on the Rosebluff Lead, the Board is well aware of its ongoing and complex proceedings involving BNSF's terminal trackage rights application for the Rosebluff Lead.[53] The extensive proceedings before the Board and the complex factual decisions the Board has made thus far show that granting LYB's sweeping request, untethered to any presentation of relevant facts, would be entirely contrary to everything the Board has done to date in its pending proceeding.

91. LYB's further request that that UP be granted access via reciprocal switching to all shippers on KCS track in Corpus Christi does not solve any supposed competitive problem arising from the merger. LYB's Corpus Christi facility is not rail-served now – the CP-KC merger does not harm competition for rail traffic there because there is no rail traffic there.

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[52] Mossville is a separate station from Westlake and West Lake Charles, as shown by UP, BNSF and KCS all listing it in their listings in the Open and Prepay Station List. LYB says that KCS "recognizes that the [recently-built Mossville facility in which LYB even more recently purchase an interest] is open to Union Pacific. But KCS refuses to recognize BNSF's access…" LYB ignores the fact that KCS provides UP reciprocal switching to the facility under KCS Tariff 8100-E, Item 345 {{ }} and that switching to locations in Westlake and West Lake Charles to which LYB tries to compare the Mossville facility are not covered by the tariff, but by a longstanding contract with UP that does not include Mossville.

[53] Finance Docket No. 32760 (Sub-No. 46).

92. Even if LYB's requests for BNSF access in the West Lake Charles and Mossville areas, or UP's access at Corpus Christi, were granted, those railroads would be handling any traffic they garnered on the same lines that LYB raises concerns over being too congested. For example, UP routing traffic to/from Corpus Christi would traverse the same UP lines between Robstown and Placedo and probably between Houston and Beaumont, and BNSF would use the same UP-BNSF joint line between Houston and New Orleans and the Neches River bridge to handle traffic that UP currently moves. Accordingly, the reciprocal switch access would not solve but could exacerbate any congestion issues.

93. LYB's request is a purely commercial preference and an attempt to have the Board grant BNSF access where BNSF does not have the commercial rights, has made no investments, threatens to increase congestion and has been unable thus far to justify even limited rights, let alone the sweeping, factually-unsupported access that LYB requests.

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VERIFICATION

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

Executed this ___ day of July, 2022.

DocuSigned by:
Stephen Simmons
CD09926AE2CC489...

Stephen D. Simmons
Director of Border and Interline Operations
The Kansas City Southern Railway Company

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 1

JUNE 29, 2022 HOUSTON AREA JOINT MEETING REPORT

JOINT MEETING
JUNE 29, 2022

JUNE DISCUSSION

Complex Workshop Success

YH387J: On Duty Change Working

YH185J: Round Tripping

Relief Crews (Complex/Joint Line)

Re-crews on downward trend

KCS GTB Automation

Timeline for Completion?

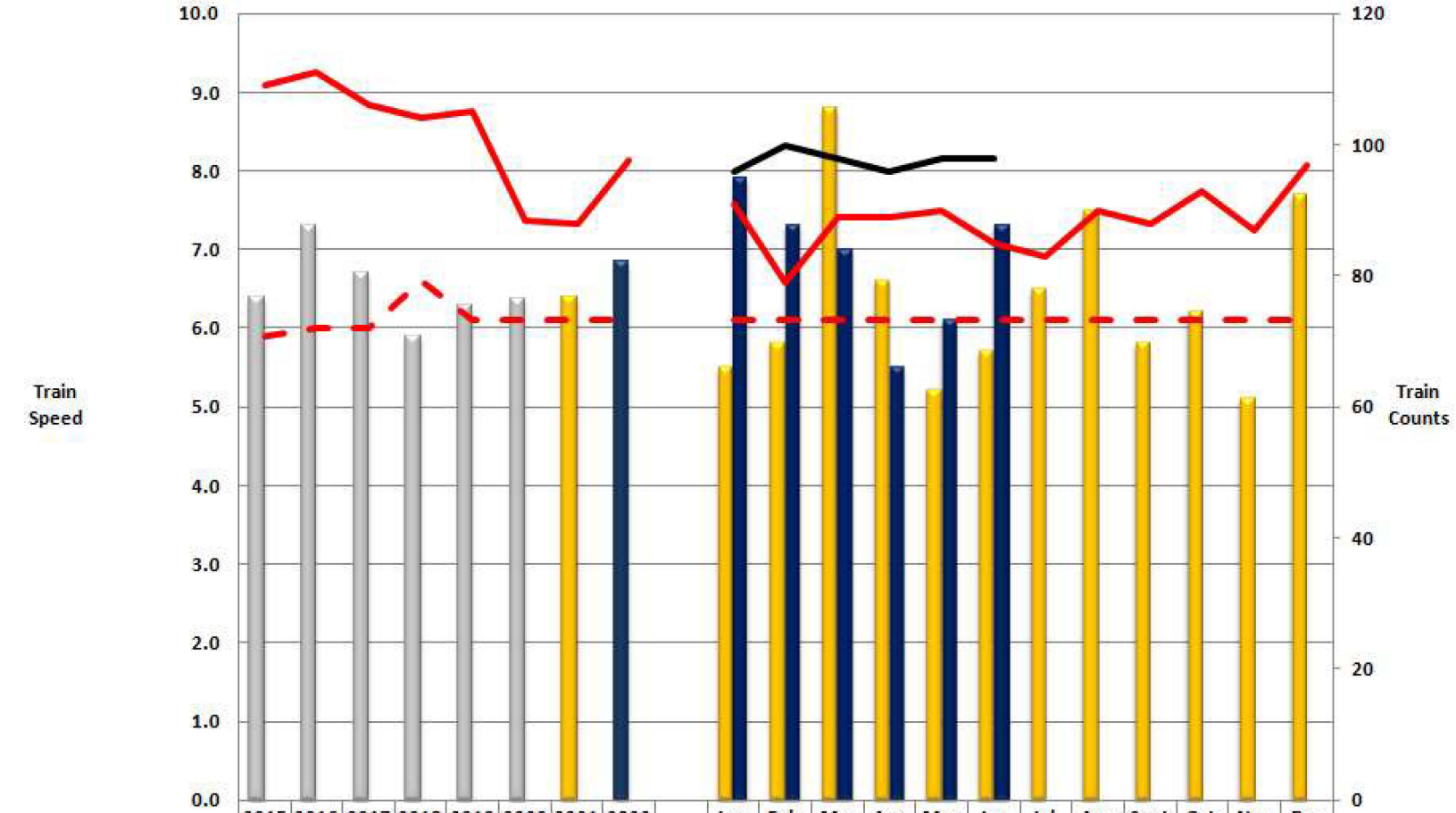
KCS

Kendleton Local Mon, Wed, Fri to discuss today

UP Beaumont

MLKBT/MBTLK time change to 0400

HOUSTON COMPLEX PERFORMANCE

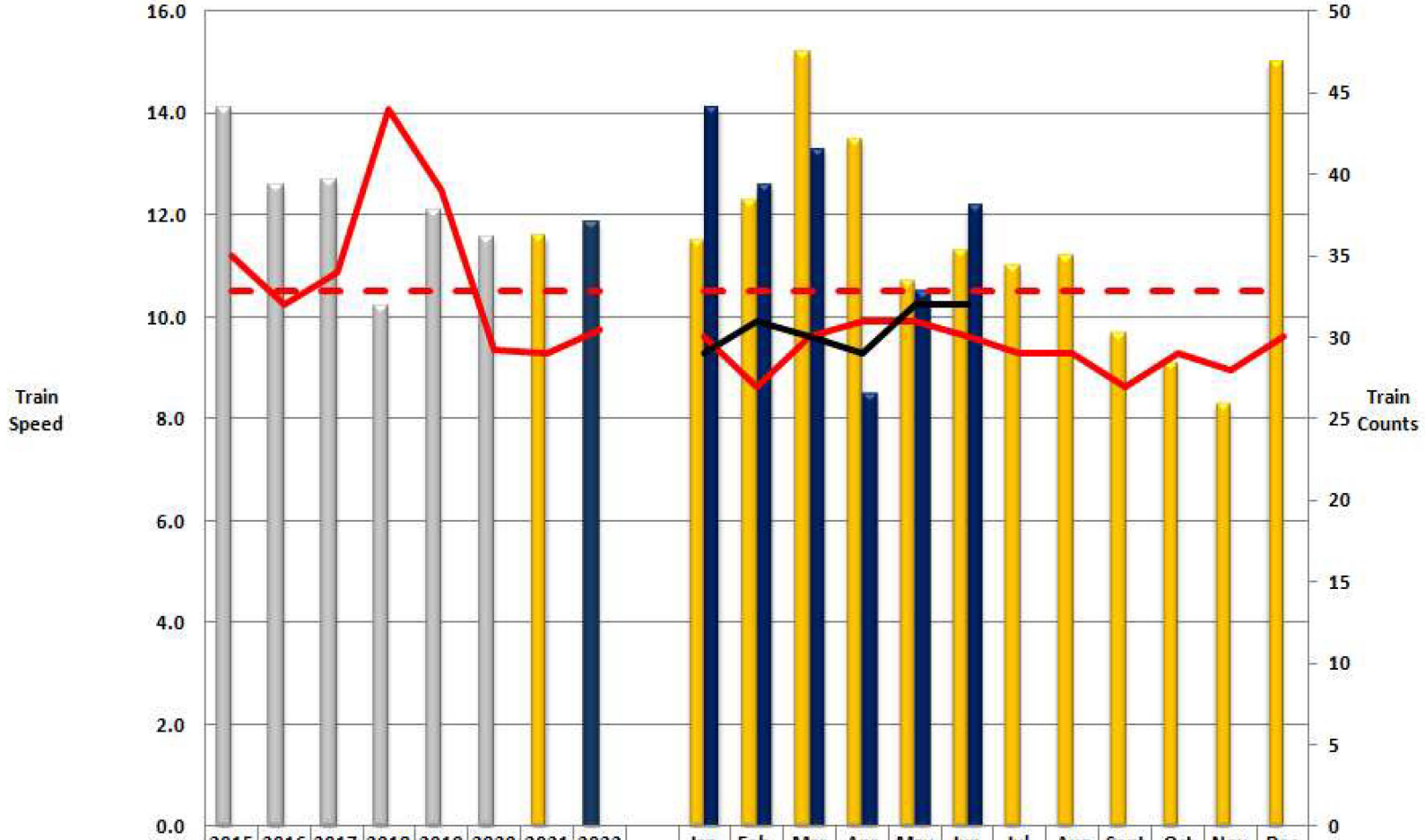


	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	6.4	7.3	6.7	5.9	6.3	6.4	6.4	6.9		5.5	5.8	8.8	6.6	5.2	5.7	6.5	7.5	5.8	6.2	5.1	7.7
2022 Speed										7.9	7.3	7.0	5.5	6.1	7.3						
Goal	5.9	6.0	6.0	6.6	6.1	6.1	6.1	6.1		6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
2021 Train Counts	109	111	106	104	105	88	88	98		91	79	89	89	90	85	83	90	88	93	87	97
2022 Train Counts										96	100	98	96	98	98						

HOUSTON COMPLEX MOW ACTIVITIES 2ND QUARTER 2022

- Glidden Road Crossing
  - Replacements in progress
    - Completion Date 07/28
- Englewood Bypass Track
  - In progress. ETO 4th Quarter 2022
- Glidden Tie Gang
  - ETA Sept. 28th, 2022

JOINT LINE PERFORMANCE



	2015	2016	2017	2018	2019	2020	2021	2022		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
2021 Speed	14.1	12.6	12.7	10.2	12.1	11.6	11.6	11.9		11.5	12.3	15.2	13.5	10.7	11.3	11.0	11.2	9.7	9.1	8.3	15.0
2022 Speed										14.1	12.6	13.3	8.5	10.5	12.2						
Goal	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5		10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5
2021 Train Counts	35	32	34	44	39	29	29	31		30	27	30	31	31	30	29	29	27	29	28	30
2022 Train Counts										29	31	30	29	32	32						

JOINT LINE INFRASTRUCTURE ENHANCEMENTS 2ND QUARTER, 2022

- July 7th
  - 24’ Liberty Bridge Replacement “Final”
- July 28th
  - 12’ Double Bridge Replacement at West Lake
- Joint Elimination
  - UP Houston Sub
    - Weld out new Double Track

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 2

TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS, EXECUTED DEC. 12, 1996 (MP/SP-TM),

45

TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS

The following terms (hereinafter referred to as the "Terms") shall govern rights provided by MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation ("MP"), and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("SP"), with MP and SP jointly and severally referred to as "MP/SP" or "Owner," on the one hand, to THE TEXAS MEXICAN RAILWAY COMPANY ("Tex Mex" or "User"), on the other hand, with MP/SP and Tex Mex sometimes referred to collectively as "Parties," pursuant to the decision of the Surface Transportation Board ("STB") in Finance Docket No. 32760 served August 12, 1996 (the "Decision").

RECITALS

A. MP/SP owns lines of railroad consisting of track structure extending between Robstown, Texas and Odem, Texas, and between Corpus Christi, Texas, and Beaumont, Texas, by way of Odem, Texas, identified as follows:

> MP's line between Robstown, Texas, in the vicinity of MP Milepost 141.48 and Placedo, Texas, in the vicinity of MP Milepost 224.2;
>
> MP's line between Corpus Christi, Texas, in the vicinity of MP Milepost 145.59, and Odem, Texas, in the vicinity of MP Milepost 132.2, via Savage Lane to MP's Viola Yard;
>
> SP's line between Placedo, Texas, in the vicinity of SP Milepost 14.2, and West Junction, Texas, in the vicinity of SP Milepost 12.6, via Victoria, Texas, and Flatonia, Texas;
>
> SP's line between West Junction, Texas, in the vicinity of SP Milepost 12.6, and T&NO Junction, Texas, in the vicinity of SP Milepost 4.6;
>
> SP's line from West Junction through Bellaire Junction to Chaney Junction, in the vicinity of SP Milepost 2.8;
>
> SP's line from Chaney Junction, in the vicinity of SP Milepost 2.8, to Tower 26, in the vicinity of SP Milepost 360.7, via the Houston Passenger station;

SP's line from Chaney Junction, in the vicinity of SP Milepost 2.8, to Tower 26, in the vicinity of SP Milepost 360.7, via the Hardy Street yard;

MP's line from Settegast Junction, in the vicinity of MP Milepost 381.61, to the connection with HB&T at Interstate Junction, in the vicinity of MP Milepost 7.60;

SP's line from T&NO Junction, in the vicinity of SP Milepost 4.6, to the connection with PTRA, in the vicinity of Katy Neck (GH&H Junction), in the vicinity of SP Milepost 1.3;

SP's line from SP Milepost 360.7 near Tower 26 to the connection with HB&T at Quitman Street, in the vicinity of SP Milepost 1.45;

MP's line between Gulf Coast Junction, Texas, in the vicinity of MP Milepost 377.98, and Amelia, Texas, in the vicinity of MP Milepost 451.4;

MP's line between Amelia, Texas, in the vicinity of MP Milepost 451.4, and the connection with SP at Langham Road, Texas, in the vicinity of MP Milepost 456.7;

SP's line between Langham Road, Texas, in the vicinity of MP Milepost 456.7, and Tower 74, in the vicinity of MP Milepost 458.8;

MP's line between Tower 74, in the vicinity of MP Milepost 458.8, and (1) the connection with The Kansas City Southern Railway Company ("KCS") at GLC Jct., Texas, in the vicinity of MP Milepost 460.36 (KCS Milepost 766.7), and (2) the connection with KCS at the Neches River Draw Bridge in Beaumont, Texas, in the vicinity of KCS Milepost 766.0;

as shown by bold line on the attached prints dated September 23, 1996 (and identified as Exhibit "A") and further described in Section 1.7 of Exhibit "B," which shall be referred to herein as the "Joint Trackage."

B. The STB in Finance Docket No. 32760 approved the common control and merger of the rail carriers controlled by Union Pacific Corporation ("UPC"), including MP and Union Pacific Railroad Company ("UPRR") (UPC, UPRR and MP are referred to collectively as "UP"), and the rail carriers controlled by Southern Pacific Rail Corporation ("SPR"), including SP, conditioned on, among other things, partial grant of the Responsive Application of Tex Mex, dated March 29, 1996.

C. In order to exercise its authority to acquire control of SPR as granted by the STB in Finance Docket No. 32760, MP/SP is willing to provide Tex Mex with the rights specified in the Decision.

D. Tex Mex desires to receive said rights and desires to conduct operations over said rights. Tex Mex and MP/SP now wish to assist the STB in specifically defining the terms and conditions under which said rights shall be exercised.

E. It is the position of Tex Mex and MP/SP that these Terms do not constitute the acquiescence by either of them in the Decision and shall not preclude either of them from seeking any reopening, reconsideration or judicial review of the Decision.

TERMS

1. General Conditions:

The General Conditions set forth in Exhibit "B" attached hereto are hereby made a part of these Terms. All capitalized Terms used and not otherwise defined in these Terms shall have the meaning ascribed to them in the General Conditions. If any conflict between the General Conditions and these Terms shall arise, the provisions of these Terms shall prevail.

2. Rights of Tex Mex:

(a) Subject to the terms and conditions contained herein, MP/SP shall grant to Tex Mex the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in Tex Mex's account over the Joint Trackage in common with MP/SP and such other railroad company or companies as MP/SP has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in these Terms), such other railroad company or companies to be considered MP/SP for the purposes of these Terms, it being understood and agreed that Tex Mex shall not have the right to:

(i) Switch industries upon the Joint Trackage, except as otherwise provided in Section 2(g);

(ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in Sections 2.11, 2.12 and 2.13 of Exhibit B;

(iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located along the Joint Trackage, except as otherwise provided in Section 2(g);

(iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of Tex Mex; provided, however, that the foregoing shall not prevent Tex Mex, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under these terms;

(v) Connect with or interchange with any other railroad, except as otherwise provided in Section 4; or

(vi) Establish any transload facilities on the Joint Trackage or build into or out from any facility from/to the Joint Trackage.

(b) The rights granted in Section 2 shall be only for rail traffic of all kinds and commodities, both carload and intermodal, in Equipment that meets all applicable specifications established by the Association of American Railroads and the Federal Railroad Administration, provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi Line.

(c) User shall have the right to establish crew change points at points on the Joint Trackage as from time to time may be mutually agreed to in writing by Owner and User. However, User agrees that if sufficient trackage is not available at such locations(s) to facilitate crew changes of User, Owner may require User to construct additional trackage ("Crew Change Facilities") in the vicinity of such location as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such Crew Change Facilities are necessary, the Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such Crew Change Facilities are constructed at the cost and expense of User, and Owner shall choose to use such Crew Change Facilities, Owner shall pay User fifty percent (50%) of the cost of constructing such Crew Change Facilities. Should Owner decline to participate, Owner shall be denied access to such Crew Change Facilities. However, should Owner elect at a later date to use such Crew Change Facilities, such right shall be granted to Owner by User upon payment of fifty percent (50%) of User's initial costs plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by User commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the Improvements. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's

interest rate (i.e. the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

In addition, Owner shall lease to User, by separate written agreement at reasonable and customary charges, existing facilities for office, locker, change and lunchroom purposes by User's personnel upon request of User to Owner, and as reasonably available, or property of Owner as reasonably available for User to establish its own facilities.

(d) User agrees that when entering or exiting the Joint Trackage or using the Joint Trackage to set out or pick up ("User's Operations"), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage in the vicinity of such location(s) as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such additional trackage is necessary, the Owner may nevertheless insist that it be constructed, with the question of its necessity, and the User's obligation to bear its cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage plus interest as calculated pursuant to Section 2(c) above.

(e) User shall have the right to such use of SP's Glidden Yard at Glidden, Texas, as is reasonably necessary to effectuate the rights granted by these Terms and on such terms and conditions (including reasonable compensation terms) as may be agreed to in writing by the parties or determined by arbitration pursuant to Section 6 of the General Conditions if the parties fail to agree; provided, however, that such use by User shall not unreasonably interfere with Owner's operations. Any dispute between User and Owner regarding the reasonableness of User's use of Glidden Yard shall be submitted to arbitration pursuant to Section 6 of the General Conditions.

(f) If Owner implements a directional flow of operations between Houston, Texas, and Beaumont, Texas, Owner will assure that User's operations are not adversely affected thereby.

(g) User shall have the right to serve all shippers that, as of September 10, 1996, were capable of receiving service from both MP and SP and no other railroad, directly or through reciprocal switching.

3. GTM Rate:

(a) In addition to other payments to be made under these Terms, User shall remit to Owner monthly for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of 3.84 mills per GTM for all Equipment, which sum per GTM ("GTM Rate") shall be deemed to include ordinary and programmed maintenance of the Joint

Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes.

(b) For the purpose of computing the GTM Rate under this Section 3, the distance between the designated points of the Joint Trackage shall be determined by reference to MPRR's EPMS Engineering Mileage Master or SP's Station Pair Master File, whichever is applicable, both of which shall be subject to verification by User.

(c) The GTM Rate set forth in Section 3(a) of these Terms shall be subject to adjustment annually, commencing as of July 1, 1997, as follows:

All trackage rights charges under this Section 3 shall be subject to adjustment annually beginning as of the effective date of these Terms to reflect seventy percent (70%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the ICC or successor agency or other organizations. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration.

4. Interchange:

In exercising the rights granted by these Terms, Tex Mex shall have the right to interchange traffic (a) with carriers other than MP/SP at the existing interchange points with those carriers on the Joint Trackage, i.e., (i) at Houston, Texas, with the Port Terminal Railroad Association ("PTRA"), the Houston Belt Terminal Railway Company ("HBT"), The Atchison, Topeka & Santa Fe Railway Company ("ATSF") and Burlington Northern Railroad Company ("BN") (ATSF and BN are referred to collectively as "BNSF"), and (ii) at Beaumont, Texas, with BNSF and The Kansas City Southern Railway Company ("KCS"); (b) with BNSF at Robstown and Corpus Christi and at any new interchange point on the Joint Trackage that may hereafter be established between MP/SP and BNSF; and (c) with MP/SP at Houston, Beaumont and such other points as may mutually be agreed. Any interchange between Tex Mex and PTRA or between Tex Mex and HBT at Houston, Texas, shall be governed by agreements entered into between those parties or terms imposed by the STB.

5. Additions:

(a) Owner and User shall conduct a joint inspection to determine what connections ("Connections") and sidings or siding extensions associated with Connections ("Sidings") are necessary in the reasonable judgment of Owner to implement the rights granted under Section 2 of these Terms. User, at its sole cost and expense, shall pay the cost of such Connections and Sidings. If User does not agree that such Connections and Sidings (other than those described in subsections (i) and (ii), the necessity for which is not in dispute, and to which this sentence does not apply) are necessary, Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be

determined by arbitration pursuant to Section 6 of the General Conditions. In the event that the User bears the sole cost and expense of any such Connections and Sidings, no other railroad shall have the right to use them except upon terms agreed to by User and such other railroad. In the event Owner shall elect to use such Connections and Sidings, Owner shall pay to User fifty percent (50%) of the cost to User of constructing the Connections and Sidings, plus interest as calculated pursuant to Section 2(c) above, and, having made such payment, Owner may also admit other railroads to the use of such Connections and Sidings. Owner shall maintain the part of any Connection or Siding on its property at its sole cost and expense, and User, at its sole cost and expense, shall maintain the part of any Connection or Siding on its property or property of others. Such necessary Connections and Sidings shall include, but are not necessarily limited to, those described in subsections (i) and (ii) below:

(i) User shall construct a connection to access MP at Robstown, Texas, to include track 8500 feet in length to permit Tex Mex trains to clear the MP main line (the "Robstown Connection"). The design for the Robstown Connection shall be submitted to Owner for its written approval within forty-five (45) days following the effective date of these Terms, which approval shall not be unreasonably withheld, and User's operation thereover shall be subject to Owner's prior written acceptance of the Robstown Connection. User agrees that the Robstown Connection shall be constructed within one hundred eighty (180) days of acquisition of the required property and approval by Owner of its design. Owner grants User the right to use, as daily dispatching conditions reasonably permit, the existing connection between Tex Mex and Owner at Robstown and 8500 feet of Owner's main line south of that connection, for a period of six (6) months following the date of Owner's approval of the design of the Robstown Connection, which connection and trackage shall be deemed part of the Joint Trackage during the period of Tex Mex's usage thereof, including any extensions of the period as provided below. Owner will extend the period of User's use of the existing connection for an additional six (6) months in the event (a) User is unable to complete the Robstown Connection within the time frame specified in the preceding sentence and User is making a bona fide effort to complete the construction of the new connection, and (b) User's continued operations over the existing connection will not, in Owner's judgment, unreasonably interfere with Owner's operations. If BNSF constructs the Robstown Connection, Tex Mex shall have the right to use the Robstown Connection on terms agreed to by Tex Mex and BNSF. If the Robstown Connection is not constructed by BNSF, Tex Mex shall construct the Robstown Connection as provided above.

(ii) User shall also construct a connection to access SP at Flatonia, Texas, to include track parallel to SP's Victoria Subdivision, Port LaVaca Branch, 8500 feet in length to permit Tex Mex trains to clear the SP main line (the "Flatonia Connection"). The design for the Flatonia Connection shall be submitted to Owner for its written approval within forty-five (45) days following the effective date of these Terms, which approval shall not be unreasonably withheld, and

User's operation thereover shall be subject to Owner's prior written acceptance of the Flatonia Connection. User agrees that the Flatonia Connection shall be constructed within one hundred eighty (180) days of acquisition of the required property and approval by Owner of its design. Owner grants User the right to use the existing connection between SP's Victoria Subdivision, Port LaVaca Branch, and SP's Glidden Subdivision at Flatonia and siding south of Owner's main line West of that connection for a period of six (6) months following the date of Owner's approval of the design of the Flatonia Connection, which existing connection and trackage shall be deemed part of the Joint Trackage during the period of Tex Mex's usage thereof.

(b) Except as provided in Section 5(a) above, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings, Centralized Traffic Control, grade separations, and future connections, shall be handled as follows: (i) if the Change in and/or Addition to the Joint Trackage is for the sole benefit of one party, that party shall be solely responsible for the entire cost and expense thereof; (ii) all other Changes in and/or Additions to the Joint Trackage shall be shared by MP/SP and Tex Mex on the basis that the parties' respective GTM's operated over the Joint Trackage bear to total GTM's operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced. The use of Joint Trackage by any third party shall be attributed to MP/SP for purposes of computing respective GTM's for purposes of this Section 5(b).

(c) In the event such Changes in and/or Additions to the Joint Trackage are constructed at the sole cost and expense of one party (party of the first part), the other party (party of the second part) shall be denied access to such Change in and/or Addition to the Joint Trackage. If the party of the second part at some future date shall choose to use such Changes in and/or Additions to the Joint Trackage, such right shall be granted to party of the second part by party of the first part upon payment of fifty percent (50%) of party of the first part's initial costs plus per annum interest calculated pursuant to Section 2(c).

6. Notices:

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to these Terms shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for MP/SP:

Executive Vice President-Operation
Room 1206
1416 Dodge Street
Omaha, Nebraska 68179

With a copy to:

Director Joint Facilities
Room 1200
1416 Dodge Street
Omaha, Nebraska 68179

If intended for Tex Mex:

The Texas Mexican Railway Company
1200 Washington Street
P.O. Box 419
Laredo, Texas 78042

Notice of address change may be given any time pursuant to the provisions of this Section 6.

7. Term:

These Terms shall be effective upon consummation of the control authority granted in the Decision for a term of ninety-nine (99) years. These Terms shall terminate, and all rights conferred pursuant thereto shall be canceled and deemed void ab initio, if, in a Final Order, the application for authority for UP to control SPC has been denied or has been approved on terms unacceptable to the applicants or has been granted on terms that do not require the rights provided herein, provided, however, that if these Terms become effective and are later terminated, any liabilities arising from the exercise of rights under Sections 1 through 5 during the period of its effectiveness shall survive such termination. For purposes of this Section 7, "Final Order" shall mean an order of the Surface Transportation Board, any successor agency, or a court with lawful jurisdiction over the matter which is no longer subject to any further direct judicial review (including a petition for writ of certiorari) and has not been stayed or enjoined.

Approved:

For MP/SP: James V Dolan

Position: Vice President - Law

Date: DEC 1 2 1996

For Tex Mex: Jerry W Fields

Position: President

Date: Nov 20, 1996

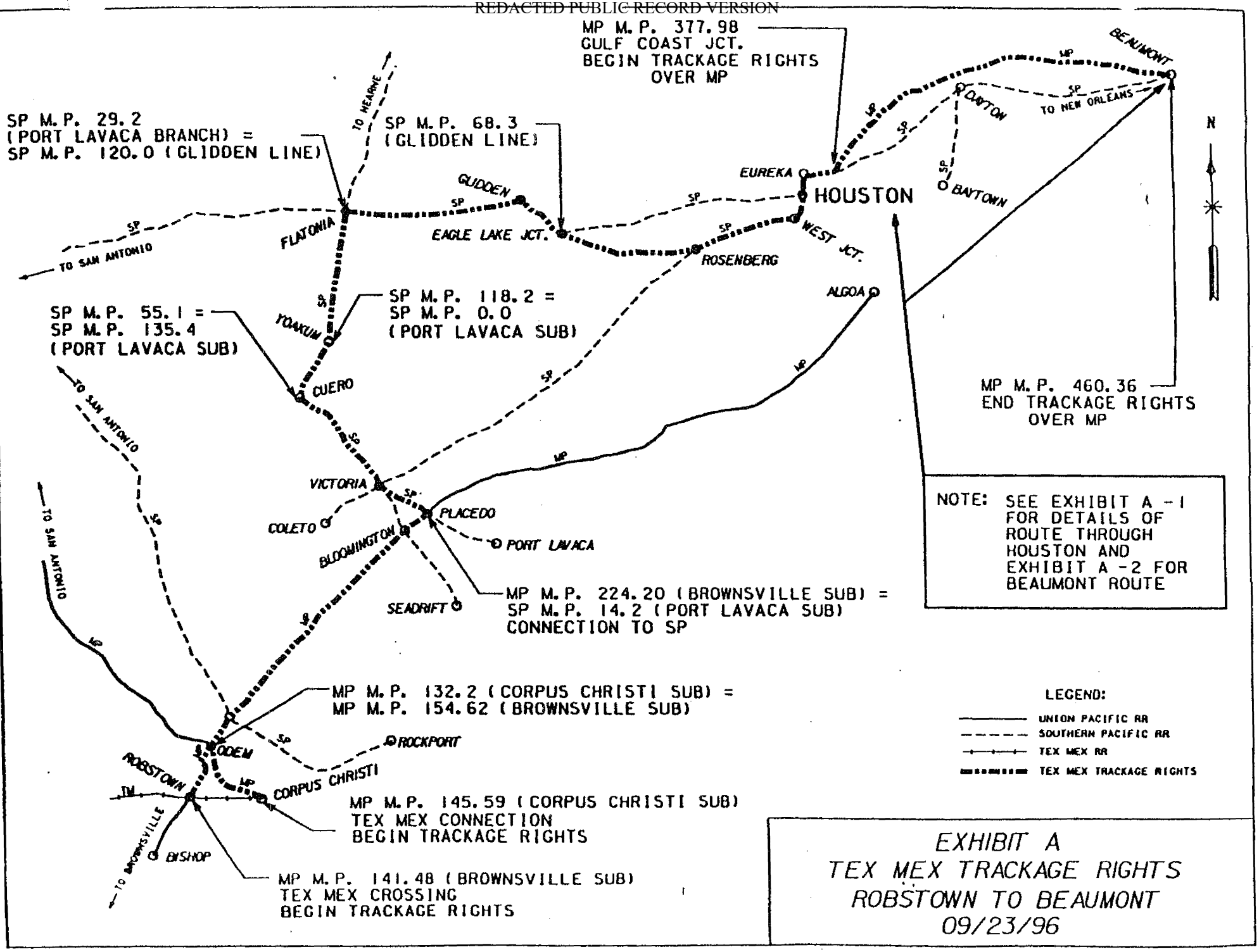


EXHIBIT A
TEX MEX TRACKAGE RIGHTS
ROBSTOWN TO BEAUMONT
09/23/96

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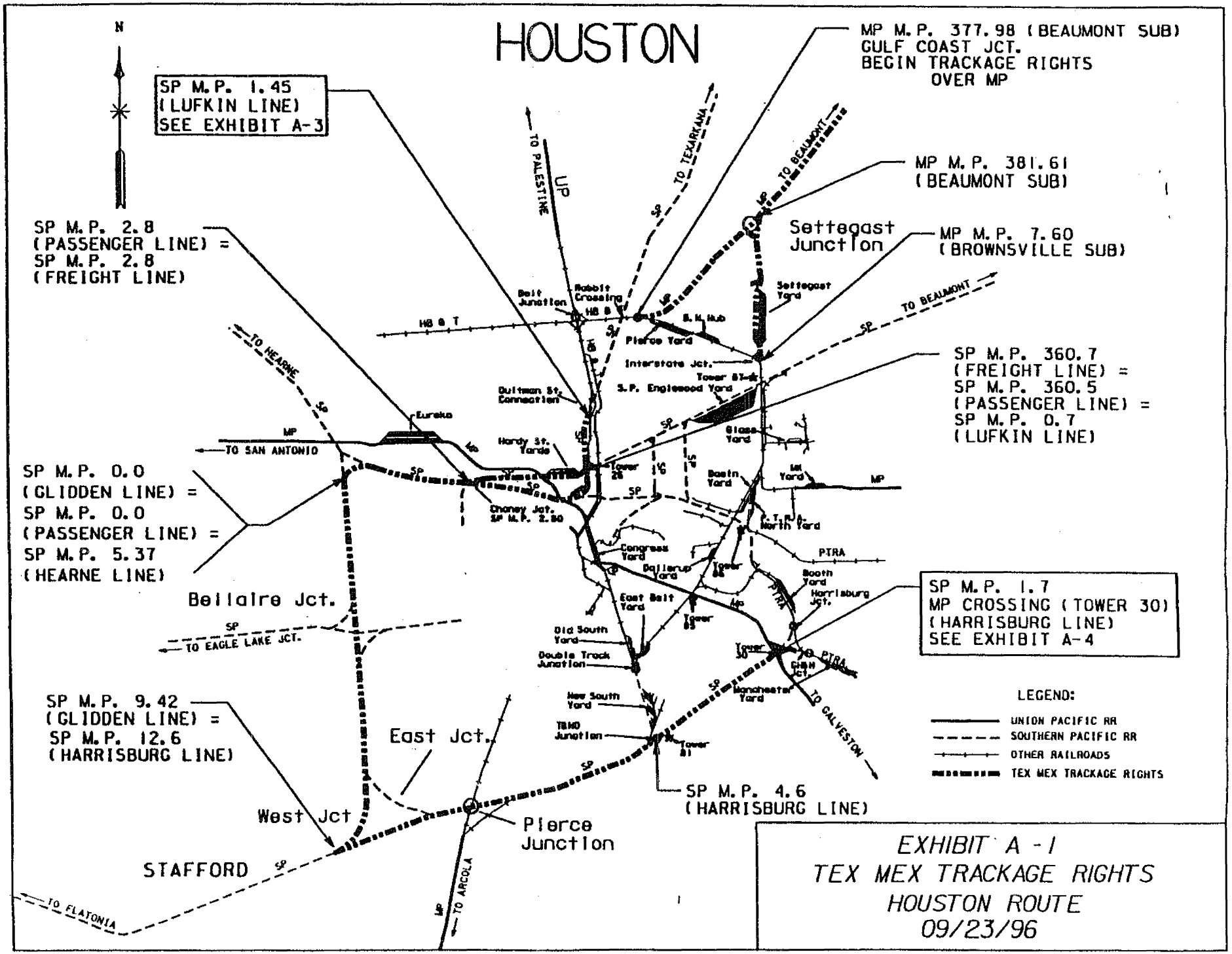

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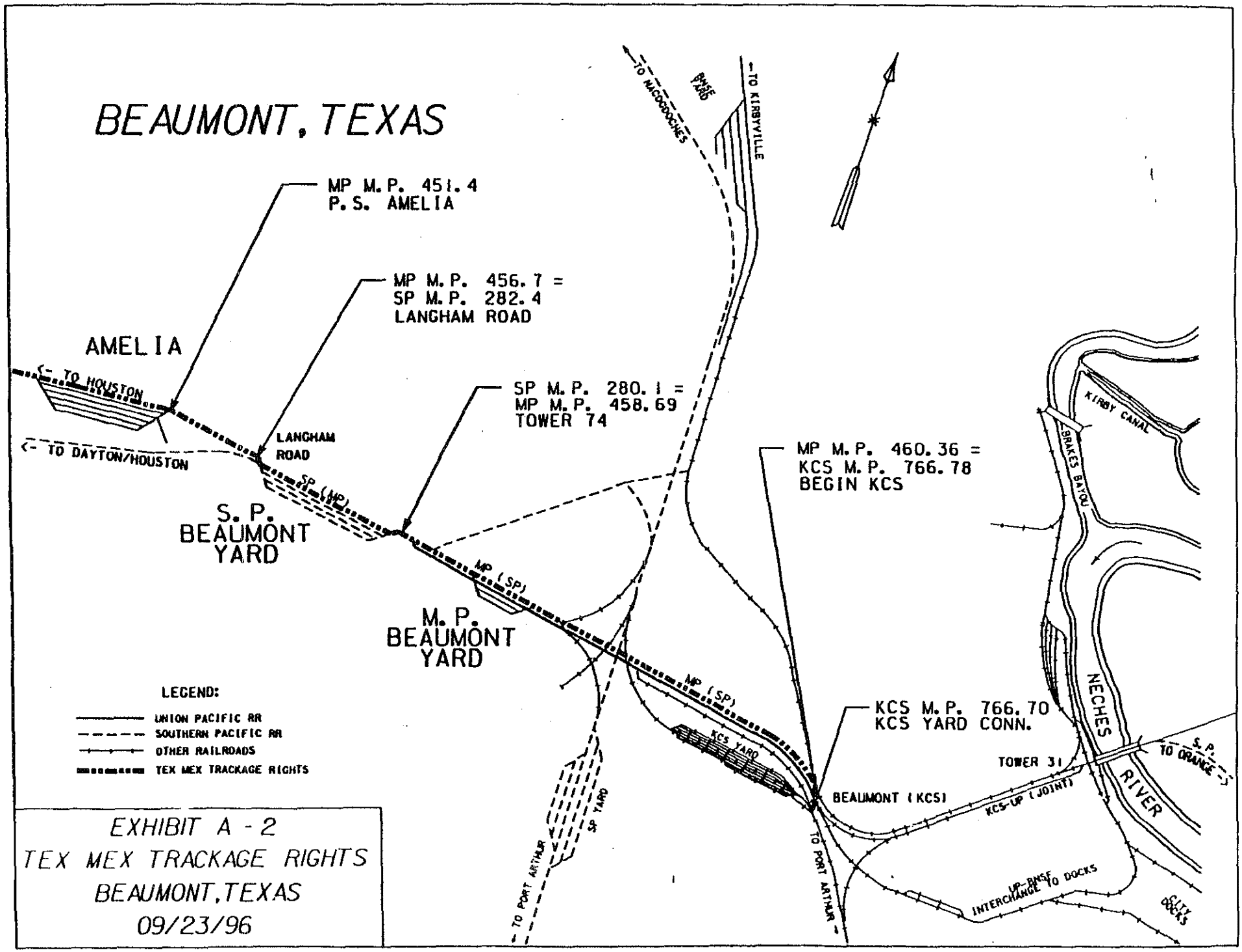
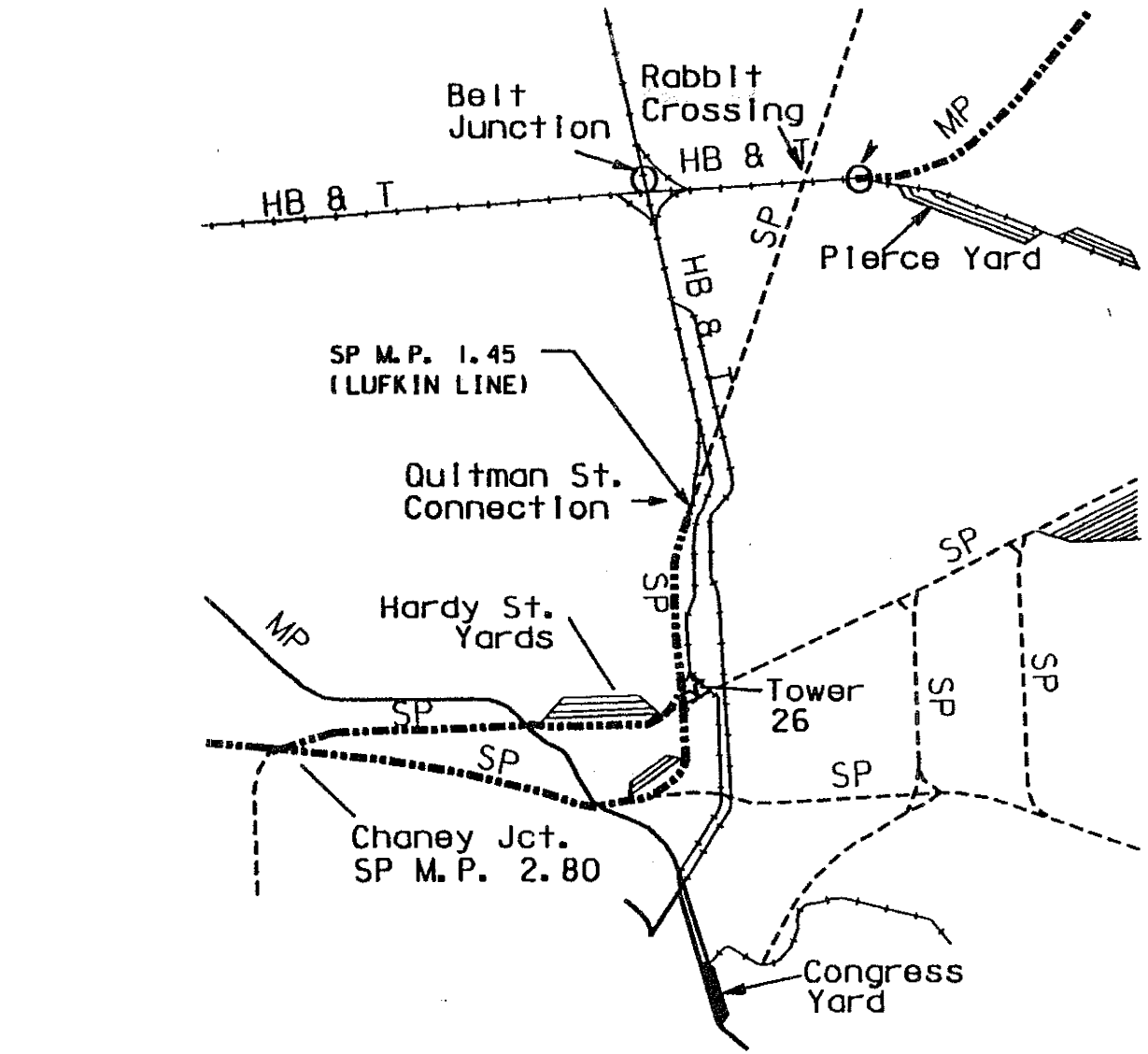

BEAUMONT, TEXAS
MP M.P. 451.4
P.S. AMELIA
MP M.P. 456.7 =
SP M.P. 282.4
LANGHAM ROAD
SP M.P. 280.1 =
MP M.P. 458.69
TOWER 74
MP M.P. 460.36 =
KCS M.P. 766.78
BEGIN KCS
KCS M.P. 766.70
KCS YARD CONN.
AMELIA
<- TO HOUSTON
<- TO DAYTON/HOUSTON
LANGHAM ROAD
SP (MP)
S.P. BEAUMONT YARD
MP (SP)
M.P. BEAUMONT YARD
MP (SP)
KCS YARD
TOWER 31
BEAUMONT (KCS)
KCS-UP (JOINT)
UP-BNSF INTERCHANGE
TO DOCKS
TO PORT ARTHUR
SP YARD
TO PORT ARTHUR
TO MACGODOCHES
BASE YARD
TO KIRBYVILLE
KIRBY CANAL
BRAKES BAYOU
NECHES RIVER
S.P. TO ORANGE
LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
OTHER RAILROADS
TEX MEX TRACKAGE RIGHTS
EXHIBIT A - 2
TEX MEX TRACKAGE RIGHTS
BEAUMONT, TEXAS
09/23/96



LEGEND:

- UNION PACIFIC RR
- SOUTHERN PACIFIC RR
- OTHER RAILROADS
- TEX MEX TRACKAGE RIGHTS

EXHIBIT A - 3
TEX MEX TRACKAGE RIGHTS
QUITMAN ST. CONNECTION (HOUSTON)
9/23/96

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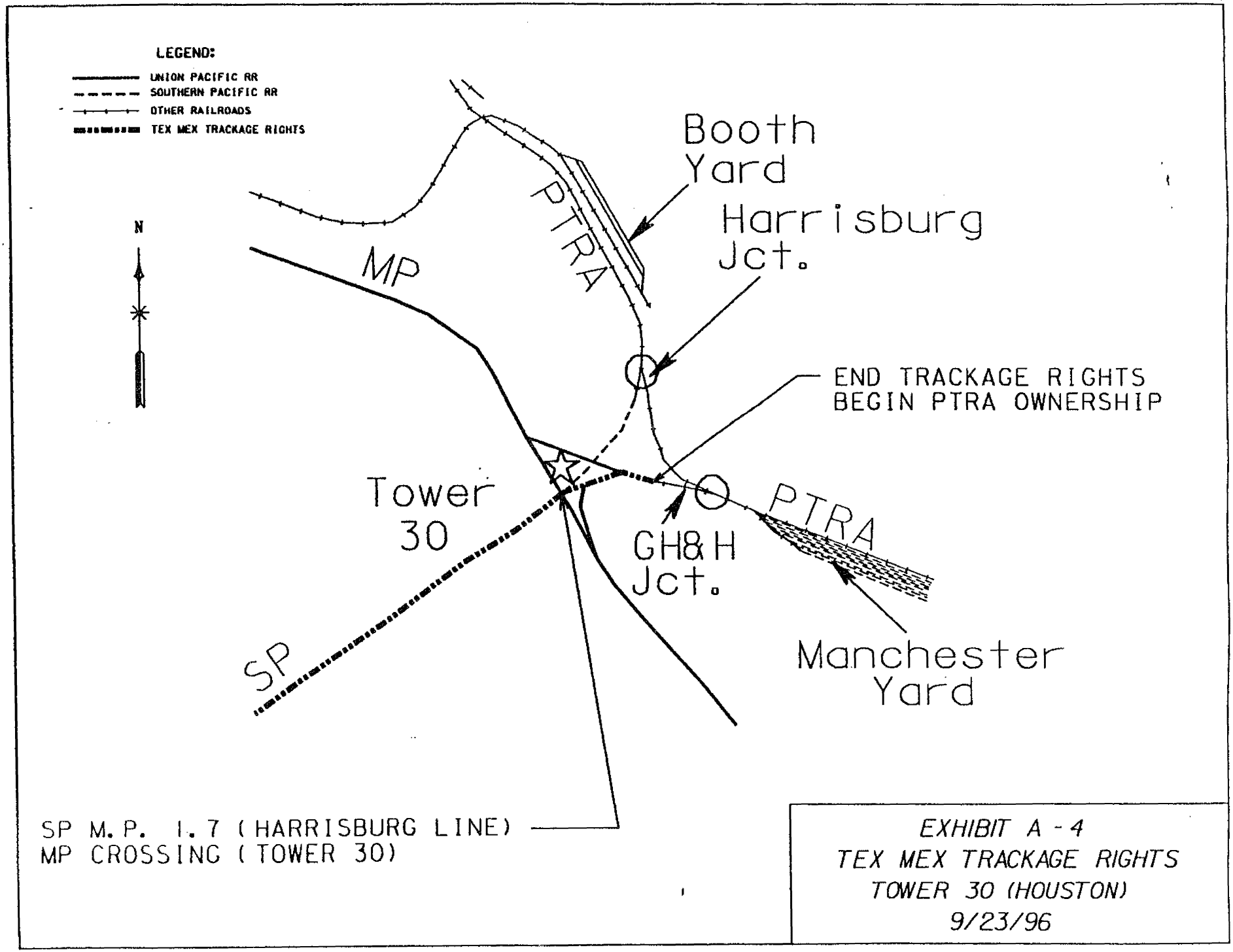

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EXHIBIT "B"

GENERAL CONDITIONS

Section 1. DEFINITIONS

1.1 "Annual" shall mean a calendar year.

1.2 "Car" shall mean one (1) rail car; provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.

1.3 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of the Terms.

1.4 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purposes of the maintenance or repair of such railroad tracks.

1.5 "GTM" shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.7 "Joint Trackage" shall mean the track structure of Owner as described in the Terms including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.8 "Mill" shall mean one-tenth of a cent ($0.001 US).

1.9 "Owner" shall have the meaning given to it in the Terms.

1.10 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.11 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.12 "Terms" shall mean those certain Terms for Texas Mexican Railway Company Trackage Rights to which this Exhibit "B" is attached.

1.13 "User" shall have the meaning given to it in the Terms.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Terms, including special instructions for the Joint Trackage as of the date of the Terms, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Terms (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage, for such use as is permitted by Section 2 of the Terms, equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement

of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner and User shall be treated equally. All operating, dispatching and maintenance decisions by Owner affecting the movement of Equipment on the Joint Trackage shall be made pursuant to the Tex Mex-UP/SP Dispatching Protocols attached hereto as Attachment 1. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities the same as Owner's trains so utilize. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.

2.5 A Joint Service Committee ("Committee"), comprised of the chief transportation officers of Owner and User (or their designees) shall be established, and shall be responsible for establishing rules and standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance and efficient joint use of the Joint Trackage. The Committee shall meet on a regular basis, but not less often than every three (3) months during the first year of operation under the Agreement, and thereafter when any party serves upon the other party thirty (30) days' written notice of its desire to meet to review the overall performance of equipment on the Joint Trackage, conflicts, if any, experienced between Equipment of Owner and Equipment of User, grievances over the handling of particular Equipment or operational events, maintenance of the Joint Trackage, ways in which future conflicts may be minimized, ways of improving operations and maintenance of the Joint Trackage and such other relevant matters as the Committee may decide to consider. The Committee may issue standards or rules to prevent unnecessary interference or impairment of use of the Joint Trackage by either party or otherwise insure fair and equal treatment as between Owner and User. Either party may request a special meeting of the Committee on reasonable notice to the other. Informal telephonic conferences shall be held by the Committee where appropriate to address immediate concerns of either party. It is expected that the work of the Committee shall be undertaken in a spirit of mutual cooperation consistent with the principles expressed in the Terms.

2.6 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.7 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Terms for use by User provided there shall at all times be afforded User a continuous route of equal utility and quality for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Terms shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.8 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.9 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in the Terms, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.10 Except as otherwise may be provided in the Terms, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint Trackage. At User's request, Owner shall furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage.

2.11 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be suspended by User from working on the Joint Trackage unless and until requalified to return to work and approved to do so by Owner. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases; and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

2.12 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.13 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.12), or to any other cause not resulting from an accident or

derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.12), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.15 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.16 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Terms, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

Section 3. BILLING

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Terms User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive

adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of the Terms shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Terms, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under the Terms; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Terms.

Section 4. COMPLIANCE WITH LAWS

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). Except with Owner's prior consent, User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and Section 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to

observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the partes hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of the Terms as a result of the other party's failure to perform or observe any other obligation or duty created by the Terms. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and

other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;

(b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

(c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;

(d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

(e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the partes hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural

resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment;

(f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4, shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;

(h) Any railroad not a party to the Terms heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of the Terms for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

(i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Terms be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Terms, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to the Terms;

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;

(e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars ($100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars ($100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.

(f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit;

if the claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit; and if such claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Owner shall investigate and defend such claim or suit; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident;

(g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

(a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned between Owner, User and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party's gross ton miles over the Joint Trackage for the preceding twelve (12) months or, if such Loss and/or Damage occurs during the first twelve (12) months following the effective date of the Terms, the usage of each party between the occurrence of such Loss and/or Damage and the effective date of the Terms, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER

INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Terms upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.

6.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may

be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Terms shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

6.5 Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all partes to the arbitration.

6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

Section 7. GOVERNMENTAL APPROVAL AND ABANDONMENT

7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval or authority from any governmental agency for the sanction of the Terms and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure all such necessary consent, approval or authority.

7.2 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Terms without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment").

Owner shall, concurrent with its Notice of Abandonment, if legally able to do so, give to User the option to purchase the part or parts of the Joint Trackage thereof to be abandoned at the Net Liquidation Value thereof, on the date of said notice; provided, however, it is understood that Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company (collectively, "BNSF") shall be given an option upon the Terms set forth in this Section 7.3, prior to that given User, to purchase the Placedo, Texas to Robstown, Texas segment of the Joint Trackage, subject to User's trackage rights, if BNSF is operating over that segment at the time of its proposed abandonment. "Net Liquidation Value" shall mean fair market value of land and salvage value of track components and other facilities less estimated cost of removal. User shall have three (3) months from the date of receipt of Owner's notice to exercise its option and shall evidence the exercise of its option by giving Owner written notice thereof. Thereafter User shall immediately make appropriate application to secure all necessary governmental authority for such transaction. Within thirty (30) days following the effective date of all requisite governmental approval of the transaction, User shall pay to Owner the amount of money required to purchase said Joint Trackage to be abandoned at the aforesaid Net Liquidation Value. Upon the receipt of payment of such sum, the Terms shall terminate as to the part of the Joint Trackage so purchased by User. Contemporaneously with such payment, by instrument or instruments, Owner shall convey and assign by good and sufficient quit claim deed or deeds, bills of sale or other instruments, all of Owner's right, title, interest and equity, in and to the Joint Trackage so purchased. Owner agrees that it shall promptly take all necessary action to obtain from the trustees of its mortgages all releases or satisfactions covering the same and shall deliver to User such instruments.

If User fails to exercise the option herein granted within the time and in the manner above specified, Owner may forthwith proceed free of all obligation to User to abandon the portion of Joint Trackage or make appropriate application, if necessary, to secure all necessary governmental authority for such abandonment. User agrees that at such time it shall concurrently make application for all necessary governmental authority for abandonment of its right to operate over such Joint Trackage. The Terms shall terminate as to the section of Joint Trackage so abandoned upon the effective date of such approval by governmental authority.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars ($100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM

9.1 User shall have the right to terminate the Terms upon twelve (12) months' prior written notice to Owner. Liabilities created under the Terms, if it becomes effective and is later terminated, shall survive such termination.

9.2 Upon termination of the Terms, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Terms, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Terms, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT

The Terms and any rights granted hereunder may not be assigned in whole or in part by User without the prior written consent of Owner except (i) as provided in Section 3.5, and (ii) to the purchaser of substantially all of User's rail properties. The Terms may be assigned by Owner without restriction. In the event of an authorized assignment, the Terms and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Terms (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Terms claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Terms under which such claim of default is made.

11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default

relates to the provisions and terms of the Terms, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Terms.

11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to affect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

12.1 The Terms and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.2 If any covenant or provision of the Terms not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Terms be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Terms.

12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Terms, the provisions of the Terms shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.

12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Terms.

12.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

END OF EXHIBIT "B"

TEX MEX - MP/SP DISPATCHING PROTOCOLS

1. Scope: These protocols apply on all segments of the Joint Trackage.

2. Purpose: To ensure that Tex Mex and MP/SP trains operating on Joint Trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiently and that the competitiveness of Tex Mex operations on the Joint Trackage is not adversely affected by the fact that MP/SP owns the track.

3. General Instructions: MP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on the Joint Trackage that Tex Mex trains are to be dispatched exactly as if they were trains of the same class of MP/SP and given equal treatment with trains of MP/SP. These instructions will be issued at agreed intervals or at the request of Tex Mex.

4. Monitoring Systems: MP/SP will provide Tex Mex with timely and accurate information about the status of Tex Mex trains operating over the Joint Trackage.

5. Train Information: Tex Mex will provide the MP/SP, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over the Joint Trackage, preferably using electronic data interchange. Tex Mex and MP/SP will establish run time standards by train category based on expected train volumes for Tex Mex. If train volumes are different than expected then adjustments to run time standards will be made by mutual agreement. Tex Mex will provide reliable and current information about trains approaching the Joint Trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching the Joint Trackage, sufficiently in advance to allow dispatchers to plan for them. MP/SP will provide to Tex Mex advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions. Tex Mex and MP/SP will consult in advance about maintenance-of-way windows resulting from planned maintenance projects so as to minimize disruptions to the operations of both carriers.

6. Specific Instructions: MP/SP will permit Tex Mex to transmit instructions regarding the requirements of specific trains and shipments to designated dispatching center employees responsible for handling those trains.

7. Train Priorities/Run Time Standards: MP/SP will provide to Tex Mex current procedures for assigning dispatching priorities or rankings to trains and information sufficient to show how those procedures are applied to their own trains. Tex Mex will assign priorities or rankings to its trains operating on the Joint Trackage using MP/SP's procedures, and MP/SP will dispatch Tex Mex trains in accordance with those priorities or rankings. It is understood that

technological advances in computer aided dispatching might result in changes to priority assignment methodologies. The parties agree to discuss technological changes which might affect priority assignment methodologies prior to implementation. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads.

8. Entry to Joint Trackage: At points where Tex Mex trains enter the Joint Trackage, entry will be provided by MP/SP on a first-come first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. If operating circumstances make strict application of this principle difficult or uncertain, Tex Mex and MP/SP may jointly establish standards for determining sequence of entry to Joint Trackage. The parties will communicate daily on any conflicts concerning entry to the Joint Trackage to gain resolution.

9. Communication: MP/SP will provide to Tex Mex, and keep current, lists of dispatching personnel responsible for dispatching the Joint Trackage and contact numbers. Tex Mex and MP/SP will designate more supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.

10. Access to Dispatching Center: Appropriate officials of Tex Mex will be admitted at any time to dispatching facilities and personnel responsible for dispatching the Joint Trackage to review the handling of trains on the Joint Trackage (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to the review). It is understood that management and supervision of dispatching operations is the responsibility of MP/SP.

11. Performance Measurement: Tex Mex and MP/SP will cooperate to develop train performance evaluation methods under which train performance of Tex Mex trains on the Joint Trackage can be compared to train performance of MP/SP's trains on the Joint Trackage for the same train category and priority.

12. Personnel Incentives and Evaluation: In evaluating the performance of employees and supervisors responsible for dispatching the Joint Trackage, MP/SP will consider train performance of Tex Mex trains and effectiveness in cooperating with Tex Mex personnel and meeting Tex Mex service requirements in the same manner as such factors are considered with respect to MP/SP's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of MP/SP's trains, performance of Tex Mex's trains shall be considered on the same basis to the extent feasible.

13. Disagreements: The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.

14. Modifications: As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of Tex Mex and MP/SP on the Joint Trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 3

TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS, EXECUTED JAN. 28, 1997 (HBT-TM)

TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS

The following terms (hereinafter referred to as the "Terms") shall govern rights provided by HOUSTON BELT & TERMINAL RAILWAY COMPANY, a Texas corporation, referred to as "HB&T" or "Owner," on the one hand, to THE TEXAS MEXICAN RAILWAY COMPANY ("Tex Mex" or "User"), on the other hand, with HB&T and Tex Mex sometimes referred to collectively as "Parties," pursuant to the decisions of the Surface Transportation Board ("STB") in Finance Docket No. 32760 (Sub-No. 14) served August 12, 1996 ("Decision No. 44") and September 10, 1996 ("Decision No. 47").

RECITALS

A. HB&T owns lines of railroad consisting of track structure extending in and through Houston, Texas, identified as follows:

> HB&T line from Quitman Street in the vicinity of HB&T Milepost 4.7 (West Belt Subdivision) to the HB&T's connection with UP at Gulf Coast Junction in the vicinity of HB&T Milepost 4.6 (East Belt Subdivision), a distance of 3.6 miles;
>
> HB&T line from its connection with the SP line at T. & N.O. Junction, TX (Tower 81) in the vicinity of HB&T Milepost 11.0 (West Belt Subdivision) to HB&T's connection with UP at Interstate Junction in the vicinity of HB&T Milepost 7.5 (East Belt Subdivision), a distance of 8.2 miles;

as shown by bold line on the attached print dated September 11, 1996 (and identified as Exhibit "A") and further described in Section 1.7 of Exhibit "B," which shall be referred to herein as the "Joint Trackage."

B. The STB in Finance Docket No. 32760 (Sub-No. 14) approved the common control and merger of the rail carriers controlled by Union Pacific Corporation ("UPC"), including Missouri Pacific Railroad Company ("MP") and Union Pacific Railroad Company ("UPRR") (UPC, UPRR and MP are referred to collectively as "UP"), and the rail carriers controlled by Southern Pacific Rail Corporation ("SPR"), including Southern Pacific Transportation Company ("SP"), conditioned on, among other things, partial grant of the Tex Mex's Terminal Trackage Rights Application, dated March 29, 1996, including trackage rights over the HB&T as specified therein.

C. Tex Mex desires to receive said trackage rights and to conduct operations pursuant thereto. Tex Mex and HB&T now wish to define the terms and conditions under which said rights shall be exercised.

D. It is the position of Tex Mex and HB&T that these Terms do not constitute the acquiescence by either of them in the Decision and shall not preclude either of them from seeking any reopening, reconsideration or judicial review of Decision No. 44 or Decision No. 47.

TERMS

1. General Conditions:

The General Conditions set forth in Exhibit "B" attached hereto are hereby made a part of these Terms. All capitalized Terms used and not otherwise defined in these Terms shall have the meaning ascribed to them in the General Conditions. If any conflict between the General Conditions and these Terms shall arise, the provisions of these Terms shall prevail.

2. Rights of Tex Mex:

(a) Subject to the terms and conditions contained herein, HB&T shall grant to Tex Mex the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in Tex Mex's account over the Joint Trackage in common with HB&T and such other railroad company or companies as HB&T has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in these Terms), such other railroad company or companies to be considered HB&T for the purposes of these Terms, it being understood and agreed that Tex Mex shall not have the right to:

(i) Switch industries upon the Joint Trackage;

(ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in Sections 2.11, 2.12 and 2.13 of Exhibit B;

(iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located along the Joint Trackage;

(iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of Tex Mex; provided, however, that the foregoing shall not prevent Tex Mex, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under these terms;

(v) Connect with or interchange with any other railroad, except as otherwise provided in Section 4; or

(vi) Establish any transload facilities on the Joint Trackage or build into or out from any facility from/to the Joint Trackage.

(b) The rights granted in Section 2 shall be only for rail traffic of all kinds and commodities, both carload and intermodal, in Equipment that meets all applicable specifications established by the Association of American Railroads and the Federal Railroad Administration, provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi Line.

(c) User shall have the right to establish crew change points at points on the Joint Trackage as from time to time may be mutually agreed to in writing by Owner and User. However, User agrees that if sufficient trackage is not available at such locations(s) to facilitate crew changes of User, Owner may require User to construct additional trackage ("Crew Change Facilities") in the vicinity of such location as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such Crew Change Facilities are necessary, the Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such Crew Change Facilities are constructed at the cost and expense of User, and Owner shall choose to use such Crew Change Facilities, Owner shall pay User fifty percent (50%) of the cost of constructing such Crew Change Facilities. Should Owner decline to participate, Owner shall be denied access to such Crew Change Facilities. However, should Owner elect at a later date to use such Crew Change Facilities, such right shall be granted to Owner by User upon payment of fifty percent (50%) of User's initial costs plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by User commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the Improvements. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest rate (i.e. the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

In addition, Owner shall lease to User, by separate written agreement at reasonable and customary charges, existing facilities for office, locker, change and lunchroom purposes by User's personnel upon request of User to Owner, and as reasonably available, or property of Owner as reasonably available for User to establish its own facilities.

(d) User agrees that when entering or exiting the Joint Trackage or using the Joint Trackage to set out or pick up ("User's Operations"), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage in the vicinity of such location(s) as may be required, in the reasonable judgment of Owner,

the cost and expense of which shall be borne solely by User. If User does not agree that such additional trackage is necessary, the Owner may nevertheless insist that it be constructed, with the question of its necessity, and the User's obligation to bear its cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage plus interest as calculated pursuant to Section 2(c) above.

3. GTM Rate:

(a) In addition to other payments to be made under these Terms, User shall remit to Owner monthly for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of 3.84 mills per GTM for all Equipment, which sum per GTM ("GTM Rate") shall be deemed to include ordinary and programmed maintenance of the Joint Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes.

(b) For the purpose of computing the GTM Rate under this Section 3, the distance between the designated points of the Joint Trackage shall be determined by reference to HB&T's then current timetable.

(c) The GTM Rate set forth in Section 3(a) of these Terms shall be subject to adjustment annually, commencing as of July 1, 1997, as follows:

All trackage rights charges under this Section 3 shall be subject to adjustment annually beginning as of the effective date of these Terms to reflect seventy percent (70%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the ICC or successor agency or other organizations. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration.

4. Interchange:

In exercising the rights granted by these Terms, Tex Mex shall have the right, pursuant to separate agreements entered into between the parties or terms imposed by the STB, to interchange traffic with (a) HB&T at Houston, Texas, (b) The Atchison, Topeka & Santa Fe Railway Company ("ATSF") and Burlington Northern Railroad Company ("BN") (ATSF and BN are referred to collectively as "BNSF") at New South Yard and at any new interchange point that HB&T may hereafter establish with BNSF on the Joint Trackage, and (c) PTRA at Basin Yard and at any new interchange point that HB&T may hereafter establish with PTRA on the Joint Trackage.

5. Additions:

(a) Owner and User shall conduct a joint inspection to determine what connections ("Connections") and sidings or siding extensions associated with Connections ("Sidings") are necessary in the reasonable judgment of Owner to implement the rights granted under Section 2 of these Terms. User, at its sole cost and expense, shall pay the cost of such Connections and Sidings. If User does not agree that such Connections and Sidings are necessary, Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In that event that the User bears the sole cost and expense of any such Connections and Sidings, no other railroad shall have the right to use them except upon terms agreed to by User and such other railroad. In the event Owner shall elect to use such Connections and Sidings, Owner shall pay to User fifty percent (50%) of the cost to User of constructing the Connections and Sidings, plus interest as calculated pursuant to Section 2(c) above, and, having made such payment, Owner may also admit other railroads to the use of such Connections and Sidings. Owner shall maintain the part of any Connection or Siding on its property at its sole cost and expense, and User, at its sole cost and expense, shall maintain the part of any Connection or Siding on its property or property of others.

(b) Except as provided in Section 5(a) above, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings, Centralized Traffic Control, grade separations, and future connections, shall be handled as follows: (i) if the Change in and/or Addition to the Joint Trackage is for the sole benefit of one party, that party shall be solely responsible for the entire cost and expense thereof; (ii) all other Changes in and/or Additions to the Joint Trackage shall be shared by HB&T and Tex Mex on the basis that the parties' respective GTM's operated over the Joint Trackage bear to total GTM's operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced. The use of Joint Trackage by any third party shall be attributed to HB&T for purposes of computing respective GTM's for purposes of this Section 5(b).

(c) In the event such Changes in and/or Additions to the Joint Trackage are constructed at the sole cost and expense of one party (party of the first part), the other party (party of the second part) shall be denied access to such Change in and/or Addition to the Joint Trackage. If the party of the second part at some future date shall choose to use such Changes in and/or Additions to the Joint Trackage, such right shall be granted to party of the second part by party of the first part upon payment of fifty percent (50%) of party of the first part's initial costs plus per annum interest calculated pursuant to Section 2(c).

6. Notices:

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to these Terms shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by

registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for HB&T:

General Manager
Houston Belt & Terminal
Railway Company
501 Crawford Street
Houston, Texas 77002

If intended for Tex Mex:

The Texas Mexican Railway Company
1200 Washington Street
P.O. Box 419
Laredo, Texas 78042

Notice of address change may be given any time pursuant to the provisions of this Section 6.

7. Term:

These Terms shall be effective upon consummation of the control authority granted in the Decision for a term of ninety-nine (99) years; provided, however, that the User shall have the right to terminate these Terms upon twelve (12) months' prior written notice to Owner. These Terms shall terminate, and all rights conferred pursuant thereto shall be canceled and deemed void ab initio, if, in a Final Order, the application for authority for UP to control SPC has been denied or has been approved on terms unacceptable to the applicants or has been granted on terms that do not require the rights provided herein, provided, however, that if these Terms become effective and are later terminated, any liabilities arising from the exercise of rights under Sections 1 through 5 during the period of its effectiveness shall survive such termination. For purposes of this Section 7, "Final Order" shall mean an order of the Surface Transportation Board, any successor agency, or a court with lawful jurisdiction over the matter which is no longer subject to any further direct judicial review (including a petition for writ of certiorari) and has not been stayed or enjoined.

Approved:

For HB&T:

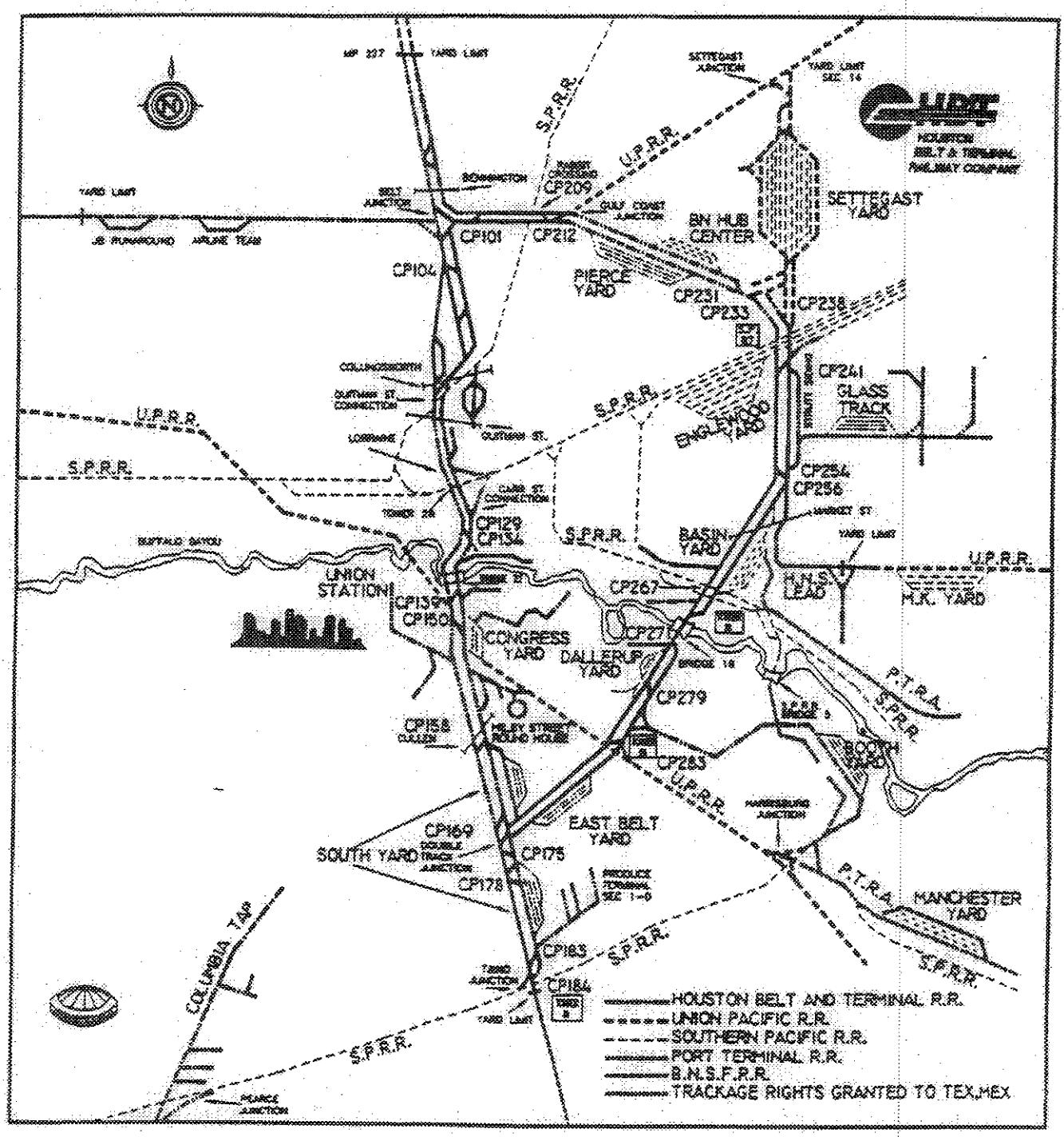
By: _____
Position: General Manager
Date: 1-10-97

For Tex Mex:

By: _____
Position: President
Date: 1-23-97

EXHIBIT A

PRINT DATE 09-11-96



N021-0047

EXHIBIT "B"

GENERAL CONDITIONS

Section 1. DEFINITIONS

1.1 "Annual" shall mean a calendar year.

1.2 "Car" shall mean one (1) rail car; provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.

1.3 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of the Terms.

1.4 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purposes of the maintenance or repair of such railroad tracks.

1.5 "GTM" shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.7 "Joint Trackage" shall mean the track structure of Owner as described in the Terms including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.8 "Mill" shall mean one-tenth of a cent ($0.001 US).

1.9 "Owner" shall have the meaning given to it in the Terms.

1.10 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.11 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.12 "Terms" shall mean those certain Terms for Texas Mexican Railway Company Trackage Rights to which this Exhibit "B" is attached.

1.13 "User" shall have the meaning given to it in the Terms.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Terms, including special instructions for the Joint Trackage as of the date of the Terms, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Terms (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage, for such use as is permitted by Section 2 of the Terms, equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner, User and any other users of the Joint Trackage shall be treated in a

non-discriminatory manner. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities the same as Owner's trains so utilize. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.

2.5 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.6 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Terms for use by User provided there shall at all times be afforded User a continuous route of equal utility and quality for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Terms shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.7 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.8 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in the Terms, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.9 Except as otherwise may be provided in the Terms, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint Trackage. At User's request, Owner shall

furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage.

2.10 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be suspended by User from working on the Joint Trackage unless and until requalified to return to work and approved to do so by Owner. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

2.11 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to

NO21-0051

make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.12 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.13 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.11), or to any other cause not resulting from an accident or derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.11), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.15 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Terms, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

Section 3. BILLING

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Terms User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of the Terms shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Terms, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under the Terms; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Terms.

Section 4. COMPLIANCE WITH LAWS

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees

incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). Except with Owner's prior consent, User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and Section 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby

shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the parties hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of the Terms as a result of the other party's failure to perform or observe any other obligation or duty created by the Terms. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified:

(b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

(c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;

(d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

(e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the parties hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment;

(f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4, shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;

(h) Any railroad not a party to the Terms heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of the Terms for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

(i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Terms be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Terms, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to the Terms;

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;

(e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name

of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars ($100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars ($100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.

(f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit; if the claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit; and if such claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Owner shall investigate and defend such claim or suit; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident;

(g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be

deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

(a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned between Owner, User and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party's gross ton miles over the Joint Trackage for the preceding twelve (12) months or, if such Loss and/or Damage occurs during the first twelve (12) months following the effective date of the Terms, the usage of each party between the occurrence of such Loss and/or Damage and the effective date of the Terms, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own

Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5, (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Terms upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in

Trackage. The Terms shall terminate as to the section of Joint Trackage so abandoned upon the effective date of such approval by governmental authority.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars ($100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM; TERMINATION

Upon termination of the Terms, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Terms, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Terms, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT

The Terms and any rights granted hereunder may not be assigned in whole or in part by User without the prior written consent of Owner except (i) as provided in Section 3.5, and (ii) to the purchaser of substantially all of User's rail properties. The Terms may be assigned by Owner without restriction. In the event of an authorized assignment, the Terms and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Terms (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Terms claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Terms under which such claim of default is made.

11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Terms, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Terms.

11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to affect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

12.1 The Terms and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.2 If any covenant or provision of the Terms not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Terms be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Terms.

12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Terms, the provisions of the Terms shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.

12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Terms.

12.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 4

HOUSTON TO BEAUMONT, TEXAS TRACKAGE RIGHTS AGREEMENT (SP-TM)

HOUSTON TO BEAUMONT, TEXAS
TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT made as of this 16th day of June, 1997, by and between SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation (hereinafter referred to as "SP" or "Owner"), and THE TEXAS MEXICAN RAILWAY COMPANY (hereinafter referred to as "Tex Mex" or "User"), (SP and Tex Mex sometimes referred to collectively herein as "Parties").

RECITALS

A. SP owns a line of railroad consisting of track structure extending between Houston, Texas, in the vicinity of SP's Milepost 360.42 (Carr Street Connection) and Beaumont, Texas, in the vicinity of SP's Milepost 282.4, as shown by bold line on the attached print dated June 4, 1997 (and identified as Exhibit "A"), and further described in Section 1.7 of Exhibit "B", which shall be referred to herein as the "Joint Trackage".

B. Union Pacific Railroad Company, a Utah corporation, (hereinafter referred to as "UP"), owns a line of railroad extending between Houston and Beaumont, Texas, over which Tex Mex was granted rights for use of UP tracks along with trackage rights over portions of SP's lines between Beaumont, Texas and Robstown/Corpus Christi, Texas, pursuant to Terms For Texas Mexican Railway Company Trackage Rights effective September 11, 1996 (the "Terms"), between SP, Missouri Pacific Railroad Company, UP's predecessor in interest, and Tex Mex; and

C. SP desires to implement directional operations between Houston, Texas and Beaumont, Texas using its line for eastbound movements and the lines subject to the Terms, Agreement for westbound movements so that Tex Mex and SP may operate their through trains directionally between Houston and Beaumont, Texas, to reduce train delays caused by the meeting of trains; and

D. SP is agreeable to granting Tex Mex bridge trackage rights over the Joint Trackage only to facilitate such directional operations between Houston and Beaumont, Texas and only so long as SP operates directionally between Houston and Beaumont; and

E. SP and Tex Mex wish to more specifically define the terms and conditions under which said trackage rights shall be exercised.

NOW, THEREFORE, it is mutually agreed by and between the parties:

1. General Conditions:

The General Conditions set forth in Exhibit "B" attached hereto are hereby made a part of this Agreement. All capitalized terms used and not otherwise defined in this Agreement shall have the meaning ascribed to them in the General Conditions. If any conflict between the General Conditions and this Agreement shall arise, the provisions of this Agreement shall prevail.

2. Rights of Tex Mex:

(a) Subject to the terms and conditions contained herein, SP hereby grants to Tex Mex the nonexclusive right to use the Joint Trackage for the limited operation of eastbound movements of Equipment in Tex Mex's account over the Joint Trackage in common with SP, UP and such other railroad company or companies as SP has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in this Agreement), such other railroad company or companies to hereinafter be considered SP for the purposes of this Agreement, it being understood and agreed that Tex Mex shall not have the right to:

(i) Switch industries upon the Joint Trackage;

(ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in this Sections 2.11, 2.12 and 2.13 of Exhibit B;

(iii) Serve any industry, team or house track, transload facilities, intermodal or auto facility now existing or hereafter located along the Joint Trackage;

(iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of Tex Mex; provided, however, that the foregoing shall not prevent Tex Mex, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under this Agreement;

(v) Build into or out from any facility from/to the Joint Trackage; or

(vi) Connect with or interchange with any other railroad; provided, however that Tex Mex shall have the right to connect with Houston Belt & Terminal Railway Company's East Belt main line in the vicinity of Tower 87 via SP's East Yard solely for the purpose of ingressing and egressing the Joint Trackage.

(b) The rights granted in Section 2 (a) shall be for rail traffic of all kinds and commodities, both carload and intermodal, in Equipment that meets all applicable specifications established by the Association of American Railroads and the Federal Railroad Administration, provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi Line.

(c) If Tex Mex uses the Joint Trackage, it shall be obligated to use the Houston - Beaumont rights granted by the September 11, 1996 Terms only for movements in the same direction as the directional current of flow on those lines, notwithstanding any additional rights set forth in the September 11, 1996 Terms.

3. GTM Rate:

(a) In addition to other payments to be made under this Agreement, Tex Mex shall remit to SP monthly for the use of the Joint Trackage in the operation of its Equipment thereabong and thereover, the total amount of 3.84 mills per GTM for all Equipment, which sum per GTM ("GTM Rate") shall be deemed to include ordinary and programmed maintenance of the Joint Trackage, operating expenses, interest rental, depreciation and taxes.

(b) For the purpose of computing the GTM Rate under this Section 3, it is mutually agreed that the distance between the designated points of the Joint Trackage shall be determined by reference to SP's Station Pair Master File, which shall be subject to verification by Tex Mex.

(c) The GTM Rate set forth in Section 3(a) of this Agreement shall be subject to adjustment annually, commencing as of July 1, 1998, as follows:

All trackage rights charges under this Section 3 shall be subject to adjustment annually beginning as of the effective date of this Agreement to reflect seventy percent (70%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the STB or successor agency or other organizations. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration.

4 Additions:

(a) Expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings, Centralized Traffic Control, grade separations, and future connections, shall be handled as follows: (i) if the Change in and/or Addition to the Joint Trackage is for the sole benefit of one party, that party shall be solely responsible for the entire cost and expense thereof; (ii) all other Changes in and/or Additions to the Joint Trackage shall be shared by SP and Tex Mex on the basis that the parties' respective GTM's operated over the Joint Trackage bear to total GTM's operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced. The use of Joint Trackage by any third party shall be attributed to SP for purposes of computing respective GTM's for purposes of this Section 4.

(b) In the event such Changes in and/or Additions to the Joint Trackage are constructed at the sole cost and expense of one party (party of the first part), the other party (party of the second part) shall be denied access to such Change in and/or Addition to the Joint Trackage. If the party of the second part at some future date shall choose to use such Changes in and/or Additions to the Joint Trackage, such right shall be granted to party of the second part by party of the first part upon payment of fifty percent (50%) of party of the first part's initial costs plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by party of the first part commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in the first year of completion of the trackage. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest rate (i.e. the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

(c) In the event Tex Mex shall have been required to participate in the cost of any Changes in and/or Additions to the Joint Trackage as set forth in the preceding paragraph of this Section 4, and SP subsequently elects to cease directional operations and terminate this Agreement as provided for in Section 9.1 of the General Conditions, SP shall reimburse Tex Mex for the unamortized portion of any Change in and/or Addition based upon a straight line amortization methodology over a 25 year period. For the purpose computing the refund, the amortization will be assumed to begin on the first date such Changes in and/or Additions to the Joint Trackage are placed in service and shall end on the effective date of termination of this Agreement. In the event SP terminates this Agreement pursuant to Section 9.1 of the General Conditions within the first year after any Change or Addition is placed in service, SP will refund to Tex Mex any payments made for such Changes in and/or Additions to the Joint Trackage.

In the event Tex Mex elects to terminate this Agreement at any time as provided for in Section 9.1 of the General Conditions, Tex Mex will not be entitled to any refund.

5. Modification of Directional Flow.

SP and Tex Mex recognize that at some time in the future it may be necessary, for operational efficiencies, for SP to modify the directional flow specified in this Agreement so that the line used for eastbound through trains may be used for westbound through trains and vise versa at the discretion of SP. Such a directional modification may be instituted upon thirty (30) days notice from SP to Tex Mex.

6. Notices:

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to this Agreement shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for SP:

Executive Vice President-Operation
Room 1206
1416 Dodge Street
Omaha, Nebraska 68179

With a copy to:

Director Joint Facilities
Room 1200
1416 Dodge Street
Omaha, Nebraska 68179

If intended for Tex Mex:

The Texas Mexican Railway Company
1200 Washington Street
P.O. Box 419
Laredo, Texas 78042

Notice of address change may be given any time pursuant to the provisions of this Section 6.

7. Term.

This Agreement shall be effective upon execution and, unless earlier terminated as provided herein below, shall terminate on the same date that the September 11, 1996 agreement between SP, UP and Tex Mex covering trackage rights between Beaumont, Texas and Robstown/Corpus Christi, Texas terminates; provided, however, that this Agreement may be terminated upon thirty (30) days prior written notice from SP

to Tex Mex that SP will cease to operate directionally between Houston and Beaumont, Texas; and provided, further, that Tex Mex shall have the right to terminate the Agreement upon twelve (12) months prior written notice to SP. Liabilities created under this Agreement, if it becomes effective and is later terminated, shall survive such termination.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

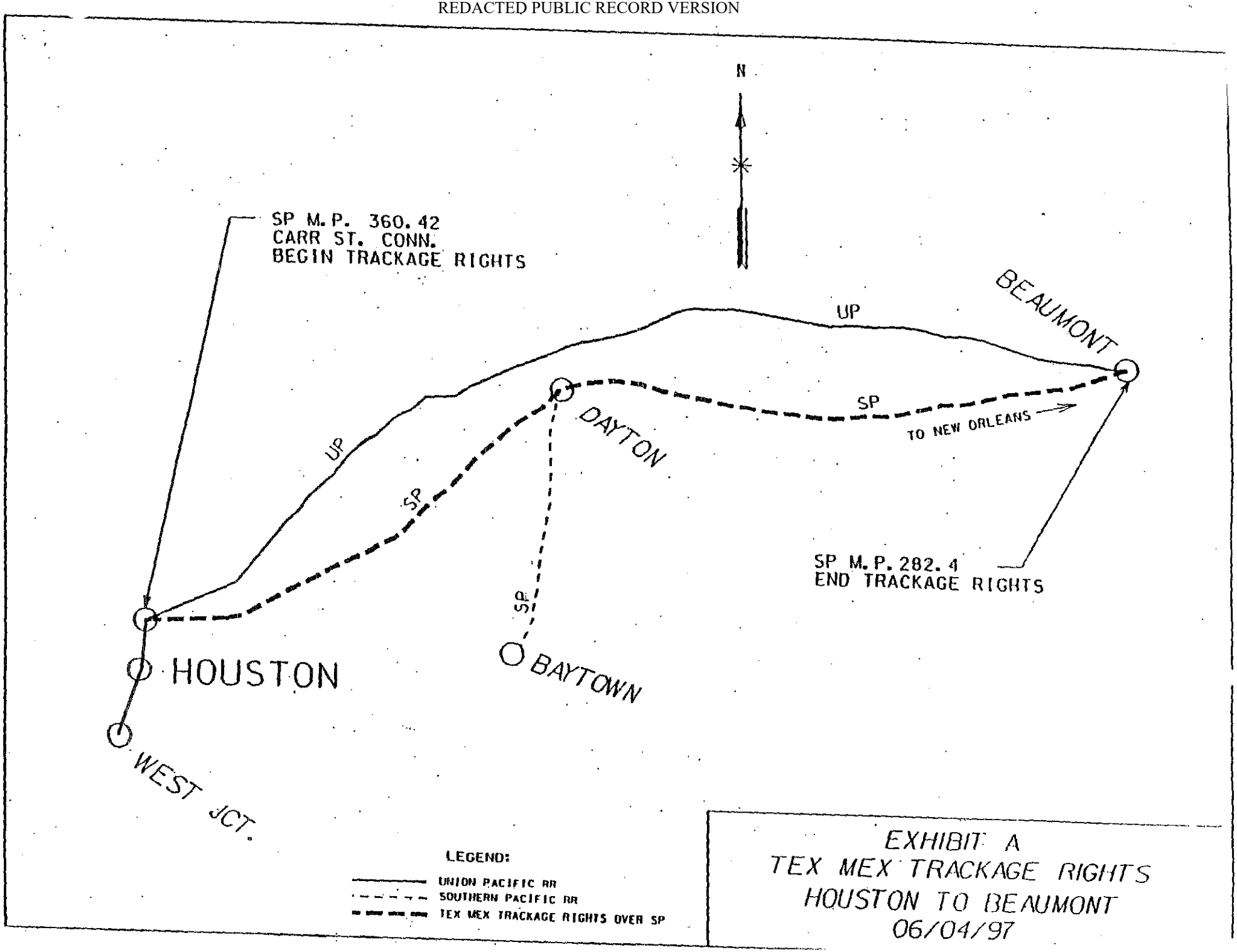
By _____

Position: Dir.-Joint Facilities

THE TEXAS MEXICAN RAILWAY COMPANY

By _____

Position: Vice President - Transportation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LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
TEX MEX TRACKAGE RIGHTS OVER SP
EXHIBIT A
TEX MEX TRACKAGE RIGHTS
HOUSTON TO BEAUMONT
06/04/97

EXHIBIT "B"

GENERAL CONDITIONS

Section 1. DEFINITIONS

1.1 "Annual" shall mean a calendar year.

1.2 "Car" shall mean one (1) rail car; provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.

1.3 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of the Agreement.

1.4 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purposes of the maintenance or repair of such railroad tracks.

1.5 "GTM" shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.7 "Joint Trackage" shall mean the track structure of Owner as described in this Agreement including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.8 "Mill" shall mean one-tenth of a cent ($0.001 US).

1.9 "Owner" shall have the meaning given to it in the Agreement.

1.10 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.11 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.12 "Terms" shall mean those certain Terms for Texas Mexican Railway Company Trackage Rights to which this Exhibit "B" is attached.

1.13 "User" shall have the meaning given to it in the Agreement.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Agreement, including special instructions for the Joint Trackage as of the date of the Agreement, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Agreement (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Agreement. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage, for such use as is permitted by Section 2 of the Agreement, equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement of Equipment over

and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner and User shall be treated equally. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities the same as Owner's trains so utilize. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.

2.5 A Joint Service Committee ("Committee"), comprised of the chief transportation officers of Owner and User (or their designees) shall be established, and shall be responsible for establishing rules or standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance and efficient joint use of the Joint Trackage. The Committee shall meet on a regular basis, but not less often than every three (3) months during the first year of operation under this Agreement, and thereafter when any party serves upon the other party thirty (30) days' written notice of its desire to meet to review the overall performance of Equipment on the Joint Trackage, conflicts, if any, experienced between Equipment of Owner and Equipment of User, grievances over the handling of particular Equipment or operational events, maintenance of the Joint Trackage, ways in which future conflicts may be minimized, ways of improving operations and maintenance of the Joint Trackage and such other relevant matters as the Committee may decide to consider. The Committee may issue standards or rules to prevent unnecessary interference or impairment of use of the Joint Trackage by either party or otherwise ensure fair and equal treatment as between Owner and User. Either party may request a special meeting of the Committee on reasonable notice to the other. Informal telephonic conferences shall be held by the Committee where appropriate to address immediate concerns of either party. It is expected that the work on the Committee shall be undertaken in a spirit of mutual cooperation consistent with the principles expressed in the Agreement.

2.6 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.7 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Agreement for use by User provided there shall at all times be afforded User a continuous route of equal utility and quality for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Agreement shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.8 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another

party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.9 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in the Agreement, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.10 Except as otherwise may be provided in the Agreement, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint Trackage. At User's request, Owner shall furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage.

2.11 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be suspended by User from working on the Joint Trackage unless and until requalified to return to work and approved to do so by Owner. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of

such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

2.12 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.13 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.11), or to any other cause not resulting from an accident or derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.11), and such Equipment is unable to proceed, or if a train of User fails to maintain the

speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.15 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.16 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Agreement, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

Section 3. BILLING

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Agreement User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of the Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Agreement, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under the Agreement; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Agreement.

Section 4. COMPLIANCE WITH LAWS

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). Except with Owner's prior consent, User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and Section 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials

release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the partes hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of the Agreement as a result of the other party's failure to perform or observe any other obligation or duty created by the Agreement. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using

the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;

(b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

(c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;

(d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

(e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the partes hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury

or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment;

(f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4. shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;

(h) Any railroad not a party to the Agreement heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of the Agreement for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

(i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Agreement be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Agreement, the party defendant paying the same or any costs, fees or other

expenses shall be reimbursed by the other party as allocated pursuant to the Agreement;

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;

(e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars ($100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars ($100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.

(f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit

involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit; if the claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit; and if such claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Owner shall investigate and defend such claim or suit; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident;

(g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

(a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned between Owner, User and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party's gross ton miles over the Joint Trackage for the preceding twelve (12) months or, if such Loss and/or Damage occurs during the first twelve (12) months following the effective date of the Agreement, the usage of each party between the occurrence of such Loss and/or Damage and the effective date of the Agreement, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT

LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.

6.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

6.5 Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all partes to the arbitration.

6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

Section 7. GOVERNMENTAL APPROVAL AND ABANDONMENT

7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval or authority from any governmental agency for the sanction of the Agreement and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure all such necessary consent, approval or authority.

7.2 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Agreement without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment").

Owner shall, concurrent with its Notice of Abandonment, if legally able to do so, give to User the option to purchase the part or parts of the Joint Trackage thereof to be abandoned at the Net Liquidation Value thereof, on the date of said notice; provided, however, it is understood that Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company (collectively, "BNSF") shall be given an option upon the Agreement set forth in this Section 7.3, prior to that given User, to purchase the Placedo, Texas to Robstown, Texas segment of the Joint Trackage, subject to User's trackage rights, if BNSF is operating over that segment at the time of its proposed abandonment.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars ($100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM

Upon termination of the Agreement, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Agreement, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Agreement, however the

same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT

The Agreement and any rights granted hereunder may not be assigned in whole or in part by User without the prior written consent of Owner except (i) as provided in Section 3.5, and (ii) to the purchaser of substantially all of User's rail properties. The Agreement may be assigned by Owner without restriction. In the event of an authorized assignment, the Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Agreement (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Agreement under which such claim of default is made.

11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Agreement.

11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

12.1 The Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.2 If any covenant or provision of the Agreement not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or

provision. Should any covenant or provision of the Agreement be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Agreement.

12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Agreement, the provisions of the Agreement shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.

12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Agreement.

12.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

REDACTED PUBLIC RECORD VERSION

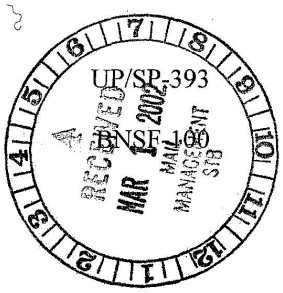
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 5

EXCERPTS FROM UP-BNSF RESTATED AND AMENDED SETTLEMENT AGREEMENT, MARCH 2001



UP/SP-393
BNSF-100

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 204871

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

– CONTROL AND MERGER –

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

Finance Docket No. 32760 (Sub-No. 21) 204872

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

– CONTROL AND MERGER –

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

**JOINT SUBMISSION OF RESTATED AND AMENDED
BNSF SETTLEMENT AGREEMENT**

ENTERED
Office of the Secretary

MAR 04 2002

Part of
Public Record

CARL W. VON BERNUTH
Union Pacific Corporation
1416 Dodge Street, Room 1230
Omaha, Nebraska 68179
(402) 271-6304

JAMES V. DOLAN
LAWRENCE E. WZOREK
WILLIAM G. BARR
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

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

JEFFREY R. MORELAND
RICHARD E. WEICHER
SIDNEY L. STRICKLAND, JR.
MICHAEL E. ROPER
The Burlington Northern
and Santa Fe Railway Company
2500 Lou Menk Drive
Third Floor
Ft. Worth, Texas 76131-0039
(817) 352-2353 *or* (817) 352-2368

ERIKA Z. JONES
ADRIAN L. STEEL, JR.
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Attorneys for The Burlington Northern
and Santa Fe Railway Company

March 1, 2002

UP/SP-393

BNSF-100

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

– CONTROL AND MERGER –

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

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

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

– CONTROL AND MERGER –

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

**JOINT SUBMISSION OF RESTATED AND AMENDED
BNSF SETTLEMENT AGREEMENT**

The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") submit the attached Restated and Amended BNSF Settlement Agreement pursuant to the Board's order in General Oversight Decision No. 21, served December 20, 2001. Also attached is a red-lined version of the Restated and Amended BNSF

Settlement Agreement that identifies the changes from the version of the Restated and Amended BNSF Settlement Agreement submitted by the parties on July 25, 2001.

Respectfully submitted,

CARL W. VON BERNUTH
Union Pacific Corporation
1416 Dodge Street, Room 1230
Omaha, Nebraska 68179
(402) 271-6304

JAMES V. DOLAN
LAWRENCE E. WZOREK
WILLIAM G. BARR
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

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

JEFFREY R. MORELAND
RICHARD E. WEICHER
SIDNEY L. STRICKLAND, JR.
MICHAEL E. ROPER
The Burlington Northern
and Santa Fe Railway Company
2500 Lou Menk Drive
Third Floor
Ft. Worth, Texas 76131-0039
(817) 352-2353 *or* (817) 352-2368

ERIKA Z. JONES
ADRIAN L. STEEL, JR.
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Attorneys for The Burlington Northern and Santa Fe Railway Company

March 1, 2002

03/01/02

RESTATED AND AMENDED AGREEMENT

This Restated and Amended Agreement ("Agreement") is entered into this ___ day of March, 2002, between UNION PACIFIC RAILROAD COMPANY ("UP"), a Delaware corporation, and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF"), a Delaware corporation.

WITNESSETH:

WHEREAS, UP and BNSF entered into an agreement dated September 25, 1995, as amended by supplemental agreements dated November 18, 1995, and June 27, 1996 (collectively, the "1995 Agreement"), in connection with UP's acquisition of Southern Pacific Rail Corporation and its affiliates ("SP") in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company;

WHEREAS, the Surface Transportation Board ("STB") approved the common control and merger of UP and SP in Decision No. 44 in Finance Docket No. 32760 (served August 12, 1996) and in so doing imposed certain conditions on UP and SP, including, as modified by the STB, the April 18, 1996 settlement agreement among UP, BNSF and the Chemical Manufacturers Association (the "CMA Agreement");

WHEREAS, as a part of its oversight of the UP/SP merger in Finance Docket Nos. 32760, 32760 (Sub-No. 21), and 32760 (Sub-No. 26), the STB has modified and clarified certain of the conditions it imposed in Decision No. 44;

WHEREAS, UP and BNSF entered into a Term Sheet Agreement dated February 12, 1998 (the "Term Sheet Agreement"), pursuant to which UP and BNSF agreed to the joint ownership of the line of railroad between Dawes, TX and Avondale, LA, which joint ownership was effected by separate agreement dated September 1, 2000 (the "TX-LA Line Sale Agreement");

WHEREAS, UP and BNSF have reached agreement with respect to the implementation of the conditions imposed by the STB on the UP/SP merger, as modified and clarified, and certain other matters relating to their rights and obligations under the 1995 Agreement, the CMA Agreement, the Term Sheet Agreement and the TX-LA Line Sale Agreement; and

WHEREAS, UP and BNSF now wish to amend and restate the 1995 Agreement to incorporate the conditions imposed by the STB on the UP/SP merger (including the CMA Agreement, as modified by the STB) and the agreements they have reached relating to those conditions and other related matters.

NOW, THEREFORE, the parties agree to amend and restate the 1995 Agreement as follows:

DEFINITIONS

For purposes of this Agreement, the following definitions and terms shall apply:

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

"2-to-1" Points shall mean all geographic locations at which at least one "2-to-1" Shipper Facility is located. Such points include, without limitation, the points listed in Section 8(i) of and on Exhibit A to this Agreement. The boundaries for such "2-to-1" Points shall be deemed to

include all areas within the switching limits of the locations as described in Section 9(g) of this Agreement.

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

New Shipper Facilities shall mean: (i) existing Shipper Facilities constructing trackage for accessing rail service for the first time; and (ii) newly constructed rail-served Shipper Facilities. New Shipper Facilities shall also mean previously-served Shipper Facilities that begin to ship by rail again where (i) there has been a change of owner or lessee, and (ii) the use of the facility is actually different in nature and purpose from the facility's prior use (e.g., there has been a change in the type of products shipped from or received at the facility). New Shipper Facilities shall not include expansion of or additions to an existing rail-served Shipper Facility, but do include (1) Shipper Facilities which, on September 25, 1995, were being developed or for which land had been acquired for that purpose in contemplation of receiving rail service by both UP and SP, and (2) Transload Facilities located after September 11, 1996, including those owned or operated by BNSF.

Trackage Rights Lines shall mean the lines over which BNSF has been granted trackage rights pursuant to this Agreement, but shall not include any other lines over which UP/SP grants

BNSF trackage rights ("Overhead Trackage Rights") solely (i) to facilitate the parties' operation over Trackage Rights Lines, (ii) to permit BNSF's operation between a mutually-agreed upon BNSF junction point and points listed or described in Section 8(i) of this Agreement, or (iii) to permit BNSF's operation between a mutually-agreed upon BNSF junction point and a build-in/build-out line pursuant to Sections 4(a), 6(c) and 8(l) of this Agreement. The mutually-agreed upon junction point will be selected with the objective of minimizing the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service. BNSF acknowledges that it shall not have the right to serve any existing or New Shipper Facility on a line over which BNSF has been granted Overhead Trackage Rights unless such right is specified in this Agreement or in any agreement implementing the Overhead Trackage Rights or unless BNSF has the right to serve a build-in/build-out line on such Overhead Trackage Rights line pursuant to the CMA Agreement or the conditions imposed on the UP/SP merger. All Overhead Trackage Rights Lines, as of the date of the execution hereof, are listed in Exhibit F to this Agreement, which exhibit may be amended and replaced from time to time by a new exhibit signed and dated by the parties. New Shipper Facilities shall be deemed to be "on" a Trackage Rights Line if the facility is either (1) adjacent to a Trackage Rights Line or (2) adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line. New Shipper Facilities are not "on" a Trackage Rights Line if they can be accessed only via a 49 U.S.C. 10901 "line of railroad" which is not a Trackage Rights Line.

Transload Facilities shall mean Shipper Facilities other than automotive or intermodal facilities or team tracks where freight is transferred from one railcar to another or from one mode to another (short term incidental storage may also occur) as defined by the STB in its decisions

lines to the Ports at BNSF's option to allow for additional operating capacity. UP/SP's commitment is subject to available capacity. Any incremental capacity related projects necessary to accommodate BNSF traffic shall be the sole responsibility of BNSF.

(h) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 3(d) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

4. **South Texas Trackage Rights and Purchase**

(a) UP/SP shall grant to BNSF trackage rights on the following lines:

- UP's line between Ajax and San Antonio, TX;

- UP's line between Houston (Algoa) and Brownsville, TX (with parity and equal access to the Mexican border crossing at Brownsville);
- UP's line between Odem and Corpus Christi, TX;
- UP's line between Ajax and Sealy, TX;
- SP's line between San Antonio and Eagle Pass, TX (with parity and equal access to the Mexican border crossing at Eagle Pass);
- UP's line between Craig Junction and SP Junction, TX (Tower 112) via Track No. 2 through Fratt, TX;
- SP's line between SP Junction (Tower 112) and Elmendorf, TX;
- SP's line in San Antonio between SP Tower 105 and SP Junction (Tower 112);
- Overhead Trackage Rights on SP's Port Lavaca Branch, between Placedo and Port Lavaca, TX, for the purpose of reaching a point of build-in/build-out to/from Union Carbide Corporation's ("UCC") facility at North Seadrift, TX. UP/SP shall permit BN/Santa Fe or UCC to construct and connect to the Port Lavaca Branch, at their expense, a build-in/build-out line. BN/Santa Fe or UCC shall have the right to purchase for net liquidation value all or any part of the Port Lavaca Branch that UP/SP may abandon;
- UP's line between Kerr (connection to Georgetown RR) and Taylor, TX;
- Overhead Trackage Rights on UP's line between Round Rock and McNeil, TX for the purpose of interchanging with the Capital Metro Transit Authority, its successors or agent;

- UP's line between Temple and Waco, TX;
- UP's line between Temple and Taylor, TX;
- UP's line between Taylor and Smithville,TX; and
- SP's line between El Paso and Sierra Blanca, TX.

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement and City Public Service Board of San Antonio, Texas Elmendorf facilities listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also have the right to interchange with: the Texas Mexican Railway Company at Corpus Christi and Robstown, TX; the Georgetown Railroad at Kerr; Transportacion Ferroviaria Mexicana ("TFM") at Brownsville (Matamoros, Mexico); Ferrocarril Mexicano ("FXE") at Eagle Pass; and the operator of SP's former line between Giddings and Llano at McNeil, TX. BNSF's access and interchange rights at Corpus Christi and Brownsville shall be at least as favorable as SP had on September 25, 1995. BNSF shall have direct access to the Port of Brownsville, the Brownsville and Rio Grande International Railroad, and the TFM. UP will designate a yard in Brownsville for sale to BNSF at such time as BNSF establishes its own trackage rights operations into Brownsville and at such time as the connection between UP and SP as a part of the Brownsville

relocation project is completed. In the event UP/SP determines to cease operations in the SP East Yard at San Antonio, TX, UP/SP will give first consideration to BNSF for taking over operation of the East Yard pursuant to a mutually-agreeable arrangement.

(c) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and

for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

(e) UP/SP shall grant BNSF the right to use SP's Bridge 5A at Houston, Texas.

(f) Except as otherwise provided herein, trackage rights and access rights granted pursuant to this section shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

(g) UP/SP shall sell to BNSF UP's Main Line No. 1 between MP 14.11 and 10.38, UP's Westwego intermodal terminal, SP's old Avondale Yard (together with the fueling and mechanical facilities located thereon) as shown on Exhibit C; and SP's Lafayette Yard.

6. **Houston, TX-Valley Junction, IL Trackage Rights**

(a) UP/SP shall grant to BNSF trackage rights on the following lines:

- SP's line between Houston, TX and Fair Oaks, AR via Cleveland and Pine Bluff, AR;
- UP's line between Fair Oaks and Bridge Junction, AR;
- SP's line between Brinkley and Briark, AR;
- UP's line between Pine Bluff and North Little Rock, AR
- UP's line between Houston and Valley Junction, IL via Palestine, TX;
- SP's line between Fair Oaks and Illmo, MO via Jonesboro, AR and Dexter Junction, MO; and

- UP's line between Fair Oaks and Bald Knob, AR.

(b) In lieu of conducting actual operations between Pine Bluff and North Little Rock, AR, UP/SP agrees, upon request of BNSF, to handle BNSF's business on a haulage basis for the fee called for by Section 8(m) of this Agreement.

(c) BNSF shall have the right to transport unit coal trains (i) over the Trackage Rights Lines to and from a point of build-in/build-out to and from Entergy Services, Inc.'s plant at White Bluff, AR if and when such a build-in/build-out line is constructed by an entity other than UP/SP to connect such plant with an SP line, and (ii) to and from Entergy Services, Inc.'s plant at White Bluff (1) by entering and exiting the Trackage Rights Lines at Jonesboro and Hoxie, AR, respectively, and/or (2) by utilization of BNSF's line via Memphis, TN.

(d) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. In addition to the other restrictions and limitations set forth herein, as to UP's and SP's lines between Memphis and Valley Junction, IL: (1) BNSF shall not have the right to enter or exit at intermediate points north of Bald Knob and Fair Oaks, AR; and (2) BNSF traffic is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana. These two restrictions do not apply to traffic moving to or

from Shipper Facilities in the Houston-Memphis-St. Louis Corridor to which BNSF has access pursuant to this Section 6(d) or Section 8(i) below. The two restrictions also do not apply to the traffic that BNSF is permitted to handle pursuant to the remaining provisions of this Section 6(d), which remains subject to all other conditions and restrictions. BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Texarkana, TX/AR, and Shreveport, LA, to and from the Memphis BEA (BEA 73), but not including proportional, combination or Rule 11 rates via Memphis or other points in the Memphis BEA. In the Houston-Memphis-St. Louis corridor, BNSF shall have the right to move some or all of its traffic via trackage rights over either the UP line or the SP line, at its discretion, for operating convenience. BNSF shall also have the right to interchange: with the Little Rock and Western Railway at Little Rock, AR; the Little Rock Port Authority at Little Rock, AR; KCS at Shreveport, LA and Texarkana, TX/AR, for movements of traffic originated by KCS at or delivered by KCS to shippers or receivers at Lake Charles, West Lake, or West Lake Charles, LA; with KCS (y) at Shreveport, LA for movements of loaded and empty coal trains moving to and from Texas Utilities Electric Company's Martin Lake generating station, and (z) at Texarkana, TX/AR for movements of empty coal trains returning from Texas Utilities Electric Company's Martin Lake generating station; and with the Texas Northeastern Railroad at Texarkana, TX for the sole purpose of moving BNSF traffic to and from Shipper Facilities at Defense, TX.

(e) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after

imposed on the UP/SP merger and BNSF has previously entered into a contract to provide transportation services to the Existing Transload Facility, UP shall extend the lease for the remaining period of such transportation contract or for a period not to exceed 24 months, whichever period is shorter.

9. **Trackage Rights - General Provisions**

(a) The compensation for operations under this Agreement shall be set at the levels shown in the following table as subsequently indexed under the 1995 Agreement:

Table I
Trackage Rights Compensation
(mills per ton-mile)

	Keddie-Stockton/Richmond	All Other Lines
Intermodal and Carload	3.48	3.1
Bulk (67 cars or more of one commodity in one car type)	3.0	3.0

These rates shall apply to all equipment moving in a train consist including locomotives. The rates shall be escalated in accordance with the procedures described in Section 12 of this Agreement. The owning line shall be responsible for maintenance of its line in the ordinary course including rail relay and tie replacement. The compensation for such maintenance shall be included in the mills per ton mile rates received by such owning line under this Agreement.

(b) BNSF and UP/SP will conduct a joint inspection to determine necessary connections and sidings or siding extensions associated with connections, necessary to implement the trackage rights granted under this Agreement. The cost of such facilities shall be borne by the party receiving the trackage rights which such facilities are required to implement. Either party shall have the right to cause the other party to construct such facilities. If the owning carrier decides to utilize such facilities constructed by it for the other party, it shall have

the right to do so upon payment to the other party of one-half (½) the original cost of constructing such facilities.

(c) Capital expenditures on the Trackage Rights Lines and on lines over which BNSF is granted Overhead Trackage Rights will be handled as follows:

(i) UP/SP shall bear the cost of all capacity improvements that are necessary to achieve the benefits of its merger as outlined in the application filed with the ICC for authority for UP to control SP. The operating plan filed by UP/SP in support of the application shall be given presumptive weight in determining what capacity improvements are necessary to achieve these benefits.

(ii) Any capacity improvements other than those covered by subparagraph (i) above shall be shared by the parties based upon their respective usage of the line in question, except as otherwise provided in subparagraph (iii) below. That respective usage shall be determined by the 12 month period prior to the making of the improvement on a gross ton mile basis.

(iii) For 18 months following UP's acquisition of control of SP, BNSF shall not be required to share in the cost of any capital improvements under the provision of subparagraph (ii) above.

(iv) BNSF and UP/SP agree that a capital reserve fund of $25 million, funded out of the purchase price listed in Section 10 of this Agreement, shall be established. This capital reserve fund shall, with BNSF's prior consent which will not unreasonably be withheld, be drawn down to pay for capital projects on the Trackage Rights Lines that are required to

accommodate the operations of both UP/SP and BNSF on those lines, but in any event shall not be used for expenditures covered by subparagraph (i) above. Any disputes over whether a project is required to accommodate the operation of both parties shall be referred to binding arbitration under Section 15 of this Agreement.

(v) If both UP/SP and BNSF intend to serve New Shipper Facilities located subsequent to UP's acquisition of control of SP as authorized by Sections 1(b), 3(c), 4(b), 5(b), 6(d), and 8(i) of this Agreement, they shall share equally in any capital investment in such connections and sidings and siding extensions or other support facilities required by both UP and BNSF to provide rail service to such New Shipper Facility. If only one railroad initially provides such service, the other railroad may elect to provide service at a later date, but only after paying to the railroad initially providing such service 50% of any capital investment (including per annum interest thereon) made by the railroad initially providing rail service to the New Shipper Facility. Per annum interest shall be at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by the other railroad commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the

access to such industry or industries. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points more or less than the prior year's interest rate.

(d) Subject to the terms of the Dispatching Protocols attached hereto as Exhibit D and incorporated herein, the management and operation of the lines over which the parties have granted trackage rights to each other pursuant to this Agreement ("Joint Trackage") shall be under the exclusive direction and control of the owning carrier, and the owning carrier shall have the otherwise unrestricted power to change the management and operations on and over Joint Trackage as in its judgment may be necessary, expedient or proper for the operations thereof intended. Trains of the parties utilizing Joint Trackage shall be given equal dispatch without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic of the owning carrier. Trains operating in the Houston terminal shall be routed over the most efficient routes as necessary to avoid delays and congestion, even routes over trackage over which the operating carrier has no operating rights.

The owning carrier shall keep and maintain the Joint Trackage at no less than the track standard designated in the current timetable for the applicable lines subject to the separate trackage rights agreement. The parties agree to establish a joint service committee to regularly review operations over the Joint Trackage lines.

In the event the owning carrier determines to sell or remove from service a Joint Trackage line and/or any associated facilities, the owning carrier shall provide the other carrier with reasonable written notice of such determination. Any such sale to a third party shall be expressly made subject to the terms and conditions of this Agreement, and the owning carrier

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 6

LETTER FROM ONE OF OUR ATTORNEYS TO AN ATTORNEY AT UP

REDACTED PUBLIC RECORD VERSION

KANSAS CITY SOUTHERN

MAILING ADDRESS: P.O. BOX 219335 • KANSAS CITY, MO 64121-9335

FOUNDED 1887

OFFICE AND EXPRESS DELIVERY ADDRESS:
427 WEST 12TH STREET
KANSAS CITY, MO 64105

DAVID C. REEVES
ASSOCIATE GENERAL COUNSEL
(816) 983-1387
FAX (816) 983-1227
E-MAIL: DREEVES@kcsouthern.com

July 23, 2012

Lawrence E. Wzorek, Esquire
AVP – Law
Union Pacific Railroad
1400 Douglas Street STOP 1580
Omaha, NE 68179 – 1580

Re: MP/SP Trackage Rights Agreement
HBT Trackage Rights Agreement

Larry –

I was reminded when we met in Omaha recently that I had promised you last Fall a letter to follow up on our discussion about whether KCS continues to view the GTM rate paid under the above-referenced trackage rights agreements as covering the costs of capacity improvements on the trackage rights lines needed to keep up with traffic growth. Yes, KCS continues to hold that view.

During the discussions that you and I had last Fall with Gayla, Mike and Jim, I expressed KCS's view that the GTM rate under the referenced agreements specifically covers capital improvements required to maintain the service standards, including transit times, that were in effect when the agreements were entered. You stated several reasons why UP believes that the GTM rate does not include the cost of maintaining those standards, citing language in an STB decision in UP/SP referring to the *SSW Compensation* decisions and UP's understanding with BNSF about the meaning of a similar UP-BNSF trackage rights agreement.

KCS believes that the clear language of the referenced trackage rights agreements governs, calling for UP to maintain the capacity and transit times of the trackage rights lines despite traffic growth. The agreements specifically state, "[T]he total amount of 3.84 mills per GTM ... shall be deemed to include ordinary and programmed maintenance of the Joint Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions...)". The referenced first sentence of Section 2.2 of the General Conditions states,

> Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Terms, including special instructions for the Joint Trackage as of the date of the Terms, ... and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms.

(Underlining added.)

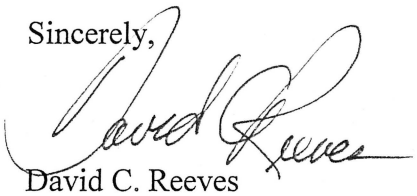
This quoted language plainly provides that UP, as the Owner, is responsible to make capacity improvements needed to continually maintain service standards, including transit times.

Our understanding of that plain language is not altered by the other matters that you referred to in our discussions. The Board's decisions in the UP/SP case did not analyze UP's duty to maintain capacity of the trackage rights lines in relation to the *SSW Compensation* decisions. Accordingly, we do not find the Board's passing reference to those decisions controlling. Moreover, we are not convinced that even if the *SSW Compensation* decisions were relevant that they would overrule or contradict the plain language of the UP-KCS trackage rights agreements.

Likewise, the fact that BNSF and UP have settled on an interpretation of the UP-BNSF trackage rights agreement that they find mutually satisfactory does not change what the language of the UP-KCS agreements actually says. Moreover, there are several important differences between the UP-BNSF agreement and the referenced agreements, not the least of which is that BNSF pays a significantly lower trackage rights fee than does KCS. It therefore does not seem that whatever UP and BNSF may have agreed to among themselves as to the interpretation of their agreement has any relevance to what the plain language of the UP-KCS agreements means.

Again, KCS believes that the language of the trackage rights agreements is clear, and that it requires UP to make capacity improvements necessary to maintain service standards and transit times in effect when the agreements were entered, regardless of the growth of traffic on those lines, without additional compensation from KCS. As the chokepoints between Robstown and Victoria, in particular, become more limiting, the need for capacity improvements to preserve the competition that the STB sought to preserve by granting the trackage rights become more pronounced.

Sincerely,



David C. Reeves

cc: Gayla Thal, Esquire

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 7

KCS-UP CAPACITY PROJECT MAP, OCTOBER 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 8

NECHES RIVER BRIDGE FEASIBILITY STUDY, FINAL REPORT – JUNE 2013, RAIL DIVISION, TEXAS DEPARTMENT OF TRANSPORTATION

Neches River Bridge Feasibility Study

Final Report – June 2013

Rail Division

Neches River Bridge Feasibility Study

prepared by

TranSystems Corporation

In association with

URS Corporation

RJRivera Associates Inc.

for

The Texas Department of Transportation

Rail Division

FINAL Report

June 2013

Table of Contents

Executive Summary

1.0 Background and Context

Study Area **1-1**
Project Description **1-5**
Review of Previous Reports **1-7**

2.0 Existing Conditions

Socioeconomic and Environmental Resources **2-1**
Inventory of Existing Rail Systems **2-8**
Current Railroad Operations **2-21**
The Rail Traffic Control (RTC) Model **2-34**

3.0 Projected Conditions

Rail Forecasts **3-1**
Developing Options **3-5**
Alternatives Considered **3-13**

4.0 Evaluation of Alternatives

Evaluation Measures **4-3**
Summary of Alternatives **4-12**

References

List of Figures

1.1 Beaumont, Texas 1-2
1.2 Neches River Bridge Feasibility Study Area 1-3
1.3 Port of Beaumont Master Plan 1-4
1.4 South East Texas Regional Planning Commission Area 1-11

2.1 2010 Households by Block 2-2
2.2 2010 Low-Moderate Income Population by Block Group 2-2
2.3 2010 Race: Percent Non-Caucasian By Block 2-3
2.4 Wetlands and Floodplains 2-5
2.5 Historic Resources 2-7
2.6 Community Resources 2-7
2.7 Primary Rail Corridors – Contiguous United States 2-8
2.8 Rail Map of Southern Texas 2-9
2.9 Sheet Index Map of Existing Conditions in Appendix 2-10
2.10 Kansas City Southern Rail Map 2-11
2.11 Union Pacific Railroad National Map 2-12
2.12 Burlington Northern and Santa Fe (Gulf Operating Division) 2-14
2.13 Port of Beaumont Master Plan (Orange County) 2-16
2.14 Amtrak Passenger Rail Lines National 2-17
2.15 Amtrak Limited Route 2-17
2.16 Key At-grade Crossing Locations 2-19
2.17 Land Use Within Study Area 2-20
2.18 Industrial Land Use in Beaumont Region 2-21
2.19 Daily Train Volumes Beaumont Area 2-22
2.20 Daily Train Volumes – National 2-22
2.21 Sample of Neches River Rail Crossings 2-23
2.22 Freight Density - Annual Rail Tonnage - Texas 2-24
2.23 Freight Density - Annual Rail Tonnage – Texas East Region 2-25
2.24 Current Level of Service - National 2-26
2.25 Rail Yards in Beaumont Region 2-27
2.26a Port of Beaumont Interchange Yard 2-28
2.26b Port of Beaumont Newport Yard 2-28
2.26c Port of Beaumont Dreyfus Yard 2-28
2.27a KCS – Chaison Yard 2-30
2.27b KCS – Vidor Siding 2-30
2.28a UPRR South Yard 2-32
2.28b UPRR East Yard 2-32
2.28c UPRR Beaumont Yard 2-32
2.29 BNSF Beaumont Yard 2-33
2.30 Rail Traffic Control (RTC) Neches River "Line" Schematic 2-34

List of Figures (continued)

3.1 Future Daily Train Volumes – National 3-1
3.2 Gulf Coast High Speed Rail 3-3
3.3 Future Level of Service – National 3-4
3.4 Conceptual High-Level Profile 3-6
3.5 Stationary Bridge General Plan and Elevation 3-9
3.6 Stationary Bridge Typical Section 3-9
3.7 Lift Bridge General Plan and Elevation 3-11
3.8 Lift Bridge Typical Section 3-12
3.9 Sheet Index Map of Alternatives Evaluated in Appendix 3-15
3.10 Roadway Circulation Concept connecting Port of Beaumont Jefferson and Orange Counties 3-18
3.11a Concepts Considered 3-21
3.11b Concepts to be Evaluated 3-21

4.1 Existing Alignment Evaluated (New lift bridge adjacent to existing) 4-1
4.2a New Alignment Evaluated (IH-10 Fixed bridge) 4-2
4.2b New Alignment Evaluated (Pine Street Lift bridge) 4-2
4.3 Crossing Corridors – Key at-grade crossings evaluated for grade separation 4-5

List of Tables

2.1 Major Employers, City of Beaumont, Texas 2-4
2.2 RTC Model Base Case – Type of Trains 2-35
2.3 RTC Freight Train Performance - Base Case 2-36

3.1 Forecast of Weekly Train Traffic 3-2
3.2 Port of Beaumont – Forecast of Annual Rail Cars and Tonnage Handled 3-2
3.3 RTC Freight Train Performance – Projected "no-build" 3-4
3.4 Vertical Clearances along Neches River 3-5

4.1 RTC Freight Train Performance - Alternatives with 2035 projected volumes 4-3
4.2 Highway and Railroad Crossing Evaluations 4-7
4.3 Potential Property Impacts 4-8
4.4 Potential Environmental Impacts 4-10
4.5 Probable Construction Costs 4-11
4.6 Summary Matrix 4-14

APPENDICES

Gulf Coast High Speed Rail
Supplemental Environmental Information
Existing Conditions Maps (1' = 200' scale)
Alignments Evaluated (1" = 200' scale)
Property Impact Assessment
Opinion of Probable Costs (Estimated Construction Cost)
Crossing Corridors – GradeDec.net Evaluation
TxDOT Evaluation Methodology

Executive Summary

This Report and summary is organized around four sections; background and context, existing conditions, projected conditions and concludes with the evaluation of alternatives. At this time a preferred alternative has not been identified. The material presented in this report is intended to inform decision-makers regarding the basic elements of physical and financial attributes. The next step is to coordinate with the various stakeholders - including the public - to arrive at a mutual consensus involving a multitude of institutions and agencies and to identify a future development plan.

Background and Context

The City of Beaumont, Texas is on the coastal plain of Texas about 30 miles inland from the Gulf of Mexico. The City is the county seat of Jefferson County, Texas. Beaumont with the cities of Port Arthur and Orange form the Golden Triangle, a major industrial area on the Gulf Coast. There is currently only one railroad bridge with a single track crossing the Neches River in Beaumont. The bridge is owned and operated by the Kansas City Southern (KCS) Railroad which shares operating rights across the bridge with the Union Pacific Railroad (UPRR), BNSF Railway Company (BNSF) and Amtrak. The study area for this report is bordered on the north by Interstate 10, on the east by the eastern city limits (extended to intersect IH-10 in Orange County), on the south by Washington Boulevard, and on the west by primarily 4th Street. A significant portion of the study area is shown in the oblique aerial photograph in Figure 1.1. A significant element in the region's economy is the Port of Beaumont which is located in the study area at the existing river bridge crossing.

Figure ES.1 – Beaumont, Texas
with Port of Beaumont in foreground, KCS Neches River Bridge
in mid-ground and Interstate 10 bridge in background



This study evaluated the feasibility of rail corridor system improvements at or near the existing Neches River rail bridge crossing in the City of Beaumont, Texas. The Neches River is a navigable waterway and the railroad lift bridge is raised in order to allow river traffic to pass. The purpose of the study is to:

- evaluate rail movements and operations within the study area,
- identify opportunities to increase rail efficiency,
- analyze potential alternatives and improvements to the existing bridge and rail alignment, and
- determine the physical and financial viability of such potential improvements.

Within the scope of this study, the elimination of the existing structure was not considered feasible. Also while the evaluation considers the potential effects upon the environment, this report is not an environmental document. The project's no-build scenario is utilized only to define the project's purpose and serve as the baseline for the alternatives. Nonetheless as a feasibility study, the focus is upon the technical, financial and political aspects of build alternatives.

Pertinent reports reviewed as background information for this study included:

- Texas Rail Plan, November 2010
- Amtrak Gulf Coast Service Plan Report, July 16, 2009
- Rail Access to the Port of Beaumont, April 2005
- Gulf Coast High-Speed Rail Corridor Evaluation, November 2004
- Metropolitan Transportation Plan (MTP)

These reports are relevant because they address all modes of transport while focusing upon rail transportation issues both for freight and passenger rail service within the State. The reports also contain regional and local information that may affect where potential rail alignments might be located.

Existing Conditions

This section provides an overview of socioeconomics and environmental resources in the study area as well as an inventory of existing rail transportation, its operations in the Beaumont region and the development of a Rail Traffic Control model to simulate existing and projected conditions. The social and environmental resources inventoried include:

- Population and Households
- Income and Race
- Employment
- Water Resources
- Wetlands and Floodplains
- Threatened and Endangered Species
- Archeological and Historic
- Land Use Conditions

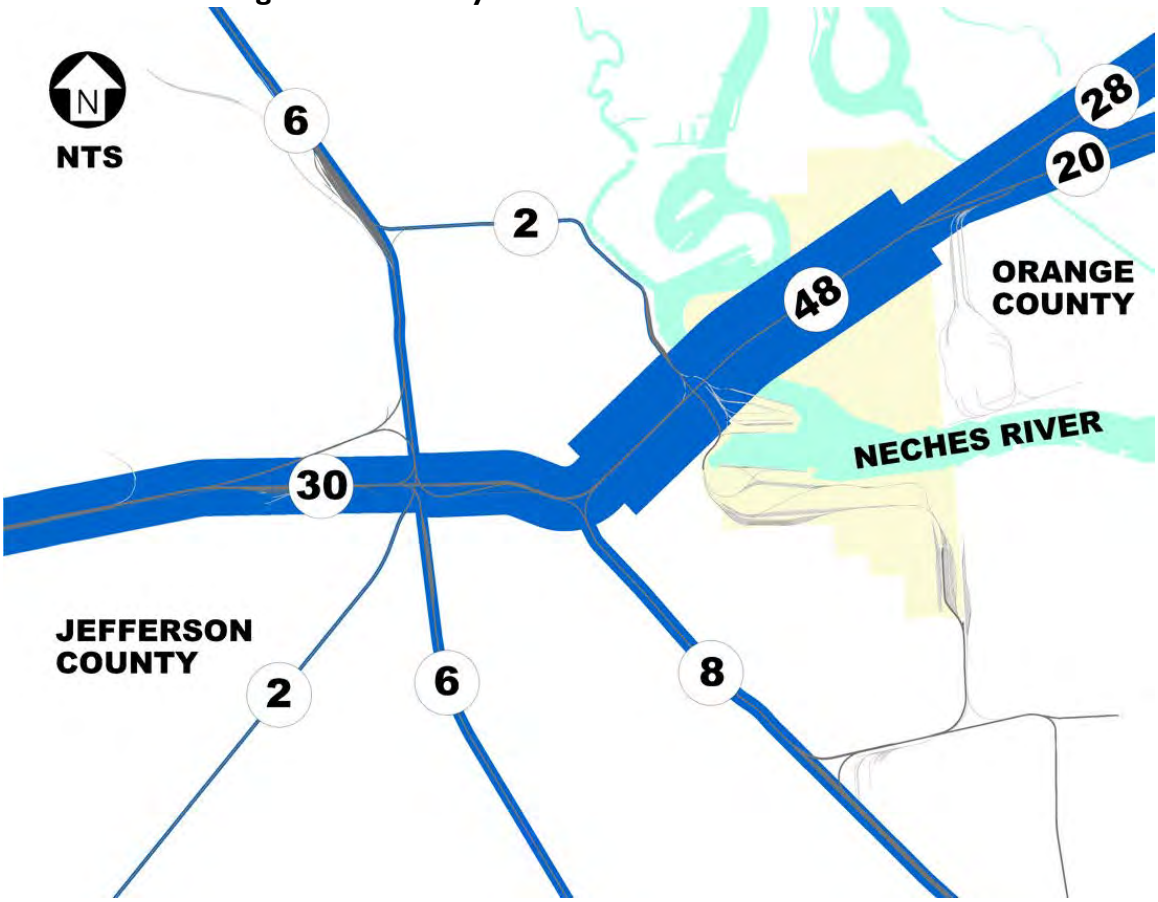
There are three Class I railroads operating in the Beaumont area; the Kansas City Southern (KCS) Railroad, the Union Pacific Railroad (UPRR) and the Burlington Northern and Santa Fe (BNSF). Each of these railroads systems are described beginning with a depiction of each freight rail carrier's national system and then moving into the regional system. Elements of the rail corridors studied are included with the identification of key at-grade crossing and service provided to local industries as well as access to the

Port of Beaumont. For this study, the rail serving the Port is focused upon the Port's Interchange Yard. The Port of Beaumont's Master Plan focuses upon the Port's Orange County facilities which could build out in excess of 450 acres. Amtrak provides intercity passenger rail service in the Beaumont Texas area via the Sunset Limited.

Rail Corridors and Operations

The primary east-west rail corridor through the Beaumont area includes the Neches River rail bridge, a vertical lift span bridge that allows river traffic to pass under the bridge. The bridge is in the rail-locked position until a navigation request is made to raise the lift bridge, generally to a requested vertical clearance. Information supplied by the United States Coast Guard (USCG) indicates approximately 400 lifts per year in 2011. Data from KCS in 2012 indicates 7 lifts in a six day period which is consistent with the USCG's annual lifts. While requests for bridge openings can occur at any time, most occur during daylight hours. The bridge raising can result in some train delays. The delays are more pronounced when trains are traveling in the same direction across the bridge as adjacent trains must be separated by two signals in order to prevent a train from stopping on the bridge. Typically the bridge stays open to river traffic between 15 and 30 minutes. The daily train count across the Neches River bridge ranges between 40 to 50 trains based upon daily train movements in the FRA's crossing inventory. Figure ES.3 represents that information as a band of varying thickness.

Figure ES.2 – Daily Train Volumes Beaumont Area



Another important issue regarding train traffic through Beaumont is that close follow-up movements are restricted by crew changes in each direction. Both the UPRR and KCS have crew changes in Beaumont which occur on the railroad's main lines. Finally, yard capacity and yard operation's efficiency have a direct impact on the rail system operations. Several yards are located in and around the Beaumont area and include:

- Port of Beaumont Interchange Yard
- KCS's Chaison Yard and Vidor Siding
- UPRR's South, East and Beaumont Yards
- BNSF's Beaumont Yard.

Projected Conditions

This section discusses rail forecast and operations in the forecasted year 2035 under the no-build scenario. An assessment of operations and various improvement concepts were developed and assessed. A key element with any improvement concept is the crossing of the Neches River with regards to meeting the river navigation criteria. The parameters for different bridge crossing types (lift vs. fixed) are discussed followed by reviews of some potential alignments. The 2035 rail forecast includes an overview of rail traffic at both a national level as well as specific to the region based upon the Texas Statewide Rail Plan. Potential impacts of implementation of the Gulf Coast High Speed Rail (GCHSR) passenger initiative are discussed. The no-build scenario's future rail system operations were analyzed utilizing the existing rail network and committed improvements, such as the new switch into the Port of Beaumont.

Rail Traffic Controller (RTC) is a computer program created by Berkeley Simulation Software, LLC, which simulates train operations over a railroad network. Variations can be made in network track layouts such as new rail lines, train composition and schedules, and operating rules and constraints, which allow for the testing and assessment of modifications. RTC is used by most North American Class I railroads to evaluate and plan their operations and in turn determine capital expenditures. The Base (Modified) RTC model estimates that under current conditions 287 trains operate during a typical week through the project study area. This translates to approximately 40 to 50 trains per day crossing the Neches River. Forecasted growth for the number of trains expected to be operating weekly in the Beaumont area by 2035 was determined utilizing a three percent (3%) compounded annual growth rate. The 3% growth rate is reasonable given the population growth forecasted for the State of Texas and the expected increased level of cross-border trade on a national basis. In addition, this is the rate that other recently completed freight studies used. Train traffic is projected to essentially double from the base condition to an estimate of 87 trains per day crossing the Neches River.

In the forecasted year with no improvements to the rail network, the average speed across the entire study network declines by about one-third from 15.0 mph to 10.6 mph. The forecasted train traffic results in the quadrupling of the delay ratio and the delay in minutes per 100 train miles. The forecasted delay hours increase at an even more significant rate, approaching eight times the value of delay hours under existing conditions. Essentially, the application of the forecasted train volumes to the existing rail network results in significant congestion. However, this is consistent with other studies regarding future levels of service for freight rail at the national level.

Developing Options

The development of options can be thought of in two basic parameters:

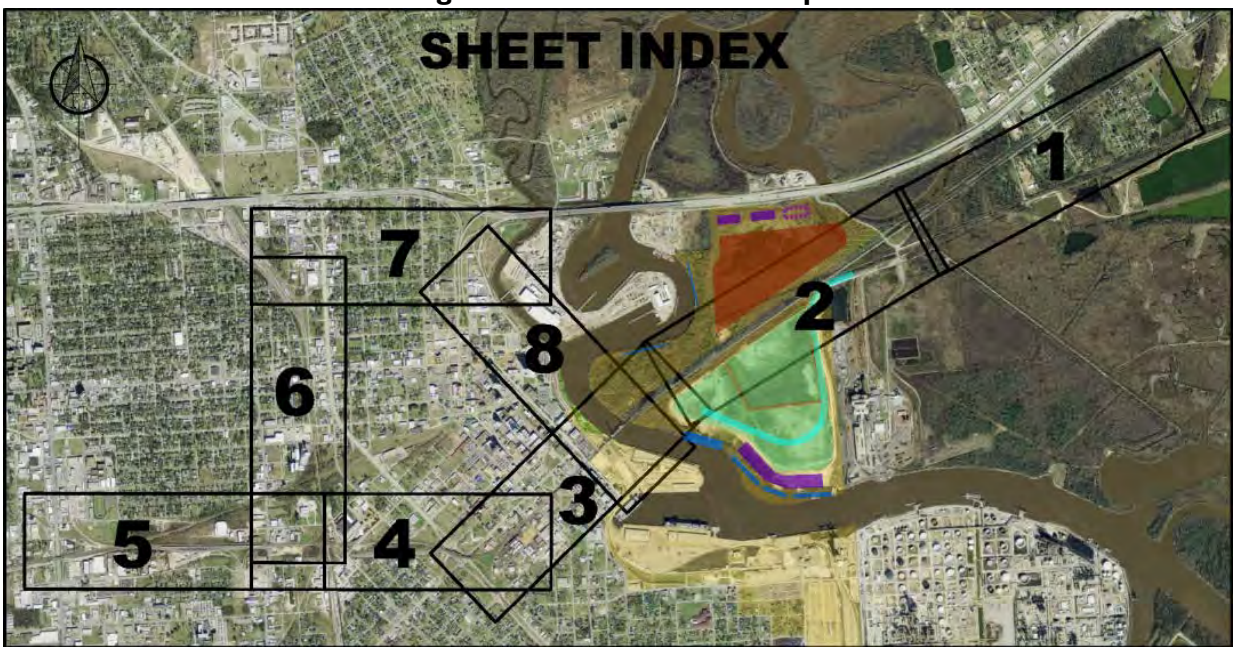
1. the development of bridge type (stationary or lift) and

2. the development of bridge crossing locations (along existing or on new alignment).

The determination of bridge type also influences the location of the bridge crossing. A stationary bridge type could consider three levels; a high level, a mid-level and a low-level. The high-level bridge would accommodate a vertical clearance at the maximum height (150 feet) which would meet the USCG's recommended navigation clearance for the Neches River. A mid-level bridge would have a vertical clearance that would accommodate the majority of river navigation. This report assumes that the mid-level bridge would have a 50 foot vertical clearance similar to the IH-10 crossing of the Neches River. A low-level crossing assumes a lift bridge with a minimum 13 foot river navigation vertical clearance in the closed position (to mimic the existing bridge vertical clearance).

A multitude of options were considered and screened. Concepts of high-level structures (with a vertical clearance of 150 feet) were considered but found to be both physically and financially impractical. Concepts for a lift bridge located south of the existing KCS bridge would have significant impacts on river navigation and the increase in the number of lifts would adversely affect rail operations. And while consideration of a former rail corridor is philosophically often a reasonable approach, the former Southern Pacific alignment through Downtown Beaumont is heavily developed with numerous street crossings. Creating an elevated rail corridor through Downtown Beaumont would have significant property and visual impacts. The corridor or alignments studied are summarized in Figure ES.3 and in the appendix.

Figure ES.3 –Sheet Index Map



Design aspects to accommodate the GCHSR were also considered and include, as part of a Phase 2 component of the GCHSR study, a proposed rail line along the existing UPRR-KCS rail corridor on the north side of the existing rail alignment. This concept is reflected by illustrating a third main west of the Gulf Coast Lines (GCL) junction, located between UPRR's East Yard and the Neches River bridge, through UPRR's east yard and continuing further westward. In Orange County, a proposed rail line is also shown in this study along the existing UPRR-KCS rail corridor on the north side of the existing rail

alignment which requires a crossing of the KCS rail. Because of the extensive existing right-of-way width on the north side between the Neches River bridge and the KCS-UPRR split at Tower 31, approximately 1 mile east of the Neches River bridge, design options were considered to accommodate a crossing with the proposed additional rail line on the north side. In order to provide a level at-grade crossing, the new rail alignment must cross at a tangent and then begin its horizontal curvature. This geometric design may necessitate minor additional right-of-way acquisition. Another option could be grade separation, though obviously this has cost implications. Considerations may even need to be given to the potential for double track alignments coming together along both the UPRR and the KCS routes at the KCS-UPRR split.

Three build alternative crossings of the Neches River were evaluated. These include an alignment along the existing river crossing corridor as well as new alignment alternatives with different types of river bridge crossings; stationary or lift span. Essentially these were determined to be the best of the options considered for alignment location and bridge type. The three alternatives are:

- Add capacity adjacent to existing KCS alignment with a new lift bridge
- Add capacity on new alignment adjacent to Interstate-10 with a stationary bridge, and
- Add capacity on new alignment along Pine Street corridor with a new lift bridge

Evaluation of Alternatives

The evaluation of transportation impacts for the alternatives included a review of river, rail, and highway operations. The rail operations are based upon the output from the RTC model while highway operations focus upon the output from GradeDec.net at the selected key at-grade rail-highway crossings. River impacts were based upon the degree of obstruction to navigation traffic. All alternatives offer the option to route trains via either the existing rail lines or the alternate route, depending upon circumstances. In effect when combined, the existing route and proposed alignments create at least two main tracks over the Neches River, and to some extent three, between the UPRR Beaumont Yard and the KCS-UPRR split. This added capacity offers more flexibility than just the existing route alone.

The rail operation measures include system route miles, total system train miles, total system weekly trains, system average velocity, total weekly system train delay, and a system delay ratio. The evaluation of an improved river crossing shows an increase in average speed over existing single track operations. However, there is no change to the delay ratio and only minor decreases in delay hours and minutes, 10% and 20% respectively. The effects of the double track are more prominent (ranging from 40% to 55% reduction in delay measures) when comparing potential projected volumes to operations on a single track.

To review potential impacts to vehicular traffic, the alternatives studied were subdivided into five rail segments for assessment via GradeDec.net. Three of the five rail segments are essentially evaluated under future conditions (increased train and vehicular volumes) while the other two rail segments have the potential to be directly affected by the alternate alignments under consideration. In summary, of the at-grade crossings evaluated for grade separation, only the crossing at Martin Luther King Parkway approaches a benefit close to the probable construction costs. This occurs only with increased and diverted train traffic associated with the new rail alignment alternative adjacent to IH-10. The existing low volume service line today would not reach a level to suggest the need for a grade separation.

Figure ES.4
Existing Alignment Evaluated
(New lift bridge adjacent to existing)



New Alignment Evaluated
(Stationary bridge Interstate 10)



New Alignment Evaluated
(Lift bridge Pine Street)



The evaluation of sustainability impacts includes a review of potential environmental and social impacts. Elements from the transportation and implementation impacts cross over to provide additional input on such factors as property impacts and transportation delay which has an effect upon air quality and energy use.

The potential for environmental impact is associated with the implementation of an alternative's infrastructure. The key issues are potential environmental impacts as well as the complexity of permits for the alternative. Several of the attributes described under the existing conditions such as population, households, income, race and employment are represented by the surrogate of property impacts by land use categories. Residential impacts would affect population and households, while commercial and industrial impacts would affect employment and income. Impacts to water resources including wetlands and floodplains are indicated by assumed areas of potential right-of-way. Often these natural areas are habitat and thus served as a surrogate for threatened and endangered species for this study. Specific sites that could be affected are identified for archeological, historic and community facilities including public lands and parks. Impacts to these attributes are represented by four degrees of impact ranging from no impact to low impact to medium impact to high impact. Superfund is the name given to the environmental program established to address abandoned hazardous waste sites. There is one Superfund site within the Study Area named International Creosoting located at 1110 Pine Street, Beaumont, Jefferson County. The new IH-10 alignment runs through the middle of this superfund site.

The evaluation of implementation impacts includes a review of probable construction costs as part of a cost effectiveness assessment. Property impact costs, while not specifically estimated at this time, are discussed in broader terms as an influence upon project development. The construction costs for the alignment

concepts have been developed based upon major elements such as the river crossing bridge as well as the length of structural approach spans. These bridge approach spans can be very long considering the potential height of the proposed rail, topography, and local soil conditions. For alignment comparisons, the quantity and associated costs of the rail were estimated based upon new rail alignment and existing rail alignment. The cost of improving adjacent to the existing rail alignments also considered whether the proposed track was within the existing rail right-of-way or adjacent to but outside existing rail right-of-way. The costs of track was varied depending upon upgrade of existing track, new track on-grade, new track on fill (typically up to 16 feet), new track on structure, and new track on river bridge. For this study, it was assumed that only a single track would be added for those new alignments. However, the bridge costs are based on providing the ability to construct a future track. In order to be consistent with the structural availability for a second track, the earthwork for the future second track is also included in the estimate. If necessary, new rail sidings and connections are quantified. At this stage, the rail traffic control and signaling system as well as improvements to crossing devices at highways are included in the contingencies. The costs only account for construction activities in 2012 dollars. The costs do not include right-of-way acquisition, design, permitting or construction inspection costs, or any annual maintenance costs. The potential for such costs should be considered when comparing alignments, particularly on those alignments that have significant property impacts.

Summary of Alternatives

Four alternatives have been assessed under forecasted 2035 conditions. The projected "no-build" alternative was analyzed to establish a baseline for comparison. This alternative establishes the fact that Beaumont's rail network would benefit from having additional rail lines at the Neches River crossing. In addition to the "no-build" alternative, three "build" alternatives were evaluated that involved improving capacity by providing additional track as well as exploring operational issues associated with the lift bridge over the Neches River. The three alternatives concentrated on improving the existing rail route with 1) a new adjacent lift bridge, 2) a new rail alignment also with a lift bridge near the existing rail corridor, and 3) a new rail alignment with a fixed river bridge crossing north of the existing rail corridor. A brief summary of the pros and cons of each build alternative are provided below.

Expand existing route to double track river crossing (lift bridge)

This alternative keeps the existing bridge in place and assumes it to be operational with a projected 16 lifts per week in the future scenario. In addition, a second lift bridge is considered immediately adjacent and north of the existing structure. While this alternative's RTC model performance measures improve over the "no-build" conditions, the operations still show significant delays. Even with the double track operations, delays under the projected train volumes would be twice to four times as great as they are now. Some potential improvements to address this delay beyond the additional capacity over the Neches River could be a third main for the UPRR and is shown conceptually in the Alternatives Evaluated mapping. This alignment alternative does not intrinsically address the delays associated with the KCS-UPRR split at Tower 31. As the proposed improvements essentially remain adjacent to or within the existing rail corridors, impacts to the community are minimized. Costs for this improvement in the Beaumont area are estimated in 2012 construction dollars approach $120 million.

New Pine Street alignment (lift bridge over Neches River)

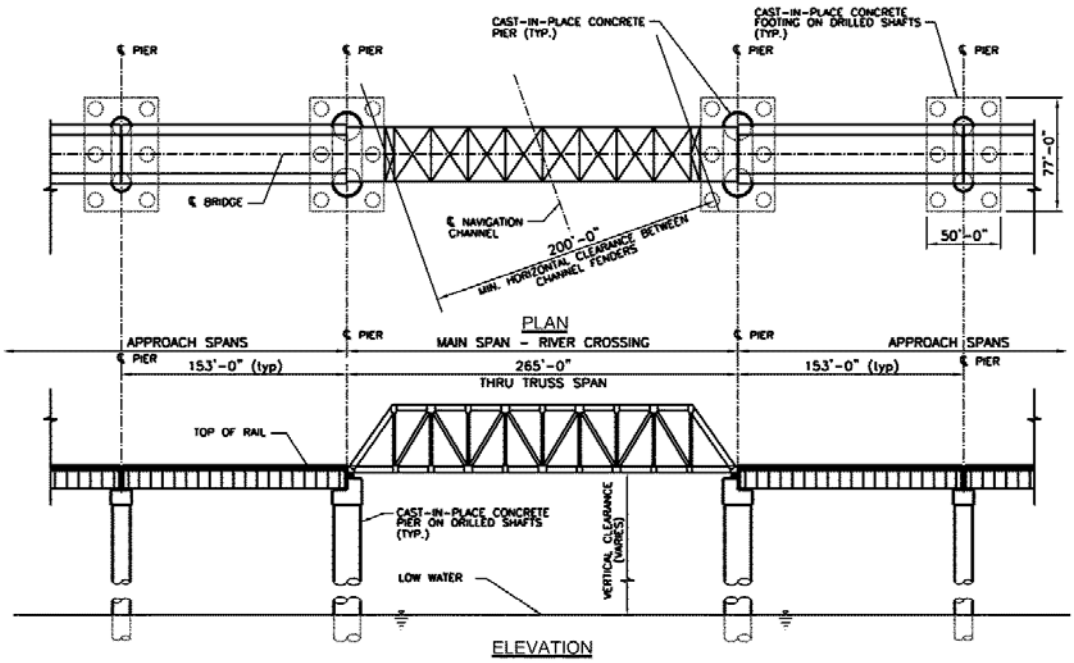
This alternative keeps the existing bridge in place and assumes it to be operational with a projected 16 lifts per week. The Pine Street alignment was initially tested through the RTC model with a potential fixed river bridge crossing. However physical limitations determined that the only practical fixed river bridge crossing lies immediately adjacent to the IH-10 corridor. Consequently it was determined that the Pine

Street alignment was the best new rail alignment with a lift bridge over the Neches River. Nonetheless, that new lift bridge location created its own set of design issues that result in additional costs compared to constructing an adjacent rail bridge to the existing rail's river crossing. The alignment's tie in on the west side is likely to create significant adverse impacts to a neighborhood with property acquisition as well as impacts to vehicular operations at critical at-grade crossings that will only add to the probable construction costs. This alignment alternative does not intrinsically address the delays associated with the KCS-UPRR split at Tower 31. Costs for this alignment are estimated in 2012 construction dollars approach $170 million.

<u>New IH-10 alignment (fixed bridge over Neches River)</u>

This alternative keeps the existing bridge in place and assumes it to be operational with a projected 16 lifts per week. The new IH-10 rail alignment has potentially significant operational benefits by addressing two key issues: 1) the delays associated with the lift operations of the river crossings, and 2) addresses the grade separation of the KCS-UPRR split on the east side of the Neches River. However, the alignment tie in on the west side is likely to create significant adverse impacts to a neighborhood with property acquisition as well as impacts to vehicular operations at critical crossings that increase the probable construction costs. This alignment is located close to an EPA Superfund site. Costs for this alignment are substantial and are estimated in 2012 construction dollars approach $240 million. While viewed from a railroad operationally viewpoint only, this new alignment is the best within this study area. The high degree of cost and probable impacts may be offset by any additional operational benefits.

Figure ES.5 – Stationary Bridge General Plan and Elevation



1.0 Background and Context

This section describes the study area and elements immediately surrounding the Neches River Bridge crossing in Beaumont, Texas. It includes a listing of the various tasks associated with the feasibility component of the study. This section concludes with a review of pertinent previous reports with a summary of their relevant aspects to this study.

Study Area

The City of Beaumont, Texas is on the coastal plain of Texas about 30 miles inland from the Gulf of Mexico. It is bordered on the east by the Neches River and on the north by Pine Island Bayou. The City is the county seat of Jefferson County, Texas. Beaumont with the cities of Port Arthur and Orange form the Golden Triangle, a major industrial area on the Gulf Coast. In 2010, Beaumont's population was 118,296.[1]

There is currently one railroad bridge crossing the Neches River in Beaumont. The bridge is owned and operated by the Kansas City Southern (KCS) Railroad that shares operating rights across the bridge with the Union Pacific Railroad (UPRR), Burlington Northern Santa Fe (BNSF) Railway and Amtrak. This bridge was constructed in 1941 and was operated on-site until 2004. In 2004, it became remotely operated from Kansas City.[2]

The study area is bordered on the north by Interstate 10 (IH-10), on the east by the eastern city limits (extended to intersect IH-10 in Orange County), on the south by Washington Boulevard, and on the west by primarily 4th Street. A significant portion of the study area is shown in the oblique aerial photograph in Figure 1.1. A map of the entire study area is shown in Figure 1.2.

A significant element in the region's economy is the Port of Beaumont which is located in the study area at the existing river bridge crossing. Due to the significant volume of maritime trade of petrochemicals, the US Customs District - that includes the Port of Beaumont - was ranked 6th in the nation in terms of total cargo volume in 2002.[3] The Port mainly handles wood products, pot ash, grain and similar bulk items as well as petroleum and chemical products. Military shipments are an important and growing source of business for the Port as well, making the Port the second largest military seaport in the world.[4]

The main vehicular entrance gate for the Port of Beaumont is located at the intersection of Main and Franklin Streets. Vessel access is provided via the Sabine-Neches Waterway, a 40-foot deep federally maintained channel. Ships and barges have free access to the Port via Sabine Pass, the Port Arthur and Sabine-Neches Canals, and the Neches River. The Port contains more than one linear mile of open wharf space, eight ship berths, 50 acres of open storage, and 600,000 square feet of transit sheds.[5]

Figure 1.1 – Beaumont, Texas

with Port of Beaumont in foreground, KCS Neches River Bridge
in mid-ground and Interstate 10 bridge in background



The Port is currently expanding its Dreyfus Yard (seen in the foreground of Figure 1.1) and constructing a new south connection to the KCS track that was planned for completion in 2011. In addition, over $20 million in capital improvement projects, including a new railcar holding yard, have been made to improve operating conditions. The Port's existing interchange yard lies north of the mainline. As a result of planned track improvements, the Port plans to lease a portion of the yard to the City of Beaumont for redevelopment. See Figure 1.3 for an image of the Port Master Plan concentrating on the Orange County facilities.

Figure 1.2 - Neches River Rail Bridge Feasibility Study Area

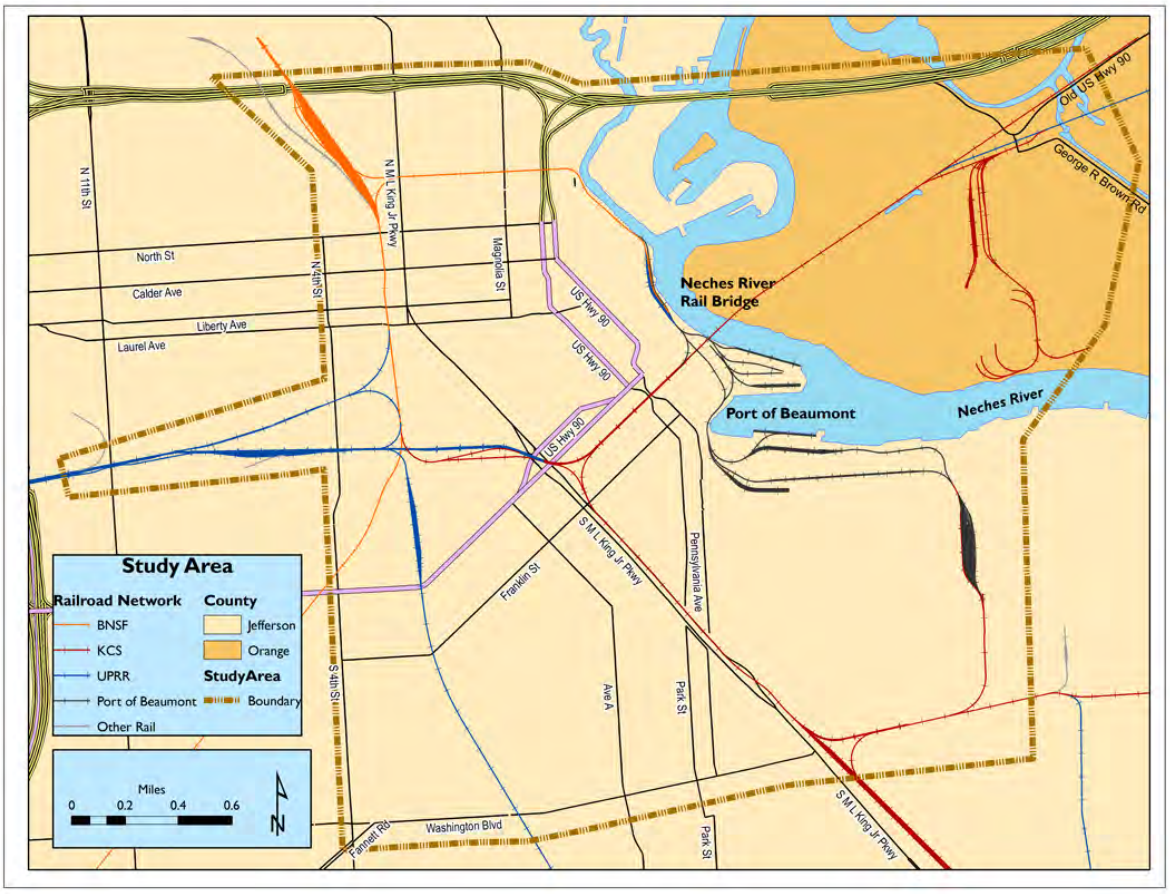


Figure 1.3 - Port of Beaumont Master Plan



Project Description

The study is to evaluate the feasibility of rail corridor system improvements at or near the existing Neches River rail bridge crossing in the City of Beaumont, Texas. This rail corridor serves a combination of Class I railroads including the Kansas City Southern (KCS) railway, the Union Pacific Railroad (UPRR), the Burlington Northern and Santa Fe (BNSF) Railway, and passenger rail operated by Amtrak. All of these railroads currently use the existing lift span bridge owned by the KCS. Approximately 40-50 trains a day cross the Neches River bridge.[6] The Neches River is a navigable waterway and the railroad lift bridge can be raised in order to allow river traffic to pass.

The purpose of the study is to:

- evaluate rail movements and operations within the study area,
- identify opportunities to increase rail efficiency;
- analyze potential alternatives and improvements to the existing bridge and rail alignment, and
- determine the physical and financial viability of such potential improvements.

This report documents the development and assessment of potential improvements and/or alternatives that could be presented to the railroads for consideration, including the evaluation of the financial, engineering, and operational viability of constructing a second river bridge crossing. These concepts were developed in coordination with the Port of Beaumont (POB) Master Plan and the Jefferson-Orange-Hardin Regional Transportation Study area Metropolitan Transportation Plan (JOHRTS MTP) and therefore should be consistent with Statewide planning practices.

The following is an outline of the study tasks. As part of the process, meetings with various stakeholders were conducted including but not limited to the City of Beaumont, the Port of Beaumont, the three major railroads operating in the region (KCS, UPRR and BNSF), as well as contacts with numerous state agencies and industries to obtain data.

Inventory Existing Rail System

- Review and summarize previous pertinent rail studies. Studies include the Texas State Rail Plan, Amtrak Gulf Coast Service Plan, TxDOT's High Speed Rail Study, Port of Beaumont as well as available studies from the Class I railroads.
- Meet with railroad representatives from BNSF, KCS, and UPRR to understand design alternatives, traffic volumes, forecasts, impacts, operating parameters and operating costs.
- Meet with the Port of Beaumont to understand their perspectives and objectives relative to the project.

Conduct Freight Rail Operational Study

- Meet with rail carriers who operate within the Beaumont area regarding existing traffic volumes and operational parameters.
- Collect available information on projected freight volumes for the study area from each railroad.

- Collect future population and employment projections from the State for the period through to the year 2035.
- Integrate data to develop a projection for future rail traffic volumes.

Identification of Freight Rail Movement Constraints

- Establish layout of track geometry that graphically represents the inventory assessed. A validated existing Rail Traffic Controller (RTC) model was used to estimate the constraints on the main line rail operations and efficiency resulting from:
  - Track, Bridge, and/or Signal deficiencies
  - Rail traffic congestion and yard utilization
  - Highway/Rail grade crossing conflicts.

Develop Alternatives and Assess Feasibility for Rail System Improvements

- Develop potential improvements at the Neches River crossing and necessary related main line track improvements, and associated track connections in the vicinity of the existing bridge. Potential track alignments to be examined include:
  - A new alignment immediately adjacent to the existing span.
  - A new approach span to new double track moveable span at the current location.
  - Up to four alternate alignments for new crossing consisting of a moveable span over the Neches River with fixed span approaches

Potential alternates for each new alignment to be examined include:

- Structure Type
  - EITHER a moveable span over the Neches River channel
  - OR a fixed span bridge that meets navigation requirements:
- Structure Typical Section
  - For alignments that connect Port of Beaumont property on both sides of the Neches River, the typical section will allow for rail double track. A 2-lane roadway section suitable for vehicles will also be examined.
  - For alignments that do not connect Port of Beaumont property on both sides of the Neches River, the typical section will only have rail double track.

Within the scope of this study, elimination of the existing structure is not considered feasible. Also while the evaluation considers the potential effects upon the environment, this report is not an environmental document. The project's no-build scenario is utilized to define the project's purpose. Nonetheless as a feasibility study, the focus is upon the technical, financial and socioeconomic aspects of build alternatives.

Utilizing the RTC Base Case model developed for the Texas Department of Transportation (TxDOT) as part of the Houston Regional study, forecasts and updated train operations for the various alternatives were prepared. A cost/benefit analysis based on order of magnitude costs for the construction of improvements, excluding right-of-way costs, was developed. Elements to be considered in the cost/benefit analysis included:

- Environmental:
  - Individual Permit or Nation Wide Permit: US Army Corps of Engineers, Galveston District.
  - Environmental Impact Statement or Categorical Exclusion
  - Potential Wetland Impacts
  - FEMA: A Conditional Letter of Map Revision (CLOMR) or Letter of Map Revision (LOMR)
  - U.S. Coast Guard and U.S. Army Corps of Engineers §10 Permits (Title 33, USC §403)
  - FAA Permit: Notice of Proposed Construction or Alteration.
  - Coastal Management Zone
  - Noise
  - Texas Land Office Permit

- Costs:
  - Probable costs including rail and structure costs as well as other associated transportation improvements to highways.
- Public Benefits:
  - Utilizing GradeDec.net, the Federal Railroad Administration's online planning tool, the public benefit for any proposed changes at key at-grade crossings was estimated.

Review of Previous Reports

Pertinent reports were reviewed as background information for the study. A brief synopsis is provided.

Texas Rail Plan, November 2010

TxDOT developed its first rail plan in 2005 and updated in 2010. The purpose of the rail plan, known as the Texas Rail Plan (TRP), is to set policy, direction, and the vision for the state in compliance with both federal and state regulations as well as how it is to be integrated into the state's multimodal transportation system. Other key components of the plan are an inventory of the freight and passenger rail infrastructure and performing a needs assessment.

The plan states that forecasted growth in population will lead to increased vehicle miles traveled (VMT) and congestion on the highways. Increased VMT and congestion will result in environmental, social, and economic impacts on Texas. Increased population also generates additional demand for consumer products and the need for an efficient freight network. Maintenance and expansion of the existing rail network will be necessary to meet that demand.

Population growth also creates additional demand on the transportation system. The TRP focuses on the ability of passenger rail to serve the demand. Three elements point to the need to integrate passenger rail as another option for intercity travelers:

1. the social and interconnectivity of many of Texas' urban areas,
2. the increasing interest in rail transportation, and
3. the accessibility rail offers to those not willing or unable to drive or fly.

The TRP provides an inventory of existing freight and passenger services provides information on safety and security, and reports on financial opportunities for rail transportation in the State.

Relevance to this Feasibility Study:

- TxDOT's proactive approach to addressing rail transportation issues within the State
- A statewide forecast of freight
- Identification of rail congestion in the Beaumont area, and
- A methodology for assessing and rating rail projects across the State.

Amtrak Gulf Coast Service Plan Report, July 16, 2009

In 1993, Amtrak's *Sunset Limited,* which had previously operated between Los Angeles, California and New Orleans, Louisiana, was extended east from New Orleans to Jacksonville, Orlando, and Miami, Florida. This created a new transcontinental Amtrak route and brought passenger rail service to the Gulf Coast Region between New Orleans and Miami. In August 2005, however, *Sunset Limited* service east of New Orleans was suspended due to massive damage to rail infrastructure caused by Hurricane Katrina. The service on this segment of the *Sunset Limited* remains suspended today due to the cost and challenges associated with restoring this service.

The report detailed the alternatives that Amtrak is considering in restoring service between New Orleans and Florida. Amtrak initially evaluated 12 alternatives. Three were selected as preferred options for evaluation based upon projected ridership, revenue, operating costs, and operating loss. After analysis, three of the options are preferred and are listed below:

1. Restore tri-weekly *Sunset Limited* service between Los Angeles, California and Orlando, Florida.
2. Extend the daily *City of New Orleans* service, which currently operates between Chicago, Illinois and New Orleans, Louisiana, east from New Orleans to Orlando, Florida.
3. Implement daily stand-alone overnight service between New Orleans, Louisiana and Orlando, Florida.

The study recommended that Congress will need to determine if passenger rail service should be restored between New Orleans and Orlando and, if so, identify its preferred option for service restoration; and provide the additional funding for capital and ongoing operating costs that will be required to implement that option. Once these steps are taken, Amtrak will move quickly to initiate the actions required for service restoration.

Relevance to this Feasibility Study:

- If Option 1 is selected, the original Sunset Limited service between Los Angeles and Orlando will be restored, increasing the ridership on this route and potentially the need for additional service, and putting additional pressure on the Neches River bridge crossing. The *Sunset Limited* has a station stop in Beaumont, Texas.

Rail Access to the Port of Beaumont, April 2005

This is a study of rail infrastructure and operations around the Port of Beaumont. It assesses several plans for relieving local rail congestion and inefficient rail service that have been proposed by the Port of Beaumont and the KCS. The Port of Beaumont's motivation to improve local rail operations centers on three objectives:

- Increase port efficiency by replacing its current interchange yard;
- Improve port security for military shipments; and
- Team with the City of Beaumont to redevelop the existing Port interchange yards and thereby increase the local tax base and provide opportunities for economic development.

Three alternatives were proposed to improve rail access to the Port. Recommendations in the report are for all parties to consider a multi-phase approach to deal with the rail congestion. The first phase would be to build a proposed turnout from the south track of the KCS Main track into the Port as well as two rail yards within the Port. These improvements have been funded and are built with the exception of the connection. The second phase would be a detailed operational and economic analysis comparing uni-directional versus bi-directional train operations at the Port. The third phase would be to address the regional rail congestion problems which would include improving the Neches River crossing and various track improvements.

Relevance to this Feasibility Study:

- The Port of Beaumont is a critical rail user in the Beaumont area
- Access to the Port of Beaumont has a strong influence on rail operations in the region, and
- Anticipated growth at the Port necessitates the identification of immediate and long-range transportation improvements.

Gulf Coast High-Speed Rail Corridor Evaluation, November 2004

The report describes an evaluation of the proposed high speed rail corridor which traverses the southeastern portion of Texas from Houston to the Louisiana/Texas State Line near Echo, Texas. This route passes through the Texas communities of Dayton, Liberty, China, Nome, Beaumont, and Orange. Station stops were assumed in Houston and Beaumont. The UPRR owns most of the route with the exception of a short segment in the City of Beaumont where the BNSF, UPRR, and KCS railroads all cross the Neches River on an existing lift span bridge owned by the KCS. The report details:

- existing conditions along the corridor;
- proposed phase improvements;
- an order of magnitude cost estimate;
- ideas for a proposed fixed span structure crossing the Neches River; and
- reviews of equipment technology options.

Phase I of the improvements deal with upgrading the corridor to increase operating speeds up to 79 miles per hour (mph). The report details the necessary horizontal and vertical alignment, number of

grade crossings, bridge and drainage structures, environmental conditions, and any grading issues. The focus of Phase II is to expand the existing route capacity to facilitate both additional freight and enhanced passenger operations. Proposed improvements include double tracking throughout most of the corridor by connecting all of the existing sidings with additional track. The primary focus of Phase III is to upgrade the track and signal infrastructure to facilitate 90 mph operations. Primary improvements recommended include grade crossing and track improvements.

Relevance to this Feasibility Study:

- Passenger rail plays an important part in the nation and in this region, and it utilizes the Neches River bridge
- Rail improvements are needed to accommodate the Gulf Coast High Speed Rail throughout Texas,
- Within Beaumont, rail improvements are desired at the existing Amtrak station.

Metropolitan Transportation Plan (MTP)

In 1974, the Governor of Texas designated the South East Texas Regional Planning Commission (SETRPC) as the Metropolitan Planning Organization (MPO) for Jefferson, Orange, and Hardin Counties as shown in Figure 1.4. As the MPO, SETRPC is responsible for conducting comprehensive, coordinated, and continuing long range transportation planning in the three-county region. The SETRPC-MPO developed a 20-year long-range Metropolitan Transportation Plan (MTP) to accommodate the future needs of the three-county region and acknowledges the vital role that transportation plays in the region's social, environmental, and economic health.

This MTP covers the Jefferson-Orange-Hardin Regional Transportation Study (JOHRTS) area. The plan details projects contained in the "financially constrained" MTP but are not in the Transportation Improvement Program (TIP) or "locked years" sections (normally years 5-20 plus) and the "unconstrained needs" project (i.e. projects that are not funded during the first 20 years). These projects were identified by the public for having merit if funding should become available. As in other Texas urban areas, the JOHRTS area has experienced significant increases in traffic volumes and traffic congestion. In large measure, increased traffic and congestion are directly correlated to the region's growth in population which by 2030 is expected to reach approximately 435,700 persons. The population of the JOHRTS region was approximately 385,090 persons in 2000, with 252,051 in Jefferson County, 84,966 in Orange County, and 48,073 in Hardin County. Geography and regional travel patterns are contributing factors to escalating traffic between the three major cities (Beaumont, Orange, and Port Arthur) and surrounding communities.[7]

The Plan contains one major transportation improvement within the City of Beaumont:

IH-10: Proposed improvements to expand IH-10 from four to six lanes between Beaumont and the eastern county line in Orange are moving forward. Engineering and design studies for each of these phased construction projects are near completion – one section has been completed and a second section is currently under construction. TxDOT is still trying to secure funding to complete all the

projects along the entire link. Long-range plans also exist to expand the capacity of IH-10 in Jefferson County from four to six or eight lanes.

The Plan also details specific objectives in improving transit and non-motorized travel in the region.

Relevance to this Feasibility Study:

- The Plan addresses all modes of transport including freight (by truck, rail, water and air)
- Air quality attainment in the region needs to be addressed and will influence future transportation improvements, and
- Roadway improvement projects in the region may affect where potential rail alignments might be located.

Figure 1.4 - South East Texas Regional Planning Commission Area



2.0 Existing Conditions

This section provides an overview of socioeconomics and environmental resources in the study area as well as an inventory of existing rail transportation, its operations in the Beaumont region and the development of a Rail Traffic Control (RTC) model to simulate existing and projected conditions.

Socioeconomic and Environmental Resources

The City of Beaumont is within Jefferson County, Texas and is part of the Metropolitan Planning Organization (MPO) known as the South East Texas Regional Planning Commission (SETRPC).

Population and Households

During the 1980's, Jefferson, Orange and Hardin counties experienced a decline in population and employment due to a downturn in the petrochemical industry. From 1980 to 1990, population in the region decreased by four percent. During the next decade (1990 to 2000), the region experienced a 6.6 percent increase in population growing to 385,090 people. Between 2000 and 2010, population growth slowed to one percent and in 2010 the three counties had a total population of 388,745. Population forecasts anticipate further growth of 11.6 percent for the SETRPC area between 2000 and 2030. Jefferson County is also forecast to grow by 11.6 percent.[8]

According to the 2010 U.S. Census, the City of Beaumont had a population of 118,296 which represents a four percent increase from 2000. This population had a median age of 32.8 years with 12 percent of the residents 65 years old or over.[9,10] Figure 2.1 displays households by block. Within the study area, the number of households tends to be low with a majority of single family households. Also note that limited residential development is located immediately adjacent to several of the railroads. Of the 43,569 occupied housing units, 56 percent are owner occupied and the remaining 44 percent are rented.[11] The median value of a house was $90,900 in 2009 within the study area.[12]

Income and Race

Economic characteristics show that in 2009 the median household income for the City of Beaumont was $39,899 and the median family income was $49,766.[13] Figure 2.2 displays the locations of families that are low to moderate income (approximately $30,000 median family income or less). Note that the entire study area includes families with low to moderate income levels. In terms of racial composition, 48 percent of the residents are black, 43 percent are white, and the balance is a mixture of other races. Figure 2.3 displays the distribution of the non-white population in the study area.[14]

Income and race statistics are important to note for environmental justice reasons. Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation of environmental laws, regulations and policies. If a project utilizes federal funds and goes through the NEPA (National Environmental Policy Act) process, there is an obligation to avoid or minimize and mitigate adverse impacts to low-income and minority populations and to assure that disproportionately high and adverse impacts on these populations are identified and addressed.

Figure 2.1 - 2010 Households by Block

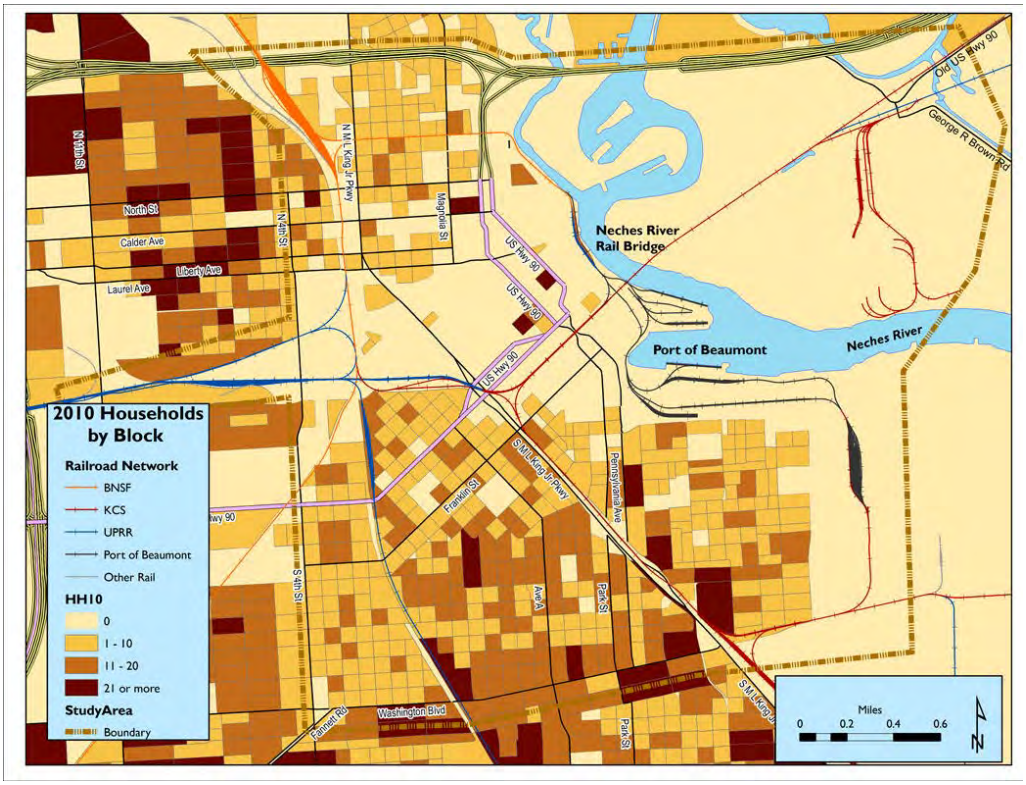


Figure 2.2 - 2010 Low-Moderate Income Population by Block Group

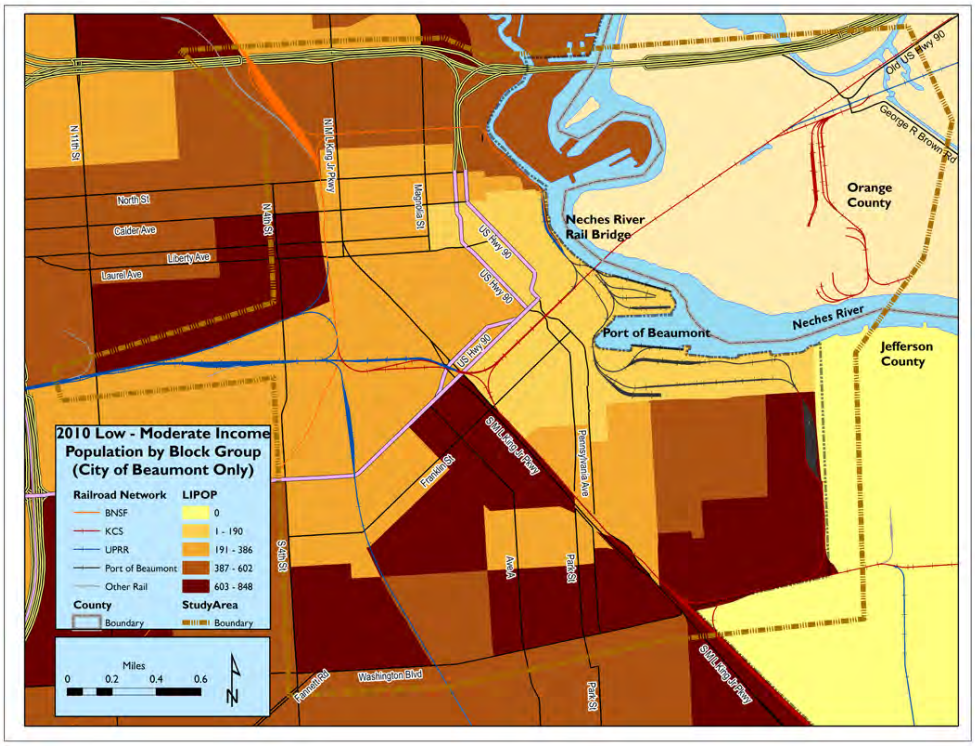
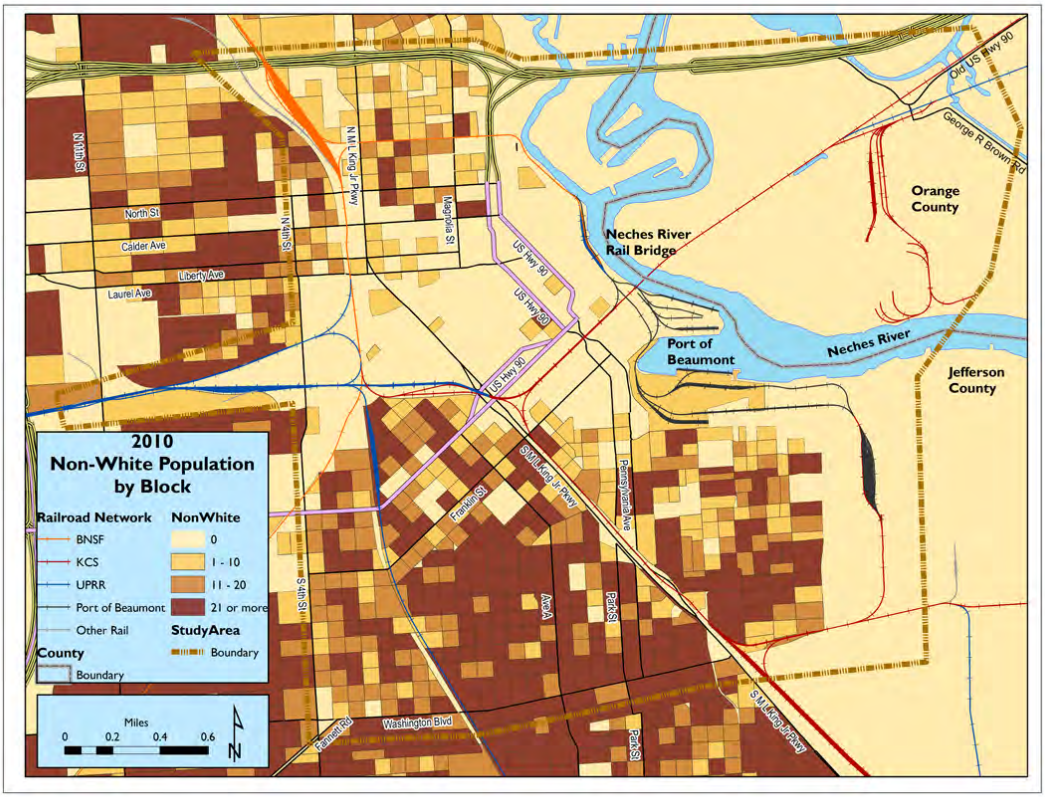


Figure 2.3 – 2010 Race: Percent Non-Caucasian By Block



Employment

Overall employment is expected to increase by 16.3 percent in the Jefferson-Orange-Hardin county region between 2002 and 2030. Since the 1970's, the regional job profile has been changing from "basic sector jobs" (i.e. mining, construction, manufacturing, transportation, communications, public utilities, and wholesale trade) to jobs classified as service (i.e. finance, insurance, real estate services, educational services, and governmental organizations) or retail. In 2002, "basic sector" employment for Jefferson, Orange, and Hardin counties accounted for 36.2 percent of employment in the region. By 2030, it is expected that these types of jobs will drop slightly to 34.1 percent of regional employment. By comparison, "service sector" employment accounted for 43.8 percent of regional employment in 2002 and is forecasted to grow slightly to 46.1 percent by 2030. Retail sector employment accounted for 19.9 percent of the overall employment in the region and is estimated to remain the same by 2030.

Major employers of over 1,000 employees within the City of Beaumont are show in Table 2.1. These employers account for 17.03 percent of all employment in Beaumont.

Table 2.1
Major Employers - City of Beaumont, Texas

Number	Employer	Number of Employees
1	Beaumont Independent School District	2,893
2	Memorial Hermann Baptist Hospital	1,621
3	Christus St. Elizabeth Hospital	1,602
4	City of Beaumont	1,314
5	Lamar University	1,174
6	Jefferson County	1,093

Source: City of Beaumont 2011 Comprehensive Annual Financial Report

Water Resources

The Neches River flows for 416 miles through east Texas to its mouth on Sabine Lake near the Port Arthur-Orange Bridge. The Lower Neches Valley Authority is the river authority which oversees the Neches River. Except for a few miles near its head, the Neches River for its entire length serves as a boundary stream, forming the county lines between Orange and Jefferson Counties. Two major reservoirs, Lake Palestine and Lake B. A. Steinhagen are located on the Neches. Several cities are located along the Neches River, including the City of Beaumont. From Lake B.A. Steinhagen down to Beaumont, the Neches River flows through the 97,000 acres Big Thicket National Preserve. This important ecosphere preserves the area where several ecosystems converge - an event that harkens back to the last glacial period. High rainfall rates produce frequent flooding of low-lying areas, and large floods occur on the average every five years. Floods in the basin are often of long duration.

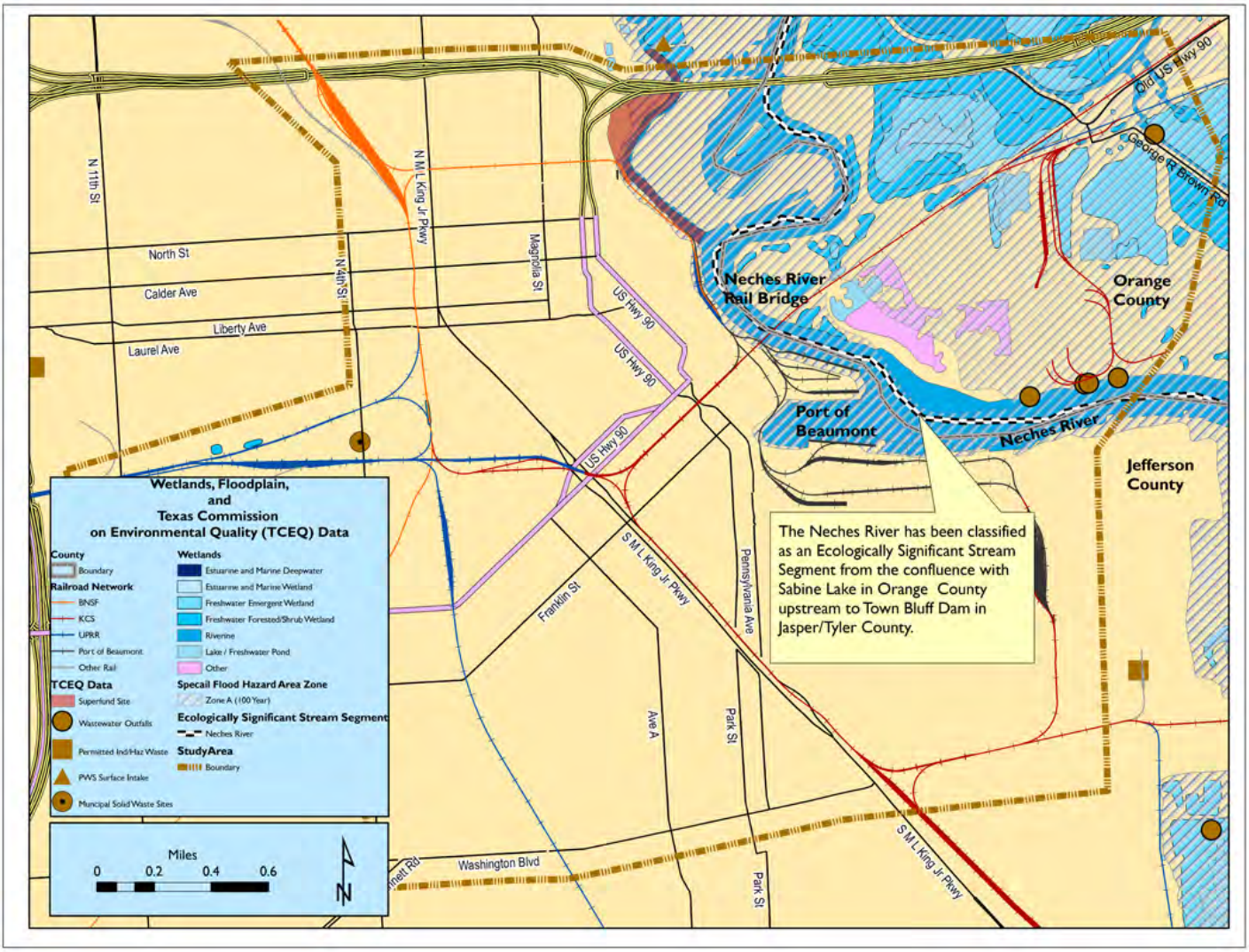
During the late nineteenth and early twentieth centuries the upper Neches River basin was the site of intensive logging. Numerous sawmills were built along the banks of the river and its tributaries during this time. After 1901, the Neches River basin became the site of large-scale oil exploration. The growth of the oil industry led to the development of the Beaumont-Port Arthur-Orange metropolitan area as a major site for oil refining, processing, and shipping. As a consequence of these developments, the waters of the Neches River became polluted. Efforts have been made to clean up the stream. An area-wide water-quality management plan was adopted for the area. But in the early 1990's the pollution problem continued, especially in the river's lower reaches.[16]

As a result of the passage of Texas Senate Bill 1 (SB1) in 1997, water planning in Texas became the domain of regional planning groups. As a part of the planning process, each regional planning group may include recommendations for the designation of ecologically unique river and stream segments in their adopted regional water plan. The Neches River from the confluence with Sabine Lake in Orange County upstream to Town Bluff Dam in Jasper/Tyler County (Texas Natural Resource Conservation Commission (TNRCC) classified stream segments 0601 and 0602) has been classified as an Ecologically Significant Stream Segment.

Wetlands and Floodplains

Figure 2.4 displays the wetlands and floodplains in the study area. The Federal Emergency Management Agency (FEMA) designated Zone A floodplain covers a significant portion of the Orange County area within the study boundary.

Figure 2.4 – Wetlands and Floodplains



Threatened and Endangered Species

The Neches River is part of the Great Texas Coastal Birding Trail. It also is considered to have a high water quality with exceptional aquatic life. Threatened or endangered (T&E) species and/or unique communities within the River include:

- Paddlefish
- Largest known population of sandbank pocketbook freshwater mussels in Texas; and

- One of the two largest populations of rare, endemic Texas heelsplitter freshwater mussels remaining.

Other T&E species within Jefferson County are listed in the Appendix. Since the study area has a large area of wetlands in Orange County, there is the potential for natural habitat for these species.

Archeological and Historic

The Neches River basin has long been the site of human habitation. Archeological excavations have discovered evidence of all stages of southeastern Indian development, beginning with the 12,000-year-old Clovis culture. Indian development reached its peak after the arrival of the Caddos about A.D. 780.

There are two recorded historic structures as designated by the Texas Historical Commission (THC) in the study area as well as several more as shown in Figure 2.5 including the Mildred Building, 1929, built by Austin Company (1400 Calder Ave.) and Idle Hours Manor, 1903, built by Frank Tipton Smith (1608 Orange). The THC offers four types of designations to recognize and protect historic and prehistoric properties: National Register of Historic Places, Recorded Texas Historic Landmark, State Archeological Landmark, and Historic Texas Cemetery.[17] The City's website identifies several other locations as "historic" within the study area as well as a Historic District in the Downtown area.[18] However, the existing rail corridors do not abut any of these sites, though the Historic District includes the former Southern Pacific Depot.

Land Use Conditions

Within Jefferson County, the major cities are Beaumont, Port Arthur, Port Neches, Nederland, and Groves. These cities generate most of the economic activity and house the majority of residents. Land uses in the central areas of these cities are predominantly industrial or commercial. Industrial activities include:

- oil refinery,
- oil and gas drilling,
- other types of petrochemical operations;
- port facilities and maritime shipping operations;
- marine construction and repair; and
- sulfur, salt, sand, and gravel mining.

Commercial land uses in the city center are mostly service oriented businesses and small retail shops. Areas on the periphery of these cities consist of residential and commercial districts as well as some agricultural areas. Residential areas are comprised of primarily low-density single-family residential units, while agricultural areas consist of cow pastures, ranches, and rice farms. Commercial districts consist of large shopping or strip malls with an assortment of stores, restaurants, and small strip malls. Institutional land uses are also prevalent. Community facilities within the study area are shown in Figure 2.6.

Figure 2.5 – Historic Resources

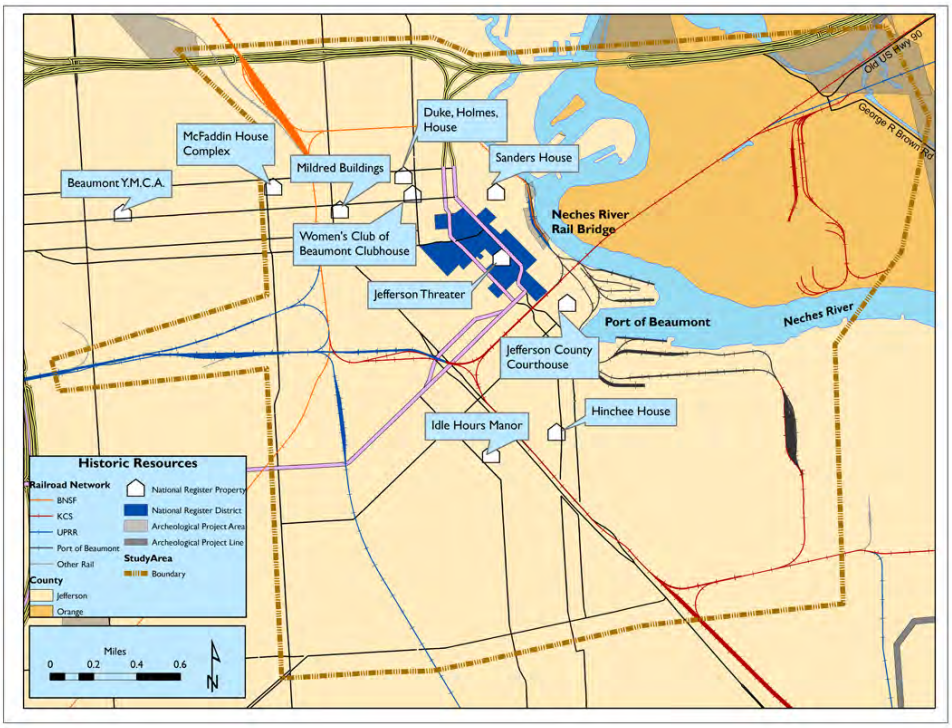


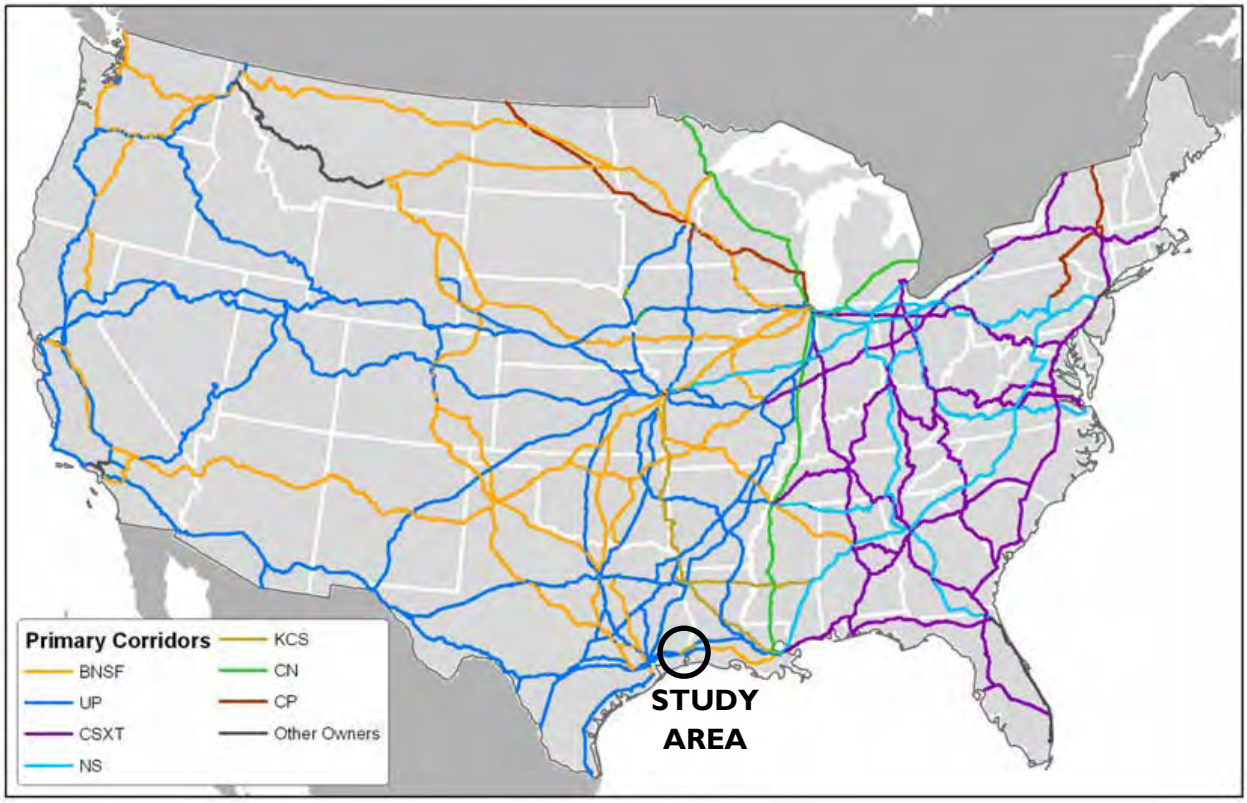
Figure 2.6 – Community Resources



Inventory of Existing Rail System

This section discusses the rail systems of the three Class I railroads operating in the Beaumont area. It begins with a depiction of the freight rail carrier's national system and then moves into the regional system. In a similar manner, the passenger rail system is discussed. Elements of rail corridors are included with the identification of key at-grade crossing and service provide to local industries. Primary rail corridors throughout the contiguous United States are shown in Figure 2.7. These primary corridors are defined by a variety of measures such as volume of traffic, weight of traffic and value of traffic moved along the corridors. The Union Pacific Railroad section east of Houston through Beaumont, with the KCS bridge over the Neches River, is identified as a primary rail corridor.

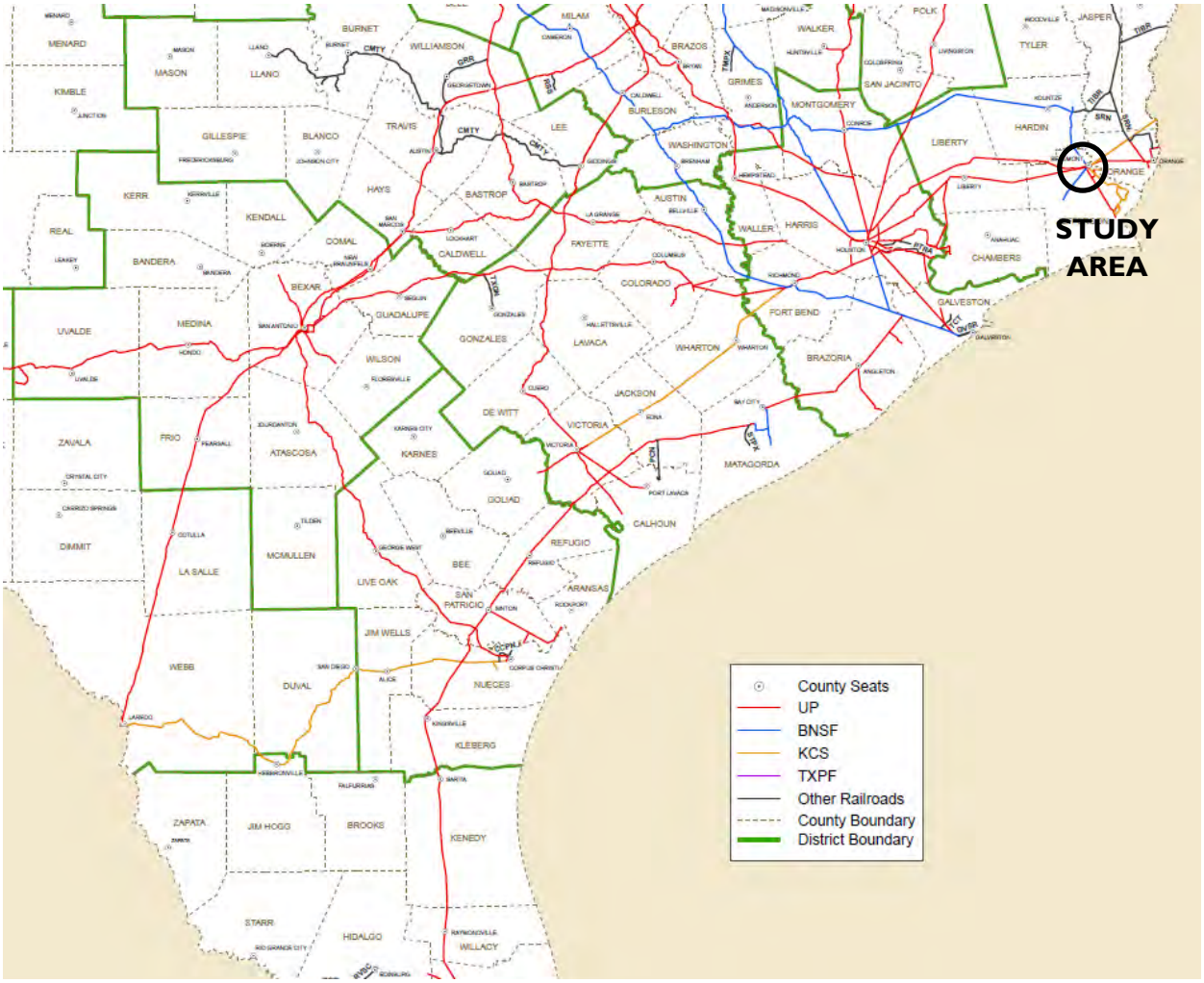
Figure 2.7 – Primary Rail Corridors – Contiguous United States



Freight Railroads

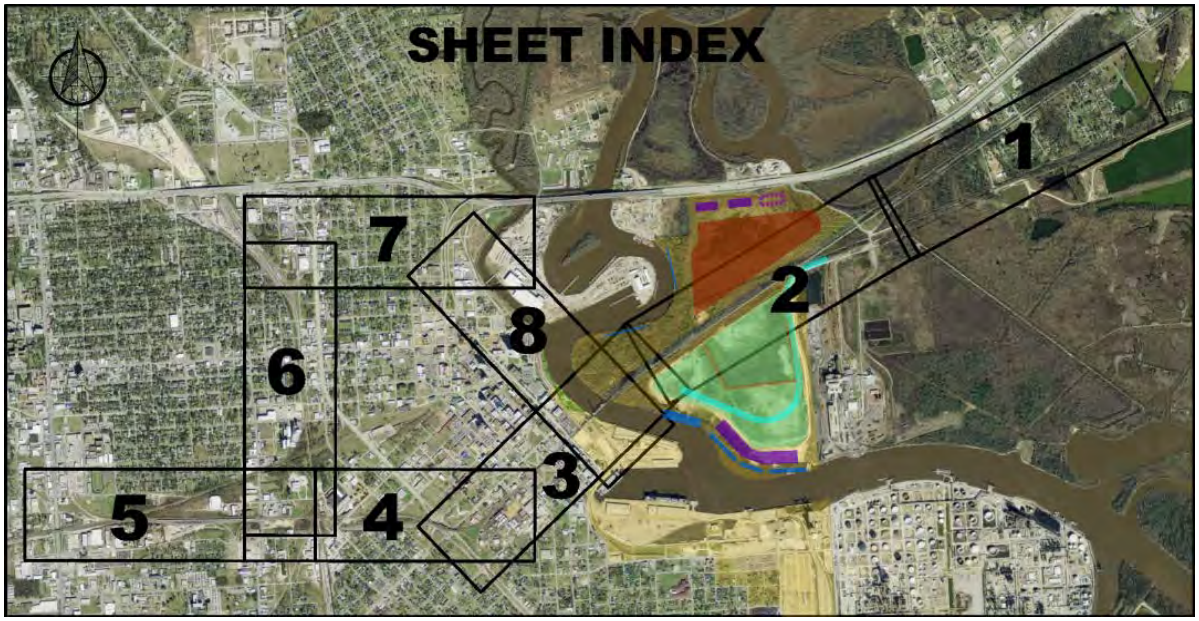
Three Class I railroads utilize the Neches River bridge in the City of Beaumont, Texas. These railroads are the KCS that owns the bridge as well as the UPRR and the BNSF Railway which operate via trackage rights and in turn pay a fee to KCS. Figure 2.8 shows an overview of these railroads and others (including shortline railroads) in the southern portion of the State of Texas along the Gulf of Mexico from the border with Louisiana to Mexico.

Figure 2.8 – Rail Map of Southern Texas



Each of the railroads is defined initially at a larger national perspective and then in a more regional perspective including the Beaumont region. Typically the descriptions follow the railroads milepost (MP) conventions which often increase when travelling westward. To assist in gaining an understanding of the location and context of the rail network, a series of maps is provided in the Appendix of existing conditions at 1" equals 200' scale with aerial photography. Figure 2.9 shows the limits of mapping and a sheet index for the study area beginning east of the KCS-UPRR split, west across the Neches River to a point on the Union Pacific line near IH-10. A loop is then made along BNSF tracks north to its Beaumont Yard and then to the Port of Beaumont at its junction with the KCS.

Figure 2.9 –Sheet Index Map of Existing Conditions in Appendix



Kansas City Southern (KCS) Railroad

The Kansas City Southern Railroad is concentrated in the central Midwest and is an international railroad with service into Mexico as shown in Figure 2.10. Access to the Mexican market is through Houston, via DeQuincy, Louisiana and Beaumont, Texas.

For purposes of the Beaumont study area (and shown in the Appendix Exhibits 1 through 3), the KCS rail corridor begins at MP 763.4 and its stationing increases heading westward towards the Neches River. The rail corridor is a single track with varying right-of-way. There are two pertinent at-grade crossings of the KCS in Orange County; Rose City Drive (MP 763.79) and Old US 90 (MP 764.61). Near Rose City Drive, the right-of-way is 100 feet, while west of Old US 90 the right-of-way widens to 200 feet with the majority of available right-of-way on the north side of the track. At MP 764.87, there is a turn out to the UPRR track that goes to Orange, Texas and onward to Lake Charles, Louisiana.

The KCS track crosses the Neches River on a lift span bridge from Orange County to Jefferson County, Beaumont. On the west side of the bridge, the track has a diamond crossing to the Port of Beaumont before an equilateral turnout expands the line to double track to the wye approximately a mile to the west. At the wye, the KCS track turns south for more than 20 miles to reach Port Arthur. For nearly 1.25 miles, the KCS is physically separated from Martin Luther King (MLK) Parkway (TX 380) on an overpass structure. The Chaison Yard and service to numerous industries are on the line to Port Arthur. Chaison Yard has a capacity of approximately 420 railcars. The wye is commonly referred to as Gulf Coast Lines (GCL) junction or Station 13. The KCS rail corridor between Main Street and Trinity Street is identified on the track charts as having a 50 foot right-of-way on both sides of the centerline. Available property line information illustrates a total right-of-way width of 60-feet. There are three at-

grade crossings (Pearl, Neches and Trinity Streets) and a rail overpass with Park/Orleans Streets within the study area for the KCS. The crossing at Main Street is closed.

Figure 2.10 –Kansas City Southern Rail Map

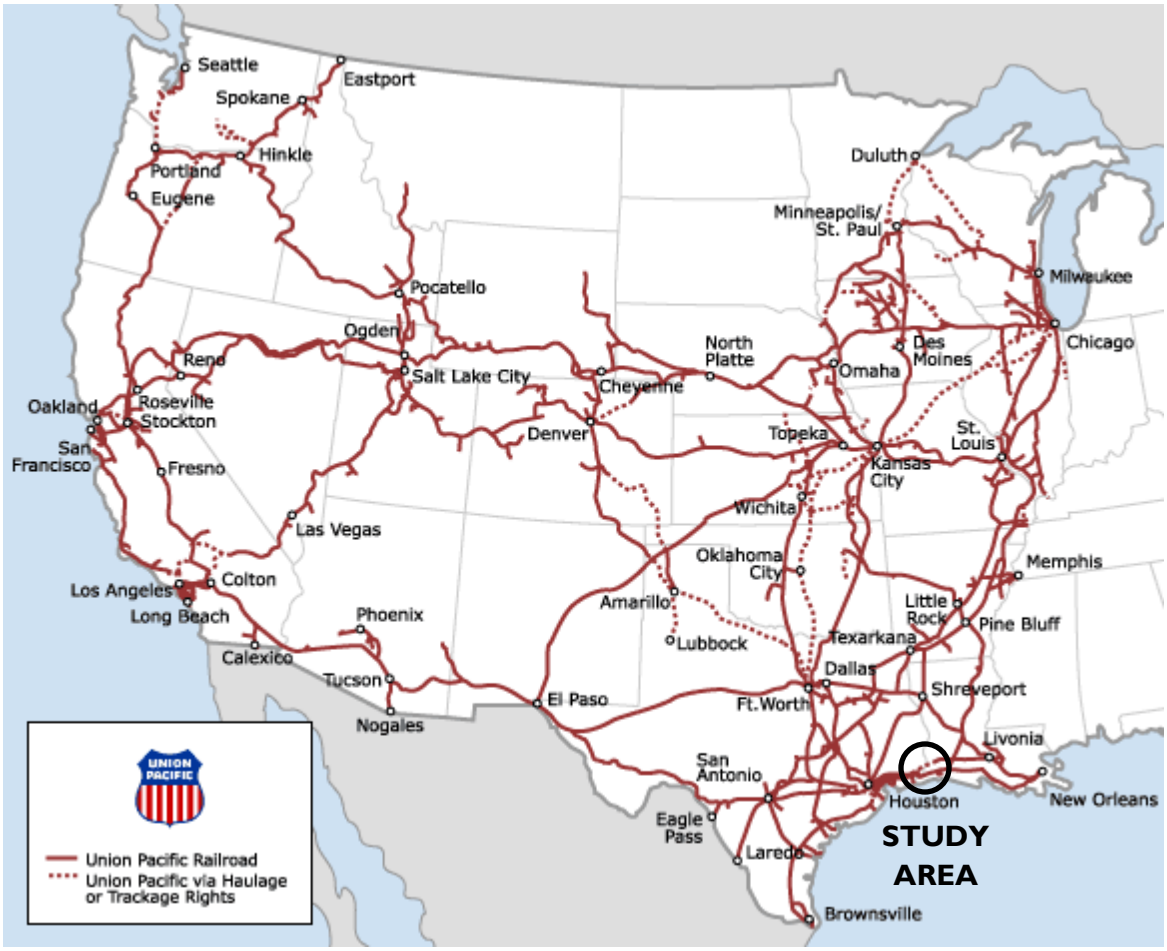


KCS track also continues westward through the former Wall Street Yard to the KCS-UPRR interchange near Cedar Street. Three tracks are elevated over the junction of US-90 (the one-way couplet of College and Wall Street) and MLK Parkway (TX 380). There is one at-grade crossing with Crockett Street.

Union Pacific Railroad (UPRR)

The Union Pacific Railroad has 31,900 route miles covering 23 states across the western two-thirds of the United States and is shown in Figure 2.11. The UPRR is headquartered in Omaha, Nebraska. The UPRR has an extensive presence in Texas with its major markets including Houston as well as several border crossings into Mexico. East of Houston, through Beaumont, the UPRR connects to New Orleans and its international markets.

Figure 2.11 – Union Pacific Railroad National Map



For purposes of the Beaumont study area, this rail corridor begins at MP 275.5 and its stationing increases heading westward towards the GCL Junction (approximate MP 278.0 and an equivalent station of MP 461.0). East of the UPRR/KCS Junction at Tower 31, east of the Neches River, the rail corridor is a single track within a 200 foot right-of-way. There is a public at-grade crossing of George Brown Road and then an assumed private crossing of an industrial siding which serves Gerdeau Ameristeel.

The UPRR double track continues westward from the joint KCS-UPRR double track at the GCL Junction crossing Crockett Street at-grade and then the railroad is grade separated over both 4th and 11th Streets. In between 4th and 11th Streets on the south side is UPRR's East Yard. UPRR's two main tracks continue westward for five miles to MP 456.0 near Dowlen Road before splitting to directional single tracks. Directional running, which in essence provides double track capacity, west of Beaumont utilizes the former Southern Pacific (SP) railroad for westward movements and the former Missouri Pacific (MP) Line for eastward movements.

Also in between 4th and 11th Streets north of the Municipal Waste Site at a diagonal is the former Southern Pacific alignment. UPRR now owns this track and utilizes it and several turnouts. The Amtrak station is located on the north side of these tracks immediately east of 11th Street. South of the UPRR-KCS Junction, another UPRR line continues to Port Arthur. UPRR's South Yard is located on this line between Crockett and Gilbert Streets. There are ten at-grade crossings along this rail corridor within the study area before Washington Boulevard. Two tracks cross US-90 which has over 30,000 vehicles per day at this location. A little more than two miles south of Washington Boulevard is a service track to the east to Exxon-Mobil's refinery. The UPRR owns several rail yards in Beaumont with a total capacity of approximately 1,700 cars.

With 24 percent of all freight cars handled by UPRR originating or terminating in Southern California, the Sunset Route is a key corridor for North American railroads. The Sunset Route is an important transcontinental route for package express business, finished automobiles, and grain. Less than one quarter of the Sunset Route had a second double-track when UPRR acquired it in 1996 as part of the merger with Southern Pacific. Since then UPRR has built 292 miles of new main line double-track through this corridor to handle the nation's growing freight traffic.

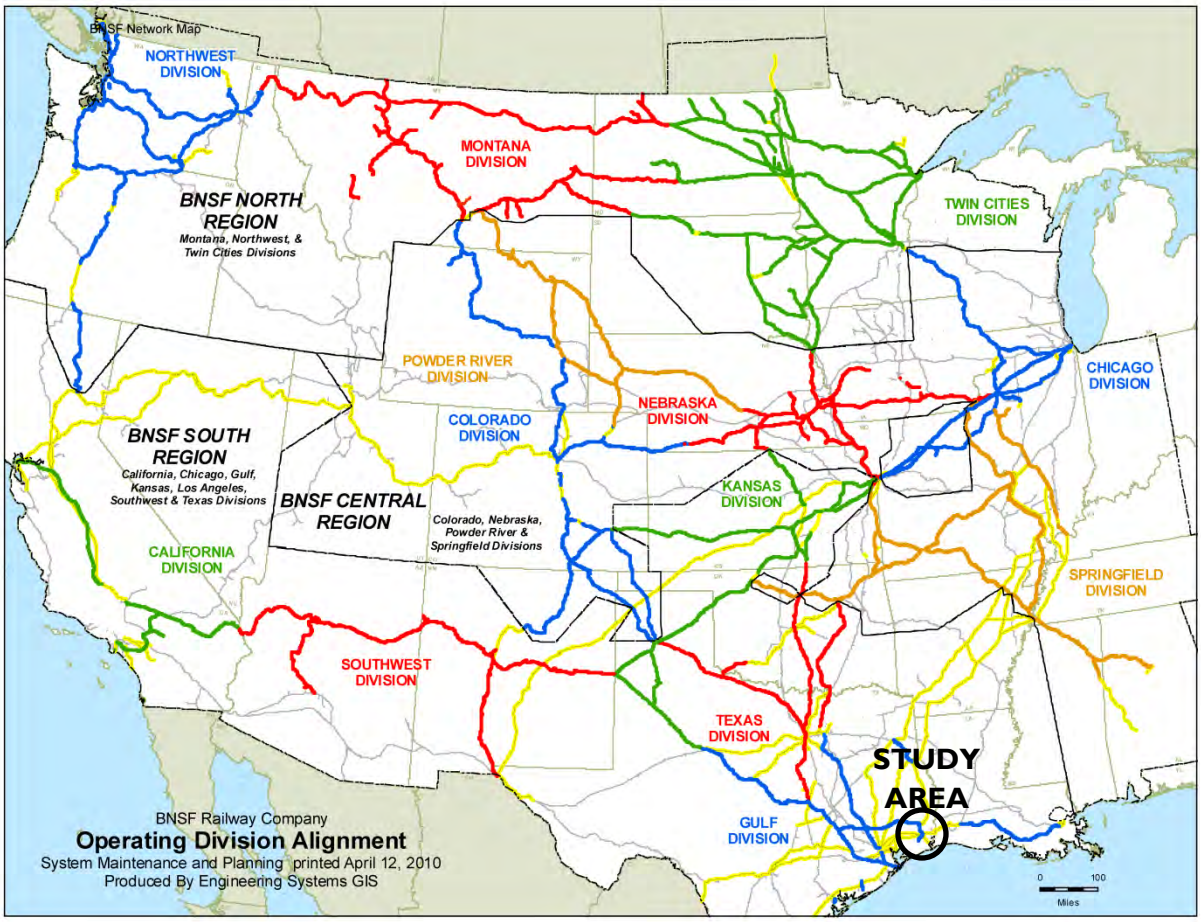
Burlington Northern and Santa Fe (BNSF)

The BNSF Railway Company (BNSF) , headquartered in Fort Worth, Texas operates one of the largest railroad networks in North America with 32,000 route miles covering the western two-thirds of the United States. Because of its extensive network in Texas alone, Figure 2.12 focuses in on BNSF's Gulf Operating Division. As BNSF does not have a hub in Houston, its presence through Beaumont is less prevalent than the other railroad companies.

For purposes of the Beaumont study area, the BNSF rail corridor begins at MP 0.0 (equivalent Union Pacific MP 30.0) and its stationing increases heading northward towards its yard, a portion of which passes beneath Interstate 10. The yard has a capacity of approximately 600 railcars. The rail corridor is a single track within an approximate 100 foot right-of-way with 1st Street parallel on the west side and Gulf Street parallel on the east side. There are six at-grade crossings south of the BNSF Yard. Between

Broadway and Calder Avenue, the horizontal alignment of the tracks shifts approximately 60 feet to the east.

Figure 2.12 – Burlington Northern and Santa Fe (Gulf Operating Division)



East of the BNSF Yard is a wye with a service track (Track 72) that is located in the middle of the Long Avenue right-of-way. The street right-of-way is approximately 60 feet wide and the road pavement is approximately 24 feet wide. The rail passes beneath US-90 before turning south along Pine Street and the west bank of Brake's Bayou. The BNSF recently upgraded the north connection along Long Avenue to the existing Port Interchange Yard which serves as their primary entrance accommodating nearly three-fourths of BNSF traffic. To access the Port of Beaumont, BNSF trains also use the diamond crossing immediately west of the Neches River Bridge. A former (now inactive) spur line crossed Brake's Bayou to Chicago Bridge and Iron. South and west of the UPRR-KCS interchange is the single track BNSF Subdivision to Fannett. Within the study area the BNSF has six at-grade crossings along the approximately 80-foot wide right-of-way.

Port of Beaumont

The Port of Beaumont is accessible from the Gulf of Mexico and Intracoastal Waterway via the federally maintained Sabine-Neches Ship Channel, 42 miles upstream from the Gulf. It is the fourth busiest port

in the United States according to the American Association of Port Authorities. It is also the busiest military port in the U.S. and the headquarters of the U.S. Army's 842d Transportation Battalion, which specializes in port logistical activity. For purposes of the Beaumont study area, the rail serving the Port is focused upon the Port's Interchange Yard. Trains entering the Port of Beaumont are directed into the Port's Interchange Yard. The existing interchange yard for the port is located on the north side of the main line while the port is on the south side. The interchange yard, located along the Neches River, has six tracks. Five of the tracks are short storage tracks that have a total capacity of approximately 100 - 120 rail cars. The short length of these tracks requires the BNSF, UPRR, and KCS to split up inbound trains so that a single train can be made to fit. The lowline (lowest elevation track) from the interchange yard is below the high-water surface elevation and often stays wet. It has a 17'-6" clearance so it is used primarily for storage or movement of empty cars. The highline (highest elevation track) is used for loads traveling between the Interchange Yard and the Port. This track has a diamond crossing of the KCS track immediately west of the Neches River Bridge. Interchange yard tracks 3 and 4 currently prohibit the use of six-axle locomotives in favor of the four-axle locomotives used primarily for local traffic and yard work.

The Port of Beaumont's Master Plan

This text focuses upon the Port's Orange county facilities which at this time appear to have begun development yet can be considered to be in the early stages of full build out. The Port's Master Plan presents an exhibit of potential facilities as shown in Figure 2.13. Major elements have been transposed onto the study's base-map to allow for an integrated planning effort. The Orange County port facilities can be divided into two basic areas that are physically separated by the KCS tracks. Under existing conditions, a crossing of the KCS tracks is not provided. Consequently the access to the two areas (north and south of the KCS) is described separately.

The site north of the KCS tracks is approximately a 215 acre area bounded on the north by the IH-10 eastbound frontage road, Old US-90 on the east side, the KCS tracks on the south side and the Neches River on the west side. Currently a large depressed area is in the center of the parcel. This depressed area is proposed as a 60 acre dredged disposal area. Along the nearly 2,200 foot of IH-10 frontage, a series of leased warehousing is proposed. A vehicular access drive is shown from Old US 90 heading westerly south of the dredge disposal area and then turning to cross the KCS tracks into the south parcel of the Port. Along the Neches River frontage, two container-on-barge wharf facilities are proposed. Water access to and from these wharfs will require a lift at the KCS bridge. No rail service is currently provided nor is shown as proposed to this parcel north of the KCS tracks.

The site south of the KCS tracks is approximately a 250 acre area bounded on the north by the KCS tracks, the rail tracks of the Gerdeau Ameristeel facility on the east side, and the Neches River on the south and west side. Currently vehicular access is provided from George R. Brown Drive which leads into Gerdeau Ameristeel and has an at-grade crossing of the UPRR tracks. Rail service to the property is an extension of the service tracks to the steel facility. The rail service would follow the eastern property line and reach a dock on the Neches River. Other tracks would swing up into the site to access an open storage area. Several general cargo docks are shown along the Neches River that could serve up to five ships.

Figure 2.13 – Port of Beaumont Master Plan (Orange County)



Amtrak

Amtrak provides intercity passenger rail service in Texas via the Sunset Limited, Heartland Flyer, and the Texas Eagle which serve most of the State's major urban areas, as shown in Figure 2.14. The Sunset Limited as shown in Figure 2.15 provides service to the City of Beaumont. The Sunset Limited's current schedule runs three times a week in each direction. Westbound trips stop in Beaumont on Mondays, Wednesdays, and Fridays while eastbound trips stop on Tuesdays, Fridays, and Sundays. Ridership at the station in Fiscal Year (FY) 2010 was 2,135 or approximately 40 passengers per week.

The Amtrak station is located at 2555 West Cedar Street. Facilities include a small unattended parking lot and 650 foot long platform. Recent improvements were made at the station for passengers requiring wheelchairs as well as adding lighting, a small passenger shelter, and other site improvements.

Figure 2.14 – Amtrak Passenger Rail Lines National

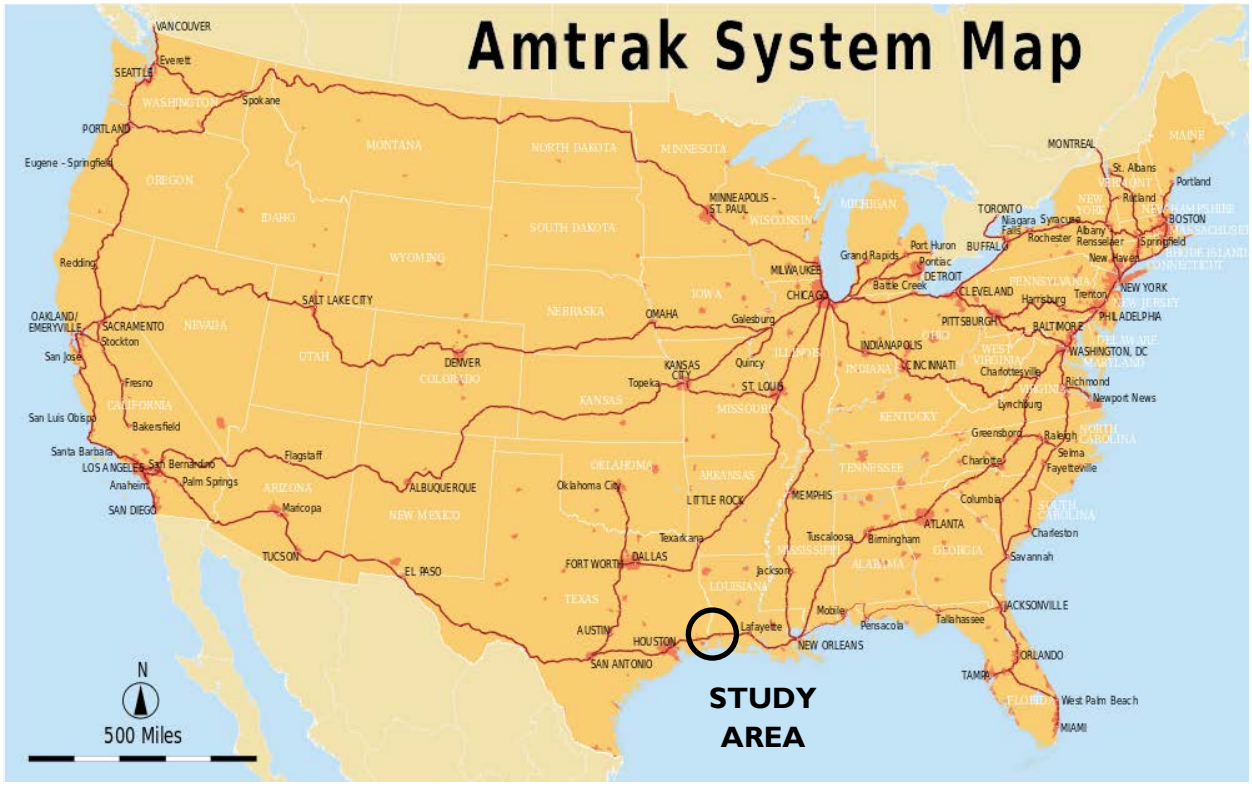


Figure 2.15 – Amtrak Sunset Limited Route



Rail Corridors

This section on rail infrastructure focuses upon the primary east-west corridors within the Study Area. Additional rail service is provided in a north-south direction via several spur lines. An understanding of train traffic volumes in the next section confirms this perspective of primary east-west movement. While many of the rail corridors are under one principal owner, trackage rights along the corridors allow other railroad carriers under an operating agreement to utilize the rail corridors.

The primary east-west rail corridor through the Beaumont area is maintained by the KCS and UPRR to the appropriate Federal Railroad Administration (FRA) classification based on the posted speeds. A review of the Beaumont Time Schedule, dated September 1, 2010 indicates the following posted speeds:

- 50 mph (miles per hour) on the KCS tracks east of the KCS/UPRR split (single track),
- 50 mph on the UPRR tracks east of the KCS/UPRR split (single track),
- 40 mph on the KCS tracks east of the Neches River bridge to the KCS/UPRR split (single track),
- 20 mph from the Gulf Coast Line (GCL) wye on the KCS tracks (double track to Main Street) through the Neches River bridge (single track),

The Neches River rail bridge is a vertical lift span bridge that allows river traffic to pass under the bridge. River traffic appears equally split between industrial barges and pleasure craft. The Beaumont Yacht Club immediately north of IH-10 has four launch ramps and several covered and uncovered slips. The bridge is in the rail-locked position until a navigation request is made to raise the lift bridge, generally to a requested vertical clearance. Information supplied by the United States Coast Guard (USCG) indicates approximately 400 lifts per year.[19] The bridge is controlled from the KCS Kansas City, Missouri dispatch office. Data from KCS indicates 7 lifts in a six day period (Monday, September 12 through Saturday, September 17, 2011) which is consistent with the USCG's annual lifts.

The railroad lift bridge across the Neches River is located at navigation mile 19.5. It has a maritime horizontal clearance of 200 feet, a vertical clearance of 13 feet above mean low water in the closed position, and a vertical clearance of 150 feet above mean low water in the open position. Note that the stated vertical clearance on the National Oceanic and Aeronautical Association (NOAA) charts is 145 feet. These clearances have been adequate to date, as the USCG has not received any complaints from waterway users.[7] From a railroad perspective, the bridge's truss structure can accommodate double stack train cars. While train speeds are limited to 20 mph, this is in part associated with the track geometry immediately west of the bridge. Because of the track and bridge conditions, capital investment improvements are currently planned including the replacement of the west timber approach and cables and sheaves on the lift bridge.

In the case of westward trains, trains are held at the KCS/UPRR split at Tower 31 in order to avoid blocking road crossings. Thus the KCS dispatcher cannot send a train across the river bridge until the UPRR dispatcher releases a signal in their territory in order to prevent trains from stopping on the bridge

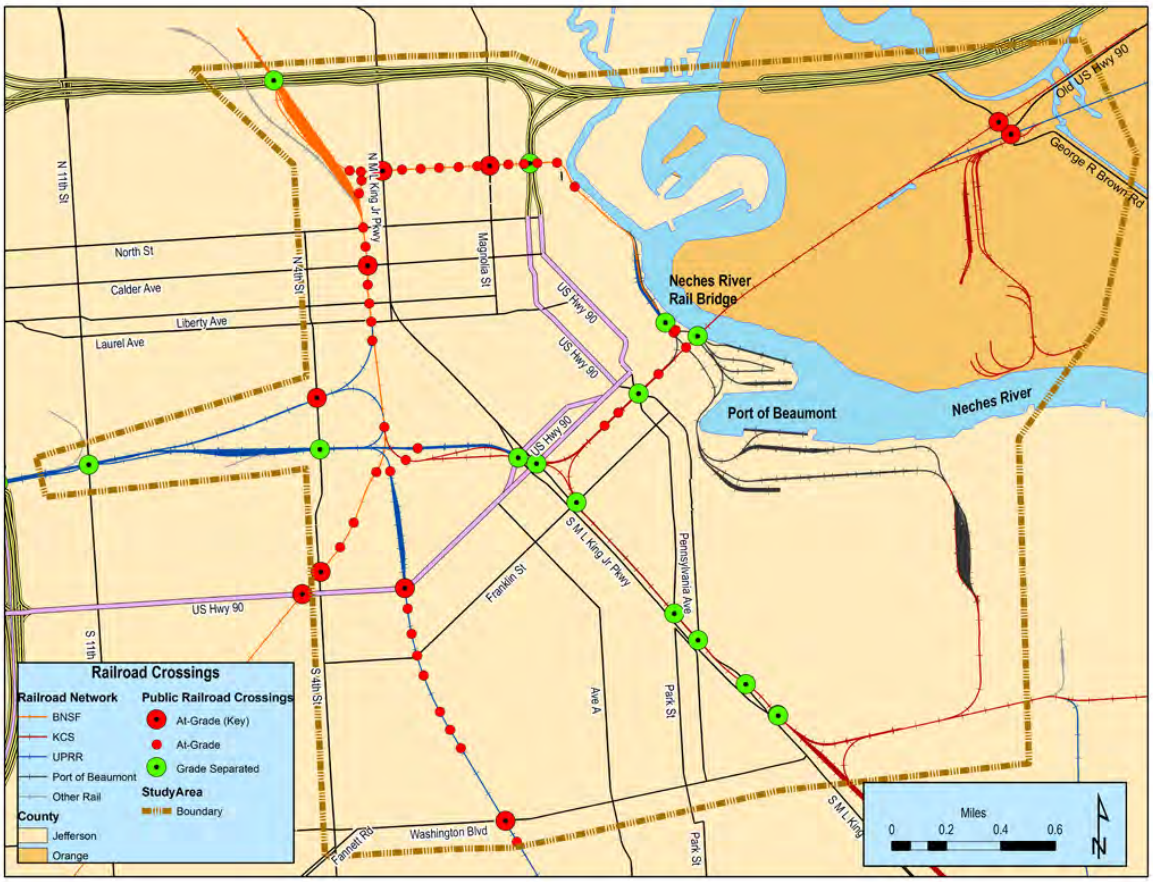
Key At-Grade Crossings

Nearly 100 highway/rail at-grade crossings (active, inactive and former crossings) were initially identified within the study area. After a field reconnaissance, review of roadway functional classifications and vehicular traffic volumes at the railroad crossings, the list of active key highway/rail at-grade crossings of public streets was reduced to ten (10). These ten crossings were viewed as representative of key rail corridors (for both existing conditions and potential future alternative corridors) at the crossings of important community roadways. For reference purposes, additional active at-grade crossings as well as grade separated crossings are shown with the key at-grade crossings selected in Figure 2.16. This data

establishes the existing conditions for the at-grade crossings. The key crossings were evaluated within a series of corridors using "GradeDec.net" which is a decision support tool developed by the Federal Railroad Administration (FRA) for benefit-cost analyses of investments involving highway-rail grade crossing improvements.

The key at-grade crossings are located at collector and arterial streets within Beaumont and at two locations in Orange County. It is anticipated that these crossings could be impacted by growth in either train or vehicular volumes or both, as well as changes to train volumes based upon potential new alignments. The highest vehicular traffic volumes are along US 90 at the BNSF Gulf Silsbee crossing and the UPRR Lafayette crossing. The BNSF Port of Beaumont line also crosses Martin Luther King (MLK) Parkway with an average daily traffic (ADT) volume of 27,000. While these crossings were identified as key locations, the majority are currently equipped with gates and flashers. The next level of improvement would be a grade separation between the rail and roadway.

Figure 2.16 – Key At-Grade Crossing Locations



Local Industries Served

Many local industrial and distribution companies are served by rail. As a city and region served by railroads for over 100 years, numerous industries have developed adjacent to the rail corridors over decades. In fact much of the local and regional industrial land uses are located near the rail corridors as shown in Figures 2.17 and 2.18. While some industry spur lines have been removed, many others remain active. The industries are located within the central downtown area of Beaumont as well as along the City's edges, including immediately west of the Beaumont Airport. The KCS recently assisted in the development of the 400-acre Triangle Marine Industrial Park. The industrial park has access to a 23-acre rail yard and includes a switching yard with a 150-car capacity, which could potentially be expanded to 300 cars. The site has 1,700 feet of frontage on the Neches River with 3 deep water docks and a 90-acre turning basin.[20]

Figure 2.17 – Land Use within Study Area

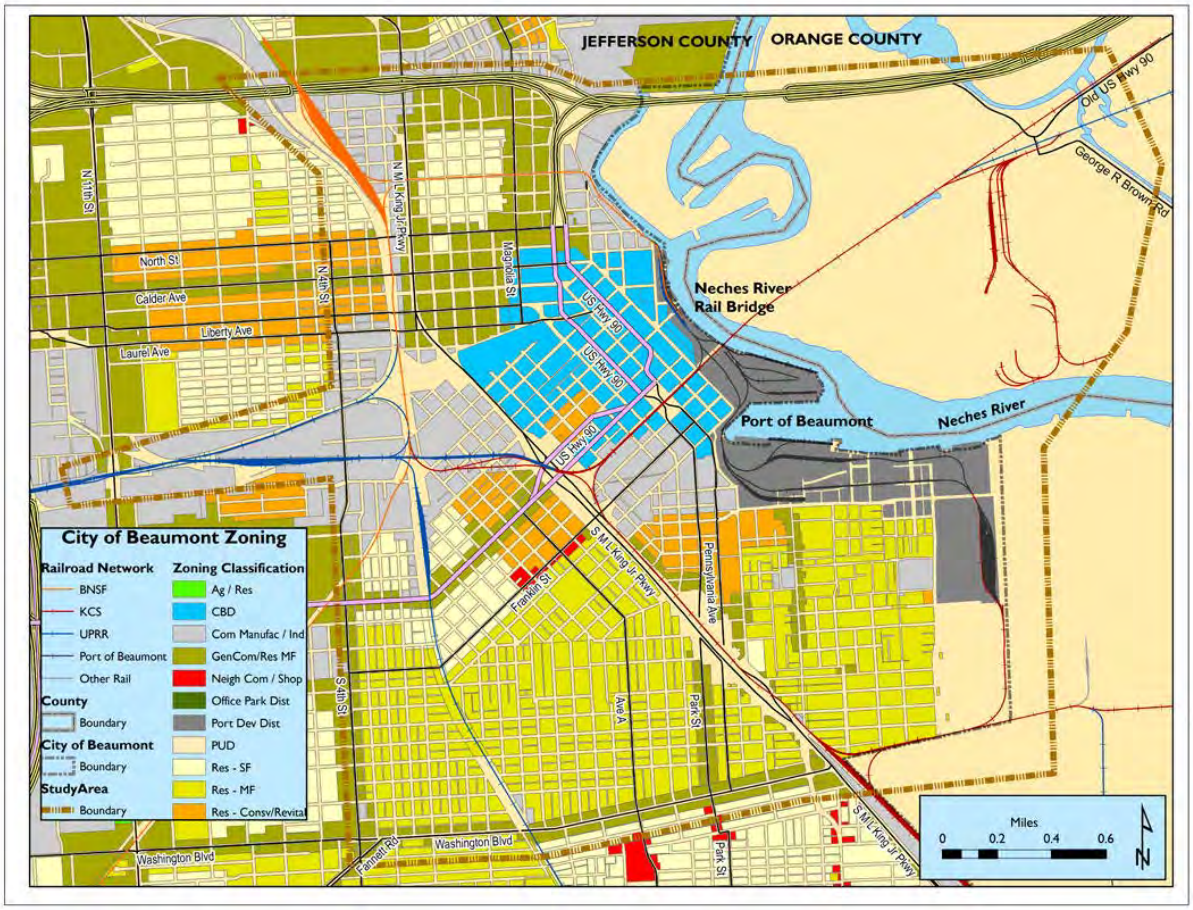
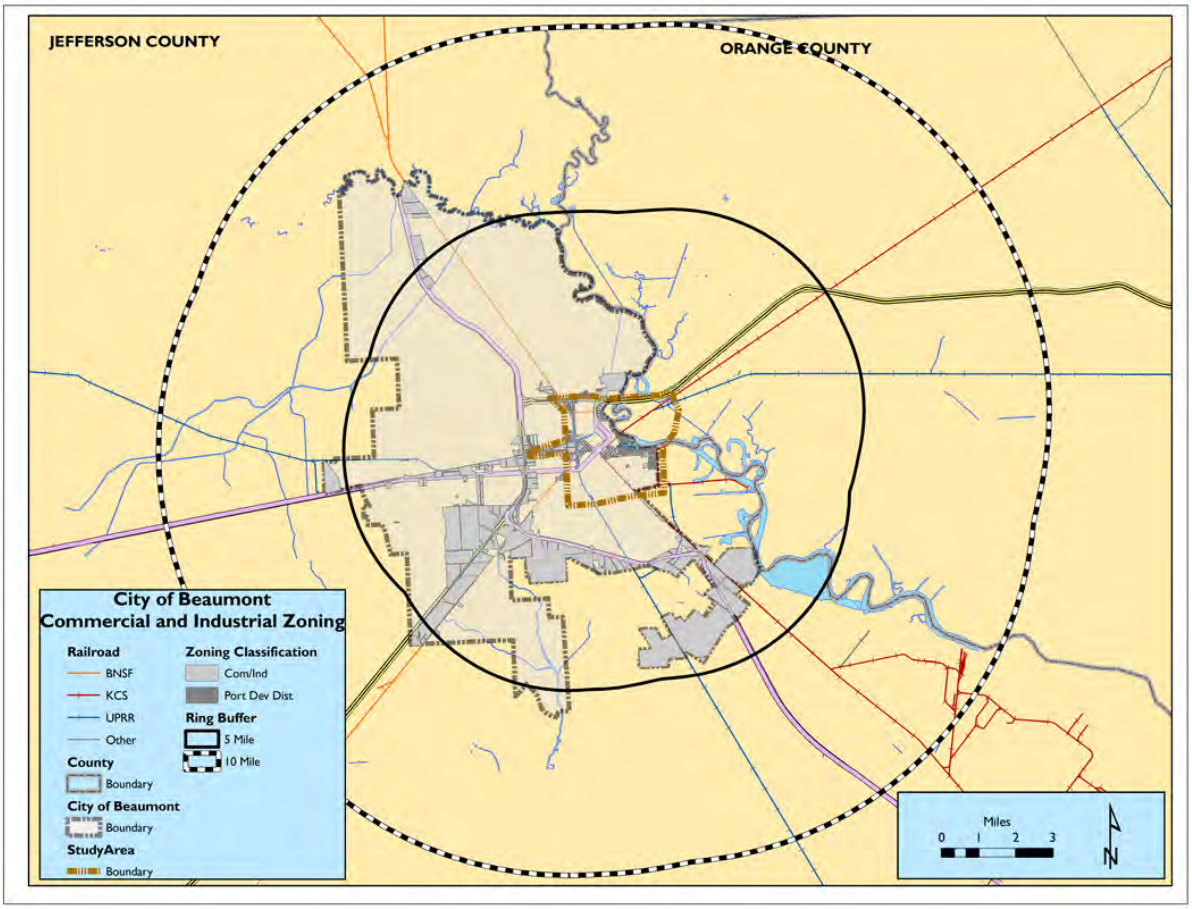


Figure 2.18 – Industrial Land Use in Beaumont Region



There is a neck of land located between Brake's Bayou and the Neches River as well as between the IH-10 and the KCS bridges that formerly had rail service. While within Jefferson County, the area is outside the City of Beaumont. Since the early 1900's, the land was used for shipbuilding. During World War II, its two side-launch ways were increased to four. In 2006, Trinity Industries sold it to Chicago Bridge & Iron (CBI) for use as a fabrication base for CBI's contracts to construct Liquefied Natural Gas (LNG) import terminals. Trinity Industries has moved some five miles to the east near Vidor with service from the UPRR line.

Current Railroad Operations

This section provides an overview of train operations in and around the Beaumont region that could directly affect operations within the Study Area. First existing traffic volumes are discussed then the operations at various yards. Also discussed is the topic of crew changes on the KCS and UPRR railroads.

Existing Rail Traffic Volumes

The daily train count across the Neches River bridge ranges between 40 to 50 trains based upon the most currently available information in the FRA's database of crossing. Figure 2.19 represents that information as a band of varying thickness similar to the national figure shown in Figure 2.20.

Figure 2.19 – Daily Train Volumes Beaumont Area (FRA database)

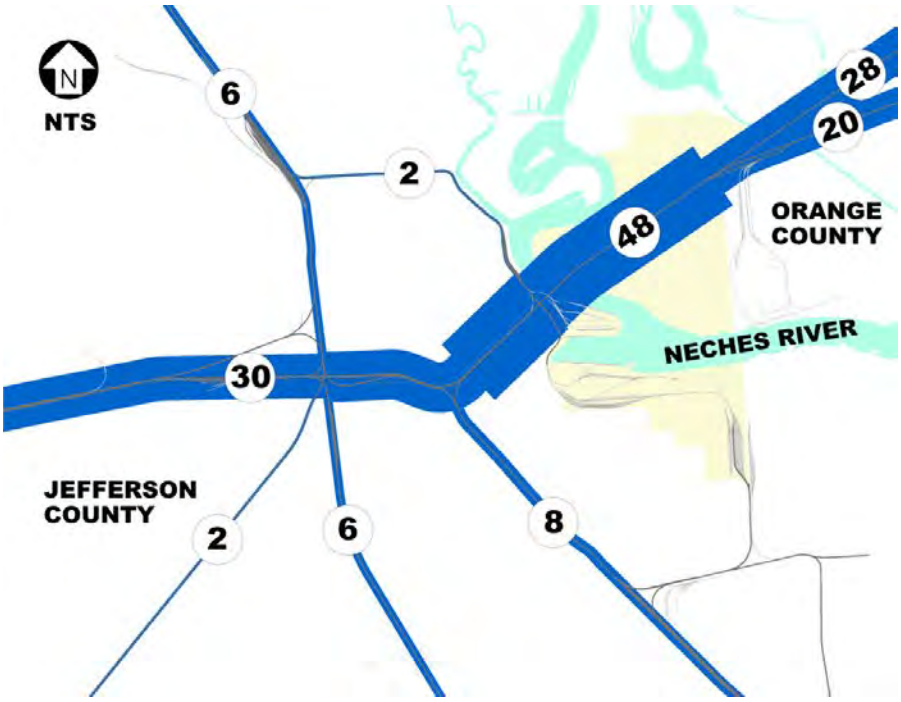
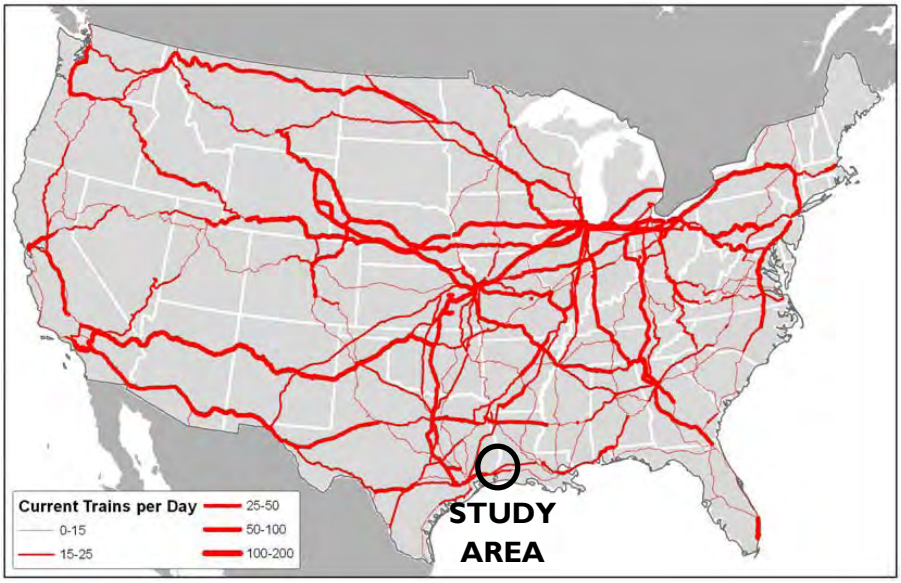


Figure 2.20 – Daily Train Volumes - National

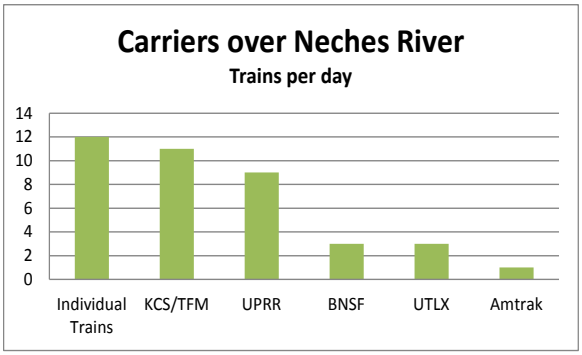


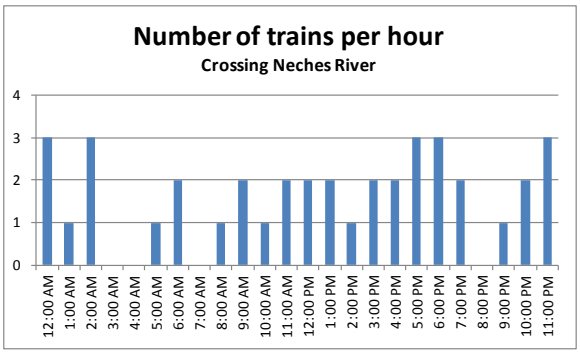
A daily breakdown of trains crossing the Neches River bridge was received from the KCS railroad. A review of this spot location shows:

- A total of 39 trains in a day cross the Neches River bridge, including one Amtrak train
- The average speed across the bridge ranged from 11 to 21 mph (average speed of 14.8 mph),
- The length of trains ranged from 7 to 118 cars, averaging over 60 cars per train, and
- The maximum number of trains that crossed in an hour was three (3), which occurred five times throughout the day.

A range of distribution by carriers occurred as shown in Figure 2.21. Individual trains include CSXT, DTTX, GMTX, IBT, MDW, NAHX, SRN, TILX, TPIX, TR, TTGX, and XOMX.

Figure 2.21 – Sample of Neches River Rail Crossings





While requests for bridge openings can occur at any time, most occur during daylight hours. Each request to raise the bridge includes a clearance (in feet) which allows the bridge to open only as high as necessary to accommodate river traffic. Data provided by KCS over a random six day period indicates:

- Requests for seven (7) lifts, for four northbound and three southbound marine vessels,
- The requests occurred on Monday, Wednesday Thursday and Saturday,
- Two boats on a Saturday were identified as pleasure craft, and
- The requested clearance ranged from 30 feet to 70 feet.

The raising of the bridge can result in some train delays, especially for trains going in the same direction across the bridge as they must be separated by two signals in order to prevent a train from stopping on the bridge. Trains traveling in opposite directions do not have to be separated by two signals. Typically the bridge stays open to river traffic between 15 and 30 minutes. However it may be open longer due to river traffic not appearing at the time requested or mechanical issues with the bridge. Mechanical issues often occur with high temperatures as experienced in the summer of 2011.

Additional national, state and regional data illustrate similar patterns of usage based upon tonnage. For example Figures 22 and 23 illustrate 2007 annual rail tons across the state of Texas and in more detail the Texas East Region. Typically any rail corridor with 30 or more million gross tons (MGT) is considered a critical rail corridor because it represents a significant level of business to the rail carrier.

It is also worth noting that with UPRR's directional running of traffic west of Beaumont and with the KCS-UPRR split east of Beaumont, the tonnage through Beaumont is far in excess of 30 MGT.

Figure 2.22 – Freight Density - Annual Rail Tonnage - Texas

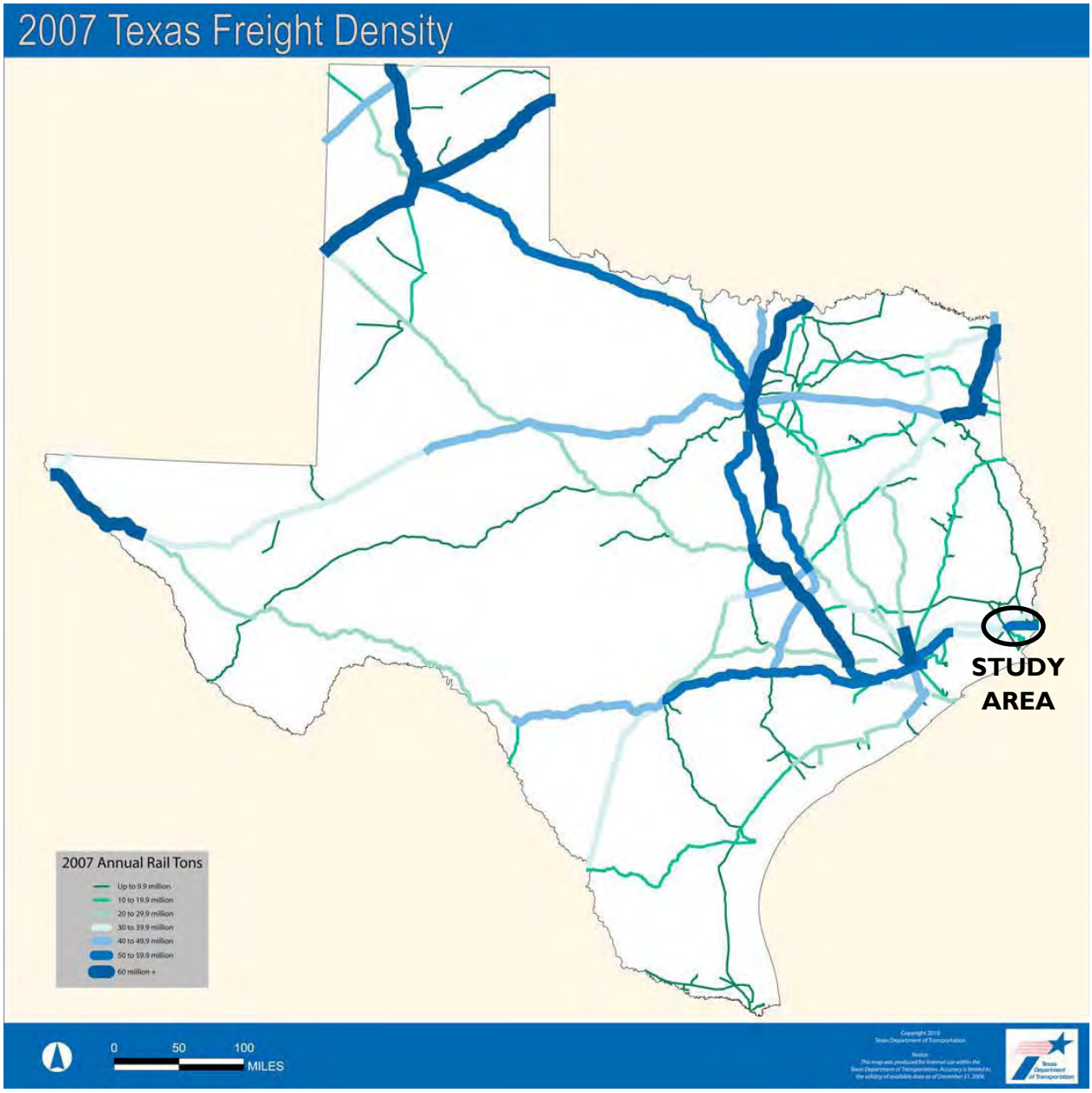
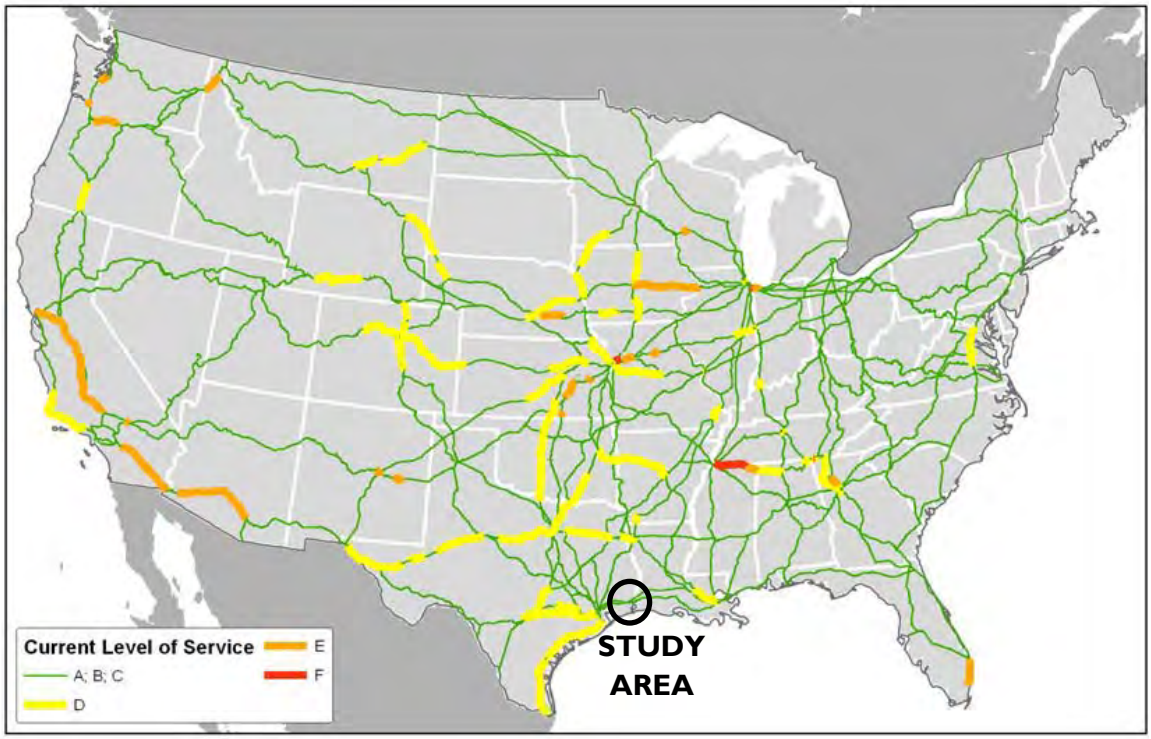


Figure 2.23 – Freight Density - Annual Rail Tonnage – Texas East Region



An overview of national railroad operations in terms of Level of Service is shown in Figure 2.24. The importance of this perspective will be more apparent when reviewing projected conditions in the next section of the report.

Figure 2.24 – Current Level of Service - National



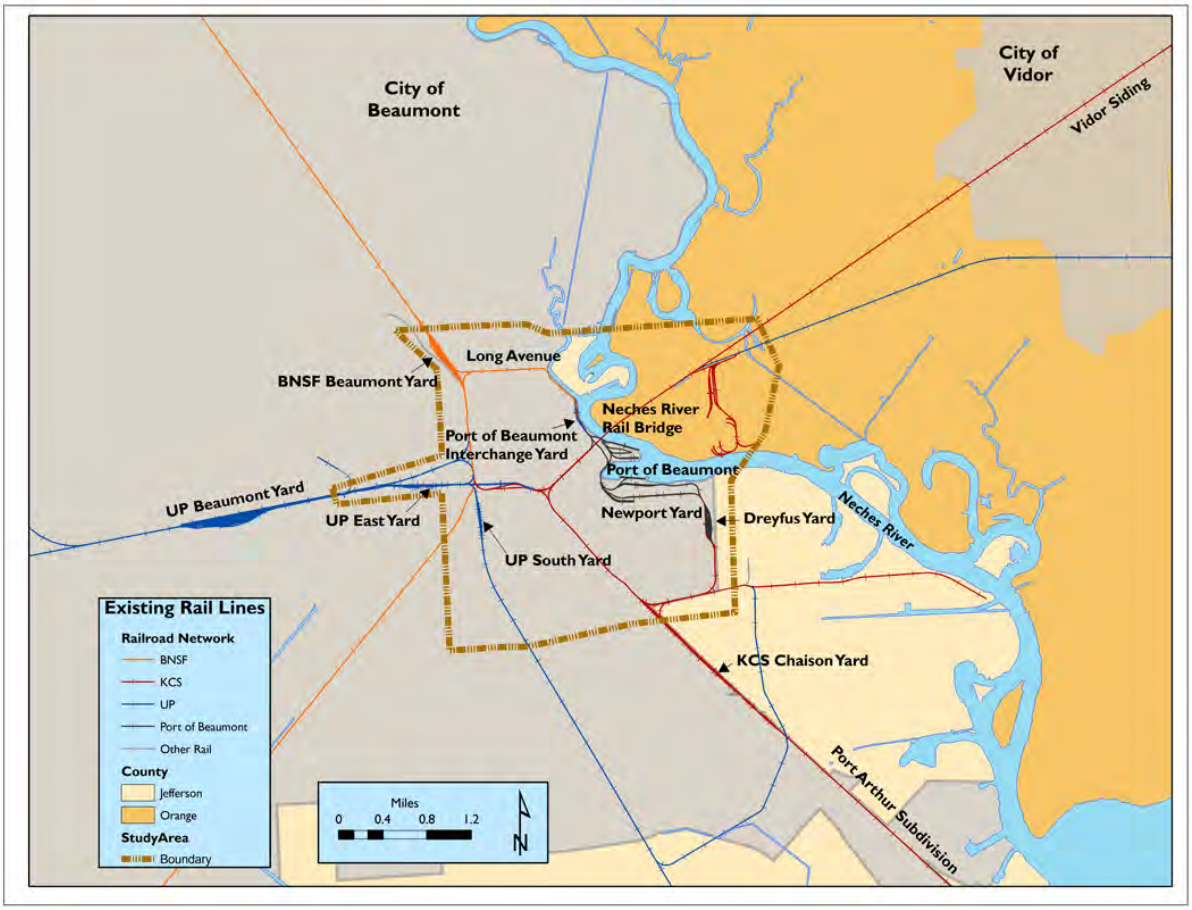
Yards and Crew Changes

Yard capacity and efficiency has a direct influence on the operations of the rail system. Several yards are located in and around the Beaumont area as shown in Figure 2.25 and include:

- Port of Beaumont Interchange Yard
- KCS's Chaisson Yard and Vidor Siding
- UPRR's South, East and Beaumont Yards
- BNSF's Beaumont Yard.

Each is described in more detail along with crew changes when and if applicable. Another important issue regarding train traffic through Beaumont is that close follow-up movements are restricted by crew changes in each direction. Both the UPRR and KCS have crew changes in Beaumont which occur on the railroads main lines.

Figure 2.25 – Rail Yards in Beaumont Region



Port of Beaumont Interchange Yard

While the Port of Beaumont has several internal yards within the Port's boundaries and south of the Neches River bridge including Newport Yard and Dreyfus Yard, the Interchange Yard north of the Neches River bridge has been the subject of numerous operational issues. The Ports' yards are shown in Figures 2.26a through c. When a train is currently being delivered to the Port of Beaumont, the train operator must approach the Port turnout from the west and then "run around" the cars and then shove them into the interchange yard, which briefly blocks both main tracks at the diamond. Trains coming from the east pull past the turnout and reverse into the yard. Any train cars moved from the Interchange Yard to the Port also blocks the mainline. The low line, with its limited vertical clearance, is only used for moving train cars from the Port to the Interchange Yard. In either case; one of the two main tracks is blocked for an extended period, effectively lengthening the single-track portion of the route.[21] Rail cars are handled within the Port's perimeter by Trans-Global Solutions, Inc., a contract switching operator. Moving cargo into and out of the port is assisted by an extensive railway system that can accommodate 600 rail cars and handles 80 cars simultaneously at shipside.[22]

Figure 2.26a – Port of Beaumont Interchange Yard

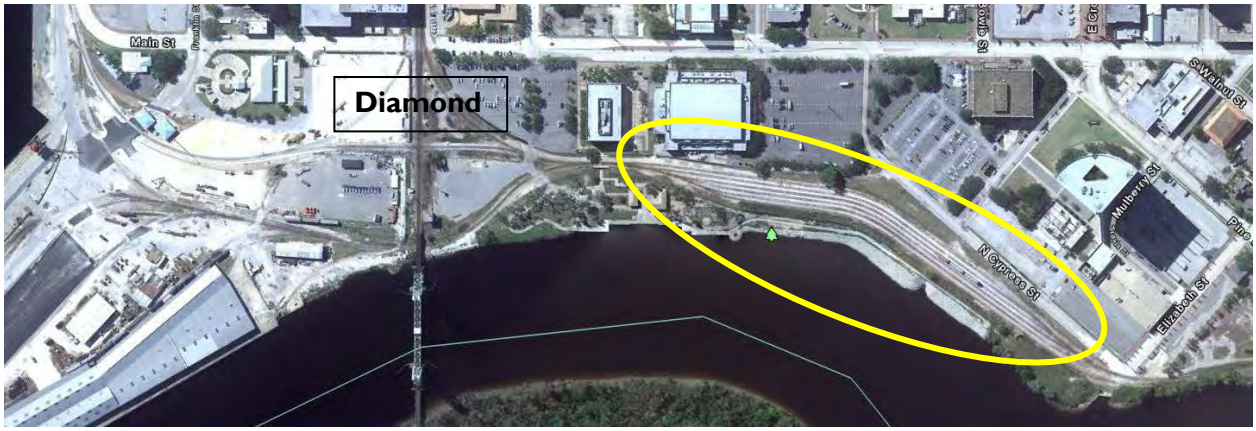


Figure 2.26b – Port of Beaumont Newport Yard



Figure 2.26c – Port of Beaumont Dreyfus Yard



BNSF utilizes the Long Avenue connection as their primary entrance to the Port. The UPRR has trackage rights along Long Avenue and occasionally utilizes it to exit the Interchange Yard after delivering rail cars. Under this scenario the UPRR will pull off the KCS main track, then take headroom toward the BNSF heading out the north end of the Interchange Yard and place their rail cars into the interchange yard without blocking the KCS mainline.

In 2003, the Port of Beaumont contacted TxDOT to discuss a proposed plan that would improve the rail infrastructure at the Port with the purpose of reducing rail traffic delays. The Port proposed construction of a new turnout from the KCS mainline, south, directly into the Port and adding capacity in the Port by extending current tracks and constructing new tracks. This would enable the railroads to perform interchange services within the Port itself, making the north yard unnecessary. TxDOT studied the proposal and found it to be both feasible and beneficial. The Beaumont MPO provided $8.5 million in Congestion Mitigation and Air Quality (CMAQ) funds for the project. It is currently under construction. The current intent, once the project is completed, is that one running track will remain through the former yard to allow BNSF access to and from the Port. All other tracks would then be removed.[23]

The Port of Beaumont handled almost 48,000 rail cars in 2003. Of these rail cars 26,398 (55 percent) were moved by the BNSF; 19,138 (40 percent) were moved by the UPRR; and 2,344 (5 percent) were moved by the KCS.[24] This amount of annual traffic is equivalent to 925 rail cars per week on average. The Port moves four main commodities: grain, potash, military equipment and wind turbine equipment. According to the American Association of Port Authorities, the Port of Beaumont ranked 54th in the world in 2009 based upon total cargo volume.[15] This ranks the Port of Beaumont 7th in the United States with 67.7 million tons. The Port of Beaumont's expansion and the new rail access route from the KCS main tracks will likely increase rail volumes in and out of the Port. The new route will enable other development on the vacated property. However, BNSF cross traffic will continue to operate through this location.[16] Expansion by the Port to property located on the east side of the Neches River with a planned rail facility may also increase rail traffic across the bridge due to internal movements within the Port. Slow moving unit trains and other rail traffic entering and exiting the Port on both sides of the Neches River may influence the need for capacity improvements as well as to allow through traffic to bypass port switching movements.

KCS's Chaison Yard and Vidor Siding

The KCS has its yard located on the line to Port Arthur, TX. In addition, the KCS utilizes the Vidor Siding as a critical operational element for staging trains as well as for conducting crew changes. Consequently, both are discussed here and are shown in Figures 2.27a and b.

Figure 2.27a – KCS Chaison Yard



Chaison Yard is located southwest of the Neches River bridge and is bordered by the Port of Beaumont to the east and MLK Parkway (TX Route 380) to the west. Six tracks are used for train makeup and arrival. Storage cars are held here for Exxon Mobil and other customers. UPRR unit trains carrying soda ash and other commodities pass through Chaison Yard enroute to Port Arthur. Local trains to the south and the east depart and arrive through Chaison Yard. The connector track (nearly two miles in length) from Chaison Yard to the UPRR is used for KCS-UPRR interchanges, KCS-BNSF interchanges, and KCS Acid Unit Trains for the Port Arthur Subdivision. The main track from GCL Junction to Chaison Yard is used by a daily local each way and a daily manifest train each way. In addition, yard jobs make transfer runs to the BNSF, UPRR, Port of Beaumont, and other area industries such as Gerdeau Ameristeel in Orange County on Tuesdays and Thursdays. This occupies the single main track (with no passing) west of the KCS-UPRR split at Tower 31 for approximately to two hours. KCS Chaison Yard to the south originates and terminates some of these trains as well. Rail traffic on the KCS Port Arthur line is also expected to grow through new contracts signed for several commodities involving unit train operations.

Figure 2.27b – KCS Vidor Siding



Vidor siding is located at KCS MP 760.4 on the Beaumont Subdivision. It is approximately five miles east of the Neches River bridge. This siding is 13,424 feet in length which enables it to serve as train storage and a staging location for KCS trains, many enroute to the U. S. – Mexican Border at Laredo, TX. Because of the length of this siding, often two trains can be stored at the same time. Vidor siding is also the designated crew change point for westbound freight trains operating between Shreveport and Houston. The siding is under Centralized Traffic Control (CTC) for the meeting and passing of trains. This is the first siding location for the KCS east of Rosenberg, TX. KCS trains are staged at Vidor siding for movement beyond Houston on the Rosenberg Subdivision as well as the UPRR Brownsville Subdivision. The KCS dispatcher cannot line westward trains by Vidor until given permission by the UPRR dispatcher for routing instructions and clearance of main tracks through UPRR's Beaumont Yard.

The KCS eastbound trains change crews at Pearl Street immediately west of the Neches River bridge, while westbound trains change crews at Vidor siding. Crew changes normally take 15 – 30 minutes. Crews are driven to either location from Chaison Yard. KCS westbound trains experience delays at Vidor siding due to operating window restrictions in place by the UPRR on the Brownsville Subdivision between Victoria and Robstown, TX (more than 250 miles west of Beaumont). The KCS is currently operating as many as seven to nine trains in each direction on the Brownsville Subdivision while the UPRR typically has five to six trains. Consequently, lesser priority trains are often held at Vidor, sometimes for eight hours or more. Occasionally trains are tied up in sidings east of Vidor at the next meeting point in Mauriceville, TX ten miles to the east.

Union Pacific Railroad's Yards

UPRR has two yards, the South and East Yards, within the study area yet its largest yard, the Beaumont Yard, is located west of Interstate 10. All of these yards are shown in Figures 2.28a through c. The East Yard is approximately 3,000 feet long and has as many as seven parallel tracks. Portions of this yard and several industry leads are elevated over 4th Street. The South Yard, along UPRR's line to Port Arthur, is approximately 2,500 feet long and has as many as five parallel tracks. The yard stretches from Crockett Street to College Street (US-90) and two tracks cross College Street at-grade.

The majority of through UPRR trains change crews on either of the two main tracks at their switching yard west of downtown Beaumont. The present practice is for these trains to stop and occupy one of the main tracks while the crew change takes place. The crew change takes a minimum of 30 minutes, but can take much longer, e.g., up to two hours, if the trains also are required to set out cars or pick up cars. When this happens, following trains are often delayed as well. UPRR trains (for both directions) change crews at their yard several miles west of the Neches River Bridge. The mainlines are not always clear for trains to enter westward due to switching operations or other trains ahead changing crews. The dispatcher cannot send a following train movement across the bridge until the signals ahead can be cleared in order that the following train will not stop on the bridge. The result of this is that the following train movements in both directions are spaced at least eight to ten minutes apart assuming the train ahead is kept moving.[17]

Figure 2.28a – UPRR South Yard



Figure 2.28b – UPRR East Yard



Figure 2.28c – UPRR Beaumont Yard



BNSF Beaumont Yard

The BNSF Beaumont Yard is located in the northwest area of the study boundary and is shown in Figure 2.29. It essentially encompasses a 3,500 foot length from North Street north to a point north of Interstate 10 just outside the study area. There are as many as fifteen parallel tracks, plus service via industry leads to the west parallel to 1st Street along the former Rock Island branch.

Figure 2.29 – BNSF Beaumont Yard



Observations

As a network, the rail transportation system is directly influenced by operations outside the limits of the study area. To better understand the current operating challenges being faced by the railroads along the corridor, the study team was granted access to the KCS Dispatch Center in Kansas City, Missouri. Operations were observed on two separate occasions for a total of 12-hours on September 12 and 13, 2011. These observations allow for several suggestions for potential operational improvements. In summary the field observations conclude:

- At the present time, neither bridge capacity nor the operation of the Port of Beaumont are a problem in terms of rail operations
- Currently, yard capacity and crew change locations in and around the Beaumont area present obstacles to efficient rail operations.
- Congestion at the Houston terminal also has a negative impact on rail operations in Beaumont, i.e., crew calls may not be made until trains are ready so as to not lose crews between Houston and Beaumont.
- While the operations of the Port and bridge capacity are not problems today; they may become more problematic as rail traffic increases.

Efforts have been made to improve coordination and communication between the various dispatchers to help operations; this should continue.

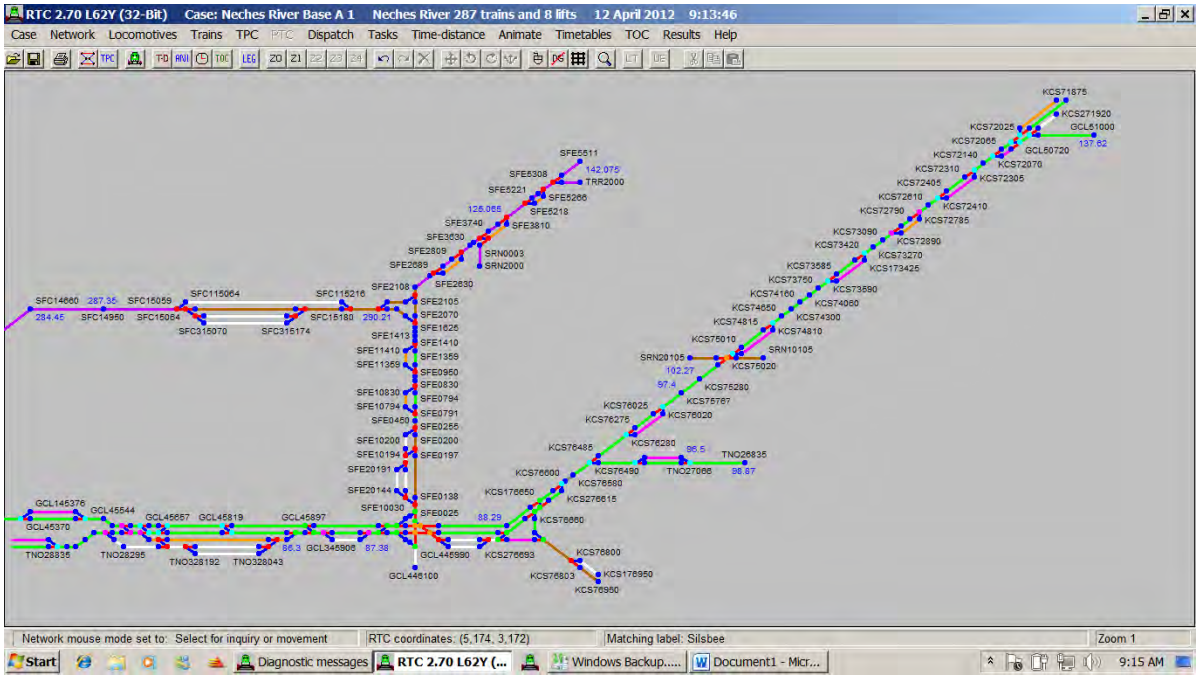
The Rail Traffic Control (RTC) Model

Rail Traffic Controller (RTC) is a computer program created by Berkeley Simulation Software, LLC, which simulates the operation of trains over a railroad network. Variations can be made in network track layouts, train composition and schedules, and operating rules and constraints, which allow for the testing and assessment of modifications. RTC is used by most North American Class I railroads to evaluate and plan their operations and in turn determine capital expenditures.

The "base case" model represents current conditions which are then validated by comparing results to known current system performance. The better the base case model matches current system performance, the more confidence one can have in the results for a planning scenario. The measured part of the Neches River base case network is bounded on the east by KCS MP 735.85 (the west fouls at Starks, Louisiana) and by Texas and New Orleans (T&NO) MP 268.35, east of Connell; and on the west by Gulf Coast Lines (GCL) MP 456.00 at Elizabeth, and T&NO MP 283.04, at the west end of Beaumont. A schematic of the Neches River "line" is shown in Figure 2.30. The UPRR and KCS yards at Beaumont are included in the Neches River "line", which is a subset of the entire network used to measure train performance that is directly affected by the Neches River bridge. The BNSF yard at Beaumont is not within the Neches River line. The simulation model consists primarily of two files:

- **Network files** which include track, signals, grades, curves, bridges, road crossings, and railroad junctions or interlockings and
- **Train files** which include information related to individual trains – their identity, type, weight, length, locomotives, time and day of operation, relative priority, origin and destination, route, railroad carrier, and intermediate work, if any.

Figure 2.30 Rail Traffic Control (RTC) Neches River "line" schematic



In all simulation cases, each train is treated individually. In other words, as no two days in the real world are identical, no two days in the model are identical. Some freight trains operate on completely random schedules, according to traffic demands; or according to availability of resources, such as locomotives and crews. The 2007 base case simulation network was constructed largely from railroad "track charts" supplied by the carriers. These schematic maps show the physical track in sections allowing the modeling of signals, switches, grade crossings, sidings, and yard tracks as well as distances and grades between points. These charts, along with railroad timetables, also show the speed limits for trains on the various sections of the network. The base case train files were constructed from two sources. The first is railroad records of through train movements. These records are taken from the dispatching system and include the identity of the train, its consist, its route, and the day and clock time when it passed certain key recording points. In addition, train data from earlier RTC model runs executed as part of the 2010 Texas Statewide Rail Plan was extrapolated to the Beaumont area network.

The base case includes the operations of 287 total freight trains in a week . In addition, there are six Amtrak passenger trains measured (three eastward, three westward), though these passenger trains are excluded from the freight statistics. The measured freight trains for the simulated week break down by type of train are shown in Table 2.2.

Table 2.2 – RTC Model Base Case – Type of Trains

BY TYPE	BNSF	KCS	UP	Total
Manifest	35	53	67	**155**
Priority Manifest			45	**45**
Expedited	11		19	**30**
Grain		12		**12**
Vehicles/Auto Parts			5	**5**
Coal	2			**2**
Other Unit	2	14	6	**22**
Local			16	**16**
TOTAL	**50**	**79**	**158**	**287**
	17%	28%	55%	

There are eight bridge openings during the week, ranging in length from 17 minutes to 31 minutes in length. The openings are randomly distributed during each day, although none are coded to take place in the early morning (between 1 AM and 4 AM) assuming that no water movements would occur during those hours.

RTC is designed to measure railroad performance in time. Some measures are "absolute" numbers while others are ratios of performance. The performance measures used here include:

- **Train Count** – the number of trains over a period of time, here a week, measured in the model. This number is always less than the number of actual trains in the case. Trains that do not complete their entire run within the measured time period are excluded from the statistics.
- **Average Speed** – the average operating speed, in miles per hour, of the measured trains operating across the entire network, or across a specific part of the network.
- **Delay Ratio** – This is the ratio of congestion-related delay to an "unimpeded" running time. Unimpeded time equals the time it would take to operate all the trains, including any en-route work needed or requirements that must be met, without any congestion-related delay.
- **Delay Hours/Day** – This is the absolute number of train-hours per day lost to congestion-related delay. In general if delay hours can be reduced, costs can be reduced. However the value presented here does not differentiate say between 100 loaded cars of time-sensitive freight from a local switching 20 cars.
- **Delay Minutes/100 Train-miles** – This is an alternate, railroad industry measure of normalized delay. It functions much like the delay ratio (the numerator is actually the same, except reduced to minutes instead of hours); but the denominator is the distance trains travel over time, rather than just the time itself. These ratios can often be high in terminals.

Table 2.3 summarizes the base case train performance over the week long period for the above referenced performance measures. The Base RTC model included 44 lifts per week on the Neches River bridge crossing. Information from various other sources suggested that the number of lifts on a typical week was significantly less; say on the order of eight (8) lifts per week. Consequently the RTC model was rerun with 8 lifts per week and represents the Base (modified). Even with a significant reduction in the number of bridge lifts in the existing conditions analysis, the delay performance measures exhibit relatively minor shifts, though of course in the positive direction, speed increases while delays decrease. Overall changes in terms of speed are very minor on the order of 2%, while delays typically drop by 9%.

Table 2.3
RTC Freight Train Performance - Base Case

Case	Train Count	Average Speed (mph)	Delay Ratio	Delay Hours / Day	Delay Minutes / 100 Train-Miles	Bridge Lifts per Week
Base	287	14.7	25%	9.9	67.0	44
Base (modified)	287	15.0	23%	9.0	61.1	8

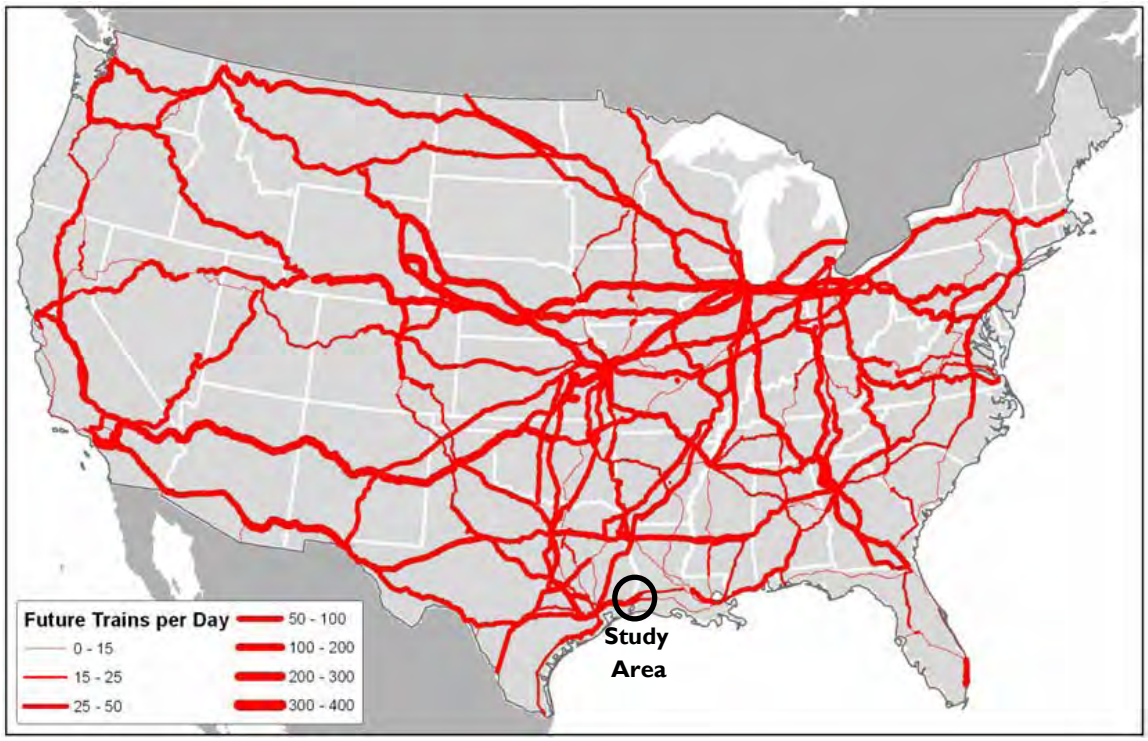
3.0 Projected Conditions

This section discusses rail forecast to the year 2035 under the no-build scenario. Then with an assessment of operations, various improvement concepts are developed and assessed. A key element with any improvement concept is the crossing of the Neches River with regards to meeting the criteria for river navigation. The parameters for different types of bridge crossings are discussed first followed by descriptions of potential alignments.

Rail Forecasts

The study area's rail forecast includes an overview of rail traffic at a national level as well as specific to the region based upon the Texas State Rail Plan. Consideration is also given to the Gulf Coast High Speed Rail passenger initiative. Operations for Beaumont area rail system were conducted for the no-build scenario which utilizes the existing rail network and committed improvements, such as the new switch into the Port of Beaumont. In general, rail traffic throughout the nation is projected to increase as shown in Figure 3.1 which includes the rail corridor through Beaumont.

Figure 3.1 – Future Daily Train Volumes - National



Projected Rail Traffic Volumes

The Base (Modified) RTC model estimates that under current conditions 287 trains operate during a typical week through the Beaumont rail network. This translates to approximately 40 to 50 trains per day crossing the Neches River. Forecasted growth for the number of trains expected to be operating

weekly in the Beaumont area by 2035 was increased from the base case utilizing a three percent (3%) compounded annual growth rate and is shown in Table 3.1. The 3% growth rate is reasonable given the population growth forecasted for the State of Texas and the expected increased level of cross-border trade on a national basis. In addition, this is the rate that other recently completed freight studies used. Train traffic is projected to essentially double during this time period with an estimate of 87 trains per day crossing the Neches River. These forecasts utilize the same distribution by rail carrier as current conditions. Similarly, the growth rate can be applied to the type of trains as previously shown in Table 2.2.

Table 3.1
Forecast of Weekly Train Traffic

Carrier	2011	2035
BNSF	50	102
KCS	79	161
UPRR	158	321
Total	287	584

Rail traffic at the Port of Beaumont is expected to grow as well. The Texas Rail Plan (TRP) reports that the number of containers handled at the Port of Beaumont is forecasted to increase 34 percent while an increase of 60 percent is forecast for tonnage.[25] Forecasts for number of rail cars and tonnage handled at the Port by carrier are shown in Table 3.2. Much of the growth at the port is likely to occur on the Orange County side of the Port, as noted in the discussion of the Port's Master Plan in earlier sections. Consequently, bridge lifts were increased in the same ratio (doubled) to account for potential expansion of the Port of Beaumont's Orange County facility to the north of the existing KCS river bridge.

Table 3.2
Port of Beaumont - Forecast of Annual Rail Cars and Tonnage Handled

	Annual Rail Cars		Annual Tonnage (millions)	
Carrier	2008	2035	2008	2035
BNSF	164	220	4.1	6.5
KCS	1,312	1,763	32.6	52.0
UPRR	1,804	2,424	44.8	71.5
Total	3,280	4,407	81.4	130.0

Gulf Coast High Speed Rail Corridor

In 1998, then U.S. Transportation Secretary Rodney Slater designated the Gulf Coast High-Speed Rail Corridor (GCHSR) which would serve the states of Texas, Louisiana, Mississippi and Alabama with "spokes" extending to Houston, TX, Mobile, AL, Birmingham, AL, and Atlanta, GA as shown in Figure 3.2. The route would connect with the proposed Southeast High Speed Rail Corridor, which extends

to Charlotte, NC, Richmond, VA, and Washington D.C. Prior to this initiative, other efforts were conducted. Aside from the States of Louisiana and Texas studying the corridor, no planning or construction has been done on the Gulf Coast corridor to date mainly due to funding constraints. In addition, the route has experienced decreases in available capacity because of increased freight traffic. The report suggests that before high speed rail can be introduced, overall capacity needs to be improved by establishing a double track mainline operation and the track will need to be upgraded to Federal Railroad Administration (FRA) Class V standards to allow for higher speeds. A three phase implementation plan is proposed on the corridor between Houston Amtrak station and the Louisiana/Texas State line near Echo, Texas. The phases are summarized:

1. Phase One – provisions for the upgrade of several segments of the existing track to facilitate 79 mph operations at an anticipated cost of $150 million.
2. Phase Two – provisions for increasing the amount of capacity by establishing a double track mainline operation throughout the length of the corridor at an anticipated additional cost of $473 million.
3. Phase Three – provisions for increasing operating speeds to 90 mph (track maintenance at FRA Track Class V standards) at an anticipated additional cost of $93 million.

Figure 3.2 – Gulf Coast High Speed Rail



Schematic plans of the GCHSR corridor in the Beaumont area are provided in the Appendix and are reproduced at a conceptual level on the Alternatives Evaluated maps as applicable.

Recently the USDOT announced it was awarding $15 million in high speed rail funds, being redirected from Florida, to Texas. The state will use the money to conduct engineering and environmental work to develop a high-speed rail corridor linking Dallas/Fort Worth and Houston. The City of Beaumont is not within that corridor.

Operations

The forecasted train traffic results in a significant increase in the delay hours per day as well as the delay minutes per 100 train miles for the project study area. The forecasted delay hours increase by a factor

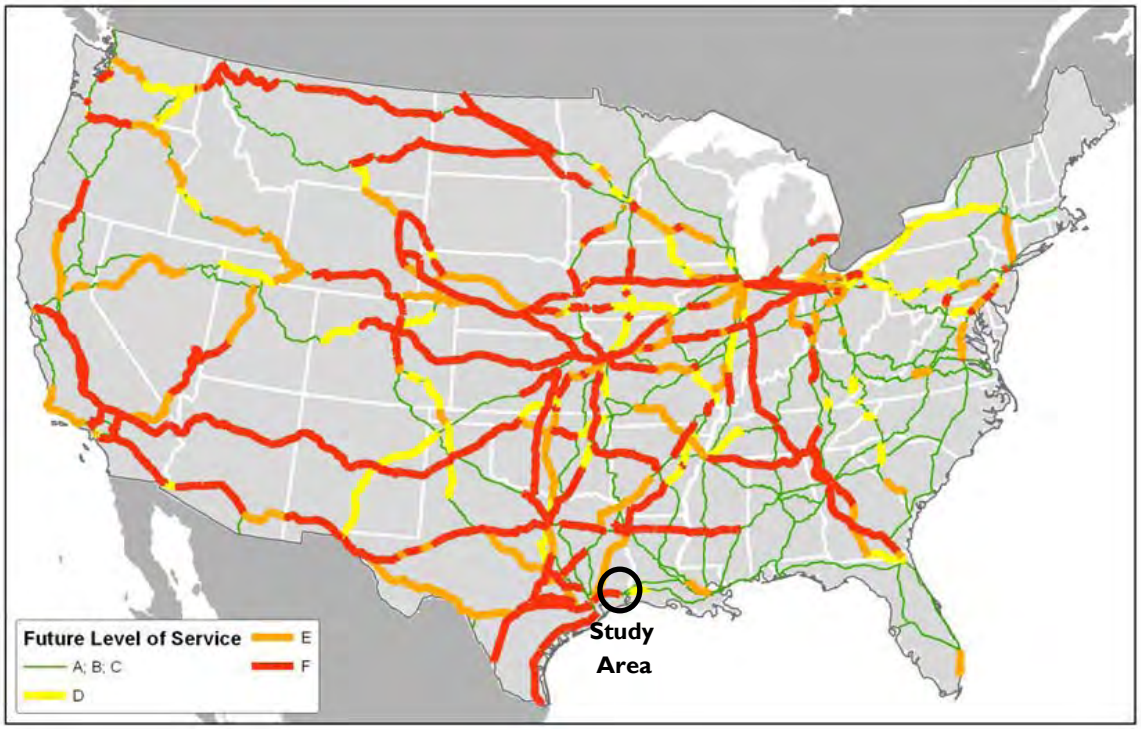
of eight while the delay minutes increase by a factor of five under the no-build conditions. Essentially, the application of the forecasted train volumes to the existing rail network results in significant congestion. However, this is consistent with other studies regarding future levels of service for freight rail at the national level. This delay noted in this report is for those trains operating or projected to operate within the limits of the Beaumont RTC model network.

Table 3.3
RTC Freight Train Performance – Projected "no-build"

Case	Train Count	Delay Hours / Day	Delay Minutes/100 Train-Miles	Bridge Lifts per Week
Base (modified)	287	9.0	61.1	8
Projected "no-build"	582	69.7	306.4	16

An assessment of operations under current rail infrastructure with future train volumes indicates a significant portion of the national rail network to approach capacity or operate at capacity as shown in Figure 3.3. Again, the rail corridor under study here is shown at capacity essentially for the segment within the study area.

Figure 3.3– Future Level of Service – National



Several physical transportation improvements are also anticipated as projected year assumptions that are included with the projected base case. These are:

- Interstate 10 bridge over Neches River expanded to eight lanes, approximately 30 feet to the south from current conditions.
- Port of Beaumont's south switch is operational and the Interchange Yard is removed.
- The BNSF connection to the Port of Beaumont across the KCS remains.
- The Gulf Coast High Speed rail corridor is preserved, if it is not already implemented.

Developing Options

The development of options can be thought of in two basic parameters:

1. the development of bridge type (stationary or lift) and
2. the development of bridge crossing locations (along existing or on new alignment).

The determination of bridge type also influences the location of the bridge crossing. The stationary bridge type could consider three levels; a high level, a mid-level and a low-level. A high-level bridge would accommodate the vertical clearance for river navigation for a maximum height (150 feet). A mid-level bridge provides a vertical clearance to accommodate the majority of river navigation as is the case with the 50 foot vertical clearance defined by the IH-10 crossing of the Neches River. A low-level crossing assumes a lift bridge with a minimum 13 foot vertical clearance in the closed position (to mimic the existing KCS bridge vertical clearance).

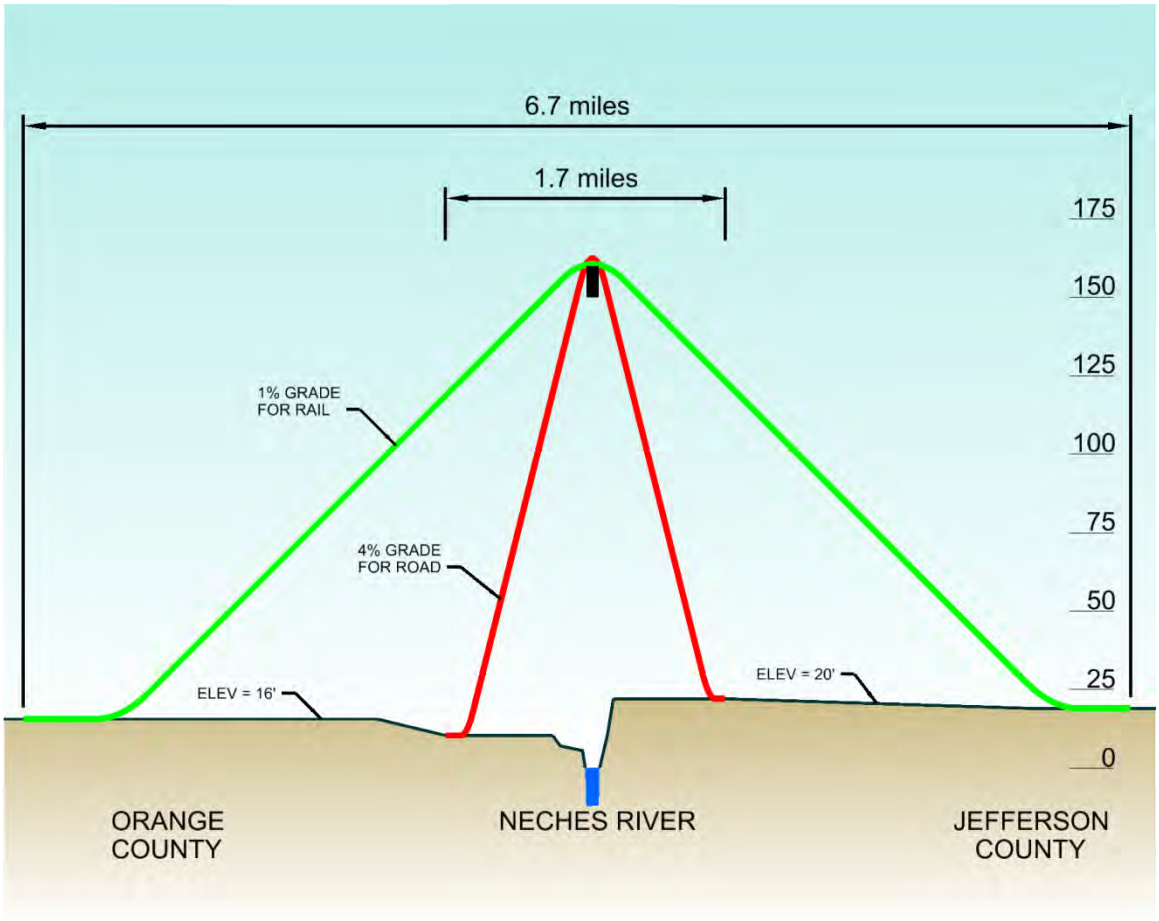
A high-level crossing could essentially occur at any location, yet the practicality of this concept needs to be called into question. A quick review of the Neches River navigation system notes several "crossings" and their associated vertical clearances which are shown in Table 3.4.[26] These crossings are listed in navigation mile markers from the south to the north. Of the crossings, several are overhead power transmission cables. Only three are vehicular bridges and only one (the KCS bridge) is a rail bridge. National Oceanic and Atmospheric Administration (NOAA) lists the following vertical clearances for elements crossing the Neches River:

Table 3.4 – Vertical Clearances along Neches River

Neches River	Mile Reference	Vertical Clearance (feet)
Road bridge - TX 73 EB	0.0	172
Overhead Power Cable	0.0	164
Road bridge - TX 73 WB	0.0	143
Overhead Power Cable	1.9	183
Overhead Power Cable	10.2	172
Overhead Power Cable	16.0	172
Rail bridge - KCS	19.5	13/150
Road bridge - Interstate 10	21.4	50

Port Arthur has State Highway 73 over the Neches River with a vertical clearance as high as 172 feet. This highway structure is nearly 1.5 miles long with an approximate approach grade of four percent. Railroads require a maximum grade of one percent and thus would have a significant increase in the length of structure for such a high-level clearance. An illustration of a theoretical high-level bridge over the Neches River in Beaumont is shown in Figure 3.4. It includes for comparison purposes a schematic profile with grades at four percent (for a highway) and at one percent (for rail). The length of the rail profile and associated structure would extend for a length of approximately 6.7 miles utilizing terrain in the Beaumont area along the existing rail corridor. Of course, no other rail connections serving Beaumont could be achieved along this aerial structure and the excessive costs of such a high-level crossing make the concept impractical.

Figure 3.4 Conceptual High-Level Profile



A tunnel option could also be contemplated. The vertical distance below the depth of the dredged channel including the vertical depth of rail tunnel would be approximately half the height of an elevated structure and therefore have approximately half the length of approach grade. Nonetheless the water table, soil condition, the need for ventilation and potential for flooding of the tunnel make such a concept impractical. However, from an operational perspective, the effects of a high-level bridge can be

assessed by running the RTC model on a theoretical rail network with zero (0) bridge lifts. This will allow an assessment and isolation of the operational impacts based upon bridge lifts as well as the opportunity for sensitivity analysis by varying the number of bridge lifts.

A mid-level crossing with its 50 foot vertical clearance (stationary bridge) is essentially defined as being adjacent to (and along the south side of) the existing Interstate 10 crossing of the Neches River.

A low-level crossing could essentially occur at any location. However, it needs to be acknowledged that at points south of the existing river bridge additional lifts would be required as the Port of Beaumont has much river traffic that accesses the Port. At points north of the existing bridge, the same number of lifts would be required as occur at the existing river bridge. In terms of navigation distance there is a limited length between the rail bridge (Mile 19.5) and the Interstate 10 bridge (Mile 20.7). Consequently as any new river crossing is physically close to the existing bridge, it can be assumed that operationally both bridges may be open at or nearly at the same time. This in turn essentially creates a system interruption in the network similar to what occurs today.

In developing design parameters to determine potential locations for alternative alignments and bridge crossings of the Neches River, the vertical clearance over the river as a navigable waterway becomes critical. Information on vertical clearance was received from the United States Coast Guard (USCG) which states: "The existing vertical lift railroad bridge across Neches River at mile 19.5 in Beaumont has a horizontal clearance of 200 feet and a vertical clearance of 13 feet above high (underline added) water in the closed position and 145 feet above high water in the open position. The existing clearances have been adequate to date, as we have not received any complaints from waterway users. "

Copies of drawings for the Neches River rail bridge, dated 1940, were obtained from KCS. These drawings confirm a horizontal clearance of 200 feet yet state a vertical clearance of 18.32 feet above the mean low water (elevation + 2.68) in the closed position and 150 feet above the mean low water in the open position. A note on the drawings adds that elevations provided are from the KCS datum and are in feet above M.G.L., Biloxi, Miss. elevation +2.68 KCS datum equals elevation 0.00 U.S. datum. Review of the vertical clearances in the closed and open positions suggests that the "water surface reference" (elevation datum) has changed since the Neches River rail bridge was constructed. Comparison to the IH-10 bridge crossing presents similar references to mean low water for clearance and notes a 50 foot clearance at IH-10. Mean low water is designated at elevation 0.30.

Equally important to evaluating the feasibility of the physical aspects of a new river crossing is the electronic contour information used to establish existing and proposed profiles. Based upon the electronic contour files, the known junction point of the KCS and UPRR rail lines (near Tower 31) is shown at elevation 14.6. Track chart from the KCS call out an elevation of 18.0 at this point which would include the difference in datum elevation for the KCS. The water surface elevation for the Neches River is shown at elevation 0.0. Consequently for the purposes of this study, the stated vertical clearance of 50 feet for the IH-10 bridge is proposed for this conceptual design. Later on should the concepts proceed to any further design level, additional and more detailed topographic data will be collected and coordinated through the various review agencies including the U. S. Army Corps of Engineers.

At the existing Neches River rail bridge location, the navigation channel is skewed to the alignment of the railroad bridge. The skewed width of the navigation channel with an allowance for a fendering system and support piers requires center to center pier spacing greater than the 200 foot minimum horizontal navigation channel clearance. Consequently the center pier spacing was lengthened for initial investigations. In order to provide for potential future expansion, the typical bridge sections were designed to accommodate a double track section with a center to center distance of 15 feet.

If a new alignment were to span land owned by the Port of Beaumont on both sides of the Neches River, a new roadway crossing has been requested by the Port in addition to a rail crossing. Therefore, a bridge section to accommodate both rail and highway traffic was developed. To avoid any at-grade crossing of the new rail line, the two-way vehicular roadway would be placed adjacent to the rail bridge. In the case of a lift bridge option, a separate two-way roadway lift bridge would be need to be constructed adjacent to the proposed rail bridge in order to provide a balanced typical section for the lift bridge support structure. Later in the "alternatives considered" section and eventually the "alternatives evaluated" section of this chapter, a vehicular circulation concept is illustrated (see Exhibits 2 and 3 in the Appendix) that includes a crossing of the Neches River as well as a grade separation over the KCS rail corridor connecting the two Orange County parcels of the Port of Beaumont.

Several options were considered including a stationary bridge (navigation clearance level to be determined based upon river crossing location) and a lift bridge. Again, the lift height will be dependent upon the river crossing location. In general, any point south of the existing river bridge should provide the 150 foot clearance as currently provided. Points immediately north of the existing bridge (at least to the limits of the dredged channel) should also provide the 145 foot clearance above high water. Immediately adjacent to the IH-10 bridge (approximately 1.7 navigation miles north of the KCS rail bridge), a lower clearance can be used to match the existing clearance afforded by the IH-10 structure (50 feet above mean low water). NOAA indicates the limits of the dredged channel to be approximately 0.8 navigation miles north of the existing KCS rail bridge.

Stationary Bridge

For planning purposes, the Neches River bridge as a stationary bridge would consist of a 260' – 0" double track thru truss main span, with a composite concrete deck, and 153' – 0" welded steel deck plate girder spans with a composite concrete deck for both approach spans. The main span will provide a minimum horizontal clearance of 200 ft. with 265' – 0" pier spacing to account for a skewed navigation channel. Piers for the bridge would be a cast-in-place concrete pier cap, two concrete columns, with a cast-in-place footing supported on drilled shafts. The approach spans, outside of the river floodway, would be either pre-stressed concrete modified AASHTO I girder spans or welded steel deck plate girder spans. Piers would be a cast-in-place concrete pier cap, with two concrete columns. Depending on the height of the columns; they will be either supported on a cast-in-place footing supported on drilled shafts or supported directly on drilled shafts. The span lengths and girder type could vary depending on the approach alignment, topographic and other environmental/hydraulic constraints. Illustrations of a stationary bridge with general plan and elevations as well as a typical section are shown in Figures 3.5 and 3.6.

Figure 3.5 – Stationary Bridge General Plan and Elevation

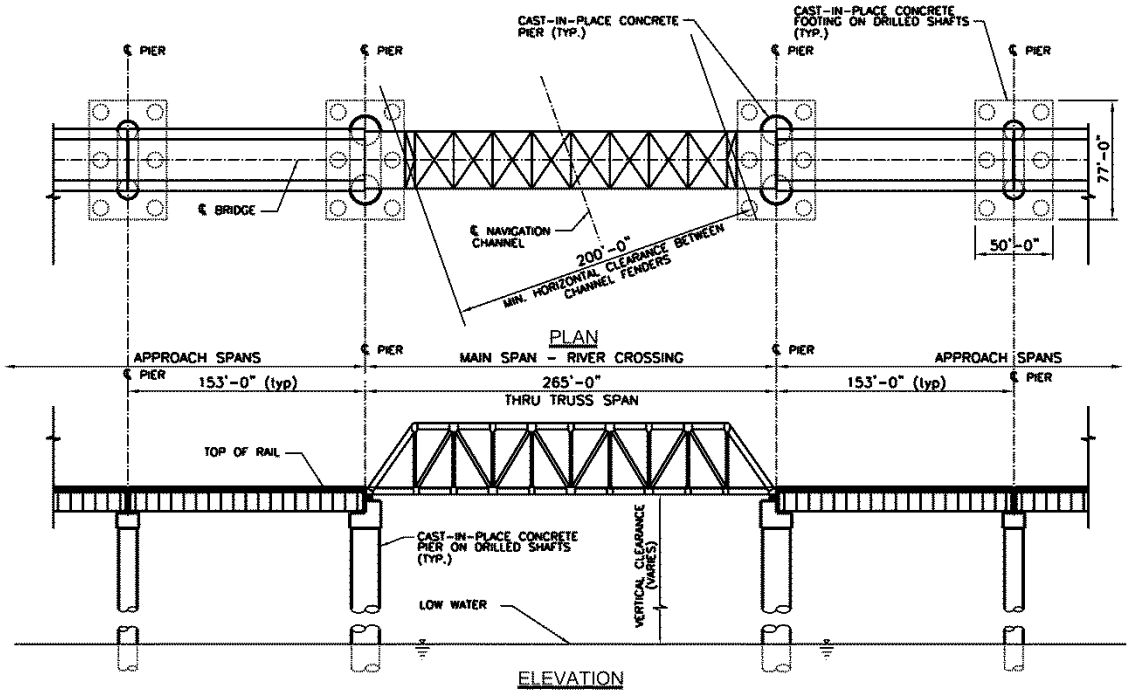
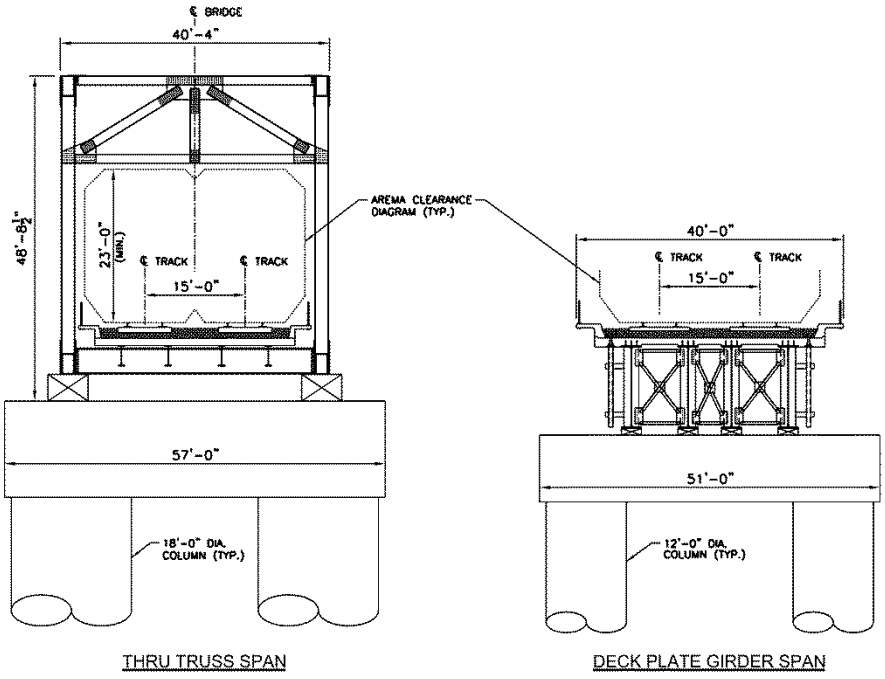


Figure 3.6 – Stationary Bridge Typical Section



A stationary bridge at the 145 foot vertical clearance above high water would be excessively long and by definition extremely expensive. The Rainbow bridge (for vehicles) in Port Arthur provides the navigation clearance for the Neches River. The total length of the bridge is over 1.5 miles. The grades on the approach spans are estimated at four percent. The maximum grade for the rail would be one percent resulting in a comparable length of nearly six miles. Consequently, consideration was also given to establishing an elevation of the bridge in the closed position that would allow say 80 percent of the navigation traffic to pass under the bridge without requiring a lift. Several factors are required to establish this elevation; the appropriate reference water surface elevation, the height of boats using the river and an acceptable minimum clearance allowing boats (and its tow) to pass without requiring the bridge to be opened. Setting this elevation would require coordination with the U. S. Army Corps of Engineers and the U. S. Coast Guard. Lift data from the KCS railroad indicates that the maximum height requested on one occasion (during a sample week) was 70 feet. This height is higher than the clearance afforded by the IH-10 bridge. The average lift request (mathematically) was for 48.6 feet. Only three of the seven lifts requested that week were below 50 feet.

Lift Bridge

This option would be similar to the existing bridge though the new bridge would be capable of supporting two main line tracks, and would be longer to account for the skewed width of the wider double track truss and the larger piers needed to support the additional weight of the second track. A vertical lift bridge typically offers several advantages. For span lengths greater than 150 ft. a steel through truss, vertical lift bridge is the typical structure type used for railroad movable bridges. An open deck system (timber ties supported on steel stringers and floor beams) is recommended to reduce the weight for the lift span. A ballasted deck system would approximately double the span's weight.

Some advantages of vertical lift bridges include:

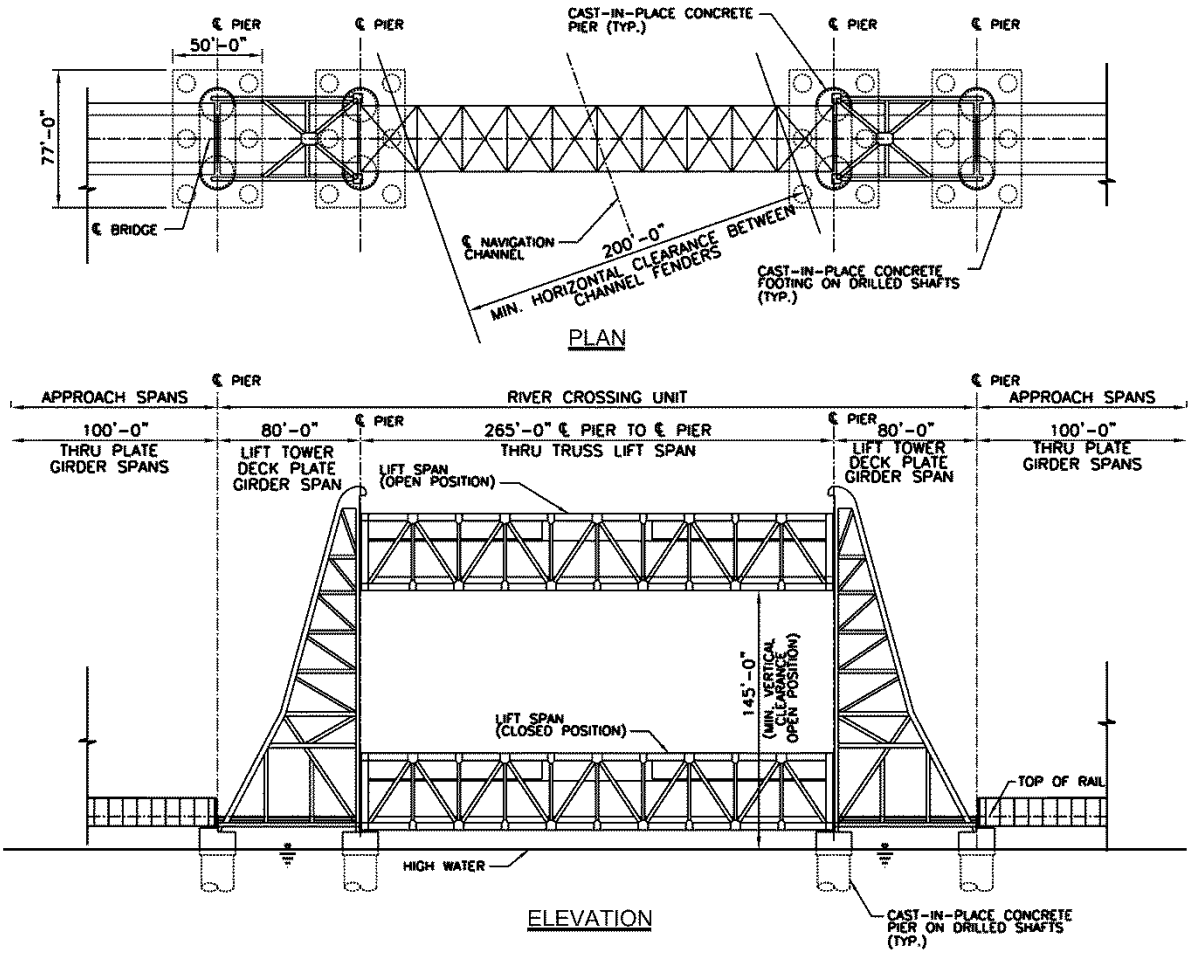
- Longer span lengths and wider navigation openings can be achieved more easily than with other movable span types (i.e. swing or bascule spans).
- The lift span is a standard design (simply supported span), similar to a stationary bridge.
- It is conceivable to design the lift span with a ballasted deck.

Some disadvantages of vertical lift bridges include:

- Towers are required to lift the vertical span and access to the top can be difficult especially on towers approaching 200 feet in height. Service elevators can be provided for tower driven spans that require frequent access to the top.
- The mechanical and electrical systems require periodic maintenance.
- Providing a sufficient number of adequately sized counterweight ropes, a flexible power cable, a large enough sheave groove radius, and adjustable rope termination take-up devices must be considered in the design.

A general plan and elevation as well as a typical section of a lift bridge are shown in Figures 3.7 and 3.8.

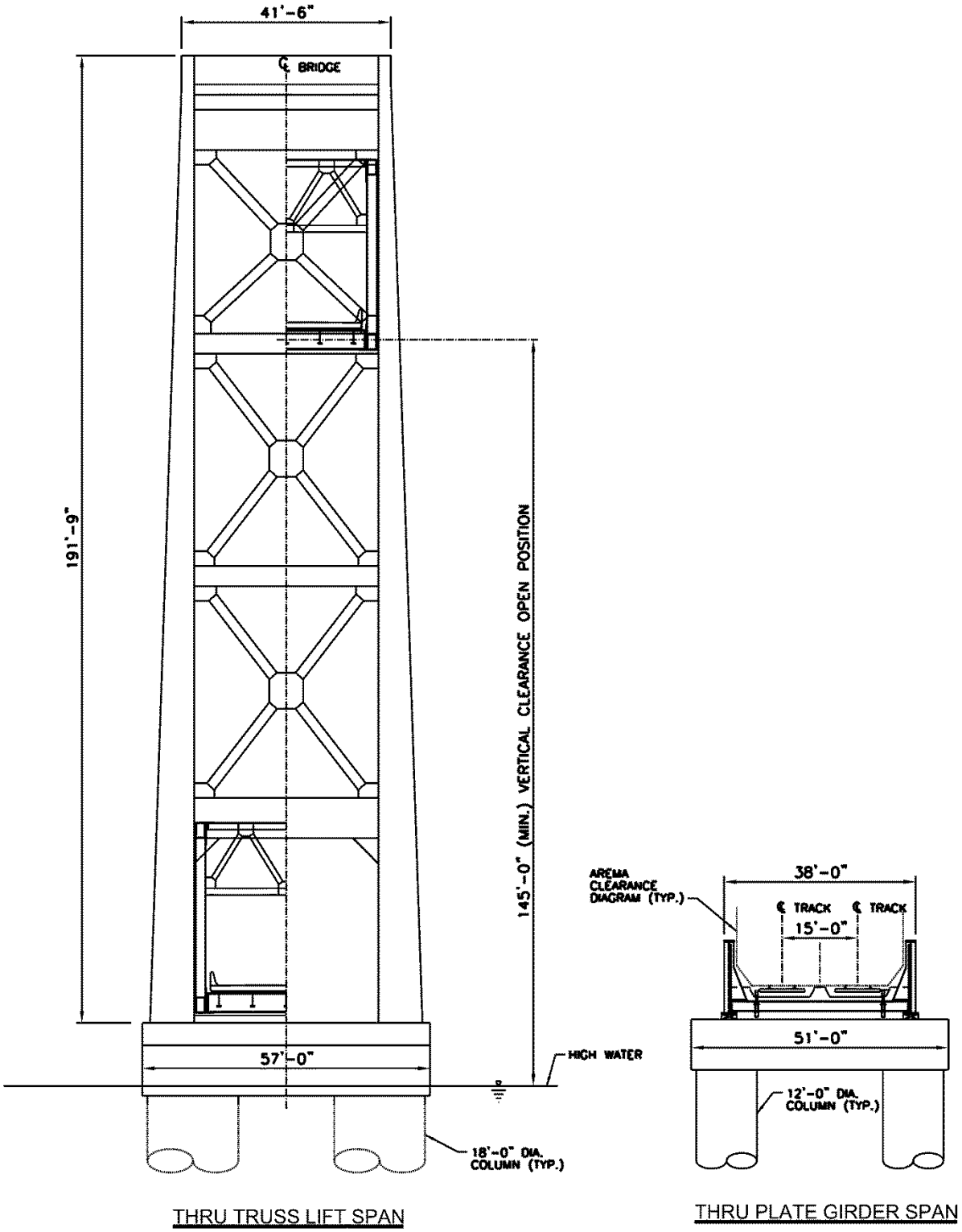
Figure 3.7 – Lift Bridge General Plan and Elevation



The piers adjacent to the navigation channel require a fender system to protect the bridge from vessel impact. Movable bridges are particularly susceptible to service interruptions as a result of vessel collision. Even minor impact on the substructure can cause mechanical equipment to fail.

From a review of the existing Pier Plan – Profile Sheet, dated Feb. 1940, it appears that the channel was about 30 foot deep measured from low water (KCS datum). The boring logs indicate that between elevations -38 to -124, the soil profile consists of alternating layers of hard to very hard clays and course to course packed sand. The foundations for the 1940 construction consisted of caissons or drilled shafts varying from 7 to 18 feet in diameter. The estimated tip was at elev. -90. For tall columns, those exceeding 30 feet ± above ground line, the columns are to be supported on a concrete pile cap or footing founded on drilled shafts. For columns less than 30 feet ± above ground line, the columns are to be supported directly on the drilled shafts or on pile footings. Because of the heavier loads anticipated from the new construction, it is estimated that the tip for drilled shafts to be elevation -110.

Figure 3.8 – Lift Bridge Typical Section



The United States Corp of Engineers will require that the low steel elevation of the approach spans be a specified distance above the high water elevation. To provide a smaller structure depth (top of rail to low steel), through plate girder spans will be used within the river floodway. The approach spans, outside of the river floodway, would be either pre-stressed concrete girder spans, or steel deck plate girder spans or thru plate girder spans. The span lengths and girder type could vary depending on the approach alignment, topographic and environmental / hydraulic constraints. The costs for the stationary and lift bridge options were developed in two forms; the span over the navigation channel and the unit costs for the approach spans assuming a consistent uniform length. This format was deemed suitable for initial considerations. Outside of the river, the span lengths and girder types will vary to provide the most cost effective combination. The costs include the potential for a variety of structural types such as cast-in-place and pre-cast, pre-stressed concrete spans, and steel deck plate girder and through plate girder spans. The costs do not include truss spans, because of the variation in types and lengths, nor for foundations in water requiring special construction techniques. Such costs would be identified at a later stage of design as a separate line item. With specific horizontal and vertical alignments across the Neches River, an accurate length of the bridge approaches and associated probable costs will be determined.

Whether the main span over the navigation channel were constructed as a stationary bridge or as a lift span, the span length of the thru truss element would be set to allow a 200' – 0" minimum horizontal clearance between the navigational channel and fendering system. Because of the potential for skewed alignment crossings of the river, the actual length of the thru truss span may be longer. The approaches in the river would typically be 150' long welded deck plate girder spans. The estimated probable construction cost (in 2012 dollars) of the stationary river bridge is on the order of $30 to $35 million. The lift span over the navigation channel will be constructed to a minimum of 13' above the mean low water level. Because the minimum navigation vertical clearance required is 150' above mean low water, a lift span is required. The estimated probable construction cost of a lift span bridge is on the order of $40 million for a single track and up to $80 million for a double track. If the vertical clearance over the river in the fixed position were higher than 13 feet which in turn reduces the total lift, then the cost of the lift span bridge may be less. This opinion of probable costs are for construction elements only and do not include costs for engineering design, permitting, or construction inspection services.

Alternatives Considered

The alignment location must pass three elements to determine feasibility, an initial review of the technical aspects (typically related to the physical environment), then a financial feasibility test with reasonable costs, and finally a political feasibility where potential impacts are not significant and there is support from applicable partners. Conceptually any new alignment must connect to the existing rail system. For this study area that essentially means connecting from a point near Tower 31 (KCS/UPRR split in Orange County) to the Union Pacific overpass of 11th Street near the existing Amtrak station. To assist in reviewing the location and the surrounding context of the alternatives to be evaluated, see Figure 3.9. A series of 1" equals 200' scale aerial maps of the alternative alignments are included in the Appendix.

For a stationary bridge concept, the alignment location begins by setting the bridge location and then attempting to create the appropriate tie-ins on the east and west sides of the Neches River crossing. For lift bridge concepts, a combination of rail alignment and river crossing location (for navigation traffic and minimizing span length) are given consideration. Operations and connections are also considered when creating the overall rail alignment. The descriptions follow the railroad mileposts which typically increase when travelling westward.

Stationary bridge

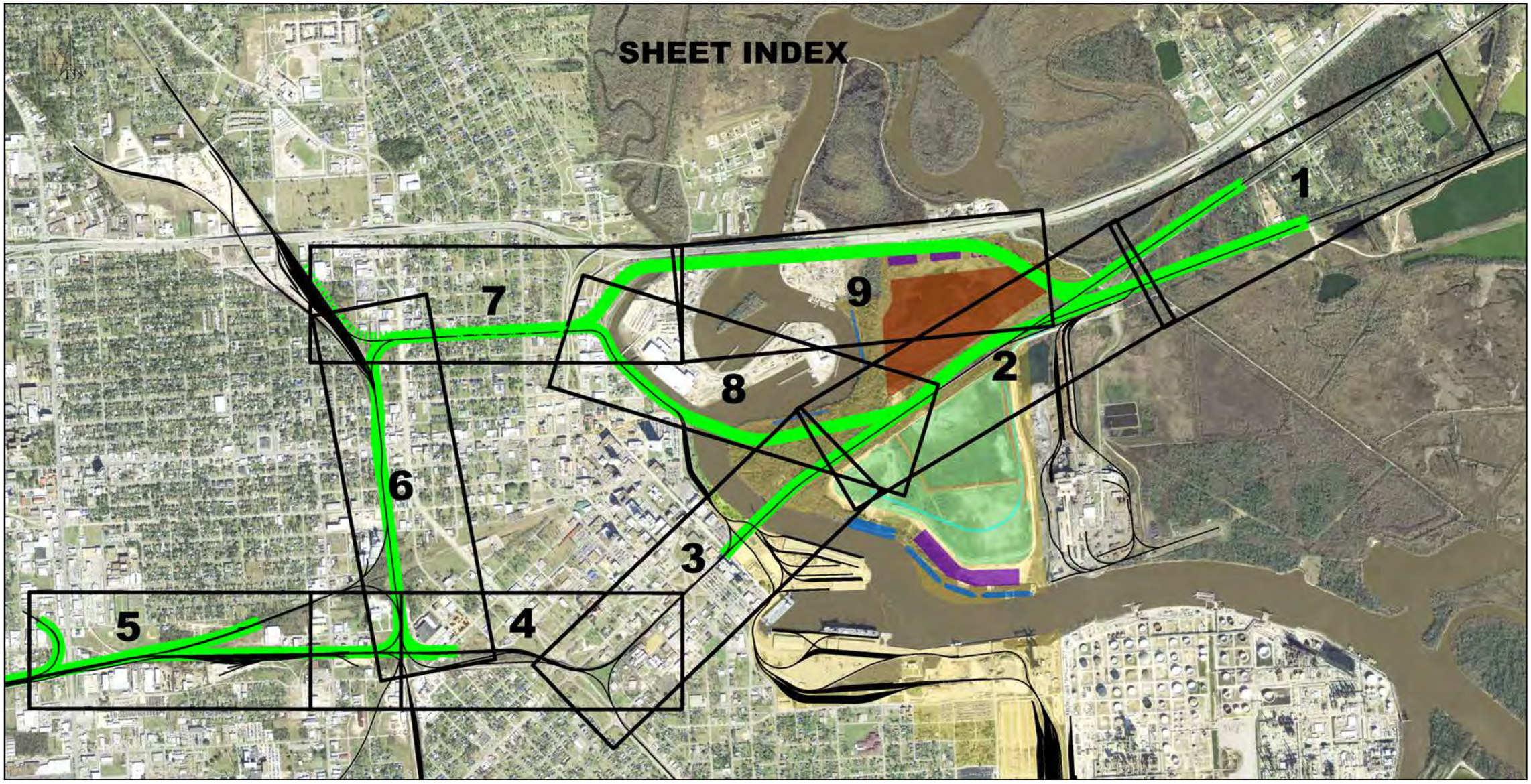
The initial alignment developed for a stationary bridge attempts to create a crossing where interruptions from navigation traffic do not occur. The best location for a stationary bridge is north of the existing KCS bridge near the existing IH-10 bridge over the Neches River. Here, the closest existing rail corridor to IH-10 on the west side of the Neches River is the BNSF spur to and through the Port's interchange yard.

On the east side of the Neches River, the KCS/UPRR split at Tower 31 presents a challenge in connecting to both the KCS and UPRR lines which are diverging. In order to create an appropriate crossover, a grade separation is envisioned. Since the bridge location under consideration is north of the existing KCS line, then the KCS line is to be crossed. The vertical design criteria at this concept planning level is set at 24 foot vertical clearance from the top of rail plus an assumed six foot depth of structure, for a total of 30 feet. The maximum grade is one percent and in general this would mean a 3,000 foot long transition. The straight line distance from the UPRR split to the IH-10 bridge is over 5,500 feet.

The horizontal alignment is conceived to be parallel to the existing track when applicable. The UPRR line includes a new second track as previously described under the Gulf Coast High Speed Rail (GCHSR) initiative. While this initiative may not yet be a committed or funded project, for purposes of a long range planning study, the new rail is shown as an element to be considered and requires coordination. The GCHSR line is shown on the north side of the existing UPRR tracks. Track centers are depicted at 20 foot centers. The spacing of track centers changes to 15 feet on center when the rail is on a structure. This change in dimension is made as a cost-sensitive design. Consequently the new alignment track would run parallel on a retaining wall section close to the proposed GCHSR track before connecting to that track. An access road on embankment is possible on the north side. However, Baird's Bayou and the existing timber viaduct structures on the order of 900 feet for UPRR and 1,000 feet for the KCS would indicate that a structural support system is needed for a portion of the track before transitioning to retaining walls and embankment.

The east tie-in is also further complicated by the at-grade crossing of Old US-90 on the KCS line. A more desirable situation would be a grade separation of this roadway and the KCS tracks. That would necessitate either raising the existing KCS track over Old US-90 or bringing Old US 90 over the KCS tracks. While the road structure would typically be less expensive than a rail structure, the proximity of Baird's Bayou as well as maintaining access across the UPRR track to George Brown Road and access to the Gerdeau Steel complicates any grade separation. In other words, the close proximity of the UPRR crossing to the KCS crossing needs to be treated as one crossing.

Figure 3.9 – Sheet Index Map of Alternatives Evaluated in Appendix



Further to the east on the KCS line is the Vidor siding. Operational consideration could be given to extending the second mainline track to points further east, such as to (or potentially past) the Vidor siding. It should be noted that the Vidor siding track is to the south of the existing mainline track, while the proposed track is on the north side of the existing track.

Any new alignment east of the Neches River and north of the existing KCS tracks will impact the Port of Beaumont's Orange County property. While this part of the Port is currently undeveloped, impacts will be assessed based upon the Port's proposed Master Plan.

The west tie-in is conceived to tie in near the BNSF spur line which occupies the center of Long Avenue. As such, the concept envisions that a new rail corridor providing room for two additional tracks would be acquired. While both sides of Long Avenue could be considered for potential expansion, the north side affords the necessary horizontal clearance between pier supports beneath the US-90 structure over Long Avenue. However, the north side also has an electrical substation located on the northeast corner of Long Avenue and Ewing Street. There are also numerous at-grade crossings to evaluate. Coordination with the BNSF indicated that they found no serious issues with either side of Long Avenue.

The Long Avenue alignment must also cross Martin Luther King Jr. Parkway. The current crossing is at-grade and is equipped with flashers and gates. Martin Luther King Jr. Parkway is six lanes wide and currently carries more than 30,000 vehicles per day. Increased train traffic crossing this roadway may necessitate modifications to the type of warning devices and even a potential grade separation.

Immediately west of Martin Luther King Jr. Parkway is the wye into the BNSF Beaumont Yard. The new track would connect to the run-through track of the BNSF Yard and to provide future double-track service connections. A second track is proposed along with upgrades to the existing track between the BNSF Yard and the existing UPRR-KCS interchange. Along this half-mile long segment, there are seven at-grade crossings.

Overall, the proposed route for a stationary bridge adjacent to IH-10 is approximately 6.0 miles long while the existing route is 5.9 miles long. The operating speeds and lengths along the proposed routes become input to the RTC model and its evaluation of operations.

Lift Bridge

When considering a lift bridge, one must acknowledge that a request for a lift at the existing bridge location will likely translate to a similar request for lift at any new location north of the existing lift bridge. This is especially true for recreational/pleasure craft which are likely utilizing the Beaumont Yacht Club immediately north of the IH-10 bridge. Navigation use by industry vessels may be dependent upon any industrial development including the Port of Beaumont's development of its Orange County facilities. The Port's Master Plan identifies the potential for two container-on-barge loading facilities north of the existing KCS bridge. Such docks would require additional bridge lifts which are not currently occurring. Consequently, the best location for a lift bridge may be as close as practical to and immediately north of the existing lift bridge.

The currently developed parcels of the Port are all located south of the existing KCS river bridge. Current vehicular access from the Jefferson County facilities to the Orange County facilities on the other side of the Neches River necessitates travel north along US-90, then east along IH-10 to Exit 856 continuing east along the Frontage Road to Old US 90 then south across the KCS tracks to George Brown Road crossing the UPRR tracks. All concepts for new alignments being considered (including along the existing river crossing) are located north of the existing river bridge. Consequently to access the new bridges for vehicular use requires crossing the existing KCS tracks on the west side of the river and again on the east side of the river to get to the Port's south parcel.

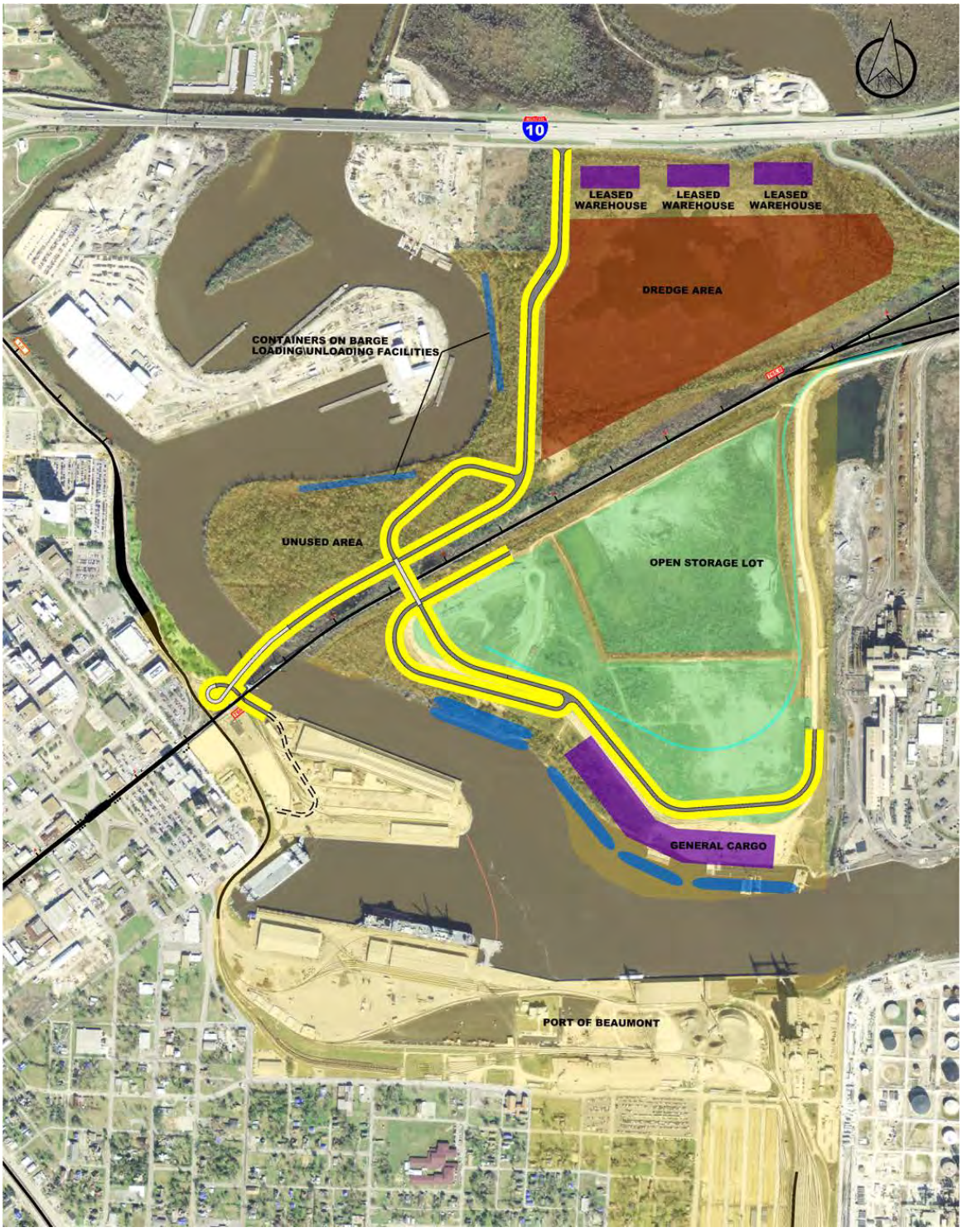
A potential concept for vehicular traffic to cross on the west side is via a grade separation of the existing KCS rail line that utilizes the current "low water" rail crossing beneath the bridge. Review of as-built plans would suggest that the vertical clearance is sufficient for trucks yet only one direction of travel could be permitted because of lateral clearance. However a second opening of similar dimensions is immediately adjacent and could be used for travel in the opposite direction (southbound). A parcel (currently a surface parking lot) in the northwest quadrant from the existing bridge would be utilized as a loop ramp from the passage beneath the bridge to the surface level of the bridge for vehicular traffic. Access from within the Port to this potential loop ramp would require at-grade crossings of numerous service rail lines. Once crossing the river, the vehicles would be on the north side of the KCS tracks.

A concept to connect the south/north parcels of the Port (separated by the railroad) via a grade separation utilizes a crossing point located approximately half-way between UPRR/KCS junction at Tower 31 and the river bridge. The crossing would be over the KCS tracks at a height of 24 feet clearance plus an assumed six foot depth of structure. The maximum grade for trucks to reach this level is 4% which results in a ramp of approximately 750 feet long. Vehicular access to the Port's Orange County facilities may be best achieved along the IH-10 Frontage Road (assuming that access rights have not previously been acquired). However the western edge of the Port property line is located less than 500 feet west of the physical gore point of the eastbound off ramp which may influence where the best location of an access point could be placed. While access via Old US 90 has some merit to limit potential out-of-distance travel of over a mile to reach an entry west of the eastbound gore, the concept of an at-grade crossing of the KCS tracks is less than desirable for a potentially major facility. The crossing location identified also requires a crossing of other industry track. See Figure 3.10 for a depiction of a roadway circulation concept connecting the Port of Beaumont's Jefferson and Orange County facilities.

The closest existing rail corridor north of the existing river bridge is the Port's Interchange Yard with a connection to BNSF's spur line along Long Avenue. Another rail corridor worth potential consideration is the former Southern Pacific (SP) line which has a direct connection on the west side to the UPRR main line. The SP bridge over the Neches River was a bascule bridge. The former timber supports for the approach spans still remain in Orange County. On the other hand, developments in Downtown Beaumont as well as the Port's Interchange Yard are physical issues that would result in potentially significant impacts.

Figure 3.10 – Roadway Circulation Concept

Connecting Port of Beaumont Jefferson and Orange Counties



A new lift bridge adjacent to the existing lift bridge could be expected to experience vertical clearance issues similar to the "low water" rail crossing beneath the existing bridge. Design options are limited to improving the clearance. Further lowering of the track creates additional constraints with water levels. Raising the track would further restrict the types of rail cars that could pass through. And raising the new bridge to a higher elevation to create additional clearance to solve one issue, would create another issue by interfering with the ability to maintain the existing diamond crossing. While a phased approach might be considered, the clearance at the existing river bridge would remain a constraint until the existing bridge may be replaced. In fact, the Port's implementation of a new rail access and expanded capacity at Dreyfus Yard are intended to allow for the removal of the Port's Interchange Yard. With the completion of these improvements, and the redirection of Port traffic, the low water level crossing should become a moot issue.

If one were to consider a lift bridge south of the existing KCS river bridge then a potential location could be along the Port's eastern edge (adjacent to Gerdeau Ameristeel) and cross the Neches River onto Jefferson County side of the Port of Beaumont connecting into the Dreyfus Yard. By connecting to the Dreyfus Yard, rail system connections could be made into the KCS at the wye north of Chaison Yard. While potentially physically possible, any crossing south of the Port of Beaumont will experience a significant increase in the number of bridge lifts to accommodate navigation traffic. Consequently this concept was dismissed.

When an alignment connects to the existing rail corridor west of the KCS- UPRR split at Tower 31, train movements to either rail corridor are direct. However, this at-grade connection will cause delays at Old US 90 and limit access to the industries and the Port of Beaumont due to trains waiting to cross the bridge. The horizontal alignment is conceived to be parallel to the existing track and again this study assumes a proposed second track associated with the GCHSR initiative. Consequently this alignment's new track should be considered a third track with the second track extending eastward along the KCS line to Vidor. To accomplish a grade separation, bringing Old US 90 over the KCS tracks would appear to be a logical opportunity.

Again any new alignment east of the Neches River and north of the existing KCS tracks will impact the Port of Beaumont's Orange County property. This time the lift bridge river crossing location and approach alignment bisects the Port property and creates difficulties for access across the railroad tracks and potentially creating useless remnants of land of reasonable size. While this part of the Port is currently undeveloped, impacts will be assessed based upon the Port's proposed Master Plan.

The west tie-in is conceived to tie in near the Elizabeth Street turn of the BNSF spur line along Long Avenue. Improvements for operating speed and future double track push the alignment east of the existing BNSF track close to the edge of Brake's Bayou and likely will require a retaining wall along the west bank of the bayou. Similar issues as already described along Long Avenue and the south connection on the BNSF line to UPRR would remain with an equivalent number of crossings and potentially a few more associated with Pine Street unless Pine Street is closed to through traffic as conceived and shown in the Appendix exhibits.

This proposed route for the lift bridge is approximately 6.3 miles long while the existing route is 5.9 miles long. Again, the operating speeds and lengths along the proposed routes become input to the RTC model and its evaluation of operations.

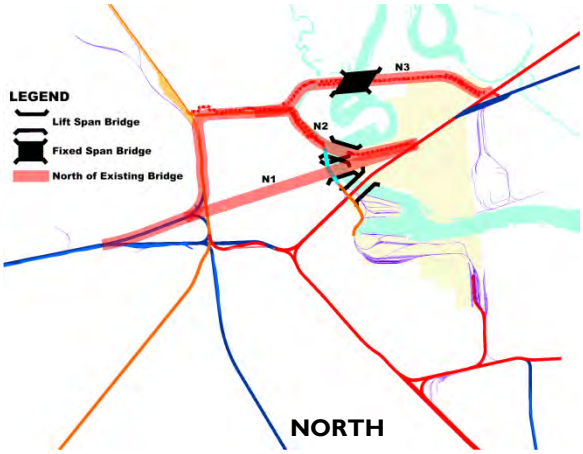
An alternate alignment could move the new river crossing a bit further south and utilize the former SP corridor. While much of the former SP corridor remains intact, the eastern edge close to the Neches River within the study area is densely developed and is designated a Historic District. This presents a challenge in finding an alignment that does not have significant property or other direct impacts. The alignment concept would require the new rail to be elevated over the BNSF track which in turn provides a higher vertical clearance for the river span when in the closed position. Nonetheless, the number of lifts is estimated to remain the same as the minimum requested clearance (based upon sample data) for the existing lift bridge was a 30 foot lift. The alignment would then remain elevated on structure and traverse through Downtown over several streets including the one-way couplet of US-90, Martin Luther King Jr. Parkway and the BNSF line before beginning descending to meet existing track. A grade separation would also be envisioned at 4th Street and dependent upon tie-in locations, a widened grade separation may also be needed at 11th Street.

Summary of Alternatives Considered, Screened and to be Evaluated

A "long list" of options were considered and screened. Concepts of high-level structures (with a vertical clearance of 150 feet) were considered but found to be both physically and financially impractical. Concepts for a lift bridge located south of the existing KCS bridge would have significant impacts on river navigation and the increase in the number of lifts would adversely affect rail operations. And while consideration of a former rail corridor is philosophically often a reasonable approach, the former SP alignment through Downtown Beaumont is heavily developed with numerous street crossings. Creating an elevated rail corridor through Downtown Beaumont would have significant property and visual impacts. Figure 3.11a depicts the broad corridors of these concepts considered and screened. Figure 3.11b depicts the broad corridors of the concepts to be evaluated in the next chapter.

Design aspects to accommodate the GCHSR are also considered and attempt to follow the guidance provided in the August 2004 plan and profile sheets at a 1" equals 3000' scale through Beaumont. Those plans include, as part of a Phase 2 component of the GCHSR study, a proposed rail line along the existing UPRR-KCS rail corridor on the north side of the existing rail alignment. This concept is directly reflected by illustrating a third main west of the GCL junction through UPRR's east yard and continuing further westward to the directional running split. In Orange County, a proposed rail line is also shown along the existing UPRR-KCS rail corridor on the north side of the existing rail alignment. Placing a second UPRR track on the north side of the existing rail requires a crossing of the KCS rail. Placing the second UPRR track on the south side might eliminate the need for a crossing yet with the extensive existing right-of-way width on the north side between the Neches River bridge and the KCS-UPRR split at Tower 31, design options were considered to accommodate a crossing with proposed rail on the north side.

Figure 3.11a – Concepts Considered





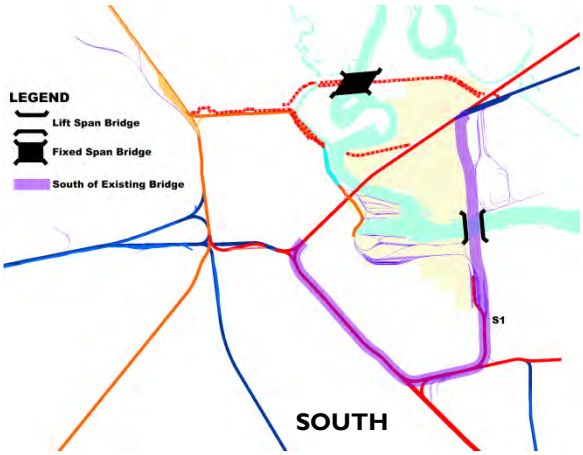
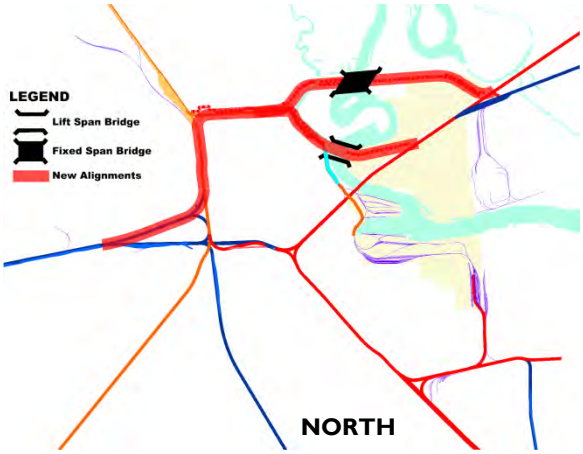


Figure 3.11b – Concepts to be Evaluated





In order to provide a level at-grade rail crossing, the new rail alignment should cross at a tangent and then begin its horizontal curvature. This geometric design may necessitate minor additional right-of-way acquisition. Another option could be grade separation, though obviously this has cost implications. An assessment of an appropriate design can be determined when more information on potential future operations is available. Considerations may even need to be given to the potential for double track alignments coming together along both the UPRR and the KCS routes at the KCS-UPRR split at Tower 31.

Three build alternatives are evaluated in more detail and include:

- Existing Alignment
    - North side of KCS tracks (lift span bridge)
- New Alignments
    - Interstate 10 alignment (fixed span bridge)
    - Pine Street alignment (lift span bridge)

RTC model assumptions

For the alternatives with new railroad alignments, the RTC model assesses an initial single-track configuration with centralized traffic control. Physical planning allows for expansion to double-track configuration though that concept does not affect operations. Maximum permitted speeds are assigned to the various rail segments based upon initial horizontal and vertical curvature as well as existing of adjacent operating speeds. The model is coded in such a way that the new alignment (whichever one is being tested) is preferred, but train traffic will be assigned to the existing route if it minimizes congestion delay. The modified bridge openings for future conditions (16 lifts per week) are retained on the existing railroad route in all alternative simulations, so that the bridge times are a constant, not an independent variable that would skew results.

With the alternate of the double track crossing of the existing route, a second track is simply added in the model to the KCS line relatively independent of physical design elements. Due to the close proximity of the two bridges, it was assumed that any call to lift the bridge for maritime traffic would require the new lift bridge to operate at the same time as the existing lift bridge.

Initially, the alternative alignments previously described in this chapter were screened utilizing existing train traffic volumes. The IH-10 alignment and the Pine Street alignments utilize some common segments including the North-South corridor and the Long Avenue corridor (both currently operated by BNSF). For location of these segments see Sheet Index Maps 6 and 7 respectively. The initial RTC model runs discovered that the North-South corridor was forecasted to experience a significant increase in delays as an existing single-track operation. Consequently, additional RTC model runs with projected train traffic were modified to include a double-track operation. The RTC model does not specifically include the existing BNSF Long Avenue rail as part of its network, although train traffic is accounted for in the model. And since the design concept is to construct a separate new track adjacent to Long Avenue, the only modification was to add the proposed track as part of the RTC model run.

For the IH-10 alignment, a significant operational modification included the railroad grade separation at the KCS-UPRR split at Tower 31 on the east side of the Neches River. Initial design thoughts were to physically tie into the existing rail corridors as quickly as possible in order to minimize construction costs and probable impacts. However the navigation vertical clearance and minimum desirable grades physically required additional horizontal length for the profile to transition over the Neches River before return to existing ground and the existing rail routes. On the east side of the Neches River, this resulted in the new alignment creating a split where one rail tied into the KCS towards DeQuincy while another rail was grade separated over the KCS line before tying into the UPRR towards Connell. This rail grade separation resulted in operational improvements on the east side of the Neches River that was not evident in the alternative without this rail grade separation.

Due to the project scope addressing only the Neches River area, the model assumptions change only the RTC's model rail infrastructure or network within the Beaumont area. Other potential improvements discussed in prior studies, such as the Texas Rail Plan, specifically those in and around the Houston area which would have a direct and positive effect upon operations east of Houston towards Beaumont are not included in the rail network for this study.

4.0 Evaluation of Alternatives

The different route options are evaluated by means of a selection of performance measures. To organize the evaluation, the framework provided by the Texas Department of Transportation's *Guidebook for Rail Project Prioritization* (May 2012) was consulted. As this is a rail capacity/facility improvement project, the measures used focus on the Transportation impacts, e.g., congestion relief and system capacity, of the proposed infrastructure changes. While the focus is on transportation impacts, an assessment is also made of an alternative's performance in the areas of Sustainability, e.g., environmental / social, and Implementation, e.g., project development, as data and known conditions permit.

Three alternative crossings of the Neches River are to be evaluated. These include an alignment along the existing river crossing corridor as well as new alignment alternatives with different types of river bridge crossings; stationary or lift span. Essentially these were determined to be the best of the options considered for alignment location and bridge type. The three alternatives are:

- Add capacity adjacent to existing KCS alignment with new lift bridge, as shown in Figure 4.1
- Add capacity on new alignment adjacent to Interstate-10 with stationary bridge, as shown in Figure 4.2a, and
- Add capacity on new alignment along Pine Street corridor with new lift bridge, as shown in Figure 4.2b

Figure 4.1 – Existing Alignment Evaluated
(New lift bridge adjacent to existing)

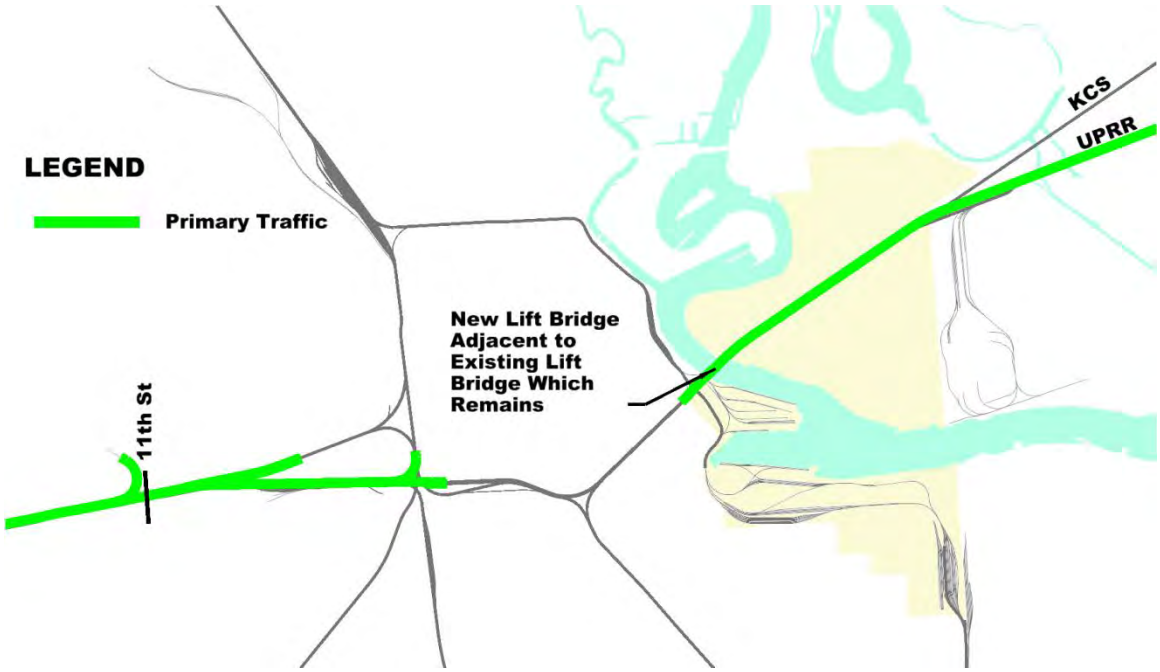


Figure 4.2a – New Alignment Evaluated (IH-10 Fixed bridge)

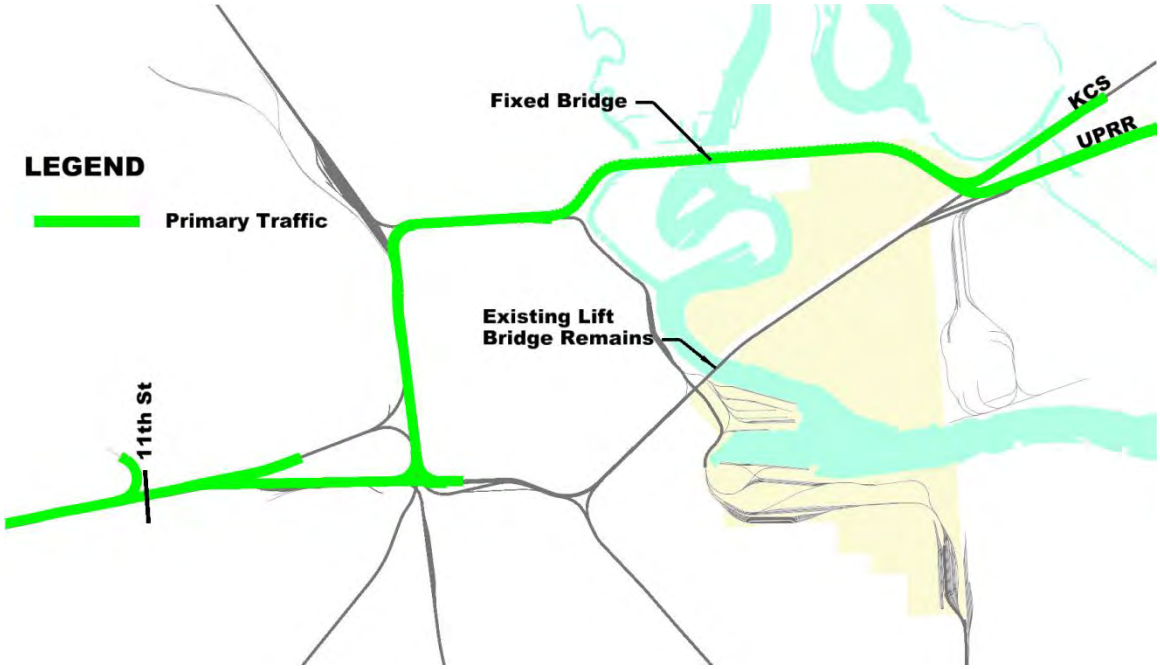


Figure 4.2b – New Alignment Evaluated (Pine Street Lift bridge)



Evaluation Measures

The measures used in the evaluation are discussed below. The performance of rail system given the assumptions underlying each alternative was estimated using Rail Traffic Controller (RTC, Berkeley Simulation Software) and GradeDec.net (Federal Railroad Administration). Each alternative will generate a set of performance measurements for the overall network. These results will be compared to the projected base case, i.e., the Project No-Build. Results may also be reported for the individual railroads (though at an aggregate level) to assess whether impact vary by carrier from a given alternative.

Transportation

The evaluation of transportation impacts includes a review of river, rail, and highway operations. The rail operations are based upon the output from the RTC model while highway operations focus upon the output from GradeDec.net for the at-grade rail-highway crossings along the corridor being evaluated. River impacts are discussed based upon the degree of obstruction to navigation traffic.

Rail Operations

All alternatives offer the option to route trains via either the existing rail lines or the alternate route, depending upon circumstances. In effect when combined, the existing route and proposed alignments create at least two main tracks, and to some extent three, between the UPRR Beaumont Yard and the KCS-UPRR split at Tower 31. This added capacity offers more flexibility than just the existing route alone.

The rail operations measures developed by RTC include total system train miles, total system weekly trains and total system weekly train delay. While 582 trains are dispatched, not all trains complete their runs within the week long measurement window. Delays accumulate over the week and some trains are behind the measurement window at the time it expires. The evaluation of an improved river crossing to provide double track capacity along either the existing route or a new location, as presented in Table 4.1, shows a significant reduction compared to the "no-build" condition (on the order of a factor of three to four). However in comparison to existing conditions this represents an increase in delay by a factor of two or more. Train traffic has also doubled and the delay hours per day may not be unrealistic when considering the Beaumont area as limited distance of a slow-speed terminal with the existing bridge as a bottleneck.

Table 4.1
RTC Freight Train Performance – Alternatives with 2035 projected volumes

Projected 2035 Case	Train Count	Delay Hours / Day	Delay Minutes/100 Train-Miles	Bridge Lifts per Week	# tracks crossing Neches River
"no-build"	582	69.7	306.4	16	1
double track existing route	573	23.4	158.1	16	2
IH-10 new alignment alternative	573	17.3	113.9	16	2

The IH-10 rail alignment alternative, as a fixed bridge, attracts approximately 37% of the total weekly train traffic. However, this represents nearly half of what could be classified as "through" train traffic crossing the Neches River. This amount of rerouting of trains is an indication that the existing rail corridor has a sizeable degree of local service that crosses the Neches River, including trains accessing the Port of Beaumont. While the new alignment option represents an overall operational improvement compared to the double tracking of the existing alignment, all of the options are more congested than current conditions. Comparing the new alignment between existing and projected train volumes, it becomes obvious that the increase in train traffic has the most significant effect upon operations.

River Navigation Impacts

River navigation impacts address the potential to affect the movement of water borne vessels. The concept of additional capacity with a second lift span river bridge adjacent to the existing bridge should not adversely affect river navigation. One central clearinghouse for raising the lift bridge(s) would remain. However, since the two structures would be aging at different rates, the older structure may experience more malfunctions and require more maintenance. The concept of a second lift bridge only 0.3 nautical miles north of the existing bridge, such as shown with the Pine Street alignment, will require both bridges to be in the open position to accommodate river traffic and could potentially increase rail delays. The fixed span rail bridge concept adjacent to the IH-10 alignment at the same vertical clearance afforded by the IH-10 structure would not have any impacts to river navigation, yet the existing lift bridge would still remain.

Key At-Grade Crossings

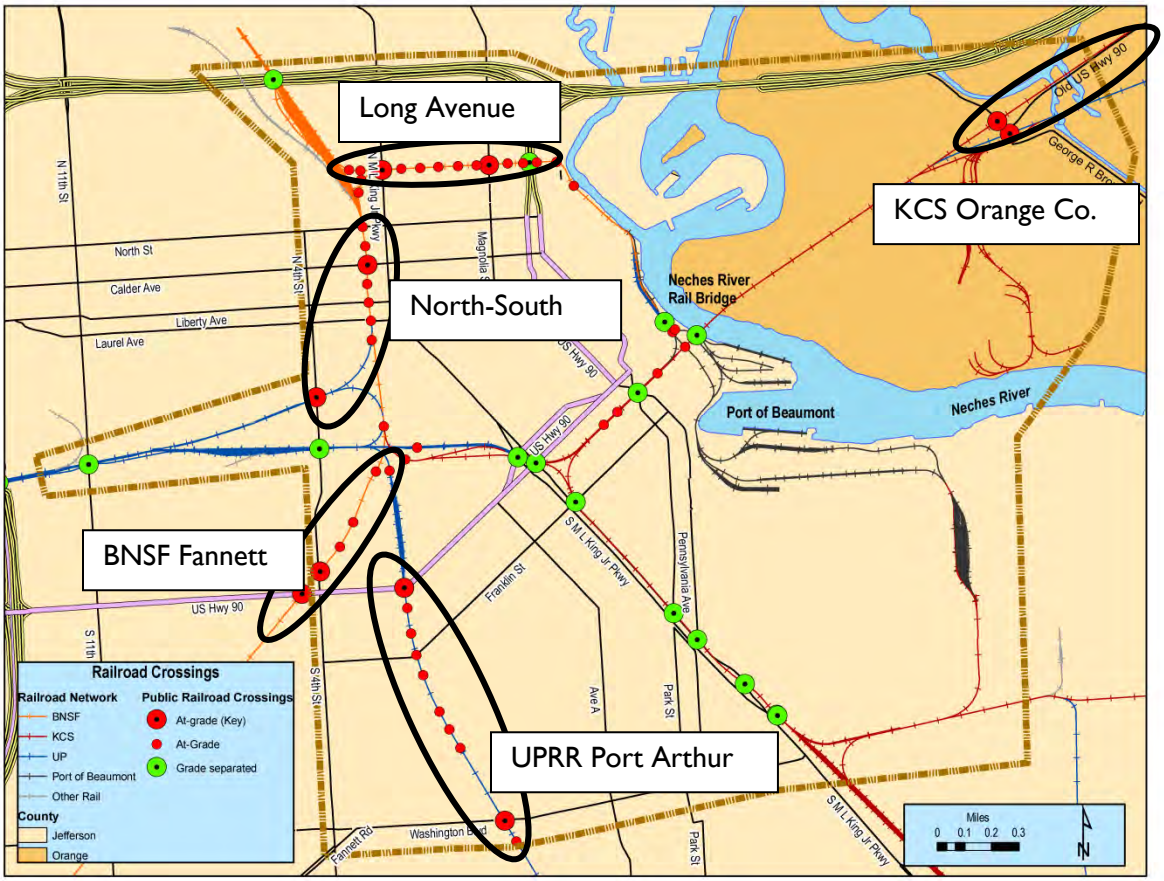
An assessment of critical at-grade crossings for grade separation was conducted utilizing the GradeDec.net software. The software package includes the base condition (type of crossing control) with alternate improvements in a hierarchical manner from passive control to lights, to gates, to new technology to grade separation or closure. A benefit – cost ratio is then determined based upon inputted train volumes, growth rates (both for rail and road) as well as estimated costs for improvements. To conduct the assessment, the input was entered using the base information developed by the RTC runs used for this analysis for the new and existing track configurations. A grade separation concept was developed for the segments analyzed along with an opinion of probable costs. The evaluation can help determine if a grade separation is beneficial.

The five rail segments for assessment via GradeDec.net and are shown in Figure 4.3. These segments were selected as representing corridors with both heavily trafficked vehicular and railroad at-grade crossings based upon projected conditions and their options. Information on these critical crossings and others along the corridors being evaluated is provided in the Appendix.

Three of the five rail segments are essentially evaluated under future conditions (increased train and vehicular volumes) and include:

- BNSF Gulf Silsbee MP 62.9 towards Fannett
- UPRR Lafayette branch Sabine towards Port Arthur, and
- KCS/UPRR in Orange County

Figure 4.3 – Crossing Corridors
(Key at-grade crossings evaluated for grade separation)



The remaining two rail segments have the potential to be directly affected by the alternate alignments under consideration. These include:

- Long Avenue and
- North-South segment (supplemented with 4th Street)

The BNSF Gulf Silsbee segment is assessed from milepost (MP) 74.58 – Washington Blvd. to 76.29 Crockett St., a distance of less than two miles. A total of ten crossings are included in this segment of the BNSF corridor. Grade separations were considered at US-90 (College) and immediately adjacent at 4th Street. Because of the proximity to each other and the major signalized intersection of College and 4th Streets, the grade separations must be viewed together and not separately. The construction costs are estimated in excess of $18 million. Right-of-way costs associated with the surrounding commercial properties may be in excess of $6 million. The overall benefit/cost ratio is significantly less than 1 at 0.229. The major source of benefits (38%) is from travel time savings.

The UPRR branch towards Port Arthur is assessed from milepost (MP) 28.35 – Euclid Ave. to 29.98 Crockett St. a distance of approximately 1.5 miles. A total of eleven crossings are included in the

corridor. Grade separations were considered at Washington Blvd. and at US-90 (College). These crossings are nearly one mile apart from each other. The construction costs are estimated on the order of $9 million for each crossing. Right-of-way costs could range from$1 to $3 million. The overall benefit/cost ratio is significantly less than 1 at 0.299. The major source of benefits (54%) is from travel time savings and is associated with US-90 and its higher level of traffic volume.

The KCS Orange County segment is assessed from milepost (MP) 761.03 – N Dewitt St. to 764.61 Old US-90 a distance of more than 3.5 miles. A total of five crossings are included in the corridor. A grade separation was considered at Old US-90. This crossing is physically very close to the UPRR track as well as the access road (George Brown Drive) leading to the Port of Beaumont. The construction cost is estimated on the order of $11 million for the grade separation of both crossings. Right-of-way costs could reach up to $2 million. The overall benefit/cost ratio is significantly less than 1 at 0.241. The major source of benefits (67%) is from safety benefits. The analysis as conducted only considers the Old US 90 crossing for potential benefits.

The Long Avenue segment is assessed for a distance of approximately 2/3rd of a mile. The existing track is operated by BNSF and is located in the middle of the roadway. A total of ten crossings are included in the corridor under evaluation. Several scenarios could be considered, ranging from a "no-build" scenario to the alternative alignment adjacent to the existing rail line. The concept for rail operations within this corridor would leave the existing BNSF track as is for service to the port and a new alignment would accommodate "through" movements and cross the river near IH-10. Currently only two trains per day utilize the existing track. An estimate of as many as 16 trains per day could be diverted to the new alignment under existing train volume conditions on "opening day" based on RTC simulations. Growth in future years is forecasted to 32 trains per day. Grade separations were considered at MLK Jr. Parkway and at Magnolia Street within the corridor limits. These crossings are nearly 0.4 miles apart from each other. The construction costs are estimated in excess of $13 million and $9 million respectively. Combined right-of-way costs approach $1 million. The overall benefit/cost ratio is 0.863 based upon an initial 16 trains per day. The major source of benefits (78%) is from vehicular travel time savings. The overall benefit/cost ratio increases to more than 1 at 1.596 based upon the future 32 trains per day. The major source of benefits (85%) is from travel time savings. While not specifically evaluated, the "no-build" scenario with just the existing service track would result in a benefit/cost ratio less than 1.0.

The North-South segment is assessed for a distance of approximately ¾ of a mile. The existing crossings include three different sets of milepost designations. A total of eight crossings are included in the corridor under evaluation. Again, several scenarios could be considered, ranging from a "no-build" scenario to the alternative alignment adjacent to the existing rail line. The concept for rail operations would leave the existing BNSF track as is for service use and a new alignment would accommodate "through" movements. Currently as many as six trains per day utilize the track. An estimate of as many as 16 trains per day could be diverted to the new alignment under existing train volumes resulting in a total of 22 trains per day estimated in the Base Case RTC model. Grade separations were considered at Calder Ave. and at 4th Street. These crossings are nearly 0.6 miles apart from each other. The construction costs are estimated at approximately $9 million each. Combined right-of-way costs approach $1.2 million. The overall benefit/cost ratio is significantly less than 1 at 0.240 based upon an

initial six trains per day. The major source of benefits (49%) is from travel time savings. The overall benefit/cost ratio increases to close 1 at 0.805 based upon the new alignment diversion with a total of 22 trains per day. The major source of benefits (78%) is from travel time savings.

Table 4.2
Highway and Railroad Crossing Evaluations

	BN Fannett	UP Port Arthur	Long Avenue		North-South corridor		KCS Orange Co.
			New (16)	New (32)	Existing	Alternate	
Safety Benefits ($1,000)	$ 972	$ 816	$ 957	$ 1,083	$ 582	$ 828	$ 1,145
Travel Time Savings ($1,000)	$ 1,493	$ 2,792	$ 10,888	$ 21,775	$ 1,921	$ 10,242	$ 18
Environmental Benefits ($1,000)	$ 7	$ 14	$ 51	$ 101	$ 8	$ 46	$ -
Veh Operating Cost Benefit ($1,000)	$ 117	$ 216	$ 714	$ 1,428	$ 118	$ 630	$ 1
Network Benefits ($1,000)	$ 9	$ 16	$ 46	$ 93	$ 13	$ 66	$ -
TOTAL BENEFITS ($1,000)	$ 3,918	$ 5,193	$ 13,903	$ 25,719	$ 3,905	$ 13,080	$ 1,703
TOTAL COSTS ($1,000)	$ 17,145	$ 17,393	$ 16,116	$ 16,116	$ 16,242	$ 16,242	$ 7,802
Net Benefits ($1,000)	$ (13,227)	$ (12,200)	$ (2,213)	$ 9,603	$ (12,336)	$ (3,162)	$ (5,378)
Benefit Cost Ratio	0.229	0.299	0.863	1.596	0.240	0.805	0.241

In summary, of the five segments analyzed for grade separation, only the Long Avenue corridor has a positive benefit cost ratio and that is only with increased and diverted train traffic associated with the new rail alignment alternative adjacent to IH-10. The existing low volume service line today would not reach a level to suggest the need for a grade separation. If a new rail alignment alternative is pursued, additional benefits could be investigated with the potential closure of one or more local streets' at-grade crossing along Long Avenue.

Sustainability

The evaluation of sustainability impacts includes a review of potential environmental and social impacts. Elements from the transportation and implementation impacts cross over to provide additional input on such factors as property impacts and transportation which have an effect upon air quality and energy use.

Property Impacts

Right of way acquisition includes right of way impacts created by new railroad construction and any associated roadway improvements, such as grade separations. Four quantitative measures are utilized based on information available in the Jefferson and Orange County Assessor's files and interpretation of aerial photography. These quantitative measures are: Number of Parcels which quantify the parcels that might be impacted, the total area of those parcels, and the area that might be most directly impacted or acquired, and Parcel Ownership which indicates an interpretation of ownership for each parcel based upon the name associated with the parcel in the Assessor's File. Another factor is the land use which was determined through a review of aerial photography. Parcels were categorized as being residential, commercial / industrial, open space / vacant, or other.

The number of properties impacted was determined by combining parcels with a common account number in the Assessor's file. Note however, that not all parcels in the file had account numbers. Assessed value for Jefferson County parcels was estimated by summing the land and improvement value

for each identified property. As was the case with the account numbers, not every property had land or improvement values. This assessed value should not be interpreted as representing probable costs to acquire the right of way as it is not a reflection of market value, does not include any relocation assistance, and values were not available for all parcels potentially impacted. Nonetheless it allows for a relative comparison. Table 4.3 summarizes the results of the analysis of potential right-of-way impacts. The Appendix contains a series of maps that illustrate the parcels potentially impacted by each alignment, the assumed ownership of each parcel, and the land use for each parcel.

Table 4.3 – Potential Property Impacts

ROW Impacts	Alternatives					
	Existing Alignment		New Alignments			
			IH-10 Fixed Bridge		Pine Street Lift Bridge	
	Jefferson Co.	Orange Co.	Jefferson Co.	Orange Co.	Jefferson Co.	Orange Co.
Parcels						
Number	59	1	76	6	85	2
Area (acres)	17	54	48	745	22	268
Acres Impacted	10	9	15	16	9	4
Parcel - Ownership						
Private	14	0	69	2	71	0
Railroad	1	1	0	2	2	1
Utility	0	0	2	0	3	0
Government	27	0	3	1	6	1
Institutional	10	0	2	0	2	0
Unknown	7	0	0	0	1	0
Land Use						
Residential	0	0	15	0	15	0
Commercial / Industrial	17	0	29	1	22	0
Open Space / Vacant	16	0	29	3	45	1
Other	26	1	3	2	3	1
Properties						
Number	18	1	52	6	56	2
Total Assessed Value	$1,270,000	N/A	$1,570,000	$4,870	$2,180,000	$938

Table Note: Not all parcels had a value associated with them. Total Assessed Value includes only parcels where a valuation was available and adjusts the value for parcels that may only be partially impacted.

Potential Environmental Impacts

The potential for environmental impact is driven by construction activities associated with the implementation of an alternative's infrastructure. The focus is upon key environmental issues and impacts as well as the complexity of permits. Several of the attributes described under the existing conditions such as population, households, income, race and employment are represented by the surrogate of property impacts by land use categories. Residential impacts would affect population and

households, while commercial and industrial impacts would affect employment and income. Impacts to water resources including wetlands and floodplains are indicated by assumed areas of potential right-of-way. Often these natural areas are habitat and consequently serve as a surrogate for threatened and endangered species. For a list of threatened and endangered species for Jefferson and Orange counties from the Texas Parks and Wildlife Department, see the Appendix. Specific sites that could be affected are identified for archeological, historic and community facilities including public lands and parks. Impacts to these attributes are represented by four degrees of impact ranging from no impact to low impact to medium impact to high impact. The degree of impact is neither based upon an absolute value nor is it relative to the other alternatives. A summary of potential environmental impacts is shown at the end of this section in Table 4.4.

Superfund Site - Superfund is the name given to the environmental program established to address abandoned hazardous waste sites. It is also the name of the fund established by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended. This law was enacted in the wake of the discovery of toxic waste dumps such as Love Canal and Times Beach in the 1970s. It allows the EPA to clean up such sites and to compel responsible parties to perform cleanups or reimburse the government for EPA-lead cleanups. There is one Superfund site within the Study Area. The name of the site is International Creosoting located at 1110 Pine Street, Beaumont, Jefferson County. The new IH-10 alignment runs through the middle of this site. This site is listed as number 11 out of 25 on the State of Texas Superfund registry that identifies those facilities that have been determined to pose an imminent and substantial endangerment. The Registry, along with a background and history of the International Creosoting site, appear in the Appendix.

Ecologically Significant Stream Segment - As a result of the passage of Texas Senate Bill 1 (SB1) in 1997, water planning in Texas became the domain of regional planning groups rather than the Texas Water Development Board (TWDB). As a part of the planning process, each regional planning group may include recommendations for the designation of ecologically unique river and stream segments in their adopted regional water plan. Stream segment designation is to be supported by a recommendation package that includes a physical description, maps, photographs, literature citations, and data pertaining to each candidate stream segment.

The Neches River is an Ecologically Significant Steam Segment from the confluence with the Sabine Lake in Orange County upstream to Town Bluff Dam in Jasper/Tyler County. Documentation available from the State of Texas Parks and Wildlife Department describes this stream segment as follows:

- Biological function - extensive freshwater wetland habitat displays significant overall habitat value[27]
- Riparian conservation area - Big Thicket National Preserve; Lower Neches River Wildlife Management Area ; Part of the Great Texas Coastal Birding Trail
- High water quality/exceptional aquatic life/high aesthetic value - exceptional aesthetic value[28]
- Threatened or endangered species/unique communities - unique, exemplary, and unusually extensive natural community (NPS, 1995); Paddlefish (SOC/St.T) (TPWD, 1998) ; The most abundant and diverse unionid assemblage found to date in Texas; largest known population of

sandbank pocketbook freshwater mussels in Texas; one of the two largest populations of rare, endemic Texas heelsplitter freshwater mussels remaining[29]

Emergent Wetland – According to the USGS, the Emergent Wetland Class is characterized by erect, rooted, herbaceous hydrophytes, excluding mosses and lichens. This vegetation is present for most of the growing season in most years. These wetlands are usually dominated by perennial plants. All water regimes are included except subtidal and irregularly exposed. In areas with relatively stable climatic conditions, Emergent Wetlands maintain the same appearance year after year. In other areas, such as the prairies of the central United States, violent climatic fluctuations cause them to revert to an open water phase in some years (Stewart and Kantrud 1972). Emergent Wetlands are found throughout the United States and occur in all Systems except the Marine. Emergent Wetlands are known by many names, including marsh, meadow, fen, prairie pothole, and slough.

Forested / Shrub Wetland – According to the USGS, the Class Forested Wetland is characterized by woody vegetation that is 6 m tall or taller. All water regimes are included except subtidal. Forested Wetlands are most common in the eastern United States and in those sections of the West where moisture is relatively abundant, particularly along rivers and in the mountains. They occur only in the Palustrine and Estuarine Systems and normally possess an overstory of trees, an understory of young trees or shrubs, and an herbaceous layer.

Table 4.4 – Potential Environmental Impacts

Environmental Challenge	Alternatives		
		New Alignments	
	Existing Alignment	IH-10 Fixed Bridge	Pine St. Lift Bridge
Superfund Site		Yes	
Ecologically Significant Stream Segment	Yes	Yes	Yes
Freshwater Emergent Wetland		Yes	
Freshwater Forested /Shrub Wetland		Yes	Yes
FEMA Q3 Zone A (100 Year)	Yes	Yes	Yes

Implementation

The evaluation of implementation impacts includes a review of probable construction costs as part of a cost effectiveness assessment. Property impact costs, while not specifically estimated at this time, are discussed in broader terms as an influence upon project development.

Probable Construction Costs

The construction costs for the alignment concepts have been developed based upon major elements such as the river crossing bridge as well as the length of structural approach spans. These approach spans can be very long considering the potential height of the proposed rail, topography, and local soil conditions. For alignment comparisons, the quantity and associated costs of the rail were estimated

based upon new rail alignment and existing rail alignment. The existing rail alignments also considered whether the proposed track was within the existing rail right-of-way or adjacent to but outside existing rail right-of-way. The costs of track was varied depending upon upgrade of existing track, new track on-grade, new track on fill (typically up to 16 feet), new track on structure, and new track on river bridge. Only one of the two potential tracks is initially proposed for new track on structure and the river bridge. In order to be consistent with the structural availability for a second track, the earthwork for the future second track is included. If necessary, new rail sidings and connections are quantified. At this stage, the rail traffic control and signaling system as well as improvements to crossing warning devices at highways are included in the contingencies. Later on as roadway modifications (if necessary) are defined, separate line items may be included.

The costs shown in Table 4.5 only account for construction activities in today's 2012 dollars. The costs do not include right-of-way acquisition, design, permitting or construction inspection costs, or any annual maintenance costs. The potential for such costs should be considered when comparing alignments, particularly on those alignments that have significant property impacts. For comparative purposes, a summary of assessed values for potentially affected properties is provided and discussed in the sustainability section.

It is worth noting that when planning for a double track structure yet only initially constructing one of the two tracks, additional up-front costs are incurred to build a structure capable of supporting the second track. Consequently, alternatives with lengthy bridge structures include costs for initial construction but also future expansion. The new alignment adjacent to Interstate 10, which is primarily structure along its entire length, has initial costs to accommodate future expansion that are greater than the costs to install future track.

Table 4.5 – Probable Construction Costs

Including contingencies in 2012 $ millions

Segment	Existing Alignment	New Alignment	
	Lift Bridge	IH-10 Fixed Bridge	Pine Street Lift Bridge
Orange County	$ 40	$ 185	$ 35
Neches River bridge	$ 40		$ 80
Long Avenue	$ -	$ 5	$ 5
BNSF Connection	$ -	$ 10	$ 10
UPRR 3rd Main	$ 40	$ 40	$ 40
TOTAL	$ 120	$ 240	$ 170

Benefits

The projected conditions provide a means to assess potential future operations under an assumed growth scenario. Operational analysis indicates that current train volumes would benefit from a second track along the current river crossing. A no-action alternative would result in significant congestion. When reviewing the forecasted train volumes with additional track across the Neches River, delays are reduced by half when compared to a single track (existing physical conditions) scenario. In addition, as modeled through RTC, the lift bridge operations result in some delays, however that level is relatively minor. Future growth will demand a second track across the Neches River.

The IH-10 alignment with its fixed bridge has greater overall benefits than a second track on the existing lift bridge alignment. However review of where the benefits accrue indicates that the grade separation at the KCS-UPRR split at Tower 31results in a significant portion of those reduced delays.

Summary of Alternatives

Four alternatives have been assessed under forecasted conditions. The projected "no-build" alternative attempts to establish a baseline for comparison. This alternative establishes the fact that Beaumont's rail network would benefit from an additional river crossing. In addition to the "no-build" alternative, three "build" alternatives were evaluated that involved improving capacity by providing additional track as well as exploring operational issues associated with the lift bridge over the Neches River. The three alternatives concentrated on improving the existing rail route with a new adjacent lift bridge, a new rail alignment also with a lift bridge near the existing rail corridor, and a new rail alignment with a fixed river bridge crossing north of the existing rail corridor. A brief summary of the pros and cons of each build alternative are provided.

<u>Expand existing route to double track river crossing (lift bridge)</u>
This keeps the existing bridge in place and assumes it to be operational with a projected 16 lifts per week in the future case. In addition, a second lift bridge is considered immediately adjacent and north of the existing structure. While the RTC model's performance measures with the double track conditions improve over the "no-build" conditions, the delays under the projected train volumes are greater than under the 'base case'. This alignment alternative does not intrinsically address the delays associated with the KCS-UPRR split at Tower 31. As the proposed improvements remain adjacent to or within the existing rail corridors, impacts to the community are minimized. Infrastructure costs only for this improvement in the Beaumont area are estimated in 2012 construction dollars approach $120 million.

<u>New Pine Street alignment (lift bridge over Neches River)</u>
This keeps the existing bridge in place and assumes it to be operational with a projected 16 lifts per week. The Pine Street alignment was initially tested through the RTC model with a potential fixed river bridge crossing. However physical limitations determined that the only practical fixed river bridge crossing lies immediately adjacent to the IH-10 corridor. Consequently it was determined that the Pine Street alignment would be analyzed with a lift bridge. Nonetheless, that new lift bridge location created its own set of design issues that result in additional costs compared to constructing an adjacent rail bridge to the existing rail's river crossing. The alignment's tie in on the west side is likely to create significant adverse impacts to a neighborhood with property acquisition as well as impacts to vehicular operations at critical at-grade crossings that will only add to the probable construction costs. This

alignment alternative does not intrinsically address the delays associated with the KCS-UPRR split at Tower 31. Costs for this alignment are estimated in 2012 construction dollars approach $170 million.

New IH-10 alignment (fixed bridge over Neches River)

This keeps the existing bridge in place and assumes it to be operational with a projected 16 lifts per week. The new IH-10 rail alignment has potentially significant operational benefits by addressing two key issues, the delays associated with the lift operations of the river crossings as well as the grade separation of the KCS-UPRR split at Tower 31 on the east side of the Neches River. However, the alignment tie in on the west side is likely to create significant adverse impacts to a neighborhood with property acquisition as well as impacts to vehicular operations at critical crossings that will only add to the probable construction costs. This alignment is located close to an EPA Superfund site. Costs for this alignment are substantial and are estimated in 2012 construction dollars approach $240 million. While viewed from a railroad operational viewpoint this new alignment is the best within this study area. The overall rail network operations indicate that more systemic improvements outside the Beaumont area are required. The high degree of cost and probable impacts may be offset by any additional operational benefits.

Funding

Up to this point in the evaluation of alternatives, the emphasis of the analysis has been on the benefits, costs, and impacts of the different alternatives. Given that the alternatives under consideration are conceptually quite similar, it has been the assumption that the selection of a preferred alternative would not be significantly impacted by an analysis of funding options. Nonetheless, all three railroad companies would need to agree upon a specific solution and its funding which in turn could make public funding sources available. While the determination of potential funding sources for the proposed improvements is beyond the scope of this effort, a cursory review may be beneficial. For example, the presence of the Existing Alignment Alternative within a corridor currently used by Amtrak and that is part of the proposed Gulf Coast High Speed Rail project may make it eligible for funding programs that the other alternatives are not.

Funding mechanisms such as tolls, user's fees based on cars and/or weight, or the creative use of public / private partnerships would seem to be options for all the alternatives. The Texas State Rail Plan also presented a summary of Federal and State programs and grants available to Texas to fund improvement projects. This summary is in the Appendix. MAP-21, the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141), was signed into law by President Obama on July 6, 2012. Funding surface transportation programs at over $105 billion for fiscal years (FY) 2013 and 2014, MAP-21 is the first long-term highway authorization enacted since 2005. SAFETEA-LU expired on September 30, 2009 and had ten extensions.

Summary Matrix

Utilizing the Transportation, Sustainability and Implementation categories of TxDOT's rail project prioritization framework, this Neches River Bridge Feasibility Study provides an assessment of the three "build" alternatives under consideration. The assessment is preliminary and the values assigned to the various criteria are subject to change with input from TxDOT. The matrix as shown in Table 4.6 offers an overview and a comparison of the potential impacts of the alternatives.

Figure 4.6 – Summary Matrix

Category	Criterion	Measures	Alternatives			Qualtitative Assessment
			Existing Alignment (new lift bridge adjacent to existing bridge)	New Alignments		
				IH-10 fixed bridge	Pine St. Lift bridge	
Sustainability	Economc Impact	Jobs	5	7	5	Higher construction cost will create more jobs, though this may be in conflict with program financial resources.
		Train Delay	3	5	3	While overall delays are the least with the fixed bridge option, the projected level of train volumes would result in significant delays throughout the entire rail network.
		Fuel Cost	3	5	3	Fewer delays result in less fuel consumption and therefore less cost, however in absolute terms the increase in delays is significant enough to result in increased fuel costs across the board.
	Environmental / Social Impact	Air Quality	3	5	3	Again, the alternatives can be compared on a relative scale amongst each other. Here the least train delay results in the best air quality and review of at-grade crossings indicates minimal enviornmental benefits. Under an absolutre scale, the overall network performance indicates a significant increase in delay and therefore a reduction in air quality.
		Energy Use	3	5	3	Again, the alternatives can be compared on a relative scale amongst each other. Here the least train delay results in the best energy use and review of at-grade crossings indicates minimal enviornmental benefits. Under an absolutre scale, the overall network performance indicates a significant increase in delay and therefore adverse energy use.
		Environmental	3	7	5	The Interstate 10 alignment may have the most significant environmental impacts. It goes through a Superfund Site, has the second longest crossing of Ecologically Sensitive Stream Segment, and crosses the greatest distance in wetlands/floodplains that may be home to T&E species.
		Social Impacts	3	7	7	Both of the new alignments will likely have the greatest community impacts. Homes, businesses, and churches will need to be acquired for the purposes of ROW. Livibility will be reduced as remaining properties will be impacted by increased noise and vibrations from increased train traffic. Right of way will essentially form a barrier between the north and south sides of the neighborhood. Social Justice will likely be a concern as well as the Long Avenue corridor is home to a relatiely low income minority population
	Asset Preservation	ROW	5	7	7	Either new alignment will help to preserve the Long Ave ROW. The improve existing KCS corridor with benefiots for passenger rail will help to preserve the rail corridor between College Street and Milam Street that crosses the existing Neches River rail bridge.
Transportation	Safety and Security	Safety	3	7	7	Increase number of grade separated crossings or improved at-grade rail crossing should help to improve safety. An increase in rail traffic along Long Avenue may increase the potential for accidnets in this residential area. While potentially offset from grade separations, such structres add costs and have other property impacts.
		Security	3	5	5	Communtiy access - more trains will mean a reduction in community access which will most likely be an issue along Long Avenue.
	Connectivity		5	5	5	Existing conenctivity is maintained through use of the existig rail corridor. All three alternatives are equal in this matter.
	Congestion Relief	Rail Travel Times	3	5	3	Improved travel times equate to less congestion - but may be off set by increased train traffic.
		Grade Separations	3	7	7	Reduced number of at grade crossings should help to relieve congestion.
	System Capacity	River Crossing Capacity	5	7	5	All alternatives increase capacity; perhaps the lift bridge alternatives less so than the stationary span
		Track Capacity	5	5	5	The "build" alternatives were specifically developed to provide an equal and comparable set of capacity improvements.
		Improved Signaling	3	3	3	Improved signalling is inherently provided within the rail network improvements. All three alternatives are equal in this matter.
Implementation	Cost Effectiveness	Cost Benefit	5	4	3	The overall cost effectiveness of any of the alternatives assessed is weakened by the operational analysis for the projected train volumes. While relative comparisons can be made amongst the alternatives, it can also be said that none of the alternatives achieve an adequate operation.
	Project Development	What stage is project at?	3	3	3	Each of the "build" alternatives is at the same stage of project development.
		Land Acquisition	3	7	7	The new alignment alternatives impact the largest number of parcels. In both cases the majority of these parcels appear to be privately owned. Both new alignment options also impact residential properties; but, also a relatively large number of parcels that are vacant / open space. These two alignments also have a high assessed valuation.
	Partnerships	Partnerships	5	7	7	The two new alignment alternatives require additional partnering efforts to determine ownership, maintenance, operational and fianncial structure and organization.
	Innovation	Technological	3	5	3	The high-level navigational clearance over the Neches River for a fixed bridge will result in structurally significant eleemnt on the landscape.
		Institutional	3	7	5	Construction adjacent to the existing railroad maintains the institutional status quo. The new alignments would require discussing a potentially new organization structure.

Legend
10 = Exceptonal level of impact/benefit
7 = Significant level of impact/benefit
5 = Moderate level of impact/benefit
3 = Minor level of impact/benefit
0 = No level of impact/benefit

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REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 9

CONFIDENTIAL - NECHES RIVER BRIDGE PROCESS IMPROVEMENT PROJECT, 1/22/2019

REDACTED PUBLIC RECORD VERSION

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SIMMONS R.V.S. EXHIBIT 10

HIGHLY CONFIDENTIAL - DALLAS TERMINAL MARKETING AGREEMENT

REDACTED PUBLIC RECORD VERSION

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SIMMONS R.V.S. EXHIBIT 11

HIGHLY CONFIDENTIAL - NORFOLK SOUTHERN RAILWAY COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, WESTERN HAULAGE AGREEMENT

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SIMMONS R.V.S. EXHIBIT 12

HIGHLY CONFIDENTIAL - NORFOLK SOUTHERN RAILWAY COMPANY-MERIDIAN SPEEDWAY LLC JOINT USE AGREEMENT, MAY 1, 2006

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SIMMONS R.V.S. EXHIBIT 13

HIGHLY CONFIDENTIAL - LIMITED LIABILITY COMPANY AGREEMENT

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SIMMONS R.V.S. EXHIBIT 14

HIGHLY CONFIDENTIAL - MSLLC MEETING PRESENTATION BY NS REGARDING SIDING LENGTHS DALLAS TO ATLANTA (INCLUDING MSLLC) AND DESIRED SIDING EXTENSIONS ON MSLLC (WITH COST ESTIMATES)

BEFORE THE
SURFACE TRANSPORTATION BOARD

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SIMMONS R.V.S. EXHIBIT 15

HIGHLY CONFIDENTIAL - KCS-CSX NEW ORLEANS INTERCHANGE ALLOWANCE AGREEMENT

REDACTED PUBLIC RECORD VERSION

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SURFACE TRANSPORTATION BOARD

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

SIMMONS R.V.S. EXHIBIT 16

HIGHLY CONFIDENTIAL - THE KANSAS CITY SOUTHERN RAILWAY COMPANY – MERIDIAN SPEEDWAY LLC JOINT USE AGREEMENT, MAY 1, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

REPLY VERIFIED STATEMENT OF JASON WILKERSON

TABLE OF CONTENTS

I. THE HOUSTON TERMINAL HAS TREMENDOUS CAPACITY WHEN OPERATED EFFECTIVELY 4

II. KCS'S THROUGH TRAINS IMPOSE MINIMAL STRESS ON HOUSTON-AREA CAPACITY 8

III. MY RECENT VISIT TO HOUSTON CONFIRMS THAT THERE ARE MANY OPPORTUNITIES TO IMPROVE OPERATIONS FOR THE BENEFIT OF ALL RAILROADS AND THEIR CUSTOMERS. 11

IV. THE CONTRACTUAL ARRANGEMENTS UNDER WHICH UP, BNSF, AND KCS SHARE TRACKAGE IN HOUSTON ARE WELL UNDERSTOOD AND PROVIDE FOR CAPACITY EXPANSION WHEN APPROPRIATE 12

1. I am Jason Wilkerson. I am employed by Canadian Pacific Railway Company as CP's Assistant VP for Transportation Canada. Previously, I was General Manager of the Prairie North Division, and prior to that I served as General Manager of the Eastern Division. I have been working in the railroad industry for more than twenty-four years in a wide variety of positions and have a great deal of experience in many aspects of railroad operations. Before joining CP, I spent nearly nineteen years working for Union Pacific Railroad in a variety of positions, in a scope that progressed from unionized jobs (track laborer, yardmaster), to management roles (yard and terminal manager, senior manager, director), and then to executive positions (superintendent, general superintendent).

2. I am providing this statement to address claims by Union Pacific Railroad Company ("UP") and BNSF Railway ("BNSF") that the anticipated growth in the number of CPKC trains operating through Houston following the implementation of the CP/KCS Transaction could cause "serious congestion and service issues" in "critical areas such as Houston" (BNSF-9-61), and that "additional capacity would be necessary at several locations in the terminal to prevent the projected jump in traffic from endangering operations in Houston." (UP-10 at 59).

3. I am in a position to address those assertions because, prior to coming to CP, I served in a number of operating positions at UP, including one that gave me an in-depth understanding of operations and capacity in the Houston terminal and the UP-owned lines radiating from Houston, including those over which KCS and BNSF operate. In particular, I served as Director of Transportation Services (DTS) for the Houston Service Unit from 2009 to 2013. In that role, I reported directly to the General Superintendent and had responsibilities for service levels and efficient operations for all trains that traversed the Service Unit including the

Houston complex, all yard and local trains, and all operations within yard and local facilities. Those responsibilities also included first and last mile service to local industries. Further, they included evaluating the operational changes that would be needed to accommodate business to ensure that it could be transported in the area without adversely affecting existing customers. As part of my DTS role, all field personnel, including yard and terminal personnel, reported up through me. I also had lead responsibility for the Houston Service Unit when the general superintendent was away.

4. My work for UP in the Houston terminal gave me an intimate understanding of how KCS and other railroads operate there, and the kinds of interactions that occur routinely among those railroads. For example, UP held monthly meetings with BNSF, which I attended, regarding strategic issues and longer term issues. UP also interacted with BNSF and KCS more frequently and as needed regarding tactical issues that arose from day-to-day in Houston operations. My responsibilities required me to work closely with the joint (UP-BNSF-KCS) Spring Dispatching Center (SDC) in Spring, TX (just north of Houston), from which all of the lines radiating from Houston are dispatched. KCS had a representative there along with UP and BNSF personnel (though KCS was not a full-fledged joint participant), and that representative was a regular point of contact for UP's interface with KCS over daily Houston operations. My role also involved regular interaction with the Port Terminal Railroad Association, the major switching railroad serving numerous customers in and around the Port of Houston. In short, cooperation among all the railroads serving Houston was well established from before my time at Houston, and there were clear lines of communications among those railroads, typically directly involving myself and the Spring Dispatching Center (SDC) as the UP representative.

5. To supplement the knowledge I gained while managing the Houston terminal for UP, I have reviewed available information about the current configuration of the infrastructure in the Houston terminal used by KCS trains and the operations that affect those trains. In late May and early June 2022, I visited the Houston complex onsite, allowing me to bring context to the current conditions based on the knowledge I had developed when I was previously responsible for running those same operations.

6. As I explain in the balance of this statement, I can say with confidence that UP and BNSF's assertions about the impact of the CP/KCS Transaction on Houston rail capacity are overblown. The Houston terminal complex has been capable of handling ebbs and flows in rail traffic that exceed--by a wide margin--the potential modest increases in CPKC train counts anticipated from the Transaction. The Houston terminal has ample capacity to handle that traffic, assuming that UP's and BNSF's own operations – which consume the lion's share of available capacity – are well managed, and that all of the railroads serving Houston are able to work together cooperatively to make things work for the benefit of all users. To the extent additional infrastructure turns out to be useful to improve the efficiency, the existing trackage rights terms among UP, BNSF, and KCS provide a well-understood and appropriate mechanism for ensuring those investments get made and the railroads using those assets share appropriately in their costs.

I. THE HOUSTON TERMINAL HAS TREMENDOUS CAPACITY WHEN OPERATED EFFECTIVELY

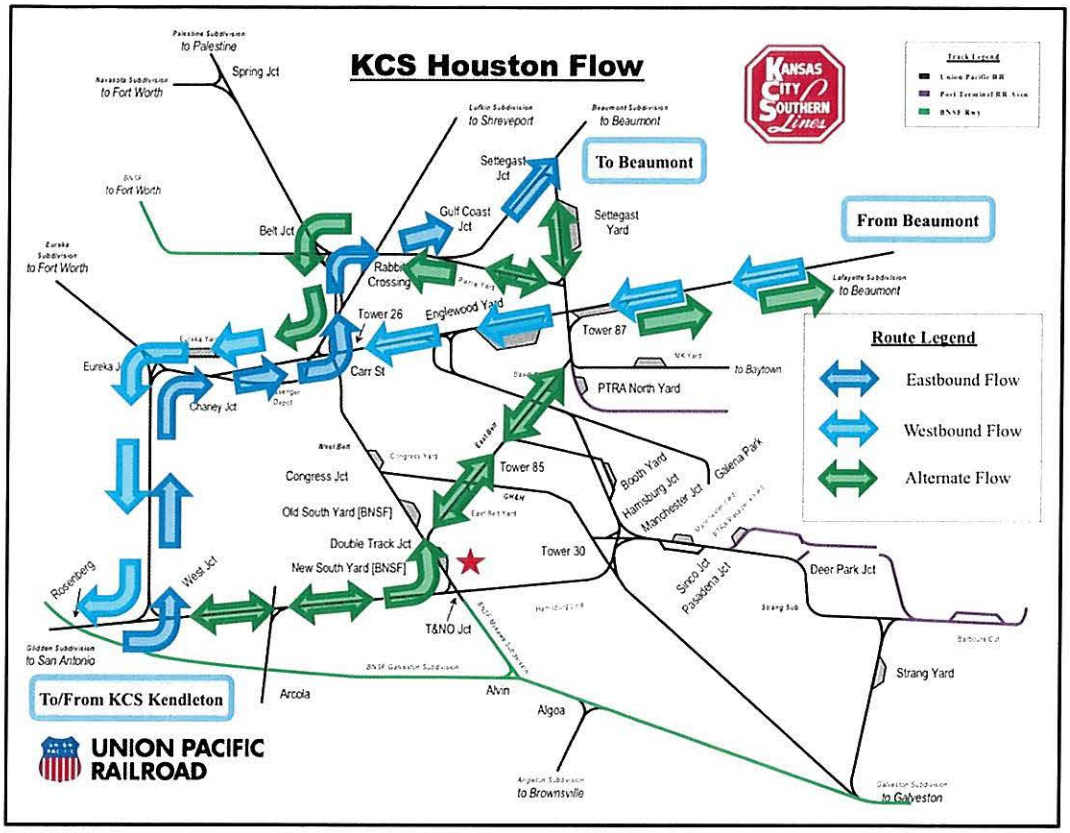
7. The Houston Terminal can be tremendously busy, but its infrastructure is built to handle those volumes. When I was UP's DTS in Houston, the complex regularly handled daily train volumes ranging from around 100 daily trains at the low end to 135 or more during busier periods. The mainline trackage serving the core of the Houston Terminal (and which KCS uses

to traverse Houston) is primarily double- or triple-tracked, and – unlike many terminals – it is configured in a way that provides multiple alternative paths from one side of the terminal to the other.

8. The efficiency of these operations is aided by the fact that dispatchers/representatives for all of the railroads in the Houston area – UP, BNSF, and KCS – are co-located in the Spring Dispatching Center. This coordination ensures that nobody's trains show up in Houston by surprise, enabling the routing of trains to be planned ahead of time to avoid evolving chokepoints. The availability and coordination of alternative routes is another major advantage for fluidity.

9. Figure 1 below is a diagram of Houston's basic mainline track layout, showing the alternative routes that are available for KCS trains moving across the terminal. This diagram was prepared by UP in the ordinary course to guide the UP dispatchers who control train movements in the terminal.

FIGURE 1
UP DIAGRAM SHOWING DIRECTIONAL FLOW OF KCS THROUGH TRAINS



10. The typical path KCS trains take across the terminal are shown with blue purple arrows. KCS's eastbound trains (heading towards Beaumont) move across UP's line from Rosenberg to West Junction, where they continue on UP's Houston Subdivision to downtown Houston, and then proceed via the Houston West Belt Subdivision to North Belt Junction and then traverse the Houston East Belt Subdivision to Gulf Coast Junction, leading them to UP's Beaumont Subdivision, which then moves into Settegast Junction and onto the eastbound directional running toward Beaumont, Texas. KCS's westbound trains (coming from Beaumont) arrive in Houston on UP's Houston Subdivision (which used to be called the Lafayette Subdivision as shown on this diagram), proceed past UP's Englewood Yard through Eureka Junction down to West Junction, entering the Glidden Subdivision and then continuing onward to Rosenberg. But as the diagram shows, there are well-understood alternative routes that can be

used to bypass congestion and keep trains moving. Furthermore, the diagram does not show all of the available routes, which include but are not limited to the East Belt, West Belt, Bell Main, and the Harrisburg Subdivision. Under the Board's "any clear route" dispatching protocol, KCS trains can use any of these routes, and UP's dispatchers should use that discretion to keep trains moving and preserve the fluidity of the complex for all railroads.

11. During my time in Houston, UP was continually investing in infrastructure replacement and capital expansion. UP did substantial work in the area to reinvest in existing infrastructure and bring it up to UP standards during my tenure on the Houston Service Unit, which resulted in increased capacity. For example, at Englewood Yard, UP installed new ties, made upgrades to the hump facility, and improved the Bell Main. At Settegast Yard, various projects were undertaken, including a tie program. In addition, on a portion of the Palestine Subdivision between Belt Junction and Spring Junction, concrete ties were installed. Similar upgrades were made during my time at UP within the Houston complex and across the service unit. In addition, UP initiated numerous capital expansion projects during my tenure, including creosote expansion, multiple tower connections, Hardy Toll Road staging tracks, Settegast Yard staging tracks, and double-tracking a portion of the Glidden Subdivision from West Junction just short of the Brazos River Bridge near Rosenberg. Significant improvement and capital expansion continued–and new projects were initiated--even after my time there, in order to further enhance fluidity, remove bottleneck issues, and improve customer service.

12. During my time at UP, the company recognized that its growth in the Southern Region would put strains on its infrastructure, particularly in the Houston complex. There was a lot of talk about the benefits associated with UP's planned investment in an entirely new hump yard (known as Brazos Yard) in Hearne, Texas, about 100 miles northwest of Houston. UP's

plan to reallocate capital dollars to that yard would improve operations and enhance customer satisfaction at existing UP facilities within the Houston Service Unit (in particular in the Houston complex) as well as throughout the entire Southern Region. I understand that plans for Brazos Yard were substantially cut back after I left UP and the project has since been moth-balled.

13. During the time I was in Houston, train volumes in the terminal fluctuated a good deal for a variety of reasons – some seasonal, some driven by business cycles, some by strategic decisions made by the operating railroads serving Houston, and many others. If CPKC is successful in attracting the anticipated traffic growth, the extra eight trains a day or so that might operate across Houston would fall well within the range of the normal ebb and flow of volumes. The current infrastructure is well equipped to handle this traffic.

II. KCS'S THROUGH TRAINS IMPOSE MINIMAL STRESS ON HOUSTON-AREA CAPACITY

14. In Houston, like in many other terminals, not every train imposes equal demands on railroad capacity. KCS's operations (just like CPKC's future operations) are at one end (the *low end*) of this spectrum. By plan, KCS through trains traverse Houston without stopping for work or to change crews. From a dispatching perspective, they are the easiest trains to move, provided other operations are well managed so that those other operations do not occupy the mainline track capacity needed for fluid through-train operations. CPKC's planned new train services will operate through Houston the same way, imposing minimal burdens on Houston infrastructure, especially in comparison to the operations of UP and BNSF.

15. In my years as UP's DTS in Houston, I do not recall any issue with KCS's operations, other than maybe one locomotive failure. KCS was never the root cause of a problem within the Houston complex. In fact, KCS was a highy collaborative partner. For example, the KCS and UP operations and service design teams collaborated in 2010 after Hurricane Alex to design new interchange and blocking options to mitigate customer impact and

train congestion, not only through UP's Houston Service Unit but throughout both railroad's networks. I never heard a complaint or issue that arose because of KCS within the Houston complex.

16. The operations of UP and BNSF, on the other hand, place much more intense and complex demands on Houston rail infrastructure. These railroads operate far more trains into and out of Houston than KCS does, or than CPKC will. In addition, each of those trains consumes more of the Terminal's capacity than KCS (or CPKC) trains. UP and BNSF use Houston as a crew change point, and they originate, terminate and (especially in UP's case) classify massive volumes of carload traffic in yards within the Houston complex. That means that trains must enter and exit yards, and at times must be staged outside of yards waiting for yard track space.

17. Dozens of UP trains enter and exit UP's Houston-area yards – especially the Englewood hump yard, but also Settegast, Strang, and others – on a daily basis, and those yards also serve dozens of local switching operations of BNSF, UP, and PTRA. To the extent traffic volumes create challenges in Houston, it is because of these activities, not getting KCS through trains across town. But good management of these issues enables the terminal to work smoothly. To reiterate, there are available alternative routes. If these are used effectively by dispatchers and coordinated well by the yards, they ought to be available to ensure that large numbers of through trains can traverse the Houston terminal without undue delay, and without themselves interfering with the operations of other trains.

18. To be sure, there were times during my Houston tenure when UP struggled to dispatch KCS trains across Houston in a timely manner. But this had nothing to do with the operational needs of the KCS trains. Instead, it happened when other aspects of UP's and

BNSF's operations were not working as smoothly as they should. Most often, problems in the Houston complex arose from a lack of operational planning/execution in and around yards.

19. For example, when UP's inbound trains have to wait to enter Englewood Yard or Settegast Yard, or when UP is short of crews for outbound trains and needs to move trains to make space inside the yard to process incoming trains, available mainline capacity can be reduced. More specifically, the ability of Englewood, Settegast, and--to a lesser degree--the satellite yards (Strang, Basin, Galena Park, etc.) to take the trains as they arrived tended to be the key determining factor. These types of issues at UP affected the ability of KCS's trains to move in and through the terminal.

20. Service interruptions at BNSF and UP –such as a locomotive failure, crew unavailability, mechanical car issue, weather, etc. – were also big drivers of issues in the terminal. These failures, if not managed properly, have the potential to cause further cascading effects such as blocked mainlines, occupied interlockers, crews running out of allowable work time, and similar problems.

21. A portion of the issues caused by BNSF arose at shipper facilities that UP and BNSF jointly served. When BNSF did not pull cars as scheduled, UP was prevented from spotting and/or pulling their own cars on schedule. This caused trains to consume branch line or mainline capacity, which could cause rippling effects in the terminal.

22. In my experience, there is ample capacity in the Houston terminal for projected traffic as long as the terminal is managed properly. I explained above how UP or BNSF problems could cause cascading issues that impact the fluidity of the terminal and KCS trains. However, the impact of these issues on mainline throughput depends primarily on how well UP (and to a lesser extent BNSF) manages their own operations in the area. If issues are managed

properly and effectively compartmentalized, delays and congestion do not have to cascade. I know how the terminal operates. It is complex. However, KCS trains should be free to navigate through the complex as long as UP and BNSF manage the property well and execute their plans efficiently to make sure the flow is maintained. If problems arise, it is imperative that all parties commit to real-time transparency and collaboration in order to minimize negative impacts to the overall complex.

III. MY RECENT VISIT TO HOUSTON CONFIRMS THAT THERE ARE MANY OPPORTUNITIES TO IMPROVE OPERATIONS FOR THE BENEFIT OF ALL RAILROADS AND THEIR CUSTOMERS.

23. My recent visit to the Houston area revealed that there are considerable opportunities to improve operations in the Houston area with more attention, transparency, effective communication, collaborative planning, tactical execution, accountability, and long-term strategic vision.

24. For railroads, infrastructure additions are not the first solution for potential capacity constraints. The first option is always an analysis of the current operations and opportunities to improve. Houston is ripe with such opportunities, and CPKC would look forward to working with both UP and BNSF to improve operations in that area for the benefit of all three railroads and their customers.

25. By way of example, on my Houston visit in May/June, I engaged with a number of KCS managers and train crews. There is no doubt that there are opportunities to improve mainline capacity utilization by making operational design adjustments. To my surpise, some of the problems are the same issues we had overcome during my time with UP in the Houston complex. For example, dispatching protocol in and out of Englewood, blocking of critical interlockers, operational design, capital and engineering renewal programs, and overall collaboration and communication. Union Pacific may not have fully considered the effects on

the broader network in Houston when redesigning, unwinding past practices, and planning its own operations for its own convenience. It was evident to me that it would be highly beneficial to have CPKC management on the ground, with open lines of communication between UP and BNSF representatives. CPKC would look forward to working with all stakeholders in Houston to find mutually beneficial strategies to improve fluidity and customer satisfaction.

26. I obviously do not have a complete grasp of all of the constraints that affect UP and BNSF operational planning choices. However, the principals of transparency and communication remain vital and there are opportunities to improve. During my visit, I learned that UP has stopped sharing certain information and key operational metrics relevant to the Houston terminal. By properly sharing these metrics, all railroads will improve their ability to identify systemic issues in real-time and via data mining. This would enable tactical adjustments, root-cause analysis, development of countermeasures, communication/transparency of countermeasures, implementation and execution, and appropriate consequences if applicable.

27. My on-the-ground observations also confirmed my judgment that that there is plenty of capacity to operate trains through Houston. Since my time working in Houston, there has been substantial investment in additional capacity, providing even more ability to move trains across the Houston terminal.

IV. THE CONTRACTUAL ARRANGEMENTS UNDER WHICH UP, BNSF, AND KCS SHARE TRACKAGE IN HOUSTON ARE WELL UNDERSTOOD AND PROVIDE FOR CAPACITY EXPANSION WHEN APPROPRIATE

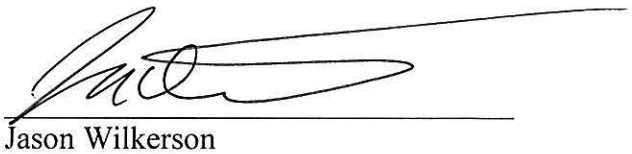
28. I understand that both BNSF and UP have suggested that CPKC be required to go through a special process to identify and pay for capacity needs before adding any traffic though Houston. This makes no sense to me. There is a well-established procedure and a long-standing precedent determining how capital is allocated based on joint-use assets and trackage rights agreements. Based upon my knowledge of the Houston complex, the current infrastructure is

more than sufficient to handle the additional CPKC trains on top of the normal variable volume from the other carriers, and this doesn't even include the soon-to-be completed projects.

VERIFICATION

I, Jason Wilkerson, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 11 day of July, 2022.



Jason Wilkerson

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

REPLY VERIFIED STATEMENT OF NICK WALKER

TABLE OF CONTENTS

I. CP DISPATCHES THE LINES IT SHARES WITH METRA RESPONSIBLY AND WELL 4

A. CP Dispatchers Understand the Importance of Giving Metra Priority 5

B. Metra's Own Performance Data Confirms that CP Dispatches Metra's Lines Effectively 8

C. Metra's Complaint About Trains Dispatched on the "Wrong Tracks" Is Misguided and Unfair 28

D. Developments Independent of the Transaction Will Further Improve the Performance of Metra's Trains on Lines Shared with CP 32

E. The Vast Majority of the Historical Delays Metra Complains About Are Not Relevant to the Potential Impact of the CP/KCS Transaction 34

II. CP RESPONSIBILITY FOR DISPATCHING IS CRITICAL TO FREIGHT OPERATIONS AND BENEFITS METRA 36

A. CP Dispatchers Are Attentive to Rail Operations Around the Clock 37

B. CP Dispatching Enables More Efficient Coordination of Freight and Passenger Operations 39

III. CP HAS CONSISTENTLY SUPPORTED GROWTH IN METRA OPERATIONS ON MD-N AND MD-W LINES 47

IV. METRA'S COMPLAINTS ABOUT CP'S PTC IMPLEMENTATION ON LINES SHARED WITH METRA ARE NOT WELL FOUNDED 51

EXHIBIT 1: METRA'S RESPONSES AND OBJECTIONS TO APPLICANTS' FIRST DISCOVERY REQUESTS .....

EXHIBIT 2: METRA, "*ON-TIME PERFORMANCE - DECEMBER 2021*" (EXCERPTS) .....

EXHIBIT 3: METRA, "*ON-TIME PERFORMANCE - DECEMBER 2020*" (EXCERPTS) .....

EXHIBIT 4: METRA, "*ON-TIME PERFORMANCE - DECEMBER 2019 (REVISED)*" (EXCERPTS).....

EXHIBIT 5: METRA, "*COMMUTER RAIL SYSTEM ON-TIME PERFORMANCE REPORT - DECEMBER 2018*" (EXCERPTS) .....

EXHIBIT 6: METRA, "*COMMUTER RAIL SYSTEM ON-TIME PERFORMANCE REPORT - DECEMBER 2017*" (EXCERPTS).....

EXHIBIT 7: METRA, *"METRA 2019 FACT BOOK"* (EXCERPTS).....

EXHIBIT 8: METRA WEBSITE, https://metra.com/time-performance-reports#Metra_and_On_Time_Performance .....

EXHIBIT 9: B17 AND B12 – FREIGHT WINDOWS – A – REFERENCED IN DEPOSITION HELD ON 06-07-2022.XLS" .....

1. I am Nick Walker, CP's Vice President of Operations for the Western Region. I started at CP in 2005 as a conductor. I was based in Bensenville, Illinois between 2005 and 2013, where I took on increased responsibility for CP's operations there. I was promoted to Yardmaster in 2009, Field Placement Coordinator in 2010, Supervisor of Operations later in 2010, and Chicago Trainmaster in 2011.

2. In July of 2013, I was transferred to St. Paul, MN, where I worked as Trainmaster and then Assistant Superintendent. I then worked as the Assistant Superintendent for the Winnipeg Terminal briefly in 2016 before returning to Bensenville as the Superintendent for the U.S. East – Bensenville Terminal from July 2016 to April 2017. After serving in that position I stayed in Chicago until 2020 as CP's General Manager for the U.S. East and then Assistant Vice President of Operations. In those positions I was principally responsible for CP's design of its planned reconfiguration of Bensenville Yard discussed in the Amended Operating Plan.[1] I worked on Bensenville and Chicago operations and dispatching throughout this time. I also have years of experience managing CP's relations with Metra, including during my time as Superintendent for the U.S. East – Bensenville Terminal.

3. In September 2020, I was promoted to my current position, and am now based in Calgary, Alberta. CP's operating team still regularly consults with me concerning Chicago-area rail operations. My years of knowledge and experience with Chicago give me a thorough and unique understanding of CP's operations in Chicago and how those operations interface with the operations of Metra and other freight railroads.

4. Given my experience, I was asked recently to review Metra's Comments and Request for Conditions and Supplemental Comments in this proceeding. I am providing this

[1] *See, e.g.* Amended Operating Plan ¶¶ 168, 303-07.

Reply Verified Statement to address assertions by Metra made therein regarding CP's dispatching of Metra's MD-W and MD-N lines and performance of Metra trains on those lines.

5. As discussed below, I have concluded that Metra's criticisms regarding delays on the MD-N and MD-W lines are unfair, misleading, and in many cases incorrect. Leaving aside that only delays west of Bensenville on the MD-W line are even relevant – because the Transaction will not otherwise increase traffic on those lines – I emphasize several points.

- First, most of the delays Metra refers to concern delays at Bensenville Yard, which will be alleviated by the Bensenville Reconfiguration I helped design.
- Second, while Metra suggests that there are a large number of delays on these lines, the number of delays – when viewed in proportion to the total number of Metra trains on these lines – is small. Metra's overall on-time performance on CP-dispatched lines is good, and delays associated with freight trains are a small fraction of all the delays to Metra's trains that figure into the OTP calculations. Metra's performance on CP-dispatched lines compares favorably to its performance on other nearby freight railroads that host Metra service.
- Third, taking dispatching away from CP is unwarranted and would harm – not help – the efficiency of rail operations on the lines Metra and CP share, to the disadvantage of Metra and CP alike.
- Fourth, Metra's various other concerns are simply unfair. Metra suggests that CP sometimes wrongly dispatches Metra trains on the other side of the tracks from the side anticipated by passengers, but this is not standard practice and when it does happen it is neither unsafe nor inappropriate, but good dispatching.
- Fifth, Metra's complaint about two instances in early 2019 when CP and Metra did not agree about the addition of Metra off-peak trains on the MD-N line ignores the circumstances of these requests and also ignores the long history of CP supporting the expansion of service on both the MD-N and MD-W lines.
- Finally, I point out that Metra's complaints about PTC implementation involve matters that are in the past and – like Metra's other complaints – have nothing to do with the CP/KCS Transaction

I. CP DISPATCHES THE LINES IT SHARES WITH METRA RESPONSIBLY AND WELL

6. As I explain in this part of my testimony, CP is responsible for dispatching all freight and passenger operations on the lines that CP and Metra share – Metra's MD-N and MD-

W lines which are part of CP's Chicago and Milwaukee and Elgin Subdivisions. CP performs those responsibilities well, with proper and diligent regard for the priority to which Metra is entitled under the governing trackage rights agreement between CP and Metra. Metra's assertions that CP does a poor job dispatching Metra's trains are wrong.

A. CP Dispatchers Understand the Importance of Giving Metra Priority

7. CP dispatches the MD-W and MD-N lines from its U.S. dispatching center in Minneapolis, MN, which will be moving to Kansas City as part of CP/KCS's consolidated headquarters there. CP's dispatchers are experienced and well trained to handle all trains on the lines and dispatch them efficiently. They are supervised by the Director of Dispatching and given instruction in the priorities of the scheduled passenger trains that operate over the MD-N and MD-W lines (both Amtrak and Metra), and in Metra's case they understand the peak-period windows during which CP's trains are not to interfere with Metra's trains except in emergencies. Dispatchers oversee safe and efficient train movements, plan meets and look out to ensure proper planning for inbounds, outbound and over the road performance.

8. CP takes concrete steps to help ensure that Metra's trains perform well on the MD-W and MD-N lines. CP's freight trains on these lines are scheduled to operate outside of Metra's peak windows, either overnight or between the morning and afternoon rush hour periods. As I explain below, we time the departures and arrivals of CP's freight trains to minimize the possibility that they result in delays to Metra trains. And, when Metra's own operations encounter difficulty, we step in to help. For example, I know of situations where CP has interrupted its yard operations to dispatch a yard locomotive to move a disabled Metra train, allowing other Metra trains to proceed and preventing Metra passengers from being stranded.

9. I have reviewed Metra's allegations about instructions given to CP dispatchers by CP "senior management" regarding the treatment of Metra's trains. I am personally offended by

Metra's suggestion that there has been a lack of leadership commitment to supporting Metra. That is just not the case. As I explain further below, CP has worked hard to perform well for Metra.

10. Metra witnesses make the specific accusation that "dispatchers have been directed by senior management to move CP trains, regardless of the impact on the network." METR-7 at 38. Metra ultimately acknowledged that it was referring to "management," not "senior management."[2] Either way, this assertion is unfounded. Metra knows or should know that CP's "senior management" has been and remains committed to supporting Metra's operations and honoring CP's obligations to dispatch Metra's trains well, with or without the Transaction. In addition, CP dispatchers consider a number of factors and circumstances when dispatching a train, many of which Metra is not privy to, and no decision to move CP trains instead of Metra trains would ever be made "regardless of the impact on the network."[3]

11. I looked closely at the specific examples cited by Metra regarding supposed "directions" by senior management (based on the identification supplied in Metra's discovery responses),[4] and while I was not personally involved in any of the specific dispatching decisions Metra refers to, it is very clear that there was no direction "to move CP trains, regardless of the impact on the network." *Id.* Instead it appears that CP's dispatching decisions were made with a

[2] *See* Deposition of Rich Oppenheim, dated June 7, 2022 ("Oppenheim Dep Tr.") at 195:21-23 ("I would be very happy if you . . . wanted to take the word 'senior' out of that statement and just say it was management.").

[3] *See id.* at 182:7-184:22 (Mr. Oppenheim acknowledging that he did not know the "operating circumstances" informing a dispatching decision he criticized).

[4] *See* METR-7, Oppenheim Verified Statement ("Oppenheim V.S.") at 11 (citing Exh. B-2 at 329); METR-7 Godfrey Verified Statement ("Godfrey V.S."), at 6; Metra, Objections and Responses to Applicants' First Requests at 6-9, 14-16 (Apr. 11, 2022) (Exhibit 1 hereto); Oppenheim V.S., Exhibit B-2 at 204, 252-53, 256, 291, 331.

broader appreciation of the network – including both passenger and freight trains taken together – than Metra realizes. (I explain below how CP's broader network perspective actually benefits Metra's trains operations.)[5] There may be room for a difference of opinion about how individual decisions were made about the specific facts and circumstances in front of a CP dispatcher (and it would be fair to say that from time to time some dispatching decisions can be criticized, especially with the benefit of hindsight). I am not intending to say that every single dispatching decision that Metra says delayed its trains was the correct one. But I am saying that it is impossible to judge those decisions without access to all of the details – network-wide – about the circumstances that informed them. More importantly, none of the decisions cited by Metra reflect any "direction" to disregard impacts on Metra trains. In fact, it would have been counterproductive for CP to make decisions that disregarded those impacts, since blocking Metra's trains needlessly would clog up the network, undermining the movement of all trains – freight trains included.

12. I also note that one of the emails that Metra's witness Mr. Oppenheim cites as support for his claims includes some very positive comments about CP's general approach toward Metra. Before laying out some perceived facts about a single incident in question, the email says: "Let me preface this by saying *how much we appreciate CP's recent willingness to discuss our respective operational concerns* and the need to work together to insure that our goals [are] met," and it goes on to say that, "[a]s we have said repeatedly on our calls, we *truly believe that CP's intentions are sincere in trying to protect Metra's schedules*."[6] In this email, Mr. Oppenheim goes on to describe a single incident where he alleges that a Metra train was

5 *See* Part II.B below.

6 Oppenheim V.S., Exh. B-2 at 204 (emphasis added).

delayed unfairly by a dispatching decision that did not properly respect Metra's peak windows. I was not involved in this incident and do not know why this decision was made or who made it. CP has investigated this allegation, but has been unable to definitively determine who was involved or what happened – in part due to Mr. Oppenheim's own unwillingness to divulge the details CP would need to properly investigate.[7] Nonetheless, if Mr. Oppenheim's description of the incident is accurate (and I have no idea whether it is), I agree that the dispatching decision as he describes it was unacceptable. But I believe that Mr. Oppenheim's focus on this one incident is the exception that proves the rule: It shows that CP *does* respect Metra's windows; otherwise Mr. Oppenheim would have been able to come up with more than one incident like this one. I have never allowed a dispatching decision like the one Mr. Oppenheim alleges to occur on my watch, and have no intention of doing so in the future.

B. Metra's Own Performance Data Confirms that CP Dispatches Metra's Lines Effectively

13. In addition to Metra's misguided suggestion that CP dispatchers are "directed" to ignore delay to Metra's trains, Metra also implies that CP dispatchers are bad at their jobs. Metra fills page after page cataloging delays that it blames on CP dispatchers and asserts that CP's dispatching of Metra trains is subject to "continual," "routine[]," "weekly," "intentional," "troubling," "serious," and "inevitable" delays. METR-7 at 11, 17, 33, 38, 61, 66, Godfrey V.S. at 6.

14. I strongly disagree with Metra's characterizations. No railroad – even one that only hosts passenger operations – is free from delays relating to dispatching and other causes.

[7] Oppenheim Dep. Tr., at 170:4-8, 171:9-10 (Q. "I'm entitled to ask about circumstances and try – and try and see whether you have knowledge that's accurate and what that information is. We're entitled to respond to your allegations." . . . . A. "[T]his name was given to me in confidence.").

The MD-W and MD-N lines are no exception. But CP's dispatchers perform well, and the delays that do occur are simply the product of the vagaries of railroad operations, especially in a complex operating environment like Chicagoland where dispatchers must make difficult decisions based on the entire network, not an individual train. As Metra's chief dispatcher, Mr. Godfrey explains, even at Metra dispatchers are taught to prioritize an individual freight train over an individual passenger train if that is better for the network in that instance.[8]

15. More importantly, and contrary to the inference that Metra wants drawn from its "delay" data, the objective hard facts show that CP performs well, and Metra is wrong to denigrate CP's performance. A review of all of the data – drawn directly from Metra's own reporting – shows that Metra's portrayal of train performance on the MD-N and MD-W lines is incredibly misleading.

16. There are three principal ways in which Metra's presentation of delay data is misleading:

- Metra witnesses focus solely on trains that were delayed, and not the much larger group of trains that were not delayed at all.
- Metra witnesses examine only the delays that were associated with CP freight trains and not the much larger group of delays that had nothing to do with CP.
- Metra witnesses report delays regardless of whether those delays had anything to do with CP's dispatching performance, or relate at all to the portion of Metra's lines that will be affected by the CP/KCS Transaction.

17. I review all of that data below to demonstrate that CP in fact dispatches Metra trains quite well.

18. I start with the data presented by Metra witness Greg Godfrey, Metra's chief dispatcher since late 2019. He draws on Metra's "TOPS" database to present the delays incurred

[8] *See* Deposition of Greg Godfrey, dated June 9, 2022 ("Godfrey Dep. Tr.") at 81:17-86:10.

by Metra trains since 2000 as a result of the presence of CP freight trains, a small set of all the delays Metra trains experienced, and an even smaller set when compared to all the trains Metra operated that were not delayed at all. He uses this data to support his claim that "from 2000 to 2021 on MD-N and MD-W . . . freight-related delays impacted 1.23 million Metra customers with delays totaling 57,048 minutes, or nearly 40 days and nights."[9]

19. This presentation is incredibly misleading. First of all, the only "delays" presented were those related to CP freight trains. As Mr. Godfrey testified at his deposition, those delays were only 12 percent of the delays that Metra trains, and passengers, incurred. The balance – i.e., the vast majority (88 percent) – were the result of causes having nothing to do with CPs freight trains.[10] These causes include Metra equipment issues, delays loading and unloading passengers, and many other causes.

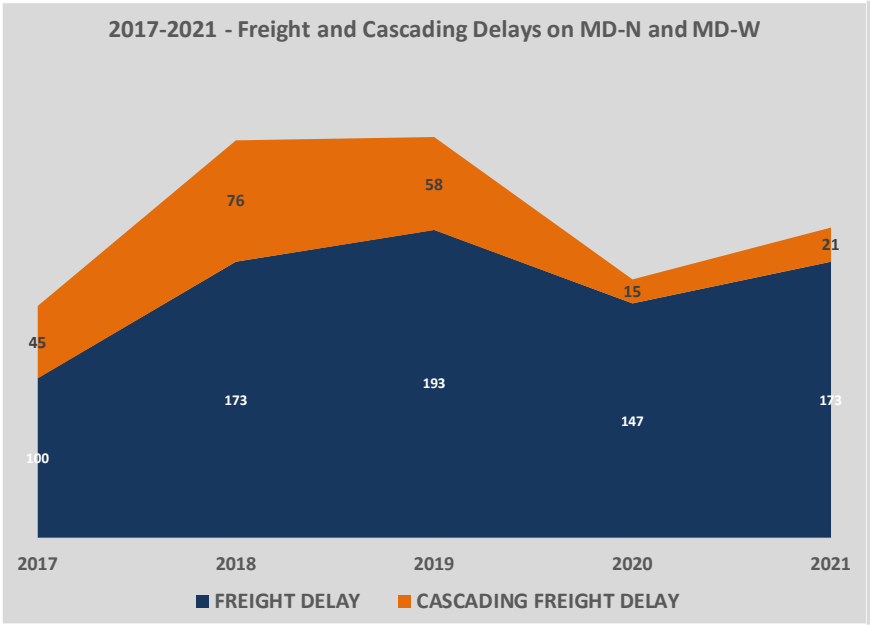
20. Second, Mr. Godfrey presents the delays supposedly caused by CP freight trains entirely out of context. His presentation fixates solely on the Metra trains that were delayed but ignores all of the Metra trains that were not delayed. When compared to the total number of trains that Metra operated over the MD-W and MD-N lines over the same period, the delays are tiny. Less than about one percent of Metra's trains incurred delays as a direct result of some issue relating to CP freight trains. In the chart set forth in Figure 1 on the next page, I recreate Mr. Godfrey's chart for the period 2017-2021 (the period for which Metra's TOPS data is available on Metra's website in its monthly on-time performance reports). And then, in the right-hand panel, I add in (in the green-shaded area) the trains *that did not incur* the direct and indirect delays that Mr. Godfrey reports. As the chart on the right shows, the supposed freight-

9 Godfrey V.S., at ¶ 9.

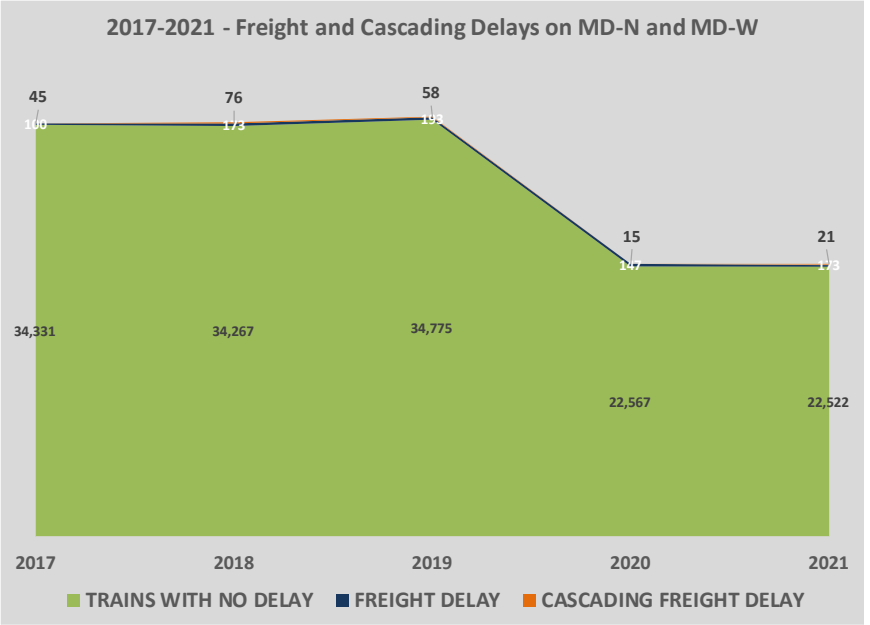
10 Godfrey Dep. Tr., at 45:3-14.

caused delays (the blue and orange lines) are almost invisible when considered against the backdrop of Metra's overall performance on the lines dispatched by CP. Metra witnesses have in effect chosen to keep out of view the much larger part of the iceberg that is underwater.

FIGURE 1[11]
METRA'S MISLEADING PRESENTATION OF "DELAY DATA"



AS PRESENTED BY METRA WITNESS GODFREY



REVISED TO INCLUDE METRA TRAINS NOT DELAYED BY "FREIGHT"

11 *See* "Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tabs "Godfrey 2017 to 2021" and "Godfrey 2017 to 2021 Revised."

21. I also looked at a separate set of data that Mr. Godfrey presents, which was compiled by Metra witness Rodriguez (and attached to his Verified Statement). The dataset was intended by Metra to reflect a more "systematic" review of delays associated with CP freight trains.[12] That data, however, is equally inconsistent with the rhetoric of the Metra witnesses.

22. Mr. Rodriguez kept track of all delays to Metra trains on the MD-N and MD-W lines between February 2020 and October 2021 caused by CP's freight trains (a subset of all freight train-cased delay, given that UP, IHB, BRC, and other railroads can contribute to freight-caused delays on these lines).[13] This data was presented as more complete because it included delays that did not necessarily result in the train being late at its final destination. The total number of delays over this period was only 337, meaning that the presence of CP freight trains caused delays to only 0.81% percent of Metra's 41,709 trains on these lines over the 21 months according to Mr. Rodriguez's "systematic" data. [14] That is hardly an indictment of CP's dispatching performance.

23. Focusing on the MD-W line, which is the only line where the Transaction will affect train counts, tells a similar story. Of the 273 MD-W line delays Mr. Rodriguez lists as having been "caused" by CP freight trains, 44 were "non-controllable" by CP and had nothing to do with CP's dispatching – like trains going into emergency or broken knuckles on CP freight trains.[15] Another meaningful portion – 25 – were so-called "indirect" delays, which reflected

[12] *See* Godfrey V.S. ¶ 10.

[13] *See* Rodriguez V.S., Exh. D-2; *see also* Deposition of David Rodriguez dated June 8, 2022 ("Rodriguez Dep. Tr.") at 45:3-9, 68:17-25.

[14] *See* Rodriguez V.S., Exh. D-1; "Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tab "Rodriguez Data."

[15] *See* Rodriguez V.S., Exh. D-1.

Metra trains starting out late at origin because of a prior delay to the same equipment.[16] A proper assessment of the number of incidents where CP freight trains or CP dispatching decisions led to a delay would exclude these events, a point Metra witnesses agreed with.[17] Indeed, Mr. Rodriguez admitted that some delays captured in his spreadsheet could not have been avoided and may not have been CP's fault, or that better dispatching may not have been able to prevent the delay.[18] For example, Metra's data does not distinguish to delays caused by CP's dispatchers from delay that resulted from decisions by another railroad's dispatchers – like IHB, UP, or BRC – affecting the movement of CP freight trains moving to or from those lines.[19]

24. Removing the "uncontrollable" and "indirect" categories from Mr. Rodriguez's tally yields 204 "controllable" delays supposedly caused by CP freight trains over a 21 month period. Figure 2 below puts this figure in context with the total number of trains Metra operated over this line during the same period. In short, 99 percent of all MD-W trains did not encounter any CP-caused freight train interference or dispatcher-cased delay.

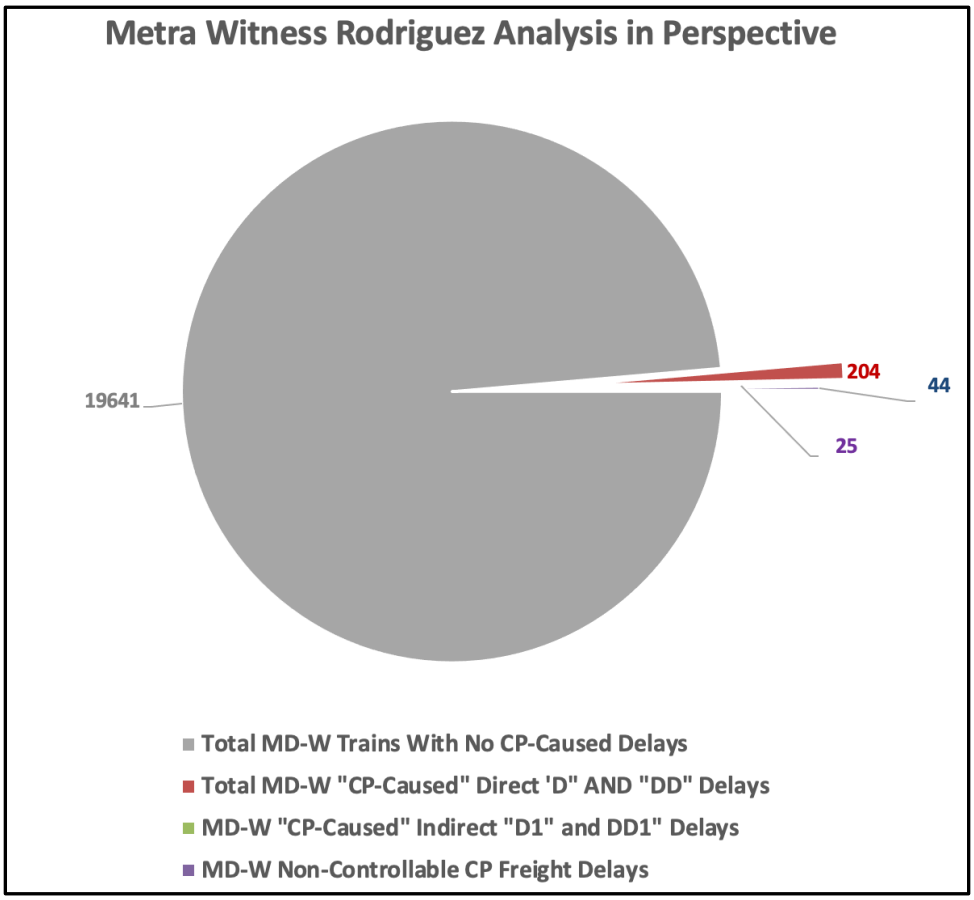
16 *Id.*

17 *See* Godfrey Dep. Tr., at 100:22-102:15.

18 *See* Rodriguez Dep. Tr., at 90:21-91:8, 91:23-92:7.

19 Godfrey Dep. Tr., at 59:16-60:7.

FIGURE 2[20]
NEARLY ALL OF METRA'S MD-W TRAINS INCUR NO CP-CAUSED DELAY



25. Another interesting feature of Mr. Rodriquez's "systematic" data review is that it essentially disproves Metra's suggestion that its own TOPS data is incomplete and overlooks lots of delays caused by CP freight trains that do not result in the trains being late at their final destinations. In fact, over 21 months Mr. Rodriguez identified only nine occasions when this occurred (the lines shown in black on Mr. Rodriquez's exhibit).[21] That's an "extra" (not in TOPS) very short delay only every two months and ten days or so.

[20] *See* "Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tab "Rodriguez in Perspective."

[21] Rodriguez Dep. Tr., at 78:25-79:8, 81:3-14; Rodriguez V.S., Ex. D-1.

26. Nonetheless, looking only at the MD-W line delays and including the brief delays that did not cause Metra trains to be late, I totaled up the number of minutes of direct *and indirect* delays (for delays Metra classifies as controllable (or "semi-controllable")) that appeared in Mr. Rodriguez's delay data. All of that delay works out to an average of *7.2 seconds* of delay per Metra train that traversed the MD-W line in that timeframe.[22]

27. To put all of this in context, I examined more deeply Metra's own data reflecting the performance of Metra's passenger trains on CP-dispatched lines and the various sources of train delay reported publicly by Metra on a monthly basis in its "On Time Performance Reports" published on Metra's website. As Metra's reports explain, Metra treats trains as being on time if they arrive at their destination in fewer than six minutes of the scheduled time, and Metra states that its goal is to achieve 95 percent on-time performance.[23] For every train that is delayed, Metra assigns a reason for the delay – some of which are the responsibility of the freight railroad over which Metra operates (*e.g.*, freight train interference) and some are the responsibility of Metra (*e.g.*, mechanical breakdowns and weather). Unlike Metra's witnesses, who focused solely on freight train related delays, I looked more broadly at the performance of Metra's trains overall.

28. Assessed against Metra's own standards, CP's dispatching on the MD-W and MD-N lines over which Metra operates is superlative. Figure 3 below reports Metra data covering all of 2021 to demonstrate the following:

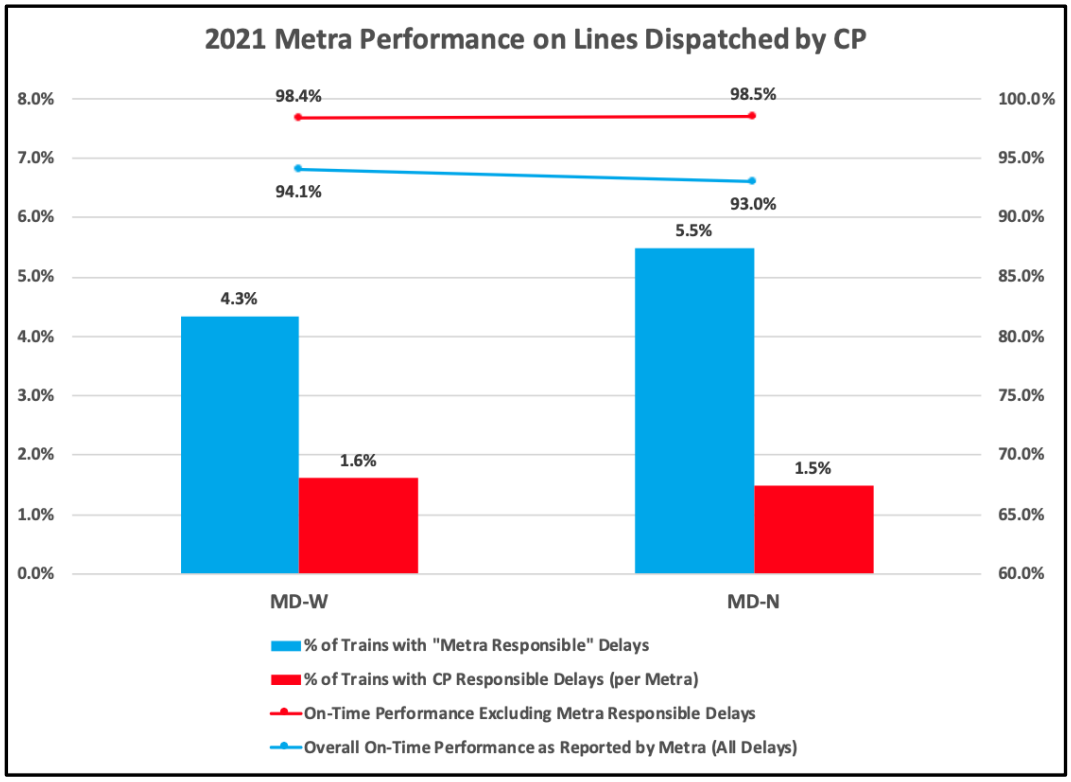
- On both the MD-N and MD-W lines, Metra's overall average on-time performance is close to Metra's 95 percent target, as shown by the blue line. This means that nearly 95 out of every 100 trains are *not delayed for any reason*.

[22] *See "*Workpaper_Walker_Godfrey_Rodriguez.xlsx," Tab "Rodriguez Data."

[23] METRA WEBSITE, https://metra.com/time-performance-reports#Metra_and_On_Time_Performance (excerpts are Exhibit 8 hereto); METR-7, at 24.

- Removing the delays to Metra's trains on these lines that were *caused by Metra and not by CP* shows that only 1.5-1.6 percent of all Metra trains were delayed for reasons attributable to CP (dispatching or otherwise), as shown by the red bars. In other words, absent the delays caused by Metra, Metra's on-time performance *would exceed 98 percent* on both lines, as shown by the red line. Delays attributable to Metra (the blue bars) far exceed those attributable to CP and drive down Metra's on-time performance.

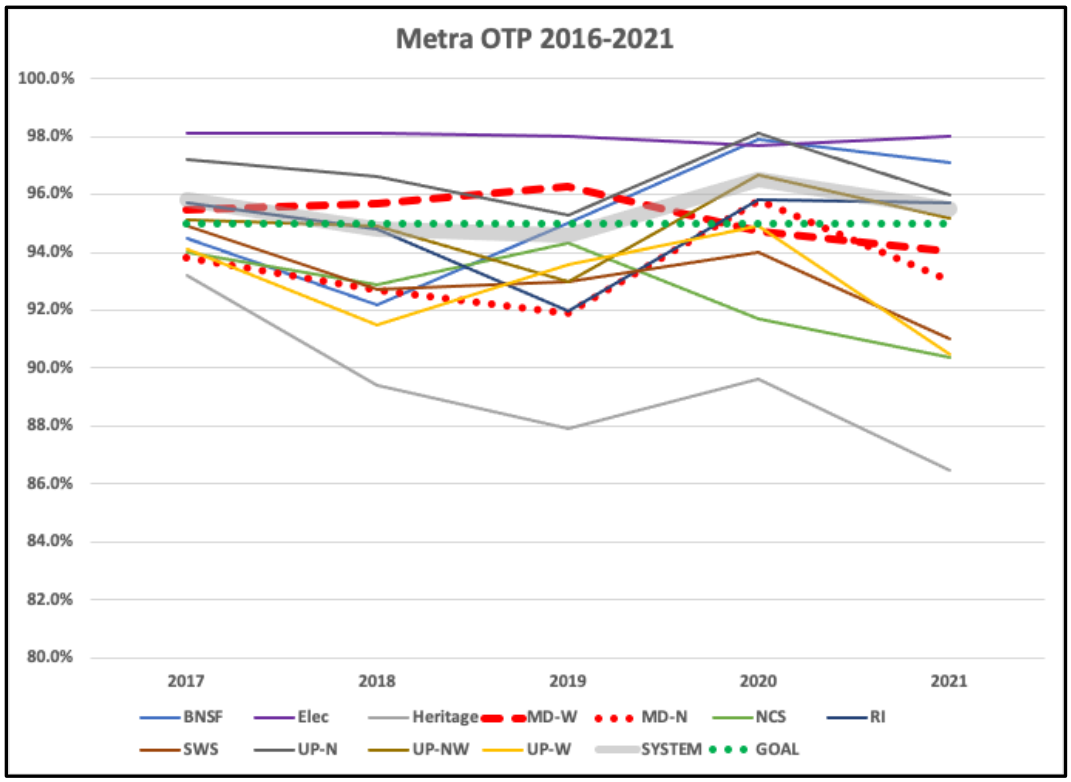
FIGURE 3[24]
METRA PERFORMANCE ON CP-DISPATCHED MD-W AND MD-N LINES



29. It is also instructive to examine Metra's on-time performance on the MD-W and MD-N lines in comparison to the other lines over which Metra operates. Figure 4 below does this using the same Metra performance data. The MD-W and MD-N lines are shown by thick red lines, and are right in the middle of the pack, bracketing Metra's 95-percent on-time performance goal (shown by the dotted green line).

[24] Source: Metra, "*On-Time Performance - December 2021*," *available at* https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December_2021.pdf (excerpts are Exhibit 2 hereto); *see* "Metra Data Workpaper," Tab "Fig 3."

FIGURE 4[25]
METRA OTP RELATIVE TO OTHER METRA LINES AND METRA'S 95% OTP GOAL

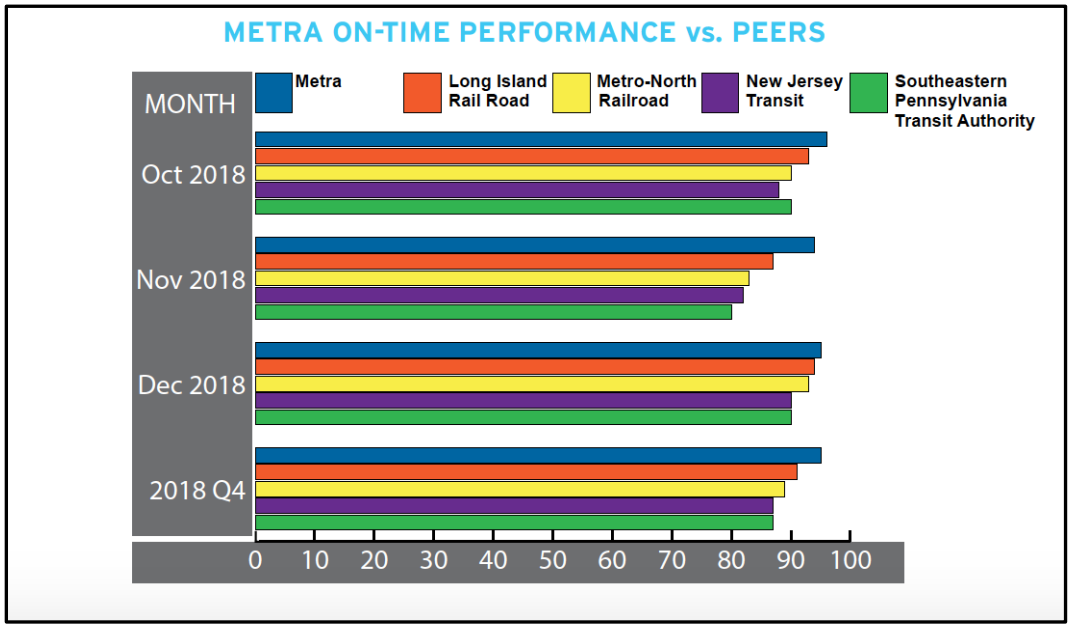


30. Interestingly, Metra's public statements show that it is quite proud of the on-time performance levels it achieves as compared with its peer commuter operations in New York and Philadelphia. Metra is far out in the lead relative to each of these commuter railroads, and

[25] Metra, "*On-Time Performance - December 2021*," *available at* https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December_2021.pdf (excerpts are Exhibit 2 hereto); Metra, "*On-Time Performance - December 2020*," *available at* https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December%202020.pdf (excerpts are Exhibit 3 hereto); Metra, "*On-Time Performance - December 2019*," *available at* https://metra.com/sites/default/files/assets/planning/on-time_performance_report_-_december_2019.pdf (excerpts are Exhibit 4 hereto); Metra, "*On-Time Performance - December 2018 (Revised)*," *available at* https://metra.com/sites/default/files/assets/planning/ridership/on-time_performance_report_-_december_2018-revised.pdf (excerpts are Exhibit 5 hereto); Metra, *"Commuter Rail System On-Time Performance Report - December 2017*," *available at* https://prod.metrarail.com/sites/default/files/assets/planning/ridership/december_2017_standalone_otp_report.pdf (excerpts are Exhibit 6 hereto); *see* "Metra Data Workpaper," Tab "Fig 4."

Metra's freight railroad partners – including CP – contribute to that excellent performance despite Chicago being by far the busiest freight hub in the Nation.

FIGURE 5[26]
METRA COMPARISON OF ITS ON-TIME PERFORMANCE WITH THAT OF OTHER COMMUTER RAILROADS



31. In the charts that follow, I focus on Metra's MD-W line. I do so for simplicity and also because that is the only line where the CP/KCS Transaction will increase the number of freight trains. (The patterns would be the same for Metra performance on the MD-N line.)

32. Metra presents data on delays experienced by MD-W and MD-N trains that Metra characterizes as "continual" and "routine[]."[27] This is a terribly misleading characterization. In fact, as I hope the preceding figures already demonstrate, CP performs very well, and according to Metra's own data, CP dispatching and freight operations are almost always successful in

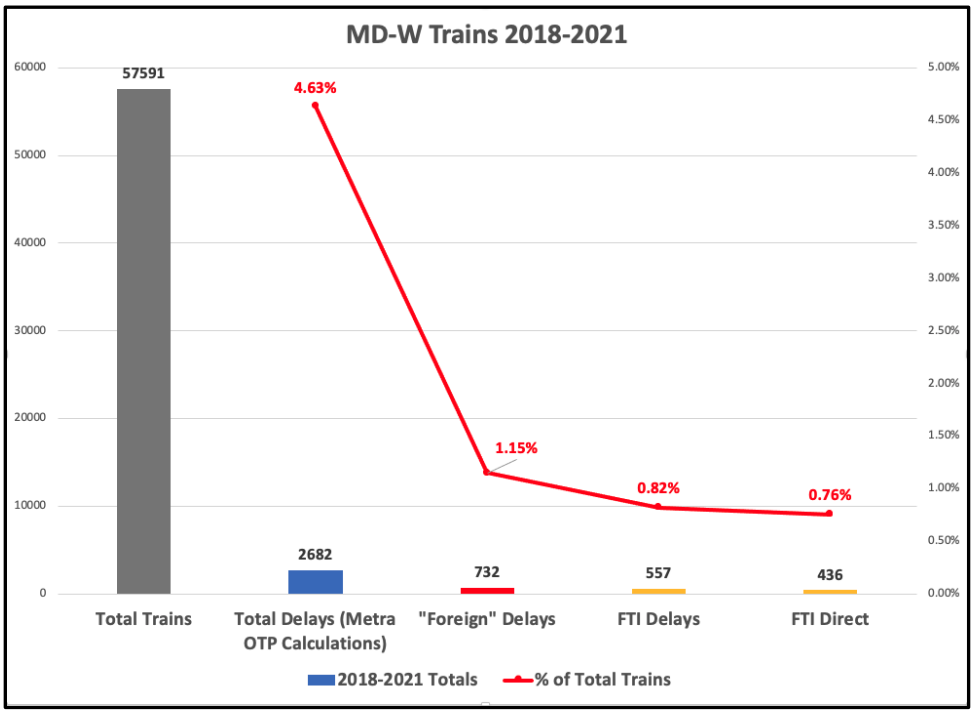
[26] Metra *"Metra 2019 Fact Book at 19," available at* https://metra.com/sites/default/files/assets/2019_fact_book.pdf (excerpts are Exhibit 7 hereto).

[27] METR-7 at 21, 30-31; Metra Comments, Vol. 3, Exhs. C-5-7.

avoiding any delay to Metra trains from CP freight trains (in other words, less than two percent of the time).

33. Despite the excellent percentage on-time performance of Metra's trains on the MD-W line, Metra's approach is to focus only on delayed trains while ignoring all of the trains that are not delayed. Figure 6 below (based on Metra's data) shows that 57,591 trains were scheduled to operate on the MD-W line between 2018 and 2021. Of these, only 2,682 trains suffered any delay meeting Metra's definitions. In other words, only 4.6% of these trains experienced any delay for any reason at all (as shown by the red line in the second column of Figure 6), corresponding to the above 95 percent on-time performance Metra reports for the period 2018-2021.

FIGURE 6[28]
A VERY SMALL PERCENTAGE OF METRA MD-W TRAINS ARE DELAYED



28 *See* "Metra Data Workpaper" Tab "Fig 5."

34. Metra wants the Board to focus only on the 2,682 delayed trains, using that figure to criticize CP's dispatching performance, while ignoring the 54,000+ trains that were not delayed. In fact, even the 2,682 provide no support for Metra's arguments about CP's dispatching performance. Metra's own data breaks down the sources of delays and which Metra trains were involved. As Figure 6 shows, of the 2,682 trains that were delayed for any reason, only 732 of them – in other words, only 1.15% of Metra's MD-W trains – were delayed for reasons attributable to CP.[29] And of these, CP-responsible delays associated with "freight train interference" (the only delays related to dispatching) accounted for only 557 delays – or less than one percent of all MD-W trains. This is shown in the fourth column of Figure 6.

35. Even this small number overstates the occasions when CP freight trains cause delay to Metra's trains. As Metra explains, many of the trains that suffer delay do so because of so-called "cascading" delays. Metra provides an illustration: a train that is delayed en route to destination by some event, and as a result of the equipment arriving late at its last station, another train (the returning equipment) is delayed when it heads back in the other direction.[30] As a result, a single instance of a dispatching decision that causes delay to Metra can result in multiple reported delays, even though it is just one instance – one dispatching event. Metra's OTP reports call these cascading delays "indirect" delays.[31] "Direct" delays are the better measure of the number of occasions when Metra perceives that CP's dispatching decisions have caused a Metra train to be delayed, a sentiment that Metra shares.[32] As shown in Figure 6, over the four years

[29] Metra's OTP reports refer to CP as the "Foreign Carrier."

[30] METR-7 at 32.

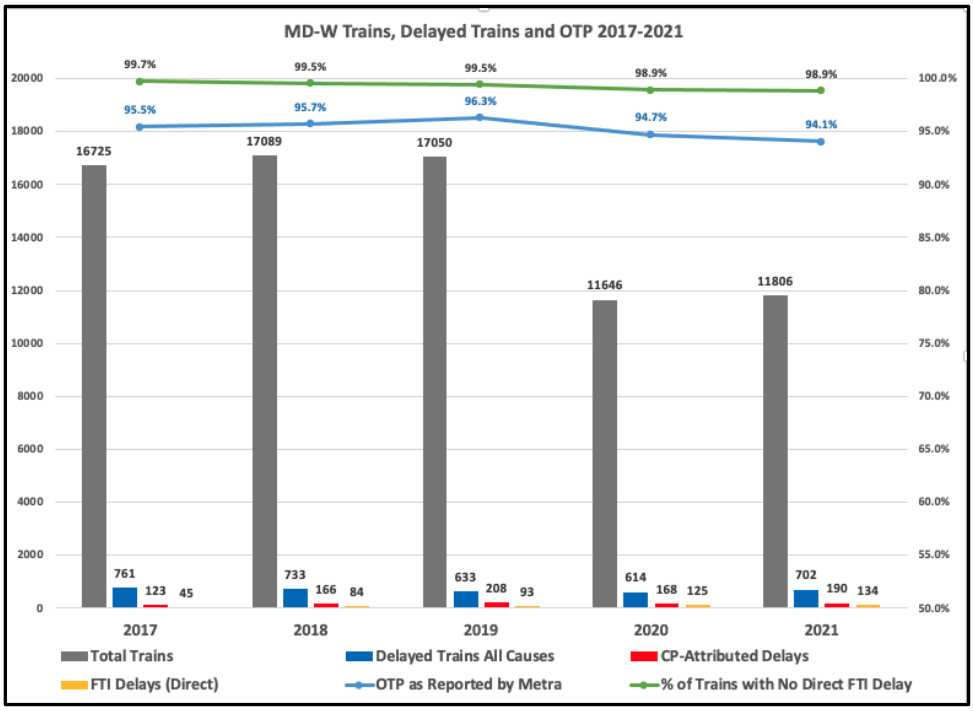
[31] Metra, "*On-Time Performance - December 2021*," *available at* https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December_2021.pdf (excerpts are Exhibit 2 hereto).

[32] *See* Godfrey Dep. Tr., at 43:12-43:23.

from 2018 through 2021 there were only 436 such occasions, representing *just 0.76% of all Metra MD-W trains* (as shown in the rightmost column in Figure 6).

36. Figure 7 below disaggregates the portrayal in Figure 7 and examines the same data points year-by-year, revealing a consistent set of relationships. CP dispatchers consistently support Metra operations at very high levels of on-time performance, with 98-99 percent of trains receiving no direct freight-train interference delays according to Metra's own records (as shown by the green line).

FIGURE 7[33]
METRA MD-W DELAYS AND OTP 2017-2021



37. Viewed another way, even if CP could wave a magic wand for Metra and *remove every single one of its freight trains from the lines shared with Metra*, Metra's on-time performance would only tick up by a tiny fraction. In 2021, Metra's 702 delays on the MD-W

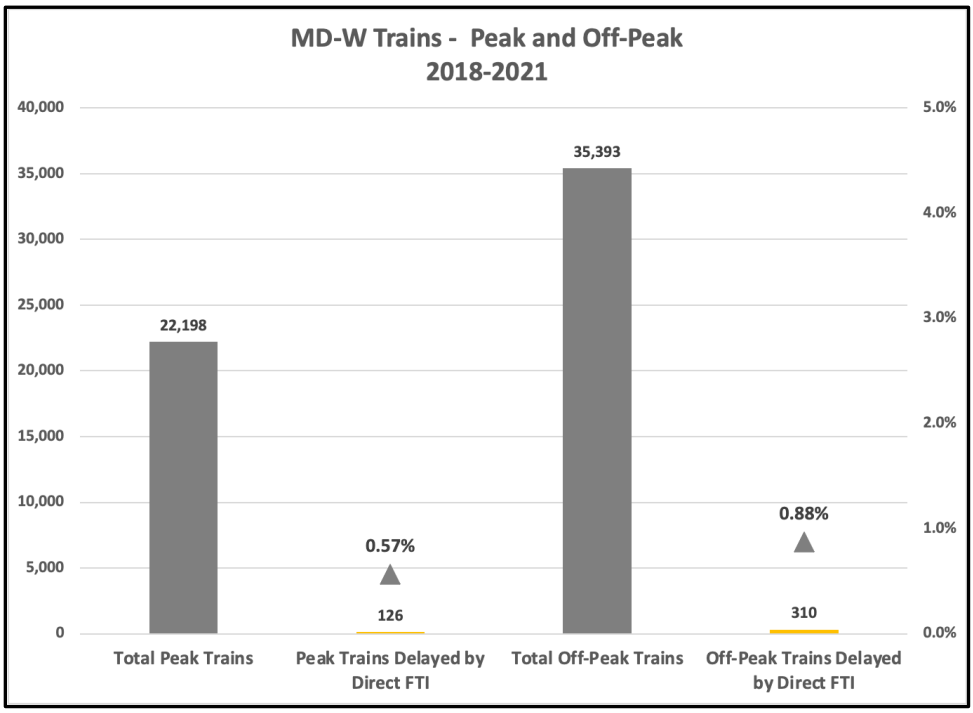
33 *See* "Metra Data Workpaper," Tab "Fig 6."

line would have been reduced by at most 190, leaving 512 delays,[34] for an on-time performance of 95.7 percent – *only 1.6 percentage points higher than with all of CP's freight operations about which Metra complains*.

38. Metra's Comments are particularly critical of CP's dispatching during Metra's so-called "Peak Periods." CP does not schedule freight trains during these periods, but CP is not prohibited by contract from doing so provided it does not "interfere" with Metra's operations during those windows. Unfortunately, Metra does occasionally report delays to its trains during Metra's peak windows. CP strives to avoid this outcome, but sometimes railroad operations do not play out precisely as planned despite our best intentions. As Figure 8 below shows, however, this happens very rarely. Again focusing on the trains that suffer "direct" delays due to freight train interference, only about half of one percent (0.57 percent) of Metra's 22,198 peak-period trains between 2018 and 2021 experienced such delays. This amounted to 126 total delays over the course of four years, or about *one delay every eight business days*. In other words, in roughly fifteen out of every sixteen of Metra's peak rush hour windows (there are two each weekday), not a single Metra train experienced a delay resulting from freight train interference. Delays occur slightly more often – but still less than one percent of the time – for Metra's off-peak trains.

[34] The CP-attributed delays removed in this thought experiment include mechanical and other delays having nothing to do with CP's dispatching of freight trains.

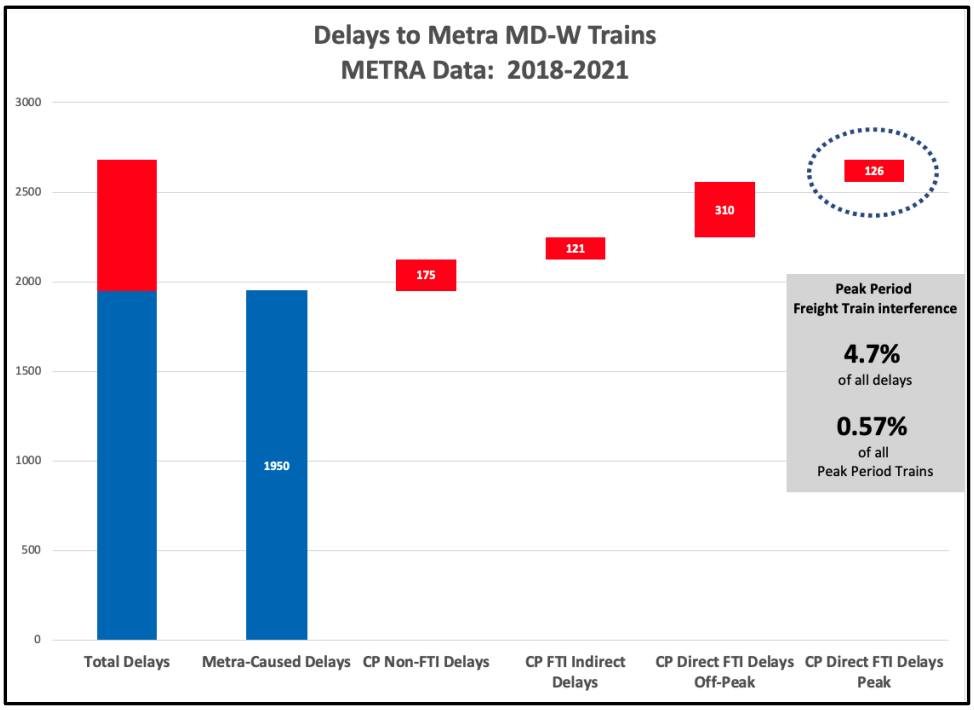
FIGURE 8[35]
MD-W FREIGHT TRAIN INTERFERENCE DELAYS PEAK VS. OFF-PEAK



39. Another useful perspective – similarly not conveyed in Metra's Comments – is how the delays attributable to CP compare to the delays that Metra attributes to itself (in other words, delays that Metra agrees are outside CP control). As Figure 9 below shows, the small numbers of delays attributable to freight train interference is dwarfed by the delays caused by Metra's own actions. Metra's Comments unfairly lump all of these delays together and blame CP for all of them.

35 *See* "Metra Data Workpaper," Tab "Fig 7."

FIGURE 9[36]
SOURCE OF DELAYS TO METRA MD-W TRAINS 2018-2021



40. I know from my railroad experience that there is always room for improvement, and I also know that CP regrets the rare occasions when its decisions might have led to delay that could have been avoided. But the record that Metra's data reveals is one of which any railroad could be proud. It is certainly not a basis for fundamentally re-writing longstanding contractual rights.

41. Another way to understand how well Metra trains have performed on the CP-dispatched MD-W line is to consider that performance in comparison to Metra's own stated on-time performance target of 95 percent. Outside of this proceeding, Metra acknowledges to its customers that no railroad – Metra, CP, nor any other – is perfect, and that conditions preclude achieving 100% on-time performance. That is why Metra measures only delays that are six minutes or longer. To quote Metra's website:

36 *See* "Metra Data Workpaper," Tab "Fig 8."

> "Like other commuter railroads, Metra considers a train to have operated on time if it reaches its final destination within five minutes and 59 seconds of its scheduled arrival. That standard filters out some of the delays that are beyond a railroad's control, so the resulting rate is a truer reflection of the railroad's efforts to control the delays that are controllable. The goal is to use this information to ultimately improve service. And, we believe this approach provides us with relevant information to measure how we are doing and where we need to improve."[37]

42. Likewise, Metra sets a 95 percent on-time goal rather than a 100 percent goal for the same reasons: because delays are inevitable no matter how hard railroads try to perform perfectly. Again, quoting Metra's website:

> "[T]here will always be variations that can cause trains to be delayed.
>
> "That's because Metra's schedules are designed to be most successful in 'best case,' normal operating conditions. In other words, if Metra picked up the exact same number of people every day, from the same exact location, and they all used the exact same doors, in the same weather, with the same equipment, etc., then it would be easy to stay on schedule and hit every stop within a minute of the schedule. To not design schedules based on these conditions would result in increased idling time in between stations and longer overall train trips on days when conditions are normal.
>
> "Unfortunately, every day, there are scores of unpredictable variations from those perfect conditions that can have small but cascading impacts on Metra's schedule. These variations can occur for a host of reasons – from the need to deploy a wheelchair lift, to an unusual number of riders at one or more stops to a medical emergency. Other factors that impact schedules include rain and snow, which can easily slow boarding, freight interference issues and mechanical problems. The list goes on."[38]

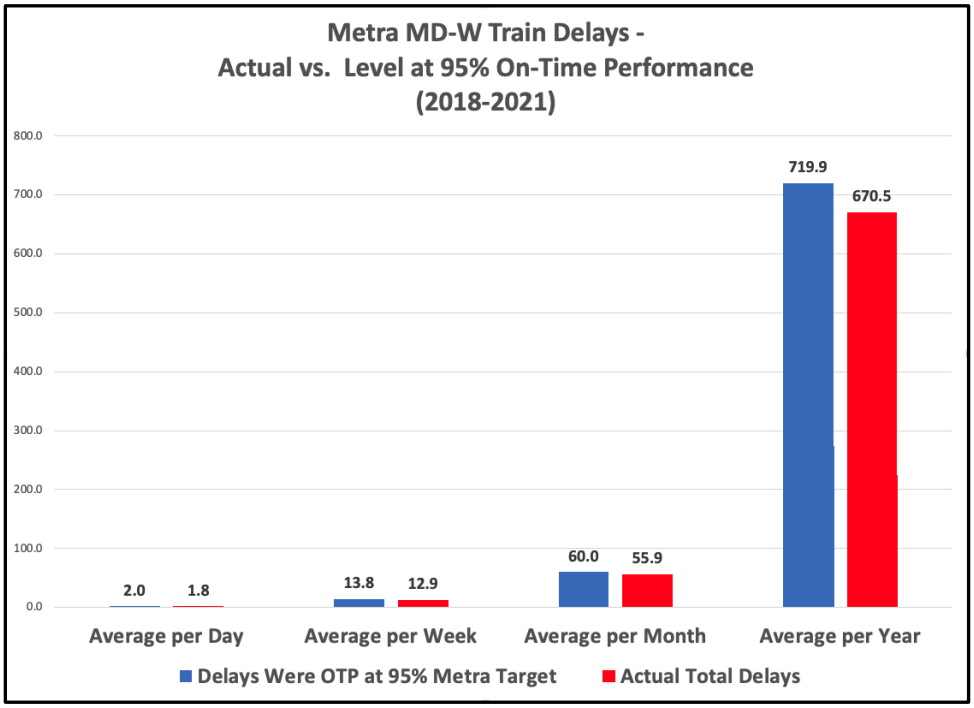
43. Using Metra's train performance data, it is easy to assess how many delays Metra's MD-W trains would have experienced had Metra just achieved its 95 percent on-time

[37] METRA WEBSITE, https://metra.com/time-performance-reports#Metra_and_On_Time_Performance (Exhibit 8 hereto).

[38] *Id.*

goal, and then to compare that amount of delay with what Metra experienced. Figure 10 below presents that comparison. With the 57,591 trains Metra scheduled on the MD-W line between 2018 and 2021 (*i.e.*, 40+ trains every weekday), Metra's own 95% on-time performance goal acknowledges that one would expect delays every single day, week in and week out, totaling up to 719 delayed trains annually. CP's dispatching allowed Metra's trains to realize *fewer actual delays* than they would have had Metra's 95 percent on-time goal been met precisely.

FIGURE 10[39]
FEWER DELAYS TO METRA MD-W TRAINS 2018-2021 THAN IF OTP HAD BEEN 95%

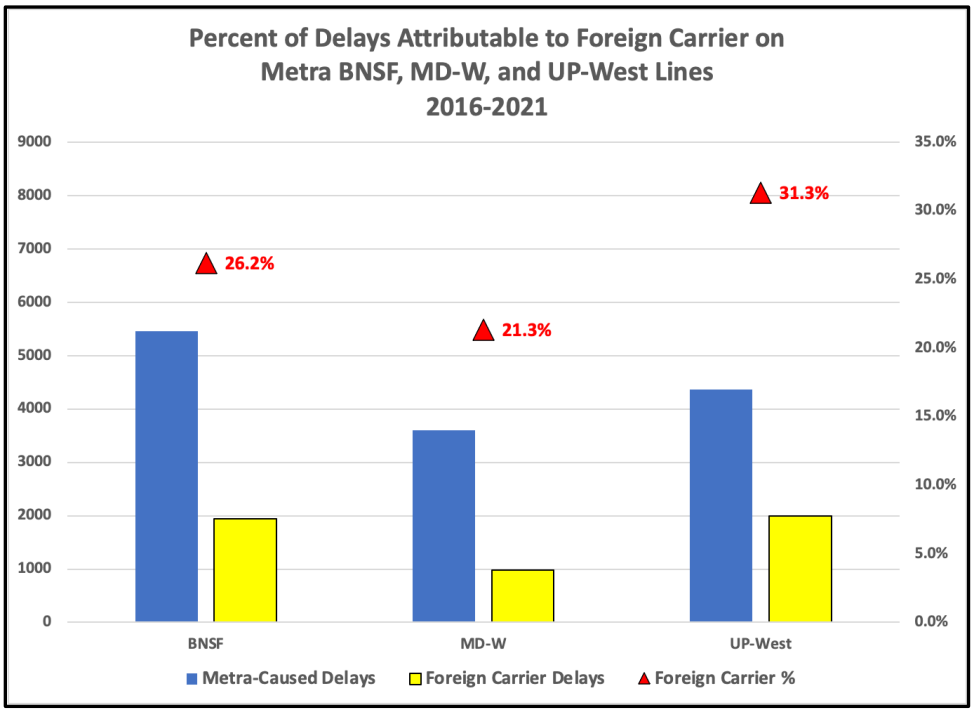


44. Metra's data also confirms that Metra's MD-W trains perform well in comparison with Metra trains operating on other Metra routes that are dispatched by freight railroads. Though it is hard to draw conclusions from the relative number or percentages of delays on different Metra lines, given the inherently different operating conditions, it is worth noting that

39 *See* "Metra Data Workpaper" Tab "Fig 9."

the portion of total delays to MD-W trains that Metra attributes to CP is meaningfully lower than the portion of delays it attributes to UP or BNSF on nearby lines that those railroads dispatch for Metra, as shown in Figure 11 below.

FIGURE 11[40]
PORTION OF DELAYS ATTRIBUTABLE TO "FOREIGN CARRIER



45. My review of the objective performance data should demonstrate that the specific examples of "freight interference" that Metra presents are just the anecdotal illustrations of the reasons why things do not always go as well *as they almost always do*. Those examples merely reflect normal railroading, not bad dispatching.

C. Metra's Complaint About Trains Dispatched on the "Wrong Tracks" Is Misguided and Unfair

46. One set of Metra's complaints about CP's dispatching has nothing to do with keeping Metra trains on schedule, but with the claim that CP "regularly dispatches Metra trains

40 "Metra Data Workpaper" Tab "Fig 10."

on different main line tracks from the ones that Metra has identified for use by its passengers heading in a specified direction." METR-7 at 27. According to Metra, this "regular" practice results in dangerous situations where "passengers must get to the opposite side of the tracks, often by darting across the tracks in the face of an oncoming freight train, or around a stationary one." *Id.* at 28.

47. This complaint is misguided and unfair. First of all, Metra's MD-W and MD-N infrastructure is *designed* to support trains in any direction on any track. Both lines are high-speed, double-track railroad, with multiple high-speed cross-overs permitting trains to operate in either direction on both tracks. This configuration helps ensure that there is ample ability to maintain Metra schedules in the presence of other Metra trains, Amtrak trains, and CP freight trains. Metra's station platforms are likewise set up to allow Metra trains moving in either direction to embark and disembark safely no matter which track the train is operating on.

48. Second, Metra's Comments make it sound like CP dispatchers disregard Metra's desire for its trains to use certain tracks as a matter of routine. That is not so. CP's dispatching practice is to run Metra and CP trains in a current of flow consistent with U.S. highways – in other words, on the right-hand track in double-track territory. This means that on the MD-W line, inbound Metra trains normally operate on the southern mainline track (which we call Track 2). Contrary to Metra's implication, CP does not seek to dispatch CP freight trains on the "wrong" track, forcing Metra's trains heading in the other direction to also operate on the wrong track. It is telling that Metra does not attempt to provide any quantification of how often its trains are dispatched in a way that has them arriving at certain stations on a different track from what commuters might expect, because it a relatively rare exception and not the norm.

49. Metra cites a few examples of Metra riders complaining in social media posts about freight trains passing through stations while passenger trains were about to load or unload passengers. METR-7 at 28-29. Examining the photos in those posts, however, provides no indication whether the Metra trains were operating on the "wrong" track, just that freight trains passed by.[41] In fact, all four posts were taken from locations that have level crossings over tracks that passengers must wait at and cross to get to the opposite platform; thus the customers were most likely complaining about having to cross the level crossing *not* that a train was operating on the "wrong" track. It also bears mentioning that these posts depict freight trains operating *outside Metra's peak periods not during them*; Metra's claim to the contrary failed to adjust the timestamps of the posts to account for local Chicago time.[42] As such, nothing about these posts implies anything different from normal operations.

50. Third, when CP's dispatchers send Metra trains onto the opposite track from what commuters might expect, there are good reasons for it, and there is nothing unsafe about it. Running an express Metra train around slower local trains, or running Metra trains around slower CP freight trains are good examples of why a Metra train might end up on the "wrong" track for some of its station stops. This is *good dispatching*, aimed at ensuring that Metra trains maintain their schedules while simultaneously accommodating other operations on the line. Metra wants CP dispatchers to do this.[43]

[41] *Id.*; *see also* Metra, Objections and Responses to Applicants' First Requests at 5-6 (Exhibit 1) (Apr. 11, 2022) ("Metra does not possess this information [concerning] . . . which railroad's freight trains are purportedly obstructing Metra's trains in the social media posts.").

[42] METR-7 at 28 n.98.

[43] Oppenheim Dep. Tr., at 252:4-9 (Q: "[T]he right dispatching move is to cross the Metra train from track 2 to track 1 to avoid delay; isn't that right?" A: "No, if that is the only way – the only option that you have to run, yes.").

51. If there were a rule that prohibited using both tracks, it would interfere with the fluid operations of the line. The result would be a significant loss in the capacity of the MD-W and MD-N lines, and situations that could bring all operations to a halt. Metra knows this, as shown by its request for a condition requiring CP to *add several crossovers* on the MD-W line.[44] Those crossovers would make sense only if they allowed trains – including Metra trains – to cross from one mainline track to the other. And that means that at some stations, those Metra trains would arrive on the "wrong" track.

52. There is absolutely nothing unsafe about Metra trains arriving on different tracks from the norm when good dispatching calls for it. As noted, Metra's stations have multiple platforms that are set up to allow this. From a passenger's standpoint, crossing the tracks is a routine part of their daily commute. Whichever platform a train is going to use, the passengers that arrive at the station from the "other side" of the tracks (where they park their car, arrive on foot, or whatever) will have to cross the tracks to get to their train, almost always at a level crossing.[45]

53. In addition, Metra's stations are equipped with loudspeakers that provide advance announcements regarding arriving trains and the tracks they will be on, giving passengers ample time to get to the correct platform. Standard train operating practice is for arriving trains to come into the station at slow speeds, in order to ensure that they can stop short if pedestrians are crossing in front of the train.

[44] METR-7 at 22, 70.

[45] Oppenheim Dep. Tr., at 151:23-24 ("I would say that on a regular basis, passengers do cross the tracks.").

D. Developments Independent of the Transaction Will Further Improve the Performance of Metra's Trains on Lines Shared with CP

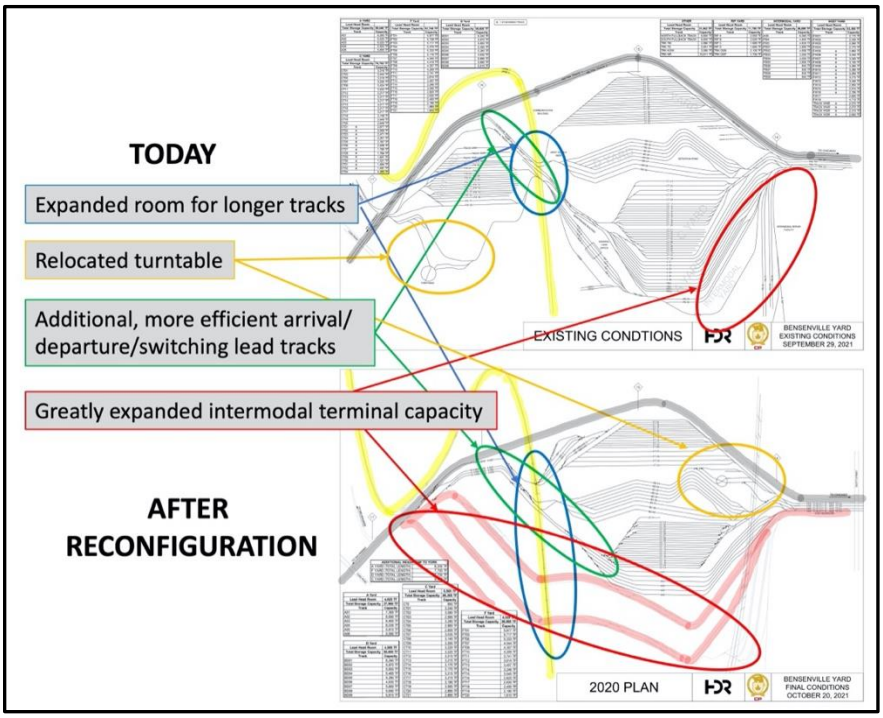
54. I have examined the examples of delays that Metra cites, and one thing that stands out is that a significant portion of those delays relate to freight trains entering and exiting CP's Bensenville Yard. As explained in the Application, independent of the CP/KCS Transaction CP is embarking on a major reconfiguration of Bensenville Yard that will dramatically improve the ability of this facility to receive and depart trains efficiently, sharply reducing the occasions when Metra trains will realize these sorts of delays.

55. Bensenville is CP's only major yard in the Chicago area. It sits at the apex of CP's lines to the Twin Cities (via Milwaukee) and Kansas City, and connects those lines with other railroads at Chicago and with CP's routes to Detroit and Eastern Canada. Figure 12 below presents schematics of the Bensenville Yard before and after the planned reconfiguration. As indicated on the "before" schematic, the intermodal facility in the southeast corner of the yard is physically constrained and requires that cuts of intermodal cars be pulled east of the yard and backed into the ramp tracks. In addition, the yard does not have sufficient numbers of long departure and receiving tracks to support the arrival and departure of multiple long trains. These conditions result from the narrow "waist" in the yard created by the embankment that supports UP's mainline line between Milwaukee and UP's Proviso Yard to the south (circled in blue on Figure 11). In addition, the location of the turntable in the southwest corner of the yard (circled in yellow) typically requires power for eastbound trains moving to/from the turntable to traverse the interlocking at Tower B17 (at the west end of the yard), potentially conflicting with through movements at that location.

56. These physical shortcomings occasionally lead to conflicts between CP's freight operations and Metra's operations today. Although Metra operates over two mainline tracks that

bypass the yard, CP's freight trains to/from Milwaukee must cross those tracks. Trains to/from Kansas City operate over tracks shared with Metra west of Tower B17. And intermodal trains entering and exiting the intermodal facility on the east end of the yard often need to use mainline tracks shared with Metra.

FIGURE 12
BENSENVILLE YARD RECONFIGURATION



57. The reconfiguration is made possible by the elimination of the UP embankment, in favor of a series of bridges, that will unlock a much wider footprint supporting longer yard tracks. The intermodal facility will be moved and allow for the straight-ahead movement of intermodal trains into and out of the yard. The much greater capacity of the new facility will allow for the repurposing of the nearby Schiller Park terminal, eliminating the movement of intermodal trains to and from that facility (across tracks shared with Metra). The turntable will be relocated to the east side of the yard, where it will be accessible to both ends of the yard without requiring locomotives to move through the B17 interlocking switches. Likewise,

additional, more efficient manifest receiving and departure tracks will be added. Even with increased numbers of trains between Bensenville Yard and points west resulting from the CP/KCS Transaction, opportunities for delays to Metra operations will be significantly reduced.

58. When this work is complete, many (perhaps the vast majority) of the situations that in the past led to conflicts between CP freight trains and Metra passenger trains will no longer occur.

E. The Vast Majority of the Historical Delays Metra Complains About Are Not Relevant to the Potential Impact of the CP/KCS Transaction

59. The vast majority of the "delays" and supposed dispatching issues that Metra's witnesses identify and complain about have no relationship at all to any effects of the CP/KCS Transaction. As Mr. Elphick explains in more detail, the only part of the lines CP shares with Metra where the Transaction will lead to an increased number of freight trains is the double-track mainline between the west end of Bensenville Yard and Big Timber Road as the west end of the MD-W line. This line has tremendous capacity, and Metra's schedules leave numerous slots throughout the day (both mid-day between the morning and evening commuter ("peak period") windows and overnight) when it will be easy to dispatch CPKC freight trains without causing any interference to Metra trains whatsoever. In fact, I understand that Metra's witness Oppenheim maintains a document reflecting his view of these freight operating windows on the MD-W line, and that document (a copy of which is attached as Exhibit 9 to my Statement)[46] shows numerous periods during which freight trains can move without interfering with Metra's trains: he shows 11 windows of 40-100 minutes in duration during the day on weekdays

[46] *See* "B17 and B12 – Freight windows – A – Referenced in Deposition Held on 06-07-2022.xls" (Exhibit 9). Mr. Oppenheim explains this document in his deposition. Oppenheim Dep. Tr., at 175:4-13; Mr. Elphick discusses the freight capacity associated with these extensive operating windows in his Reply Verified Statement. Elphick R.V.S. at ¶¶ 19-21.

(between 8am and 9am, between 9am and 10am, between 11am and 1pm), and a six hour period overnight. He even shows a window of time during the morning peak period when CP trains can operate.

60. Dispatching other parts of the lines CP shares with Metra can be more complex, especially where there is a need to interface with other railroads in order to move trains off of Metra trackage. For example, at Tower A20 on the MD-N Line, CP freights heading to Bensenville Yard from the north (or coming from Bensenville heading north) must enter or exit UP trackage. Also at Tower B17, freight trains heading north from Bensenville (or south from Bensenville) must enter or leave UP-dispatched trackage, and at Tower B12, CP freights to and from eastern carriers must gain access to trackage dispatched by the Indiana Harbor Belt or Belt Railway of Chicago. CP dispatchers do a good job at managing these interfaces, but delays can occur as Metra's witnesses point out. But my point is that none of this will be affected by the CP/KCS Transaction because the Transaction will not result in CPKC operating more trains through these interfaces than CP does pre-Transaction.

61. Mr. Oppenheim's list of the most important "issues with CP's joint operation and dispatching" (which is at pages 11-12 of his Verified Statement) identifies categories of concerns about dispatching that have nothing to do with the Transaction. At least three of his categories (items (2)-(4)) involve issues relating to Bensenville Yard that will be addressed by the reconfiguration I summarize above. The other four (items (1) and (5)-(7)) involve issues on the MD-N line,[47] or on the UP segment connecting the MD-N line with Bensenville Yard. As I have

[47] Mr. Oppenheim mistakenly states that trains between Rondout and Tower A20 are on the MD-W line. That is incorrect; they are on the MD-N line.

explained, the CP/KCS Transaction *will not increase train counts* on the MD-N line or the UP segment connecting MD-N with Bensenville Yard.

62. I understand that Mr. Oppenheim may have been under the misimpression that the Transaction would increase the number of CPKC trains moving between Bensenville and the north (on the MD-N line) because Metra's consultants suggested that CPKC would divert Kansas City-St. Paul trains off of the Marquette Subdivision and through Chicago, which Mr. Oppenheim testified would cause growth in "trains between Kansas City and St. Paul that operate via Chicago," and "trains between points north of Chicago and Kansas City."[48] But as Mr. Elphick explains, that is just not the case. Those trains will not come through Chicago (except perhaps in emergencies).

63. A review of the delay data put forward by Metra's other witnesses confirms that Mr. Oppenheim's catalog of the areas raising the most issues was correct. The available information reflecting the location and cause of delays to Metra's trains confirms that the vast majority relate to the categories Mr. Oppenheim lists, none of which involve CP operations that will be affected by the Transaction. At his deposition, Metra witness Rodriguez confirmed that the delay spreadsheet he prepared shows delays that occurred in connection with CP operations that will not be impacted by the Transaction.[49]

II. CP RESPONSIBILITY FOR DISPATCHING IS CRITICAL TO FREIGHT OPERATIONS AND BENEFITS METRA

64. Metra's request for a condition compelling CP to relinquish responsibility for dispatching to Metra, contrary to the governing trackage rights agreement between CP and

[48] Oppenheim Dep. Tr., at 95:4-100:1.

[49] *See* Rodriguez Dep. Tr. at 96:22-99:9.

Metra, would be both unwarranted and affirmatively detrimental to efficient rail operations for both CP's freight trains and Metra's commuter trains, as well as for the Amtrak trains that also operate over the MD-W line. Shifting dispatching makes no sense given the strong performance CP has proven year in and year out. In addition, a shift of dispatching responsibility would harm overall rail operations: (a) it would replace CP's 24/7/365 dispatchers who are focused on around-the-clock rail operations with Metra dispatchers who would be focused on the operation of passenger trains between the early morning hours and late evening hours; and (b) it would undermine the efficient coordination of freight and passenger operations on the lines shared by CP and Metra and divide responsibility for dispatching CP's lines to/from Chicago into two separately accountable groups, undermining coordination and thus creating a greater potential for interference between freight and passenger trains.

A. CP Dispatchers Are Attentive to Rail Operations Around the Clock

65. Like most commuter operations, Metra does not operate trains on the MD-W and MD-N lines around the clock. Its first weekday trains are scheduled to depart at 4:52 AM on the MD-W line and 4:46 AM on the MD-N line. And its last weekday trains are scheduled to arrive at their destinations at 12:05 AM and 12:12 AM, respectively. Between the last train of the night and the first train of the morning, Metra's operations go dark. On weekends and holidays this dark period is even longer.

66. CP's freight operation, by contrast operates around the clock, 365 days a year, and its dispatching center is staffed to support this cadence. There are no gaps in coverage. Giving Metra responsibility for dispatching would risk degrading freight operations during these overnight hours, when Metra's dispatching center would be reduced to a skeleton staff to support only CP's freight trains during the overnight hours.

67. Finally, there is good reason to be concerned that Metra does not appreciate the greater complexity associated with dispatching freight operations relative to scheduled commuter trains. For one, Metra's dispatchers do not look at the broader CP network on a day-to-day basis and do not interact with the conditions of Bensenville Yard, despite Metra's acknowledgment that the appropriate dispatching decision in a particular case needs to consider the implications of a particular move on the entire network, not just for one train.[50] Moreover, in contrast to scheduled commuter trains, freight trains do not adhere to schedules as precisely, must be received by yard tracks that are available to handle them, must meet one another at sidings that are the proper length to handle them, operate at more varied speeds, and encounter a far more diverse array of potential conditions (broken knuckles, overheated bearings, etc.) that disrupt operations on lines of road. Metra's dispatchers would need to develop the experience and expertise to handle all of these conditions, but would start out far behind CP's dispatchers on the learning curve.

68. While Metra dispatchers have some experience dispatching a handful of freight trains on other lines in the Chicago area, they lack the experience of CP's dispatchers. In response to discovery requests, Metra was able to identify only "Metra's Rock Island Line and portions of the Southwest Service Line" as lines where its dispatchers "dispatch both passenger and freight trains."[51] On the Rock Island Line, Metra dispatches only about "four daily freight trains," and on the Southwest Service Line it dispatches only "one Norfolk Southern train along the entire length of the line."[52] Metra did also note that its dispatchers dispatch freight train

50 *See* Godfrey Dep. Tr., at 122:2-122:23 and 83:25-86:10.

51 Metra, Objections and Responses to Applicants' First Requests at 4 (Apr. 11, 2022). See

52 *Id.*

traffic on the MD-W, MD-N, and Waukesha Subdivisions,[53] but in reality what Metra is describing is the work of former tower operators – which Metra now calls "dispatchers" – whose job is to line switches and signals in order to implement the dispatching judgments made by CP.[54] This inexperience would inevitably jeopardize efficient rail operations on the lines CP and Metra share, as well as disrupting CP's freight operation far beyond the boundaries of those lines.

69. It is not surprising to me that all of the lines over which Metra operates that have the largest volumes of freight traffic are dispatched by the freight railroad operator, not by Metra. BNSF dispatches Metra's BNSF line, UP dispatches Metra's UP-West line, CN dispatches Metra's Heritage Corridor and North Central Service north of Tower B12, and as we have seen CP dispatches Metra's MD-N and MD-W lines. That allocation makes good sense from the standpoint of ensuring the most efficient operation of the railroad for the benefit of all users, freight and passenger alike.

B. CP Dispatching Enables More Efficient Coordination of Freight and Passenger Operations

70. Apart from the greater experience and acumen of CP's dispatchers, CP's responsibility for dispatching enables far greater operational efficiency on the MD-W and MD-N lines than could be achieved were Metra responsible for dispatching. This is because CP's dispatchers have visibility across the network and can coordinate activities that affect the efficiency of freight and passenger operations alike.

53 *Id.*

54 Godfrey Dep. Tr., at 116:11-117:9.

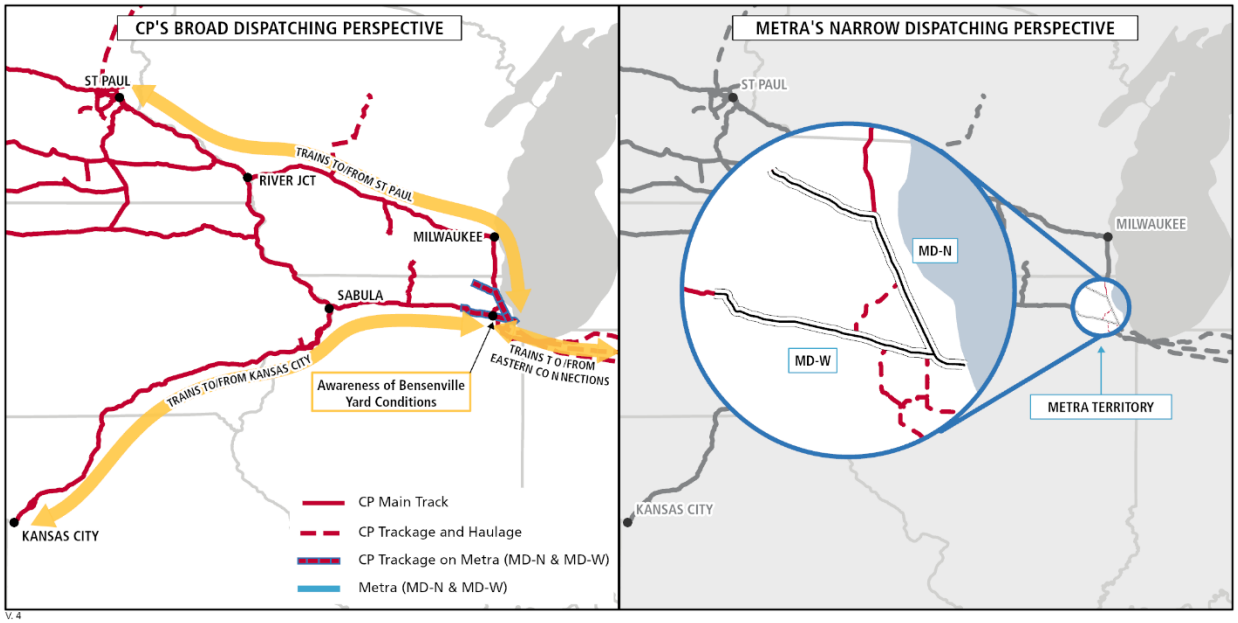
71. Good dispatching requires broad awareness of all parts of the rail network that could affect future operations over the line being dispatched. Mr. Oppenheim, at his deposition, objected to giving Metra dispatching rights over only half the MD-W line because the MD-W line is "a through operation" and "needs to be handled as such."[55] He explained that "[s]ituations occur on one . . . side of the dividing line that would have to be rectified on the other side of the dividing line," so it "would just be very awkward" for Metra "trying to hand things off" on the other side of the line.[56] But Metra has not explained why this principle should not apply more broadly than just the MD-W line—why a dispatcher on the MD-W line should not have awareness of issues that occur outside the dividing line that would have to be rectified on the MD-W line.

72. In fact, the efficient dispatching of freight and passenger operations on the Metra MD-W and MD-N lines require awareness and coordination of operating conditions well beyond the boundaries of those lines. CP dispatchers must interface with UP, IHB, BRC, and other dispatchers controlling freight lines in the Chicago terminal. They must coordinate with CP's Bensenville yard operations, and they must coordinate with CP freight operations as far away as Kansas City and St. Paul, MN. CP responsibility for dispatching delivers this coordination. Metra responsibility would bring a much narrower perspective, jeopardizing operations on the lines CP shares with Metra and far beyond. The different perspectives are depicted in Figure 13 below.

55 Oppenheim Dep. Tr., at 292:8-17.

56 *Id.*

FIGURE 13
DIFFERENT PERSPECTIVES OF CP AND METRA DISPATCHERS



73. As Figure 13 tries to depict, CP's dispatchers dispatching CP's freight trains and Metra's passenger trains in the Chicago area can focus in on the specific trains needing attention, but they bring to that effort a broader awareness of conditions across the railroad that can improve decision-making. This perspective lets them see in multiple dimensions (in terms of a broader geography and a broader temporal scope – *i.e.*, what will conditions look like later if I make a different decision now), rather than being myopically focused on resolving individual train conflicts as they arise.

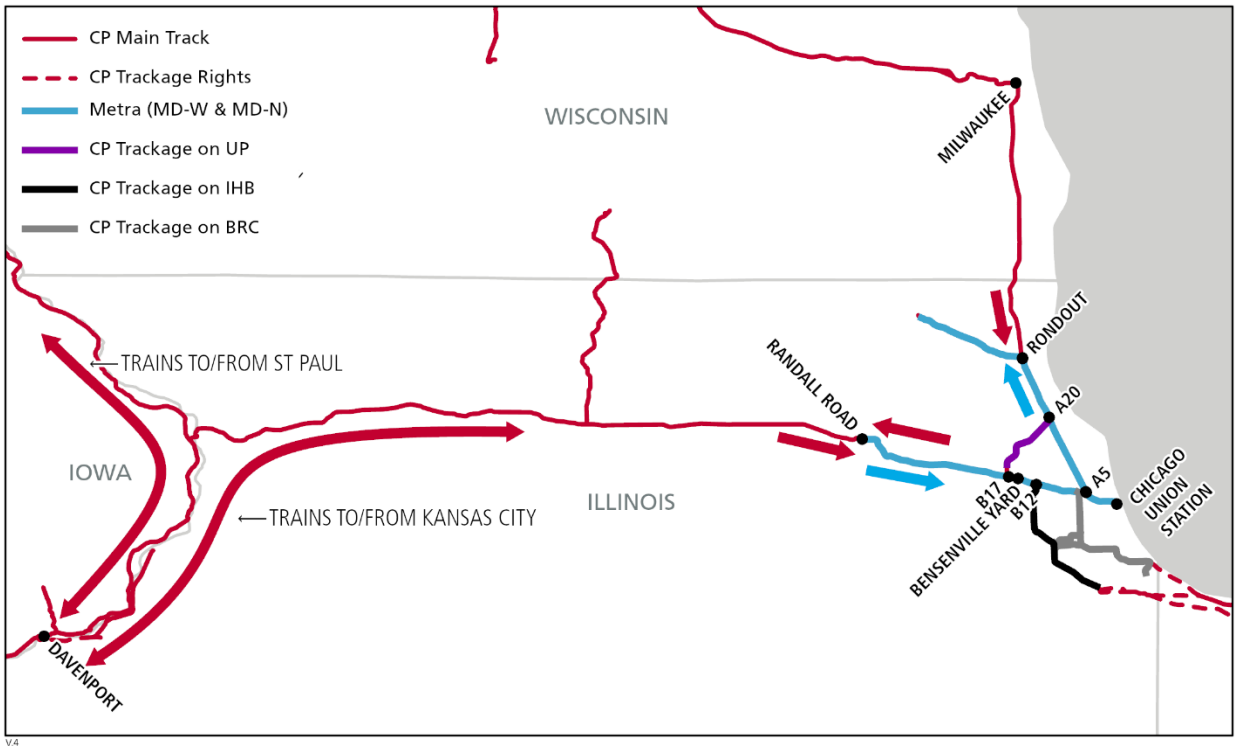
74. I will illustrate this point with a few real-world examples.

75. First, consider a CP freight train heading toward Chicago from Kansas City. A CP dispatcher responsible for dispatching across the entire territory will have awareness of Metra operations, the availability of open tracks in Bensenville Yard to receive the train, and many other conditions affecting fluid operations. That dispatcher can stage Chicago-bound freights at

appropriate locations west of the MD-W line both to avoid interference with Metra's operations as well as avoid blocking CP freight trains heading north or west from Chicago.

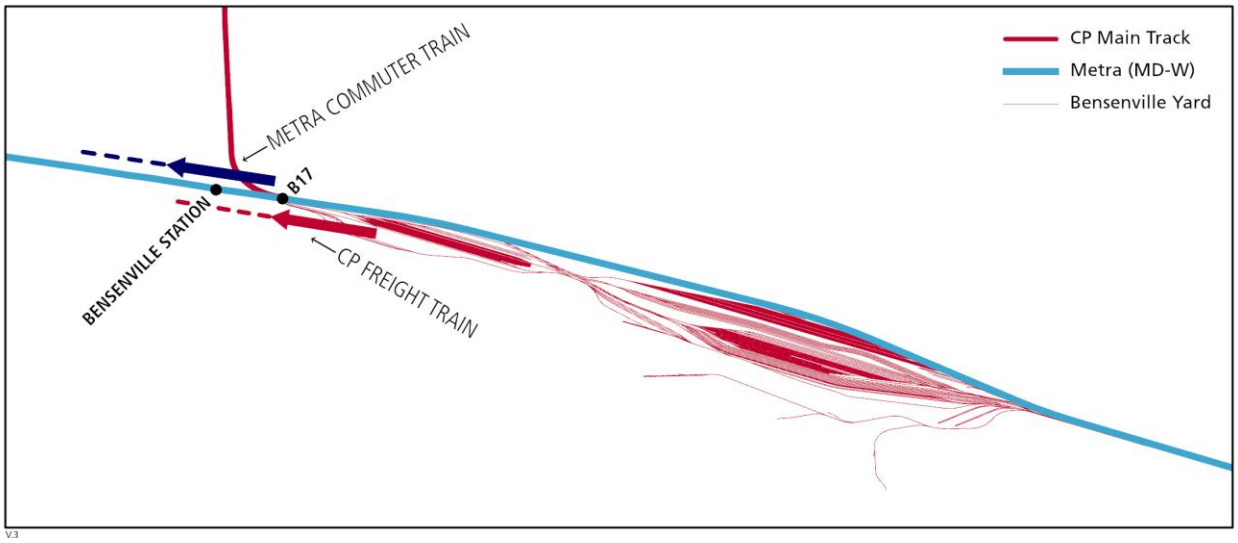
76. Were dispatching divided between Metra (on just the MD-W lines) and CP (on CP's lines west of Randall Road), this efficient coordination would be curtailed. CP dispatchers would no longer be able to coordinate the flow of Chicago-bound trains in a way that optimized operations in light of conditions on the MD-W line. Because CP's dispatchers would not know whether or when a Metra dispatcher would allow the train onto the MD-W line, those trains could end up arriving at the west end of the MD-W line too early, thus blocking westbound freights, or too late because they held far from Chicago. A coordinated flow would be replaced with a queuing system (as shown in Figure 14 below) that would consume capacity and likely be inferior from Metra's perspective as well because westbound freight trains would be affected along with the eastbounds. The disruption would be exacerbated by Metra's peak windows during which Metra dispatchers would refuse access to the MD-W line regardless of whether there was room to move an arriving freight.

FIGURE 14
COORDINATION OF TRAINS BOTH ON AND OFF METRA LINES



77. Second, consider a CP freight train originating at Bensenville Yard and heading west toward Kansas City during the mid-day hours between Metra's peak period operating windows. Today, it is standard practice for CP's dispatcher to depart such a train immediately after an outbound Metra train clears Tower B17 at the west end of Bensenville Yard. By doing this, the freight train will stay behind the commuter train and have no difficulty reaching the west end of Metra's double-track line (at Randall Road) long before the next outbound commuter train catches up. This supports efficient freight operations while also avoiding interference with Metra. This sequence is shown in Figure 15, below.

FIGURE 15
COORDINATION OF CP YARD ACTIVITY WITH METRA TRAIN MOVEMENTS



78. But to make this work requires a lot of coordination between the CP dispatcher and CP's operating personnel at Bensenville. Long before the outbound Metra train gets to B17, the dispatcher must coordinate with the CP trainmaster and train crew to ensure that the westbound freight is made up, has completed any required brake tests, and is ready to go. The CP dispatcher will be proactively monitoring the activity associated with preparing that freight train for departure – making sure there are no crew issues, no power issues, no miscommunications, no paperwork issues, and nothing else that could delay its departure. Then when the Metra train passes B17, stops to discharge passengers at Bensenville station, and starts to pull out of the station, the CP dispatcher can give the CP freight the green light to proceed so that it reaches the end of Metra's line with plenty of time to spare ahead of the next Metra train (usually an hour later). Without all of this coordination – which could not possibly work as smoothly were Metra responsible for dispatching – this coordination would break down and either Metra would hold CP trains for long periods of time inefficiently, or the risk of freight train interference would increase rather than decrease. This would be particularly

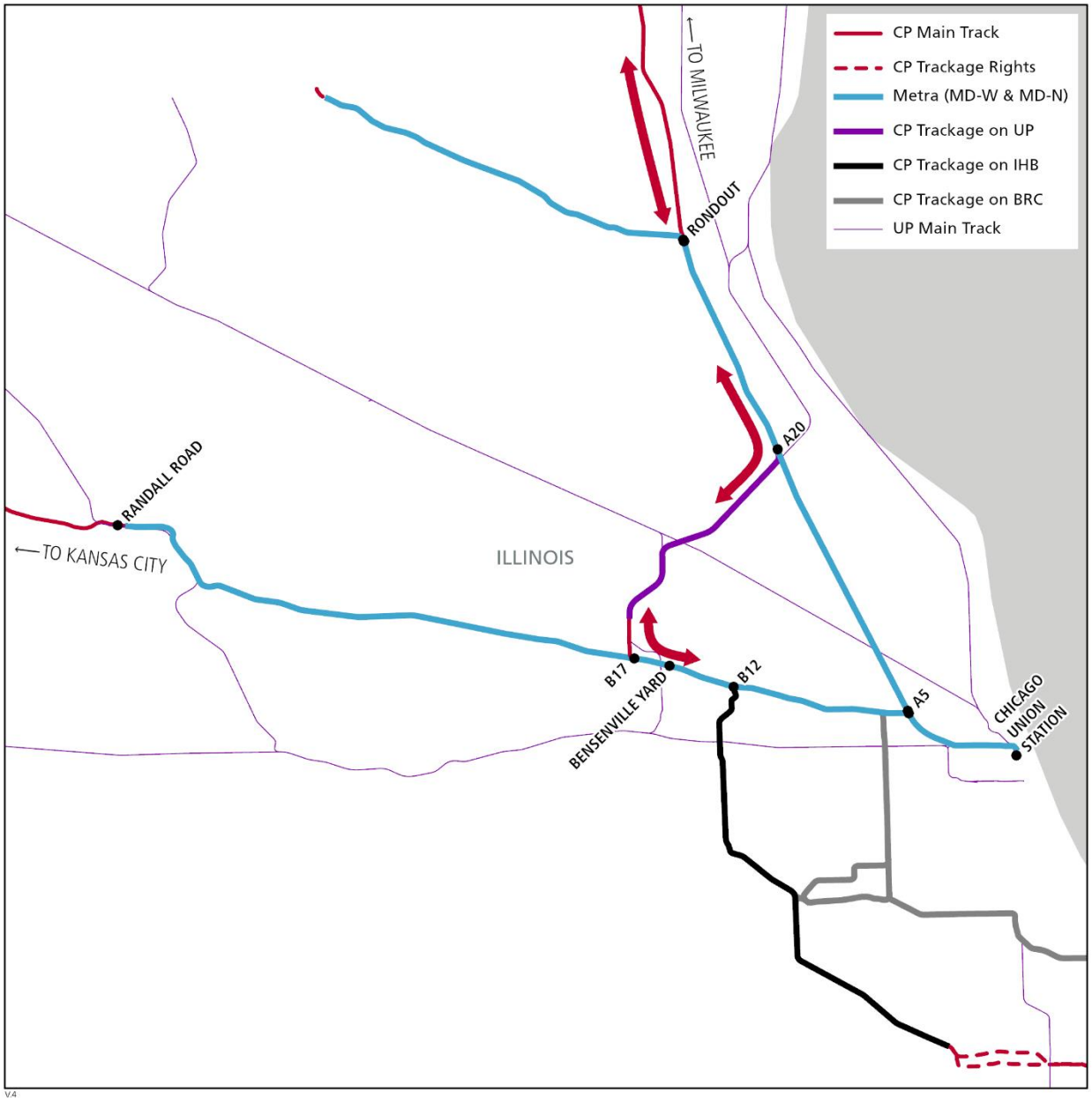
counterproductive with the increased number of freight trains that CP anticipates operating over this line as a result of the CP/KCS Transaction.

79. Third, consider CP freight trains operating between Bensenville Yard and Milwaukee. The CP/KCS Transaction will not affect operations or train counts on this route, but Metra's dispatching could disrupt operations severely. As shown in Figure 16 below, the typical path these trains take is to depart the west end of Bensenville Yard, cross the MD-W line at Tower B17, operate on UP trackage rights to Tower A20, and then traverse the MD-N line to Rondout. Southbound trains operate in the reverse direction.

80. Dispatching these trains requires the same kind of coordination between CP dispatchers and Bensenville Yard operations, and in addition close coordination with UP dispatchers who are responsible for the segment between Tower A20 and Tower B17. CP dispatchers have visibility into both ends of the UP segment, as well as the CP line beyond Rondout. CP dispatchers are also able to coordinate with UP Proviso Yard, which also provides key planning inputs daily. Transferring responsibility for the MD-N and MD-W lines to Metra would multiply the complexity associated with this coordination, and inevitably result in CP freight trains stranded at A20 (either on the UP or MD-W line), CP trains held up in Bensenville Yard, reduced capacity to move other trains into the yard, and any number of other bad outcomes.

81. This track configuration is shown in Figure 16 below.

FIGURE 16
COORDINATION OF TRAINS MOVING ACROSS UP TRACKAGE
BETWEEN BENSENVILLE AND POINTS NORTH



82. I could offer a nearly endless series of additional examples. Good dispatching requires broad and holistic awareness of, and close communication with, all of the parts of the rail network that could affect future operations over the line being dispatched. CP dispatchers have that vantage and communicate hourly with other freight railroads and Metra about the ebb

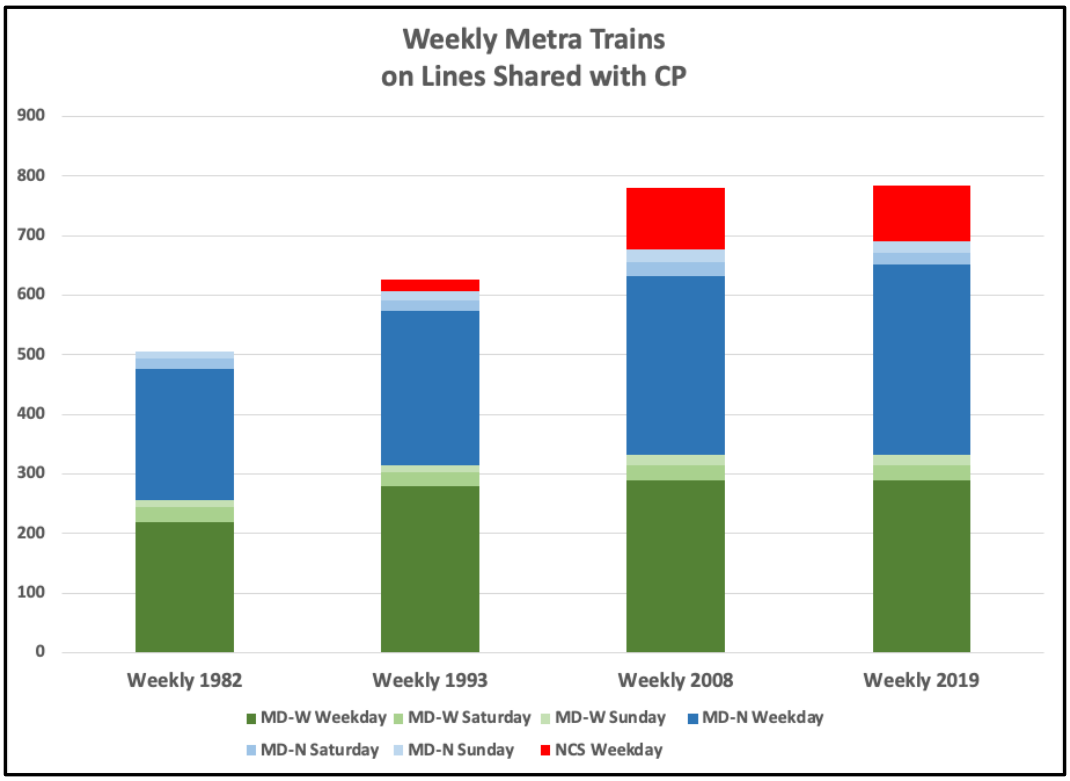
and flow of freight operations in and affecting Chicago. That awareness benefits Metra's operations by keeping the MD-N and MD-W lines fluid. Metra dispatching could not match this performance.

III. CP HAS CONSISTENTLY SUPPORTED GROWTH IN METRA OPERATIONS ON MD-N AND MD-W LINES

83. Metra's operations on lines shared with CP have grown significantly since their inception. When Metra first began operating commuter trains on Milwaukee Road's lines in 1982, the governing trackage rights agreement – entered into between Metra and Milwaukee's bankruptcy trustee – spelled out separate weekday and weekend train schedules, with a total of 44 daily trains on weekdays, 24 on Saturdays, and 12 on Sundays on the MD-W line and a total of 44 daily trains on weekdays, 18 on Saturdays, and 12 on Sundays on the MD-N line. When CP assumed Milwaukee's freight operations on the MD-W and MD-N lines in 1986, Metra's schedules remained the same.

84. By the end of 2019, prior to Metra's COVID-related service reductions, the number of trains on the MD-W and MD-N lines had grown tremendously, all with the support of CP, as shown in Figure 17 below.

FIGURE 17[57]
EXPANSION OF METRA SERVICE ON LINES SHARED WITH CP



85. In 1993, CP agreed to support significant increases in the number of Metra trains on both the MD-W and MD-N lines. In addition, CP supported adding Metra trains on the portion of the MD-W line east of Tower B12 (just east of Bensenville Yard) to support Metra's new "North Central Service," which diverges at Tower B12 onto CN's former Wisconsin Central mainline to Antioch, IL. In addition, CP allowed for a 45-minute extension of peak period for westbound trains from Chicago Union Station to Elgin from 5:30 AM to 8:00 AM to 5:15 AM to 8:30 AM.

86. I understand that Metra has expressed frustration with correspondence from CP in April 2019 regarding Metra's proposed addition of several off-peak trains on the MD-N line. Metra claims that it "sought CP's consent (which cannot be unreasonably withheld)" to

[57] "Metra Data Workpaper," Tab "Fig. 16."

"*reinstate* four Saturday and two Sunday commuter trains that were eliminated in 2018 due to budgetary issues."[58] It asserts "CP refused, stating that there was limited or no capacity on the line, even though these slots were not being used for freight." *Id.* Similarly, in March 2019, Metra proposed "the addition of 4 non-peak trains," and Metra now asserts CP denied this addition even though "time slots were empty," because of similar capacity issues.[59] At the outset, I note that Metra may not add non-peak trains "without CP's prior written consent," and one reasonable basis for CP to withhold consent is if the added trains will "materially interfere with freight operations."[60]

87. I was involved in CP's consideration of Metra's 2019 proposals, and can make several points. First, CP did not decline to agree to the addition of these additional Metra trains because there would have been insufficient capacity on this line. As Metra itself pointed out, CP had previously operated up to ten additional trains per day on the MD-W and MD-N lines without affecting Metra.[61]

88. Second, based on my direct communications with Metra at the time, Metra's proposal to add four non-peak trains stemmed from its plan to experiment with "reverse commuter trains" designed to take workers from their homes in downtown Chicago to their jobs in the northern suburbs. The additional trains would have been just outside Metra's existing peak periods.

89. My analysis of the situation was that adding these additional trains just outside Metra's peak periods, without reducing the number of off-peak trains operated at other times,

58 METR-7 at 42.

59 *Id.*

60 METR-7, Ex. A-3.

61 Metra Comments, Vol. 2, Exh. H-1 (Mar. 26, 2019 letter)

would have in effect extended those peak periods when CP's freight operations are almost entirely shut down for an additional hour and forty-five minutes each morning and evening. That would have effectively squeezed all CP freight operations – which must coexist with off-peak Metra trains as well as Amtrak trains on the MD-N line – into shorter and inflexible operating periods. With uncertainty at the time about the future expansion in Amtrak service on this line and CP's at-the-time recent experience of very heavy train traffic from North Dakota and Alberta destined for interchange with other carriers at Chicago, we were reluctant to agree to a permanent reduction in the period during the day when we could operate freight trains. We offered to let Metra add as many new reverse-commute trains as they wished by *shifting their peak* windows to include these proposed trains (leaving the windows the same duration but ending later or starting earlier), but we did not want to forever relinquish the ability to run our trains when Metra's added trains would be entitled to priority.

90. Metra's April 2019 proposal to add six weekend trains to the MD-N line on a "trial basis" got caught up in the same discussion with Metra about accommodating the needs of CP, Amtrak, and Metra on this line. Freight operations had changed since Metra had removed those trains from its schedule in early 2018, and as noted the potential need to accommodate increased Amtrak trains also needed to be considered. CP was not intending to tell Metra that it could never add additional off-peak trains to the lines CP shares with Metra. At the time, the weekend trains Metra was already operating on the line were not running at or even near capacity. In requesting to add additional Metra trains, Metra was unable to provide any reason to think there was demand for these additional trains; rather Metra just wanted to experiment. CP was not telling Metra that it could never add additional off-peak trains to the lines CP shares with Metra, but CP felt it could not agree to add these trains without a more involved assessment of

their impacts on CP's future operation flexibility and a further consideration of available alternatives.

IV. METRA'S COMPLAINTS ABOUT CP'S PTC IMPLEMENTATION ON LINES SHARED WITH METRA ARE NOT WELL FOUNDED

91. Metra also criticizes the fact that Metra and PTC have had to work together to implement new dispatching software to support positive train control ("PTC") on the lines CP and Metra share. I am baffled by this critique, which seems entirely contrived to bolster Metra's misguided effort to force a shift in dispatching responsibility to Metra. In fact, CP cooperated closely with Metra and Metra's software vendor ("Wabtec") to implement Metra's TMDS software on CP's dispatching systems, so that Metra could be the party responsible for PTC on the lines CP and Metra share.

92. CP went to considerable expense to accommodate Metra, and to the extent there were delays and occasional glitches associated with that implementation, they were no different in kind or extent from the hard work all railroads have endured implementing PTC and fine-tuning the various operational aspects of PTC, such as delays by vendors in releasing the original software and software updates, defects found in the host company's software, the various challenges of integrating, testing and validating vendor software and interoperability between the host and tenant railroad software.[62]

93. To the extent Metra is suggesting that forcing a shift in dispatching authority would simplify Metra's own PTC implementation, that is not correct. First of all, the work of integrating TMDS into CP's dispatching systems is already substantially complete. In addition,

[62] CP and Metra were far from the only rail companies to experience these problems. *See* United States Government Accountability Office, Positive Train Control: As Implementation Progresses, Focus Turns to the Complexities of Achieving System Interoperability (July 31, 2019), available at https://www.gao.gov/assets/gao-19-693t.pdf.

no matter who has "control" of dispatching, CP freight trains controlled by PTC would still need to transition safely between CP-owned and dispatched trackage (where CP deploys CTC, OCS and TGBO dispatching software) and Metra-owned (and Metra-dispatched were the Board to force a shift) trackage where Metra's TMDS system would need to accommodate safe and efficient handoffs. Maintaining a safe and efficient PTC system that accommodates handoffs and shared use of trackage by multiple railroads is intrinsically burdensome, and Metra dispatching would not make these issues go away.

VERIFICATION

I, Nicholas C. Walker, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12th day of July, 2022.



Nicholas C. Walker
Vice-President Operations Western Region
Canadian Pacific Railway Limited

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 1

METRA, OBJECTIONS AND RESPONSES TO APPLICANTS' FIRST REQUESTS AT 6-9, 14-16 (APR. 11, 2022)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

OBJECTIONS AND RESPONES BY COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY D/B/A METRA TO INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSION FORM APPLICANTS CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.*

The Commuter Rail Division of the Regional Transportation Authority d/b/a Metra ("Metra"), by and through counsel, hereby responds and objects as follows to the First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission served March 25, 2022 ("Discovery Requests"), submitted by Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, "Canadian Pacific" or "CP") and Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, "KCS"; together with CP, the "Applicants").

GENERAL OBJECTIONS

Each and every one of Metra's responses to the Discovery Requests is subject to and incorporates the following general objections, as applicable. These objections are set forth here to avoid the duplication and repetition of restating them for each request. Some general objections may be referred to in a given answer for purposes of clarity. The failure to list a particular general objection in a given answer should not be construed as a waiver of that objection.

1. Metra objects to these Discovery Requests to the extent that they call for the disclosure of information protected by the attorney-client privilege, the common-interest privilege, or other privilege and/or the right of privacy.

2. Metra objects to these Discovery Requests to the extent that they call for the disclosure of information protected by the attorney work-product privilege.

3. Metra objects to these Discovery Requests to the extent that they impose any obligations on Metra beyond those imposed by the Code of Federal Regulations, the United States Code, or order of the Surface Transportation Board ("STB").

4. Metra objects to these Discovery Requests to the extent that they call for information that neither is relevant to the subject matter of the pending proceedings, nor appears reasonably calculated to lead to the discovery of admissible evidence. The issue before the STB as relevant to Metra is whether Applicants' proposed merger is in the public interest. Discovery regarding other matters is not relevant to this matter and is not likely to be reasonably calculated to lead to the discovery of admissible evidence.

5. Metra objects to these Discovery Requests to the extent that they request information that is publicly available, or that either previously originated from or was received by Applicants on the basis that such a request serves only to annoy the party burdened with producing the documents.

6. Metra objects to these Discovery Requests to the extent that they are unduly burdensome, and the time and effort required to attempt to compile all responsive information or documents outweighs the potential discoverability or probative value thereof.

7. Metra objects to these Discovery Requests to the extent that they are designed to cause undue annoyance, harassment, or oppression.

8. Metra objects to these Discovery Requests to the extent that they are overly broad with respect to scope, context, and/or time period.

9. Metra objects to these Discovery Requests to the extent that they are vague, indefinite, or ambiguous, and as such would require Metra to speculate as to the meaning or scope of the discovery request and potentially responsive information.

10. Notwithstanding these objections, Metra's responses to these Discovery Requests are based upon a diligent search by Metra and its counsel. Discovery and other investigation and research concerning these proceedings are continuing. Metra, therefore, reserves the right to amend or supplement its responses at any time in light of deposition testimony, further investigation, research, or analysis, to the extent permitted or required by law, and to introduce any and all evidence in these proceedings.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1:

Describe Metra's dispatching practices for any line for which it dispatches both commuter and freight trains, including but not limited to (i) whether Metra's dispatchers on such lines are available 24 hours a day to dispatch freight trains overnight, (ii) how many freight trains a day Metra dispatches on such lines, (iii) Metra's dispatchers' interaction process with other Class I railroads that have dispatching authority over adjacent or nearby subdivisions, and (v) which subdivisions Metra's dispatchers monitor and factor into their dispatching decisions.

Response to Interrogatory No. 1:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that is not in Metra's possession or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that its dispatchers currently dispatch both passenger and freight trains on the Metra's Rock Island Line and portions of the Southwest Service Line. In addition, Metra's dispatchers working under the supervision of CP's dispatching control station dispatch freight train traffic operating on Metra's MD-W and MD-N on CN's Waukesha Subdivision where it crosses MD-W. Metra's dispatchers on these lines are available 24 hours a day to dispatch freight trains overnight.

On Metra's Rock Island Line, Metra dispatches approximately four daily freight trains—two CSX trains and two Iowa Interstate trains. Metra's dispatching of this line also requires it to

handle approximately 8-10 daily freight train crossings at the Canadian National Railway's Leighton Subdivision crossing east of Joliet.

On Metra's Southwest Service Line, Metra dispatches one Norfolk Southern train along the entire length of the line, as well as approximately 8 daily Norfolk Southern freight trains on this line between a connection at 59th Street and a connection with the BRC at 74th Street, and between 4 and 8 daily trains on another segment between Chicago Ridge and Landers. Metra's dispatchers are also involved in handling approximately 20 daily trains on 5 crossings along the segment between 59th Street and 74th Street.

On Metra's MD-N Line at Control Tower A5, Metra's dispatchers control dispatching under supervision and authority of CP's dispatching center and dispatch all freight and passenger traffic crossing that tower for both CP's C&M and Elgin Subdivisions. On Metra's MD-W Line at Control Tower B12, Metra's dispatchers control dispatching under supervision and authority of CP's dispatching center and dispatch all freight and passenger traffic crossing that tower for CP's Elgin Subdivision as well as the Galewood East and Cicero West (connection with Belt Railway Company of Chicago ("BRC")) Control Points. Under CP dispatcher authority, they also control movements in and out of the east end of Bensenville Yard through the Control Point Franklin Park West, as well as movements to and from the Indiana Harbor Belt Railway at the Control Point Edgington.

Interrogatory No. 2:

Identify which railroad's freight trains are purportedly obstructing Metra's trains in the social media posts in Figure 4 of Metra's Comments and Request for Conditions filed on March

15, 2022, and the direction of travel and track on which the depicted Metra and freight trains were operating. Produce all Documents in support of that identification.

Response to Interrogatory No. 2:

Metra specifically objects to this request on the basis that it requests information that is not in Metra's possession or would require Metra to conduct unduly burdensome additional research.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra does not possess this information.

Interrogatory No. 3:

Describe in detail each instance in which Greg Godfrey and his staff allegedly "witnessed CP dispatchers who [were] able to prioritize or avoid delay to Metra being directly told by senior management to move CP trains, regardless of the impact on the network" and that "sometimes Metra train dispatchers are even forced and required by CP to follow these instructions to display signals for freight trains ahead of Metra trains" as asserted on page six of the Verified Statement of Greg Godfrey (Exhibit E to Metra's Comments and Request for Conditions filed on March 15, 2022) and, for each such instance, identify (i) the date and time it occurred and (ii) the Metra employees, the CP dispatchers and the CP senior management personnel who were allegedly involved.

Response to Interrogatory No. 3:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it

requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that it has already produced this information. These instances are discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See*, *e.g.*, METR-7, Ex. B-2 at 204, 252-53, 256, 291, 331.

Interrogatory No. 4:

Identify the "daily operations decisions" that CP dispatchers make which "clearly favor their freight operations, both in and outside of the peak-periods" as asserted on page 10 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022), including but not limited to specific examples and the dates and times of those actions.

Response to Interrogatory No. 4:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating it has already provided this information to Applicants. This is discussed in the documents already provided to Applicants attached to Metra's Comments. *See*, *e.g.*, METR-7, Ex. B at 11-12; *id*. Ex. B-2 at 1-333. Further information regarding specific

examples with dates and times is also provided in the additional documentation produced in response to Applicants' Request for Production No. 4, below.

Interrogatory No. 5.:

Explain in detail how CP "could schedule night service to avoid interference with Metra's trains" as asserted on page 10 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022), including but not limited to how such a practice would work under current operating procedures.

Response to Interrogatory No. 5:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that, as discussed in Metra's Comments, Metra operates dozens of passenger trains on MD-W and MD-N. None of Metra's inbound trains operate scheduled service for over seven hours between 9:45 pm and 4:52 am during the week, and none of its outbound trains operate scheduled service for over six hours between 12:05 am and 6:21 am during the week. *See* https://schedules.metrarail.com/pdf/alternative/MD-W.pdf and https://schedules.metrarail.com/pdf/alternative/MD-N.pdf. These windows, which are similar during the weekend, constitute a significant proportion of time available for freight movements that are not appropriate for passenger service. Typically, the only CP freight train that operates

during this night-time window on the C&M Sub is a 471 (now relabeled 255) train. On the Elgin Subdivision, sporadic movements between Bensenville Yard and the BRC connection at Cicero West could easily be augmented with additional freight traffic. The rest of CP's freight trains regularly operate during the times when Metra trains also operate.

Interrogatory No. 6:

Describe in detail each instance in which CP dispatchers have allegedly "ignored or disabled the hot line, leaving [Mr. Oppenheim] and [his] staff without expeditious recourse when CP dispatching decisions are either the cause of CP-related issues on Metra's lines or CP-related issues could be resolved or mitigated through dispatching" as asserted on page 17 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022) and, for each such instance, identify (i) the date and time it occurred and (ii) the Metra employees and CP employees who were allegedly involved.

Response to Interrogatory No. 6:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already provided this information to Applicants. This is discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See, e.g.*, METR-7, Ex. B-2 at 29, 252-54.

Interrogatory No. 7:

Describe in detail each instance in which CP's dispatchers have allegedly "require[d] passengers to cross tracks unnecessarily, dodge on-coming freight trains, or circumnavigate idling freight trains at Metra stations" as asserted on page 25 of Metra's Comments and Request for Conditions filed on March 15, 2022, and identify the date and time of each such instance.

Response to Interrogatory No. 7:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already produced this information to Applicants. CP dispatchers create this dangerous and inconvenient situation on a constant basis in the process of rerouting Metra trains around or past freight trains. This occurs often and Metra does not have a specific count of the times it has occurred. However, Metra has documented a number of these events, which are discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See, e.g.*, METR-7, Ex. B-2 at 21, 28, 34, 41, 48, 54, 55, 56, 57, 58, 59, 62, 65, 75, 78, 85, 86, 95, 115, 131, 139, 140, 141, 147, 160, 220, 231, 233, 235, 238, 239, 293, 295, 299, 301, 308, 312, 314, 317, 328, 332.

Interrogatory No. 8:

Describe in detail each instance in which CP has allegedly "demonstrated a lack of regard for constrains on its operating and dispatching authority for the MD-W and MD-N" as asserted on page 79 of Metra's Comments and Request for Conditions filed on March 15, 2022 and, for each such instance, identify (i) the date and time it occurred and (ii) the Metra employees and CP employees who were allegedly involved.

Response to Interrogatory No. 8:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating this is discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See, e.g.*, METR-7, Verified Statement of Richard Oppenheim, Ex. B at 11-12; *id*. Ex. B-2 at 1-333. Further information regarding specific examples with dates and times is also provided in the additional documentation produced in response to Applicants' Request for Production No. 4, below.

Interrogatory No. 9:

For the period from January 1, 2016 until February 28, 2022, describe in detail each instance in which CP has "dispatche[d] Metra trains on different main line tracks from the ones that Metra has identified for use by its passengers heading in a specified direction" as asserted on

page 27 of Metra's Comments and Request for Conditions filed on March 15, 2022, and, for each such instance, identify (i) the date and time it occurred and (ii) the reason it occurred.

Response to Interrogatory No. 9:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that CP dispatchers dispatch Metra trains on different main line tracks from the ones that Metra has identified for use by its passengers heading in a specified direction on a constant basis in the process of rerouting Metra trains around or past freight trains. This occurs often and Metra does not have a specific count of the times it has occurred. However, Metra has documented a number of these events, which are discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See, e.g.*, METR-7, Ex. B-2 at 21, 28, 34, 41, 48, 54, 55, 56, 57, 58, 59, 62, 65, 75, 78, 85, 86, 95, 115, 131, 139, 140, 141, 147, 160, 220, 231, 233, 235, 238, 239, 293, 295, 299, 301, 308, 312, 314, 317, 328, 332.

RESPONSES TO REQUESTS FOR PRODUCTION

Request No. 1:

Please produce the workpaper titled "GG-CP-Analysis-FINAL-3-15-2022 MDDATA" in Excel (or other) native format.

Response to Request No. 1:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra will produce this document in native format in its virtual document room.

Request No. 2.

Produce data showing 100% of the trains operated on the lines and for the periods covered in the workpaper titled "GG-CP-Analysis-FINAL-3-15-2022 MDDATA".

Response to Request No. 2:

Metra specifically objects to this request on the basis that it is overly broad, unduly burdensome, and not proportional to the scope of the issues raised in this proceeding. Metra also objects on the basis to the extent that this request requires Metra to conduct a special study to obtain this data.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that it has already produced data for "100% of the trains operated on the lines" within the parameters and purposes for which the data was used, i.e. Metra trains delayed due to CP's dispatching and operations.

Request No. 3:

Produce all Documents providing support for the assertions made on page six of the Verified Statement of Greg Godfrey (Exhibit E to Metra's Comments and Request for Conditions filed on March 15, 2022) that "[o]n a number of recent occasions [Godfrey's] staff and [he] have witnessed CP dispatchers who are able to prioritize or avoid delay to Metra being directly told by senior management to move CP trains, regardless of the impact on the network" and that "sometimes Metra train dispatchers are even forced and required by CP to follow these instructions to display signals for freight trains ahead of Metra trains."

Response to Request No. 3:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already produced the documents requested. *See* METR-7, Exs. B-2 and B-3.

Request No. 4:

Produce all Documents providing support for the assertion made on page 10 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022) that "CP dispatchers make daily operations decisions which clearly favor their freight operations, both in and outside of the peak-periods."

Response to Request No. 4:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already produced the documents requested. *See* METR-7, Exs. B-2 and B-3; *id.*, Ex. D-1. In addition, Metra is producing additional documents documenting details regarding specific occurrences in its virtual document room.

Request No. 5:

Produce all Documents providing support for the assertion made on page 10 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022) that CP "could schedule night service to avoid interference with Metra's trains."

Response to Request No. 5:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that the Documents that Metra possesses supporting this

statement are already publicly available. *See* https://schedules.metrarail.com/pdf/alternative/MD-W.pdf and https://schedules.metrarail.com/pdf/alternative/MD-N.pdf.

Request No. 6:

Produce all Documents providing support for the assertion made on page 17 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022) that "CP dispatchers have at times ignored or disabled the hot line, leaving [Mr. Oppenheim] and [his] staff without expeditious recourse when CP dispatching decisions are either the cause of CP-related issues on Metra's lines or CP-related issues could be resolved or mitigated through dispatching."

Response to Request No. 6:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already produced the documents requested. *See, e.g.*, METR-7, Ex. B-2 at 29, 252-54.

Request No. 7:

Produce all Documents providing support for the assertion made on page 19 of Metra's Comments and Request for Conditions filed on March 15, 2022, that Metra encounters "regular interference" during peak periods.

Response to Request No. 7:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already produced the documents requested. *See* METR-7, Exs. B-2 and B-3; *id.*, Ex. D-1. *See also* the additional documentation provided in response to Request No. 4.

Request No. 8:

Produce all Documents providing support for the assertion made on page 25 of Metra's Comments and Request for Conditions filed on March 15, 2022, that "CP's dispatching decisions too often require passengers to cross tracks unnecessarily, dodge on-coming freight trains, or circumnavigate idling freight trains at Metra stations."

Response to Request No. 8:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that it has already provided this information to Applicants. This

occurs often and Metra does not have a specific count of the times it has occurred. However, Metra has documented a number of these events, which are discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See*, *e.g.*, METR-7, Ex. B-2 at 21, 28, 34, 41, 48, 54, 55, 56, 57, 58, 59, 62, 65, 75, 78, 85, 86, 95, 115, 131, 139, 140, 141, 147, 160, 220, 231, 233, 235, 238, 239, 293, 295, 299, 301, 308, 312, 314, 317, 328, 332.

Request No. 9:

Produce all Documents providing support for the assertion made on page 79 of Metra's Comments and Request for Conditions filed on March 15, 2022, that "CP has in the past demonstrated a lack of regard for constraints on its operating and dispatching authority for the MD-W and MD-N."

Response to Request No. 9:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already produced the documents requested. METR-7, Exs. B-2 and B-3; *id.*, Ex. D-1. *See also* the additional documentation provided in response to Request No. 4.

Request No. 10:

Produce all Documents providing support for the assertion made on page 27 of Metra's Comments and Request for Conditions filed on March 15, 2022, that "CP regularly dispatches Metra trains on different main line tracks from the ones that Metra has identified for use by its passengers heading in a specified direction."

Response to Request No. 10:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that it has already provided this information. This occurs often and Metra does not have a specific count of the times it has occurred. However, Metra has documented a number of these events, which are discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See, e.g.*, METR-7, Ex. B-2 at 21, 28, 34, 41, 48, 54, 55, 56, 57, 58, 59, 62, 65, 75, 78, 85, 86, 95, 115, 131, 139, 140, 141, 147, 160, 220, 231, 233, 235, 238, 239, 293, 295, 299, 301, 308, 312, 314, 317, 328, 332.

Request No. 11:

Produce all Documents relating to any proceeding before the Interstate Commerce Commission or the Surface Transportation Board concerning Metra's acquisition of ownership of the MD-W Line.

Response to Request No. 11:

Metra specifically objects to this request on the basis that the word "concerning" is vague, indefinite and ambiguous. Additionally, Metra objects on the basis that this request is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce when it is already readily available to Applicants through publicly accessible means.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has no Documents responsive to this request.

Request No. 12:

Produce all Documents reflecting the transfer of ownership of the MD-W Line to Metra.

Response to Request No: 12:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra is producing responsive documents in its virtual document room.

Request No. 13:

Produce all Documents studying, analyzing, discussing, or reflecting CP's common carrier obligations with respect to the MD-W Line.

Response to Request No. 13:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has no Documents responsive to this request.

RESPONSES TO APPLICANTS' REQUESTS FOR ADMISSION

Request for Admission No. 1:

Admit or deny that Metra is not a freight common carrier with respect to any part of the MD-W Line.

Response to Request for Admission No. 1:

Admit.

Request for Admission No. 2:

Admit or deny that CP is a freight common carrier possessing a common carrier obligation with respect to the MD-W Line.

Response to Request for Admission No. 2:

Metra objects on the basis that responding to this request requires Metra to reach a legal conclusion. Subject to this objection and without waiving its right to respond further regarding this request, Metra admits.

Request for Admission No. 3:

Admit or deny that CP is the only freight common carrier with the right to operate its locomotives over the MD-W Line.

Response to Request for Admission No. 3:

Deny.

Request for Admission No. 4:

Admit or deny that the rights that CP possesses under its agreements with Metra governing CP's operations over the MD-W Line support CP's discharge of its common carrier obligations with respect to the MD-W Line.

Response to Request for Admission No. 4:

Admit.

Respectfully Submitted,

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORTIY D/B/A/ METRA
By Counsel



Charles A. Spitulnik
Christian L. Alexander
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, NW, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
calexander@kaplankirsch.com

Date: April 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2022, I caused the foregoing Response to Applicants' Interrogatories, Requests for Production of Documents, and Requests for Admission by Metra to be served on the following parties and upon all parties of record in this proceeding.



Charles A. Spitulnik

The Secretary of the U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Brad Chase
1001 Sherwin Road
Winnipeg, MB R3H 0T8
Canada

Timothy O. Nugent
98 East Third Street
Manteno, IL 60950

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 2

METRA, "ON-TIME PERFORMANCE - DECEMBER 2021" (EXCERPTS)

On-Time Performance

December 2021



Prepared by the Division of Strategic Planning & Performance

On-Time Performance
December 2021

This report presents an analysis of December 2021 train delays as reported for Metra's eleven rail lines. On-time is defined, for this analysis, as those regularly scheduled trains arriving at their last station stop less than six minutes behind schedule. Trains that are six minutes or more behind schedule, including annulled trains (trains that do not complete their scheduled runs), are regarded as late. "Extra" trains (trains added to handle special events but not shown in the regularly published timetables) are excluded from on-time performance calculations unless shown in special-event schedules that include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers. Cancelled (not annulled) trains and non-revenue trains are also excluded from on-time performance calculations.

On-Time Performance Tables

Table 1 shows the total number of scheduled and delayed trains for each line by service period for the current month and year-to-date.

Table 2 lists on-time percentages by line for each month and year since 2016.

Table 3 lists each weekday train that was less than 85% on-time for the current month, in order of line, train, and dates delayed. The codes in the *Delay Code* column of Table 3 are defined and shown sorted by cause category and carrier designation in Table 4. Effective January 1, 2020, and November 1, 2021, Metra is using an updated set of delay codes and delay cause categories. Changes to the delay cause categories used for Tables 5 through 7 have been applied retroactively to prior year data; totals by cause category for prior years may not match what was previously reported.

Table 5 shows the number of delays by cause and line for the current month, including a 5-year average. The table highlights the top two delay causes for each line.

Table 6 shows the number of delays by cause and line for year-to-date, including a 5-year average. The table highlights the top two delay causes for each line.

Table 7 shows the number of delays by cause and month for the current year and prior year. The table highlights the top two delay causes for each month.

For Tables 5 through 7, delays by cause are separated into *Metra/PSA* and *Foreign* designations, where applicable. *Metra/PSA* refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation. *Foreign* refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. *Foreign* also includes delays attributable to BNSF and Union Pacific freight operations. See Table 4 for a detailed breakdown of delay codes by cause category and carrier designation.

Table 8 shows the number of delays by duration and service period for each line.

Table 9 shows the annual number of train delays and annual on-time performance by line for the past five years. Table 9 is only included in the December monthly report.

Table 10 shows the annual number of train delays by cause and line for the past five years. Table 10 is only included in the December monthly report.

Reporting Calculations for Temporary Schedules and Special Events

Planned construction projects or special events can adversely affect on-time performance. Metra occasionally publishes full temporary schedules, which supersede the standard published schedules, to inform riders of possible delays or modifications to regular service. Metra also may publish informational notices to accompany temporary schedules. On-time performance is calculated using the temporary schedules and any accompanying notices.

Alternate Service Schedules due to the Coronavirus (COVID-19) Pandemic

On Monday, March 23, 2020, Metra began operating alternate weekday schedules on all lines, except the Heritage Corridor (HC), to adjust for the reduced number of riders due to school closures, work-from-home mandates and other consequences of the coronavirus pandemic. Through the month of April Metra continued to operate regularly scheduled weekday service on the HC Line as well as normal weekend service. On May 4 Metra reduced weekday service on the HC, North Central Service (NCS) and SouthWest Service (SWS) lines, and on May 9 reduced Saturday service to Sunday service levels on all lines except the Metra Electric (ME), thus eliminating all SWS Saturday service. Metra increased weekday service on the ME on May 18 as required for implementation of the Positive Train Control (PTC) safety system on that line. Metra increased weekday service on the RI on June 15 and on the HC, NCS and SWS on June 29. As of July 4, Metra decreased Saturday service on the ME to match Sunday service, thus eliminating Saturday service on the ME Blue Island Branch. Beginning August 3, Metra added two weekday BNSF trains and four weekday RI trains. Metra added four weekday UP-N trains and six weekday UP-NW trains on November 2.

On January 11, 2021, Metra added two weekday MD-N trains and four weekday MD-W trains, and on February 1 added 10 weekday RI trains. Metra added four weekday BNSF and MD-N trains and two NCS trains on April 12. Metra added four weekday ME trains on May 10, four Saturday ME trains on May 15 and four Sunday ME trains on May 16. On May 29 Metra restored Saturday service on the BNSF, MD-N, MD-W, RI, UP-N, UP-NW, and UP-W lines, resulting in an increase of 46 Saturday revenue trains systemwide.

In July, Metra launched pilot schedules on the BNSF, ME and UP-N (July 12), and the RI (July 19) that added off-peak options to meet post-COVID needs for riders. Metra also implemented minor weekday peak-period service increases on all other lines and restored ME Saturday service effective July 12. These changes resulted in an increase of 148 weekday trains and 38 Saturday trains systemwide in July. Schedule adjustments on September 13 resulted two fewer weekday trains on both the UP-N and UP-W. A schedule adjustment on November 15 resulted in eight fewer weekday BNSF trains. There were no schedule adjustments in December.

Under these pilot and alternate schedules Metra operated 558 regularly scheduled revenue trains each weekday in December, which is a 19 percent reduction from Metra's pre-pandemic weekday service of 692 scheduled revenue trains. Metra operated 269 regularly scheduled revenue trains each Saturday in December, which is a one percent reduction from the 273 Saturday trains Metra operated pre-pandemic. Metra operated 185 regularly scheduled revenue trains each Sunday in December, which is a two percent increase from the 181 Sunday revenue trains Metra operated pre-pandemic. As a result of the changes under these alternative and pilot schedules, Metra operated about 16 percent fewer total revenue trains in December 2021 than in December 2019, but about 36 percent more total revenue trains than in December 2020.

Metra has developed a set of service restoration principles to guide schedule design as service is added back. These principles will help Metra meet the needs of riders as travel demand approaches a new normal. Metra will continue to monitor ridership and will add service back incrementally throughout the system to stay ahead of the ridership growth curve and ensure that adequate service is in place to provide social distancing and encourage ridership.

Table 1.a: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
December 2021

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	861	1	99.9%	945	11	98.8%	1,806	12	99.3%	150	5	96.7%	100	3	97.0%	2,056	20	99.0%
ME-ML	483	10	97.9%	882	16	98.2%	1,365	26	98.1%	210	4	98.1%	121	1	99.2%	1,696	31	98.2%
ME-BI	147	6	95.9%	231	4	98.3%	378	10	97.4%	40	0	100.0%		--		418	10	97.6%
ME-SC	231	10	95.7%	651	18	97.2%	882	28	96.8%	160	4	97.5%	100	0	100.0%	1,142	32	97.2%
Subtotal	861	26	97.0%	1,764	38	97.8%	2,625	64	97.6%	410	8	98.0%	221	1	99.5%	3,256	73	97.8%
HC	105	11	89.5%	21	3	85.7%	126	14	88.9%		--			--		126	14	88.9%
MD-N	378	24	93.7%	420	14	96.7%	798	38	95.2%	100	12	88.0%	90	9	90.0%	988	59	94.0%
MD-W	399	26	93.5%	441	22	95.0%	840	48	94.3%	120	18	85.0%	90	10	88.9%	1,050	76	92.8%
Subtotal	777	50	93.6%	861	36	95.8%	1,638	86	94.7%	220	30	86.4%	180	19	89.4%	2,038	135	93.4%
NCS	168	12	92.9%	84	6	92.9%	252	18	92.9%		--			--		252	18	92.9%
RI	651	9	98.6%	1,029	30	97.1%	1,680	39	97.7%	165	2	98.8%	140	9	93.6%	1,985	50	97.5%
SWS	189	18	90.5%	63	12	81.0%	252	30	88.1%		--			--		252	30	88.1%
UP-N	462	21	95.5%	1,092	56	94.9%	1,554	77	95.0%	130	1	99.2%	90	3	96.7%	1,774	81	95.4%
UP-NW	441	30	93.2%	504	24	95.2%	945	54	94.3%	170	4	97.6%	105	4	96.2%	1,220	62	94.9%
UP-W	336	27	92.0%	504	57	88.7%	840	84	90.0%	100	6	94.0%	90	12	86.7%	1,030	102	90.1%
Subtotal	1,239	78	93.7%	2,100	137	93.5%	3,339	215	93.6%	400	11	97.3%	285	19	93.3%	4,024	245	93.9%
System	4,851	205	95.8%	6,867	273	96.0%	11,718	478	95.9%	1,345	56	95.8%	926	51	94.5%	13,989	585	95.8%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/14/2022) version from TOPS.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 3

METRA, "ON-TIME PERFORMANCE - DECEMBER 2020" (EXCERPTS)

On-Time Performance

December 2020



Prepared by the Division of Strategic Planning & Performance

On-Time Performance
December 2020

This report presents an analysis of December 2020 train delays as reported for Metra's eleven rail lines. On-time is defined, for this analysis, as those regularly scheduled trains arriving at their last station stop less than six minutes behind schedule. Trains that are six minutes or more behind schedule, including annulled trains (trains that do not complete their scheduled runs), are regarded as late. "Extra" trains (trains added to handle special events but not shown in the regularly published timetables) are excluded from on-time performance calculations unless shown in special-event schedules that include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers. Cancelled (not annulled) trains and non-revenue trains are also excluded from on-time performance calculations.

On-Time Performance Tables

Table 1 shows the total number of scheduled and delayed trains for each line by service period for the current month and year-to-date.

Table 2 lists on-time percentages by line for each month and year since 2015.

Table 3 lists each weekday train that was less than 85% on-time for the current month, in order of line, train, and dates delayed. The codes in the *Delay Code* column of Table 3 are defined and shown sorted by cause category and carrier designation in Table 4. Effective January 1, 2020, Metra is using an updated set of delay codes and delay cause categories. Changes to the delay cause categories used for Tables 5 through 7 have been applied retroactively to prior year data; totals by cause category for prior years may not match what was previously reported.

Table 5 shows the number of delays by cause and line for the current month, including a 5-year average. The table highlights the top two delay causes for each line.

Table 6 shows the number of delays by cause and line for year-to-date, including a 5-year average. The table highlights the top two delay causes for each line.

Table 7 shows the number of delays by cause and month for the current year and prior year. The table highlights the top two delay causes for each month.

For Tables 5 through 7, delays by cause are separated into *Metra/PSA* and *Foreign* designations, where applicable. *Metra/PSA* refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation. *Foreign* refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. *Foreign* also includes delays attributable to BNSF and Union Pacific freight operations. See Table 4 for a detailed breakdown of delay codes by cause category and carrier designation.

Table 8 shows the number of delays by duration and service period for each line.

Table 9 shows the annual number of train delays and annual on-time performance by line for the past five years. Table 9 is only included in the December monthly report.

Table 10 shows the annual number of train delays by cause and line for the past five years. Table 10 is only included in the December monthly report.

Reporting Calculations for Temporary Schedules and Special Events

Planned construction projects or special events can adversely affect on-time performance. Metra occasionally publishes full temporary schedules, which supersede the standard published schedules, to inform riders of possible delays or modifications to regular service. Metra also may publish informational notices to accompany temporary schedules. On-time performance is calculated using the temporary schedules and any accompanying notices.

Alternate Service Schedules due to the Coronavirus (COVID-19) Pandemic

On Monday, March 23, Metra began operating alternate weekday schedules on all lines, except the Heritage Corridor (HC), to adjust for the reduced number of riders due to school closures, work-from-home mandates and other consequences of the coronavirus pandemic. Through the month of April Metra continued to operate regularly scheduled weekday service on the HC Line as well as normal weekend service. On May 4 Metra reduced weekday service on the HC, North Central Service (NCS) and SouthWest Service (SWS) lines, and on May 9 reduced Saturday service to Sunday service levels on all lines except the Metra Electric (ME), thus eliminating all SWS Saturday service. Metra increased weekday service on the ME on May 18 as required for implementation of the Positive Train Control (PTC) safety system on that line. Metra increased weekday service on the RI on June 15 and on the HC, NCS and SWS on June 29. As of July 4, Metra decreased Saturday service on the ME to match Sunday service, thus eliminating Saturday service on the ME Blue Island Branch. Beginning August 3, Metra added two weekday BNSF trains and four weekday RI trains. There was no change in the number of daily scheduled trains in September or October. Metra added four weekday UP-N trains and six weekday UP-NW trains on November 2. There was no change in the number of daily scheduled trains in December.

Under these alternate schedules, Metra operated 392 scheduled revenue trains each weekday in December, which is a 43 percent reduction from Metra's normal weekday service of 692 scheduled revenue trains. Metra operated 181 revenue trains each Saturday in December, which is a 34 percent reduction from the 273 Saturday trains Metra normally operates. There has been no change in the number of Sunday trains. As a result of these reductions under the alternative schedules, Metra operated about 39 percent fewer revenue trains in December 2020 than in December 2019. The reduced schedules will remain in effect until health officials deem the crisis has passed and/or ridership begins to return to normal. Metra will continue to monitor ridership and may adjust service levels on a line-by-line basis to meet the ridership demands.

Table 1.a: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
December 2020

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	528	5	99.1%	418	0	100.0%	946	5	99.5%	80	1	98.8%	100	0	100.0%	1,126	6	99.5%
ME-ML	440	4	99.1%	748	10	98.7%	1,188	14	98.8%	80	0	100.0%	100	0	100.0%	1,368	14	99.0%
ME-BI	154	0	100.0%	242	0	100.0%	396	0	100.0%		--			--		396	0	100.0%
ME-SC	242	4	98.3%	594	1	99.8%	836	5	99.4%	80	4	95.0%	100	1	99.0%	1,016	10	99.0%
Subtotal	836	8	99.0%	1,584	11	99.3%	2,420	19	99.2%	160	4	97.5%	200	1	99.5%	2,780	24	99.1%
HC	88	2	97.7%		--		88	2	97.7%		--			--		88	2	97.7%
MD-N	308	11	96.4%	308	20	93.5%	616	31	95.0%	72	6	91.7%	90	2	97.8%	778	39	95.0%
MD-W	286	20	93.0%	418	24	94.3%	704	44	93.8%	72	13	81.9%	90	9	90.0%	866	66	92.4%
Subtotal	594	31	94.8%	726	44	93.9%	1,320	75	94.3%	144	19	86.8%	180	11	93.9%	1,644	105	93.6%
NCS	88	4	95.5%		--		88	4	95.5%		--			--		88	4	95.5%
RI	330	10	97.0%	638	9	98.6%	968	19	98.0%	112	0	100.0%	140	0	100.0%	1,220	19	98.4%
SWS	154	4	97.4%	66	4	93.9%	220	8	96.4%		--			--		220	8	96.4%
UP-N	264	4	98.5%	616	3	99.5%	880	7	99.2%	72	2	97.2%	90	2	97.8%	1,042	11	98.9%
UP-NW	418	9	97.8%	528	2	99.6%	946	11	98.8%	84	1	98.8%	105	0	100.0%	1,135	12	98.9%
UP-W	264	20	92.4%	484	36	92.6%	748	56	92.5%	72	5	93.1%	90	0	100.0%	910	61	93.3%
Subtotal	946	33	96.5%	1,628	41	97.5%	2,574	74	97.1%	228	8	96.5%	285	2	99.3%	3,087	84	97.3%
System	3,564	97	97.3%	5,060	109	97.8%	8,624	206	97.6%	724	32	95.6%	905	14	98.5%	10,253	252	97.5%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/15/2021) version from TOPS.

Table 1.b: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
January - December 2020

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	7,673	144	98.1%	6,077	115	98.1%	13,750	259	98.1%	1,216	45	96.3%	1,156	40	96.5%	16,122	344	97.9%
ME-ML	6,001	133	97.8%	8,976	240	97.3%	14,977	373	97.5%	1,538	56	96.4%	1,158	41	96.5%	17,673	470	97.3%
ME-BI	1,939	46	97.6%	2,772	36	98.7%	4,711	82	98.3%	240	11	95.4%	40	3	92.5%	4,991	96	98.1%
ME-SC	2,727	45	98.3%	7,007	106	98.5%	9,734	151	98.4%	1,338	39	97.1%	1,158	32	97.2%	12,230	222	98.2%
Subtotal	10,667	224	97.9%	18,755	382	98.0%	29,422	606	97.9%	3,116	106	96.6%	2,356	76	96.8%	34,894	788	97.7%
HC	1,110	118	89.4%	87	7	92.0%	1,197	125	89.6%		--			--		1,197	125	89.6%
MD-N	4,210	174	95.9%	4,861	193	96.0%	9,071	367	96.0%	970	56	94.2%	1,042	40	96.2%	11,083	463	95.8%
MD-W	4,070	193	95.3%	5,492	305	94.4%	9,562	498	94.8%	1,042	83	92.0%	1,042	33	96.8%	11,646	614	94.7%
Subtotal	8,280	367	95.6%	10,353	498	95.2%	18,633	865	95.4%	2,012	139	93.1%	2,084	73	96.5%	22,729	1,077	95.3%
NCS	1,311	120	90.8%	837	59	93.0%	2,148	179	91.7%		--			--		2,148	179	91.7%
RI	4,693	234	95.0%	7,345	307	95.8%	12,038	541	95.5%	1,558	50	96.8%	1,636	56	96.6%	15,232	647	95.8%
SWS	1,883	107	94.3%	1,863	118	93.7%	3,746	225	94.0%	108	6	94.4%		--		3,854	231	94.0%
UP-N	3,898	67	98.3%	7,292	124	98.3%	11,190	191	98.3%	1,078	26	97.6%	1,042	35	96.6%	13,310	252	98.1%
UP-NW	5,126	202	96.1%	6,056	166	97.3%	11,182	368	96.7%	1,324	36	97.3%	1,216	43	96.5%	13,722	447	96.7%
UP-W	3,876	175	95.5%	6,131	357	94.2%	10,007	532	94.7%	970	36	96.3%	1,042	47	95.5%	12,019	615	94.9%
Subtotal	12,900	444	96.6%	19,479	647	96.7%	32,379	1,091	96.6%	3,372	98	97.1%	3,300	125	96.2%	39,051	1,314	96.6%
System	48,517	1,758	96.4%	64,796	2,133	96.7%	113,313	3,891	96.6%	11,382	444	96.1%	10,532	370	96.5%	135,227	4,705	96.5%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/15/2021) version from TOPS.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 4

METRA, "ON-TIME PERFORMANCE - DECEMBER 2019" (EXCERPTS)

On-Time Performance

December 2019



Prepared by the Division of Strategic Planning & Performance

On-Time Performance
December 2019

This report presents an analysis of December 2019 train delays as reported for Metra's eleven rail lines. On-time is defined, for this analysis, as those regularly scheduled trains arriving at their last station stop less than six minutes behind schedule. Trains that are six minutes or more behind schedule, including annulled trains (trains that do not complete their scheduled runs), are regarded as late. "Extra" trains (trains added to handle special events but not shown in the regularly published timetables) are excluded from on-time performance calculations unless shown in special-event schedules that include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers. Cancelled (not annulled) trains and non-revenue trains are also excluded from on-time performance calculations.

On-Time Performance Tables

Table 1 shows the total number of scheduled and delayed trains for each line by service period for the current month and year-to-date.

Table 2 lists on-time percentages by line for each month and year since 2014.

Table 3 lists each weekday train that was less than 85% on-time for the current month, in order of line, train, and dates delayed. The codes in the *Delay Code* column of Table 3 are defined and shown sorted by cause category and carrier designation in Table 4.

Table 5 shows the number of delays by cause and line for the current month, including a 5-year average. The table highlights the top two delay causes for each line.

Table 6 shows the number of delays by cause and line for year-to-date, including a 5-year average. The table highlights the top two delay causes for each line.

Table 7 shows the number of delays by cause and month for the current year and prior year. The table highlights the top two delay causes for each month.

For Tables 5 through 7, delays by cause are separated into *Metra/PSA* and *Foreign* designations, where applicable. *Metra/PSA* refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation. *Foreign* refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. *Foreign* also includes delays attributable to BNSF and Union Pacific freight operations. See Table 4 for a detailed breakdown of delay codes by cause category and carrier designation.

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Table 9 shows the annual number of train delays and annual on-time performance by line for the past five years. Table 9 is only included in the December monthly report.

Table 10 shows the annual number of train delays and annual on-time performance by cause and line for the past five years. Table 10 is only included in the December monthly report.

Reporting Calculations for Temporary Schedules & Special Events

Planned construction projects or special events can adversely affect on-time performance. Metra occasionally publishes full temporary schedules, which supersede the standard published schedules, to inform riders of possible delays or modifications to regular service. Metra also may publish informational notices to accompany temporary schedules. On-time performance is calculated using the temporary schedules and any accompanying notices.

Table 1.a: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
December 2019

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	1,170	27	97.7%	873	19	97.8%	2,043	46	97.7%	120	1	99.2%	120	6	95.0%	2,283	53	97.7%
Elec -ML	870	18	97.9%	894	13	98.5%	1,764	31	98.2%	160	1	99.4%	120	0	100.0%	2,044	32	98.4%
-BI	273	4	98.5%	294	2	99.3%	567	6	98.9%	32	2	93.8%		--		599	8	98.7%
-SC	273	4	98.5%	652	13	98.0%	925	17	98.2%	128	0	100.0%	120	0	100.0%	1,173	17	98.6%
Subtotal	1,416	26	98.2%	1,840	28	98.5%	3,256	54	98.3%	320	3	99.1%	240	0	100.0%	3,816	57	98.5%
Heritage	126	6	95.2%	21	0	100.0%	147	6	95.9%		--			--		147	6	95.9%
Milw -N	542	24	95.6%	781	30	96.2%	1,323	54	95.9%	80	9	88.8%	108	11	89.8%	1,511	74	95.1%
-W	559	15	97.3%	659	36	94.5%	1,218	51	95.8%	96	0	100.0%	108	5	95.4%	1,422	56	96.1%
Subtotal	1,101	39	96.5%	1,440	66	95.4%	2,541	105	95.9%	176	9	94.9%	216	16	92.6%	2,933	130	95.6%
NCS	185	2	98.9%	235	12	94.9%	420	14	96.7%		--			--		420	14	96.7%
RI	756	30	96.0%	681	50	92.7%	1,437	80	94.4%	132	8	93.9%	168	15	91.1%	1,737	103	94.1%
SWS	231	8	96.5%	399	30	92.5%	630	38	94.0%	24	0	100.0%		--		654	38	94.2%
UP -N	622	5	99.2%	848	4	99.5%	1,470	9	99.4%	104	2	98.1%	108	1	99.1%	1,682	12	99.3%
-NW	677	34	95.0%	680	25	96.3%	1,357	59	95.7%	136	4	97.1%	126	12	90.5%	1,619	75	95.4%
-W	563	15	97.3%	676	39	94.2%	1,239	54	95.6%	80	1	98.8%	108	3	97.2%	1,427	58	95.9%
Subtotal	1,862	54	97.1%	2,204	68	96.9%	4,066	122	97.0%	320	7	97.8%	342	16	95.3%	4,728	145	96.9%
System	6,847	192	97.2%	7,693	273	96.5%	14,540	465	96.8%	1,092	28	97.4%	1,086	53	95.1%	16,718	546	96.7%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/15/20) version from TOPS.

Table 1.b: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
January - December 2019

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	13,995	768	94.5%	10,467	488	95.3%	24,462	1,256	94.9%	1,549	60	96.1%	1,138	36	96.8%	27,149	1,352	95.0%
Elec -ML	10,549	250	97.6%	10,608	217	98.0%	21,157	467	97.8%	2,038	68	96.7%	1,167	11	99.1%	24,362	546	97.8%
-BI	3,279	79	97.6%	3,535	69	98.0%	6,814	148	97.8%	448	4	99.1%	40	0	100.0%	7,302	152	97.9%
-SC	3,282	60	98.2%	7,839	113	98.6%	11,121	173	98.4%	1,632	7	99.6%	1,160	12	99.0%	13,913	192	98.6%
Subtotal	17,110	389	97.7%	21,982	399	98.2%	39,092	788	98.0%	4,118	79	98.1%	2,367	23	99.0%	45,577	890	98.0%
Heritage	1,530	176	88.5%	255	40	84.3%	1,785	216	87.9%		--			--		1,785	216	87.9%
Milw -N	6,556	539	91.8%	9,319	658	92.9%	15,875	1,197	92.5%	1,052	154	85.4%	1,049	97	90.8%	17,976	1,448	91.9%
-W	6,845	369	94.6%	7,900	372	95.3%	14,745	741	95.0%	1,258	53	95.8%	1,047	47	95.5%	17,050	841	95.1%
Subtotal	13,401	908	93.2%	17,219	1,030	94.0%	30,620	1,938	93.7%	2,310	207	91.0%	2,096	144	93.1%	35,026	2,289	93.5%
NCS	2,286	112	95.1%	2,802	180	93.6%	5,088	292	94.3%		--			--		5,088	292	94.3%
RI	9,150	803	91.2%	8,150	682	91.6%	17,300	1,485	91.4%	1,876	117	93.8%	1,645	66	96.0%	20,821	1,668	92.0%
SWS	2,799	181	93.5%	4,840	366	92.4%	7,639	547	92.8%	312	8	97.4%		--		7,951	555	93.0%
UP -N	7,598	419	94.5%	10,186	340	96.7%	17,784	759	95.7%	1,375	130	90.5%	1,066	66	93.8%	20,225	955	95.3%
-NW	8,377	716	91.5%	8,169	397	95.1%	16,546	1,113	93.3%	1,566	108	93.1%	1,086	125	88.5%	19,198	1,346	93.0%
-W	6,869	556	91.9%	8,165	647	92.1%	15,034	1,203	92.0%	1,056	69	93.5%	1,056	56	94.7%	17,146	1,328	92.3%
Subtotal	22,844	1,691	92.6%	26,520	1,384	94.8%	49,364	3,075	93.8%	3,997	307	92.3%	3,208	247	92.3%	56,569	3,629	93.6%
System	83,115	5,028	94.0%	92,235	4,569	95.0%	175,350	9,597	94.5%	14,162	778	94.5%	10,454	516	95.1%	199,966	10,891	94.6%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/15/20) version from TOPS.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 5

METRA, "ON-TIME PERFORMANCE - DECEMBER 2018 (REVISED)" (EXCERPTS)

On-Time Performance

December 2018

(Revised)



Prepared by the Division of Strategic Capital Planning

On-Time Performance
December 2018

This report presents an analysis of December 2018 train delays as reported for Metra's eleven rail lines. On-time is defined, for this analysis, as those regularly scheduled trains arriving at their last station stop less than six minutes behind schedule. Trains that are six minutes or more behind schedule, including annulled trains (trains that do not complete their scheduled runs), are regarded as late. "Extra" trains (trains added to handle special events but not shown in the regularly published timetables) are excluded from on-time performance calculations unless shown in special-event schedules that include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers. Cancelled (not annulled) trains and non-revenue trains are also excluded from on-time performance calculations.

On-Time Performance Tables

Table 1 shows the total number of scheduled and delayed trains for each line by service period for the current month and year-to-date.

Table 2 lists on-time percentages by line for each month and year since 2013.

Table 3 lists each weekday train that was less than 85% on-time for the current month, in order of line, train, and dates delayed. The codes in the *Delay Code* column of Table 3 are defined and shown sorted by cause category and carrier designation in Table 4.

Table 5 shows the number of delays by cause and line for the current month, including a 5-year average. The table highlights the top two delay causes for each line.

Table 6 shows the number of delays by cause and line for year-to-date, including a 5-year average. The table highlights the top two delay causes for each line.

Table 7 shows the number of delays by cause and month for the current year and prior year. The table highlights the top two delay causes for each month.

For Tables 5 through 7, delays by cause are separated into *Metra/PSA* and *Foreign* designations, where applicable. *Metra/PSA* refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation. *Foreign* refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. *Foreign* also includes delays attributable to BNSF and Union Pacific freight operations. See Table 4 for a detailed breakdown of delay codes by cause category and carrier designation.

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Reporting Calculations for Temporary Schedules & Special Events

Planned construction projects or special events can adversely affect on-time performance. Metra occasionally publishes full temporary schedules, which supersede the standard published schedules, to inform riders of possible delays or modifications to regular service. Metra also may publish informational notices to accompany temporary schedules. On-time performance is calculated using the temporary schedules and any accompanying notices.

Changes in Reporting

In continued efforts to streamline and enhance the information provided in this report, Metra staff modified or removed the following tables effective with the March 2018 Report:

- *Table 1: Scheduled and Delayed Trains, and On-Time Performance by Service Period and Line* – Modified to include a year-to-date time period.
- *Table 2: On-Time Performance by Line and Branch* – Made minor formatting changes.
- *Table 3: List of Weekday Trains less than 85% On-Time* – Made minor formatting changes.
- *Table 4: Delay Incident Codes and Definitions* – Removed
- *Table 5: Delay Incident Codes Sorted by Cause Category & Carrier Designation* – Made minor formatting changes. Changed table number and title to *Table 4: Delay Codes by Cause Category & Carrier*.
- *Table 6: Frequency of Train Delays by Control and Line* – Removed
- *Table 7: Number of Delays by Date* – Removed
- *Table 8: Frequency of Train Delays by Cause and Line* – Added shading to highlight the top two delay causes for each line. Changed table number and title to *Table 5: Train Delays by Cause and Line*.
- *Table 9: Frequency of Train Delays by Cause and Line* – Added shading to highlight the top two delay causes for each line. Changed table number and title to *Table 6: Train Delays by Cause & Line – YTD*.
- *Table 10: Frequency of Train Delays by Cause & Month* - Added shading to highlight the top two delay causes for each month. Changed table number and title to *Table 7: Train Delays by Cause & Month*.
- *Table 11*: *Freight Delays* – Removed
- *Table 12: Frequency of Lift-Deployment Train Delays by Line & Month* - Removed
- *Table 13: Frequency of Train Delays by Duration* – Included delay information for the Saturday and Sunday service periods. Changed table number and title to *Table 8: Train Delays by Duration*.
- *Table 14: Average Length of Delay by Service Period, in Minutes* – Removed
- *(December monthly report only) Table 15: Annual Train Delays and On-Time Performance* – Made minor formatting changes. Changed table number and title to *Table 9: Annual Train Delays and On-Time Performance*.
- *(December monthly report only) Table 16: Frequency of Train Delays by Cause and Line* – Removed

- *(December monthly report only) Table 17: Annual System Causes of Delay* – Made minor formatting changes. Changed table number and title to *Table 10: Annual System Causes of Train Delays*.
- *(December monthly report only) Table 18: Frequency of Train Delays by Duration* – Removed
- *(December monthly report only) Table 19: Frequency of Train Delays by Duration and Line* – Removed

Table 1.a: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
December 2018

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	1,074	75	93.0%	832	25	97.0%	1,906	100	94.8%	140	6	95.7%	108	0	100.0%	2,154	106	95.1%
Elec -ML	828	64	92.3%	852	27	96.8%	1,680	91	94.6%	200	6	97.0%	122	1	99.2%	2,002	98	95.1%
-BI	260	19	92.7%	280	13	95.4%	540	32	94.1%	40	1	97.5%		--		580	33	94.3%
-SC	260	7	97.3%	620	9	98.5%	880	16	98.2%	160	1	99.4%	118	4	96.6%	1,158	21	98.2%
Subtotal	1,348	90	93.3%	1,752	49	97.2%	3,100	139	95.5%	400	8	98.0%	240	5	97.9%	3,740	152	95.9%
Heritage	120	11	90.8%	20	2	90.0%	140	13	90.7%		--			--		140	13	90.7%
Milw -N	496	16	96.8%	704	49	93.0%	1,200	65	94.6%	100	11	89.0%	108	4	96.3%	1,408	80	94.3%
-W	532	20	96.2%	628	23	96.3%	1,160	43	96.3%	120	2	98.3%	108	2	98.1%	1,388	47	96.6%
Subtotal	1,028	36	96.5%	1,332	72	94.6%	2,360	108	95.4%	220	13	94.1%	216	6	97.2%	2,796	127	95.5%
NCS	176	15	91.5%	224	31	86.2%	400	46	88.5%		--			--		400	46	88.5%
RI	712	38	94.7%	628	27	95.7%	1,340	65	95.1%	160	9	94.4%	168	2	98.8%	1,668	76	95.4%
SWS	220	9	95.9%	380	20	94.7%	600	29	95.2%	30	1	96.7%		--		630	30	95.2%
UP -N	576	34	94.1%	808	41	94.9%	1,384	75	94.6%	130	6	95.4%	108	3	97.2%	1,622	84	94.8%
-NW	636	28	95.6%	648	28	95.7%	1,284	56	95.6%	120	11	90.8%	90	9	90.0%	1,494	76	94.9%
-W	528	54	89.8%	652	97	85.1%	1,180	151	87.2%	100	5	95.0%	108	4	96.3%	1,388	160	88.5%
Subtotal	1,740	116	93.3%	2,108	166	92.1%	3,848	282	92.7%	350	22	93.7%	306	16	94.8%	4,504	320	92.9%
System	6,418	390	93.9%	7,276	392	94.6%	13,694	782	94.3%	1,300	59	95.5%	1,038	29	97.2%	16,032	870	94.6%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/28/19) version from TOPS.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 7

METRA, "COMMUTER RAIL SYSTEM ON-TIME PERFORMANCE REPORT - DECEMBER 2017"

(EXCERPTS)

COMMUTER RAIL SYSTEM

ON-TIME PERFORMANCE REPORT

December 2017

Metra

Division of Strategic Capital Planning **February 2018**

COMMUTER RAIL ON-TIME PERFORMANCE
December 2017

This report presents an analysis of the December 2017 train delays as reported for Metra's eleven commuter rail lines. On-time is defined, for this analysis, as those regularly scheduled trains arriving at their last station stop less than six minutes behind schedule. Trains that are six minutes or more behind schedule, including annulled trains (trains that do not complete their scheduled runs), are regarded as late. “Extra” trains (trains added to handle special events but not shown in the regularly published timetables) are excluded from on-time performance calculations unless shown in special-event schedules that include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers. Cancelled (not annulled) trains and non-revenue trains are also excluded from on-time performance calculations.

On-Time Performance Tables

Table 1 presents the number of train delays by rail line and service period. During December 2017, Metra operated 16,184 scheduled trains, including scheduled “extras”, if any. 989 of these trains were delayed (late or annulled), representing an on-time performance rate of 93.9%. Table 2 lists on-time percentages by line for each month and year since 2012.

Table 3 lists each train that was on time for less than 85% of its weekday runs in December 2017, in order of line, train, and dates delayed. The codes in the 'Delay Code' column of Table 3 are defined in Table 4 and shown sorted by delay-cause category and carrier designation in Table 5. Effective January 1, 2012, January 1, 2014, and July 1, 2016, Metra is using an expanded set of delay codes, to provide more detail about the cause of and responsibility for each train delay.

Table 6.a shows the frequency of train delays by delay-cause control and by line during December 2017. Of the 989 delays systemwide in December 2017, all but 513 (52%) were beyond Metra's control. Table 6.b shows the average frequencies over the previous five Decembers, and Table 6.c shows the differences between Table 6.a and Table 6.b., illustrating that in December 2017, 237 more delays than the average over the previous five Decembers were controllable. Table 6.d shows the delay-cause control frequencies since the beginning of the year. Of the 8,541 delays in 2017, all but 4,242 (50%) were beyond Metra's control.

Table 7 provides a daily listing of the number of delays by line and branch for December 2017.

Table 8.a shows the frequency of train delays by delay-cause category and by line during December 2017. Table 8.b shows the average frequencies over the previous five Decembers, and Table 8.c shows the differences between Table 8.a and Table 8.b. There were 989 delays systemwide in December 2017, 301 more than the average over the previous five Decembers. Table 9.a shows delays from the beginning of the year through December 2017. Table 9.b shows the average frequencies from the beginning of the year through December of each of the previous five years, and Table 9.c shows the differences between Table 9.a and Table 9.b. Tables 10.a and 10.b display the systemwide frequency of train delays by cause and by month, for 2017 and 2016 respectively, and Table 10.c shows the difference between the two. From January through December of 2017, a total of 8,541 trains were delayed, compared to 8,053 trains delayed in the same twelve months of 2016.

In Tables 8 through 10, delays by cause are separated into 'Metra/PSA' and 'Foreign' designations, where applicable. 'Metra/PSA' refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation. 'Foreign' refers to

delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations. See Table 5 for a detailed breakdown of delay codes by cause category and carrier designation.

Table 11 shows, by line and month, all train delays caused by freight operations over the past 24 months. In December 2017 freight operations delayed 110 trains systemwide, compared to 94 a year earlier. Tables 12.a and 12.b display the frequency of lift-deployment train delays by line and month, for 2017 and 2016 respectively. A total of 28 trains were delayed by lift deployment in December 2017.

A review of December 2017 late trains by duration of delay is shown in Table 13. The range with the greatest number of delays was, as usual, six-to-ten minutes, accounting for 45.8% of all late trains. Table 14 shows that the average length of delay was 15.9 minutes in December 2017. It should be noted that these averages relate only to reportable delays (i.e., trains late by six minutes or more).

Tables 15 to 19 report year-end statistics. Table 15 presents annual train delays and on-time performance by line. Table 16 displays the frequency of 2017 annual train delays by cause and by line. The top two causes for each line are highlighted. Annual system causes of delay for 2012 to 2017 are shown in Table 17. The annual frequencies of train delays by duration for the Metra system are shown in Table 18, and for each line in Table 19.

Changes in On-Time Performance Reporting Calculations

“Extra” Trains

“Extra” trains (trains added to handle special events but not shown in the regularly published schedules) are excluded from on-time performance calculations, except for those “extra” trains whose special-event schedules include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers.

Intermediate station departure times and final station arrival times for some “extra” trains are either unknown (departures of some “extra” trains are held until after the completion of the respective special event) or not published. On-time performance for these two types of “extra” trains cannot be calculated, as arrival times are not known ahead of time; these trains are therefore excluded from on-time performance calculations. However, on-time performance can be calculated for “extra” trains that have full published schedules.

Temporary Schedules and Notices, for Construction and Special Events

Planned construction projects or special events can adversely affect on-time performance. Metra occasionally publishes full temporary schedules, which supersede the standard published schedules, to inform riders of possible delays or modifications to regular service. Metra also may publish informational notices to accompany temporary schedules. On-time performance is calculated using the temporary schedules and any accompanying notices.

TABLE 1: SCHEDULED AND DELAYED TRAINS, AND ON-TIME PERFORMANCE BY SERVICE PERIOD AND LINE
December 2017

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	1,078	113	89.5%	814	54	93.4%	1,892	167	91.2%	140	1	99.3%	108	0	100.0%	2,140	168	92.1%
Elec -ML	834	9	98.9%	846	12	98.6%	1,680	21	98.8%	200	0	100.0%	122	8	93.4%	2,002	29	98.6%
-BI	260	7	97.3%	280	2	99.3%	540	9	98.3%	40	1	97.5%		--		580	10	98.3%
-SC	280	4	98.6%	620	5	99.2%	900	9	99.0%	160	6	96.3%	120	6	95.0%	1,180	21	98.2%
Subtotal	1,374	20	98.5%	1,746	19	98.9%	3,120	39	98.8%	400	7	98.3%	242	14	94.2%	3,762	60	98.4%
Heritage	120	10	91.7%	20	3	85.0%	140	13	90.7%		--			--		140	13	90.7%
Milw -N	497	31	93.8%	703	76	89.2%	1,200	107	91.1%	120	1	99.2%	120	2	98.3%	1,440	110	92.4%
-W	536	63	88.2%	624	70	88.8%	1,160	133	88.5%	120	11	90.8%	108	20	81.5%	1,388	164	88.2%
Subtotal	1,033	94	90.9%	1,327	146	89.0%	2,360	240	89.8%	240	12	95.0%	228	22	90.4%	2,828	274	90.3%
NCS	218	17	92.2%	222	18	91.9%	440	35	92.0%		--			--		440	35	92.0%
RI	715	65	90.9%	685	53	92.3%	1,400	118	91.6%	160	2	98.8%	168	4	97.6%	1,728	124	92.8%
SWS	220	11	95.0%	380	28	92.6%	600	39	93.5%	30	0	100.0%		--		630	39	93.8%
UP -N	584	27	95.4%	808	24	97.0%	1,392	51	96.3%	130	10	92.3%	108	5	95.4%	1,630	66	96.0%
-NW	640	52	91.9%	648	20	96.9%	1,288	72	94.4%	120	8	93.3%	90	1	98.9%	1,498	81	94.6%
-W	532	62	88.3%	648	63	90.3%	1,180	125	89.4%	100	0	100.0%	108	4	96.3%	1,388	129	90.7%
Subtotal	1,756	141	92.0%	2,104	107	94.9%	3,860	248	93.6%	350	18	94.9%	306	10	96.7%	4,516	276	93.9%
SYSTEM	6,514	471	92.8%	7,298	428	94.1%	13,812	899	93.5%	1,320	40	97.0%	1,052	50	95.2%	16,184	989	93.9%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Delays data for most recent month is final (01/25/18) version from TOPS.

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TABLE 2: ON-TIME PERFORMANCE BY LINE/BRANCH

LINE	YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN-DEC	AVG
BNSF	**2012**	94.4	97.3	95.2	98.4	97.2	91.8	95.0	94.2	98.0	96.9	95.0	98.5	96.0%	96.0%
	2013	95.8	93.9	94.6	93.3	96.0	88.5	95.2	97.1	97.2	94.0	95.8	92.2	94.5%	94.5%
	2014	78.6	84.6	95.6	92.0	82.2	82.0	94.1	91.4	94.1	92.2	95.2	94.1	89.7%	89.7%
	2015	90.9	90.1	96.8	97.5	96.6	92.4	93.0	95.4	95.8	93.6	93.5	97.4	94.4%	94.4%
	2016	93.2	93.8	95.9	96.8	94.0	93.5	93.8	91.4	91.3	95.2	95.4	93.1	94.0%	94.0%
	2017	95.9	95.6	96.2	96.3	95.4	93.7	96.2	94.4	92.7	93.8	91.8	92.1	94.5%	94.5%
2012-2016 average		90.5	92.0	95.6	95.6	93.2	89.7	94.2	93.9	95.2	94.4	95.0	95.1	93.7%	93.7%
Electric	**2012**	93.7	98.4	97.9	98.7	98.0	97.0	97.3	97.7	97.5	96.6	97.1	98.2	97.3%	97.3%
	2013	98.1	99.0	98.5	98.0	98.0	98.3	92.4	96.4	97.2	97.3	96.9	97.0	97.2%	97.2%
	2014	93.7	95.3	97.7	98.8	98.3	97.4	96.7	98.1	98.7	98.4	98.6	98.7	97.5%	97.5%
	2015	96.3	95.4	98.4	98.4	98.3	97.7	96.5	98.2	97.9	97.8	97.8	99.0	97.6%	97.6%
	2016	98.0	98.6	98.8	98.9	98.9	96.5	97.9	98.5	97.1	98.6	97.7	97.7	98.1%	98.1%
	2017	95.6	98.9	98.3	98.9	98.7	97.1	98.7	98.5	98.2	98.3	97.8	98.4	98.1%	98.1%
2012-2016 average		95.9	97.4	98.3	98.5	98.3	97.4	96.1	97.8	97.7	97.7	97.6	98.1	97.6%	97.6%
Heritage	**2012**	95.2	99.2	94.7	98.4	97.7	92.1	91.3	95.7	98.2	94.9	92.9	96.7	95.6%	95.6%
	2013	97.0	99.2	94.4	97.7	94.7	92.5	97.7	99.2	97.5	96.4	98.3	92.1	96.4%	96.4%
	2014	79.5	75.8	88.1	93.2	92.1	94.4	94.7	93.7	92.1	97.8	96.5	98.5	91.4%	91.4%
	2015	92.1	90.0	96.2	88.6	85.8	89.4	92.0	85.7	86.5	98.5	85.0	90.9	90.2%	90.2%
	2016	90.0	92.9	97.4	97.3	95.2	94.8	87.9	94.4	94.6	98.0	94.6	91.8	94.2%	94.2%
	2017	93.9	94.3	96.9	96.4	94.2	89.0	90.7	97.5	95.7	90.3	88.4	90.7	93.2%	93.2%
2012-2016 average		90.7	91.5	94.3	95.1	93.3	92.7	92.7	93.9	93.7	97.1	93.5	93.9	93.6%	93.6%
Milw - N	**2012**	95.1	96.4	94.0	95.3	93.5	93.2	84.8	92.9	94.3	94.9	95.4	95.5	93.8%	93.8%
	2013	95.5	92.4	94.1	95.7	95.3	89.6	92.8	93.6	94.4	93.3	95.7	87.5	93.3%	93.3%
	2014	73.1	81.9	89.5	97.9	95.1	91.1	96.0	95.2	95.5	96.2	95.4	93.5	91.7%	91.7%
	2015	91.8	87.9	93.5	95.1	95.4	94.8	97.1	94.9	95.6	97.9	97.0	96.8	94.9%	94.9%
	2016	95.3	94.2	95.7	96.8	92.5	92.9	95.0	93.1	93.8	97.5	95.1	93.8	94.6%	94.6%
	2017	95.3	95.6	96.5	96.1	95.9	93.4	88.4	93.1	90.4	93.9	94.8	92.4	93.8%	93.8%
2012-2016 average		90.1	90.6	93.4	96.2	94.4	92.3	93.2	93.9	94.7	95.9	95.7	93.4	93.7%	93.7%
Milw - W	**2012**	94.4	95.1	95.3	97.5	97.1	95.6	93.7	94.1	89.3	93.9	94.6	95.5	94.7%	94.7%
	2013	96.6	91.3	96.3	95.8	96.2	90.9	93.2	93.2	92.6	96.5	93.9	93.7	94.2%	94.2%
	2014	84.8	88.4	91.4	97.6	95.9	92.2	94.0	93.5	96.7	95.5	97.7	94.6	93.5%	93.5%
	2015	93.6	93.0	94.8	97.7	97.2	95.4	96.6	96.8	97.8	99.0	98.2	96.5	96.4%	96.4%
	2016	94.0	95.3	94.4	96.0	94.9	93.6	92.1	95.2	97.4	97.0	95.6	93.3	94.9%	94.9%
	2017	96.9	95.2	95.2	95.6	97.5	95.8	96.3	96.3	95.5	96.7	96.9	88.2	95.5%	95.5%
2012-2016 average		92.7	92.7	94.4	96.9	96.2	93.5	94.0	94.6	94.8	96.4	96.0	94.7	94.7%	94.7%
NCS	**2012**	94.8	94.4	94.4	85.1	95.2	94.8	82.5	91.9	95.7	93.9	92.0	94.8	92.4%	92.4%
	2013	95.0	87.5	93.7	90.9	94.0	92.7	93.6	95.0	92.5	93.1	90.0	87.4	92.2%	92.2%
	2014	76.0	81.1	88.5	96.3	88.5	89.2	94.0	88.5	95.2	90.9	97.8	91.9	89.9%	89.9%
	2015	93.9	82.5	92.6	94.8	95.7	94.8	96.0	92.6	95.2	97.1	96.1	93.6	93.8%	93.8%
	2016	92.3	95.5	91.7	93.3	94.4	96.3	95.0	96.4	96.1	95.5	95.2	92.6	94.5%	94.5%
	2017	92.6	91.6	95.1	95.2	95.5	95.7	94.8	98.0	92.7	91.9	92.6	92.0	94.0%	94.0%
2012-2016 average		90.4	88.3	92.2	92.1	93.6	93.6	92.3	93.0	95.0	94.0	94.2	92.1	92.6%	92.6%

TABLE 2 (continued): ON-TIME PERFORMANCE BY LINE/BRANCH

LINE	YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN-DEC	AVG
RI	**2012**	94.3	96.8	94.8	96.1	95.8	94.1	92.9	93.7	96.8	95.6	97.1	96.4	95.3%	95.3%
	2013	96.5	98.1	97.9	94.0	95.5	91.5	93.6	95.5	98.3	96.5	91.7	94.0	95.3%	95.3%
	2014	82.5	83.4	93.4	95.3	95.7	92.5	95.1	97.2	96.6	97.3	97.9	98.6	93.8%	93.8%
	2015	97.4	95.3	98.9	98.7	97.8	97.4	94.2	97.0	96.3	97.3	97.1	97.4	97.1%	97.1%
	2016	92.6	96.2	95.8	96.5	97.9	96.2	93.5	96.3	96.0	98.2	97.9	95.3	96.1%	96.1%
	2017	95.2	97.1	97.8	98.0	94.6	96.0	95.3	95.2	95.7	95.9	94.0	92.8	95.7%	95.7%
	2012-2016 average	92.6	94.0	96.2	96.1	96.5	94.4	93.9	96.0	96.8	97.0	96.4	96.3	95.5%	95.5%
SWS	**2012**	94.2	96.6	94.8	95.3	95.8	93.2	95.3	94.5	93.8	94.3	93.7	96.3	94.8%	94.8%
	2013	94.7	97.1	97.3	97.7	95.0	91.0	98.0	96.8	97.1	98.2	93.2	91.1	95.6%	95.6%
	2014	83.0	92.0	93.5	94.9	93.2	92.8	93.9	95.2	94.2	92.0	90.2	96.2	92.6%	92.6%
	2015	94.7	89.7	95.6	96.1	96.3	91.1	92.4	93.8	97.6	96.8	96.0	94.4	94.5%	94.5%
	2016	95.6	97.2	97.8	95.6	91.9	95.3	94.1	93.3	91.6	97.4	96.6	96.2	95.2%	95.2%
	2017	96.2	94.1	96.4	97.3	92.8	97.1	97.1	94.3	96.3	93.7	90.1	93.8	94.9%	94.9%
	2012-2016 average	92.4	94.6	95.8	95.9	94.4	92.7	94.7	94.7	94.9	95.7	94.0	94.9	94.6%	94.6%
UP - N	**2012**	94.6	98.4	97.9	98.1	95.1	95.1	95.9	95.1	96.3	97.3	96.6	95.8	96.4%	96.4%
	2013	98.3	97.3	97.9	96.6	96.7	93.0	96.0	94.9	97.0	96.5	96.9	98.0	96.6%	96.6%
	2014	91.2	92.1	97.4	97.8	97.4	97.2	97.6	98.1	97.6	97.4	97.8	98.3	96.7%	96.7%
	2015	98.6	95.6	98.3	97.1	97.7	98.2	97.0	95.9	98.2	97.0	97.6	98.4	97.5%	97.5%
	2016	96.9	98.6	97.1	98.3	98.3	98.2	97.0	96.0	98.1	99.1	98.0	98.1	97.8%	97.8%
	2017	95.6	99.0	98.3	97.0	97.3	97.3	95.6	97.7	96.9	98.1	96.9	96.0	97.2%	97.2%
	2012-2016 average	95.9	96.4	97.7	97.6	97.0	96.4	96.7	96.0	97.4	97.4	97.4	97.7	97.0%	97.0%
UP - NW	**2012**	95.9	98.6	96.4	98.9	95.9	96.0	94.8	96.7	97.8	94.2	94.6	96.6	96.3%	96.3%
	2013	96.3	97.7	96.0	95.1	93.3	89.2	93.9	93.7	96.3	94.6	94.6	94.2	94.6%	94.6%
	2014	86.6	91.1	96.3	98.6	95.6	95.2	94.7	97.4	98.3	95.0	97.1	96.2	95.2%	95.2%
	2015	96.0	91.6	97.6	96.3	96.9	96.8	94.1	96.5	96.1	97.5	96.7	97.5	96.2%	96.2%
	2016	97.0	98.1	97.8	98.1	96.0	96.6	94.9	96.8	96.9	96.5	93.2	93.4	96.3%	96.3%
	2017	96.2	97.4	98.1	93.7	97.2	93.3	92.2	94.6	93.8	94.8	95.6	94.6	95.1%	95.1%
	2012-2016 average	94.3	95.5	96.8	97.4	95.5	94.8	94.5	96.2	97.1	95.6	95.2	95.6	95.7%	95.7%
UP - W	**2012**	93.1	97.1	95.2	95.5	95.6	92.4	93.8	94.3	97.2	97.2	96.0	96.4	95.3%	95.3%
	2013	96.5	96.2	96.9	94.4	93.7	89.2	95.0	93.0	96.6	96.6	94.0	91.5	94.5%	94.5%
	2014	85.9	90.9	94.4	96.7	96.4	94.8	96.4	94.3	96.7	94.6	95.9	96.2	94.4%	94.4%
	2015	93.9	91.1	96.1	96.3	97.5	93.9	93.9	95.9	96.0	96.1	97.3	96.8	95.4%	95.4%
	2016	97.8	93.4	97.2	96.7	90.1	94.4	96.6	96.0	96.2	95.6	94.0	92.9	95.1%	95.1%
	2017	95.0	96.5	96.1	92.9	93.8	92.4	94.8	94.3	94.7	92.9	94.8	90.7	94.1%	94.1%
	2012-2016 average	93.4	93.7	96.0	95.9	94.6	93.0	95.1	94.7	96.5	96.0	95.4	94.7	94.9%	94.9%
SYSTEM excluding South Shore	**2012**	94.3	97.4	96.1	97.2	96.3	94.7	94.0	95.2	96.2	95.9	95.8	96.9	95.8%	95.8%
	2013	96.8	96.1	96.7	95.7	95.9	92.4	94.0	95.2	96.4	95.9	95.1	93.8	95.4%	95.4%
	2014	85.6	89.3	94.9	96.8	94.5	93.1	95.6	95.7	96.8	95.9	96.9	96.5	94.3%	94.3%
	2015	94.9	92.5	97.0	97.2	97.2	95.8	95.3	96.3	96.8	97.0	96.8	97.5	96.2%	96.2%
	2016	95.8	96.4	96.8	97.4	95.8	95.5	95.4	95.7	95.7	97.4	96.2	95.2	96.1%	96.1%
	2017	95.6	96.9	97.2	96.6	96.5	95.3	95.5	96.0	95.2	95.7	95.2	93.9	95.8%	95.8%
	2012-2016 average	93.4	94.4	96.3	96.9	96.0	94.3	94.9	95.6	96.4	96.4	96.2	96.0	95.6%	95.6%

Delays data for most recent month is final (01/25/18) version from TOPS. P:\ONTIME\report\[Delays&TrainsByServPeriod.xls]OTPbyLine&Month 1/26/2018

'2012-2016 average' calculated by summing the delays over the five years, summing the trains run over the five years, and calculating their ratio.

TABLE 3: LIST OF WEEKDAY TRAINS LESS THAN 85% ON-TIME
December 2017

Line	Train	Date	Minutes Late	Delay Code	Delay Explanation
BNSF	1234	Mon, Dec 04	8	G1	2B SW @ BERWYN
70% OT		Tue, Dec 05	8	UF1	LATE FLIP FROM 1206
		Thu, Dec 07	12	FW1	FOLLOWING 1232
		Mon, Dec 18	0	E1	METX 199
		Tue, Dec 26	7	G1	BROKEN RETIRED IJ
		Fri, Dec 29	21	H1	LATE TURN FROM 1207 DUE TO 1204 MECH ISSUE.
BNSF	1238	Thu, Dec 07	10	UF1	WAITING ON TRAFFIC AT FAIRVIEW
80% OT		Mon, Dec 18	8	E1	ADDED 1234 STOPS
		Tue, Dec 26	15	G1	BROKEN RETIRED IJ
		Fri, Dec 29	18	H1	LATE TURN FROM 1209 DUE TO 1204 MECHANICAL ISSUE.
BNSF	1242	Mon, Dec 04	9	U	ADA PASSENGER HANDLING
70% OT		Thu, Dec 07	11	UF1	STUCK BEHIND 1236
		Thu, Dec 14	0	XFW	CAR WOULD NOT SET UP
		Tue, Dec 19	8	RA	ROUTED INTO 4
		Tue, Dec 26	10	G	BROKEN RETIRED IJ
		Fri, Dec 29	18	RF1	STOPPED AT CPK BEHIND OUT OF SLOT TRAINS.
BNSF	1248	Mon, Dec 04	6	G1	CONGESTION FROM EARLIER SWITCH FAILURE.
60% OT		Thu, Dec 07	7	UF1	FOLLOWING TRAFFIC AHEAD
		Fri, Dec 15	6	D1	FOLLOWING TRAFFIC AHEAD, SWS810 WAS LATE
		Mon, Dec 18	7	E1	LATE FLIP/EARLIER MECH DELAYS
		Tue, Dec 19	6	RA1	TRAFFIC AHEAD 1242 MISROUTED
		Tue, Dec 26	12	G1	FAILED RETIRED IJ
		Wed, Dec 27	8	GA	SWITCH FAILURE 818 SWITCH.
		Fri, Dec 29	18	RF1	TRAFFIC FROM EARLIER DELAYS
BNSF	1250	Mon, Dec 11	9	G	4B SW WOULD NOT NORMAL
75% OT		Mon, Dec 18	16	E1	EARLIER DELAYS
		Tue, Dec 26	15	G1	BROKEN RETIRED IJ
		Wed, Dec 27	7	GA1	FOLLOWING 1250
		Fri, Dec 29	17	RF1	DELAYED FROM 1213
BNSF	1254	Mon, Dec 11	9	E1	CAB SIGNAL PROBLEMS 1223
80% OT		Fri, Dec 22	10	RF	MIROUTED BY UNION AVE DS
		Tue, Dec 26	12	G1	BROKEN RETIRED IJ
		Fri, Dec 29	11	RF1	LATE FLIP AT CPK DUE TO TRAFFIC JAM.
BNSF	1256	Fri, Dec 08	17	E1	LATE FLIP BEHIND 1219
80% OT		Mon, Dec 18	16	E1	LATE FLIP
		Tue, Dec 26	9	G1	BROKEN RETIRED IJ
		Fri, Dec 29	9	RF1	FOLLOWING DELAYED 1254
BNSF	1258	Fri, Dec 08	18	E1	LATE FLIP FROM 1219
80% OT		Mon, Dec 18	7	E1	LATE FLIP
		Tue, Dec 26	23	G1	RETIRED IJ FAILED
		Fri, Dec 29	6	RF1	FOLLOWING TRAFFIC AHEAD
BNSF	1269	Mon, Dec 04	11	G	HELD ON MT2 FOR 1265 TO CROSSOVER AND CLEARING FOR CROSSING MALFUCTIONS
80% OT		Tue, Dec 05	9	G	SIGNAL / SWITCH FAILURE TALKED BY SIGNAL AT LAVERGNE
		Mon, Dec 11	12	E	NO HEP TRYING TO DEPART CUS AND DEPARTS 7 LATE. MECHANICAL RESPONDED AND MADE REPAIRS WITH TLC
		Fri, Dec 29	7	E1	WAITING ON DELAYED 1261
BNSF	1271	Mon, Dec 04	15	G	MAPLE, MAIN, PRAIRIE GATE WIRE MALFUNCTION
78% OT		Tue, Dec 05	12	G1	FOLLOWING 1269
		Tue, Dec 26	0	E1	CANCELLED ACCT OPERATED 1275 FROM CUS ACCT METX 125 WATER LEAK
		Fri, Dec 29	6	E1	SLOW UNLOADING, WEATHER
BNSF	1279	Fri, Dec 01	8	DD	DELAYED DUE TO FGP1101 ROUTED THRU THE PARADE BY EE DS
75% OT		Mon, Dec 04	16	G1	FOLLOWING TRAFFIC FROM EARLIER, MULTIPLE XING FAILURES GATE WIRE MALFUNCTION
		Tue, Dec 05	10	G1	TRAFFIC CONGESTION FROM EARLIER DELAYS
		Mon, Dec 11	8	RF	MISROUTE AT FAIRVIEW AVE.
		Fri, Dec 29	7	IW	SLOW UNLOADING, WEATHER
BNSF	1288	Fri, Dec 01	11	DD1	DELAYED DUE TO FGP1101 ROUTED THRU THE PARADE BY EE DS
80% OT		Wed, Dec 13	10	VE1	LATE FLIP FROM 1243
		Thu, Dec 28	12	IW	DEPART 10" LATE FROM AURORA. 1288 5" LATE DUE TO WEATHER.
		Fri, Dec 29	21	UF1	LATE TURN FROM 1243, ADA ISSUE
BNSF	1373	Mon, Dec 04	7	G	MAPLE, MAIN, PRAIRIE GATE WIRE MALFUNCTION
83% OT		Tue, Dec 05	15	G1	FOLLOWING 1281 AND 1285 FROM EARLIER DELAY
		Tue, Dec 12	9	CW	BROKEN RAIL MT2 BERWYN CAUSING 6 BOX 2S
HC	918	Thu, Dec 07	14	D	18M DELAY CORWITH AACT X-TRAFFIC
80% OT		Mon, Dec 11	7	D	10M DELAY CORWITH ACCT. X-TRAFFIC, NO ANSEWER FROM BN
		Thu, Dec 21	11	D	11M DELAY CORWITH , X-TRAFFIC, NO ANSWER FROM BN
		Thu, Dec 28	17	GF	20M MEETING AMT301, SINGLE TRACKING ACCT SWITCH PROBLEMS.

TABLE 3 (continued): LIST OF WEEKDAY TRAINS LESS THAN 85% ON-TIME
December 2017

Line	Train	Date	Minutes Late	Delay Code	Delay Explanation
MN	2125	Wed, Dec 06	10	CH	10" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
80% OT		Fri, Dec 22	9	H	7" GETTING LOCO TIED ON @ CUS; 4" APPROACH/STOPPED, MAYFAIR
		Tue, Dec 26	8	J1	10" STOPPED @ MORTON GROBVE & X/O TO 2MT GOING AROUND #2123; 3" STOPPED, A-20 X/O BACK TO 1MT; 2" LOOSE HOSE ON ENGINE AIR LEAK
		Fri, Dec 29	16	I	14" 9 CAR TRAIN; 2" STOPPED, RONDOUT
MN	2135	Wed, Dec 06	11	CH	12" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
78% OT		Thu, Dec 07	6	A	4" X-TRAFFIC, MAYFAIR; FOLLOWING #2133; 3" ADA, LIBERTYVILLE
		Tue, Dec 12	7	U	3" ADA, LIBERTYVILLE; 4" PASSENGER LOADING
		Thu, Dec 21	26	JM	33" FEMALE PASSENGER EXPRERIENCED A DIABETIC MEDICAL EMERGENCY ON BOARD, WAIT FOR MEDICS TO TREAT & REMOVE
MN	2140	Wed, Dec 06	11	CH	18" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
65% OT		Wed, Dec 13	10	G1	EN ROUTE DEERFIELD-BROKEN TRACK CIRCUIT WIRE AT DUNDEE ROAD
		Mon, Dec 18	8	KD	10" STRUCK OBJECT, WALKED TRAIN LOOK FOR OBJECT, ROUND LAKE
		Thu, Dec 21	7	I	8" HEAVY PASSENGER LOADING, ALL STOPS; 2" STOPPED, MAYFAIR
		Fri, Dec 22	10	I	3" WAIT FOR #2119, GRAYSLAKE; 3" HEAVY PASSENGER LOADING, ALL STOPS; 3" STOPPED, MAYFAIR
		Thu, Dec 28	9	G	SIGNAL SWITCH MALFUNCTION
		Fri, Dec 29	9	I	8" HEAVY PASSENGER LOADING, ENROUTE; 2" STOP INDICATION WAITINGON AMTRAK #8, A20.
MN	2145	Tue, Dec 05	20	E1	20" HOLDING @ MORTON GROVE FOR #2152 TO SASHAY AROUND #2150
80% OT		Wed, Dec 06	34	CH	34" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Fri, Dec 08	18	I1	18" LATE TURN FROM #2146.
		Mon, Dec 11	11	RF1	11" LATE TURN FROM #2146
MN	2146	Wed, Dec 06	17	CH	17" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
75% OT		Fri, Dec 08	14	I	8" HOLIDAY PASSENGER LOADING, ENROUTE; 5" LATE TURN FROM #2121; 4" CROSS TRAFFIC, MAYFAIR.
		Mon, Dec 11	8	U1	6" LATE TURN FROM #2121; 5" ADA, NORTHBROOK
		Wed, Dec 20	6	D1	6" LATE ARRIVAL OF #2121
		Fri, Dec 29	7	I	6" SLOW PASSENGER LOADING AND UNLOADING, ENROUTE; 1" NO REASON GIVEN, ENROUTE.
MN	2147	Tue, Dec 05	17	E1	17" FOLLOWING #2145
75% OT		Wed, Dec 06	15	CH	15" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Fri, Dec 08	11	I1	12" FOLLOWING LATE TRAIN #2145, ENROUTE.
		Mon, Dec 11	12	RF1	5" LATE TURN FROM #2148 & FOLLOWING #2145
		Tue, Dec 12	0	XE	ANNULLED LOCO 216 DEVELOPED A WATER LEAK, GLENVIEW
MN	2148	Fri, Dec 01	7	CC1	2" LATE TURN FROM #2127; 5" WAITING ON LATE #2146; 3" HEAVY PASSENGER LOADING
80% OT		Tue, Dec 05	7	E1	7" #2150 ANNULLED DUE TO MECHANICAL ISSUES
		Mon, Dec 11	7	U1	7" LATE TURN FROM #2127
		Wed, Dec 13	6	A1	6" LATE TURN FROM #2127, DEERFIELD
MN	2149	Tue, Dec 05	0	E1	ANNULLED ACCT #2150 MECHANICAL ISSUES @ GOLF
75% OT		Wed, Dec 06	10	CH	10" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Mon, Dec 11	20	RF1	18" WAIT ON #2156; 4" STOP SIGNAL, CN
		Tue, Dec 12	57	E1	57" TIED ONTO #2147 & SHOVED TO FOX LAKE
		Tue, Dec 26	70	GW	64" WAIT ON #2156 & 2158 TO CLEAR RONDOUT; 6" STOPPED SIGNAL/SWITCH PROBLEMS, CN XING
MN	2150	Tue, Dec 05	0	XE	ANNULLED, LOCO 103 STOPPED LOADING, GOLF
80% OT		Wed, Dec 06	14	CH	14" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Fri, Dec 08	6	A1	10" LATE TURN FROM #2133.
		Mon, Dec 18	0	E1	EXPRESSED FROM DEERFIELD ACCT LACK OF POWER IN COACHES (NO LIGHTS, ETC) NO HEP
MN	2151	Tue, Dec 05	10	E1	10" WAITING ON LATE #2158
70% OT		Wed, Dec 06	21	CH	21" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Mon, Dec 11	20	RF1	20" WAIT ON #2158
		Tue, Dec 12	31	E1	32" FOLLOWING #2147/2149
		Mon, Dec 18	11	E1	11" HOLD FOR LATE I/B & SLOW PASSENGERS
		Tue, Dec 26	44	GW1	44" WAIT FOR #2156 & 258 TO CLEAR, RONDOUT THEN FOLLOWED #2149 TO FOX LAKE
MN	2154	Tue, Dec 05	15	E1	15" LATE TURN FROM #2145, DEERFIELD
75% OT		Wed, Dec 06	37	CH	33" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Fri, Dec 08	19	I1	19" LATE TURN FROM #2145.
		Mon, Dec 11	12	RF1	13" LATE TURN FROM #2145
		Fri, Dec 22	7	I1	10" LATE DEPARTING CHANGING ENDS & BRAKE TEST
MN	2155	Tue, Dec 05	9	E1	6" LATE TURN FROM #2158, CUS
75% OT		Wed, Dec 06	7	CH	7" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Tue, Dec 12	13	E1	13" MEET #2158, FOREST GLEN
		Tue, Dec 26	10	GW1	8" LATE TURN FROM #2158, CUS
		Fri, Dec 29	9	I	9" PASSEGNER LOADING, EN ROUTE
MN	2156	Tue, Dec 05	7	E1	9" WAIT ON LATE #2147; 5" MEETING LATE TRAINS, EN ROUTE
80% OT		Wed, Dec 06	10	CH	10" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Mon, Dec 11	15	RF1	15" LATE TURN FROM #2147; 6" STOP SIGNAL RESTRICTED SPEED, CN
		Tue, Dec 26	42	GW	42" SIGNAL/SWITCH PROBLEMS, CN XING

TABLE 3 (continued): LIST OF WEEKDAY TRAINS LESS THAN 85% ON-TIME
December 2017

Line	Train	Date	Minutes Late	Delay Code	Delay Explanation
MN	2158	Tue, Dec 05	10	E1	10" #2150 ANNULLED DUE TO MECHANICAL ISSUES @ GOLF
75% OT		Wed, Dec 06	30	CH	30" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
		Mon, Dec 11	26	RF1	26" WAIT ON #2149
		Tue, Dec 12	65	E1	65" WAITING ON #2149/2147 & 2151
		Tue, Dec 26	15	GW	20" SIGNAL/SWITCH PROBLEMS, CN XING
MN	2160	Wed, Dec 06	11	CH	11" LATE TURN FROM #2153, FOX LAKE
75% OT		Thu, Dec 07	8	D	10" FREIGHT, CN XING
		Tue, Dec 26	13	GW1	12" LATE TURN FROM #2153, FOX LAKE
		Wed, Dec 27	10	RO	7" LATE TURN FROM #2153; 5" OPERATOR ERROR, RED SIGNAL, GRAYLAND; 1" STOP, WESTERN
		Fri, Dec 29	6	I1	6" LATE DEPARTING CHANGING ENDS
MW	2205	Tue, Dec 12	21	EW1	20" LATE TURN FROM #2206, CUS
80% OT		Tue, Dec 26	20	G	30" SIGNAL PROBLEMS B-35 TO SPAULDING; LATE TURN FROM # 2204 ; LATA SYSTEM SHOW TIME UP TO ELGIN
		Wed, Dec 27	13	G1	11" LATE TURN FROM #2206
		Fri, Dec 29	7	G	7" SIGNAL PROBLEMS DARK SIGNAL RESTRICTED SPEED, MANNHEIM TO BENSENVILLE; SIGNAL PROBLEMS, ELGIN/B-35
MW	2208	Thu, Dec 07	8	GT	8" SIGNAL PROBLEMS, TRACK CIRCUIT, RESTRICTING SIGNALS, ROSELLE-ITASCA
75% OT		Tue, Dec 12	23	EW1	15" FOLLOWING #2206
		Tue, Dec 26	38	G1	40" OPERATING ON RESTRICTING SIGNALS ELGIN COACH YARD TO A-5; FOLLOWING TRAINS AHEAD DUE TO SIGNAL PROBLEMS @ B-35
		Wed, Dec 27	15	G	15" 3 ITEM2' ELGIN; RED SIGNAL B-35; BROKEN RAIL/3 MORE ITEM 2'S
		Thu, Dec 28	10	G	11" SIGNAL PROBLEMS, ELGIN
MW	2212	Thu, Dec 07	7	GT	8" SIGNAL PROBLEMS, TRACK CIRCUIT, RESTRICTING SIGNALS, ROSELLE-ITASCA
80% OT		Tue, Dec 12	14	GW	25" SIGNAL PROBLEMS, ROSELLE WEST-ITASCA; FLAGGED BY VERBAL PERMISSION PAST SIGNAL, RESTRICTED SPEED
		Tue, Dec 26	0	G1	ANNULLED UESD EQUIPMENT FROM #2220; #104 ACCOMMODATED PASSENGERS
		Wed, Dec 27	9	CW	10" BROKEN RAIL & 3 ITEM 2'S
MW	2214	Thu, Dec 07	8	GT	8" SIGNAL PROBLEMS, TRACK CIRCUIT, RSETRICTING SIGNALS, ROSELLE-ITASCA
80% OT		Tue, Dec 12	10	GW	10" SIGNAL PROBLEMS, ROSELLE WEST-ITASCA; FLAGGED BY VERBAL PERMISSION PAST SIGNAL, RESTRICTED SPEED FOLLOWING #2212
		Tue, Dec 26	14	G	9" SIGNAL PROBLEMS, ELGION; 2 ITEM 2'S; 2" STOP SIGNAL, CANAL ST
		Fri, Dec 29	7	R	10" WAITING ON ENGINEER, ELGIN
MW	2216	Thu, Dec 07	7	GT	7" SIGNAL PROBLEMS, TRACK CIRCUIT, RESTRICTING SIGNALS, ROSELLE-ITASCA
75% OT		Tue, Dec 12	15	GW	15" SIGNAL PROBLEMS ROSELLE WEST-ITASCA; FLAGGED BY VERBAL PERMISSION PAST SIGNAL, RESTRICTED SPEED
		Tue, Dec 26	15	G	15" SIGNAL PROBLEMS, B-35 TO SPAULDING
		Wed, Dec 27	7	CW	8" BROKEN RAIL & 3 ITEM 2'S
		Fri, Dec 29	8	G	4" SIGNAL PROBLEMS, B-35; 4" DARK SIGNAL, AUGUSTA
MW	2220	Tue, Dec 12	8	GW	8" SIGNAL PROBLEMS ROSELLE WEST-ITASCA; FLAGED BY VARBAL PERMISSION PAST SIGNAL, RESTRICTED SPEED
80% OT		Tue, Dec 26	33	G	33" SIGNAL PROBLEMS, B-35 TO SPAULDING
		Wed, Dec 27	18	CW	18" BROKEN RAIL & 3 ITEM 2'S
		Fri, Dec 29	8	G1	8" WAIT ON #2218. WEST ROSELLE; DOOR PROBLEMS SNOW/FROZEN CAR 8255 & 8257; STOP SIGNAL, LAKE ST
MW	2221	Wed, Dec 06	14	CH	18" SIGNAL & POWER FAILURE, CP CANAL ST-CP MORGAN
80% OT		Tue, Dec 12	10	G	4" STOP SIGNAL, B-35;2" NEAR MISS, MARS(DUMPED AIR AT MONT CLAIRE)2" TRK 3 TO TRK 1 TO B-6, A-5;2" YARD DROP OFF 2223 ENGINEER.
		Wed, Dec 27	8	G	8" SIGNAL PROBLEMS/ITEM 2, B-35;2" NO LINEUP, CUS;2" YARD DROP OFF # 2223 ENGINEER;2" 3 MAIN TO 1 MAIN, A5-B6.
		Thu, Dec 28	12	G	6" SIGNAL ISSUES & ITEM 2'S, B-35; 2" YARD DROP OFF OF #2223 ENGINEER; 2" X/O 3-1 @ A-5/B-6; 3" SLOW LOADING ENG 413
MW	2224	Tue, Dec 12	11	GW1	12" LATE TURN FROM #7241; #7241 DEPARTED CUS 17" LATE DUE TO LATE ARRIVAL OF #2208
80% OT		Tue, Dec 26	20	G	20" SIGNAL PROBLEMS, B-35 TO SPAULDING
		Wed, Dec 27	18	G1	15" LATE ARRIVAL OF #7241 ACCT #2208 DELAY
		Thu, Dec 28	9	G1	10" LATE TURN FROM #7241, FRANKLIN PARK
MW	2228	Tue, Dec 12	23	EW1	24" LATE TURN FROM #2205, BIG TIMBER
80% OT		Wed, Dec 27	16	G1	13" LATE TURN FROM #2205
		Thu, Dec 28	6	G1	5" LATE TURN FROM #2205 EARLIER SIGNAL PROBLEMS @ ELGIN
		Fri, Dec 29	9	G1	7" LATE TURN FROM #2205; SIGNAL PROBLEMS, ELGIN/B-35
MW	2231	Wed, Dec 06	12	CH	10" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
80% OT		Thu, Dec 14	8	I1	7" WAITING ON I/B TRAIN TO CLEAR, CUS
		Tue, Dec 26	7	G	7" STOPPED, B-35; 3" ITEM 2
		Thu, Dec 28	10	H1	7" X-TRAFFIC CUS ACCT #919 INCIDENT, CUS; 5"FOLLOWING TRAINS AHEAD TO A-5; 3" SIGNAL PROBLEMS, B-35
MW	2242	Wed, Dec 06	24	CH	24" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
80% OT		Tue, Dec 26	8	G1	8" PERMISSION BY B-35 ON 2MT
		Wed, Dec 27	10	G	10" PERMISSION BY B-35 ON 2MT.
		Thu, Dec 28	7	G	SIGNAL

TABLE 3 (continued): LIST OF WEEKDAY TRAINS LESS THAN 85% ON-TIME
December 2017

Line	Train	Date	Minutes Late	Delay Code	Delay Explanation
MW	2251	Wed, Dec 06	13	CH	13" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
75% OT		Tue, Dec 26	16	G1	11" LATE TURN FROM #2250
		Wed, Dec 27	12	G	13" SIGNAL PROBLEMS, B-35
		Thu, Dec 28	8	G1	13" LATE TURN FROM #2250
		Fri, Dec 29	10	G	10" SIGNAL PROBLEMS, B-35
MW	2254	Thu, Dec 14	16	D	15" WAIT FOR CP FREIGHT TO CLEAR INTO YARD, B-12 CP141 747 101 CARS 7658 LENGTH
75% OT		Tue, Dec 26	12	G1	12" LATE TURN FROM #2249
		Wed, Dec 27	37	G1	20" LATE TURN FROM #2249; 7" SIGNAL PROBLEMS, B-35; 10" 3 DISRUPTIVE PASSENGERS REMOVED, WESTERN
		Thu, Dec 28	14	G	7" LATE TURN FROM #2249; 7" SIGNAL PROBLEMS, B-35
		Fri, Dec 29	15	G1	15" LATE TURN FROM #2249 & SIGNAL PROBLEMS, B-35
MW	2255	Thu, Dec 14	11	D1	13" LATE TURN FROM #2254, CUS
75% OT		Tue, Dec 26	13	G1	10" LATE TURN FROM #2254
		Wed, Dec 27	40	G1	36" LATE TURN FROM #2254
		Thu, Dec 28	18	G1	14" LATE TURN FROM #2254
		Fri, Dec 29	19	G1	21" LATE TURN FROM #2254 & SIGNAL PROBLEMS, B-35
NCS	118	Wed, Dec 06	10	CH	10" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
80% OT		Tue, Dec 19	20	D1	20" STOPPED @ PRAIRIE VIEW WAIT FOR #111 & #113 TO X/O DUE TO FREIGHT INTERFERENCE
		Tue, Dec 26	6	IW	PASSENGER LOADING
		Fri, Dec 29	10	D	9" N/B FREIGHT, LAKE VILLA
NCS	119	Wed, Dec 06	8	CH	8" SIGNAL & POWER FAILURES, CP CANAL ST-CP MORGAN
65% OT		Thu, Dec 07	7	D	3" RED DUE TO X-TRAFFIC, GRAYSLAKE.
		Mon, Dec 11	10	GF1	10" STOP SIGNAL RESTRICTED SPEED, GRAYSLAKE
		Tue, Dec 19	7	D1	8" LATE TURN FROM #118, CUS
		Fri, Dec 22	13	D	20" S/B FREIGHT, LOMOND
		Tue, Dec 26	20	GW1	23" WAIT FOR #2156 TO HADN LINE ROUTE, GRAYSLAKE, THEN TALKED BY SIGNAL RESTRICTED SPEED
		Fri, Dec 29	12	E1	13" FOLLOWING #2247 THAT WAS EXPERIENCEING ENGINE PROBLEMS
RI	401	Wed, Dec 06	6	G	7M TRAVELING RESTRICTED SPEED FROM 35.5 TO EJE DUE TO SIGNAL PROBLEMS AT 35.5
75% OT		Thu, Dec 14	12	R1	12M AT RICHARDS WAITING ON LATE TRAINS AHEAD.
		Tue, Dec 26	40	GW1	40M.HAD TO BE FLAGGED BY PERSHING DUE TO #1SW OUT OF CORRESPONDANCE. ALSO AND CP 81ST DUE TO #3 SWITCH OUT OF CORRESPONDANCE.
		Wed, Dec 27	8	EW1	8M LATE ENROUTE MAKING MEETS W/E/B TRAINS
		Fri, Dec 29	13	G	10M B/W GRESHAM AND 99TH DUE TO TRACK CIRCUIT AND GOING AT RESTRICTED SPEED.
RI	416	Mon, Dec 04	45	M	45M 29TH @ MP 3.50 STRUCK A TRESPASSER/INDIVIDUAL WAS TAKEN THE THE HOSPITAL . CAB CAR#8570
80% OT		Tue, Dec 26	46	GW1	46M LATE DEPARTING JUD DUE TO SWITCH FAILURES @ CP PERSHING & CP 81ST. THE CONDUCTOR HAD TO HAND LINE SWITCHES @ CP81ST ST
		Wed, Dec 27	15	IW	5M LATE DEPARTING JUD DUE TO LATE TURN OF EQUIP AS RI401/10M LATE ENROUTE ACCOMMODATING PASSENGERS & WAITING ON W/B TRAINS
		Fri, Dec 29	15	G1	9M LATE DEPARTING RICHARDS DUE TO LATE TURN OF EQUIPMENT. 6M ENROUTE FOLLOWING RI616 OUT OF GRESHAM
RI	419	Mon, Dec 04	26	T1	DEPARTED LSS 29M LATE ACCT LATE TURN FROM 422 AND MECHANICAL LOOKING FOR CAUSE OF HEAVY SMOKE
75% OT		Mon, Dec 11	7	KW	7M ENROUTE DUE TO WHEEL SLIPPAGE DUE TO WEATHER
		Tue, Dec 26	14	GW1	1M LSS LATE PASSENGER. 3M IN ROUTE FOR DOOR ISSUES. 7M FROM 31.9 TO EJ&E FOLLOWING TRAINS AHEAD. 8M EJ&E WAITING FOR TRAINS TO YARD.
		Thu, Dec 28	9	G	HAD TO BE TALKED PASSED SIGNAL DUE TO TRACK CIRCUT/UNABLE TO GET SIGNAL 1 TO 1 WEST (10 MIN AT GRESHAM)
		Fri, Dec 29	11	D1	11M LATE INTO JOLIET DUE TO LATE FLIP
RI	509	Tue, Dec 26	16	CW1	12M LATE DEPARTIKNG LSS WAITING ON MTR TO CLEAR FOUL TIME @ CP PERSHING DUE TO INTERMITTENT TRACK CIRCUIT ON TK#1 OVE #3 SW
80% OT		Wed, Dec 27	8	IW	8M ENROUTE FULL CONSIST & ACCOMODATING PASSENGERS
		Thu, Dec 28	6	IW	6M LATE ENROUTE ACCOMMODATING PASSENGER AND FULL CONSIST
		Fri, Dec 29	6	I	10 EN ROUTE TRAVELLING WITH FULL CONSIST AND HEAVY PASSENGER LOADING/UNLOADING
RI	512	Thu, Dec 07	6	D	10M AT EJE DUE TO CROSS TRAFFIC. CNL508 TAKING HEAD ROOM AND NOT BEING ABLE TO CLEAR.
70% OT		Tue, Dec 12	7	CF	3 MIN AT ROBBINS GOING THROUGH CROSSOVERS AND 4 MIN GOING THROUGH FORM B LIMITS COULD NOT GET AHOLD OF FOREMAN
		Thu, Dec 14	9	I	HEAVY PASSANGER LOADING
		Fri, Dec 22	7	I	7M LATE DUE TO HEAVY LOADING & FULL CONSIST
		Tue, Dec 26	6	IW	5M LATE ENROUTE DUE COLD WEATHER RESTRICTION
		Thu, Dec 28	6	IW	6M ENROUTE ACCOMMODATIONG PASSENGES AND FULL CONSIST
RI	527	Thu, Dec 07	8	D	11 MIN @ EJE DUE TO RB DISPATCHER DELAYING THE MOVEMENT IA500BROUGHT UP TO RICHARDS ON 1, Q314 GOING EAST ON 2, RB HAD ALREADY ACCEPTED IA.
80% OT		Fri, Dec 22	0	XE	LOST COMPLETE POWER @ NEW LENOX AND TRAIN ANNULLED
		Wed, Dec 27	0	DE1	ANNULLED FREIGHT BLOCKING 16TH ST.
		Thu, Dec 28	9	RD	7 MIN WAITING ON A SIGNAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 8

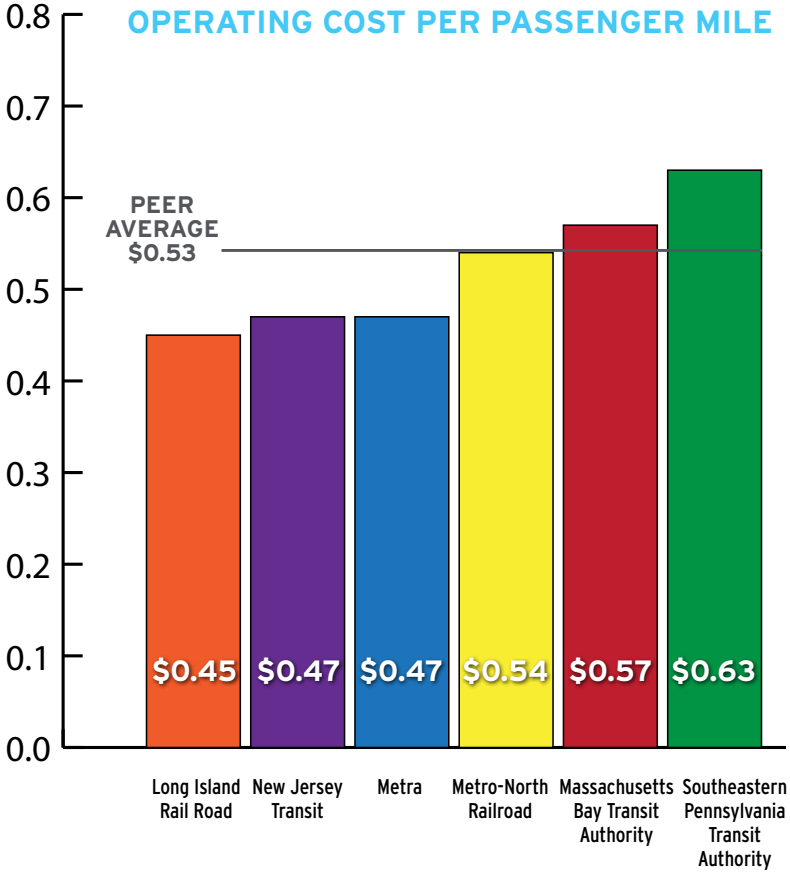
METRA WEBSITE, HTTPS://METRA.COM/TIME-PERFORMANCE-REPORTS#METRA_AND_ON_TIME_PERFORMANCE

METRA FACT BOOK 2019

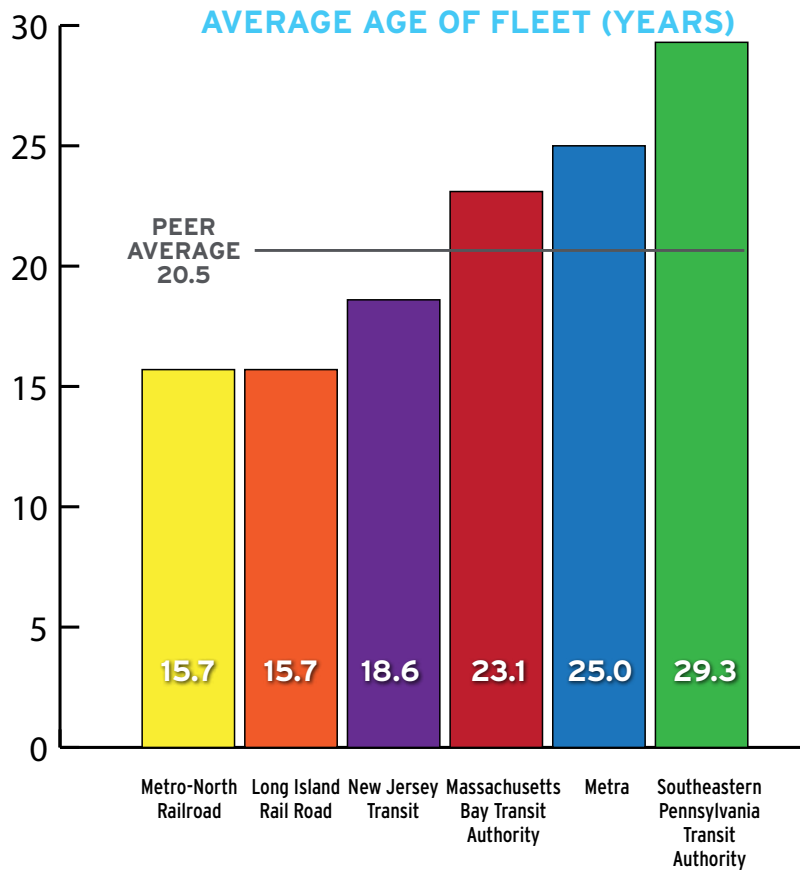


Norman Carlson, Chairman
Jim Derwinski, CEO/Executive Director

HOW WE COMPARE to OTHER RAILROADS

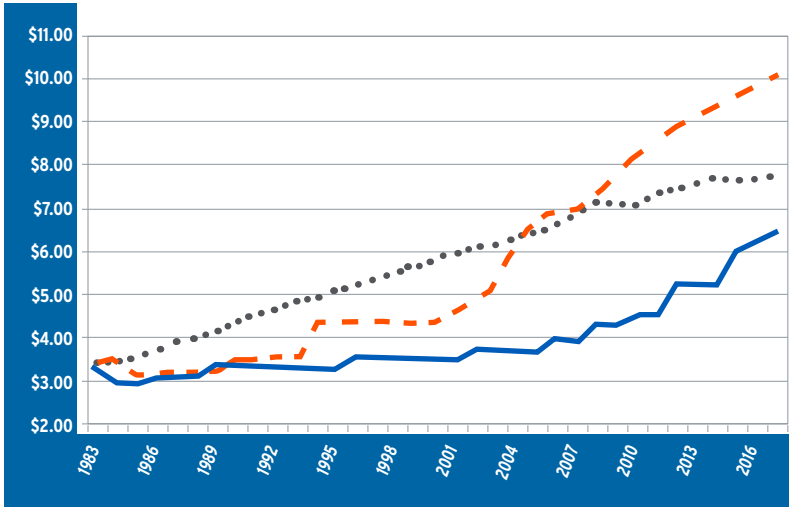


* 2017 National Transit Database



* 2017 National Transit Database

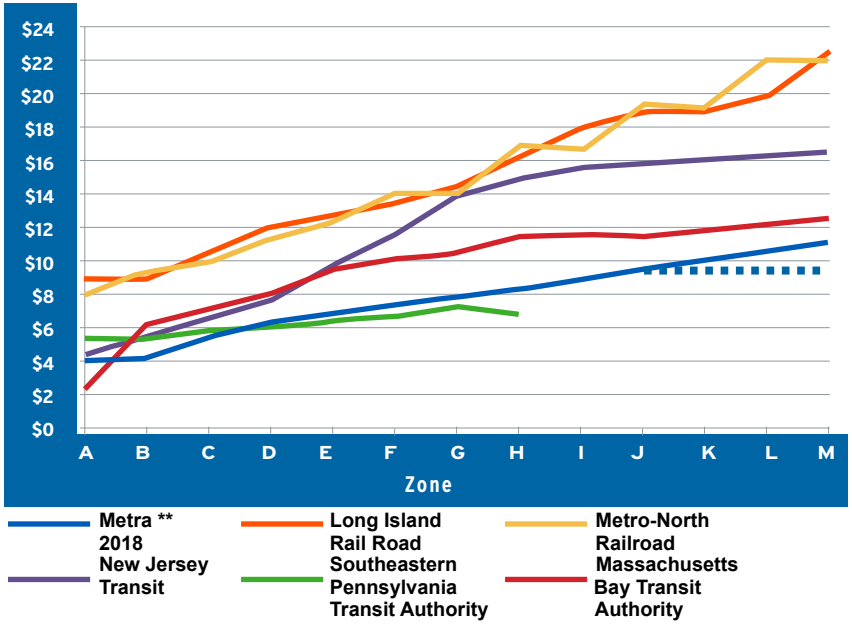
METRA ONE-WAY FARES* vs. CPI and PEERS



Average Peer Fare includes MBTA (Boston), LIRR & Metro-North Railroad (New York), New Jersey Transit (New Jersey), and SEPTA (Philadelphia), CPI data U.S. Burea of Labor Statistics. Data not available for all peers in all years. Consumer Price Index (CPI) and Peer Fares collected from June of each year.

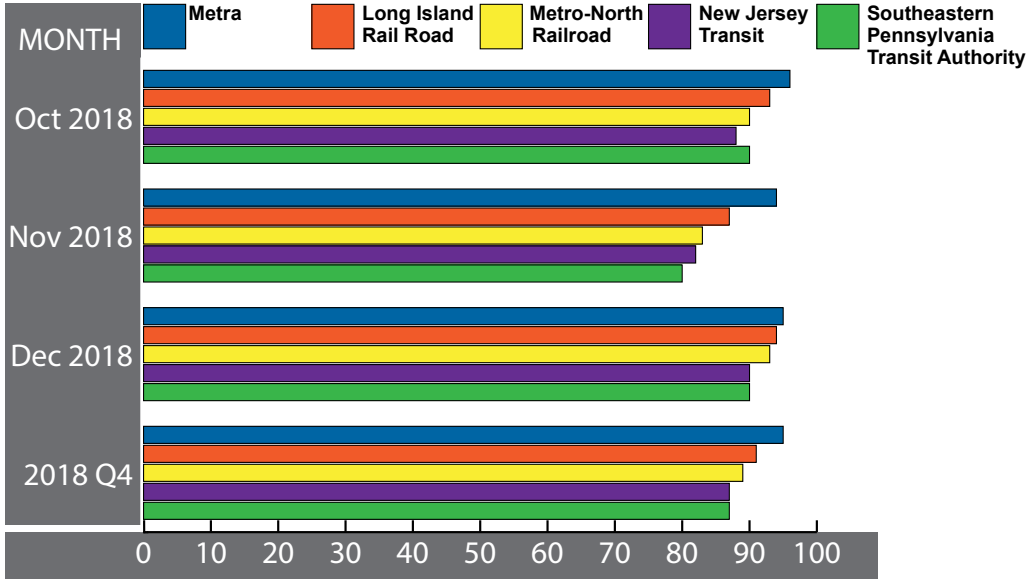
** Zone E Average*

METRA vs. PEER AGENCY PEAK ONE-WAY FARES*



** All 2018; values are not adjusted for cost of living and do not include discounted off-peak or intermediate fares offered by peers but not Metra.*
*** Metra Zones K-M consolidated into Zone J under Fare Pilot Program, effective July 15, 2018.*

METRA ON-TIME PERFORMANCE vs. PEERS





Metra

547 West Jackson Blvd.
Chicago, Illinois 60661
metrarail.com

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 7

METRA,"METRA 2019 FACT BOOK"
(EXCERPTS)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

WALKER R.V.S. EXHIBIT 9

B17 AND B12 – FREIGHT WINDOWS – A – REFERENCED IN DEPOSITION HELD ON 06-07-2022.XLS

TOWER B17 - WEEKDAYS

PUBLIC VERSION

	MILW-E		MILW-W				WINDOWS		
		0113	**2725 (Mon only)**				**0001-0520**	**(Clear 0110 MON)**	
	2202	0528							
	2204	0611					**0535-0605**		
	2206	0628							
	2208	0636							
	2210	0656							
		0659	**2203**						
	2212	0709					**0713-0733**		
	2216	0737							
	2222	0756							
		0806	**2205**						
	2226	0809					**0812-0900**		
	2228	0905							
		0906	**2209**				**0910-1000**		
	2230	1005					**1010-1100**		
		1103	**2213**						
	2232	1105					**1110-1300**		
		1303	**2217**						
	2236	1305					**1310-1405**		
		1413	**2219**				**1420-1500**		
		1503	**2221**						
	2240	1505					**1510-1600**		
	2242	1605							
		1607	**2223**				**1610-1635**		
		1638	**2225**						
	2244	1705							
		1707	**2227**						
		1723	**2233**						
		1737	**2235**						
		1750	**2237**						
	2246	1805							
		1815	**2239**				**1817-1835**		
		1838	**2243**						
	2248	1905					**1840-1900**		
		1915	**2247**				**1920-2010**		
		2015	**2249**				**2020-2100**		
	2252	2105							
		2115	**2251**				**2120-2310**		
		2313	**2255**				**2320-0520**	clear 0110 MON	

TOWER B12 - WEEKDAYS

PEDESTRIAN/BICYCLE-ROUTE VERSION

MILW-E		MILW-W	B12-GW			WINDOWS		
	0108	**2725 (Mon only)**				**0001-0530**	**(Clear 0105 MON)**	
2202	0535		**#3 MT**					
2204	0616							
NC-100	***0629***							
2206	0635					**0540-0630**		
2208	0643		**#3 MT**					
NC-102	***0708***							
	0652	**2203**						
2210	0701							
2212	0716		**#3 MT**			***0720-0735***	*(15 min)*	
NC-108	***0738***							
2216	0743							
	0800	**2205**						
2222	0801							
NC-110	***0812***							
2226	0816		**#3 MT**			**0820-0855**		
	0900	**2209**						
2228	0911		**#3 MT**			**0915-1005**		
2230	1011		**#3 MT**			**1015-1050**		
	1057	**2213**						
2232	1111		**#3 MT**			**1115-1250**		
	1258	**2217**				**1315-1405**		
2236	1311		**#3 MT**					
	1408	**2219**				**1410-1450**		
	1458	**2221**						
2240	1511		**#3 MT**					
	1600	**2223**						
2242	1605		**#3 MT**			**1610-1630**		
	1632	**2225**						
NC-116	***1644***							
	1649	***NC-109***						
	1652	**2227**						
2244	1705		**#3 MT**					
	1709	***2229***						
	1717	**2233**						
2404	1723							
	1724	***NC-113***						
	1732	**2235**						
	1744	**2237**						
	1757	***NC-115***				**1835-1905**		
	1810	**2239**						
2246	1811		**#3 MT**			**1915-2005**		
	1822	***NC-117***				**2015-2105**		
	1837	**2243**						
	1910	**2247**				**2115-2305**		
2248	1912		**#3 MT**			**2300-0530**	clear 0105 MON	
	2010	**2249**						
	2110	**2251**						

TOWER B12 - WEEKDAYS

PUBLIC VERSION

	2252	2112		**#3 MT**						
		2308	**2255**							

TOWER B17 - SATURDAYS and SUNDAYS

REDACTED DUE TO COVID-19

	MILW-E		MILW-W				WINDOWS		
		0113	***Sun-Mon only***				**0001-0625**	**(Clear 0110 SUN)**	
	2700	0632							
	2704	0832					**0635-0825**		
		0903	**2703**				**0835-0855**		
	2708	1032					**0905-1025**		
		1103	**2707**				**1035-1055**		
	2714	1232					**1105-1225**		
		1303	**2709**				**1235-1255**		
	2716	1432					**1305-1425**		
		1503	**2711**				**1435-1455**		
	2718	1632					**1635-1655**		
		1703	**2715**				**1705-1825**		
	2720	1832					**1835-1910**		
		1913	**2719**				**1915-2040**		
	2722	2047					**2050-2105**		
		2113	**2721**				**2115-2240**		
	2724	2247					**2250-2310**		
		2313	**2723**				**2315-0110**		
Sun-Mon only		**0113**	**2725**				**0115-0525**	**0625 SUN, 0525 MON**	
							1817-1835		
							1840-1900		
							1920-2010		
							2020-2100		
							2120-2310		
							2320-0520	clear 0110 MON	

TOWER B12 - SATURDAYS and SUNDAYS

REFACTORED TIER DOOR VERSION

	MILW-E		MILW-W				WINDOWS		
		0108	***Sun-Mon only***				**0001-0635**	**(Clear 0110 SUN)**	
	2700	0639							
	2704	0839					**0645-0830**		
		0858	**2703**				***0840-0855***	***15 min***	
	2708	1039					**0900-1030**		
		1058	**2707**				***1040-1055***	***15 min***	
	2714	1239					**1100-1230**		
		1258	**2709**				***1240-1255***	***15 min***	
	2716	1439					**1300-1430**		
		1458	**2711**				***1440-1455***	***15 min***	
	2718	1639					**1500-1630**		
		1658	**2715**				***1640-1655***	***15 min***	
	2720	1839					**1700-1830**		
		1908	**2719**				**1840-1905**		
	2722	2049					**1910-2040**		
		2108	**2721**				***2040-2055***	***15 min***	
	2724	2249					**2110-2240**		
		2308	**2723**				***2240-2255***	***15 min***	
Sun-Mon only		**0108**	**2725**				**2310-0105**		
							0110-0525	**0625 SUN, 0525 MON**	
							1510-1600		

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF ADOLPH GAMEIRO

TABLE OF CONTENTS

I. THE GOVERNING CONTRACTS REQUIRE METRA TO SHARE ITS LINES WITH CP'S FREIGHT TRAFFIC 3

A. Milwaukee Road's Bankruptcy Led to the Bifurcation of Freight Operating Rights and Commuter Agency Ownership 4

B. The 1985 Trackage Agreement Grants CP Rights that Are the Equivalent to Those Milwaukee Had When It Owned the Metra Lines 7

C. Metra's Proposed Conditions Would Disrupt the Permanent Contractual Rights Granted to CP 9

II. BNSF'S SUGGESTION THAT IT MAY SEEK TRACKAGE RIGHTS OVER CPKC BETWEEN CLINTON, IA AND SAVANNA, IL IS OVERREACHING 13

EXHIBITS

EXHIBIT 1: THE "1982 TRACKAGE AGREEMENT" - TRACKAGE AGREEMENT BETWEEN RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, DEBTOR AND THE REGIONAL TRANSPORTATION AUTHORITY (SEPT. 16, 1982) (ALSO METRA COMMENTS EXH. A-1)

EXHIBIT 2: THE "1984 ASSET PURCHASE AGREEMENT" - ASSET PURCHASE AGREEMENT BETWEEN SOO LINE RAILROAD COMPANY AND SLRCO, INC, ON THE ONE HAND, AND RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY (APR. 6, 1984)

EXHIBIT 3: *IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R.*, R.R., REORGANIZATION NO. 77 B 8999, ORDER NO. 809 (N.D. ILL. FEB. 19, 1985)

EXHIBIT 4: THE "1985 TRACKAGE AGREEMENT" - TRACKAGE AGREEMENT BETWEEN RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, DEBTOR AND SLRCO, INC. (FEB. 19, 1985) (ALSO METRA COMMENTS EXH. A-2)

EXHIBIT 5: *IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R.*, R.R. REORGANIZATION, NO. 77 B 8999, STIPULATION (N.D. ILL. SEPT. 3, 1987) (METR_FD36500_012882-928) (EXCERPTS)

EXHIBIT 6: THE 1993 SOO-METRA SUPPLEMENTAL AGREEMENT – SUPPLEMENTAL AGREEMENT BETWEEN COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY AND SOO LINE RAILROAD COMPANY (MAY 27, 1993) (ALSO METRA COMMENTS EXH. A-3)

EXHIBIT 7: THE 2003 SOO-METRA AMENDMENT AGREEMENT – AMENDMENT AGREEMENT BETWEEN COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY AND SOO LINE RAILROAD COMPANY (APR. 1, 2003) (ALSO METRA COMMENTS EXH. A-4)

1. I am Adolph Gameiro. I am the Managing Director Interline and Network Strategy at Canadian Pacific. I have held that role since April 2021. Prior to this role, I served as Director Interline Agreements since 2011. I am responsible for CP's trackage rights and other joint facility agreements with other railroads and commuter rail agencies in the United States and Canada.

2. The purpose of this Verified Statement is to address (a) assertions made by Metra regarding the contractual relationship between CP and Metra concerning the Chicago area trackage that CP and Metra share and (b) assertions by BNSF that it may in the future ask the Board to grant new trackage rights for BNSF to operate over CP trackage between Savanna, IL and Clinton, IA.

3. As I explain below, the trackage that CP and Metra share was part of Milwaukee Road's network. CP's affiliate Soo Line Railroad Company ("Soo Line") acquired the core Milwaukee Road network, including its access to Chicago via the shared lines. CP's rights over those lines were and remain governed by agreements entered into in connection with the transfer of Milwaukee Road's assets, and subsequently renegotiated multiple times between CP and Metra. I will discuss the significance of these agreements in more detail in this statement.

I. THE GOVERNING CONTRACTS REQUIRE METRA TO SHARE ITS LINES WITH CP'S FREIGHT TRAFFIC

4. The governing agreements grant CP the right to operate freight trains on Metra's MD-W and MD-N lines. The agreements place no limit on the number of freight trains CP may operate, provided that CP's trains may not interfere with Metra's passenger operations during specified peak periods. Conversely, the agreements preclude Metra from adding non-peak trains that would materially interfere with CP's freight operations. Changes in commuter train schedules, including the addition of new train service, required the Milwaukee Road's consent

and likewise now require CP's consent. The agreements also preserve freight railroad control (with CP as successor to Milwaukee Road), including the right to dispatch all freight and passenger operations on the lines.

5. I review the history of these rights and the ways that Metra's proposals in this proceeding would override specific contractual provisions that are important to CP's ability to conduct freight operations.

A. Milwaukee Road's Bankruptcy Led to the Bifurcation of Freight Operating Rights and Commuter Agency Ownership

6. The Milwaukee Road declared bankruptcy in 1977, and was ceasing its commuter operations in Chicago soon thereafter. This led to a series of transactions that split freight and commuter operating rights in order to continue both sets of transportation services.

7. First, to continue commuter service, the Milwaukee Road bankruptcy trustee entered into a Trackage Agreement in 1982 with the Regional Transportation Authority (the commuter rail operating division of which is Metra) granting it the right to operate commuter trains on the Milwaukee Road lines that had hosted commuter trains. The 1982 Agreement is attached to Metra's submission, as Exhibit A-1 to the Verified Statement of Rocio Gentil. For convenience, I reattach excerpts from this Agreement as Exhibit 1 hereto. Under the 1982 Agreement, the Milwaukee Road maintained control and dispatch of the Joint Line, had rights to run unlimited numbers of freight trains over the lines, and recognized the priority of commuter trains only during specified peak periods.

8. Second, the Milwaukee Trustee developed a plan for preserving freight service on the viable portions of the Milwaukee Road system, essentially the lines east of Kansas City and the Twin Cities. This part of the network, of course, included Milwaukee Road's essential freight operations to and from the Chicago gateway via both the Chicago and Milwaukee

Subdivision (between Milwaukee and Chicago) and the Elgin and Chicago Subdivisions (between Chicago and Savanna, Illinois). After a vigorous bidding war for these assets and dueling applications at the Interstate Commerce Commission, in 1984 the ICC approved Soo Line's proposal.[1]

9. In 1984, the Trustee obtained the approval of the federal bankruptcy court handling the matter to convey Milwaukee Road's freight assets to Soo Line.[2] The Trustee and Soo Line entered into an Asset Purchase Agreement ("APA") that provided for Soo Line's acquisition of those assets. Excerpts from this Agreement are Exhibit 2 hereto. The Trustee retained ownership of Milwaukee's "Commuter Service Properties," namely the lines over which Metra operates. Notably, the Commuter Assets expressly excluded Milwaukee Road's (now CP's) Bensenville Yard. *See* APA, Exhibit C-1.

10. But the Trustee conveyed to Soo Line all of the rights other than ownership that Milwaukee Road had possessed under the 1982 Trackage Agreement relative to the excluded Commuter Assets. This kept in place the integral nature of the Milwaukee Road network, preserving its connection to the vital Chicago gateway. Specifically, the APA provided that Soo Line would be granted "*permanent* trackage rights in and over the Commuter Service Properties substantially in the form attached as Exhibit G to this Agreement." APA § 15(d) (emphasis added). "Exhibit G" in turn stated that the agreement itself was "[to be furnished]" but made clear that the agreement would "provide for Soo and SLRCO's use of the Commuter Service

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[1] *Chicago, Milwaukee, St. Paul & Pacific R.R. – Reorganization – Acquisition by Grand Trunk Corp.*, 2 I.C.C.2d 161, 274 (1984).

[2] The formal acquirer of the Milwaukee Road assets under the APA was SLRCO, Inc., an affiliate of Soo Line.

Properties on terms no less favorable to Soo and SLRCO than those under which the Trustee [*i.e.,* Milwaukee Road] currently operates over such trackage." *Id.*, Exh. G.

11. This Agreement was expressly approved by the Bankruptcy Court's Order No. 809, entered February 19, 1985, a copy of which is attached as Exhibit 3.

12. In 1985, Soo Line's SLRCO affiliate and the Trustee entered into a Trackage Agreement granting precisely these rights. Although the 1985 Trackage Agreement terminates in 2083, the conveyance of Milwaukee Road's assets, including rights to the "Commuter Service Properties," was permanent as noted in the previous paragraph. In addition, as the Board knows, under the "*Tex Mex* Doctrine," CP's rights could not be discontinued or abandoned without an order of the Board authorizing such a discontinuation. The 1985 Trackage Agreement is attached to Metra's submission, as Exhibit A-2 to the Verified Statement of Rocio Gentil. For convenience, I reattach excerpts from the 1985 Trackage Agreement as Exhibit 4 hereto. I discuss the significance of the terms of this Agreement below.

13. A few years later, in 1987, the Trustee conveyed Milwaukee's "Commuter Service Properties" to Metra in a condemnation sale. That conveyance, of course, was subject to the permanent rights granted to Soo Line in 1985. It is noteworthy that Metra did not seek authorization from the ICC to acquire ownership of these former-Milwaukee Road rail lines. Instead, Metra indemnified the Trustee's successor from any liability associated with "the absence of a request for ICC approval of, or the lack of ICC approval of, the condemnation of the Acquired Property." Stipulation in Condemnation Matter, § 10.1(c) (METR_FD36500_012882) (Excerpts are Exhibit 5 hereto). Metra's decision not to seek ICC approval is another indication that Metra understood that the rights granted to Soo Line in the 1985 Trackage Agreement ensured that Metra's acquisition would not have any effect on – and not interfere in any way

with – Soo Line's freight operations or dispatching on the line in the discharge of Soo Line's common carrier obligations.

14. In 1993, CP and Metra supplemented the 1985 Trackage Agreement to make clear that CP was the successor to SLRCO under that agreement, to give Metra responsibility for maintaining the line, and to incorporate certain concepts from the 1982 Trackage Agreement that had been left out of the 1985 Trackage Agreement – namely the existence of "peak period" windows during which Metra trains would have priority and provisions addressing processes for Metra to alter its schedules or to add trains. The core provisions of the 1985 Trackage Agreement giving Soo Line unrestricted rights to conduct freight operations (subject to avoiding interference with Metra during peak periods) and to dispatch all freight and passenger trains on the line remained intact. The 1993 Supplemental Agreement is attached to Metra's submission, as Exhibit A-3 to the Verified Statement of Rocio Gentil. For convenience, I reattach excerpts from this Agreement as Exhibit 6 hereto.

15. In 2003, when CP admitted the Iowa, Chicago & Eastern Railroad to operate freight trains over a portion of Metra's MD-W line (west of Bensenville), CP and Metra comprehensively renegotiated the compensation terms governing CP's use of the Metra-owned lines over which it operates and amended the 1995 Trackage Agreement. The 2003 Amendment Agreement is attached to Metra's submission, as Exhibit A-4 to the Verified Statement of Rocio Gentil. For convenience, I reattach excerpts from this Agreement as Exhibit 7 hereto.

B. The 1985 Trackage Agreement Grants CP Rights that Are the Equivalent to Those Milwaukee Had When It Owned the Metra Lines

16. Consistent with the clear statement in the 1984 Asset Purchase Agreement that Soo's permanent rights to operate on the Metra-owned lines would be "no less favorable to Soo … than those under which the Trustee [*i.e.*, Milwaukee Road] currently operates over such

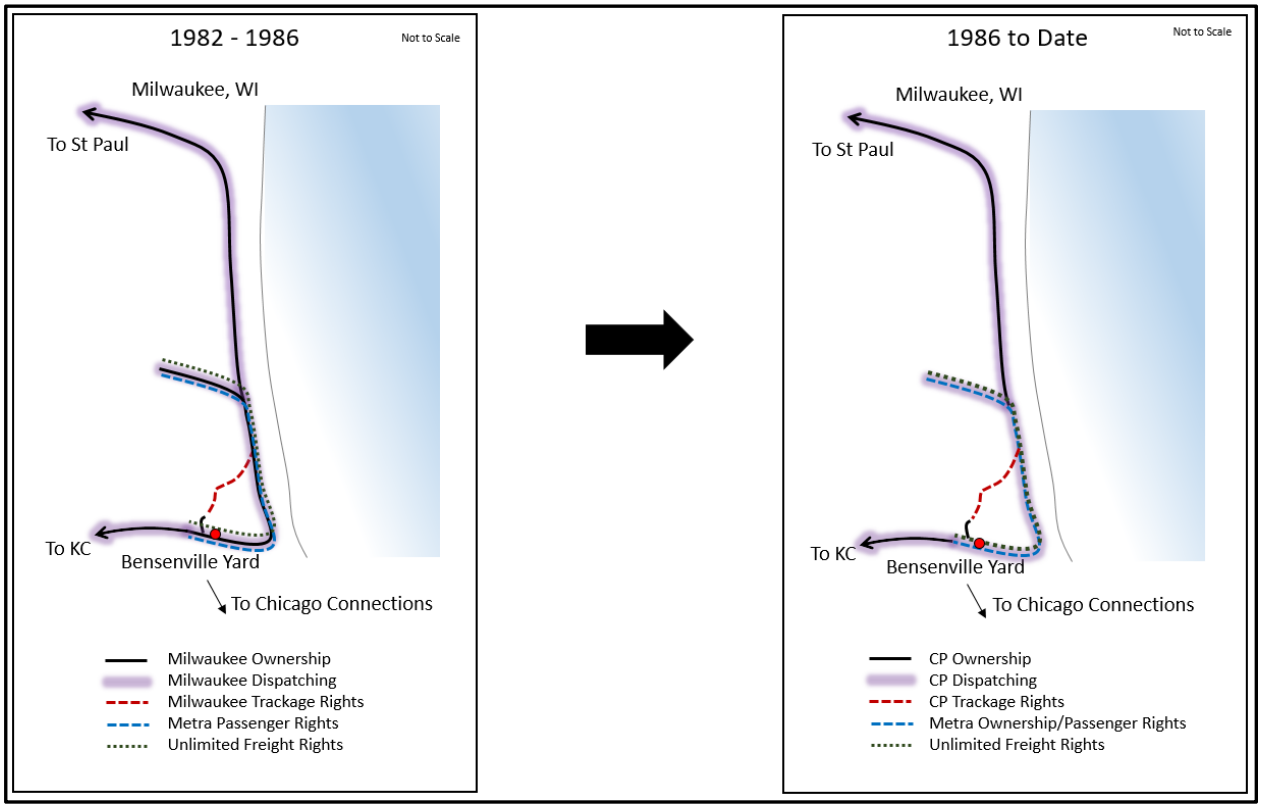
trackage," the 1985 Trackage Agreement, as supplemented by the 1993 Supplemental Agreement, preserved the key attributes of the 1982 Trackage Agreement allowing Metra to operate over Milwaukee Road. Table 1 below compares the key provisions of these agreements that bear on the rights of the freight railroad (Milwaukee in 1982 and CP today) to operate in conjunction with Metra's commuter operations.

TABLE 1
KEY TERMS OF 1982 AND 1985/1993 TRACKAGE AGREEMENTS

RIGHTS	1982 AGREEMENT	1985 AND 1993 AGREEMENTS
Owner of Track Assets	Freight RR	Metra
Freight railroad responsible for directing the movement of all freight and passenger trains (i.e., dispatching)	☑ § 9.1	☑ 1985 § 8.1
Operation of all freight and passenger trains over the line subject to freight railroad direction	☑ § 9.2	☑ 1985 § 8.2
No limit on growth in freight operations	☑	☑
Addition of sidings necessitated by increased traffic left to judgment of freight railroad	☑ § 4.1	☑ 1985 § 3.1
Freight railroad consent required to add trains beyond those specifically provided for by agreement	☑ § 9.8	☑ 1993 § 8.16
Priority given to commuter trains during defined peak periods	☑ § 9.8	☑ 1993 § 8.15
Freight railroad shall not "unreasonably disrupt or delay" non-peak period commuter trains	☑ § 9.8	☑ 1993 § 8.15

17. As summarized in Figure 1 below, the only fundamental change is a shift of ownership from Milwaukee Road to Metra, and not any alteration in the freight railroad's rights to add freight trains to the lines and dispatch all operations on the lines (again with priority for commuter trains only during peak periods).

FIGURE 1
METRA'S PURCHASE OF THE MD-W AND MD-N LINES
HAD NO EFFECT ON CP'S FREIGHT OPERATING RIGHTS



C. Metra's Proposed Conditions Would Disrupt the Permanent Contractual Rights Granted to CP

18. Several of the conditions that Metra seeks in this proceeding would significantly alter the contractual rights set forth in the governing agreements between CP and Metra.

19. First, Metra asks for a condition requiring that CP "amend its Trackage Agreement with Metra to transfer dispatching control to Metra." METR-7 at 70-73. This on its face would alter CP's contractual rights, which by their express terms give CP complete operational control over all freight and passenger trains on the MD-W and MD-N lines in perpetuity. The importance of CP retaining these rights is discussed in the Reply Verified Statement of Nick Walker.

20. To the extent Metra has complaints about how CP dispatches Metra trains, the existing agreements provide Metra with contractual rights that it can seek to enforce if it chooses to do so, including through specific performance in certain circumstances. *See* 1985 Trackage Agreement, § 17.5.

21. Second, Metra seeks a condition imposing a "standard and process for Metra schedule changes and new trains" based on the claim that Metra has a "right to use capacity on MD-W and MD-N, which it owns." METR-7 at 74. With respect, although Metra does own the track assets associated with the MD-W and MD-N lines, as I have explained the longstanding agreements between CP and Metra do not give Metra "ownership of the operational capacity" on these lines any more than they give such ownership to CP. Rather, they provide for a set of capacity-allocation rules that vary between (a) Metra's peak periods, during which CP may not interfere with Metra and Metra is free to add trains without limitation beyond the physical capabilities of the infrastructure, and (b) all other times of the day and night, when the agreements provide for an agreed number of Metra trains and a set schedule for those trains, devoting all remaining capacity to CP's freight operations (so long as those trains do not unreasonably disrupt or delay Metra trains) and requiring CP consent (not to be unreasonably withheld) for changes to Metra's schedules or the addition of new Metra trains.

22. By requesting a "binding mechanism" for adding trains, Metra is saying that it should have the contractual entitlement to add trains regardless of the physical capabilities of the infrastructure and the demands placed on that infrastructure by CP's freight operation. In effect, Metra is seeking to extend its peak period windows across the entire day. This concept is fundamentally at odds with the rights CP purchased (and which the ICC authorized and the Bankruptcy Court approved) to increase its freight operations so long as doing so did not

interfere with Metra during its peak periods or "unreasonably disrupt or delay" non-peak period commuter trains.

23. Third, Metra proposes a blizzard of conditions addressing so-called "financial" issues, including a condition requiring CP to pay for the full cost of capital projects on the MD-W and MD-N lines "if increases in its traffic volume, weight, and frequency, as well as the length of trains, is the reason that the capital project is pursued," a requirement to "compensate Metra for maintenance … by changing CP's maintenance contribution from a flat fee to a fee based on train counts and gross ton miles," and a "change on CP's rental terms from a flat fee to a dollar per car mile." METR-7 at 77-78. All of these requests would alter the economic terms and basic structure of the agreements. In addition, Metra proposes to insert into those agreements a variety of new "performance penalties" that are not contained in the existing agreements. *Id.* at 78.

24. Metra also appears to ignore the fact that the agreement (as amended in 2003) already contains mechanisms for adjusting compensation based on increases in CP freight traffic. *See* 2003 Amendment Agreement (Exh. 7 hereto), §§ 6, 19. Metra is asking the Board to grant it terms it did not negotiate, and without which Metra has nonetheless expanded its service over the years.

25. These requests reflect a one-way demand to renegotiate the governing agreements in Metra's favor, despite the fact that nothing about the CP/KCS Transaction requires any adjustment to those agreements. Again, the agreements allow for CP to increase its freight traffic on the lines without restriction. If they did not, they would have interfered with CP's common carrier rights and obligations, and required Metra to get the Board's (or ICC's) approval to acquire the MD-W and MD-N lines from the Milwaukee Road Trustee.

26. Metra's request to change the compensation formulas in the agreements is particularly one-sided and ill-considered. The flat fee approach of the existing agreements makes sense given that Metra has been and will remain by far the dominant user on these lines, and its high-speed, precisely-scheduled passenger service drives significantly greater costs for capital and maintenance on the lines. In addition, passenger trains consume considerably greater line capacity than do freight trains, a feature that is reflected in the compensation structure of the existing agreement. (The difference between freight needs and passenger needs is even acknowledged in the 1993 Supplemental Agreement, at Section 7.6).

27. Metra's dissatisfaction with the existing compensation terms appears to be that CP's freight operations will be growing as a share of total traffic on the MD-W line (though no change is anticipated on the MD-N line). But Metra appears to be ignoring that when these compensation terms were established, freight trains accounted for a higher share of traffic than CP trains will represent even after the full implementation of the CPKCS transaction. During the 1980s and 1990s, there were approximately 12 scheduled freight trains on the MD-W line west of Bensenville Yard daily, plus locals.[3] The CP/KCS transaction will yield only about the same number.[4] Meanwhile, Metra's train counts have increased tremendously, as Mr. Walker explains in his Reply Verified Statement. These circumstances make it even less appropriate for Metra to request an order requiring the revisions to the compensation terms of the CP-Metra agreements.

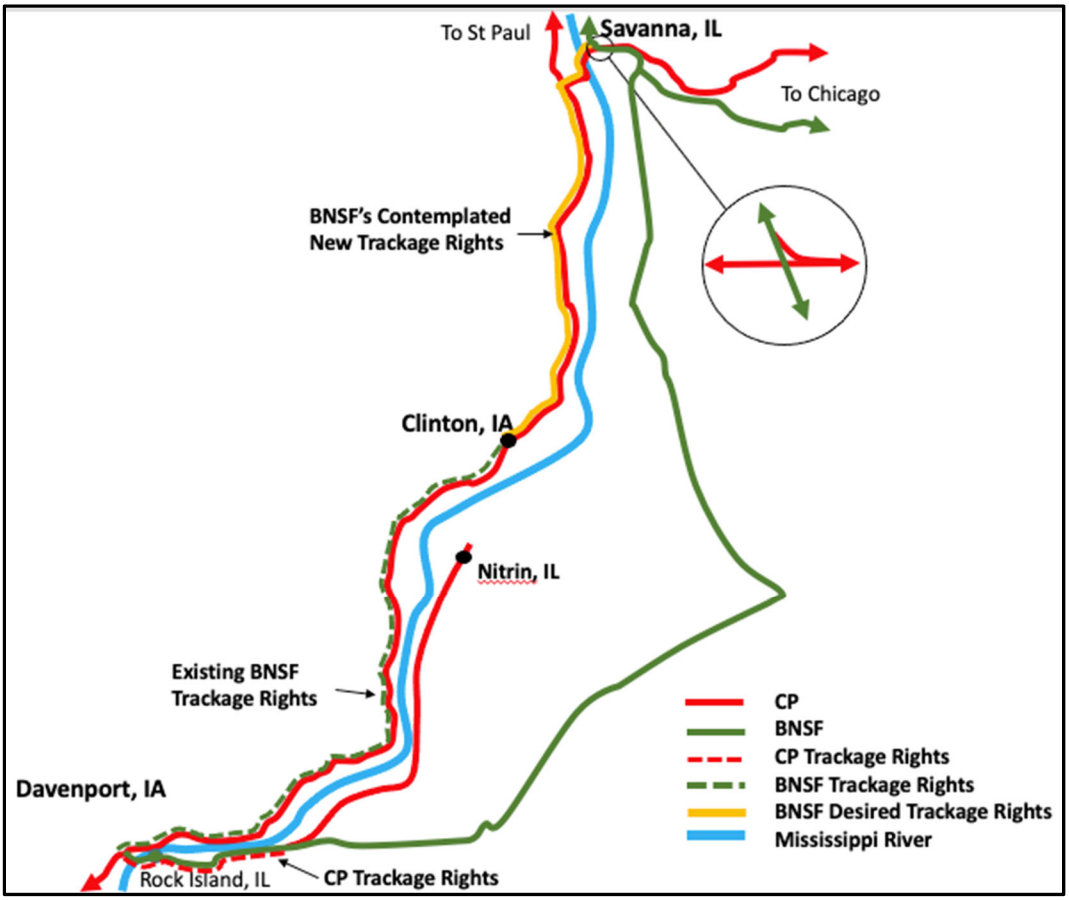
[3] This is borne out both by the deposition testimony of Metra's witness Oppenheim (Tr. at { [redacted]) and records of Milwaukee Road train schedules (which I am including with my workpapers).

[4] *See* Amended Operating Plan, App. T at 6 (segment 81).

II. BNSF'S SUGGESTION THAT IT MAY SEEK TRACKAGE RIGHTS OVER CPKC BETWEEN CLINTON, IA AND SAVANNA, IL IS OVERREACHING

28. Today, BNSF has trackage and solicitation rights over CP's trackage along the west side of the Mississippi River between Davenport, IA, and Clinton, IA. BNSF's trackage rights over CP were granted as part of a reciprocal exchange of rights in 1995 that gave CP trackage and solicitation rights over BNSF trackage along the east side of the Mississippi at Rock Island, IL, Moline IL, and other points. Both BNSF and CP reach their rights via the Crescent Bridge, which is a weight-restricted bridge over the Mississippi River at Davenport. These existing rights are shown in the map set forth as Figure 2 below.

FIGURE 2
MAP OF CP AND BNSF LINES DAVENPORT TO SAVANNA



29. In discussions with CP, BNSF has long sought trackage rights allowing it to reach Clinton (and points south) via a connection with CP at Savanna rather than Davenport. I personally met with BNSF in Calgary to discuss this BNSF request in 2011.

30. CP has not been willing to grant such rights. Among other things, there is no connection between CP and BNSF at Savanna that would allow "straight ahead" operation of BNSF trains. The only connection is in the northeast quadrant of the at-grade crossing at Savanna, meaning that BNSF trains would have to perform a backing move on CP mainline trackage there, which would disrupt mainline operations. In addition, were BNSF to access its Clinton-Davenport rights via Savanna, BNSF trains would operate over an additional 19.6 miles of CP mainline trackage, introducing additional operational complexity there and fundamentally altering the reciprocal nature of the rights exchanged in 1995.

31. Were CP to agree to grant BNSF such rights, it would only be part of a mutually agreeable negotiated outcome that provided benefits to both parties, not just BNSF.

VERIFICATION

I, Adolph Gameiro, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this ___ day of July, 2022.



Adolph Gameiro

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 1

THE "1982 TRACKAGE AGREEMENT" - TRACKAGE AGREEMENT BETWEEN RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, DEBTOR AND THE REGIONAL TRANSPORTATION AUTHORITY (SEPT. 16, 1982) (EXCERPTS) (ALSO METRA COMMENTS EXH. A-1)

EXHIBIT A-1

RTA 1982 Trackage Agreement

REDACTED PUBLIC RECORD VERSION

TRACKAGE AGREEMENT

Joint Line Defined.....2
Grant for Operation.....4
Connecting Tracks.....7
Construction of Additional Sidings.....8
Radio Communications Equipment.....9
Payment by Authority.....10
Manner of Payment-Inspection of Records.....19
Joint Line Capital Expenditures.....23
Operation & Maintenance of Joint Line.....26
Examination of Authority Employees.....31
Switch Keys & Rule Books.....32
Time Tables.....32
Compliance with Laws.....33
Insurance and Casualty.....33
Claims and Reports.....36
Security Deposit; Remedies.....37
Effective Date and Duration.....38
Abandonment.....39
Notices.....40
Section Headings.....41
Not for Benefit of Third Parties.....41
Successors and Assigns; Assignment.....41
Agreement Limitations on Trustee.....42
Equal Employment Opportunity.....42
Other Miscellaneous Provisions.....43

TRACKAGE AGREEMENT

THIS AGREEMENT, made and entered into this 16th day of September, 1982, by and between RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR ("Milwaukee"), and the REGIONAL TRANSPORTATION AUTHORITY, a municipal corporation organized under the provisions of the Regional Transportation Authority Act of the State of Illinois ("Authority").

W I T N E S S E T H:

WHEREAS, Milwaukee owns and operates lines of railroad between Chicago and Fox Lake, Illinois and between Chicago and Almora, Illinois, which lines of railroad are shown on Exhibit A; and

WHEREAS, Milwaukee has discontinued the rail passenger commuter service over such lines; and

WHEREAS, the Authority believes that the continuance of rail passenger commuter service is in the public interest; and

WHEREAS, the Authority is willing to commence operations of the rail passenger commuter service discontinued by the Milwaukee over trackage facilities owned or used by the Milwaukee on the terms and conditions contained herein;

NOW THEREFORE, the parties hereto agree as follows:

ARTICLE I.

JOINT LINE DEFINED

1.1 The term "Joint Line" refers to the following trackage, as shown in approximation on Exhibit A, and ancillary facilities between Madison Street, Chicago, Illinois (Mile Post 0.2) and Fox Lake, Illinois (Mile Post 49.79) ("North Line") and between Tower A-5 (Mile Post 5.26) and Almora, Illinois (Mile Post 40.26) ("West Line"): (a) the right of way and improvements thereto, including, but not limited to, rails, ties, ballast, switches, turnouts, wyes, crossovers, bridges, culverts, fills, cuts, right of way fences, embankments, tunnels and grade crossings and grade crossing signals; (b) sidings and spurs, except industry spurs; (c) signals and communication facilities; (d) interlocking devices; (e) towers, sheds, buildings and structures; and (f) such other property, equipment and facilities necessary to the provision of Commuter Service on the North line and West Line and used by the Milwaukee in the normal course of providing Commuter Service in the past 3 years. The Joint Line shall not include air rights (except for such air rights as have been necessary to the operation of the Commuter Service in the past 3 years).

1.2 For the purposes of equitably dividing the monthly expenses for billing purposes between the two parties, the Joint Line shall be divided on a zone basis as follows:

a. North Line

Zone 1 (1 main). Between Fox Lake, Illinois (Mile Post 49.79) and Rondout, Illinois (Mile Post 32.25).

Zone 2 (1 and 2 mains). Between Rondout, Illinois (Mile Post 32.25) and Deerfield, Illinois (Mile Post 24.58).

Zone 3 (1 and 2 mains). Between Deerfield, Illinois (Mile Post 24.58) and Tower A-20, Techny, Illinois (Mile Post 20.63).

Zone 4 (1 and 2 mains). Between Tower A-20, Techny, Illinois (Mile Post 20.63) and Tower A-5, Chicago, Illinois (Mile Post 5.85).

Zone 5 (1, 2 and 3 mains). Between Tower A-5, Chicago, Illinois (Mile Post 5.85) and Tower A-2, Chicago, Illinois (Mile Post 3.02).

Zone 6 (1, 2 and 3 mains). Between Tower A-2, Chicago, Illinois (Mile Post 3.02) and Canal Street, Chicago, Illinois (Mile Post 0.57), such mains being jointly owned by Milwaukee and The Consolidated Rail Corporation ("Conrail") under an Agreement dated February 7, 1873, as amended.

Zone 7 (1 and 2 mains). Between Lake Street, Chicago, Illinois (Mile Post 0.55) and Madison Street, Chicago, Illinois (Mile Post 0.20), such mains being jointly owned by Milwaukee and Conrail under an Agreement dated February 7, 1873, as amended.

b. West Line (1 and 2 Mains)

Zone 8. Between Almora, Illinois (Mile Post 40.26) and Elgin, Illinois (Mile Post 36.64).

Zone 9. Between Elgin, Illinois (Mile Post 36.64) and Spaulding, Illinois (Mile Post 32.75).

Zone 10. Between Spaulding, Illinois (Mile Post 32.75) and Tower B-17, Bensenville, Illinois (Mile Post 16.87).

Zone 11. Between Tower B-17, Bensenville, Illinois (Mile Post 16.87) and Tower B-12, Franklin Park, Illinois (Mile Post 12.82).

Zone 12. Between Tower B-12, Franklin Park, Illinois (Mile Post 12.82) and Tower A-5, Chicago, Illinois (Mile Post 5.11).

ARTICLE II.

GRANT FOR OPERATION OF AUTHORITY TRAINS

2.1 Milwaukee grants to the Authority the non-exclusive right to use the Joint Line solely for the purpose of operating Commuter Service (as defined in the Transition Agreement between the Milwaukee and the Authority dated August __, 1982) over the Joint Line. The Authority's right to use the Joint Line shall be in common with the Milwaukee and such other railroad company or companies previously or subsequently admitted to the use of any part of the Joint Line; provided that:

(a) The Milwaukee shall not operate, and shall not cause or allow any third party to operate, Commuter Service over the Joint Line; provided, however, nothing in

this Trackage Agreement shall be construed to limit the right of the National Railroad Passenger Corporation, its successors and assigns, to provide intercity rail passenger service over the Joint Line under the provisions of any law or agreement. For purposes of this Agreement, "intercity rail passenger service" means rail passenger service other than commuter and short-haul service in metropolitan and suburban areas, which commuter and short-haul service is usually characterized by reduced fare, multiple-ride and commutation tickets and by morning and evening peak period operations.

(b) Except for (1) FRA track inspections, (2) emergencies and (3) temporary detour usage of less than 30 days in a 12 month period, the Milwaukee shall not admit any third party to the use of any part of the Joint Line ("Third Party Use") if:

(A) such Third Party Use interferes with the Authority's use of the Joint Line as contemplated by this Agreement, or

(B) with respect to Joint Line facilities which were paid for in whole or in part by or through the Authority, such Third Party Use may result in deterioration of such facilities in excess of the deterioration which could be expected if such Third Party Use were not allowed, unless (i) with respect to fixed facilities subject to the Fixed Facili-

ties Agreements (as defined in Section 7A of the Transition Agreement), the Authority is compensated in accordance with the provisions of section 7.B.6 of the Transition Agreement, or (ii) the Authority is compensated pursuant to a separate agreement with respect to such Third Party Use.

(c) The Authority shall not permit any third party to use or detour over any portion of the Joint Line or agree to operate on the Joint Line the trains, engines and cars which in the normal course of business would not be considered the trains, engines or cars of the Authority engaged in Commuter Service; provided, however, that the Authority may move Commuter Service trains, engines and cars of other railroads over Zones 5, 6 and 7 of the Joint Line for the purpose of maintenance, repair, rebuilding and storage of cars and engines at the Western Avenue Coach Yard.

2.2 The Authority may ingress and egress to and from the Joint Line at the following connections only: (a) the Western Avenue Coach yard, (b) the Fox Lake yard, (c) Chicago Union Station, (d) the Elgin yard, and (e) any yard or station built at Almora or Spaulding.

2.3 The rights herein granted to the Authority to use the Joint Line are limited solely to the operation of Commuter Service; nothing in this Agreement shall be construed to give the Authority or any third party the right to

operate freight or intercity passenger service trains over the Joint Line.

2.4 If necessary to the safe and efficient operation of the Commuter Service due to an emergency, construction or repair work, the Authority may set out, use or operate trains, engines and cars on non-Joint Line tracks, yards or other facilities as may be designated by and under direction of Milwaukee's train dispatcher. All terms and conditions of this Trackage Agreement shall be applicable to such use or operation by the Authority as though such tracks, yards or other facilities were part of the Joint Line.

ARTICLE III.

CONNECTION TRACKS

3.1 The Milwaukee shall, upon the request of the Authority and at the Authority's sole cost, construct such connecting tracks as may be necessary or useful to the operation of Commuter Service conducted by the Authority; provided that connecting tracks shall not unreasonably interfere with the Milwaukee's operations over the Joint Line. Any such connecting tracks shall be the property of the Authority, but shall, upon the request of the Authority, be maintained, repaired and renewed by the Milwaukee at the Authority's sole expense.

ARTICLE IV.

CONSTRUCTION OF ADDITIONAL SIDINGS

4.1 As of the date of this Agreement, the sidings which exist on the Joint Line are sufficient to permit safe and efficient operation of the existing level of Commuter Service, intercity passenger service and freight rail traffic over the Joint Line. The Milwaukee shall construct any additional sidings which are made necessary in its judgment by increased levels of traffic over the Joint Line or which are requested by the Authority. The costs of the construction of these additional sidings shall be paid by:

(a) the Authority, if the sidings are made necessary solely due to an increase in the operations of the Authority or are requested by the Authority;

(b) the Milwaukee, if the sidings are made necessary solely due to increases in the operations of the Milwaukee or in the operations of a third party admitted to the use of the Joint Line;

(c) both parties pursuant to a separate agreement allocating such costs if the sidings are made necessary by increases in the operations of both (i) the Authority and (ii) the Milwaukee or any third party admitted to the use of the Joint Line.

4.2 Additional sidings constructed under this Agreement shall be considered personal property and title to an additional siding shall vest in the Milwaukee and the

Authority in proportion to the costs paid by each party for the construction. The additional sidings shall be maintained, repaired and renewed by the Milwaukee but the costs therefor shall be allocated in the proportion to the costs of construction paid by each party.

ARTICLE V.

RADIO COMMUNICATIONS EQUIPMENT

5.1 As of the date of this Agreement the radio communications equipment on or in the Authority's trains, engines and cars is sufficient for their safe and efficient operation on the Joint Line. The cost of installation and maintenance of additional radio communications equipment on the Authority's trains, engines and cars shall be paid by Milwaukee if the additional radio communications equipment is required by the Milwaukee, or shall be paid by the Authority if the additional radio communications equipment is requested by the Authority or is required by federal, state or local law or regulation.

5.2 The Authority shall, at its sole expense, maintain, repair and replace, as necessary, all radio communications equipment on its trains, engines and cars to permit safe and efficient operation on the Joint Line. The Authority shall comply with the plans and specifications which are reasonably required by the party requiring the purchase, installation and maintenance of such radio communications equipment.

5.3 The radio communications equipment shall become the property of the party paying for such equipment.

ARTICLE VI.

PAYMENT BY AUTHORITY

6.1 The Authority shall pay to the Milwaukee the amounts described in this Article VI. Payment shall be made in accordance with Article VII.

6.2 As used in this Agreement, the following terms shall have the meanings ascribed to them:

(a) Estimated RTA Summary Expense Bill -- the Milwaukee's reasonable and good faith estimate of the Authority's proportionate share of Reimbursable Expenses for a calendar month.

(b) RTA Summary Expense Bill -- the monthly bill submitted by the Milwaukee to the Authority for the Authority's proportion of Reimbursable Expenses for a calendar month, as computed pursuant to Section 6.5.

(c) Property Tax Bill -- the annual bill submitted by the Milwaukee to the Authority for the payment of Authority's proportionate share computed pursuant to Section 6.4 for general real estate taxes with respect to the Joint Line and the property leased to the Authority in the counties of Cook, Lake, DuPage and Kane within the State of Illinois.

(d) Gross Ton Mile Proportion -- the ratio determined by dividing the gross ton miles generated by all

trains, engines, cars and contents (including passengers) by or on behalf of the Authority in each zone of the Joint Line during a calendar month by the total number of gross ton miles generated by all trains, engines, cars and contents (including passengers) by or on behalf of the Milwaukee, the Authority and any third parties in each zone during that month. Deadhead, backup and industry switching movements shall be excluded in determining Gross Ton Miles Proportion except deadhead movements initiated by the Authority after the Commencement Date (as defined in the Transition Agreement) in excess of 51 per week-day shall be used in determining gross ton miles. The number of passengers on each Authority or third party train during a month shall be determined on the basis of an annual joint study of the Authority and the Milwaukee.

(e) Train Count Proportion -- the ratio determined by dividing the number of trains operated by or on behalf of the Authority in each zone of the Joint Line during a calendar month by the total number of all trains operated by or on behalf of the Milwaukee, the Authority and any third parties in each zone during that month. Deadhead, backup and industry switching movements shall be excluded in determining the train count proportion except deadhead movements initiated by the Authority after the Commencement Date in excess of 51 per week-day shall be included.

(f) Reimbursable Expenses -- Reimbursable Expenses means the following expenses incurred by the Milwaukee:

(1) the expenses are incurred during, and attributable to, the Agreement term as recorded in the Milwaukee's accounts;

(2) the expenses are properly chargeable to the zones defined in Section 1.2 of this Agreement;

(3) the expenses are incurred for material, labor, health and welfare benefit, fuel, equipment rentals, payroll taxes (including "head" taxes), sales taxes, use taxes and excise taxes and miscellaneous expenses in maintaining, operating, repairing and renewing the Joint Line.

Reimbursable Expenses shall be accounted for by the accrual method of accounting in the Milwaukee's accounts, consistently applied, in accordance with the Uniform System of Accounts prescibed by 49 CFR Part 1201. Except as required by applicable ICC regulations, changes made by the Milwaukee in its accounting system shall not affect the timing of recognition of Reimbursable Expenses under this Agreement.

6.3 The Authority shall pay the Milwaukee a fixed rental each month during the term of this Agreement as follows:

(a) From the date the Authority commences operations of rail passenger commuter service on the Joint Line through December 31, 1983, the fixed rental shall be $51,743.31 each month.

(b) Beginning January 1, 1984, the fixed rental described in subparagraph 6.3(a) shall be increased by the percentage increase in the Consumer Price Index ("CPI") for

the City of Chicago of the Bureau of Labor Statistics, U.S. Dept. of Labor, from October, 1982 through November, 1983.

(c) The fixed rental for February, 1984 shall be increased or decreased from the rental for January, 1984 by the percentage increase or decrease in the CPI between November, 1983 and December, 1983. The fixed rental for each succeeding month shall be determined by the same method, that is; the fixed rental shall increase or decrease on the first day of each subsequent month after February, 1984 during the term of the Agreement, by the same percentage as the CPI for the most recently reported month shall have increased or decreased from the CPI used in determining the prior month's fixed rental, provided that the fixed rental shall never be reduced below $51,743.31 per month. In the event that the CPI as hereinabove defined ceases to exist, then the Milwaukee shall substitute therefor the index replacing the CPI and if none is available, a comparable index based upon changes in the cost of living or purchasing power of the consumer dollar published by an appropriate U.S. governmental agency.

(d) The fixed rental shall be adjusted pro-rata for partial months at the beginning and termination of this Agreement.

6.4 General real estate taxes with respect to the Joint Line and the premises leased to the Authority referred to in the Transition Agreement for Cook, Kane, DuPage and Lake counties shall be based on the total real estate taxes

levied against all property of the Milwaukee located within those counties. These taxes shall be allocated to the Joint Line and the premises leased to the Authority referred to in the Transition Agreement, separately, for each county, on the basis of the ratio of the Joint Line route miles within each county to the total Milwaukee owned route miles within the county. The Authority's proportion of this allocation shall be determined by the ratio of the unit-miles of the locomotives, cars and cabooses operated by or on behalf of the Authority over the entire Joint Line during a calendar year to the unit-miles of all locomotives, cars and cabooses operated over the entire Joint Line during that year. Each yearly Property Tax Bill shall be initially based on the tax bills for the preceding year for which a definite tax bill is available and movements for the preceding year, and shall be adjusted, based on actual movements and actual tax bills, within 30 days of receipt of the actual tax bills for each year during the term of this Trackage Agreement. The Property Tax Bill for each year shall be submitted by the Milwaukee to the Authority on or after August 1 of the year to which it applies, beginning with the year 1982 (for 1982 taxes), payable by the 15th day of the month after the month of receipt of the bill. The Property Tax Bill shall be pro-rated for a partial year; such prorations shall be made within 30 days after definite data requiring the proration becomes available.

The Milwaukee shall pay any balances due pursuant to such adjustment or proration within 30 days of an adjustment or proration; the Authority shall pay any balance due pursuant to an adjustment or proration within 30 days after receipt of an invoice from the Milwaukee.

Any special assessments levied against the Joint Line shall be amortized over the useful life of the facility for the construction or improvement of which the special assessment was levied. The amount of such special assessment applicable to each calendar year of this Agreement shall be allocated between the parties, billed, paid, prorated and adjusted on the same basis as general real estate taxes.

6.5 The Authority shall pay its proportion of Reimbursable Expenses as follows:

(a) Maintenance of way and structures expenses incurred for each zone of the Joint Line shall be allocated on a monthly basis between the parties on the Gross Ton Mile Proportion. These expenses are currently accounted for in the Milwaukee's primary accounts reflected in Exhibit B.

(b) Transportation, signal and communication systems expenses and maintenance expenses of non-Milwaukee owned equipment incurred for each zone of the Joint Line shall be allocated on a monthly basis between the parties on a Train Count Proportion. These expenses are currently accounted for in the Milwaukee's primary accounts reflected in Exhibit C.

(c) Expenses for train dispatchers (currently primary account numbers 372, 409 and 532) incurred in operating the Joint Line shall be allocated on a monthly basis by the average of the Train Count Proportions for all zones of the Joint Line.

(d) The Authority's monthly allocated share of labor and fringe benefits expenses (including payroll taxes) determined in accordance with subparagraphs (a) through (c) above shall be increased for administrative overhead and vacation and holidays in accordance with Exhibit D.

(e) Monthly expenses incurred for joint facilities which are part of the Joint Line not solely owned by the Milwaukee, identified in Exhibit E, shall be allocated on a Train Count Proportion in the zone in which each facility is located.

(f) Rental rates for the use on the Joint Line of equipment and vehicles which equipment and vehicles are owned by the Milwaukee or leased to the Milwaukee under a lease with a term of at least 12 months will be charged at the rates prescribed in accordance with the Milwaukee Comptroller's Circular Number 41, in effect at the time incurred (but not in excess of the General Managers' Association of Chicago's (GMA) rates if any for specific equipment).

(g) Monthly expenses for material allocated to the Authority under subparagraphs (a) through (c) above shall be increased by an amount calculated in accordance with Exhibit F.

(h) The expenses referred to in subparagraphs (a) through (e) above are recorded in the Milwaukee's primary accounts prescribed by the Interstate Commerce Commission's Uniform System of Accounts in effect on December 31, 1977 ("old U.S.O.A."). If the Milwaukee changes its accounting system to the Interstate Commerce Commission's Uniform System of Accounts in effect January 1, 1978 ("new U.S.O.A.") the old U.S.O.A. will be converted to the new U.S.O.A. on the basis prescribed in 49 CFR part 1201.

6.6 All amounts to be paid by either party under this Agreement shall bear interest from the date the amount was due in accordance with this Agreement until paid, at a rate equal to the lesser of: (a) the maximum rate permitted by law to be paid by the Authority, or (b) the prime commercial rate in effect at the time the amount was originally due. "Prime commercial rate" means the interest rate publicly announced by the largest commercial banking institution located in Illinois (measured in terms of total assets) for 90 day unsecured borrowings by its most credit worthy commercial customers.

6.7 The Authority shall not be obligated to pay: (a) any part of the Capital Expenditures (as defined in 49 CFR part 1201) of the Milwaukee with respect to the Joint Line, except as otherwise specifically provided in Articles III, IV and VIII hereof; (b) any expenses incurred with respect to additions, betterments, improvements, or maintenance to the Joint Line contributed or paid by any third

party and not required to be repaid by the Milwaukee; (c) expenses with respect to a particular matter to the extent the Milwaukee would recover from the Authority and other sources more than 100% of its expenses; or (d) amounts covering expenses of the Milwaukee for which the Authority has been billed by the Milwaukee pursuant to another provision of this Agreement.

6.8 The Authority shall have no liability for any payments or other obligations arising out of its use of the Joint Line pursuant to this Agreement except as provided in this Article VI or specifically provided in another provision of this Agreement.

6.9 At the end of each calendar year (or for the lesser period from Commencement Date to December 31, 1982 and any lesser period in the event of the termination or expiration of this Agreement (hereinafter "lesser period")), the Milwaukee shall recalculate the Authority's proportion of the charges set forth in section 6.5 on the basis of the Authority's gross ton mile proportion and train count proportion for such calendar year (or lesser period). Such recalculation shall be computed within 45 days after the expiration of such calendar year (or lesser period).

In the event that the Authority's proportion of such charges for such calendar year (or lesser period) exceeds the sum of the Authority's proportion of such charges for each of the individual months during such calendar year (or the individual months during a lesser period), the

Authority shall pay the Milwaukee such difference within 30 days of such recalculation; and in the event that the Authority's proportion of such charges for such calendar year (or lesser period) is less than the sum of the Authority's proportion of such charges computed for each of the individual months during such calendar year (or the individual months during a lesser period), the Milwaukee shall pay the Authority such difference within 30 days of such recalculation or credit the Authority with such amount in the next Estimated RTA Summary Expense Bill.

ARTICLE VII.

MANNER OF PAYMENT -- INSPECTION OF RECORDS

7.1 The Authority shall pay on the fifteenth day of each month the fixed monthly rent defined in Section 6.3.

7.2 The Authority shall pay the annual Property Tax Bill on or before the 15th day of the month following the month in which it was received.

7.3 On the first day of each calendar month the Milwaukee shall submit to the Authority an Estimated RTA Summary Expense Bill for that month, due within 15 days of receipt. The Milwaukee shall submit to the Authority within 45 days after the end of each calendar month the RTA Summary Expense Bill for that month. If the Estimated RTA Summary Expense Bill exceeds the RTA Summary Expense Bill, the Milwaukee shall credit the Authority with the excess in the

following month's Estimated RTA Summary Expense Bill or pay the excess to the Authority within 15 days. If the Estimated RTA Summary Expense Bill is less than the RTA Summary Expense Bill, the Authority shall pay the difference by the 15th day of the month following the month in which the RTA Summary Expense Bill is received.

7.4 The Authority shall furnish to Milwaukee, within 15 days after the end of each calendar month during the term of this Agreement, a statement showing for that month: (a) the train count for the trains operated by or on behalf of the Authority over each zone of the Joint Line; and (b) the gross ton miles generated by the trains, engines and cars and contents operated by or on behalf of the Authority over each zone of the Joint Line. Deadhead movements in in excess of 51 per weekday shall be reported by the Authority for (a) and (b) above. The statement shall be subject to verification and correction by the Milwaukee. If the Authority fails to furnish the statement within the 15 day period, the Milwaukee may submit an RTA Summary Expense bill for that month based on to the Gross Ton Proportion and Train Count Proportion during the preceding 12 month period. That bill shall be adjusted upon receipt of the required statement from the Authority.

7.5 The Authority's portion of the costs of the projects described in sections 3.1, 4.1(a), 4.1(c), 8.4(b) 8.4(c) and 8.4(d), shall be billed as incurred and paid on the 15th day of the month following the month in which the

bill is received, subject to verification of the costs and progress of the work.

7.6 The Authority may deduct from any payments due to Milwaukee under this Agreement any undisputed amounts which are due and payable to Authority from the Milwaukee under this Agreement, the Transition Agreement or the Agreements contemplated by the Transition Agreement. In making such deductions, the Authority shall comply with the following procedure: (a) the Authority shall send a written bill to the Milwaukee itemizing the amounts due and payable to the Authority and the reasons for such charges; (b) the Milwaukee shall have 21 days from receipt of a bill from the Authority to send to the Authority a written Notice of Objection to all or a portion of a bill from the Authority which Notice shall set forth the Milwaukee's objections on a detailed basis; and (c) if the Authority receives no Notice of Objection or a Notice objecting to only a portion of the amounts contained in a bill from the Authority within 21 days after receipt by the Milwaukee of a bill sent by the Authority, then the Authority shall have the right to deduct the amounts set forth in the bill or any portions thereof to which the Milwaukee has not objected from its next payment due to the Milwaukee provided that the Authority shall at the time of making such payment or at the time such payment is due, if no payment is made, notify the Milwaukee of what amounts are being deducted and identify the bill containing such amounts and the items giving rise to such amounts. The

Authority may not deduct or offset from any amount due under this Agreement any amounts due to Authority under any other agreement or arrangement (other than the Transition Agreement or the Agreements contemplated by the Transition Agreement).

7.7 No payment shall be delayed because of an error or dispute in a bill. Errors of less than $5,000 shall be adjusted in the next Estimated or Summary Expense Bill. Bills containing errors or disputed items in excess of $5,000 may be reduced by the amount of the disputed item.

7.8 The amounts required to be paid by the Authority shall be paid by check or by wire transfer to the Trustee's account #50-30048 at The First National Bank of Chicago or another account designated by the Milwaukee.

7.9 Except as otherwise provided in this Agreement all payments under this Agreement are due and payable within 30 days of receipt of the bill or invoice.

7.10 Records of each party reasonably relating to payment or allocation of expenses under this Agreement shall be open to inspection during regular business hours. Each party shall provide sufficient office space for these inspections together with reasonable assistance in conducting an inspection. Records shall be closed to audit, and no bills as to which no exception has been taken shall be adjusted, after three (3) years from December 31 of the year of the invoice date.

7.11 The amounts reflected in audit exceptions made by the Authority and overpayments by the Authority to

the Milwaukee which in each case are not resolved within 30 days after furnished or claimed in writing to the Milwaukee shall if resolved in favor of the Authority bear interest at the rate specified in Section 6.6 from the expiration of the 30 day period until paid or credited.

ARTICLE VIII.

JOINT LINE CAPITAL EXPENDITURES

8.1 The Milwaukee may effect capital projects, including significant maintenance projects, in the Joint Line necessary or desirable for the economical and safe operation of trains, engines or cars over the Joint Line, or which are required by applicable law or regulations.

8.2 A report reflecting such capital projects, including significant maintenance projects, for the Joint Line for the periods April-September and October-March shall be furnished by the Milwaukee to the Authority within 60 days after execution of the Transition Agreement and thereafter on February 1 and August 1 of each year during the Agreement Term. This report shall show in reasonable detail new projects, progress on existing projects, an estimate of the Authority's share of the project costs and estimated completion dates. Except in emergencies the Milwaukee shall give 60 days prior notice to the Authority of substantial changes to previously reported projects and previously unreported new projects which the Milwaukee anticipates will

be commenced prior to the submission of the next semi-annual report.

8.3 The Milwaukee shall not charge to the Authority the costs of a capital project, including a significant maintenance project, for which the Authority is liable to pay in the aggregate in excess of $15,000 unless the Authority has consented in writing to such project; provided the Milwaukee may upon sixty days notice to the Authority (or upon reasonable notice of less than 60 days where a 60 day notice period is not possible) effect without the consent of the Authority any such project to comply with the directive of a government agency having jurisdiction.

8.4 The costs of capital projects, including significant maintenance projects, shall be paid by:

(a) the Milwaukee, if required solely by the operations of the Milwaukee or of third parties admitted to the use of the Joint Line by the Milwaukee;

(b) the Authority, if required solely by the operations of the Authority and the requirements of Section 8.3 have been met;

(c) both parties, in accordance with the allocation formulas for operating expense contained in Section 6.5 applied to capitalized expenses, for projects required by the operations of both the Authority and the Milwaukee or third parties admitted to the use of the Joint Line by the Milwaukee which projects are accounted for in the Milwaukee's accounts described in Exhibit I, and with respect to which

the Authority's share of the allocated costs shall not exceed $15,000 for a single project or the Authority has consented pursuant to Section 8.3 above;

(d) both parties pursuant to a separate fixed facilities agreement allocating such costs, if the provisions of subsection (c) are inapplicable and if the project is required by the operations of both the Authority and the Milwaukee or third parties admitted to the use of the Joint Line by the Milwaukee.

8.5 The Milwaukee shall determine whether a capital project, including a significant maintenance project, constructed pursuant to this Section is required by the operations of the Authority, the Milwaukee or a third party.

8.6 The Milwaukee shall effect capital projects, including significant maintenance projects, requested by and at the sole expense of the Authority unless such projects would substantially interfere with the Milwaukee's operations over the Joint Line or the rights of a third party admitted to the use of the Joint Line.

8.7 Capital projects, including significant maintenance projects, effected pursuant to this Section shall be considered personal property and title to such projects shall vest in the Authority and Milwaukee in proportion to the costs paid by each party.

ARTICLE IX.

OPERATION AND MAINTENANCE OF JOINT LINE

9.1 The Milwaukee shall control and manage the Joint Line and shall direct the movement of all trains, engines, cars and inspection vehicles over the Joint Line. All track, bridge, signal and communication work, materials and track operated machinery and equipment used will be in accordance with the Milwaukee's standards, specifications and procedures, which shall be consistent with industry standards.

9.2 The operation of trains over the Joint Line by or on behalf of the Authority is subject to the direction and control of the Milwaukee, and shall at all times be in accordance with reasonable safety and operating rules, regulations and operating timetables prescribed by the Milwaukee. The management of the Authority's Commuter Service is vested solely in the Authority and Authority's trains, engines and cars shall be operated solely by the Authority's employees or agents and at the Authority's sole expense.

9.3 The Milwaukee shall maintain the Joint Line with its own supervision and labor in accordance with the terms and conditions of this Agreement. The Milwaukee shall maintain the track structure of the Joint Line to the level of FRA Class III in accordance with the applicable standards of the Federal Railroad Administration, or any successor

agency, so as to permit operation of commuter trains at a speed of not less than 60 miles per hour. If the Authority withholds its consent to financial participation in any capital or maintenance project required to maintain the track structure to these standards, the Milwaukee shall be relieved to that extent of its obligation under this Section 9.3. The Milwaukee shall maintain minimum clearances on the Joint Line to tolerances in effect as of the date the Authority commences operations of rail passenger commuter service on the Joint Line.

9.4 A report reflecting significant maintenance projects for the Joint Line for the periods April-September and October-March will be furnished by the Milwaukee to the Authority within 60 days after execution of the Transition Agreement and thereafter on February 1 and August 1 of each year during the term of this Agreement. This report shall show in reasonable detail new projects, progress on existing projects, an estimate of the Authority's share of these projects and estimated completion dates. Except for emergencies, the Milwaukee shall give 60 days prior written notice to the Authority of substantial changes to significant maintenance projects and previously unreported new projects which the Milwaukee anticipates will be commenced prior to the submission of the next semi-annual report.

9.5 If the use of or traffic over the Joint Line is interrupted or delayed at any time, the Milwaukee shall expeditiously restore the line for the passage of trains and

if reasonably feasible under the circumstances, prior to the scheduled departures of the peak period trains (defined in Section 9.8, below) immediately following the disruption or delay. Any train, engine or car derailed or damaged on the Joint Line shall be expeditiously picked up or removed by the Milwaukee or its emergency service contractor. The expenses incurred in picking up and removing derailed or damaged trains and the cost of restoration of the Joint Line resulting from a derailment or accident shall be paid by the party whose train was involved in the derailment or accident and shared equally if the trains of both parties are involved. If a minor derailment on the Joint Line to an Authority train, engine or car occurs which can be promptly corrected solely by rerailers and blocking carried on the derailed train, the Authority may with the permission of the Milwaukee train dispatcher rerail the derailed equipment at its expense.

9.6 If the Milwaukee fails to maintain the Joint Line in accordance with Section 9.4 or fails to restore the Joint Line in accordance with Section 9.5, the Authority may on notice to the Milwaukee, subject to the Milwaukee's reasonable direction and subject to non-interference with the Milwaukee's labor arrangements and practices, correct the defects or restore the Joint Line required to maintain and continue the commuter operations contemplated by and in accordance with the schedules provided for in this Agreement. The reasonable costs incurred by the Authority in making the correction or restoration shall be allocated in

accordance with Article VI and to the extent applicable, Section 9.5, above. The provisions of this section shall not be construed to impose any obligation on the Authority to repair, restore or maintain the Joint Line.

9.7 The Milwaukee shall (a) maintain all joint facility agreements, interlocking agreements and similar arrangements necessary to the operations of the Commuter Service over the Joint Line contemplated by this Agreement; (b) pay and discharge when due and payable all lawful governmental charges or levies imposed with respect to the Joint Line (except to the extent and while the validity thereof is contested by appropriate proceedings or when deferred pursuant to an order of the Reorganization Court having jurisdiction over the Milwaukee); (c) provide for utility services necessary to the operations of Commuter Service over the Joint Line; and (d) take all other action necessary to permit the Joint Line to be used for Commuter Service by the Authority.

9.8 The Milwaukee recognizes the priority of Commuter Service operations on the Joint Line on Monday through Friday, inclusive, with respect to trains which depart from their originating stations during the times and in the zones identified below and maintain timetable schedule (the "peak period trains"):

Elgin to CUS -- eastbound

5:30 a.m. - 8:00 a.m.
4:30 p.m. - 6:30 p.m.

CUS to Elgin -- westbound

5:30 a.m. - 8:30 a.m.
4:00 p.m. - 6:15 p.m.

Rondout to CUS -- southbound

6:00 a.m. - 7:50 a.m.
4:20 p.m. - 6:00 p.m.

CUS to A-20 -- northbound

6:25 a.m. - 8:45 a.m.
4:15 p.m. - 6:10 p.m.

A-20 to Rondout -- northbound

7:00 a.m. - 8:15 a.m.
4:30 p.m. - 6:20 p.m.

Fox Lake to Rondout -- southbound

5:00 a.m. - 8:30 a.m.

Rondout to Fox Lake -- northbound

4:30 p.m. - 6:45 p.m.

Except as required by an emergency, the Milwaukee shall not interfere or permit any third party to interfere with peak period trains. The Milwaukee shall not object to the Authority's operations of peak period trains on the grounds that those operations unreasonably interfere with the Milwaukee's or third parties' ability to provide efficient freight or intercity passenger service. The Milwaukee may make reasonable adjustments to the operations of traffic on the Joint Line which do not unreasonably disrupt or delay trains which are not peak period trains.

9.9 Except as provided in this section 9.9, the operation of the Commuter Service on the Joint Line shall be

subject to the schedule attached to this Agreement as Exhibit G. The Authority may not change the schedule without the Milwaukee's prior written consent, except that: (a) the Authority may upon 45 days prior written notice, change the schedules during peak period, subject to the intercity passenger service schedule then in effect; (b) during the term of this Agreement, upon 45 days prior written notice the Authority may add not more than eight (8) trains as follows: (i) one morning peak period train in each direction on the West Line; (ii) one evening peak period train in each direction on the West Line; (iii) one morning peak period train in each direction on the North Line; and (iv) one evening peak period train in each direction on the North Line; and (c) at any time upon 10 days prior written notice decrease the number of Commuter Service trains.

ARTICLE X.

EXAMINATION OF AUTHORITY EMPLOYEES

10.1 All employees of the Authority engaged in or connected with Commuter Service over the Joint Line shall at all times comply with the Milwaukee safety and operating rules operating timetable special instructions and shall be required to pass periodic examinations on the rules annd regulations of the Milwaukee.

10.2 An officer of Milwaukee shall conduct examinations every two years on the consolidated code of operating

rules and Milwaukee safety rules of the Authority's principal operating officers. These Authority offficers in turn shall test Authority employees. Testing of Authority employees may be audited by the Milwaukee.

10.3 The Authority shall bar from the Joint Line any Authority employee who does not comply with the Milwaukee's safety and operating rules or who fails to pass required examinations. If the Authority fails to bar such employee from the Joint Line, the Milwaukee may bar that Authority employee from the Joint Line.

ARTICLE XI.

SWITCH KEYS AND RULE BOOKS

11.1 The Milwaukee shall supply the employees of the Authority with necessary books of rules and switch keys. The Authority shall deposit with Milwaukee $3.00 for each book of rules and each switch key supplied. This deposit shall be refunded upon the return of such books of rules or switch keys.

ARTICLE XII.

TIME TABLES

12.1 The expenses, including costs of composition, printing, binding and distribution, incurred by Milwaukee in the issuance of revised operating time tables required by

changes in the operations of the Authority, the Milwaukee or third parties shall be allocated proportionately among the parties whose operations required the change, except that the incremental cost of changes made by the Milwaukee with respect to its freight or intercity passenger service in connection with a revision required by the Authority shall be paid by the Milwaukee.

ARTICLE XIII.

COMPLIANCE WITH LAWS AND OTHER PUBLIC REGULATIONS

13.1 Each party shall comply with all applicable federal, state and local laws, regulations and rules with respect to the use of and the conduct of its operations over the Joint Line. If a party's non-compliance results in any fine, penalty, cost or charge being imposed or assessed on or against the other party, the non-complying party shall defend on notice from the other party, and shall promptly reimburse and indemnify the other party for or on account of such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in defending, any action which may be brought against the other party on account thereof.

ARTICLE XIV.

INSURANCE: PROPERTY DAMAGE AND CONSEQUENTIAL DAMAGE WAIVERS: FORCE MAJEURE

14.1 The Authority waives and shall require its insurers to waive all rights of recovery from the Milwaukee

for direct physical loss of all property of the Authority located or occurring on the Joint Line during the term of this Agreement. The Authority shall either (a) require third parties whose property is on the Joint Line by permission of the Authority to waive and their insurers to waive all rights of recovery from the Milwaukee for direct physical loss to all property of such third parties (including luggage) located or occurring on the Joint Line during the term of this Agreement; or (b) indemnify the Milwaukee for such loss paid by the Milwaukee.

14.2 The Milwaukee waives and shall require its insurers to waive all rights of recovery from the Authority for direct physical loss to all property of the Milwaukee (including cargo) located or occurring on the Joint Line during the term of this Agreement. The Milwaukee shall either (a) require third parties whose property is on the Joint Line by permission of the Milwaukee to waive and their insurers to waive all rights of recovery from the Authority for direct physical loss to all property of such third parties (including cargo) located or occurring on the Joint Line during the term of this Agreement; or (b) indemnify the Authority for such loss paid by the Authority.

14.3 Neither the Authority nor the Milwaukee shall be liable to the other or any third party for delays, interruptions or the failure to perform its obligations under this Agreement due to causes beyond their reasonable control, including: acts of God; any act, delay or failure to act on

the part of any governmental authority or agency (other than the Authority); insurrection or riot; fires; strikes; work stoppages; wrecks; major equipment breakdowns; failure or delay beyond the control of the Authority or the Milwaukee in obtaining necessary labor, materials or manufacturing facilities or acts of the other party.

14.4 Neither the Milwaukee nor the Authority shall be liable to the other in contract or in tort (including negligence) under any theory of strict liability, or otherwise, for any special, incidental or consequential loss or damage of any nature arising at any time or from any cause under or related to the performance of this Agreement.

14.5 Except as expressly provided in Sections 14.1 and 14.2 hereof, nothing in this Agreement shall be construed as affecting or impairing any rights of the Milwaukee or the Authority to contribution or indemnity arising out of claims of third parties.

14.6 During the term of this Agreement, the Milwaukee and the Authority shall each provide and maintain in effect with respect to the Joint Line and the respective operations of each on and affecting the Joint Line contemplated by this Agreement minimum insurance coverage as follows:

Type of Coverage	Limits of Liability
Third Party Liability Insurance including FELA coverage	$50,000,000 per occurrence

Deductibles and coinsurance provisions with respect to the above policies shall be determined by and shall be assumed by the party furnishing the policy; provided that the deductible portion with respect to such coverage shall not be greater than $2,000,000.

14.7 The Authority and the Milwaukee shall give each other notice of any proposed settlement of claims involving joint liability, and the party proposing to enter into a settlement agreement shall make itself reasonably available to meet with the other before entering into such settlement agreement.

ARTICLE XV.

CLAIMS AND REPORTS

15.1 If a claim is made by a third party against the Milwaukee or the Authority for which the other may be liable, in whole or in part, the party against whom the claim is made shall give prompt notice to the other.

15.2 Initial reports of all injuries to or death of persons and loss or destruction of or damage to property on the Joint Line resulting from occurrences involving either party shall be made by that party and a copy furnished to the other party within twenty four (24) hours of the occurrence.

15.3 All claims involving personal injury or death of an employee or property damage of either party shall be

investigated by the party whose employee is injured or whose property is damaged. If employees or property of both parties are involved, the parties shall agree which one of them shall make the investigation.

ARTICLE XVI.

SECURITY DEPOSIT; DEFAULT; REMEDIES

16.1 The Authority shall, on the Commencement Date of this Agreement, deposit the sum of Five Hundred Thousand Dollars ($500,000) ("deposit") in a separate escrow account in a bank of the Authority's choice pursuant to the form of escrow agreement attached to this Agreement as Exhibit H. The deposit shall be held for the benefit of and disbursed under the terms of this Agreement. Interest on the $500,000 shall belong to the Authority and shall not be held for the benefit of or disbursed to Milwaukee; such interest may be withdrawn at any time by the Authority. The unused portion of the deposit (plus interest) shall be returned to the Authority on termination of this Agreement.

16.2 If the Authority fails to make any payment due to the Milwaukee under this Agreement within 90 days of the due date, the Milwaukee may withdraw in accordance with the terms of the Escrow Agreement, the amount due plus any interest on such amount due from the escrow account established under Section 16.1. This withdrawal shall constitute payment of the amount due to the extent of the withdrawal.

16.3 If (a) the principal balance of the escrow account is less than $500,000 for a period of more than 10 days and (b) payment of outstanding bills owed to the Milwaukee under this Agreement are not made within 30 days of their respective due dates and cannot be satisfied in full from the escrow account, the Milwaukee may terminate its obligations under this Agreement on 10 days written notice to the Authority unless the Authority prior to the expiration of the 10 day period both restores the escrow account principal balance to $500,000 and satisfies all outstanding amounts owed to the Authority which are overdue by more than 30 days at the end of the 10 day period.

ARTICLE XVII.

EFFECTIVE DATE AND DURATION

17.1 This Agreement shall become effective on the date established in Section 3 of the Transition Agreement.

17.2 This Agreement shall terminate on December 31, 1984; provided that if the Authority files prior to January 1, 1985 an eminent domain action against the Milwaukee with respect to all or substantially all of the Joint Line, either for the taking of an easement or license for the use of or the taking of the Milwaukee's entire interest, this Agreement shall be extended ("Extended Term") from the period January 1, 1985 through the earlier of (a) the date on which the Authority makes payment for the interest in the

Premises taken in the eminent domain action, or (b) December 31, 1988, subject in each case to the following modifications and conditions:

(a) Prior to January 1, 1985 the Authority shall discharge in full all amounts owed to the Milwaukee under the terms of the Trackage Agreement which have not been paid within 30 days from the invoice date.

(b) If the Reorganization Court has jurisdiction over the Milwaukee at the time an eminent domain action is to be filed which would extend the Trackage Agreement, the Authority shall file that action in the reorganization proceeding, subject to the jurisdiction of the Reorganization Court.

17.3 Upon the termination of this Agreement, the Authority may: (a) remove its rolling stock from the Joint Line; and (b) remove the fixed facilities and equipment, title to which is vested in whole or in part in the Authority, provided that the Milwaukee may, at its option, pay the Authority the value of the Authority's portion of such fixed facilities and equipment determined on the basis of net depreciated cost using a straight line basis.

ARTICLE XVIII.

ABANDONMENT BY EITHER PARTY OF ITS OPERATION OVER THE JOINT LINE

18.1 The Authority may at any time abandon or discontinue its operation over the Joint Line, and on 60 day

prior written notice may terminate this Agreement as of the date the abandonment or discontinuance becomes effective.

18.2 If the Milwaukee abandons, embargoes or discontinues its common carrier operations over the Joint Line or the Reorganization Court orders the liquidation of the Joint Line, the Milwaukee shall use its best efforts to sell or transfer its interest in the Joint Line for continued use as railroad property.

18.3 The Trustee waives any right to reject or disaffirm this Trackage Agreement and agrees that any sale or transfer of any part of the Joint Line to any purchaser other than the Authority, its successors or affiliates, shall be subject to the rights of the Authority under this Agreement.

ARTICLE XIX.

NOTICES -- HOW GIVEN

19.1 All requests, notices, demands, authorizations, directions, consents or waivers or other documents required or permitted under this Agreement shall be in writing and shall be delivered in person to, or deposited postage pre-paid in the registered or certified mails of the United States addressed to the Authority at:

Contract Manager
Regional Transportation Authority
300 North State Street
Chicago, Illinois 60610

or to the Milwaukee at:

Trustee
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company
874 Union Station Building
516 West Jackson Boulevard
Chicago, Illinois 60606

or at such other address as either party may at any time or from time to time designate by notice to the other.

ARTICLE XX.

SECTION HEADINGS

20.1 Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

ARTICLE XXI.

NOT FOR BENEFIT OF THIRD PARTIES

21.1 The provisions of this Agreement, are intended for the exclusive benefit of the Milwaukee and the Authority and not for the benefit of any third party.

ARTICLE XXII.

SUCCESSORS AND ASSIGNS; ASSIGNMENT

22.1 This Agreement shall be binding upon the successors of the parties hereto. The respective rights and

obligations the Authority under this Agreement may not be assigned or delegated without the written consent of the Milwaukee except to the Northeast Illinois Regional Commuter Railroad Corporation.

ARTICLE XXIII.

AGREEMENT LIMITATIONS ON TRUSTEE

23.1 This Agreement is binding on Richard B. Ogilvie, not as an individual, but solely in his capacity as Trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor.

ARTICLE XXIV.

EQUAL EMPLOYMENT OPPORTUNITY

24.1 It is understood and agreed that the parties hereto are subject to, and that to the extent applicable, will comply with all federal and state laws and regulations relating to equal employment opportunity for all persons without regard to race, color, creed, sex, or national origin, and those federal laws and regulations relating to non-segregated facilities, minority business enterprises, the employment of veterans and handicapped persons, including, without limitations, Executive Order No. 11246, 41 CFR Part 60-1, et seq., 41 CFR Part 1-1.1310-2, 41 CFR Part 60-741 et seq., Executive Order No. 11701, and 41 CFR Part

60-250.1 et seq. and 49 CFR Part 265, and the Illinois Human Rights Act, 1981 Ill. Rev. Stat., Ch. 68, §1-101 et seq.

ARTICLE XXV.

OTHER MISCELLANEOUS PROVISIONS

25.1 No modification, addition or amendment to this Agreement shall be effective unless in writing executed by the authorized officers or agents of each party.

25.2 This Agreement shall be governed by the laws of the State of Illinois.

25.3 The provisions of this Agreement shall be interpreted where possible in a manner necessary to sustain their legality and enforceability. The unenforceability of any provision of this Agreement in a specific situation shall not affect the enforceability of: (a) that provision in another situation; or (b) the other provisions of this Agreement if such other provisions could then continue to conform with the purposes of this Agreement and the terms and requirements of applicable law.

25.4 The Milwaukee warrants and represents that it has not paid and agrees not to pay any bonus, commission, fee or gratuity to any employee or official of the Authority for the purpose of obtaining this Agreement. In addition to the obligations imposed by Section 3 of "An Act to Prevent Fraudulent and Corrupt Practices in the Making or Accepting of Official Appointments and Contracts by Public Officers,"

approved April 9, 1872, as amended (1981 Ill. Rev. Stat. Ch. 102, §3), no officer, director, employee or professional consultant or advisor of or to the Authority shall be admitted by Milwaukee to any financial share of this Agreement or to any financial benefit arising therefrom.

25.5 The failure of the Authority or the Milwaukee to insist upon strict performance by the other of its obligations under this Agreement or the failure or delay in exercising any rights or remedies provided under this Agreement or at law shall not be deemed or construed as a waiver of any claims or rights. No waiver of a breach of any provision of this Agreement shall constitute or be construed as a waiver of any other breach or of that provision.

25.6 All obligations of the Authority which may, from time to time, be incurred by it under provisions of the Regional Transportation Authority Act which authorize secured, unsecured, short term, long term, equipment trust certificate or other borrowing shall be superior to and have priority over any and all obligations of the Authority under this Agreement.

25.7 Nothing in this Agreement shall in any way either authorize the Authority to exercise or preclude the Authority from exercising any of its powers of eminent domain.

25.8 If the Milwaukee or the Authority refuses to perform its obligations under this Agreement in accordance with its terms and that action results in the inability of

either the Milwaukee or the Authority to use the Joint Line substantially on the terms contemplated by this Agreement, the non-defaulting party shall, in addition to the remedies available to it at law, be entitled to specific performance of the affected provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this document to be executed in at least quadruplicate as of the day and year first hereinabove written.

RICHARD B. OGILVIE
TRUSTEE OF THE PROPERTY OF THE
CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY, DEBTOR

WITNESS

Carlisle C. Stone

Richard B. Ogilvie

ATTEST:

REGIONAL TRANSPORTATION
AUTHORITY

Edmund J. Wolf Jr.
SECRETARY SEP 16 1982

By
Chairman

REDACTED PUBLIC RECORD VERSION
TRACKAGE AGREEMENT EXHIBITS

Exhibit A Location of joint lines (maps of 12 zones)

Exhibit B Maintenance of Way and Structures Expenses

Exhibit C Transportation, Signal, and Communication system expenses

Exhibit D Administration, overhead, vacation, and holiday expenses

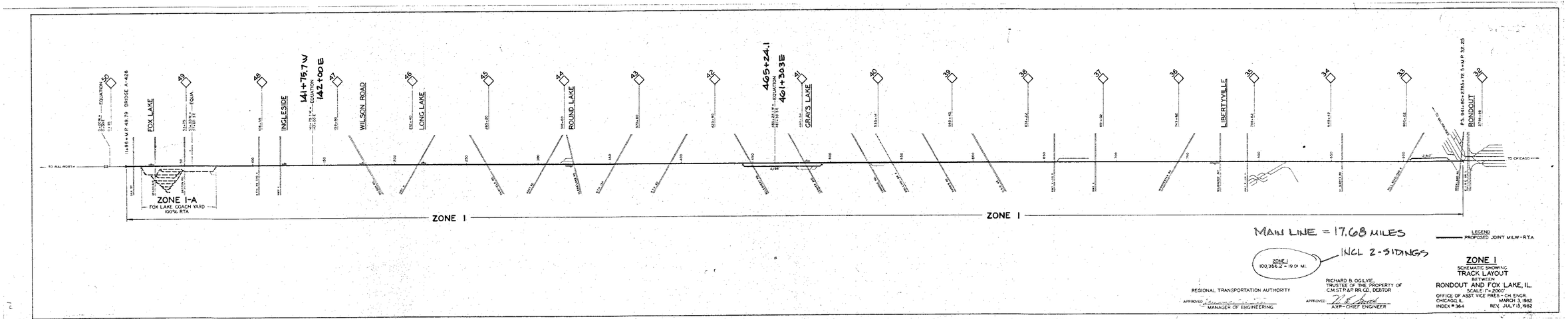
Exhibit E Joint Facilities

Exhibit F Material

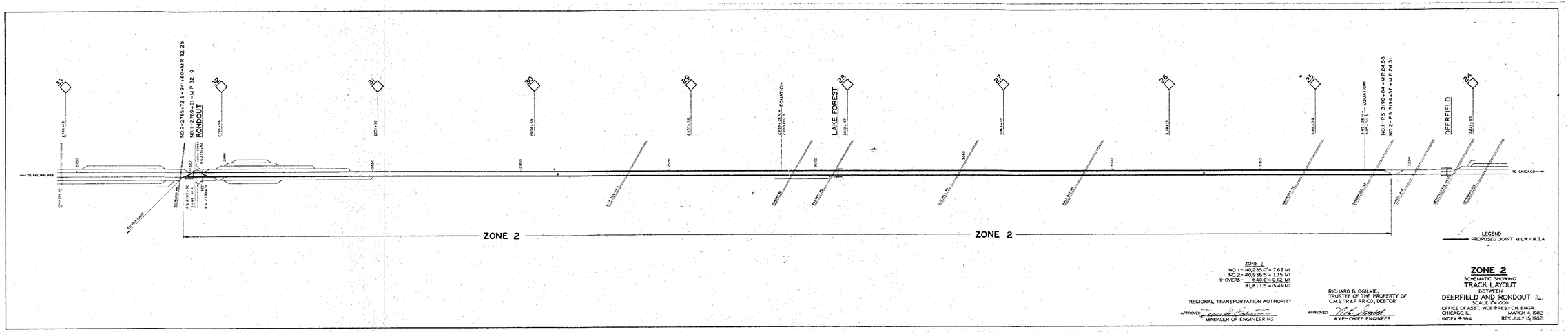
Exhibit G Commuter Service Schedule

Exhibit H Escrow Agreement

Exhibit I Primary Accounts


FOX LAKE
INGLESIDE
WILSON ROAD
LONG LAKE
ROUND LAKE
GRAY'S LAKE
LIBERTYVILLE
RONDOUT
141+75.7 W
142+00.8 E
465+24.1
461+30.3 E
ZONE 1-A
FOX LAKE COACH YARD
100% RTA
ZONE 1
ZONE 1
TO CHICAGO
MAIN LINE = 17.68 MILES
INCL 2-SIDINGS
LEGEND
PROPOSED JOINT MILW-R.T.A.
ZONE 1
100,308.2' = 19.01 MI.
REGIONAL TRANSPORTATION AUTHORITY
APPROVED
MANAGER OF ENGINEERING
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR CO., DEBTOR
APPROVED
AVP-CHIEF ENGINEER
ZONE 1
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
RONDOUT AND FOX LAKE, IL.
SCALE: 1" = 2000'
OFFICE OF ASST. VICE PRES. - CH. ENGR.
CHICAGO, IL.
MARCH 3, 1982
INDEX # 364
REV. JULY 15, 1982

REDACTED PUBLIC RECORD VERSION

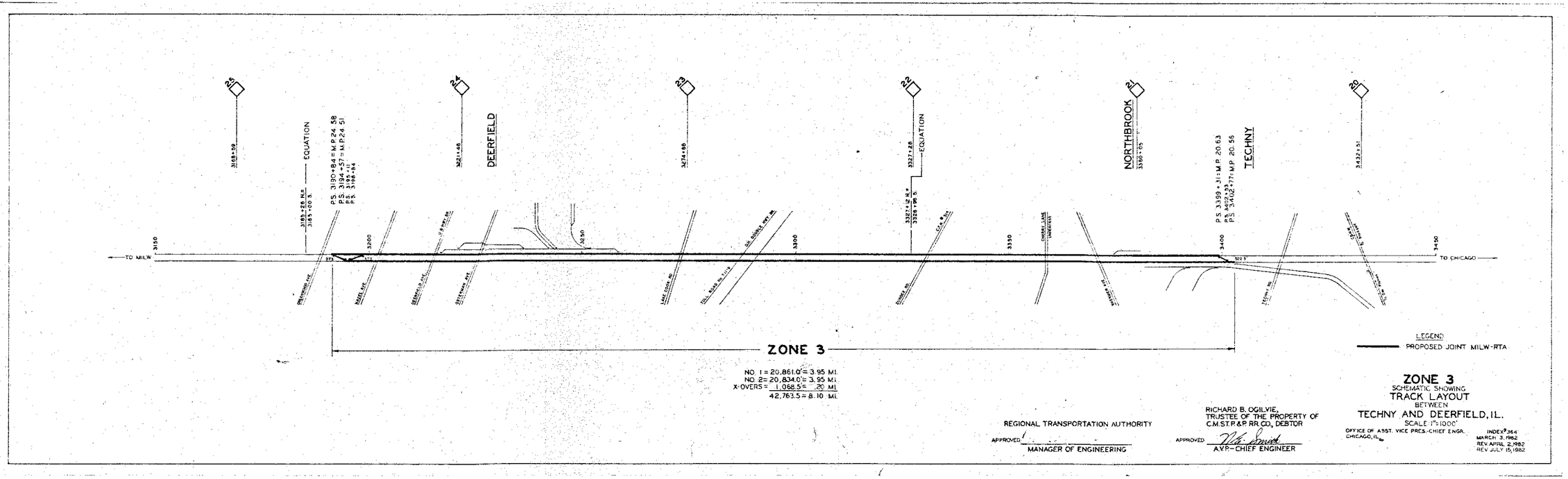


ZONE 2
NO.1 - 40,235.0' = 7.62 MI
NO.2 - 40,936.5 = 7.75 MI
X-OVERS - 640.0' = 0.12 MI
81,811.5 = 15.49 MI

REGIONAL TRANSPORTATION AUTHORITY
APPROVED
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P.RR.CO., DEBTOR
APPROVED
A.V.P.-CHIEF ENGINEER

ZONE 2
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
DEERFIELD AND RONDOUT IL.
SCALE 1"=1000'
OFFICE OF ASST. VICE PRES.-CH. ENGR.
CHICAGO, IL. MARCH 4, 1982
INDEX #364 REV. JULY 15, 1982



NO. 1 = 20,861.0' = 3.95 MI.
NO. 2 = 20,834.0' = 3.95 MI.
X-OVERS = 1,068.5' = .20 MI.
42,763.5 = 8.10 MI.

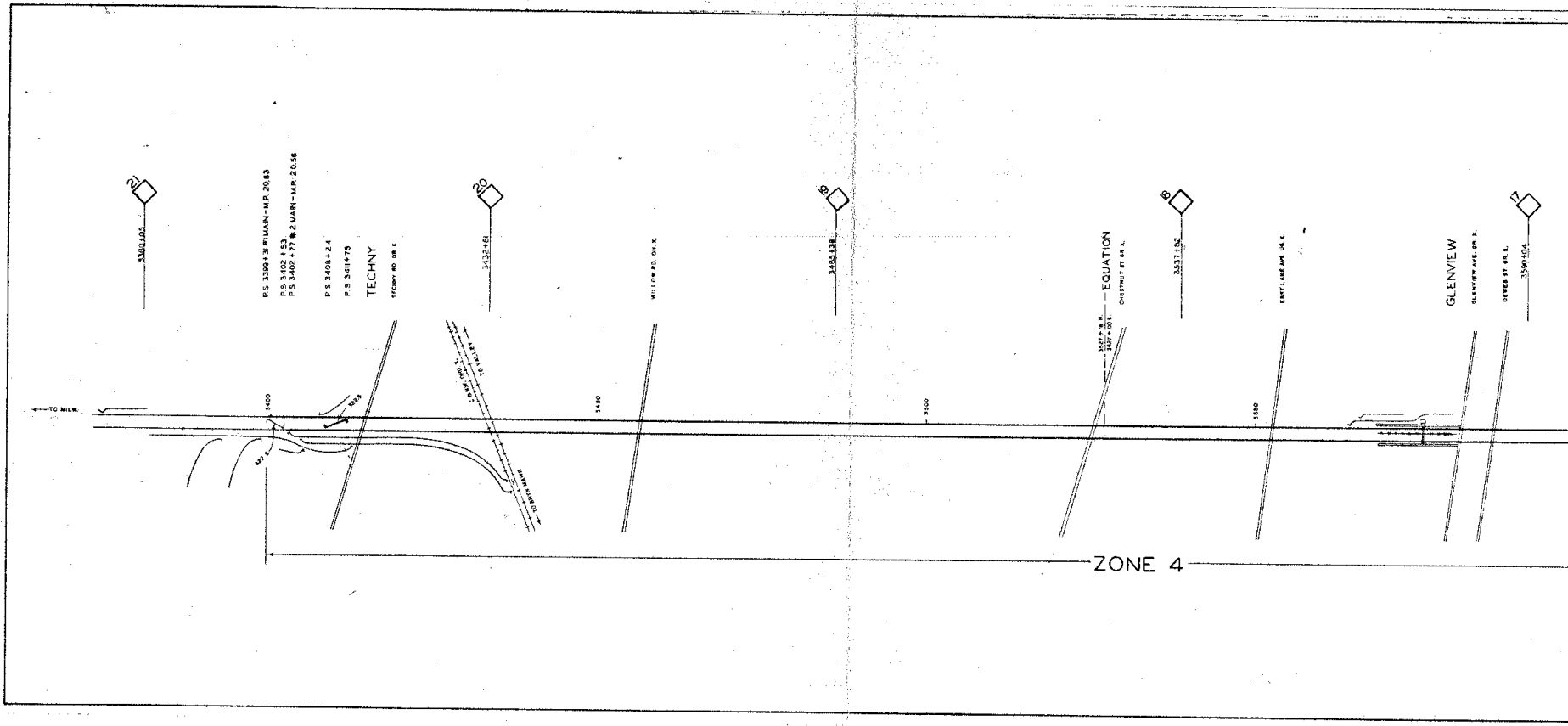
REGIONAL TRANSPORTATION AUTHORITY
APPROVED _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED _____
AVP-CHIEF ENGINEER

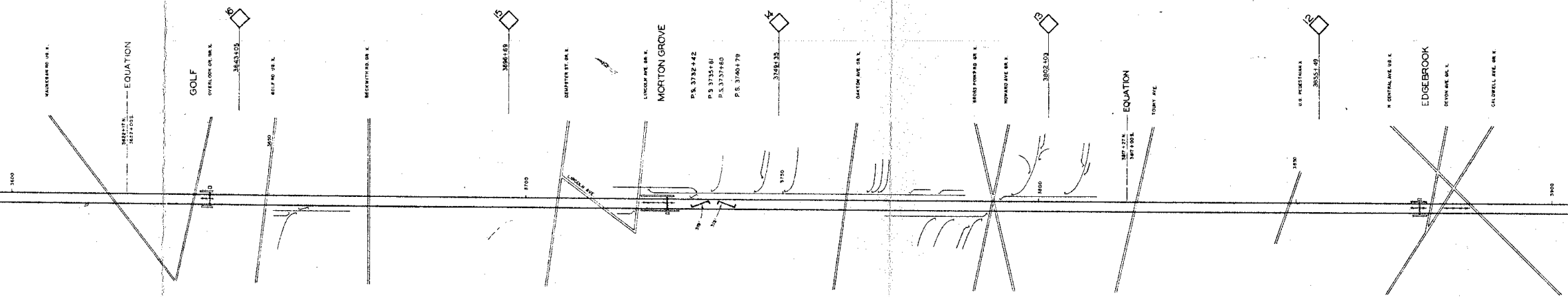
ZONE 3
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
TECHNY AND DEERFIELD, IL.
SCALE 1"=1000'

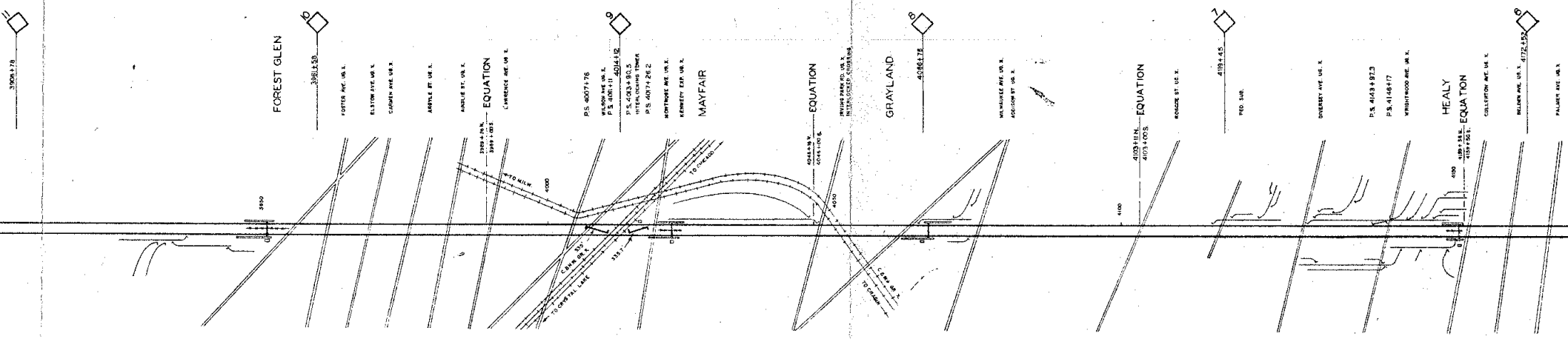
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL.

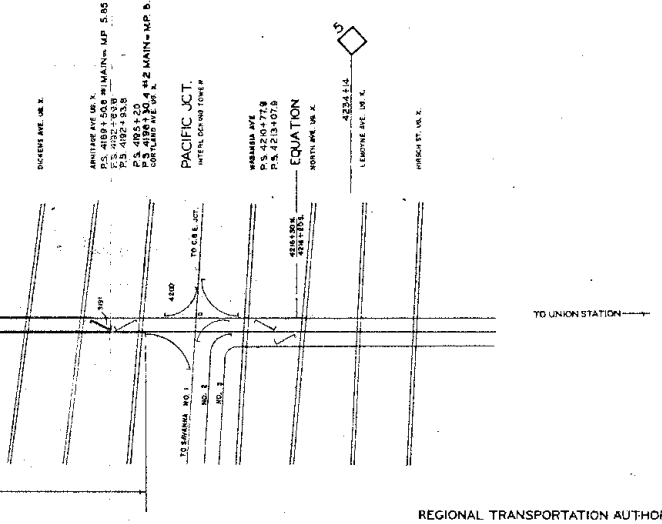
INDEX² 364
MARCH 3, 1982
REV APRIL 2, 1982
REV JULY 15, 1982


21
3390+05
P.S. 3399+31 #1 MAIN – M.P. 20.83
P.S. 3402+53
P.S. 3402+77 #2 MAIN – M.P. 20.56
P.S. 3408+2.4
P.S. 3411+75
TECHNY
TECHNY RD. GR. X.
20
3432+51
C.&N.W. OVD. X.
TO VALLEY
TO BRYN MAWR
WILLOW RD. GR. X.
19
3485+38
3527+18 N.
3527+00 S.
EQUATION
CHESTNUT ST. GR. X.
18
3537+82
EAST LAKE AVE. UG. X.
GLENVIEW
GLENVIEW AVE. GR. X.
DEWES ST. GR. X.
17
3590+04
TO MILW.
3400
322.5
322.5
3450
3500
3550
ZONE 4

REDACTED PUBLIC RECORD VERSION


WAUKEGAN RD UG X.
3600
EQUATION
3622+17 N.
3622+00 S.
GOLF
OVERLOOK DR. GR. X.
16
3643+05
GOLF RD UG X.
3650
BECKWITH RD. GR. X.
15
3696+69
3700
DEMPSTER ST. GR. X.
LINCOLN AVE
LINCOLN AVE. GR. X.
MORTON GROVE
P.S. 3732+42
P.S 3735+61
P.S. 3737+60
P.S. 3740+79
14
3749+35
3750
OAKTON AVE. GR. X.
GROSS POINT RD GR. X.
HOWARD AVE GR. X.
13
3802+03
3800
EQUATION
3817+27 N.
3817+00 S.
TOUHY AVE.
U.G. PEDESTRIAN X
3850
12
3855+49
N CENTRAL AVE. UG. X
EDGEBROOK
DEVON AVE. GR. X.
CALDWELL AVE. GR. X.
3900


11
3906+78
3950
FOREST GLEN
10
3961+58
FOSTER AVE. UG. X.
ELSTON AVE. UG. X.
CARMEN AVE. UG. X.
ARGYLE ST. UG. X.
AINSLIE ST. UG. X.
3989+26 N.
3989+03 S.
EQUATION
LAWRENCE AVE. UG. X.
TO MILW.
4000
P.S. 4007+76
WILSON AVE UG. X.
P.S. 4011+11
9
4014+12
P.S. 4013+80.5
INTERLOCKING TOWER
P.S. 4017+26.2
MONTROSE AVE. UG. X.
KENNEDY EXP. UG. X.
MAYFAIR
TO CHICAGO
C.&N.W. RR. X.
333'
333.7
TO CRYSTAL LAKE
4046+16 N.
4046+00 S.
EQUATION
4050
IRVING PARK RD. UG. X.
INTERLOCKED CROSSING
GRAYLAND
8
4060+78
C.&N.W. RR. X.
TO CHICAGO
MILWAUKEE AVE. UG. X.
ADDISON ST. UG. X.
4100
4103+11 N.
4103+00 S.
EQUATION
ROSCOE ST. UG. X.
7
4119+45
FED. SUB.
DIVERSEY AVE. UG. X.
P.S. 4143+97.3
P.S. 4146+17
WRIGHTWOOD AVE. UG. X.
4150
HEALY
4159+38 N.
4159+32 S.
EQUATION
FULLERTON AVE. UG. X.
BELDEN AVE. UG. X.
6
4172+52
PALMER AVE. UG. X.


DICKENS AVE. UG. X.
ARMITAGE AVE UG. X.
P.S. 4189+50.8 #1 MAIN= M.P. 5.85
P.S. 4192+63.8
P.S. 4192+93.8
P.S. 4195+20
P.S. 4198+30.4 #2 MAIN= M.P. 5.72
CORTLAND AVE UG. X.
PACIFIC JCT.
INTERLOCKING TOWER
WABANSIA AVE.
P.S. 4210+77.9
P.S. 4213+07.9
EQUATION
NORTH AVE. UG. X.
5
4234+14
LEMOYNE AVE. UG. X.
HIRSCH ST. UG. X.
TO C.B.E. JCT.
4200
4191
4216+30 K
4214+85 L
TO SAVANNA NO. 1
NO. 2
NO. 3
TO UNION STATION

LEGEND
—— PROPOSED JOINT MILW.-R.T.A.

ZONE 4
NO. 1=79,140.6'=14.99 MI.
NO. 2=79,474.4'=15.05 MI.
X-OVERS= 1950.2'= 0.37 MI.
TOTAL 180565.2'=30.41 MI.

REGIONAL TRANSPORTATION AUTHORITY

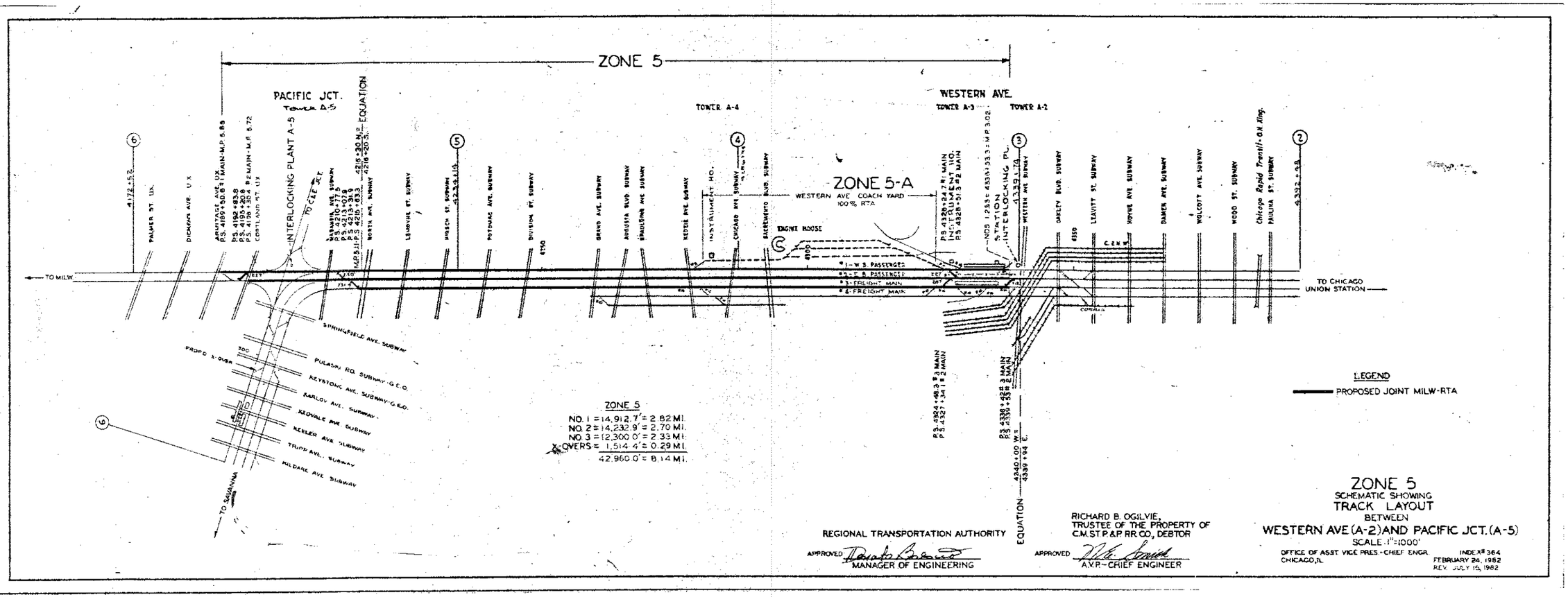
APPROVED
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR

APPROVED
A.V.P.-CHIEF ENGINEER

ZONE 4

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
PACIFIC JCT.(A-5) AND TECHNY (A-20)
SCALE: 1"=1000'
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL INDEX #364 MARCH 1, 1982 REV. 4-2-82



ZONE 5
NO. 1 = 14,912.7' = 2.82 MI.
NO. 2 = 14,232.9' = 2.70 MI.
NO. 3 = 12,300.0' = 2.33 MI.
OVERS = 1,514.4' = 0.29 MI.
42,960.0' = 8.14 MI.

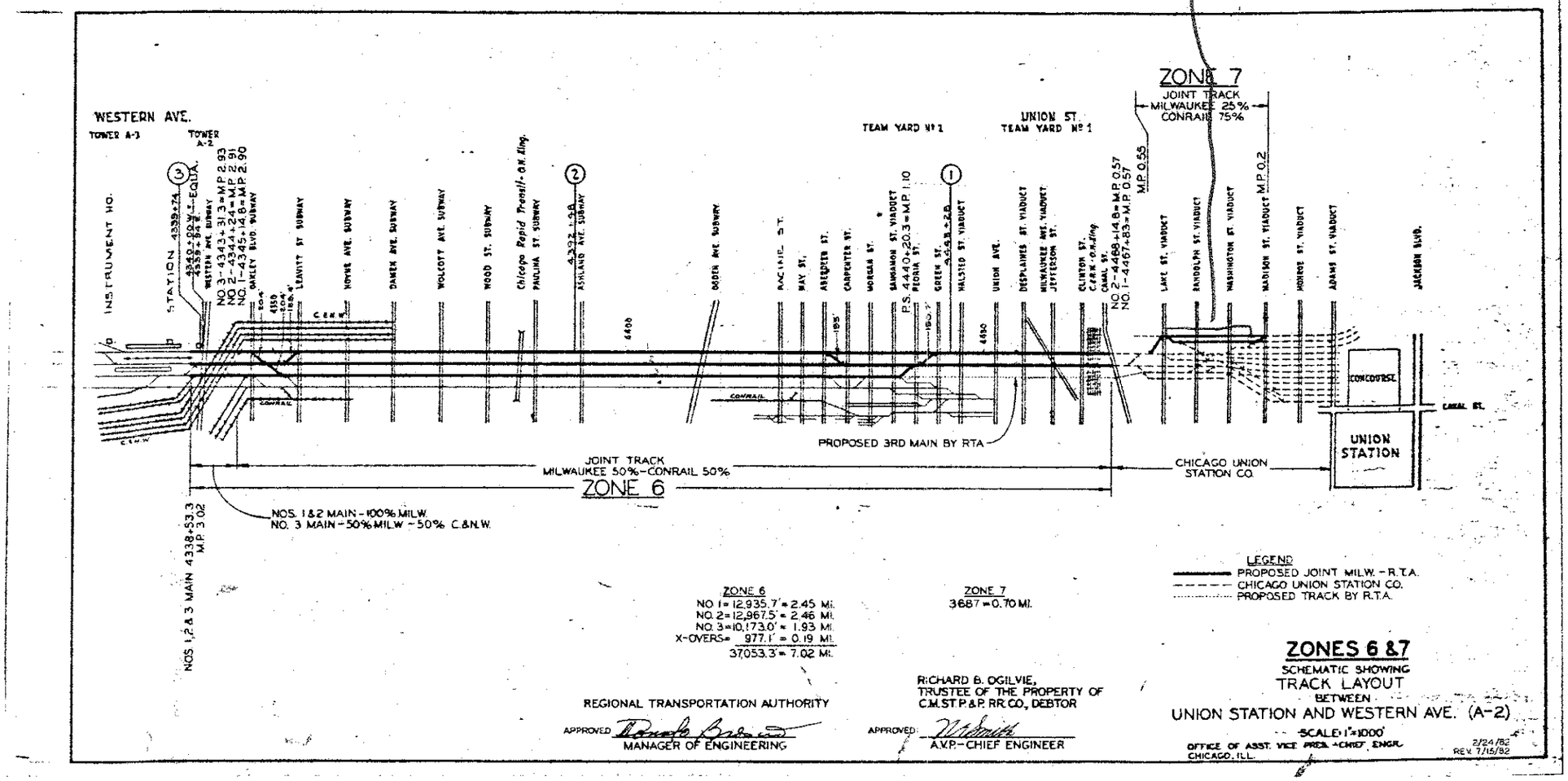
REGIONAL TRANSPORTATION AUTHORITY
APPROVED _____
MANAGER OF ENGINEERING

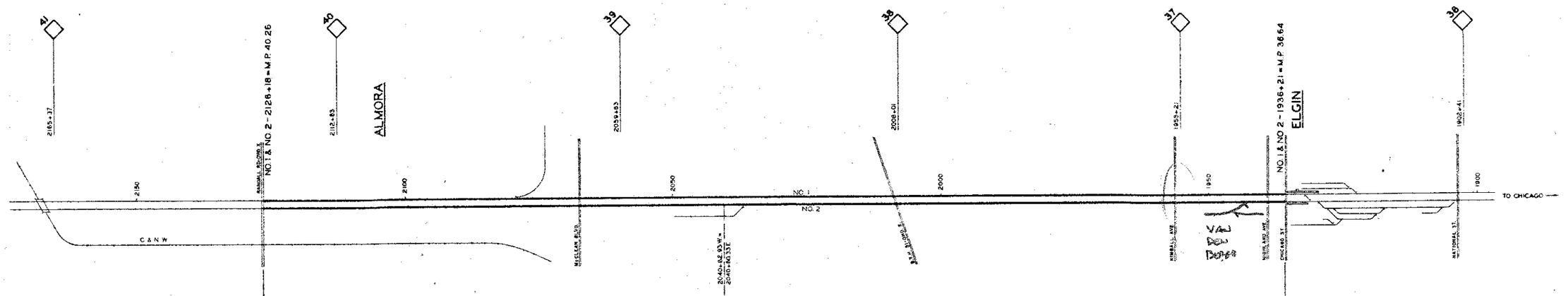
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR. CO., DEBTOR
APPROVED _____
A.V.P.-CHIEF ENGINEER

ZONE 5
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
WESTERN AVE (A-2) AND PACIFIC JCT. (A-5)
SCALE - 1" = 1000'

OFFICE OF ASST VICE PRES - CHIEF ENGR.
CHICAGO, IL.
INDEX # 364
FEBRUARY 26, 1982
REV. JULY 15, 1982

Lake - Washington
and Union Sta
APRIL, 1986





REGIONAL TRANSPORTATION AUTHORITY

APPROVED _____
MANAGER OF ENGINEERING

ZONE 8
NO. 1 - 18,997' = 3.60 MI.
NO. 2 - 18,994.4' = 3.60 MI.
37,991.4' = 7.20 MI.

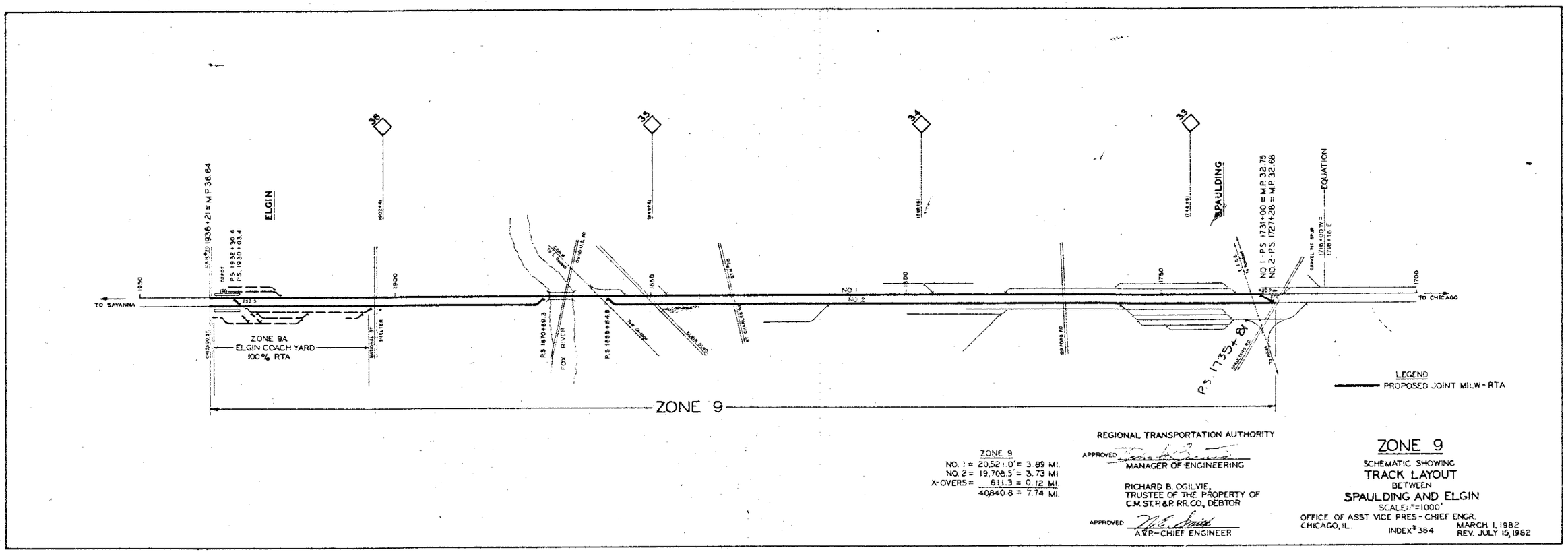
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR

APPROVED _____
A.V.P.-CHIEF ENGINEER

ZONE 8

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
ELGIN AND ALMORA
SCALE: 1" = 1000'

OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL. MARCH 1, 1982
INDEX #364 REV. JULY 15, 1982



ZONE 9
NO. 1 = 20,521.0' = 3.89 MI.
NO. 2 = 19,708.5' = 3.73 MI.
X-OVERS = 611.3 = 0.12 MI.
40,840.8 = 7.74 MI.

REGIONAL TRANSPORTATION AUTHORITY

APPROVED _____
MANAGER OF ENGINEERING

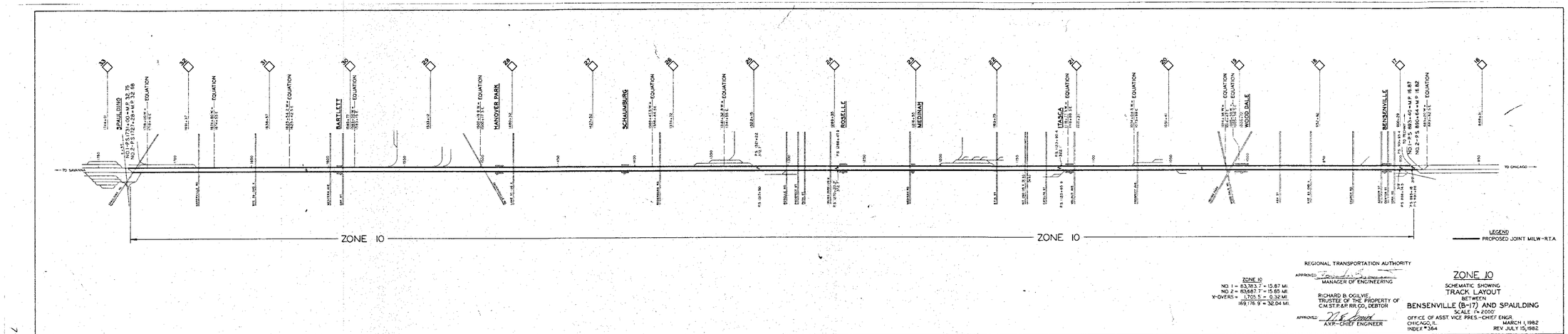
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR. CO., DEBTOR

APPROVED _____
A.V.P.-CHIEF ENGINEER

ZONE 9

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
SPAULDING AND ELGIN
SCALE: 1"=1000'

OFFICE OF ASST VICE PRES.-CHIEF ENGR.
CHICAGO, IL. INDEX # 384 MARCH 1, 1982
REV. JULY 15, 1982



REGIONAL TRANSPORTATION AUTHORITY

APPROVED _____
MANAGER OF ENGINEERING

ZONE 10
NO. 1 = 83,783.7 = 15.87 MI.
NO. 2 = 83,687.7 = 15.85 MI.
Y-OVERS = 1,705.5 = 0.32 MI.
169,176.9 = 32.04 MI.

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P.R.R.CO., DEBTOR

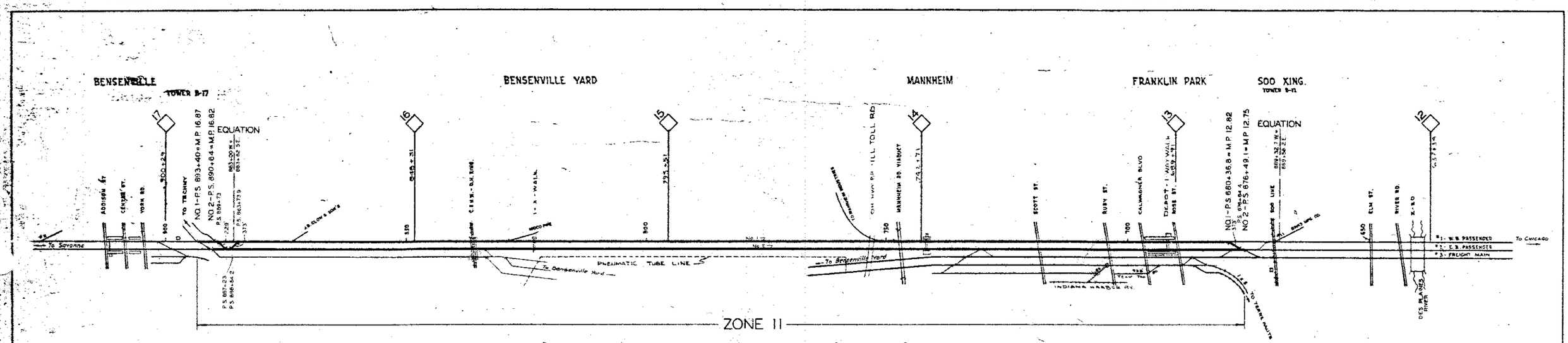
APPROVED _____
A.V.P.–CHIEF ENGINEER

ZONE 10

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
BENSENVILLE (B-17) AND SPAULDING
SCALE 1" = 2000'

OFFICE OF ASST. VICE PRES.–CHIEF ENGR.
CHICAGO, IL. MARCH 1, 1982
INDEX # 364 REV. JULY 15, 1982

REDACTED PUBLIC RECORD VERSION



LEGEND
PROPOSED JOINT MILW-R.T.A

ZONE 11
NO. 1 = 21,385.7' = 4.05 MI.
NO. 2 = 21,497.4' = 4.07 MI.
X-OVERS = 975.0' = 0.18 MI.
43,858.1' = 8.31 MI.

REGIONAL TRANSPORTATION AUTHORITY
APPROVED _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED _____
A.V.P.-CHIEF ENGINEER

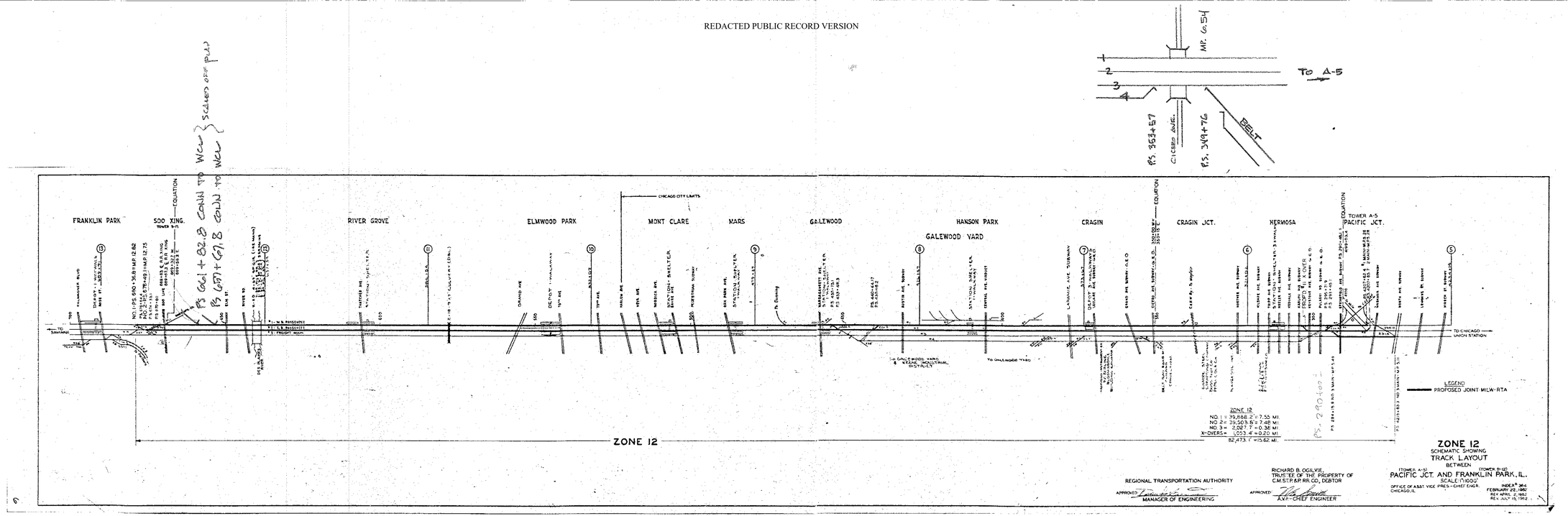
ZONE 11

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
FRANKLIN PARK (B-12) AND BENSENVILLE (B-17)

SCALE: 1"=1000'

OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, ILL.

REV. 7/16/82
2/24/82



~~3RD MAIN = 7.19 MI.~~

3RD MAIN = 7.93 MI. (P.S. 4215+63.3 – P.S. 676+49.1 @ B12)

Trackage Agreement
Exhibit B

Primary Accounts

Account Number	Description
202	Roadway maintenance
206	Tunnels and subways
208	Bridges, trestles and culverts
210	Elevated structures
212	Ties
214	Rails
216	Other track material
218	Ballast
220	Track laying and surfacing
221	Fences, snowsheds and signs
227	Station and office buildings
229	Roadway buildings
265	Miscellaneous structures
267	Retirements, road
269	Roadway machines*
270	Dismantling retired road property
271	Small tools and supplies
272	Removing snow, ice and sand
273	Public improvements; maintenance
274	Injuries to persons
276	Stationery and printing
281	Right-of-way expenses
282	Other expenses
277	Employees health and welfare benefits
532	Railway tax accruals

*Non-Milwaukee owned machines

Trackage Agreement
Exhibit C

Primary Accounts

Account Number	Description
326	Work equipment; repairs*
328	Miscellaneous equipment; repairs*
247	Communication systems
249	Signals and interlockers
253	Power plants
257	Power-transmission systems
373	Station employees
376	Station supplies and expenses
404	Signal and interlocker operation
405	Crossing protection
407	Communication system operation
410	Stationery and printing
411	Other expenses
415	Clearing wrecks
420	Injuries to persons
277	Employees health and welfare benefits
335	Employees health and welfare benefits
409	Employees health and welfare benefits
532	Railway tax accruals

*Non-Milwaukee owned equipment

TRACKAGE AGREEMENT

EXHIBIT D

EXHIBIT D

METHODOLOGY FOR ALLOCATION OF VACATION AND HOLIDAY EXPENSES

Expenses to be Allocated (A):

Vacation and holiday expenses properly distributed to operating expense accounts as prescribed by the Interstate Commerce Commission's Uniform System of Accounts in 49 CFR part 1201.

Expenses specifically not allocable:

Labor expenses of officers on the exempt payroll, separation allowance payments and productivity fund payments.

Labor Base to Which Vacation & Holiday Expenses are to be Applied (B):

Direct Labor, exclusive of vacation and holiday payments and other payments mentioned above; paid to all employees.

Procedure for Allocation:

Divide the expenses to be allocated (A) by the labor base to which vacation and holiday expenses apply (B). Multiply the resulting ratio by (1) the applicable labor and fringe benefits properly charged or allocated to each zone on the joint line for commuter service and (2) labor and fringe benefit expenses charged for dispatching on the joint line.

Example Allocation (Unaudited):

Vacation and holiday expenses = $14,891,180

Labor base = $154,624,225

Vacation and holiday expense ratio = $14,891,180 ÷ $154,624,225 = 9.631%

Labor and fringe benefit expenses allocated to zone of commuter line = $10,500

Vacation and holiday expenses allocated to zone = $10,500 x 9.631% = $1,011.26

Allocation Statistic Update Procedures:

Update annually in January utilizing data from previous calendar year.

METHODOLOGY FOR ALLOCATION OF ADMINISTRATIVE OVERHEAD EXPENSES

Labor Expenses to be Allocated (A):

Expenses for Superintendence and General Administration properly charged to operating expense accounts as prescribed by the Interstate Commerce Commission's Uniform System of Accounts in 49 CFR part 1201.

Expenses specifically not allocable:

Expenses properly chargeable to the following functional areas or accounts are specifically not allocable (B):

> Marketing, Car Management, Freight Claim Prevention, Customer Services, Freight Adjustment, Regional Accounting, Revenue/Interline Accounting, and operating expense accounts properly chargeable as shop and store expense.

Labor Base to Which Administrative Overhead Expenses are to be Applied (C):

Labor and vacation and holiday expenses properly charged to operating expense accounts as prescribed in 49 CRR part 1201 and excluding expenses reported in sections A and B.

Procedure for Allocation:

Divide the expenses to be allocated (A) by the labor base to which administative overhead expenses apply (C). Multiply the resulting ratio by (1) the applicable labor, vacation and holiday expenses, fringe benefits and miscellaneous expenses properly charged or allocated to each zone on the joint line for commuter service and (2) labor, vacation and holiday expenses, fringe benefits and miscellaneous expenses charged for dispatching on the joint line.

Example Allocation (Unaudited):

Administrative overhead expenses = $2,086,187

Labor base = $8,711,933

Administrative overhead expense ratio = 23.946%

Labor, vacation and holiday expenses, fringe benefits and miscellaneous expenses allocated to zone of commuter line = $11,511

Administrative overhead expenses allocated to zone = $2,756.42

Allocation Statistic Update Procedures:

Update monthly based on actual expenses.

TRACKAGE AGREEMENTS

JOINT FACILITY AGREEMENTS

EXHIBIT E

E

JOINT FACILITY AGREEMENTS

ZONE LOCATION	RAILROAD	AGREEMENT DATE	DESCRIPTION	LOCATION
ONE	SOO LINE	8-15-99	AUTOMATIC INTERLOCKER	GRAYS LAKE
TWO	EJ&E RY.	8- 1-89	TOWER & INTERLOCKER	RONDOUT
FOUR	C&NW TRANSP.	1- 1-95	TOWER & INTERLOCKER	MAYFAIR - CHICAG
FOUR	C&NW TRANSP.	12-31-94	AUTOMATIC INTERLOCKER	GRAYLAND - CHICA
FIVE	C&NW TRANSP. CONRAIL	3-24-04	TOWER A-Z, TRACKS & SWITCHES, CROSSINGS	WESTERN AVE. - C
SIX	CONRAIL	2- 7-73	TRACKS & FACILITIES WESTERN AVE. TO CANAL ST.	CHICAGO
SEVEN	CONRAIL	2- 7-73	TRACKS & FACILITIES LAKE STREET TO MADISON STREET	CHICAGO
NINE	C&NW TRANSP.	6-11-10	REMOTE CONTROLLED INTERLOCKER	ELGIN
NINE	EJ&E RY.	8- 1-89	TOWER & INTERLOCKER	SPAULDING
ELEVEN	C&NW TRANSP.	4-18-10	OVERHEAD CROSSING	BENSENVILLE
ELEVEN	C&NW TRANSP.	6-26-12	OVERHEAD CROSSING	BENSENVILLE
ELEVEN	SOO LINE	12- 1-30	TOWER & INTERLOCKER	FRANKLIN PARK
TWELVE	I.H.B.R.R.	3- 1-32	REMOTE CONTROLLED INTERLOCKER	FRANKLIN PARK
TWELVE	C&NW TRANSP.	2- 1-05	REMOTE CONTROLLED INTERLOCKER PACIFIC JCT.	CRAIGIN JUNCTION CHICAGO

TRACKAGE AGREEMENT

EXHIBIT F

Exhibit F

(i) To the chargeout (including taxes and foreign line freight charges) of all items of material, fuel and supplies used (including working timetables and rule books), add 15% to cover inspection, accounting, purchasing, handling and transportation to point of use or point from which handled by work train.

(ii) In all cases of salvage credit in connection with the maintenance of operation, there shall first be deducted 15% to cover expenses in connection with accounting, handling and transportation of such salvaged material.

(iii) When a non-Joint Line track breaks out of a Joint Line track, the Joint Line track shall be charged with 50% of the cost of material to repair or renew the turnout. The material considered as part of the turnout is the frog, switch, guard rails, guard rail clamps, switch stand, switch lamps, switch ties, and ballast and track fastenings. The cost of rail shall be charged to the Joint Line on the same basis as material. Work train services shall be charged to the Joint Line on the same basis as labor.

(iv) Separation of material as between track and signal shall be based on the accounts to which the

material is charged under the ICC Classifications, that is, Maintenance Accounts "Ties," and "Other Track Material," shall be classed as track material and charged to whose track structure it is applied. Signal and interlocker material, and material for highway protection when part of the Joint Line interlocking plant, charged to Investment Account "Signals and Interlockers" and Maintenance Account "Signals and Interlockers" shall be classed as signal and interlocker material and charged to the Authority on bases provided in this Agreement.

Item of material considered as:

Track

- Switches and derails, derail points, switch points and moveable frog points with fastenings.
- Switches, derail and movable point frog timbers or ties.
- Guage or tie plates with or without insulation and with or without extensions, to tie operating or locking movements in relation to rail, together with fastenings.
- Toe or butt plates with fastenings.
- Rail braces with fastenings.
- Riser plates with fastenings.
- Transit or switch clips with fastenings.
- Switch rods with or without insulation with fastenings.
- Insulated rail joints.
- Head rod guides for derails with fastenings.

Signal and Interlocker

° Tie straps with fastenings.

° Front and lock rods with switch lugs or feet and fastenings.

° Throw rods, with switch adjustments and fastenings.

° Machine, tail or base plates with fastenings.

° All cranks and stands with fastenings.

° Switch circuit controllers with rods, point lugs and fastenings.

° Switch and lock movements with fastenings.

° Bolt locks with rods and fastenings.

° Bolt lock base plates with fastenings.

° Bond wires applied in connection with ordinary maintenance of plant, or construction of new plant. (Cost of bond wires or other items of signal material applied in connection with program of rail renewals or other track changes shall be apportioned on basis provided for Track material instead of Signal and Interlocker material.)

REDACTED PUBLIC RECORD VERSION

EXHIBIT G

NORTH LINE between CHICAGO and FOX LAKE

NORTHBOUND

SATURDAY ONLY

	2109 AM	2111 AM	2115 PM	2601 PM	2121 PM	2603 PM	2607 PM	2609 PM	2147 AM
Lv UNION STATION	8.35	9.50	12.25	2.00	3.55	5.05	7.35	9.20	12.25
Western Ave.	8.43	9.58	12.33	2.08	4.03	5.13	7.42	9.28	12.33
Healy	8.48	10.04	12.38	2.13	4.08	5.19	7.47	9.33	12.38
Grayland	8.51	10.07	12.41	2.16	4.11	5.21	7.50	9.36	12.41
Mayfair	8.53	10.09	12.43	2.18	4.13	5.23	7.52	9.38	12.43
Forest Glen	8.56	10.12	12.46	2.21	4.16	5.26	7.55	9.41	12.46
Edgebrook	8.59	10.15	12.49	2.24	4.19	5.29	7.58	9.44	12.49
Morton Grove	9.03	10.19	12.53	2.28	4.24	5.33	8.03	9.48	12.53
Golf	9.06	10.22	12.56	2.31	4.27	5.36	8.06	9.51	12.56
Glenview	9.09	10.25	12.59	2.34	4.30	5.39	8.09	9.54	12.59
Northbrook	9.15	10.31	1.04	2.39	4.35	5.45	8.14	10.00	1.05
Deerfield	9.20	10.36	1.09	2.44	4.40	5.50	8.19	10.05	1.09
Lake Forest	9.25	10.41	1.14	2.49	4.45	5.55	8.24	10.10	1.14
Rondout	9.30	10.46	1.19	2.55	4.50	6.00	8.29	10.17	1.19
Libertyville	9.35	10.51	1.24	3.00	4.56	6.05	8.35	10.22	1.24
Grays Lake	9.42	10.58	1.31	3.07	5.04	6.12	8.43	10.29	1.31
Round Lake	9.46	11.02	1.35	3.11	5.09	6.16	8.48	10.33	1.36
Long Lake	9.50	11.06	1.39	3.14	5.12	6.20	8.52	10.37	1.40
Wilson Road	9.53	11.09	1.42	3.17	5.15	6.23	8.55	10.39	1.42
Ingleside		11.11	1.44	3.20	5.18	6.26	8.57	10.41	
Ar FOX LAKE	10.00 AM	11.15 AM	1.50 PM	3.25 PM	5.23 PM	6.30 PM	9.02 PM	10.45 PM	1.47 AM

EXHIBIT G

REDACTED PUBLIC RECORD VERSION

WEST LINE between CHICAGO and ELGIN

EASTBOUND

MONDAY THROUGH FRIDAY

		Miles	2222 AM	2224 AM	*2226 PM	2228 PM	2230 PM	2232 PM	2236 PM	2244 PM	2246 PM	2248 PM	2250 PM
Lv	ELGIN	0.0	8.55	11.05	1.05	2.05	3.05	4.05	5.05		7.10	8.30	9.35
	Elgin (Nat'l St.)	0.6	8.57	11.07	1.07	2.07	3.07	4.07	5.07		7.12	8.32	9.37
	Bartlett	6.5	9.05	11.15	1.15	2.15	3.15	4.15	5.15		7.20	8.40	9.45
	Hanover Park	8.2	9.08	11.18	1.18	2.18	3.18	4.18	5.18		7.23	8.43	9.48
#	Schaumburg	10.1	9.11	11.21		2.21	3.21	4.21	5.21		7.26	8.46	9.49
	Roselle	12.7	9.14	11.24	1.24	2.24	3.24	4.24	5.24	6.45	7.29	8.49	9.52
	Medinah	13.6	9.17	11.27	1.27	2.27	3.27	4.27	5.27		7.32	8.52	9.54
	Itasca	15.6	9.20	11.30	1.30	2.30	3.30	4.30	5.30		7.35	8.55	9.57
	Wood Dale	17.5	9.23	11.33	1.33	2.33	3.33	4.33	5.33		7.38	8.58	9.59
	Bensenville	19.4	9.26	11.36	1.36	2.36	3.36	4.36	5.36	6.55	7.41	9.01	10.02
	Mannheim	22.6	9.32	11.42	1.42	2.42			5.42		7.47	9.07	10.07
	Franklin Park	23.4	9.34	11.43	1.43	2.44	3.44	4.42	5.44		7.49	9.09	10.09
	River Grove	25.2	9.37	11.47	1.47	2.47	3.47	4.45	5.47		7.52	9.12	10.12
	Elmwood Park	26.4	9.39	11.49	1.49	2.49	3.49	4.47	5.49		7.54	9.14	10.14
	Mont Clare	27.1	9.41	11.51	1.51	2.51	3.51	4.49	5.51		7.56	9.16	10.16
	Mars	27.5	9.43	11.53	1.53	2.53			5.53		7.58	9.18	10.18
	Galewood	28.0	9.45	11.55	1.55	2.55	3.55	4.53	5.55		8.00	9.20	10.20
	Hanson Park	28.9	9.48	11.58	1.58	2.58			5.58		8.03	9.23	10.23
	Cragin	29.6	9.51	12.01	2.01	3.00			6.00		8.05	9.25	10.26
	Hermosa	30.7	9.54	12.03	2.03	3.03	3.59	4.57	6.03		8.08	9.28	10.29
	Western Ave.	33.7	9.59	12.09	2.09	3.09	4.05	5.03	6.09	7.14	8.14	9.34	10.34
Ar	UNION STATION	36.6	10.10 AM	12.20 PM	2.20 PM	3.20 PM	4.15 PM	5.13 PM	6.20 PM	7.25 PM	8.25 PM	9.45 PM	10.45 PM

Service to this station will begin on or about November 1, 1982.

*Illinois Commerce Commission Docket No. 82-0169 - Train discontinued from April 16, 1982, to on or before November 1, 1982. Schedule as contained in Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in effect until service begins to the Schaumburg station.

EXHIBIT G

REDACTED PUBLIC RECORD VERSION

WEST LINE between CHICAGO and ELGIN

WESTBOUND

MONDAY THROUGH FRIDAY

les	2207 AM	2209 AM	2213 AM	*2215 AM	2217 PM	2219 PM	2221 PM	2223 PM	2225 PM	2227 PM	2229 PM
0	6.30	7.15	9.35	11.35	12.35	1.50	2.40	3.40	4.10	4.35	4.55
9	6.38		9.43	11.43	12.43	1.58	2.48	3.48	4.18	4.43	5.02
9	6.44		9.48	11.48	12.48	2.04	2.53	3.54	4.23	4.49	
0	6.46		9.50	11.50	12.50		2.55	3.57	4.26	4.52	
7	6.48		9.52	11.52	12.52		2.57	3.59	4.28	4.54	
6	6.50		9.54	11.54	12.54		2.59	4.01	4.30	4.56	
1	6.51		9.55	11.55	12.55		3.01	4.03	4.31	4.58	
5	6.52		9.56	11.56	12.56		3.03	4.04	4.33	5.00	
2	6.54		9.58	11.58	12.58	2.10	3.05	4.06	4.35	5.02	
6	6.56		10.01	12.01	1.01	2.13	3.08	4.09	4.38	5.05	
2	6.59		10.05	12.05	1.05	2.17	3.12	4.13	4.41	5.08	
0	7.01		10.07	12.07	1.07		3.14	4.15	4.44	5.10	
2	7.07	7.40	10.13	12.13	1.13	2.22	3.20	4.22	4.50	5.15	5.21
1	7.10		10.16	12.16	1.16	2.25	3.23	4.25	4.53	5.18	5.24
0	7.13		10.19	12.19	1.19	2.28	3.26	4.28	4.56	5.21	5.28
0	7.16		10.22	12.22	1.22		3.29	4.31	5.00	5.25	
9	7.19		10.25	12.25	1.25	2.34	3.32	4.35	5.03	5.28	5.34
5	7.21		10.27		1.27	2.36	3.34	4.37	5.05	5.30	5.36
.4	7.26		10.32	12.31	1.32	2.41	3.39	4.42	5.10	5.35	5.41
.1	7.29		10.35	12.34	1.35	2.44	3.42	4.45	5.14	5.39	5.45
.0	7.43		10.46	12.45	1.46	2.53	3.53	4.53	5.21	5.48	
.6	7.47		10.50	12.48	1.50	2.57	3.57	4.57	5.27	5.52	
	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM

ll begin on or about November 1, 1982

ission Docket No. 82-0169 - Train discontinued from April 16, 1982, to on or before November 1, 1982.

hicago, Milwaukee, St. Paul & Pacific Railroad Comapny Employee Timetable No. 2 dated April 25, 1982 shall remain in
s to the Schaumburg station.

EXHIBIT G

REDACTED PUBLIC RECORD VERSION

WEST LINE between CHICAGO and ELGIN

WESTBOUND

MONDAY THROUGH FRIDAY

Les	2231 PM	2233 PM	2235 PM	2237 PM	2239 PM	2241 PM	2243 PM	2245 PM	2247 PM	2249 PM	2251 AM
)	4.58	5.10	5.17	5.22	5.35	6.05	6.35	7.50	9.15	10.35	12.15
)		5.18	5.25	5.30	5.43	6.13	6.43	7.58	9.23	10.43	12.23
)				5.36	5.49	6.19	6.49	8.03	9.28	10.49	12.29
)				5.39	5.52	6.22	6.52	8.06	9.31	10.52	12.31
7					5.54	6.24	6.54	8.09	9.33	10.55	12.33
5				5.43	5.56	6.26	6.56	8.11	9.35	10.57	12.35
L					5.58	6.28	6.58	8.13	9.37	10.59	12.36
5	5.15			5.46	5.59	6.29	6.59	8.14	9.38	11.00	12.37
2	5.18			5.49	6.01	6.31	7.01	8.16	9.40	11.02	12.39
4	5.21			5.52	6.04	6.34	7.04	8.19	9.43	11.04	12.41
2	5.25			5.56	6.07	6.37	7.07	8.22	9.47	11.07	12.44
)					6.09		7.09	8.24	9.49	11.09	12.46
2			5.44	6.02	6.14	6.44	7.14	8.29	9.56	11.15	12.52
L			5.48	6.05	6.17	6.47	7.17	8.31	9.59	11.18	12.55
)			5.52	6.08	6.20	6.50	7.20	8.34	10.02	11.21	12.58
)		5.45		6.11	6.23	6.53	7.23	8.37	10.05	11.24	1.01
)		5.49		6.15	6.26	6.56	7.26	8.40	10.09	11.26	1.04
		5.51		6.17	6.28	6.58	7.28	8.42	10.11	11.28	1.07
4			6.03	6.22	6.34	7.04	7.34	8.48	10.16	11.33	1.11
1		6.01		6.25	6.38	7.08	7.38	8.51	10.19	11.36	1.14
0		6.11	6.16		6.48	7.18	7.48	9.03	10.28	11.46	1.23
6		6.14	6.19		6.52	7.22	7.52	9.07	10.32	11.50	1.27
	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	AM

ll begin on or about November 1, 1982.

Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in ns to the Schaumburg station.

EXHIBIT G

REDACTED PUBLIC RECORD VERSION

WEST LINE between CHICAGO and ELGIN

WESTBOUND

SATURDAY ONLY

	2207 AM	2209 AM	2213 AM	2217 PM	2701 PM	2703 PM	2223 PM	2227 PM	2239 PM	2243 PM	2247 PM	2251 AM
Lv UNION STATION	6.30	7.15	9.35	12.35	1.15	1.24	3.40	4.35	5.35	6.35	9.15	12.15
Western Ave.	6.38		9.43	12.43	1.23	1.32	3.48	4.43	5.43	6.43	9.23	12.23
Hermosa	6.44		9.48	12.48		1.38	3.54	4.49	5.49	6.49	9.28	12.29
Cragin	6.46		9.50	12.50		1.40	3.57	4.52	5.52	6.52	9.31	12.31
Hanson Park	6.48		9.52	12.52		1.42	3.59	4.54	5.54	6.54	9.33	12.33
Galewood	6.50		9.54	12.54		1.44	4.01	4.56	5.56	6.56	9.35	12.35
Mars	6.51		9.55	12.55		1.45	4.03	4.58	5.58	6.58	9.37	12.36
Mont Clare	6.52		9.56	12.56		1.46	4.04	5.00	5.59	6.59	9.38	12.37
Elmwood Park	6.54		9.58	12.58		1.49	4.06	5.02	6.01	7.01	9.40	12.39
River Grove	6.56		10.01	1.01		1.52	4.09	5.05	6.04	7.04	9.43	12.41
Franklin Park	6.59		10.05	1.05		1.56	4.13	5.08	6.07	7.07	9.47	12.44
Mannheim	7.01		10.07	1.07		1.58	4.15	5.10	6.09	7.09	9.49	12.46
Bensenville	7.07	7.40	10.13	1.13	1.40	2.05	4.22	5.15	6.14	7.14	9.56	12.52
Wood Dale	7.10		10.16	1.16	1.43		4.25	5.18	6.17	7.17	9.59	12.55
Itasca	7.13		10.19	1.19	1.46		4.28	5.21	6.20	7.20	10.02	12.58
Medinah	7.16		10.22	1.22	1.49		4.31	5.25	6.23	7.23	10.05	1.01
Roselle	7.19		10.25	1.25	1.52		4.35	5.28	6.26	7.26	10.09	1.04
# Schaumburg	7.21		10.27	1.27	1.54		4.37	5.30	6.28	7.28	10.11	1.07
Hanover Park	7.26		10.32	1.32	1.59		4.42	5.35	6.34	7.34	10.16	1.11
Bartlett	7.29		10.35	1.35	2.02		4.45	5.39	6.38	7.38	10.19	1.14
Elgin (Nat'l St.)	7.43		10.46	1.46	2.13		4.53	5.48	6.48	7.48	10.28	1.23
Ar ELGIN	7.47		10.50	1.50	2.17		4.57	5.52	6.52	7.52	10.32	1.27
	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM	AM

Service to this station will begin on or about November 1, 1982

Schedule as contained in Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in effect until service begins to the Schaumburg station.

EXHIBIT G

WEST LINE between CHICAGO and ELGIN

WESTBOUND

SUNDAY AND HOLIDAY

	2213 AM	2217 PM	2239 PM	2245 PM	2247 PM	2251 AM
Lv UNION STATION	9.35	12.35	5.35	7.50	9.15	12.15
Western Ave.	9.43	12.43	5.43	7.58	9.23	12.23
Hermosa	9.48	12.48	5.49	8.03	9.28	12.29
Cragin	9.50	12.50	5.52	8.06	9.31	12.31
Hanson Park	9.52	12.52	5.54	8.09	9.33	12.33
Galewood	9.54	12.54	5.56	8.11	9.35	12.35
Mars	9.55	12.55	5.58	8.13	9.37	12.36
Mont Clare	9.56	12.56	5.59	8.14	9.38	12.37
Elmwood Park	9.58	12.58	6.01	8.16	9.40	12.39
River Grove	10.01	1.01	6.04	8.19	9.43	12.41
Franklin Park	10.05	1.05	6.07	8.22	9.47	12.44
Mannheim	10.07	1.07	6.09	8.24	9.49	12.46
Bensenville	10.13	1.13	6.14	8.29	9.56	12.52
Wood Dale	10.16	1.16	6.17	8.31	9.59	12.55
Itasca	10.19	1.19	6.20	8.34	10.02	12.58
Medinah	10.22	1.22	6.23	8.37	10.05	1.01
Roselle	10.25	1.25	6.26	8.40	10.09	1.04
# Schaumburg	10.27	1.27	6.28	8.42	10.11	1.07
Hanover Park	10.32	1.32	6.34	8.48	10.16	1.11
Bartlett	10.41	1.35	6.38	8.51	10.19	1.14
Elgin (Nat'l St.)	10.46	1.46	6.48	9.03	10.28	1.23
Ar ELGIN	10.50	1.50	6.52	9.07	10.32	1.27
	AM	PM	PM	PM	PM	AM

Service to station to begin on or about November 1, 1982
Schedule as contained in Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in effect until service begins to the Schaumburg station.

NORTH LINE between CHICAGO and FOX LAKE

SOUTHBOUND

MONDAY THROUGH FRIDAY

	Miles	2100 AM	2102 AM	2104 AM	2106 AM	2108 AM	2110 AM	2112 AM	2114 AM	2116 AM	2118 AM
FOX LAKE	0.0	5.02	5.35	6.10	6.24	6.40	6.50	6.59		7.12	7.25
Ingleside	1.7	5.05	5.38			6.43					
Wilson Road	2.5	5.07	5.40			6.45				7.16	
Long Lake	3.5	5.10	5.43	6.15		6.47		7.04		7.19	
Round Lake	5.5	5.14	5.47	6.18	6.30		6.57	7.07			7.32
Grays Lake	8.5	5.19	5.52		6.35	6.53		7.11		7.26	
Libertyville	14.0	5.26	5.59	6.28	6.42	6.59	7.07			7.32	7.42
Rondout	17.2	5.32	6.05			7.05					
Lake Forest	21.5	5.37	6.10			7.10		7.27		7.43	
Deerfield	25.3	5.42	6.15	6.43	6.57	7.15		7.32	7.35	7.48	7.57
Northbrook	28.4	5.47	6.20	6.48	7.01	7.19	7.25		7.40	7.52	
Glenview	32.1	5.52	6.26	6.54	7.07		7.32	7.40	7.45	7.58	
Golf	33.3	5.55	6.29	6.57		7.25			7.48		
Morton Grove	35.2	5.58	6.32	7.00	7.11		7.36	7.44	7.50		8.09
Edgebrook	37.9	6.03	6.37	7.05	7.14			7.48	7.53	8.06	
Forest Glen	39.3	6.06	6.40	7.08		7.33			7.56		
Mayfair	40.5	6.09	6.43	7.11		7.36			7.58		
Grayland	41.3	6.11	6.45	7.14		7.39			8.00		
Healy	43.1	6.15	6.49	7.17	7.22	7.43	7.49	7.55	8.03	8.15	8.21
Western Ave.	46.6	6.20	6.53	7.22	7.27	7.48	7.54	8.00	8.08	8.19	8.26
Ar UNION STATION	49.5	6.30 AM	7.05 AM	7.33 AM	7.38 AM	8.00 AM	8.07 AM	8.10 AM	8.20 AM	8.30 AM	8.37 AM

NORTH LINE between CHICAGO and FOX LAKE

SOUTHBOUND

MONDAY THROUGH FRIDAY

	Miles	2120 AM	2124 AM	2126 AM	2128 AM	2130 PM	2132 PM	2136 PM	2138 PM	2140 PM	2142 PM	2146 PM
FOX LAKE	0.0		8.12	10.12	11.25	12.45	2.12	4.12			7.12	9.50
Ingleside	1.7		8.15	10.15	11.28	12.48	2.15	4.15			7.15	
Wilson Road	2.5		8.17	10.17	11.30	12.50	2.17	4.17			7.17	9.54
Long Lake	3.5		8.20	10.20	11.33	12.53	2.20	4.20			7.20	9.57
Round Lake	5.5		8.24	10.24	11.37	12.57	2.24	4.24			7.24	10.01
Grays Lake	8.5		8.29	10.29	11.42	1.02	2.29	4.29			7.29	10.06
Libertyville	14.0		8.36	10.36	11.49	1.09	2.36	4.36			7.36	10.13
Rondout	17.2		8.41	10.41	11.54	1.14	2.41				7.41	10.17
Lake Forest	21.5		8.46	10.46	11.59	1.19	2.46	4.46			7.46	10.23
Deerfield	25.3	8.08	8.52	10.52	12.05	1.25	2.52	4.52	5.52	6.52	7.52	10.28
Northbrook	28.4	8.13	8.57	10.57	12.10	1.30	2.57	4.57	5.57	6.57	7.57	10.33
Glenview	32.1	8.18	9.03	11.03	12.16	1.36	3.03	5.03	6.03	7.03	8.03	10.39
Golf	33.3	8.21	9.06	11.06	12.19	1.39	3.06	5.06	6.06		8.06	10.42
Morton Grove	35.2	8.24	9.09	11.09	12.22	1.42	3.09	5.09	6.09	7.09	8.09	10.45
Edgebrook	37.9	8.27	9.14	11.14	12.27	1.47	3.14	5.14	6.14	7.14	8.14	10.49
Forest Glen	39.3	8.32	9.17	11.17	12.30	1.50	3.17	5.17	6.17		8.17	10.53
Mayfair	40.5		9.20	11.20	12.33	1.53	3.20	5.20	6.20		8.20	10.56
Grayland	41.3		9.22	11.22	12.35	1.55	3.22	5.22	6.22		8.22	10.58
Healy	43.1	8.37	9.25	11.25	12.38	1.58	3.25	5.25	6.25		8.25	11.01
Western Ave.	46.6	8.42	9.30	11.30	12.43	2.03	3.30	5.30	6.30	7.25	8.30	11.06
Ar UNION STATION	49.5	8.52 AM	9.40 AM	11.40 AM	12.53 PM	2.13 PM	3.40 PM	5.40 PM	6.40 PM	7.35 PM	8.40 PM	11.15 PM

REDACTED PUBLIC RECORD VERSION

EXHIBIT G

NORTH LINE between CHICAGO and FOX LAKE

NORTHBOUND

MONDAY THROUGH FRIDAY

	Miles	2103 AM	2109 AM	2111 AM	2113 AM	2115 PM	2117 PM	2121 PM	2123 PM	2125 PM	2127 PM
Lv UNION STATION	0.0	6.38	8.35	9.50	11.05	12.25	2.10	3.55	4.33	4.42	4.46
Western Ave.	2.9	6.46	8.43	9.58	11.13	12.33	2.18	4.03	4.40		4.54
Healy	6.4	6.51	8.48	10.04	11.18	12.38	2.23	4.08		4.54	4.59
Grayland	8.2	6.54	8.51	10.07	11.21	12.41		4.11			
Mayfair	9.0	6.56	8.53	10.09	11.23	12.43		4.13			
Forest Glen	10.2	6.59	8.56	10.12	11.26	12.46		4.16			
Edgebrook	11.6	7.02	8.59	10.15	11.29	12.49	2.30	4.19			
Morton Grove	14.3	7.06	9.03	10.19	11.33	12.53	2.34	4.24	4.55		
Golf	16.2	7.09	9.06	10.22	11.36	12.56	2.36	4.27	4.58		
Glenview	17.4	7.12	9.09	10.25	11.39	12.59	2.39	4.30	5.01		5.12
Northbrook	20.9	7.17	9.15	10.31	11.44	1.04	2.44	4.35	5.05	5.10	
Deerfield	23.9	7.23	9.20	10.36	11.49	1.09	2.49	4.40	5.10		5.21
Lake Forest	28.0		9.25	10.41	11.54	1.14	2.54	4.45		5.18	
Rondout	32.3		9.30	10.46	12.00	1.19	3.00	4.50			
Libertyville	35.5		9.35	10.51	12.05	1.24	3.05	4.56	5.24	5.29	5.35
Grays Lake	41.0		9.42	10.58	12.12	1.31	3.12	5.04	5.32		5.43
Round Lake	44.0		9.46	11.02	12.16	1.35	3.16	5.09	5.37	5.41	5.48
Long Lake	46.0		9.50	11.06	12.19	1.39	3.19	5.12			5.51
Wilson Road	47.0		9.53	11.09	12.22	1.42	3.22	5.15			5.54
Ingleside	47.8			11.11		1.44	3.25	5.18			5.56
Ar FOX LAKE	49.5		10.00 AM	11.15 AM	12.30 PM	1.50 PM	3.30 PM	5.23 PM	5.45 PM	5.50 PM	6.01 PM

EXHIBIT G

NORTH LINE between CHICAGO and FOX LAKE

NORTHBOUND

MONDAY THROUGH FRIDAY

les	2129 PM	2131 PM	2133 PM	2135 PM	2137 PM	2139 PM	2141 PM	2143 PM	2145 PM	2147 AM
0	4.48	5.08	5.20	5.25	5.48	5.55	6.55	8.20	10.05	12.25
9	4.56			5.33	5.56	6.03	7.03	8.27	10.13	12.33
4	5.01			5.38	6.01	6.08	7.08	8.33	10.18	12.38
2	5.04			5.41		6.11	7.11	8.35		12.41
0	5.06			5.43		6.13	7.13	8.37		12.43
2	5.09			5.46		6.16	7.16	8.40	10.24	12.46
6	5.12			5.49		6.19	7.19	8.43	10.27	12.49
3	5.17			5.54		6.24	7.24	8.47	10.32	12.53
2	5.20			5.57		6.27	7.27	8.50	10.35	12.56
4	5.23	5.34	5.43	6.00	6.14	6.30	7.30	8.53	10.38	12.59
9	5.27	5.39	5.49	6.04	6.20	6.35	7.35	8.59	10.44	1.05
9	5.32	5.44	5.54	6.09	6.25	6.42	7.40	9.04	10.49	1.09
0		5.50		6.14	6.31		7.45	9.09	10.54	1.14
3				6.20	6.37		7.50			1.19
5		6.00	6.08	6.25	6.42		7.56	9.20	11.04	1.24
0		6.07	6.16	6.33	6.50		8.04	9.27	11.12	1.31
0		6.11	6.21	6.38	6.55		8.09	9.31	11.17	1.36
0			6.24	6.41	6.58		8.12	9.35	11.20	1.40
0				6.44	7.01		8.15	9.37	11.22	1.42
8				6.47	7.04		8.18	9.40		
5		6.21	6.33	6.53	7.10		8.23	9.45	11.28	1.47

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8-18

REDACTED PUBLIC RECORD VERSION

EXHIBIT G

NORTH LINE between CHICAGO and FOX LAKE

SOUTHBOUND

SATURDAY ONLY

	2100 AM	2602 AM	2604 AM	2126 AM	2606 PM	2132 PM	2136 PM	2142 PM	2146 PM
Lv FOX LAKE	5.02	6.49	7.48	10.12	12.12	2.12	4.12	7.12	9.50
Ingleside	5.05	6.52		10.15	12.15	2.15	4.15	7.15	
Wilson Road	5.07	6.54		10.17	12.17	2.17	4.17	7.17	9.54
Long Lake	5.10	6.57		10.20	12.20	2.20	4.20	7.20	9.57
Round Lake	5.14	7.01	7.55	10.24	12.24	2.24	4.24	7.24	10.01
Grays Lake	5.19	7.05	8.00	10.29	12.29	2.29	4.29	7.29	10.06
Libertyville	5.26	7.12	8.06	10.36	12.36	2.36	4.36	7.36	10.13
Rondout	5.32	7.17		10.41	12.41	2.41		7.41	10.17
Lake Forest	5.37	7.22	8.16	10.46	12.46	2.46	4.46	7.46	10.23
Deerfield	5.42	7.27	8.22	10.52	12.52	2.52	4.52	7.52	10.28
Northbrook	5.47	7.31	8.27	10.57	12.57	2.57	4.57	7.57	10.33
Glenview	5.52	7.37	8.32	11.03	1.03	3.03	5.03	8.03	10.39
Golf	5.55	7.40		11.06	1.06	3.06	5.06	8.06	10.42
Morton Grove	5.58	7.43	8.37	11.09	1.09	3.09	5.09	8.09	10.45
Edgebrook	6.03	7.47	8.42	11.14	1.14	3.14	5.14	8.14	10.49
Forest Glen	6.06	7.50		11.17	1.17	3.17	5.17	8.17	10.53
Mayfair	6.09	7.53	8.46	11.20	1.20	3.20	5.20	8.20	10.56
Grayland	6.11	7.55	8.48	11.22	1.22	3.22	5.22	8.22	10.58
Healy	6.15	7.58	8.50	11.25	1.25	3.25	5.25	8.25	11.01
Western Ave.	6.20	8.03	8.55	11.30	1.30	3.30	5.30	8.30	11.06
Ar UNION STATION	6.30 AM	8.14 AM	9.05 AM	11.40 AM	1.40 PM	3.40 PM	5.40 PM	8.40 PM	11.15 PM

NORTH LINE between CHICAGO and FOX LAKE

SOUTHBOUND

SUNDAY AND HOLIDAY

	2602 AM	2126 AM	2132 PM	2136 PM	2142 PM	2146 PM
Lv FOX LAKE	6.49	10.12	2.12	4.12	7.12	9.50
Ingleside	6.52	10.15	2.15	4.15	7.15	
Wilson Road	6.54	10.17	2.17	4.17	7.17	9.54
Long Lake	6.57	10.20	2.20	4.20	7.20	9.57
Round Lake	7.01	10.24	2.24	4.24	7.24	10.01
Grays Lake	7.05	10.29	2.29	4.29	7.29	10.06
Libertyville	7.12	10.36	2.36	4.36	7.36	10.13
Rondout	7.17	10.41	2.41		7.41	10.17
Lake Forest	7.22	10.46	2.46	4.46	7.46	10.23
Deerfield	7.27	10.52	2.52	4.52	7.52	10.28
Northbrook	7.31	10.57	2.57	4.57	7.57	10.33
Glenview	7.37	11.03	3.03	5.03	8.03	10.39
Golf	7.40	11.06	3.06	5.06	8.06	10.42
Morton Grove	7.43	11.09	3.09	5.09	8.09	10.45
Edgebrook	7.47	11.14	3.14	5.14	8.14	10.49
Forest Glen	7.50	11.17	3.17	5.17	8.17	10.53
Mayfair	7.53	11.20	3.20	5.20	8.20	10.56
Grayland	7.55	11.22	3.22	5.22	8.22	10.58
Healy	7.58	11.25	3.25	5.25	8.25	11.01
Western Ave.	8.03	11.30	3.30	5.30	8.30	11.06
Ar UNION STATION	8.14	11.40	3.40	5.40	8.40	11.15

EXHIBIT G

D-18

NORTH LINE between CHICAGO and FOX LAKE

NORTHBOUND

SUNDAY AND HOLIDAY

	2109 AM	2111 AM	2115 PM	2605 PM	2609 PM	2147 AM
Lv UNION STATION	8.35	9.50	12.25	5.40	9.20	12.25
Western Ave.	8.43	9.58	12.33	5.48	9.28	12.33
Healy	8.48	10.04	12.38	5.53	9.33	12.38
Grayland	8.51	10.07	12.41	5.56	9.36	12.41
Mayfair	8.53	10.09	12.43	5.58	9.38	12.43
Forest Glen	8.56	10.12	12.46	6.01	9.41	12.46
Edgebrook	8.59	10.15	12.49	6.04	9.44	12.49
Morton Grove	9.03	10.19	12.53	6.08	9.48	12.53
Golf	9.06	10.22	12.56	6.11	9.51	12.56
Glenview	9.09	10.25	12.59	6.15	9.54	12.59
Northbrook	9.15	10.31	1.04	6.21	10.00	1.05
Deerfield	9.20	10.36	1.09	6.26	10.05	1.09
Lake Forest	9.25	10.41	1.14	6.31	10.10	1.14
Rondout	9.30	10.46	1.19	6.36	10.17	1.19
Libertyville	9.35	10.51	1.24	6.41	10.22	1.24
Grays Lake	9.42	10.58	1.31	6.49	10.29	1.31
Round Lake	9.46	11.02	1.35	6.53	10.33	1.36
Long Lake	9.50	11.06	1.39	6.56	10.37	1.40
Wilson Road	9.53	11.09	1.42	6.58	10.39	1.42
Ingleside		11.11	1.44	7.00	10.41	
Ar FOX LAKE	10.00 AM	11.15 AM	1.50 PM	7.05 PM	10.45 PM	1.47 AM

EXHIBIT G

REDACTED PUBLIC RECORD VERSION

WEST LINE between CHICAGO and ELGIN

EASTBOUND

MONDAY THROUGH FRIDAY

	Miles	2200 AM	2202 AM	2204 AM	2206 AM	2208 AM	2210 AM	2212 AM	2214 AM	2216 AM	2218 AM	2220 AM
Lv ELGIN	0.0	5.00	5.52	6.25	-	6.40	6.50		7.03		7,29	7.50
Elgin (Nat'l St)	0.6	5.02	5.54	6.27		6.42	6.52		7.05		7.31	7.52
Bartlett	6.5	5.10	6.02	6.34	6.42	6.50		7.05	7.13		7.38	8.00
Hanover Park	8.2	5.13	6.05	6.37	6.45	6.53	7.02	7.08	7.15		7.41	8.02
# Schaumburg	10.1	5.15	6.07	6.40	6.48	6.56	7.05		7.17		7.44	8.05
Roselle	12.7	5.18	6.10	6.43	6.51	6.59	7.08	7.13	7.21		7.47	8.08
Medinah	13.6	5.20	6.13		6.53			7.15			7.50	
Itasca	15.6	5.23	6.16	6.47	6.56	7.03	7.12		7.26		7.53	8.13
Wood Dale	17.5	5.26	6.19	6.50	6.59	7.06		7.20	7.30		7.56	8.16
Bensenville	19.4	5.29	6.22	6.55	7.04	7.11	7.17	7.24	7.35	7.45	7.59	8.19
Mannheim	22.6	5.35	6.28			7.16				7.51		
Franklin Park	23.4	5.38	6.30	7.00	7.09	7.18	7.23			7.53	8.05	8.25
River Grove	25.2	5.41	6.34	7.03	7.12		7.26	7.32		7.56		8.28
Elmwood Park	26.4	5.43	6.36	7.06	7.15	7.22	7.28	7.35		7.58		8.30
Mont Clare	27.1	5.45	6.38		7.17	7.24	7.30			8.00		
Mars	27.5	5.46	6.40		7.19		7.32			8.02		
Galewood	28.0	5.48	6.42			7.26		7.39		8.04		
Hanson Park	28.9	5.50	6.44		7.22		7.35			8.07		
Cragin	29.6	5.53	6.46	7.14	7.25	7.29				8.09		
Hermosa	30.7	5.57	6.51	7.17	7.28	7.32	7.39	7.44		8.12		
Western Ave.	33.7	6.04	6.56	7.23	7.34	7.39	7.45	7.50	7.52	8.17	8.23	8.45
Ar UNION STATION	36.6	6.15 AM	7.08 AM	7.35 AM	7.45 AM	7.50 AM	7.55 AM	8.02 AM	8.05 AM	8.26 AM	8.34 AM	8.55 AM

Service to this station will begin on or about November 1, 1982. Schedule as contained in Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in effect until service begins to the Schaumburg station.

EXHIBIT G

REDACTED PUBLIC RECORD VERSION

WEST LINE between CHICAGO and ELGIN

EASTBOUND

SATURDAY ONLY

	2200 AM	2202 AM	2214 AM	2216 AM	2218 AM	2222 AM	2224 AM	2704 PM	2228 PM	2236 PM	2246 PM	2250 PM
Lv Elgin	5.00	5.52	7.03		7.29	8.55	11.05		2.05	5.05	7.10	9.35
Elgin (Nat'l St.)	5.02	5.54	7.05		7.31	8.57	11.07		2.07	5.07	7.12	9.37
Bartlett	5.10	6.02	7.13		7.38	9.05	11.15		2.15	5.15	7.20	9.45
Hanover Park	5.13	6.05	7.15		7.41	9.08	11.18		2.18	5.18	7.23	9.48
# Schaumburg	5.15	6.07	7.17		7.44	9.11	11.21		2.21	5.21	7.26	9.49
Roselle	5.18	6.10	7.21		7.47	9.14	11.24		2.24	5.24	7.29	9.52
Medinah	5.20	6.13			7.50	9.17	11.27		2.27	5.27	7.32	9.54
Itasca	5.23	6.16	7.26		7.53	9.20	11.30		2.30	5.30	7.35	9.57
Wood Dale	5.26	6.19	7.30		7.56	9.23	11.33		2.33	5.33	7.38	9.59
Bensenville	5.29	6.22	7.35	7.45	7.59	9.26	11.36	2.10	2.36	5.36	7.41	10.02
Mannheim	5.35	6.28		7.51		9.32	11.42		2.42	5.42	7.47	10.07
Franklin Park	5.38	6.30		7.53	8.05	9.34	11.43		2.44	5.44	7.49	10.09
River Grove	5.41	6.34		7.56		9.37	11.47		2.47	5.47	7.52	10.12
Elmwood Park	5.43	6.36		7.58		9.39	11.49		2.49	5.49	7.54	10.14
Mont Clare	5.45	6.38		8.00		9.41	11.51		2.51	5.51	7.56	10.16
Mars	5.46	6.40		8.02		9.43	11.53		2.53	5.53	7.58	10.18
Galewood	5.48	6.42		8.04		9.45	11.55		2.55	5.55	8.00	10.20
Hanson Park	5.50	6.44		8.07		9.48	11.58		2.58	5.58	8.03	10.23
Cragin	5.53	6.46		8.09		9.51	12.01		3.00	6.00	8.05	10.26
Hermosa	5.57	6.51		8.12		9.54	12.03		3.03	6.03	8.08	10.29
Western Ave.	6.04	6.56	7.52	8.17	8.23	9.59	12.09	2.27	3.09	6.09	8.14	10.34
Ar UNION STATION	6.15 AM	7.08 AM	8.05 AM	8.28 AM	8.34 AM	10.10 AM	12.20 PM	2.40 PM	3.20 PM	6.20 PM	8.25 PM	10.45 PM

Service to this station to begin on or about November 1, 1982

Schecule as contained in Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in effect until service begins to the Schaumburg station.

EXHIBIT G

WEST LINE between CHICAGO and ELGIN

EASTBOUND

SUNDAY AND HOLIDAY

	2700 AM	2702 AM	2224 AM	2228 PM	2236 PM	2248 PM
Lv ELGIN	6.36	8.20	11.05	2.05	5.05	8.30
Elgin (Nat'l St.)	6.38	8.22	11.07	2.07	5.07	8.32
Bartlett	6.44	8.29	11.15	2.15	5.15	8.40
Hanover Park	6.46	8.32	11.18	2.18	5.18	8.43
# Schaumburg	6.48	8.34	11.21	2.21	5.21	8.46
Roselle	6.50	8.37	11.24	2.24	5.24	8.49
Medinah	6.52	8.39	11.27	2.27	5.27	8.52
Itasca	6.55	8.42	11.30	2.30	5.30	8.55
Wood Dale	6.58	8.45	11.33	2.33	5.33	8.58
Bensenville	7.02	8.49	11.36	2.36	5.36	9.01
Mannheim	7.07	8.55	11.42	2.42	5.42	9.07
Franklin Park	7.09	8.58	11.43	2.44	5.44	9.09
River Grove	7.12	9.01	11.47	2.47	5.47	9.12
Elmwood Park	7.14	9.03	11.49	2.49	5.49	9.14
Mont Clare	7.16	9.05	11.51	2.51	5.51	9.16
Mars	7.18	9.07	11.53	2.53	5.53	9.18
Galewood	7.20	9.09	11.55	2.55	5.55	9.20
Hanson Park	7.23	9.11	11.58	2.58	5.58	9.23
Cragin	7.26	9.13	12.01	3.00	6.00	9.25
Hermosa	7.30	9.15	12.03	3.03	6.03	9.28
Western Ave.	7.35	9.20	12.09	3.09	6.09	9.34
Ar UNION STATION	7.46	9.30	12.20	3.20	6.20	9.45
	AM	AM	PM	PM	PM	PM

Service to this station to begin on or about November 1, 1982

Schedule as contained in Chicago, Milwaukee, St. Paul & Pacific Railroad Company Employee Timetable No. 2 dated April 25, 1982 shall remain in effect until service begins to the Schaumburg station.

Exhibit H

Escrow No. _____

ESCROW AGREEMENT

To: Bank of LaGrange Park
Oak Avenue at Sherwood
LaGrange Park, Illinois 60525

The following property is deposited with you by the Regional Transportation Authority:

Five Hundred Thousand Dollars ($500,000)

As Escrowee, you are hereby directed to hold, deal with and dispose of the aforesaid property and any other property at any time held by you hereunder in the following manner, subject however, to the terms and conditions hereinafter set forth:

1. For purposes of this Agreement, the following terms shall have the following meanings:

(a) "Authority" -- The Regional Transportation Authority.

(b) "Claim Notice" -- A notice from the Milwaukee to the Escrowee, which notice shall: (i) be signed by the principal operating officer of the Milwaukee or, in his absence, the Milwaukee's Vice-President of Finance; (ii) state that the Authority has failed to pay the amounts specified in the Applicable Provisions of the Subject Agreements within the time period prescribed for such payment by such provisions; (iii) specify the amounts which the Authority has failed to pay, the date or dates on which such payments were to be made by the Authority, and the basis for claiming that the payment was to be made by the Authority and that the Authority has failed to make such payments within the prescribed time period; and (iv) state that the Milwaukee has given to the Authority, at least ___ business days prior to Milwaukee's submission of the Claim Notice to the Escrowee, a copy of such Claim Notice.

(c) "Milwaukee" -- Richard B. Ogilvie, Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

(d) "Applicable Provisions of the Subject Agreements" -- Section 16.2 of the Trackage Agreement dated _____ between the Milwaukee and the Authority; Section 7 of the Lease of Stations and Station Grounds dated _____ between the Milwaukee and the Authority; Section ___ of the Lease of Western Avenue Yard dated _____ between the Milwaukee and the Authority; Section __ of the Lease of the Fox Lake Yard dated _____ between the Milwaukee and the Authority; and Section ___ of the Lease of the Elgin Yard dated _____ between the Milwaukee and the Authority.

2. Upon receipt of a Claim Notice from the Milwaukee, you are directed to pay, from the principal amount then on deposit with you, to the Milwaukee the amount which the Milwaukee has, pursuant to subparagraph 1(b) of this Escrow Agreement, stated that the Authority has failed to pay. You shall give notice to the Authority of such payment immediately after making such payment.

3. The Milwaukee shall not submit a Claim Notice to the Escrowee unless and until the Milwaukee gives the Authority, at least 3 business days prior to the Milwaukee's submission of the Claim Notice to the Escrowee, a copy of such Claim Notice.

4. At the direction of the Authority, you are directed to invest the principal balance held by you hereunder in such investments in which the Authority is authorized by law to invest with a maturity not in excess of 31 days.

5. Upon receipt of any investment earnings, you are directed to pay such earnings to the Authority.

6. To the extent necessary to make any payment pursuant to paragraph 2 above, you are directed to liquidate investments made pursuant to paragraph 4 above.

7. Each time the principal balance held by you hereunder is less than $500,000 for a period of more than 10 days, you are directed to notify the Milwaukee and the Authority of the principal balance and the date on which such balance last was $500,000 or more. For the purpose of determining the principal balance held by you, you are directed to value any investments at your cost.

8. Upon receipt from the Milwaukee and the Authority of notice of the termination of this Agreement, you are directed to distribute all the property held hereunder to the Authority.

9. This Agreement is binding on Richard B. Ogilvie, not as an individual, but solely in his capacity as Trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor. After approval by the Reorganization Court the Milwaukee waives any right pursuant to section 77 of the Bankruptcy Act or any other federal law to reject or disaffirm this Agreement.

TERMS AND CONDITIONS

10. Your duties and responsibilities shall be limited to those expressly set forth in these escrow instructions, and you shall not be subject to, nor obliged to recognize, any other agreement between, or direction or instruction of, any or all of the parties hereto even though reference thereto may be made herein: provided, however, with your written consent,

these escrow instructions may be amended at any time or times by an instrument in writing signed by all the then parties in interest.

11. You are authorized, in your sole discretion, to disregard any and all notices or instructions given by any of the undersigned or by any other person, firm or corporation, except only such notices or instructions as are hereinabove provided for and orders or process of any court entered or issued with or without jurisdiction. If any property subject hereto is at any time attached, garnished, or levied upon under any court order or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then and in any of such events you are authorized in your sole discretion, to rely upon and comply with any such order, writ, judgment or decree which you are advised by legal counsel of your own choosing is binding upon you; and if you comply with any such order, writ, judgment or decree you shall not be liable to any of the parties hereto or to any other person, firm or corporation by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

12. You shall not be personally liable for any act taken or omitted hereunder if taken or omitted by you in good faith and in the exercise of your own best judgment. You shall also be fully protected in relying upon any written notice, demand, certificate or document which you in good faith believe to be genuine.

13. Unless otherwise specifically indicated herein you shall proceed as soon as practicable to collect any checks or other collection items at any time deposited hereunder. All such collections shall be subject to the usual collection agreement regarding items received by your commercial banking department for deposit or collection. You shall not be required to have a duty to notify anyone of any payment or maturity under the terms of any instrument deposited hereunder, nor to take any legal action to enforce payment of any check, note or security deposited hereunder. You shall have no liability to pay interest on any money deposited or received hereunder (except as provided in paragraphs 4 and 5 above).

14. You shall not be responsible for the sufficiency or accuracy of the form, execution, validity or genuineness of documents or securities now or hereafter deposited hereunder, or of any endorsement thereon, or for any lack of endorsement

thereon, or for any description therein, nor shall you be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such document, security or endorsement or these escrow instructions.

15. Any notices which you are required or desire to give hereunder to any of the undersigned shall be in writing and may be given by mailing the same to the address indicated below opposite the signature of such undersigned (or to such other address as said undersigned may have theretofore substituted therefor by written notification to you), by United States mail, postage prepaid. For all purposes hereof any notice so mailed shall be as effectual as though served upon the person of the undersigned to whom it was mailed at the time it is deposited in the United States mail by you whether or not such undersigned thereafter actually receives such notice. Notices to you shall be in writing and shall not be deemed to be given until actually received by your employee or officer who administers this escrow. Whenever under the terms hereof the time for giving a notice or performing an act falls upon a Saturday, Sunday or holiday, such time shall be extended to the next business day. Notices between the Milwaukee and the Authority shall not be deemed to be given until actually received.

16. In case you become involved in litigation on account of being escrowee hereunder or on account of having received property subject hereto, your costs, expenses and reasonable attorneys' fees shall be paid by the party that does not prevail in the litigation or as agreed by the parties in any settlement of the litigation.

17. You shall be paid your reasonable fees for your services and reimbursed for your costs and expenses hereunder by the Authority.

18. If your fees, costs expenses, or reasonable attorneys' fees provided for herein, are not promptly paid, you shall have the right to sell a sufficient portion of the property held hereunder to provide for such payment and reimburse yourself therefor from the proceeds of such sale or from the cash held hereunder.

19. It is understood that you reserve the right to resign as Escrowee at any time by giving 30 days written notice of your resignation, specifying the effective date thereof, to the undersigned. Within 30 days after receiving the aforesaid notice, the Authority shall appoint a successor Escrowee to which you may distribute the property then held hereunder, less

your fees, costs and expenses. If a successor Escrowee has not been appointed and has not accepted such appointment by the end of the 30 day period, you may apply to a court of competent jurisdiction for the appointment of a successor Escrowee, and the Authority shall pay the costs, expenses and reasonable attorneys' fees which you incur in connection with such a proceeding.

20. If, by its terms, this escrow shall not have previously terminated, then it shall terminate on December 31, 1989, at which time the property then held hereunder, less your fees, costs and expenses shall be distributed to the Authority.

21. This escrow agreement shall be construed, enforced, and administered in accordance with the laws of the State of Illinois. The Authority may assign its rights hereunder to the Northeast Illinois Regional Commuter Railroad Corporation.

22. The undersigned Escrowee hereby acknowledges receipt of the property described in the above Escrow Agreement and agrees to hold, deal with and dispose of said property and other property at any time held by it hereunder in accordance with the foregoing Escrow Agreement.

23. Executed this ____ day of _____, 1982 at Chicago, Illinois.

PARTIES TO ESCROW	ADDRESSES
Regional Transportation Authority By: _____ Lewis W. Hill, Chairman	300 North State Street Chicago, Illinois 60611 Attn: Contract Manager
Richard B. Ogilvie, Trustee of the Property of the Chicago Milwaukee, St. Paul and Pacific Railroad Company	874 Union Station Building 516 West Jackson Boulevard Chicago, Illinois 60606
_____	
Bank of LaGrange Park By: _____ Donald H. Schwiesow, President	Oak Avenue at Sherwood LaGrange Park, Illinois 60525

ATTEST:

_____

Trackage Agreement
Exhibit I

Primary Accounts

Account Number	Description
1	Engineering
2	Land for transportation purposes
3	Grading
6	Bridges, trestles and culverts
8	Ties
9	Rail
10	Other track material
11	Ballast
12	Track laying and surfacing
13	Fences, snowsheds and signs
16	Stations and office buildings
17	Roadway buildings
26	Communication systems
27	Signals and interlockers
29	Power plants
31	Power transmission systems
39	Public improvements
45	Power plant machinery

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 2

HIGHLY CONFIDENTIAL - THE "1984 ASSET PURCHASE AGREEMENT" - ASSET PURCHASE AGREEMENT BETWEEN SOO LINE RAILROAD COMPANY AND SLRCO, INC, ON THE ONE HAND, AND RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY (APR. 6, 1984) (EXCERPTS)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 3

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R., R.R., REORGANIZATION NO. 77 B 8999, ORDER NO. 809 (N.D. ILL. FEB. 19, 1985) (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of	)	
	)	In Proceedings for
CHICAGO, MILWAUKEE, ST. PAUL	)	the Reorganization of
AND PACIFIC RAILROAD COMPANY,	)	a Railroad
	)	
Debtor.	)	No. 77 B 8999
	)	Thomas R. McMillen, Judge

ORDER NO. 809

Upon consideration of the matter of the sale, pursuant to Sections 4 and 5(b) of the Milwaukee Railroad Restructuring Act ("MRRA"), notice having been given to all parties, of the Rail Assets, as defined in and pursuant to an Asset Purchase Agreement dated April 6, 1984, as amended (the "APA"), to be entered into between Richard B. Ogilvie, not personally, but solely as trustee ("Trustee") of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Soo Line Railroad Company, a Minnesota corporation ("Soo"), and SLRCO, Inc., a Minnesota corporation ("SLRCO"), the Court, acting as the Court of Reorganization for the Milwaukee pursuant to Section 77 of the Bankruptcy Act of 1898 and pursuant to Section 4 and Section 5(b) of the MRRA finds and concludes as follows:

1. Soo and SLRCO filed an application with the Interstate Commerce Commission (the "Commission") seeking approval of a purchase of the Rail Assets. In addition, Chicago and North Western Transportation Company ("CNW") filed its application seeking the purchase of essentially similar assets.

2. The Commission rendered its decision on September 26, 1984 with respect to the application of Soo and SLRCO to purchase the assets specified in the APA. That decision, inter alia, approved the application pursuant to Section 11344(b) of the Interstate Commerce Act, Section 5(b) of the MRRA, and Section 77 of the Bankruptcy Act of 1898. The Commission served its further decision with respect to CNW's modified application on January 11, 1985, which decision incorporated certain portions of its September 26, 1984 decision.

3. The Court has ~~heard~~ considered the evidence adduced, heard the arguments of counsel, and the oral and written applications of various parties in interest seeking review of and commenting upon the Commission's September 26, 1984 and January 11, 1985 decisions, including those of the Trustee, Burlington Northern Railroad Company, Chicago Milwaukee Corporation, Escanaba and Lake Superior Railroad Company, First National Bank of Chicago (as Indenture Trustee), Grand Trunk Corporation, Bruce E. Hendry and Mobil Oil Corporation, the

Commission, LaSalle National Bank (as Successor Corporate Trustee), the City of Milwaukee, Wisconsin, CNW, the Chicago, Milwaukee, St. Paul and Pacific Railroad Bond and Debenture Holders Protective Committee (the "Protective Committee"), Railway Labor Executives' Association, Soo, States of Iowa, Minnesota and Wisconsin Departments of Transportation, the United States, United Transportation Union Local No. 528, Wisconsin Power and Light Company, Green Hills Regional Planning Commission, North Dakota Public Service Commission, Seaboard System Railroad, Inc., Harold E. Spencer, Peter N. Todhunter and Richard James Stevens, State of Missouri, South Dakota Department of Transportation, Coalition to Save The Milwaukee and "Certain Employees for the Milwaukee".

4. Section 5(b)(2) of the MRRA empowers this Court to review the order of the Commission entered under that Section only under Sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5 of the United States Code. The Commission has certified to this Court the full record of proceedings before it in connection with the decision of September 26, 1984 and the decision of January 11, 1985. The Court has considered and reviewed the findings and decisions of the Commission filed with this Court, pursuant to the requirements of those sections. The Court has further considered the allegations of error contained in

the petitions for review and comments and has found that the Commission's findings and decisions should be and are approved by this Court, since the findings and decisions were in accordance with law and were not arbitrary, capricious, an abuse of discretion, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority or limitations, short of statutory right, or without observance of procedure required by law.

5. The Court has ~~heard~~ considered the evidence adduced, the arguments of counsel, and the oral and written arguments of various parties in interest expressing a preference for or objecting to the approval of the sale to either the Soo and SLRCO or CNW, including those of the Trustee, Burlington Northern Railroad Company, Chicago Milwaukee Corporation, Escanaba and Lake Superior Railroad Company, First National Bank of Chicago (as Indenture Trustee), Grand Trunk Corporation, Bruce E. Hendry and the Mobil Oil Corporation, LaSalle National Bank (as Successor Corporate Trustee), the City of Milwaukee, Wisconsin, North Dakota Public Service Commission, CNW, the Protective Committee, Railway Labor Executives' Association, Soo, States of Iowa, Minnesota and Wisconsin Departments of Transportation, Stickney Corporation, the United States, United Transportation Union Local No. 528, Wisconsin Power and Light Company, Green Hills Regional Planning Commission, Seaboard System Railroad,

Inc., State of Missouri, South Dakota Department of Transportation, Coalition to Save The Milwaukee and "Certain Employees of the Milwaukee". The Court has considered the Commission's findings with respect to the public interest, the Commission's vote and basis for its preference for the Soo and SLRCO over CNW, the consideration to be paid to the Debtor's estate, the amount of wages to be paid to employees and other relevant matters. The prompt sale of the Rail Assets to Soo and SLRCO for the continued provision of common carrier service in return for the consideration specified in the APA (including the assumption of certain liabilities of the Milwaukee's estate) is in the best interest of the Milwaukee's estate and of ultimate reorganization of the Milwaukee, and is consistent with the public interest. ~~Soo and SLRCO are bona fide purchasers within the meaning of Rule 8-703 of the Bankruptcy Rules of the Supreme Court of the United States.~~

6. The immediate execution by the Trustee of the APA, and the prompt closing of the transactions in the manner and time contemplated by the APA, are in the best interests of the Milwaukee's estate.

7. The Trustee has issued certain Trustee Certificates during the course of these proceedings which were purchased by the United States Department of Transportation ("DOT") and the Federal Financing Bank pursuant to Sections

505 and 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 and Section 7 of the MRRA. The estate also is liable to the DOT under the terms of its Series I Redeemable Preference Shares issued in 1977 prior to the Milwaukee's filing for reorganization. The Trustee's obligations under the above Trustee Certificates and under the Preference Shares will be assumed at closing by Soo and SLRCO in the manner provided in the APA.

8. The purchase of the Rail Assets together with prior purchases approved by this Court constitute the purchase of substantially all of the Milwaukee Railroad for purposes of Section 7(h)(1)(B) of the MRRA (as amended by Section 701(c)(1) of the Staggers Rail Act of 1980), 45 USC §906(h)(1)(B), and all obligations to the United States or any agency or instrumentality of the United States incurred pursuant to Section 7 of the MRRA by the Milwaukee or the Trustee, including Trustee Certificates 1980 A and B are waived and cancelled.

9. The sale of the Rail Assets and the assignment and assumption of the trackage agreements, joint facilities and operating rights over segments of the rail properties now operated by the Trustee are in the public interest (as determined by the Commission and affirmed by this Court) and are in the best interest of the estate as

found by this Court. The assignment and assumption of the trackage agreements, interests in or agreements with respect to joint facilities, leases, operating rights and all other rights and interests of the Trustee being assigned pursuant to the APA will not effect a termination of the Trustee's rights and interests under the contracts, leases and agreements granting those rights and interests, and those rights and interests are [redacted] assignable to Soo and SLRCO in accordance with the terms of the APA, and notwithstanding any provisions in any such contracts, leases or agreements to the contrary.

10. Section 5 of the MRRA mandates that the Court require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of title 49 of the United States Code. In prior sales of lines of railroad pursuant to Section 5, the Court imposed "Appendix B Conditions" (report of the Special Master dated February 20, 1980) which were found to be as protective as statutorily required and consistent with both the scheme and language of the MRRA by the Court of Appeals for the Seventh Circuit in Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Consolidated Appeals of Railway Labor Executives' Association, 658 F.2d 1149 (7th Cir. Aug. 17, 1981), cert. den. 455 U.S. 1000 (Mar. 8, 1982).

11. Section 5 of the MRRA does not require that labor protective conditions be imposed with respect to employees of The Milwaukee Motor Transportation Company, and the Court finds that such conditions ~~are unnecessary~~ should not be imposed. then

12. The additional findings and conclusions of law, not inconsistent with the provisions of this Order, made pursuant to Rule 52 by the Court orally on February 8, 1985, are incorporated in this Order by reference and made a part of this Order.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the sale and assignment to Soo and SLRCO, in accordance with the APA and this Order, of the Trustee's right, title and interest in the Rail Assets are approved and confirmed in all respects. The Rail Assets shall, upon conveyance, be free and clear of all liens, security interests, claims and encumbrances, of whatever nature, whenever arising, including without limitation those arising from federal, state and local tax claims or liens, those arising from that certain First Mortgage dated as of January 1, 1944 with Continental Illinois National Bank and Trust Company of Chicago, Indenture Trustee, and the General Mortgage dated as of January 1, 1944 with Harris Trust and Savings Bank, Indenture Trustee, and all mortgages supplemental thereto, except only liens, security interests,

claims and encumbrances created by, or specifically permitted to remain on the Rail Assets pursuant to, the APA.

2. That the Trustee is authorized and directed to execute promptly and deliver to Soo and SLRCO the APA, to consummate promptly the sale as set forth in the APA and to execute and deliver on or as soon as practicable after the Closing Date (as defined in the APA), all deeds, bills of sale, assignments, certificates of title, and other documents, and to take such other actions, as shall be required or appropriate to effectuate the transactions contemplated by the APA, including to the extent necessary under the circumstances as determined by the Trustee, modifications to the APA or the transaction required to result in a fully taxable transaction, so that for federal income tax purposes gain or loss will be fully recognized by the Milwaukee on the consummation of the sale, and that the net operating loss carry forwards and tax credits available to the Milwaukee immediately prior to the closing of the sale will be preserved to the Milwaukee.

3. That the Trustee is authorized and directed to assign to Soo or SLRCO, as appropriate, all of his rights under contracts as provided by the APA.

4. That the Trustee is authorized and directed to assign to Soo or SLRCO, as appropriate and in accordance with the APA, all of the trackage agreements, joint facili-

ties and operating rights necessary for Soo or SLRCO, as the case may be, to operate the Railroad (as defined in the APA).

5. That the Trustee is authorized and directed to assign to Soo or SLRCO, as appropriate, all labor contracts (including collective bargaining agreements) with respect to employees of the Trustee required by the APA to be offered employment by Soo or SLRCO.

6. That Soo and SLRCO, or either of them, assume each of the obligations and liabilities arising under the contracts or agreements assigned by the Trustee in accordance with paragraphs 3, 4 and 5 of this Order. In addition, Soo and SLRCO, or either of them, shall assume the Trustee's obligations under the Wage Deferral Agreement and the last two sentences of Paragraph 2b of the Wage Reduction Agreement, as specified in the APA as modified in the December 4, 1984 letter agreement between the Soo and the Trustee, the obligations of the Trustee under the Trustee Certificates issued to DOT and the Federal Financing Bank pursuant to Sections 505 and 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 or Section 7 of the MRRA (excluding Trustee Certificates 1980 A and B), the obligations with respect to the Series I Redeemable Preference Shares, the obligations of the Trustee with respect to any labor conditions imposed with respect to the transactions contemplated by the APA and other obligations and liabilities

of the Trustee to be assumed by Soo and SLRCO, or either of them, pursuant to the APA. After the Closing (as defined in the APA), all obligations and liabilities of the Trustee to be assumed by Soo or SLRCO in accordance with this Order or the APA and not otherwise discharged shall be the sole obligation of Soo or SLRCO, or both, as the case may be, and the Trustee and the Milwaukee shall be relieved from any and all liabilities in connection with or arising out of such obligations except as expressly may be provided otherwise by the APA, whether occuring after the Closing or arising out of the conveyance or assignment; provided, however, the foregoing shall not impose on Soo or SLRCO any liability or obligation not imposed upon or assumed by them in accordance with the terms of the APA.

7. That all prepetition obligations and debts of the Trustee and Debtor and its subsidiaries to Soo and its subsidiaries are cancelled. In addition, all outstanding debts and obligations of the Trustee and Debtor and any of its subsidiaries arising out of facilities embargoed or abandoned prior to Closing are cancelled.

8. That the sale, transfer and assigment of the Rail Assets is without warranties, representations or guaranties of any kind, expressed or implied, except as specifically stated in the APA.

9. That upon consummation of the transactions contemplated by the APA, all common carrier obligations of the Trustee and Debtor be assumed by Soo and SLRCO, and shall cease as to the Trustee and Debtor.

10. Subject to the agreement of Soo and SLRCO with representatives of employees to labor protection conditions at least as protective as those specified below, the conditions contained in Appendix B to the Report of the Special Master dated February 20, 1980 are adopted for the protection of employees of Soo and Milwaukee Road affected by the transactions contemplated by the APA; Section 4(e) is included therein as specified in Order No. 276B; Appendix B is also modified as provided in Order No. 409A. Notwithstanding the foregoing, no labor protective conditions are imposed with respect to the employees of The Milwaukee Motor Transportation Company.

11. That the Court shall retain jurisdiction over this matter for the purpose of implementing and carrying out the APA and resolving any disputes arising under or with respect to the APA, this Order or the Closing. The ICC shall have such continuing jurisdiction over this transaction as is by law vested in it.

12. That the rights, claims, liens and interests of any creditor of, or claimant against, the Debtor's estate which are not assumed by Soo or SLRCO in accordance with

this Order or adjudicated by this Order as applying to the Rail Assets which are sold, transfered or assigned pursuant to this Order shall be, upon the Closing, transferred from the Rail Assets to the net proceeds of the sale; such net proceeds shall, until further order of this Court, be deposited and retained in the existing trust account bearing the designation "Escrow Agent Account" No. 13-01043-4 at the Continental Illinois National Bank and Trust Company of Chicago and shall be invested pursuant to this Court's Order No. 536 in accordance with instructions from the Trustee or a person designated by him.

13. That following the closing of the sale and pending the earlier of (i) further order of this Court, (ii) the date on which this Order authorizing the sale shall not have been reversed and no further appeal may be taken by any party or (iii) 90 days after the Closing Date, Soo and SLRCO are directed to conduct the operations of the Railroad, (as defined in the APA), and to maintain the Rail Assets, subject to additions and dispositions in the ordinary course, on a basis reasonably designed to account for the operations of the Railroad and the identification of the Rail Assets subsequent to their transfer to Soo and SLRCO.

14. All requests for relief pertaining to the subject matter of this Order not otherwise granted by this Order shall be considered denied.

15. Directions contained in this Order shall be carried out forthwith.

Dated:

ENTER

Thomas R. McMillen
United States District Judge

Feb. 19, 1985

A true copy-Attest
H. Stuart Cunningham, Clerk
By Kathleen Branch
Deputy Clerk
U. S. District Court, Northern District of Illinois
Date: FEB 19 1985

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 4

THE "1985 TRACKAGE AGREEMENT" - TRACKAGE AGREEMENT BETWEEN RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, DEBTOR AND SLRCO, INC. (FEB. 19, 1985) (EXCERPTS) (ALSO METRA COMMENTS EXH. A-2)

EXHIBIT A-2

SLRCO 1985 Inc. Trackage Agreement

T 00640

EXHIBIT G-1

TRACKAGE AGREEMENT

THIS AGREEMENT, made and entered into this 19th day of February, 1985, by and between RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR ("Milwaukee"), and SLRCO, INC. a Minnesota corporation ("SLRCO").

The parties hereto agree as follows:

ARTICLE I.

JOINT LINE DEFINED

1.1 The term "Joint Line" refers to the following trackage, as shown in approximation on Exhibit A, and ancillary facilities between Madison Street, Chicago, Illinois (Mile Post 0.2) and Fox Lake, Illinois (Mile Post 49.79) ("North Line") and between Tower A-5 (Mile Post 5.26) and Almora, Illinois (Mile Post 40.26) ("West Line"): (a) the right of way and improvements thereto, including, but not limited to, rails, ties, ballast, switches, turnouts, wyes, crossovers, bridges, culverts, fills, cuts, right of way fences, embankments, tunnels and grade crossings and grade crossing signals; (b) sidings and spurs, except industry owned spurs; (c) signals and communication facilities; (d) interlocking devices;

(e) towers, sheds, buildings and structures; and (f) such other property, equipment and facilities necessary to the provision of freight service and intercity passenger service ("Service") on the North line and West Line and used by the Milwaukee in the normal course of providing Service. The Joint Line shall not include air rights.

1.2 For the purposes of equitably dividing the monthly expenses for billing purposes between the two parties, the Joint Line shall be divided on a zone basis as follows:

a. North Line

Zone 1 (1 main). Between Fox Lake, Illinois (Mile Post 49.79) and Rondout, Illinois (Mile Post 32.25).

Zone 2 (1 and 2 mains). Between Rondout, Illinois (Mile Post 32.25) and Deerfield, Illinois (Mile Post 24.58).

Zone 3 (1 and 2 mains). Between Deerfield, Illinois (Mile Post 24.58) and Tower A-20, Techny, Illinois (Mile Post 20.63).

Zone 4 (1 and 2 mains). Between Tower A-20, Techny, Illinois (Mile Post 20.63) and Tower A-5, Chicago, Illinois (Mile Post 5.85).

Zone 5 (1, 2 and 3 mains). Between Tower A-5, Chicago, Illinois (Mile Post 5.85) and Tower A-2, Chicago, Illinois (Mile Post 3.02).

Zone 6 (1, 2 and 3 mains). Between Tower A-2, Chicago, Illinois (Mile Post 3.02) and Canal Street, Chicago,

Illinois (Mile Post 0.57), such mains being jointly owned by Milwaukee and The Consolidated Rail Corporation ("Conrail") under an Agreement dated February 7, 1873, as amended.

Zone 7 (1 and 2 mains). Between Lake Street, Chicago, Illinois (Mile Post 0.55) and Madison Street, Chicago, Illinois (Mile Post 0.20), such mains being jointly owned by Milwaukee and Conrail under an Agreement dated February 7, 1873, as amended.

b. West Line (1 and 2 Mains)

Zone 8. Between Almora, Illinois (Mile Post 40.26) and Elgin, Illinois (Mile Post 36.64).

Zone 9. Between Elgin, Illinois (Mile Post 36.64) and Spaulding, Illinois (Mile Post 32.75).

Zone 10. Between Spaulding, Illinois (Mile Post 32.75) and Tower B-17, Bensenville, Illinois (Mile Post 16.87).

Zone 11. Between Tower B-17, Bensenville, Illinois (Mile Post 16.87) and Tower B-12, Franklin Park, Illinois (Mile Post 12.82).

Zone 12. Between Tower B-12, Franklin Park, Illinois (Mile Post 12.82) and Tower A-5, Chicago, Illinois (Mile Post 5.11).

ARTICLE II.

GRANT FOR OPERATION OF TRAINS

2.1 Milwaukee grants to SLRCO the non-exclusive right to use the Joint Line solely for the purpose of providing Service over the Joint Line, and the exclusive right to provide Service to industries on the Joint Line. SLRCO's right to use the Joint Line shall be in common with the Regional Transportation Authority and its assignee, Northeast Illinois Regional Commuter Railroad Corporation (collectively "RTA") pursuant to a Trackage Agreement dated September 16, 1982 between the Milwaukee and RTA (the "RTA Agreement") and such other railroad company or companies previously or subsequently admitted to the use of any part of the Joint Line; provided that:

(a) Except for (1) FRA track inspections, (2) emergencies and (3) temporary detour usage of less than 30 days in a 12 month period, the Milwaukee shall not admit any third party to the use of any part of the Joint Line ("Third Party Use") which materially interferes with SLRCO's use (or the use of any third party admitted by SLRCO) of the Joint Line as contemplated by this Agreement.

(b) SLRCO shall not permit any third party (except Amtrak) to use or detour over any portion of the Joint Line or agree to operate on the Joint Line the trains, engines and cars

which in the normal course of business would not be considered the trains, engines or cars of SLRCO engaged in Service, except that SLRCO may admit a third party to use of the Joint Line in accordance with Section 2.3.

2.2 The rights herein granted to SLRCO to use the Joint Line are limited solely to the provision of Service; nothing in this Agreement shall be construed to give SLRCO or any third party the right to operate Commuter Service as defined in the RTA Agreement.

2.3 SLRCO may admit a third party to use of the Joint Line as long as:

(a) the third party's use of the Joint Line would not materially interfere with any other prior user of the Joint Line;

(b) the third party is not allowed any use of the Joint Line which would not be permitted to SLRCO under this Agreement; and

(c) the third party pays the Milwaukee an amount equal to its proportionate share of Reimbursable Expenses (defined below) and capital expenditures upon the same terms provided in this Agreement with respect to SLRCO, plus a fixed rental at least equal to a base rental of $645,000 per year escalated from March, 1984 in accordance with the provisions of Section 5.2(g) multiplied by the ratio of the route miles the

third party is admitted to use to the route miles of the entire Joint Line.

ARTICLE III.

CONSTRUCTION OF ADDITIONAL SIDINGS

3.1 As of the date of this Agreement, the sidings which exist on the Joint Line are sufficient to permit safe and efficient operation of the existing level of Commuter Service and Service over the Joint Line. The Milwaukee shall construct any additional sidings which are made necessary in its judgment by increased levels of traffic over the Joint Line or which are requested by SLRCO. The costs of the construction of these additional sidings shall be paid by:

(a) SLRCO, if the sidings are made necessary solely due to an increase in the operations of SLRCO or are requested by SLRCO;

(b) A third party, if the sidings are made necessary solely due to increases in the operations of a third party (including RTA) admitted to the use of the Joint Line;

(c) SLRCO and a third party pursuant to a separate agreement allocating such costs if the sidings are made necessary by increases in the operations of both SLRCO and a third party (including RTA) admitted to the use of the Joint Line.

ARTICLE IV.

RADIO COMMUNICATIONS EQUIPMENT

4.1 SLRCO shall, at its sole expense, maintain, repair and replace, as necessary, all radio communications equipment on its trains, engines and cars to permit safe and efficient operation on the Joint Line.

ARTICLE V.

PAYMENT

5.1 SLRCO shall pay to the Milwaukee the amounts described in this Article V. Payment shall be made in accordance with Article VI.

5.2 As used in this Agreement, the following terms shall have the meanings ascribed to them:

(a) Estimated SLRCO Summary Expense Bill -- the Milwaukee's reasonable and good faith estimate of SLRCO's proportionate share of Reimbursable Expenses for a calendar month.

(b) SLRCO Summary Expense Bill -- the monthly bill (or credit) submitted by the Milwaukee to SLRCO for SLRCO's proportion of Reimbursable Expenses for a calendar month, as computed pursuant to Section 5.4.

(c) Property Tax Bill -- the annual bill submitted by the Milwaukee to SLRCO for the payment of SLRCO's proportion-

ate share computed pursuant to Section 5.3 for general real estate taxes with respect to the Joint Line in the counties of Cook, Lake, DuPage and Kane within the State of Illinois.

(d) Gross Ton Mile Proportion -- the ratio determined by dividing the gross ton miles generated by all trains, engines, cars and contents (including passengers) by or on behalf of SLRCO in each zone of the Joint Line during a calendar month by the total number of gross ton miles generated by all trains, engines, cars and contents (including passengers) by or on behalf of the SLRCO and any third parties (including RTA) in each zone during that month. The number of passengers on each SLRCO or third party (including RTA) train during a month shall be determined on the basis of an annual joint study of the RTA and SLRCO.

(e) Train Count Proportion -- the ratio determined by dividing the number of trains operated by or on behalf of Parent in each zone of the Joint Line during a calendar month by the total number of all trains operated by or on behalf of the SLRCO and any third parties (including RTA) in each zone during that month.

(f) Reimbursable Expenses -- Reimbursable Expenses means the following expenses incurred by or on the account of the Milwaukee or on the account of SLRCO:

(1) the expenses incurred during the term of this Agreement and attributable to this Agreement as recorded in the Milwaukee's or SLRCO's accounts;

(2) the expenses properly chargeable to the zones defined in Section 1.2 of this Agreement;

(3) the ordinary and necessary expenses incurred for material (including normal handling charges), labor, health and welfare benefit, fuel, equipment rentals, payroll taxes (including "head" taxes), sales taxes, use taxes and excise taxes and miscellaneous expenses in maintaining, operating, repairing and renewing the Joint Line.

Reimbursable Expenses shall be accounted for by the accrual method of accounting in the Milwaukee's and SLRCO's accounts, consistently applied. Except as required by applicable ICC regulations, changes made by SLRCO or the Milwaukee in its accounting system shall not affect the timing of recognition of Reimbursable Expenses under this Agreement.

(g) Fixed Expense -- Fixed Expense shall mean $645,000 per year, payable in 12 equal monthly installments, which shall be adjusted in accordance with this paragraph. As of the first of March in each year beginning March 1, 1985, Fixed Expense shall be adjusted based on the ratio of the Consumer Price Index - Urban, All Items, United States City Average ("CPI-U") as published by the U.S. Department of Labor for that month to the CPI-U for March 1984. The adjustment shall be based on the first published final index for March of that year, or if not available, the first published final index for the most recently available prior month. Any adjustment based upon an index for a prior month shall be provisional, and

revisions to this provisional adjustment, if necessary, will be made at the time the first published final index for March is available. Should the CPI-U be discontinued or the basis for its calculation be substantially modified, a proper index shall be substituted by mutual agreement of the parties.

5.3 General real estate taxes payable by the Milwaukee with respect to the Joint Line on a county by county basis shall be allocated on the basis of the ratio of the unit-miles of the locomotives, cars and cabooses operated by or on behalf of SLRCO over the entire Joint Line during a calendar year to the unit-miles of all locomotives, cars and cabooses operated over the entire Joint Line during that year. Each yearly Property Tax Bill shall be initially based on the tax bills for the preceding year for which a definite tax bill is available and movements for the preceding year, and shall be adjusted, based on actual movements and actual tax bills, within 30 days of receipt of the actual tax bills for each year during the term of this Agreement. The Property Tax Bill for each year shall be submitted by the Milwaukee to SLRCO on or after August 1 of the year to which it applies, beginning with the year 1984 (for 1984 taxes), payable by the 15th day of the month after the month of receipt of the bill. The Property Tax Bill shall be pro-rated for a partial year; such prorations shall be made within 30 days after definite data requiring the proration becomes available.

The Milwaukee shall pay any balances due pursuant to such adjustment or proration within 30 days of an adjustment or proration; SLRCO shall pay any balance due pursuant to an adjustment or proration within 30 days after receipt of an invoice from the Milwaukee.

Any special assessments levied against the Joint Line shall be amortized over the useful life of the facility for the construction or improvement of which the special assessment was levied. The amount of such special assessment applicable to each calendar year of this Agreement shall be allocated between the parties, billed, paid, pro-rated and adjusted on the same basis as general real estate taxes.

5.4 SLRCO and the Milwaukee shall allocate Reimbursable Expenses as follows:

(a) Maintenance of way and structures expenses incurred for each zone of the Joint Line shall be allocated on a monthly basis between the parties on the Gross Ton Mile Proportion.

(b) Transportation, signal and communication systems expenses and maintenance expenses of non-Milwaukee owned equipment (used in the operation or maintenance of the Joint Line) incurred for each zone of the Joint Line shall be allocated on a monthly basis between the parties on a Train Count Proportion.

(c) Expenses for train dispatchers incurred in operating the Joint Line shall be allocated on a monthly basis by

the average of the Train Count Proportions for all zones of the Joint Line.

(d) The monthly allocated share of labor and fringe benefits expenses (including payroll taxes) determined in accordance with subparagraphs (a) through (c) above shall be increased for administrative overhead and vacation and holidays in accordance with Exhibit B.

(e) Monthly expenses incurred for joint facilities which are part of the Joint Line not solely owned by the Milwaukee, identified in Exhibit C, shall be allocated on a Train Count Proportion in the zone in which each facility is located.

5.5 All amounts to be paid by either party under this Agreement shall bear interest from the date the amount was due in accordance with this Agreement until paid at a rate equal to 2% in excess of the corporate base rate of interest announced from time to time by The First National Bank of Chicago, changing as and when such corporate base rate changes.

5.6 SLRCO shall have no liability for any payments or other obligations arising out of its use of the Joint Line pursuant to this Agreement except as provided in this Article V or specifically provided in another provision of this Agreement.

5.7 At the end of each calendar year the Milwaukee shall recalculate SLRCO's and the Milwaukee's respective pro-

portions of the charges set forth in section 5.4 on the basis of SLRCO's Gross Ton Mile Proportion and Train Count Proportion for such calendar year. Such recalculation shall be computed within 45 days after the expiration of such calendar year.

In the event that SLRCO's proportion of such charges for such calendar year exceeds the sum of SLRCO's proportion of such charges for each of the individual months during such calendar year, SLRCO shall pay the Milwaukee such difference within 30 days of such recalculation; and in the event that SLRCO's proportion of such charges for such calendar year is less than the sum of SLRCO's proportion of such charges computed for each of the individual months during such calendar year, the Milwaukee shall pay SLRCO such difference within 30 days of such recalculation or credit SLRCO with such amount in the next Estimated SLRCO Summary Expense Bill.

ARTICLE VI.

MANNER OF PAYMENT -- INSPECTION OF RECORDS

6.1 SLRCO shall pay Fixed Expense installments on the first day of each month, and shall pay the annual Property Tax Bill on or before the 15th day of the month following the month in which it was received.

6.2 On the first day of each calendar month the Milwaukee shall submit to SLRCO an Estimated SLRCO Summary

Expense Bill for that month. If the Estimated SLRCO Summary Expense Bill shows that SLRCO owes the Milwaukee, the amount owing shall be due within 15 days of receipt of the Estimated SLRCO Summary Expense Bill. If the Estimated SLRCO Summary Expense Bill shows that the Milwaukee owes SLRCO, the amount shall be paid to SLRCO within 30 days of the date of the Estimated SLRCO Summary Expense Bill.

The Milwaukee shall submit to SLRCO within 45 days after the end of each calendar month the SLRCO Summary Expense Bill for that month. If the Estimated SLRCO Summary Expense Bill showed more owing by SLRCO or less owing by the Milwaukee than the SLRCO Summary Expense Bill, the Milwaukee shall credit SLRCO with the excess in the following month's Estimated SLRCO Summary Expense Bill or pay the excess to SLRCO within 15 days. If the Estimated SLRCO Summary Expense Bill showed less owing by SLRCO or more owing by the Milwaukee than the SLRCO Summary Expense Bill, SLRCO shall pay the difference by the 15th day of the month following the month in which the SLRCO Summary Expense Bill is received.

6.3 SLRCO shall furnish to Milwaukee, within 15 days after the end of each calendar month during the term of this Agreement, a statement showing for that month: (a) the train count for the trains operated by or on behalf of SLRCO over each zone of the Joint Line; (b) the gross ton miles generated by the trains, engines and cars and contents operated by or on

behalf of SLRCO over each zone of the Joint Line; and (c) any expenses claimed by SLRCO as a reduction of Reimbursable Expenses. The statement shall be subject to verification and correction by the Milwaukee. If SLRCO fails to furnish the statement within the 15 day period, the Milwaukee may submit a SLRCO Summary Expense bill for that month based on the Gross Ton Proportion and Train Count Proportion during the preceding 12 month period, and assuming no reduction of Reimbursable Expenses. That bill shall be adjusted upon receipt of the required statement from SLRCO. Milwaukee shall furnish to SLRCO copies of RTA's statements to the Milwaukee pursuant to Section 7.4 of the RTA Agreement.

6.4 SLRCO's portion of the costs of the projects described in sections 3.1(a), 3.1(c), 7.2(b) 7.2(c) and 7.2(d), shall be billed as incurred and paid on the 15th day of the month following the month in which the bill is received, subject to verification of the costs and progress of the work.

6.5 No payment shall be delayed because of an error or dispute in a bill. Errors of less than $5,000 shall be adjusted in the next Estimated or Summary Expense Bill.

6.6 The amounts required to be paid by SLRCO shall be paid by check or by wire transfer of immediately available funds to the Trustee's account #50-30048 at The First National Bank of Chicago or another account designated by the Milwaukee.

6.7 Except as otherwise provided in this Agreement all payments under this Agreement are due and payable within 30 days of receipt of the bill or invoice.

6.8 Records of each party reasonably relating to payment or allocation of expenses under this Agreement shall be open to inspection during regular business hours. Each party shall provide sufficient office space for these inspections together with reasonable assistance in conducting an inspection. Records shall be closed to audit, and no bill as to which no exception has been taken shall be adjusted, after three (3) years from December 31 of the year of the invoice date.

ARTICLE VII.

JOINT LINE CAPITAL EXPENDITURES

7.1 The Milwaukee may effect capital projects, including significant maintenance projects, in the Joint Line necessary or desirable for the economical and safe operation of trains, engines or cars over the Joint Line, or which are required by applicable law or regulations.

7.2 The costs of capital projects, including significant maintenance projects, shall be paid by:

(a) a third party, if required solely by the operations of third parties (including RTA) admitted to the use of the Joint Line;

(b) SLRCO, if required solely by the operations of SLRCO;

(c) SLRCO and a third party, in accordance with the allocation formulas for operating expense contained in

Section 5.4 applied to capitalized expenses, for projects required by the operations of both SLRCO and third parties (including RTA) admitted to the use of the Joint Line.

(d) SLRCO and a third party pursuant to a separate fixed facilities agreement allocating such costs, if the provisions of subsection (c) are inapplicable and if the project is required by the operations of both SLRCO and third parties (including RTA) admitted to the use of the Joint Line.

7.3 The Milwaukee shall effect capital projects, including significant maintenance projects, requested by and at the sole expense of SLRCO unless such projects would substantially interfere with the rights of a third party (including RTA) admitted to the use of the Joint Line.

ARTICLE VIII.

OPERATION AND MAINTENANCE OF JOINT LINE

8.1 SLRCO shall direct the movement of all trains, engines, cars and inspection vehicles over the Joint Line. All track, bridge, signal and communication work, materials and track operated machinery and equipment used will be in accordance with industry standards. The priority of the Commuter Service operations and schedules of RTA over the Joint Line shall be observed in accordance with the provisions of the RTA Agreement.

8.2 The operation of all trains over the Joint Line is subject to the direction of SLRCO, and shall at all times be in accordance with reasonable safety and operating rules, regulations and operating timetables prescribed by SLRCO. The management of RTA's Commuter Service is vested solely in the RTA and RTA's trains, engines and cars shall be operated solely by RTA's employees or agents and at RTA's sole expense.

8.3 The Milwaukee shall (a) maintain all joint facility agreements, interlocking agreements and similar arrangements necessary to the operations of the Service over the Joint Line contemplated by this Agreement; (b) pay and discharge when due and payable all lawful governmental charges or levies imposed with respect to the Joint Line (except to the extent and while the validity thereof is contested by appropriate proceedings or when deferred pursuant to an order of the Reorganization Court having jurisdiction over the Milwaukee); (c) provide for utility services necessary to the operations of Service over the Joint Line; and (d) take all other action necessary to permit the Joint Line to be used for the Service by SLRCO.

ARTICLE IX.

TIME TABLES

9.1 The expenses, including costs of composition, printing, binding and distribution, incurred by SLRCO in the

issuance of revised operating time tables required by changes in the operations of SLRCO or third parties (including RTA) shall be allocated proportionately among the parties whose operations required the change, except that the incremental cost of changes made by SLRCO with respect to its freight or intercity passenger service in connection with a revision required by RTA shall be paid by SLRCO.

ARTICLE X.

COMPLIANCE WITH LAWS AND OTHER PUBLIC REGULATIONS

10.1 Each party shall comply with all applicable federal, state and local laws, regulations and rules with respect to the use of and the conduct of its operations over the Joint Line. If a party's non-compliance results in any fine, penalty, cost or charge being imposed or assessed on or against the other party, the non-complying party shall defend on notice from the other party, and shall promptly reimburse and indemnify the other party for or on account of such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in defending, any action which may be brought against the other party on account thereof.

ARTICLE XI.

INSURANCE; PROPERTY DAMAGE AND
CONSEQUENTIAL DAMAGE WAIVERS; FORCE MAJEURE

11.1 SLRCO waives and shall require its insurers to waive all rights of recovery from the Milwaukee for direct physical loss of all property of SLRCO located or occurring on the Joint Line during the term of this Agreement. SLRCO shall either (a) require third parties whose property is on the Joint Line by permission of SLRCO to waive and their insurers to waive all rights of recovery from the Milwaukee for direct physical loss to all property of such third parties (including luggage and cargo) located or occurring on the Joint Line during the term of this Agreement; or (b) indemnify the Milwaukee for such loss paid by the Milwaukee.

11.2 The Milwaukee waives and shall require its insurers to waive all rights of recovery from SLRCO for direct physical loss to all property of the Milwaukee (including luggage and cargo) located or occurring on the Joint Line during the term of this Agreement.

11.3 Neither SLRCO nor the Milwaukee shall be liable to the other or any third party for delays, interruptions or the failure to perform its obligations under this Agreement due to causes beyond their reasonable control, including: "acts of God"; wars (or similar military action); any act, delay or failure to act on the part of any governmental authority or

agency; insurrection or riot; fires; strikes; work stoppages; wrecks; major equipment breakdowns; failure or delay beyond the control of SLRCO or the Milwaukee in obtaining necessary labor, materials or manufacturing facilities or acts of the other party.

11.4 Neither the Milwaukee nor SLRCO shall be liable to the other in contract or in tort (including negligence) under any theory of strict liability, or otherwise, for any special, incidental or consequential loss or damage of any nature arising at any time or from any cause under or related to the performance of this Agreement.

11.5 Except as expressly provided in Sections 11.1 and 11.2 hereof, nothing in this Agreement shall be construed as affecting or impairing any rights of the Milwaukee or SLRCO to contribution or indemnity arising out of claims of third parties.

11.6 During the term of this Agreement, SLRCO shall provide and maintain in effect with respect to the Joint Line and its operations on and affecting the Joint Line insurance coverage of the types and in amounts customary for a line similar to the Joint Line.

ARTICLE XII.

DURATION

12.1 This Agreement shall terminate on December 31, 2083; provided, however, this Agreement may be earlier

terminated by SLRCO with respect to any zone on 180 days written notice. The Fixed Expense shall be proportionately reduced in the event of termination of a zone on the basis of the route miles of the zone to the route miles of the entire Joint Line. Upon the termination of this Agreement, SLRCO shall remove its rolling stock from the Joint Line.

12.2 If SLRCO terminates this Agreement with respect to a zone, SLRCO may remove at its expense any sidings or other capital projects in that zone entirely paid for by SLRCO, subject to the Milwaukee's right to purchase any or all of the sidings or other capital projects at their net liquidation value.

ARTICLE XIII.

NOTICES -- HOW GIVEN

13.1 All requests, notices, demands, authorizations, directions, consents or waivers or other documents required or permitted under this Agreement shall be in writing and shall be delivered in person to, or deposited postage pre-paid in the registered or certified mails of the United States addressed to SLRCO at:

SLRCO, Inc.
516 West Jackson Boulevard
Chicago, Illinois 60606

Attention: President

or to the Milwaukee at:

Trustee
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company
P.O. Box 6205
597 West Jackson Boulevard
Chicago, Illinois 60680-6205

or at such other address as either party may at any time or from time to time designate by notice to the other.

ARTICLE XIV.

SECTION HEADINGS

14.1 Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

ARTICLE XV.

SUCCESSORS AND ASSIGNS; ASSIGNMENT

15.1 This Agreement shall be binding upon the successors of the parties hereto. The respective rights and obligations of SLRCO under this Agreement may not be assigned or delegated without the written consent of the Milwaukee, except to a successor in interest to SLRCO (whether by merger, consolidation, or acquisition of all or substantially all of SLRCO's assets) or to another corporation which controls, is controlled by, or is under common control with, SLRCO.

15.2 The respective rights and obligations of the Milwaukee under this Agreement shall be considered to run with and be a burden on the Joint Line and shall be binding on any successor to the Milwaukee. Effective as of any transfer of the title of the Milwaukee to any third party, including for that purpose to SLRCO, the Milwaukee shall to the extent title is transferred have no further rights under and shall be relieved of all obligations under this Agreement, except for rights and obligations accrued as of the date of transfer.

ARTICLE XVI.

AGREEMENT LIMITATIONS ON TRUSTEE

16.1 This Agreement is binding on Richard B. Ogilvie, not as an individual, but solely in his capacity as Trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor.

ARTICLE XVII.

OTHER MISCELLANEOUS PROVISIONS

17.1 No modification, addition or amendment to this Agreement shall be effective unless in writing executed by the authorized officers or agents of each party.

17.2 This Agreement shall be governed by the laws of the State of Illinois.

17.3 The provisions of this Agreement shall be interpreted where possible in a manner necessary to sustain their legality and enforceability. The unenforceability of any provision of this Agreement in a specific situation shall not affect the enforceability of: (a) that provision in another situation; or (b) the other provisions of this Agreement if such other provisions could then continue to conform with the purposes of this Agreement and the terms and requirements of applicable law.

17.4 The failure of SLRCO or the Milwaukee to insist upon strict performance by the other of its obligations under this Agreement or the failure or delay in exercising any rights or remedies provided under this Agreement or at law shall not be deemed or construed as a waiver of any claims or rights. No waiver of a breach of any provision of this Agreement shall constitute or be construed as a waiver of any other breach or of that provision.

17.5 If the Milwaukee or SLRCO refuses to perform its obligations under this Agreement in accordance with its terms and that action results in the inability of the SLRCO or any third party (including RTA) to use the Joint Line substantially on the terms contemplated by this Agreement, the non-defaulting party shall, in addition to the remedies available to it at law, be entitled to specific performance of the affected provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this document to be executed as of the day and year first above written.

RICHARD B. OGILVIE
TRUSTEE OF THE PROPERTY OF THE
CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,
DEBTOR

WITNESS

_____

ATTEST:

_____

SELCO, INC.

President

REDACTED PUBLIC RECORD VERSION

Soo Line Railroad Company

Soo Line Building
Box 530
Minneapolis, Minnesota 55440
(612) 347-8240

PAUL D. GILMORE
Senior Vice President
Operations

June 13, 1989

CMC Real Estate Corporation
P. O. Box 6205
Chicago, Illinois 60680-6205

Metra
547 West Jackson Boulevard
Chicago, Illinois 60606

Re: Trackage Agreement dated February 19, 1985, by and between Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, and SLRCO, Inc. (the "Trackage Agreement")
Law Department files: 533, 1083

Gentlemen:

The Trackage Agreement refers to Exhibits A, B, and C. Unfortunately, the Exhibits were apparently never attached to the originals of the Trackage Agreement; either that, or they were subsequently lost or misplaced.

The purpose of this letter is to evidence our agreement that the documents attached hereto as Exhibits A, B, and C (which documents are described more particularly below) are in fact true copies of the correspondly-lettered Exhibits to the Trackage Agreement. We are also in agreement that the attached Exhibits A, B, and C, or copies thereof, may be attached to the executed originals of the Trackage Agreement in lieu of the missing Exhibits.

The attached documents are described more fully as follows:

Exhibit A: A composite Exhibit consisting of eleven maps, which maps are identified as follows --

Zone 1 schematic showing track layout between Rondout and Fox Lake, IL., bearing date of March 3, 1982, and revision date of July 15, 1982.

REDACTED PUBLIC RECORD VERSION

Zone 2 schematic showing track layout between Deerfield and Rondout, IL., bearing date of March 4, 1982, and revision date of July 15, 1982.

Zone 3 schematic showing track layout between Techny and Deerfield, IL., bearing date of March 3, 1982, revision date of April 2, 1982, and revision date of July 15, 1982.

Zone 4 schematic showing track layout between Pacific Jct. (A-5) and Techny (A-20), bearing date of March 1, 1982, and revision date of 4-2-82.

Zone 5 schematic showing track layout between Western Ave. (A-2) and Pacific Jct. (A-5), bearing date of February 24, 1982, and revision date of July 15, 1982.

Zone 6 & 7 schematic showing track layout between Union Station and Western Ave. (A-2), bearing date of 2/24/82 and revision date of 7/15/82.

Zone 8 schematic showing track layout between Elgin and Almora, bearing date of March 1, 1982, and revision date of July 15, 1982.

Zone 9 schematic showing track layout between Spaulding and Elgin, bearing date of March 1, 1982, and revision date of July 15, 1982.

Zone 10 schematic showing track layout between Bensenville (B-17) and Spaulding, bearing date of March 1, 1982, and revision date of July 15, 1982.

Zone 11 schematic showing track layout between Franklin Park (B-12) and Bensenville (B-17), bearing date of 2/24/82 and revision date of 7/15/82.

Zone 12 schematic showing track layout between Pacific Jct. (Tower A-5) and Franklin Park (Tower B-12), IL., bearing date of February 22, 1982, revision date of April 2, 1982, and revision date of July 15, 1982.

Exhibit B: A two-page Exhibit pertaining to the allocation of vacation, holiday, and administrative overhead expense.

Exhibit C: A one-page Exhibit entitled "JOINT FACILITY AGREEMENTS."

Very truly yours,

PDG/jr

Attachment

AGREED:

CMC Real Estate Corporation

By _____

Its _____

Commuter Rail Division of the
Regional Transportation Authority
(commonly known as Metra)

By _____

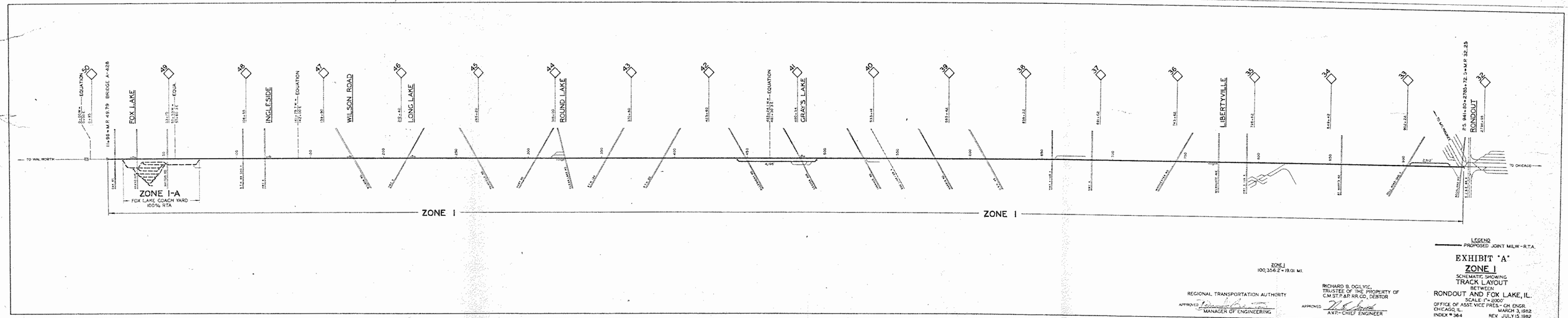
Its ~~EXECUTIVE DIRECTOR~~

GOQL.081

APPROVED AS TO LEGAL FORM

BY _____

DATE 6/23/89



LEGEND
PROPOSED JOINT MILW - R.T.A.

ZONE I
100,356.2' = 19.01 MI.

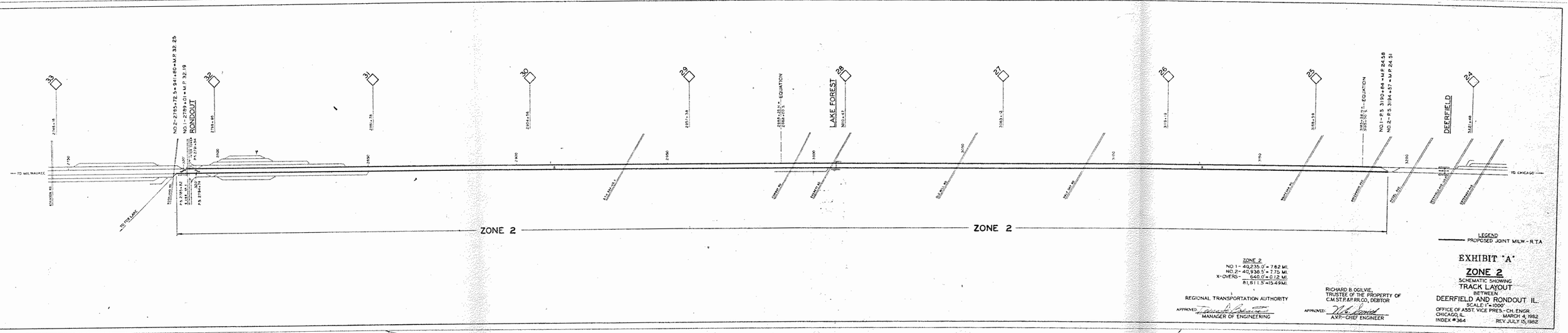
REGIONAL TRANSPORTATION AUTHORITY
APPROVED _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED _____
A.V.P.- CHIEF ENGINEER

EXHIBIT "A"

ZONE I

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
RONDOUT AND FOX LAKE, IL.
SCALE 1" = 2000'
OFFICE OF ASST. VICE PRES. - CH. ENGR.
CHICAGO, IL.
INDEX # 364
MARCH 3, 1982
REV. JULY 15, 1982



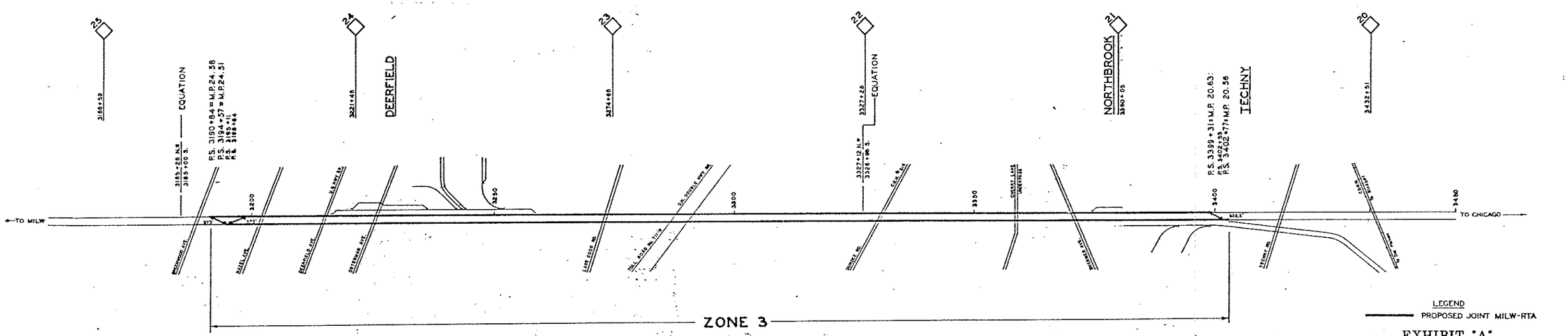
LEGEND
PROPOSED JOINT MILW-R.T.A

ZONE 2
NO.1- 40,235.0' = 7.62 MI.
NO.2- 40,938.5' = 7.75 MI.
X-OVERS- 640.0' = 0.12 MI.
81,811.5' = 15.49 MI.

REGIONAL TRANSPORTATION AUTHORITY
APPROVED: _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P.RR.CO, DEBTOR
APPROVED: _____
A.V.P.-CHIEF ENGINEER

EXHIBIT "A"
ZONE 2
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
DEERFIELD AND RONDOUT IL.
SCALE 1" = 1000'
OFFICE OF ASST. VICE PRES.- CH. ENGR.
CHICAGO, IL. MARCH 4, 1982
INDEX # 364 REV. JULY 15, 1982



NO. 1 = 20,861.0' = 3.95 MI.
NO. 2 = 20,834.0' = 3.95 MI.
X-OVERS = 1,068.5' = .20 MI.
42,763.5 = 8.10 MI.

REGIONAL TRANSPORTATION AUTHORITY

APPROVED: _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR

APPROVED: _____
A.V.P.–CHIEF ENGINEER

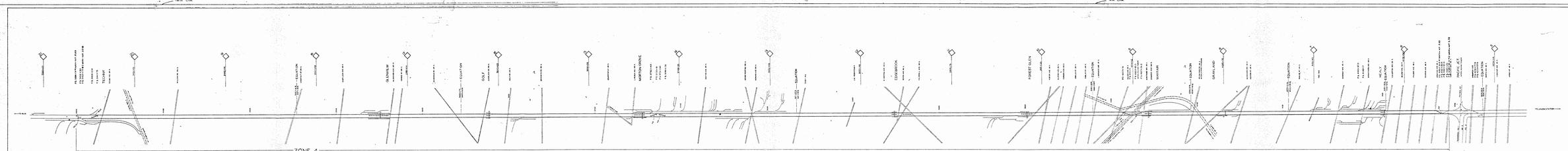
LEGEND
PROPOSED JOINT MILW-RTA

EXHIBIT "A"
ZONE 3
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
TECHNY AND DEERFIELD, IL.
SCALE: 1"=1000'

OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL.

INDEX #384
MARCH 3, 1982
REV. APRIL 2, 1982
REV. JULY 15, 1982

REDACTED PUBLIC RECORD VERSION



USERN
PROPOSED JOINT W&M - R.T.A.

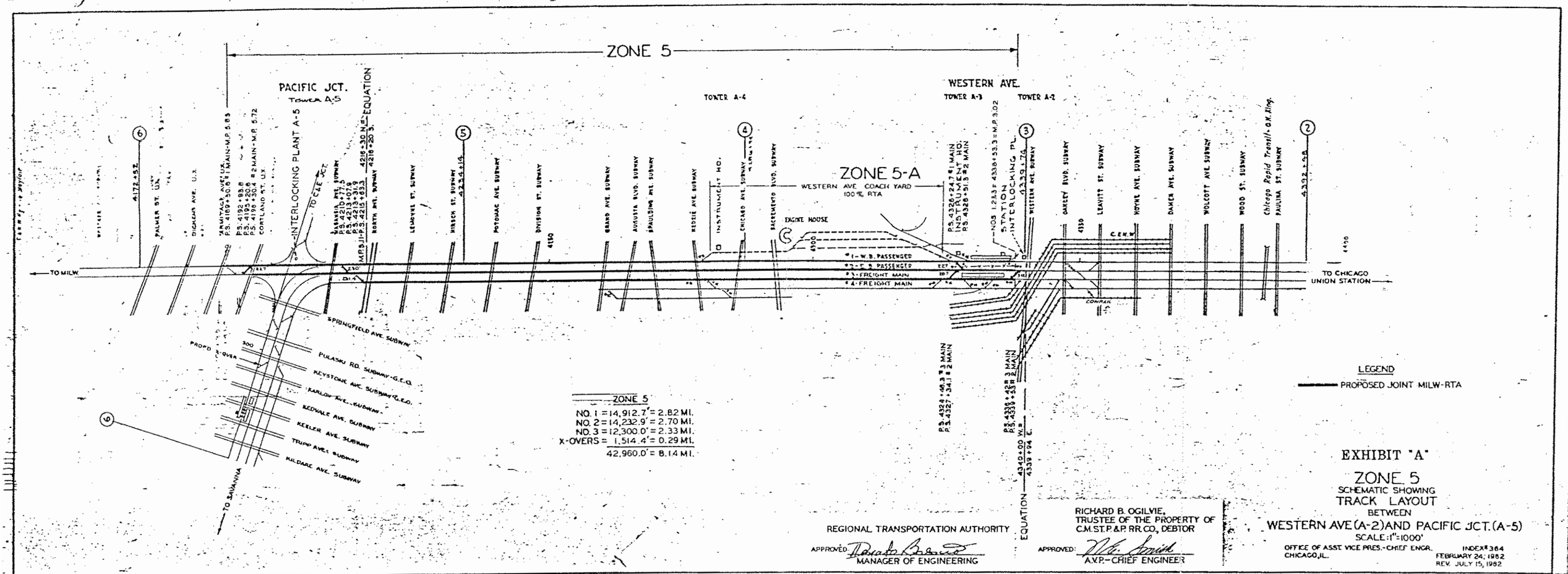
REGIONAL TRANSPORTATION AUTHORITY
APPROVED
MANAGER OF ENGINEERING

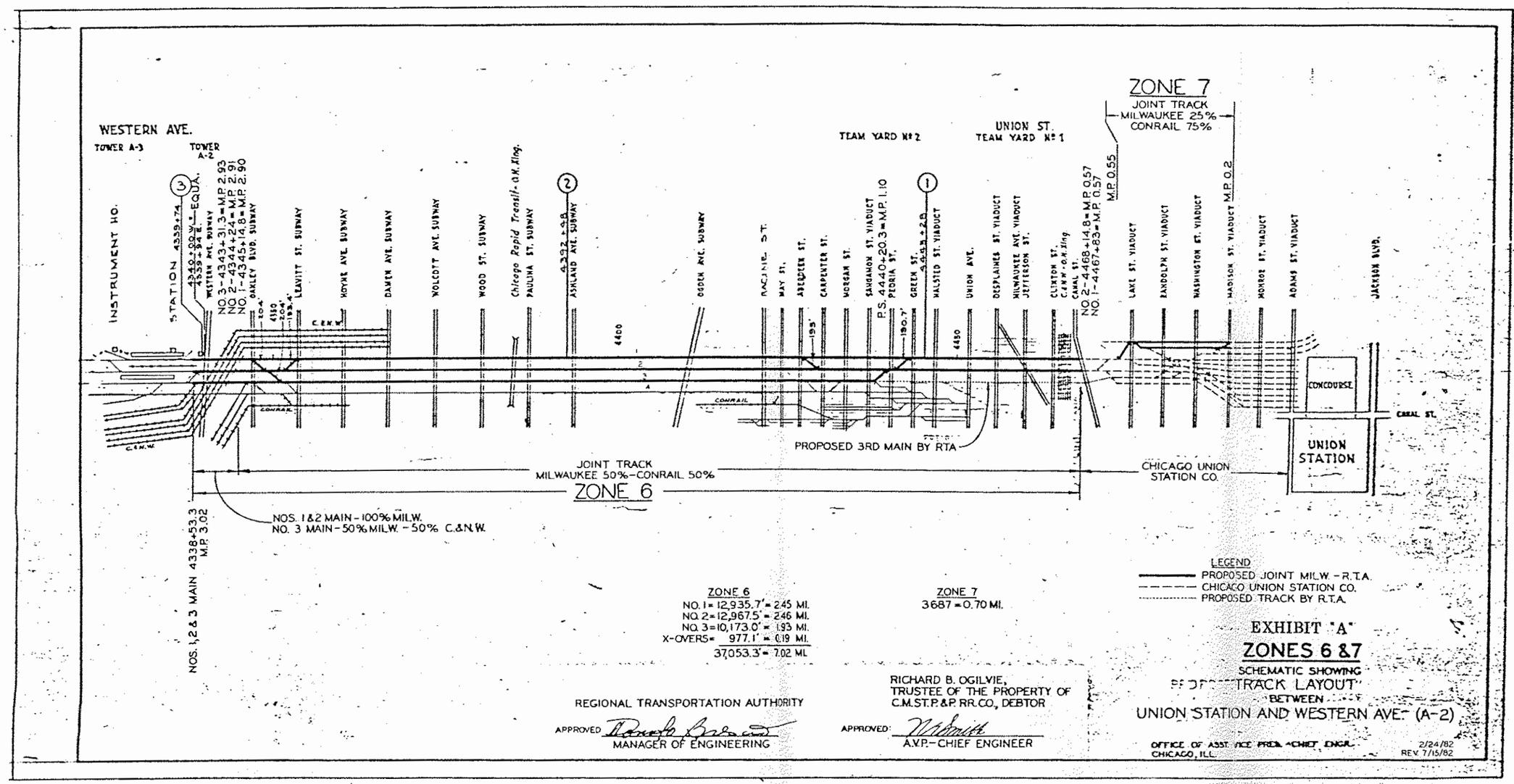
ZONE 4
NO 1176+54.44 W&E
NO 3+76+74.44 S.95 M.
EXISTING W&E P.S.T.M.
TOTAL REQUIRED W.E.

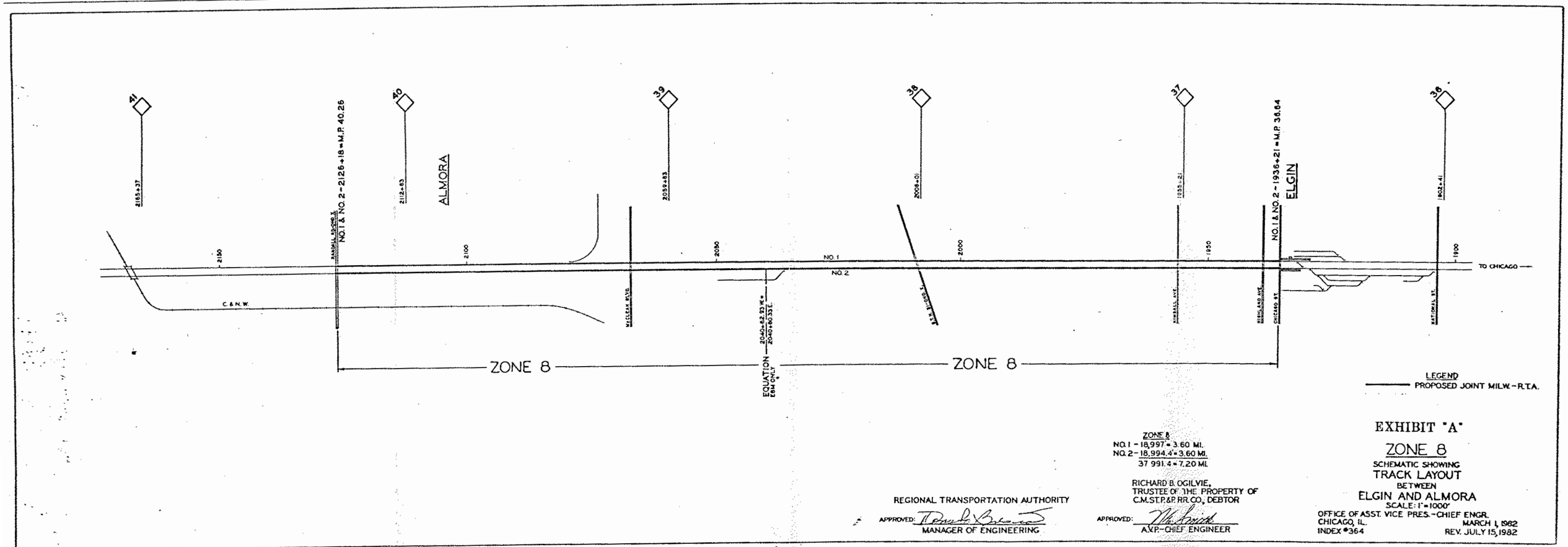
RICHARD B. DOOLEY
TRUSTEE OF THE PROPERTY OF
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R. CO., DEBTOR
APPROVED
ASST. CHIEF ENGINEER

EXHIBIT 'A'

ZONE 4
SCHEMATIC SHOWING
TRACK ARRANGEMENT
AT NORTH
PACIFIC JCT.(A-1) AND TECHNY (A-20)
SCALE 1" = 1000'
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, ILL.
NOVEMBER 1, 1982 REV. 4-8-83


ZONE 5
PACIFIC JCT.
Tower A-5
INTERLOCKING PLANT A-5
TO CLE. JCT.
EQUATION
4216+30 N.
4216+20 S.
TOWER A-4
WESTERN AVE.
TOWER A-3
TOWER A-2
ZONE 5-A
WESTERN AVE. COACH YARD
100% RTA
ENGINE HOUSE
INSTRUMENT HO.
STATION INTERLOCKING PL
4339+76
TO MILW.
TO CHICAGO UNION STATION
SPRINGFIELD AVE. SUBWAY
PULASKI RD. SUBWAY-G.E.Q.
KEYSTONE AVE. SUBWAY-G.E.Q.
KARLOV AVE. SUBWAY
KEDVALE AVE. SUBWAY
KEELER AVE. SUBWAY
TRUMP AVE. SUBWAY
KILDARE AVE. SUBWAY
TO SAVANNA
ARMITAGE AVE. U.K.
PALMER ST. U.K.
DICKENS AVE. U.K.
CORTLAND ST. U.K.
LEAVITT ST. SUBWAY
HOYNE AVE. SUBWAY
DAMEN AVE. SUBWAY
WOLCOTT AVE. SUBWAY
WOOD ST. SUBWAY
Chicago Rapid Transit-G.N. Elev.
PAULINA ST. SUBWAY
CONRAIL
ZONE 5
NO. 1 = 14,912.7' = 2.82 MI.
NO. 2 = 14,232.9' = 2.70 MI.
NO. 3 = 12,300.0' = 2.33 MI.
X-OVERS = 1,514.4' = 0.29 MI.
42,960.0' = 8.14 MI.
LEGEND
PROPOSED JOINT MILW-RTA
REGIONAL TRANSPORTATION AUTHORITY
APPROVED:
MANAGER OF ENGINEERING
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED:
A.V.P.-CHIEF ENGINEER
EXHIBIT "A"
ZONE 5
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
WESTERN AVE.(A-2)AND PACIFIC JCT.(A-5)
SCALE: 1"=1000'
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL.
INDEX # 364
FEBRUARY 24, 1982
REV. JULY 15, 1982


WESTERN AVE.
TOWER A-3
TOWER A-2
INSTRUMENT HO.
STATION 4339+74
4340+80 W. EQUA.
4359+84 E.
WESTERN AVE. SUBWAY
NO. 3 - 4343+31.3 = M.P. 2.93
NO. 2 - 4344+24 = M.P. 2.91
NO. 1 - 4345+14.8 = M.P. 2.90
OAKLEY BLVD. SUBWAY
LEAVITT ST. SUBWAY
HOYNE AVE. SUBWAY
DAMEN AVE. SUBWAY
WOLCOTT AVE. SUBWAY
WOOD ST. SUBWAY
Chicago Rapid Transit - O.H. Xing.
PAULINA ST. SUBWAY
ASHLAND AVE. SUBWAY
OGDEN AVE. SUBWAY
RACINE ST.
MAY ST.
ABERDEEN ST.
CARPENTER ST.
MORGAN ST.
SANGANON ST. VIADUCT
P.S. 4440+20.3 = M.P. 1.10
PEORIA ST.
GREEN ST.
HALSTED ST. VIADUCT
UNION AVE.
DESPLAINES ST. VIADUCT
MILWAUKEE AVE. VIADUCT
JEFFERSON ST.
CLINTON ST.
C.&N.W.-O.H. Xing
CANAL ST.
NO. 2 - 4468+14.8 = M.P. 0.57
NO. 1 - 4467+83 = M.P. 0.57
M.P. 0.55
TEAM YARD Nº 2
UNION ST.
TEAM YARD Nº 1
ZONE 7
JOINT TRACK
MILWAUKEE 25%
CONRAIL 75%
LAKE ST. VIADUCT
RANDOLPH ST. VIADUCT
WASHINGTON ST. VIADUCT
MADISON ST. VIADUCT M.P. 0.2
MONROE ST. VIADUCT
ADAMS ST. VIADUCT
JACKSON BLVD.
CONCOURSE
CANAL ST.
UNION STATION
CONRAIL
C.&N.W.
PROPOSED 3RD MAIN BY RTA
JOINT TRACK
MILWAUKEE 50%-CONRAIL 50%
ZONE 6
CHICAGO UNION STATION CO.
NOS. 1 & 2 MAIN - 100% MIL.W.
NO. 3 MAIN - 50% MIL.W. - 50% C.&N.W.
NOS. 1, 2 & 3 MAIN 4338+53.3
M.P. 3.02
LEGEND
PROPOSED JOINT MIL.W. - R.T.A.
CHICAGO UNION STATION CO.
PROPOSED TRACK BY R.T.A.
ZONE 6
NO. 1 = 12,935.7' = 2.45 MI.
NO. 2 = 12,967.5' = 2.46 MI.
NO. 3 = 10,173.0' = 1.93 MI.
X-OVERS = 977.1' = 0.19 MI.
37,053.3' = 7.02 MI.
ZONE 7
3687 = 0.70 MI.
REGIONAL TRANSPORTATION AUTHORITY
APPROVED
MANAGER OF ENGINEERING
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED:
A.V.P.-CHIEF ENGINEER
EXHIBIT "A"
ZONES 6 &7
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
UNION STATION AND WESTERN AVE. (A-2)
OFFICE OF ASST. VICE PRES. - CHIEF ENGR.
CHICAGO, ILL.
2/24/82
REV. 7/15/82



LEGEND
PROPOSED JOINT MILW.-R.T.A.

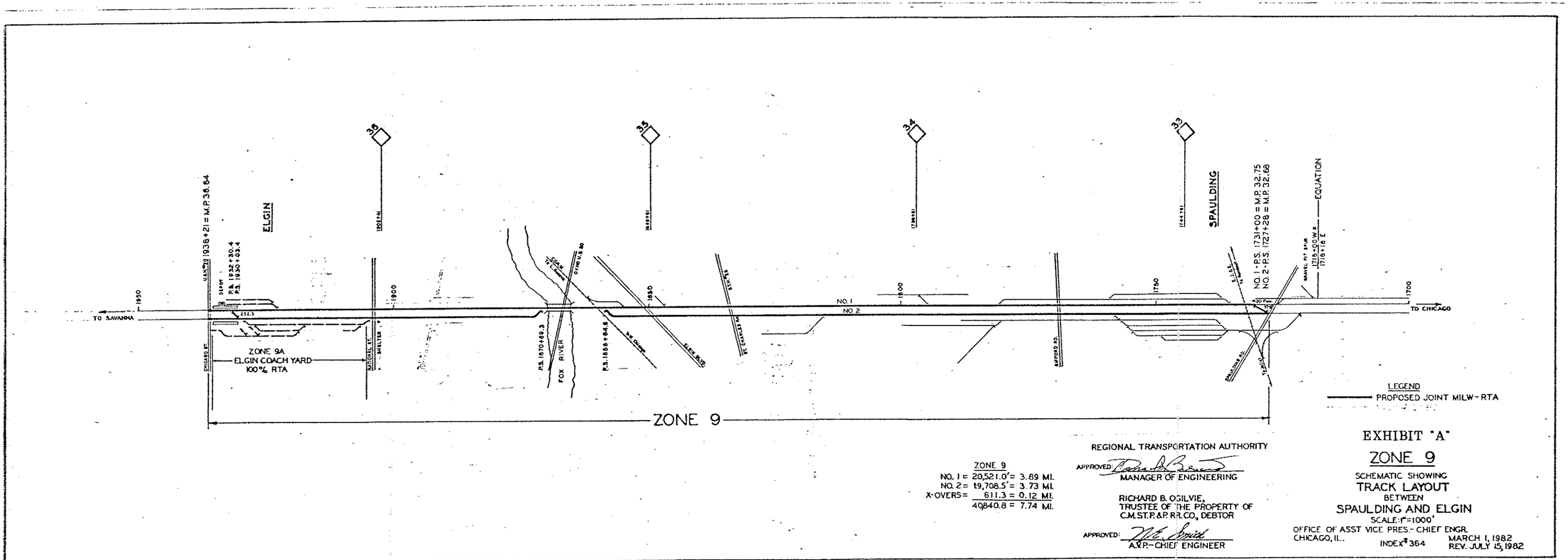
ZONE 8
NO. 1 - 18,997' = 3.60 MI.
NO. 2 - 18,994.4' = 3.60 MI.
37 991.4 = 7.20 MI.

REGIONAL TRANSPORTATION AUTHORITY
APPROVED: Donald Brown
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR. CO., DEBTOR
APPROVED: M. Smith
A.V.P.-CHIEF ENGINEER

EXHIBIT "A"

ZONE 8
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
ELGIN AND ALMORA
SCALE: 1" = 1000'
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL. MARCH 1, 1982
INDEX #364 REV. JULY 15, 1982



ZONE 9
NO. 1 = 20,521.0' = 3.89 MI.
NO. 2 = 19,708.5' = 3.73 MI.
X-OVERS = 611.3 = 0.12 MI.
40,840.8 = 7.74 MI.

REGIONAL TRANSPORTATION AUTHORITY

APPROVED: _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. R.R. CO., DEBTOR

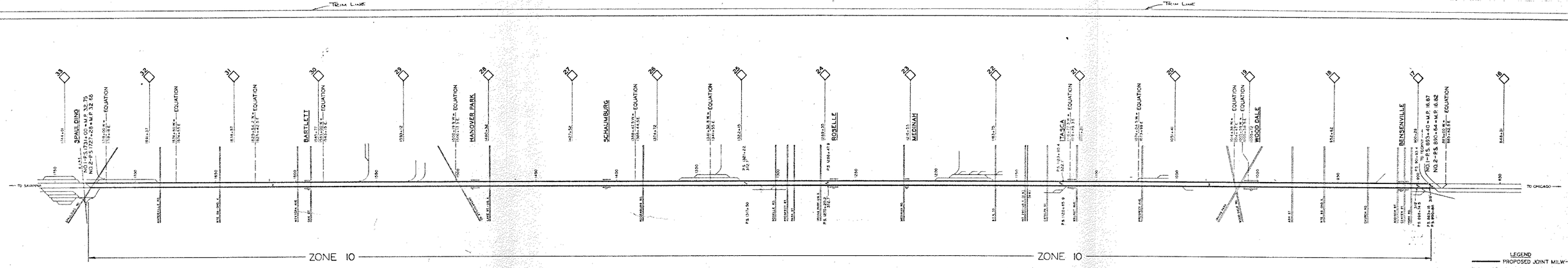
APPROVED: _____
A.V.P.-CHIEF ENGINEER

EXHIBIT "A"

ZONE 9

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
SPAULDING AND ELGIN
SCALE: 1"=1000'

OFFICE OF ASST VICE PRES.- CHIEF ENGR.
CHICAGO, IL. INDEX # 364 MARCH 1, 1982
REV. JULY 15, 1982



LEGEND
PROPOSED JOINT MILW-R.T.A.

REGIONAL TRANSPORTATION AUTHORITY

APPROVED: _____
MANAGER OF ENGINEERING

RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO, DEBTOR

APPROVED: _____
A.V.P.–CHIEF ENGINEER

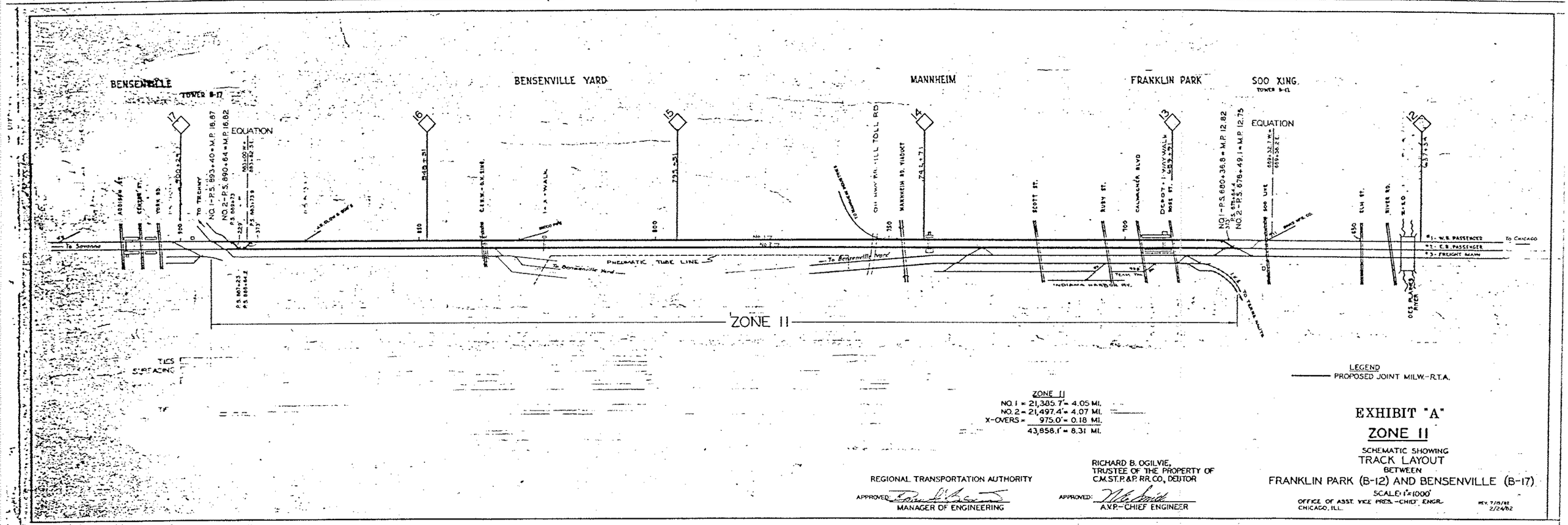
ZONE 10
NO. 1 = 83,783.7 = 15.87 MI.
NO. 2 = 83,687.7 = 15.85 MI.
Y-OVERS = 1,705.5 = 0.32 MI.
169,176.9' = 32.04 MI.

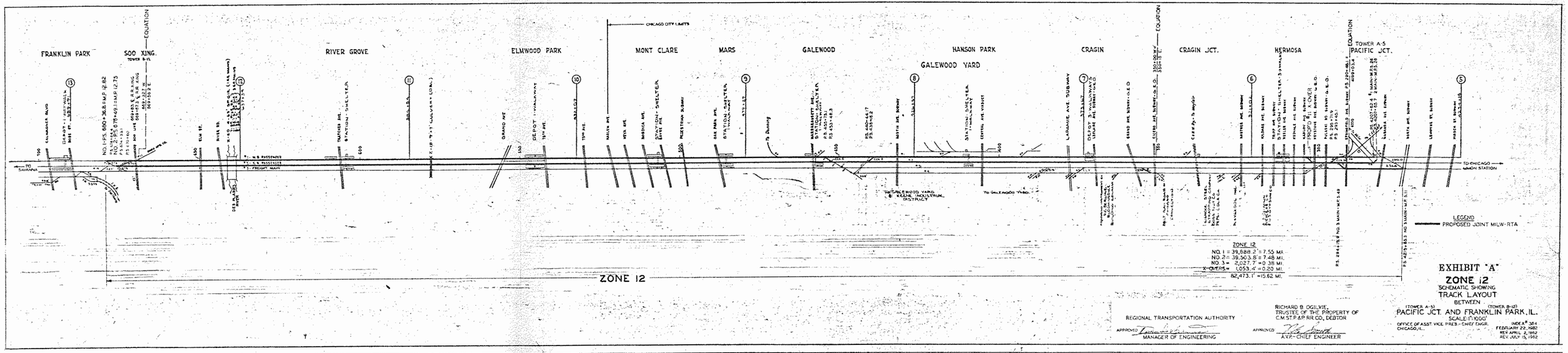
EXHIBIT "A"

ZONE 10

SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
BENSENVILLE (B-17) AND SPAULDING
SCALE: 1"=2000'

OFFICE OF ASST. VICE PRES.–CHIEF ENGR.
CHICAGO, IL.
INDEX # 364
MARCH 1, 1982
REV. JULY 15, 1982


BENSENVILLE
TOWER B-17
BENSENVILLE YARD
MANNHEIM
FRANKLIN PARK
SOO XING.
TOWER B-12
EQUATION
EQUATION
NO.1 - P.S. 893+40 = M.P. 18.87
NO.2 - P.S. 890+64 = M.P. 16.82
NO.1 - P.S. 680+36.8 = M.P. 12.82
NO.2 - P.S. 678+49.1 = M.P. 12.75
To Savanna
To Chicago
#1 - W.B. PASSENGER
#2 - E.B. PASSENGER
#3 - FREIGHT MAIN
PNEUMATIC TUBE LINE
To Bensenville Yard
To Bensenville Yard
ZONE II
LEGEND
PROPOSED JOINT MILW.-R.T.A.
ZONE II
NO. 1 = 21,385.7' = 4.05 MI.
NO. 2 = 21,497.4' = 4.07 MI.
X-OVERS = 975.0' = 0.18 MI.
43,858.1' = 8.31 MI.
REGIONAL TRANSPORTATION AUTHORITY
APPROVED:
MANAGER OF ENGINEERING
RICHARD B. OGILVIE,
TRUSTEE OF THE PROPERTY OF
C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED:
A.V.P.-CHIEF ENGINEER
EXHIBIT "A"
ZONE II
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
FRANKLIN PARK (B-12) AND BENSENVILLE (B-17)
SCALE: 1"=1000'
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, ILL.
REV. 7/15/82
2/24/82


FRANKLIN PARK
SOO XING.
Tower A-15
EQUATION
RIVER GROVE
ELMWOOD PARK
CHICAGO CITY LIMITS
MONT CLARE
MARS
GALEWOOD
HANSON PARK
GALEWOOD YARD
CRAGIN
CRAGIN JCT.
HERMOSA
TOWER A-5
PACIFIC JCT.
TO SAVANNA
TO CHICAGO UNION STATION
TO GALEWOOD YARD & KEENE INDUSTRIAL DISTRICT
ZONE 12
LEGEND
PROPOSED JOINT MILW-RTA
ZONE 12
NO. 1 = 39,888.2' = 7.55 MI.
NO. 2 = 39,503.8 = 7.48 MI.
NO. 3 = 2,027.7 = 0.38 MI.
1,053.4' = 0.20 MI.
82,473.1' = 15.62 MI.
EXHIBIT "A"
ZONE 12
SCHEMATIC SHOWING
TRACK LAYOUT
BETWEEN
(TOWER A-15) PACIFIC JCT. AND FRANKLIN PARK, IL. (TOWER B-12)
SCALE: 1"=1000'
REGIONAL TRANSPORTATION AUTHORITY
APPROVED
MANAGER OF ENGINEERING
RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF C.M.ST.P.&P. RR.CO., DEBTOR
APPROVED
A.V.P.-CHIEF ENGINEER
OFFICE OF ASST. VICE PRES.-CHIEF ENGR.
CHICAGO, IL.
INDEX # 38-6
FEBRUARY 22, 1980
REV. APRIL 2, 1982
REV. JULY 15, 1982

METHODOLOGY FOR ALLOCATION OF VACATION AND HOLIDAY EXPENSES

Expenses to be Allocated (A):

Vacation and holiday expenses properly distributed to operating expense accounts as prescribed by the Interstate Commerce Commission's Uniform System of Accounts in 49 CFR part 1201.

Expenses specifically not allocable:

Labor expenses of officers on the exempt payroll, separation allowance payments and productivity fund payments.

Labor Base to Which Vacation & Holiday Expenses are to be Applied (B):

Direct Labor, exclusive of vacation and holiday payments and other payments mentioned above; paid to all employees.

Procedure for Allocation:

Divide the expenses to be allocated (A) by the labor base to which vacation and holiday expenses apply (B). Multiply the resulting ratio by (1) the applicable labor and fringe benefits properly charged or allocated to each zone on the joint line for commuter service and (2) labor and fringe benefit expenses charged for dispatching on the joint line.

Example Allocation (Unaudited):

Vacation and holiday expenses = $14,891,180

Labor base = $154,624,225

Vacation and holiday expense ratio = $14,891,180 ÷ $154,624,225 = 9.631%

Labor and fringe benefit expenses allocated to zone of commuter line = $10,500

Vacation and holiday expenses allocated to zone = $10,500 x 9.631% = $1,011.26

Allocation Statistic Update Procedures:

Update annually in January utilizing data from previous calendar year.

EXHIBIT B
p. 1 of 2

METHODOLOGY FOR ALLOCATION OF ADMINISTRATIVE OVERHEAD EXPENSES

Labor Expenses to be Allocated (A):

Expenses for Superintendence and General Administration properly charged to operating expense accounts as prescribed by the Interstate Commerce Commission's Uniform System of Accounts in 49 CFR part 1201.

Expenses specifically not allocable:

Expenses properly chargeable to the following functional areas or accounts are specifically not allocable (B):

> Marketing, Car Management, Freight Claim Prevention, Customer Services, Freight Adjustment, Regional Accounting, Revenue/Interline Accounting, and operating expense accounts properly chargeable as shop and store expense.

Labor Base to Which Administrative Overhead Expenses are to be Applied (C):

Labor and vacation and holiday expenses properly charged to operating expense accounts as prescribed in 49 CRR part 1201 and excluding expenses reported in sections A and B.

Procedure for Allocation:

Divide the expenses to be allocated (A) by the labor base to which administative overhead expenses apply (C). Multiply the resulting ratio by (1) the applicable labor, vacation and holiday expenses, fringe benefits and miscellaneous expenses properly charged or allocated to each zone on the joint line for commuter service and (2) labor, vacation and holiday expenses, fringe benefits and miscellaneous expenses charged for dispatching on the joint line.

Example Allocation (Unaudited):

Administrative overhead expenses = $2,086,187

Labor base = $8,711,933

Administrative overhead expense ratio = 23.946%

Labor, vacation and holiday expenses, fringe benefits and miscellaneous expenses allocated to zone of commuter line = $11,511

Administrative overhead expenses allocated to zone = $2,756.42

Allocation Statistic Update Procedures:

Update monthly based on actual expenses.

EXHIBIT B
p. 2 of 2

EXHIBIT C
P. 1 of 1

JOINT FACILITY AGREEMENTS

ZONE LOCATION	RAILROAD	AGREEMENT DATE	DESCRIPTION	LOCATION
ONE	SOO LINE	8-15-99	AUTOMATIC INTERLOCKER	GRAYS LAKE
THO	EJ&E RY.	8- 1-89	TOWER & INTERLOCKER	RONDOUT
FOUR	C&NW TRANSP.	1- 1-95	TOWER & INTERLOCKER	MAYFAIR - CHICAGO
FOUR	C&NW TRANSP.	12-31-94	AUTOMATIC INTERLOCKER	GRAYLAND - CHICAGO
FIVE	C&NW TRANSP. CONRAIL	3-24-04	TOWER A-Z, TRACKS & SWITCHES, CROSSINGS	WESTERN AVE. - CHICAGO
SIX	CONRAIL	2- 7-73	TRACKS & FACILITIES WESTERN AVE. TO CANAL ST.	CHICAGO
SEVEN	CONRAIL	2- 7-73	TRACKS & FACILITIES LAKE STREET TO MADISON STREET	CHICAGO
NINE	C&NW TRANSP.	6-11-10	REMOTE CONTROLLED INTERLOCKER	ELGIN
NINE	EJ&E RY.	8- 1-89	TOWER & INTERLOCKER	SPAULDING
ELEVEN	C&NW TRANSP.	4-18-10	OVERHEAD CROSSING	BENSENVILLE
ELEVEN	C&NW TRANSP.	6-26-12	OVERHEAD CROSSING	BENSENVILLE
ELEVEN	SOO LINE	12- 1-30	TOWER & INTERLOCKER	FRANKLIN PARK
TWELVE	I.H.B.R.R.	3- 1-32	REMOTE CONTROLLED INTERLOCKER	FRANKLIN PARK
TWELVE	C&NW TRANSP.	2- 1-05	REMOTE CONTROLLED INTERLOCKER PACIFIC JCT.	CRAIGIN JUNCTION CHICAGO

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 5

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R., R.R. REORGANIZATION, NO. 77 B 8999, STIPULATION (N.D. ILL. SEPT. 3, 1987) (METR_FD36500_012882-928) (EXCERPTS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY	)	In Proceedings For The Reorganization of a Railroad
Debtor.	)	No. 77 B 8999

REGIONAL TRANSPORTATION AUTHORITY, an Illinois municipal corporation,	)	
Plaintiff,	)	
vs.	)	No. 85 C 5969
CMC REAL ESTATE CORPORATION; 1,132 ACRES OF LAND, MORE OR LESS, comprising a certain railroad right-of way between Canal Street in Chicago Illinois and Rondout, Illinois, between Rondout, Illinois and Fox Lake, Illinois, and between Pacific Junction (tower A-5) and Almora, Illinois; certain personal property related to the operation of commuter rail services over said right-of-way; and certain UNKNOWN OWNERS,	)	Honorable Prentice H. Marshall
Defendants.	)	

S T I P U L A T I O N

The undersigned parties hereto, CMC Real Estate Corporation ("CMC"), the Regional Transportation Authority ("RTA"), and the Commuter Rail Division of the Regional Transportation Authority ("METRA"), enter into this Stipulation ("Stipulation") after being fully advised by their respective

counsels, for the purpose of defining the property and property rights of CMC to be taken pursuant to the above-captioned proceedings ("Condemnation Proceedings") and the property and property rights not to be acquired and to which the taking is subject, agreeing on an award of just compensation for the taking and the manner of its payment, and providing for other terms, conditions, and rights related to the foregoing, all as set forth herein and in the Schedules and Exhibits attached hereto.

SECTION 1. PROPERTY TO BE ACQUIRED

Subject to the exceptions set forth in Section 2 hereof and in reliance on the representations, covenants, and warranties set forth herein, on the Effective Date (as hereinafter defined) the parties hereto agree as follows:

1.1 Real and Personal Property. RTA shall acquire pursuant to the Condemnation Proceedings, and shall simultaneously deed, convey, assign, and transfer to METRA, all of the right, title, and interest of CMC in:

(a) all fixtures, land, and realty, all rights of way, easements, and the like pertaining or relating thereto as described in Exhibit 1-A attached hereto;

(b) all structures, fixtures, and improvements and appurtenances thereto (i) located within the areas outlined on the maps attached hereto as Exhibit 1-B ("Maps") from the west side of Canal Street, Chicago, Illinois (Mile Post 0.57) to Rondout, Illinois (Mile Post 32.52); from Rondout,

Illinois (Mile Post 32.52) to Fox Lake, Illinois (Mile Post 49.79); and from Tower A-5 (Mile Post 5.26) to Almora, Illinois (Mile Post 40.26) commonly known as the Milwaukee Road North and West Commuter Lines (collectively "Commuter Rail Lines"), including without limitation retaining walls, roadbeds, main and connecting tracks, rails, ties, ballast, switches, turnouts, wyes, crossovers, tunnels, grade crossings, sidings, depots, yards, storage and parking areas, culverts, fills, cuts, right of way fences, embankments, bridges, sheds, buildings, structures, communication and signal facilities and equipment, interlocking towers, commuter stations and platforms or (ii) located adjacent to the areas outlined on the Maps if such property is either primarily held for use or primarily used in connection with the management, operation, and maintenance of the commuter rail operations over the Commuter Rail Lines ("Commuter Rail Service") or other rail operations on the Commuter Rail Lines (but specifically excluding parking lots or industry lead tracks not located within the areas outlined on the Maps); and

(c) all machinery, equipment, tools, signal relays, cables and equipment, supplies, telephone cables, circuits, and equipment, relays or parts of relays held as replacement equipment, all valuation maps and records, all reproducible drawings, tracings, microfilm and the like, all books and

records, and any other personal property primarily used or held for use, in any manner whatsoever, in connection with the Commuter Rail Service or the Commuter Rail Lines.

1.2 Assumed Contracts. Subject to the prorations set forth in Section 4.5 hereof, METRA shall acquire pursuant to the Condemnation Proceedings all of CMC's right, title, interest, and shall assume all of CMC's obligations in, to, and under, the Assumed Contracts (as hereinafter defined). Notwithstanding the foregoing,

(a) CMC hereby retains the benefit of any and all rights of indemnification from third parties under the Assumed Contracts with respect to liabilities arising out of events or occurrences occurring prior to the Effective Date; provided, however, that to the extent METRA or RTA is held liable for any such event or occurrence as a consequence of its ownership of the Acquired Property or its assumption of the Assumed Contracts, the foregoing retention is hereby limited so as to provide that the benefits of such rights of indemnification shall first accrue to METRA and/or RTA, as the case may be, to the extent of such liability, unless CMC has hereunder indemnified METRA and/or RTA, as the case may be, against such liability; and

(b) to the extent any Assumed Contract pertains to real or personal property not comprising the Acquired Property (the "Non-Acquired Property"), CMC hereby retains those rights, benefits and obligations under such Assumed Contract which arise directly out of the Non-Acquired Property.

1.3 Other Terms.

(a) The real property, personal property, interests, and other assets described in Sections 1.1 and 1.2 above (but excluding the Exceptions and Reservations as set forth in Section 2 below), shall be collectively referred to as the "Acquired Property".

(b) In the event of any conflict between the descriptions of the land comprising the Acquired Property set forth on Exhibits 1-A and 1-B, the description of the land established by the black outlines on Exhibit 1-B shall control.

(c) Any fixture, improvements, or structures comprising the Acquired Property lying on land adjacent to the areas outlined on the Maps of which METRA does not take possession of, exert control over, or utilize within any two (2) year period following the Effective Date may, upon sixty (60) days written notice to Metra, at CMC's option be deemed abandoned, and in such event, CMC may remove, demolish, or otherwise dispose of such property; provided, however, that Metra may,

within the sixty (60) day period following such notice, take possession of (and shall demonstrate a bona fide need for) or remove or dispose of such property.

SECTION 2. EXCEPTIONS AND RESERVATIONS

The Acquired Property shall not include the following property, rights, and interests:

2.1 Excluded Assets. All personal property set forth on Schedule 2.1 attached hereto.

2.2 Excluded Air Rights. The volume of air space as set forth on Schedule 2.2 attached hereto.

2.3 Excluded Fiber Optics Revenues. The revenues from fiber optics contracts retained by CMC as set forth in the Fiber Optics Agreement attached hereto as Exhibit 4.3(a).

2.4 Easements.

(a) CMC Easements. The easements or fees ("CMC Easements") as set forth on Exhibits 2.4(a)(1) through 2.4(a)(25) hereto, but subject to the terms and conditions contained therein. The terms and conditions of the CMC Easements are subject to requests for variations therein made by CMC; provided, however, such variations must be in form and substance acceptable to METRA and such acceptance by Metra shall not be unreasonably withheld or withheld at all if in the same form and substance customarily used for similar such easements by railroads which conduct commuter passenger service. CMC may assign, transfer, lease, license,

or grant an easement or subeasement ("Transfer") in any and all CMC Easements to any third party or parties ("Transferees") with or without consideration subject to METRA's approval, such approval not to be withheld with respect to the transferee's set forth on Schedule 2.4(a)(II). In the event of a Transfer of any CMC Easement, CMC shall be released from any liabilities or obligations thereunder accruing after the Transfer to the extent that the Transferee assumes such liabilities or obligations. CMC shall keep and retain any and all monies that it receives or has received in connection with the Transfer of any and all CMC Easements, and METRA and RTA hereby waive all claims to such monies. If, with METRA's written approval, a CMC Easement is transferred after the date hereof and prior to the Effective Date, such CMC Easement shall be deemed an Assumed Contract as if described on Schedule 2.6 hereto.

(b) Galewood Easements. Four (4) easements for grade crossings at the Galewood Yard ("Galewood Easements") as set forth in Exhibit 2.4(b) attached hereto, but subject to the terms and conditions contained therein. The terms and conditions of the Galewood Easements are subject to requests for variations therein made by CMC; provided, however, such variations must be in form and substance acceptable to METRA and such acceptance by Metra shall not be unreasonably

withheld or withheld at all if in the same form and substance customarily used for similar such easements by railroads which conduct commuter passenger service.

(c) Certain Terms and Conditions of Galewood Easements. All Galewood Easements are subject to the following terms and conditions: (i) cost of construction, including without limitation grade crossings, signal systems, and crossing devices or cost of maintenance of any Galewood Easement is at the sole cost and expense of CMC or any successor or partial successor to CMC's interest, but such construction and maintenance shall be performed by METRA or persons employed by it or acting on its behalf as requested by CMC or its successor, or as Metra may deem appropriate; (ii) any construction, development, or alteration pertaining to any Galewood Easement, or any portion thereof is subject to METRA's prior approval, such approval not to be unreasonably withheld and; (iii) any use, assignment, transfer, lease, license, grant of any easement or subeasement, construction, development, or alteration, pertaining to any Galewood Easement, or any portion thereof by CMC or any successor or partial successor to CMC's interest may not interfere with the safety or efficient operation of any rail service over the Commuter Rail Lines.

2.5 CRC's Interest. All right, title, and interest of Consolidated Rail Corporation ("CRC") as an owner of any undivided interest in any of the Acquired Property.

2.6 Assumed Contracts. All right, title, and interest of all parties (including without limitation any parties claiming by or through such other parties) other than CMC in, to, and under the contracts, contract rights, leases, permits, and licenses ("Assumed Contracts") set forth on Schedule 2.6 attached hereto.

2.7 Certain Excluded Real Estate. Subject to the transfers effected by Section 1.1(b)(ii) hereof, CMC retains the real property and improvements thereon described in Exhibits 2.7(a) and 2.7(b) hereto.

SECTION 3. CONSIDERATION

3.1 Cash Consideration. The parties hereto agree that just compensation for the Acquired Property shall be SIXTY-SEVEN MILLION NINE HUNDRED THOUSAND DOLLARS ($67,900,000).

3.2 4.04 Obligations.

(a) The consideration shall be paid by RTA to CMC by the Notes, issued pursuant to Illinois Revised Statutes Chapter 111 2/3, paragraph 704.04, pursuant to the General Ordinance adopted August 5, 1985, as amended July 23, 1986 and November 20, 1986, and the Series Ordinance adopted August 6, 1987 (collectively, the Note, the General Ordinance and the Series Ordinance are referred to as the "4.04

Obligations"), all as set forth in Exhibit 3.2 attached hereto and subject to the terms and conditions contained therein.

(b) The 4.04 Obligations shall not be assigned, transferred or otherwise disposed of except (i) pursuant to a sale or pledge of all or substantially all of CMC's assets, (ii) to an entity resulting from a merger or consolidation with CMC, (iii) to a successor in interest to CMC by operation of law, or (iv) to CMC's parent or an entity in which CMC or its parent holds a fifty percent (50%) or greater controlling interest; provided, however, that no such transfer shall be undertaken for the purpose, in whole or in part, of obtaining a premium on the principal balance of the 4.04 Obligations. Any transaction undertaken in violation of this Section 3.2(b) shall be without force or effect. In no case shall a transfer of the 4.04 Obligations be made in violation of the Securities Act of 1933 or the Securities Exchange Act of 1934, as amended, or the rules and regulations promulgated thereunder.

3.3 Assumption of Liabilities. METRA shall undertake, assume, pay, perform, and discharge (and shall indemnify and defend CMC against and hold CMC harmless from) all debts, liabilities, and commitments, absolute or contingent (other than as attributable to the intentional or negligent acts or omissions on or after the Effective Date of CMC or a CMC Affiliate (as

hereinafter defined)) accruing or arising on or after the Effective Date out of (i) the Assumed Contracts (but specifically excluding debts, liabilities or obligations arising out of rights or obligations pertaining to Non-Acquired Property), and/or (ii) the Acquired Property.

SECTION 4. FURTHER AGREEMENTS

4.1 Termination of Agreements. CMC and RTA or METRA shall terminate as of the Effective Date those contracts, agreements, and understandings ("Terminated Contracts") as set forth on Schedule 4.1 attached hereto. The following terms and conditions shall apply to the termination of all Terminated Contracts:

(a) Any audit rights under the Terminated Contracts which have not been barred by orders of the reorganization court shall survive the termination.

(b) Any rights, liabilities, and obligations of CMC, RTA, or METRA under the Terminated Contracts (which have not been barred by orders of the reorganization court) accruing or arising from events or time periods occurring prior to the Effective Date shall survive the termination, whether or not asserted until after the Effective Date.

(c) Any payments, charges, credits, offsets, or portions thereof which relate to a period prior to the Effective Date shall be prorated according to the terms of such Terminated Contracts or if a Terminated Contract contains no such terms, the number of days in such period

(e) Except as set forth above, any monies received by CMC or METRA to which another party hereto is entitled pursuant to this Stipulation, and which are not subject to the proration, reproration, and settlement addressed in Section 4.5, shall be held in trust by the party receiving such monies on behalf of the party so entitled to such monies, and shall be paid over to the party so entitled to such monies within 15 days after the other party's receipt thereof; provided, however, that each party shall be permitted to co-mingle such funds with other of its general funds.

SECTION 10. INDEMNIFICATIONS

10.1 METRA's Indemnification. METRA hereby agrees to indemnify and hold CMC and its successors and assigns forever harmless from and against any and all liabilities, claims, demands, actions or causes of action, assessments, losses, costs, damages, or expenses, including reasonable attorneys' fees, sustained or incurred by CMC:

(a) resulting from or arising out of any misrepresentation or breach of warranty or nonfulfillment of any covenant on the part of METRA contained in this Stipulation or other instrument or document furnished by METRA pursuant hereto or in connection herewith; or

(b) resulting from or arising out of any liability or obligation under the Assumed Contracts (but specifically excluding liabilities or obligations arising out of non-Acquired Property) or relating to the Acquired Property accruing or arising from events occurring on and after the Effective Date, other than events attributable to the negligent or intentional acts or omissions after the Effective Date of CMC, any CMC Affiliate or any other party indemnified under this Section 10.1; or

(c) resulting from or relating to the absence of a request for ICC approval of, or the lack of ICC approval of, the condemnation of the Acquired Property.

10.2 RTA's Indemnification. RTA hereby agrees to indemnify and hold CMC and its successors and assigns forever harmless from and against any and all liabilities, claims, demands, actions or causes of action, assessments, losses, costs, damages or expenses, including reasonable attorneys' fees, sustained or incurred by CMC resulting from or arising out of any misrepresentation or breach of warranty or nonfulfillment of any covenant on the part of RTA contained in this Stipulation.

10.3 CMC's Indemnification. CMC hereby agrees to indemnify and hold RTA and METRA and their successors and assigns forever harmless from and against any and all liabilities, claims,

demands, actions or causes of action, assessments, losses, costs, damages or expenses, including reasonable attorneys' fees, sustained or incurred by RTA or METRA:

(a) resulting from or arising out of any misrepresentation or breach of warranty or nonfulfillment of any covenant on the part of CMC contained in this Stipulation or other instrument or document furnished by CMC pursuant hereto or in connection herewith;

(b) accruing or arising from events occurring prior to the Effective Date which result from or arise out of (i) any liability or obligation of CMC under the Assumed Contracts or (ii) the Acquired Property, except (x) as otherwise provided for in any lease or other agreement by and between CMC and RTA or METRA in effect prior to the execution of this Stipulation, (y) as caused by events prior to the Effective Date creating or permitting to exist a physical condition out of which such liability arises after the Effective Date or (z) as arising out of events attributable to the intentional or negligent acts or omissions of METRA, RTA or any other party indemnified under this Section 10.3;

(c) resulting from or arising out of the CMC Easements, except as to which CMC is relieved of liability under Section 2.4 hereof or the agreements contemplated thereby; or

(d) accruing or arising out of any claims pertaining to the sites identified on Schedule 5.6 and which (i) arise under federal, state or local environmental laws or regulations, or (ii) otherwise arise out of any environmental hazards present at such sites; notwithstanding anything to the contrary contained herein, CMC hereby retains liability, if any, for all such claims pertaining to the sites identified on Schedule 5.6.

(e) accruing or arising out of any liability directly or indirectly imposed upon METRA or RTA under Section 902(d) of the Illinois Income Tax Act and Section 5(j) of the Illinois Retailers Occupation Tax Act with respect to taxes owed by CMC or any CMC Affiliate to the State of Illinois or any subdivision thereof.

10.4 Procedure Re: Indemnification.

(a) If any party entitled to indemnification hereunder ("Indemnified Party") shall discover or have actual notice of facts giving rise or which may give rise to a claim for indemnification under this Section 10, or shall receive notice of any demand, assertion, claim, action, or proceeding, judicial or otherwise ("Action"), with respect to any matter for which indemnification may be claimed, the Indemnified Party shall, within twenty (20) days following service of process (or within such shorter time as may be necessary to give the party required by the terms hereof to

provide indemnification therefor ("Indemnifying Party") a reasonable opportunity to respond to such service of process) or within thirty (30) days after any other such notice, notify the Indemnifying Party in writing thereof together with a statement of such information respecting such matter as the Indemnified Party then has; it being understood and agreed that any failure or delay of the Indemnified Party to so notify the Indemnifying Party shall not relieve the Indemnifying Party from liability hereunder except and solely to the extent that such failure or delay shall have materially adversely affected the Indemnifying Party's ability to defend against, settle, or satisfy any such Action. Following such notice, the Indemnifying Party shall have the right, at its sole cost and expense, to contest or defend such Action through attorneys, accountants, and others of its own choosing (the choice of such attorneys, accountants, and others being subject to the approval of the Indemnified Party, such approval not to be unreasonably withheld) and in the event it elects to do so, it shall promptly notify the Indemnified Party of such intent to contest or defend such Action. If within twenty (20) days following such notice (or within such shorter time as may be necessary to give the Indemnifying Party a reasonable opportunity to respond to service of process or other judicial or administrative action) from the Indemnified

Party, the Indemnified Party has not received notice from the Indemnifying Party that such Action will be contested or defended by the Indemnifying Party, the Indemnified Party shall have the right to (i) authorize attorneys satisfactory to it to represent it in connection therewith and/or (ii) at any time settle, compromise, or pay such action, in either of which events the Indemnified Party shall be entitled to indemnification therefor subject to this Section 10. Following any notice of an indemnification claim not based on an Action, the Indemnifying Party shall promptly reimburse the Indemnified Party for all amounts owed to it by reason of such indemnification obligation.

(b) In the event and so long as the Indemnifying Party is actively contesting or defending against an Action as hereinabove provided, the Indemnified Party shall cooperate with the Indemnifying Party and its counsel in such contest or defense, shall join in making any appropriate counterclaim or cross-claim in connection with the Actions, and shall provide such access to the books and records of the Indemnified Party as shall be necessary in connection with such defense or contest, all at the sole cost and expense of the Indemnifying Party. Notwithstanding that an Indemnifying Party is actively conducting such defense or contest, any Action may be settled, compromised, or paid by the Indemnified Party without the consent of the Indemnifying

Party, provided however, that if such action is taken without the Indemnifying Party's consent, its indemnification obligations in respect of such claim shall thereby be nullified. No such Action may be settled, compromised, or paid by the Indemnifying Party without the Indemnified Party's consent, provided that if an offer of compromise, settlement, or payment shall be rejected by the Indemnified Party, the liability of the Indemnifying Party in respect of such Action shall in no event exceed the amount of such offer, less any legal fees and costs incurred by the Indemnifying Party after such offer.

(c) In the event any Action involves matters partly within or partly outside the scope of the indemnification by the Indemnifying Party hereunder, then the attorneys' fees, costs, and expenses of contesting or defending such Action shall be allocated between the Indemnified Party and the Indemnifying Party as they shall agree. If such an allocation cannot be agreed upon, the Indemnifying Party, at its sole expense, shall contest or defend those matters involved in the Action that fall within the scope of the indemnifications hereunder, and the Indemnified Party, at its sole expense, shall contest or defend those matters involved in the Action that fall outside the scope of the indemnifications hereunder.

parties hereto agree that the Court in the Condemnation proceedings retains jurisdiction for the determination and adjudication of any matters which may arise with respect to the Acquired Property, or any other matters relating to the terms, rights, and obligations set forth in this Stipulation or the Schedules and Exhibits and Schedules attached hereto.

IN WITNESS WHEREOF, each of the parties hereto has duly executed this Agreement as of this 3 day of September, 1987 and year first above written.

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION AUTHORITY

Attest:
Assistant Secretary

By: ~~Executive Director~~

REGIONAL TRANSPORTATION AUTHORITY

Attest:
Secretary

By:

CMC REAL ESTATE CORPORATION

Attest:
Asst. Secretary / Vice President

By:

STATE OF ILLINOIS)
) ss.
COUNTY OF C O O K)

I, Sarah Filler as a notary public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Samuel K. Skinner personally known to me to be the Chairman of the Board of the Regional Transportation Authority, and Edmund J. Wolf, personally known to me to be the Secretary of the Regional Transportation Authority, and personally known to me to be the same persons whose names subscribed to the foregoing instrument, appeared before me in person and severally acknowledged that as such Chairman of the Board and Secretary, they signed and delivered the said instrument as Chairman of the Board and Secretary of said Regional Transportation Authority, and caused the corporate seal of the Regional Transportation Authority to be affixed thereto, pursuant to authority, given by the Board of Directors of said Regional Transportation Authority as their free and voluntary act, and as the free and voluntary act and deed of said of the Regional Transportation Authority, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 3 day of September, 1987.

Sarah Filler
Notary Public

Commission expires May 4, 1989

STATE OF ILLINOIS)
) ss.
COUNTY OF C O O K)

I, Sarah E. Filler, as a notary public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Edwin Jacobson personally known to me to be the President of CMC Real Estate Corporation, and Lawrence Adelson personally known to me to be a Vice-President of CMC Real Estate Corporation and personally known to me to be the same persons whose names subscribed to the foregoing instrument, appeared before me in person and severally acknowledged that as such President and Vice-President; they signed and delivered the said instrument as President and Vice-President of said CMC Real Estate Corporation, and caused the corporate seal of CMC Real Estate Corporation to be affixed thereto, pursuant to authority, given by the Board of Directors of said CMC Real Estate Corporation as their free and voluntary act, and as the free and voluntary act and deed of said CMC Real Estate Corporation, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 3 day of September, 1987.

Sarah Filler
Notary Public

Commission expires May 4, 1989

STATE OF ILLINOIS)
) ss.
COUNTY OF C O O K)

I, Sarah E. Filler, as a notary public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Jeffrey R. Ladd personally known to me to be the Chairman of the Commuter Rail Division of the Regional Transportation Authority, and Maureen McClelland, personally known to me to be the Assistant Secretary of the Commuter Rail Division of the Regional Transportation Authority, and personally known to me to be the same persons whose names subscribed to the foregoing instrument, appeared before me in person and severally acknowledged that as such Chairman and Assistant Secretary, they signed and delivered the said instrument as Chairman and Assistant Secretary of said Commuter Rail Division of the Regional Transportation Authority, and caused the corporate seal of the Commuter Rail Division of the Regional Transportation Authority to be affixed thereto, pursuant to authority, given by the Board of Directors of said Commuter Rail Division of the Regional Transportation Authority as their free and voluntary act, and as the free and voluntary act and deed of said Commuter Rail Division of the Regional Transportation Authority, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 3 day of September, 1987.

Sarah Filler
Notary Public

Commission expires May 4, 1989

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 6

THE 1993 SOO-METRA SUPPLEMENTAL AGREEMENT – SUPPLEMENTAL AGREEMENT BETWEEN COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY AND SOO LINE RAILROAD COMPANY (MAY 27, 1993) (EXCERPTS) (ALSO METRA COMMENTS EXH. A-3)

EXHIBIT A-3

Metra-CP 1993 Supplement

METRA COUNTERPART

SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, made and entered into this 27TH day of May, 1993, by and between the Commuter Rail Division of the Regional Transportation Authority, a division of a municipal corporation (hereafter referred to as "Metra"), and Soo Line Railroad Company, d/b/a CP Rail System (hereinafter referred to as "CP"). Collectively hereinafter Metra and CP shall be referred to as "the Parties".

PRELIMINARY STATEMENT

SLRCO (a predecessor in interest to CP) and Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad (a predecessor in interest to Metra) entered into a Trackage Agreement dated February 19, 1985 ("Trackage Agreement") whereby SLRCO acquired certain rights to use of the Joint Line as therein defined to provide service over the Joint Line; and

Metra desires to assume certain maintenance obligations on the Joint Line and the Parties wish to supplement the Trackage Agreement to establish the terms and conditions under which Metra will provide such maintenance; and

The Parties desire to incorporate in the Trackage Agreement certain provisions from the September 16, 1982 Trackage Agreement between Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor and the Regional Transportation Authority and the March 2, 1988, Letter Agreement between the Parties.

In consideration of the terms and conditions hereinafter contained, the Parties agree to amend and supplement the Trackage Agreement as follows:

1. All references to Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor ("Milwaukee") shall be deemed to be references to Metra, and all references to SLRCO, Inc. ("SLRCO") shall be deemed to be references to CP.

2. Amend Article 1 as follows:

(i) Delete Zone 7 from Section 1.2 a

(ii) Amend Article 1.2 b to add to the end of the sentence under Zone 11:

", including Tracks No. 3, 4, 5, and 6 as shown in Attachment 5 only for the purpose of maintaining signal circuits for the crossings shown in Attachment 5."

(iii) Amend Section 1.2 b to add the following: "Zone 13 (#3 main). Between Pacific Junction (Mile Post 5.85) and Tower B-12 (Mile Post 12.82).

3. Amend Article II as follows:

(i) Add the following to the end of the first sentence of Section 2.1:

", including the right to operate self-propelled maintenance of way equipment and inspection equipment. CP shall be required to provide qualified operators when

operating such equipment on the Joint Line."

(ii) Delete the parenthetical "(except Amtrak)" from Section 2.1 (b)

(iii) Add to the end of Section 2.1(b) the following:

"; provided however, that CP and its connecting freight carriers shall have the right to carry out normal interchange activities in the Chicago area (cars not destined to or from CP shall in no event be considered interchange cars), and cars and trains of connecting carriers shall be considered those of CP for purposes of compensation to Metra, billing, and liability under this Supplemental Agreement.

(iv) Add a new Section 2.3 (d) to read as follows:

(d) Prior to April 30, 1996, Amtrak shall be considered a third-party admitted by CP, and until such date CP shall be entitled to all payments due from Amtrak for use of the Joint Line. No additional or other compensation shall be due Metra for Amtrak's use of the Joint Line other than compensation paid by CP for its use of the Joint Line.

(v) Add a new Section 2.4 to read as follows:

2.4 At any time after April 30, 1996, Metra shall have the right to admit Amtrak to use of the Joint Line and shall be entitled to all compensation due from Amtrak for such use. Amtrak's use of the Joint Line as of and after such aforesaid date shall be considered for

all purposes hereunder as use by Metra trains.

(vi) Add a new Section 2.5 as follows:

2.5 Metra agrees that nothing contained in this Agreement shall in any way be construed or acted upon when such would impede the ability of CP to meet its obligations under the Rail Passenger Service Act of 1970, 45 U.S.C. Section 501, et seq., or under existing and future contracts executed pursuant thereto with the National Railroad Passenger Corporation ("Amtrak"). In such circumstances, the offending provision shall be considered by the Parties to be null and void.

4. Amend Article V as follows:

(i) Section 5.1 shall be amended to read as follows:

"The Parties shall apportion between them the amounts described in this Article V and all payments due under this Article V shall be subject to the special provisions of Attachment 1 attached hereto. Payment shall be made in accordance with Article VI."

(iii) Section 5.2(d) shall be amended to add the following sentence after the first sentence thereof:

"Light engine, backup and industry switching movements shall be excluded in determining Gross Ton Miles Proportion except light engine movements initiated by Metra in excess of 51 per weekday shall be included."

(iv) Amend Section 5.2(e) to add the following sentence

after the first sentence thereof:

"Light engine, backup and industry switching movements shall be excluded in determining the Train Count Proportion except light engine movements initiated by Metra in excess of fifty-one (51) per weekday shall be included."

(v) Amend Section 5.4 (d) by adding the following at the end of the section:

", subject to the provisions of Attachment 1 of this Supplemental Agreement."

(vi) The word "Parent" in Section 5.2(e) shall be amended to read "either Party."

5. Article VI shall be amended as follows:

(i) Section 6.2 shall be amended to add at the beginning of the paragraph the following:

"Except for the first calendar month following the Commencement Date,"

(ii) The last sentence of Section 6.3. is amended to read as follows:

Metra shall furnish to CP within 15 days after the end of each calendar month during the term of this Agreement, a statement showing for that month: (a) the train count for the trains operated by or on behalf of Metra over each zone of the Joint Line; and (b) the

gross ton miles generated by the trains, engines and cars and contents operated by or on behalf of Metra over each zone of the Joint Line. Light engine movements in excess of fifty-one (51) per weekday shall be reported by Metra for (a) and (b) above. The statement shall be subject to verification and correction by CP. If Metra fails to furnish the statement within the fifteen (15) day period, the Summary Expense bill for that month shall be based on the Gross Ton Proportion and Train Count Proportion during the preceding twelve (12) month period. That bill shall be adjusted upon receipt of the required statement from Metra.

(iii) All words after to in the third line of Section 6.6 shall be deleted and replaced with:

"Metra's account 140003100 at Amalgamated Trust and Savings Bank at Chicago or another account designated by Metra."

6. Article VII is deleted in its entirety and replaced with the following:

Section 7. JOINT LINE CAPITAL EXPENDITURES

Definitions: For purposes of this Agreement "Capital Projects" shall mean a project that deals specifically with capital related improvements (e.g.; rehabilitation, replacement, renewal, modernization, or expansion of facilities or equipment) as contained in Attachment 2, as amended from time to time.

7.1. Metra may effect Capital Projects on the Joint Line necessary or desirable for the economical and safe operation of

trains, locomotives or cars over the Joint Line, or which are required by applicable law or regulations. Attachment 2 contains the Five Year Capital Projects Plan through calendar year 1997.

7.2. The costs of Capital Projects shall be paid by:

(a) Metra, if required solely by the operations of Metra or of third parties admitted to the use of the Joint Line by Metra;

(b) CP, if required solely by the operations of CP or of third parties admitted to the use of the Joint Line by CP; provided that CP shall pay the entire cost of the renewal in kind of turnouts for industry spurs used solely for freight operations except those paid for by the industry;

(c) Metra and CP have agreed to an allocation of costs for the Capital Projects identified on Attachment 2. As future Capital Projects are included in amended Attachment 2's, allocation of costs shall be agreed upon; however, in no event shall CP be required to contribute more than fifty percent (50%) of the cost of any Capital Project for the joint benefit of the Parties.

The Parties hereto further agree that the budget figures contained in Attachment 2 are estimates only and will be adjusted to actual expenditures as the work is completed.

7.3. Metra shall effect Capital Projects requested by and at the sole expense of CP unless such projects would substantially interfere with Metra's operations over the Joint Line or the rights

of a third party admitted to the use of the Joint Line.

7.4. Capital Projects effected pursuant to this Section shall be considered personal property and title to such projects shall vest in CP and Metra in proportion to the costs paid by each Party; provided that upon expiration of the useful life (as determined by standard accounting rules) of the project, title to such materials shall automatically transfer to and vest in Metra, except for industry spurs used solely for freight operations.

7.5. The designated representatives from Metra's Engineering Department and CP's Engineering Department shall make an annual joint inspection of the Metra Joint Line for the purpose of determining the Capital Projects to be undertaken and developing the Five Year Capital Program.

A report reflecting Capital Projects for the Metra Joint Line shall be furnished by Metra to CP within thirty (30) days after the annual joint inspection referred to in this Section 7.5 but not later than May 1 of each year. This report shall show in reasonable detail new projects, progress on existing projects, an estimate of total project costs and estimated completion dates. Metra shall not charge to CP the costs of any Capital Project for which CP has not given consent and authorization for expenditure in writing. Such consent shall not be unreasonably withheld, conditioned, or denied.

7.6. In reaching agreement as to allocation, the Parties shall be guided by the following guidelines: CP has no need for the main line tracks to be maintained to higher than FRA Class 3 for freight trains and FRA Class 4 for intermodal trains, and any additional cost needed to meet the Metra Track Standards shall be borne solely by Metra.

7.7. Each Party shall bill the other Party and the Parties shall pay each other in accordance with Article VI Section 6.4.

7. Article VIII is amended to add the following:

8.3. Metra shall furnish all labor and material and shall maintain, repair and renew the Joint Line, as amended in this Supplemental Agreement, in accordance with the terms of this Agreement, provided that CP shall maintain with its own forces, and at its sole expense, the portion of industry spurs and the portion of side tracks and yards including, but not limited to, those at Spaulding, Rondout, Galewood, Morton Grove, Schaumberg, Itasca, and similar trackage at other locations used exclusively for freight operations all as shown in green on Attachment 3; provided that such trackage owned by Metra shall be maintained by CP to not less than FRA Class 1 standards. Notwithstanding any provision hereof Metra shall perform the entirety of any publicly funded grade crossing improvement project on the Joint Line as amended in this Supplemental Agreement.

8.4. The Parties shall maintain all track, interlocking and crossing signals on the Joint Line as provided in Attachment 4, except the maintenance of the signal system at five (5) grade crossings in Franklin Park shall be governed by Attachment 5.

8.5. Metra shall own and maintain the tower structures at Rondout, A-2, A-5, B-12 and B-17, regardless of which Party operates the towers.

8.6. Metra shall assume maintenance responsibility for the entirety of all bridges spanning or carrying any portion of the Joint Line, but only to the extent CP is currently performing such

maintenance or Metra's predecessors were obligated to perform such maintenance.

8.7. CP shall maintain communication facilities that are related to the control of freight train movements including those related to commuter operations when such facilities overlap with freight operations. CP shall also maintain the CDRC (Centralized Dispatcher Radio Control) communication network including the base stations located at Fox Lake, Rondout, Spaulding, and A-5 and the local radios at Towers B-12, B-17, and Rondout. CP shall maintain the intercom network connecting Towers B-12, B-17, and CP's Bensenville Yard Office and hump tower.

Metra shall maintain the local radio at Towers A-2, A-5, and Track 19 (i.e.; Union Station) including the talk back speakers at those locations. Metra shall also maintain the pole line whether located on Metra property, CP property or third party property.

MCI shall continue to maintain the fiber optics cable. In the event MCI no longer desires to retain fiber optics cable between Cragin and Milwaukee, CP shall have the right to assume MCI's rights to the extent CP uses them for railroad operations.

CP shall continue to own and maintain the T1 equipment, located at the CDRC radio base station building at Rondout and at Bensenville. This equipment is associated with the 24 channel fiber optics circuit between Bensenville and Rondout which is used (or in the process of being used) for the CDRC network, CTC, and telephone circuit.

8.8. CP shall have the right to store inventory at reasonable locations on Metra property for no charge by providing Metra thirty (30) days written notice of its intent to do so, but such storage

shall be at its sole risk and responsibility. The location at which the inventory is stored shall not interfere with Metra's operations. Both CP and Metra shall have such reasonable vehicular and pedestrian access to the other's property as shall be required for their respective maintenance obligations. Each Party shall have the right to locate equipment and other property necessary for its commuter or freight operation on the other Parties property at no charge to the other Party; provided that such equipment and property shall not interfere with the operation of the owning Party. Requests to locate any additional equipment or property on the other Party's property in the future shall be made not less than sixty (60) days in advance of the need to do so and approval of such request shall not be unreasonably withheld.

8.9. As used herein, "Metra Track Standards" means the Class 4 standard of the Federal Railroad Administration or any successor agency ("FRA") for all aspects of track maintenance except track geometry, and the FRA Class 5 standard for track geometry, so as to facilitate the operation of Metra's trains at 70 miles per hour. Metra shall maintain the Joint Line main line tracks to the Metra Track Standards. Exceptions: (i) main line Track No. 3 between Pacific Junction, Chicago, Tower B-12 need only be maintained to FRA Class 2; and (ii) the double main line tracks between Rondout (Mile Post 32.25) and the termination of Metra ownership (Mile Post 32.52) shall be maintained to FRA Class 4 standards for all aspects of track maintenance including geometry. Joint Line facilities other than main line tracks shall be maintained by Metra in accordance with reasonable standards jointly agreed by CP and Metra. Metra shall maintain minimum clearances as are in effect as of the effective date of this Agreement. Track standards necessary for freight operations on the No. 1 and No. 2 main lines (except for intermodal trains and Amtrak) shall be a maximum of FRA Class 3 standards. Track standards necessary for the operation of intermodal trains and Amtrak shall be

not more than FRA Class 4 and 70 miles per hour respectively (79 miles per hour between Mile Post 29 and Mile Post 32.25) in the zones used for such operation.

8.10. If the use of or traffic over the Joint Line is interrupted or delayed at any time, the Parties shall expeditiously restore the line for the passage of trains. Any Metra train, locomotive, or car derailed or damaged on the Joint Line shall be expeditiously picked up or removed by Metra or its emergency service contractor. Any CP train, engine or car derailed or damaged on the Joint Line shall be expeditiously picked up or removed by CP or its emergency service contractor; provided that in the event CP does not so act expeditiously, Metra shall have the right to provide such removal services. The expenses incurred in picking up and removing derailed or damaged trains and the cost of restoration of the Joint Line resulting from a derailment or accident shall be paid in accord with the provision of Section 11.7 hereof.

8.11. In the event Metra fails to meet its obligations under this Section, and if CP gives written notice specifying the failure and requesting that it be remedied, and if Metra fails to remedy such failure within 30 days of receipt of such written notice, then CP shall have the right to correct such failure. With respect to any such corrective work, CP shall also be entitled to deduct from any payments due Metra, Metra's proportionate share of CP's costs of correction, including CP overheads.

8.12. Metra shall (a) maintain all joint facility agreements, interlocking agreements and similar arrangements necessary to the operations controlled by these facilities, with the expense therefore allocated between the Parties as provided in this Agreement; (b) pay and discharge when due and payable all lawful governmental charges or levies imposed with respect to the Joint Line (except to the extent

and while the validity thereof is contested by appropriate proceedings); (c) provide for utility services necessary to operations over the Joint Line; and (d) take all other action necessary to permit the Joint Line to be used for the joint benefit of the Parties and their admittees.

8.13. The routine maintenance forces to be utilized by Metra are specified in Exhibit F of the Transition Agreement. These routine maintenance forces are to remain at or below the levels contained in Exhibit F for the purpose of allocating track and signal maintenance expenses to CP under the Section 5.4 and Attachment 1.

8.14. For costs hereunder, each Party shall bill the other Party and the Parties shall pay each other in accordance with Article V and Article VI, subject to the provisions of Attachment 1.

8.15. CP recognizes the priority of commuter service operations on the Joint Line on Monday through Friday, inclusive, with respect to trains which depart from their originating stations during the times and in the zones identified below and maintain timetable schedule (the "peak period trains"):

Big Timber Road to CUS -- eastbound

5:15 a.m. - 7:45 a.m.
4:30 p.m. - 6:30 p.m.

B-12 to CUS -- eastbound

6:05 a.m. - 8:35 a.m.
5:15 p.m. - 7:15 p.m.

CUS to B-12 & Big Timber Road -- westbound

5:15 a.m. - 8:30 a.m.
4:00 p.m. - 6:15 p.m.

Rondout to CUS -- southbound

6:00 a.m. - 7:50 a.m.
4:20 p.m. - 6:00 p.m.

CUS to A-20 -- northbound

6:25 a.m. - 8:45 a.m.
4:15 p.m. - 6:10 p.m.

A-20 to Rondout -- northbound

7:00 a.m. - 8:15 a.m.
4:30 p.m. - 6:20 p.m.

Fox Lake to Rondout -- southbound

5:00 a.m. - 8:30 a.m.

Rondout to Fox Lake -- northbound

4:30 p.m. - 6:45 p.m.

Except as required by an emergency, CP shall not interfere or permit any third party to interfere with peak period trains. CP shall not object to Metra's operations of peak period trains on the grounds that those operations unreasonably interfere with CP's or third parties' ability to provide efficient freight or intercity

passenger service. CP may make reasonable adjustments to the operations of traffic on the Joint Line which do not unreasonably disrupt or delay trains which are not peak period trains.

8.16. Except as provided in this Section 8.16, the operation of the commuter service on the Joint Line during times outside the peak periods shall be subject to the schedules effective April 25, 1993, for the west line and May 9, 1993 for the north line attached as Attachment 6. Metra may not change the schedule on Attachment 6 without CP's prior written consent, which may not be unreasonably withheld; providing that such change shall not materially interfere with freight operations. However, CP agrees that Metra may add trains to the Joint Line on the new service route between Chicago Union Station and Antioch during the off peak periods as scheduled below:

Eastbound:

Train	Depart	Time
106	B-12	10:38 a.m.
108	B-12	2:38 p.m.

Westbound:

Train	Depart	Time
103	CUS	11:40 a.m.
105	CUS	2:30 p.m.

Additionally, Metra may add, subject to consultation with CP regarding the schedule and CP's consent (whose consent shall not be unreasonably withheld providing that the trains do not materially

interfere with freight operations), ten (10) trains during the off-peak periods as follows: (i) one (1) train in each direction between Tower B-12, Franklin Park and Chicago Union Station (CUS); (ii) Two (2) trains in each direction between Elgin and CUS; (iii) two (2) trains in each direction between Fox Lake and CUS. At any time upon ten (10) days prior written notice, Metra may decrease the number of commuter service trains.

8.17. CP shall operate the interlocking towers, with the exception of Towers A-2 and A-5 which shall be operated by Metra, all under the direction of the CP dispatcher. Billing for the operator positions for Towers A-2 and A-5 shall be in accordance with Article V, Section 5.4 without regard to Attachment 1, subject, however, to the staffing levels contained in Exhibit F.

8. Article XI is amended to add a new Section 11.7 which shall read as follows:

Section 11.7 LIABILITY

Definition: Whenever the expression "proportionally by the Parties" is used in this Section, it means that expenses will be borne in proportion to the total gross ton miles handled by each Party in the zone in which the incident occurred in the month prior to the occurrence, or if it cannot be determined in which zone the incident occurred or if the incident occurred in more than one zone, the expenses will be borne in proportion to the total gross ton miles handled by each Party over the entire Joint Line in the month prior to the occurrence. Until April 30, 1996, the locomotives, trains, cars, property, passengers or employees of National Railroad Passenger Corporation (Amtrak) shall be considered CP for liability purposes in this Section 11.7. After such date, said locomotives, trains, cars, property,

passengers, or employees shall be considered Metra for purposes of liability under this Section 11.7. Wisconsin & Calumet Railroad's (WICT) locomotives, trains, cars, and property shall be considered as Metra.

(a) Both Parties shall undertake to comply with all applicable federal and state laws or regulations, and all applicable rules, regulations or orders promulgated by any municipality, board or commission. If any failure of either Party to comply with such laws, rules, regulations or orders in respect to the use of the Joint Line results in any fine, penalty, cost or charge being assessed against the other Party, the Party which failed to comply agrees to reimburse promptly and indemnify the other Party for such amount.

(b) The employees of either Party while operating, maintaining or directing operation along the Joint Line shall not be considered as joint employees but will remain the sole employees of either Party. However, when any sole employee of CP or Metra is engaged in maintaining, repairing, renewing, removing, or inspecting the Joint Line, or in dispatching, giving orders for or directing the movement of trains over the Joint Line, or performing other service involving the Joint Line for the common benefit of the Parties, and the death of, injury to, or loss of property of the sole employee arises out of such service for the common benefit of the Parties, then the liability shall be borne proportionally by the Parties, except for cases covered by Sections 11.7(c) and 11.7(h) below, which losses shall be divided between the Parties in accord with the provisions thereof.

(c) Liability for injury to or death of any persons or loss of or damage to any property, including the Joint Line

and turnouts therefrom, in any manner resulting from or in connection with the operation of locomotives, trains or cars of either Party, or in connection with the presence on the Joint Line of locomotives, trains, cars, property, passengers or employees of either Party, shall be borne and paid by the Parties as follows:

(i) When the same shall involve the train of only one of the Parties, or a defect in or failure of the Equipment of one of the Parties, liability will be borne by that Party. "Equipment" in this Subparagraph means rolling stock, locomotives and cabooses and includes cars of any ownership which are on the Joint Line in the account of one of the Parties, in which event such cars will be considered to be equipment of the Party in whose account they are unless the car has been repaired by the other Party after it arrived on the Joint Line and the liability is traceable to that repair, in which case that car will be considered to be in the account of the Party performing the repair.

(ii) When the same shall be due to the acts or omissions of any sole employee of a Party, and that employee is not performing service for the common benefit, liability shall be born by that Party, regardless of any other provision of this Agreement.

(iii) When the same shall involve the trains of both Parties, the liability shall be borne by each Party as to its own employees, passengers, property, or property in its custody, and as to third party property or persons (other than passengers) the

liability shall be borne proportionally by the Parties.

(iv) When the same shall be due to any acts or defects not provided for in this Agreement, liability shall be borne by each Party as to its own employees, passengers, property, or property in its custody, but as to third party property or persons (other than passengers) the liability shall be borne by the Party whose locomotive, train or car is involved in the accident causing the loss, damage, injury or death, and if the locomotives, trains or cars of both Parties were involved in causing such accident, then such liability shall be borne proportionally by the Parties.

(v) Third-party claims for loss or damage to property arising out of the killing or injuring of livestock or the setting of fires on or along the Joint Line, when caused by the locomotive, train or car of one of the Parties, shall be handled or settled by the Party whose locomotive, train or car caused such loss or damage, but if it cannot be determined whose locomotive, train or car caused such loss or damage, the claim will be handled or settled on behalf of both Parties in the first instance by Metra, and the loss will then be borne proportionally by the Parties.

(vi) Notwithstanding anything to the contrary herein, claims which are caused by or arise out of the sole negligence of CP train dispatchers or CP or Metra tower operators performing service under the control

of CP or Metra supervision shall be borne by the Party providing such supervision.

(d) Except when Section 11.7(b) is applicable, in the event no locomotive, train or car of either Party is involved, liability shall be borne by each Party as to its own employees, passengers, property, or property in its custody, and as to third party property or persons (other than passengers) the liability shall be borne proportionally by the Parties.

(e) Each Party agrees that it will pay for all loss, damage and expense, the risk of which it has herein assumed, the judgment of any court to the contrary notwithstanding, and will forever indemnify and save harmless the other Party, its successors and assigns, from such judgment.

(f) In the event that both Parties hereto shall be liable under this Agreement for any claim, demand, suit or cause of action, and the same shall be compromised and settled by voluntary payment of money or valuable consideration by one of the Parties, release from liability will be taken in the name of both Parties. Neither Party shall make any such compromise or settlement in excess of $5,000 without authority of the other Party having liability, but any settlement made by one Party in consideration of $5,000 or less shall be a settlement releasing all liability of both Parties and shall be binding upon the other Party having liability.

(g) In case a lawsuit or lawsuits shall be commenced against either Party hereto for or on account of any damage or injury for which the other Party would be solely or jointly liable under this Agreement, the Party thus sued shall give

the other Party timely written notice of the pendency of such suit, and thereupon the Party so notified shall assume or join in the defense thereof, and if the Party so notified is liable therefor under this Agreement, such Party shall save harmless the Party so sued from all loss, cost and expense so determined by this Agreement. Neither Party shall be concluded by any judgment against the other Party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified, and said opportunity to join in the defense of the action afforded, the Party so notified shall to the extent of its liability under this Agreement be concluded by such judgment.

(h) It is understood and agreed that a number of vehicular crossings of the Joint Line presently exist, or may be constructed. The Parties agree to accept all crossings in their design and configuration as they may be during the term of this Agreement and further agree that rules of liability in this Section 11.7 shall apply to crossing accidents, and such rules shall not be subject to any offset or defense based on such design or configuration.

Supplemental Agreement
Metra/CP Rail

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized.

ATTEST:

SOO LINE RAILROAD COMPANY
d/b/a CP RAIL SYSTEM

Fern B. Albers
Corporate Secretary

By: _____
P. A. Pender
Vice President and
Chief Operating Officer

ATTEST:

COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY

_____
Maureen Pochron
Assistant Secretary

By: _____
Philip A. Pagano
Executive Director

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

GAMEIRO R.V.S. EXHIBIT 7

THE 2003 SOO-METRA AMENDMENT AGREEMENT – AMENDMENT AGREEMENT BETWEEN COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY AND SOO LINE RAILROAD COMPANY (APR. 1, 2003) (EXCERPTS) (ALSO METRA COMMENTS EXH. A-4)

EXHIBIT A-4

Metra-CP 2003 Amendment Agreement

AMENDMENT AGREEMENT

THIS AMENDMENT AGREEMENT is made and entered into this 15 day of April, 2003, by and between the Commuter Rail Division of the Regional Transportation Authority, a division of a municipal corporation (hereafter referred to as "Metra") and the Soo Line Railroad Company, a Minnesota corporation d/b/a Canadian Pacific Railway (hereafter referred to as either "CP" or "CPR"), sometimes collectively referred to below as the "Parties" and sometimes individually referred to below as a "Party."

PRELIMINARY STATEMENT

SLRCO, Inc. (a predecessor in interest to CPR), and Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor (a predecessor in interest to Metra) entered into a Trackage Agreement, dated February 19, 1985 (as amended by agreements executed May 27, 1993, May 11, 1995, June 3, 1996, September 28, 2001, and June 17, 2002) ("Trackage Agreement") whereby CPR acquired certain rights to use the Joint Line as therein defined and to admit a third party to the Joint Line; and

CPR and Metra amended certain aspects of the Trackage Agreement through a Supplemental Agreement, dated May 27, 1993, ("Supplemental Agreement"). In an Agreement, dated April 7, 1997, CPR and Metra acknowledged that CPR was admitting, but not assigning rights to, I&M Rail Link, LLC ("IMRL") pursuant to CPR's rights under the Trackage Agreement; and

In view of the sale of IMRL's assets to the Iowa, Chicago & Eastern Railroad Corporation ("IC&E"), and the discontinuance of IMRL's rail operations, CPR has decided that it will admit IC&E to Zones 8 through 13 of the Joint Line pursuant to its rights under the Trackage Agreement, and Metra has concluded, subject to the following undertakings and subject to those contained in a separate Trackage Rights Agreement executed simultaneously with this Amendment Agreement ("IC&E Trackage Rights Agreement"), that the traffic projected by IC&E for the period immediately following its admission to Zones 8 through 13 of the Joint Line does not at present materially interfere with the current level of traffic on the Joint Line.

The Parties agree that fixing the Base Cap amount is intended to simplify the administration of the existing Base Cap mechanism, and is consistent with the economic arrangement and the protections afforded to CPR by the Base Cap that the Parties agreed to in the 1993 Supplemental Agreement.

The Parties agree it is mutually beneficial to eliminate the monthly compilation of gross ton miles and train counts for the purpose of the equitable allocation of expenses related to the Joint Line as defined in the February 19, 1985 Trackage Agreement as amended.

NOW THEREFORE, in consideration of the terms and conditions contained in this Amendment Agreement and in the IC&E Trackage Rights Agreement, the parties agree to amend and supplement the Trackage Agreement as follows:

1. CPR has determined that it will exercise its right under Section 2.3 of the Trackage Agreement to admit IC&E to Zones 8 through 13 of the Joint Line as a replacement for CPR's former admittee, IMRL, effective April 1, 2003. The operations and traffic of IC&E, or any successor to IC&E, shall be governed by the IC&E Trackage Rights Agreement, which

designates Metra as a third party beneficiary with the authority to enforce the terms of the Trackage Rights Agreement in accordance with Section 8.4 thereof. Based upon statements made by IC&E in filings it has made at the Surface Transportation Board in Finance Docket No. 34177, Metra has determined that current operations of the IC&E will not materially interfere with traffic currently on the Joint Line, including Metra's traffic. The Parties agree that IC&E is being admitted as a third party admittee and not as a result of an assignment of a portion of CPR's trackage rights under the Trackage Agreement.

2. The Parties agree that the terms "Existing Traffic," "Increased Traffic," "Coal Trains," "Force Majeure Trains," and "Excess Trains" as used in this Agreement shall have the same meanings as set forth in Section 1.6 of the IC&E Trackage Rights Agreement.

3. The terms of the Trackage Agreement, as amended, will continue to prevail with respect to maintenance, operation and compensation, and the current formula and procedures for capital improvements will stay in effect without modification so long as IC&E's traffic does not include Increased Traffic, Excess Trains, or Coal Trains over any zone(s) to which it has been admitted on the Joint Line. CPR will direct IC&E to report to Metra any increases relative to Increased Traffic, Coal Trains and Excess Trains.

4. In the event IC&E seeks to operate Increased Traffic, Excess Trains, or Coal Trains over the Joint Line, the Trackage Agreement as amended will continue in effect but certain provisions will be modified as expressly provided by this Amendment Agreement. In such an event, CPR will enforce the procedures specified in Sections 2.13 and 2.14 of the IC&E Trackage Rights Agreement, including the refusal to admit Coal Trains, Increased Traffic, or Excess Trains, except as permitted by those Sections, and will assist and cooperate with Metra in Metra's efforts to enforce those provisions. The Parties shall promptly notify each other of any

failure of IC&E to abide by the terms of the IC&E Trackage Rights Agreement entered into between IC&E and CPR. Should CPR's refusal to dispatch or admit IC&E's Increased Traffic, Excess Trains, or Coal Trains pursuant to the terms of that Agreement result in the issuance of an order of the Surface Transportation Board ("STB"), its successor, or a court of law with competent jurisdiction requiring that CPR dispatch or admit said traffic onto the line, Metra agrees that any CPR compliance with such order shall not constitute breach of this Agreement or the Trackage Agreement and that Metra shall have no cause of action arising from CPR's compliance with such order.

5. Section 5.4(a) shall be deleted and replaced with the following language: "Maintenance of way and structures expenses incurred for each zone of the Joint Line not included in expenses governed by the CPR Base Cap or the Fixed Cap shall be allocated based upon the average Gross Ton Mile Proportion for the applicable zone(s) between the Parties for the preceding Fiscal Year. Five years from June 1, 2004, and at five (5) year intervals thereafter, either Party may reopen and reevaluate this allocation at their expense by notice given to the other at least 30 days prior to the end of each five (5) year period and the Parties shall determine the need to agree to a new allocation."

Section 5.4(b) shall be deleted and replaced with the following language: "Transportation, signal and communication systems expenses and maintenance of non-Milwaukee owned equipment (used in the operation or maintenance of the Joint Line) incurred for each zone of the Joint Line not included in expenses governed by the CPR Base Cap or the Fixed Cap shall be allocated based upon the average Train Count Proportion for the applicable zone(s) between the Parties for the preceding Fiscal Year. Five years from June 1, 2004, and at five (5) year intervals thereafter, either Party may reopen and reevaluate this allocation at their

expense by notice given to the other at least 30 days prior to the end of each five (5) year period and the Parties shall determine the need to agree to a new allocation."

Section 5.4(c) shall be deleted and replaced with the following language: "Expenses for train dispatchers incurred in operating the Joint Line shall be allocated based upon the average Train Count Proportion for all zones between the Parties for the preceding Fiscal Year. Five years from June 1, 2004, and at five (5) year intervals thereafter, either Party may reopen and reevaluate this allocation at their expense by notice given to the other at least 30 days prior to the end of each five (5) year period and the Parties shall determine the need to agree to a new allocation."

Section 5.4(e) shall be deleted and replaced with the following language: "Monthly expenses incurred for joint facilities which are part of the Joint Line and not solely owned by the Milwaukee, identified in Exhibit C, and not included in expenses governed by the CPR Base Cap or the Fixed Cap shall be allocated based upon the average Train Count Proportion for the applicable zone(s) between the Parties for the preceding Fiscal Year. Five years from June 1, 2004, and at five (5) year intervals thereafter, either Party may reopen and reevaluate this allocation at their expense by notice given to the other at least 30 days prior to the end of each five (5) year period and the Parties shall determine the need to agree to a new allocation."

6. CPR and Metra agree that the computation for the Base Cap for the year beginning June 1, 2003 under Attachment 1 to the Supplemental Agreement shall include, in addition to other CPR traffic, all IMRL and IC&E traffic, as set forth in (i), (ii), and (iii) below, as CPR trains, and shall be based upon applicable IMRL and IC&E operating statistics for the period June 1, 2002 to May 31, 2003 that will be the sum of the following calculations:

(i) for the period June 1 through July 29, 2002, the applicable operating statistics shall be the actual level of IMRL traffic over the Metra Trackage;

(ii) for the period July 30, 2002 through August 29, 2002, the applicable operating statistics shall be the average applicable operating statistics for the level of IC&E traffic over the Metra Trackage by IC&E trains from the time period August 30, 2002 through the date of this Agreement, that being the time period during which IC&E trains moved over the Metra Trackage by way of that certain Detour Agreement with Metra; and

(iii) for the period from August 30, 2002, through May 31, 2003, the applicable operating statistics shall be the actual applicable operating statistics of IC&E trains over the Metra Trackage, whether operated under that certain Detour Agreement or under the IC&E Trackage Rights Agreement.

As of June 1, 2004, CPR's Base Cap as defined in Section (A)(1)(a) of Attachment 1 of the May 27, 1993 Supplemental Agreement shall be referred to as the "Fixed Cap," and shall be established as the greater of $1,765,137.78 adjusted by the annual average of the CPI-U-Chicago Index (as calculated based on the sum of the monthly Index numbers for the preceding 12 months, divided by 12 ("Index"), for the period beginning June 1, 2003 and ending May 31, 2004), or the annual Base Cap paid by CPR to Metra as set forth above for the period of June 1, 2003 through May 31, 2004, adjusted by the Index for the period beginning June 1, 2003 and ending May 31, 2004. The Fixed Cap shall be adjusted by Metra, on or before August 1 of each fiscal year, being the period of June 1st through May 31st in any one year ("Fiscal Year"), in accordance with the Index ("Fiscal Year Adjustment"). In the event that the CPI-U-Chicago Index ceases to be published, or the methodology by which it is derived is materially altered, the parties shall determine the most appropriate substitute index that most closely matches the

structure of the canceled/altered CPI-U-Chicago Index. Such replacement index will be used for the remainder of the Agreement, unless and until it ceases to be published, or is materially altered, and is replaced in the manner stated above.

CPR shall pay the annual Fixed Cap in twelve (12) equal installments in the following manner: On or before August 1st of each Fiscal Year, Metra shall issue twelve (12) monthly invoices to CPR, and CPR shall pay the amounts due under said invoices in U.S. currency within thirty-five (35) days after the first day of each of the following months, including the month of August, in the Fiscal Year. Fixed Cap Installments paid for the months of June and July shall be the same as the monthly amount paid in the prior Fiscal Year and shall be billed or credited retroactively based on the amount of the Fiscal Year Adjustment and, if billed, shall be paid in U.S. currency within thirty (30) days of CPR's receipt of an invoice for the retroactive amount due. Other than annual CPI-U adjustments, the Fixed Cap shall remain fixed for five (5) year periods starting June 1, 2004, and may be reevaluated at the written request of either party by notice given to the other at least 30 days prior to the end of each five (5) year period. In the absence of such request, the Fixed Cap shall continue for the next five (5) year term. The terms upon which either party may request a reevaluation of the Fixed Cap are as follows:

(1) Changes in FRA Standards or government mandates which cause an increase or decrease in the maintenance expense incurred by Metra.

(2) Increases in the allowable gross weight per car that is currently authorized at 286,000 pounds.

(3) Increases or decreases in expenses experienced by Metra as a result of improvements installed to the Joint Line on behalf of CPR or to accommodate the Existing Traffic of CPR's third party admittee, provided that the additional

expenses are offset by any reduction in expenses due to the removal of replaced structures.

(4) Material changes to maintenance procedures of Metra or traffic levels of Metra or CPR (including Existing Traffic of CPR's third party admittee, but excluding Increased Traffic, Coal Trains or Excess Trains of CPR's third party admittee).

In the event a Party requests a reevaluation of the Fixed Cap in accordance with the terms of this Agreement, CPR agree to continue to pay the Fixed Cap in accordance with the current formula for the Fixed Cap as adjusted by the Index. At such time as the Parties agree to the amount of the reevaluated Fixed Cap, the new Fixed Cap amount shall be applied retroactively to the beginning of the five (5) year term for which the reevaluation was requested.

7. Effective the first month during which Increased Traffic, Excess Trains, or Coal Trains are transported on the Joint Line, CP shall in addition direct IC&E to pay directly to Metra the GTM Excess Train Charge or the GTM Coal Train Charge in accordance with the terms of the IC&E Trackage Rights Agreement (representing IC&E's obligation for Increased Traffic, Excess Trains, and Coal Trains and for which IC&E must either pay directly or indirectly and reimburse CP). Under the IC&E Trackage Rights Agreement, IC&E has agreed to pay these charges directly to Metra if directed to do so by CPR. Said GTM Excess Train Charge or GTM Coal Train Charge, as applicable, shall be consistent with the charges set forth in Sections 3.1 and 3.2 of the IC&E Trackage Rights Agreement for any IC&E Increased Traffic, Excess Trains or Coal Trains that are transported over the Joint Line. The GTM Train Charge as defined and set forth in the IC&E Trackage Rights Agreement shall be adjusted effective July 1 of each year, beginning July 1, 2003, on the basis established in Appendix A hereto to compensate Metra for increases in the cost of labor, materials and other expenses plus applicable

additives. These charges represent the exclusive charges payable to Metra for all expenses associated with the operation of ICE Increased Traffic, Excess Trains, or Coal Trains other than capital expenditures.

8. To address additional capital expenditures that are necessary to accommodate IC&E's Increased Traffic, Excess Trains, and Coal Trains on the Joint Line, Section 7.2 of the Trackage Agreement, as amended by Section 6 of the Supplemental Agreement, is further amended by substituting the following sentences for the second sentence of subsection (c):

> As future Capital Projects are included in amended Attachments 2, allocation of costs shall be agreed upon, however, in no event shall CP be required to contribute more than fifty percent (50%) of the cost of any Capital Project for the joint benefit of the Parties, unless the Capital Project is in part necessitated by the introduction of Increased Traffic, Excess Trains, or Coal Trains. Where introduction of such Increased Traffic, Excess Trains, or Coal Trains causes the need for the Capital Project, the procedures set forth in Sections 2.14, 3.4, 3.6, 3.7, and 3.8 of the IC&E Trackage Rights Agreement shall be used to determine the allocation of such Capital Project costs among Metra, CPR and IC&E. CP, subject to Section 7.2(e), shall be solely responsible for that portion of the Capital Project, plus no more than 50% of the remaining portion of the Capital Project attributable to other CP and Metra traffic. CP's allocation for Capital Projects involving signals, dispatching and communications facilities shall be based upon the Train Count Proportion for the year prior to adoption of the plan for the Capital Project, plus no more than 50% of the remaining portion of the Capital Project attributable to other CP and Metra traffic, except that CP, subject to Section 7.2(e), shall be solely responsible for that portion of the Capital Project attributable to the increase in its Train Count as modified

by projections of future traffic growth for IC&E Increased Traffic and Coal Trains. It is agreed that to the degree that operation of Increased Traffic, Excess Trains, and Coal Trains diminishes the remaining useful life of an existing capital structure as established by Metra and approved by the Federal Transit Administration for commuter rail operations or requires an upgrading of capital structures to prevent annual maintenance expenses from exceeding the average level of annual expenses computed in constant dollars over the preceding ten years, CP shall be solely responsible for that portion of the Capital Project.

An example of the foregoing computations is set forth in Appendix B to this Agreement.

9. Section 7.2 of the Trackage Agreement is further modified by inserting the following new subsections:

(d) Subject to Section 7.2(e), CP, if required solely by the transportation of Increased Traffic, Excess Trains, or Coal Trains on the Joint Line; or if required solely because Increased Traffic, Excess Trains, or Coal Trains causes the remaining useful life of the existing and future rail facilities on the Joint Line to diminish below the "useful life" standards set by Metra and reported to the Federal Transit Administration.

(e) CP will not be responsible to Metra for payments for Capital Projects attributable to Increased Traffic, Excess Trains, or Coal Trains; *provided* that CP creates the Escrow Account described by Section 3.6 of the IC&E Trackage Rights Agreement, including arrangements for Metra to verify the sufficiency of funds deposited therein and to promptly receive payment upon submission of the

appropriate documentation, and cooperates with Metra to insure that the Escrow Account is administered as required by Section 3.6.

10. Section 8.15 to the Supplemental Agreement is amended by adding the following sentence at the end of the Section:

CP shall not admit or permit IC&E trains, including those transporting coal, to operate within Zones 8 through 13 during the periods when peak period trains are operating in those Zones.

11. CPR shall insure that all IC&E engineers and train crews are properly certified to operate on the Joint Line in compliance with the Trackage Agreement, as amended. CPR acknowledges that from time to time Metra will conduct spot inspections including a review of crew certification activities. IC&E trains, equipment and employees will be treated as CPR trains, equipment and employees with regard to liability.

12. CPR waives any claim or cause of action against Metra relating to or arising from any delay in the admission of IC&E to the Metra Trackage or in Metra's refusal to consent to an assignment of the CPR-IMRL Trackage Rights Agreement dated April 4, 1997, or for any delay in completion of capital improvements needed prior to admission of Coal Traffic.

13. Section 6.3 (ii) is amended to eliminate, commencing May 31, 2003, the requirement of both Parties to furnish statements of train counts and gross ton mileage per zone on a monthly basis. CPR shall furnish statements of train counts and gross ton mileage per zone to Metra on an annual basis. Notwithstanding the foregoing, in order for Metra to accurately invoice CPR and confirm that payments received from CP are in accordance with Section 4 of this Agreement, CPR agrees to obtain from IC&E and to forward to Metra gross ton mileage data

described in Section 2.15 of the IC&E Trackage Rights Agreement within 15 days of the close of the calendar month.

14. In Section 11.7, the definition "proportionally by the Parties" shall be modified by the substitution of the following sentences for the existing first sentence: "Whenever the expression 'proportionally by the parties' is used in this Section, it means that expenses will be borne in proportion to the total gross ton miles in the preceding year for the applicable zone in which the incident occurred, or if it cannot be determined in which zone the incident occurred or if the incident occurred in more than one zone, the expenses will be borne in proportion to the total gross ton miles handled by each party over the entire Joint line during the preceding year. Five years from June 1, 2004, and at five (5) year intervals thereafter, either Party may review and reevaluate this allocation at their expense by notice given to the other at least 30 days prior to the end of each five (5) year period and the Parties shall determine the need to agree to a new allocation."

15. Nothing in this Agreement shall be construed to give CPR's admittee the right to operate any commuter service over the Joint Line, or any portion thereof, or otherwise use the Joint Line, or any portion thereof, to provide any passenger service, unless and until CPR's admittee has first received Metra's prior written consent.

16. The Parties agree that a purchaser of all or substantially all of the assets of IC&E shall be permitted to enter into a new trackage rights agreement as provided in Section 8.3 of the IC&E Trackage Rights Agreement. Furthermore, in the event of a sale by IC&E of all or substantially all of its assets, Metra shall enter into a new amendment agreement with CPR containing the same terms and conditions as this Amendment Agreement recognizing said purchaser as CPR's admittee under the terms of the Metra Agreement.

17. The Parties agree that the Amendment Agreement between them dated April 7, 1997 is terminated and shall be of no further force and effect, and that the Chicago Trackage Rights Agreement between CPR and IMRL dated April 4, 1997 shall also be of no further force and effect.

18. CPR agrees that CPR shall not enter into any agreements to amend, revise, or otherwise alter the IC&E Trackage Rights Agreement in any manner that may affect or affects Metra's rights, remedies, or obligations thereunder without Metra's prior written consent, which consent shall not be unreasonably withheld or delayed.

19. In any case where the Parties, after attempting to negotiate with each other for a reasonable period of time, are unable to reach an agreement regarding any of the provisions of Sections 5 and 6 of this Agreement, then either Party may request mediation or binding arbitration to resolve the dispute in accordance with the procedure set forth below.

a. Such dispute shall be submitted to a single arbitrator; said arbitrator to be chosen in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

b. In the event of the death or disability of the arbitrator during the pendency of an arbitration, a substitute arbitrator shall be chosen in the manner the original arbitrator was appointed.

c. The arbitration shall proceed in an expeditious manner with any hearings that are deemed necessary to resolution of the issues properly before the arbitrator, and the arbitrator shall render a decision and, if appropriate, an award. The arbitration shall take place in Chicago, Illinois, unless the Parties otherwise agree. At the discretion of the arbitrator, the Commercial Rules of the

American Arbitration Association may be used, in whole or in part, to govern the conduct of the proceedings (except insofar as they contradict any provision of this Agreement, in which case this Agreement shall take precedence and control). Pending the final resolution of any dispute arising under or relating to this Agreement, the Parties shall continue to perform all obligations in accordance with the terms and conditions of this Agreement.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment Agreement to be executed by their respective officers who are duly authorized.

ATTEST:

SOO LINE RAILROAD COMPANY

d/b/a CANADIAN PACIFIC RAILWAY:

_____

By: James Bender
DIR. I'LINK MGMT

ATTEST:

COMMUTER RAIL DIVISION OF THE

REGIONAL TRANSPORTATION AUTHORITY:

Debra M. Ellison

By: _____

Philip A. Pagano, Executive Director

Appendix A

To

Amendment Agreement

ESCALATION

The GTM Train Charges established in the Trackage Rights Agreement and referenced in this Amendment Agreement shall be escalated upward or downward effective July 1 of each year, beginning July 1, 2003, to compensate for the increase or decrease, if any, in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Charge-Out Prices and Wage Rates (1977 = 100), Series Q-MPW, included in "Indexes of Railroad Material Prices and Wage Rates" and supplements thereto, issued by the Association of American Railroads. In making such determination, the final "Material prices, wage rates and supplements combined (excl. fuel) " index for the Western District shall be used and the final index figure for the calendar year 2001 of 325.0 shall be taken as the base ("Base Charge"). The method of escalating the GTM Train Charges shall be determined by calculating the percent of increase or decrease in the index of the year to be escalated as related to the base year, and applying that percent to the Base Charge.

By way of example, assuming "A" to be the Material prices, wage rates and supplements combined (excl. fuel) final index figure for the year 2001, "B" to be the "Material prices, wage rates and supplements combined (excl. fuel) for the year 2002; "C" to be the Base Charge and "D" to be the percent of increase or decrease, the escalated charge effective as of July 1, 2003 would be determined by the following formula:

(1) $(B - A) \div A = D$

(2) $(D \times C) + C =$ escalated charge effective 7/1/03

If the base for the annual Indexes of Charge-Out Prices and Wage Rates issued by the Association of American Railroads shall be changed from the year 1977, appropriate revision shall be made in the base (established as herein provided) for the calendar year 2001. If the Association of American Railroads or any successor organization discontinues publication of the Annual Indexes of Charge-Out Prices and Wage Rates (or of any relevant component), an appropriate substitute for determining the percentage of increase, or decrease, shall be negotiated by the Parties.

Appendix B
To
Amendment Agreement

Example of Methodology for Allocation of Capital Project Costs if Necessitated In Part by the Introduction of IC&E Increased Traffic, Coal Trains or Excess Trains

Estimated Cost of Capital Project for zones covered by Agreement provisions relating to allocation of Capital Project Costs	$1,000,000	
Gross Ton Miles:		
CP Rail (Including IC&E Existing Traffic)	13,500,000	GTM
Metra	16,500,000	GTM
IC&E Increased Traffic, Coal Trains, and Excess Trains	10,000,000	GTM
Total GTM for Line	40,000,000	GTM
IC&E Increased Traffic, Coal Trains, and Excess Trains as a percentage of Total Gross Ton Miles (10,000,000÷40,000,000)	25%	GTM
IC&E Share of capital costs due to IC&E Increased Traffic, Coal Trains, and Excess Trains	$250,000	
Metra & CPR to further split the balance per the Metra Agreement based upon GTM allocation (up to a Maximum of 50% for CP if for benefit of both parties)		
CP Rail Share (all or a portion of which may be the obligation of IC&E based upon the CPR/IC&E Existing Traffic GTM pro ration)	375,000	
Metra Share	375,000	
Total Capital Cost	$1,000,000	

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF OSCAR AUGUSTO DEL CUETO CUEVAS

TABLE OF CONTENTS

I. KCSM Has Provided Huge Benefits to the Mexican Rail System and Its Customers in KCSM's First Twenty-Five Years; The STB Should Not Reach Across International Borders to Interfere With That Success.....3

II. The Mexican Rail System is Governed by a Robust Legal and Regulatory System, Including Protections Relating to Rates, Competitive Access, and Anticompetitive Conduct.....5

A. Background on the Development of Mexican Railroad Concessions 6

B. Mexican Railroads Are Governed by a Robust Legal and Regulatory System that Supports the Stated Goals of the Mexican Government 8

III. BNSF and UP Fail to Consider How KCSM Operates, and How a Post-Transaction CPKC Would Operate, in Real World Market Conditions.....13

IV. UP and BNSF Comments Amount to a Criticism of the Mexican Regulatory Scheme, Not a Criticism of This Transaction.....14

V. BNSF's Request for "Springing" Trackage Rights Has Nothing To Do With This Transaction; It Is Only an Attempt to Get an Unfair Advantage for a Possible Future Attempt to Obtain a Concession to Operate in Mexico. 16

1. My name is Oscar Augusto Del Cueto Cuevas. I am the Presidente, Gerente General y Representante Ejecutivo (President, Executive Representative and General Manager) of Kansas City Southern de México, S.A. de C.V. (KCSM). I am also a member of KCSM's Board of Directors.

2. I have been with KCSM since it began operating its concession from the Mexican government in 1997.[1] I have served in my current role since August 1, 2020. I previously served as Vice President and General Director from November 2018 to July 2020 and as Vice President-Operations from January 2009 to October 2018. Prior to 2009, I held various other leadership positions working for KCSM. In all, I have nearly 32 years of railway industry experience, working in institutional relations, communication, operations, planning and logistics.

3. In my role as President of KCSM, I also serve as a director of Ferrocarril y Terminal del Valle de México, S.A. de C.V. (Ferrovalle), the terminal railroad in the Mexico City area,[2] and have served as the head of the Asociatión Mexicana de Ferrocarriles (the Mexican Railroad Association).

4. My educational background includes a master's degree in business administration from the University of Monterrey and a bachelor's degree in communications. I also have

[1] KCSM initiated railroad operations on June 24, 1997 as TFM, S.A. de C.V. (TFM, formerly Ferrocarril del Noreste, S.A. de C.V.). TFM was owned 80% by Grupo Transportacion Ferroviaria Mexicana, S.A. de C.V. (Grupo TFM) (formerly Transportacion Ferroviaria Mexicana, S. de R.L. de C.V.) - a joint venture of Kansas City Southern Industries, Inc., and Transportacion Maritima Mexicana, S.A. de C.V. (TMM) – and 20% by the Mexican government. In 2005, Kansas City Southern acquired the interests of TMM and of the Mexican government. Following that acquisition, TFM was renamed Kansas City Southern de México, S.A. de C.V. Also, during my career working for KCSM I was an employee of KCSM Servicios, S.A. de C.V. (Servicios), a KCSM subsidiary that employed everyone who provided services to KCSM except KCSM's president. Servicios was merged into KCSM in July 2021. For simplicity, I will refer to my work with KCSM, its subsidiary and predecessors simply as work for KCSM.

[2] Ferrovalle is owned 25% by Ferrocarril Mexicano, S.A. de C.V. (Ferromex), 25% by Ferromex's affiliate Ferrocarril del Sureste, S.A. de C.V. (Ferrosur), 25% by KCSM and 25% by the Mexican government through the Secretaría de Infraestructura, Comunicaciones y Transportes (SICT).

completed advanced studies in Mexico and the United States, such as the University of Michigan Railroad Administration Program certificate and certificate programs at the Center for Transportation Technology, in Pueblo, Colorado.

5. My office is in Mexico City, but my responsibilities take me to many places throughout Mexico as I interface with KCSM's customers, employees and with the many local, state and federal officials with which KCSM works in providing its service across Mexico. A substantial portion of my responsibilities involves working with our customers and our regulators to manage compliance with our regulatory responsibilities while meeting our customers' needs.

6. I am submitting this Reply Verified Statement to provide real-world context regarding Mexican railroad laws and regulations that comments filed with the Surface Transportation Board (Board or STB) by Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF) in this proceeding failed to analyze. I will also address KCSM compliance with these regulations, how BNSF and UP's proposed "conditions" are not related to impacts of the Transaction and how, from the perspective of Mexican regulatory authorities, BNSF's and UP's proposed conditions are not properly before the Board.

I. KCSM Has Provided Huge Benefits to the Mexican Rail System and Its Customers in KCSM's First Twenty-Five Years; The STB Should Not Reach Across International Borders to Interfere With That Success.

7. Before turning to discussion of the testimony of UP and BNSF's paid experts, I want to provide some real-world context about what KCSM is and how it functions in the Mexican transportation system.

8. As this statement is being finalized, KCSM has just completed the celebration of its first 25 years as the operator of Mexico's northeast rail concession. During that celebration, KCSM had occasion to look back over the vast changes that it has been able to help bring to the

Mexican rail system and its customers. Some of those changes, highlighted in a recent KCS company newsletter, include:

- In 1997, 12-14 trains a day crossed the International Bridge between Nuevo Laredo, Tamaulipas and Laredo, Texas. Today, 28-32 trains cross the bridge daily.
- In 1997, the average train length was 55-60 rail cars per train. Today, trains are as long as 120 rail cars.
- In 25 years, KCSM evolved from a load capacity of 1,000 metric tons and average speeds of 9.5 kilometers per hour to 16,000 metric tons and speeds of up to 110 kilometers per hour.
- In 1997, most rail was 90-pound jointed rail. Today, most of the KCSM network is 136-pound welded rail, allowing KCSM to move larger trains at higher speeds for better fluidity and better customer service.
- Railroad sector participation in Mexico's freight transportation system increased from 12 percent of total cargo moved in 1997 to today's 26 percent of all freight transported. KCSM represents 30 percent of all freight transported by rail in Mexico.
- Before KCSM's acquisition of the northeast concession, the majority of Mexico's railroad switches were operated by hand. Today, most of the network has Centralized Traffic Control.
- Total KCSM carloads have increased significantly. In 1988, the network moved approximately 570,000 loaded rail cars. In 2021, KCSM moved 920,000 loaded rail cars.

- In 25 years, KCSM has invested more than $4.4 billion to maintain excellent service through new and better infrastructure.

9. These facility improvements, this growth in traffic and these investments are not indicative of an anticompetitive business functioning in the unregulated, anything-goes environment that UP and BNSF witnesses hypothesize. Rather, these are signs of a business that seeks to grow and to serve customers and the public interest better.[3] They are not signs of something that a U.S. regulatory agency should reach across the border to hobble, as UP and BNSF invite this agency to do.

II. The Mexican Rail System is Governed by a Robust Legal and Regulatory System, Including Protections Relating to Rates, Competitive Access, and Anticompetitive Conduct.

10. As background for this statement, I have reviewed the statements by Dr. Aaron Dychter Poltolarek, in support of BNSF's comments, and Dr. Luis De la Calle, in support of UP's comments. Both identify some of the applicable law and regulations and identify the appropriate regulatory agencies.

11. However, neither Dr. Dychter nor Dr. De la Calle analyze how KCSM operates (or how a post-Transaction CPKC would operate) under the Mexican regulatory system or real-life market conditions. Instead, both Dr. Dychter and Dr. De la Calle make only generic

[3] The International Transport Forum at the Organisation for Economic Co-operation and Development (OECD) wrote in 2014, "Mexico has seen a transformation of its railway in the last fifteen years, from a declining operation increasingly dependent on large government subsidies to what we have found to be a very productive and technologically improved system that operates profitably without public subsidy. This performance has lessons for other countries…". It added that, "[i]nvestment in the main railway concessions in Mexico since reform has transformed a declining and unreliable system into a reliable and technologically competent railway, with improved track and signaling systems permitting the use of heavier, more productive trains. The productivity of Ferromex and Kansas City Southern Mexico railways is higher by a large margin than any other general freight rail carrier in Latin America." Peer Review of Railway Freight Development in Mexico, Report of the International Transport Forum, February 2014 at 7, 33.

criticisms of how Mexico regulates Mexico's railroad industry. With all due respect, their analyses are both hypothetical and incomplete.

12. KCSM and other Mexican railroads exist within a robust legal and regulatory environment. As both Dr. Dychter and Dr. De la Calle note, the applicable Mexican laws and regulations cover, among other things, rates, competition, merger control, and anticompetitive conduct, and provide remedies ranging from rate regulation, opening access to improve competition, and investigations and penalties for anticompetitive conduct.

13. The essential argument by both Dr. Dychter and Dr. De la Calle seems to be that Mexican legal and regulatory systems -- systems they both indicate that they had a hand in creating -- are inadequate, and that the Mexican government would not mind if the STB reached across the border to remedy supposed deficiencies of Mexican law and regulation by giving BNSF and UP certain control of KCSM's rates and operations. De la Calle VS, page 3 and Sections I and III; Dychter VS, Section III. In my view, that argument is simply wrong.

A. Background on the Development of Mexican Railroad Concessions

14. In the mid-1990s, the Mexican government granted concessions for operation of the formerly state-owned rail system to encourage revitalization of the Mexican rail industry. The then Secretariat of Communication and Transport (now named Secretariat of Infrastructure, Communications, and Transport (SICT)) divided the national rail system into three large and several smaller sections, and auctioned to private businesses concessions to improve, maintain, and operate the rail systems on those separate sections of the network.

15. On June 1, 1997, the Mexican government issued the Northeast rail concession to TFM. TFM was owned 20% by the Mexican government and 80% by Grupo TFM, a joint venture of Kansas City Southern Industries, Inc., and Transportacion Maritima Mexicana, S.A. de C.V. (TMM).

16. On June 24, 1997, TFM began operating the Northeast rail concession, which extended from that concession's connections to the U.S. rail network at Laredo and Brownsville, TX, through Monterrey and Mexico City, to the Pacific Coast port of Lazaro Cardenas and to Veracruz and Tampico on the Gulf Coast. The other two major concessions were granted to Ferromex and Ferrosur.

17. KCSM and other concessionaires each remain subject to the Regulatory Railway Transportation Law (Ley Reglamentaria del Servicio Ferroviario)(the Rail Law) and the Regulations of the Railway Transportation Service (Reglamento del Servicio Ferroviario)(the Rail Regulations, together with the Rail Law, referred to as Mexican Regulations). These regulations generally encouraged private investment in the Mexican rail network while allowing the Mexican government to continue oversight to ensure a free and competitive market. Pursuant to Mexican Regulations, concessionaires must provide authorized services on an on-going basis in a uniform and equitable manner, without discriminating and under equal conditions as regards to time, quality, and price. *See* Rail Law, Article 24, first paragraph, which can be translated as, "Rail services shall be provided to all requesting users on a permanent, uniform and fair basis in terms of opportunity, quality and price."

18. The rail systems operated by concessionaires are property of the Mexican government, and revert back to the government at the expiration or termination of the concession, effectively operating somewhat like a lease of the government-owned assets. Major concessions such as the ones that KCSM and Ferromex operate were granted for terms of 50 years, with the possible extension of another 50 years subject to certain provisions of the Mexican Regulations.[4] TFM's concession included a 30-year exclusivity period in which only

[4] Some smaller concessions were granted for shorter periods.

TFM/KCSM can render rail services on its concessioned system, except for authorized trackage rights or as may otherwise be agreed with other concessionaires (the Exclusivity Period).

19. On October 6, 2004, Mexico's Foreign Investment Commission (FIC) notified KCS of its approval of KCS's application for authority to acquire TMM's interest in TFM. This approval was necessary for a foreign company to become a majority owner of a Mexican railway company. In 2005, KCS bought out its joint venture partner TMM and subsequently acquired the Mexican government's 20% interest in TFM to become the sole ultimate parent of TFM. KCS then changed the name of TFM to KCSM.

B. Mexican Railroads Are Governed by a Robust Legal and Regulatory System that Supports the Stated Goals of the Mexican Government

20. There are four Mexican governmental agencies that have jurisdiction over railroads. They are the Mexican rail authority (Agencia Reguladora del Transporte Ferroviario (the ARTF)) - and the Rail Development and Multimodal General Directorate (Dirección General Desarrollo Ferroviario y Multimodal) (DGDFM), both under the SICT; the SICT itself; and the Mexican antitrust authority, the Comisión Federal de Competencia Económica (COFECE).

21. The ARTF establishes regulations concerning railway safety and operations, and is responsible for resolving disputes between railways and customers. KCSM must register its maximum rates with the ARTF and make regular reports to the ARTF and the SICT. The DGDFM regulates certain projects such as permits for transload terminals, "comodatos", and other matters.

22. COFECE is Mexico's competition authority. Among its responsibilities, it conducts merger control and investigations under the Federal Economic Competition Law (Ley Federal de Competencia Economica)(Competition Law). If the ARTF or another party considers

there to be no effective competition for a particular rail service, they may request an opinion from the COFECE regarding market conditions. If the COFECE determines that there is no effective competition for particular movements, the ARTF could set rates for those movements or grant limited trackage rights to another railroad while the condition of no effective competition remains.

23. Similar to railroad regulations in the United States, Mexican Regulations allow railroads to take the initiative in setting their rates. Unlike the United States, however, concessionaires must register maximum rates, referred to as TUCE rates, and can be sanctioned by the government for charging a customer more than the TUCE rate.

24. Drs. Dychter and De la Calle each imply that the registration of TUCE rates is a simple matter and that KCSM is largely free to set whatever TUCE rate it wants. In fact, though, quite the opposite is true. KCSM personnel spend weeks discussing changes in TUCE rates with regulators, going through various cost and other justifications and making adjustments to satisfy the agency, before the ARTF will accept the annual change in KCSM's TUCE rates. Translated to English, Article 46 of the Rail Law describes this process as follows:

> "Any modification to the maximum rates of different services and charges must be registered before the Agency prior to its application, with the concessionaire accompany the relevant justification. The Agency may issue recommendations on the proposed increases. The Agency may also, at any time, if appropriate, request the opinion of the Federal Economic Competition Commission to proceed in terms of its powers."

In short, the process of registering TUCE rates is not as easy or as unregulated as Drs. Dychter and De la Calle imply.

25. Further, Article 170 of the Mexican Regulations imposes a non-discrimination requirement on rates. Concessionaires may implement discount programs or promotions, but only under equitable conditions and without discrimination, taking into account the specific

characteristics of each service such as volume, equipment, and distance. Concessionaires cannot discriminate based on interline partner, unless cost differentiations justify those differences.

26. Shippers and other market participants have viable processes and recourse for violations of the Mexican Regulations. For example, as noted by Dr. De la Calle, the COFECE conducted an investigation of competition in transport of four hazardous chemicals to customers south of Veracruz. The COFECE concluded that there was a lack of effective competition for shipments of those chemicals on 20 of 31 routes considered.[5] The COFECE's conclusion triggered the ARTF's imposition of price controls on shipments of those chemicals on those routes. While KCSM has challenged the ARTF's action in court, that court action did not prevent ARTF's rate limitations from taking effect. My understanding is that this process is somewhat similar to U.S. processes, where the STB makes a finding of market dominance before it can regulate a challenged rate, and that a party disappointed with the STB's decision can appeal that decision in court.

27. Had it chosen to do so, the ARTF also could have imposed trackage rights to resolve the COFECE's concerns about a lack of effective competition in the involved markets. Article 36 of the Rail Law allows for the compelled access by one concessionaire to another's track in the event COFECE finds a lack of effective competition in a particular route or routes.

28. The ARTF can also impose rate limitations on its own initiative in instances where the COFECE has found a lack of effective competition. (Rail Regulations, Article 174.)

29. Moreover, the regulatory agencies have the ability to levy significant penalties. Concessionaires operate at the behest of the Mexican federal government and can even lose their

[5] The COFECE's investigation covered shipments of anhydrous ammonia, chlorine, ethylene oxide, and caustic soda with an origin or destination in the southern region of the State of Veracruz not served directly by KCSM. KCSM was involved in limited segments of only 5 out of such 20 routes, and only in connection with the shipments of chlorine and ethylene oxide.

concession -- for which they may have paid hundreds of millions of dollars and invested even more to upgrade -- if the ARTF imposes sanctions on the concessionaire for a significant infraction three times in a period of five years. (Rail Law, Article 21.)

30. Due to its public responsibilities and the serious potential consequences of violations of Mexico's rail law or regulations, including penalties as serious as revocation of its concession, KCSM takes great care to comply with all applicable law and regulations. We have a robust regulatory compliance process to ensure our continuing compliance with the law. Neither Dr. Dychter nor Dr. De la Calle offers any evidence of non-compliance by KCSM. Nor should they, as KCS and KCSM maintain compliance with all applicable laws and regulations. KCSM has not received any penalty from these agencies in its twenty-five years operating its concession.

31. What Drs. Dychter and De la Calle seem to be saying, rather, is that Mexico's application of its laws and regulations is uncertain and, also, that perhaps Mexican regulatory authorities do not care about international traffic.

32. If by uncertain they mean that there is not a long history of application of railroad laws and regulations by the COFECE, the ARTF, and the SICT, that is not surprising. The Mexican rail system was concessioned only 25 years ago; prior to that it was part of the government. In those 25 years, there has been one major rewrite of the Rail Law, and the COFECE and the ARTF each were established only within the past ten years, replacing previous agencies that had somewhat similar responsibilities. Necessarily these agencies will not have a long history of regulatory enforcement activity.

33. However, a lack of a long regulatory history does not mean regulatory inertia or disinterest. The ARTF and the COFECE are quite active, always seeking additional information

from concessionaires, conducting frequent audits, and performing studies on the functioning of the rail system. KCSM must provide reports on investments; traffic volumes; theft and vandalism on the general right of way; customer complaints; fuel consumption; numbers of locomotives, railcars, and employees; activities around maintenance of way, sidings and spurs; and numerous financial matters. While KCSM is able to take the initiative in establishing its rates on a non-discriminatory basis, up to the maximum rates registered with the ARTF, at any time the ARTF may request additional information regarding the determination of such rates and may issue recommendations with respect to proposed rate increases. A lack of enforcement decisions does not mean a lack of attention by the regulatory agencies.

34. The contention that Mexican authorities perhaps do not care about international traffic is puzzling. Article 48 of the Law[6] specifically addresses international rail transport, indicating that the Mexican government *does* care about the activities of Mexico's railroads with respect to cross-border traffic. And, as stated above, concessionaires cannot discriminate based on interline partner.

35. The main thesis of Drs. Dychter and De la Calle that Mexican rail regulators are incapable of defending shippers' interests is wrong. The ARTF, the SICT and the COFECE form a powerful regulatory trio that is very involved in concessionaires' activities. That is the real world, which is very different from the hypothetical one that UP's and BNSF's witnesses discuss.

[6] Article 48 can be translated as follows standards: "The international rail transport is the one operated from another country to the national territory, or vice versa, and shall conform to the terms and conditions provided for in the applicable international treaties or, failing that, to the conventions concluded between the participating railway undertakings."

III. BNSF and UP Fail to Consider How KCSM Operates, and How a Post-Transaction CPKC Would Operate, in Real World Market Conditions

36. Not only are the regulatory constraints on KCSM much stronger than UP and BNSF suggest, the transportation marketplace also would prevent KCSM from engaging in the manipulations of Mexican rates that UP and BNSF claim.

37. First, KCSM already has the incentive to maximize the rate it can achieve for its services while still earning the customer's business. KCSM does this now, just as I am sure UP and BNSF do on the U.S. side of the border. Indeed, BNSF's complaint that KCSM Rule 11 rates[7] and other practices that fully comply with Mexican law create a lack of transparency that prevents BNSF from knowing what it can charge to capture a shipper's business is really BNSF saying that it does not know how high it can make its rate without driving away the business.[8] BNSF's demand for "transparency" of rates covering transportation within Mexico really is just a way for BNSF to get the highest rate it can on the U.S. side of the border.

38. Second, KCSM is restrained by the marketplace. KCSM competes with other rail transport as well as with water and truck transportation.[9] This competition presses KCSM to keep its rates low to attract business.

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[7] Article 36 Ter. of the Rail Law specifically allows shippers to request separate rates from each carrier, saying (as translated), "When the public cargo or passenger transport service requested by the user refers to routes involving the participation of more than one concessionaire, the user shall have the right to choose between agreeing a rate independently with each concessionaire on the portion of the route that corresponds or in an integral way on the total of the route with the originating concessionaire or the destination concessionaire." In addition, there are certain tax implications of through rates on shipments from the U.S. into Mexico that can be mitigated by using Rule 11 rates.

[8] Also, transportation service contracts in Mexico remain subject to inspection by the ARTF. Article 46 of the Rail Law says in part, "those rates that are mutually agreed between concessionaires and users, which must be available at all times at the request of the Agency." I understand that by law in the United States, transportation contracts are not subject to any regulatory oversight, even though most U.S. rail traffic moves under such contracts. Seemingly this makes U.S. rates less 'transparent' than BNSF claims is the case for rates in Mexico.

[9] UP's witness John Turner claims that much rail traffic is not compatible with truck transport. Rocker/Turner VS at 17. In fact, though, a smaller portion of rail traffic in Mexico is rail-dependent than in the United States, because Mexican railroads do not have the same high amount of coal and ore

39. Further, all traffic that KCSM handles in Mexico, regardless of the U.S. interline partner, is KCSM business that earns revenue for KCSM's parent, whether that is KCS or CPKC. Single-line CPKC business will only be a fraction of the total Mexico movements. It would be against KCSM's and its parent's own self-interest to push rates so high that its customers would choose a non-rail option over KCSM/UP or KCSM/BNSF.

40. Finally, KCSM does not want to jeopardize its concession. As explained above, concessionaires operate at the behest of the government. The ARTF, the SICT, and the COFECE together can impose a number of penalties for violations of the Mexican Regulations, including stripping a concessionaire of its concession. KCS has invested billions of dollars in its Mexican and cross-border business. KCS and CPKC have every incentive not to jeopardize that investment.

IV. UP and BNSF Comments Amount to a Criticism of the Mexican Regulatory Scheme, Not a Criticism of This Transaction.

41. This Transaction has no effect on the supposed deficiencies of the Mexican regulatory system and legal system that UP and BNSF allege. The merger does not change any regulations, laws, process, timeline, or agency authority. Nor does the merger change KCSM's abilities, rights or obligations, or that of any shipper. KCSM will remain a separate entity as part of the CPKC network. The merger makes no impact on the application of Mexican law or agency authority. Legal and regulatory options available to shippers remain the same both before and after the Transaction.

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shipments as U.S. railroads. *See* Peer Review of Railway Freight Development in Mexico, Report of the International Transport Forum, February 2014 at 15: "Comparisons of the traffic densities, modal shares and cost levels of freight railway systems should always distinguish between those that serve heavy concentrated mining flows (like coal and iron ore) and those that do not have such favourable base-load traffics but must rely on general industrial and agricultural cargoes. … The Mexican railway system is predominantly a general cargo railway, a characteristic that must be considered when reviewing the different aspects of its performance."

Del Cueto Cuevas R.V.S. at 14

42. Neither Dr. Dychter nor Dr. De la Calle argue that there is anything specific to the CP/KCS transaction that creates a unique situation under Mexican law. Both describe the current state of regulation in Mexico. Both hypothesize, without evidence, that post-merger a future KCSM would act with anticompetitive intent. It is only that assumed hypothetical intent which allows them to list out their criticisms.

43. Despite their hypothetical criticisms of the Mexican legal and regulatory system, both Drs. Dychter and De la Calle effectively admit that system works. For example, Dr. De la Calle and Dr. Dychter mention a number of investigations that have been opened, reports published by COFECE, including one investigation that resulted in a finding of a lack of effective competition. In fact, Dr, Dychter admits that the lack of enforcement can be equally explained by the railroad's compliance with policies where no shipper has felt the need to litigate. (Dychter VS, paragraph 18.)

44. I hope that as a government agency, the STB will take more seriously than UP and BNSF do the political and economic consequences of UP's and BNSF's invitation to regulate across the border and interfere with Mexican authorities' power to regulate Mexican railroads operating in Mexico under Mexican statutes and regulations. If the situation were reversed, would the STB sit idly by and allow the ARTF to regulate the behavior of railroads in the U.S.? Isn't regulation of railroads in Mexico beyond the authority given to the STB by the U.S. Congress?

45. Moreover, the conditions proposed by UP and BNSF would not resolve the alleged deficiencies of the Mexican regulatory system. The verified statement in this filing by my colleague Mike Naatz, KCS's Executive Vice President and Chief Marketing Officer, provides an in-depth analysis of the proposed mileage pro-rate mechanism proposed by UP and

BNSF and how that mechanism would simply tie KCSM's hands for UP's and BNSF's benefit. Also, because of the anti-discrimination requirements of the Rail Law, UP and BNSF's proposed control of some rates could indirectly affect other rates, with undetermined overall impact on KCSM. In short, none of the concerns raised by BNSF or UP (lack of transparency, regulatory precedent, or experience in dispute resolution) are fixed by their conditions.

V. BNSF's Request for "Springing" Trackage Rights Has Nothing To Do With This Transaction; It Is Only an Attempt to Get an Unfair Advantage for a Possible Future Attempt to Obtain a Concession to Operate in Mexico.

46. In its Comments, BNSF argues that it will seek a concession to operate as a railroad in Mexico at some point in the future. Further, BNSF admits that its request for potential future trackage rights over KCS to Laredo is about "ensur[ing] that BNSF may access Mexico when the Mexican Government opens its rail lines to additional competition." And that "[t]o obtain such a concession, BNSF would need to be able to demonstrate to the Mexican government that it has a credible plan for accessing Mexico, which would require direct access to Laredo." (BNSF Comment at 50) (BNSF-9-54.)

47. KCSM does not believe that Mexican law allows the type of concession that BNSF describes itself getting. But even if the law did allow that, whether BNSF could ever get a concession to operate a railroad in Mexico depends on a number of things, including future conditions under Mexican regulation and policy, BNSF's ability to present an acceptable application, and BNSF's ability to find a willing Mexican co-venturer.[10] None of these required showings would be changed by the Transaction.

48. More importantly, though, the reason BNSF says that it needs trackage rights on KCS's line from Robstown to Laredo is to show in its concession application that it can connect

[10] Article 17 of the Rail Law translates as, "Foreign investment may participate up to forty-nine percent in the share capital of the concessionary companies referred to in this Law."

to the Mexican rail system. But BNSF doesn't need trackage rights from Robstown to Laredo to connect to the Mexican rail system because BNSF already has trackage rights to connect to KCSM via UP's Brownsville Subdivision, and BNSF also connects with Ferromex at San Diego, California and El Paso and Eagle Pass, Texas. My understanding is that BNSF has never used its trackage rights on UP's Brownsville Subdivision, but if BNSF needed to show that it has trackage rights to connect to KCSM in Mexico (in addition to its own multiple track connections to other Mexican gateways), BNSF already has such rights. It does not need trackage rights on KCS.

49. Again, BNSF's request for potential future trackage rights to Laredo does not relate to a problem created by the Transaction. BNSF argues the Board should grant it trackage rights over KCS to Laredo because the Mexican Government may want a "credible plan for accessing Mexico," but BNSF already accesses Mexico through multiple other gateways except Laredo. It is entirely speculative that the Mexican Government would require BNSF to access all gateways, especially since CPKC now and in the future only access a single gateway.

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VERIFICATION

I, Oscar Augusto Del Cueto Cuevas, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this ___ day of July, 2022.

DocuSigned by:
Oscar Del Cueto
165928ED74B840D...

Oscar Augusto Del Cueto Cuevas
Presidente, Gerente General y Representante Ejecutivo
Kansas City Southern de México, S.A. de C.V.

CORNERSTONE RESEARCH
ECONOMIC AND FINANCIAL CONSULTING AND EXPERT TESTIMONY

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500
CANADIAN PACIFIC RAILWAY LIMITED, ET AL. – CONTROL – KANSAS CITY SOUTHERN, ET AL.

EXPERT REPLY STATEMENT OF W. ROBERT MAJURE, PH.D.

July 12, 2022

Table of contents

1. Qualifications and assignment 4

1.1. Qualifications 4

1.2. Assignment 5

1.3. Summary of opinions 7

2. Commenters' analysis of vertical economic theory do not establish a risk of vertical harm from the CP/KCS combination 10

2.1. Overview of the flaws in Commenters' critiques of my analysis of potential vertical effects from the CP/KCS combination 10

2.2. Professor Salop's vertical theories do not prove actual harm, or even the risk of harm from a CP and KCS combination 19

2.3. Dr. Reishus's vertical analysis is internally inconsistent and does not establish that a CP and KCS combination is likely to result in harm 30

3. Commenters' critiques of my analysis of Laredo traffic and other empirical foreclosure arguments are flawed and do not change my conclusion 38

3.1. Commenters analysis of southbound traffic is methodologically flawed and misleading 43

3.2. Commenters' analyses that compare shares over time and for subsets of traffic ignore patterns in the data consistent with stronger competition from KCS and cannot be interpreted as Commenters suggest. 46

3.3. BNSF and CSXT's argument that I have defined areas served by KCS too broadly is flawed 62

3.4. Dr. Reishus's incomplete and misleading analysis does not support his claims that BNSF has been foreclosed by KCS 67

3.5. Professor Mayo's analysis of corridors where CPKC will allegedly choose to foreclose interline options with NS in favor of new CPKC single-line service is flawed and misleading 86

4. Remedies proposed by Commenters purport to resolve competitive harms that do not exist and would be anticompetitive in any event 92

4.1. The "remedy" proposed by Professor Salop and Dr. Reishus to regulate CPKC interline rates would be anticompetitive and would ensure UP and BNSF do not face fully competitive single-line pricing from CPKC 92

4.2. CN's proposed divestiture seeks to resolve an alleged harm that does not exist and instead would create risk of harm to horizontal competition 116

5. Other Commenters that raise issues of "competiton" do not raise an issue of competitive effects due to a CP/KCS combination 120

6. Technical appendix: analysis showing the anticompetitive effect of the proposed mileage-prorate "remedy," additional details..... 127

1. QUALIFICATIONS AND ASSIGNMENT

1.1. Qualifications

1. My name is W. Robert Majure. I am a Vice President at Cornerstone Research. Prior to joining Cornerstone Research, I worked for approximately 25 years in the Antitrust Division of the U.S. Department of Justice ("DOJ") as an economist, Assistant Section Chief, Section Chief, and ultimately as the Director of Economics.

2. I earned my Ph. D. in Economics from Massachusetts Institute of Technology in 1994 and a B.A. from the University of Virginia in 1990. My main area of expertise is the economics of industrial organization – particularly issues of competition.

3. While at the DOJ, I performed and supervised economic analyses of competition issues in various industries, including transportation, telecommunications, banking, computer software and hardware, heavy industry, mining and drilling, healthcare, entertainment, and railroads. I submitted testimony on competitive effects in the merger of the Union Pacific and Southern Pacific Railroads and on the suitability of remedy in *U.S. v. SBC Communications Inc. and AT&T Corp.* and *U.S. v. Verizon Communications Inc. and MCI, Inc.* I also served on the committee that drafted the 2010 Horizontal Merger Guidelines. I received awards for my work at the DOJ, including presidential recognition for my contributions as a senior executive of the civil service.

4. A copy of my *curriculum vitae* is attached as Appendix A.

1.2. Assignment

5. In the context of these proceedings, on April 30, 2021 and at the request of counsel for Canadian Pacific ("CP"), I submitted an expert statement ("Initial Statement") to describe my preliminary findings on the competition issues related to the proposed acquisition of Kansas City Southern ("KCS") by Canadian Pacific, and to compare them to competitive issues that would be raised in an acquisition of KCS by Canadian National ("CN").[1]

6. On June 28, 2021, at the request of counsel for CP, I submitted a second expert statement ("Voting Trust Statement"), in the context of the proceedings related to the proposed acquisition of KCS by CN.[2] In the Voting Trust Statement, I provided an economic analysis of the voting trust arrangement that had been proposed by CN for its potential acquisition of KCS, and showed that a voting trust arrangement would have given CN an immediate incentive to implement its part of the anticompetitive horizontal consequences of a CN/KCS combination. I also provided additional analysis that confirmed the proposed merger of CN and KCS should have been treated as a horizontal merger, and that CN's proposed divestiture was insufficient to

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[1] Expert Statement of W. Robert Majure, Ph.D., *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 and *Canadian National Railway Company, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36514, April 30, 2021 ("Initial Statement").

[2] Expert Statement of W. Robert Majure, Ph.D., *Canadian National Railway Company, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36514, June 28, 2021 ("Voting Trust Statement").

resolve the horizontal competition issues that would have been created by the transaction.

7. On October 29, 2021, I submitted a third expert statement ("Application Statement") at the request of counsel for CP evaluating whether the proposed acquisition of KCS by CP is likely to generate any procompetitive benefits or cause any competitive harms.[3]

8. On February 28, 2022, UP, BNSF, NS, CN, and CSXT filed comments on the merger application of CP and KCS. Included in these comments are responses to my Application Statement, as well as other arguments and analyses assessing the potential competitive effects of a CP/KCS combination. Several other parties also filed comments expressing particular concerns they describe as related to competition. I have been asked to submit a fourth expert statement at the request of counsel for CP responding to these submissions.

9. Cornerstone Research is being compensated at my standard billing rate of $955 per hour. I have been assisted by staff of Cornerstone Research, who worked under my direction. Cornerstone Research's compensation in this matter is not in any way contingent or based on the content of my opinion or the outcome of this or any other matter, nor is my compensation.

[3] Expert Statement of W. Robert Majure, Ph.D., *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, October 29, 2021 ("Application Statement").

10. Appendix B contains a list of materials I have relied upon in preparing this statement. I reserve the right to supplement my analysis if additional information and data become available as these proceedings continue.

1.3. Summary of opinions

11. My economic analysis continues to support the following main conclusion: a CP/KCS combination is a vertical transaction of two complementary networks that would create opportunities for procompetitive benefits throughout the CP/KCS network and would not substantially lessen competition.

12. Commenters on behalf of competing railroads have largely ignored my analysis and conclusion that a combination of CP and KCS will not have adverse horizontal competitive effects within any corridor or between corridors. They focus their attention on arguments that an end-to-end railroad merger *might* have adverse vertical competitive effects. In doing so, they incorrectly dismiss the Board's past findings that such effects are not likely in this industry and otherwise ignore the facts and circumstances of the railroad industry. When those facts are considered, I find that the Commenters offer no reason for concluding that adverse vertical effects are likely in an end-to-end railroad merger and, in particular, in a CP/KCS combination.

13. Commenters have variously proposed "remedies" for their perceived competitive concerns. In addition to failing to establish any need for such remedies, I find that the proposed remedies are self-serving and would not enhance competition. Indeed,

"remedies" proposed by UP and BNSF would impair competition by raising the cost to CPKC of offering shippers attractive rates for single-line service – both existing single-line service as well as the new single-line service made possible by the combination.

14. I organize my economic analysis that supports these conclusions with respect to the various arguments raised by different Commenters as follows:

- In section 2, I consider Commenters' analysis of end-to-end railroad mergers and the possibility of vertical competitive effects based on economic theories. I show that Commenters are incorrect to characterize the Board's past findings as a presumption based on a specific economic theory. Rather, the Board has repeatedly assessed end-to-end railroad mergers in a manner consistent with the framework recently articulated in the Vertical Merger Guidelines, which call for investigation of whether an industry is prone to incentive and ability elements necessary for a vertical competitive effect. In contrast, Professor Salop articulates a framework which *presumes* an incentive and ability based on his assumption that railroads are limited in the ways they can set or adjust prices amongst themselves – an assumption that is not consistent with the facts of the industry. And, Dr. Reishus posits a numerical example of cross-border movements that is consistent with neither the facts of Mexican non-discrimination regulation on such movements nor with basic economic rationality.
- In section 3, I consider Commenters' analyses that purport to show foreclosure as an empirical matter. This includes Professor Mayo's analysis of interline movements involving NS and the Meridian Speedway as well as various Commenters' responses to my analysis of whether the current flows of traffic through Laredo rule out allegations made at the time of KCS's acquisition of TM and TFM that competition north of Laredo would be largely foreclosed. I show that these responses are flawed both in concept and in methodology, as well as inconsistent with the factual record. I examine Commenters' representations of various changes that have occurred in the intervening years and show that these comparisons fail to account for a number of innocuous

changes affecting cross-border traffic in general and for specific commodities. Moreover, the changes illuminate that competition has been enhanced through improved single-line service provided by KCS and KCSM and through investments in competitive routings (including investments by others that have made other gateways on the Mexican border more competitive for UP and BNSF). I show that, as Eagle Pass (for UP and BNSF) and El Paso (for BNSF) have become more competitive on cross-border traffic that might have crossed at Laredo, overall this cross-border traffic has not been restrained and, instead, {{{[redacted]}}} since the acquisition of TM and TFM.

- In section 4, I consider "remedy" proposals made by UP, BNSF, and CN. I show that the similar proposals of UP and BNSF to regulate CPKC interline rates would harm competition. This unnecessary regulation would create a disincentive for CPKC to offer competitive rates to shippers. UP and BNSF would benefit from not facing the full competitive force of new single-line service from CPKC while shippers, including shippers that currently use single-line service on KCS that would be swept up in this effect, are likely to see higher prices from such a "remedy." I also show that CN's proposal that the Board award it a specific portion of KCS's track is equally self-serving. CN has not shown that either current or prospective competition is likely to be adversely affected if this track is part of CPKC.
- In section 5, I consider comments from shippers or from certain other parties that suggest other issues they associate with competition. I find that the issues articulated in these comments are not reasons to consider likely any adverse competitive effect of the CP/KCS combination.

2. COMMENTERS' ANALYSIS OF VERTICAL ECONOMIC THEORY DO NOT ESTABLISH A RISK OF VERTICAL HARM FROM THE CP/KCS COMBINATION

15. In my Application Statement, I concluded that neither CP nor KCS would have the incentive and ability as a combined firm to foreclose rivals or otherwise lessen competition as a result of vertical integration. Commenters responded with theoretical critiques of my conclusion. In this section, I address their arguments and explain why they do not change my conclusion. In section 2.1, I provide an overview of the flaws in Commenters' reasoning in their theoretical critiques of my conclusions regarding potential effects from a CP/KCS combination. In section 2.2, I address the specific theoretical arguments presented by Professor Steve Salop on behalf of UP. In section 2.3, I respond to the specific theoretical arguments presented by Dr. David Reishus on behalf of BNSF.

2.1. Overview of the flaws in Commenters' critiques of my analysis of potential vertical effects from the CP/KCS combination

16. Commenters have not disputed the basic framework of vertical effects analysis I used in reaching my opinion. Vertical effects require that a merger creates both an *ability* for the merging parties to achieve some new objective – i.e., that the arrangements they could reach independently were limited in a way that the merger resolves – and that they have an *incentive* to pursue the new objective – i.e., they do not already earn the same profits or greater profits in some other form. Those vertical effects can be anticompetitive, if the previously unexploited incentive and ability

relate to impairing competition, or procompetitive, if they relate to enhancing the combined product or terms of the merging parties.

17. In the combination of CP and KCS, there is a clearly procompetitive vertical effect in the ability to operate as a single-line to offer shippers a more efficient and effective service. The incentive to offer such service is the fundamentally procompetitive drive to win business by offering shippers a better option.

18. In my Application Statement, I noted that the Board has repeatedly examined the industry facts relevant to end-to-end railroad mergers and, in case after case, has determined that there is neither an ability nor an incentive to support anticompetitive vertical effects from combinations such as CP and KCS.[4] In considering ability, the Board has examined whether various past combinations are likely to change the set of constraints facing the merged firms and found that this is not likely.[5] In considering incentive, the Board has noted that, to the extent that a railroad may have power over a shipper, the pricing and practices in the industry do not support the assumption that the railroad is significantly constrained in ways that a merger would affect, and therefore, the railroad's ability to earn profit is not an incentive to anticompetitive effects.[6]

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[4] *See* Application Statement, § 3.2, ¶ 13, fns. 3, 4; ¶ 22, fn.10.

[5] *See* Application Statement, § 3.2, ¶ 25, fn. 12.

[6] The Board decisions use language for this incentive issue dating back to Bork (1954) in the academic literature and so speak of the potential profit a railroad may earn as its "lump" and whether the railroad is already earning that full potential as the "one lump" theory. See Application Statement, § 3.2, ¶, fn. 11; *See* Robert Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," *The University of Chicago Law Review*, 22(1), 1954, pp. 157–201.

19. For the most part, Commenters do not offer any new theories or facts about the industry for the Board to examine in this case. Rather than engage with the facts of the industry or show some other reason to think that the Board was wrong in its past investigations, Commenters have mischaracterized the Board decisions as merely presumptions based on a single theory and proceed to knock down this straw man of the "one lump" theorem.[7] I discuss Commenters' straw-man attacks on the "one lump presumption" in section 2.1.1.

20. To the extent Commenters suggest any theories that might apply to the railroad industry, they either fail to connect those theories to facts of the industry or make the same claims that have been rejected on the facts in prior Board proceedings.[8] For example, Commenters claim that Mexican non-discrimination regulations make the Laredo gateway a special situation – this claim was alleged and rejected during the

[7] Commentators do this, despite taking contrasting positions during prior Board investigations of their own proposed combinations. For example, economic expert opinion submitted on behalf of BN during the investigation of its acquisition of the Santa Fe Railroad argued that the "one lump" theory "assumes neither automatic foreclosure nor automatic gains from integration," "has long been accepted by many economists as a sound starting point for analysis,"...and is a "widely useful and cogent theory," while also noting that "the ICC, too, has accepted the one-lump theory, and concluded, rightly in my view, that it should be applied in all but exceptional circumstances." *See* Rebuttal Verified Statement of Richard L. Schmalensee, *Burlington Northern Inc., et al. – Control and Merger – Santa Fe Pacific Corporation, et al.*, Finance Docket Nos. 32549, 32549 (Sub-No. 1), June 9, 1995, BNSF0001523 – 97 ("Schmalensee R.V.S. 1995") at BNSF0001550 – 1, BNSF0001554.

[8] That Commenters lack a theory that is both (i) connected to the facts of the railroad industry and (ii) predicts vertical harm is consistent with their observations during past investigations. For example, expert opinions submitted on behalf of BN during the investigation of its acquisition of the Santa Fe Railroad stated that, ("It is well recognized that the circumstances under which 'vertical foreclosure' leads to post-merger reductions in competition in relevant markets are extremely limited, and that such circumstances are generally absent from railroad markets.") Verified Statement of Joseph P. Kalt, *Burlington Northern Inc., et al. – Control and Merger – Santa Fe Pacific Corporation, et al.*, Finance Docket No. 32549, October 1994, BNSF0002026 – 117 ("Kalt V.S. 1994") at BNSF002126.

Board's investigation of the KCS-TM-TFM combinations.[9] I address the specific claims and theoretical arguments of Professor Salop in section 2.2 and of Dr. Reishus in section 2.3.

21. Having failed to demonstrate any reason to expect some heretofore unseen incentive and ability for an end-to-end railroad merger to impair competition, Commenters resort to relabeling the likely procompetitive effects as "anticompetitive" without engaging in some consideration of why the CP/KCS combination would differ from all the end-to-end railroad mergers that have come before. They take the extreme view that any instance where CP and KCS have identified an opportunity to win business with the enhanced single-line service their combination allows would instead be an opportunity that CPKC would win through anticompetitive effects.[10] Further, they fail to suggest any reason why, assuming CPKC did have some anticompetitive means to accomplish the same ends, they would choose such a strategy and not the straightforward path of winning this business by offering a better service. As I discuss in section 2.1.2, even assuming that CPKC might face such a choice between anticompetitive activity and competing on the merits, Commenters offer no evidence that CPKC would choose the former, nor

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9 *Kansas City Southern – Control – The Kansas City Southern Railway Company, et al.*, Finance Docket No. 34342 (Decision No. 12 served Nov. 29, 2004) ("KCS-TM-TFM Decision"), pp. 6, 29–30.

10 *See*, *e.g.*, Verified Statement of Steven C. Salop, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 27, 2022 ("Salop V.S."), ¶ 12; Verified Statement of David Reishus, Ph.D., *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 28, 2022, BNSF-9-400 – 77 ("Reishus V.S."), ¶ 16; Verified Statement of Professor John Mayo, Ph.D., *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 28, 2022 ("Mayo V.S."), ¶¶ 9–10.

do they describe this hypothetical anticompetitive activity with the specificity necessary to assess such a question.

2.1.1. Commenters' straw man arguments about a "one lump presumption" are misguided

22. Instead of offering any reason of their own to doubt the Board's past findings, Commenters inaccurately describe the Board's past findings as having been based strictly on the *presumptions* of a single economic model – namely, the "one lump" theory. They then proceed to attack this straw-man, rather than the Board's actual assessments of the facts. In doing so, Commenters ignore all the ways in which the Board's discussions in those past decisions are inconsistent with the particularly strict application of the "one lump" theory that the Commenters wish to knock-down. Those inconsistencies suggest that, in these decisions, the Board is simply borrowing terminology from that theory to help describe the incentive element in the Board's more nuanced view.

23. In these decisions, the Board often uses the terms "lump" and "one lump theory," but does so to discuss incentives generally not to employ the strict straw-man version of that theory Commenters attack. The Board discusses the potential profit a railroad may realistically earn from whatever power it may have as the degree to which that railroad has a profit—or a "lump"—that it can earn.[11] The Board refers to the "one

[11] *See*, *e.g.*, *CSX Corporation, et al. – Control and Operating Leases/Agreements – Conrail Inc., et al.*, Finance Docket No. 33388 (Decision No. 89 served July 23, 1998) ("CSX-Conrail Decision"), p. 269, fn. 107 ("Further, Kalt has shown that Kahn/Dunbar have made no attempt to

lump theory" as a reflection of the basic incentive issue – that is, the fact that alternative ways for the railroad to earn the "lump" do not create an incentive for merger effects unless they create some opportunity to expand the "lump." Unlike the theory from which this terminology is taken, however, the Board was *not* assuming an absolute ability to extract rents absent a merger. Indeed, the discussion of degrees of a railroad's "lump" that the Board uses as a premise clearly distinguishes the Board's usage from a strict application of the theory.[12]

24. Thus, Commenters miss the point with their observations that the "one lump" theory, *if it were strictly applied*, would fail to match real-world facts of the industry.[13] The question is whether the incentive issue that the Board is considering when it uses language borrowed from the "one lump" theory is still relevant.

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control for competitive factors that affect the size of the profit opportunities, or "lump," available to the railroads."); KCS-TM-TFM Decision, p. 59 ("Market forces that prevent a lump from being taken prior to a control transaction will continue to prevent that lump from being taken even after vertical firms have come under common control.").

12 *See*, *e.g.*, CSX-Conrail Decision, p. 268 ("the one-lump theory does not predict that bottleneck carriers will always be able to execute a perfect price squeeze; it merely predicts that vertical integration will not increase the bottleneck carrier's market power over shippers."), p. 269 ("Kahn/Dunbar are simply wrong in asserting that the general applicability of the one-lump theory to mergers requires a set of explicit and rather implausible assumptions, and thus 'the circumstances in which the pure one-lump theory is likely to hold represent an 'extreme example.' They appear unaware that this very argument has been considered and rejected by the ICC, with the ICC's reasoning specifically affirmed by the court."); *Burlington Northern Inc., et al. – Control and Merger – Santa Fe Pacific Corporation, et al.*, Finance Docket No. 32549 (Decision No. 38 served Aug. 23, 1995), 10 I.C.C.2d ("BN-SF Decision"), p. 751 ("We do not think that the one lump theory requires the series of perfect conditions that the utilities claim must be present for the theory accurately to represent the coal transportation markets at issue here. Our focus here is properly on *substantial* harm to competition…Conversely, when certain factors are present that limit a carrier's ability to take full advantage of a bottleneck, those factors will remain in place as effective safeguards after the merger.") and ("The fact that a bottleneck carrier might not have sufficient information to execute a perfect price squeeze or to extract the last penny of economic profits does not mean that *substantial* benefits to shippers will be lost when the bottleneck carrier merges with a connecting carrier.").

13 *See*, *e.g.*, Salop V.S., ¶ 32; Reishus V.S., ¶ 39.

Commenters have not tried to suggest that the incentive issue, rather than the specific theory, is irrelevant.

25. The incentive issue, however one refers to it, remains relevant. The modern incarnation of this fundamental economic consideration is seen in the 2020 Vertical Merger Guidelines' requirement of an incentive for vertical effects.[14] Thus, Commenters' focus on the specific model, and not on the incentive issue, is misguided and fails to recognize that the Board's decisions, though phrased in the language of "one lump," are nevertheless an examination of relevant economic incentives and of the facts in the railroad industry.

2.1.2. *Relabeling procompetitive effects of single-line service "anticompetitive" is not only unfounded, it fails to consider reasons that CPKC would prefer to win traffic through better service*

26. Another common mistake among Commenters' analyses is to assume that opportunities CP and KCS have identified for new single-line service are

[14] U.S. Department of Justice and the Federal Trade Commission, "Vertical Merger Guidelines," June 30, 2020, available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf ("Vertical Merger Guidelines"), p. 5. As I noted in my Application Statement, on September 15, 2021, the FTC voted to withdraw from these guidelines. The majority statement in that decision took issue with a separate section of the 2020 VMG related to efficiencies while endorsing the sections that discussed the incentive and ability elements: "The 2020 VMGs represent a substantial improvement over the 1984 guidelines that they replaced and address important principles such as raising rivals' costs, foreclosure, and misuse of competitively sensitive information." *See* Federal Trade Commission, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines," Commission File No. P810034, September 15, 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf, p. 2

opportunities to win traffic through some anticompetitive action.[15] In doing so, these Commenters imply a perverse equivalence – in their logic, any opportunity to compete is an opportunity to restrain competition. It is not clear why they would draw such an equivalence, but it is clear that, by doing so, they skip over the required elements of analyzing the hypothesized anticompetitive action – what it is, why the merger creates an ability to pursue it, and why CPKC would have an incentive to pursue it, rather than other actions. Most critically, they fail to recognize that, in the face of CPKC's demonstrated opportunity to win the traffic through a better product – and expand the market in the process – Commenters' hypothesis that CPKC would pursue the traffic through anticompetitive actions of some sort is particularly unlikely.[16]

27. Commenters correctly identify the traffic at issue, i.e., interline traffic that could be served by a CPKC single-line service post-merger, but overlook the fact that *how* that traffic is won can have very different consequences for CPKC. It is important to distinguish the incentive implications of a prize, such as the traffic that might be won, from the overall incentive to engage in a particular strategy to win that prize. For example, I have an incentive to win the lottery, and may even buy a ticket. However,

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15 Salop V.S., ¶ 12; Reishus V.S., ¶¶ 16, 45; Mayo V.S., ¶¶ 9–10.

16 Economic experts submitting statements on behalf of BNSF argued a similar position when discussing the traffic diversions forecasted by the combined BN-SF. One expert explained that these diversions would "arise from improvements in the service offerings to customers" and are "not the consequence of any exercise in market power." Kalt V.S. 1994, BNSF0002125. Another expert explained that, "this merger is likely to yield substantial efficiencies and service improvement. This means that, with increased efficiency and expanded service, BN/Santa Fe would likely gain business from competitors. This result is exactly what would be expected under competition and has nothing to do with anticompetitive foreclosure." Schmalensee R.V.S. 1995, BNSF001561.

I would certainly not pursue other strategies for winning that have different overall costs (e.g., stealing a ticket or trying to rig the numbers). These strategies have the same prize with the same contribution to overall incentives, but each strategy has its own costs and risks. When vertical merger theory considers a firm's incentives, it considers the profits of a particular strategy, not an unbridled assessment of the incentive to win the prize by any strategy. Commenters have confused the incentive to win the prize – the traffic capable of being won – with an incentive to engage in unspecified strategies to win the prize. As this confusion means Commenters have not even identified what the anticompetitive strategy is that they are hypothesizing, its risks and costs – its incentives as a strategy – cannot be assessed. Commentators are, in effect, making the same sort of unfounded presumption about vertical effects that they accuse the Board of making – though they would have it as a presumption of harm

28. In general, Commenters have failed to justify their mis-identification of opportunities to win traffic through new single-line service as opportunities to engage in some unspecified anticompetitive strategy. Moreover, even if such a strategy could be shown to be relevant, they fail to explain why CPKC would pursue it instead of competing – especially since the pro-competitive choice expands the market available to be won.

2.2. Professor Salop's vertical theories do not prove actual harm, or even the risk of harm from a CP and KCS combination

29. Professor Salop makes the straw-man argument discussed above, taking aim not at the relevant analysis, but the "one lump" theory. To this argument, he adds two observations about possible contracting difficulties to further support his non sequitur that the "one-lump" theory as he conceives it is inappropriate in the railroad context. As I discussed above, that argument is a straw-man and does nothing to undermine all of the Board's past findings about the railroad industry and why anticompetitive vertical effects are unlikely in end-to-end railroad mergers. Similarly, and as explained below, the particular contracting realities Professor Salop points out are also not reasons to conclude that the Board was wrong in all of its past examinations of the industry.

30. In addition to attacking the "one lump" theory, Professor Salop also presents his own theory, based on an unfounded assumption about how interline prices are set, and conducts simulation analysis of this theory, which he claims evaluates the effects of the CP/KCS combination. As I explain below, Professor Salop's model is built on an assumed contracting mechanism that is inconsistent with ordinary practice in the railroad industry. Taking account of that ordinary practice eliminates any incentive or ability for vertical effects suggested by Professor Salop's model. Thus, as the effects he models and simulates would not occur in actual railroad markets, his model does not suggest, much less establish, that a CP/KCS combination poses any significant risk of the theoretical harm he identifies.

31. In this section, I unpack Professor Salop's observations and assumptions about the railroad industry. I show that his observations that railroads have imperfect information about their interline partners and that rail service is a differentiated product for shippers do not undermine the Board's previous findings related to a "one lump," nor the Board's past conclusions that vertical effects are not likely in end-to-end railroad mergers. I also discuss the foundation of Professor Salop's theory of vertical harm – that railroads cannot negotiate both a combined price to the shipper in interline movements and the allocation of the profits of such a movement between them – and why it is not a good description of actual negotiations over interline movements. Finally, I conclude that Professor Salop's theoretical model's reliance on assumptions in place of actual industry conditions leads the model to presume an anticompetitive concern in any vertical merger in any industry, with the only question for overall effect one of whether this concern is outweighed by a particular efficiency that is also not specific to any facts of the railroad industry. Professor Salop's model is thus of little use in assessing the CP/KCS combination.

2.2.1. Professor Salop's observations of the rail industry do not establish that anticompetitive vertical effects are likely in end-to-end railroad mergers

32. Professor Salop makes two observations about actual conditions in the railroad industry. First, he observes that railroads often have imperfect information about other railroads involved in an interline movement.[17] He is correct to note that

[17] Salop V.S., § 3.2.

uncertainty is not a feature included in the original "one lump" model. However, uncertainty alone is not a reason to ignore the more general principle illuminated by the "one-lump" theory – the need to examine incentives and whether the contracts between independent vertically related firms could already provide a means to achieve the profit that might be earned from a hypothesized anticompetitive effect. If railroads have means other than mergers to achieve those profits, there is little reason to expect that a merger will result in anticompetitive behavior to achieve those same profits.

33. Professor Salop fails to consider that the economics literature has explored a variety of ways that contracting parties routinely cope with uncertainty. Indeed, a whole area of economics has been developed around the design of mechanisms to solve such problems and ensure truthful revelation of private information.[18] Of course, the original "one lump" model was not meant to explore such issues and so it is no surprise that the model does not assume either uncertainty or solutions to uncertainty. However, to go from that observation to an implication that railroads can only solve uncertainty issues through vertical mergers requires that railroad

[18] *See*, *e.g.*, Dirk Bergemann and Juuso Välimäki, "Information in Mechanism Design," in *Advances in Economics and Econometrics: Theory and Applications, Ninth World Congress*, Volume I, eds. Richard Blundell, Whitney K. Newey, and Torsten Persson, eds. (Cambridge: Cambridge University Press, 2006), pp. 186–221 at p. 186 ("The basic issue in mechanism design is how to truthfully elicit private and decentralized information in order to achieve some private or social objective. The task of the principal is then to design a game of incomplete information in which the agents have indeed an incentive to reveal the information."). *See*, *e.g.*, R. Preston McAfee and John McMillan, "Auctions and Bidding," *Journal of Economic Literature*, 25(2), 1987, pp. 699–738; Alexander Teytelboym, Shengwu Li, Scott Duke Kominers, Mohammad Akbarpour, and Piotr Dworczak, "Discovering Auctions: Contributions of Paul Milgrom and Robert Wilson," *The Scandinavian Journal of Economics*, 123(3), 2021, pp. 709–750 for surveys of literature on bidding mechanisms under asymmetric information.

executives faced with uncertainty are as limited in the scope of contractual provisions they can employ as Professor Salop's model is.[19]

34. Professor Salop has shown nothing of the sort.

35. Second, Professor Salop observes that shippers perceive railroads' service as a differentiated product.[20] That is, each railroad offers some unique characteristics that shippers value, so the shipper's choice of railroads is a product of the values they place on each of these characteristics as well as the price.[21] Again, this is an aspect of real markets that the original "one lump" model was not attempting to capture. However, rather than proving CP and KCS have some incentive and ability to foreclose rival railroads after the CP/KCS combination, the fact that shippers view rail service as a differentiated product actually illustrates one of the reasons CPKC would want to continue working with other railroads. The unique characteristics of those other railroads create value for some customers, and the only way to be part of that value is for CPKC to work with the railroad that shipper particularly wants to use.

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[19] In Professor Salop's model, while one interpretation of downstream competition between carriers is that they each submit a bid to the shipper for a through rate, in the upstream market, the hypothesized monopoly carrier is limited to set a through-rate and there is no bidding or other mechanisms allowed to affect the terms of interchange between railroads. Salop V.S., Appendix C.

[20] Salop V.S., § 3.3.

[21] Sources of product differentiation cited by Professor Salop include distances between shippers' locations to the origin stations, speed, reliability, and frequency of service, other dimensions of customer service, terms of payment, etc. *See* Salop V.S., ¶ 40.

36. In concluding that product differentiation is, instead, a reason to assume that anticompetitive effects are likely, Professor Salop offers only his model and simulations. However, as I discuss next, that model depends critically on another assumption that Professor Salop makes and which is a particularly poor fit to industry practice.

2.2.2. *Professor Salop's theoretical model depends on an assumed tension that disappears if actual conditions in the railroad industry are taken into account*

37. The potential vertical harm Professor Salop asserts with his theoretical analysis is driven by his assumption that railroads have to set interline prices in a specific, limited way. Although economists commonly make similar assumptions in order to simplify vertical relationships into a mathematical model, those assumptions are not necessarily a good description of any particular industry. For railroads, it is not a good description of the way interline rates are actually set and negotiated. Similarly, Professor Salop's simulation analysis is untethered to industry facts and thus provides no basis for the alleged risk of vertical issues from the CP/KCS combination.

38. Professor Salop's theory of vertical harm rests on an assumption that the upstream firm is restricted to employ only a linear pricing mechanism (i.e., the railroad sets or agrees to a price per unit which is the entire arrangement that railroad is allowed to have with its interline partners).[22] Thus, under Professor Salop's basic framework, the upstream railroad with hypothesized monopoly power only has this one contracting

[22] Salop V.S., ¶ 26.

tool – and no other levers – to accomplish two conflicting goals. The first goal is to maximize the size of available joint profits. His hypothesized monopolist could only achieve this goal by *lowering* the price to the downstream firms.[23] The second goal of Professor Salop's hypothesized monopolist is to maximize its own share of the available joint profit. Professor Salop's pricing assumption means the hypothesized monopolist can only accomplish this goal by *raising* its price to the downstream firms.

39. Thus, Professor Salop's framework is built upon an assumed tension. The harm from a vertical merger it predicts is a result of the merger relaxing the restriction created by his linear price assumption. Relaxing this restriction gives the merged firm separate ways to collect profits and set total prices for shippers – that is, the hypothesized monopolist gains direct control of one of the interlining railroad's prices and profits and affects its willingness to work with other railroads where the tension is assumed to constrain it.

40. However, the economics literature has established that a wide range of more creative pricing arrangements resolve the tension inherent in Professor Salop's model and thus eliminate the incentive for any effect of a vertical merger. Essentially, if the two goals (optimize the end price to maximize joint profits and allocate those profits

[23] In particular, the upstream carriers are assumed to influence downstream pricing by offering them through-rate divisions based on the upstream firm's profit-maximizing incentives, which the downstream firms can then use to maximize their profits. *See* Salop V.S., ¶¶ 26, 55, Appendix C, p. C-1.

between the interlining railroads) can be achieved with the pricing tools available to real-world executives, there is no incentive for anticompetitive vertical effects.

41. The kind of prices Professor Salop's model depends on are, at most, the starting point from which actual railroad interline pricing is determined. I understand railroad contract terms may include volume discounts, volume commitments, and service guarantees.[24] Moreover, railroad contracting involves more than setting a unit-price, and contract negotiations play out in ways not contemplated by Professor Salop's model.

42. Unlike in the assumed price setting of Professor Salop's model, in real-world railroad interline pricing there is opportunity for negotiations, with shippers and between interline partners, before final contract terms are set. A shipper may request a combined interline rate from one railroad, which will request and incorporate a rate from its prospective interline partner. When the shipper receives that bid, it can compare the terms with alternatives. It can then return to the railroad with a request for improved terms, including an amount by which the combined rate must decrease

[24] For example, I reviewed a negotiation between KCS and a shipper in which the terms reviewed by KCS management include { [redacted] }. *See* Kansas City Southern, {{ [redacted] }} (Majure R.V.S. Exhibit C-1), p. 10. In another example, this one involving CP, CP renegotiated a contract with {{ [redacted] }}. *See* Email chain from {{ [redacted] }} (Majure R.V.S. Exhibit C-2).

to win the business.[25] At that point, the railroad can begin negotiating with its interline partner over how to adjust their combined bid in order to win the business.[26]

43. A shipper can also request separate rates directly from each interline partner, with the same effect. After receiving these individual bids, the shipper can return to one or both railroads, again with a request for improved terms, including an amount the two would-be interline partners need to reduce their combined rates to win the business. The prospective interline partners can then, again, begin negotiating adjustments to their individual bids in order to reach an effective combined rate that can win the business. In either scenario, a rational shipper will be indifferent to the divisions

[25] I understand such negotiations are common. For example, { }}. *See* Email chain from {{ }} (Majure R.V.S. Exhibit C-3) {{ }

[26] For instance, {{ }}. *See* Email chain from {{ }} (Majure R.V.S. Exhibit C-3). As another example of the negotiations between interlining railroads, consider the interaction between {{ }} *See* Email chain from {{ }} (Majure R.V.S. Exhibit C-4).

between the two railroads, and the two railroads have the ability to negotiate between themselves.

44. Although Professor Salop asserts that his model holds if extended to negotiated rates, he artificially restricts the subject of those negotiations between railroads to be solely over each railroad's per-unit interline rate, which he assumes constitutes the entirety of the arrangement between them. In limiting the contracting to a single term (a linear per-unit price), Professor Salop precludes the possibility that negotiations *simultaneously* address (i) any transfer or split among the railroads and (ii) the end-price (or that the split might make the payments between railroads contingent on or proportional to the rate ultimately negotiated with the shipper).[27] If Professor Salop had included this fact of real negotiations over interline rates, the tension in his model would have been resolved.[28] The hypothesized monopolist would be able to agree

[27] Salop V.S., pp. C-3, D-2. In Professor Salop's negotiation framework, even though both sides of the negotiation know that agreeing to any particular split rate will result in an end price to the shipper that is higher than the rate that would maximize their joint profits, they cannot bring that issue to the negotiating table. That is, they simply take the inefficient markups that will happen after they agree to a split rate as inevitable and proceed to negotiate only over that one tool which, under this assumption, naturally carries the same tension between the same two goals as Professor Salop's model relied upon without negotiation.

[28] Professor Salop claims that his model covers situations when more general contracts (e.g., volume rebates) are negotiated between railroads. He claims in these situations that vertical integration with one competing carrier and foreclosure of the other allows the hypothesized monopoly carrier to extract the full monopoly profit that it could not pre-merger. However, in these situations Professor Salop adds that railroads face an additional contracting constraint – that one competing carrier does not observe the contract terms between the other competing carrier and the hypothesized monopoly carrier. Essentially, there is another goal – coordinating the beliefs of the two interline partners about the overall strategy – to absorb the additional tool (e.g., the volume rebates) which maintains the tension of too many goals for the number of tools he allows in his model. The new contracting issue he notes also has solutions that are recognized in the economics literature. *See* Salop V.S, fn. 10; Patrick Rey and Jean Tirole, "A Primer on Foreclosure," in *Handbook of Industrial Organization*, Volume 3, eds. Mark Armstrong and Robert H. Porter (Amsterdam: North-Holland, 2007), pp. 2145–2220 at pp. 2167–2168.

with interline partners on the end-price and simultaneously negotiate the split of joint profits. And, as I explained above, without that tension there is no incentive in Professor Salop's model for any anticompetitive effect of a vertical integration.

2.2.3. *Professor Salop's simulation model would presume an anticompetitive concern in all vertical mergers in all industries, and incorrectly assumes that only one form of efficiency applies in vertical mergers*

45. Professor Salop's simulations, which are based on his model, are not a reason to expect harm from vertical integration. As discussed above, such harm is an artifact of his modeling assumption that does not fit the reality of railroad pricing. His simulations are also untethered to industry facts beyond the pricing mechanisms. He acknowledges that none of his parameters are calibrated to industry data points.[29] Thus, there is no factual basis for the assertion that these simulations demonstrate a risk of vertical issues from the combination of CP and KCS.

46. In further disregard for actual conditions in the railroad industry, Professor Salop also assumes that one, and only one, form of efficiency applies to vertical mergers. In particular, Professor Salop's pricing assumption creates an efficiency through the elimination of double-marginalization.[30] However, he excludes from his analysis the

[29] Salop V.S., fn. 43 ("In this regard, I want to emphasize that the models are not calibrated.").

[30] Salop V.S., ¶¶ 45–47.

possibility of efficiencies in the form that is actually most relevant to the railroad industry – enhanced quality associated with single-line service.[31]

47. Professor Salop's theoretical framework would presume an anticompetitive concern in *every* vertical merger across *all* industries. Rather than analyze whether the facts of the railroad industry fit his theory, Professor Salop simulates the effects of the merger as if the theory always holds. The only relevant question Professor Salop's approach would allow is to investigate whether the incentive to foreclose is outweighed by the particular efficiency of reduced double marginalization.[32]

48. Given the lack of connection to the railroad industry in Professor Salop's approach, it is not surprising that his presumptions are inconsistent with the Board's fact-based conclusion in all of its past investigations of end-to-end railroad mergers. That is, to the extent constraints prevent railroads from achieving monopoly rents on an entire move through their control of an endpoint, it is not, despite the assumption in Professor Salop's model, a lack of creative pricing mechanisms that constrains them. Moreover, the constraints that bind them are also ones that are not likely to be relaxed to the detriment of shippers just because a merger lets a railroad work more closely with its former interline partner to set a final price to shippers. Professor Salop's theory, which is so disconnected from the relevant facts and realities of the railroad industry, offers no reason to re-examine these basic determinations that both

31 *See*, *e.g.*, Application Statement, § 3.1.

32 Salop V.S., ¶ 51.

incentive and ability for anticompetitive vertical effects are lacking in these end-to-end railroad mergers.

2.3. Dr. Reishus's vertical analysis is internally inconsistent and does not establish that a CP and KCS combination is likely to result in harm

49. Dr. Reishus makes the same straw-man argument of a "one lump" presumption and makes a similar observation as Professor Salop; namely that interline partners possess imperfect information about each other. Nevertheless, unlike Professor Salop, he acknowledges that end-to-end rail mergers are typically pro-competitive with benefits such as providing new single-line service and operational efficiencies.[33] As a reason to believe the CP/KCS combination may be an exception, Dr. Reishus points to a particular fact that would apply at the Laredo gateway – regulation in Mexico against discriminatory pricing.[34] This is, incidentally, the same constraint that Professor Hausman suggested, on behalf of UP, might generate an incentive and ability for vertical effects when KCS was acquiring TM and TFM, and which the Board at the time found unlikely to lead to vertical effects.[35] In an attempt to revive this rejected theory, Dr. Reishus presents a numerical example that he claims illustrates how the regulation could lead to a merger effect.[36] Dr. Reishus's

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33 Reishus V.S., ¶¶ 23–28.

34 Reishus V.S., § C.

35 *See* Verified Statement of Jerry A. Hausman, *Kansas City Southern – Control – The Kansas City Southern Railway Company, et al.*, Finance Docket No. 34342, August 1, 2003 ("Hausman V.S. 2003"), pp. 11–16.

36 Reishus V.S., Figure 3.

assumption about the way that this regulation operates is incorrect. Even if it did operate as he assumes, though, his illustrative example is not economically coherent and fails to establish the vertical foreclosure incentive and harm to shippers that he claims.

50. Consider how Dr. Reishus's example works. He assumes a monopoly railroad (M) is subject to Mexican regulation. This railroad interconnects with three U.S. railroads (A, B, and C) that are each the only way to serve three different shippers. He also assumes that M sets a single price that applies to all three interconnections, which is the way he assumes the regulation binds M. Specifically, he assumes that this price leaves zero profit for railroads B and C (who each carry their respective traffic at their marginal cost of $10 in his example) but a positive profit for railroad A (who is also assumed to have marginal cost of $10, but a shipper willing to pay $3 more than the shippers B and C serve). If Dr. Reishus's numbers were credible, M would like to charge A more than it charges B and C, but because he assumes Mexican law does not allow any differences in price, he concludes that M has an incentive and ability after a merger with B to raise its price to all three carriers. His assumption that C is already pricing at marginal cost is what makes this model a prediction of anticompetitive effects, as it leads to his conclusion that M's decision would mean foregoing the movement to C's shipper at this higher price.

51. Before getting into why Dr. Reishus's numbers are not credible as a matter of economics, it is worth noting that Mexican regulation does not preclude differences in prices that apply to the segment within Mexico in the way Dr. Reishus assumes in his

example. In particular, Dr. Reishus assumes away the possibility that non-discriminatory prices can include different pricing for otherwise similar shipments that differ by volume. This assumption is contrary to my understanding of Mexican pricing regulation.[37]

52. There is no effect of the merger in Dr. Reishus's numerical example if carrier M can comply with Mexican regulation and set a schedule of rates that is non-discriminatory (in the sense that the same schedule is available to any shipper) but which results in a different effective rate for A's shipper than would apply to B or C. In particular, because Dr. Reishus's simplified example relies on A's shipper handling half the volume, a $3 surcharge on all large shipments would give M all of the possible profit without any effect from a merger while still complying with Mexican regulation.

[37] *See*, *e.g.*, Reply Verified Statement of Oscar Augusto Del Cueto Cuevas, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al*., Finance Docket No. 36500, July 12, 2022, ¶ 25 ("Further, Article 170 of the Mexican Regulations imposes a non-discrimination requirement on rates. Concessionaires may implement discount programs or promotions, but only under equitable conditions and without discrimination, taking into account the specific characteristics of each service such as volume, equipment, and distance. Concessionaires cannot discriminate based on interline partner, unless cost differentiations justify those differences."). *See also* Kansas City Southern de México,{{ }}, KCSR-HC-00020713 – 9 ("{{ }}").

53. Even if Dr. Reishus were correct about the way that regulation in Mexico works, his numerical example only shows the effect it does because he assumes a set of prices and quantities that defy economic principles. In particular, the prices Dr. Reishus assumes are ones that do not constitute an economic equilibrium. That is, one or more of the railroads in his example would make more profit with a different price than with the price he assumes. I illustrate this flaw in Exhibit 1. I show that railroad C would make more profit by charging a higher price – one above marginal costs – than Dr. Reishus assumes.

EXHIBIT 1
Flaws in Dr. Reishus's numerical example

Railroad	Cost[1]	Price[2]	Quantity	Profit[3]	Total Shipper Price Paid	Max Price of Complete Move[4]	Acceptable Total Price For Shipper[5]
Dr. Reishus's prices and quantities pre-merger							
Mexican Railroad							
M	$10	$15	100	$500			
Interconnecting U.S. Railroads							
A	*$10*	*$13*	*50*	*$150*	*$28*	*$28*	*Yes*
B	*$10*	*$10*	*30*	*$0*	*$25*	*$25*	*Yes*
C	$10	$10	20	$0	$25	$25	Yes
Response 1: Carrier C charges $10.50, M does not lower its price[6]							
Mexican Railroad							
M	$10	$15	80	**$400**			
Interconnecting U.S. Railroads							
A	*$10*	*$13*	*50*	*$150*	*$28*	*$28*	*Yes*
B	*$10*	*$10*	*30*	*$0*	*$25*	*$25*	*Yes*
C	$10	**$10.50**	0	$0	$26	$25	**No**
Response 2: Carrier C charges $10.50, M lowers its price[7]							
Mexican Railroad							
M	$10	**$14.50**	100	**$450**			
Interconnecting U.S. Railroads							
A	*$10*	*$13.50*	*50*	*$175*	*$28*	*$28*	*Yes*
B	*$10*	*$10.50*	*30*	*$15*	*$25*	*$25*	*Yes*
C	$10	**$10.50**	20	$10	$25	$25	Yes

Source: Reishus V.S., Figure 3
Note:
[1] The marginal cost per carload for each rail segments.
[2] The rate per carload set by each railroad for its segment.
[3] Calculated as the difference between the price and marginal cost for each railroad multiplied by the quantity.
[4] The maximum rates per carload that can be charged for the shipments to different receivers across the three interconnecting railroads (Reishus's model of shipper demand).
[5] Describes whether the total price paid by the receivers, i.e., the price for the Mexican segment plus the interline price, is no greater than the maximum price that can be charged for the shipments to different receivers in Reishus's model of demand.
[6] In this response, Reishus's model of demand posits that railroad C would have zero quantity becuase the total price charged exceeds the maximum rate from the corresponding receiver.
[7] In this response, railroad M lowers its price to $14.50 per carload which, in Reishus's model of demand, ensures that the movement over railroad C occurs as the total price does not exceed the maximum rate from the corresponding receiver.

54. As I show in the top panel of Exhibit 1, Dr. Reishus assumes that railroad C makes zero profit carrying 20 units of traffic at its marginal cost of $10. But, in an economically rational equilibrium of this example railroad C would not settle for zero profit, and M has no mechanism by which to force C to settle for zero profit. If railroad C in this model charged $10.50, instead, then railroad M would face a choice between continuing to charge $15 as Dr. Reishus assumes (foregoing the traffic with C) and making $400 in profit (Response 1 in the middle panel of the exhibit) or lowering its price to $14.50 to carry all of the traffic and making $450 in profit (Response 2 in the lower panel of the exhibit). As railroad C should expect M to choose the larger profit between these choices, charging $10.50 to make some profit is clearly better for C than making zero profit and Dr. Reishus's assumed behavior for C is not rational.[38]

55. This flaw in Dr. Reishus's numerical example is critical to the effect he uses the example to demonstrate. Recall that the reason he predicts an anticompetitive effect is that, in his example, he assumes railroad C is already pricing at its marginal cost and cannot further lower price to retain the business when M tries to get more of the profit that he assumes is left to A. In an economically rational equilibrium, railroads B and C would not settle for zero profit, and C would not be in the precarious position necessary for Dr. Reishus's prediction. Indeed, this assumption is inconsistent with the realities of the railroad industry. In the real world, railroads earn profits, including

[38] Railroad B would be in a similar position with an ability to make higher profit than Dr. Reishus's numbers assume it would settle for.

on their interline traffic. For instance, UP and BNSF report that in 2019 they earned 39 and 34 percent in operating margins, respectively.[39]

56. More generally, when Dr. Reishus assumes that "railroad M is in a position to capture as much of the available profit as possible" his numbers fail to reflect that the amount that is possible is actually a product of bargaining with the other railroads over the split of profits.[40] That split, the bargaining over it, and the other limitations on a real railroad's ability to earn "as much profit as possible" are the facts that the Board noted as defusing vertical effects from Mexican non-discrimination regulations

[39] Union Pacific Corporation, SEC Form 10-K for period ended December 31, 2019, filed on February 7, 2020, pp. 1–98 at p. 24; Burlington Northern Santa Fe, LLC, SEC Form 10-K for period ended December 31, 2019, filed on February 21, 2020, pp. 1–48 at p. 16. I understand that, in particular, UP and BNSF {{{ }}} on their cross-border traffic through the Laredo gateway. Michael Baranowski has examined the profitability of these routes using RVC ratios, which, for a movement or a set of movements, are calculated as the ratio of revenue to a measure of variable costs (referred to as URCS) which was developed by the Board and is reported in the Confidential Waybill Sample ("CWS"). Mr. Baranowski finds that, on average, in 2019, UP's RVC was {{{ }}}. He also finds that, on average, in 2019, BNSF's RVC was {{ }}. *See* Rebuttal Verified Statement of Michael R. Baranowski, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, July 12, 2022 ("Baranowski R.V.S."), Table 6.

[40] It is also possible that Dr. Reishus may have meant to assert yet another constraint, that M sets its price before any other railroad and is somehow constrained to never change that price. While I am not aware of any evidence that such a constraint applies anywhere in the pricing of interline railroad movements, it is an assumption that sometimes appears in the academic economics literature and would make Dr. Reishus's numbers rationalizable, if not credible, due to a well-studied extreme case of bargaining game theory referred to as ultimatum games. The theory of subgame perfection applied in these games suggests one can predict a party with no profits at stake will act however one chooses (i.e., that Dr. Reishus can assume B and C will carry the traffic if left with zero profit whether they do so or not). Laboratory experiments of ultimatum games, however, have shown repeatedly that it is not credible to assume B or C would make the choice that M wants after M's price setting leaves them with no chance to make a profit of their own. *See*, *e.g.*, Werner Güth, Rolf Schmittberger, and Bernd Schwarze, "An experimental analysis of ultimatum bargaining," *Journal of Economic Behavior & Organization*, 3(4), 1982, pp. 367–388; Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, "Fairness and the Assumptions of Economics," *The Journal of Business*, 59(4), 1986, pp. S285–S300.

the last time this possibility was raised. Dr. Reishus's failure to incorporate these considerations in his numerical example makes the scenario he posits irrelevant to the analysis of vertical effects.

3. COMMENTERS' CRITIQUES OF MY ANALYSIS OF LAREDO TRAFFIC AND OTHER EMPIRICAL FORECLOSURE ARGUMENTS ARE FLAWED AND DO NOT CHANGE MY CONCLUSION

57. In my Application Statement, I explained that "neither CP nor KCS would have the incentive and ability as a combined firm to foreclose rivals or otherwise lessen competition as a result of vertical integration."[41] To support this conclusion, I provided analysis of northbound traffic KCSM brings to the Laredo gateway to "illustrate how the overall effects on rivals of a combination of CP and KCS are likely to stem, not from CP/KCS foreclosing those rivals, but from enhanced competition as shippers freely choose newly-created CP/KCS single-line options."[42]

58. In response, Commenters have provided empirical analyses of their own in which they find that KCS handles different shares of traffic when they look at different cuts of data or different subsets of traffic than I did. They point to these different percentages as suggesting that some UP or BNSF traffic may have been foreclosed by KCS in the years since it acquired TFM-TM, and argue that my analysis cannot rule out this possibility. In the rest of this section, I address these analyses, but first, I explain the overarching reason why the approach taken by Commenters is misguided, flawed, and does not show what they claim it shows.

59. In the previous section, I established that Commenters have not offered any new theories to support anticompetitive vertical effects from mergers of end-to-end railroads, such as CP and KCS. Commenters' empirical arguments suffer from this

41 Application Statement, ¶ 12.

42 Application Statement, ¶ 12.

same fundamental flaw – their analyses do not test a theory for how a CP/KCS combination would create a new incentive and ability that my analysis did not already rule out. Instead, they offer empirical observations they claim could be consistent with the outcome of some heretofore-unspecified theories of foreclosure.

60. The analysis I presented in my Application Statement tested, and ruled out, the only foreclosure theory posited by Commenters UP and BNSF at the time of the KCS-TFM-TM merger. The theory implied that KCS could divert a substantial amount of traffic at the Laredo gateway by foreclosing UP and BNSF:

- Professor Hausman, UP's expert witness, pointed to the non-discrimination regulation in Mexico as a constraint and argued that KCS would raise TFM's rate following the merger, disadvantaging UP and hurting shippers with the amount of the increase determined by the ability to give a rebate on traffic diverted to KCS. Thus, for his theory to predict a significant effect on competition, a significant volume of traffic would have to be diverted to KCS.[43]
- Dr. Reishus, BNSF's witness at the time, argued that "to the extent that BNSF provides a competitive discipline to UP at Laredo and Brownsville, this alternative could be lost or reduced if [KCS] were to inefficiently favor its own traffic through its routing over the Laredo and Brownsville gateways." He did not suggest a theory of how the merger would remove some constraint that could generate the requisite incentive or ability for such a prediction. However, he did suggest that BNSF could lose all competitive relevance from KCS foreclosure after the TFM-TM combination, implying a similarly substantial amount of foreclosure.[44]

[43] Professor Hausman claimed that almost half of the traffic at Laredo (corresponding to 75 percent of UP traffic at the time) could be diverted to KCS following the acquisition. *See* Hausman V.S. 2003, pp. 15–16.

[44] Verified Statement of David Reishus, *Kansas City Southern – Control – The Kansas City Southern Railway Company, et al.*, Finance Docket No. 34342, August 4, 2003, pp. 73–74.

61. These theories suggest that the appropriate benchmark is a relatively obvious one. As Professor Salop admits, the shares I report in my analysis are "inconsistent with a claim of complete foreclosure."[45] Professor Hausman's rebate theory may not imply as precise a benchmark, but the implication is clear enough to examine in the data: a finding that, as of 2019, KCS does not handle a substantial fraction of the traffic at Laredo—despite doing so being most consistent with the theorized KCSM power—is sufficient to show that neither of these theories were borne out. Indeed, this is what I found. In my analysis of northbound traffic at Laredo I found that KCS hands over to UP or BNSF {{[redacted]}} of the traffic it takes to Laredo from Mexico.[46]

62. Commenters' response to this is to produce different cuts of my analysis and then to point to the ones where KCS keeps a higher share of movements at Laredo in 2019, suggesting that my analysis cannot rule out *all* potential theories of *partial* foreclosure that could apply to these subsets of traffic.[47] This exercise does not prove that KCS is foreclosing UP or BNSF as interline partners on particular subsets of traffic. In suggesting there is some unrefuted theory of foreclosure that could be consistent with the observed shares, Commenters simply assume that out of all possible reasons shares may have evolved, some partial foreclosure is the relevant explanation.[48] They do not offer any evidence that might help distinguish between

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45 Salop V.S., ¶ 89.

46 Application Statement, Exhibit 2.

47 Reishus V.S., ¶¶ 62–63, Table 2; Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 28, 2022 ("Carey/Bremser V.S."), pp. 17–18, Figure 2; Salop V.S., ¶¶ 94–96, Figure 8.

48 Reishus V.S., § 4; Salop V.S., § 5.

their vague, unspecified theories, procompetitive explanations, and other unrelated changes in traffic patterns to explain the differences in shares observed in the data. Instead, their exercise only proves there is a lot of variation in how different subsets of the traffic were affected by the many reasons that shares may change over the intervening 15 years since the KCS-TFM-TM transaction.

63. While Commenters are correct that my analysis cannot rule out *all possible* theories of foreclosure as an explanation of share changes over time, they have not addressed the question of whether any of these possible theories are *relevant.* As I explained above, only one serious theory of potential foreclosure, the theory that was suggested at the time of the KCS-TFM-TM transactions, has actually been suggested; other theories, to the extent they are discernible, are disconnected from the facts of the industry or even from economic principles for the reasons described elsewhere in my statement. My analysis is sufficient to rule out that theory.

64. Thus, to the extent Commenters suggest examining how KCS shares evolved over time relative to a but-for scenario, this greater precision would only be needed to rule out additional theories that were not even suggested at the time of the KCS-TFM-TM transaction. As I discussed in section 2, despite how readily experts have pointed out that presumptions should not govern the analysis of vertical effects, they have collectively failed to present any theories consistent with facts of the railroad industry – beyond what have already been rejected by the Board in past investigations including at the time of the KCS-TFM-TM transactions and again by my analysis – to explain why a CP and KCS combination would create a new incentive and ability to

foreclose. In fact, as discussed in section 2.1.2, with no justification they adopt a presumption that any share gain is the result of anticompetitive conduct.

65. In the rest of this section, I address Commenters' analyses in more detail. I organize my response to their arguments as follows. In section 3.1, I explain that Commenters' analysis of KCS shares of southbound traffic, which naively inverts my analysis of northbound traffic, is theoretically flawed and misleading. In section 3.2, I demonstrate that an examination of cross-border traffic patterns reveal Commenters' analyses comparing shares over time are incomplete, ignore patterns in the data consistent with stronger competition from KCS, and cannot be interpreted as Commenters suggest. In section 3.3, I address Commenters' flawed critique of my use of BEAs to identify destinations where KCS could compete for northbound traffic from Laredo. In section 3.4, I respond to analyses presented by BNSF and demonstrate why they do not provide evidence of KCS foreclosure of BNSF. Finally, in section 3.5, I evaluate Professor Mayo's analysis that he claims identifies risk of foreclosure by CPKC and explain that it is methodologically flawed and based on the unfounded, perverse logic that I discussed in section 2.1.2 – which presumes that all opportunities to compete are opportunities to restrain competition.

3.1. Commenters analysis of southbound traffic is methodologically flawed and misleading

66. Commenters present an analysis in which they naively invert my analysis of northbound traffic to examine southbound traffic moving through Laredo.[49] In this section I explain that, unlike my analysis of northbound flows, Commenters' analyses of southbound flows cannot reliably test the hypothesis that KCS is using its position at Laredo to foreclose its interline partners, UP and BNSF, on southbound movements. To examine the reverse flow of traffic, Commenters' experts would have needed to control for several differences that complicate the interpretations of their analyses. What they have done, instead, is not comparable to the analysis of northbound traffic that I put forward in October and is not informative about KCS's incentive and ability to foreclose its interline partners at Laredo.[50]

67. The foreclosure theories posited at the time of the KCS-TFM-TM merger predict that KCSM would favor KCS on cross-border traffic at Laredo to get a longer haul. For example, according to these theories, KCS may try to hold onto a northbound movement carried to Laredo by KCSM and either deliver it to its final destination or to an interline partner at another gateway located farther into KCS's U.S. network than Laredo.

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[49] Reishus V.S., ¶¶ 62–63, Table 2; Carey/Bremser V.S., pp. 17–18, Figure 2; Salop V.S., ¶¶ 94–96, Figure 8.

[50] I noted in my Application Statement that an analysis based on reversing the direction of my Laredo traffic flow analysis from northbound to southbound would not be an appropriate test of KCS's potential foreclosure incentives. *See* Application Statement, Exhibit 2, fn. 17.

68. My analysis of northbound traffic provided a direct and clean test of the theory. Laredo is the only gateway through which KCSM can deliver northbound cross-border shipments. Thus, for a shipment moving north from Mexico to the U.S. or Canada, which KCSM delivered to the border, Laredo represents the first gateway along that shipment's route at which KCS could use the alleged market power of KCSM to force a longer haul for itself. This means that Laredo is the gateway at which KCS's incentives to foreclose interline partners would be strongest. By taking over the shipment directly from KCSM at Laredo, KCS maximizes its length of haul. Thus, my analysis of the share of northbound traffic that KCSM hands to UP or BNSF at Laredo tests the posited theory that alleged KCSM market power at Laredo provided KCS with the incentive and ability to foreclose UP and BNSF.

69. It is not possible however to replicate a similar test for traffic headed south to Mexico by examining KCS shares of southbound traffic at Laredo. First, the numerator (i.e., the traffic that KCS carries to Laredo) is not the right measure to serve as a test of the theory, because it obscures any distinction between traffic that was handed off as early as possible and traffic that was not. Southbound traffic arrives at Laredo from multiple origins and could theoretically transit through multiple gateways along the way. Rather than identifying traffic that had a longer haul on KCS than its minimum possible, the numerator used by Commenters merely identifies traffic that KCS handled on both sides of the border. Whether that traffic could have been or was handed off as early as practical, or was held longer than practical, is simply not being tested with this numerator.

70. Second, the denominator used by Commenters is misleading and artificially inflates the share attributed to KCS at Laredo. In focusing on the northbound traffic that KCSM brings to Laredo, I identified a base of traffic to study that allowed for all of the possible market power the theory would assume. That is, the theory assumes that vertical effects might alter the choice of carrier and route north of Laredo, but KCSM has no reason to distort traffic it is already carrying in Mexico. Examining southbound traffic requires considering that the originating carrier, UP, or BNSF, may have reasons to encourage movements over other border gateways. I understand that UP has been working with FXE (particularly once it acquired a 26 percent stake in FXE) to improve the flow of traffic at Eagle Pass.[51] As KCS does not serve Eagle Pass on either side of the border, traffic that UP or BNSF may route over that gateway is missing from the analysis. Taking this traffic out of the denominator – traffic that can only be associated with UP or BNSF's share of overall southbound movements – mechanically inflates the share attributed to KCS at Laredo.

71. Additionally, Commenters' analysis of southbound traffic suffers from a data-availability issue that similarly biases their calculations to show larger shares for KCS. Specifically, shipments that FXE delivers to locales that are alternatives to delivery on KCSM should be included in the denominator of a southbound analysis. Given the {{[redacted]}} amount of traffic that UP and BNSF can be identified as

[51] Union Pacific Railroad, "1999 Fact Book," September 2000, available at https://www.up.com/investors/factbooks/factbook99/factbook99.pdf, p. 24 ("Union Pacific increased its investment in the Ferromex (FXE) railroad from 13 [percent] to 26 [percent]. The FXE is a 4,000-mile rail network serving four of the six gateways to the United States.").

handling at Eagle Pass and Brownsville,[52] the lack of relevant FXE data is a significant flaw in Commenters' analysis of southbound movements.[53]

3.2. Commenters' analyses that compare shares over time and for subsets of traffic ignore patterns in the data consistent with stronger competition from KCS and cannot be interpreted as Commenters suggest

72. In this section, I demonstrate that the analyses Commenters offer comparing shares over time or across different subsets of traffic cannot be interpreted as a reliable test, even of some unspecified theory of partial foreclosure. Despite Commenters' suggestions otherwise, the patterns they observe in the data are likely capturing variations in traffic that follow from procompetitive and other explanations unrelated to whatever vague, unspecified theory Commenters may have in mind.

3.2.1. Growth in traffic at the Eagle Pass gateway may explain some of the patterns in UP, BNSF, and KCS shares presented by Commenters

73. One big change in traffic patterns since the KCS-TFM-TM transactions is the growth of the Eagle Pass gateway. This growth, which Commenters ignore, makes it difficult to assess the evolution over time of traffic that would have been handled into

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52 *See* § 3.2.1.

53 FXE traffic tapes have not been produced in these proceedings. UP and BNSF traffic tapes – which provide some information on movements handled by FXE – were produced after I submitted my Application Statement. I have not examined whether the information about FXE terminations that may be available in UP and BNSF tapes is sufficient to rectify Commenters' error as the issue with the numerator I describe above would still make such an exercise misleading.

and out of Laredo by UP or BNSF in some but-for scenario without the KCS-TFM-TM transaction.

74. Growth at Eagle Pass may explain some of the seeming loss in UP and BNSF traffic that Commenters point to at Laredo.[54] Analyses presented by Professor Salop and Dr. Reishus of cross-border traffic shares are limited to traffic that crosses the Mexican border at the Laredo gateway.[55] Their analyses do not include traffic crossing the border at the Eagle Pass or Brownsville gateways. To the extent growth at Eagle Pass, in particular, demonstrates that it is an increasingly good alternative to Laredo and that the growth likely includes some traffic that otherwise would have transited at Laredo, looking only at shares of traffic at Laredo over time is misleading. UP and BNSF both handle U.S. traffic into and out of Eagle Pass and Brownsville, while KCS does not connect to either these two gateways.[56] So, growth in UP and BNSF traffic at Eagle Pass or Brownsville mechanically makes KCS appear to be gaining share at Laredo, even if the amount of U.S.-Mexico traffic handled by each railroad did not change.

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54 For example, as I discuss in section 3.4 below BNSF appears to have shifted {{ }} grain traffic from Laredo to Eagle Pass.

55 Reishus V.S., Table 2; Salop V.S., Figure 8.

56 UP owns tracks to Eagle Pass, where it connects with FXE. BNSF has trackage rights over UP that allow it to directly access the FXE network at Eagle Pass, whereas BNSF's access to Laredo begins in Robstown located around 150 miles away from Laredo. BNSF also has trackage right over UP to access the Brownsville gateway where it connects to KCSM network. *See, for example*, Union Pacific Railroad, "Union Pacific System Map," available at https://www.up.com/aboutup/reference/maps/system_map/index.htm; BNSF Railway, "Mexico System Map," available at https://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/mexico-system-map.pdf.

75. El Paso is another gateway to Mexico that can be relevant as an alternative to Laredo, particularly for BNSF. Indeed, as I discuss in section 3.4.3, BNSF has {{[redacted]}}. For example, BNSF traffic {{[redacted]}} on BNSF's main route from Chicago to Southern California (its "Southern Transcon" line), rather than depending on trackage rights over UP as it does to Laredo, Eagle Pass, and Brownsville.[57] Consistent with this, BNSF traffic at El Paso {{{[redacted]}}} since the time of the KCS-TFM-TM transaction.[58] Indeed, as of 2019, BNSF handles {{{[redacted]}}} through El Paso and Eagle Pass than through Laredo and Brownsville.[59]

76. I have not included traffic through El Paso in the analysis of cross-border flows that I present in what follows, however, to avoid possible complications in interpretation. First, UP's network does not appear to have similar advantages for El Paso relative to Laredo (or Eagle Pass), so diversion to El Paso may be a more BNSF-

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57 *See* § 3.4.3. BNSF's reliance on trackage rights from UP to access Laredo, Eagle Pass, or Brownsville and its connection over owned tracks between El Paso and BNSF's Southern Transcon line at Belen, NM can be seen in BNSF Railway, "Mexico System Map," available at https://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/mexico-system-map.pdf; BNSF Railway, "Rail Talk – BNSF Railway's Southern Transcon: Rail's Super Highway," October 23, 2018, available at https://www.bnsf.com/news-media/railtalk/service/southern-transcon.html.

58 BNSF traffic at El Paso {{{[redacted]}}} between 2006 and 2019. A rough estimate of BNSF traffic over El Paso to/from U.S. points east of El Paso shows this traffic has also {{{[redacted]}}}. *See* my workpaper 1.

59 *See* my workpaper 1.

specific phenomenon. Second, even focusing on BNSF traffic, the El Paso gateway is also BNSF's {{{[redacted]}}} for traffic out of the Western U.S.,[60] so excluding El Paso ensures the traffic in my analysis is more focused on traffic that KCS competes for via the Laredo gateway. Nevertheless, the prospect of BNSF substitution to El Paso is a reason to consider my analyses in this section a lower bound.

77. In Exhibit 2, I present cross-border traffic volumes at the Laredo, Eagle Pass, and Brownsville gateways in 2006 and 2019 for UP, BNSF, and KCS.[61] I find that UP and BNSF {{{[redacted]}}} cross-border traffic across these three gateways

[60] Based on comparing BNSF traffic through El Paso, Eagle Pass, Laredo, and Brownsville, I find that the share of El Paso traffic originating or terminating in the Western U.S. is {{{[redacted]}}} than the other three gateways, handling around {{{[redacted]}}} percent of all Western U.S. traffic in 2006 and 2019. *See* my workpaper 1. In his deposition, Mr. Hirsch identified San Diego, CA as the only other BNSF gateway along the Mexican border. According to publicly available traffic data presented by Dr. Reishus the San Diego gateway handles small amounts of traffic. The data presented by Dr. Reishus include two additional gateways: Calexico, CA and Nogales, AZ. Based on its "Mexico System Map," BNSF does not have access to these two other gateways either through its own tracks, nor through trackage rights on UP's network from which these gateways are accessible. *See* Remote Zoom Videotaped Deposition of Paul Hirsch, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, June 3, 2022 ("Hirsch Deposition"), pp. 28–29; Reishus V.S., Figure 2; BNSF Railway, "Mexico System Map," available at https://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/mexico-system-map.pdf.

[61] For 2019 traffic, I rely on combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT traffic tapes ("Combined Tapes"). These data provide information on all 2019 movements crossing the Mexican border that involve CP, KCS, UP, or BNSF. Similar traffic tapes are not available in this proceeding for 2006. Thus, for 2006 traffic, I rely on the CWS. Due to limitations in the CWS, for 2006 I approximate cross-border traffic by assuming for traffic observed originating or terminating at one of the border stations at Eagle Pass, Brownsville, or Laredo (and, by extension, Robstown or Corpus Christi by BNSF) that the ultimate origin or the ultimate destination for the movement is in Mexico. This method may understate movements through Eagle Pass because through-movements terminated by FXE in Mexico are not reported in the CWS. The conclusions of my analyses in § 3.2 are qualitatively unchanged if for 2019 traffic, rather than use the 2019 Combined Tapes, I use the same methodology I used for 2006 on the 2019 CWS to approximate cross-border traffic. *See* my workpaper 2.

in 2019 than they did in 2006.[62] While BNSF traffic volume {{{[redacted]}}} between 2006 and 2019.[63] For UP, {{{[redacted]}}}.[64] As overall traffic across the three gateways grew, UP and BNSF cross-border traffic at Eagle Pass grew {{{[redacted]}}}. By 2019, Eagle Pass accounted for approximately {{[redacted]}} percent of all traffic crossing the three gateways, {{{[redacted]}}} percent in 2006.[65]

[62] Considering all three gateways combined, UP {{{[redacted]}}} its total cross-border traffic from {{{[redacted]}}}; BNSF {{{[redacted]}}} its total traffic from {{{[redacted]}}}. *See* my workpaper 3. My analysis is also consistent with {{[redacted]}} BNSF traffic through Mexico since the KCS-TFM-TM transaction that is documented by BNSF. *See* BNSF Railway, {{[redacted]}}, BNSF0002839 – 57 at BNSF0002842.

[63] *See* my workpaper 4.

[64] *See* my workpaper 5.

[65] *See* my workpaper 6.

EXHIBIT 2
Traffic {{{ }}} through Eagle Pass has increased

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Source: Confidential Waybill Sample, 2006; Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; CP Intermodal Containers to Railcar Conversion Factor.xls
Note: This analysis considers traffic southbound and northbound to/from Mexico, including movements identified in the CWS and the Combined Tapes as terminating/originating in Mexico and passing through the Laredo, Eagle Pass, and Brownsville gateways, or movements identified in the 2006 CWS as terminating/originating in the SPLC of Laredo (including SPLCs for Robstown/Corpus Christi for BNSF), Eagle Pass, or Brownsville, regardless of rebill code. Movements are considered handled by a carrier if the carrier is observed handling the movement to the gateway or terminating/originating the shipment at the SPLC of a gateway. Volume of traffic is reported in expanded carloads when relying on the CWS. Intermodal units in the 2006 CWS and in the Combined Tapes are converted to carloads using 4.7 units per flat car, which corresponds to a system average for CP in 2019.

78. The {{{ }}} is consistent with evidence of investments made by UP to improve the quality of its service at Eagle Pass and encourage shippers to use UP's routings through Eagle Pass for movements between Mexico and the U.S. For example, by 2015, UP expanded its

Eagle Pass yard capacity and constructed double track infrastructure.[66] In the same year, it expanded its "Eagle Premium Service" offered in conjunction with FXE for intermodal and automotive traffic.[67] UP currently advertises its Eagle Premium intermodal service as the "Industry's Best Mexico Service."[68]

79. In light of this significant growth of Eagle Pass, Commenters are incorrect to focus on traffic only at Laredo. By calculating shares only at the one gateway, they incorrectly ignore the fact that changes over time in the choice among border gateways generates an artificial appearance of increases in KCS's share.

3.2.2. Procompetitive or innocuous factors that would have affected shares have been ignored by Commenters which invalidates their conclusion that any changes in UP, BNSF, and KCS shares can be attributed to anticompetitive effects

80. In addition to the growth at Eagle Pass discussed in the prior section, many other changes across more than 15 years since the TM and TFM transactions will have affected traffic patterns – including changes that reflect the enhanced competitiveness of various movements. In particular, Commenters fail to account for any efficiencies

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66 Union Pacific Corporation, "2015 Investor Fact Book," April 2016, available at https://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf_up_invest_2015_factbook.pdf, p. 33.

67 Union Pacific Corporation, "2015 Investor Fact Book," April 2016, available at https://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf_up_invest_2015_factbook.pdf, pp. 17, 30.

68 Union Pacific Corporation, "The Industry's Best Mexico Service Just Got Better: Expanded Eagle Premium Service Connects Monterrey to Chicago, Los Angeles, Lathrop and Seattle Markets," January 2018, available at https://www.up.com/cs/groups/public/@uprr/@customers/documents/up_pdf_nativedocs/pdf_up_inter_eagle.pdf.

of single-line service created by the merger of KCS with TM and TFM. Commenters also ignore the effect of countless other factors, instead attributing any differences in KCS's share over time for all border traffic or for subsets of traffic to a possibility of some partial foreclosure theory.

81. In Exhibit 3**,** I show the volume of traffic that each of UP, BNSF, and KCS carried to and from the Mexican border through one of the three gateways, Laredo, Eagle Pass, and Brownsville, in 2006 and in 2019. The exhibit presents the same volume figures shown in Exhibit 2 above, but considers the direction in which the traffic flows rather than the gateway through which it goes, first combining northbound and southbound traffic, and then showing each direction separately. Each bar shows the traffic handled by each of UP, BNSF, and KCS.

EXHIBIT 3
Traffic through the three Mexican gateways increased from 2006 to 2019 {{{[redacted]}}}

{{{

[redacted]

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Source: Confidential Waybill Sample, 2006; Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; CP Intermodal Containers to Railcar Conversion Factor.xls

Note: This analysis considers traffic southbound and northbound to/from Mexico, including movements identified in the CWS and the Combined Tapes as terminating/originating in Mexico and passing through the Laredo, Eagle Pass, and Brownsville gateways, or movements identified in the 2006 CWS as terminating/originating in the SPLC of Laredo (including SPLCs for Robstown/Corpus Christi for BNSF), Eagle Pass, or Brownsville, regardless of rebill code. Movements are considered handled by a carrier if the carrier is observed handling the movement to the gateway or terminating/originating the shipment at the SPLC of a gateway. Volume of traffic is reported in expanded carloads when relying on the CWS. Intermodal units in the 2006 CWS and in the Combined Tapes are converted to carloads using 4.7 units per flat car, which corresponds to a system average for CP in 2019.

82. Consistent with what I presented in Exhibit 2, total traffic between the U.S. and Mexico through these three gateways, combining both northbound and southbound movements, increased {{{[redacted]}}}. The {{{[redacted]}}} demonstrate that

traffic patterns are likely to have changed significantly for reasons other than any possible foreclosure by KCS.

83. Looking at the northbound traffic, I find increases in volume {{{ }}} relative to 2006. {{{ }}} These patterns show an expansion of northbound traffic, not an anticompetitive reduction in output. Regardless of what interpretation Commenters may put on shares, their failure to consider the expansion in overall traffic belies their supposition that this data suggests KCS may have made the markets for this traffic less competitive.[72]

84. A review of southbound traffic supports the same point. Overall southbound traffic volume also increased between 2006 and 2019. {{{ }}} Looking more closely at the

69 *See* my workpaper 7.

70 *See* my workpaper 7.

71 *See* my workpaper 8.

72 When I look at the data for the specific commodity types (automotive and intermodal) that constituted about {{{ }}} percent of northbound movements in 2006, I find similar patterns. Total volumes handled by {{{ }}} between 2006 and 2019. *See* my workpaper 9.

73 *See* my workpaper 10.

74 *See* my workpaper 10.

commodity composition of the southbound traffic reveals that many different factors have likely affected the changes in shares for each carrier.

85. In Exhibit 4, I present southbound cross-border traffic for different commodity types. I categorize commodities according to the same "lines of business" that Brown and Zebrowski used for their diversion analysis: Automotive, Energy, Grain, Intermodal, and Other.[75] KCS's {{{ }}}. However, the situation appears to vary considerably from category to category which suggests that category-specific factors are particularly important to understanding these changes.

[75] The "Other" category combines all other lines of business considered by Brown and Zebrowski. *See* Verified Statement of Richard W. Brown and Nathan S. Zebrowski, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, October 28, 2021 ("Brown/Zebrowski V.S."), ¶ 25.

EXHIBIT 4
Decomposition of southbound traffic through the three gateways by carrier and commodity type

{{{ [redacted] }}}

Source: Confidential Waybill Sample, 2006; Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; CP Intermodal Containers to Railcar Conversion Factor.xls
Note: This analysis considers traffic southbound and northbound to/from Mexico, including movements identified in the CWS and the Combined Tapes as terminating/originating in Mexico and passing through the Laredo, Eagle Pass, and Brownsville gateways, or movements identified in the 2006 CWS as terminating/originating in the SPLC of Laredo (including SPLCs for Robstown/Corpus Christi for BNSF), Eagle Pass, or Brownsville, regardless of rebill code. Movements are considered handled by a carrier if the carrier is observed handling the movement to the gateway or terminating/originating the shipment at the SPLC of a gateway. Volume of traffic is reported in expanded carloads when relying on the CWS. Intermodal units in the 2006 CWS and in the Combined Tapes are converted to carloads using 4.7 units per flat car, which corresponds to a system average for CP in 2019. I use the line of business ("LOB") classifications that were part of the backup materials to the Brown/Zebrowski V.S., which categorize 7-digit STCCs into coarser commodity groupings.

86. For example, Automotive movements from the U.S. to Mexico are a declining area of traffic {{{ [redacted] }}} but are also the only category with overall declines – likely a result of new auto manufacturing facilities in Mexico.[76] The reduced

[76] According to a study by the Federal Reserve Bank of Chicago, Mexico light vehicle production increased from around 1.5 million in 2004 to almost 3.5 million in 2016. The study notes that most of the increase in auto output was exported, with the United States remaining the principal

{{{ }}} traffic in this commodity seems to be explained by the overall decrease in this type of movement, rather than as a consequence of some foreclosure by KCS. {{{ }}}.[77] Southbound Automotive volume handled by KCS {{{ }}}, while BNSF handled {{{ }}} of southbound Automotive traffic in either year.[78] Rather than suggesting a diversion of traffic, as Commenters' comparisons would suggest, these changes suggest the most important factor to explain this traffic is the overall decline in demand for such movements.

87. For the Energy category, which also includes chemicals and plastics, total southbound volume increased by {{{ }}} carloads in 2006 to {{ }} in 2019.[79] Although KCS {{{ }}} its volume of southbound Energy traffic {{{ }}} over this period, UP

destination. *See* Thomas H. Klier and James Rubenstein, "Mexico's Growing Role in the Auto Industry Under NAFTA: Who Makes What and What Goes Where," *Economic Perspectives*, 41(6), September 2017, available at https://www.chicagofed.org/publications/economic-perspectives/2017/6, pp. 5, 23. As of 2020, Mexico produced about 3.0 million automobiles and exported about 2.7 million automobiles. *See* Reuters, "Mexican auto production falls for fourth year running," January 10, 2022, available at https://www.reuters.com/business/autos-transportation/mexican-auto-production-falls-second-year-running-2022-01-07/.

77 *See* my workpaper 11.

78 *See* my workpaper 12.

79 *See* my workpaper 13.

volumes {{{[redacted]}}} and BNSF volumes {{{[redacted]}}}.[80]

88. The expansion of Energy traffic moving from the U.S. to Mexico over this time period is consistent with a liberalization in the Mexican energy sector which began in 2013 and by 2016 allowed for Mexican receivers to import refined energy products.[81] The regulatory change opened up new southbound business for U.S. carriers to compete for. Thus, changes since the KCS-TFM-TM transaction in shares of southbound traffic handled by UP, BNSF, and KCS would not reflect changes in the terms of interconnecting existing traffic, as Commenters' comparisons would suggest, but would mostly reflect each carrier's relative ability to win this new business moving refined energy products to Mexico. To that extent, the single-line service enabled by the KCS-TFM-TM transaction was particularly relevant in helping shippers served by KCS's U.S. network efficiently reach new markets in Mexico.[82]

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[80] In 2006 {{{[redacted]}}}, in 2019 {{[redacted]}}. For Intermodal traffic, {{{[redacted]}}}. *See* my workpaper 14.

[81] David Alire Garcia, "UPDATE 1-Mexico fuel prices to begin liberalization at end of March," *Reuters*, December 21, 2016, available at https://www.reuters.com/article/mexico-gasoline/update-1-mexico-fuel-prices-to-begin-liberalization-at-end-march-idINL1N1EG0PN.

[82] For example, as Mr. Naatz explains in his Reply V.S., in December 2017, ExxonMobil began shipping gasoline and diesel fuel from the Jefferson Energy Terminal near Beaumont to San Luis Potosi and San Jose Iturbide, in Mexico. UP, BNSF and KCS all have access to the Jefferson Energy Terminal and bid for this traffic. KCS won the contract with Exxon. *See* Reply Verified Statement of Michael J. Naatz, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, July 12, 2022 ("Naatz R.V.S."), ¶ 44. As Mr. Naatz explains, unlike UP or BNSF, KCS can offer single-line service to and has rail infrastructure in the eastern part of Mexico, which, at the time, was the focus of Exxon's strategy for the commercialization of gasoline and diesel. *See* Naatz R.V.S., ¶ 45.

89. For the Grain category, the pattern is again different. Total grain shipments increased by about {{{ }}} percent.[83] {{{ }}}.[84] But, the fact that KCS has {{{ }}} its grain shipments is completely understandable as a result of competing effectively through its relationship with Bartlett Grain.

90. Bartlett is a major shipper of grain to Mexico,[85] and over the past two decades has become KCS's largest grain customer.[86] Over this time, KCS and Bartlett have invested in and built a mutually beneficial partnership. In the 2005-2006 timeframe KCS introduced a shuttle train service for grain, partly in response to Bartlett's interest in a 75-car cross-border service.[87] Their collaboration continued to grow and KCS and Bartlett signed a long-term contract in 2012.[88] Since signing the contract with KCS, Bartlett has made considerable investments in its grain operations, including the launch of a new multimillion-dollar grain elevator facility in

83 *See* my workpaper 15.

84 *See* my workpaper 16.

85 Bartlett, A Savage Company, "About Bartlett," available at https://bartlettco.com/about/.

86 Naatz R.V.S., fn. 33.

87 Naatz R.V.S., ¶ 93.

88 Naatz R.V.S., ¶ 93.

Jacksonville, IL,[89] upgrades at other U.S.-based elevator facilities,[90] and the acquisition and further expansion of facilities in Mexico at Aguascalientes in 2015, Cuautitlan in 2017, and San Louis Potosi in 2019.[91] Over the same period, KCS has also made investments in their grain service infrastructure, with the goal of improving reliability and reducing cycle times.[92] This mutually beneficial relationship has resulted in KCS's grain shipments for Bartlett {{ }} carloads in

[89] Bartlett invested $25 million in the construction of the Jacksonville, IL grain terminal. The terminal, located on a KCS line, launched operations in July 2013 with capacity for about 2.2 million bushels of grain and the ability to accommodate 100-cars trains. According to commentary by KCS at the time, the facility added another strategic origination point from which KCS could service Bartlett grain shipments and would "enhance the supply chain to Mexico." *See* Progressive Railroading, "KCS helps Bartlett Grain inaugurate Illinois facility, installs Smith as AVP," August 12, 2013, available at https://www.progressiverailroading.com/kansas_city_southern/news/KCS-helps-Bartlett-Grain-inaugurate-Illinois-facility-installs-Smith-as-AVP–37236.

[90] Naatz R.V.S., fn. 34 ("Facilities that Bartlett upgraded include the Council Bluffs north facility in 2013, the Kansas City River Rail facility in 2014, the Council Bluffs south facility in 2016, and the Atchison, Kansas elevator in 2019.").

[91] Verified Statement of Mr. Bob Knief, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, June 20, 2022, ¶ 9 ("To support our Mexico business, Bartlett has bought and made significant investments in three train unloading facilities in Mexico. Specifically, we bought facilities at Aguascalientes in 2015, Cuautitlan in 2017, and San Louis Potosi in 2019. Each of those has been expanded since we purchased them to add capacity.").

[92] For example, a KCS ordinary course document indicates that {{ }}. *See* {{ }} (Naatz R.V.S. Exhibit 1), p. 5. Also in 2013 KCS invested in 450 jumbo grain hoppers to support its grain franchise and had upgraded approximately 40 percent of the corridor between Monterrey and Laredo which allowed it to increase train speeds. *See* Kansas City Southern, "2013 Annual Report," March 2014, available at https://www.annualreports.com/HostedData/AnnualReportArchive/k/NYSE_KSU_2013.pdf, "Letter to Our Stockholders."

2003 to {{ }} in 2019.[93] As of 2019, Bartlett accounts for over {{ }} percent of KCS grain shipments through Laredo.[94]

91. Commenters' failure to account for these and many other possible procompetitive and innocuous changes underlying the changes over time in each carrier's share makes their attempted attribution of any differences in KCS's share over time for all border traffic or for subsets of traffic to a possibility of some partial foreclosure theory meaningless.

3.3. BNSF and CSXT's argument that I have defined areas served by KCS too broadly is flawed

92. In my analysis of northbound Laredo traffic, I rely on U.S. BEA areas to identify destination areas that "KCS serves."[95] Admittedly, this label could have been clearer, and at deposition I did clarify that the point was to capture an area where KCS has had the potential to win business that it either directly serves or could have served.[96] That is, if the opposition theory in KCS-TM-TFM were correct, the BEA area around KCS's current service should be where KCS's hypothesized foreclosure allowed it to expand service by inducing customers to transload, relocate, build out, etc., as well as by inducing a switch of directly served locations.

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93 Naatz R.V.S. Figure 6, Workpaper – HC – Bartlett KCS Grain Cars Shipped.

94 *See* my workpaper 17.

95 Application Statement, Exhibit 2.

96 Remote Videotaped Deposition of W. Robert Majure, Ph.D., *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 7, 2022 ("Majure Deposition"), pp. 194–195.

93. Dr. Reishus and Drs. Carey and Bremser criticize my use of the BEA area, and present a version of my analysis that replaces the BEA area with a more narrowly defined area. In this section, I respond to their arguments and explain that my use of BEA areas was reasonable and that their analyses exclude relevant forms of competition between railroads, which renders the KCS shares they present unreliable for the purposes of testing any alleged theory of KCS foreclosure.

94. In my analyses, the BEA area defines the endpoint (origin or destination) for a particular movement or corridor, and is used to reflect the area over which competition could be realized over time between two railroads that both serve the area.[97] Thus, in identifying the size of the area used to define endpoints, it is important to consider whether, of all the different ways that two nearby railroads may compete, the identified area captures the relevant ones. The Board has identified a number of ways that nearby railroads can compete that it views as relevant in examining a proposed transaction, such as a CP/KCS combination.[98] As I explained in my Application Statement and again in my deposition, BEA areas are well suited to capture the possibilities contemplated by the Board,[99] and are a "reasonable

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97 Majure Deposition, p. 112:4–10.

98 Specifically, the Board asked about the possibility of the "elimination of shippers' buildout, transloading, plant siting, and production shifting choices when two railroads serving overlapping areas merge." *See* Application Statement, ¶ 45; Majure Deposition, p. 110:10–23; and *Canadian National Railway Company, et al. – Control – Kansas City Southern, et al.,* Finance Docket No. 36514 (Decision No. 5 served Aug. 31, 2021), p. 4.

99 Application Statement, ¶ 47 ("The factors used to construct a BEA area correspond well to the kinds of economic decisions underlying local competition possibilities that have been considered by the Board.").

representation of areas in which a shipper is likely to look for 'nearby' railroad competition."[100]

95. Yet, Commenters argue my choice of BEA areas is too broad, and propose narrower areas to define corridor endpoints. While Dr. Reishus and Drs. Carey and Bremser suggest different alternative areas, both proposals suffer from the same fundamental error – they exclude forms of competition between railroads that are relevant to my analysis and thereby bias upwards the KCS shares they present.

96. Dr. Reishus uses the Brown-Zebrowski diversion methodology to narrow the definition of areas where "KCS serves," suggesting this methodology is a "better, if imperfect, categorization of traffic moving through the Laredo gateway that KCS could potentially serve in single-line service in competition with UP and BNSF."[101] Yet, in making this assessment, Dr. Reishus mistakenly ignores the implications for his test of using two fundamentally different approaches to identifying areas of potential railroad competition. The approach contemplated by the Brown-Zebrowski diversion study is appropriately focused on areas around its current service where a railroad is most likely to expand its service in a relatively short time. By restricting attention to such areas, rather than all areas where a railroad is reasonably likely to offer competitive options to shippers, Dr. Reishus is effectively counting KCS's share only where it was already most likely to offer service. Dr. Reishus offers no

100 Application Statement, ¶ 46.

101 Reishus V.S., ¶ 77.

adjustment or explanation to make this measure a relevant test of any foreclosure theory.

97. The goal of the Brown-Zebrowski diversion study, as I understand it, is to identify traffic that would be most readily available for potential diversion by a new CP-KCS single-line service "within three years" of the CP/KCS combination.[102] My subject—potential effects on competition—incorporates a longer time horizon and considers additional potential competitive scenarios, which the Board identified and which I discussed in my Application Statement.[103]

98. Applying the Brown-Zebrowski approach to an analysis looking at how competition could have evolved over the 15 years since the TFM and TM transactions would inherently exclude much of the relevant shipper activity and, instead, over-focus on the most likely traffic to be served by KCS. In particular, over this longer horizon the potential forms of railroad competition that are relevant includes shippers relocating within a community, transloading, or building out. As I explained above, the BEA area is a reasonable and reliable representation for this purpose.

99. Thus, by applying the Brown-Zebrowski methodology to define what areas "KCS serves," Dr. Reishus constructs a measure based on the traffic *already* most likely to

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[102] Brown/Zebrowski V.S., ¶ 27 ("…opportunities we expect would experience some level of traffic diversions within the *three years* following consummation of the CP/KCS merger.") (emphasis added).

[103] For example, Brown and Zebrowski note, "Our analysis…does not consider other potentially significant traffic opportunities that would arise from …investments by CP/KCS in growth opportunities unlocked by a combined CP/KCS network." *See* Brown/Zebrowski V.S., fn. 1.

see KCS service, without any adjustment to reflect the correspondingly higher expectation that KCS would serve this traffic in any event. The fact that he finds in his Table 6 a higher share for KCS within this restricted set of traffic is due to the nature of the restriction and not a valid way to test any alleged theory of KCS foreclosure.[104]

100. Drs. Carey and Bremser make a similar, and arguably more extreme, version of Dr. Reishus's error. Drs. Carey and Bremser apply an even narrower definition of what constitutes the relevant forms of competition between railroads for the purpose of testing alleged KCS foreclosure. Specifically, they assume KCS's ability to compete for traffic is limited to traffic that is originating from or destined for stations (9-digit SPLCs) that KCS currently serves.[105] As I explained in my Application Statement, defining an endpoint very narrowly, like Drs. Carey and Bremser have, only allows for very restricted forms of competition between railroads.[106] Such a narrow definition of competition does not allow for many of the ways the Board has recognized that railroads could compete over time for traffic in an area. More critically, this further restriction around traffic KCS is most likely to serve, further inflates KCS's expected share. Indeed, their methodology approaches counting KCS's share among its existing customers. With no recognition of this effect of their

104 Reishus V.S., Table 6.

105 Carey/Bremser V.S., pp. 18–19, Figure 3.

106 Application Statement, ¶ 44 ("For example, one candidate for defining a corridor's endpoints might be the exact location at which a movement starts and the exact location at which it ends. Such a narrow definition would count only competition among railroads that serve these exact locations and would not allow consideration of other potential forms of competition.").

restrictions, the KCS shares presented by Drs. Carey and Bremser in their Figure 3 are unreliable for the purposes of testing any alleged theory of KCS foreclosure.

3.4. Dr. Reishus's incomplete and misleading analysis does not support his claims that BNSF has been foreclosed by KCS

101. I now turn to the claims made by Dr. Reishus that BNSF has been foreclosed by KCS at Laredo after the TFM-TM transaction. Dr. Reishus asserted that, according to BNSF's witness Mr. Paul Hirsch, a rate increase that KCS put in place for cross-border movements after the TFM-TM transaction resulted in a decline of BNSF carload traffic at Laredo. Dr. Reishus portrayed this price increase as a unilateral move by KCS, like Mr. Hirsch, and suggested that this is inconsistent with a lack of vertical anticompetitive effects following a vertical merger.[107] In support of this claim, Dr. Reishus has presented an analysis of BNSF cross-border traffic at Laredo and asserted these patterns, showing a decline in carload traffic since the TFM-TM acquisitions, as evidence in support of his claim of foreclosure by KCS at Laredo.[108]

102. In this section, I first explain why Dr. Reishus mischaracterizes and misinterprets the rate increase following the TFM-TM transaction (§ 3.4.1). I then explain that the analysis Dr. Reishus presents as supporting his foreclosure claim cannot distinguish between his vague claims of foreclosure, procompetitive

[107] Reishus V.S., ¶ 82, fn. 71; Verified Statement of Paul Hirsch, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 28, 2022, BNSF-9-192 – 211, p. 7.

[108] Reishus V.S., ¶¶ 83–87.

explanations, and other unrelated changes in traffic patterns to explain the differences in shares and traffic volumes observed in the data (§ 3.4.2). Next, I demonstrate that by looking only at Laredo Dr. Reishus ignored the fact that BNSF can route Mexican traffic across the border through other gateways, and thus omits important context for evaluating his foreclosure claim. Indeed, his approach assumes away the strategy BNSF appears to have taken following the KCS-TFM-TM transaction (§ 3.4.3). Finally, I revisit the data presented by Dr. Wilson and illustrate how this traffic illuminates the flaws in BNSF's allegation that it has been foreclosed at Laredo (§ 3.4.4).

3.4.1. Dr. Reishus mischaracterizes and misinterprets the KCS rate increase he claims foreclosed BNSF

103. Dr. Reishus's characterization of BNSF's experience since the TFM-TM merger is premised on the presumption that KCS increased a particular rate in order to foreclose BNSF.[109] However, one long-recognized benefit of mergers is that new management can lead to better decision making. That appears to be what happened with the rate Dr. Reishus references in his analysis. As I explain below, KCS management identified a rate that was insufficient to cover costs and thus inconsistent with profit-maximizing behavior. Bringing that rate up for the first time in about a decade ended a particularly favorable deal for BNSF, but facing market rates (or even

[109] Reishus V.S., ¶ 82.

rates sufficient to cover the other railroad's costs) is not at all the same as being foreclosed.

104. Following the KCS acquisition of TM, the management of KCS reviewed the price TM had been charging on the 150-mile stretch that connects BNSF's network at Robstown/Corpus Christi to the Laredo gateway. At the time, the rate was approximately $260 and had not been raised in years.[110] After the acquisition of TM, KCS's management announced a new rate of $525 and maintained it at that level until 2015 when it increased it to $595, the level at which it currently stands.[111] I understand with these increases, KCS rates exceed the variable costs it likely incurs on such movements, but by a small margin.[112] This in turns implies that, at a $260 rate, these movements were most likely unprofitable for TM.[113]

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110 Naatz R.V.S., ¶ 12 ("At the time KCS took control of Tex Mex, Tex Mex was offering BNSF a rate of $260 per car if BNSF hit certain volume requirements, which I am told they always did."); ¶ 14 ("It is true that KCS did raise Tex Mex's division requirements. KCS did so because the then rates existing prior to the merger were not remunerative and had not been raised in years.").

111 Naatz R.V.S., ¶ 18 ("After control was implemented, KCS did raise its rate for movements over the Tex Mex rail lines, initially to $525 and now, with adjustements, it stands at $595.").

112 In his R.V.S., Michael Naatz, Chief Marketing Officer of KCS, has calculated that the RVC ratio of KCS rates to 2020 URCS variable costs on the Robstown to Laredo route and on the Corpus Christi to Laredo route are equal to 114 and 107 percent, or $75 and $43 over URCS variable costs, respectively. Mr. Naatz also calculated that at the time when KCS first increased the rates, these ratios stood at 121 and 115, or $96 and $71 over 2006 URCS variable costs, respectively. *See* Naatz R.V.S., Tables 1, 2.

113 Naatz R.V.S., ¶ 21 ("I did not have access to the 2004 URCS costs, but the 2004 costs should not be that dissimilar to the 2006 costs. Assuming such 2004 URCS costs were like those in 2006, and when one considers that prior to 2005 Tex Mex was charging approximately $260 per car or less for grain, intermodal, and automotive traffic, Tex Mex *was charging hundreds of dollars less than URCS costs*.") (emphasis in original).

105. BNSF was understandably not pleased that these rates increased. But rather than negotiate, BNSF reportedly decided to route more traffic over Eagle Pass by offering a price for its single-line service to Eagle Pass that is lower than what the through-rate would be for a BNSF-KCS interline to Laredo. This would encourage BNSF shippers to use the Eagle Pass crossings instead of Laredo.[114]

106. According to testimony by Mr. Hirsch, BNSF was forced to pursue this strategy of shifting to Eagle Pass because the increase in rates proposed by KCS would force BNSF to {{[redacted]}} to service Mexican traffic via Laredo.[115] However, it is telling to compare the markup on this rate to the markup on rates BNSF charges its shippers on the Mexican traffic it does serve via Laredo. Mr. Naatz reported that the rate KCS currently charges BNSF to Laredo is 7 to 14 percent above its URCS variable costs,[116] while I understand the markup BNSF charges shippers is on average {{{[redacted]}}} percent above its URCS variable costs for carload

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114 Naatz R.V.S., ¶ 6 ("It is BNSF that is intentionally keeping its division requirement high and has steadfastly refused to lower its division requirements to make a joint BNSF/KCSR interline movement competitive with UP or the BNSF single-line movement."); ¶ 23 ("We understand from customers that BNSF's single-line rates to Eagle Pass at grain origins where BNSF, KCS, and/or UP compete are lower by approximately the difference between the current KCSR rate and the original $260 Tex Mex rate.").

115 Hirsch Deposition, pp. 149:11–150:14 ("{{[redacted]}}").

116 Naatz R.V.S., Table 1.

traffic and {{{ }}} percent above URCS for intermodal traffic, {{{ }}}.[117] So, what BNSF considers acceptable for shippers to pay is apparently {{{ }}} than it considers acceptable for KCS to charge it. Indeed, as these ratios suggest, BNSF's claim is not one of foreclosure as much as it is an admission that reducing its division slightly and continuing to {{{ }}} movements through Laredo was not as attractive as the profit it could make serving Mexico through Eagle Pass. By choosing, instead, to focus on Eagle Pass and to price so that shippers are encouraged to choose Eagle Pass, BNSF has exercised a competitive option. And, as much as foreclosure is not defined as an inability to get and set the prices BNSF finds acceptable, foreclosure is particularly not defined by BNSF engaging in competitive options to avoid even a small reduction in its margins.

107. The evidence on which Dr. Reishus relies to characterize this particular rate change as anticompetitive is inadequate for such a conclusion. He has only noted that the rate increased,[118] and has not demonstrated that it increased to some supracompetitive level. He has not examined the effect of the price change on competition – he has not looked at whether any of BNSF's Laredo traffic was diverted to KCS or to UP. In addition, to the extent any traffic was diverted and

[117] Mr. Baranowski finds that, on average, in 2019, BNSF's RVC was {{ }}. *See* Baranowski R.V.S., Table 6.

[118] Reishus V.S., ¶ 82.

ended up on UP, he has not explained why such an outcome would be anything other than a consequence of BNSF's refusal to negotiate over a market rate.

108. Rather, the analysis Dr. Reishus has presented is a recitation of share and volume changes since the TFM-TM combination that provide no way to distinguish between his vague claims of foreclosure, procompetitive explanations, and other unrelated changes in traffic patterns to explain the differences in shares observed in the data.

3.4.2. Dr. Reishus's analysis cannot distinguish his hypothesis of foreclosure from the many unrelated factors that affect BNSF traffic volumes and shares

109. Evidence from BNSF ordinary course documents makes clear that many factors other than alleged foreclosure caused these traffic share changes, and that there is a lot of variation in how different subsets of the traffic were affected over the intervening 15 years since the KCS-TFM-TM transaction. Dr. Reishus does not attempt to control for these factors, does not identify any change in shares that is not explained by them, and consequently does not identify any change that would be explained by his hypothesized foreclosure.

110. First, BNSF documents highlight changes in Mexican cross-border traffic for BNSF (and other railroads) that correspond to changes in macroeconomic trends, such as the strength of the Mexican economy and overall Mexican-U.S. trade volume. This includes {{[redacted]}} in both the macroeconomic indicators and in traffic which

happened to follow the KCS-TFM-TM transaction. Dr. Reishus's analysis would associate these {{ }} in traffic with his alleged foreclosure. For example, {{ .}} Yet, BNSF documents highlight that at this time Mexico's economy was slowing considerably, and {{ }}[119] After 2009, the Mexican economy and total Mexico-U.S. trade increased, and {{ }}[120]

111. Second, although Dr. Reishus points to aggregate changes in overall Mexican cross-border BNSF traffic, BNSF documents demonstrate that these aggregate

[119] A December 2008 BNSF document tracks {{ } *See* BNSF Railway, {{ }}, BNSF0002814 – 28 at BNSF0002815, BNSF0002822.

[120] A 2010 BNSF document tracks {{ }} *See* BNSF Railway, {{ }}, BNSF0002839 – 57 at BNSF0002840, BNSF0002844. A 2012 BNSF document noted how { }} *See* BNSF Railway, {{ }}, BNSF0002798 – 813 at BNSF0002799, BNSF0002800. A 2014 BNSF document {{ } *See* BNSF Railway, {{ }}, BNSF0002910 – 29 at BNSF0002912, BNSF0002917.

changes obfuscate the varied underlying dynamics of specific commodities or lines of business. For example, between 2007 and 2008, while BNSF {{ }}[121] Moreover, different lines of business appear to have had specific factors affect the changes over time. For example, BNSF highlights {{ }}[122] Neither of these reasons are related to foreclosure of BNSF by KCS.

112. In addition, while BNSF observed {{ }} For example, between 2011 and 2012, {{ }}

[121] BNSF Railway, {{ }}, BNSF0002814 – 28 at BNSF0002819.

[122] BNSF Railway, {{ }}, BNSF0002814 – 28 at BNSF0002818.

[123] BNSF Railway, {{ }}, BNSF0002839 – 57 at BNSF0002850.

[124] At this time volume for other "business segments" {{ }} *See* BNSF Railway, {{ }}, BNSF0002798 – 813 at BNSF0002801. As another example, {{ } *See* BNSF Railway, {{ }}, BNSF0002910 – 29 at BNSF0002919.

[redacted]}} – factors specific to this line of business and not indications of any foreclosure by KCS. Dr. Reishus's analysis cannot account for the many different factors that affected specific categories of BNSF traffic, and thus cannot distinguish any effect to associate with his alleged foreclosure from the many unrelated reasons that BNSF traffic volumes may have changed over the last 15 years.

113. Finally, BNSF documents demonstrate {{[redacted]}} Since at least 2008, BNSF has systematically tracked {{[redacted]}}[125] An examination of these reports suggests that while {{[redacted]}} This pattern is consistent with competition from UP affecting BNSF volumes.[126] Dr. Reishus's

[125] *See*, *e.g.*, BNSF Railway, {{[redacted]}}, BNSF0002814 – 28 at BNSF0002820; BNSF Railway, {{[redacted]}}, BNSF0002839 – 57 at BNSF0002846, BNSF0002849; BNSF Railway, {{[redacted]}}, BNSF0002798 – 813 at BNSF0002806, BNSF0002807; and BNSF Railway, {{[redacted]}}, BNSF0002910 – 29 at BNSF0002913, BNSF0002916.

[126] Between 2008 and 2012 { [redacted] } *See* BNSF Railway, {{[redacted]}}, BNSF0002814 – 28 at BNSF0002822; BNSF Railway, {{[redacted]}}, BNSF0002839 – 57 at BNSF0002844; BNSF Railway, {{[redacted]}}, BNSF0002798 – 813 at BNSF0002800; BNSF Railway, {{[redacted]}}, BNSF0002910 – 29 at BNSF0002917. These patterns in { [redacted]

analysis, however, does not consider this possibility – changes in BNSF cross border traffic volumes that were the result of competition with UP would be incorrectly ascribed in his analysis to his hypothesized foreclosure of BNSF.

3.4.3. Dr. Reishus' analysis only looks at traffic to Laredo ignoring the fact that BNSF can route Mexican traffic across the border through other gateways

114. Another flaw in Dr. Reishus's analysis is that he looked only at BNSF's traffic to Laredo and not the ease with which BNSF has substituted other border gateways in its offerings to shippers. As I discussed above, BNSF electing to use a competitive option rather than sacrifice any of its margin on Mexican traffic by adjusting divisions on the Laredo route is not an example of foreclosure. By excluding BNSF's use of options other than Laredo for its Mexican traffic, Dr. Reishus's analysis incorrectly treats this traffic as evidence of foreclosure when it is not.

115. {{

}} *See* BNSF Railway, {{ }}, BNSF0002839 – 57 at BNSF0002846; BNSF Railway, {{ }}, BNSF0002798 – 813 at BNSF0002806; BNSF Railway, {{ }}, BNSF0002910 – 29 at BNSF0002913.

[redacted]}} Dr. Reishus ignores these options.

116. As early as 2003 – prior to the KCS-TFM-TM transaction – {{[redacted]}} In one document, BNSF {{[redacted]}} For example, the document noted that {{[redacted]}}[127] And, BNSF noted {{[redacted]}}[128]

117. Similarly, a 2016 BNSF document assessed BNSF's {{[redacted]

[redacted]

127 BNSF Railway, {{[redacted]}}, BNSF0000932 – 42 at BNSF0000934; Hirsch Deposition, p. 71:14–19; BNSF Railway, "Rail Talk – BNSF Railway's Southern Transcon: Rail's Super Highway," October 23, 2018, available at https://www.bnsf.com/news-media/railtalk/service/southern-transcon.html.

128 BNSF Railway, {{[redacted]}}, BNSF0000932 – 42 at BNSF0000936.

[redacted]}}[129] As Mr. Hirsch clarified in his deposition, this meant that {{[redacted]}}.[130]

118. The relevance of these other gateways as meaningful alternatives to Laredo is emphasized by a recent internal document in which BNSF {{[redacted]}}[131]

119. Despite BNSF's implication otherwise, its documents indicate that Laredo is only one among several options that BNSF considers, and is not always the most preferred gateway. BNSF has weighed the costs and benefits of handling cross-border

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[129] BNSF Railway, {{[redacted]}}, BNSF0000947 – 64 at BNSF0000951; Hirsch Deposition, p. 169:7–16 ("{ [redacted] }}").

[130] Hirsch Deposition, pp. 171:18–172:13 ("{{[redacted]}}").

[131] In the document BNSF describes { [redacted] } BNSF Railway, {{[redacted]}}, BNSF0000166 – 8 at BNSF0000166 – 7.

Mexican traffic through different gateways, even prior to the KCS-TFM-TM combination. Yet, in his analysis, Dr. Reishus assumes away the relevance of these other gateways by limiting his analysis to Laredo.

120. In the analysis I present below, I show that by limiting his analysis to Laredo, Dr. Reishus omits relevant context for evaluating his claims of foreclosure. As a result, his analysis is incomplete and cannot reliably support his claims of foreclosure. In Exhibit 5 below, I present the volume of BNSF's cross-border traffic by gateway in 2006 and 2019.[132] As I did in my analysis of traffic flows in section 3.2, I consider flows through Eagle Pass, Laredo, and Brownsville.[133] I consider both total traffic as well as the specific categories of traffic considered by Dr. Reishus: Carload, Automotive, and Intermodal.[134] Traffic volumes, including for Intermodal movements, are expressed in terms of carloads.[135]

[132] For 2019 traffic, I rely on BNSF's traffic tapes. These data provide information on all 2019 movements involving BNSF. Similar traffic tapes are not available in this proceeding for 2016. Thus, for 2016 traffic, I rely on the CWS. *See* § 3.2 for additional details.

[133] To the extent El Paso is also seen in BNSF documents as a viable alternative for certain traffic from Laredo, including traffic flows through El Paso would further underscore the limitations and incompleteness of Dr. Reishus's analysis. BNSF traffic at El Paso {{{[redacted]}}} between 2006 and 2019. A rough estimate of BNSF traffic over El Paso to/from U.S. points east of El Paso shows this traffic has also {{{[redacted]}}}. *See* my workpaper 1.

[134] I combine together loaded and empty Intermodal movements to ease the exposition. Intermodal traffic volumes broken down by loaded and empty movement are available in my workpapers. *See* my workpaper 18.

[135] As in my Application Statement, I convert volumes of Intermodal traffic from containers to carloads by dividing the number of reported carloads by 4.7, which describes the CP-system average number of containers-per-flat-car. *See* Application Statement, Exhibit 2.

EXHIBIT 5
Since 2006 BNSF has moved {{{ }}} carload traffic over Eagle Pass and {{{ }}} intermodal traffic over Laredo

{{{



}}}

Source: Confidential Waybill Sample, 2006; Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; CP Intermodal Containers to Railcar Conversion Factor.xls

Note: This analysis considers traffic southbound and northbound to/from Mexico, including movements identified in the CWS and the Combined Tapes as terminating/originating in Mexico and passing through the Laredo, Eagle Pass, and Brownsville gateways, or movements identified in the CWS as terminating/originating in the SPLC of Laredo (including SPLCs for Robstown/Corpus Christi for BNSF), Eagle Pass, or Brownsville, regardless of rebill code. Movements are considered handled by BNSF if BNSF is observed handling the movement into the gateway or terminating the shipment at a gateway SPLC. Volume of traffic is reported in expanded carloads. Intermodal units in the 2006 CWS and in the Combined Tapes are converted to carloads using 4.7 units per flat car, which corresponds to a system average for CP in 2019.

121. As shown in the exhibit, traffic at Eagle Pass constituted {{{ }}} percent of BNSF traffic crossing the border at these gateways (in either direction) in 2006 and it {{{ }}} percent in 2019.[136] In terms of volume, BNSF went from

136 *See* my workpaper 19.

{{{ }}} carloads through Eagle Pass in 2006 to {{ }} carloads in 2019.[137] And, by category, over this period, the fraction of Carload movements through Eagle Pass {{{ }}}, and for Automotive traffic {{{ }}}.[138]

122. Moreover, the traffic BNSF has {{{ }}} at Laredo has mostly been the Intermodal category that it {{{ }}} prior to the combination of KCS with TM and TFM. Among these three gateways, BNSF {{{ }}}. Specifically, {{{ }}}.[139]

123. By omitting traffic at Eagle Pass from his analysis, Dr. Reishus has assumed away the strategy BNSF appears to have adopted – diverting its business to another border gateway. Ignoring BNSF's actual choices inherently understates BNSF's share of the relevant traffic, and counting only traffic that did transit at Laredo mechanically overstates KCS's share, since BNSF can handle traffic through Eagle Pass and KCS cannot. This omission is critical to Dr. Reishus's interpretation of the rate change as some sort of foreclosure of BNSF at Laredo.

124. By not presenting any analysis of BNSF's ease of substitution between Laredo and other gateways, and Eagle Pass in particular, Dr. Reishus has not offered the

137 *See* my workpaper 20.

138 *See* my workpaper 21.

139 *See* my workpaper 22.

proper context through which to interpret the dispute between BNSF and KCS over the rate increase for the Laredo-Robstown route. The significant {{{[redacted]}}} of Carload and Automotive traffic that I can observe at Eagle Pass suggests that BNSF is not at KCS's mercy, but rather that it has viable alternatives to use in a negotiation, or at least good enough alternatives to be willing to let the negotiation be protracted for over a decade.

3.4.4. The data presented by Dr. Wilson illuminate the flaws in BNSF's foreclosure claim

125. Dr. William W. Wilson, another BNSF expert witness, presented an account of BNSF grain shipments through Laredo and Eagle Pass.[140] According to Dr. Wilson, these data indicate that BNSF appears to have been foreclosed at Laredo because BNSF grain traffic has shifted to Eagle Pass even though that route is more circuitous.[141]

126. In what follows, I revisit the data presented by Dr. Wilson and illustrate how this traffic instead illuminates the flaws in BNSF's allegation that it has been foreclosed at Laredo. As I discuss below, the shift in BNSF grain traffic from Laredo to Eagle Pass demonstrates that BNSF's use of these two gateways is a fluid situation across this span of years, reacting dynamically to a number of changes that seem to have affected

[140] Verified Statement of William W. Wilson, Ph.D., *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, February 28, 2022, BNSF-9-497 – 527 ("Wilson V.S."), Figures 11, 12.

[141] Wilson V.S., pp. 4, 16–19.

one or both of the gateways at various points, rather than alleged foreclosure by KCS at Laredo.

127. In Exhibit 6 below, I present annual shipments of grain that BNSF carried over the Mexican border between 2000 and 2019 as presented by Dr. Wilson. Each bar describes the total carload volume handled each year, while the shading of the bars indicates how much of this traffic was handled through Eagle Pass (blue) and Laredo (orange).

EXHIBIT 6
BNSF corn, wheat, and soybean volumes moving via Eagle Pass and Laredo gateways: 2000–2019

{{



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Source: BNSF Shipment Records, 2000 – 2019 from BNSF Wilson Production, March 29, 2022
Note: This analysis considers northbound and southbound grain movements presented by Dr. Wilson in his Verified Statement. Movements are first identified as transiting through the Laredo or Eagle Pass gateways based on the Mexican Gateway variable available in the data provided by Dr. Wilson. Movements are then aggreated to compute annual total volumes of traffic and shares of traffic moving through each gateway. Volumes of traffic are reported in carloads as recorded in Dr. Wilson's data.

128. The data in Exhibit 6 suggest that BNSF shifted grain traffic {{[redacted]}} a pattern Dr. Reishus's analysis could not reveal because he omits traffic at Eagle Pass. From 2000 to 2002, {{[redacted]}}. After the acquisition and from 2006 to 2007, {{[redacted]}}. While the volume of grain traffic through Laredo {{[redacted]}}

129. Moreover, the {{[redacted]}} in grain volume lamented by Dr. Wilson and Dr. Reishus occurred {{[redacted]}}. This suggests that something other than alleged KCS foreclosure, such as a drop in demand for BNSF grain shipments or BNSF difficulties competing with UP, which also serves both gateways, likely underlie the patterns presented in Exhibit 6.

130. Further, between 2011 and 2014 combined volume at Eagle Pass and Laredo {{[redacted]}}. In 2015 and 2016 it {{[redacted]}}

142 *See*, *e.g.*, Reishus V.S., Figure 6; Wilson V.S., pp. 4, 16–19.

[redacted]}}.

Over this period (2011 – 2019), {{[redacted]}} BNSF grain traffic {{[redacted]}} over Eagle Pass.

131. Consequently, it took over {{[redacted]}} years after the KCS-TFM-TM merger for the alleged "exclusion" of BNSF grain traffic from Laredo to occur. At that same time, the Eagle Pass grain shipments of BNSF {{[redacted]}} even though the alleged explanation of foreclosure cannot apply to those movements. The alleged foreclosure also has not prevented BNSF from {{[redacted]}}. Moreover, the allegedly inferior Eagle Pass gateway has been handling {{[redacted]}} BNSF grain shipments {{[redacted]}}. None of these patterns are consistent with the foreclosure explanation Dr. Wilson and Dr. Reishus hypothesize.

132. As I explained in section 3.2, KCS's success in grain shipments has depended on the establishment of long-term relationships with large shippers as well as the investment that those shippers made in the U.S. *and* in Mexico. And KCS witnessed rapid growth once those relationships and investments came to fruition. Without any explanation provided by Dr. Wilson and Dr. Reishus for the patterns presented in Exhibit 6 above, other than vague claims of foreclosure by KCS, and based on the experience I have detailed for KCS's grain franchise, I interpret the large swings in total grain volume and the emergence of Eagle Pass as the border crossing of choice for BNSF grain as consistent with underlying competitive dynamics and market

forces rather than some foreclosure by KCS at Laredo. In particular, the pattern observed seems consistent with geographic competition the Board has identified as important, including commodity flows shifting to alternative destinations or from alternative origins in response to improvements in transportation alternatives.[143]

3.5. Professor Mayo's analysis of corridors where CPKC will allegedly choose to foreclose interline options with NS in favor of new CPKC single-line service is flawed and misleading

133. In this section, I address the analysis presented by Professor Mayo in which he claims to show that a "substantial number of rail traffic routes are subject to potential incentives for anticompetitive conduct in the wake of the proposed CP/KCS merger."[144] The traffic Professor Mayo claims is at risk of competitive harm is traffic within corridors he identifies (via an unreliable methodology) as corridors with the potential for new CPKC single-line service. Thus, at the core of Professor Mayo's analysis is the mistaken notion, which I discussed in section 2, that any opportunity to win business with the enhanced single-line service a CP/KCS combination allows can be identified as an opportunity for CPKC to impair competition. Rather than presenting any evidence that might show CPKC would have the incentive and ability to pursue a foreclosure strategy, he bases his conclusions on an assumption that CPKC will foreclose interline partners in these corridors. Thus, despite reiterating the straw-man attack on the "one lump presumption" I addressed above, Professor Mayo

[143] I understand Mr. Hirsch claimed that traffic through Eagle Pass {{[redacted]}}. However, this is not inconsistent with geographic competition. *See*, *e.g.*, Hirsch Deposition, pp. 139:4–141:5, 145:8–148:21, 158:4–160:6.

[144] Mayo V.S., ¶ 46.

offers no facts, nor even a theory, to dispute the Board's prior findings that end-to-end railroad mergers are unlikely to have anticompetitive vertical effects.

134. I first discuss the methodology used by Professor Mayo to select his {{{[redacted]}}} "potential new single-line corridors that will be created by the merger."[145] He starts from the methodology I used for a preliminary analysis of traffic that might benefit from CPKC single-line service as part of a statement I filed more than a year ago to aid the Board's analysis of CN's proposal to use a Voting Trust to acquire KCS.[146] However, Professor Mayo makes substantive modifications to relax the criteria defining a potential single-line opportunity for CPKC. Given that Professor Mayo worked from a methodology that has been supplanted by a more detailed and rigorous analysis in the Application, one would expect him to impose more caution, rather than less, in drawing inferences from the data about where a CPKC single-line service would be commercially feasible and could expect significant diversion of traffic.[147]

135. However, Professor Mayo relaxes the definition considerably, despite his claim that he's only "modifying [the methodology] slightly." In particular, he makes the following changes:

- He assumes away limitations on CPKC service. In some cases, a railroad may be more competitive terminating traffic in an area than in originating or *vice*

145 Mayo V.S., ¶ 46.

146 Voting Trust Statement, § 5.2.

147 For more details on Applicants' estimated diversions, *see* Brown/Zebrowski V.S., pp. 11–19.

versa. This may even be a matter of feasibility if, for example, observed movements involve trackage rights with restrictions on the type of movements that can be served.[148] In my preliminary analysis, I respected this issue by requiring that one of CP or KCS serves the origin but not the destination, and the other serves the destination but not the origin, in order to identify a corridor as having the potential for a new CPKC single-line service. Professor Mayo removes the directional element and assumes any service proves that all service is available.[149]

- He ignores circuity altogether.[150] Every instance of railroad competition involves one route that is technically more circuitous than another which, in ordinary situations, can be offset with better service, better rates, or other characteristics shippers may value. Professor Mayo takes the extreme position that circuity never becomes so great as to make such competitive pressure too limited – that even a CPKC route starting in Mexico, crossing into Canada, circling the great Lakes, and returning south to reach the Mid-Atlantic region is one he is willing to assume shippers would choose often enough that foreclosure to induce such a route could be profitable. Such routes are not expected to divert traffic with the benefits of single-line service in my preliminary analysis or in the analysis of Brown and Zebrowski, which is explicitly focused on estimating likely diversions.[151]

136. To illustrate how Professor Mayo's assumptions undercut his analysis by relaxing the identification of potential CPKC single-line service, I focus on the Houston BEA area as an example. Professor Mayo identified Houston as an endpoint in {{{[redacted]}}} of the {{{[redacted]}}} corridors in his analysis, representing more than

148 *See*, *e.g.*, Brown/Zebrowski V.S., pp. 17–18, fn. 11.

149 Mayo V.S., p. 96, fn 73 ("Modifying Dr. Majure's assumptions slightly, I consider a corridor to be a potential candidate for a new single line service when CP and KCS are present (originated or terminated traffic in 2019) in respective origin and destination locations. That is, for this analysis, I consider a corridor a "potential route" even if it would involve CP originating from (terminating at) a location in which CP was only observed terminating at (originating from), and similarly vis-a-vis KCS."); Voting Trust Statement, p. 39.

150 Dr. Mayo only considers the circuity of a route as a characteristic in a robustness check presented in the Appendix of his statement. *See* Mayo V.S., p. 94, fn. 73, and Appendix Exhibits 1, 2.

151 Voting Trust Statement, pp. 39–40.

{{{[redacted]}}} percent of the total Class I carrier revenue for which he claims there is risk of anticompetitive harm by a combined CP/KCS.[152] As explained in the Wahba/Naatz V.S. and the Brown/Zebrowski V.S., KCS's access to the area relies on UP trackage rights that restrict the type of traffic KCS can originate or terminate in Houston.[153] For that reason, my preliminary analysis, as well as Brown/Zebrowski's detailed diversion analysis excluded any potential routes that involved Houston.[154]

137. More generally, Professor Mayo's methodology leads to a set of corridors that are, for the most part, demonstrably unlikely to see any effects on competition. Of the {{{[redacted]}}} corridors he identifies, {{{[redacted]}}} are corridors where one of CP or KCS is not involved in any movement of any commodity seen in the 2019 CWS.[155] That is, these are corridors which dropped out at the very first step of my within-corridor analysis of competitive effects. [156] Even though that analysis was focused on

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152 Mayo V.S., ¶ 46; Mayo workpapers. *See* my workpaper 24.

153 Verified Statement of Jonathan Wahba and Michael J. Naatz, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, October 29, 2021 ("Wahba/Naatz V.S."), p. 24 ("KCS already operates an intermodal facility in Kendleton, TX, near Houston, but restrictions in KCS's trackage rights over UP between Beaumont and Houston (which KCS must use to reach Kendleton) prohibit intermodal traffic originating or terminating at Kendleton and moving to/from points north."); Brown/Zebrowski V.S., p. 18 ("As another example, KCS does not currently have rights to move traffic over UP trackage between Houston and Beaumont unless that traffic has had a prior or subsequent haul on the Tex Mex Laredo-Robstown/Corpus Christi line or is moving to/from shipper facilities on KCS's "Wharton Line" between Rosenberg and Victoria, TX.").

154 Voting Trust Statement backup materials; Brown/Zebrowski V.S., p. 18 ("As a result, our analysis excluded movements between Houston and CP territory from potential diversion.").

155 *See* my workpaper 25.

156 I draw similar conclusions for the subset of the {{{[redacted]}}} corridors that are of specific interest for NS – those where NS interlines with CP or KCS: {{{[redacted]}}} of the {{{[redacted]}}} such corridors dropped out in this first stage review of whether CP and KCS both have involvement in moves for that corridor. *See* my workpaper 26.

horizontal competition, this first step – ensuring that each of CP and KCS is capable of winning some part of some movements in the corridor – also establishes a foundation for any possible anticompetitive vertical effects in the corridor.[157] Additionally, {{{[redacted]}}} of the corridors Professor Mayo identifies were screened as 1-to-1.[158] That is, these corridors already have some railroad that is involved in every route observed in the data for movements in the 2019 CWS, so shippers already have no ability to negotiate with an independent route. This is another way in which Professor Mayo's list is over-inclusive.[159]

138. For the few corridors in Professor Mayo's list that would remain after eliminating the over-inclusive entries, there is an unaddressed question of why any anticompetitive vertical effect would be likely. Professor Mayo asserts in his Exhibit 4 that many of these corridors have what he labels [redacted]}}} as a result of the CP/KCS combination.[160] However, these labels are misleading and are based only on *assumptions* about CPKC's behavior post-merger. His {{{[redacted]}}} is an assumption that *if* the merged firm chose to foreclose *all* its current interline partners, the only routing in the corridor would be a CPKC single-line service. Similarly, his

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157 Professor Mayo glosses over this issue by identifying the corridors he finds concerning as having some reliance on CP or KCS. But, to have an effect following from the combination, the other party should be contributing something to the route, otherwise incentives and ability can hardly be expected to change.

158 *See* my workpaper 27.

159 Application Statement, § 4.

160 Professor Mayo's Exhibit 4 focuses specifically on the {{{[redacted]}}} of the {{{[redacted]}}} corridors where NS interlines with CP or KCS. He describes this narrowed focus on these corridors relevant to NS traffic as an "illustrative example."

{{{[redacted]}}} is based on another assumption: {{{[redacted]}}}[161] Professor Mayo provides no evidence that CPKC would have the incentive or ability to pursue such strategies in these corridors. Professor Mayo's presumption of harm aside, there is no reason to conclude an anticompetitive vertical effect of the CP/KCS combination is likely.

[161] Mayo V.S., Exhibit 4, notes.

4. REMEDIES PROPOSED BY COMMENTERS PURPORT TO RESOLVE COMPETITIVE HARMS THAT DO NOT EXIST AND WOULD BE ANTICOMPETITIVE IN ANY EVENT

139. Several Commenters have proposed "remedies" to be included by the Board as conditions for approval of a CP/KCS combination. In this section, I address "remedies" proposed by Professor Salop, Dr. Reishus, and CN. I show that these "remedies" purport to resolve competitive harms that do not exist, and in the case of the "remedies" suggested by Professor Salop and Dr. Reishus, would be anticompetitive to the benefit of the carriers, UP and BNSF, that propose them.

4.1. The "remedy" proposed by Professor Salop and Dr. Reishus to regulate CPKC interline rates would be anticompetitive and would ensure UP and BNSF do not face fully competitive single-line pricing from CPKC

140. Both UP and BNSF responses include proposed "remedies" which would regulate the interline rates that KCSM can charge in Mexico so that any single-line price CPKC offers on a movement that crosses the border entitles UP and BNSF to use KCSM at a mileage prorated portion of the CPKC single-line price.[162] Commenters argue that this regulation allows CPKC to realize the benefits of any

[162] To illustrate how the proposal would work, consider the following example. Suppose that CPKC sets a particular single-line rate for movements from Rio Verde, Mexico, to Chicago, IL. The proposed remedy fixes the rate that CPKC can charge for the segment from Rio Verde, Mexico, to the Laredo Gateway to be the single-line rate scaled by the share of Mexican segment miles relative to the total CPKC route miles to reach Chicago. If the segment length from Rio Verde to the Laredo Gateway were 25 percent of the total CPKC miles between Rio Verde and Chicago, then CPKC's Mexican interline rate would be regulated at 25 percent of its single-line rate from Rio Verde to Chicago. For a description of BNSF's proposal, *see Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (Comments of BNSF Railway Company dated Feb. 28, 2022), BNSF-9-1 – 581 ("Comments of BNSF Railway Company"), p. 46–47. For UP's proposal, *see* Salop V.S., ¶¶ 117, 119.

efficiencies derived from the combination while alleviating UP and BNSF's (unfounded) concerns that CPKC will engage in anticompetitive behavior to foreclose UP and BNSF from winning traffic at the Mexican border.[163] In this section, I demonstrate that Commenters are wrong – their proposal to regulate CPKC interline rates would be anticompetitive and would ensure UP and BNSF do not face the full competitive pressure they would otherwise face from a combined CPKC.

141. Before addressing the core reason the proposed "remedies" would be anticompetitive, I note that through the process of regulating CPKC's interline rates to align with its single-line rates, both proposals would create the opportunity for CPKC's competitors to learn CPKC's single-line rates. The proposals, perhaps in recognition of the implication for competition if rivals can observe CPKC's offers, each provide mechanisms intending to keep UP and BNSF from learning CPKC's single-line rates with certainty. These mechanisms, however, are likely to be weak protections. In BNSF's proposal, based on an existing arrangement between BNSF and UP at the Portland Gateway (i.e. "I-5 Prop Rate Agreement"),[164] the history of CPKC single-line rates is still revealed.[165] In UP's proposal, although the CPKC rates

163 Salop V.S., ¶¶ 12–13; Reishus V.S., ¶ 16; Comments of BNSF Railway Company, p. 45.

164 Reishus V.S., ¶¶ 98–104. I have examined the I-5 Prop Rate Agreement. I observe that the agreement was negotiated between two parties as part of a larger exchange of interests. As might be expected, the I-5 Prop Rate Agreement is complicated, reflecting the outcome of negotiations between sophisticated parties. Attempting to impose a similar arrangement as a condition, rather than negotiated agreement, is not only unlikely to resolve any of Dr. Reishus's illusory concerns, but is also likely to create new problems. *See* Proportional Rate Agreement between BNSF Railway Company, Union Pacific Railroad Company, and Southern Pacific Transportation Company, May 22, 1997, BNSF0003706 – 61.

165 The underlying single-line rates are based on the average single-line rates charged for similar traffic in the prior period. A third-party entity would calculate the average single-line rates and the

are provided directly to the shipper, the shipper would need to reveal to UP the price of the KCSM portion in order to discuss the total price of UP's offer and the mechanism makes recovering the CPKC price simple math from that point.[166] This leakage of CPKC's private, commercially valuable information is one way in which the proposed remedies are likely to harm competition.[167]

142. This revelation of CPKC's competitive information, however, is not the main reason the proposals are anticompetitive. Both proposals erect a disincentive for CPKC to price its single-line service as competitively as it otherwise might, and, in doing so, act as a tax on single-line rates offered by CPKC that insulates UP and BNSF from facing fully competitive single-line pricing from a combined CPKC. To see this, assume for illustrative purposes that Commenters are right in the premise upon which they rely in arguing the need for the "remedy." That is, assume that KCSM has some particular power over shippers in Mexico that would give KCSM the ability to charge a higher rate on the Mexican segment than might typically be earned on a segment with more competition. If not constrained from doing so by this "remedy" regulation, CPKC's ability to offer new single-line service would put even more competitive pressure on the carriers competing to win the segment north of the

implied mileage-based prorates for the Mexican segments. The interline carriers would then observe the mileage-based prorates to use them to quote shippers a through-rate that includes both the Mexican and U.S. segments. *See* Reishus V.S., ¶¶101–103.

166 In UP's proposal, CPKC would quote to inquiring shippers both a single-line rate and a mileage-based prorate for the Mexican segment. *See* Salop V.S., ¶¶ 19, 118, 120. UP and BNSF would not directly observe these interline rates, but shippers would need to reveal the provided CPKC interline quote to prospective interline partners in order to negotiate over the total rate for the interline movement. With this information, UP or BNSF would know CPKC's single-line rate as well.

167 Professor Salop notes the value of private information for carriers in his discussion of strategic bargaining incentives. *See* Salop V.S., ¶ 105.

border. The enhanced offer by CPKC would drive down the effective price to shippers of a given level of service.

143. However, if the proposed "remedy" is allowed to regulate the relationship between CPKC's single-line and interline rates, even maintaining its existing end-to-end pricing on an interlined CP-KCS route would require CPKC to give up revenue it was otherwise making on the interline segment in Mexico. So, before CPKC can even begin to compete with a new single-line service, it would face a regulatory "tax" on its Mexican revenue that it can only mitigate by raising its single-line rate or abandoning its own end-to-end offer. Only where KCSM currently earns *less* than its U.S. interline partners on a prorated basis, a scenario that is not at all consistent with Commenters' justification for the proposal, could this proposal fail to impair competition.

144. Indeed, the proposed "remedy" would have this effect of taxing CPKC's ability to compete with single-line service anywhere that interline rates on the KCSM segment happen to be higher than a mileage-based prorate for any reason – not just a hypothesized power over shippers. This is indeed the effect the proposed "remedies" would have on CPKC. In this way, the "remedy" serves as a tax on CPKC's ability to compete, and has the effect of insulating from that competition the same carriers who proposed the "remedy" – UP and BNSF.

145. In the rest of this section, I establish the anticompetitive effect of these proposed "remedies" in more detail. In section 4.1.1, I show that market-based rates in the

industry do not align with mileage-based prorates. Where interline segment rates are above a mileage-based prorate, the "remedy" would inhibit competition, even if Commenters are wrong in their theory that KCSM possesses market power that it leverages in its rate setting. In section 4.1.2, I demonstrate how the "remedies" act as a tax on CPKC single-line service and insulate UP and BNSF from facing competition from CPKC, creating an impetus to raise prices faced by shippers on many cross-border movements. In section 4.1.3, I explain that Commenters' "remedies" are, despite their claims otherwise, economically similar to the "rate equalization" conditions previously shown to be anticompetitive.

4.1.1. Market rates for interline traffic are not set based on prorated mileage

146. In this section, I show that market rates for interline traffic generally are not set based on prorated mileage. Although the "remedies" proposed by UP and BNSF intend to regulate CPKC so it could not set KCSM interline rates higher than a mileage-based prorate, rates for many interline segments are already higher than what would be implied by a mileage prorate.[168]

[168] UP and BNSF discuss their proposals with reference only to interchanges at or near Laredo. The examples in this section are meant to demonstrate that interchanges throughout the U.S. commonly demonstrate one railroad earning a higher prorated rate without even the veneer of concern which UP and BNSF have raised specifically about Laredo. To the extent the proposed "remedies" would apply to these market-based rates wherever CPKC happens to currently have some reason for the higher rate and a prospect of single-line service, they would also impose distortions to competition affecting shippers on such routes.

147. The segment-level freight revenue and distances from the 2019 traffic tape data confirm that market-based rates for interline movements are not set based on mileage alone. These data show that market rates for interline segments do not align with the prorated mileage covered by the segment. Other market-based factors determine whether a carrier earns more or less revenue than would be implied by its segment's share of the movement's revenues.

148. In Exhibit 7, I focus on interline movements within the U.S. or between the U.S. and Canada in the 2019 traffic tape data. In particular, I analyze interline movements in which KCS or CP interlines with UP, BNSF, or each other.[169] For these movements, I show the relationship between the share of miles and the share of revenues earned by each carrier.

149. There are four panels, one for each of KCS, CP, UP, and BNSF. In each panel, the x-axis describes the share of miles handled by that carrier on the interline movement, and the y-axis describes the share of total movement revenue earned by that carrier on the same movement. For example, the top left panel shows the mileage share handled by KCS on routes it interlines with either UP, BNSF, or CP along the x-axis, and the share of KCS revenue earned on each interlined route along the y-axis.

150. If interline rates were typically set based on mileage, then the movement-level dots would tend to fall along the 45-degree line in each panel of Exhibit 7. However,

[169] This analysis is limited to interline movements that involve two or three Class I carriers for traffic in which we observe all interline carriers' segment-level revenues and distances in the data.

many movements are above and many are below the 45-degree line, indicating that market-based rates on interline movements generally do not simply reflect the share of mileage handled by the carrier. All four carriers, including UP and BNSF, earn more than their mileage-share would imply on many movements, and less than their mileage-share would imply on many others. In addition, shorter hauls often earn more than their mileage-share (that is, movements to the left of the 50 percent Share of Mileage on the x-axis tend to be above the 45-degree line). This is true for {{[redacted]}}.

EXHIBIT 7
KCS, UP, BNSF, and CP interline rates do not align with a mileage prorate, Movements within the U.S. or between the U.S. and Canada

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Source: Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; CP Intermodal Containers to Railcar Conversion Factor.xls

Note: Each of the colored dots in each panel describes the Share of Mileage and the Share of Revenue earned by each of the four carriers, KCS, UP, BNSF, and CP, on segments that it interlines with one of the other carriers on movements in the U.S. or in the U.S. and Canada. The Share of Revenue is defined as the revenue for each carrier divided by the total revenue on the relevant interline movements. A similar method is used to calculate Share of Mileage. The opacity of the dots indicate the frequency of traffic where darker shades indicate more instances of traffic with that Share of Mileage and Share of Revenue.

4.1.2. The proposed "remedy" imposes a tax on KCSM's revenue in Mexico that CPKC can only mitigate by reducing or avoiding competition with UP and BNSF – making it a regulation to prevent rather than enhance competition as UP and BNSF claim

151. In this section, I explain how the proposed "remedies" would be anticompetitive, incentivize CPKC to raise prices on single-line offerings, and insulate UP and BNSF

from facing fully competitive single-line pricing from a combined CPKC. I first demonstrate that the "remedy" would act as a tax on KCSM's revenue in Mexico wherever it currently earns a higher share of through revenues than its share of miles and would otherwise enhance competition with CPKC single-line service. As I showed in the previous section, the share of revenue a carrier earns on an interline movement frequently does not align with the share of miles covered by the carrier's segment. Therefore, and as I show in this section, the anticompetitive effect of the proposed "remedy" would reduce competition for a substantial volume of traffic, to the benefit of UP and BNSF.[170] Finally, I explain why Professor Salop's defenses of his proposed "remedy" are flawed and misleading.

152. In my assessment of the competitive implications of the proposed "remedy," I use the following notation:

- For interline routes involving other railroads (e.g., UP or BNSF), the rate that CPKC earns on its Mexican segment is *r*.
- Without the "remedy," the total through-rate for a CPKC single-line movement between an origin-destination pair is noted as *P*.
- The share of total movement miles accounted for by KCSM's Mexican segment in a CPKC single-line route is *d.*
- With the "remedy," the CPKC single-line rate is *S,* and the rate for the Mexican-segment that the "remedy" would require CPKC make available for interlines

[170] Both UP and BNSF have focused their proposed "remedies" on traffic handled by KCSM through the Laredo gateway. Thus, the discussion and analysis in this section focus on the potential effect of the "remedies" on KCSM traffic through Laredo. However, the remedy proposed by UP and Professor Salop could potentially be interpreted as applying more broadly to any combination of CPKC single-line route with a related shorter segment interlining with other carriers, regardless of whether it crosses to or from Mexico. To the extent this broader application of the "remedy" is intended, it would create anticompetitive effects like those discussed in this section for additional traffic beyond Laredo traffic.

with UP or BNSF is *dS* (i.e., the mileage prorate of the CPKC single-line rate).[171]

153. To see how the "remedy" creates a tax on revenues in Mexico, I focus on traffic for which the Mexican-segment rate earned by CPKC is more than the implied mileage prorate for that segment. That is, traffic where $r > dP$. I then ask the following question: under the proposed "remedy," what single-line rate would CPKC need to set in order to maintain the Mexican-segment revenue CPKC would earn in the absence of the "remedy"? That is, what CPKC single-line price would "keep them whole" for a given volume of traffic?

154. It is straightforward to show that the single-line price (S) CPKC would have to set to satisfy this condition will be greater than the pre-"remedy" interline price (P) – that is, when $r > dP$, then $S > P$.[172] The difference between S and P is the tax that the "remedy" would create and is an incentive for CPKC to *raise* its single-line prices simply to avoid losing revenue it would have earned without the "remedy."[173]

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171 Similarly, after imposing the "remedy," CPKC would be required to make available to UP *dS* on all of its interline routes that are also served by KCSM-KCS.

172 The revenue neutrality condition shows that $SQ + dSq = PQ + rq$, where Q is CPKC's current single-line volume and q is CPKC's current interline volume. Rearranging terms to solve for S, shows that $S = (PQ + rq) / (Q + dq)$. Using this we know that $S > P$ when $(PQ + rq) / (Q + dq) > P$, which can be rearranged to be $r > dP$. The inequality, $r > dP$, compares the rates that KCS currently earns on interline movements with other carriers, such as UP, BNSF, or CP, to the mileage-based prorates it *would* earn on CPKC single-line service if current rates were prorated according to KCS's share of total movement mileage.

173 Note that movements in which $r < dP$ would not necessarily lead to a tax from the "remedy," but they are also not likely to lead to a "rebate," or single-line price reduction for shippers, as the remedy is not binding in this direction. That is, UP and BNSF already obtain an interchange rate lower than the one the "remedy" would offer them and are unlikely to avail themselves of the opportunity to pay CPKC more. Consequently, I do not draw any conclusions about the "remedy" for such movements. In addition, I am not considering scenarios where the new single-line service would

155. To make this more concrete, consider an example in which CPKC earns $40 on the Mexican segment of its interline route, CPKC earns $100 on its single line, and the Mexican segment of the CPKC single-line route accounts for 30 percent of the total movement miles. Because $40 is greater than 30 percent of $100, the price CPKC would have to charge for its single-line after the remedy to remain revenue neutral will be greater than $100. Exactly how much larger will depend on volumes. If CPKC's single-line volume is 20 and CPKC's interline volume is 100, before the "remedy" revenue is $100*20 + $40*100 = $6,000. With the "remedy," the single-line price CPKC would need to charge to remain revenue neutral would be $120 (with the "remedy" dictating an interline rate of $120 * 30% = $36), which gives the same $6,000 of revenue broken down as $120 on 20 units and $36 on 100 units. Thus, in this example the tax that the "remedy" would create is the $20 difference between the single-line price CPKC would otherwise set ($100) and the price it would have to set to stay revenue neutral ($120).[174]

156. UP and BNSF benefit twice from this tax on CPKC. First, they get the proceeds of the tax in the form of room to raise their rates to shippers (by $4 in the example) before the shipper sees any overall increase in rates. Then, they gain a cushion ($20 in

be so efficient that just as a result of that efficiency shippers would never be inclined to choose any interline service, as such extremes would both obviate Commenters' premise for a remedy of any sort and make irrelevant the "remedy" they have proposed.

[174] The analysis presented in this section, as well as the example just discussed, assume that CPKC single-line volume and interline volumes are fixed. *See* Appendix § 6 for additional details, including for elastic quantities.

the example) on their own pricing before they face the competitive pressure of CPKC single-line rates.

157. I now analyze the traffic tape data to identify traffic for which the "remedy" would create this regulatory tax. In particular, I focus on two categories of traffic through the Laredo gateway, and show that for each the "remedy" would reduce CPKC's incentive to compete aggressively on a substantial volume of traffic.[175] I first look at Laredo traffic on routes where KCSM-KCS already offers a single-line. I show that the "remedy" effectively imposes a tax of {{[redacted]}} percent on single-line revenues on routes where I currently observe both KCS interline and single-line service for the same commodity.[176] There is approximately {{[redacted]}} million of current KCS single-line service, all of which, as I discuss below, would be subject immediately to the issues of this tax.[177] I then look at the effect of the "remedy" on movements where CPKC has identified the combination would create particular procompetitive opportunities for CPKC to compete with its new single-line service.[178] Based on the forecast of these new services in the absence of a "remedy," I

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175 Although I focus on these two sets of CPKC traffic, the "remedy" could have such an anticompetitive effect on additional traffic. For example, there may be additional corridors that could be served by CPKC that were not identified as diversion opportunities in which CPKC's incentive to compete with a single line would be reduced. In addition, my analysis focuses on traffic that moves between Mexico and the U.S., which is largely the focus of the "remedies" proposed by Dr. Reishus and Professor Salop; however, if the "remedy" were to be expanded beyond the Mexican-border traffic, more shippers would be subject to the anticompetitive effect of this regulatory tax.

176 *See* my workpaper 28.

177 According to the 2019 KCS traffic tapes. *See* my workpaper 29.

178 To identify these corridors, I use the corridors identified by Brown and Zebrowski as diversion opportunities for new CPKC single-line service. These are corridors where CPKC has identified that a CP/KCS combination would promote enhanced competition and provide better service and value. Brown/Zebrowski V.S., p. 7, Parts II–III.

estimate below the tax that the "remedy" would effectively impose on this traffic is approximately {{[redacted]}} million.[179] For both categories of traffic, the only way for CPKC to mitigate the tax is to compete less aggressively with UP and BNSF.

158. In Exhibit 8**,** I focus on the first category of movements – Laredo traffic on routes where I observe that KCS already offers interline and single-line service for the same commodity[180] – and identify for which of these movements the "remedy" would act as a regulatory tax on the single-line traffic that KCS already has.[181] As I explained above, the "remedy" acts as a regulatory tax on traffic for which KCSM interline rates are greater than the implied mileage-based prorate, i.e., $r > dP$, or $r/P > d$.[182] I find that this is true for approximately {{[redacted]}} percent of this KCS traffic – corresponding to the traffic above the 45-degree line (the red dots).[183] It is also

179 *See* my workpaper 30.

180 In particular, I identify all of the origin-destination-commodity ("ODC") triplets where KCSM-KCS offers a single-line service and KCSM offers interline service with UP or BNSF in the 2019 Combined Tapes, using BEAs to identify ultimate endpoints.

181 That is, under the "remedy," for which of these movements would KCS (CPKC) have an incentive to raise its KCSM-KCS single-line rates in order to maintain "revenue neutrality" with what it was earning absent the "remedy."

182 I calculate the implied mileage-based prorate as the share of distance handled by KCSM on its single-line traffic (d) times the total revenue-per-car earned for the KCSM-KCS single-line traffic (P). I then pair the average mileage-based prorate from the KCSM-KCS single-line traffic with KCSM's interline rates (r) on KCSM interline traffic for the same ODC triplets.

183 Competing interlines in this analysis serve the same BEA as the existing KCS movements. As I have explained, routes serving the same BEA compete with each other for shipper business, accounting for the multiple dimensions of competition the Board has noted as relevant for assessing railroad competition. Thus, UP or BNSF interlines serving the BEA compete with these existing KCS movements, even if UP or BNSF would need to take some additional steps or motivate the shipper to take additional steps in order to serve a specific shipper. These additional steps would still be needed before UP or BNSF can implement service using the "remedy" terms. However, the competitive pressure of their ability to do so was already deemed to bind on CPKC's decisions without the "remedy," so CPKC would appropriately add the tax into their decision-making in such situations. *See* my workpaper 31.

straightforward to calculate the effective tax rate the "remedy" would immediately impose on the traffic shown in Exhibit 8. For this traffic – traffic on routes where I currently observe KCS interline and single-line service for the same commodity – the "remedy" would impose an effective tax rate of {{ }} percent on KCS single-line revenues.[184]

[184] For each of the movements above the 45-degree line, the amount of tax is essentially the vertical distance to the 45-degree line ($r - dP$) scaled by the volume of traffic represented by the dot. For each of the movements below the 45-degree line $r<dP$, and as I explained above, the "remedy" would not necessarily lead to a tax, but it is also not likely to lead to a "rebate," or single-line price reduction for shippers, as the remedy is not binding in this direction. The effective tax rate for these movements is the total tax divided by the total revenue. *See* my workpaper 28.

EXHIBIT 8

The proposed "remedies" would create an incentive to raise prices for a large volume of traffic for routes where KCS already provides both interline and single-line service

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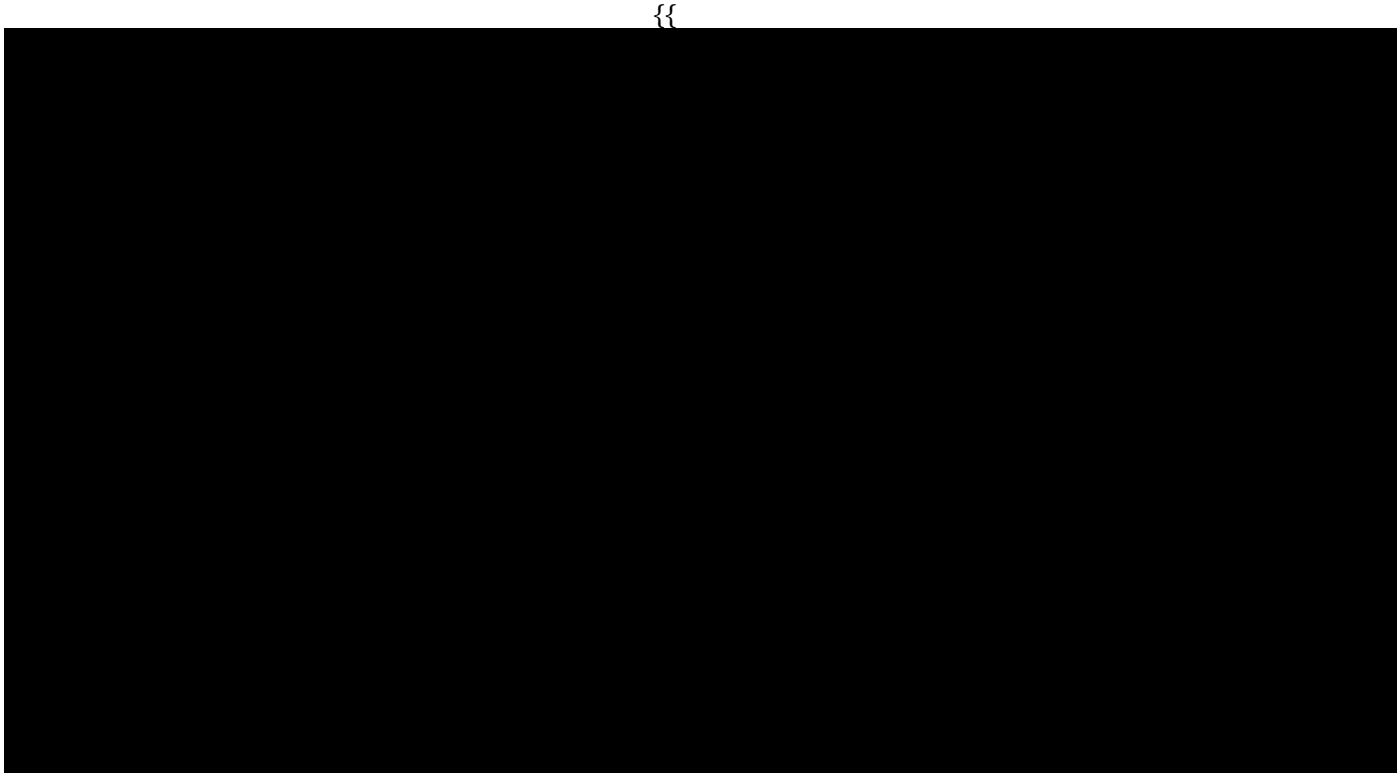

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Source: Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; CP Intermodal Containers to Railcar Conversion Factor.xls

Note: Describes the Share of Single-Line Mileage and the Interline Revenue earned by KCSM divided by the average KCSM-KCS single-line price to serve those corridors in 2019. Specifically, the y-axis shows *r/P* – the ratio of (i) revenue earned on the Mexican segment of a KCSM interline route with UP or BNSF and (ii) KCSM-KCS single-line revenue earned on similar traffic. The x-axis shows *d* – the share of miles covered by the KCSM segment on the KCSM-KCS single-line serving the same corridor. Traffic is plotted for all ODC triplets that can be served by a KCSM-KCS single-line service and that compete with a KCSM-interline service with either BNSF or UP through the Laredo Gateway. Each dot describes traffic for interline routes observed in the 2019 Combined Tapes data. The opacity of the dots indicate the frequency of traffic where darker shades describe more instances of particular traffic types. The size of the dots indicates the amount of traffic handled that are of particular traffic types.

159. There is approximately {{ }} million in current KCS single-line service through Laredo.[185] All of this traffic would immediately be subject to the issues of the tax imposed by the "remedy." Even where I observe single-line service but do not

185 *See* my workpaper 29.

observe KCS currently offering an interline service for the same commodity,[186] the "remedy" would force KCS to make an interline offer if requested by a shipper. While it is not clear the extent to which shippers would choose this interline option – KCS does not currently provide it – one way to think about the effect of the "remedy" on KCS's pricing incentives when making its offer is that this same {{[redacted]}} percent tax will apply.[187] This is a tax on existing *KCS* single-line traffic – that is, a tax on traffic that is, in terms of the alleged concern this "remedy" purportedly addresses, unaffected by the CP/KCS combination.

160. Moreover, any tax on the {{[redacted]}} million in existing KCS single-line revenues is a subset of the potential effect of the tax created by the "remedy."[188] For instance, in markets where KCS does not currently provide single-line service, but could provide it in the future, this tax would create a disincentive for KCS to invest in providing that single-line service and winning traffic. In addition, there is approximately {{[redacted]}} million in current KCS interline service through Laredo where KCS interchanges north of Laredo.[189] If the "remedy" is intended to cover these longer hauls, by requiring KCS to price short hauls to Laredo according to the mileage prorate of its longer haul service, then the issues of this tax could also apply

186 Routes for which I do observe both a KCS interline and single-line service for the same commodity are included in Exhibit 8.

187 *See* my workpaper 28.

188 *See* my workpaper 29.

189 This is calculated according to the 2019 Combined Tapes and limited to KCS interlines that are not identified as new single-line opportunities by Brown and Zebrowski and where CP is not the only interconnecting railroad. *See* my workpaper 32. *See* also Brown/Zebrowski V.S. Backup Materials, 8 – Diversion Identification.xlsx.

to this traffic. All of this harm is to competition in markets where CPKC essentially *is* KCS. In these markets, there should not be changes to incentives due the CP/KCS combination, so any incentive changes are solely the result of the distortionary effects of the "remedy."

161. I next turn to the second category of movements – where CPKC has identified the combination would create particular procompetitive opportunities for CPKC to compete with its new single-line service, focusing on opportunities involving Laredo. As I did in Exhibit 8, I identify for which of these movements the "remedy" would tax CPKC's revenues. However, this analysis differs from that one because for these movements CPKC does not yet offer single-line service. Rather, these are commodity-corridors where CPKC anticipates being able to enhance competition with new single-line service after the CP/KCS combination. Thus, for this particular analysis, the relevant question is not whether the "remedy" would create an incentive to raise prices on existing CPKC movements, but instead whether the "remedy" would reduce CPKC's incentive to price its new single-line service as aggressively as it would have without the "remedy." Specifically, I evaluate whether the "remedy" would create a disincentive for CPKC to price its new single-line service at the same level as current interline rates.

162. In Exhibit 9, the y-axis is the ratio of KCSM interline revenue to the revenue CPKC would earn on a single-line if it set the price of that new service equal to observed KCSM-UP or KCSM-KCS-BNSF interline rates (which I use as a

"hypothetical CPKC single-line revenue").[190] The x-axis is the KCSM share of CPKC single-line mileage.[191] Almost all of this traffic (more than {{[redacted]}} percent) is above the 45-degree line.[192] For this traffic, the "remedy" would tax CPKC's single-line revenue, giving CPKC an incentive to set its new single-line service at a price higher than existing interline prices. Shippers that utilize these routes would not benefit from fully competitive single-line pricing from CPKC.

[190] Note that for this traffic, the revenue neutral condition is based on a pre-"remedy" single-line rate P^* that is the observed through rate on traffic KCS interlines with UP or BNSF.

[191] I identify traffic in the 2019 Combined Tapes data with origin and termination SPLCs and commodities identified at the 7-digit STCC that has also been identified by the Brown/Zebrowski V.S. analysis as corridors and commodities with diversion opportunities because of the CP/KCS combination. Each dot in Exhibit 9 describes a movement that is a potential diversion opportunity for CPKC, capturing the ratio of KCSM interline rates over the hypothetical single-line rate along the y-axis and the KCSM interline-segment share of the single-line mileage. *See* Brown/Zebrowski V.S., p. 7, Parts II–III.

[192] *See* my workpaper 23.

EXHIBIT 9
KCSM interline rates are often greater than a mileage-based prorate for a competitive interline route on routes with CPKC diversion opportunities

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Source: Combined CP-KCS-KCSM-UP-BNSF-CN-NS-CSXT Traffic Tapes, 2019; 8 – Diversion Identifiation.xlsx (Brown/Zebrowski V.S. backup materials); CP Intermodal Containers to Railcar Conversion Factor.xls
Note: Describes the Share of Single-Line Mileage and the Interline Revenue earned by KCSM divided by the average CPKC single-line price to serve those corridors in 2019. The y-axis shows *r/P* – the ratio of (i) revenue earned on the Mexican segment of a KCSM interline route with UP or BNSF and (ii) interline revenue earned on the same traffic in each corridor. The x-axis shows *d* – the share of miles covered by the KCSM segment on CPKC single-line serving the same corridor. The opacity of the dots indicate the frequency of traffic where darker shades describe more instances of particular traffic types. The size of the dots indicates the amount of traffic handled that are of particular traffic types. The traffic is limited to corridors and commodities identified by the Brown/Zebrowski V.S. analysis as diversion opportunities.

163. For this category of traffic, the tax would apply to movements CPKC could reasonably expect to win if its incentive to compete for traffic on these routes were not constrained by the "remedy." To forecast this traffic, I use the estimates of CPKC diversions from Brown and Zebrowski. With that forecast of volume for CPKC traffic on these routes, I can approximate the total tax the "remedy" effectively imposes on

such traffic. [193] Aggregating across all relevant movements in the forecast, the total tax imposed on these CPKC movements is more than {{[redacted]}} million.[194] This is a tax of more than {{[redacted]}} million on traffic that CPKC otherwise expects to win as a result of the enhanced single-line service CPKC would offer. In other words, this is a direct tax on the enhanced competition and procompetitive benefits of the CP/KCS combination, and has the effect of insulating from that competition the same carriers who proposed the "remedy" – UP and BNSF.

164. Dr. Reishus links his proposed "remedy" to an agreement reached between BNSF and UP during the latter's acquisition of the SP (the I-5 Prop Rate Agreement). He repeatedly points to how long this agreement has remained in effect as an indication of its procompetitive durability. However, considering the benefit UP and BNSF would each receive from an agreement that is reciprocal and may therefore discourage each of them from pricing aggressively, this durability hardly proves the agreement is procompetitive.[195] That his proposed "remedy" is based on such an agreement does not obviate the need to examine its consequences. And, as I have

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[193] For each of the movements above the 45-degree line, the amount of tax is essentially the vertical distance to the 45-degree line ($r - dP$) scaled by the volume of traffic represented by the dot. For each of the movements below the 45-degree line $r<dP$, and as I explained above, the "remedy" would not necessarily lead to a tax, but it is also not likely to lead to a "rebate," or single-line price reduction for shippers, as the remedy is not binding in this direction.

[194] *See* my workpaper 30.

[195] Indeed, as a BNSF {{[redacted]}} on the I-5 Prop Rate Agreement explains, {{[redacted]}}
See BNSF Railway, {{[redacted]}},
BNSF0003672 – 83 at BNSF0003674.

shown here, those consequences mean that this would not be a good policy provision to promote or preserve competition for railroad services.

165. I now explain why Professor Salop's defenses of his proposed "remedy" are flawed and misleading. In defense of his proposed "remedy," Professor Salop argues that the "goal and impact" of the "remedy" is to "prevent price foreclosure that would otherwise occur, and which would lead to *higher* single-line rates and *higher* rates charged on interline routes."[196] He also provides a simple numeric example that he purports to show that under his proposed "remedy," CPKC would still have an incentive to reduce its single-line rates.[197] First, as I explain throughout this report, Professor Salop is wrong that the CP/KCS combination would result in price foreclosure and higher rates.

166. Second, Professor Salop's numeric example is inconsistent with his own theory and does not show what he claims it does. His example assumes the pre-merger KCSM "monopoly" interline rate is *already* prorated based on mileage. Yet, Professor Salop's theory, were it true, suggests that KCSM, today, has some power over shippers that enables it to charge a higher rate for the Mexican segment than might typically be earned on a segment with more competition. It is this "monopoly" power over the Mexican segment that Professor Salop's theory suggests CPKC will be able to leverage to implement the alleged "price foreclosure" after the combination. Professor Salop's "remedy" is thus targeted at existing marker power—

196 Salop V.S., ¶ 123 (emphasis in original).

197 Salop V.S., ¶ 124.

whether real or imagined—and not an effect of the CP/KCS combination. In Professor Salop's numerical example, he assumes away the very "monopoly" power his theory of vertical harm and his justification for the "remedy" are based upon.

167. Further, in my analysis, I evaluated the effect of the "remedy" where KCSM *does* currently earn more than its mileage prorate on the Mexican segment (whether via some form of market power, as Professor Salop alleges, or some other reason). As I demonstrated above, the effect of the "remedy" on such routes would be the opposite of what Professor Salop claims – it would actually *create* an incentive to *raise* prices. Thus, for the routes that are potentially relevant for Professor Salop's theory (and for many routes that happen to have a rate above prorated mileage for innocuous reasons), the proposed "remedy," does not maintain competition, and instead deters competition by imposing a regulatory tax on CPKC that would discourage CPKC from competing as aggressively. The reduced competition would benefit UP and BNSF by insulating them from the full competitive pressure they would otherwise face from a combined CPKC.

4.1.3. UP and BNSF's attempts to distance their proposed "remedy" from the reasons that made the DT&I conditions anticompetitive are wrong

168. Conditions originally established as part of the approval to merge in the Detroit, Toledo & Ironton R.R. et al. Control, Etc. ("DT&I") matter were rescinded by the ICC as anticompetitive. Commenters for both BNSF and UP recognize this and try to

distance their "remedy" proposals from the DT&I conditions.[198] However, although the Commenters' proposed "remedies" may not immediately appear to restrict rate-setting behavior in the same way as the DT&I conditions, they do, like the DT&I conditions, ultimately lead to reduced flexibility in rate setting and, as my analysis in the previous section shows, anticompetitive outcomes.

169. The DT&I conditions required merging carriers to continue offering interline routes, rates, and services available to shippers through gateways affected by the new combination, with the ostensible goal of prohibiting discrimination in favor of the post-merger entity, e.g., a new single-line service.[199] When the ICC rescinded the DT&I conditions in 1982 as anticompetitive, it recognized that enforcement of the conditions "prevented carriers from pricing more efficient routes at lower rates," led to rate equalization and rate freezing, and "encouraged unnecessary utilization."[200] In its decision to revoke routine application of the DT&I conditions, the ICC stated that,

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198 Comments of BNSF Railway Company, pp. 47–48; Salop V.S., ¶ 121.

199 The first condition required the consolidated carrier to "keep open all routes and channels of trade via existing junctions and gateways." This condition was interpreted by the ICC to require rate equalization because it was feared that a lower single-line rate without a lower interline rate would lead to shipper diversion to the single-line service and lead to closure of the interline option, violating the condition. The second and fourth conditions disallowed any discrimination in service provided on interline traffic. The third condition required the carrier to maintain "present traffic and operating relationships." The fifth condition allowed industries operating on the consolidated carriers' network to have all pre-merger routes and gateways open to them. *See* Interstate Commerce Commission Decision, Ex Parte No. 282 (Sub-No. 5), *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings* (Decided Mar. 9, 1982), 366 I.C.C. 122, 1982 WL 28412, p. 1.

200 The Commission found the DT&I conditions to be "anticompetitive and contrary to the public interest." *See* Interstate Commerce Commission Decision, Ex Parte No. 282 (Sub-No. 5), *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings* (Decided Mar. 9, 1982), 366 I.C.C. 122, 1982 WL 28412, pp. 1–2.

"instead of restraining potential monopolistic behavior, they [the DT&I conditions] were found to prevent the realization of merger efficiencies and public benefits."[201]

170. The Commenters for UP and BNSF argue that their proposals would not lead to the same concerns raised by the DT&I conditions such as rate equalization or rate freezing.[202] Rather, they claim that their proposed remedies are "far narrower than the DT&I conditions," do "not constrain the single-line rate of the merged firm," and do not diminish carriers' incentives to pass on cost savings to shippers.[203]

171. Yet, the "remedy" proposals put forward by the Commenters are similarly restrictive, reducing carriers' rate-setting flexibility and leading to forms of rate equalization. Under the proposed "remedies," CPKC will have less flexibility setting lower prices for its single-line service because those rates would necessarily be tethered to its interline rates. CPKC would not be able to pass on cost savings related to single-line service to its single-line customers without also passing on proportional reductions to its interline customers. Absent price-setting flexibility for its single-line service, CPKC would not be able to "use its assets to the fullest" by providing the

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201 Daniel Smith, "The Evolution of Rail Merger Policy," in *Proceedings – Twenty-fourth Annual Meeting*, Volume XXIV, Number 1 (Transportation Research Forum, 1983), available at https://ageconsearch.umn.edu/record/311628, pp. 558–565 at p. 564.

202 Comments of BNSF Railway Company, p. 47 ("By allowing Applicants to adjust their rates to reflect post-merger efficiencies, a proportional rate mechanism would avoid the issues associated with the anti-competitive 'rate equalization' conditions imposed by the ICC on mergers after its decision in Detroit, Toledo & Ironton R.R. et al. Control, Etc., 275 I.C.C. 455 (1950)."); Salop V.S., ¶ 121 ("Applicants might attempt to argue that the CRR formula will force rate equalization and deter rate reductions driven by lower costs in the same way as the now-discredited DT&I conditions. However, this criticism is not well-founded.").

203 Salop V.S., ¶¶ 121, 122.

"cheapest and most efficient transportation service possible."[204] In addition, these "remedies" may lead to higher rates for shippers, because CPKC may be unwilling to pay the tax – i.e., to forgo the lost profits on its interline rates,[205] or they may not benefit from improved single-line service altogether because CPKC will have reduced incentive to invest in it.

172. Thus, in contrast to Commenters' claims, the "remedies" they propose share the key competitive implications, such as a degree of rate equalization leading to less flexible rate setting and less benefit of single-line service to shippers, that made the DT&I conditions anticompetitive and ultimately led the Commission to revoke them.

4.2. CN's proposed divestiture seeks to resolve an alleged harm that does not exist and instead would create risk of harm to horizontal competition

173. In my Application Statement, I demonstrated that a combination of CP and KCS would not have any adverse horizontal competitive effects.[206] CN argues otherwise, claiming my analysis did not consider potential horizontal concerns related to KCS's line between Kansas City and Springfield, IL, which connects to a CN line between

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204 Interstate Commerce Commission Decision, Ex Parte No. 282 (Sub-No. 5), *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings* (Decided Mar. 9, 1982), 366 I.C.C. 122, 1982 WL 28412, p. 4 (citing *Seaboard Coast Line Railroad Company, et al.—Investigation of Control and Modification of Traffic Conditions*, Finance Docket No. 21215 (Sub-No. 2) (Served Feb. 22, 1979)), p. 5 ("In direct contrast [to the DT&I conditions], the recent legislation has emphasized the need for rail carriers to have the flexibility to make individual ratemaking and routing choices.").

205 *See* § 4.1.2.

206 Application Statement, §§ 4, 5.

Springfield and Chicago – specifically as part of a route with CN to serve Chicago and beyond.[207] CN uses this alleged competitive concern as a basis to demand divestiture of the entire KCS Springfield/St. Louis Line – to CN.[208]

174. In this section, I address CN's claims, and explain that CN's concern is exclusively about speculative potential future competition that has not been borne out by past experience. The CP/KCS combination presents no significant horizontal competitive concern based on traffic currently moving in corridors involving service over this line. CN's assertion is, instead, premised on a series of assumptions. First, that there are potential benefits which could be unlocked through investments in this line that require partnership with CN to achieve. Second, that these benefits outweigh the benefits of investments CPKC would make in this line and elsewhere on its network without such a partnership. And, finally, that CPKC would choose to forego a share in the benefits of such a partnership with CN. None of these assumptions are particularly justified, but the final assumption is contrary to basic profit-maximizing behavior and has no place in an economic analysis of competitive effects.

175. The analysis I presented in my Application Statement demonstrated that, with respect to traffic movements observed to occur, the CP/KCS combination creates no

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207 *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (CN's Comments on Application and Request for Conditions dated Feb. 28, 2022) ("CN's Comments on Application and Request for Conditions"), p. 39 ("The CP-KCS merger raises a significant horizontal competitive concern that must be addressed by the Board. As CN had demonstrated, the Springfield Line is part of a direct competitive alternative to CP's route between Kansas City and Chicago, and beyond to Detroit and Eastern Canada.").

208 CN's Comments on Application and Request for Conditions, Part IV.A.

risk of significant horizontal concerns. My within-corridor analysis examined all corridors observed in the 2019 CWS, including those CN identifies as involving the Springfield/St. Louis Line, and demonstrated that in none of these corridors would there likely be a reduction in competition from a CP/KCS combination.[209] My initial screen identified {{{[redacted]}}} involving the Springfield/St. Louis Line that even warranted some detailed review: the {{{[redacted]}}} corridor. However, that further examination showed that shippers are unlikely to experience a significant competitive effect from not having an independent KCS on this corridor.[210] Similarly, my between-corridor analysis fully included traffic over the Springfield/St. Louis Line in demonstrating that the CP/KCS combination would not likely affect cross-corridor competition in any area in North America.[211]

176. Thus, CN's argument must be understood to be about traffic that is not currently moving over the Springfield/St. Louis Line. That is, the claim of competitive effects is an assertion about the magnitude of two unquantifiable amounts – the potential benefits of CP investment on this line *vs* the potential benefits of CN investments on this line. For the most part, CN's assertion in this regard is simply that CPKC will not

209 Application Statement, Exhibit 3.

210 This corridor screens as a potential 5-to-4 corridor. As I noted in my Application Statement, the Board has historically focused on 3-to-2 and 2-to-1 reductions as most relevant. Shippers in the corridor would have four independent single-line routes available {{{[redacted]}}}, even without an independent KCS. Moreover, KCS's observed involvement in the corridor was minimal, {{{[redacted]}}}, consistent with the KCS routing option not being one of the better options among the many available to shippers. *See* Application Statement, ¶ 70.

211 Application Statement, §§ 5, 7, and backup materials.

have an incentive to invest because it has another line to Chicago.[212] CN has offered no support for the proposition that CPKC would not maintain the Springfield/St. Louis Line.[213] However, to the extent one does assume there is a project that would enhance options for some shippers to Chicago or beyond in a way that CPKC cannot achieve without partnering with CN, there is no rational basis to assume CPKC would choose to spite CN rather than choosing the course of maximizing its return to its own shareholders. Consequently, there is no basis for predicting any difference in the potential that will be realized and there is no effect on potential competition to justify CN's demand to be given the Springfield/St. Louis Line.

177. Further, the proposed divestiture is not harmless. Forcing CPKC off the Springfield/St. Louis Line would impair the benefits of the CP/KCS combination, ultimately depriving shippers of some of the enhanced competition the CP/KCS combination would otherwise generate.

212 CN's Comments on Application and Request for Conditions, pp. 40–41, 44.

213 CN's Comments on Application and Request for Conditions, §§ III.A.1–2.

5. OTHER COMMENTERS THAT RAISE ISSUES OF "COMPETITON" DO NOT RAISE AN ISSUE OF COMPETITIVE EFFECTS DUE TO A CP/KCS COMBINATION

178. I have been asked by counsel to review Comments from several parties expressing particular concerns they describe as related to competition. In this section, I explain that the issues raised in those Comments do not concern competitive effects of a CP/KCS combination. Some do not appear to involve issues of competition at all. Others appear to be general concerns about the importance of competition among Class I railroads – something a CP/KCS combination will not worsen and is likely to improve. To that end, the "remedies" called for in these Comments would be counter-productive – restraining the ability for a CP/KCS combination to reverse the perceived trend and enhance competition and expand shippers' choices.

179. First, several Commenters have asserted a competitive effect in the possibility of CPKC adopting CP's tariff and insurance requirements for transporting TIH/PIH hazardous chemicals. I understand that CP and KCS currently have different provisions covering transportation of these materials and that these Commenters would like for the Board to preserve the terms they view as more favorable to them for movements on the current KCS network.[214] I have reviewed these Commenters' claims. I believe that it is plausible that CPKC will attempt to follow a consolidated

[214] *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (Comments and Request for Conditions of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League dated Feb. 28, 2022), p. 2; *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (Amended Comments of The Chlorine Institute dated June 9, 2022), p. 4; Letter from Karenanne Stegmann (OxyChem) to Martin Oberman, et al. (Surface Transportation Board), "RE: STB Finance Docket No. 36500, Canadian Pacific Railway – Control – Kansas City Southern," February 28, 2022, p. 2.

policy which necessarily involves some change. However, the reason for such change is not any loss of competition. CP and KCS's current management have each made their own business decisions regarding the potential liabilities associated with transporting hazardous materials and those decisions affect their respective choices of tariff and insurance provisions. These business decisions reflect the experience and knowledge of each railroad's management. As with any business combination or indeed any change in management, it is efficient for the combined CPKC to benefit from the combination of that experience and knowledge into a common management team. This process may well result in a consolidated policy, which necessarily involves some changes for movements over at least one of the two railroads' current systems, but for reasons that are not a reflection of competition between the two railroads. Thus, the choice of provisions that the combined firm will make for the CPKC network is not an indication of any potential competitive effect of the CPKC transaction.

180. Second, Texas International Terminals ("TxIT"), a multi-modal facility for deep draft vessels located along the Galveston Ship Channel, identifies conditions which it believes could enhance competition.[215] These conditions appear unrelated to any competitive effect of the CP/KCS combination and instead appear aimed at improving TxIT's relative competitive position, rather than preserving competition. Specifically, TxIT requests the Board to require CPKC to market to shippers some

[215] *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (Comments and Request for Conditions of Texas International Terminals Ltd dated Feb. 28, 2022) ("TxIT Request for Conditions, 2022"), pp. 2–3.

KCS access rights to Galveston so that TxIT can add CPKC to the existing competition it enjoys between UP and BNSF.[216] I understand these access rights were granted to KCS after the UP-MKT transaction, and that KCS has "not effectuated or sought to aggressively market" these rights to date.[217] On its face, TxIT's preference for KCS to "aggressively" utilize its Galveston rights cannot be an issue of the CP/KCS combination reducing competition in any market. KCS made an independent decision that predates the CP/KCS combination and which precludes any potential competitive effects from the combination. Conditions that would force a different choice on CPKC are presumptively impositions of a bad business decision that would inhibit CPKC from using its resources to compete most effectively where it can do so.

181. Third, several Commenters raise concerns about international trade policy and their belief that U.S. wheat producers are at a competitive disadvantage relative to Canadian wheat producers. In particular, three associations of U.S. wheat growers – the NAWG, USWA, and NDWC – argue that by extending CP's network in the U.S. and into Mexico a CP/KCS combination would distort competition between Canadian wheat growers and U.S. wheat growers.[218] Even assuming the premise of unfair

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216 TxIT Request for Conditions, 2022, pp. 8–9.

217 TxIT Request for Conditions, 2022, p. 4.

218 *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (U.S. Wheat Associates Comments and Request for Conditions dated Feb. 28, 2022) ("USWA Request for Conditions, 2022"), pp. 4, 14–16; *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (North Dakota Wheat Commission Request for Conditions dated Feb. 28, 2022) ("NDWC Request for Conditions, 2022"), p. 5; Letter from David Milligan (National Association of Wheat Growers) to Martin Oberman, et al. (Surface Transportation Board), "RE: Canadian Pacific Railway Limited – Control – Kansas City Southern (Docket No. FD 36500)," February 28, 2022 ("NAWG Request for Conditions, 2022"), p. 2.

international competition were accurate, merger review is not about insulating U.S. shippers from competition with other shippers. The push for such a strategy in these Comments amounts to preventing competition by preventing a CP/KCS combination from offering some shippers the benefit of more competitive terms.

182. In arguing that the Board should keep these concerns in mind when evaluating the CP/KCS combination, these wheat industry Comments mischaracterize the issues as related to potential competitive effects of the combination.[219] I understand that John Brooks has reviewed the Canadian policies that Commenters point to and has explained that these policies do not apply to wheat movements from Canada to U.S. or Mexican destinations, and thus could not be relevant for the competitive effects of the CP/KCS combination on U.S. wheat growers.[220] In addition, in my Application Statement, I evaluated whether the CP/KCS combination would result in potential reductions in competitive options for shippers, including U.S. wheat growers and destinations that might substitute Canadian sources of wheat, and showed the combination would not result in adverse competitive effects.[221] The CP/KCS combination could affect competition in markets accessed by U.S. wheat growers by *enhancing* competition through new single-line options connecting growers, including those in the Upper Midwest and Canada, to destinations on the KCS

219 USWA Request for Conditions, 2022, pp. 2–3. *See also* NAWG Request for Conditions, 2022, pp. 1–2; NDWC Request for Conditions, 2022, p. 5.

220 Reply Verified Statement of John Brooks, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, July 12, 2022 ("Brooks R.V.S."), ¶ 81.

221 Application Statement, ¶ 12, §§ 4, 5.

network, including those in the South Central United States and Mexico.[222] That enhanced competition should be encouraged both in merger review and in international trade negotiations so that markets, rather than regulators, determine the success of individual shipper groups in their competition with one another.

183. Finally, a number of Commenters, including some of the shipper groups discussed above as well as others, have requested that the Board impose various forms of open access, reciprocal switching conditions, and rate restrictions that are loosely based on a general observation that past consolidation in the rail industry has reduced competition and harmed shippers.[223] However, that concern is misguided as to the CP/KCS combination.

184. Unlike a number of past consolidations, the CP/KCS combination is an end-to-end railroad merger. As I demonstrated in my Application Statement, the CP/KCS combination would not generate any significant reduction in competition within any corridor nor the competition between corridors (either source or destination

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222 Mr. Brooks also comments on the potential benefits to U.S. wheat growers from the CPKC transaction. *See* Brooks R.V.S., ¶¶ 76–78.

223 TxIT requests that the Board "require Applicants to adhere to their pledge to maintain open gateways and interchanges, and impose conditions which allow for enforcement of these conditions." *See* TxIT Request for Conditions, 2022, p. 9. The PRFBA requests that the Board require reciprocal switching for "any shipper on the new CP/KCS system that is subject to market dominance or receives inadequate service" as a condition of the merger. *See Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (PRFBA Request for Condition dated Feb. 28, 2022), p. 12. The IMA requests that the Board "limit any rate increases to captive shippers for five years after the transaction is approved to 10 [percent] of that time." Other conditions stipulated by the IMA align very closely with the proposals from the wheat grower associations. *See Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500 (IMA-NA Request for Conditions dated Feb. 28, 2022), pp. 12–13.

competition).[224] In that regard, this combination stands out from almost every past rail merger for how purely end-to-end it is. There is no loss of competition from this transaction for these proposed remedies to resolve.

185. And, as a particularly end-to-end railroad merger, the CP/KCS combination presents opportunities to enhance competition with improved options to shippers and enhanced competition through new single-line service. The Comments reflect these shippers' perception that past railroad mergers have generally been associated with a trend of reduced competition and worse options for shippers, but a CP/KCS combination is the kind of merger that goes against any such trend. It is, indeed, a chance to mitigate the history about which these shipper organizations express concern and to enhance the competition for affected shippers.

186. To the extent that past railroad mergers may have reduced competition and harmed shippers, the solution is not to burden the CPKC with unwarranted conditions that would limit CPKC's ability to compete better in markets it will serve. As I showed with respect to the "remedy" proposals of BNSF and UP, imposing such a restriction on CPKC would tax the ability of CPKC to compete and would lead to less competitive prices for shippers. Perversely, the only beneficiaries of such a restriction are the very railroads whose past consolidations these shippers identify with lost competition. The proposed restrictions insulate those railroads from the new competition a CP/KCS combination would otherwise bring for shippers. To advance

[224] Application Statement, ¶ 12, § 5.

the Board's objective of fostering rail competition, and to address the concern of these shippers, the better way to proceed is to force the railroads responsible for that concern to face an unfettered CPKC.

6. TECHNICAL APPENDIX: ANALYSIS SHOWING THE ANTICOMPETITIVE EFFECT OF THE PROPOSED MILEAGE-PRORATE "REMEDY," ADDITIONAL DETAILS

187. In section 4.1.2, I show that the proposed mileage-prorate "remedy" would create a tax on Mexican revenues. In demonstrating this, I focused on the following question: under the proposed "remedy," what single-line rate would CPKC need to set in order to maintain the Mexican-segment revenue CPKC would earn in the absence of the "remedy"? And, I showed this would be true under the following "revenue neutrality condition:" $SQ + dSq = PQ + rq$, where Q is CPKC's current single-line volume and q is CPKC's current interline volume, and that $S > P$ when $r > dP$. In this appendix I provide additional details and explanation of this analysis.

188. Without the "remedy," CPKC would earn total revenue of $PQ + rq$ on these movements. On its single-line movements, without the remedy, CPKC earns P. On the interline, KCS earns r. Thus, total CP and KCS revenues without the remedy would be $PQ + rq$. Note that one could also redefine P to be the pre-combination total price on an interline between CP and KCS (with CP's portion being $P - r$ and KCS's portion being r) and get the same relationship. Under the "remedy," CPKC would earn total revenues of $SQ + dSq$.[225]

189. Thus, for CPKC to remain revenue neutral after the "remedy" is imposed, CPKC needs to charge a single-line price S so that $SQ + dSq = PQ + rq$. This equality is the "revenue neutrality condition" I discussed above. This describes the condition for which CPKC earns the same total revenues on its single-lines and interlines with UP

[225] CPKC earns S on each single-line movement and dS on each interline movement.

(or BNSF) as CPKC did without the "remedy." To the extent the effect of the "remedy" is to incent CPKC to charge a higher single-line rate than it would have absent the "remedy" in order to maintain its pre-merger revenues, this could incent some shippers to switch to the KCS-UP (KCS-BNSF) interline. If the *S* that satisfies revenue neutrality is greater than *P,* then the "remedy" has created an incentive for CPKC to raise single-line prices after the combination.

190. It is straightforward to show that the single-line price that satisfies revenue neutrality will be greater than the pre-"remedy" interline price for all traffic where $r > dP$. The revenue neutrality condition shows that $SQ + dSq = PQ + rq$. Rearranging terms to solve for S, shows that $S = (PQ + rq) / (Q + dq)$. Using this we know that $S > P$ when $(PQ + rq) / (Q + dq) > P$, which can be rearranged to be $r > dP$. The inequality compares the rates that KCS currently earns on interline movements with other carriers, such as UP, BNSF, or CP, to the mileage-based prorates it *would* earn on a CPKC single-line service if current rates were prorated according to KCS's share of total movement mileage.

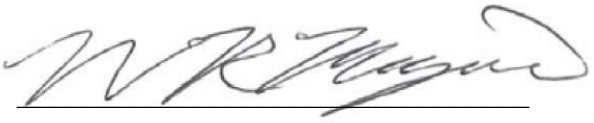
191. Instances in which $S > P,$ i.e. when single-line rates are higher compared to the interline alternative, could lead some shippers to switch away from the single-line option to the interline option. In a scenario with diversion to a competing interline route, the S^* that achieves revenue neutrality is generally larger than the *S* with no diversion, confirming that there would still be incentive for CPKC to raise its single-line rate in order to maintain its pre-merger revenue. In particular, the revenue neutrality condition becomes $S^*(Q - e) + dS^*(q + e) = PQ + rq,$ where $e < Q$ is a

positive number denoting the diversion from the single-line to the interline option for the given price difference. The revenue neutrality condition can then be re-arranged to solve for $S^* = (PQ + rq) / [Q + dq + (d - 1)e]$, and since $(d - 1) < 0$, then $[Q + dq + (d - 1)e] < (Q - d)$. This implies that $S^* > S$, suggesting that there is a greater incentive for CPKC to raise its single-line rates when there is diversion.

VERIFICATION

I, W. Robert Majure declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this statement.

Executed this 12th day of July, 2022



W. Robert Majure

APPENDIX A

W. Robert Majure, Ph.D.
Vice President

Cornerstone Research
2001 K Street NW • North Tower, Suite 800 • Washington, DC 20006
202.912.8978 • fax 202.912.8999
rmajure@cornerstone.com

ACADEMIC BACKGROUND

1990 – 1994 **Massachusetts Institute of Technology** Cambridge, MA
Ph.D., Economics
Specialization: Industrial Organization, Microeconomics, Econometrics
Thesis: Disequilibrium Game Theory

1986 – 1990 **University of Virginia** Charlottesville, VA
B.A., Economics and Mathematics

PROFESSIONAL EXPERIENCE

2019 – Present **Cornerstone Research, Inc.** Washington, DC
Vice President
Provide financial and economic analysis for commercial litigation matters. Support experts in preparing for deposition and trial testimony.

2010 – 2018 **Antitrust Division – U.S. Department of Justice** Washington, DC
Director of Economics
Senior career executive supervising the Antitrust Division's Economic Analysis Group. Helped formulate economic evidence and testimony for cases in industries such as software (*U.S. v. H&R Block, Inc., et al.*), telecommunications (*U.S. and Plaintiff States v. AT&T Inc., et al.*), video (*U.S. v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc.*), publishing (*U.S. v. Apple, Inc., et al.*), airlines (*U.S., et al. v. US Airways Group, Inc. and AMR Corp.*), oilfield services (*U.S. v. Halliburton Co. and Baker Hughes Inc.*), and health insurance (*U.S. and Plaintiff States v. Aetna Inc., and Humana Inc.* and *U.S. and Plaintiff States v. Anthem, Inc. and Cigna Corp.*).

2003 – 2010 **Antitrust Division – U.S. Department of Justice** Washington, DC
Chief of Competition Policy Section
Managed a section of about 18 economists and other staff. Supervised economic analysis of antitrust investigations in various industries including computer software (*U.S. v Oracle Corp.*), real estate (*U.S. v Kentucky Real Estate Commission*), and telecommunications (*U.S. v Cingular Wireless et al*). Testified in *U.S. v SBC Communications Inc. and AT&T Corp.* and *U.S. v. Verizon Communications Inc. and MCI, Inc.* Consulted on appellate arguments of the United States in Circuit Court (including *FCC v Prometheus Radio Project*).

1997 – 2003 **Antitrust Division – U.S. Department of Justice** Washington, DC
Assistant Chief of Economic Regulatory Section

Assisted with the management of a section of about 18 economists and other staff. Supervised economic analysis of antitrust investigations in various industries including telecommunications (*U.S. v WorldCom and Sprint*), computer software (*U.S. v Mathworks and Wind River*), publishing, radio and television advertising (*U.S. v Univision and Hispanic Broadcasting Corp*), electricity, and airlines. Consulted on appellate arguments of the United States in Circuit Court and the U.S. Supreme Court (including *Iowa Utilities Board v FCC and U.S.*).

1994 – 1997 **Antitrust Division – U.S. Department of Justice** Washington, DC
Economist
Performed economic analysis in antitrust investigations. Applied developments in the fields of industrial organization, microeconomics, and econometrics to practical questions raised in antirust analysis. Examined mergers or practices in telecommunications (including *U.S. v Sprint and Joint Venture Co.*), computer software, and banking. Testified in the merger of Union Pacific Railroad and Southern Pacific Railroad (before the Surface Transportation Board).

TESTIMONY

Library of Congress Copyright Royalty Judges Case No. 16-CRB-0009 CD (2014-17) – Submitted testimony in re: Distribution of Cable Royalty Funds on behalf of joint sports claimants.

STB Finance Docket No. 36500 – Submitted testimony in support of the application by Canadian Pacific Railway Limited, *et al.* to combine with Kansas City Southern, *et al*. Testified in deposition.

STB Finance Docket No. 36514 – Submitted testimony on behalf of Canadian Pacific Railway Limited analyzing prospective combination of Canadian National Railway Company, *et al.* with Kansas City Southern, *et al.*

Real Estate Exchange, Inc. v Zillow, Inc. et al. – Filed declaration in support of motion for preliminary injunction.

U.S. v SBC Communications Inc. and AT&T Corp. and *U.S. v. Verizon Communications Inc. and MCI, Inc.* – Filed declarations in Tunney Act proceeding to explain the economic analysis of the United States for the proposed mergers and of the proposed consent decrees.

ICC Finance Docket No. 32760 – Submitted testimony on behalf of the U.S. Dept. of Justice analyzing prospective merger of Union Pacific Railroad and Southern Pacific Railroad. Testified in deposition.

PUBLICATIONS

"Evaluating Innovation Theories of Harm in Merger Review: Economic Frameworks and Difficulties" with Nathaniel Hipsman and Jessica Liu in *Getting the Deal Through—Merger Control 2022* September 2021

"Comparing Vertical Merger Guidelines Across Jurisdictions" with Peter Davis and Kostis Hatzitaskos in *Law360* February 2020.

"Revisiting Guidance on MFN Terms" with Andrew Sfekas in *Antitrust Chronicle* September 2019.

"Economics at the Antitrust Division 2016-2017: Healthcare, Nuclear Waste, and Agriculture," with A. Gerstle, H. Knudsen, D. Williamson, and J. Lee, *Review of Industrial Organization*, Vol 51, Issue 4, 2017, pp. 515-528

"The Year in Review: economics at the Antitrust Division: 2011," with F. Scott Morton, *Review of Industrial Organization*, Vol. 41, Issue 4, 2012, pp. 321-331

"The Antitrust Division: Economic Issues Presented in 2010-2011," *Review of Industrial Organization*, Vol 39, Issue 4, 2011, pp. 327-334

"The Year in Review: Economics at the Antitrust Division, 2004–2005," with E. Emch and K. Heyer, *Review of Industrial Organization*, Vol 27, Issue 3, 2005, pp. 197-221

"Ensuring Fair and Efficient Access to the Telecommunications 'Bottleneck'" with D. Rubinfeld, in C.D. Ehlermann and L. Gosling (eds.), Third Competition Law Annual 1998: Regulating Telecommunications (Hart Publishing: Oxford)

"An Empirical Analysis of Bank Branching: Portugal 1989-1991" with L. Cabral, in The Empirical Analysis of Industrial Organization Conference Report of the Centre for Economic Policy Research

WHITE PAPERS

"Comment on the January 2022 DOJ and FTC RFI on Merger Enforcement," with John Asker, Kostis Hatzitaskos, Nathan Miller, Aviv Nevo, and Ana McDowall, April 2022, available at https://downloads.regulations.gov/FTC-2022-0003-1847/attachment_1.pdf.

"Comments on the January 2020 Draft Vertical Merger Guidelines," with Kostis Hatzitaskos, Aviv Nevo, and Ana McDowall, February 2020, available at https://media.justice.gov/vod/atr/comments-draft-vmg/dvmg-0012.pdf.

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"Review: Selected Research of Andrew Sweeting, New Bureau of Economics Director" with Andrew Sfekas, Ross Askenazi, and Laurien Gilbert, January 2020, available at https://www.cornerstone.com/Publications/Articles/Selected-Research-of-Andrew-Sweeting.pdf

HONORS AND AWARDS

President's Award for Meritorious Executive	2017
Assistant Attorney General's Award for Excellence	2015
Attorney General's John Marshall Award for Legal Advice (Nominated)	2004
Assistant Attorney General's Award for Excellence	2001
Distinguished Service Award	1997
National Science Foundation Fellowship	1990 – 1993
Phi Beta Kappa	1989

CONFERENCE PARTICIPATION

8th Annual Bill Kovacic Antitrust Salon 2020
Discussed vertical merger guidelines and enforcement issues in a panel hosted by George Washington University School of Law and *Concurrences Review.*

"New Debates and Tensions in Antitrust: The 2020 Vertical Merger Guidelines" 2020
Discussed newly issued vertical merger guidelines with attorneys and economists in government and private practice.

ABA panel "Sequences & Sparks: Life Sciences Innovation Mergers." (podcast) 2020
Discussed issues of innovation competition, potential competition, and merger enforcement.

DOJ Workshop on Proposed Vertical Merger Guidelines 2020
Discussed issues of vertical merger analysis and suggested modifications to draft guidelines.

ICN Chief/Senior Economist Workshop 2016
Discussed tools and techniques of current interest with senior economists representing competition authorities around the world.

FCC Roundtable on Media Ownership Policies 2001
Discussed economic issues related to prospective changes in the FCC's rules governing media ownership.

PERSONAL

U.S. Citizen. Married with two daughters and one son.

APPENDIX B

Majure Reply V.S. Materials Relied Upon

Verified Statements

Expert Statement of W. Robert Majure, Ph.D., *Canadian National Railway Company, et al. – Control – Kansas City Southern, et al.* , Finance Docket No. 36514, June 28, 2021, and backup materials.

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APPENDIX C

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

MAJURE R.V.S. EXHIBIT C-1

{{[redacted]}}

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

MAJURE R.V.S. EXHIBIT C-2

{{[redacted]}}

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

MAJURE R.V.S. EXHIBIT C-3

{{[redacted]}}

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

MAJURE R.V.S. EXHIBIT C-4

{{[redacted]}}

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

REPLY VERIFIED STATEMENT OF RICHARD W. BROWN AND NATHANIEL S. ZEBROWSKI

TABLE OF CONTENTS

I. INTRODUCTION 3

II. OUR TRAFFIC STUDY PROVIDES A RELIABLE ESTIMATE OF THE LIKELY IMPACT OF THE CP/KCS COMBINATION ON RAIL TRAFFIC 6

A. Our Identification of Traffic Groups Providing Opportunities for Shifting to CPKC Is Sound and Largely Undisputed 6

1. BNSF Witness's Speculation Why Our Estimate May Be Understated Does Not Justify Increasing Our Estimate 7

2. CSX Witnesses Wrongly Assert that Two Relatively Small Traffic Groups of New Traffic Are Not Merger-Related 10

3. CN Witness Erroneously Rejects Two Groups of Traffic Not Directly Linked to Specific Station-to-Station Movements 11

B. Our Estimate of the Portion of Traffic Likely to Be Attracted to New CPKC Options Uses the Most Appropriate Approach Supported by the Data and Provides Accurate Results 13

1. The Criticisms of CN's Witness David Hunt Related to CPKC Route Length Are Contrary to Both What His and Our Data Analysis of Traffic Distributions Show 15

2. The Diversion Levels We Estimate Accurately Account for the Effects of Relative Route Distance, and Assertions by Other Railroads to the Contrary Overlook Both What the Data Show and the Real-World Factors That Drive Shipper Choices 23

3. The Levels of Shifting Traffic We Estimate Are Those That Would Occur Without Changes in Relative Rate Levels and Do Not Depend on "Foreclosure" of Other Options....36

C. We Accurately Estimate the Revenue Levels CPKC Will Earn for Diverted Traffic on a Pro Forma 2019 Basis....39

D. Our Rail-to-Rail Diversion Estimates Are Complementary to, and Do Not Conflict with, the Other Anticipated Traffic Gains Identified by Other Applicant Witnesses....43

III. THE RAIL TRAFFIC DIVERSION ESTIMATES OFFERED IN SUPPORT OF CN'S RESPONSIVE APPLICATION ARE FLAWED....44

A. Mr. Hunt's Diversion Percentages Are Effectively Random....44

B. The Majority of Diversion Volumes Mr. Hunt Identifies Are Based on Unfounded Premises....47

C. Mr. Hunt's Revenue Estimates Are Methodologically Unsound and Overstated....56

IV. TRAFFIC DATA SHOW THAT KCS-CN ROUTES VIA SPRINGFIELD PLAY NO MEANINGFUL COMPETITIVE ROLE....58

APPENDIX A....61

I. INTRODUCTION

1. We are Richard W. Brown and Nathaniel S. Zebrowski of FTI Consulting, Inc. We previously submitted a verified statement to the Surface Transportation Board ("STB") in this proceeding on October 29, 2021, included in Canadian Pacific Railway's ("CP") Application for Control of Kansas City Southern ("KCS"). In that opening verified statement ("O.V.S."), we estimated the amount of existing railroad traffic the combined CP/KCS system would attract, commonly referred to as "rail-to-rail diversion" traffic. We determined that CPKC will attract 216,675 units of existing railroad traffic annually, representing $513.1 million in revenues at 2019 levels, by the third year of combined operations. Details on our methodology and results are provided in our O.V.S.

2. In this statement, we address various claims made by other Class 1 railroads concerning our estimate of traffic CPKC is likely to attract.[1] Generally speaking, the railroads do not dispute that the categories of traffic we identified as likely to shift to CPKC would be affected by the proposed Transaction, nor do they argue there were categories we should have identified but did not. Instead, the railroads express in various ways the view that much of the traffic we estimated would move to CPKC would only do so via foreclosure because CPKC routes would often be somewhat longer than existing routes. CN further alleges that we erred by not adjusting diversion percentages on a lane-by-lane basis to account for differences in relative route lengths. Despite making these assertions, none of the railroads address the analysis provided in our initial statement demonstrating that modest differences in relative route lengths minimally affect traffic shares. In fact, CN's own rail-to-rail diversion analysis corroborates

[1] We did not identify any claims directly addressing or critiquing our estimate in the comments of non-Class 1 railroad parties.

both that the diversion percentages we apply are reasonable, and that it would be inappropriate to adjust them formulaically as a function of route length.

3. CSX and CN mistakenly believe we should have assumed that rate reductions will be required to attract traffic to CPKC, and the absence of such reductions means CPKC can only attract traffic by foreclosing competitors. By design, our study estimates the amount of traffic that CPKC would attract absent foreclosure. As we explain, if we had assumed CPKC reduced its rates while railroads competing for eligible traffic did not, we would have found higher levels of traffic moving to CPKC.

4. Additionally, various other claims made by the railroads are unfounded, as we explain. These claims include allegedly understating traffic that CPKC may attract, making technical errors developing revenue estimates, and double counting existing and growth-related traffic diversion volumes. None of the railroads' comments merit any adjustments to our initial estimate of traffic that CPKC may attract. We believe our estimate is reasonable and accurate and fully supports the sufficiency of CP's Application.

5. This statement also addresses the rail-to-rail traffic diversion estimates put forward by Mr. David Hunt in support of CN's Responsive Application. As discussed in Section III, there are several major flaws and inconsistencies that make his methodology unreliable and his results unrealistic. First, approximately one third of his diversion traffic is specialized RoadRailer service that CN does not provide. Second, he found substantial amounts of additional diversion traffic by forcing his model to ignore the fact that CN already has existing single-line routes to St. Louis. These and numerous other problems are addressed in detail in Section III.

6. At the request of counsel for CP and KCS, we also provide an analysis of the traffic moving on KCS's Kansas City-Springfield/St. Louis Line, as well as an analysis of historical traffic patterns over corridors where KCS's Springfield Line could be used as part of a KCS-CN interline routing alternative for movements in corridors between Kansas City and/or Mexico, on one end, and Chicago, Detroit, or Toronto on the other end. This analysis shows that in recent history, the Springfield Line has rarely been used (in fact almost not at all) by traffic moving over these corridors (including traffic that travelled over these corridors as part of a broader movement). Instead, the traffic moves over a wide variety of other routes, many of which are single-line. Thus, there appears to be no practical cases where a CP/KCS combination could theoretically affect competition or lead to the foreclosure of any interline routes.

7. We have organized the remainder of our statement into three sections. Section II responds to critiques of our traffic study, specifically: Section II(A) explains that our identification of traffic groups providing opportunities for traffic CPKC will attract is sound and largely undisputed; Section II(B) explains that our process for estimating the traffic CPKC will attract uses the most appropriate approach supported by the data, and addresses the various incorrect claims made by other railroads concerning route circuity, foreclosure, and rate changes; Section II(C) discusses why our revenue estimates are accurate and the criticisms raised by CN are wrong; and Section II(D) describes how the existing railroad traffic we estimate will move to CPKC is aligned with the growth traffic estimated in the Verified Statement of Jonathan Wahba and Mike J. Naatz ("Wahba/Naatz O.V.S."). Section III addresses CN's Responsive Application, including Mr. David Hunt's flawed rail-to-rail diversion estimates. Section IV provides an analysis of traffic patterns relevant to KCS's Springfield line.

II. OUR TRAFFIC STUDY PROVIDES A RELIABLE ESTIMATE OF THE LIKELY IMPACT OF THE CP/KCS COMBINATION ON RAIL TRAFFIC

A. Our Identification of Traffic Groups Providing Opportunities for Shifting to CPKC Is Sound and Largely Undisputed

8. To start, we initially identified 33 individual groups of commodity-specific regional traffic flows, totaling 569,166 units (at 2019 levels), which represents the individual rail freight movements where shippers would gain new competitive options immediately after the CP/KCS combination, regardless of what portion actually moves to CPKC.[2] Class 1 railroads offered various critiques of this population, to which we will respond in this section. Specifically:

- BNSF's witness Benton Fisher argues we may have generally understated the population of theoretically divertible traffic;
- CSX queries whether two of the groups involving automotive diversions to Kansas City are properly treated as Transaction-related; and
- CN questions the validity of two other groups of lumber and grain traffic not tied to specific existing 2019 station-to-station movements.

9. Besides these limited items, no railroads or shippers raised any specific concerns about the validity of the 33 traffic groups or argued other groups should have been included. We explain below why the alleged issues raised by the Class 1s, all minor in nature, are either invalid or do not justify adjustments to our estimate. We also affirm our initial findings accurately identified the amount of traffic that would benefit from new competitive options under the CP/KCS combination.

[2] *See* Table 5 of our O.V.S.

1. BNSF Witness's Speculation Why Our Estimate May Be Understated Does Not Justify Increasing Our Estimate

10. BNSF's Witness Benton Fisher offers three reasons suggesting why he believes we may have underestimated the amount of traffic that would be attracted to CPKC single-line service. However, he does not attempt to quantify the additional amount he believes will move to CPKC. None of the reasons he provides merit adjustments to our estimate.

11. First, Mr. Fisher suggests that the amount of traffic we identified as potentially moving to CPKC may have been understated due to the exclusion of 361,000 units during the initial screening process.[3] This is the same alleged issue raised by UP in its November 19, 2021, filing petitioning the STB to reject the Application as incomplete, and sufficiently addressed by Applicants in their November 22, 2021 reply. Again, it may be addressed with a simple look at the traffic in question—a step neither BNSF nor UP appeared to have taken as a part of formulating their criticisms: the large majority of the traffic in this category is clearly not eligible to move to CPKC.[4] Over 210,000 of the 361,000 excluded units are intermodal movements originating or terminating in locations where CP or KCS do not currently have intermodal facilities.[5] As we explained in our initial statement, and as Applicants explained in the

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[3] *See* BNSF-9, Verified Statement of Benton V. Fisher ("Fisher V.S.") at 13-14. We confirm the correct figure is 361,000; not the 380,000 figure inadvertently referenced in our O.V.S.

[4] This is seen based on review of the traffic characteristics for all 361,000 units in question that are readily available in our workpapers. *See* "8 – Diversion Identification.xlsx," tab "Calculations," at Columns B to AA.

[5] Specifically, these locations are: 1) The northeastern states of New York, Pennsylvania, New Jersey, and Massachusetts; 2) Portland, OR; 3) Memphis, TN; and 4) Houston, TX. *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Non-Divertable Summary." Regarding Houston, while KCS does have an intermodal facility at Kendleton outside of Houston, due to trackage rights restrictions this facility cannot be used for traffic moving to/from CP-served territories, as explained in footnote 11 of our initial statement.

November 22, 2021 filing[6], our estimate is limited to traffic that can be handled by existing CP and KCS facilities, clearly excluding intermodal traffic without intermodal facilities.[7] Another nearly 50,000 units involve traffic originating or terminating in Kentucky, Ohio, or other states where CP has only limited operating rights over other carriers' lines, and where CP generally does not provide direct service options.[8] It also would not have been inappropriate to include in our estimates much of the remaining traffic—about 100,000 units, representing less than one-tenth of all traffic screened, for various reasons. As examples, this traffic may be automotive traffic moving to destinations where CP or KCS have no automotive facilities, or, consist of movements originating or terminating in Houston where KCS likely does not have local access rights. As explained in our initial statement, we considered the small portion of this traffic remaining as too heterogeneous to reliably classify as potentially moving to CPKC.[9] Unsurprisingly, neither BNSF nor UP identified any subset of the 361,000 units in question they assert would likely be attracted to CPKC.

12. Second, Mr. Fisher identifies minor discrepancies in our assignment of four lanes (out of the thousands we reviewed) to traffic groups.[10] Specifically, he provides "as examples" four lanes where we included only a portion of the traffic in the automotive line of business as

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6 *See* CP-33/KCS-21, Applicants' Reply to Union Pacific's "Petition to Reject Application as Incomplete" at 6 and 7.

7 This is not to say that in the future CPKC could not pursue investment initiatives seeking to attract such types of growth-related traffic. We take no opinion on this, but only point out that these hypothetical future opportunities are properly not included in the scope of our study of existing rail-to-rail traffic that could be attracted to CPKC.

8 *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Non-Divertable Summary." Much of this traffic was only picked up in the initial screening model due to anomalous station reporting in the CSM as explained in footnote 11 of our initial statement.

9 *See* Brown/Zebrowski O.V.S. at 17.

10 *See* Fisher V.S. at 14.

eligible for diversion.[11] These four lanes are not just examples of such discrepancies; they in fact comprise nearly all of such cases.[12] Accordingly, addressing this minor lane classification issue would involve adding a few hundred units at most to our estimate of over two hundred thousand units—a negligible impact on our findings that does not warrant adjustment.[13]

13. Third, Mr. Fisher claims that the CWS understates UP's Mexico-U.S. cross-border traffic by approximately 20 percent overall, which he argues may in turn result in our estimate being understated. [14] His concern is largely moot due to our use of KCSM 100-percent traffic tape data, not CWS data, for quantifying the majority of diversions involving this traffic group. Only about {{{[redacted]}}} estimated diverted units involving UP's Mexico-U.S. cross-border traffic, i.e., the portion interchanged with FXE and not included in KCSM 100% traffic tape data, are derived from CWS data.[15] To put this in context, even assuming the 20 percent understatement ratio estimated by Mr. Fisher was an appropriate adjustment to apply, this would only increase our diversion estimate by about {{{[redacted]}}} of 216,675

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[11] This minor discrepancy is mostly related to inadvertently omitting shipments reporting the 7-digit STCC code for trucks while including shipments reporting the 7-digit STCC code for automobiles.

[12] *See* Fisher V.S. at 14 where Mr. Fisher claims there to be "many instances of shipments of the same commodity on the same traffic lane for which Applicants dropped a portion…and concluded another portion would divert to new single-line service on the combined CP-KCS system." The four examples identified account for 730 units that were dropped due to this minor lane classification issue. After review of the remainder of lanes screened in our diversion process, we only found an additional 110 units that may be affected by this type of classification issue identified by Mr. Fisher. *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Lane Classification Analysis."

[13] Mr. Fisher also speculates that there may be additional discrepancies based on application of radial adjustments, but does not provide any examples of this.

[14] *See* Fisher V.S. at 16 and 17.

[15] The 55,440 units of traffic originating in Mexico as reported in the 2019 CWS cited by Mr. Fisher do not include the large portion of traffic originating in Mexico that is reported in the CWS as originating at a border crossing location such as Laredo, Eagle Pass, or El Paso. As such, this figure does not provide a meaningful reference point.

estimated units.[16] However, applying such an adjustment would be speculative at best, since Mr. Fisher's calculations provide no way to know whether the portion of UP's Mexico-U.S. cross-border traffic eligible to move to CPKC is proportional to the entire set of traffic on which his adjustment is based. Our approach[17] is consistent with the guiding principle of past rail-to-rail diversion studies to use the best data available at the time the study is performed.[18]

2. CSX Witnesses Wrongly Assert that Two Relatively Small Traffic Groups of New Traffic Are Not Merger-Related

14. CSX witnesses Julie Carey and Albert Bremser question whether two groups of traffic, consisting of automotive traffic moving from Canada to Kansas City and Mexico to Kansas City, are properly treated as Transaction-related since, for the two groups respectively, CP and KCS can already serve both origin and destination territories.[19] As explained in our initial statement and discovery responses, the Transaction will improve CPKC's ability to attract

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[16] *See* workpaper "8 – Diversion Identification Reconciliation.xlsx," at tab "Cross-border CWS Summary."

[17] The 2019 100% traffic tape data produced by UP and BNSF after our traffic diversion study was performed confirm the CWS data available to us at the time is well-aligned with the traffic flows interchanged with FXE at Eagle Pass relevant to our study. Excluding southbound grain, which our diversion methodology treats separately from waybill data (it is instead based on overall U.S. trade export statistics) BNSF and UP's internal waybill data report {{[redacted]}} loaded revenue units through Eagle Pass, and the CWS data reports {{{[redacted]}}} units through Eagle Pass. This difference of {{{{[redacted]}}}} indicates that the drivers of the overall differences Mr. Fisher observes are related to other traffic flows not relevant to our quantification of diversions. *See* workpaper "CWS and Tape Data Comparison.xlsx," at tab "Summary Figures."

[18] *See, e.g., Burlington Northern Inc. and Burlington Northern R.R. Co. – Control and Merger – Santa Fe Pacific Corp. and the Atchison, Topeka and Santa Fe Ry. Company*, Finance Docket No. 32549, BN/SF-7, Verified Statement of Mark Hornung (*BN/ATSF* Rail-to-Rail Diversion study), at 6 (in workpapers); *see also Canadian National Ry., et al. – Control – Illinois Central Corp., et al.*, Finance Docket No. 33556 at 4, CN-IC 7, Verified Statement of George Woodward (*CN/IC* Rail-to-Rail Diversion study) (in workpapers).

[19] *See* CSX-8, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser ("Carey/Bremser V.S.") at 33. Their vague suggestion that perhaps CP could acquire rights to use IFG from KCS without the combination is unfounded and contrary to the expressed views of CP company witness Mr. John Brooks related to past coordination efforts between the two independent companies. *See* Brooks O.V.S. at paragraphs 30-6.

such traffic because it will enable CP to gain access to an automotive ramp in Kansas City (at International Freight Gateway) for the first time as well as create economies from increased automotive movements across the combined system through Kansas City.[20]

3. CN Witness Erroneously Rejects Two Groups of Traffic Not Directly Linked to Specific Station-to-Station Movements

15. CN's Witness David Hunt claims that we have no basis for including lumber traffic from Canada to Dallas or grain traffic from the Midwest to Mexico because, unlike the rest of the rail traffic predicted to shift to CPKC in our estimate, these amounts are not directly tied to individual station-to-station moves in the 2019 traffic data.[21] Mr. Hunt's reasoning is at odds with the purpose of a rail-to-rail traffic analysis and is not followed by his own approach for estimating traffic shifts for purposes of CN's Responsive Application.

16. As previously explained both in our O.V.S. and by Mr. Wahba and Mr. Naatz, these traffic shifts are likely because CP origins capable of supplying volumes of lumber and grain will benefit from single-line access to destinations demanding these commodities.[22] In other words, had CP and KCS functioned as a combined system in 2019, and single-line service been available, incremental amounts of traffic to certain KCS and KCSM destinations would likely have originated on locations on CP. This is driven by the common sense fact that grain does not grow at grain elevators, and trees do not grow at sawmills. Instead, producers choose which rail origin to move their grain and lumber products to from the field, and this decision is influenced by what route options and destinations are efficiently accessed at the different origin alternatives. Mr. Hunt recognizes in his own diversion study that grain "has some flexibility in

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20 *See* Brown/Zebrowski O.V.S. at ¶¶ 14 and 66.

21 *See* CN-13, Verified Statement of David Hunt ("Hunt Comments V.S.") at 21-23.

22 *See* Brown/Zebrowski O.V.S. at ¶¶ 36-44, 79-81 and Wahba/Naatz O.V.S. at ¶¶ 21-22, 96-98.

rail loading and unloading locations," indicating he agrees with the core premise specific to our grain diversion analysis.[23] Indeed, one of the fundamental features driving beneficial railroad combinations is the creation of enhanced single-line transportation linkages efficiently connecting underutilized origins supplying product with new destination options demanding this product. Not accounting for such synergies would have been inappropriate, and opened us to criticism from railroads and others that our estimate failed to address groups of traffic that CPKC would be reasonably anticipated to attract.

17. Mr. Hunt also disputes our application of a 15 percent growth rate to this lumber diversion calculation. We applied this growth rate in order to properly account for a known and quantifiable change in the market. That said, this adjustment only results in approximately {{[redacted]}} additional diversion units, so its effect on our overall diversion estimate is negligible.[24] In response to Mr. Hunt's allegation that there was no analysis to support these figures, we refer to the verified statement of Messrs. Wahba/Naatz referencing the "demand for lumber for the hot housing and construction markets...especially the Dallas/Fort Worth metropolitan area…," *see* Wahba/Naatz O.V.S. at ¶ 97, to changes in BNSF and UP's lumber traffic levels between 2019 and 2021 reported in their Quarterly Commodity Statistics, and to 2019 to 2021 changes in local housing starts in the Dallas area.[25]

18. Mr. Hunt's claim is ironic because he estimates diversions involving the Port of Montreal in CN's Responsive Application in a comparable manner, although he provides

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23 *See* CN-14, Verified Statement of David Hunt ("Hunt Application V.S.") at 37.

24 {{[redacted]}} *See* Brown/Zebrowski O.V.S. at ¶ 81.

25 *See* workpaper "Available Lumber Figures.xlsx," at tab "Summary Figures."

significantly less supporting analysis and rationale.[26] The purpose of a rail diversion study is to analyze where shifts of existing rail traffic are expected to occur and identify the corresponding amount of diversion traffic.[27] It is appropriate, and even necessary, to include any diversions from anticipated traffic pattern changes in a diversion study, as we both have done in different instances with different degrees of support. His suggestion that we did not provide explanations for this traffic appears to overlook substantial portions of our initial statement providing explanations.[28]

B. Our Estimate of the Portion of Traffic Likely to Be Attracted to New CPKC Options Uses the Most Appropriate Approach Supported by the Data and Provides Accurate Results

19. As discussed above, the other railroads express few concerns with our identification of traffic that will have new competitive options introduced by the Transaction. The issues they do raise relate to the portion of traffic attracted to CPKC single-line routes from these railroads' existing routes. We address their various claims and explain why our method is the most appropriate data-supported approach, and provides accurate results.

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[26] Specifically, his diversion estimate assumes that 15 percent of volumes currently moving through New York and New Jersey ports would instead move through the Port of Montreal were CN to gain a single-line route to Kansas City. He does not provide any source for this 15 percent assumption, which appears strictly as a hard coded figure in his workpapers. *See* Hunt Application V.S. at 19-20. In contrast, as discussed in our initial statement, our assumption that CPKC would gain a 5 percent market share in specific grain origin areas is provided by CP's Vice President Jonathan Wahba, who based this specific assumption on his overall knowledge of the grain market, as detailed in his verified statement. Our assumption that CPKC would gain a 5 percent market share at CP-accessible lumber origins to supply Dallas is also directly related to an understanding of the current market shares of lumber supply to the Dallas area, and KCS's capacity to handle additional lumber to supply the Dallas area. *See* Wahba/Naatz O.V.S. at ¶¶ 21 and 98 and Brown/Zebrowski O.V.S. at ¶ 80.

[27] *See* 1180.7 (a) which includes analysis identifying "the anticipated effects of the transaction on traffic patterns."

[28] *See* Brown/Zebrowski O.V.S. at ¶¶ 36-44 and 79-81.

20. The other railroads do not deny that CPKC will have abundant opportunities to compete, but argue that the portion of traffic we estimate CPKC will attract is overstated, or depends on theorized use of foreclosure tactics or specific rate reductions not included in the scope of our study to achieve. As we explain, these claims are incorrect, and misconstrue the nature of the analysis we performed to estimate the portion of traffic that will shift to CPKC. We estimate that 201,707 of 569,116 units of the traffic potentially susceptible to movement over CPKC routes (i.e., "eligible" for potential diversion) will be attracted to CPKC within three years of the combination. This figure is determined by applying, on a lane-specific basis, several different diversion percentages that vary depending on the route options available to the traffic. The diversion percentages are set based on the average distributions of actual traffic shares observed across hundreds of county-to-county pairs with route options comparable to those of the divertible traffic. Overall, our analysis considered traffic distributions among routes presenting different types of competitive situations involving over 100 million units of traffic in the 2015-2019 CWS travelling on over 1,000 distinct county-to-county pairs.

21. For example, when determining the appropriate diversion percentage to apply to carload traffic currently using an independent interline route, i.e., where a new CPKC single-line route would be competing against an interline route not involving CP or KCS, we look at the average share of traffic that uses a single-line route option for county-to-county pairs where there is at least one interline route option involving two other railroads that is also used. In this case, there are 221 such county-to-county pairs involving rail movements over 1,000 miles in the

2015-2019 CWS data and the average share using the single-line route option is 56 percent. Our use of a 50 percent diversion rate for comparable traffic is driven by this data finding.[29]

22. Our data-driven approach is based on average traffic share distributions across hundreds of individual regional traffic flows for rail traffic with route options and competitive characteristics similar to those of the divertible traffic. Applying average shares derived from this analysis to hundreds of identified divertible lanes with like characteristics provides an accurate and statistically sound method for estimating the average amount of traffic that will move to CPKC in a given period across eligible lanes.

1. The Criticisms of CN's Witness David Hunt Related to CPKC Route Length Are Contrary to Both What His and Our Data Analysis of Traffic Distributions Show

23. CN's Witness David Hunt alleges that our estimate of the portion of eligible traffic CPKC would attract is overstated due to CPKC often having relatively longer routes. However, to reach this conclusion, he dismisses the results of our data analysis and his own data analysis on the topic, both of which show that it would be wrong to conclude that modest differences in route mileage strongly influence the portion of traffic a competing carrier is likely to attract. Mr. Hunt submitted both a Verified Statement supporting CN's Comments addressing CP's Application ("Comments V.S."), including our estimate of rail-to-rail traffic shifts CPKC will attract, and a separate Verified Statement supporting CN's Responsive Application, which estimated diversions relating to the proposed forced divestiture of KCS's Springfield line to CN

[29] As explained in our opening statement and in discovery responses to UP, BNSF, and CSX, considering all relevant factors—including relative route length and the larger size of the Class 1 railroads that would compete against CPKC—we select a 50% diversion percentage as a reasonable assumption to use in our estimate. Given the overall breadth of the analysis, and use of average outcomes across large sets of traffic, we think using a more specific diversion percentage, e.g., 56%, would provide an unjustified level of precision disproportionate to the purpose of the study. Such a level of detail would not materially alter the results of our study and could lead to a misleading sense of precision.

("Responsive V.S."). In Mr. Hunt's Comments V.S., his main criticism is that our approach does not accurately identify the specific movements of traffic that will be attracted to CPKC, and overstates the amount of traffic that will move to CPKC. Specifically, he asserts that we err (i) by not adjusting individual lane diversion percentages based on differences in relative route lengths, (ii) by not basing our diversion percentages on any data analysis[30] and, (iii) somewhat contradictorily, our data analysis demonstrating that differences in route length do not heavily influence traffic shares is flawed.[31] We agree that distance is an important component to consider in transportation modelling, which is why our initial statement discusses and analyzes the issue of relative route length in depth,[32] but Mr. Hunt errs by concluding that the distance component must be used in a formulaic way to adjust predicted traffic shares, regardless of what the relevant data analysis actually shows.

24. While he calls our statistical analysis "flawed," he does not provide any reasons disputing our methodology. The data analysis we conducted was properly performed and correctly interpreted to show that traffic shares are only minorly influenced by modest differences in route length. For example, Figure 1 below, which is a reproduction of Figure B3 in our initial statement, very clearly shows that there is no definitive pattern of rail traffic shares changing as relative route distance changes.

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30 *See* Hunt Comments V.S. at 13 ("…they offer no data, analysis, or other evidence to support such inflexible percentage-based diversion assumptions").

31 *See* Hunt Comments V.S. at 9. ("They conducted a statistical analysis comparing the relationship between rail carriers' length-to-haul and their historical market share…" and "…using their flawed analysis as justification…[they] applied a set of fixed percentage-based diversion rules.").

32 *See* Brown/Zebrowski O.V.S. at ¶¶ 28 & 30-31 and Appendix B.

FIGURE 1
REPRODUCING FIGURE B3 FROM BROWN/ZEBROWSKI O.V.S.{{{



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It would be wrong to review the above data and conclude, as Mr. Hunt appears to do, that diversion percentages should formulaically be adjusted on a lane-by-lane basis based on relative route mileages. Accordingly, we correctly used diversion percentages that do not vary based on relative mileages, rather than introduce misleading assumptions about the effects of relative route length that were unsupported by the data.[33] While use of that sort of approach is unsupported,

[33] As explained in our initial statement, even though we conclude it is inaccurate to formulaically adjust diversion percentages based on relative route lengths, this does not mean we dismissed the effects of relative route lengths on traffic shares as Mr. Hunt wrongfully claims (*see* Hunt Comments V.S. at 14: "Brown and Zebrowski apparently concluded that such substantial route-distance disadvantages would not affect CPKC's ability to divert traffic from carriers with more efficient routes"). Specifically, based on review of the data we recognized that on aggregate the "carrier having the shorter route likely to take a slightly larger share of the traffic," and "we have considered that CP/KCS single-line routes for the diversion opportunities average 10 to 20 percent longer than those of the shortest rival route." (Appendix B ¶¶ 6 and 15). This is one of the factors that led us to select diversion percentages that "err on the side of conservatism in estimating the likely lane shares that CPKC offerings would achieve."

the data does support treating diversion routes that are significantly longer that other existing options as unlikely to attract rail traffic shifts. Accordingly, we applied a filter to remove from consideration potential shifts to routes that were more than 50% or 500 miles longer than the shortest possible existing route.[34] In contrast, despite fixating on how diversion percentages should be adjusted formulaically based on relative route length, Mr. Hunt in his own analysis did not apply any such filter to avoid (incorrectly) identifying diversions to highly-circuitous routes.[35]

25. Tellingly, if Mr. Hunt's method for estimating rail-to-rail diversions for the CN Responsive Application were applied to our analysis, the majority of new CP/KCS single-line routes would be considered *similar to or more efficient* than existing routes. Mr. Hunt states that each interchange adds impedance equivalent to between 350 and 650 route miles, so by his own standards, single-line CP/KCS routes would be *preferable* to interline routes even if they were 350 to 650-miles longer, and, as Mr. Hunt notes, CPKC routes will on average be only 217-miles longer.[36] In other words, although he claims that our estimate is overstated due to CP/KCS often having somewhat longer routes, his own analysis recognizes that on average CP/KCS has more

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[34] As explained in our discovery response to BNSF, this filter was informed based on the observation that few lanes had multiple routes participating where one route was more than 50% longer than the other. *See* CP response to interrogatory number 2 in BNSF's second set of discovery requests ("The witnesses' examination of traffic distributions described in their Appendix B (Application Vol. 2 at 2-175 to -184) demonstrates that in the majority of cases where multiple rail routes are used to connect the same county-to-county pairs, the route lengths are within 50 percent of one another.").

[35] As a result, he predicts traffic diverting to much more highly circuitous lanes. For example, he would divert {{{ }}} from CP's local lane between Calgary and Kansas City to the CN route using KCS's Springfield line which is over 500 miles longer. *See* Hunt workpaper "HC- 2022January_R2R_Auto_v4.xlsx," tab "New2Existing," at Rows 53 and 54.

[36] Even assuming there was only one junction on the existing route, and it were assigned the lowest 350-mile equivalent impedance, this would still be higher than the 217-mile average additional length of CP/KCS routes he cites.

favorable single-line routes for diversion traffic than currently moves on interline routes, which represents over two-thirds of our estimated diversion traffic.[37]

26. In addition, Mr. Hunt's approach produces results where relative route lengths barely influence diversion percentages. In fact, Mr. Hunt's approach goes so far as to produce *higher* diversion percentages precisely because the routes are *longer*. For example, Mr. Hunt's approach would divert 39.2% of carload traffic from a 1,000 mile interline-line route to a 1,000 mile new single-line route, but would divert 39.7% to a 2,000 mile new single-line route. In other words, he would divert more traffic to a route simply because it is twice as long, which clearly contradicts his criticisms of us for not lowering diversion percentages when routes are relatively longer. In other cases, while the diversion percentages would slightly decline based on relative route length, the changes are negligible. For example, his approach would divert 39.2% from one 1,000 mile single line route to a 1,000 mile new single-line route, but would divert 38.5% to a 2,000 mile new single-line route.[38]

27. Not only does his diversion analysis contradict his criticisms of our treatment of relative route distances, but his own analysis provides statistical confirmation that our determination not to adjust diversion percentages based on relative route lengths is correct. At a high level, this occurs because he uses insufficient statistical techniques to "fit" the coefficients of his regression model against the data. Consequently, he does not generate the standard statistical information required to see that the coefficient in his model that is related to mileage is statistically insignificant. Specifically, he compares the traffic shares predicted by his "logit"

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[37] *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Interline Share."

[38] The above percentages show results for his grain/other model, but similar results are also produced for Mr. Hunt's automotive and intermodal models. *See* workpaper "Diversion Percentage Analysis.xlsx," at tab "Summary Figures."

equation with actual traffic shares across lanes served by multiple routes, and forces Microsoft Excel to solve for the coefficients in this equation that yield the minimum square of the difference between the two shares across all observations. However, this approach does not allow for measuring the relevant statistical parameters required to properly assess the resulting coefficients, in particular, the standard deviations necessary to construct confidence intervals to determine whether the coefficients are statistically significant.

28. To address this deficiency, we imported his regression data for each of his three regressions (which underlie his intermodal, automotive, and carload "logit" equations) into a standard statistical software platform (called "R") and re-ran the analysis using the same regression parameters and equation form as he did. We generated similar coefficients, but found that the coefficients related to mileage are statistically insignificant in each case.[39] Table 1 below provides the statistical parameters we developed for assessing Mr. Hunt's regression for predicting non-automotive carload diversions.

[39] The reason why our coefficients are slightly different is because his method using "Solver" in Excel differs from a proper application of regression fitting equations contained in a standard statistical software program. As such, we view our results as more accurate.

TABLE 1[40]
STATISTICAL PARAMETERS FOR ASSESSING HUNT REGRESSION

Results:	Mr. Hunt's Coefficients Determined Using Statistically Incomplete Excel "Solver" Method	Coefficients Fitted Using Statistical Software	P-value (greater than 5% is statistically insignificant at the 95% confidence level)	Statistically Significant?
Intercept	n/a	2.510	0.0%	Yes
Junction Frequency Variable	-2.099	-2.306	0.0%	Yes
Impedance (mileage-related) Variable	**-0.044**	**-0.045**	**24.8%**	**No**

29. Table 1 shows that his mileage-related variable is not statistically significant. We confirmed this is also the case for his automotive and intermodal diversion equations, as detailed in our workpapers.

30. In other words, Mr. Hunt did not perform his regressions in a statistically robust way and failed to identify his mileage-related coefficients are statistically insignificant. This is important because in past diversion studies, when a coefficient in the regression model was statistically insignificant, it was dropped from the equation predicting diversion percentages.[41] That his own regressions confirm that such a variable is not statistically significant undercuts his criticism that we erred by not including this variable in our analysis.

31. The examples Mr. Hunt provides where he claims our diversion percentages err by not changing based on relative mileage illustrate the illogic of his criticisms. In Table 2

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40 *See* workpaper "Regression Fitting Analysis.xlsx," at tab "Final Table."

41 *See* CN-IC-7, Woodward V.S. at II-25.

below, we apply the traffic shares his approach would assign to the lane examples where he alleges our diversion percentages are too high and/or do not properly change based on relative mileage.[42]

TABLE 2[43]
THE EXAMPLE DIVERSION LANES USED BY MR. HUNT TO ATTEMPT TO CRITICIZE OUR DIVERSION PERCENTAGES SUPPORT THE SUPERIORITY OF OUR METHOD

From Exhibit 4-1 in CN Comment Verified Statement of David Hunt:							FTI Calculation:
Origin	Destination	Current RR	Current RR Miles	CPKC Miles	Difference in Miles	Assigned Diversion Percentage	Diversion Percentage Under Mr. Hunt's Method
New Orleans, LA	Superior, WI	BNSF	2023	1675	-348	25%	21.1%
New Orleans, LA	Elkhart, IN	NS	1075	1476	401	25%	27.3%
Chicago, IL	San Angelo, TX	BNSF	1274	1499	225	25%	27.5%

32. Table 2 shows that for each example he raised in attempts to criticize our use of a 25% diversion percentage, diversion percentages under his approach would both be generally similar to ours, and would minimally change depending on mileage. The one case where his approach yields a slightly lower diversion percentage than we would use is, nonsensically, the lane between New Orleans and Superior where CPKC has the shorter route. In light of this, his criticisms that our diversion percentages are overstated and do not identify the specific traffic that will be attracted to CPKC should be rejected.

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[42] We apply this method by including routes that were not historically used, since his approach does this in at least some instances. Were we not to include such routes, this would result in higher estimated diversion percentages, but the dynamics of how they varied minimally based on relative mileage would not change.

[43] *See* workpaper "Diversion Percentage Analysis.xlsx," at tab "Summary Figures."

2. The Diversion Levels We Estimate Accurately Account for the Effects of Relative Route Distance, and Assertions by Other Railroads to the Contrary Overlook Both What the Data Show and the Real-World Factors That Drive Shipper Choices

33. Although the preceding sections have already refuted the mistaken notion that modestly longer CP/KCS routes would fail to attract to CPKC the levels of traffic we predict, given the prevalence of this theme echoed by other railroads, we provide additional context on why our data-driven findings on the role of relative route length are reasonable and accurate in light of the dynamics of shipper preferences and railroad industry operations.

34. Several other railroad witnesses, including Carey/Bremser for CSX and Messrs. Haley, Salop, and Rocker/Turner for UP, all suggest in one way or another that CP/KCS's relatively longer routes would fail to attract traffic to CPKC voluntarily, and, based on this flawed premise, reason that CPKC would attempt to use foreclosure tactics.[44] The views of UP are particularly relevant, because our study estimates that approximately {{[redacted]}} intermodal containers and {{[redacted]}} carloads would shift from routes involving UP through Laredo to CPKC single-line routes as a result of the Transaction.[45] While none of the other railroads' witnesses purport to have performed any traffic analysis to support their critiques and do not offer any substantive criticisms of our traffic analysis, we further explain why our results are reasonable.

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[44] *See* Carey/Bremser V.S. at 30-31; UP-10, Verified Statement of Thomas Haley at 21-22; UP-10, Verified Statement of Kenny Rocker and John Turner ("Rocker/Turner V.S.") at 8-11; and UP-10, Verified Statement of Steven Salop at 29-31.

[45] *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "UP Traffic Through Laredo."

35. For starters, it should be recognized that there are many aspects that influence how shippers value competing transportation options, and the relative weight shippers assign different aspects. For example:

- A shipper that cares most about running consistent operations based on predictable supply chain schedules may value service reliability the most.
- A shipper with adequate storage inventory and railcar capacity may value price above service factors. Shippers that owned their own rail cars would also factor equipment utilization levels and turn times into the equation when determining the lowest cost option.
- A shipper with more complicated or intense industry switching service or changing requirements may prefer one line haul carrier over a second regardless of rates or service times.
- A shipper with multiple origins or destinations may select a line haul carrier based on the best option for all of its business, which may mean suboptimizing a single location.

These are just a few examples, and shippers may value multiple elements of service and price simultaneously at different relative weights, but this list illustrates why we cannot base shipper preferences solely on the relative length of different routes. If this were true, the traffic that could be attracted to CPKC would already be travelling on the shortest existing route. As we have already demonstrated, and the other railroads have not disputed, this is not the case.[46]

36. This reality is well recognized in the railroad industry. For example, Oliver Wyman released a survey in 2020 that found the three elements of railroad service the shippers valued most were "on-time performance, shipment visibility, and the availability of equipment and capacity."[47] Since route length or fastest transit time (which is not synonymous with route

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46 *See* Brown/Zebrowski O.V.S. at Table 6.

47 *See* workpaper "2020 Rail Service Survey Article.pdf."

length) are not even identified as any of the top elements of service, any assertions about the singular importance of relative route length should be viewed skeptically.

37. Even when shippers value transit time above all else, it would be wrong to suppose the shorter route would necessarily provide the faster transit time. For example, assuming average train velocity of 20 miles per hour, a CP/KCS single-line route would have the same transit time as an interline route up to 480 miles longer using the rule of thumb convention that an interchange adds 24 hours.[48] UP and KCSM car event data {{[redacted]}} for the UP-KCSM interchange at Laredo, where it takes on average {{[redacted]}} between when a car arrives on KCSM at Laredo, TX and when it departs on a UP train from Port Laredo, TX.[49] UP's witness Mr. Haley provides a useful reference in his estimate that UP's route would take 32.8 hours between Laredo to Chicago while the existing KCS/CP interline route would take 47.4 hours.[50] In this case, the 14.6-hour additional pure running time from Laredo to Chicago on CP/KCS cited by Mr. Haley could be overcome on saved interchange time alone.

38. Other factors may also explain situations where the longer route provides a faster transit time. For instance, a route that is five percent longer with average train speed that was five percent faster would have the same transit time as the other route. Based on publicly reported service data in the STB's EP 724 docket, CP and KCS average train velocities are

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[48] For instance, this convention was referenced by CSX's Executive Vice President of Operations Jamie Boychuk at the Board's January 13, 2022 hearing on the CSX/Pan Am Merger: CSXT/Pan Am, Finance Docket No. 36472, Hearing Tr. (Jan 13, 2022) at 139, lines 8-10 (incl. in workpapers). *See* workpaper "Hearing Transcript.pdf."

[49] *See* workpaper "Transit Time Analysis.xlsx." For intermodal, while interchange times are expected to be faster, it still takes on average {{[redacted]}} between when a unit arrives on KCSM at Laredo, TX and when it departs on a UP train from Port Laredo, TX.

[50] *See* Haley V.S. at 21. This analysis effectively represents the pure running time and accounts for no time for yard dwell, line congestion, actual train speeds, crew change availability, or any other variety of items that influence actual transit time.

between 5 to 7 percent higher on average than UP since 2019.[51] In addition, increasing the frequency of when the railroad provides switching service to pick up or deliver carloads to the customer's facilities could overcome a difference in transit time. For example, providing switching service at the origin and destination three times a week instead of two would eliminate the end-to-end transit time difference.[52] This process of establishing the appropriate frequency of origin and destination switching services in calculating the required end-to-end transit times is discussed in the amended operating plan.[53]

39. Actual relationships between route length and transit time are not linear, which is at odds with the view that CPKC would not be able to provide competitive service levels due to relatively longer routes. Using UP's car event data and waybill data, we surveyed how route miles compared to transit time for movements across UP's system that moved through Laredo.[54] The results of this analysis show that transit times vary widely regardless of route length, and it is frequently the case that longer routes have shorter transit times.

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51 *See* workpaper "Historical Train Speed Reporting.xlsx," at tab "Summary."

52 Seven days in a week divided by two industry switch visits per week implies 3.5 days between switches, meaning a car on average is waiting 1.75 days for pickup from the time it is released, or placement from the time it reaches the serving yard. This same figure is 1.16 days under a scenario with 3 industry switch pick-ups per week, which implies more than a 1-day savings of adding one industry switch visit per week at the origin and destination. 7/(2*2)=1.75, 7/(3x2)=1.16, and (1.75-1.16)x2=1.16 day transit time reduction.

53 *See* Elphick/Orr amended operating plan verified statement at ¶ 162. ("As CPKC integrates the two networks, in-depth reviews of local service levels may reveal opportunities to adjust local assignments to provide further improvements in the service provided to customers. CP plans to approach this process – referred to as "white-boarding" – on a customer-specific basis to design services that consider end-to-end customer transit time along with the service timing and frequency that meets the customer's needs.")

54 We defined the transit start time based on "IR" and "RL" events and transit end time based on "ID", "AP", and "OD" events.

FIGURE 2[55]
UP FY2019 TRANSIT TIMES AND ROUTE LENGTH FOR CARLOAD SHIPMENTS THROUGH LAREDO



{{ }}

40. The distribution in the scatter plot in Figure 2 above illustrates that there is {{ }} even when focusing on a single railroad's network, and that shipments traveling longer distances frequently have shorter transit times. In particular, movements {{ }}.

41. This poses both challenges and opportunities for each railroad contending to provide the ideal service parameters demanded by shippers in a myriad of individual circumstances. Many elements of CPKC's operating plan, including train schedules, line

[55] *See* workpaper "Transit Time Analysis.xlsx."

capacity and velocity, planned maintenance outages, switching frequency, and intermediate handlings, will affect the transit times and service levels CPKC is able to provide to customers. It is unfounded to discount CPKC's opportunities to compete on the narrow basis of relative route length, or that one of its routes is simulated to have a running time that is {{[redacted]}}

42. Critiques about relative route length and transit time also overlook the importance of service reliability. As the above scatter plot in Figure 2 shows, typical shipments through Laredo may spend anywhere between {{[redacted]}} travelling on UP's system and frequently have {{[redacted]}}.[56] Regarding the paramount importance of service reliability, Adriene Bailey, a partner at Oliver Wyman, stated at the recent RailTrends 2021 conference: "Variability is the root of all evil."[57] Our initial statement emphasized how the focused, repetitive train movements on the CPKC main north-south corridor would be conducive to such reliability. We also understand CP/KCS planned operations will emphasize the use of daily scheduled trains to minimize the possibility of service disruptions and coordination breakdowns.[58]

43. To illustrate such variation in a situation directly relevant to diversion traffic CPKC would compete to attract, the below chart shows transit time in days from when

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56 *See* workpaper "Transit Time Analysis.xlsx."

57 *See* workpaper "Wyman Variability Article.pdf."

58 *See* CP's May 13, 2022 Amended Operating Plan at ¶ 139. "Based on CP's long experience with PSR, it is understood that daily service for all lines of business in all directions creates a predictable daily schedule that encourages the railroad and its customers to collaborate to achieve predictable and reliable operations… This experience informed the approach to designing a consolidated plan for the CP/KCS system that took advantage of its greater scope and density with both efficiency and service reliability as the primary objectives."

containers were received by UP from KCSM at Laredo to when they were released at UP's Yard Center intermodal terminal in Chicago.

FIGURE 3[59]
2019 UP-KCSM TRANSIT TIMES FOR
LAREDO TO CHICAGO INTERMODAL MOVES

{{ [redacted] }}

44. Figure 3 shows that UP's intermodal shipment times typically vary between {{ [redacted] }} days in this lane. In this context, assertions, like those made by UP's witnesses, that CPKC would be unable to provide a reliable service within these time parameters because the simulated running time of its route is 14-hours longer are clearly unfounded.

45. Similarly, the below figure shows the transit time in days from when automotive shipments were received by UP from KCSM at Laredo, Mexico to when they were placed at UP's automotive facility in Chicago.

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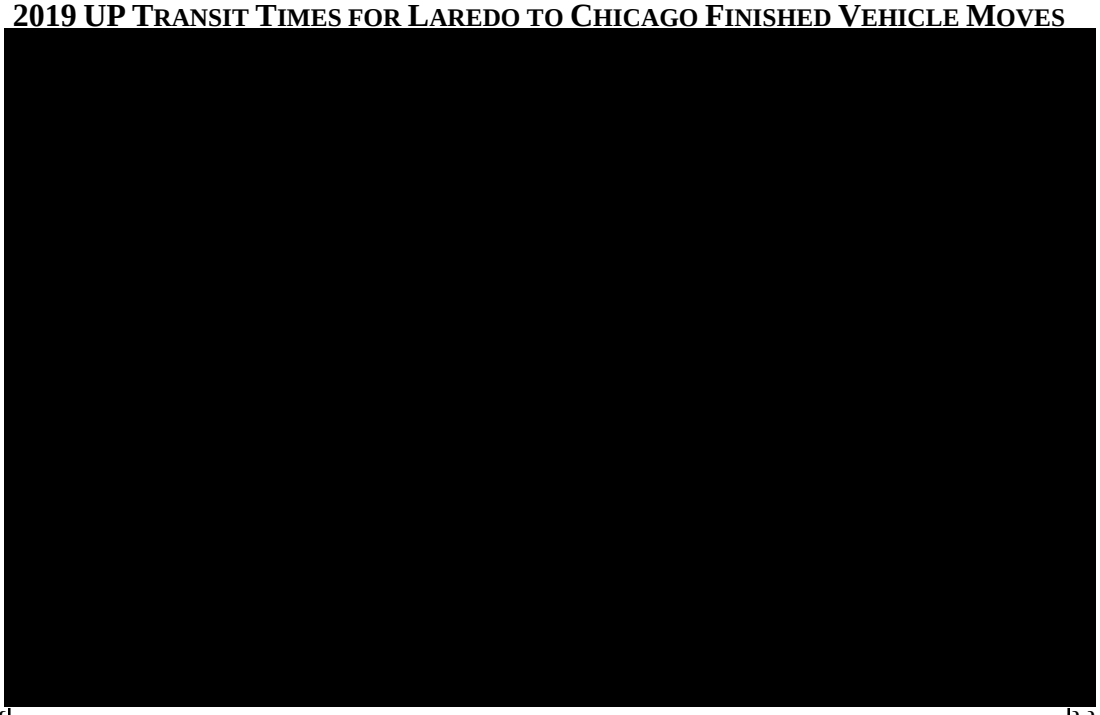
[59] *See* workpaper "Transit Time Analysis.xlsx."

FIGURE 4[60]
2019 UP TRANSIT TIMES FOR LAREDO TO CHICAGO FINISHED VEHICLE MOVES



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46. Figure 4 shows that shipment times typically vary between {{ }}, though at times, it takes longer. It would again be wrong to conclude CPKC would be unable to provide competitive service levels due to having a route simulated to have a running time that was 14 hours longer than UP's. Instances where CPKC can narrow the standard deviation with improved reliability, even assuming for the sake of argument overall average transit times are slightly longer, would likely result in the ability to offer the most attractive service option to many shippers.

47. The notion that longer routes may be unable to attract traffic is also at odds with UP's experience competing against BNSF for intermodal traffic moving from the Laredo gateway to Chicago. According to Mr. Haley, UP's route is 1,420 miles and BNSF's route is

[60] *See* workpaper "Transit Time Analysis.xlsx."

1,708 miles. He also estimates BNSF's simulated running time is about 7 hours longer than UP's.[61] Despite this difference, BNSF was able to attract {{{[redacted]}}} of intermodal volumes on this corridor in 2019 and {{{[redacted]}}} in 2020.[62] The below charts show BNSF transit time typically varying between {{[redacted]}} days from Laredo to Chicago, compared to UP's transit time varying between {{[redacted]}}. It also illustrates how much actual transit times differ from the simulated running times estimated by Mr. Haley.

61 *See* Haley V.S. at 21

62 *See* workpaper "Recent Laredo to Chicago IM Shares.xlsx," at tab "Summary Figures."

FIGURE 5[63]
2019 BNSF AND UP 10-DAY ROLLING AVERAGE TRANSIT TIMES FOR LAREDO TO CHICAGO INTERMODAL MOVES COMPARED TO MR. HALEY'S SIMULATED RUNNING TIME {{

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63 *See* workpaper "Transit Time Analysis.xlsx."

As shown in Figure 5, while UP tends to have {{[redacted]}}, this is not always the case. Moreover, even though {{{[redacted]}}}. In line with this result, it is reasonable to expect that CPKC, whose route is nearly identical in length to BNSF's as identified by Mr. Haley, would also be able to {{{[redacted]}}} of traffic in this corridor.

48. Figure 5 also plots Mr. Haley's simulated running times for the BNSF and UP routes. For each railroad, the gap between Mr. Haley's theoretical figures and actual performance is measured in {{[redacted]}} demonstrating that the alleged seven extra hours required on a CPKC route (according to Mr. Haley's modeling) would not remotely be disqualifying. Indeed, the seven-hour gap between Mr. Haley's modeled BNSF running time and CPKC's running time corresponds quite closely to the gap between UP and BNSF, and {{[redacted]}}.[64]

49. It should also be recognized that longer routes do not lead to higher rates as some other railroad witnesses have suggested, without any support.[65] To demonstrate this, we examined the pricing for movements of comparable types of traffic between county-to-county pairs in our initial traffic distribution analysis.[66] For example, Figure B1 in our Appendix B included 524 individual county-to-county carload traffic flows of at least 1,000 miles in length

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64 Mr. Haley claims that BNSF's route is seven hours faster than the CP/KCS route in terms of running time, but it is unreasonable to think that the reason that BNSF could attract significant shares of traffic on this lane and CP/KCS could not is simply a function of this seven hour difference. *See* Workpaper "Recent Laredo to Chicago IM Shares.xlsx," at tab "Summary Figures." {{[redacted]}}

65 *See* Rocker/Turner V.S. at 11-12.

66 Our analysis controlled for specific traffic characteristics that impact rates, including 7-digit STCC, Car Ownership, and Shipment Size.

for which two Class 1 carriers offered single-line routes that were used between 2015 and 2019. There are 521 unique lanes within these county-to-county pairs where two Class 1 carriers each move the same traffic type. As shown in Figure 6 below, 55% of the time the carrier with the longer route offered the lower rate.

FIGURE 6[67]
RELATIVE RATE LEVELS (X-AXIS) AND RELATIVE ROUTE MILES (Y-AXIS) FOR EQUIVALENT CARLOAD MOVEMENTS BETWEEN COUNTY-TO-COUNTY PAIRS SERVED BY TWO SINGLE-LINE CARRIERS IN 2015-2019 (CWS DATA)



{{{ }}}

50. A similar story is also observed for the 33 county-to-county pairs in Figure B2 of our Appendix B analysis where two Class 1 railroads offer single-line intermodal service.[68] As seen in Figure 7 below, 61% of the identified lanes are instances where the carrier with the longer route offers the lower rate.

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67 *See* workpaper "Rate and Distance Analysis.xlsx," at tabs "Summary Charts" and "Summary Figures."

68 *See* Brown/Zebrowski O.V.S. at 66, Appendix B, ¶ 7.

FIGURE 7[69]
RELATIVE RATE LEVELS (X-AXIS) AND RELATIVE ROUTE MILES (Y-AXIS) FOR EQUIVALENT INTERMODAL MOVEMENTS IN COUNTY-TO-COUNTY PAIRS SERVED BY TWO SINGLE-LINE CARRIERS IN 2015-2019 (CWS DATA)

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51. The outcomes observed in the above charts – showing the railroad with the longer routes often offering the lower rate – are aligned with basic knowledge of how railroad carriers operate and compete. As referenced in our initial statement, the nature of differential pricing permits railroads to remain competitive and often offer lower rates even assuming, for sake of demonstration, their variable costs were modestly higher.[70]

52. In summary, it should not be expected that CPKC would *always win* on service, transit time, rate, or any number of other factors that a given shipper values any more than it

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69 *See* workpaper "Rate and Distance Analysis.xlsx," at tabs "Summary Charts" and "Summary Figures."

70 *See* Brown/Zebrowski O.V.S. at fn.16.

should be proposed that any other *competing railroad would always prevail* on these factors. Because of the multiple factors that shippers consider, basing diversion percentages on average expected traffic shares historically achieved among carriers competing across many different lanes is appropriate. This context is important to understanding the findings from our analysis showing that relative route distance does not heavily influence traffic shares within modest distances where the alternative routes are no more than 50 percent different in length. With all these factors in mind, we identified traffic that fit within reasonable mileage thresholds, and CP's operating team analyzed our choices in depth to determine whether CPKC would be capable of providing effective service.

3. The Levels of Shifting Traffic We Estimate Are Those That Would Occur Without Changes in Relative Rate Levels and Do Not Depend on "Foreclosure" of Other Options

53. As discussed above, our percentages of traffic likely to shift to CPKC are supported by actual historical distributions of traffic in similar competitive situations. Accordingly, they represent the most reasonable estimates of what would have occurred under the status quo in 2019 had CP and KCS functioned as a combined railroad, holding other factors equal. In light of comments made by various railroad witnesses[71], it should be emphasized that, as we explained in our initial statement, our estimate of traffic that would move to CPKC are those that would occur absent any hypothesized anti-competitive conduct such as foreclosure. [72] Our estimates also do not assume or depend on changes in rate levels. Rather, they represent how traffic would tend to divide among carriers and their associated route options based on existing traffic distribution patterns in the freight railroad industry.

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71 *See* Carey/Bremser V.S. at 31-35, Rocker/Turner V.S. at 13, and Hunt V.S. at 9.

72 *See* Brown/Zebrowski O.V.S. at ¶ 33.

54. ***Our Traffic Gain Estimates Assume No "Foreclosure."*** The amount of traffic we estimate CPKC would attract from existing routes is based on traffic share distributions for competitive transportation lanes without any hypothetical route foreclosure occurring. For each county-to-county geography we consider, there are multiple active route options used by shippers, which is contrary to a situation where traffic would only travel on a given route because all of the other options were foreclosed. As such, our analysis shows that CPKC is already anticipated to attract substantial amounts of new traffic from competing in the marketplace without using hypothetical foreclosure strategies, which supports the conclusion that CPKC *would not* engage in such strategies.

55. The traffic distributions we rely on that are most relevant to illustrating this point are for so-called "dependent interline" situations, i.e., where a railroad that solely serves one end of the movement could theoretically try to disincentivize traffic from travelling on available interline route options, so as to keep the traffic on its single-line route all the way to the other end. As with all of our estimates, we based our analyses of these situations on actual data points reflecting shipper routing choices. In situations where single-line and dependent interline routes could be used for rail service between a given county-to-county pair, the data showed that dependent interline routes were available and actually chosen by many shippers. These are situations where foreclosure is by definition not occurring despite the *theoretical ability* of the railroad with sole access at one end to engage in foreclosure strategies.[73] In other words, the

[73] There is no reason to believe that foreclosure is occurring in other lanes where the single-line route is exclusively preferred by shippers over a dependent interline. This presumably reflects the shipper's preference for single-line service in many if not all instances. While accounting for such single-line only lanes could arguably justify using higher diversion percentages, we focus on those situations with an active dependent interline route specifically to ensure there is no possibility of route foreclosure implied in our diversion estimate.

amount of traffic we estimate CPKC would attract is based on average traffic shares that single-line routes have historically attracted while making interline route options available as well.[74] The data thus demonstrate in these situations that shippers tend to favor the single-line route option, but at least one interline route also remains an option that is chosen at least some of the time, and on which the single-line carrier willingly participates.[75] As a result, the amount of traffic we estimate shifting as a result of the Transaction represents what CPKC would attract without engaging in any hypothetical foreclosure strategies.

56. ***Our Traffic Gain Estimates Are Not Dependent on Rate Level Changes.*** Our analysis of traffic share distributions, which feed into our diversion percentages, do not assume changes to existing rate levels. The traffic shares we observe have already been established, presumably based on factors including various rate levels offered among the competing railroads. As such, it would not be appropriate to adjust the assumed rate levels underlying these traffic distributions without also considering whether traffic distributions should be adjusted as well. For example, consider a shipper that was indifferent between two carriers in all regards except rate: were we to assume that one carrier reduced its rate, and the other did not, this would justify higher levels of traffic moving on the carrier with the lower rate than estimated by our

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[75] It is reasonable to assume continued participation of other Class 1 railroads on dependent diversion lanes for a variety of reasons, including the possibility of them already offering favorable service and rates in some cases, being willing to compete on rate and improve their service in other cases, and having the ability to make competitive responses leveraging their franchise strength were CPKC to try to force a shipper to choose a routing alternative it does not voluntarily prefer. Specifically, given that other Class 1 railroads participate in {{[redacted]}}, it is reasonable to assume that any attempts to remove another Class 1 railroad's participation in a dependent interline route forcibly against a shipper's wish could result in KCSM losing existing business it has with that shipper both on the lane in question to an FXE-routing and to many other locations where the CPKC system could not reach without interlining. *See* workpaper "KCSM Crossborder Traffic Summary.xlsx," at tab "Summary Figures."

diversion percentages, which are rate-neutral.[76] We recognize that the CP/KCS combination is reasonably expected to increase competition and lead to rate reductions (or reductions to future rate increases that would otherwise occur) both arising from CPKC's own improved efficiency or competitive responses, or both, and this enhanced competition is among the principal benefits of a CP/KCS combination.[77] The key point here is that for the purpose of estimating traffic shifts, we appropriately used existing rate levels so that rates among carriers are the same relative to each other, regardless of whether or how much overall rate levels may change in the future, which we do not attempt to predict. Instead, as determined through the bidding process, CPKC would sometimes win and sometimes lose a particular piece of business based on how the shipper weighs – both from price and service perspectives – the transportation offers available to it at the time from railroads competing for the traffic. This rate-neutral approach is typical to rail traffic diversion studies.

C. We Accurately Estimate the Revenue Levels CPKC Will Earn for Diverted Traffic on a Pro Forma 2019 Basis

57. To estimate incremental revenues for traffic attracted to CPKC, we used actual 2019 revenues when available, and when not available we estimated prevailing rate levels for individual diversion lanes, calculated from available revenue information for comparable movements. Such estimates were only required for "extended haul" diversions where the waybill record for the existing interline move is rebilled and does not report end-to-end revenues. In these cases, we examined the data in two ways: by looking at the average end-to-end

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[76] We note the reason we applied a 5% reduction to the limited subset of traffic shifting from other single-line traffic to CPKC was because we recognized CP would need to differentiate its service in some regard from the existing service, which would typically involve relatively shorter routes, in particular for intermodal moves on the Dallas-Chicago corridor which constitutes over 80% of the traffic at issue. *See* Wahba and Naatz O.V.S. at ¶ 52.

[77] *See* Brown/Zebrowski O.V.S. at ¶¶ 32 and 89.

revenues for the most comparable set of traffic moving in the same end-to-end corridor less existing CP and KCS divisions (the "end to end approach"), and by looking at the segment revenues for the most comparable set of traffic moving over the same segment where CP or KCS would extend the haul under the diversion (the "segment approach"). Where one of the two approaches yields a "poor" set of comparable traffic (usually because the geography of the most comparable shipments are only detailed at the freight region or country level), and the other approach does not, we default to the approach that has the better match. In these cases, the "segment approach" typically has a more precise match than the "end to end approach," and accordingly we default to the "segment approach" in the limited instances where both approaches have matches that are not "poor."

58. Mr. Hunt's claim that we significantly overstated revenues is based on his apparent failure to understand how our revenue estimating process works, i.e., what he characterizes as discrepancies between actual revenue levels and those we estimated, are actually differences between two estimated levels, which we then review to determine which is most appropriate to use.[78] He claims we wrongfully selected the "segment approach" to estimate revenue for 52,927 units, but he not only fails to articulate if one approach is preferable and why, he also overlooks that over 90% of these units (47,421 to be exact) are cases where the "segment approach" had a match that is not "poor," and the "end to end approach" had a match that is "poor."[79] Thus, even if we had defaulted to the "end to end" approach where both approaches had matches that were not "poor," revenues for this traffic would not have differed substantially because the "segment approach" would still have been selected in most cases, as is logically

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[78] *See* Hunt Comments V.S. at 15-19.

[79] *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Segment Revenue Reconciliation."

appropriate, due to having the better match. We note that Mr. Hunt does not dispute the appropriateness of choosing the more precise match; he instead erroneously believes that our logic "defaults" to the segment approach at this stage in the process, when actually it "defaults" to the more precise match. For the minimal amount of the traffic where both approaches had non-poor matches and it may have been justifiable to use either approach, we believe defaulting to the "segment approach" was the better option due to the observation that the segment approach generally yielded the more precise match. Defaulting to the "end to end approach," however, would have resulted in revenues only approximately $3.6 million lower overall – a trivial impact on our results.[80] In this light, Mr. Hunt's allegation that we overstated revenues by nearly $50 million is simply a function of his inaccurate understanding of our process, and should be dismissed.

59. Mr. Hunt makes two other similarly erroneous claims that also appear to be a function of his inaccurate understanding of our process for estimating revenues. First, he incorrectly suggests that we use revenues that are sometimes higher than known actual revenues. The one example he cites to try to substantiate this claim is for a rebilled move.[81] However, because this was a rebilled moved, we did not have complete end-to-end revenues and had to estimate the revenues. His comparison between partial revenue amounts for the rebilled move and estimated revenues for the complete end-to-end moves is an irrelevant apples-to-oranges comparison.

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[80] *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Segment Revenue Reconciliation."

[81] *See* Hunt Comments V.S. at 20. *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Calculations," Column A (Row ID) = 2693, Column T (Rebill Code) = 3.

60. Second, Mr. Hunt also cites to an example where a column in our calculation spreadsheet shows a negative revenue amount for non-CP/KCS revenues on a certain movement.[82] His suggestion that this is indicative of an error in our process is misleading, since, as our workpapers clearly show, these amounts have no bearing on our revenue calculations. As is the case for all of the limited instances where there are negative revenues in this column for diversion traffic, this move is rebilled, which means that non-CP/KCS revenue amounts listed in this column are incomplete and should not be used to develop revenue levels for the complete end to end route(which is why we had to estimate revenues instead).

61. Mr. Hunt identifies a minor coding error in our conversion of Canadian dollars to U.S. Dollars.[83] This affects a total of 21 units of traffic, and would impact total revenues by less than 0.01%.[84] We deem it unnecessary to make a correction given the minimal impact.

62. CSX witnesses Carey/Bremser also make certain claims about our process for estimating incremental revenues that should be addressed.[85] First, they fault us for not basing incremental revenues on rates for single-line movements.[86] This claim ignores that we use existing rate levels whenever they are available, and these largely consist of single-line movements.[87] Second, they wrongfully assert that we overstate revenues by using masked CWS

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82 *See* Hunt Comments V.S. at 20. *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Calculations," Column A (Row ID) = 11797, Column T (Rebill Code) = 1.

83 *See* Hunt Comments V.S. at 23-24 and workpaper "HC- Currency Conversion Error.txt."

84 *See* workpaper "8 - Diversion Identification Reconciliation.xlsx," at tab "Canadian Revenue Reconciliation."

85 Their primary concern, related to the alleged need to model the effect of future competition on existing rate levels, is addressed above.

86 *See* Carey/Bremser V.S. at 34.

87 *See* our O.V.S. workpapers "6a - Revenue Matching.sql" and "6b - Revenue Matching.xlsx."

revenues. [88] This is factually incorrect. We use the same unmasked CWS data that they presumably also obtained access to per the terms of the CWS approval agreement they signed.[89]

D. Our Rail-to-Rail Diversion Estimates Are Complementary to, and Do Not Conflict with, the Other Anticipated Traffic Gains Identified by Other Applicant Witnesses

63. CN's witness Mr. Hunt also alleges that we "missed" certain diversion traffic which was then included in the growth traffic estimate by Mr. Wahba. As a threshold issue, his claim is self-contradictory because after saying we "missed" the traffic, which implies it exists and can be attracted to CPKC, he proceeds to remove this traffic from his restatement of diversions, presumably because he believes it does not exist or is not divertible. Putting this aside, the traffic he references is appropriately not covered in our work because it did not move in 2019, and is appropriately included in the work of Mr. Wahba because it would move in the case of the CP/KCS combination. The scope of our rail diversion estimate, traffic that would have been attracted to CPKC had it existed in 2019, and how our study relates to the growth traffic of Mr. Wahba, is described in detail in our initial estimate[90], so it is unclear why Mr. Hunt would claim this exclusion is either "unusual" or "unexplained."

64. Nonetheless, we provide the details of the specific instances he cites to explain why they are complementary. The LPG growth traffic included in Mr. Wahba's statement are new volumes gained by CP after 2019, so, by definition, they are not included in our estimate

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88 *See* Carey/Bremser V.S. at 35.

89 *See* STB 07/08/2021 Waybill Agreement WB21-37 filing 302693, at 8.

90 *See* Brown/Zebrowski O.V.S. at 4. ("We examine whether the traffic moving between individual origins and destinations in 2019 would have moved differently were CP and KCS functioning as a combined system." *See* also Footnote 1. ("Our analysis based on 2019 traffic data does not consider other potentially significant traffic opportunities that would arise from (a) post-merger changes in traffic patterns (except for grain); (b) investments by CPKC in growth opportunities unlocked by a combined CP/KCS network; or (c) diversions to CPKC intermodal offerings from the highways (so-called truck-to-rail diversions)").

based on 2019 traffic. The soybean and DDG growth traffic are also not included in our rail-to-rail diversion estimate. Mr. Wahba explains how each is based on focused business initiatives targeting specific receivers in Monterrey, NL. The only soybean diversions we include are based on the five percent market share increase estimated by Mr. Wahba, which by design was developed separately from diversion amounts under this specific initiative. Moreover, we do not include any DDG traffic in our estimate involving the receivers in Monterrey that are part of his growth traffic estimate (specifically, {{[redacted]}}), so there is no possibility for a double-count for this group of traffic.[91]

III. THE RAIL TRAFFIC DIVERSION ESTIMATES OFFERED IN SUPPORT OF CN'S RESPONSIVE APPLICATION ARE FLAWED

65. We have been asked by counsel for CP and KCS to evaluate Mr. Hunt's estimate of the amount of rail traffic that would shift to CN as a result of CN's proposed acquisition of KCS's Kanas City-Springfield/St. Louis line (the "Springfield Transaction"). For the reasons discussed below, we believe his estimate is flawed and produces unrealistic and invalid results.

A. Mr. Hunt's Diversion Percentages Are Effectively Random

66. As discussed above, Mr. Hunt's method for estimating diversion percentages is deeply flawed. To summarize, he bases estimates on models that use coefficients that are statistically insignificant and produce diversion percentages that contradict real-world expectations (for example, by diverting more traffic as relative route length becomes longer).

67. The thoroughly arbitrary nature of his approach is shown by comparing what his diversion model predicts regarding the allocation of rail traffic among alternative routes with

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[91] In fact, we only include {{[redacted]}} total diversion carloads of DDGs (STCC codes 2085940 and 2082330) to the entire Mexican state of Nueva Leon. None of these are to {{[redacted]}}. *See* workpaper "DDG Traffic Detail.xlsx".

how that traffic actually is distributed. Mr. Hunt's predictions are determinative of every diversion percentage he applies, yet as the chart in Figure 8 shows, they entirely fail to accurately predict any actual traffic shares.[92]

FIGURE 8[93]
MR. HUNT'S REGRESSION MODEL PREDICTS TRAFFIC SHARES THAT BEAR NO RESEMBLANCE TO ACTUAL TRAFFIC SHARES{{

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68. The black diagonal line in Figure 8 depicts Mr. Hunt's predicted traffic shares and the red dots represent the actual traffic shares he is trying to predict. Were his model a sound

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92 This shows results for his grain/other regression model, but similar results are also produced in his automotive and intermodal regression models.

93 *See* workpaper "Diversion Percentage Analysis.xlsx," at tab "Final Charts," at Columns D-N.

representation of reality, the red dots would be expected to track fairly closely to the black line. The chart clearly shows the two have nothing in common.

69. As a result of modelling predicted traffic shares that bear no resemblance to actual traffic shares, and then using these as the basis for determining the amount of traffic that would divert as a result of the Springfield Transaction, Mr. Hunt's approach also produces diversion percentages that are illogical and obviously flawed in terms of how they relate to one another. Mr. Hunt's approach differs from previous diversion studies both by using coefficients that are not statistically significant and basing his estimates purely on theoretically modelled pre-transaction traffic shares not related to actual traffic shares.[94]

70. The consequences of this flawed approach are apparent in the results generated by his process. For example, his diversion percentages are nearly identical whether a new CN single line route would be competing against an existing single-line route or against an existing interline route. A new CN-Springfield route in a market where CN currently handles no traffic would attract 39.2% of the traffic whether the existing route is single-line or interline.[95] This is illogical. As his own assignment of junction impedance indicates, all else equal, a single-line

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[94] *See* CN/IC-7, Woodward V.S. at II-26: "The traffic allocation process uses a complex set of rules that compares the market share estimate of the eligible route to the pre-transaction market shares of the railroads in the eligible route. The eligible route will replace pre-transaction routes involving railroads in the eligible route up to the level of the eligible route market share or the pre-transaction market share, whichever is greater." Although the exact process cannot be precisely determined from available information, it appears diversion percentages under the Woodward approach are based on the difference between actual pre-transaction market shares (as opposed to modelled) and predicted post-transaction market shares, rather than based on differences in two purely hypothetical predicted market shares as done by Mr. Hunt. *See also BN/*SF-7, Hornung V.S. (BN/ATSF rail-to-rail diversion study) at II-46 to II-47 ("the potential amount of diversion equals the estimated market share on the post-BN/Santa Fe consolidate route, minus the market share in base 1993 on routes involving both BN and Santa Fe").

[95] This example assumes all routes are 1,000 miles in length. This analysis shows results for his grain/other model, but similar results are also produced for his automotive and intermodal models. *See* workpaper "Diversion Percentage Analysis.xlsx," at tab "Summary Figures."

route should be more preferable to an interline route than to another a single-line route, and thus attract a higher relative share of traffic from the interline route. As another example, his diversion percentages are also illogically higher when a new single line route competes against two existing interline routes instead of one. For example, a new CN-Springfield route in a market where CN currently handles no traffic would attract 47.2 percent of the traffic when competing against two existing interline routes, compared to the 39.2 percent of traffic that would be attracted when competing against only one interline route.[96] This finding contradicts expectations because competing against two routes instead of one should not result in gaining a higher share of the total traffic available. In summary, his diversion percentages are not supported by any valid data analysis nor are internally consistent, and represent figures that are effectively random.

B. The Majority of Diversion Volumes Mr. Hunt Identifies Are Based on Unfounded Premises

71. Even putting aside his deeply flawed process for determining the portion of traffic that will shift to CN, the base traffic he identifies as eligible for diversion is beset by problems. First, nearly one-third of Mr. Hunt's total diversions consist of NS traffic moving between Kansas City and St. Louis, on one end, and Detroit, on the other end, in specialized RoadRailer service, which is jointly and exclusively offered by NS and its subsidiary Triple Crown.[97] Despite characterizing this as the "primary" diversion opportunity in his study, Mr. Hunt does not explain how CN would attract this traffic (in fact, the only place he acknowledges this is

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96 *See* Workpaper "Diversion Percentage Analysis.xlsx," at tab "Summary Figures."

97 All traffic he identifies moving between Detroit and Kansas City, as well as some between St. Louis and Detroit, is in RoadRailer service. This traffic is identified as RoadRailer based on the "Intermodal Equipment Flag" field in the CWS. *See* workpaper "CN Diversion Analysis.xlsx," at tabs "Summary Figures" and "2019 CWS RoadRailer Summary."

RoadRailer traffic is in his workpapers where he unsuccessfully attempts to adjust their shipment weights as will be explained later in this statement).[98] RoadRailer is a specialized service only offered domestically by NS and Triple Crown in this one corridor since 2016. [99] As seen in the images in Figure 9 below, RoadRailer service uses a unique type of equipment where the chassis has both rubber and steel wheels, and a special operation that moves the chassis directly between rail and road, without lifting a container between the road and railroad flat car as done for other intermodal service.

FIGURE 9
NORFOLK SOUTHERN'S UNIQUE ROADRAILER EQUIPMENT



98 "The primary rail-to-rail diversion opportunity for a CN acquisition of the Springfield Line will be intermodal shipments between Detroit and Kansas City." *See* Hunt Application V.S. at 14.

99 *See* workpaper "Triple Crown Article.pdf."

72. Nowhere in its Responsive Application has CN indicated that it intends to make the necessary investments to offer this service, nor does Mr. Hunt explain why customers using the current service would convert to a different type of CN intermodal service between Kansas City and St. Louis. When asked in discovery to provide all documents related to this estimate, CN acknowledged that the reason it was included was merely because it was identified as intermodal traffic in the CWS data.[100] This is an insufficient explanation to justify why this service would be attracted to CN, which presumably does not even possess the right type and amount of rail equipment to handle these RoadRailer volumes, or explain why customers would be interested in converting away from RoadRailer service to another type of intermodal service. Simply put, this group of traffic should not be viewed as realistically moving to CN.

73. Second, there is a fundamental disconnect between how Mr. Hunt describes the benefits to CN of acquiring the Springfield Line related to traffic originating or terminating in the St. Louis area, and how he estimates diversions for this traffic. At the beginning of his statement, he describes how CN – which already serves St. Louis – would reduce its existing single-line route between St. Louis and points north by approximately 50 miles as a result of acquiring the Springfield Line.[101] However, he does not calculate diversions associated with the effect of this single-line route improvement, but instead calculates diversions based on the notion that the transaction would convert an *interline CN route to* a single-line route via Springfield.[102]

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100 *See* CN's response to CP's Fourth Set of discovery requests at request number 6. "CN responds that RoadRailer traffic was reported as intermodal in the STB Carload Waybill Sample. It was therefore included in the Springfield Line intermodal rail-to-rail diversion study." *See* workpaper "CN Response to CP Fourth Discovery.pdf."

101 *See* Hunt Application V.S. at 6.

102 For example, *see* workpaper "CN Diversion Analysis.xlsx," at tab "New2Existing – Auto", at row 21. This shows the effect of switching from a 547-mile route with one junction to a 547-route with no junctions as originally calculated by Mr. Hunt. In reality, the impact of the Springfield Transaction is

This construct is artificial. As Mr. Hunt recognizes, CN already has a single-line route via Du Quoin, IL.[103] Nonetheless, Mr. Hunt diverts traffic assuming the impact of CN acquiring the Springfield line was CN switching from an interline route to a single-line route, rather than switching from one single-line route it already uses to another single-line route that is 50 miles shorter.

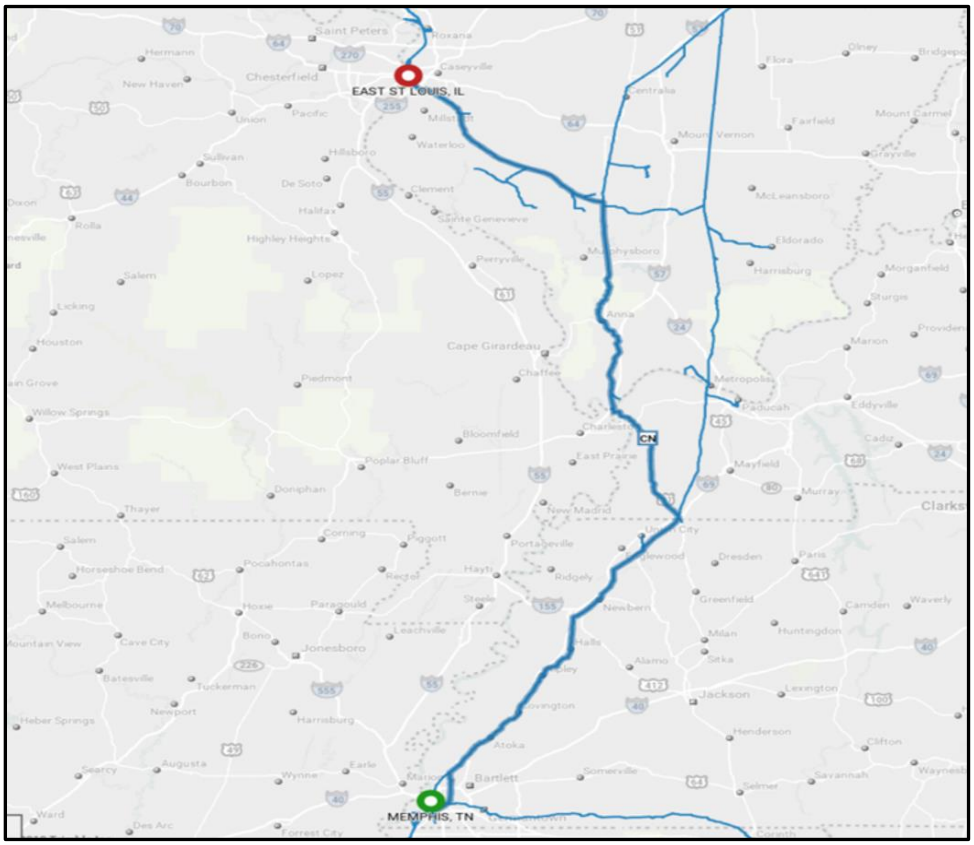
74. Third, the remainder of Mr. Hunt's division estimates involving St. Louis incorrectly assume that acquiring the Springfield Line would have any modelled impact on CN's ability to attract traffic moving between St. Louis and the south. Similar to above, he calculates diversion amounts associated with removing a junction at East St. Louis for such traffic, but such movements do not and would not use this junction either before or after the transaction.[104] To illustrate, the map in Figure 10 below depicts one auto movement Mr. Hunt diverts to a CN route between East St. Louis and Memphis. In this case, CN's existing route has no junction, so a junction would not be eliminated were CN to acquire the Springfield line, contrary to Mr. Hunt's assumption in his calculations.

switching from the existing single-line route, to a new single-line route that is 50-miles shorter, which is corrected in workpaper "CN Diversion Analysis.xlsx," at tab "New2Existing – Auto Corrected," Cells P22, Q22, and Z22.Under his process this correction would result in {{{[redacted]}}} carloads diverting instead of the {{{[redacted]}}} that he originally estimated. *See* workpaper "CN Diversion Analysis.xlsx," at tabs "New2Existing – Auto Corrected" and "Existing2New – Auto Corrected" for further examples.

[103] *See* Hunt Responsive Application V.S. at 5.

[104] For example, *see* workpaper "CN Diversion Analysis.xlsx," at tab "New2Existing – Auto" where Column B (Mkt) = 4. This shows the effect of switching from a 714-mile route with one junction to a 714-route with no junctions as originally calculated by Mr. Hunt. In reality, the impact of the Springfield Transaction is switching from the existing single-line route, to a new single-line route that is the same length, which is corrected in workpaper "CN Diversion Analysis.xlsx," at "New2Existing – Auto Corrected," cells P16, Q16, and Z16. Under his process this correction would result in {{{[redacted]}}} carloads diverting instead of the {{{[redacted]}}} that he originally estimated. *See* workpaper "CN Diversion Analysis.xlsx.," at tabs "New2Existing – Auto Corrected" and "Existing2New – Auto Corrected" for further examples.

FIGURE 10
EXAMPLE MOVEMENT BETWEEN EAST ST. LOUIS AND MEMPHIS WHERE MR. HUNT'S DIVERSION CALCULATIONS MISTAKENLY ASSUME THERE WOULD BE A CHANGE IN THE NUMBER OF JUNCTIONS[105]



75. Applying his process correctly to account for the actual impact of the proposed acquisition for shipments involving Saint Louis, would have a dramatic impact on his results, where instead of the {{{[redacted]}}} units Mr. Hunt estimates, his own methodology would properly have found only {{{[redacted]}}}.[106]

105 Generated using PC Miler 27 using the "Practical Route" setting.

106 *See* workpaper "CN Diversion Analysis.xlsx," at tab "Summary Figures."

76. While there may be valid reasons for why traffic not impacted by route synergies could move to CN due to effects of a proposed transaction, it is inappropriate to, without any explanation, estimate these diversions by forcing the model to generate diversion percentages based on changes in routes that would not occur as a result of the Springfield Transaction.[107]

77. Fourth, Mr. Hunt provides no explanation for how he quantifies the level of diversions involving shifts from other East Coast ports to the Port of Montreal, which comprise over 20 percent of his diversion traffic (and a majority of the traffic not already flawed for the reasons explained above). He simply assumes {{[redacted]}} estimated containers (which is roughly 15 percent) moving between locations he characterizes as "Eastern Ports" and Kansas City and St. Louis will divert to CN. He neither examines the current modal shares, or carrier shares among the portion that is moving by rail. His 15 percent assumed diversion percentage appears only as raw and unfounded assumption. He neither claims to have obtained this figure from knowledgeable CN personnel, performed any analysis to justify it, nor provided any explanation for why he views it as reasonable.

To illustrate the significance of the flaws we have described, the chart in Figure 11 below summarizes his different buckets of diversion traffic in light of the four specific problems discussed above. Figure 11 shows that approximately two-thirds of the rail-to-rail diversion volumes calculated in his study are unrealistic.

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[107] It may be possible that Mr. Hunt is trying to reflect that CN does not have local access to certain KCS-served customers within the Saint Louis area, and that he believes by acquiring the Springfield Line, CN would gain local access and thus eliminate a junction. However, concluding that such diversions were likely would require reviewing the individual customers' access options within the St. Louis terminal to make such determinations, which Mr. Hunt does not appear to do. To the extent CN is attempting to acquire the Springfield line to gain additional access to customers in the St. Louis terminal area, rather than address alleged competitive dynamics of the proposed CP/KCS combination, it would presumably be required to explain why such an intervention by the STB would be appropriate or relevant to the proposed CP/KCS combination.

FIGURE 11[108]
SUMMARY OF DIFFERENT GROUPS OF TRAFFIC IN MR. HUNT'S RAIL DIVERSION STUDY FOR CN'S PROPOSED SPRINGFIELD LINE ACQUISITION

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78. There are also methodological problems related to how he determines what traffic to consider for diversions in the first place that further add to the unreliability of his study. As a result of a lack of documentation showing what logic he used to select traffic for further review that is potentially divertible,[109] and apparent inconsistencies in the traffic he did select, there is no clear way to discern how he screened for divertible traffic. It follows there is no way to evaluate whether his approach was justifiable. Notably, anomalies abound in the hard-coded results he did provide, making it difficult to determine the exact criteria he used when applying the "geographic filters" he says he did.

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[108] *See* workpaper "CN Diversion Analysis.xlsx," at tab "Summary Chart."

[109] *See* Hunt Application V.S. at 36. "Geographic filters were applied to select traffic between CN currently served regions and the proposed new terminals in Kansas City and East St. Louis and areas served by these new terminals." CP asked direct and detailed questions about how the traffic he selected was identified, which appear only as hard-coded figures in his workpapers, but CN's only response was to cite CP back to the hard-coded figures asked about in the first place. This is insufficient, because the question is not what traffic was selected, but what methodology was used to select it.

79. For instance, he describes the geographic selection criteria for "in-scope" intermodal traffic as the "areas served by" the newly planned terminals at East St. Louis and Kansas City,[110] which he defines for intermodal movements as "traffic within the same BEA or neighboring BEA at both the origin and destination." However, he identifies a significant amount of intermodal traffic terminating at Omaha, which is not a neighboring BEA and is over 160 miles away from Kansas City.[111] There is no discussion in his statement of what treatment he intends for Omaha-related intermodal diversions or why. The only context he provides related to Omaha is in his workpapers, where he notes that auto traffic is "unlikely to truck to Omaha" and removes it from his diversion estimate. This serves to raise further questions about why he includes thousands of potentially divertible intermodal units to or from Omaha in his diversion model workpapers. In many cases, it appears that any consistent set of logic used would have captured two similar lanes of traffic, although he only selected one. For example:

- He diverts traffic on the Montreal to Kansas City auto lane, but not on a Saint-Luc to Kansas City auto lane. Saint-Luc is in Montreal and served by CN.[112]

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110 *See* Hunt Application V.S. at 36. "[T]raffic within the same BEA or neighboring BEA at both the origin and destination was considered to be competitive."

111 *See* Hunt Application workpaper "HC-2022January_R2R_Intermodal_v4.xlsx," at tab "Existing2New," at Rows 18-20. While perhaps he intended to use the "catchment" areas from his truck-to-rail diversion study instead of "neighboring BEAs," were this to be the case, it is not clear why he only looked at the Omaha BEA but not other BEAs such as Lincoln, Springfield, and Joplin that are also listed. *See* Hunt Application V.S. at 26. Similar anomalies in the areas he selects can be seen in other instances. For example, although he says he is selecting grain at the BEA level, he also selects, and then cuts from his diversions, traffic from BEAs not touching the Springfield Line such as Des Moines. *See* Hunt Application workpaper "HC-2022January_R2R_Grain_v4.xlsx," at tab "Raw-CN," Rows 174-176, and at tab "Raw-STB," Rows 5-6, 9, 11, 13-16, 18, 24, 28-29, 70-80.

112 *See* Hunt Application workpaper "HC-2022January_R2R_Auto_v4.xlsx," at Tab "Raw-CN," at Row 55. *See also* workpaper "Missed Diversion Traffic Analysis.xlsx," at tab "Kansas City to St. Luc Autos."

- He diverts traffic on the Kansas City, MO to New Westminster auto lane, but not on the Fairfax, KS to Vancouver auto lane. New Westminster is in Vancouver and served by CN.[113]
- He diverts traffic on the Kansas City to Joffre auto lane, but not on the Kansas City to Quebec City lane. Joffre is only 15-miles from Quebec and both are served by CN.[114]

80. If there is any logic that explains such apparent discrepancies, Mr. Hunt should have provided it. Absent such an explanation, the study's methodology and results cannot be viewed as coherent, much less reliable.

81. There are additional problems affecting the traffic that was selected stemming from the portion that was "cut." For example, Mr. Hunt states that Memphis to Omaha automotive traffic is "unlikely to compete with [a] UP direct route" and thus eliminates it, but he diverts a significant amount of Memphis to Omaha intermodal traffic from UP.[115] Since intermodal traffic is generally the most time-sensitive traffic railroads handle, it is unclear why CN could compete on intermodal but not on automotive between the same geographies. In a similar case, he excludes grain movements from St. Louis to the south because he states there is no route improvement, but includes auto movements in these same corridors that likewise have

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113 *See* Hunt Application workpaper "HC-2022January_R2R_Auto_v4.xlsx," at Tab "Raw-CN," at Rows 52. *See also* workpaper "Missed Diversion Traffic Analysis.xlsx," at tab "Kansas City to NWM Autos."

114 *See* Hunt Application workpaper "HC-2022January_R2R_Auto_v4.xlsx," at Tab "Raw-CN," at Rows 56. *See* also workpaper "Missed Diversion Traffic Analysis.xlsx," at tab "Kansas City to Quebec Autos."

115 *See* Hunt Application workpaper "HC- 2022January_R2R_Intermodal_v4.xlsx," at tab "Existing2New," at Rows 18-20. *See also* Hunt Application workpaper "HC-2022January_R2R_Auto_v4.xlsx," at tab "Raw-STB" at Row 72.

no route improvement.[116] To reiterate, while there may be explanations for these seeming contradictions, but Mr. Hunt provided none in his statement or in discovery.[117]

82. Moreover, while Mr. Hunt states CN's commercial team provided guidance on "geographic regions they viewed as opportunities for traffic gain," his estimate does not always conform to their stated views and he does not explain why. For example, Mr. Przednowek's Verified Statement notes that "a CN-owned Springfield Line would increase transportation competition for grain customers on CN's lines in the Midwest by offering a revived competitive option to the East St. Louis barge market,"[118] but Mr. Hunt excluded grain traffic to St. Louis from the Midwest, citing in his workpapers that there is "no advantage for grain to St. Louis."[119]

C. Mr. Hunt's Revenue Estimates Are Methodologically Unsound and Overstated

83. Mr. Hunt's revenue estimates suffer from serious issues as well. First, where actual revenues are unavailable, his estimates boil down to assuming CN will either earn {{{[redacted]}}} per incremental car mile, depending on commodity group, as derived from CWS system-wide averages for GTW. Such a level of extreme simplicity is not typical in rail-to-rail diversion study and conflicts with prevailing rate levels on the traffic lanes he diverts, which is why we opted for a more precise and sophisticated approach when

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116 *See* Hunt Application workpaper "HC- 2022January_R2R_Auto_v4.xlsx," at tab "New2Existing," at Rows 4-13 and 20-22. *See also* Hunt Application workpaper "HC-2022January_R2R_Grain _v4.xlsx," at tab "Raw-CN" at Rows 90-91 and at tab "Raw-STB," at Rows 60, 64, and 66-69.

117 CP asked direct and detailed questions about how the traffic he selected was identified, which appear only as hard-coded figures in his workpapers, but CN's only response was to cite CP back to the very same hard-coded figures.

118 *See* Przednowek Responsive Application V.S, at 4.

119 *See* Hunt Application workpaper "HC- 2022January_R2R_Grain_v4.xlsx," at tab "Raw-CN," Rows 44, 48, and 50, at tab "Raw-CPKCS," Rows 34-36 and 43-45, and at tab "Raw-STB," Rows 34-36, 39, 42, and 44, where it states "<- cut - no advantage for grain to St Louis" in the Column labeled "Cuts."

calculating lane specific prevailing rate levels, taking into account movement characteristics such as STCC, Car Type, and Car Ownership, since such factors impact rate levels as well.

84. We analyzed Mr. Hunt's diversions where actual revenues are unavailable and found many cases where prevailing rate levels are substantially lower than the system-wide averages he uses. For example, we were able to precisely match to moves in the 2015-2019 CWS for two automotive lanes from Ontario to Kansas City and Kansas City to Ontario, in terms of Origin/Destination SPLC, First Digit AAR Car Type, 4-Digit STCC, and Car Ownership, with prevailing rate levels of {{{[redacted]}}} on each lane respectively. This represents 34% and 41% reductions (after accounting for his 5% reduction) respectively from the revenue levels Mr. Hunt developed using system-wide revenue per car mile estimates for these diversions.

85. Mr. Hunt's process of relying on average revenues per car mile instead of prevailing rate levels is also illogical – and contrary to market-based rate-making – because this results in CN earning more incremental revenues than the incumbent carrier simply because it has the longer route.[120] For example, on an Automobile lane diverted from Kansas City, MO to Regina, SK, CN's proposed route is about 280 miles longer than the current route on CP. As a result, CN calculates a revenue per car of {{[redacted]}}, whereas the revenue per car mile that Mr. Hunt's approach would have developed based on the current, shorter route mileage would by {{[redacted]}}, which amounts to a 20% increase in CN's calculated rate simply because CN has the longer route.[121]

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[120] *See* workpaper "CN Revenue Analysis.xlsx," at tab "Main," where Column W (Revenue Grouping) = "No Historical Revenue - Rev/Car Approach Used and Shorter Relative Route" or "No Historical Revenue - Rev/Car Approach Used and Longer Relative Route."

[121] *See* workpaper "CN Revenue Analysis.xlsx," at tabs "Summary Figures" and "Main," at Rows 136 and 137

86. Mr. Hunt also makes a technical error that significantly overstates revenues for his "primary" category of diversions. Specifically, as noted in his workpapers, he intended to proportionally reduce his revenue estimate to account for the relative lower weight of Triple Crown RoadRailer shipments compared to other intermodal shipments, but he instead increased revenues by multiplying by "12.86/9.5" rather than by "9.5/12.86." Due to this error on top of his otherwise inaccurate process, the end result of his calculation is that CWS data shows intermodal units moving between Detroit and Kansas City have revenues of {{{[redacted]}}} per unit, while Mr. Hunt estimated CN would earn {{{[redacted]}}} for each diverted unit.[122]

87. For all the reasons Mr. Hunt articulates in his criticisms of our diversion study – which, as we explain above, is reasonable and reliable – his estimates of diversion traffic truly are flawed and random, and as a result render all downstream operational, environmental, financial and other analyses required to evaluate CN's application to acquire the Springfield line meaningless.

IV. TRAFFIC DATA SHOW THAT KCS-CN ROUTES VIA SPRINGFIELD PLAY NO MEANINGFUL COMPETITIVE ROLE

88. At the request of counsel for Applicants, we also provide an overview of traffic using KCS's Springfield Line by movement category (overhead, locally served, and CN-KCS interchanged), as well as an analysis of historical traffic patterns over corridors where KCS's Springfield Line could theoretically be used as part of an interline route. Our analysis of current traffic uses 2019 Combined CP/KCS traffic tape data as was submitted in our O.V.S.

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122 *See* workpaper "CN Revenue Analysis.xlsx," at tab "Summary Figures." It should also be noted that Mr. Hunt does not even apply the Triple Crown adjustment to all Triple Crown traffic. *See* Hunt workpaper "HC- 20220208 Rev Adjustment v03.xlsx," at tab "Main," where at Cells U4 and U13 are blank but should include the same Triple Crown Adjustment as Cells U6 and U15.

89. Using 2019 Combined CP/KCS 100-percent traffic tape data, we summarized the amount of traffic moving in the following buckets: overhead, local, and CN-KCS traffic interchanged at Springfield. This is depicted in Table 3 below.

TABLE 3[123]
2019 TRAFFIC ON KCS SPRINGFIELD LINE BY MOVEMENT CATEGORY

Movement Category	2019 Units	Percent
Traffic Locally Served on Springfield Line	{{{[redacted]}}}	{{{[redacted]}}}
Overhead Traffic on Springfield Line	{{{[redacted]}}}	{{{[redacted]}}}
CN-KCS Springfield Interchange Traffic	{{{[redacted]}}}	{{{[redacted]}}}
Total 2019 KCS Springfield Line Traffic	**{{{[redacted]}}}**	**100.0%**

90. Table 3 shows that the CN-KCS interchange traffic at Springfield is an {{{[redacted]}}} component of KCS's use and operation of the Springfield Line, which {{{[redacted]}}}

91. We further analyzed available data to assess the role that the Springfield Line plays in various rail traffic corridors of potential interest, particularly where CN says that the line competes with CP's route between Kansas City and Chicago. Our analysis of historical traffic patterns uses primarily 2015-2020 CWS data, as well as 2019 CN and Combined CP/KCS traffic tape data for Toronto movements.

92. The results of this analysis show that practically no traffic moving over the following corridors has used KCS's Springfield Line.

- Between Kansas City and Chicago
- Between Kansas City and Detroit

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123 *See* workpaper "2019 Springfield Line Traffic Summary.xlsx," at tab "Summary Table." Figures include originations/terminations at St. Louis but not Kansas City (which KCS may still be able to serve without using the Springfield Line).

- Between Kansas City and Toronto
- Between Mexico and Chicago
- Between Mexico and Detroit
- Between Mexico and Toronto

93. Specifically, an {{{[redacted]}}} of total traffic moving over these corridors used the CN-KCS interchange at Springfield in the past five years (or the past one year for Toronto corridors). Figure 12 below table summarizes these results.

FIGURE 12[124]
HISTORICAL ROUTES USED IN CORRIDORS RELEVANT TO KCS'S SPRINGFIELD LINE BETWEEN 2015 AND 2020

{{{[redacted]}}}

[124] Source: STB Carload Waybill Sample. Carloads on corridors including Toronto reflect 2019 traffic flows from CN and Combined CP/KCS traffic tape data. Mexico corridors include traffic rebilled at the Mexican border. Intermodal containers are converted to carloads at a containers-to-carloads ratio of 5-to-1. *See* workpaper "Historical Springfield Line Analysis.xlsx," at tab "Chart."

APPENDIX A

In Appendix A of our O.V.S, we described the processed used to generate 100-percent traffic tapes for the combined CP and KCS systems. At request of counsel, we have supplemented this data table is certain ways described below using 2019 traffic tape data produced by BNSF, UP, NS and CSXT.

First, we added records to the data table from BNSF and UP traffic tape data for loaded interline shipments with FXE, and loaded CN shipments between the United States and Canada (interline and local). Prior to adding records, we first removed limited internal duplicates from the data based on unique combinations of waybill date and car/container initial and number. We did not add records where CP, KCS, or KCSM participated on the route to the extent these were already covered by existing records for the same movement in the base data table. We also only added a single copy of a movement that was in multiple of the additional carriers' traffic tapes, e.g., for a FXE-BNSF-UP movement, we only added the record from the BNSF traffic tapes to the extent it was also included in UP traffic tapes. Where certain variables in the additional carriers' traffic tapes were confirmed to align with variables already in the base data table, we structured them in the same field, and otherwise appended fields onto the original data table layout containing these variables.

Second, we appended revenue and routing fields for interline records onto the updated data table from the traffic tapes of all available carriers participating on the route. Specifically, for all records involving CN, CP, and KCS interline movements, as well as for BNSF-FXE and UP-FXE interline movements, we appended available revenue and routing fields from each of the carriers' respective traffic tape data onto the base record for the movement in the data table, e.g., for a KCSM-UP movement, we appended revenue and routing fields from the UP record

onto the base KCSM record for the same movement in the data table. Movements from different carriers' traffic tapes were matched together based on unique combinations of waybill date and car/container initial and number.

Third, we applied logic to develop standardized routing location and railroad fields for each interline movement (e.g., for a CP-BNSF movement, SPLC 1, SPLC 2, SPLC 3, RR1, RR2, RR3, etc. as derived from CP traffic tapes; SPLC 1, SPLC 2, SPLC 3, RR1, RR2, RR3, etc. as derived from BNSF traffic tapes). Using this standardized information, we developed PC Miler miles for each segment of the route, e.g., Miles 1, Miles 2, Miles 3, etc. PC Miler miles were developed in PC Miler Version 27 using the "practical" route option.

The below table summarizes the records we added and appended based on this process. Details our provided in our workpapers.

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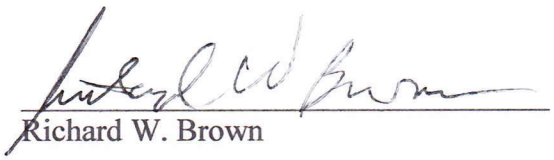
[125] *See* workpaper subfolder "Appendix A".

VERIFICATION

I, Richard W. Brown, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed this 12 day of July, 2022.



Richard W. Brown

VERIFICATION

I, Nathaniel S. Zebrowski, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed this 12 day of July, 2022.



Nathaniel S. Zebrowski

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.

REPLY VERIFIED STATEMENT
OF
MICHAEL R. BARANOWSKI

TABLE OF CONTENTS

I. THE CLASS 1 CRITICISMS OF MY ESTIMATES OF TRANSACTION-RELATED OPERATING COST SAVINGS ARE NOT WELL FOUNDED 5

A. There Is No Basis for Assertions that the Operating Savings I Estimated Cannot Be Achieved in the Proposed Timeframe 5

B. My Savings Estimates Are Based on Valid and Verifiable Calculations Drawing from Data Customarily Relied Upon in the Railroad Industry 5

II. THE CLASS 1 CRITICISMS OF MY ESTIMATES OF CPKC'S COSTS TO HANDLE TRANSACTION-RELATED TRAFFIC GAINS ARE NOT WELL FOUNDED 6

A. My Estimates Did Not Omit Categories of Expenses 7

B. Differences from the Precise Approach Taken in Other Merger Cases Do Not Undermine the Validity of My Estimates 12

C. My Operating Expense Estimates Are Tethered Directly to the Operating Plan (and Amended Operating Plan) 14

D. My Cost Estimates Are Based on Valid and Verifiable Calculations Drawing from Data Customarily Relied Upon in the Railroad Industry 16

E. The Specific Manner in Which Joint Facility Costs Are Considered Does Not Materially Affect My Estimates 18

III. CALCULATIONS OF BNSF AND UP REVENUE TO VARIABLE COST RATIOS 20

REPLY VERIFIED STATEMENT
OF
MICHAEL R. BARANOWSKI

1. My name is Michael R. Baranowski. I am a Senior Managing Director of FTI Consulting, Inc. which is located at 8251 Greensboro Drive, McLean, VA 22102, and leader of the firm's Network Industries Strategies ("NIS") practice. I submitted a Verified Statement on behalf of Applicants Canadian Pacific ("CP") and Kansas City Southern ("KCS") in this proceeding on October 29, 2021 (which I refer to as my "V.S."). A detailed statement of my qualifications is attached as Exhibit No. 1 to my V.S.

2. In my V.S., I developed the total savings in operating expenses that would result from the Transaction. I also calculated the costs (and net revenues) associated with the incremental Transaction-related traffic that other Applicant witnesses (Jonathan Wahba and Mike Naatz, Richard Brown and Nathan Zebrowski, and Bengt Mutén) anticipated the combined CPKC system would attract as a result of the Transaction, using a Uniform Rail Costing System ("URCS") application for 2019 that I constructed for the consolidated CPKC system. Those estimates were not affected by any of the changes reflected in the Amended Operating Plan filed in May.

3. Table 1 below summarizes the savings the combined CPKC system will achieve over the first three years of combined operations.

TABLE 1[1]
CPKC CUMULATIVE OPERATING SAVINGS SUMMARY
(IN USD, EXCLUDES SAVINGS RELATED TO MERGER-RELATED TRAFFIC ADDITIONS)

Item	Year 1	Year 2	Year 3
Operating Metrics	52.59M	52.59M	52.59M
Fuel Savings	26.57M	28.19M	29.79M
Locomotive Depreciation and Lease	10.15M	10.15M	10.15M
Freight Car	0.00M	1.79M	2.60M
Procurement	4.18M	12.05M	20.54M
Total	**93.5M**	**104.8M**	**115.7M**

4. Table 2 below summarizes the net revenues that the combined CPKC system will generate from incremental Transaction-related traffic gains.

TABLE 2[2]
SUMMARY OF CPKC MERGER BENEFITS

	Year 1 (2023)	Year 2 (2024)	Year 3 (2025)
Diverted Carloads/Units	195,093	351,620	509,490
Incremental Revenues	$418.0M	$726.7M	$1021.9M
Incremental Costs by Category:			
Engineering – Maintenance of Way	$18.1M	$28.6M	$38.8M
Mechanical	$10.2M	$17.1M	$23.4M
Transportation	$91.1M	$148.6M	$204.8M
Equipment Requirements and Utilization	$1.3M	$6.5M	$13.6M
Intermodal Operations	$8.6M	$17.0M	$25.7M
Total Incremental Costs	$129.2M	$217.8M	$306.3M
Net Merger Benefits	**$288.9M**	**$508.8M**	**$715.6M**

5. I have been asked by Applicants to respond to a variety of criticisms of my development of Transaction-related savings and net revenue from incremental traffic attracted to CPKC as a result of the Transaction raised in the comments of a number of Class 1 carriers in this proceeding ("Opposition Carriers"). I have reviewed those criticisms and conclude that they

[1] CP-25/KCS-13, Verified Statement of Michael Baranowksi (filed October 28, 2021) ("Baranowski V.S.") at 11.

[2] Baranowski V.S. at 26.

are without merit. The substantial benefits to this Transaction from the savings and net benefits that I have estimated are real opportunities on which CPKC will capitalize. The criticisms of my estimates are not well-founded and do not undermine my confidence in my methodology or my estimates for reasons discussed below.

6. In large part they are purely anecdotal, merely observing that the approach that I have taken here is different from the approaches taken by other witnesses in prior merger proceedings and speculating that the merger savings that I calculated cannot be achieved in the timeframe contemplated. None of them question the fact that my approach was reasonable and appropriate for purposes of analyzing this Transaction.

7. Opposition Carrier witnesses also opine that the costs that I develop to handle the additional carload and intermodal volumes that will be attracted to the combined CPKC system are lower as a percentage of revenues than what they have observed in prior mergers. To the extent that they compare my results to other benchmarks, those comparisons are based on manipulations of data that clearly produce wrong results. In addition, they ignore that these prior mergers involved railroads that had not adopted the efficiency components of operations like those underpinning precision scheduled railroading as adopted by CP, KCS, and the future CPKC.

8. While certain Opposition Carrier witnesses discuss specific cost components they believe are not accurately reflected by my analysis, no witness has presented an alternative set of results.

9. I have also been asked to summarize revenue to variable cost ratios for BNSF and UP intermodal and carload shipments to and from Mexico via Laredo, TX.

10. In Section I of this Reply Verified Statement (R.V.S.), I address the relatively minor criticisms of my estimate of the operating expense savings that will be generated by the combination of CP and KCS. In Section II, I refute the criticisms of my estimates of the costs required to handle CPKC's anticipated Transaction-related traffic gains. In Section III, I summarize BNSF and UP revenue to variable cost ratios for intermodal and carload shipments to and from Mexico via Laredo, TX.

I. THE CLASS 1 CRITICISMS OF MY ESTIMATES OF TRANSACTION-RELATED OPERATING COST SAVINGS ARE NOT WELL FOUNDED

A. There Is No Basis for Assertions that the Operating Savings I Estimated Cannot Be Achieved in the Proposed Timeframe

11. My analysis of the timing of cost reductions is based on the pace of Transaction implementation set forth in the Application. Given CP's and KCS's strong operational track record and history of effective merger implementation and the extensive planning that was already well underway for the post-control integration of CP and KCS at the time of my statement and that has continued during this proceeding, my assumptions and estimates continue to be reasonable.

B. My Savings Estimates Are Based on Valid and Verifiable Calculations Drawing from Data Customarily Relied Upon in the Railroad Industry

12. CN witness Mark E. Zmijewski opines that my calculations of Transaction-related operating expense savings are not verifiable.[3] This criticism is inaccurate. I provided ample workpapers from which my calculations could be verified. Table 3 below summarizes the workpapers provided in support of my merger-related operating expenses savings in my V.S.

[3] CN-13, Verified Statement of Mark Zmijewski (filed February 28, 2022) ("Zmijewski Comments V.S.") at 58.

TABLE 3
SUMMARY OF WORKPAPERS PRODUCED IN SUPPORT OF TRANSACTION-RELATED SAVINGS

FILENAME	DESCRIPTION
Base to Optimized Fuel Savings Summary.xlsx	Transaction-related synergy fuel-related savings calculations
Base to Optimized Operating Plan Summary.xlsx	Transaction-related savings calculations applicable to operating metric differences between base and optimized operating plans
CPKCS Procurement Synergies Study.xlsx	Transaction-related procurement savings calculations and assumptions
Freight Car Savings.xlsx	Summary of Transaction-related freight car savings

13. Not only is my analysis reliable and verifiable, it is also consistent with approaches to rail costing used both in Board proceedings and by railroads in the ordinary course. For example, as explained in my V.S., fuel savings attributable to CPKC are aligned with CP's internal projections while procurement savings are based on real opportunities for increased volume-related price adjustments and best practices.

II. THE CLASS 1 CRITICISMS OF MY ESTIMATES OF CPKC'S COSTS TO HANDLE TRANSACTION-RELATED TRAFFIC GAINS ARE NOT WELL FOUNDED

14. The criticisms of my development of the costs attributable to the shipments that would be attracted to the CPKC system as a result of the Transaction ("Attracted Shipments") can be grouped into five categories. First, CN witness Hugh Randall[4] and UP witness Thomas C. Haley[5] suggest that certain costs are missing from my analysis, and that based on their observations, my operating expenses are too low. Second, Mr. Randall asserts that the operating expense methodology I use differs from the methodology used by applicants in prior mergers.[6]

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[4] CN-13, Verified Statement of Hugh Randall (filed February 28, 2022) ("Randall Comments V.S.") at 32.

[5] UP-10, Verified Statement of Thomas Haley (filed February 25, 2022) ("Haley Comments V.S.") at 10.

[6] Randall Comments V.S. at 33.

Third, Mr. Randall[7] and CN witness Carl Van Dyke[8] suggest that my development of operating expenses attributable to the Attracted Shipments is untethered to the Operating Plan or the MultiRail tool used to develop the Operating Plan for scheduled train service. Fourth, Dr. Zmijewski opines that my operating costs are not verifiable.[9] And fifth, CSX witnesses Julie M. Carey and Alfred W. Bresmer[10] and BNSF witness Benton V. Fisher[11] suggest that my cost estimates do not include the actual joint facility costs that will be triggered by the Attracted Shipments. I address each of these categories in the remainder of this section.

A. My Estimates Did Not Omit Categories of Expenses

15. A number of Opposition Carrier witnesses complain that I omitted certain cost elements associated with the Attracted Shipments or that the costs I attributed are too low.

16. First, my estimates included the relevant costs. I explained clearly in my V.S. that the buildup of costs that I attributed to the Attracted Shipments reflect the following two categories:

- URCS cost components that are affected directly by the Attracted Shipments; and
- Costs that are not accounted for in other analyses undertaken by CP.

17. The only categories of costs that I omitted from my estimates were (a) those calculated and presented by other Applicant witnesses and (b) those that would not be affected by the addition of the Attracted Shipments. My critics simply ignore the fact that my analysis

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7 *Id.*

8 CN-13, Verified Statement of Carl Van Dyke (filed February 28, 2022) ("Van Dyke Comments V.S.") at 29.

9 Zmijewski Comments V.S. at 60.

10 CSX-8, Verified Statement of Julie Carey and Albert Bremser (filed February 28, 2022) ("Carey & Bremser Comments V.S.") at 37.

11 BNSF-9, Verified Statement of Benton Fisher (filed February 28, 2022) ("Fisher Comments V.S.") at 38.

had to both avoid double counting costs that other witnesses estimated and adding costs unaffected by incremental traffic gains.

18. As my V.S. explained, I took account of the cost analysis of these other witnesses by making the following adjustments to standard URCS costing procedures:

- Elimination of all overhead expenses. The merger-related changes to general overhead and administrative expenses are addressed in the Verified Statement of Dean Vargas;
- Elimination of all overhead expenses attributed directly to the maintenance of way, mechanical, and transportation departments. The merger-related changes to these departments are addressed in the Amended Operating Plan. Further, departmental overheads are not affected by the addition of the Attracted Shipments;
- Elimination of all carload clerical costs. These costs are largely IT related and changes to IT as a result of the merger are addressed in the Verified Statement of James Clements; and
- Elimination of all road and equipment ownership costs, with the exception of a portion of depreciation and lease costs associated with additional locomotives and freight car equipment required to accommodate the Attracted Shipments as set forth in the Amended Operating Plan. To be clear, ownership costs in URCS include both depreciation expenses, which represent the return of investment and return on investment. Additional capital requirements needed to accommodate the Attracted Shipments are addressed in the Operating Plan. Adding depreciation expenses from URCS would result in a double count of those capital ownership costs.

19. My estimates, together with estimates presented by other Applicant witnesses, thus encompassed all of the costs that would arise from the incremental Transaction-related traffic, without double-counting. Because the costs my analysis attributed to the Attracted Shipments meet my stated criteria of being affected by the addition of the diverted traffic shipments and not addressed elsewhere in the CP Application, any observations related to cost elements not included as part of my analysis are invalid.

20. Second, claims by a number of Opposition Carrier witnesses that my cost estimates are too low are incorrect. They make this allegation based on their observations of an

"operating ratio" attributable to the incremental new shipments of 30%.[12] Relatedly, Mr. Van Dyke argues that the projected incremental traffic, which is sizeable, would not move from truck or other railroads at the variable cost-to-revenue ratio levels reflected in my statement.[13]

21. These allegations are incorrect for reasons similar to those discussed above. Both of these Opposition Carrier witnesses' concerns fail to consider that the costs I attribute to the incremental shipments are only the URCS unit costs that are affected directly by those shipments,[14] a subset of total costs, whereas reported operating ratios *include* all such costs. As an example, in my analysis I did not identify any additional maintenance of way overhead costs directly. Under a standard URCS application, a portion of maintenance of way overhead cost would be attributed to the Attracted Shipments. Specifically, the service units for the Attracted Shipments would be added to the service units generated by the existing CP and KCS shipments and the cost for maintenance of way overhead spread over the larger combined shipment volumes. Because my analysis focused only on the incremental cost to the combined CPKC of handing the Attracted Shipments, I did not find it necessary to redistribute costs not directly affected by the additional volumes to those volumes. Therefore, a comparison to an operating ratio is a comparison of apples and oranges.

22. Equally important, comparing the 30 percent figure to typical railroad operating ratios is invalid. Reported operating ratios are based on aggregate revenues and costs for enterprise-wide bodies of traffic. Thus, instead of looking at only the costs and revenues specific

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[12] Randall Comments V.S. at 27.

[13] Van Dyke Comments V.S. at 16.

[14] Again, costs evaluated by other witnesses are not included in my estimates because they are addressed elsewhere in the Application. Incremental costs in the categories of depreciation, general and administration, and other cost elements that are addressed elsewhere in the Application or are otherwise not affected by the addition of the Attracted Shipments are excluded from my analysis, as they should be.

to the *incremental* traffic, comparisons of the revenue-to-cost relationship for the combined CPKC should be considered in assessing, from a top-down perspective, the overall reasonableness of the results. Table 4 below compares the combined CPKC pro forma 2019 operating ratio for the U.S. portion of the system, including the revenues and costs attributable to the Attracted Shipments, with the actual 2021 U.S. operating ratios for CP, KCS, and pro forma CPKC combined for the U.S. network.

TABLE 4
CPKC'S PRO FORMA OPERATING RATIO VALIDATES MY COST ESTIMATES[15]

Comparison of 2019 CPKC U.S. Operating Ratio Including U.S. Portion of Transaction-Related Traffic Increases (Revenue and Cost to CP and KCS 2021 Operating Ratio)				
Description	**CP 2019 (Soo)**	**KCSR 2019**	**Incremental Traffic (U.S. Portion)**	**Total**
2019 Overview				
Revenue ($000s)	1,581,634	1,484,821	775,117	3,841,572
Expenses ($000s)	1,075,661	1,147,854	232,359	2,455,874
Operating Ratio	0.68	0.77	0.30	0.64
2021 Overview				
Revenue ($000s)	1,575,619	1,572,087	n/a	3,147,706
Expenses ($000s)	970,660	1,117,264	n/a	2,087,924
Operating Ratio	0.62	0.71	n/a	0.66

23. Table 4 shows that the pro forma 2019 operating ratio for the U.S. portion of the combined CPKC is 0.64, which unsurprisingly is two points higher than the 2021 CP U.S. operating ratio of 0.62 and two points below the 2021 combined CPKC operating ratio of 0.66. Put another way, the combined operating ratio for the U.S. portion of the combined CPKC included in the Application is in line with the operating ratios achieved by the CP's and KCS's U.S. operations in 2021, despite the lower "variable cost-to-incremental-revenue ratio" that

[15] *See* workpaper "Operating Ratio Calculations.xlsx," at tab "Summary Table."

Opposition Carrier witnesses misleadingly cite to suggest that my cost estimates were unrealistically low.

24. Mr. Randall further asserts that the combined CPKC operating expenses for the first three years of consolidated operations are understated by nearly $2.47 billion dollars. He bases this alleged shortfall by comparing the historical cost per gross ton mile from 2015 to 2019 for CP and KCS with the projected average cost per gross ton mile for the combined CPKC during the first three years of operation derived from the Application income statement ("CPKC Projected Average Cost"). Mr. Randall's assertion is that the CPKC Projected Average Costs are understated because the CPKC Projected Average Cost of $0.0126 is below the historical 2015–2019 average cost per thousand gross ton miles that he observed for CP-U.S. and KCS-U.S. combined and separately for BNSF, CSX, NS, and UP combined.

25. Mr. Randall provides no explanation of why the observed historical average operating expense for what he describes as the "Big Four" is at all relevant to the combined CPKC network.[16] The arbitrary nature of his finding becomes apparent by changing only one assumption from his analysis. Specifically, by using the historical average cost per thousand gross ton miles for BNSF over the 2015 to 2019 timeframe instead, the combined CPKC operating expenses would appear overstated – not understated – by approximately $1.82 billion.[17] This confirms that my estimates are in a reasonable range.

26. Mr. Randall's analysis also does not consider the efficiencies of the combined CPKC system as outlined in the Amended Operating Plan. As Mr. Elphick explains, upon

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[16] Randall Comments V.S. at 26.

[17] *See* workpaper "Oliver Wyman OPEX Worksheet – Restated.xlsx," at tab "Summary for OPEX VS - BNSF Only," at Cell D181.

authorization of control, CPKC would begin to make changes to improve service and efficiency on the combined network through new train services and longer-distance train profiles and longer-distance blocking. The practical effects of these efficiencies would be to lower operating expenses per thousand gross ton miles to below the historical levels observed for the independent CP and KCS over the 2015 to 2019 timeframe.

B. Differences from the Precise Approach Taken in Other Merger Cases Do Not Undermine the Validity of My Estimates

27. CN witness Randall argues that the approach I developed for costing the Attracted Shipments differs from the approach taken in prior mergers.[18] It is important to note that nowhere does Mr. Randall indicate that the approach that I have taken is wrong. It is only that in his view, the approach I have taken is different.

28. The heart of Mr. Randall's criticism seems to be that in prior mergers, applicants' approaches were organized differently and included what he describes as a "system model" to derive operating statistics from the operating plan, and that those operating statistics were then input into a "costing model" where they were converted into projected operating expenses based on the historic relationship of each category of operating expense with projected changes in operating activity as represented by projected changes in GTMs.[19] The results of the costing model are then inputs into the "financial model."

29. While my analysis may not follow a structure that Mr. Randall views as familiar or routine, all of the required steps he outlines are included. To the extent that there is any meaningful deviation, it relates to the CP and KCS combination being a truly end-to-end merger.

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[18] Randall Comments V.S. at 30.

[19] *Id.* at 29.

Specifically, economies associated with internal network re-routing or network rationalization that may have been available to applicants in mergers with more overlapping routes – potentially leading to more efficient routing alternatives and a reduction in train miles, car miles and gross ton miles – are not present here. As such, there is no need for a so-called "system model" to recompute operating statistics here. It is most important to identify the incremental costs that the combined CPKC will incur to handle the Attracted Shipments, which I have done.

30. The "financial model" Mr. Randall believes is necessary for this analysis – i.e., the tool used to develop the pro forma financial statements – *was* used by Applicants and described in the Verified Statement of Dean Vargas. The end-to-end nature of the CP and KCS consolidation produces a financial model that is straightforward, beginning by adding together the financial results of the independent CP and KCS systems. The only pieces that then need to be added to comport with Mr. Randall's view are the revenue and operating expense estimates associated with the Attracted Shipments, which *is precisely what my analysis did*. Specifically, my approach:

- Created a consolidated set of URCS inputs;
- Adjusted the consolidated URCS costs for improved efficiencies generated by the Operating Plan;
- Identified the specific cost URCS cost components affected by the Attracted Shipments;
- Developed URCS-related operating statistic inputs specific to the Attracted Shipments;
- Multiplied the diverted shipment operating statistics by the relevant URCS unit costs to determine incremental operating expenses;
- Aggregated incremental operating expenses by diverted shipment traffic category and operating expense grouping consistent with the requirements of the financial model; and
- Provided results to Mr. Vargas.

C. My Operating Expense Estimates Are Tethered Directly to the Operating Plan (and Amended Operating Plan)

31. In a similar criticism, Mr. Van Dyke criticizes my development of the operating expenses attributable to the Attracted Shipments because I did not use MultiRail as the basis for my operating expenses, which he believes are untethered to the Operating Plan.[20] Mr. Van Dyke's critique is incorrect and meritless.

32. First, the Attracted Shipments included in my costing analysis were provided by Messrs. Brown and Zebrowski (and included the estimates of incremental traffic gains forecasted by Applicant witnesses Jonathan Wahba and Michael Naatz, and Bengt Mutén). Those same shipments were provided to the Operating Plan team for processing in the development of the Operating Plan. In other words, the Operating Plan and my cost analysis rely on exactly the same set of Attracted Shipments.[21]

33. Second, my costing of the Attracted Shipments did incorporate the applicable efficiency adjustments generated from the MultiRail process within the Operating Plan for scheduled train movements which, for purposes of reporting consolidated system-wide effects, were combined with bulk train shipments not addressed within MultiRail. Specifically, my analysis incorporated the following costing adjustment produced by the operating plan MultiRail process:

- Improved fuel consumption efficiency by 2.0%, 1.8% and 1.7% in years 1, 2 and 3 respectively;
- Reduced locomotive units per train by 4.0%, 2.0% and 2.4% in years 1, 2 and 3, respectively;

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[20] Van Dyke Comments V.S. at 28.

[21] The Attracted Shipments for which I developed CPKC handling costs generate approximately 196.5 million gross ton miles per day.

- Increased trailing tons per train by 3.5%, 3.4% and 3.3% in years 1, 2 and 3, respectively; and
- Increased average crew miles per train by 0.7% in years 1 through 3.

34. Mr. Van Dyke also suggests that I failed to consider the effects of growth-related traffic in the Operating Plan in my development of costs.[22] Consistent with the development of the pro forma financial results showing the effects of the proposed consolidation on base year 2019 financials, my costing of Attracted Shipments focused only on the incremental cost of handling those shipments. Accounting for productivity from the efficiency gains attributable to organic growth traffic as suggested by Mr. Van Dyke would have resulted in even lower incremental costs for the Attracted Shipments.

35. Last, Mr. Van Dyke asserts that costs attributable to block swaps and other intermediate switching and intermodal lifts required to handle the Attracted Shipments are not included in costs I developed.[23] Again Mr. Van Dyke is wrong. The costs I developed for the Attracted Shipments include inter and intra-train ("I&I") switching cost at the standard URCS switching intervals for carload and intermodal shipments. I&I switches include block swaps and intermediate switching of freight cars from one train to another. Accordingly, the costs I developed *do* include these allegedly missing costs, for all intermodal Attracted Shipments.[24]

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22 *Id.* at 9.

23 Van Dyke Comments V.S. at 33.

24 *See* Baranowski V.S. workpaper "URCS Phase III Calculation For Growth Traffic.xlsx," tab "Phase III Calculation" rows 154 and 256.

D. My Cost Estimates Are Based on Valid and Verifiable Calculations Drawing from Data Customarily Relied Upon in the Railroad Industry

36. As he did with my development of operating expense savings attributable to the Transaction, Dr. Zmijewski, relying in part on the testimony of Mr. Randall, expresses that he is "aware of no facts, calculations, or detailed methodology for the Baranowski VS's calculation of incremental cost per diverted unit" and goes on to conclude that my development of the cost attributable to the Attracted Shipments is not verifiable.[25] It is not clear to me the scope of the analysis – if any – conducted by Dr. Zmijewski in making his assertion, but in addition to my V.S., in which I explained the methodology that I used to determine the costs attributable to the Attracted Shipments, I included the workpapers in Table 5 pertaining exclusively to that analysis.

[25] Zmijewski Comments V.S. at 59.

TABLE 5
SUMMARY OF WORKPAPERS PRODUCED IN SUPPORT OF DIVERTED SHIPMENT COSTS

FILENAME	DESCRIPTION
2019 CTA Annual Report Final – signed	Canadian Pacific Railway - Canada 2019 Annual Report
CP Operating Plan Output Cost Metrics Model.xlsx	Spreadsheet model developed by CP to quantify operating metric differences between base and optimized operating plans, including the effects of diversions, productivity and organic growth
CP SOO and CPR comparison table.xlsx	Comparison of relative CP SOO and CP Canada 2019 cost metrics
Incremental URCS Unit Costs.xlsx	URCS unit cost line items included in costing of Attracted Shipments
Summary of URCS Costing Adjustments to Diverted Shipments.doc	Description of costing adjustments applied to Attracted Shipments
URCS Diversion Costing Metrics Adjustments	Spreadsheet calculating productivity related costing adjustments between base and optimized plan and equipment-related costing adjustments
2019 URCS Phase II Model for Combined CP and KCS.xlsx	Spreadsheet starting with STB 2019 URCS Phase II model, combining CP and KCS inputs, and applying calculations discussed in statement
URCS Phase III Calculation For Growth Traffic Input.xlsx	Traffic characteristics developed for running URCS Phase III for rail-to-rail, truck-to-rail, and growth-related traffic provided by other witnesses
URCS Phase III Calculation For Growth Traffic.xlsm	URCS Phase III calculations required for incremental cost estimates discussed in my statement

37. Dr. Zmijewski further asserts that many of the claimed efficiencies engendered by the merger are not verifiable or merger-specific under a framework typically employed by the DOJ/FTC known as the *Merger Guidelines.*[26] Yet, this framework, by Dr. Zmijewski's own admission, is not applicable to the acquisition of KCS by CP, nor does it prescribe specific standards, methods, or tests, to verify claims of efficiency.[27]

38. As I explained above, my approach is fully consistent with the approach used routinely in the railroad industry, both for the purposes of Board proceedings and ordinary

[26] Zmijewski Comments V.S. at 35.

[27] *Id.*

course railroad costing. Further, based on conversations with CP, the incremental costs of handling the Attracted Shipments that I develop are in line with both CP's experience and expectations related to the efficiencies available from the combined system and the costs of handling additional volumes. In sum, the efficiencies achieved by this Transaction have been estimated in the same way the railroads approach such matters in the ordinary course and in regulatory proceedings and should not be rejected for failing to meet Dr. Zmijewski's own self-imputed litigation-style standards.

E. The Specific Manner in Which Joint Facility Costs Are Considered Does Not Materially Affect My Estimates

39. CSX witnesses Drs. Carey and Bresmer observe correctly that the costs that I developed and attributed to the Attracted Shipments rely on system-average URCS costs instead of lane-specific costs to cover the economic costs associated with haulage agreements or trackage rights agreements. Though they acknowledge that I included these costs, they nevertheless assert that URCS system-average costs may understate the fees attributable to a specific route.[28] In contrast to Drs. Carey and Bremer, who acknowledge that I included costs to cover haulage and trackage rights agreements, BNSF witness Mr. Fisher observes that the costs that I attribute to these Attracted Shipments do not include the URCS line item costs that are specifically related to joint facilities expenses.[29]

40. I disagree that joint facility costs are not considered properly in my analysis. Consistent with Drs. Carey's and Bresmer's view, my analyses include an estimate of the CPKC economic costs attributable to haulage or trackage rights for the Attracted Shipments.

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[28] Carey & Bremser Comments V.S. at 35, fn.151.

[29] Fisher Comments V.S. at 38.

Specifically as I explained in my V.S., the URCS running track costs include maintenance of way, maintenance of way administration, joint facility costs and other costs related to operating and maintaining right of way from which I identified those specific line items affected by the Attracted Shipments. Although my analysis did not identify the specific URCS joint facility-related unit cost elements as directly affected by the Attracted Shipments, my analysis does include the operating mileages over the trackage rights segments and the full URCS related variable costs for tie, rail, OTM and ballast maintenance costs. Ties, rail, OTM and ballast maintenance costs are typically a significant component of joint facility compensation. Further, unlike for fuel, crew, and locomotive costs discussed above, I did not make any efficiency adjustments to the unit costs for components relating to the below-the-rail cost associated with trackage rights segments. As such, my costs for the Attracted Shipments include appropriate consideration for trackage rights-related costs associated with Attracted Traffic including KCS's trackage rights over UP-owned lines in Texas.

41. Although I disagree with the critiques about my methodology and resulting cost levels, I performed a sensitivity analysis after reading these critiques. If I were instead to add URCS "joint facility" costs to my analysis on top of the maintenance-related costs already included in my analysis, the costs attributable to the Transaction-related shipments would increase by only $7.1 million, from $306.3 million to $313.5[30] million, before determining how to adjust the costs that I included in my analysis. In short, my methodology included costs for the haulage and trackage rights segments, was reasonable, and produced valid and reasonable results.

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[30] *See* workpaper "URCS Phase III Calculation For Growth Traffic with Joint Facility Costs.xlsm," at tab "Final Summary," at cells F13 and G13.

III. CALCULATIONS OF BNSF AND UP REVENUE TO VARIABLE COST RATIOS

42. I have been asked to provide revenue to variable cost ("RVC") ratios for BNSF and UP intermodal and carload shipments moving to and from Mexico via Laredo, TX. I identified from the Board's 2019 Confidential Carload Waybill Sample ("CWS") the BNSF and UP shipments moving through the Laredo, TX gateway based on the following criteria:

- All BNSF shipments with reported on or off junctions at Robstown or Corpus Christi and originating or terminating in Mexico.
- All UP shipments with a reported on or off junction at Laredo and originating or terminating in Mexico.

43. To develop the RVC ratios and average revenue above variable costs, I used the variable cost developed by the Board and reported in the CWS, and identified the actual BNSF and UP shipment revenue from the BNSF and UP waybill data produced in discovery. My results are summarized in Table 6 below and details of my calculations are set forth in my work papers.[31]

TABLE 6
BNSF AND UP AVERAGE RVC RATIOS AND AVERAGE REVENUE ABOVE VARIABLE COST FOR SHIPMENTS MOVING THROUGH LAREDO

{{{

[redacted]

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[31] *See* workpaper "Laredo RVC Calculations.xlsx" at tab "Summary."

VERIFICATION

I, Michael Baranowski, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed this 12 day of July 2022.

Michael Baranowski

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

REPLY VERIFIED STATEMENT OF BENGT MUTÉN

TABLE OF CONTENTS

I. CRITICISMS OF MY ANALYSIS ARE INCORRECT 2

II. MY ANALYSIS DOES NOT UNDERMINE THE TESTIMONY OF OTHER APPLICANT WITNESSES 4

III. MR. HUNT'S PROJECTIONS OF FUTURE INTERMODAL TRAFFIC ON THE SPRINGFIELD LINE APPEAR IMPLAUSIBLE BECAUSE OF FLAWS IN HIS METHODOLOGY 6

1. My name is Bengt Mutén, and I am a Consulting Principal with S&P Global in its Economics and Country Risk practice. My office is located at One Financial Center, Suite 1900, Boston, Massachusetts 02111. I submitted a Verified Statement supporting the Application filed on October 29, 2021. I am submitting this Reply Verified Statement, first, to respond to certain criticisms of my truck-to-rail diversion analysis and Applicants' rail-to-rail diversion estimates; and second, to address flaws in the Verified Statement of David T. Hunt, submitted by Canadian National Railway Company ("CN").

I. CRITICISMS OF MY ANALYSIS ARE INCORRECT

2. In my analysis of truck-to-rail diversions, I set an upper limit of 70.9 percent for the rail intermodal share of traffic in any particular corridor. BNSF witness Benton Fisher criticizes this ceiling as "a broad assessment" that results in inappropriately understated diversion estimates.[1] This ceiling, however, was entirely appropriate.

3. As I explained in my Verified Statement, this ceiling allowed me to remove potentially unreliable outliers in the data and avoid overestimating potential diversions. In line with the standard practice of expert transportation analysts, I reviewed the rail intermodal traffic and lane shares to remove outlier data that would have an unreliable impact on the outcome of the analysis. To remove unreliable outliers in the data, I sorted all the BEA-to-BEA flows sequentially in order of intermodal share, and then excluded the top 20 percent of flows. The maximum intermodal share among the remaining flows was 70.9 percent. Excluding the top 20 percent of flows is a safeguard that is particularly useful when considering potential diversions across a large geographic area and a broad range of commodities, as the breadth of information

[1] BNSF-9, Verified Statement of Benton Fisher ("Fisher V.S.") at 15.

tends to produce unreliable outliers. Thus, given the substantial scope of the CP-KCS transaction, I removed outliers to produce a more reliable dataset and applied the resulting 70.9 percent ceiling.

4. While there were instances where actual rail intermodal share in certain corridors, compared to total dry van and refrigerated traffic, exceeded the upper limit I set for my analysis, I found those instances to be unrepresentative exceptions that would be inappropriate to rely upon in reaching conclusions about the likely body of truck traffic susceptible to being attracted by new CPKC intermodal services. It is possible that some number of these exceptional corridors were among those subject to diversion in my analysis. However, I did not have the ability to identify the specific reasons why rail intermodal share might have exceeded the limit in a particular corridor. To illustrate, for example, in the Norfolk BEA to Chicago BEA lane, Transearch data showed 1,395 moves in dry van or refrigerated trucks, while the expanded Confidential Waybill Sample ("CWS") showed {{{[redacted]}}} trailers or containers, for a rail intermodal share of {{{[redacted]}}} percent. But it would be inappropriate to apply this figure more generally, because it is likely that intermodal share in this lane is driven by import container flows arriving at the Hampton Roads and moving inland by rail. This would not be a useful model for most of the flows considered for CP-KCS. There may be other reasons that explain the outlier observation in other lanes. However, even had I wanted to exclude just import containers from my analysis, it would not have been possible to do so, because the CWS import/export flag in most cases is "9," representing unknown status.

5. Mr. Fisher makes another misguided critique when he notes: "[a] third source of understatement of the likely level of rail and truck traffic diversions involves the source of the data," as the "Board's Carload Waybill Sample does not fully represent transborder shipments,

especially rail traffic volumes moving to/from Mexico."[2] First, my analysis did not rely solely on CWS data. I used CWS data in conjunction with Transearch data and 100-percent data from KCS, KCSM, and CP actual waybills, which produced a reliable and accurate data source, as shown by the fact that the count of cross border rail traffic from those sources matches the count of cross border rail traffic in the Bureau of Transportation Statistics.

6. Second, the CWS does include essentially all cross border traffic to and from Mexico. A significant share is shown as rebill traffic received or forwarded at the border crossing, but by using CWS data in conjunction with Transearch rail volumes, I was able to estimate the Mexico origins and destinations.

7. Third, even if there was an undercount of rail flows, which there was not, this would have led to an overstatement – not an understatement – of diversions, since Transearch starts with total overland trade, and truck volumes are presumed to be *the remainder* after rail and pipeline flows are netted out.

II. MY ANALYSIS DOES NOT UNDERMINE THE TESTIMONY OF OTHER APPLICANT WITNESSES

8. CN witness David Hunt also errs in his criticism of Applicants' projected rail-to-rail traffic shifts when he erroneously applies my analysis to facts to which it does not apply. For example, Mr. Hunt inaccurately relies on my Verified Statement to criticize FTI's analysis regarding rail-to-rail diversion to longer routes.[3] In broad terms, it is true that a shipper's freight

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[2] BNSF-9, Fisher V.S. at 16.

[3] Mr. Hunt states: "[t]he relationship between route length and route choice is a well-established concept in transportation modeling. This idea is both simple and intuitive: the least-cost route between an origin and a destination is likely to capture the greatest share of traffic, where cost is a function of distance. The traffic diversion models used in prior Class I railroad merger cases have consistently recognized this principle. Indeed, Applicants' own witness, Bengt Mutén, testifies that 'distance between end points' was found by his former colleagues at Reebie Associates to be one of 'the primary drivers of intermodal market share.' CP witness Mutén's truck-to-rail diversion model includes two parameters

mode choice is typically a trade-off between time (whether absolute or relative) and the cost and other options avalable to the shipper. (Even here, however, Mr. Hunt's criticism based on route length is an oversimplification, in that route length is only one of many factors that determine transit time.)

9. What Mr. Hunt most crucially overlooks, however, is that FTI was undertaking a fundamentally different analysis, involving fundamentally different service parameters, than my analysis. Distance directly impacts both time and cost for truck shipments, whereas that is not necessarily true for rail shipments. In other words, distance is a far better proxy for time and cost in truck shipping than in rail shipping. It is therefore to be expected that a truck-to-rail diversion study would be more sensitive to route circuity than a rail-to-rail traffic analysis.

10. In addition, Mr. Hunt fails to properly apply my analysis to the facts when he criticizes Messrs. Wahba's and Naatz's perishable diversion estimates.[4] Mr. Hunt

based on route distance, overall truck distance and the difference between truck and rail distances." CN-13, Verified Statement of David Hunt ("Hunt V.S.") at 8.

Mr. Hunt also notes "[i]t appears that witnesses Brown and Zebrowski initially recognized the importance of distance in rail market share. They conducted a statistical analysis comparing the relationship between rail carriers' length-of-haul and their historical market share. But the results of their analysis – which purported to find 'a weak correlation between the relative shares of traffic among the available routing options and the movement mileage for those options' – are utterly inconsistent with both prior traffic diversion modeling and witness Mutén's truck-to-rail diversion analysis." *Id.* at 9.

[4] "Witnesses Wahba and Naatz also project that CPKC will earn an additional $54.4 million in incremental revenues from perishables truck-to-rail diversions. Specifically, they divert to the CPKC network 24,748 units of perishables in 53-foot refrigerated containers that move by truck from Michoacán/Veracruz, Mexico to Chicago, the Twin Cities, and Kansas City. Applicants' own truck-to-rail diversion expert Mutén concluded that only a much smaller volume of this perishable traffic would be divertible: 374 units, with associated revenues of just $0.06 million. Witness Mutén explained why he did not include the 24,748 units diverted by witnesses Wahba and Naatz: 'Most of these volumes flow out of Mexico to intermediate destinations [sic] in border states and later move to the Midwest.' Witnesses Wahba's and Naatz's 'analysis' of this 'additional opportunity' appears to consist of (i) estimating that five million tons of produce moved from Mexico to wholesaler markets in border states, (ii) assuming that CPKC could capture ten percent of such traffic, and (iii) diverting that ten percent from truck to CPKC. Applications do not explain why these shipments are divertible, or why witness Mutén (who clearly was aware of the movements) did not judge them to be divertible." *Id.* at 34-35.

misunderstands the relationship between my analysis and Messrs. Wahba's and Naatz's analysis. Their analysis assesses the potential of new CPKC single-line rail service connecting origins in Mexico with destination markets in the United States to attract perishables traffic that is moving by truck today, but not via the same path. Because the new CPKC service represents a route that does not exist today, I was not able to incorporate it into my analysis using my methodology. The underlying truck flows of perishables from Mexico to the United States, however, do show up in the data. To the extent my analysis identified diversions of perishable traffic from truck to rail, I manually removed those moves from my analysis to avoid double-counting those diversions.[5]

11. To be more specific, the Transearch database shows movements of perishables from Mexico to the Upper Midwest as they currently occur, primarily in two distinct flows: first, perishables flow to distribution centers in Texas, and then, the perishables flow from those distribution centers to their final destinations, such as Chicago. Messrs. Wahba and Naatz identified flows from origin to final destination for which a direct, single-line CPKC service could be competitive by replacing those two moves with a single-rail intermodal move. In my diversion analysis, I initially found a small amount of likely diversions of perishables on the existing legs. Because Messrs. Wahba and Naatz were forecasting both legs to be replaced by new flows (that do not yet exist), I manually and correctly removed those potential diversions to avoid double-counting the same freight.

III. MR. HUNT'S PROJECTIONS OF FUTURE INTERMODAL TRAFFIC ON THE SPRINGFIELD LINE APPEAR IMPLAUSIBLE BECAUSE OF FLAWS IN HIS METHODOLOGY

12. CN witness Mr. Hunt forecasts huge shifts in truck traffic from highways to CN's

[5] *See* Application, Mutén V.S. at 22.

proposed new route between Kansas City and Chicago if CN is permitted to acquire KCS's Kansas City-Springfield Line. These predictions are implausible for several reasons.

13. First, Mr. Hunt's model is flawed, as it completely ignores important factors influencing shipper choice. The most serious omission is that Mr. Hunt's model does not take shipment time or the variability of shipment time into account at all. The mode choice in Mr. Hunt's model is driven by comparing Uniform Rail Costing System costs for the rail portion (with modeled truck operator costs added for the drays), with modeled truck operator costs for the existing highway flow. Changes in relative costs drive his results.

14. In reality, however, shippers' choices between trucks and rail intermodal service *are not solely based on relative out-of-pocket costs* (*i.e.*, *transportation charges*), but on a much broader array of logistics costs that are affected by service levels and service reliability – including the inventory costs associated with shipment time and the cost of safety stock needed in case of delays. Those other costs are typically higher for rail flows (including intermodal) than for truckload flows because of longer shipment time and greater variability, but Mr. Hunt's model does not account for those additional costs at all.[6]

15. Second, Mr. Hunt inappropriately included in his analysis several lanes with well-developed and efficient direct intermodal service, and he diverted substantial volumes of truck traffic in those lanes to CN's theoretical new service. For example, in 2019 Norfolk Southern carried {{{[redacted]}}} units between Kansas City and Detroit and {{{[redacted]}}} units between St. Louis and Detroit, and BNSF carried {{{[redacted]}}} units between Kansas City and Chicago. In effect, Mr. Hunt's analysis incorrectly treated these lanes as if there was not any existing rail

[6] Mr. Hunt's workpapers show only the URCS rail costs and modelled truck costs. There is no mention of shippers' indirect costs.

intermodal service today, and asked, if rail costs are lower that truck costs with rail attract trucks off the highway. Mr. Hunt's analysis improperly ignored that the remaining pool of truck traffic in these lanes reflects choices by shippers who, for whatever reason, have *already rejected* the intermodal option. While a second competing option over a somewhat more circuitous CN available route might attract some of this portion of this traffic, it certainly would not divert the same share that a brand new service would attract, as Mr. Hunt's analysis inappropriately assumes.[7]

16. Third, Mr. Hunt wrongly forecasts diversions to CN's hypothetical rail intermodal service despite the fact that in many lanes the service would require significant drays *away from the destination* to the origin ramp, *back towards the origin* from the destination ramp, *or both*. While intermodal service can be competitive despite meaningful drayage distances when the drays are *in the ultimate direction of travel*, other drays that are contrary to the flow of traffic are unlikely to be cost effective. Mr. Hunt's analysis nonetheless predicts (incorrectly in my view) significant diversions that would require inefficient drays. For example, Mr. Hunt predicts diversions of truck flows between Evansville, IN and Detroit, despite the need for the origin dray to drive approximately 535 miles away from Detroit to reach CN's planned St. Louis ramp and be loaded on a train that would head back towards Detroit. To the extent this traffic is susceptible to intermodal diversion at all, it likely would be from a ramp in Chicago. Although Chicago is 129 miles farther from Evansville than St. Louis, Chicago is much closer to the ultimate rail destination. Similarly, it is unlikely that the drays from Springfield, MO, Columbia, MO, and Joplin, MO first going west to Kansas City before starting their journey east (or vice versa) will create diversions. The number of highway miles needed to reach Kansas City would

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[7] CN-13, Hunt V.S. at 9.

have the shipment much closer to its ultimate destination (or a ramp in Chicago closer to the destination). Thus, it is unlikely that this traffic will convert given that these movements involve drays that will not be cost effective.

17. Fourth, as illustrated by the Evansville-St. Louis drayage example, many of Mr. Hunt's diversions involve shipments that would not need to use KCS's Kansas City-Springfield Line. Mr. Hunt's model of estimated future intermodal traffic on the Springfield Line assumes diversions to and from a proposed CN intermodal ramp in St. Louis. Diversions attributable to this ramp account for 22.8 percent of the intermodal diversions in Mr. Hunt's model. But St. Louis is already served by CN, and a route between St. Louis and Chicago via KCS trackage would be only 50 miles shorter than CN's existing, parallel rail route. CN is and has been free to build this St. Louis ramp without the requested divestiture of the Springfield Line – thus, these gains Mr. Hunt's analysis predicts are unrelated to CN's Responsive Application and should not be considered as diversions stemming from the requested diversion. Even if properly treated as related to CN's proposed transaction, Mr. Hunt's analysis overestimates the extent of potential diversions, as it fails to account for the new route's insignificant impact on route distance and the limited cost savings it will create. Using Mr. Hunt's own cost model, the route would only create a savings of 1.4 percent, or $173,000, annually.[8]

[8] *See* CN-13, Hunt V.S. at 28.

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VERIFICATION

I, Bengt Mutén, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12 day of July, 2022.

DocuSigned by:
5E80761C3104459...

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Bengt Mutén

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT S

REPLY VERIFIED STATEMENT OF BISON TRANSPORT

REDACTED PUBLIC RECORD VERSION

Recruiting:
1-800-GO-BISON
recruit@BisonTransport.com

Head Office:
1001 Sherwin Rd.
Winnipeg, MB
Canada R3H 0T8
204-833-0000 P
204-833-0112 F
800.668.4321

Mississauga:
5840 Shawson Dr.
Mississauga, ON
Canada L4W 3W5
905-364-4401 P
905-564-9865 F

Calgary:
234090 Wrangler Rd.
Rocky View, AB
Canada T1X 0K2
403-444-0555 P
403-203-5707 F

Edmonton:
80 Liberty Rd.
Sherwood Park, AB
Canada T8H 2J6
780-416-7736 P
780-416-0961 F

Langley:
9818-198 B St.
Langley, BC
Canada V1M 2X5
778-298-4605 P
778-298-4607 F

April 21, 2022

RE: STB Finance Docket No. 36500

ATTN: Surface Transportation Board

My name is Darren Loewen, Director of Intermodal at Bison Transport ("Bison"). My business address is 1001 Sherwin Rd, Winnipeg, MB R3H 0T8.

Bison is a North American transportation company that specializes in full truckload, intermodal, logistics & less-than-truckload. Bison moves goods between Canada, the USA, and Mexico and believes that the CP-KCS merger will create efficiencies for our transportation network. Because of that, we are writing to express our support for the merger.

As a transportation provider moving goods between Mexico, the USA and Canada, we can see the benefit of a single-line rail option to serve all three markets. A single carrier to move our rail intermodal shipments will allow for a much simpler process with:

- Less need for trucks to move containers between interline partner rail terminals.
- Less complex routings that will create more competitive alternatives for Bison and its customers.
- The ability to compete with over-the-road transport and allow for new truck-to-rail conversions that are not possible today.

We have worked with both CP and KCS for many years and have been pleased with both of their commitments to on time delivery and safety. We fully expect CPKC to meet or exceed those same standards.

Certain parties in this matter have filed comments with the Board proposing conditions on the merger. Having reviewed those proposals, we see no benefits stemming from the proposed conditions. We also believe the proposed conditions present a serious risk of inhibiting the new, combined railroad's ability to effectively compete in the market. Because competition in the rail transportation market is good for Bison and good for our customers, we urge the Board to approve the Merger without conditions.

Sincerely,

Darren Loewen



Director of Intermodal

Bison Transport
dloewen@bisontransport.com
(204)223-6095 (Cell)

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT T

REPLY VERIFIED STATEMENT OF CENTRAL MISSOURI AGRI-SERVICE, LLC

CENTRAL MISSOURI
AGRIService LLC

211 N. Lyon Ave. • Marshall, MO 65340 • (660) 886-6976

Verified Statement of John Fletcher

1. I am John Fletcher, General Manager of Central Missouri Agri-Service, LLC (CMAS), and I am submitting this verified statement to oppose the responsive application filed by Canadian National (CN) in STB Finance Docket 36500. We support of the Canadian Pacific (CP)-Kansas City Southern (KCS) Transaction and urge the Board to approve it without granting the CN responsive application.

2. CMAS was formed and began operations on September 1, 1999. CMAS is a joint venture of Fletcher Grain Company, MFA Incorporated, and Cooperative Association Number 1 of Slater, Missouri.

    a. Fletcher Grain Company began operations in Marshall, Missouri in the 1910s, selling seed and feed to farmers and purchasing produce from farmers in the Marshall and surrounding areas. In the last half of the century the company experienced concentrated growth in the areas of grain handling, fertilizer and crop protection products, seeds, and livestock feed.

    b. MFA Incorporated is a state-wide cooperative; organized in 1914 in a schoolhouse near Brunswick MO. MFA operates agricultural related businesses throughout the state of Missouri and in surrounding states.

    c. Cooperative Association Number 1 was founded in 1919. It was the first local cooperative founded under the 1919 state law providing for farmer owned cooperatives.

3. Our facility is located at Marshall, Missouri, and is served by KCS. It is located on the line from Kansas City to Springfield, Illinois, that CN asks the Surface Transportation Board to force KCS to divest to it. CN claims that it will grant haulage rights to CPKC if the line is divested to it.

4. We opened the Marshall facility in 2015 after investing about $25 million in it. It includes loop tracks to build in efficiencies.

5. Of the more than 5,000 cars we shipped in 2021, fewer than 10 percent move East.

6. The economics of our single-line hauls with KCS to serve customers to the south and west would be undermined if the line were divested to CN. We are also concerned that haulage is not a real solution to allow us to continue to efficiently move our grain to our customers. Added interchanges between CN to CPKC would not be as efficient as our single-line haul on the KCS system.

7. Moreover, most of our shipments – indeed about 80% -- move to Mexico. We ship a substantial percentage of our volume to Mexico via KCS-KCSM. This is our route of choice, which we use because it is best for us -- and not as some allege because we are coerced to do so.

8. The line in question has been treated as a stepchild for as long as I can remember prior to KCS acquiring it. This has occurred because either the owner didn't care, or because the owner was a short line and couldn't afford to be competitive. Since KCS acquired this line, it has been significantly upgraded, traffic has increased, and the service level has greatly increased. I would hate to see the improvements of the last twenty years abandoned in favor of an unknown quantity.

VERIFICATION AND CERTIFICATION

I, John Fletcher, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified und authorized to file this verified statement. I also certify that I have this day served a copy of the foregoing Verified Statement upon all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Executed April 8, 2022



John Fletcher

General Manager

Central Missouri Agri-Service

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT U

REPLY VERIFIED STATEMENT OF CHS, INC.

REDACTED PUBLIC RECORD VERSION

5500 Cenex Drive
Inver Grove Heights, MN 55077-1721

Creating connections to empower agriculture

Reply Verified Statement of Kevin Hall in STB Finance Docket 36500

1. My name is Kevin Hall. I am Vice President, Supply Chain & Continuous Improvement, Agriculture for CHS Inc. ("CHS").
2. CHS is a diversified global agribusiness cooperative owned by farmers and local cooperatives across the United States. First organized in 1929, CHS employs more than 10,000 dedicated people around the globe who provide our owners and customers with a strong, efficient supply chain, access to global markets, and products and services for agricultural businesses and rural communities.
3. As stated in CHS' April 2021 letter, CHS supports the approval of the CP-KCS merger. CHS continues to support the CP-KCS merger, because we believe it will create new, single routes that will be more efficient than existing interline routes and will benefit farmers.
4. The increased efficiencies and market access created by the CP-KCS merger would be an impetus for rail-using companies, such as CHS, to make the most of those benefits by considering making new investments in supply chain infrastructure to be served by CPKC. Without the CP-KCS merger and the aforementioned benefits, such investments would be unlikely to provide a strategic rationale or rate of return sufficient to justify the capital investment.

VERIFICATION AND CERTIFICATION

I, Kevin Hall declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified und authorized to file this verified statement. I also certify that I have this day served a copy of the foregoing Verified Statement upon all other parties of record by depositing a copy in the U S mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Executed April 25, 2022

Kevin A Hall

Kevin A. Hall
Vice President Supply Chain and Continuous Improvement
Agriculture
CHS Inc.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT V

REPLY VERIFIED STATEMENT OF HAPAG-LLOYD (AMERICA) LLC

Hapag-Lloyd

Surface Transportation Board

Finance Docket No. 36500

Reply Verified Statement of Uffe Ostergaard

1. My name is Uffe Ostergaard. I am President for Hapag-Lloyd (America) LLC.

2. Hapag-Lloyd (America) LLC previously wrote in support of the CP-KCS Transaction in March 2021. We submit this Verified Statement to further express our views on one specific benefit we expect the Transaction to generate efficient and effective intermodal service between the port of Lazaro Cardenas and destinations in the United States and Canada.

3. Much ocean freight from Asia bound for the United States and Canada flows through various Canadian and United States ports, including Los Angeles and Long Beach. While it is undeniable that those ports will continue to be lynchpins in the global supply chain, it is also evident that the volumes shipping through most ports often strain their capacity, creating delays.

4. The port of Lazaro Cardenas could handle some of this ocean freight from Asia to the United States and Canada, reducing the strain on other key gateways.

5. The lack of efficient single-line intermodal service from the port of Lazaro Cardenas to major distribution hubs in the United States and Canada, however, has limited the potential of Lazaro Cardenas to serve this function. Currently, KCS serves Lazaro Cardenas, but only reaches as far as Kansas City. Intermodal service from Lazaro to places like Chicago, Detroit, and Toronto is thus necessarily interline service.

6. The combined CP-KCS network, however, will create efficient, single-line service from Lazaro Cardenas to those U.S. and Canadian population centers, making Lazaro a valuable relief valve for freight that would otherwise further clog other ports.

7. We understand that some commenters have called into question whether intermodal service on CPKC from Lazaro to the U.S. Midwest is really an option shippers would choose. We believe that it will be. Reliable, efficient rail service will make Lazaro a reasonable alternative to overcrowded Southern California ports.

8. While the combined rail-water distance from some Asian ports to key Midwest and Canadian destination markets via the Port Lazaro Cardenas is somewhat farther than for other U.S. West Coast ports, the extra distance is not a major handicap in providing reliable service to reach end-markets. The key is reliability and efficiency, and the Port of Lazaro Cardenas, couples with efficient CPKC single-line rail service, will offer a very attractive alternative for companies like Hapag and our many intermodal customers. We are so excited about this new option that we have embarked on trial shipments through Lazaro Cardenas in recent months with a number of beneficial cargo owners ("BCOs") that are looking for alternatives and flexibility. Providing more options to U.S. shippers must be a priority and this solution will bring a larger part of the rail network to the intermodal market and support competition as well.

9. We believe this strengthening of Lazaro Cardenas and thus of the global supply chain is a very likely outcome of the CP-KCS Transaction. For this reason, and the reasons expressed in our earlier letter, we support the CP-KCS Transaction.

VERIFICATION AND CERTIFICATION

I, Uffe Ostergaard, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified und authorized to file this verified statement. I also certify that I have this day served a copy of the foregoing Verified Statement upon all other parties of record by depositing a copy in the U S mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Executed April 20, 2022

Uffe Ostergaard

President

Hapag-Lloyd (America) LLC

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT W

REPLY VERIFIED STATEMENT OF HARDISTY ENERGY TERMINAL

USD GROUP

HARDISTY ENERGY TERMINAL

STB Finance Docket No. 36500

My name is Josh Ruple and I am Executive Vice President, Chief Operating Officer of US Development Group, LLC ("USDG") and a member of the Board of Directors at Hardisty Energy Terminal GP Ltd., the General Partner of the Hardisty Energy Terminal Limited Partnership ("HET"). In March 2021, HET wrote to the Board to express our support for the Proposed Merger of Canadian Pacific ("CP") and Kansas City Southern Railway ("KCS"). Both USDG and HET continue to support the Proposed Merger based on our belief that it will benefit our joint customers.

I write to emphasize the importance of this merger to the future growth in our DRUbit™ by Rail™ Network. As we explained in the March 2021 letter, HET is a partnership between USDG and Gibson Energy ULC formed for the purpose of building and operating a Diluent Recovery Unit ("DRU") to create DRUbit™, a safer and more efficient shipment of heavy Canadian crude oil to markets outside of Canada. Historically, Canadian heavy crude is shipped by pipeline in the form of "Dilbit," which is bitumen with diluent blended to lower viscosity, making it more suitable for pipeline transportation. For destinations not reached by pipeline, rail offers the only viable means of transportation, and traditionally crude shipped by rail has been in the same "Dilbit" form. This is despite the fact that for crude-by-rail shipments the diluent serves no further purpose and has certain drawbacks in that it adds weight and volume to the shipment; it increases the risk of transportation handling; and adds to the flammability of the blended product.

HET's DRU facilities remove the diluent just prior to loading the bitumen onto a railcar, creating a product we call DRUbit™. DRUbit™ is a safer, and more economical, way to ship Canadian heavy crude by rail. DRUbit™ ships by rail as a non-hazardous and non-flammable commodity and with approximately 20% -30% less CO_2e emissions than currently available rail and pipeline alternatives, respectively. Replacing Dilbit rail shipments with movements on our DRUbit™ by Rail™ Network is very much in the public interest. And switching from dilbit to DRUbit™ requires further infrastructure investments at both origin and destination, respectively. Some of those infrastructure projects are already in progress and/or are completed, including at our Hardisty and Port Arthur facilities which opened in August 2021 and were fully operational in December 2021.

I understand that certain commenters have asserted that, because our DRUbit™ by Rail™ Network is already operational, the proposed CP/KCS combination cannot be responsible for forecasted increases in DRUbit™ shipping. In our estimation, this assertion isn't fully supported. We have plans to invest in additional capacity through future DRUbit™ by Rail™ Network expansions. This additional capacity is currently planned in additive DRU infrastructure in Hardisty, coverting additional existing Dilbit rail shipments into safer DRUbit™ shipments and capacity increases at our Port Arthur rail destination to connect our joint customers to the Gulf Coast refining market. This additional capacity, market access

811 MAIN STREET, SUITE 2800 HOUSTON, TX 77002 | P 281.291.0510 | F 281.291.0321

and resulting investments are largely dependent on efficient rail transportation from Canada to the Gulf Coast. We believe the CP/KCS combination will create new, efficient, single-line connections relevant to our DRUbit™ by Rail™ Network, served at origin by CP's network, and many of our customers in the Gulf, served by KCS at destination. The efficiencies created by the transaction, including improved cycle times and more reliable service, will enhance the DRUbit™ by Rail™ Network value proposition for our joint customers, which will in turn allow us to commercialize the increased volumes needed to justify further capacity investment. Put simply, we believe that our goal of additive Dilbit to DRUbit™ shipment transition is substantially more likely to increase in a world with CPKC than in one without.

For these reasons, and for the reasons expressed in the March 2021 letter, we respectfully urge the Board to approve the Proposed Merger as soon as possible.

Respectfully,

Josh Ruple
Executive Vice President, Chief Operating Officer – US Development Group LLC
Member of the Board of Directors – Hardisty Energy Terminal GP Ltd.

VERIFICATION

I, Josh Ruple, declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Further, I certify that I am qualified und authorized to file this verified statement.

Executed this 2ND day of May, 2022

Josh Ruple

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT X

REPLY VERIFIED STATEMENT OF NEW COOPERATIVE INC.

REDACTED PUBLIC RECORD VERSION

NEW COOPERATIVE INC.
2626 1st Ave. South | P.O. Box 818 | Fort Dodge, IA 50501

Reply Verified Statement of NEW Cooperative, Inc.
STB Finance Docket 36500

I am Dan Dix, General Manager at NEW Cooperative Inc. ("NEW Coop"). I have been General Manager since 2015.

I write on behalf of NEW Cooperative Inc, a coop owned by Iowa farmers.

As we wrote in our March 2021 letter, we support the CP-KCS combination. We believe that the combined CPKC network will provide substantial benefits to our 8,000 member owners. We believe that those benefits will enable us to make an investment that we otherwise could not.

I write today to advise the STB of a potential investment that is contingent on the approval of the CP-KCS combination. This combination provides us the possibility to build a greenfield grain elevator to ship corn and soybeans in Northern Iowa, to capitalize on new, efficient single-line routes on CP-KC from Iowa to grain destinations on the KCS, including Mexico. We estimate that this project will cost $30,000,000. We believe this investment will bring further benefits to our members and the supply chain as a whole, but is only viable in light of opportunities created by the CP-KCS combination. We again urge the STB to approve the combination.

VERIFICATION AND CERTIFICATION

I, Dan Dix, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified und authorized to file this verified statement. I also certify that I have this day served a copy of the foregoing Verified Statement upon all other parties of record by depositing a copy in the U S mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Executed April 15, 2022

Dan Dix



General Manager
NEW Cooperative Inc.

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT Y

REPLY VERIFIED STATEMENT OF RAY-CARROLL COUNTY GRAIN GROWERS, INC.

REDACTED PUBLIC RECORD VERSION

RAY-CARROLL COUNTY GRAIN GROWERS, INC.

post office box 158 / richmond, missouri 64085

816-776-2291

STB Finance Docket 36500

Verified Statement of Ray Carroll County Grain Growers, Inc

Dear Surface Transportation Board Members:

I am Beau Hepler, General Manager of Ray Carroll County Grain Growers ("Ray Carroll"). Ray Carroll strongly opposes the Inconsistent Application filed by Canadian National ("CN") in this proceeding.

Farmers are experts in making things grow. As a full-service cooperative, Ray-Carroll County Grain Growers provides the services and technical expertise to help our local producers thrive. We've been proud to serve our member-owners since 1931.

Customers count on us for grain, agronomy, precision agriculture, insurance, energy, and feed solutions. There is a reason why Ray-Carroll has continued to grow since local farmers formed the cooperative more than 80 years ago. Guided by an 11-member board of directors, Ray-Carroll is focused on providing members and customers with high-quality products and services as we move forward together.

We are pleased to support the CP-KC transaction and believe that it opens up more possibilities for us. In fact, we anticipate making new investments in this corridor in the foreseeable future. If this transaction is approved it will open new business opportunities for us.

We have been moving forward thanks to the options we have for our grain. In 2004, we purchased the elevator in Slater, MO, from Farmland Industries. In 2013, we constructed a new shuttle loading elevator in Corder, MO, that we continue to upgrade and expand. We have invested heavily in the expansion of our Corder, MO facility. We have spent this money as we see the opportunity to continue gaining efficiencies and the ability to grow our market share in the region. Both of our elevators at Coder and Slater, MO, are located on the KCS line between Kansas City and Springfield, Illinois. This is the line that CN has asked the Surface Transportation Board to force divesture to the CN, while granting haulage rights back to KCS.

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Environmentally Friendlier
Locally Grown!

We oppose CN's Inconsistent Application and request for divestiture of this line. The markets that we serve are Mexico and other points reached via KCS's line via Kansas City to the west of our facility. In fact, in 2021, we shipped nearly 6,500 cars, of which 94% of our shipments moved West and to Mexico while only 6% moved East. With 5,270 of those cars (or 81% of our cars) terminating in Mexico, you can see that the vast majority of our product is shipped to Mexican markets via KCS-KCSM. That route is efficient. We have chosen to because they are the best option available to us on the merits.

If the line were divested to CN, we believe that the options for our grain would be constrained. Moreover, granting CPKC haulage rights over the line is not a solution to our lost options. Haulage, which would require CN to take our railcars toward Kansas City for interchange with CPKC, is a much less efficient process than we have today with single-line service from KCS.

Ray Carroll supports the CPKC Transaction and urges the Board to approve it without granting CN's Inconsistent Application.

VERIFICATION AND CERTIFICATION

I, Beau Hepler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified und authorized to file this verified statement. I also certify that I have this day served a copy of the foregoing Verified Statement upon all other parties of record by depositing a copy in the U S mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Executed April 12, 2022



Beau Hepler

General Manager

Ray Carroll

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT Z

REPLY VERIFIED STATEMENT OF RICHARDSON INTERNATIONAL LIMITED

RICHARDSON

STB Finance Docket 36500

Verified Statement of Robert Bielik

My name is Robert Bielik and I am Vice-President, Transportation, of Richardson International Limited ("Richardson").

I and Richardson are aware of, and support the CP-KC Transaction and encourage the Surface Transportation Board to confirm its approval.

Richardson recently acquired St. Louis-based Italgrani USA, Inc., the largest durum miller in North America. The transaction assets included a milling facility in St. Louis that specializes in semolina and durum flour products, along with grain storage and crop inputs facilities situated at Tolley, Powers Lake, and Benedict (North Dakota); and a commodity trading office in Minneapolis.

Richardson has reviewed the CP-KC Transaction and believes it opens new markets to our company. More specifically, we expect to be able to access new markets for our grain handling facilities located in North Dakota to ship grain to the Gulf area as well as Mexico. Additionally, the CP-KC network resulting from the Transaction will also allow Richardson to source durum for milling at its KCS-served St. Louis durum milling facility from its extensive CP-served network in southern Saskatchewan and from its newly-acquired elevators in North Dakota over new CP-KC single-line routes. Furthermore, the CP-KC Transaction would result in the connection of the St. Louis durum milling facility to important markets in the West and in Mexico over an existing KCS single-line route, which is very important to our business plan. The Springfield Line is an important part of that single-line route.

It is our understanding that Canadian National has asked the Board to order the KCS rail line between Springfield, Illinois, and Kansas City to be divested to it, while granting haulage operating rights back to KCS. We oppose Canadian National's request that the Board divest the Springfield Line to it because it would eliminate single-line service—both on routes that currently exist and routes that will become available as a result of the CP-KC Transaction—that are important to us. Retaining the rail line into St. Louis via the Springfield Line as part of the CPKC network is important to achieving the benefits of a single-line haul over those new routes.

Richardson International Limited
2800 One Lombard Place, Winnipeg, MB, Canada R3B 0X8 P. 204.934.5961 F. 204.947.2647
www.richardson.ca

RICHARDSON

VERIFICATION AND CERTIFICATION

I, Robert Bielik, declare that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed April 8, 2022

Robert Bielik
Vice-President, Transportation
Richardson International Limited

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT AA

REPLY VERIFIED STATEMENT OF SPARX LOGISTICS INC.

SPARX logistics

1. SPARX logistics Inc. ("SPARX") submits this verified statement in support of the CP-KCS Transaction.
2. SPARX is a leading global logistics provider.
3. SPARX recently introduced a new ocean service from China to the port of Lazaro Cardenas in Mexico, specifically targeting customers with final destinations in the central United States.
4. We believe this service will alleviate some of the congestion, and associated delays, the ports of Los Angeles and Long Beach, creating a valuable option for our customers. Considering the congestion on the USWC the routing via LZC improves the overall transit times into the Midwest of the USA.
5. KCS's reliable intermodal service is a key component of the success of this enterprise. However, the fact that the KCS network does not reach beyond Kansas City requires that some customers must use less efficient interline routings to reach Chicago and points beyond.
6. The CP-KCS Transaction promises to substantially increase the value of routings through the port of Lazaro Cardenas by extending efficient, single-line intermodal service to Chicago, New York, Toronto, and other important destinations. We would like to extend this service into ATL/SAV/NJ and Columbus,OH.
7. We understand that some commenters in this proceeding have questioned whether the market will realistically support a route from Asia through Lazaro to the U.S. Midwest. We clearly believe it can.
8. We have proven through our actions that we believe ocean shipping from Asia to Lazaro Cardenas is a viable way to reach destinations in the Central and Eastern United States. We believe that the CP-KCS Transaction can only strengthen this exciting new option, making it better for our shippers and their customers.
9. For these reasons, SPARX supports the CP-KCS Transaction.

VERIFICATION AND CERTIFICATION

I, Markus Heinken, confirm that the foregoing is true and correct .

SPARX Logistics Inc., Miami, April 18th, 2022

Markus Heinken

VP Global Ocean Procurement

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT AB

REPLY VERIFIED STATEMENT OF TERNIUM MEXICO, S.A. DE C.V.

Ave. Munich 101
Col. Cuauhtémoc
San Nicolás, N.L.
Tel 52 81 8865 2828
www.ternium.com

April 29, 2022

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W. Washington,
DC 20423-0001

Re: Verified Statement FD 36500, Canadian National Railway Company, Grand Trunk Corporation, and CN's Rail Operating Subsidiaries—Control—Kansas City Southern, the Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company.

Dear Ms. Brown:

My name is Adrián Estrada Montemayor, and I serve as General Counsel and Institutional Affairs VP of Ternium México, S.A. de C.V. ("Ternium"). I reach out to you in order to confirm our previous communication dated June 25, 2021, in support to the Canadian Pacific - Kansas City Southern merger ("CPKC Transaction").

As I mentioned before, Ternium is one of the largest railway service users in Mexico and has a long-standing strategic commercial relationship with Kansas City Southern México, S.A. de C.V. ("KCSM"); using railway infrastructure, Ternium ships (i) slabs from Port of Brownsville and Lázaro Cárdenas, Michoacán to our industrial facilities in Nuevo León, (ii) scrap and direct reduced iron (DRI) to our facilities in Nuevo León and Puebla and (iii) all kinds of steel products from our industrial facilities in Mexico to serve our customers in the region. With KCSM´s railway service, our most relevant manufacturing footprint is covered.

Railway competition is paramount for large rail users like us, therefore we trust that the CPKC Transaction would enhance competition, bring efficiencies and generate flexibility for all rail users in the North American market. Moreover, we expect that the CPKC Transaction will boost the existing rail network and provide new routing and interchange options for rail users, generating competition with other large rail and truck carriers.

Given the foregoing, Ternium supports the CPKC Transaction and respectfully urges the STB to approve it under its current merger guidelines, so the companies can be fully integrated to unlock the benefits of the strategic combination.

Should you have any question or comment on the above, please feel free to contact me.

Sincerely,

Ternium México S.A. de C.V.
Adrián Estrada Montemayor
General Counsel and Institutional Affairs VP

REDACTED PUBLIC RECORD VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

EXHIBIT AC

REPLY VERIFIED STATEMENT OF BRAD SANDERS, USD GROUP

USD GROUP

STB Finance Docket No. 36500

Reply Verified Statement of Brad Sanders

1. My name is Brad Sanders and my business address is 811 Main St, Suite 2800, Houston, TX 77002. I am Executive Vice President, Chief Commercial Officer of US Development Group, LLC ("USDG"). In my role, I am responsible for developing the commercial strategies and the proper execution of them for USDG.

2. USDG has previously submitted to the Board letters supporting approval of the proposed CP/KCS combination. As expressed in our previous letters, USDG supports swift approval of the CP/KCS combination because of the significant benefits we and our customers expect to realize from this transaction. We believe the single-line benefits and new investments made possible by the CP/KCS transaction will provide the improved rail efficiency and economics necessary to support further investment in our DRUbit™ by Rail™ Network.

3. USDG and its partners operate the Hardisty Energy Terminal. In 2021 we began shipping DRUbit™ from our DRU (diluent recovery unit) near Hardisty, Alberta to the Port Arthur Terminal on the U.S. Gulf Coast for sale to numerous refining customers in the United States and international locations by pipe and vessel. Our joint customer chose CP and KCS to provide rail transportation on an interline basis.

USD GROUP

4. Canadian bitumen shipped as DRUbit™ uniquely ships by rail in the United States and Canada as non-hazardous and non-flammable, and with approximately 20% -30% less CO2e emissions than currently available rail and pipeline alternatives, respectively.

5. Switching from dilbit to DRUbit™ requires substantial infrastructure investment. At origin, diluent recovery units are required to transform dilbit to DRUbit™. At destination, additional, specialized infrastructure is required to remove DRUbit™ from railcars for final delivery to refineries. Some of those infrastructure projects are already in progress and/or are completed, including at our Hardisty and Port Arthur facilities. We are proud of the success of our Phase I DRUbit™ Hardisty operation. However, given the volatility in the crude market, additional investments to expand the capacity of the Hardisty facility – what we call Hardisty DRUbit™ Phases II and III – and counterpart unloading facilities are not assured.

6. We believe the CP-KCS Transaction will provide compelling support for additional investments, and in the process enable crude moving by rail as dilbit (sometimes through the crowded Chicago gateway) to be converted to DRUbit™ moving on new CPKC routes. Our Hardisty facility is on the CP network, and many of the refineries to which we ship can ben accessed on the KCS network. The CP-KCS Transaction will connect those origins and destinations in efficient, single line routes that do not exist today, resulting in improved cycle times and reliability. We believe the efficiencies unlocked by the CP-KCS Transaction will make further investments in DRUbit™ more economically viable.

USD GROUP

7. We understand that some comments have questioned whether increased DRUbit™ traffic on CPKC can fairly be attributed to the efficiencies of the CP/KCS Transaction. We answer that question in the affirmative. We believe the Transaction will create more efficient, new single line routes from origins near the Alberta oil sands, on CP's network, to destination refineries on KCS's network, without which new DRUbit™ traffic is much less likely to arise. We understand that CPKC will support new investment in capacity (longer sidings, etc.) on the CP-KCS North-South route connecting Canada with the Gulf Coast, enabling improved cycle times and reliability and the ability to move more product on the same number of trains, which impacts cost, efficiency, and capacity. These efficient new routes promise to incentivize further investment in DRUbit™ infrastructure, thereby speeding up the transition to more efficient, safer DRUbit™.

8. For the reasons stated above and drawing specific attention to the significant additional sustainability benefits that we believe the DBR™ Network will create with the CP-KCS combination, USDG urges the Board to approve the CP-KCS proposed combination as expeditiously as possible. We look forward to seeing the new CPKC as a stronger competitor in the industry.

Respectfully,

Brad Sanders
Executive Vice President, Chief Commercial Officer
USD Group LLC

VERIFICATION

I, Brad Sanders, declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Further, I certify that I am qualified und authorized to file this verified statement.

USD GROUP

Executed this 20th day of APRIL, 2022

Brad Sanders

811 MAIN STREET, SUITE 2800 HOUSTON, TX 77002 | P 281.291.0510 | F 281.291.0321

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS, OPPOSITION TO RESPONSIVE APPLICATIONS, AND REBUTTAL IN SUPPORT OF THE APPLICATION

VOLUME 3 OF 3

William A. Mullins
BAKER & MILLER PLLC
Suite 3000
1105 S Street NW
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Email: wmullins@bakerandmiller.com
Telephone: (202) 663-7823

Adam J. Godderz
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335
Email: agodderz@kcsouthern.com
Telephone: (816) 983-1387

Counsel for KCS

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

SULLIVAN & CROMWELL LLP
Adam S. Paris
1888 Century Park East, Suite 2100
Los Angeles, California 90067-1725
Email: parisa@sullcrom.com
Samantha F. Hynes
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006-5215
E:mail: hyness@sullcrom.com

Jeffrey J. Ellis
CANADIAN PACIFIC
7550 Ogden Dale Road S.E. Calgary, AB
T2C 4X9 Canada Email: Jeff_Ellis@cpr.ca
Telephone: (888) 333-6370

Counsel for CP

Attorneys for Applicants

July 12, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VERIFIED STATEMENT OF SAMANTHA HYNES

I, Samantha Hynes, declare under penalty of perjury under the laws of the United States of America, as follows:

1. I am a partner of Sullivan & Cromwell LLP. I make this verified statement in support of Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application.

2. Attached as Exhibit 1 is a true and correct copy of excerpts of the Verified Statement of Richard J. Pierce, Jr. in BNSF Railway Company's Comments filed in *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1), on November 17, 2000.

3. Attached as Exhibit 2 is a true and correct copy of the Verified Statement of John P. Lanigan in BNSF's Reply Comments filed in *Competition in the Railroad Industry*, Ex Parte No. 705 on May 27, 2011.

4. Attached as Exhibit 3 is a true and correct copy of the Verified Statement of Paul Tellier of CN's Application filed in *Canadian National Railway Company, Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corp., Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.*, Finance Docket 34000 (April 9, 2001).

5. Attached as Exhibit 4 is a true and correct copy of the memorandum opinion *FTC v. Peabody Energy Corp.*, No. 4:20-cv-00317-SEP, (E.D. Mo. Oct. 5, 2020).

6. Attached as Exhibit 5 is a true and correct copy of the document produced by CN bearing production number CN0000185-HC.

7. Attached as Exhibit 6 is a true and correct copy of an excerpt of the document produced by BNSF bearing production number BNSF0001598.

8. Attached as Exhibit 7 is a true and correct copy of the Comments of the Burlington Northern and Santa Fe Railway Co. filed in *Major Rail Consolidation Procedures – Advance Notice of Proposed Rulemaking*, STB Ex Parte No. 582 (Sub-No. 1) on Nov. 17, 2000.

9. Attached as Exhibit 8 is a true and correct copy of the document produced by BNSF bearing production number BNSF0001135.

10. Attached as Exhibit 9 is a true and correct copy of NS's Comments in *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) filed on May 16, 2000.

11. Attached as Exhibit 10 is a true and correct copy of UP's Comments and Initial Proposals in *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) filed on May 16, 2000.

12. Attached as Exhibit 11 is a true and correct copy of the document produced by BNSF bearing production number BNSF0001235.

13. Attached as Exhibit 12 is a true and correct copy of Union Pacific Railroad Company's Comments filed in *Kansas City Southern – Control – The Kansas City Southern Railway Company et al.*, Finance Docket No. 34342, on August 4, 2003.

14. Attached as Exhibit 13 is a true and correct copy of the Comments of the Burlington Northern and Santa Fe Railway Company filed in *Kansas City Southern – Control –*

The Kansas City Southern Railway Company et al., Finance Docket No. 34342, on August 4, 2003.

15. Attached as Exhibit 14 is a true and correct copy of the document produced by BNSF bearing production number BNSF0000932.

16. Attached as Exhibit 15 is a true and correct copy of the document produced by BNSF bearing production number BNSF0003021.

17. Attached as Exhibit 16 is a true and correct copy of the document produced by BNSF bearing production number BNSF0003279.

18. Attached as Exhibit 17 is a true and correct copy of the document produced by BNSF bearing production number BNSF0003606.

19. Attached as Exhibit 18 is a true and correct copy of the document produced by BNSF bearing production number BNSF0003550.

20. Attached as Exhibit 19 is a true and correct copy of the document produced by BNSF bearing production number BNSF0003355.

21. Attached as Exhibit 20 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0003331.

22. Attached as Exhibit 21 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0002814.

23. Attached as Exhibit 22 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0002839

24. Attached as Exhibit 23 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0003304.

25. Attached as Exhibit 24 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0002804.

26. Attached as Exhibit 25 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0002798.

27. Attached as Exhibit 26 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0002910.

28. Attached as Exhibit 27 is a true and correct copy of the document produced by BNSF bearing production numbered BNSF0000166.

29. Attached as Exhibit 28 is a true and correct copy of the document produced by NS bearing production numbered NS00006614.

30. Attached as Exhibit 29 is a true and correct copy of the document produced by UP bearing production number UP-HC-001106.

31. Attached as Exhibit 30 is a true and correct copy of the document produced by UP bearing production number UP-HC-001387.

32. Attached as Exhibit 31 is a true and correct copy of the Final Brief of Defendant The Burlington Northern and Santa Fe Railway Company in *Public Service Company of Colorado d/b/a Xcel Energy* v. *The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057, served on September 8, 2003.

33. Attached as Exhibit 32 is a true and correct copy of the Reply Comments of BNSF filed in *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1) on May 31, 2006.

34. Attached as Exhibit 33 is a true and correct copy of the document produced by BNSF bearing production number BNSF0002691.

35. Attached as Exhibit 34 is a true and correct copy of excerpts of the Joint Comments of Alliance for Rail Competition, et al. filed in *Competition in the Railroad Industry*, Ex Parte No. 705, on April 12, 2011.

36. Attached as Exhibit 35 is a true and correct copy of the Brief for Respondent NITL in Support of Petitioner filed with the United States Supreme Court in *Western Coal Traffic League* v. *Surface Transportation Board, et al.* (No. 99-135), on August 9, 1999.

37. Attached as Exhibit 36 is a true and correct copy of the Comments of the National Association of Wheat Growers filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1), on February 14, 2022.

38. Attached as Exhibit 37 is a true and correct copy of the testimony of the U.S. Wheat Associates filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1), on February 14, 2022.

39. Attached as Exhibit 38 is a true and correct copy of the testimony of the Industrial Minerals Association—North America filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1), on February 14, 2022.

40. Attached as Exhibit 39 is a true and correct copy of the Comments of the National Grain and Feed Association filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1), on February 14, 2022.

41. Attached as Exhibit 40 is a true and correct copy of the testimony of the Private Railcar Food and Beverage Association filed in *Reciprocal Switching*, Ex Parte No. 711 (Sub-No.1), on February 14, 2022.

42. Attached as Exhibit 41 is a true and correct copy of the Supplemental Submission of the National Grain and Feed Association filed in STB Docket No. EP 761 and STB Docket No. 722, on February 13, 2020.

43. Attached as Exhibit 42 is a true and correct copy of the written statement of The Fertilizer Institute filed in STB Docket No. EP 738, on July 24, 2017.

44. Attached as Exhibit 43 is a true and correct copy of the Written Comments of the National Industrial Transportation League filed in STB Docket No. EP 761 and STB Docket No. EP 722, on November 26, 2019.

45. Attached as Exhibit 44 is a true and correct copy of the Comments of the Industrial Minerals Association filed in STB Docket No. EP 761 and STB Docket No. EP 722 on November 25, 2019.

46. Attached as Exhibit 45 is a true and correct copy of the Terms for Texas Mexican Railway Company Trackage Rights between Houston Belt & Terminal Railway Company and The Texas Mexican Railway Company, dated January 1997.

47. Attached as Exhibit 46 is a true and correct copy of the document produced by UP, bearing production number STB-FD36500-UP-HC000092.

48. Attached as Exhibit 47 is a true and correct copy of the document produced by UP, bearing production number STB-FD36500-UP-HC000521.

49. Attached as Exhibit 48 is a true and correct copy of Metra's public workpaper Summary of CP Delay Events 2016 – 2021, produced by Metra, bearing production number METR_FD36500_001156.01.

50. Attached as Exhibit 49 is a true and correct copy of Metra's December 2021 On-Time Performance report, available at https://metra.com/sites/default/files/inline-files/On-Time%20Performance%20Report%20-%20December_2021.pdf (last accessed July 12, 2022).

51. Attached as Exhibit 50 is a true and correct copy of Metra's January 2019 Ridership Trends report, available at https://metra.com/sites/default/files/assets/planning/ridership/jan_2019_ridership_report_standalone.pdf (last accessed July 12, 2022).

52. Attached as Exhibit 51 is a true and correct copy of excerpts of the Comments of Metra filed in *Canadian Pacific Ry., et al. – Control – Dakota, Minnesota & Eastern R.R., et al.*, Finance Docket No. 35081, on March 4, 2008.

53. Attached as Exhibit 52 is a true and correct copy of excerpts of Metra's Response to Applicants' Interrogatories, Requests for Production and Requests for Admission (Apr. 11, 2022).

54. Attached as Exhibit 53 is the document produced by CN, bearing production number CN0000187.

55. Attached as Exhibit 54 is a true and correct copy of the document produced by CN, bearing production number CN0000049.

56. Attached as Exhibit 55 is a true and correct copy of the document produced by CN, bearing production number CN0000037.

57. Attached as Exhibit 56 is a true and correct copy of Canadian National Railway Company, et. al—Control—Kansas City Southern, et al.'s Motion to Withdraw (CN-28) filed in *CN/KCS*, Finance Docket 36514 (September 16, 2021).

58. Attached as Exhibit 57 is a true and correct copy of the document produced by CN, bearing production number CN0000071.

59. Attached as Exhibit 58 is a true and correct copy of the document produced by CN, bearing production number CN0000137.

60. Attached as Exhibit 59 is a true and correct copy of the document produced by CN, bearing production number CN0000147.

61. Attached as Exhibit 60 is a true and correct copy of the document produced by CN, bearing production number CN00000185.

62. Attached as Exhibit 61 is a true and correct copy of the document produced by CN, bearing production number CN00000167.

63. Attached as Exhibit 62 is a true and correct copy of the document produced by CN, bearing production number CN0001142.

64. Attached as Exhibit 63 is a true and correct copy of the document produced by CN, bearing production number CN0000783.

65. Attached as Exhibit 64 is a true and correct copy of the document produced by CN, bearing production number CN0000708.

66. Attached as Exhibit 65 is a true and correct copy of the document produced by CN, bearing production number CN0000415.

67. Attached as Exhibit 66 is a true and correct copy of the document produced by CN, bearing production number CN0001255.

68. Attached as Exhibit 67 is a true and correct copy of a CN investor deck (April 2021), titled “CN-KCS Will Create the End-to-End USMCA Rail Network.”

69. Attached as Exhibit 68 are excerpts of the true and correct copy of the verified statement of Jean-Jacques Ruest to CN and KCS's Joint Motion for Approval of Voting Trust Agreement (CN-18 KCS-1), filed in *CN/KCS*, Finance Docket 36514 on May 26, 2021.

70. Attached as Exhibit 69 are excerpts of the true and correct copy of the verified statement of Jean-Jacques Ruest to CN and KCS's Reply to Comments on Proposed Voting Trust Agreement (CN-26 KCS-9), filed in *CN/KCS*, Finance Docket 36514 on May 26, 2021.

71. Attached as Exhibit 70 is a true and correct copy of excerpts of the document produced by NS, bearing production number NS00000001.

72. Attached as Exhibit 71is a true and correct copy of excerpts of the document produced by NS, bearing production number NS00000991.

73. Attached as Exhibit 72 is a true and correct copy of excerpts of the document produced by NS, bearing production number NS00000018.

74. Attached as Exhibit 73 is a true and correct copy of excerpts of the document produced by NS, bearing production number NS00000954.

75. Attached as Exhibit 74 is a true and correct copy of excerpts of the document produced by NS, bearing production number NS00002011.

76. Attached as Exhibit 75 is a true and correct copy of excerpts of the document produced by NS, bearing production number NS00002982.

77. Attached as Exhibit 76 is a true and correct article of a web article titled "New Norfolk Southern Operating Plan to Blend Traffic and Build Longer Trains," Trains (Feb. 12, 2019), available at https://www.trains.com/trn/news-reviews/news-wire/12-new-norfolk-southern-operating-plan-to-blend-traffic-and-build-longer-trains/ (last accessed July 12, 2022).

78. Attached as Exhibit 77 is a true and correct copy of the document produced by BNSF, bearing production number HC BNSF0003265.

79. Attached as Exhibit 78 is a true and correct copy of the document produced by NS, bearing production number NS 00004912.

80. Attached as Exhibit 79 is a true and correct copy of the Notice of Exemption in the Meridian Speedway transaction, filed in Finance Docket No. 34822 on January 17, 2006.

81. Attached as Exhibit 80 is a true and correct copy of BNSF Network Map, BNSF Railway, available at https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/network-map.html (last visited May 12, 2022).

82. Attached as Exhibit 81 is a true and correct copy of Gateway & Connections, BNSF Railway, available at https://www.bnsf.com/ship-with-bnsf/maps-and-shipping-locations/mexico/gateway-and-connections.html (last visited June 28, 2022).

83. Attached as Exhibit 82 is a true and correct copy of the document produced by BNSF bearing production number BNSF0000151.

84. Attached as Exhibit 83 is a true and correct copy of the document produced by BNSF, bearing production number BNSF0003259.

85. Attached as Exhibit 84 is a true and correct copy of excerpts of the CP Response to Information Request No. 1, EI 31352 (Oct. 28, 2021).

86. Attached as Exhibit 85 is a true and correct copy of the CREATE webpage, available at https://www.createprogram.org/about-create/ (last visited on July 12, 2022).

87. Attached as Exhibit 86 is a true and correct copy of a May 24, 2022 letter from C. Anne Ergo to A. Giordano.

88. Attached as Exhibit 87 is a true and correct copy of CP's Commitment to Fight Climate Change, CP Sustainably Driven (2020), available at https://sustainability.cpr.ca/downloads/CP_Rail_2020_Climate_Statement.pdf (last accessed on July 12, 2022).

89. Attached as Exhibit 88 is a true and correct copy of CP's Climate Strategy, CP Sustainably Driven (2021), available at https://sustainability.cpr.ca/downloads/CP_Rail_Climate_Strategy.pdf (last accessed on July 12, 2022).

90. Attached as Exhibit 89 is a true and correct copy of an email from D. Meyer to A. Hirschkorn, dated Feb. 25, 2022.

91. Attached as Exhibit 90 is a true and correct copy of excerpts of the document produced by the Joint Associations, bearing production number JA-HC-000001.

92. Attached as Exhibit 91 is a true and correct copy of the Comments of LyondellBasell in Ex Parte No. 711, filed February 14, 2022.

93. Attached as Exhibit 92 is a true and correct copy of the document produced by NS bearing production number NS00005474.

94. Attached as Exhibit 93 is a true and correct copy of the document produced by NS bearing production number NS00004912.

95. Attached as Exhibit 94 is a true and correct copy of excerpts of the June 3, 2022 Deposition of Paul Hirsch.

96. Attached as Exhibit 95 is a true and correct copy of excerpts of the June 9, 2022 Deposition of Greg Godfrey.

97. Attached as Exhibit 96 is a true and correct copy of excerpts of the June 8, 2022 Deposition of David Rodriguez.

98. Attached as Exhibit 97 is a true and correct copy of excerpts of the June 7, 2022 Deposition of Rich Oppenheim.

99. Attached as Exhibit 98 is a true and correct copy of excerpts of the Feb. 2, 2022 Deposition of Patrick Ottensmeyer.

VERIFICATION

I, Samantha Hynes, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 12th day of July, 2022.



Samantha Hynes

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 1

MAJOR RAIL CONSOLIDATION PROCEDURES, EX PARTE NO. 582 (SUB-NO. 1), COMMENTS OF BNSF, VERIFIED STATEMENT OF RICHARD J. PIERCE, JR. (FILED NOV. 17, 2000)

BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

VERIFIED STATEMENT OF RICHARD J. PIERCE, JR.

My name is Richard J. Pierce, Jr. I am the Lyle T. Alverson Research Professor of Law at George Washington University, 720 20th Street, N.W., Washington, D.C. 20052. I have been asked by The Burlington Northern and Santa Fe Railway Company (BNSF) to provide my opinions on the new rail merger policy the Surface Transportation Board (STB or Board) proposed in Ex Parte No. 582 (Sub-No. 1). I will begin by describing my background and experience relevant to that task. I then will summarize the history of economic regulation, deregulation, and regulatory reform in the U.S. over the last three decades. I will follow that with a description of the merger policies currently implemented by other agencies, with emphasis on the current policy of the Federal Energy Regulatory Commission (FERC), an agency that, like the STB, applies a public interest standard, rather than pure antitrust review. After that, I will identify the characteristics of the STB's proposed policy that I believe to be inappropriate, counterproductive, and a major step backward from the regulatory reform efforts that have produced outstanding results in numerous markets, including the rail market, over the past 30 years.

I conclude that any final rules adopted by the STB should: (i) result in timely review of mergers; (ii) eliminate the presumption that future rail mergers will not produce efficiencies; and

(iii) eliminate the presumptions that future rail mergers will produce competitive harms and service disruptions. The STB should not require merger applicants to propose "competitive enhancements" to offset presumed harms, and the scope of post-merger review should be limited to the efficacy of competitive conditions adopted in the merger and the temporary remedy of any merger-related service disruptions.

BACKGROUND AND EXPERIENCE

I have been a law professor for 23 years. The courses I regularly teach include Regulated Industries, Antitrust Law, and Administrative Law. My research and scholarly writings correspond with the subjects I teach. I have written a dozen books and over 80 articles. I have attached a copy of my resume, including a list of my publications, as Appendix A to this report. My central interest in teaching, research, and writing is the effects of various forms of government intervention – including economic regulation and antitrust law – on the performance of markets. My writings have been relied upon by numerous agencies and courts, and are found in many opinions of the U.S. Supreme Court. I have played an active role in the process of restructuring, and reforming the regulation of, many markets in North America, Europe, Asia, and Australia. In addition, I have provided consulting services to a wide variety of private and governmental participants in those processes of restructuring and regulatory reform, including the General Accounting Office, the U.S. Agency for International Development, the Organization for Economic Coordination and Development, and The World Bank.

THE RECENT HISTORY OF ECONOMIC REGULATION

In the early 1970's, the U.S. relied primarily on economic regulation to govern the performance of many markets, including rail, trucking, air travel, financial services, natural gas, electricity, oil and petroleum products, and telecommunications. Regulatory agencies used a

combination of rate regulation and regulatory restrictions on market entry and exit to implement a system of central planning. All of those regulated markets performed poorly.

The U.S. responded by deregulating the markets that were not characterized by natural monopoly conditions – specifically, trucking, airlines, oil and petroleum products, and financial services. The results were so socially beneficial that the U.S. turned its attention to markets with more complicated characteristics. The natural gas, telecommunications, and electricity markets include many functions that are susceptible to performance in an unregulated, structurally competitive market, but they also include some functions, like transmission of electricity, that continue to be natural monopolies. In each of these markets, the U.S. has reduced significantly the role of government regulation as a governance mechanism, and has increased its reliance on unregulated competitive market forces to obtain socially beneficial changes in the performance of the markets. Generally, the U.S. has separated the natural monopoly functions from the functions that are susceptible to governance by competitive markets, deregulated the functions that are susceptible to performance in a competitive market, and switched to new methods of regulating the residual natural monopoly functions that are compatible with, and supportive of, the newly deregulated market-based functions.

The results have been impressive. Each of these markets performs much better today than it did when we attempted to rely on central planning and pervasive regulation to govern it. As scholars from the Brookings Institution and George Mason University concluded in an important study published in 1997, consumers have obtained scores of billions of dollars in annual benefits as a result of this movement toward deregulation and regulatory reform. Robert Crandall & Jerry Ellig, Economic Deregulation and Consumer Choice (1997). I have described this process and its many socially beneficial results at greater length and in greater detail elsewhere. See, e.g.,

Richard J. Pierce, Jr. & Ernest Gellhorn, Regulated Industries (4th ed. 1999); Richard J. Pierce, Jr., Economic Regulation (1994); Richard J. Pierce, Jr., Reconstituting the Natural Gas Industry from Wellhead to Burnertip, 9 Energy L. J. 1 (1988).

The extraordinary success of the U.S. deregulation and regulatory reform process, combined with the enviable performance of the U.S. economy and the collapse of the centrally planned Soviet economy, has inspired nations on every continent to emulate the U.S. approach. Almost every country is in some stage of attempting to apply the lessons of the U.S. movement toward deregulation and regulatory reform, with the same kind of resulting substantial improvements in market performance that the U.S. has experienced.

As the Board well knows, the history of the U.S. rail industry is similar to the history of the other industries that have been the subject of deregulation and regulatory reform. In the early 1970s, the U.S. rail market was on the verge of total collapse. Most railroads were either bankrupt or nearly so. The cause was easy to identify. Implementation of a central planning approach to the market through application of rate regulation and regulatory restrictions on market entry and exit had nearly destroyed the market. The rail regulatory regime that was being implemented at the time cost the U.S. economy between $9.7 and $16.2 billion per year. C. Barnekov & A. Kleit, The Costs of Railroad Regulation (1988).

Congress responded by enacting the 4R Act and the Staggers Act. As they were ultimately implemented by first the ICC and then the STB, those statutes went a great distance toward replacing central planning with reliance on markets to determine prices, terms and conditions of service, and market entry and exit. Those statutes were predicated on the well-supported belief that railroads confront effective competition in most markets from a combination of other railroads and other modes of transportation. The STB continues to perform

some important regulatory roles, e.g., regulation of rates charged where a railroad has "market dominance." Even in those narrow contexts, however, the STB has come increasingly to rely on regulatory methods that reflect market forces, e.g., differential or Ramsey pricing, rather than traditional cost-of-service regulation. As a result, the rail market is much healthier than it was prior to the regulatory changes mandated by Congress. By any conceivable measure, shippers and the U.S. economy have experienced significant benefits attributable to the movement from primary reliance on regulation to primary reliance on market forces to govern the rail market.

The Board's revised merger policy should reflect these general and rail-specific directions in economic regulation.

MERGER POLICY

Any country needs a merger policy that accomplishes two goals. First, it should enable an agency to identify, and potentially to block, proposed mergers that would have the potential to create unacceptable anticompetitive effects. Second, it should enable all other proposed mergers to be reviewed and approved quickly and easily. We often tend to emphasize the first goal in talking about merger policy, but the second goal is even more important than the first. Only a small fraction of proposed mergers pose any plausible threat of harm to the performance of any market. The vast bulk pose no such threat. In an economy as diverse and dynamic as the U.S. economy, it is essential that firms be able to order, and to reorder, their structures and relationships quickly and easily in response to constantly changing marketplaces.

The U.S. legal regime applicable to most mergers furthers both goals admirably. In most areas, the Department of Justice and the Federal Trade Commission (DOJ/FTC) share responsibility to determine whether a proposed merger is likely to have intolerable anticompetitive effects and to attempt to block any such merger that they so identify. They fulfill

those responsibilities in a highly pragmatic manner that has helped to give the U.S. the best performing economy in the world. A high proportion of proposed mergers do not even meet the threshold criteria that trigger a duty to notify the DOJ/FTC of the merger. Of those that do, the DOJ/FTC attempt to block only a handful of proposed mergers each year. A high proportion of the proposed mergers that do meet those criteria elicit only a quick review by the DOJ/FTC that is sufficient to allow them to conclude that the merger poses no plausible threat to harm the performance of any market. The DOJ/FTC identify only a small fraction of proposed mergers that raise plausible concerns sufficient to justify detailed scrutiny. Even within that small class of proposed mergers, in most cases the DOJ/FTC ultimately conclude either that the proposed merger does not, in fact, threaten competitive harm or that any such threat can be mitigated adequately through undertakings that the firms are willing to make as conditions on the DOJ/FTC's acquiescence in the proposed merger. Through this process, the vast majority of proposed mergers in the U.S. are completed quickly and inexpensively. In most cases, the DOJ/FTC complete the process of reviewing a proposed merger within sixty days. Thus, as it is designed and implemented, U.S. merger policy reflects a presumption that most mergers are socially beneficial. That presumption can be rebutted only by demonstrating that a proposed merger has the clear potential to harm the performance of a market.

It is even more important to have a merger policy that allows mergers to be completed quickly and inexpensively in the context of a previously regulated market that is undergoing a transition to greater reliance on market forces. Regulation always distorts firms' decisionmaking and induces firms to choose inefficient structures. It also distorts their decisionmaking in many other contexts, e.g., it induces them to make poor investment decisions, to invest in the wrong kinds of assets in the wrong places, to hire the wrong numbers and types of personnel, and to

make other decisions based on regulation, rather than economic efficiency. When previously regulated firms are freed from regulatory restraints and subjected instead to competitive market forces, they invariably conclude that they must make major changes in order to be efficient enough to survive and prosper in their new environment. Many discover that they must make major structural changes through mergers and acquisitions. Any agency that is responsible for considering proposed mergers in that context must adopt a merger policy that will both allow it to identify, and to block, the occasional proposed merger that poses intolerable risks of harm to the performance of markets, and, even more important, allow the quick and inexpensive consummation of the many mergers that do not pose such risks.

Of course, regulatory agencies review mergers under a "public interest" standard that is not necessarily the same as the antitrust analysis performed by the DOJ/FTC. However, even in this area, regulators have, over time, narrowed the scope of their review considerably.

For example, FERC has jurisdiction over mergers in the electric utility industry, an industry that is undergoing a transition from pervasive regulation to primary reliance on competitive market forces. FERC originally used a six-factor test for merger review: (1) the effect of the proposed merger on competition; (2) the effect of the proposed merger on the applicants' operating costs and rate levels; (3) the reasonableness of the purchase price; (4) the degree of coercion, if any, the acquiring utility has applied to the to-be-acquired utility to accept the merger; (5) the impact of the merger on state and federal regulation; and (6) the contemplated accounting treatment. In a high proportion of cases, FERC applied that policy through the use of lengthy oral adjudicatory hearings.

However, in 1996, FERC concluded that its policy was no longer appropriate for application to an industry that was undergoing a transition to primary reliance on market forces,

and announced a new policy that was designed to fit the new environment. See FERC Order No. 592, Docket No. RM96-6-000 (Dec. 18, 1996) (policy statement) and Order No. 592-A, Docket No. RM96-6-001 (June 2, 1997) (order on reconsideration); FERC Order No. 642, 93 F.E.R.C. ¶61.164 (November 15, 2000). See also Richard J. Pierce, Jr., Antitrust Policy in the New Electricity Industry, 17 Energy L. J. 29 (1996).

In justifying its changed policy, FERC identified several major defects in its old policy, each of which also is relevant to the Board's proposed revisions to its merger policy. First, many of the factors it considered were not appropriate for consideration by an agency that was reviewing mergers proposed by firms that are subject to market forces. Second, FERC concluded that its old policy was too unpredictable in its outcome, imposed undue burdens, and required far too much time to implement in many cases. FERC recognized that most proposed mergers are socially beneficial, and that a policy that is difficult to predict, burdensome, and slow deters many firms from even attempting to enter into socially beneficial mergers. Third, FERC recognized that its old policy was highly susceptible to abuse by badly motivated protestors and intervenors. Those included competitors who wanted to stop, or at least to delay, a transaction that would create a more formidable competitor, and rent seekers who used their ability to protest, or to demand a costly hearing, as a source of leverage to extract from the merging firms a variety of special interest concessions on issues unrelated to the proposed merger. Fourth, FERC recognized that its old policy tended to discount and to submerge the issue that should dominate its merger policy in the new environment – whether a proposed merger is likely to cause serious harm to the performance of any market.

To remedy these problems, FERC's new policy reduced to three the factors that FERC will consider in acting on a proposed merger: (1) effects on competition; (2) effects on rates;

and (3) effects on regulation. As a practical matter, FERC places almost exclusive emphasis on effects on competition in most cases. In applying the first factor – effects on competition – FERC has largely adopted the DOJ/FTC Merger Guidelines. This enables FERC to screen proposed mergers, so that mergers that do not raise significant competitive issues can be handled on an expedited basis. The second factor – effects on rates – is unique to FERC's method of ratemaking. It usually can be satisfied simply by applicants agreeing not to file for rate increases directly attributable to the merger. The third factor – effects on regulation – reflects potential jurisdictional problems that sometimes are raised by a merger as a result of some judicial interpretations of the Public Utility Holding Company Act. Those opinions suggest that some utility mergers can have the effect of precluding both FERC and state regulators from regulating transactions among corporate affiliates. That factor usually can be satisfied simply by applicants agreeing not to use the merger as a vehicle to avoid state or FERC regulation of matters that were subject to state or FERC regulation before the merger.

FERC's revised policy had positive results. FERC has applied its new policy to 42 proposed mergers in the last four years, excluding the few merger applications that were filed and withdrawn when the applicants changed their minds about the desirability of the proposed merger. See List of Mergers Filed with the Commission Since 1995, available at http://www.ferc.fed.us./electric/mergers/mgrpag.htm (last updated July 31, 2000). FERC approved each of these mergers, though it approved some on the condition that the parties adopt mitigating measures. FERC completed its review and approval process in less than six months in 37 of the 42 cases, and its average processing for merger applications has been 117 days since it revised its policy. It completed the process in less than a year in all but one of the cases. That case raised extremely difficult and unprecedented issues. Even in those cases where competition

issues were raised, FERC has been able to resolve most mergers on the basis of the filing submitted by the merger applicants, pleadings filed by interested parties, and supplemental data requests from its staff. Most mergers handled by FERC do not result in formal discovery by the parties and are resolved through "paper hearings," without the use of formal discovery or evidentiary hearings. Courts have repeatedly upheld and often applauded this type of decisionmaking procedure by agencies that are acting under broader statutory standards in cases in which the dominant issues are economic. See, e.g., Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998); Union Pacific Fuels v. FERC, 129 F.3d 157 (D.C.Cir. 1997); SBC Communications v. FCC, 56 F.3d 1484 (D.C. Cir. 1995). See generally Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 8.2 (3d ed. 1994 and annual supplements). The advantages of this procedure are obvious and substantial. It permits the agency to make decisions on the basis of high quality data and analysis with limited consumption of agency resources. It expedites the decisionmaking process. It also reduces the ability of third parties to abuse the merger review process by using it to block or to delay a competitor's merger or to extract special interest benefits by threatening to try to block the merger or to delay the proceeding.

FERC's policy has, over time, moved toward the focused approach used by the DOJ/FTC and other agencies that are engaged solely in antitrust review. Under this approach, the agency first defines the appropriate markets and the effects on those markets of the proposed merger. If the agency identifies a market in which it fears that the merger creates an undue risk of harming the performance of the market, it works with the applicants to identify an effective means of mitigating the potential harm it has identified. In a high proportion of the relatively few cases that reach this stage of the decisionmaking process, the agency is able to identify effective

mitigation measures that the firm is willing to implement as a condition on the completion of its merger, e.g., divestiture of assets in a market in which the merged firm otherwise would have an unduly high share of the market. If the agency identifies a market in which the merger poses a significant risk of anticompetitive behavior that is not amenable to effective mitigation, the agency looks at the potential social benefits of the merger to determine whether they are sufficient to justify its approval notwithstanding the existence of some risk that the merger might harm the performance of some market. These are the relatively rare hard cases that sometimes elicit an order disapproving a proposed merger.

One characteristic of this decisionmaking process is particularly noteworthy. Each step is contingent on the results of the prior step. Thus, for instance, the agency does not engage in detailed economic analysis unless and until it has applied some simple screens to see whether such an analysis is necessary. It does not look for mitigation measures unless and until it has concluded that the merger would pose an undue risk to the performance of a market in the absence of mitigation measures. It does not look for social benefits of a merger unless and until it concludes that the merger poses otherwise unacceptable and unmitigatable risks to the performance of a market.

This clear, simple, contingent, and sequential approach has many advantages. It conserves the resources of the agency and the parties. It minimizes the amount of time required to review a proposed merger. Finally, it permits any firm that is considering a potential transaction to perform its own analysis early in its own decisionmaking process and to make a reasonably reliable prediction of the likely results of the agency's decisionmaking process.

Following this general trend, the Board's final merger rules should focus principally on competitive issues, with additional review of issues that are unique to the rail industry, such as

service issues. A narrow scope of review, coupled with expedited review, would be consistent with the Board's application of a broad "public interest" standard.

THE STB'S PROPOSED POLICY

The STB is wise to reconsider its merger policy to determine whether conditions have changed in the past twenty years in ways that justify a change in policy and to reflect the general trends in the area of economic regulation. The proposed new policy is severely flawed in a number of respects, however. Before I discuss each of the elements of the proposed policy that are inappropriate and counterproductive, I will describe the problems that would be created by adoption of the policy as a whole.

The proposed policy would require the STB to apply at least four factors in addition to the potential adverse effect on competition in evaluating a proposed merger: (1) the adequacy of the firms' plan to improve service; (2) the adequacy of the firms' plan to enhance competition; (3) the adequacy of the firms' plan to minimize service disruptions during the post-merger transition period; and (4) the adequacy of the firms' attempt to anticipate and then to evaluate the likely responses of the firms' competitors to the proposed merger, including additional mergers that might be proposed as a competitive response to the proposed merger. The inclusion of "enhanced competition" and downstream effects in this analysis would impose extraordinarily heavy burdens on both the applicants and the STB's staff. It would produce long, expensive, and complicated proceedings. It would maximize the opportunities for competitors and other third parties to abuse the merger approval process by using it to stop or to delay a pro-competitive merger or to use it as a means to extract special favors unrelated to the proposed merger. It would require the STB to select winners and losers if it adopts remedies or conditions that are not specifically designed to offset identified harms. Finally, the use of such factors in reviewing

mergers would render prediction of the likely results of the merger review process nearly impossible. Through each of those effects, the proposed policy would deter firms from even attempting to identify, negotiate, and propose socially beneficial mergers.

The factors beyond competitive and service effects that the STB has proposed also represent a major step back to the bad old days in which agencies acted on the assumption that agency-implemented central planning will yield better results than primary reliance on market forces to determine the most efficient structure of a market. As stated in the recently released "Final Report of The International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust" (2000) [hereinafter Attorney General's Advisory Committee, available at www.usdoj.gov.atr/icpac/icpac.htm]:

> As a best practice or discipline, with limited exceptions (such as national security), noncompetition factors should not be applied in antitrust merger review. If a jurisdiction's law recognizes noncompetition factors (such as preservation of jobs, promotion of exports, or international comparative advantage), such factors should be applied transparently and in a manner narrowly tailored to achieve their ends. *Executive Summary*, Attorney General's Advisory Committee.

While the Board reviews mergers under a public interest standard, the analysis of merger-related competitive effects should, for reasons discussed above, be the core of that analysis. Moreover, the Board's proposed policy would reduce the transparency of its decisions and expand the scope of its review and remedies.

I will now discuss each of the factors the STB proposes to apply in reviewing proposed mergers.

Presumption That All of the Efficiency Enhancing Mergers Have Been Completed

The Board's proposed "paradigm" shift in merger policy review is premised on the unprecedented and unsupported presumption that the rationalization of the nation's rail system

and the elimination of excess capacity have been completed. Specifically, the Board cites substantial reductions in excess capacity and improvements in efficiency that have resulted from the prior rail mergers that rationalized the nation's rail system, and then concludes that "this process has now largely been completed, and [] the efficiencies and service improvements to be realized from further downsizing of rail route systems are limited." Comments to Proposed § 1180.1(a), Notice of Proposed Rulemaking (NPR) at 11.

To my knowledge, no agency has ever announced a merger policy that presumes that future mergers are unlikely to improve the performance of a market. The STB reasons that, since prior mergers yielded large efficiency gains, future mergers are unlikely to produce significant further improvements. That is a classic non sequitur. The STB provides no support for its belief, and it is hard to imagine how any agency could support such a belief. It is highly unlikely that any market in history has been characterized by optimal structural efficiency. If any market ever reached that state of structural euphoria, that state would exist only for a very short time. The U.S. economy is extraordinarily dynamic. Firms in every market must engage in a continuous process of reevaluating their structure to determine whether it continues to allow them to participate in constantly changing markets in an efficient manner.

The Presumption of Anticompetitive Effects

The Board has also proposed to adopt a presumption that any proposed merger of Class I railroads would have anticompetitive effects. Thus, the Board says that "[a]ny railroad combination entails a risk that the merged carrier will acquire and exploit increased market power." Proposed § 1180.1(c)(2)(i), NPR at 15. In another place, the Board says that it "expects that any merger of Class I carriers will create some anticompetitive effects . . . ." Proposed § 1180.1(d), NPR at 16. That presumption seems to drive many of the other elements of the

Board's proposed policy. Thus, for instance, because mergers would have anticompetitive effects, the Board says that it "does not favor consolidations . . . unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved." Comments to Proposed § 1180.1(a), NPR at 11.

A presumption that an entire class of potential mergers will have anticompetitive effects is again unprecedented and unsupportable. There are over 120 merger policies currently in effect around the world. To the best of my knowledge, none of those policies includes a presumption that an entire class of mergers will have anticompetitive effects. The Board has provided no support for this presumption.

Some proposed mergers pose significant risks that they will impair the performance of one or more markets. Others do not. The only way to distinguish among them is to apply standard tools of economic analysis to each market that is potentially affected by a specific proposed merger. The Board can fulfill its responsibilities in the merger review process only by identifying each product and geographic market that is potentially affected by a proposed merger and evaluating the potential effects of the merger on the performance of each of those markets.

Presumption of Significant Service Disruptions

The Board discusses at length its concerns about potential service disruptions during the period following a merger. It then adopts a presumption that rail mergers will necessarily create substantial service disruptions. It says: "Our recent experience has shown that, even with substantial advance planning, implementing large rail mergers may cause substantial service disruptions that delay or outweigh expected efficiency gains that should flow to the public. Under our proposed rule, these potential harms would be included in our balancing test." Comments to Proposed § 1180.1(c), NPR at 13.

However, only some of the most recent consolidations produced those unfortunate results. Two cases are not sufficient to support a sweeping generalization, particularly when those two cases involved unusual factors and when there are numerous cases in which mergers did not yield serious service disruptions. There is no justification for a presumption that rail mergers will cause substantial service disruptions, particularly when the Board also is proposing that merger applicants address their transitional plans with a new level of detail and that a heightened regime of post-merger monitoring of service be implemented.

Moreover, merger applicants will have every incentive to minimize service disruptions in the future. Markets punish firms severely for service disruptions. The financial performance of UP during the period in which it experienced severe service problems illustrates the point. During its service crisis, UP's quarterly earnings per share dropped from $0.96 in September 1997 to a low of a loss of $1.70 per share in June, 1998. UP's earnings did not recover until the second half of 1999. UP was hit with several lawsuits, and the STB imposed emergency service orders on UP during the depths of its crisis. UP's experience serves as an effective object lesson to other firms that might otherwise be tempted to try to implement a merger with inadequate planning.

Because the Board believes that the risk of service disruptions is serious enough to warrant consideration in merger review proceedings, it clearly can require applicants to submit their plans to avoid those problems for the Board's review, as the Board has proposed. (I understand that BNSF supports this requirement.) However, the Board should then limit its consideration of the proposed plan to avoid service disruptions to a simple yes or no determination with respect to the adequacy of the plan. It should not attempt to assign a value to the risk of service disruptions that must then be offset with unrelated enhancements. That is the

antithesis of the "transparent" and "narrowly tailored" consideration of noncompetition factors recommended by the Attorney General's Advisory Committee.

Mandatory "Enhanced Competition" Conditions

The Board proposes "to require applicants to incorporate proposals for enhanced competition . . . ." Comments to Proposed § 1180.1(c), NPR at 13. The Board refers to an "equal access" rule as an example of such a mandatory proposal. It also says that inclusion of such a proposal is "likely to be extremely important to us in determining whether to approve a particular application." Id. at 14. This is a bad idea for at least four reasons.

First, if the Board is convinced that some major change in its regulatory policy, like an equal access requirement, would yield significant public benefits, the efficacy of that policy change will depend primarily on its scope. It would make little sense, and do little good, to impose it selectively on railroads that propose to merge. Instead, the agency should consider whether to apply the new approach to all railroads.

Second, adopting a policy of approving mergers only if the applicants agree to adopt a major change in their methods of operation that they consider highly undesirable is much more likely to discourage railroads from proposing socially beneficial mergers than to produce a legal regime in which many railroads agree to the change as a condition of approval of a merger.

Third, the policy would require the Board to determine what level of enhancements are necessary to offset possible harms and then allocate those enhancements to shippers who are not, by definition, directly affected by the potential harm. The unfairness inherent in providing benefits to one class of shippers, rather than another, is a key reason why remedies should be designed to offset specified harms to specific groups.

Fourth, and most important, no agency should consider adopting a major change in its regulatory policy, like an equal access rule, without considering carefully and in detail all of the implications and effects of adopting the new policy. That cannot be done as an add-on to a merger review proceeding. It requires instead a separate rulemaking in which the agency addresses with care the scores of important issues that are raised by such a proposed policy change.

Requiring only one participant in a market to allow its competitors to use its assets is a radical step. In the vast majority of circumstances, this would be a terrible idea, whether or not open access or similar regimes would be beneficial if implemented on a broad basis.

Mandatory Post-Merger Oversight

The Board proposes to establish an elaborate "formal oversight process" applicable to all mergers. Proposed § 1180.1(g), NPR at 19; see also Proposed § 1180.1(i), NPR at 20. Because the Board's review extends beyond the efficacy of any competition-related merger conditions and merger-related service problems to include unforeseen circumstances, subsequent mergers, and conditions related to the achievement of all projected benefits exactly when projected, this proposal would undercut the transparency and finality that is required in merger proceedings. Indeed, unless the scope of post-merger review is properly limited to the efficacy of the competitive remedies adopted in the merger and the identification and resolution of merger-related service problems, I cannot imagine any firm that would be willing to propose a merger that would be subject to such an extraordinary, open-ended post-merger oversight process and subject to the risk of after-the-fact imposition of new, impossible-to-predict conditions.

The Board's proposal would vastly expand the scope of post-merger review beyond that undertaken by other agencies. Agencies sometimes approve mergers subject to mitigation

conditions, e.g., divest fifty percent of your retail gasoline outlets in Los Angeles. Agencies act in that manner when they conclude that a proposed merger would have unacceptable effects on the performance of a market in the absence of the mitigation condition. When an agency approves a merger subject to a mitigation condition, it retains the power to enforce the condition, or even to dissolve the merger, if the merged firm fails to comply with the condition. All merger applicants understand and accept the need for an agency to retain that power. The applicants know what the mitigation conditions on approval are before they merge. If they conclude that the conditions are unacceptable, they simply decline to merge. I have never heard of any agency attempting to retain an open-ended power to impose new conditions on a previously approved and completed merger based on the agency's determination that the merger has not produced exactly the results that the applicants expected or that the agency later prefers.

First, as I noted earlier, under the proper scope of review in today's economy, the Board should not require submission of evidence that a merger will produce benefits unless it concludes that the merger poses a significant risk of adversely affecting the performance of a market and that risk cannot be effectively mitigated. However, I understand that this is an accepted practice in the rail industry, even without the expansion the Board is currently providing. Nonetheless, an agency certainly should not attempt to engage in post-merger oversight to ensure that the merger produced precisely the benefits the applicants projected.

Second, it would be extremely difficult to determine whether any "shortfall" in benefits is a result of the problems relating to the merger. The performance of any firm depends on a myriad variables, many of which are beyond the firm's control. If a merged firm's performance falls short of its expectations and those of the Board, the Board would have to determine the extent to which its performance is attributable to the merger versus the extent to which it is

attributable to any number of other potential sources, e.g., an economic downturn, the responses of competitors, an increase in fuel or labor costs, or a tightening of capital markets.

Third, no transaction ever goes exactly as planned or as the parties anticipated that it would. That basic truth certainly applies to all mergers. I doubt that any merger in history has produced exactly the results the firm expected. The results of a merger depend on how it interacts with numerous other factors, including changes in market conditions, responses of competitors, and changes in general economic conditions. Sometimes a merger produces benefits that differ significantly from the firm's expectations. Thus, for instance, a firm might project large savings in labor costs, but unexpected increases in demand for the firm's services might persuade it to retain its original workforce and to reassign many of its employees in ways that permit it to meet the increased demand efficiently and effectively. Would the Board consider that a failure to fulfill the firm's benefit projections? Would it order the firm to fire enough employees to fulfill its original projected labor cost savings? Some mergers produce disappointing results – results that fall well short of the firm's expectations. Agencies do not approve mergers because they expect all mergers to be successful. Such an expectation would be absurd. It is contradicted by history. Some mergers yield spectacular results; some yield terrible results. Agencies approve mergers that do not have anticompetitive effects because they know that many will yield good results and because they know that the firms that propose to merge are in a much better position than any agency to predict the results of the merger.

Fourth, and most important, unless the scope of post-merger is properly limited, I cannot imagine any firm that would be willing to merge, or even to consider a merger, under conditions in which an agency can impose unknown and unknowable conditions on the merged firm years after the merger is approved and implemented.

Requirement to Anticipate and to Analyze Responses of Competitors

The proposed policy would require merger applicants to predict the responses of their competitors, including any mergers their competitors might propose in an effort to remain competitive with the merged firm, and to evaluate the effects of those potential responses. The Board would then hold the applicants responsible for the effects of their competitors' responses by denying the application if the Board concludes that the competitors' responses would have unacceptable effects.

The Board should not adopt this policy. First, it is extremely difficult for a firm to predict the actions of its competitors with any degree of confidence and accuracy. Of course, firms attempt to do this all of the time, but they can never do better than to predict a relatively wide range of potential responses. Second, any firm is understandably reluctant to disclose to its competitors its evaluation of the likely effects of the range of actions it believes that its competitors might take. No agency should compel any firm to disclose that information. Markets do not perform well when competitors are required to share with each other their predictions and evaluations of their competitors' potential actions. Third, this requirement will force applicants to speculate and will make merger proceedings unmanageable. That is why the STB wisely refrained from imposing such a requirement in the past. Those reasons remain valid and persuasive today. Fourth, this requirement would provide competitors of merger applicants an ideal vehicle to abuse the merger review process by blocking a socially beneficial merger. The competitor would need only to allege that it would respond to the merger by proposing a patently outrageous merger in order to block approval of the proposed merger. Fifth, it makes no sense to disapprove an otherwise socially beneficial merger because it might induce a competitor to

propose a socially destructive merger. If that happens, the Board should simply disapprove the second proposed merger.

CONCLUSION

The Board should not adopt those proposed changes in its merger policy that would expand the scope of its merger review or create new presumptions against mergers. Such changes would return the Board to a central planning role, threaten the transparency and predictability of Board review, and result in a mismatch of actual harms and actual remedies. The Board should maintain the approach that is clearly reflected in the 4R Act and the Staggers Act and that has produced excellent results in so many other markets. It should rely primarily on market forces to produce good results, and it should rely on regulation only in those few contexts in which market forces alone are unlikely to produce good results.

Therefore, any final rules adopted by the Board should: (i) eliminate the presumption that rail mergers will no longer produce public benefits; (ii) eliminate the presumptions that future rail mergers will cause competitive and service harms; and (iii) eliminate the requirement that merger applicants propose "competitive enhancements" to offset these presumed harms. Final rules also should not require applicants to "guarantee" the projected benefits of mergers or to forecast the responsive actions of their competitors. The Board's rule also should limit the scope of post-merger review to the efficacy of competition conditions adopted as part of the merger and the temporary remedy of merger-related service problems. Most importantly, any final merger rules should contain an expedited schedule and provide railroads and interested parties with transparency and finality in Board actions.

RICHARD J. PIERCE, JR.
122 Madison Place
Alexandria, Virginia 22314

Birthdate: July 15, 1943
Married: Jill Birdwhistell Pierce
Children: Gabriel, 1974; Danielle, 1976

PRESENT POSITION: Lyle T. Alverson Research Professor of Law
George Washington University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-1549

COURSES:

Administrative Law, Antitrust Law, Regulated Industries, Energy Law, Oil and Gas Law, Energy Tax Policy, Evidence, Torts, Conflicts, Economic Analysis of Law

EMPLOYMENT:

June 1989 - June 1995 - Paul J. Kellner Professor of Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027-7297

June 1986 - June 1989 - George W. Hutchison Professor of Energy Law
Southern Methodist University School of Law
Dallas, TX 75275

July 1984 - June 1986 - Dean and Professor of Law
University of Pittsburgh School of Law
3900 Forbes Avenue
Pittsburgh, PA 15260

July 1981 - June 1984 - W. R. Irby Professor of Law
and Director, Energy Law Program
Tulane University School of Law
New Orleans, LA 70118

August 1980 - June 1981 - Visiting Professor of Law
University of Virginia School of Law
Charlottesville, VA 22901

August 1977 - August 1981 - Professor of Law
University of Kansas School of Law
Lawrence, KS 66045
(Associate Professor until June 1980)

June 1972 - August 1977 - Sutherland, Asbill & Brennan
1666 K Street, N. W.
Washington, D. C. 20006

May 1969 to Sept. 1969- Instructor, United States Coast Guard
Reserve Training Center
Yorktown, VA 23690

May 1968 to May 1969 - Assistant Chief, Aids to Navigation Branch
U.S. Coast Guard District Headquarters
1520 Market Street
St. Louis, MO 63103

June 1966 to May 1968 - Operations Officer
United States Coast Guard
Cutter Sedge
Cordova, AK 99501

February 1966 to June 1966 Officer Candidate School
United States Coast Guard
Reserve Training Center
Yorktown, VA 23960

June 1965 to February 1966 Financial Management Trainee
General Electric Company
Switchgear Department
6901 Elmwood Avenue
Philadelphia, PA 19142

EDUCATION:

September 1969 to June 1972 - University of Virginia School of Law
Charlottesville, VA 22901
J. D.: 1972
Managing Editor, Virginia Law Review
Order of the Coif
Michie Legal Writing Award
Student Assistant to Prof. Richard Merrill

September 1961 to June 1965 - Lehigh University
Bethlehem, PA 18017
B.S.: Economics

September 1958 to June 1961 - Harriton High School
Rosemont, PA 19072

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VERIFICATION

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

Executed on November 16, 2000.

Richard J. Pierce, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

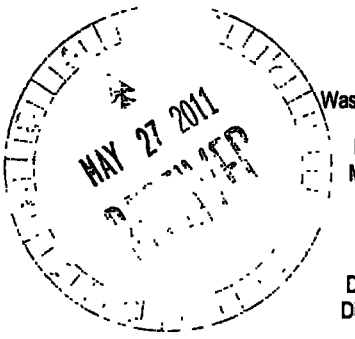
HYNES V.S. EXHIBIT 2

COMPETITION IN THE RAILROAD INDUSTRY, EX PARTE NO. 705, BNSF REPLY COMMENTS, VERIFIED

STATEMENT OF JOHN P. LANIGAN (MAY 27, 2011*)*

229639

MAYER·BROWN



Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Robert M. Jenkins III
Direct Tel +1 202 263 3261
Direct Fax +1 202 263 5261
rmjenkins@mayerbrown.com

May 27, 2011

BY HAND-DELIVERY

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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Re: Competition in the Railroad Industry
Ex Parte 705

Dear Ms. Brown:

Enclosed for filing the in the above-referenced proceeding are an original and ten copies of the "Reply Comments of BNSF Railway Company." Please date-stamp the enclosed extra copy and return it to our representative. Thank you.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosure

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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

REPLY COMMENTS OF BNSF RAILWAY COMPANY

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Public Record

Roger P. Nober
Richard E. Weicher
Jill K. Mulligan
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131

Robert M. Jenkins III
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006

Counsel for BNSF Railway Company

Dated: May 27, 2011



BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

REPLY COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company submits these reply comments pursuant to the Board's decisions served January 11 and February 4, 2011, in this proceeding. Attached in support of these comments is the verified statement of John P. Lanigan, Executive Vice President and Chief Marketing Officer for BNSF.

INTRODUCTION

Since the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), the railroad industry has made significant investment in infrastructure and equipment to the immense benefit of its customers and the nation at large. As implemented by the Interstate Commerce Commission ("ICC"), the market-based regulatory model mandated in the Staggers Act was so successful that Congress reinforced that mandate when it passed the mantle to the Surface Transportation Board ("STB") in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"). In the post-Staggers era, the STB has adopted regulatory policies aimed at preserving a careful balance between reliance on market forces to establish reasonable rates and protecting shippers from abuse of market power.

Under the current regulatory regime, competitive access remedies are reserved for demonstrated abuses of market power. Commenting parties seeking more intrusive regulation

bear a heavy burden of showing why changes to the existing regime, which already provides ample recourse for shippers claiming abuse of market power through its existing rate reasonableness and competitive access mechanisms, are necessary and represent good public policy.

The commenters in this proceeding arguing for more access regulation have not met that heavy burden. Most of their arguments simply reprise claims that have been made to the ICC, the STB, and the courts for over two decades. Somewhat distinctively here, many of the commenters rely on unsupported claims of "duopoly power" arising from rail mergers, "parallel pricing," and railroads awash in excess profits.[1] These claims, however, are equally unavailing. The rail mergers of the 1990s made the industry *more* competitive, not less. The efficiency and productivity of the industry produced both lower prices and better service. As Mr. Lanigan explains in his verified statement, BNSF competes daily with other railroads, trucking companies, and barge companies by providing competitive, high-value service. The real focus of most of the shipper commenters appears to be the *level* of the rates they are charged for this service—as they have been for most of the three decades since the passage of the Staggers Act. They point to recent rate increases and urge the Board to adopt changes under the rubric of access as a means of obtaining lower rail rates than what the Board's existing rate regulation would prescribe. In fact, as described herein, after falling steadily for over two decades, rail prices began to increase in the mid-2000s because demand and costs increased, not because of a

[1] *See, e.g.,* Comments of Concerned Captive Coal Shippers ("CCCS Comments"); Comments of The Fertilizer Institute ("TFI Comments"); Comments Submitted by Olin Corporation ("Olin Comments"); Comments of Omaha Public Power District, Et Al. ("OPPD Comments"); Comments of Western Coal Traffic League ("WCTL Comments"); Initial Comments of Arkansas Electric Cooperative Corporation ("AECC Comments"); Initial Comments of Westlake Chemical Corporation ("Westlake Comments"); Joint Comments of Alliance for Rail Competition, Et Al. ("Alliance Comments").

lack of competition between railroads. Rail prices are still far below their levels in 1980 in real terms, and the shipping public has benefited enormously from the reinvestment made possible by the industry's improved financial condition.

Further, the fact that railroads have become more profitable and better able to attract investment capital today does *not* mean that they have achieved the kind of sustained profitability that will enable them to replace their assets in the long run. Depriving railroads of revenues simply because they have more revenues and are closer to a self-sustaining financial *future* is the surest way of preventing that future from being reached.

In sum, calls for reopening mergers and imposing new regulatory requirements that would siphon revenues from efficient operations are misguided and contrary to the interests of the majority of BNSF's shippers. There is ample regulation in place to protect shippers against unreasonable rates, poor service, or other abuses. Comments filed in this proceeding have not shown why the STB should abandon its current, more balanced regulatory regime and adopt an uncertain radical new approach to access regulation.

I. THE ROLE OF ECONOMIC REGULATION OF RAILROADS

As the Board is well aware, the nation learned the hard way in the 1960s and 1970s that railroads operate in largely competitive markets and that regulation that attempted to mandate non-market-based pricing or operations would, over time, bankrupt the industry. A significant number of major railroads in the Northeast and Midwest in fact went bankrupt, and most others were in poor financial condition. *See* S. Rep. No. 609, 93rd Cong., 1st Sess. 5-13 (1973). Congress found that the crisis had been caused in substantial part by a pervasive, inflexible regulatory scheme administered by the ICC, which promoted equalized rates and "open routing" and hindered the efforts of individual railroads to achieve greater efficiency and compete

successfully with other transportation modes. *See, e.g.*, S. Rep. No. 499, 94th Cong., 1st Sess. 10-11 (1975) ("[T]he present regulatory system has sapped the ability of railroads to respond, compete, innovate, and develop their full service capacity."); H.R. Rep. No. 1430, 96th Cong., 2nd Sess. 111 (1980). *See generally* T. Keeler, *Railroads, Freight and Public Policy*, 24-32 (1980).

Congress made the first effort to free up the regulatory stranglehold on the industry in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4R Act"), but the ICC was slow to react to the imperative for reduced regulation. Frustrated with the ICC's lack of progress and the continuing financial crisis in the rail industry, Congress four years later enacted the Staggers Act, which mandated much more extensive deregulation of the industry. This time the ICC responded appropriately to Congress's mandate. The ICC in the ensuing years adopted and implemented rules and exemptions that generally adhered to the principle that the markets for rail service would be allowed to operate freely, and regulation would be applied only in situations where it was proven necessary to protect a shipper against a demonstrated abuse of market power.[2]

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[2] *See, e.g., Western Railroads Agreement*, 364 I.C.C. 635 (1981) (rejecting prior regime of "equalized rates" and "open routing"); *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982) (same), *rev'd on other grounds sub nom. Detroit, Toledo & Ironton Ry. v. ICC*, 725 F.2d 47 (1984); *Standards for Intramodal Rail Competition*, STB Ex Parte No. 445 (served July 7, 1983) (encouraging independent rate and route actions, and reserving regulatory intervention for anticompetitive conduct); *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520 (1985) (adopting rate reasonableness standards recognizing the necessity for market-based, differential pricing), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987); *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 424 (1983) (exempting traffic from regulation where abuse of market power unlikely), *aff'd in relevant part sub nom. Brae Corp v. ICC*, 740 F.2d 1023 (D.C. Cir. 1984); *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985) (adopting rules for addressing allegations of anticompetitive conduct in individual cases) (served Oct. 31, 1985), *aff'd sub nom. Baltimore Gas & Electric v. United States*, 817 F.2d 108 (D.C. Cir. 1987); *Midtec Paper Corp. v. Chicago & North Western Transp. Co.*, 3 I.C.C.2d 171 (1986) (restricting application of competitive access rules to situations where anticompetitive abuse occurs), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

So successful was that approach that when Congress passed ICCTA in 1995, it reduced regulation still further, and reinforced the mandate that, "to the maximum extent permissible by law," regulation should be applied only to protect against market abuse. *See* 49 U.S.C. § 10502(a); H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 91 (1995), at 96. Consistent with that statutory mandate, the STB adhered to the market-based regulatory policy of the Staggers Act and ICCTA and declined invitations to impose blanket "interchange," "bottleneck," or "access" regulation. *See Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059 (1996), 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

The results demonstrate the wisdom of that adherence to the principles of the 4R and Staggers Acts. A freight rail industry that was almost moribund in the late 1970s slowly crept back to life. Freed to set demand-based rates, railroads reacted by pricing their services to meet the requirements of the individual markets in which they operated. They withdrew from rate bureaus and began independently pricing their portions of through movements as well as their single-line rates. Market-based prices encouraged market-based investment, and investment capital began to return to the industry. With the demise of the old "open routing" regulatory regime, railroads had greater assurance that their investments in efficient routes and facilities would be rewarded, and they were able to build greater density on their main lines and justify upgrades to key yards. As Congress concluded in passing the ICCTA, the deregulatory approach of the Staggers Act "produced a renaissance in the railroad industry." H.R. Rep. No. 104-311, at 91.

Many Class I railroads combined, largely end-to-end, to enhance their ability to provide single-line service over major routes and consolidate facilities. At the same time, the number of

regional and shortline railroads dramatically increased as they took advantage of their lower cost structures to maintain and grow local gathering networks.[3] The productivity of the industry surged, and much of that productivity was passed on to shippers in the form of lower rates. Lanigan VS at 5, 10. Today, rail rates across the country are significantly lower in real terms than they were when the Staggers Act was passed. *Id.* at 10 And the railroads are on much firmer financial footing. None of the Class I railroads has achieved long-term revenue adequacy, but they have made substantial progress toward that vital financial and statutory goal. *See Railroad Revenue Adequacy—2009 Determination,* STB Docket No. EP 552 (Sub-No. 14) (served Nov. 10, 2010).

In the face of this clear validation of the deregulatory mandate of the Staggers Act and ICCTA—and clear vindication of the ICC's and STB's implementation of that mandate—some of the shipper interests in this proceeding claim that they do not seek to have the Board impose more regulation on the railroads, but only to impose more "competition." *See, e.g.,* Alliance Comments at 4-5. However, the Board's imposition of routing or rate requirements on railroads, however denominated, is the very definition of regulation. Such regulation can be justified in situations where a railroad has demonstrably abused its market power—as the STB's rules currently provide (*see* 49 C.F.R. Part 1144)—but the shipper interests seeking more "competitive access" do not want to restrict it to abusive situations. Even where traffic is moving efficiently, they want the STB to micro-manage the railroads' routes and rates, harkening back to the kind of "open routing" philosophy that helped bring the industry to its knees before the modern era of

[3] A study of rail competition undertaken by Christensen Associates at the STB's request concluded that the total number of railroads in the country increased from around 490 in the mid-1980s to 559 in 2009. Laurits R. Christensen Assoc., Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition: Revised Final Report* (2009) ("*Christensen Report*"), at ES-8.

rail deregulation. *See, e.g., Western Railroads—Agreement*, 364 I.C.C. at 648-49 (holding that independent, market-based rate and route decisions would promote "a sound, economic, and efficient rail system" and that "[t]he elimination of costly, circuitous and inefficient routes will benefit the industry as well as its customers.")

Some of the commenters claim that they do not want to return to an "open routing" regime, but only to have the STB intervene when a railroad's rates exceed certain R/VC ratios. *See, e.g.,* CCCS Comments at 75-82. They do not claim that rates set at those R/VC ratios are unreasonably high, or demonstrate that the traffic is moving inefficiently, or that the shipper is otherwise receiving poor service. For all intents and purposes, therefore, they want to use access remedies to curtail differential pricing. As the Board well knows, however, demand-based differential pricing is the cornerstone of the railroads' ability to cover their fixed and common costs. *See, e.g., Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d at 526-27 (explaining that "the cost structure of the railroad industry necessitates differential pricing of rail services" and endorsing market-based pricing). If a shipper believes that it is being charged an unreasonably high rate for the through service it receives, then its remedy lies in the Board's rate reasonableness standards. If it is receiving efficient service at a reasonable rate, however, it should not be permitted to use "access" regulation as a back-door method to undermine the railroad's rates.

A few commenters make a frontal assault on the STB's market dominance and rate reasonableness rules. They claim that the railroads have "duopolies" in the West and East that make access remedies of questionable utility. *See, e.g.,* WCTL Comments at 23-30. Some even suggest that the STB should reopen the Class I rail mergers of the 1990s to impose unarticulated regulatory conditions. *See, e.g.,* Olin Comments at 18-22. They also claim that the industry is

currently awash in excess profits that the STB should curtail. *See, e.g.,* AECC Comments at 4. While these claims are far afield from the access issues framed by the STB in this proceeding, we address these attacks on the structure and financial progress of the industry in the remainder of these reply comments and in the attached verified statement of Mr. Lanigan.

II. THE STRUCTURE OF THE RAIL INDUSTRY

Contrary to the suggestion of some shipper interests, there are considerably more railroads operating in the United States today than at the time the Staggers Act was passed. While there are fewer Class I railroads, there are many more regional and shortline railroads, and together they provide much more competitive service than was possible under the old structure. Among the regulatory reforms that Congress mandated in the Staggers Act were provisions that encouraged rail mergers, so that Class I railroads could capitalize on economies of scale and single-line service on major routes, as well as consolidate redundant facilities. Staggers Act, Section 228 (amending 49 U.S.C. §§ 11344 and 11345). At the same time, Congress made it easier for Class I railroads to spin off rail lines to regional and shortline carriers with lower costs and a local focus that helped retain and grow traffic on lower density lines. The resulting restructuring of the rail industry was one of the key drivers of the post-Staggers productivity improvements that benefited the shipping public as well as the rail industry. Lanigan VS at 4-5.

Some of the shipper commenters, however, suggest that the rail mergers of the 1990s created "duopolies" that have facilitated deleterious "parallel pricing" or "conscious parallelism" by the railroads, and they suggest that new regulatory requirements are necessary to ameliorate this allegedly anticompetitive state of affairs. *See* Olin Comments at 18-19. Arguments for the post hoc imposition of blanket merger conditions are far beyond the scope of this proceeding, and are unfounded from both a legal and practical perspective. There is no precedent for the

long reach back that the shippers seek and no way that retroactive conditions could be imposed without disrupting the settled interests and expectations of numerous parties and unraveling scores of existing commercial relationships for shippers and railroads alike.

In any event, the suggestion that shippers have suffered increased rates as a result of Class I rail mergers in the 1990s is wrong. First, the idea that those mergers increased the railroads' market power rests on a misperception about rail markets. "Captive" shippers generally do not become more captive when two railroads combine end-to-end, and most of the mergers in the 1990s were end-to-end. As the STB found in approving those mergers, the suggestion that "captive" shippers require special regulatory protections simply because two railroads have combined end-to-end to become one railroad is incorrect. *See, e.g., Burlington Northern, Et Al.—Merger—Santa Fe Pacific, Et Al.*, 10 I.C.C.2d 661, 725 (1995). In the instances where a non-captive shipper became captive as a result of a merger, the STB imposed conditions to remedy that effect; but the STB properly avoided any unnecessary additional regulation. *See, e.g., id.* at 761-62. The result, as the STB predicted, was *enhanced* competition from the merged railroads.

The 1995 merger of the Burlington Northern Railroad ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("ATSF") exemplifies this phenomenon. The ability of the combined railroads to provide more efficient single-line service, to internally reroute traffic to achieve greater traffic densities, to combine their car and locomotive fleets for greater efficiencies, to reduce their overhead costs, and to avoid duplicative capital expenditures benefited both the railroads and their customers. Lanigan VS at 2-5. BNSF expanded the overall volume of service the two railroads had provided while dramatically improving the efficiency of its operations and its service quality. *Id.* It managed to pour billions of dollars into plant and

equipment to sustain and enhance its system while significantly improving its financial condition. *Id.* at 6.

WCTL focuses on coal traffic from the Powder River Basin ("PRB") as indicative of the alleged deleterious effects of the Class I rail mergers of the 1990s. *See* WCTL Comments, Richards VS at 7-19. But in fact the PRB provides a good example of how the mergers of the 1990s *enhanced* rather than diminished competition. BN and the Chicago and Northwestern Transportation Company ("CNW") were the original railroads serving the PRB. When Union Pacific Railroad ("UP") acquired CNW, it did not diminish competition in the PRB, but in fact enhanced competition by replacing CNW with a railroad that had much greater financial resources and the largest rail network in the country. BN's merger with ATSF further enhanced competition for PRB traffic by extending BNSF's single-line reach and enabling it to consolidate facilities for greater efficiency. Lanigan VS at 4. Furthermore, conditions were imposed in the BN/ATSF and UP/SP mergers that ameliorated any shipper captivity that resulted from those mergers. Thus, the suggestion that competition for PRB traffic was diminished by the BN/ATSF or the UP/CNW and UP/SP mergers is simply groundless.

Yet WCTL argues that the fact the rail prices began to increase around 2004, after they had steadily declined for over two decades, shows that the railroads have "duopoly power" as a result of the mergers that should be remedied by the Board. *See* WCTL Comments, Richards VS at 16-19. This argument, which is echoed by non-PRB shipper interests as well, is without merit. *See, e.g.,* Alliance Comments at 15-16. When rates generally increase across all traffic categories, the explanation lies not in unsubstantiated conspiracy theories but in the simple fact, as the STB's own Christensen study found, that costs began to increase in 2004, which alone can account for much of the rates increases to date. Christensen Report, at ES-5, ES-16; *see also*

Laurits R. Christensen Assoc., Inc, *An Update to the Study of Competition in the U.S. Freight Railroad Industry: Final Report* (2010) ("*Christensen Update*"), at i (railroads' "marginal cost has been increasing at a faster average annual rate than railroad revenue per ton-mile"). At the same time, after years of enormous productivity growth, the industry's ability to wring more cost savings from consolidation and technology began to slow, and the railroads began to pour even more money into maintaining and enhancing their capacity to meet the demand for their services. Lanigan VS at 9-11.

Moreover, demand for rail service surged across most traffic categories as the nation's economy expanded in the mid-2000s and railroads priced their services accordingly. *Id.* The increase in their profitability finally began to put the railroads on the kind of sound financial footing that Congress envisioned in the Staggers Act, but the railroads still did not earn, and have not earned, sustained revenues sufficient in the long run to replace the assets required to meet shipper demand. Rates in real terms still remain below their level when the Staggers Act was passed. *Id.* at 10. In short, shipper complaints about abuse of market power arising from rate increases in the 2000s are not supported by the facts.

WCTL opines that rate increases on PRB coal traffic are attributable to BNSF's and UP's issuance of published tariffs applicable to that traffic in 2003 and 2004. WCTL Comments, Richards VS at 13-15. There are several reasons why this argument is wrong. As described above, increases in rates on PRB coal traffic coincided with increases in rates on all traffic nationwide in the same time period as a result of increased costs and market demand. BNSF certainly does not agree that the issuance of published tariffs is suspect. A great deal of traffic in the rail industry moves under published tariffs—tariffs covering the movement of agricultural products are a good example—and many shippers prefer them. But the question is moot with

respect to PRB coal movements, because those published tariffs have not supplanted confidential contracts, which have been and continue to be the dominant mode of pricing those movements. Lanigan VS at 12. Not only does WCTL concede this, but WCTL also complains about the confidentiality of those contracts. WCTL Comments, Richards VS at 15, 18. Finally, as Mr. Lanigan states in his verified statement, assertions that BNSF and UP do not compete for the business of coal shippers, or non-coal shippers, are without any factual basis. BNSF competes hard with UP for shippers' business, and both loses and gains traffic, including coal traffic, in the process. *Id.* at 12-13.

The bottom line is that the restructuring of the rail industry after passage of the Staggers Act, including the mergers of the 1990s, enhanced competition in the rail industry. Rates went down while service improved and reinvestment in the industry grew. The fact that rates went up as demand and costs increased in the 2000s, after decades of rate reductions, reflects exactly the kind of price adjustment that occurs in every competitive industry where demand and costs fluctuate. And the fact that railroads' financial situation continued to improve reflects exactly the progress toward revenue adequacy that Congress, the ICC, and the STB intended.

III. THE FINANCIAL CONDITION OF THE RAIL INDUSTRY

Many of the shipper interests commenting in this proceeding assert that the railroad industry is highly profitable and, accordingly, railroads can afford to have revenues siphoned off to some shippers by various forms of new access regulation. *See, e.g.,* Alliance Comments at 16. Of course, these shippers do not demonstrate that their proposals for new access regulation are necessary to address abuses of market power at particular locations. Instead, they suggest that the STB need not concern itself with the railroads' loss of revenue under new access regulation,

because a number of different indicators of railroad profitability show that the industry is earning supra-competitive returns. *See, e.g.,* WCTL Comments at 31-35.

With respect to BNSF, several shipper commenters point to an observation by Warren Buffett that its investment in BNSF had yielded good returns. *See, e.g.,* Alliance Comments at 19-20. But none of these commenters show that any railroad, including BNSF, has reached a sustained level of earnings that will permit it to replace its productive assets in the long term. All of the measures of profitability and financial health cited by these commenters are measure of *short-term* financial strength. Whether BNSF or any other railroad has attained a level of earnings sufficient to meet demand and replace its system in the long run depends on a *long-term* measure of revenue adequacy. BNSF will be required to make many billions of dollars in capital investment in the future to have the capacity to meet shipper demand. Lanigan VS at 6, 13. Whether that investment will make economic sense for BNSF depends on whether, over the long term, the potential return outweighs the risks—including the risk from changes in regulatory policy. *Id.* at 13-14.

None of the shipper commenters attempts an economic demonstration that the various financial ratios they propose are suitable measures of long-term revenue adequacy in the rail industry. The STB need only refer to the ICC's own extensive deliberations on the subject to refute the idea that the kinds of financial ratios proposed by these commenters are good indicators of revenue adequacy. Prior to passage of the Staggers Act, the ICC experimented with a variety of different indicators of financial health—including return on shareholders' equity, fixed charge coverage ratios, proportion of debt in the capital structure, ratio of market value of common stock to book value, "funds flow" analyses, operating ratios, and throw-off-to-debt ratios. *See, e.g., Standards and Procedures for the Establishment of Adequate Railroad Revenue*

Levels (Ex Parte No. 338), 358 I.C.C. 844 (1978); *Adequacy of Railroad Revenue—1978 Determination (Ex Parte No. 352),* 362 I.C.C. 199 (1979). The ICC found, among other things, that even the Pittsburgh and Lake Erie Railroad, which subsequently filed for bankruptcy, could be deemed revenue adequate because it had a low operating ratio, a low debt ratio, and a sizable investment program. 362 I.C.C. at 327-28.

After the Staggers Act was passed, the ICC revisited its standards for revenue adequacy and determined that the financial ratios and "funds flow" approaches it had briefly sanctioned "were and are appropriate as indicators only of the short-term viability of railroads." *Standards for Railroad Revenue Adequacy (Ex Parte No. 393)*, 364 I.C.C. 803, 808 (1981). The ICC explained further:

> If we adopted the Ex Parte No. 353 minimum or short-term standard for use here, we would likely in the next few years find ourselves denying a railroad the pricing flexibility necessary to obtain long-term revenue adequacy simply because that railroad was making some progress toward achieving that goal. In short, we would be assigning the railroads the Sisyphean task of working toward revenue adequacy, and every time it came close robbing it of the very means it had used to get there. We do not believe this is desirable nor do we believe it was intended by Congress. [*Id.*]

Accordingly, the STB adopted a rate of return on investment equal to the current cost of capital as the standard of revenue adequacy. As the ICC observed, "[s]uch a standard is widely agreed to be the minimum necessary to attract and maintain capital in the railroad, or any other, industry." *Id.* at 809. Furthermore, it is the only standard that meets the statutory definition of revenue adequacy at 49 U.S.C. § 10704(a)(2):

> The Board shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under this part that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, *plus a reasonable and economic*

> *profit or return (or both) on capital employed in the business.*
> [Emphasis added]

As noted earlier, the railroad industry was in poor financial condition when the Staggers Act was passed, and it has taken three decades for the industry to progress financially to the point where there is a realistic prospect of achieving revenue adequacy. The industry demonstrably has not reached that goal, even when measured by a single year, much less the Board's long-term standards. *See Railroad Revenue Adequacy—2009 Determination,* STB Docket No. EP 552 (Sub-No. 14) (served Nov. 10, 2010).

Finally, one shipper commenter, NRG Energy, Inc., claims that the STB should not only revise its methodology for calculating revenue adequacy but also change its use of generally accepted accounting principles ("GAAP") to value a railroad's assets after a merger or acquisition. NRG claims that where the purchase price of the assets exceeds their book value, including the "acquisition premium" in the railroad's rate base "distorts the true financial health of the railroad," and points to Berkshire's acquisition of BNSF as an example. NRG Comments at 2. Not only is this "acquisition premium" claim well outside the scope of this proceeding about competitive access, but it has been thoroughly litigated and repeatedly rejected by this agency and the courts.[4] NRG complains that the use of acquisition cost could "skew" the STB's revenue adequacy and variable cost calculations, but the STB has specifically addressed both issues and concluded the opposite. *See, e.g., Conrail,* 3 S.T.B. at 262-65. The STB stressed there that acquisition cost "represents by far the best evidence of the current market value of

[4] *See Major Railroad Consolidation Procedures,* STB Ex Parte No. 582 (Sub-No. 1), slip op. at 28, 2001 WL 648944, *18 (served June 11, 2001); *CSX Corp.—Control—Conrail, Inc.,* 3 S.T.B. 196, 262-65 (1998) ("*Conrail*"), *aff'd sub nom. Assoc. of Amer. RR's v. ICC,* 978 F.2d 737, 741-43 (D.C. Cir. 1992); *Railroad Revenue Adequacy—1988 Determination,* 6 I.C.C.2d 933, 935-42 (1990), *aff'd sub nom. Erie-Niagara Rail Steering Comm. v. STB,* 247 F.3d 437, 442-43 (2d Cir. 2001).

[railroad] properties." *Id.* at 265. Virtually every Class I railroad merger or acquisition that has taken place in the past two decades has involved an "acquisition premium," and in every instance the acquisition cost has been booked by the ICC and the STB using GAAP accounting. NRG has offered no reason why Berkshire's acquisition of BNSF should be an exception.

CONCLUSION

The Board should not permit this proceeding about access issues to be used to mount a collateral attack on the economic model underpinning our freight railroad industry. As discussed in BNSF's initial comments, there is ample regulation in place to protect shippers against unreasonable rates, poor service, or other abuses. None of the commenters proposing alternative access standards has demonstrated why legitimate shipper concerns cannot be met under the Board's existing regulatory rate or service frameworks. The kind of intrusive access regulation being promoted by a subset of shippers may give them short-term benefits, but it is not only the railroads that will suffer. The shipping community as a whole will also pay for the diminution in investment and operational inefficiency that would result. It has taken BNSF and its predecessors over three decades since the passage of the Staggers Act to optimize the combined railroad network, and altering the Board's access policies to move back toward an open routing regime would significantly jeopardize the efficiency of the network's operations. The deregulatory approach taken by Congress in the Staggers Act and ICCTA, and implemented by

the ICC and the STB, has been a demonstrable success and the Board should refrain from instituting radical new access regulation that jeopardizes these hard-won successes.

Respectfully submitted,

Roger P. Nober
Richard E. Weicher
Jill K. Mulligan
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131

Robert M. Jenkins III
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006

Counsel for BNSF Railway Company

Dated: May 27, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

VERIFIED STATEMENT OF
JOHN P. LANIGAN

My name is John P. Lanigan. I am Executive Vice President and Chief Marketing Officer for BNSF Railway Company. I have been in this position since 2003 and have responsibility for BNSF's sales, marketing, customer service, and economic development. I lead the activities of the four business groups within our Marketing Department: Agricultural Products, Coal, Consumer Products, and Industrial Products. Prior to joining BNSF, I spent over sixteen years with Schneider National, Inc., one of the largest truckload motor carriers in the United States.

I understand that the STB in this proceeding has sought comments regarding the possibility of altering its longstanding "access" doctrines. In addition to commenting on the existing access doctrines, several shipper interests have submitted comments in this proceeding claiming that new regulation is justified because, they assert, the intensity of competition among railroads, in particular western railroads, has diminished in recent years, largely as a result of Class I railroad mergers in the 1990s, including the merger of Burlington Northern Railroad ("BN") and The Atchison, Topeka and Santa Fe Railway ("ATSF") in 1995. I am submitting this statement to respond to those filings.

As I explain below, BNSF competes for traffic in every commodity group. We compete hard for business at BNSF, as we did at Schneider. At Schneider, we competed not only with other trucking companies, but with railroads as well. At BNSF, we compete with other railroads, trucking companies, and barge companies on a daily basis. Our goal is to provide our customers with competitive, high-value service that will cause them to choose BNSF over our rail competitors or other modes of freight transportation. Our corporate vision is to realize the tremendous potential of BNSF by providing transportation services that consistently meet our customers' expectations, and that vision extends to every customer, every day, in every customer circumstance.

The BN/ATSF merger contributed substantially to BNSF's competitive capacity and significantly improved BNSF's ability to compete in the marketplace for transportation services. Shippers have benefitted from the enhanced service BNSF has been able to provide, as well as the enormous investment BNSF has made improving our system. BNSF's continued ability and readiness to reinvest in our system and further expand our service offerings depends on the continued opportunity to earn a reasonable return.

In their filings, some shippers or shipper trade associations assert that the BN/ATSF merger led to a reduction in competition. Distilling all of the arguments to their core, these commenters point to recent rate increases for rail service as evidence. I strongly disagree with these assertions. Rate increases over the past eight years are not evidence of a reduction in competition among railroads flowing from the rail mergers of the 1990s. Coming out of the manufacturing-led recession of the early 2000s, consumer demand and housing starts soared to all-time record levels. This demand led to rapid growth in rail loadings, culminating in record rail demand in 2006. I know from extensive experience in the transportation industry that prices

often increase even where there is vigorous competition, particularly when demand exceeds capacity and costs increase. BNSF's rate increases in recent years resulted directly from cost increases and increases in demand for service on increasingly constrained rail capacity coupled with rising costs, not from the BN/ATSF merger or any subsequent reduction in the intensity with which BNSF competes for business.

There can be no dispute that BNSF's costs have increased, particularly for our two largest expense categories, fuel and wages. For example, in 1996, the total cost of diesel fuel for BNSF was $727 million. In 2010, our cost of fuel had increased to $3,016 million. We have also seen increases in our personnel costs over that time. Similarly, there can be no dispute that volumes have increased on BNSF. In 1996 the railroad hauled 6,992 thousand units of freight; by 2006 that number had increased to 10,637 thousand, and even after the recent recession the number of units hauled in 2010 stood at 9,157 thousand units. Finally, since 1996 BNSF made $39 billion in capital investments in our network. All of these are costs and expenses that must be reflected in our rates.

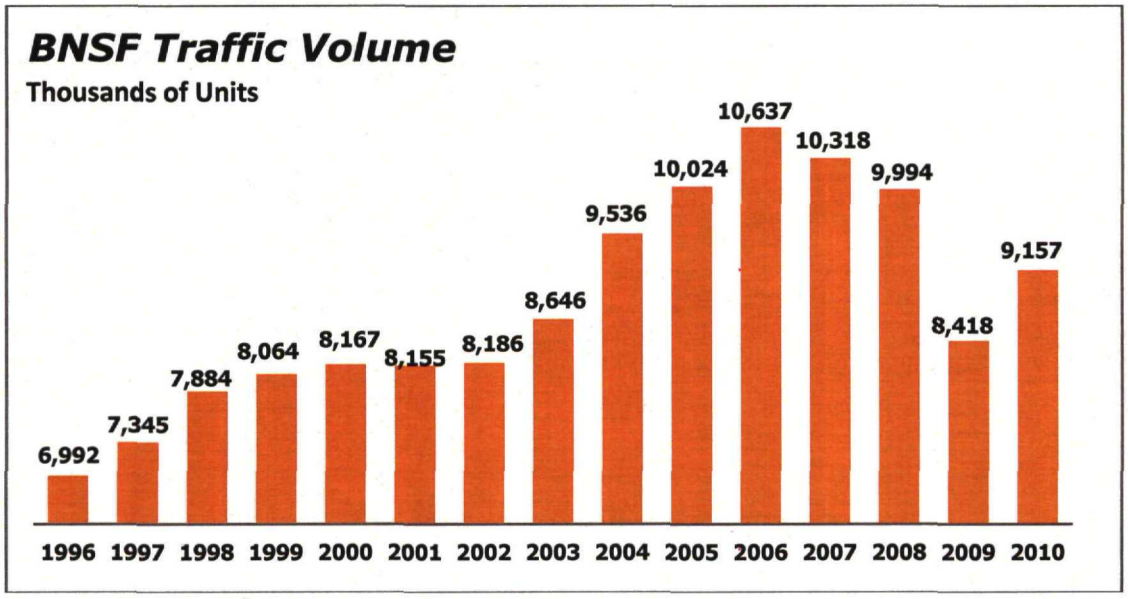
I interact every day with our customers, and they are frank and open about their expectations of the railroad in terms of service and rate levels, and I believe that the negative filings before the STB in this proceeding represent a vocal but small minority of the almost ten thousand companies with which we do business. Rail rates are determined by market forces as the Staggers Act envisioned. The critical shippers appear to be complaining about the level of their rates. But the STB's existing rate reasonableness regime already provides shippers with several options for seeking appropriate rate relief. BNSF also has mechanisms outside the STB's procedures, like the Montana Alternative Dispute Resolution program for rate level challenges by Montana grain shippers as a supplement to the rate reasonableness challenge rights shippers

enjoy before the Board. The STB should refrain from imposing unnecessary new regulations that micro-manage railroads' operations, artificially depress rates, and jeopardize BNSF's ability to invest in our network to meet current and future transportation demand.

1. The Competitive Benefits of the BN/ATSF Merger.

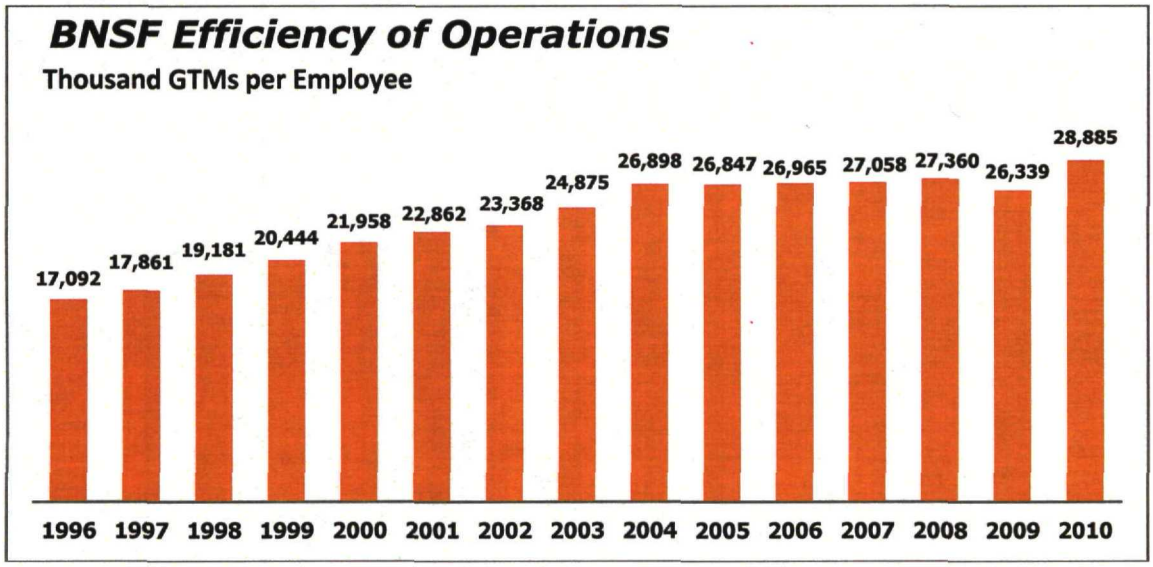
I was not at BNSF at the time of the BN/ATSF merger, but I can personally attest to the competitive benefits that resulted from the marketing reach, diversity of traffic, and operating efficiencies produced by the merger. The BN/ATSF merger integrated two rail networks with little overlap. It created an expanded rail system that could provide new single-line service from points on BN's system to points on ATSF's system. It significantly diversified the traffic bases of the two railroads, balancing BN's strength in coal and grain with ATSF's strength in intermodal traffic. Among other things, it enabled the two railroads to internally reroute traffic to achieve greater traffic densities, to integrate the productive facilities of the railroads, to combine car and locomotive fleets for greater efficiency, to reduce overhead costs, and to target capital expenditures to projects yielding the greatest benefits to the combined system and our customers.

The result was exactly as the two railroads predicted. The merger created a stronger railroad with the size and scale to compete more effectively for domestic and international business, including our intermodal business, and to move significant volumes of traffic off the highways and on to rail. Over time, the new BNSF system significantly expanded both the volume of rail services it provided and the efficiency of those services. Between 1996 and 2006, BNSF's total volume of traffic increased over 50%. The recession beginning in 2007 took a heavy toll on BNSF's business, but in 2010 our volume was still over 30% higher than in 1996.



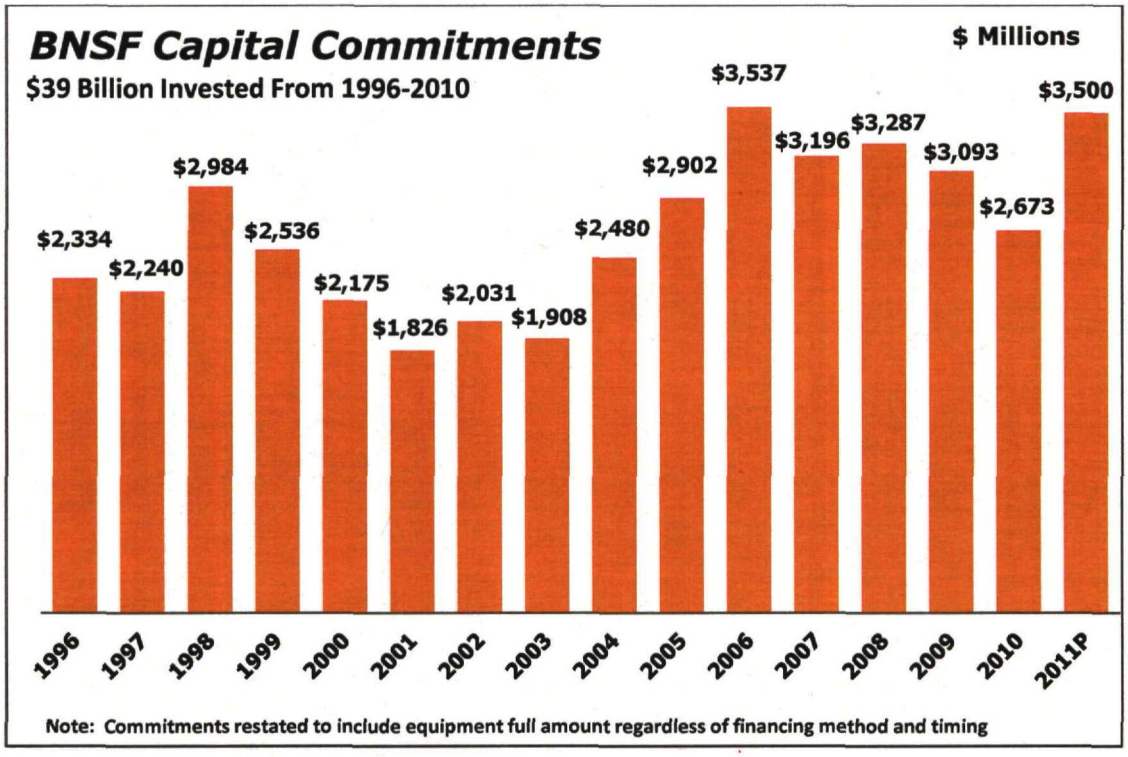
BNSF's traffic increased in every major product group between 1996 and 2006. We grew our consumer products traffic by 76%, our agricultural products traffic by 66%, our coal traffic by 33%, and our industrial products traffic by 19%. Even with the effects of the recession, in 2010 our volume in every commodity group except industrial products was substantially higher than in 1996.

The efficiency of BNSF's operations also improved dramatically.

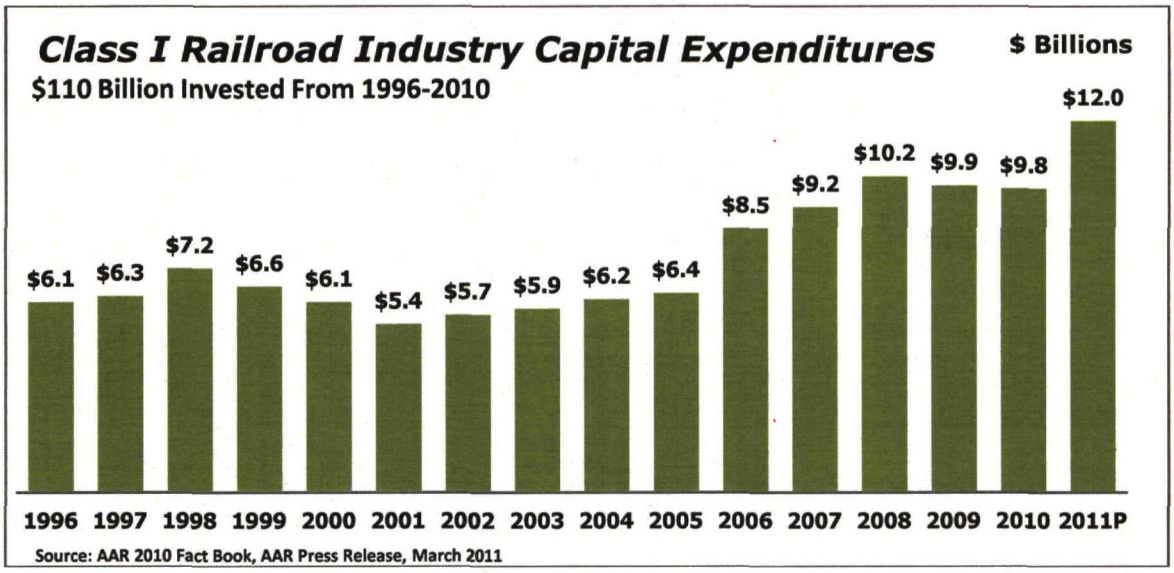


Not only was our employee productivity higher, but our locomotive utilization was much better and we carried more tonnage per gallon of fuel.

All of these improvements required billions of dollars in capital investment. Between 1996 and 2010, BNSF poured over $39 billion into the network to both maintain and expand our plant, equipment and technology. We estimate that in 2011 we will spend another $3.5 billion to sustain and enhance our capacity.



BNSF was not alone. The other railroads also invested billions of dollars into improving their rail systems and aggressively competed for business.



These benefits would be at risk if the STB were to adopt new regulation that would artificially reduce rates for a minority of shippers while substantially increasing the operational complexities and costs of providing service to *all* shippers. Many of the proposals advanced by commenting shippers in their opening submissions seem to be aimed at returning the railroads to a Pre-Staggers Act open interchange regime. Such an approach would significantly disrupt the substantial progress we have made over the last two decades by interfering with the cost efficiency of our current network, compromising network velocity, and making it harder for BNSF to meaningfully compete for business.

2. The Claims of "Parallel Pricing" and Excess Profits

Despite the fact that the BN/ATSF merger delivered exactly what was predicted, some of the shipper interests in this proceeding claim that the Class I mergers of the 1990s, including the BN/ATSF merger, have somehow led to a reduction in competition among railroads. As evidence, they point to alleged "parallel pricing" by BNSF and other Class I railroads, to so called "conscious parallelism" between BNSF and the other large Western railroad, Union Pacific ("UP"), and to excess profits by the four largest railroads. As remedies, they suggest that

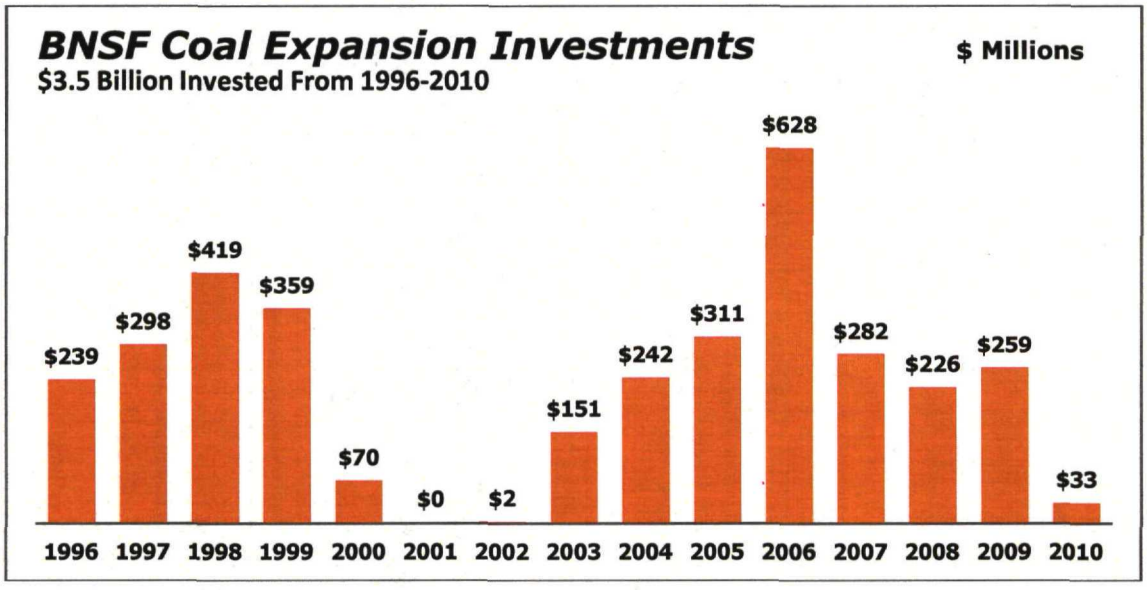
the mergers of the 1990s should be reopened to impose new access conditions, or that the STB should otherwise impose new access or rate reasonableness regulations. The justifications used by these commenting shippers for more regulation are wrong on several levels.

In the first place, they rest on mistaken assumptions about the markets for rail transportation. When two railroads combine end-to-end, that does not diminish the number of railroads serving the origin or the number of railroads serving the destination. And, of course, it does not diminish the competition from other transportation modes, like trucks and barges. The claim of some shippers that competition was reduced as a result of certain end-to-end mergers ignores the vast diversity of market conditions and competitive options in different transportation markets. Those shippers also ignore the benefits produced by those mergers that have allowed railroads to compete more effectively for business. As I discussed above, railroads combining end-to-end, like BN and ATSF, do have the opportunity to create more efficient networks, and compete more effectively for long-haul service. And that is exactly what transpired as a result of the BN/ATSF merger. BNSF was able to improve its service and grow the combined railroads' business in every major traffic category.

Some of the coal shipper interests make much of the so-called "duopoly" that BNSF and UP have for coal service to and from the Powder River Basin ("PRB"), but the suggestion that the rail mergers of the 1990s created a PRB "duopoly" or in any way diminished competition could not be more wrong. The PRB has never been served by more than two railroads—first, BN and the Chicago and North Western Transportation Company ("CNW"), and then BNSF and UP (as a result of the BN/ATSF merger and the UP/CNW merger). There is no question that UP's acquisition of the financially troubled CNW actually enhanced competition in the PRB. BNSF and UP were able to offer more single-line service to and from the PRB and they had

greater financial resources to invest in coal service. The resulting service improvements have made PRB coal more competitive in eastern U.S. markets and in export markets, which can be served by both BNSF and UP.

Indeed, since the mergers, BNSF has invested enormous amounts into the Joint Line that serves the PRB, as well as other facilities and equipment dedicated to coal service. In 1985, the Joint Line handled 19 million tons of coal. Volume grew steadily and by 2005 the Joint Line capacity had grown to handle a record 325 million tons. BNSF and UP agreed to add a third and fourth mainline, which enabled the Joint Line to handle in excess of 400 million tons. Of course, BNSF's investment in coal service covered more than the Joint Line. As the chart below shows, BNSF invested over $3.5 billion between 1996 and 2010 to expand its capacity to handle increased coal traffic. This does not include the substantial on-going investment required to maintain and replace our existing coal infrastructure.

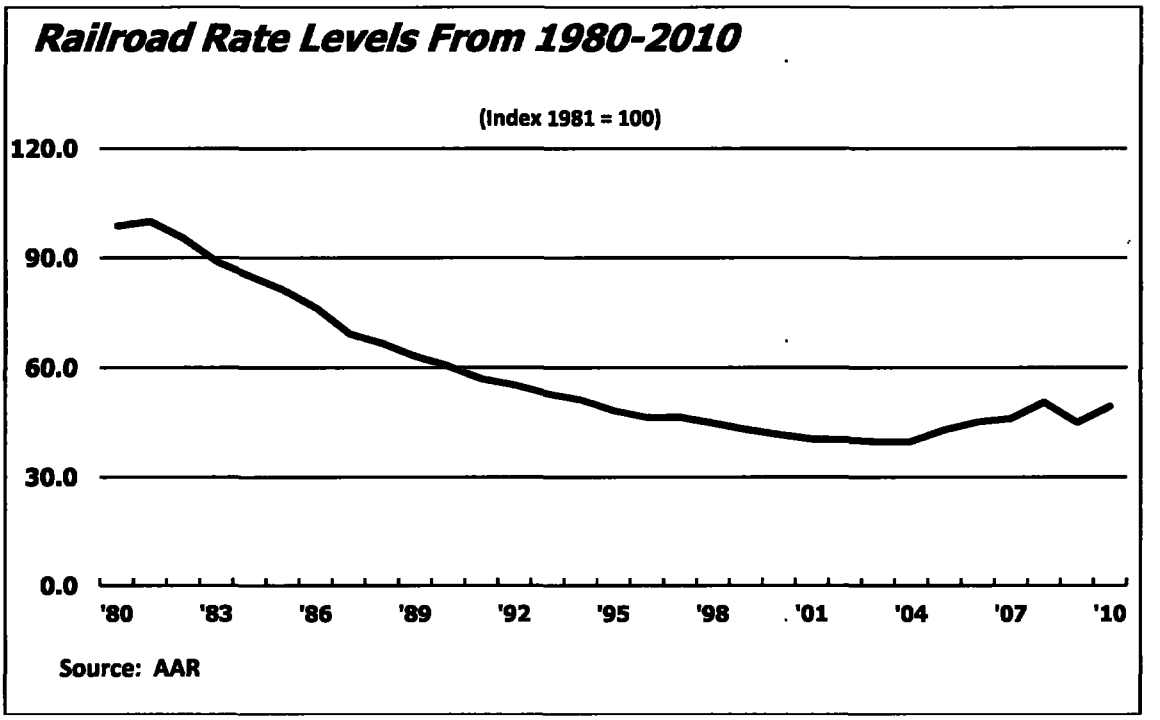


BNSF's investment in its competitive capacity has by no means been limited to coal. BNSF has also made substantial capital investments in infrastructure across our network that

benefits many other types of traffic. Growth in one area contributes to growth in another by expanding the base of traffic that shares the common costs of the network.

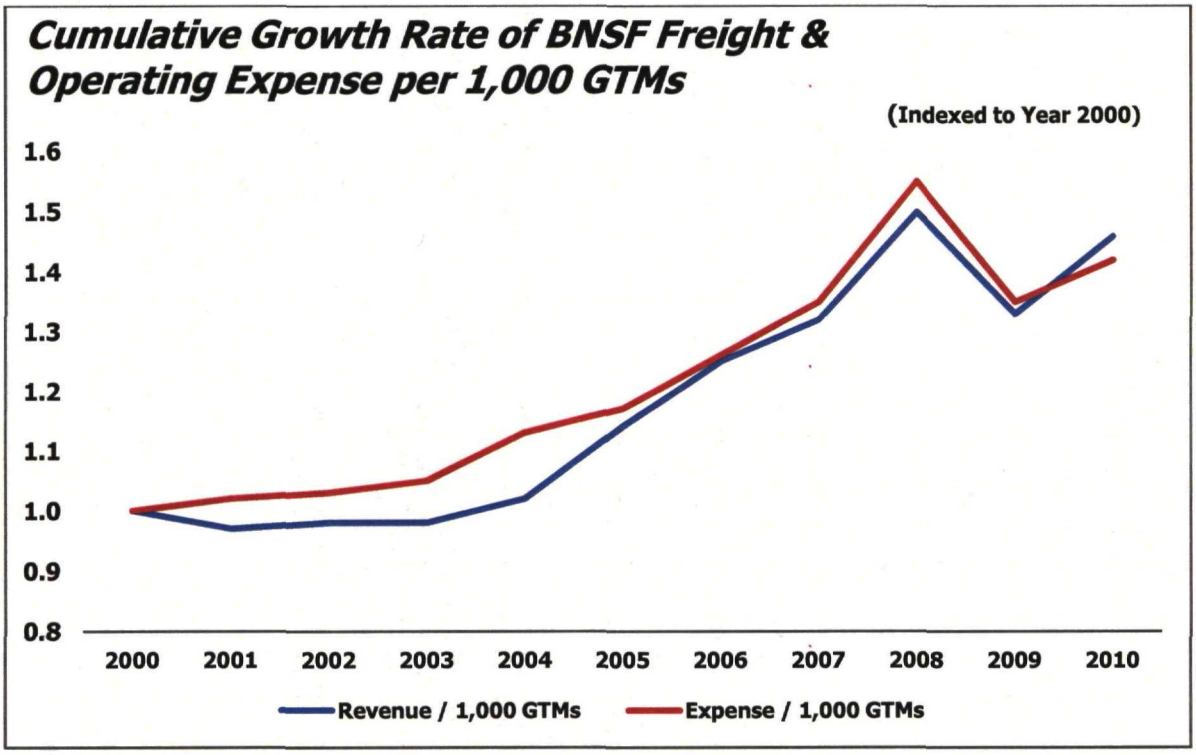
In short, shippers cannot make any serious claim that competition was reduced by the structural changes in the rail network that resulted from the combination of BN and ATSF. Those changes have been uniformly positive. Some shipper interests, however, argue that pricing competition must have been reduced, because, after over two decades of steady decline, BNSF's and other railroads' prices began to rise around 2004.

One major problem with this argument as it applies to western railroads is that the BN/ATSF and the UP/SP mergers took place in the mid-1990s, but the increases in prices did not take place until many years later. As the chart below demonstrates, rail prices in fact continued to trend downward in real terms after the mergers.



The rate increases in the mid-2000s were attributable to market forces. An enormous increase in demand from the shipping public for rail service coincided with a substantial increase

in costs, at the same time that the productivity gains that had characterized the industry since the passage of the Staggers Act began to slow. BNSF, like other railroads, was stretched to meet that demand and cover its costs, and we set prices accordingly. For many years, the increase in our revenues did not keep pace with the increase in our costs.



My experience in the trucking industry involved similar dynamics—when costs and demand went up, particularly in a capacity constrained environment, rates increased; when demand no longer exceeded capacity and costs fell, so did rates. Anyone familiar with transportation markets knows that prices can rise even where there is competition among the providers of service. When costs increase and demand increases, rates will inevitably rise. These were the factors that led to rate increases in recent years, not any reduction in competition.

In addition, BNSF saw in this period the expiration of a large number of long-term contracts that contained below-market rates. While some shippers faced significantly higher rates than they had enjoyed under their old contracts, those higher rates were in line with market

based rates that BNSF negotiated with similarly situated shippers. BNSF also poured even more investment into plant, equipment and technology in an effort to provide the best service it could to as many shippers as possible. BNSF's price increases were a direct response to demand, capacity and cost conditions in the mid-2000s, not to any structural after effects of the rail mergers in the mid-1990s or any diminution of competition.

A couple of coal interests assert that BNSF's and UP's prices increased for PRB coal movements because in 2003 and 2004 BNSF and UP introduced published coal tariffs. As the STB well knows, published tariffs are common in the rail industry, and many of our shippers prefer them. Agricultural products, for example, move almost entirely under tariff rates. Moreover, increased BNSF rates for PRB coal transportation were entirely consistent with the increases in rates across all commodity groups, and, as described above, were driven by increased demand and constrained capacity. In any event, UP's coal tariff rates were never made public and BNSF's were public only for a limited period of time. Additionally, the coal shipper interests acknowledge that the vast majority of PRB coal continues to move under private, confidential contracts as it has since the inception of vigorous rail competition for PRB movements in the early 1980s.

Some shipper commenters, including some coal shipper interests, assert that they cannot always get the type of bids that they want for their business. Obviously, neither BNSF nor any other freight transportation company in any mode can meet every shipper's desired price or service. Demand and costs differ greatly among different types of traffic and among different shippers. But any suggestion that we do not compete for business everywhere we can is simply wrong. Other railroads, trucks, and barges also compete with us, and we cannot always retain the business we have. With respect to UP, every year since I have been at BNSF we have

competed with UP for new and existing business. We win some and we lose some. In some instances, our business losses are quite public, such as when intermodal industry leader Hub Group shifted the majority of its business away from BNSF, representing a major loss in revenue and volume to UP. Many other examples of business losses and gains are less public, though they are equally impactful. The assertions of some coal shippers that BNSF does not compete for their business and that after 2004 no coal business has shifted between BNSF and UP are categorically false.

Finally, some shippers assert that Class I railroads, including BNSF, should be subjected to more regulation because we are awash in excess revenues. Several point to a statement made by Berkshire Hathaway's Chairman, Warren Buffett, that Berkshire Hathaway's acquisition of BNSF has been profitable. But asserting that this means that BNSF has reached revenue adequacy confuses the short-term profitability of Berkshire Hathaway's investment with the long-term ability of BNSF to sustain and replace its system. There is no doubt that BNSF's financial condition has improved significantly, as has the financial condition of the other Class I railroads in the United States since the passage of the Staggers Act. But there is equally no doubt that BNSF has not yet achieved the sustained level of earnings necessary to cover its long-term costs.

Railroad assets are very long-lived. BNSF, like every other railroad, must make decisions about whether to invest in new assets or replace old assets on the basis of its expectations about whether it will have a reasonable opportunity to cover the costs of that investment in the long run. BNSF is committed to maintaining and expanding our network to enable us to better serve our existing customers and to compete for new customers, but we must be able earn a return over the long term that justifies those investments. For decades, our

customers implored us to invest to improve capacity and efficiency. It takes a profitable return to make these record investments that benefit our customers. The United States needs a strong and growing freight rail industry to compete in an increasingly global economy. Our national freight rail network, of which BNSF is the largest in terms of units and revenues, is a critical competitive advantage for our economy. Now that BNSF and other railroads, after 30 years, have finally begun to approach the level of earnings that might sustain and grow their operations in the long run, the STB should not lightly entertain proposals in this proceeding to impose new merger conditions or other regulations that jeopardize the ability and incentive of railroads to make future investments in the rail freight system.

VERIFICATION

I, John P. Lanigan, Jr., declare under penalty of perjury that the foregoing statement is true and correct and that I am qualified and authorized to file this statement.



Executed: May 26, 2011

John P. Lanigan, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 3

CN/WC, FINANCE DOCKET NO. 34000, APPLICATION, VERIFIED STATEMENT OF PAUL TELLIER (FILED APR. 9, 2001)

REDACTED PUBLIC RECORD VERSION 201931

ENTERED
Office of the Secretary
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Public Record

HARKINS CUNNINGHAM
ATTORNEYS AT LAW
SUITE 600
801 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2615
202 973-7600
FACSIMILE 202 973-7610

RECEIVED
APR 9 2001
MAIL
MANAGEMENT
STB

2800 ONE COMMERCE SQUARE
2005 MARKET STREET
PHILADELPHIA, PA 19103-7042
215 851-6700
FACSIMILE 215 851-6710

10 ROCKEFELLER PLAZA
SUITE 1250
NEW YORK, NY 10020-1903
212 218-1990
FACSIMILE 212 218-1999

WRITER'S DIRECT DIAL
(202) 973-7600

April 9, 2001

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SURFACE TRANSPORTATION BOARD
APR 09 2001
SURFACE TRANSPORTATION BOARD

BY HAND

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.
RAILROAD CONTROL APPLICATION (CN/WC-2)
(STB Finance Docket No. 34000)

Dear Mr. Williams:

Enclosed for filing in the above-captioned docket please find an original and 25 copies of volumes 1 and 2 of the above-captioned railroad control application, which is designated as "CN/WC-2." We are including with the application a filing fee in the amount of $5,500.00, pursuant to 49 C.F.R. § 1002.2(f)(38)(iii). Also enclosed are three diskettes, each containing sections of the text of this document in WordPerfect 6/7/8/9 format.

Very truly yours,

Paul A. Cunningham

Enclosures

REDACTED PUBLIC RECORD VERSION 201981



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34000

CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND WC MERGER SUB, INC.
–CONTROL–
WISCONSIN CENTRAL TRANSPORTATION CORPORATION, WISCONSIN CENTRAL LTD., FOX VALLEY & WESTERN LTD., SAULT STE. MARIE BRIDGE COMPANY, AND WISCONSIN CHICAGO LINK

RAILROAD CONTROL APPLICATION

VOLUME 1 OF 2

SUPPORTING INFORMATION, SUMMARY OF BENEFITS, STATEMENTS OF APPLICANTS' PRINCIPAL OFFICERS, OTHER SUPPORTING STATEMENTS, RELATED APPLICATION, DENSITY CHARTS, OPERATING PLAN - MERGER AND SERVICE ASSURANCE PLAN

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William C. Sippel
FLETCHER & SIPPEL LLC
Two Prudential Plaza
180 North Stetson Avenue
Chicago, IL 60601-6721
(312) 540-9451

Janet H. Gilbert
Vice President & General Counsel
WISCONSIN CENTRAL SYSTEM
6250 North River Road, Suite 9000
Rosemont, IL 60018

Counsel for Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.

Paul A. Cunningham
HARKINS CUNNINGHAM
801 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2664
(202) 973-7600

Sean Finn
CANADIAN NATIONAL RAILWAY COMPANY
P.O. Box 8100
Montreal, PQ H3B 2M9
(514) 399-5430

Myles L. Tobin
CANADIAN NATIONAL RAILWAY COMPANY
455 North Cityfront Plaza Drive
Chicago, IL 60611-5318
(312) 755-7621

Counsel for Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, and North American Railways, Inc.

April 9, 2001

ENTERED
Office of the Secretary
APR 09 2001
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Public Record

VERIFIED STATEMENT
OF
PAUL M. TELLIER

I am Paul M. Tellier, President and Chief Executive Officer and a director of Canadian National Railway Company. My professional background is outlined in Attachment A to this statement.

SUMMARY OF STATEMENT

Combining CN and the Wisconsin Central Transportation Corporation will be good for shippers, employees and shareholders. This end-to-end Transaction will contribute to the public interest in meeting the growing transportation needs of the NAFTA marketplace and will deliver significant public benefits. It will be particularly beneficial to WC shippers.

Our Transaction will have no anticompetitive effects:

- There are no 2-1 or 3-2 shippers.
- There will be no reduction in geographic competition.
- There will be no increase in the market power of CN or WC.
- We will keep active gateways affected by the Transaction open on commercially reasonable terms.

By increasing efficiency and building upon WC's tradition as a service-oriented carrier, the CN/WC merger will be entirely procompetitive:

- WC shippers will benefit from the large system resources and market reach that the CN/WC merger will bring.
- Customers of both CN and WC will benefit from shortened car transit times, increased reliability and other service improvements and operating efficiencies fostered by the merger.

And, the Transaction will offer employees their best long-term opportunity on the WC:

- Merger implementation will be carried out safely and incrementally, like the CN/IC merger, and will entail only minor workforce reductions.

- CN will remain financially strong after the WC acquisition, able to maintain the integrated CN/WC system in top condition and highly competitive in the marketplace.

We are confident that implementation of the CN/WC merger will proceed smoothly and will result in meaningful service improvements. We plan to operate WC as the sixth division of the CN system in order to preserve WC's local characteristics and the value of its employee's experience as much as possible while securing the benefits of system integration. Among other things, this will assure that customers on WC's relatively low-density lines will continue to receive the quality of service they have come to expect from WC. We have provided a Service Assurance Plan that we are confident will assure customers that service levels for each of them will be as good as or better than current levels.

What we need to do now is get on with the process of building a strong CN/WC that will promote competition in the rail industry. Because the Transaction will cause no harm to competition but will instead bring enhanced competition and other public benefits, I respectfully urge this Board to review the CN/WC Transaction under the Board's procedures for minor transactions. And, for these same reasons, I urge you to approve it without delay.

A NEW BEGINNING FOR WC

WC has made impressive progress in improving service on its lines. However, it is now at the stage, according to its own board of directors and management, where it cannot

go further on its own. Opportunities to improve WC's competitive position are not economically feasible absent the scale and scope of a much larger system. The recognition that these circumstances do not bode well for WC's shareholders, customers and employees led to WC's decision to seek to merge with CN.

CN is ready, willing and able to complete this Transaction successfully. WC is already an efficient regional carrier. We believe that we can make WC even better for both its customers and its employees. CN has shown in the recent past that it can increase efficiency and offer new and improved services through an effective merger with another railroad. The CN/IC Transaction was implemented with real gains in efficiency and, we are proud to say, without any significant service quality problems. Since 1998, we have reduced our system operating ratio from 75.1% to 69.6%. The process of becoming more efficient has continued throughout the implementation of the CN/IC transaction. Our operating ratio was 73.4% in the first half of 1999, 72% in all of 1999, and 69.6% in 2000.

SECURING CN's NAFTA ROUTE

North-South Trade Flows

Our acquisition of IC and our Alliance with KCS reflect our emphasis on serving the rapidly growing market for cross-border NAFTA traffic. WC already plays an important role in our ability to serve these transportation needs. Primarily through the CN/WC haulage agreements, approximately 20% of WC's freight revenue derives from CN, while 25% of CN's cross-border traffic moves over WC's Superior-to-Chicago line.

By acquiring WC, we now seek to secure and to increase to the maximum extent possible the efficiency of our important NAFTA route connecting western Canada and the

central U.S. In fact, securing the WC portion of this route is CN's principal motivation for this Transaction. WC was put up for sale by its board of directors. We responded quickly, as we saw ourselves as the logical and most capable owner of this important link in our system.

The CN/IC merger in 1999 enhanced the potential for CN traffic to move in either direction over WC between Superior and Chicago and underscored the importance of the WC connection to CN. However, the efficacy of the WC haulage arrangements faced a threat when WC decided late last year to pursue a sale of its U.S. operations to a major railroad. This created a risk that CN's crucial Superior-Chicago connection via WC could come under control of another Class I railroad competitor, which might result in less cooperative service and ultimately non-renewal of the haulage agreements, which, in contrast to trackage rights, are not subject to continuation by the Board. The CN/WC Transaction would secure permanently CN's control of the vital WC connection between Superior and Chicago.

The North American economy is integrating and shippers are demanding better integrated rail service. NAFTA customers are causing trade flows between Canada and the U.S. to grow at a rate of approximately 10% per year. Trade flows between Canada and Mexico, and between the U.S. and Mexico, are each growing at a rate of about 15% per year. With its enhanced single-line service, the CN/WC merger will help us meet the expanding cross-border transportation needs of customers across the merged system. Several important examples of the greater operating efficiencies that will result from the merged system are outlined in our Operating Plan.

Shipper Benefits

Expanded single-line service and other large network advantages, including the availability of a larger supply of well-maintained locomotives and rail cars, will benefit WC customers. New market opportunities, both inbound and outbound, will be opened to them through their post-merger access to the full scale, scope, and operating efficiencies of CN's rail network. CN's customers will benefit, too, from more efficient access to origins and destinations on WC's lines.

We believe, for example, that shippers of metals and minerals, forest products, chemicals, and agricultural products will be special beneficiaries of the expanded single-line network and improved equipment supply that will be made available to them by the CN/WC merger. As a result, we expect to gain new business in the transportation of these commodities following the CN/WC merger.

Additional Benefits

Together, our two systems will yield as a result of the Transaction important cost-saving benefits that do not depend on large labor force reductions, or on a wholesale restructuring of rail facilities. These benefits are estimated at approximately $55 million in recurring annual operating savings, which we expect to be attained incrementally over an estimated three-year implementation period. We will achieve these savings mainly through increasing asset productivity, consolidating general and administrative functions, and joint procurement of equipment, supplies and other needs. Cost savings, as well as service improvements, will also result from the use of CN's state-of-the-art information technology system to manage WC's rail network.

These cost efficiencies will strengthen our financial ability to improve the quality of CN/WC service. Service improvements represent increased value to customers and to the economy as a whole, which has long been recognized in principle as an important public benefit.

In addition to improving customer service, safety will continue to be a top priority throughout and after the implementation process. Our Safety Integration Plan will detail the steps we will take to ensure that the implementation of this Transaction will emphasize maintaining and improving safety throughout our merged system.

Labor impacts from the consolidation will be relatively small. Some workforce reductions will be handled through normal attrition. Others will be mitigated by our strong commitment to retraining and relocation. WC employees will benefit, too, from being part of a larger, stronger, better-positioned system in an industry where customers' transportation needs are rapidly evolving.

Implementing the CN/WC Transaction will be comparatively straight-forward. Only one facility will be consolidated: we will combine yard operations in Superior at CN's Pokegama Yard. Merger implementation will be facilitated by the absence of any need to deal with network overlap or line abandonments. More important, we will not be undertaking any significant rerouting of traffic. Operating changes, on balance, will be minor. In fact, the overall level of changes will be insignificant when compared with those occasioned by other major railroads' recent efforts to integrate or divide substantially overlapping rail operations.

Finally, the integrated CN/WC system will be financially strong. While we will in the first instance borrow under CN's revolving credit facility the $800 million in cash needed to complete the merger, we expect post-merger to reduce CN's overall debt substantially within a relatively short period using retained earnings and the proceeds from the eventual disposition of WC's overseas holdings. Even with the added debt from the WC acquisition, our balance sheet will remain strong. Our financial capacity to pursue opportunities to improve our rail system will be, if anything, enhanced by the CN/WC Transaction.

Improving Service

We have every expectation that merger implementation will proceed smoothly, deliberately and, above all, safely. Even the hint of a service or safety problem will receive the prompt attention of the merged system's top managers. The principles, policies and procedures set forth in our Service Assurance Plan, and in our Safety Integration Plan -- both of which we will continue to develop during the period before approval and implementation -- are intended to guide and focus our efforts to eliminate problems before they happen.

We are not, of course, blind to the fact that problems can arise, despite our best intentions and our most careful precautions. If a problem does occur suddenly, it will be met with on-the-ground management flexibility, with top-level backing, and with whatever resources are necessary to effect a complete and timely resolution. Bolstering our confidence in our ability to do just that are two critical factors. First, our two rail systems are in fine shape, both structurally and operationally. Because we are going to operate WC as the sixth CN Division, we anticipate little change in its local operations. The CN/WC system will have ample line and facility capacity, well-functioning car and locomotive fleets, and a

carefully integrated information system. And, we will have the financial wherewithal to maintain and, where appropriate, to improve the operational capabilities of the merged system.

Second, CN and WC already work well together. The proposed merger will simply add the benefits of unitary control to maximize the opportunities of both systems together. Integrating our railroads' operations at their two points of connection in the U.S. – where they are already working closely to maximize the benefits of the CN/WC haulage agreements – thus should not be a major challenge. Our highly talented personnel have experience in successfully implementing the CN/IC transaction, have witnessed first hand through interline portals or otherwise the troubled implementations of other transactions, and have directed our two railroads' efforts in helping resolve the problems that arose in their wake.

We will not fail in the implementation of our Transaction. We recognize, however, that many shippers, particularly those who had bad experiences following transactions not involving CN, may worry about the potential for declining service during the period of merger implementation. Our successful implementation of the CN/IC transaction, we believe, was a favorable experience for shippers. We fully expect that the CN/WC transaction will be accomplished in the same way. Indeed, we are assuring all of our customers that their rail service will be as good as – or better than – the service they now receive from our two railroads.

FAIRNESS TO SHAREHOLDERS

In approving and recommending the proposed CN/WC merger, CN's board of directors received and relied upon, among other things, the opinion of its financial advisor,

Salomon Smith Barney Inc., to the effect that, as of January 29, 2001 (the date of CN's merger agreement with WC) the cash consideration to be paid by CN to WC shareholders upon the merger closing was fair, from a financial point of view, to CN. A copy of Salomon Smith Barney's fairness opinion is provided as Attachment B to this statement.

CONCLUSION

A natural fit for both companies, the CN/WC Transaction will infuse WC with greater financial strength and other resources necessary to ensure that WC's prior successes in safely providing high quality service to customers can continue. The Transaction will also make CN's NAFTA route secure and incrementally better without any appreciable risk of service deterioration. Shippers, especially those on CN 's and WC's lines, will benefit further from expanded single-line service and other easily implemented service improvements.

Relatively few operational changes will be made in implementing the merger, and those that are made will be managed carefully. We will phase in implementation, just as we did in integrating the CN and IC systems. We fully expect the CN/WC implementation process to be successful, but if there are problems, we will fix them promptly. While this may be a minor transaction from a regulatory perspective, it will still be a matter of importance to our shippers. We therefore will give it our full attention in order to make it another success story like CN/IC.

This Transaction will improve our customers' ability to participate in fast-growing NAFTA markets. It will introduce added efficiency that will be a procompetitive plus for the North American transportation system. There is, in our view, no competitive downside to the merger.

For WC and its customers, the Transaction will provide new opportunities and greater efficiencies through single-line access to markets served by CN's network, and through the addition of CN's resources and operational strengths.

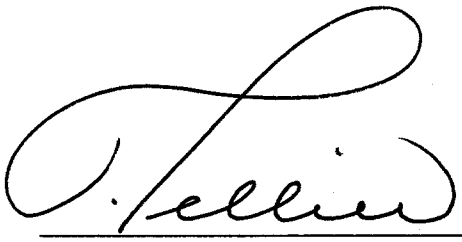
For CN, the Transaction will permanently secure a crucial element of its rail network that is now bridged by term-limited haulage agreements with WC for CN traffic over WC's high-capacity main line connecting Superior and Chicago.

This is a good transaction. I respectfully urge its prompt review and approval by the Board.

VERIFICATION

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

Executed on April 6, 2001.



Paul M. Tellier

ATTACHMENT A

Personal Background of Paul M. Tellier

I have occupied my current positions since 1992. Prior to that, I served for seven years as clerk of the Privy Council and secretary to the Cabinet of the Government of Canada. I have also served in other positions in the Government of Canada, including Deputy Minister of Indian Affairs and Northern Development (1979) and as Deputy Minister of Energy, Mines and Resources (1982). I am a graduate of the Universities of Ottawa, Canada and Oxford, England. I was admitted to the Quebec Bar in 1963 and was appointed Queen's Counsel in 1981.

SALOMON SMITH BARNEY

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CONFIDENTIAL

January 29, 2001

The Board of Directors
Canadian National Railway Company
935 de La Gauchenere Street West
Montreal, Quebec H3B 2M9
Canada

Members of the Board:

You have requested our opinion as to the fairness, from a financial point of view, to Canadian National Railway Company ("CNR") of the Merger Consideration (as defined below) to be paid by CNR pursuant to the terms and subject to the conditions set forth in the Agreement and Plan of Merger, dated as of January 29, 2001 (the "Merger Agreement"), among Wisconsin Central Transportation Corporation ("Wisconsin Central"), CNR and WC Merger Sub, Inc., an indirect wholly owned subsidiary of CNR ("Merger Sub"). As more fully described in the Merger Agreement, (i) Merger Sub will merge with and into Wisconsin Central (the "Merger") and (ii) each outstanding share of the common stock, par value $0.01 per share, of Wisconsin Central ("Wisconsin Central Common Stock") will be converted into the right to receive $17.15 in cash, without interest (the "Merger Consideration").

In arriving at our opinion, we reviewed the Merger Agreement and held discussions with certain senior officers, directors and other representatives and advisors of CNR and certain senior officers and other representatives and advisors of Wisconsin Central and certain of its affiliates concerning the business, operations and prospects of Wisconsin Central. We examined certain publicly available business and financial information relating to Wisconsin Central as well as certain financial forecasts and other information and data relating to CNR and Wisconsin Central which were provided to or otherwise discussed with us by the managements of CNR and Wisconsin Central and certain of its affiliates, including certain information relating to the potential strategic implications and operational benefits anticipated by the management of CNR to result from the Merger. We reviewed the financial terms of the Merger as set forth in the Merger Agreement in relation to, among other things: current and historical market prices and trading volumes of Wisconsin Central Common Stock; the financial condition and historical and projected earnings and other operating data of Wisconsin Central; and the capitalization of Wisconsin Central. We considered, to the extent publicly available, the financial terms of other transactions recently effected which we considered relevant in evaluating the Merger and analyzed certain financial, stock market and other publicly available information relating to the businesses of other companies whose operations we considered relevant in evaluating those of Wisconsin Central. We also evaluated the potential pro forma financial impact of the Merger on CNR. In addition to the foregoing, we conducted such other analyses and examinations and considered such other financial, economic and market criteria as we deemed appropriate in arriving at our opinion.

In rendering our opinion, we have assumed and relied, without independent verification, upon the accuracy and completeness of all financial and other information and data publicly available or furnished to or otherwise reviewed by or discussed with us. With respect to financial forecasts and other

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information and data provided to or otherwise reviewed by or discussed with us, we have been advised by the managements of CNR and Wisconsin Central and certain of its affiliates that such forecasts and other information and data (including adjustments to the forecasts and other information and data relating to Wisconsin Central prepared by the management of CNR) were reasonably prepared on bases reflecting the best currently available estimates and judgments of the respective managements of CNR and Wisconsin Central and certain of its affiliates as to the future financial performance of CNR and Wisconsin Central and the best currently available estimates and judgments of the management of CNR as to the strategic implications and operational benefits (including the amount, timing and achievability thereof) anticipated to result from the Merger. We have assumed with your consent that, in the course of obtaining the necessary regulatory and third party approvals or consents for the Merger, no delay, limitation, restriction or condition will be imposed that would have a material adverse effect on Wisconsin Central or the contemplated benefits to CNR of the Merger. We have not made or been provided with an independent evaluation or appraisal of the assets or liabilities (contingent or otherwise) of Wisconsin Central nor have we made any physical inspection of the properties or assets of Wisconsin Central. Our opinion does not address, and we express no view as to, the relative merits of the Merger as compared to any alternative business strategies that might exist for CNR or the effect of any other transaction in which CNR might engage. Our opinion is necessarily based upon information available to us, and financial, stock market and other conditions and circumstances existing and disclosed to us, as of the date hereof.

Salomon Smith Barney Inc. has acted as financial advisor to CNR in connection with the proposed Merger and will receive a fee for such services, a significant portion of which is payable upon the consummation of the Merger. We in the past have provided services to CNR unrelated to the proposed Merger, and may participate in the financing for the Merger, for which services we have received and would receive compensation. In the ordinary course of our business, we and our affiliates may actively trade or hold the securities of CNR and Wisconsin Central for our own account or for the account of our customers and, accordingly, may at any time hold a long or short position in such securities. In addition, we and our affiliates (including Citigroup Inc. and its affiliates) may maintain relationships with CNR, Wisconsin Central and their respective affiliates.

Our advisory services and the opinion expressed herein are provided for the information of the Board of Directors of CNR in its evaluation of the proposed Merger, and may not be relied upon by any third party or used for any other purpose. Our opinion may not be published or otherwise used or referred to, nor shall any public reference to Salomon Smith Barney Inc. be made, without our prior written consent.

Based upon and subject to the foregoing, our experience as investment bankers, our work as described above and other factors we deemed relevant, we are of the opinion that, as of the date hereof, the Merger Consideration to be paid by CNR pursuant to the Merger Agreement is fair, from a financial point of view, to CNR.

Very truly yours,

Salomon Smith Barney Inc.

SALOMON SMITH BARNEY INC.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 4

FTC V. *PEABODY ENERGY CORP*., NO. 4:20-CV-00317-SEP, MEMORANDUM OPINION (E.D. MO. OCT. 5, 2020)

492 F.Supp.3d 865
United States District Court,
E.D. Missouri, Eastern Division.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
PEABODY ENERGY CORPORATION
and Arch Resources, Inc., Defendants.

Case No.
4
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cv
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00317
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SEP
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Signed 09/29/2020
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Filed 10/05/2020

Synopsis

Background: Federal Trade Commission (**FTC**) brought action against coal producers that sought to form joint venture, seeking injunction under Federal Trade Commission Act (FTCA) to prevent joint venture from moving forward until **FTC** could conduct an administrative hearing to determine whether joint venture would violate Section 7 of the Clayton Act.

Holdings: The District Court, Sarah E. Pitlyk, J., held that:

[1] relevant product market was the market for coal from the specific geographical region in which proposed venture's coal was mined;

[2] relevant geographic market was the specific river basin from which the coal was mined;

[3] **FTC** established prima facie case that proposed joint venture would result in a significant market share and an undue increase in concentration in the relevant market, warranting presumption that venture would substantially lessen competition;

[4] coal producers failed to rebut presumption of anticompetitive effects;

[5] coal producers' claim that joint venture would generate significant efficiencies was insufficient to rebut **FTC's** prima facie showing of anticompetitive effects of the venture; and

[6] preliminary injunction was in the public interest.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

West Headnotes (49)

[1] Antitrust and Trade Regulation Preliminary

The standard for a preliminary injunction described in Section 13(b) of the FTCA differs from the more familiar preliminary injunction standard applied in other contexts: a preliminary injunction may be granted in an antitrust case if the Federal Trade Commission shows that weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[2] Antitrust and Trade Regulation Preliminary

In order to demonstrate a likelihood of ultimate success in an antitrust case, as required for a preliminary injunction under the FTCA, the Federal Trade Commission (**FTC**) must raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the **FTC** in the first instance and ultimately by the Court of Appeals. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

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[3] **Antitrust and Trade Regulation** Injunction

A showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief under FTCA. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[4] **Antitrust and Trade Regulation** Presumptions and burden of proof

Antitrust and Trade Regulation Preliminary

Under the burden-shifting framework for evaluating Federal Trade Commission's (**FTC**) likelihood of success on the merits of a Clayton Act claim, as required for a preliminary injunction under the FTCA, the **FTC** must first present a prima facie case that the merger will result in an undue market concentration for a particular product or service in a particular geographic area, which creates a presumption that the merger will substantially lessen competition; the burden of production then shifts to defendants to rebut the presumption, and, on a sufficient showing, back to the **FTC** to present additional evidence of anticompetitive effects. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[5] **Antitrust and Trade Regulation** Presumptions and burden of proof

Antitrust and Trade Regulation Preliminary

On a motion for a preliminary injunction under FTCA, the ultimate burden of persuasion remains at all times with the Federal Trade Commission. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[6] **Antitrust and Trade Regulation** Presumptions and burden of proof

Antitrust and Trade Regulation Preliminary

The more compelling the prima facie case on a motion for preliminary injunction under the FTCA, the more evidence the defendant must present to rebut it successfully. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[7] **Antitrust and Trade Regulation** Presumptions and burden of proof

Antitrust and Trade Regulation Preliminary

On a motion for a preliminary injunction under FTCA, a defendant can make the required showing to rebut a prima facie case that a merger will result in undue market concentration by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[8] **Antitrust and Trade Regulation** Preliminary

A failure of proof in any respect on a motion for preliminary injunction under FTCA will mean the transaction at issue should not be enjoined. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[9] **Antitrust and Trade Regulation** Preliminary

On a motion for preliminary injunction under the FTCA, the court must also weigh the equities, but if the Federal Trade Commission is unable to demonstrate a likelihood of success, the equities

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alone cannot justify an injunction. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[10] **Antitrust and Trade Regulation** Relevant market in general

Antitrust and Trade Regulation Preliminary

The Federal Trade Commission's initial burden on a motion for preliminary injunction under FTCA is to demonstrate that there is a relevant market in which the proposed merger is likely to harm competition relative to the but-for world in which there is no merger. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[11] **Antitrust and Trade Regulation** Product market

Antitrust and Trade Regulation Geographic market

A "relevant market" for purpose of an antitrust action consists of two separate components: a product market and a geographic market.

[12] **Antitrust and Trade Regulation** Product market

The "relevant product market" for purpose of antitrust action identifies the product and services with which the defendants' products compete.

[13] **Antitrust and Trade Regulation** Geographic market

The "relevant geographic market" for purpose of an antitrust action identifies the geographic area in which the defendant competes in marketing its products or service.

[14] **Antitrust and Trade Regulation** Elasticity of supply and demand

Antitrust and Trade Regulation Product market

For purpose of an antitrust action, a product market is defined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

[15] **Antitrust and Trade Regulation** Product market; line of commerce

For purpose of an antitrust action, a properly defined product market includes the functionally similar products to which customers could turn if merger attempted to impose a post-closing price increase.

[16] **Antitrust and Trade Regulation** Product market

A relevant product market in an antitrust action need not be defined around a single product.

[17] **Antitrust and Trade Regulation** Product market

The mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes; rather, the critical question is whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.

[18] **Antitrust and Trade Regulation** Relevant market in general

If two commercial entities seeking to merge compete in multiple product markets, the merger will be illegal under the Clayton Act if it causes substantial competitive harm in any of those markets. Clayton Act § 7, 15 U.S.C.A. § 18.

[19] **Antitrust and Trade Regulation** Relevant market in general

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Because competitive harm in any relevant product market is enough to make out a prima facie case for violation of the Clayton Act, and because potential harms to competition will likely be less apparent in a broader, less concentrated market than in a narrower included market, the court's task in an antitrust action is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant product market. Clayton Act § 7, 15 U.S.C.A. § 18.

[20] **Antitrust and Trade Regulation** Product market; line of commerce

The hypothetical monopolist test is an analytical method for determining the relevant product market in a Clayton Act antitrust action, which asks whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products.

[21] **Antitrust and Trade Regulation** Product market; line of commerce

Under the hypothetical monopolist test, an analytical method for determining the relevant product market in a Clayton Act antitrust action, if a firm with a monopoly over the products in a candidate market could profitably impose a small but significant non-transitory increase in price, then that market constitutes a relevant product market.

[22] **Antitrust and Trade Regulation** Product market; line of commerce

In determining a relevant product market for purpose of a Clayton Act antitrust action, courts also often consider whether a candidate market is characterized by certain practical indicia, known as the *Brown Shoe*, 82 S.Ct. 1502, factors, including industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct consumers, distinct prices, sensitivity to price changes, and specialized vendors.

[23] **Antitrust and Trade Regulation** Product market; line of commerce

The *Brown Shoe*, 82 S.Ct. 1502, factors for determining a relevant product market for purpose of a Clayton Act antitrust action are not rigidly applied.

[24] **Antitrust and Trade Regulation** Relevant market in general

Ultimately, the determination of the relevant market for purpose of a Clayton Act antitrust action is a matter of business reality – of how the market is perceived by those who strive for profit in it.

[25] **Antitrust and Trade Regulation** Product market; line of commerce

The first *Brown Shoe*, 82 S.Ct. 1502, factor for determining a relevant product market for purpose of a Clayton Act antitrust action evaluates how industry participants recognize competitive realities; the industry or public recognition of the submarket as a separate economic unit matters because courts assume that economic actors usually have accurate perceptions of economic realities.

[26] **Antitrust and Trade Regulation** Product market; line of commerce

Market definition for purpose of a Clayton Act antitrust action is not a zero-sum game; each proposed relevant product market stands or falls on its own merits, and the narrowest market principle determines which of the qualifying markets a court should use for the rest of its merger analysis.

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[27] **Antitrust and Trade Regulation** Oil, gas, and mining

Antitrust and Trade Regulation Preliminary

Relevant product market for purpose of Federal Trade Commission's (**FTC**) motion for preliminary injunction under FTCA to prevent two coal producers from forming joint venture pending **FTC's** review of whether venture would violate Clayton Act was the market for coal from the specific geographical region in which proposed venture's coal was mined; although coal competed with natural gas and renewable **energy** sources in a broader **energy** market, hypothetical monopolist test demonstrated that customers of coal from region were likely to continue to purchase it in the face of small price increases, industry actors treated the region's coal as a distinct submarket, price of region's coal was set through market-specific competitive interactions among suppliers, only utilities with plants designed specifically for region's coal could buy and use it, and region's coal had distinct properties that made it more desirable for customers. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b); Clayton Act § 7, 15 U.S.C.A. § 18.

[28] **Antitrust and Trade Regulation** Geographical market; section of country

The proper question to be asked in determining the relevant geographic market for a Clayton Act antitrust action is where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.

[29] **Antitrust and Trade Regulation** Geographical market; section of country

The relevant geographic market for purpose of a Clayton Act antitrust action must correspond to the commercial realities of the industry and be economically significant.

[30] **Antitrust and Trade Regulation** Oil, gas, and mining

Antitrust and Trade Regulation Preliminary

Relevant geographic market for purpose of Federal Trade Commission's (**FTC**) motion for preliminary injunction under FTCA to prevent two coal producers from forming joint venture pending **FTC's** review of whether venture would violate Clayton Act was the specific river basin from which the coal was mined, as type of coal from that river basin could not be mined outside of the basin. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b); Clayton Act § 7, 15 U.S.C.A. § 18.

[31] **Antitrust and Trade Regulation** Relevant market in general

Market concentration, for purpose of determining if a merger will cause anticompetitive effects, is a function of the number of firms in a market and their respective market shares.

[32] **Antitrust and Trade Regulation** Relevant market in general

A common tool used to measure changes in market concentration is the Herfindahl–Hirschmann Index (HHI), which is calculated by summing the squares of an individual firms' market shares, a calculation that gives proportionately greater weight to the larger market shares; sufficiently large HHI figures establish the Federal Trade Commission's prima facie case that a merger is anticompetitive, as required for preliminary injunction under FTCA.

Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[33] **Antitrust and Trade Regulation** Presumptions and burden of proof

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Antitrust and Trade Regulation Mergers and acquisitions

Federal Trade Commission (**FTC**) established prima facie case that proposed joint venture between two coal producers would result in a significant market share and an undue increase in concentration in the relevant market, warranting presumption that venture would substantially lessen competition, as required for preliminary injunction baring creation of the venture pending **FTC** hearing to determine whether venture would violate Section 7 of the Clayton Act, unless producers could rebut presumption of anticompetitive effects; relevant market was already highly concentrated and calculations demonstrated that venture would make it far more concentrated, customers benefited from head-to-head competition between producers that would be eliminated, customers would not be able to resist five to ten percent price increases, and producers were focused on generating higher margins for investors, giving them incentive to raise prices. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[34] **Antitrust and Trade Regulation** Mergers and Acquisitions

Antitrust and Trade Regulation Preliminary

For purpose of establishing a prima facie case of the likelihood of anticompetitive effects from a merger, as required for preliminary injunction under FTCA, a merger that eliminates head-to-head competition between close competitors is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[35] **Antitrust and Trade Regulation** Preliminary

Ultimately, the court need not decisively sift through various models and theories to determine, on a motion for preliminary injunction under FTCA, whether a proposed merger would have anticompetitive effects; the court's task is to determine whether the Federal Trade Commission (**FTC**) has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the **FTC** in the first instance and ultimately by the Court of Appeals. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[36] **Antitrust and Trade Regulation** Presumptions and burden of proof

Antitrust and Trade Regulation Preliminary

On a motion for preliminary injunction under FTCA, the presumption that a merger will substantially lessen competition is rebuttable; defendants can either discredit the data underlying the initial presumption in the government's favor, or affirmatively show why the merger is unlikely to substantially lessen competition. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[37] **Antitrust and Trade Regulation** Oil, gas, and mining

Antitrust and Trade Regulation Mergers and acquisitions

Coal producers that sought to form joint venture failed to rebut presumption of anticompetitive effects created by Federal Trade Commission's (**FTC**) showing that creation of venture would have resulted in significant market share and an undue increase in competition in the relevant market, and thus **FTC** established a likelihood of success on the merits, as required to enjoin creation of venture pending **FTC** hearings on whether it violated Section 7 of the Clayton Act; although there was competition from other

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fuels and other suppliers of coal from relevant market, there was no prospect for new coal mines to open in relevant market or for existing mines to expand, and energy producers could not easily change to other fuel sources. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b); Clayton Act § 7, 15 U.S.C.A. § 18.

[38] **Antitrust and Trade Regulation** Mergers and acquisitions

Antitrust and Trade Regulation Preliminary

Where a court finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case of anticompetitive effects of a merger, on a motion for a preliminary injunction under FTCA. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[39] **Antitrust and Trade Regulation** Mergers and acquisitions

Antitrust and Trade Regulation Preliminary

On a motion for preliminary injunction under FTCA, even if evidence of efficiencies gained by a merger alone is insufficient to rebut the government's prima facie case of anticompetitive effects of the merger, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[40] **Antitrust and Trade Regulation** Mergers and Acquisitions

Antitrust and Trade Regulation Preliminary

In evaluating a defendant's claim that a merger will promote efficiencies, offered to rebut the government's prima facie case of anticompetitive effects of the merger made on a motion for preliminary injunction under FTCA, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[41] **Antitrust and Trade Regulation** Mergers and Acquisitions

Antitrust and Trade Regulation Preliminary

In evaluating a defendant's claim that a merger will promote efficiencies, offered to rebut the government's prima facie case of anticompetitive effects of the merger made on a motion for preliminary injunction under FTCA, the court must determine whether the efficiencies are merger-specific, meaning they represent a type of cost saving that could not be achieved without the merger, and verifiable, meaning the estimate of the predicted saving must be reasonably verifiable by an independent party. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[42] **Antitrust and Trade Regulation** Mergers and acquisitions

Antitrust and Trade Regulation Preliminary

In evaluating a defendant's claim that a merger will promote efficiencies, offered to rebut the government's prima facie case of anticompetitive effects of the merger made on a motion for preliminary injunction under FTCA, defendants bear the burden of demonstrating that their claimed efficiencies are merger-specific, which requires demonstrating that the efficiencies cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

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[43] **Antitrust and Trade Regulation** Mergers and acquisitions

Antitrust and Trade Regulation Preliminary

In evaluating a defendant's claim that a merger will promote efficiencies, offered to rebut the government's prima facie case of anticompetitive effects of the merger made on a motion for preliminary injunction under FTCA, defendants must also demonstrate that their claimed efficiencies would benefit customers. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[44] **Antitrust and Trade Regulation** Oil, gas, and mining

Antitrust and Trade Regulation Mergers and acquisitions

Coal producers' claim that creation of joint venture between two companies would generate significant efficiencies by optimizing production across mines that were currently operated separately was insufficient to rebut the Federal Trade Commission's (**FTC**) prima facie showing of anticompetitive effects of the joint venture, on **FTC's** motion for preliminary injunction under FTCA; although producers were able to demonstrate some verifiable efficiencies from venture, many of the efficiencies shown were unverifiable because they were grounded in the business judgment of producers' employees, producers used 20-year horizon for forecasting efficiencies, which was less accurate than the typical five-year horizon used, not all of the anticipated efficiencies were merger-specific, and all claimed efficiencies together were insufficient to offset likely competitive harm to customers from the venture. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[45] **Antitrust and Trade Regulation** Presumptions and burden of proof

Antitrust and Trade Regulation Preliminary

Even once a presumption in favor of a preliminary injunction under FTCA is established, the public interest standard still requires the court to weigh the public and private equities of enjoining the merger. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[46] **Antitrust and Trade Regulation** Oil, gas, and mining

Antitrust and Trade Regulation Preliminary

Preliminary injunction under FTCA enjoining creation of joint venture between two coal producers pending full administrative hearing on the merits of the merger under the Clayton Act was in the public interest; although venture would generate efficiencies that would be delayed or lost if venture was blocked and preventing the venture from proceeding was likely to lead to unforeseen abrupt mine closures, bankruptcies, and layoffs, creation of venture between two largest coal producers in region would cause harm to customers from lost competition that likely could not be undone if creation of venture was permitted to proceed. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b); Clayton Act § 7, 15 U.S.C.A. § 18.

[47] **Antitrust and Trade Regulation** Preliminary

The principal equitable consideration weighing in favor of a preliminary injunction under FTCA pending a Federal Trade Commission (**FTC**) hearing on whether a proposed merger would violate Section 7 of the Clayton Act is the strong public interest in effective enforcement of the antitrust laws and in the **FTC** having the ability to order effective relief if it succeeds in an administrative proceeding. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b); Clayton Act § 7, 15 U.S.C.A. § 18.

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[48] Antitrust and Trade Regulation Preliminary

Allowing a proposed merger to proceed and then later "unscrambling the eggs" upon a finding of illegality under the Clayton Act by the Federal Trade Commission (**FTC**) is a daunting and potentially impossible task, which supports the issuance of an injunction under FTCA pending **FTC** hearing on the matter. Clayton Act § 7, 15 U.S.C.A. § 18; Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b).

[49] Antitrust and Trade Regulation Preliminary

The parties' stated intention to abandon a proposed merger prior to the Federal Trade Commission's (**FTC**) merits proceeding under Clayton Act if an FTCA injunction is granted pending resolution of the **FTC** proceedings is a private equity, and cannot on its own overcome the public equities that favor granting the injunction. Federal Trade Commission Act § 13, 15 U.S.C.A. § 53(b); Clayton Act § 7, 15 U.S.C.A. § 18.

Attorneys and Law Firms

***873** Amy E. Dobrzynski, Daniel Matheson, Federal Trade Commission, Alicia Burns-Wright, Cecelia Waldeck, Christopher Caputo, Elizabeth Arens, Ernest Eric Elmore, Jeanine Balbach, Jonathan Lasken, Joshua Goodman, Maria Cirincione, Michael Anthony Franchak, Philip Kehl, Sean Hughto, Stephen Santulli, Taylor Alexander, Federal Trade Commission, Washington, DC, for Plaintiff.

Corey Roush, Pro Hac Vice, Gorav Jindal, Haidee Schwartz, J. Matthew Schmitten, Akin and Gump, Edward Hassi, Leah S. Martin, DeBevoise and Plimpton LLP, Washington, DC, Matthew T. Schelp, Michael Charles Martinich-Sauter, Catherine L. Hanaway, Husch Blackwell LLP, St. Louis, MO, Cristina R. Thrasher, Akin and Gump, Johan Robert Abraham, Michael Schaper, Tristan Myles Ellis, DeBevoise and Plimpton LLP, New York, NY, for Defendant **Peabody Energy** Corporation.

Stephen Weissman, Andrew Thomas George, Elisa Beneze, Jarad Scot Daniels, Matthew Adler, Michael J. Perry, Steven Benjamin Pet, William Connor Lavery, Baker Botts LLP, Washington, DC, for Defendant Arch Coal, Inc.

MEMORANDUM OPINION

SARAH E. PITLYK, UNITED STATES DISTRICT JUDGE

Flipping a light switch is the culmination of a long and convoluted process. The electricity needed to turn on that light—indeed, the electricity needed for any purpose, be it residential, commercial, or industrial—is generated at power plants owned by investor- or publicly-owned utilities and cooperatives, independent power producers, or the government. Joint Stipulation of Uncontested Facts ("JSUF") (Doc. [301-1]) ¶ 4. Each power plant consists of one or more electricity generating units ("EGUs"). *Id.* ¶ 5. Each EGU uses one of a wide range of generating technologies to transform the **energy** in a specific fuel—e.g., uranium, coal, oil, natural gas, sunshine, wind, water—into electricity. *Id.* ¶ 6. The typical user of electrical power is indifferent to the method used to generate that power; to most of us, a megawatt is a megawatt is a megawatt. *Id.* ¶ 8. But to **energy** companies, utilities, policymakers, regulators, and investors (to name just a few), the process by which certain fuels are selected—or not—for use in electricity generation is a matter of momentous consequence. This case is about that process.

One of the most important fuels for electricity generation is thermal coal. Though it has steadily ceded ground to natural gas and renewables over the past twenty years, coal still provides 20 percent of our nation's electricity, and it is ***874** projected to remain an important fuel source for decades to come. Defendants **Peabody Energy** Company ("**Peabody**") and Arch Resources, Inc., ("Arch") are the two largest coal producers in the United States. **Peabody Energy Corp**.'s Answer & Affirmative Defenses (Doc. [54]) ("**Peabody** Answer") ¶¶ 15-16. **Peabody** and Arch propose to mitigate the effects of the coal industry's overall decline on their employees and investors by combining some of their thermal coal operations in a joint venture (the "JV"). JSUF ¶ 30. Defendants announced their intention to form the JV on June 19, 2019. *Id.*

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Eight months later, three days before the JV was to be consummated, the Federal Trade Commission ("**FTC**") filed suit in this Court seeking an immediate injunction under Section 13(b) of the Federal Trade Commission Act to prevent the proposed JV from moving forward until the **FTC** could conduct an administrative hearing to determine whether it would violate Section 7 of the Clayton Act. Defendants stipulated to a temporary restraining order pending this Court's hearing on the **FTC's** Motion for Preliminary Injunction (Doc. [137]). After two COVID-19-related delays, that hearing took place in mid-July 2020, less than 5 months after the **FTC's** initial filing. In the interim, the parties worked furiously to exchange written discovery, take dozens of depositions, and prepare hundreds of pages of briefing and thousands of exhibits—all within the extraordinary constraints imposed by a global pandemic.

In considering the Motion, the Court has been the beneficiary of those herculean efforts, as both sides ably distilled their complex arguments into coherent, comprehensible presentations over the course of a nine-day evidentiary hearing, followed by proposed findings of fact and conclusions of law and closing arguments. Having carefully considered all of those submissions, the Court finds that the **FTC** has met its burden under Section 13(b) of the Federal Trade Commission Act for a preliminary injunction; accordingly, its Motion for Preliminary Injunction (Doc. [137]) is granted.

BACKGROUND

I. Factual Background

A. SPRB coal mining and transportation

The case is principally concerned with one of the several fuels that can be used for **energy** production: thermal coal. JSUF ¶¶ 13-14. It is even more narrowly focused, in fact, on thermal coal that is mined in one specific geographical region, the Southern Powder River Basin ("SPRB"), located in northeastern Wyoming, near the town of Gillette. *Id.* ¶¶ 16-17.

Unlike some mines in other parts of the country, SPRB mines are surface mines, meaning they are not underground. Tr. Vol. 2A (Jones) 5:20-21. Mining SPRB coal therefore requires removing "overburden," the material covering the coal. *Id.* at 5:22-23. The number of cubic yards of dirt that must be removed to access one ton of coal is the "strip ratio." Tr. Vol. 5A (Lang) 110:13-17. As an example, if a mine has a strip ratio of 4, that means that, on average, 4 cubic yards of dirt must be removed to access one ton of coal. *Id.* at 110:17-18. An SPRB coal mine's cost structure is primarily a function of the how difficult it is to access the coal, which is most succinctly captured by a mine's strip ratio. Tr. Vol. 5A (Kellow) at 64:22-65:2.

Coal companies design mines to minimize the cost of extracting coal, which involves optimizing the use of equipment used to remove overburden. There are three ways to move overburden. Tr. Vol. 5A (Lang) at 109:1-3. The most cost-effective ***875** method is explosives, whereby mining companies blast the overburden over the top of the pit and land it in another pit, revealing the material below what was blasted. *Id.* at 109:3-9. These can be massive explosions. Paul Lang, Arch's CEO and himself an experienced coal miner, stated that he has detonated as much as approximately 8.5 million pounds of explosives at a time. *Id.*

The second cheapest way to move large volumes of material is a dragline. *Id.* at 109:9-11. A dragline is an order of magnitude more expensive than explosives, but it is still very efficient. *Id.* Draglines are some of the largest earth-moving equipment in the world, with buckets that can scoop as much as 165 cubic yards at a time. *Id.* at 108:18-21. However, because of their size and the way they function, there are limitations on what they can do and where they can do it. *Id.* at 109:13-18.

The third way to move material is truck shovels, which are two to three times more expensive than a dragline. *Id.* at 109:19-22. When a company designs a coal mine, it optimizes the mine plan for the less expensive technologies, explosives and draglines. *Id.* at 109:23-25. As coal is extracted from a mine, the cost of extracting the marginal ton of coal increases as explosives and draglines become less feasible, and expensive shovel trucks are eventually needed for an increasing share of overburden removal. *Id.* at 110:24-111:17.

Once accessed, the coal is trucked out of the pit in six-foot chunks and run through a crusher, which breaks it up into two-inch-long pieces that customers can put into their boilers. Tr. Vol. 5B (Lang) 11:24-12:7. The crushed coal is loaded onto conveyor belts, which transport it to loadouts, where it is loaded onto train cars. *Id.* at 11:12-24.

Coal customers buy and take possession of the coal when it is loaded onto railcars in the SPRB. Tr. Vol. 1B (Meyer) 22:24-25. Hence, the price paid for the coal is sometimes

called the "mine-mouth" price. [Redacted] That commodity price is only a fraction of the coal's total delivered cost because customers also pay to transport the coal from the SPRB to wherever it will be used. *Id.* at 23:1-12. The transportation costs are substantial, sometimes up to more than half of the total delivered cost of the SPRB coal. *See, e.g.*, *id.*

All SPRB mines are along a rail line. The portion of the rail line south of the town of Gillette, Wyoming, is referred to as the "joint line" because it is owned by both the Burlington Northern Santa Fe ("BNSF") and Union Pacific railroads. [Redacted] The joint line is quadruple track through the SPRB coal mines, making it an efficient means of transporting coal out of the SPRB. *Id.* Mines north of Gillette are generally on a BNSF line only, which affects available prices and destinations for coal from that area. *Id.*; Tr. Vol. 3B (Sandlin) 81:19-82:1 (mines not along the joint line are "a bit more limited" in what power plants they can serve). The Buckskin, Rawhide, Eagle Butte, Dry Fork, and Wyodak mines are all north of Gillette and are served only by the BNSF line, while the Caballo, Belle Ayr, Cordero Rojo, Coal Creek, Black Thunder, NARM, and Antelope mines are all south of Gillette and served by the joint line. PX8001 (Hill Report) Fig. 2. [1] The lack of rail competition for mines north of the joint line has led to higher prices for transportation for coal from these mines, making such coal somewhat less attractive relative to ***876** mines served by the joint line. *See, e.g.*, [Redacted] does not solicit SPRB coal suppliers with only mines north of the joint line because they are "not competitive from a transportation standpoint"); [Redacted] only solicits SPRB coal suppliers with mines on the joint line); Tr. Vol. 5B (Stuchal) 93:9-12 (NPPD purchases SPRB coal from all producers on the joint line and none on the BNSF-only line).

B. ISOs and RTOs

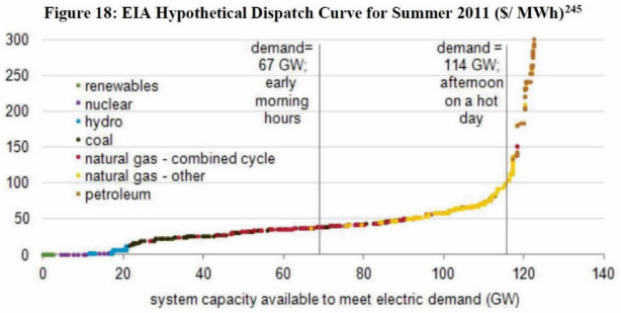
When coal arrives at a power plant, it is not yet determined how frequently the plant will burn the coal or how much it will burn. Many utilities do not make these decisions themselves. Rather, the majority of all U.S.-generated electricity is managed through seven regional electricity markets known as Independent System Operators ("ISOs") or Regional Transmission Organizations ("RTOs"). [2] JSUF ¶ 9; PX8001 (Hill Report) ¶ 62. The Southwest Power Pool ("SPP"), the Midcontinent Independent System Operator ("MISO"), the **Energy** Reliability Council of Texas ("ERCOT"), and the Pennsylvania, Jersey, Maryland Power Pool ("PJM") together account for nearly 75% of all SPRB coal consumed in the United States. DX4005 (Carey Report) ¶ 19, Fig. 6. These organizations conduct daily auctions to match regional electricity demand as projected by providers, such as utility companies, with electricity supply offers from generators to maintain reliable and cost-effective electricity service in their geographic areas. DX4005 (Carey Report) ¶¶ 13, 27-32. These auctions are conducted on both day-ahead and real-time bases. *Id.* ¶ 27.

ISOs, and not the electricity generators, ultimately determine which EGUs "dispatch"—i.e., generate electricity and provide it to the grid—at every moment of every day. Tr. Vol. 6A (Carey) 24:13-16. The ISOs determine which EGUs dispatch on a "least-cost basis," meaning that those EGUs that can supply the anticipated electricity demand at the lowest cost will be instructed to run by the ISO. DX4005 (Carey Report) ¶ 28. EGUs in an ISO must make a confidential bid, based on the variable cost to supply a unit of production. *Id.* ¶¶ 30, 32. Based on the anticipated amount of **energy** (for the day-ahead market) or the actual amount of **energy** being demanded (for the real-time market), each ISO sets a market-clearing price—that is, the price at which the bid of the marginal unit of supply meets demand. *Id.* ¶ 31. If an EGU's bid is less than the market-clearing price, the ISO will instruct that EGU to generate, and the EGU's operator will be paid the market-clearing price for its power—even if its bid was less than the market-clearing price. *Id.*; DX4001 (Bailey Report) ¶ 13; Tr. Vol. 6A (Carey) 30:5-19. When this happens, the EGU is described as "in the money." DX4005 (Carey Report) ¶ 31. If, by contrast, an EGU's bid is greater than the market-clearing price, the ISO will not instruct that EGU to generate, and the EGU's operator will not be paid for that unit, putting the EGU "out of the money." *Id.*

This process—referred to as "merit-order dispatch" or "least-cost dispatch"—results in the lowest cost electricity dispatching (i.e., on a "least-cost basis"), regardless of the method by which the electricity is generated. *Id.* ¶ 28. In the dispatch process, then, EGUs within an ISO compete against all EGUs of all fuel types within that same ISO to generate electricity. DX4001 (Bailey Report) ¶ 13; Tr. Vol. 3B ***877** (Trushenski) 40:2-19. While certain areas of the country are not covered by an ISO, vertically integrated electrical utilities in those areas, such as the Tennessee Valley Authority ("TVA") and Southern Company, rely on merit-order dispatch to ensure cost-effectiveness. *See, e.g.,* Tr. Vol. 7B (Fuller) 9:10-10:10. [3]

C. Electricity dispatch curves

The mechanism by which merit-order dispatch occurs is the electricity dispatch curve, sometimes referred to as a dispatch "stack." DX4001 (Bailey Report) ¶¶ 13-14.



DX4005 (Carey Report) Fig. 18. Generally speaking, different EGU types occupy different parts of the dispatch curve. Some units—typically renewables such as wind, solar, and hydroelectric—generate power at close to no marginal cost because they have no fuel costs. Such EGUs are therefore bid into the market at low cost and typically are the first to run when available and needed to fulfill anticipated **energy** demand. DX4005 (Carey Report) ¶ 84. Nuclear-powered EGUs are typically next on the dispatch curve, as these units also have low marginal costs and are dispatchable.[4] Tr. Vol. 1B (Meyer) 11:19-22. EGUs that generate electricity from fossil fuels—e.g., coal, natural gas, and oil—have higher variable costs, primarily because of their fuel costs. Tr. Vol. 7B (Fuller) 10:2-5. These EGUs are typically bid in at their variable costs, appearing further up and to the right of the dispatch curve. DX4005 (Carey Report) ¶ 99; Tr. Vol. 5B (Stuchal) 99:11-17 (NPPD submits its nuclear plant as a must-run generating facility, followed by wind generation, then other renewables ***878** including hydro, and finally coal and natural gas).

As described above, an EGU is typically dispatched only when its bid is at or below the market-clearing price. The more low-cost bids are submitted by renewable- and nuclear-powered EGUs, the further fossil fuels, including coal, are pushed to the right on the dispatch curve, because the marginal cost of generating an additional megawatt from renewables or nuclear is virtually always lower than the marginal cost of generating that megawatt from coal. DX4005 (Carey Report) ¶ 99. Whatever the market-clearing price, then, increasing renewable generation likely means that fewer fossil fuel-powered EGUs will be called to run. Tr. Vol. 6A (Carey) 46:14-19.

Whether because of market-order dispatch, planned or unplanned maintenance, or other reasons, an EGU does not run at its maximum capacity at every moment of every day of every year. Tr. Vol. 1B (Meyer) 10:2-16. An EGU's "capacity factor," or "utilization rate," measures how often a unit runs as a fraction of its total capability. Tr. Vol. 2A (Peterson) 39:25-40:1. A lower capacity factor means that a unit runs less often; a higher capacity factor means that it runs more often. The higher a unit's capacity factor, the more economical it is to operate. Vol. 1B (Meyer) 10:3-12.

D. Recent trends in energy generation

The most recent major antitrust proceeding in the coal industry took place in 2004. *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). The commercial circumstances of coal companies have changed significantly in the intervening sixteen years. The three most important changes for this case's purposes are the significantly lower price of natural gas; the substantial increase in renewable generation; and the steep decline in coal generation. The confluence of those trends has led to a significant decrease in coal consumption since 2004.

1. Declining natural gas prices

Technological advancements such as hydraulic fracturing, sometimes referred to as "fracking," as well as the discovery of vast reserves of natural gas in shale rock formations throughout the United States, have precipitated a remarkable decline in the cost of producing natural gas. DX4001 (Bailey Report) ¶ 17. Since 2008, the price of natural gas has fallen by more than 75%, from over $8/mmBTU to under $2/mmBTU. *Id.* These developments have made the United States the world's largest natural gas producer. DX4003 (Israel Report) ¶ 50. At the same time, new and highly efficient combined cycle gas turbines ("CCGTs") have made natural gas EGUs much more efficient at converting the **energy** stored within natural gas into electricity. DX4001 (Bailey Report) ¶ 17; [Redacted]

The combination of cheap natural gas and efficient CCGTs has made electricity generation from natural gas more cost-effective than in the past, causing many utilities to construct natural gas-powered EGUs that compete with coal-powered EGUs to dispatch. DX4005 (Carey Report) ¶¶ 75-77. As a result, average capacity factors within MISO, SPP, and ERCOT for natural gas-powered EGUs have risen from approximately 30-40% to 50-60% from 2010 to 2019, while

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average capacity factors for coal-powered EGUs have fallen from approximately 70% to 40% over that same time period. *Id.* ¶¶ 93-94 & Figs. 13-14.

2. Increasing renewable generation

Over the last several decades, governmental authorities have introduced subsidies ***879** and other policies designed to encourage investment in renewable **energy** generation, and electricity generators have directed their capital investments accordingly. Tr. Vol. 1B (Meyer) 16:13-15 ("We are adding renewables right now ... to meet compliance with Missouri's renewable **energy** standard."). Accordingly, electricity generation from wind and solar has doubled since 2010. Tr. Vol. 6A (Carey) 45:3-45:8.

Solar and wind power are intermittent and "non-dispatchable" **energy** sources, meaning they only generate **energy** when the wind is blowing or the sun is shining, which is out of the utility company's control. Tr. Vol. 6A (Galli) 113:5-8; Tr. Vol. 7B (Fuller) 18:22-19:8. That constraint makes renewable fuels imperfect replacements for fossil fuels like coal. When they do run, however, renewables are the lowest-cost generation options on the dispatch curve, shifting SPRB coal generation to the right, and decreasing the likelihood that an SPRB coal-fired unit will be dispatched. *See* Section I.C, *supra.* As such, increased use of renewables has contributed to an erosion in demand for coal. [Redacted]

3. Declining coal generation

In addition to plummeting natural gas prices and pro-renewable policies, some witnesses pointed to environmental regulations as a factor increasing the cost of operating coal-fired EGUs in recent years. [Redacted] plans to retire certain coal-fired EGUs because "there would be significant capital investments that would be required in those units to extend the life and to operate and meet environmental standards"); *see also* [Redacted] Whatever the causes, the operational costs of coal-fired generation have increased over the past 16 years, relative to other fuel sources. DX4001 (Bailey Report) ¶¶ 18-20. In response to these increasing costs, electricity generators have shifted away from coal by investing in new renewable and natural gas-powered EGUs and idling or permanently retiring their coal EGUs. *Id.*

Between 2010 and the first quarter of 2019, U.S. power companies announced the retirement of at least 546 coal-powered EGUs totaling about 102 gigawatts (GW) of generating capacity. DX8009-001. Plant owners intend to retire another 17 GW of coal-fired capacity by 2025. *Id.* Strikingly, not a single megawatt of coal generating capacity is currently being built or planned in the entire United States. Tr. Vol. 6A (Carey) 46:20-21.

In addition, some plants that are not being retired are being relegated to seasonal operations. For instance, [Redacted] has retired, idled, or converted to natural gas [Redacted] coal-fired EGUs, and it is considering retiring its [Redacted] remaining coal-fired EGUs or shifting to seasonal operations. [Redacted]

4. Cumulative impact on the coal industry

As a result of these developments, coal is no longer uniformly regarded as the "baseload" generation source that it was when *Arch Coal* was decided. DX4001 (Bailey Report) ¶ 31 (collecting statements from various utilities). Coal-fired EGUs are increasingly "load-following," meaning that they may or may not dispatch depending on day-to-day changes in the ISO dispatch market. *Id.*

In 2004, coal, including but not limited to SPRB coal, comprised almost 50% of net electricity generation in the United States, while nuclear provided about 20%, natural gas provided about 18%, hydro provided about 7%, and other renewables, including wind and solar, provided about 2%. *Id.* at Ex. 8. In 2019, as a result of the three trends described above, coal's share of net electricity generation in the United States had fallen to about 23%, while natural gas ***880** generation had leapt to about 38% of net generation and other renewables had climbed from 2% to about 10%. *Id.* Meanwhile, the country's annual net electricity consumption has stayed relatively flat, increasing by less than 15% over that same time period. *Id.* at Ex. 9. These trends represent a clear structural shift away from coal to other fuels, and no party has suggested that coal will ever again be the primary fuel used to generate electricity in the United States.

The overall decline in electricity generation from coal is reflected in SPRB coal production. From a peak of 452 million tons of SPRB coal mined in 2008, aggregate SPRB coal production decreased by over 40% to 267 million tons in 2019. *Id.* ¶ 21. Between 2011 and 2019, **Peabody's**

production at its three SPRB mines (NARM, Caballo, and Rawhide) declined by nearly 30%, from 148 million tons to 108 million tons. *Id.* Likewise, Arch's production at its two SPRB mines (Black Thunder and Coal Creek) declined by 41%, from 128 million tons to 75 million tons. *Id.* These declines can also be seen in customers' SPRB coal deliveries. *Id.* ¶ 22.

As the costs of production have increased and demand has decreased, the price of SPRB coal has declined from $20 per ton in 2006 to approximately $12 per ton in 2020. Tr. Vol. 3B (Sandlin) 101:24-102:3. Higher costs of production combined with lower prices have caused profit margins to fall. Arch's profit margin for Black Thunder coal fell from [Redacted] in 2004 to [Redacted] in 2019. DX4001 (Bailey Report) ¶ 23. Arch's SPRB margins were negative in each of the first two quarters of 2020. Tr. Vol. 5A (Lang) 77:15-24, 81:20-83:18. **Peabody's** profits margin for NARM coal declined from [Redacted] in 2007 to [Redacted] in 2019. DX4001 (Bailey Report) ¶ 23. **Peabody's** overall SPRB margins in the first quarter of 2020 were 10%. Tr. Vol. 5A (Kellow) 32:21-24.

The combination of low natural gas prices, increasing use of renewables, structural decline in SPRB coal production, and falling margins has caused numerous SPRB coal producers to declare bankruptcy over the last ten years. JSUF ¶¶ 27-29. In order to cut costs, mining companies have laid off significant fractions of workforces at all SPRB mines in recent years, including in the last several months. DX8698-001; Tr. Vol. 5A (Kellow) 13:14-14:10 (describing recent **Peabody** layoffs); Tr. Vol. 5A (Lang) 69:8-12 (Arch has gone from 39 coal mines and over 8,000 employees in 2011 to 8 coal mines and 3,400 employees today). One of the witnesses at the hearing had himself retired early as part of **Peabody's** ongoing force reduction efforts. Tr. Vol. 6A (Galli) 105:16-24.

Given the pace of retirements of coal-powered units and the lack of any plans for new coal-powered units, coal companies perceive any retirement of a coal-powered EGU to be a permanent loss in demand. Tr. Vol. 5A (Kellow) 6:19-7:6 (once a customer decides to retire a coal plant, the associated demand is "lost to coal forever" because "we are not seeing new generation of coal units coming online"). Coal companies therefore have an incentive to work with customers to try to prevent such retirements. Tr. Vol. 6B (Galli) 42:19-45:3 (regarding [Redacted]); DX4003 (Israel Report) ¶ 123 (collecting examples of Defendants adjusting pricing to forestall coal EGU retirements).

II. The Proposed Joint Venture

Peabody is a publicly traded mining company headquartered in St. Louis, Missouri. JSUF ¶ 2. **Peabody** describes itself as "the leading global pure-play coal company, serving power and steel customers in more than 25 countries on six continents." ***881** PX9010-002. It is the largest producer and supplier of coal from the SPRB. **Peabody** Answer ¶ 16; PX8001 (Hill Report) ¶ 30. **Peabody** operates three mines in the SPRB: North Antelope Rochelle ("NARM"), Rawhide, and Caballo. JSUF ¶ 20. NARM is the largest coal mine in the world, powering approximately 4.5% of total U.S. electricity generation. PX9010-002. In 2019, **Peabody** sold approximately 108 million tons of SPRB coal: 85.3 million tons from NARM, 12.6 million tons from Caballo, and 10.1 million tons from Rawhide. PX9063-061.

Arch is also a publicly traded mining company headquartered in St. Louis, Missouri. JSUF ¶ 3. Arch also operates two thermal coal mines in the SPRB: Black Thunder and Coal Creek. JSUF ¶ 19. In 2019, Arch sold 72 million tons of SPRB coal from Black Thunder and 2.6 million tons from Coal Creek. PX9055-015. According to the U.S. **Energy** Information Administration ("EIA"), which defines itself as the "premier source for **energy** information" in the United States, JSUF ¶ 11, and whose data and reports on power generation both parties cite extensively, Black Thunder is the second most productive mine in the United States, after **Peabody's** NARM. PX9041-034.

In addition to **Peabody** and Arch, five other companies produce coal in the SPRB from seven mines. JSUF ¶ 21. Navajo Transitional **Energy** Co. ("NTEC") operates the Antelope and Cordero Rojo mines. *Id.* ¶ 22. [5] Eagle Specialty Minerals ("Eagle"), an affiliate of FM Coal, operates the Eagle Butte and Belle Ayr mines. *Id.* ¶ 23. [6] Peter Kiewit Sons, Inc., ("Kiewit") operates the Buckskin mine. *Id.* ¶ 24. Black Hills Corporation operates the Wyodak mine. *Id.* ¶ 25. The Western Fuels Association ("WFA") operates the Dry Fork mine. *Id.* ¶ 26.

Defendants announced the proposed joint venture on June 19, 2019. *Id.* ¶ 30. If consummated, the JV would combine **Peabody** and Arch's PRB and Colorado mining assets. *Id.* The JV would be 66.5% owned by **Peabody** and 33.5% owned by Arch, *id.* ¶ 31, and **Peabody** would serve as the JV operator and handle coal marketing for the JV. PX1564-004. The JV would control approximately 65-70% of all SPRB coal

produced, PX8001 Fig. 22, and would operate five of the top ten most productive mines in the United States. PX1564-005.

Defendants contend that the JV will combine their Colorado and SPRB mining assets in a "highly synergistic joint venture aimed at strengthening coal's competitiveness against natural gas and renewables, while creating substantial value for customers and shareholders." Defendants' Proposed Findings of Fact and Conclusions of Law ("DPFFCL") (Doc. [404]) ¶ 50; DX8696-001. The JV would join **Peabody's** NARM mine with Arch's Black Thunder mine into a single mining complex. DPFFCL ¶ 50; DX8696-002. Currently, the two mines neighbor one another but are separated by a seven-mile property line. *Id.*

III. The FTC's Challenge and Procedural History

On February 25, 2020, the **FTC** initiated an administrative proceeding challenging the JV under Section 7 of the Clayton Act ***882** and Section 5 of the **FTC** Act. JSUF ¶ 32. The following day, the **FTC** initiated this litigation, filing a complaint seeking a temporary restraining order ("TRO") and preliminary injunction blocking the JV pursuant to Section 13(b) of the **FTC** Act. *Id.* ¶ 33. On February 28th, the **FTC** and Defendants stipulated to, and this Court ordered, a TRO blocking Defendants from consummating the JV pending this Court's adjudication of the **FTC's** motion for a preliminary injunction. *Id.* ¶ 34.

The parties originally intended to conduct a preliminary injunction hearing in June 2020. Because of delays caused by the ongoing COVID-19 pandemic, that schedule was amended twice, giving the parties more time to adjust to rapidly evolving health guidelines and public safety risks and to conduct heroic amounts of written discovery and scores of depositions.

Even with those delays, this case was litigated at breakneck speed. Less than five months after the **FTC's** initial filing in this Court in late February, the parties conducted a nine-day preliminary injunction hearing from July 14th through the 24th, during which the parties admitted hundreds of exhibits and presented testimony from dozens of witnesses.[7] On August 3rd, the parties filed proposed findings of fact and conclusions of law, and on August 10th, the parties presented their closing arguments to the Court.

LEGAL STANDARD

Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18. When the **FTC** has "reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act," it may seek a preliminary injunction under Section 13(b) of the **FTC** Act to "prevent a merger pending the Commission's administrative adjudication of the merger's legality." *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997) ("*Staples I*") (citing 15 U.S.C. § 53(b)).[8]

[1] [2] [3] The standard for a preliminary injunction described in Section 13(b) of the **FTC** Act differs from the more familiar preliminary injunction standard applied in other contexts. *F.T.C. v. Sysco **Corp.***, 113 F. Supp. 3d 1, 22 (D.D.C. 2015). A preliminary injunction may be granted in an antitrust case if the **FTC** shows that "weighing the equities and considering the Commission's likelihood of ultimate success, such ***883** action would be in the public interest." *F.T.C. v. Tenet Health Care **Corp.***, 186 F.3d 1045, 1051 (8th Cir. 1999) (quoting 15 U.S.C. § 53(b)). In order to demonstrate such a likelihood of ultimate success, "the **FTC** must raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the **FTC** in the first instance and ultimately by the Court of Appeals." *F.T.C. v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995) (quotation omitted). "A showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief." *Tenet Health*, 186 F.3d at 1051 (citing *Freeman Hosp.*, 69 F.3d at 267).

[4] [5] [6] [7] [8] [9] In *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990), the D.C. Circuit established a burden-shifting framework for evaluating the **FTC's** likelihood of success on the merits. The Eighth Circuit has analyzed, endorsed, and applied the *Baker Hughes* burden-shifting framework in the context of an alleged Clayton Act violation. *See F.T.C. v. Sanford Health*,

926 F.3d 959 (8th Cir. 2019). The Eighth Circuit described the framework:

> Under this approach, the [**FTC**] must first present a prima facie case that the merger will result in an undue market concentration for a particular product or service in a particular geographic area. That showing creates a presumption that the merger will substantially lessen competition. The burden of production then shifts to the defendant[s] to rebut the presumption, and, on a sufficient showing, back to the [**FTC**] to present additional evidence of anticompetitive effects. The ultimate burden of persuasion remains at all times with the [**FTC**].

Id. at 962-63. "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.* "[A] failure of proof in any respect will mean the transaction should not be enjoined." *F.T.C. v. Arch Coal*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004). The court must also weigh the equities, but if the **FTC** is unable to demonstrate a likelihood of success, the equities alone cannot justify an injunction. *Id.*

DISCUSSION

I. Market Definition

[10] The **FTC's** initial burden, then, is to demonstrate that there is a relevant market in which the proposed JV is likely to harm competition relative to the "but-for" world in which there is no JV. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *Sanford*, 926 F.3d at 962-63 (describing market definition and burden-shifting framework); Horizontal Merger Guidelines [9] ("Guidelines") § 1 (merger analysis normally requires "an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not"); *F.T.C. v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979) ("[W]hen examining a merger, a court must necessarily compare what may happen ***884** if the merger occurs with what may happen if the merger does not occur.").

This initial step is mission-critical for all **FTC** merger challenges. *United States v. Marine Bancorp.*, 418 U.S. 602, 618, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (Market definition is " 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (quoting *United States v. E.I. du Pont De Nemours & Co.*, 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957)); *Tenet Health*, 186 F.3d at 1051 ("Without a well-defined relevant market, a merger's effect on competition cannot be evaluated. It is thus essential that the **FTC** identify a credible relevant market before a preliminary injunction may properly issue.") (citation omitted); *Freeman Hosp.*, 69 F.3d at 268 ("Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning."). This case is no exception. If the **FTC** does not produce sufficient evidence for its proposed market definition —and satisfactorily address Defendants' objections thereto— it will be very difficult to justify its request for a preliminary injunction against the JV. *See, e.g.*, *F.T.C. v. RAG-Stiftung et al.*, 436 F.Supp.3d 278, 287 (D.D.C. 2020) (The **FTC's** failure "to properly define a market in terms of both product and geography ... all but precludes the Court from siding with it.").

[11] **[12]** **[13]** "A relevant market consists of two separate components: a product market and a geographic market." *Freeman Hosp.*, 69 F.3d at 268. "First, the 'relevant product market' identifies the product and services with which the defendants' products compete. Second, the 'relevant geographic market' identifies the geographic area in which the defendant competes in marketing its products or service." *Arch Coal, Inc.*, 329 F. Supp. 2d at 119; *see also* *F.T.C. v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009) (same). In this case, the principal question in the market definition phase is the relevant product market. If the **FTC** succeeds in defining the product market as SPRB coal, the geographic market follows rather uncontroversially from that conclusion. Therefore, the Court will focus first on the parties' positions on the relevant product market.

A. Relevant product market

[14] **[15]** A product market is defined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. *See also Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, Case No. 4:10-cv-645-CDP, 2011 WL 403121, at *2 (E.D. Mo. Feb. 1, 2011) ("[T]he relevant product market includes all reasonably interchangeable products."). In other words, a properly defined product market includes the functionally similar products to which customers could turn if the JV attempted to impose a post-closing price increase. *See Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 596 (8th Cir. 2009) (noting focus is whether "consumers will shift from one product to the other in response to changes in their relative costs"); *F.T.C. v. R.R. Donnelley & Sons Co.*, Case No. 90-1619-SSH, 1990 WL 193674, at *2 (D.D.C. Aug. 27, 1990) ("If customers are able to substitute one product or service in response to a nontrivial increase in the price of another, these products or services must fall within the same product market.").

[16] **[17]** A relevant product market need not be defined around a *single* product. *See United States v. Grinnell Corp.*, 384 U.S. 563, 572, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) ("We see no barrier to combining in a single market a number of different products or services where that ***885** combination reflects commercial realities."); *Sysco*, 113 F. Supp. 3d at 26 ("The 'product' that comprises the market need not be a discrete good for sale."); *see, e.g.*, *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). Also, "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Staples I*, 970 F. Supp. at 1075. Rather, the critical question is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *Id.* at 1074 (quotation omitted); *see also Sysco*, 113 F. Supp. 3d at 26 ("[M]arket definition hinges on whether consumers view the products as reasonable substitutes.") (internal quotation marks and citation omitted).

Here, the **FTC** insists that the market for SPRB coal satisfies all applicable criteria for a relevant product market. Defendants counter that the electricity industry is so complex and dynamic that the JV cannot reasonably be evaluated in the context of the market for SPRB coal alone. Instead, they urge this Court to define the relevant product market for evaluation of the JV more broadly, to include not only other kinds of coal but also other fuels that compete with coal in the electricity generation market. Resolution of this critical question has been complicated by a recurring theme of this litigation: "There is no industry like the electricity industry." Tr. Vol. 6A (Carey) 24:8-9. The parties took great pains to educate the Court about the idiosyncrasies of that industry, though, and the Court has done its best to take them into account in its evaluation of their proposed relevant product markets.

Courts have various tools with which to determine whether to adopt the **FTC's** proposed relevant product market, including quantitative approaches, such as the hypothetical monopolist test ("HMT"), and qualitative approaches, such as the factors laid out in *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. The parties here have discussed both the HMT and *Brown Shoe*. And both sides have made compelling points in favor of their preferred product markets, as outlined below. Considering all of the evidence, though, both quantitative and qualitative, the Court finds that SPRB coal is the relevant product market in which to evaluate the competitive effects of the proposed JV.

[18] Crucial to the Court's conclusion is the "narrowest market principle." A broad product market (e.g., American electricity production) may contain smaller markets (e.g., the markets for each of the individual sources of fuel or markets consisting of power producers in a certain region) which themselves "constitute [relevant] product markets for antitrust purposes." *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. If **Peabody** and Arch compete in multiple product markets, the JV will be illegal under the Clayton Act if it causes substantial competitive harm in *any* of those markets. *United States v. Cont'l Can Co.*, 378 U.S. 441, 458, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502 ("Because [Section 7] of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce,' it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition.") (internal citations omitted).

[19] Because competitive harm in *any* relevant product market is enough to make out a prima facie case for violation of the Clayton Act, and because potential ***886** harms to competition will likely be less apparent in a broader, less concentrated market than in a narrower included market, this Court's task is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant product market. *See* *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31, 73 S.Ct. 872, 97 L.Ed. 1277 (1953) ("The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn."); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 58-60 (D.D.C. 2011) (explaining "the principle that the relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test"). The prospective merger's likely competitive effects on *that* market will determine its legality. *See* Guidelines § 4.1.1; *Sysco*, 113 F. Supp. 3d at 26-27; *Arch Coal*, 329 F. Supp. 2d at 120; *Tronox*, 332 F. Supp. 3d at 201-02.

It is indisputable on the record in this case that coal competes with natural gas and renewables in a broader **energy** market. Still, the **FTC** has presented more than sufficient evidence that there is *also* a distinct competitive market among SPRB coal producers that satisfies the applicable criteria for market definition. Because the SPRB coal market satisfies the relevant criteria and is narrower than the **energy** market writ large, that is the market within which the Court must evaluate the legality of the proposed JV. *Cont'l Can Co.*, 378 U.S. at 458, 84 S.Ct. 1738; *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502.

In determining the relevant product market for analysis of the proposed JV, the Court has considered the **FTC's** application of the HMT, the parties' criticisms and defenses thereof, and each of the *Brown Shoe* practical indicia. The Court will address each of these considerations in turn.

1. Hypothetical Monopolist Test

The **FTC** argues that the HMT, which is "commonly used in antitrust actions to define the relevant market," *Sanford*, 926 F.3d at 963, demonstrates that the relevant product market here is the market for SPRB coal. PPCL ¶¶ 19-21; *see also* Guidelines § 4.1.1 (The **FTC** "employ[s] the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets.").

[20] **[21]** The HMT is an analytical method that asks "whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products." *F.T.C. v. Staples, Inc.*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016) ("*Staples II*"). If a firm with a monopoly over the products in a candidate market could profitably impose a small but significant non-transitory increase in price ("SSNIP"), then that market constitutes a relevant product market for antitrust purposes. Guidelines § 4.1.1. Federal agencies, including the **FTC**, usually use a SSNIP of 5% of prices absent the merger in their analyses of prospective mergers. *Id.* § 4.1.2. Neither party has argued that 5% is an inappropriate SSNIP to use in the Court's application of the HMT to the JV.

a. The **FTC's** HMT analysis

Dr. Nicholas Hill, an antitrust economist, gave expert testimony on behalf of the **FTC** regarding implementation of the HMT to assess whether SPRB coal is properly defined as the relevant product market for evaluation of the proposed JV. Plaintiff's Proposed Findings of Fact ("PPFF") (Doc. [395]) ¶¶ 38-40; PX8001 (Hill Report) ¶¶ 80-84. Dr. Hill implemented the HMT using the critical elasticity ***887** method, Tr. Vol. 4A (Hill) 25:10-13, which he testified is a long-established and well accepted method, Tr. Vol. 9B (Hill) 82:21-83:10. To apply the method, Mr. Hill first calculated the critical elasticity, which is based on industry margins and a 5% SSNIP. PX8001 (Hill Report) ¶ 115; Tr. Vol. 4A (Hill) 26:6-17, 27:2-28:13. Next, Dr. Hill calculated the actual price elasticity of demand for SPRB coal, using standard econometric techniques on real-world data sources. PX8001 (Hill Report) ¶ 114; Tr. Vol. 4A (Hill) 26:18-23, 28:14-25. Finally, Dr. Hill compared the critical elasticity to the actual elasticity: If the actual price elasticity of demand is lower than the critical elasticity, the HMT is satisfied, and the group of products is a properly defined relevant product market for antitrust purposes. PX8001 (Hill Report) ¶ 113; Tr. Vol. 4A (Hill) 29:3-9.

In order to calculate critical elasticity, one must use an industry margin. The parties gave very different estimates of industry SPRB coal margins at the hearing, ranging from negative margins (*i.e.*, Defendants lost money on SPRB coal sales) to margins in excess of 30%. Dr. Hill relied on the average industry variable cost margin based on Defendants' own accounting data. PX8001 (Hill Report) ¶ 250. Dr. Mark Israel, one of Defendants' experts, presented a different margin based on a different categorization of certain costs as variable, decreasing the margin. Tr. Vol. 9B (Israel) 29:16-20. The **FTC** argues that Dr. Hill's margin calculations apply a more consistent methodology than Dr. Israel's. PPFF ¶ 45. The Court feels no need to resolve that dispute, because Dr. Hill explained that his methodology, which resulted in a *higher* margin, made the HMT *more* stringent and *more* difficult for the proposed relevant product market to satisfy. Tr. Vol. 4A (Hill) 132:15-133:6. Thus, the use of Dr. Israel's lower margin with the HMT would presumably have yielded results even more strongly supportive of the **FTC's** proposed market. Moreover, Defendants never argued that a different set of margins would have led to a different outcome on the HMT, so choosing between Dr. Hill's and Dr. Israel's margin calculations would be an academic exercise.

The actual price elasticity of demand is an economic metric for how many sales a product (here, SPRB coal) would lose in response to a small change in price. PX8001 (Hill Report) ¶ 107. It is another signifier of how closely potential substitutes, such as natural gas or other fuels, compete with SPRB coal, in that a higher price elasticity of demand suggests that customers can easily switch to an alternative, whereas a lower elasticity means that customers cannot. *See id.* ¶ 149. Dr. Hill estimated the actual price elasticity of demand for SPRB coal using five different data sets drawn from real-world market sources. *Id.* Fig. 21; PX8006 (Hill Rebuttal Report) Fig. 73; Tr. Vol. 4A (Hill) 30:19-48:8. In all of Dr. Hill's elasticity estimates, the actual price elasticity of demand for SPRB coal was relatively low. PX8001 (Hill Report) ¶ 117. According to the **FTC**, this finding, which takes into account the competitive pressures from potential substitutes like natural gas, means that customers of SPRB coal, viewed in the aggregate, are likely to continue purchasing SPRB coal in the face of a small increase in price. *Id.* ¶¶ 149-50; Tr. Vol. 4A (Hill) 47:21-49:14. None of Defendants' experts calculated an alternate value for the price elasticity of demand for SPRB coal. Tr. Vol. 9B (Hill) 52:3-11. Thus, according to the **FTC**, Dr. Hill' analysis proves that SPRB coal satisfies the HMT and constitutes the relevant product market in which to consider the legality of the proposed JV.

b. Defendants' response to the HMT

Defendants assert three objections to Dr. Hill's analysis of the relevant product ***888** market based on the HMT: Dr. Hill's HMT fails to incorporate the effects of dynamic competition; it contradicts real-world facts; and it is inconsistent with the realities of merit-order dispatch.

i. Dynamic versus static competition

First, Defendants argue that Dr. Hill's HMT analysis is fundamentally flawed because "[t]he electricity generation marketplace is uniquely complex and subject to multiple levels of dynamic competition." DPFFCL ¶ 182. They contend that "dynamic competition and the ever-present risk of coal EGU retirements and resulting permanent loss of SPRB coal demand" would prevent a hypothetical SPRB coal monopolist from increasing SPRB coal prices, thereby risking a permanent reduction in future coal demand. *Id.* ¶ 183.

According to Defendants, "[a] hypothetical SPRB coal monopolist considering a price increase must account not just for short-term potential lost sales volume to other fuels, but also for the coal demand that will be lost due to longer-term changes in generation strategies, including the permanent loss of demand when coal EGUs are retired." *Id.* ¶ 185. As Defendants' expert, Dr. Elizabeth Bailey, an antitrust economist at NERA Economic Consulting, explained at the hearing, "if the price of SPRB coal were to go up by a small amount ... in the short run, that has an effect on utilization or dispatch. And then in the medium and longer run, that has an effect on dynamic substitution, these changes in generation strategies." Tr. Vol. 7A (Bailey) 29:23-30:3.

In a world with dynamic competition, Defendants argue, competition from natural gas and renewables triggers two types of "bad news" for SPRB coal producers and consumers: (1) declining utilization of coal-powered generation, as ISOs dispatch fewer coal-fired EGUs as a result of relatively cheaper alternative sources of **energy**; and (2) a decline in wholesale electricity prices, causing all EGUs to be paid a lower market-clearing price when they run. Tr. Vol. 7A (Bailey) 46:18-48:11. These forces mean that if a hypothetical monopolist attempted to increase SPRB coal prices, both short-run and longer-run demand would fall, driving dynamic substitution away from SPRB coal. *Id.*;

DPFFCL ¶ 187. As described in Section I(D)3, above, such dynamic substitution can take multiple forms: a shift to seasonal operations; entering into power purchase agreements with other electricity generators; accelerating investments in alternative generation sources; accelerating retirement decisions; or retiring a unit immediately and permanently. Tr. Vol. 7A (Bailey) 31:23-32:17. This combination of static and dynamic substitution affects all SPRB coal-powered EGUs, regardless of efficiency. Thus, Defendants claim, even relatively efficient coal-powered EGUs "have made dynamic changes in generation strategy in response to competition from other fuel sources." DPFFCL ¶ 190 (citing Tr. Vol. 7A (Bailey) 50:15-52:7).

As an example of how this dynamic substitution occurs, Defendants point to [Redacted] DPFFCL ¶ 189. [Redacted] but as competition from natural gas and subsidized renewables increased, [Redacted] Tr. Vol. 7A (Bailey) 34:19-35:3 [Redacted] evaluated a range of options, from buying **energy** off the grid through power purchase agreements, shifting to seasonal operations, temporarily idling or "mothballing" the plant, and then finally retiring the plant. *Id.* at 35:4-36:1; DX1055-0004 [Redacted] operating environment has changed drastically over the last several years, transitioning from base load operations to load following, and now reconsidering reserve shut down scenarios. This is largely driven by falling natural gas prices which drive down ERCOT wholesale market ***889** prices, ample generation capacity in ERCOT, and the continued growth of renewables in the ERCOT market."). Arch [Redacted] to try to make [Redacted] more competitive with *other* ***energy*** *sources*—critically, not in an attempt to undercut competing SPRB coal suppliers or as a result of an RFP. [Redacted] While Arch was ultimately unsuccessful and [Redacted] Defendants argue that this example shows that they are in close competition with other sources of **energy**, perhaps even closer competition than they are in with other SPRB coal producers, and that they are highly sensitive to dynamic competition.

Dr. Israel explained that this dynamic competition affects how a rational, profit-maximizing coal producer will operate. DX4003 (Israel Report) ¶¶ 84-130. In a counterfactual coal-only world with only static competition, if the JV raised prices and found that its lost sales rendered the price increase unprofitable, it could lower its prices to regain the market share lost by the earlier price increase. *Id.* ¶ 85. However, in a world with competition from other fuel sources, SPRB coal producers must consider the risk that raising prices would induce customers to accelerate coal EGU retirements, permanently reducing demand and making it impossible to return to the pre-price-increase world simply by lowering prices. *Id.* ¶¶ 86-87. According to Defendants, Dr. Hill's HMT estimates only the immediate, static substitution caused by shifts in the dispatch curve, which misses longer-term dynamic risks and therefore cannot explain decisions like those made by [Redacted] in regard to its [Redacted] plant and by Arch in trying to [Redacted]. DPFFCL ¶ 193. Customers, on the other hand, recognize the reality of dynamic competition, and use the threat of dynamic substitution to obtain more competitive pricing in RFPs. *Id.*; [Redacted] (acknowledging that [Redacted] uses the threat of coal plant retirements or seasonal shutdowns to get better pricing from SPRB coal suppliers).

In rebuttal, Dr. Hill notes that his application of the HMT does capture dynamic substitution of the sort described by Defendants' experts, such as the risk of plant retirement, in his calculation of the price elasticity of demand. Tr. Vol. 9B (Hill) 50:8-13. One of Dr. Hill's estimates of this elasticity was explicitly based on plant closures, *i.e.*, the relationship between SPRB coal prices and the probability of closures of SPRB coal plants. *Id.* at 50:15-18. Dr. Hill concluded that SPRB prices have only a modest impact on plant closures and, therefore, on SPRB demand. PX8006 (Hill Rebuttal Report) ¶¶ 93-94, 174.

Dr. Israel argued that Dr. Hill's plant closure elasticity was flawed because it looked at only the likelihood of retirement in the next year, and the elasticity should be increased (possibly by as much as a factor of 10) to account for the long-run effect of plant closures. Tr. Vol. 9A (Israel) 51:15-52:5. As Dr. Hill explained, however, if there is a price increase in year one, any plants that close are likely to be plants that were already marginal economically, perhaps because of their old age or small size. Tr. Vol. 9B (Hill) 50:22-51:13. If a plant survives the price increase in year one, and the price increase persists, then the surviving plant is relatively unlikely to close in the following years because the fact of its survival in the first year suggests it is a relatively healthier plant. *Id.* Therefore, Dr. Hill contended, multiplying his elasticity based on the prospect of plant closures by a factor of 10 would not yield a more accurate result.

ii. Real-world facts

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Defendants also argue that, in addition to failing to account for dynamic competition, Dr. Hill's HMT contradicts real-world ***890** facts. DPFFCL ¶ 194. Dr. Bailey explained that key economic indicators for SPRB coal producers, such as margins, prices, and production, belie the **FTC's** theory of an oligopoly with increasing concentration. Tr. Vol. 7A (Bailey) 53:5-55:1; DX4001 (Bailey Report) Exs. 11, 19, 23, 43. For instance, her analysis shows that, as production in the SPRB has become more concentrated and the overall number of SPRB coal producers has stayed constant, margins have *fallen.* Tr. Vol. 7A (Bailey) 53:21-54:13; DX4002 (Bailey Rebuttal Report) Exs. 2, 3. According to Dr. Bailey, this means that "the decline that we're seeing in the profit margins is not being driven by entry or a change in the number of suppliers or what that market structure looks like." Tr. Vol. 7A (Bailey) 55:20-56:1. Instead, she hypothesizes that the changing price of natural gas can explain these real-world facts. *Id.* at 55:2-19.

Dr. Hill denies that his application of the HMT is in tension with real-world facts. He levels two criticisms at Dr. Bailey's analysis, both based on the underlying fact that Dr. Bailey's comparison of SPRB coal margins and the price of natural gas between 2010-2011 (the "high gas price" period) and 2017-2019 (the "low gas price" period) is labeled an "event study" but is in fact not based on any event at all. Tr. Vol. 9B (Hill) 61:8-62:4. First, he argues that the comparison cannot show what caused declining SPRB coal margins. *Id.* For example, between those two time periods, strip ratios increased and new environmental regulations were implemented, both of which would be expected to diminish margins. *Id.* at 62:5-19. Dr. Bailey's study, which is not centered around any event, offers no insight into what drove down SPRB coal margins during the time periods she selected; rather, it simply shows that SPRB coal margins did in fact decline. In the absence of further evidence, new environmental regulations and increasing strip ratios—both acknowledged by Defendants at the hearing—explain decreasing SPRB coal margins as convincingly as declining natural gas prices.

This conclusion is bolstered by Dr. Hill's second criticism of Dr. Bailey's analysis: Because the "event" study lacks an event, there is nothing constraining the analysis to 2010-2011 as a control period for high gas prices. In his rebuttal report, Dr. Hill showed that Dr. Bailey's purported findings evaporate when her analysis is performed with 2013-2014 as a control period, rather than 2010-2011—even though gas prices were very similar in both years. *Id.* at 62:20-65:3; PX8006 (Hill Rebuttal Report) ¶¶ 121, 124. [10] Meanwhile, between those two time periods, major environmental regulations had begun being implemented, providing a plausible alternative explanation for declining margins. Tr. Vol. 9B (Hill) 64:10-65:3. Rather than conduct a regression analysis to determine how natural gas prices affect SPRB coal margins, Defendants rely on a flawed "event" study that fails to prove that Dr. Hill's HMT analysis diverges from real-world facts.

iii. Merit-order dispatch

Finally, Defendants' argue that Dr. Hill's HMT is inconsistent with the reality of merit-order dispatch. A hypothetical monopolist, they argue, could not successfully impose a SSNIP because ISOs apply merit-order dispatch to decide which ***891** EGUs run. Any increase in SPRB coal prices relative to other fuels will result in coal EGUs bidding into the ISO at higher prices and dispatching less frequently. DPFFCL ¶ 200. Therefore, a SSNIP would cause utilities, who want their EGUs to dispatch and therefore get paid, to switch from coal to other fuels—both in the short term by reducing coal burn and purchases and in the long term by shifting electricity generation resources away from coal EGUs toward EGUs powered by other fuels that are likely to be dispatched more frequently. *Id.* Defendants called six witnesses responsible for procuring coal (on behalf of Entergy, NIPSCO, NPPD, AEP, Southern Company, and DTE **Energy**) who testified that they would switch to other fuels if SPRB coal prices increased. *See, e.g.*, Tr. Vol. 7B (Fuller) 23:22-24:16 (explaining how capacity factors at Southern's various plants affect the company's fossil fuel procurement strategy).

Against Defendants' witnesses claiming that they would switch fuel sources if SPRB coal prices rose, the **FTC** presented seven witnesses stating the opposite. *See, e.g.*, [Redacted] purchasing of SPRB coal would not be affected by a 5 percent increase in SPRB coal prices because natural gas still would not be competitive). While the **FTC** cannot meet its burden by offering evidence from a limited subset of customers, *see R.R. Donnelley*, 1990 WL 193674, at *2 ("Isolated segments with isolated customers do not make for a separate product market."), Defendants have not substantiated their claim that the subset of customers who testified for the **FTC** "are not representative of the market." *U.S. v. Engelhard*, 126 F.3d 1302, 1306 (11th Cir. 1997). Customers representing almost 90% of all SPRB coal sales

were subpoenaed in this action, and customers representing over 75% of all SPRB coal sales were deposed. PX8001 (Hill Report) Fig. 42. Customers called by the **FTC**, including such Fortune 500 heavyweights as Ameren and Xcel, account for about 33% of SPRB coal sales. Tr. Vol. 1A (**FTC** Opening) 54:22-55:15. Defendants cannot reasonably maintain that the **FTC** has to call every SPRB coal consumer or prove that not a single one of Defendants' customers will desert them in the event of a SSNIP. And they provide the Court with no reason to regard the customers called by the **FTC** as any less representative than the witnesses called by Defendant—or the coal customers whom neither party called, for that matter.

In addition, the **FTC** has presented factual evidence that customers will accept, and in fact have accepted, price increases in the range of a SSNIP without decreasing their coal purchases. As will be discussed in greater depth in Section II.C, below, the Black Lung Excise Tax ("BLET"), which is a tax paid by coal suppliers but not suppliers of other fuels, increased at the beginning of 2020. [Redacted] Tr. Vol. 3A (Smith) 16:16-18:1, PX6046 (Galli) 132:23-136:21. Five customers testified that they did not reduce coal burn or consider reducing their future projected coal purchases as a result. PPFF ¶ 141 (collecting testimony). The reason is simple: Utilities "still need the coal to fuel [their] power generating units to supply electricity for [their] customers." [Redacted]

This last observation also undermines Defendants' reliance on *U.S. v. Sabre* ***Corp***., 452 F.Supp.3d 97, 126 (D. Del. 2020), as an example of a court finding an economic expert's SSNIP test unpersuasive where the expert relied on an inaccurate assumption that ignored industry realities. *See* DPFFCL ¶ 199. That expert's SSNIP tests "assume[d] that an airline confronted with a hypothetical price increase has only two choices: pay the increase or walk away." ***892** *Sabre*, 452 F.Supp.3d at 126. The court held that that assumption ignored the fact that "airlines also have the ability to withhold consent or not reach a deal" with the hypothetical monopolist and instead try to steer business to other places. *Id.* (internal quotation and citation omitted). The industry in *Sabre* (the airline travel industry) differs from the electricity industry in a critical way: Utilities are *legally obligated* to provide electricity to their customers. *See*, [Redacted] They cannot simply choose to "not reach a deal," *Sabre*, 452 F.Supp.3d at 126, but rather must generate electricity—including from SPRB coal, if their EGUs are designed to burn it—in order to meet those obligations. SPRB coal customers are, to that extent, different from customers in many other industries. The Court will not rely on arguments that "ignore[ ] industry realities." *Sabre*, 452 F.Supp.3d at 144.

c. Conclusion of HMT analysis

The **FTC** has presented substantial legal authority supporting the use of the HMT for questions of market definition that are relevantly similar to the one faced by this Court. *See Sanford*, 926 F.3d at 963-64; *Tronox*, 332 F. Supp. 3d at 204; *Sysco*, 113 F. Supp. 3d at 33-34; *H & R Block*, 833 F. Supp. 2d at 51-52. Every industry has its idiosyncrasies. Defendants have not persuaded the Court that the **energy** industry is so different from all other industries that a standard, well-accepted analytical tool like the HMT must be discounted entirely, or that the Court should favor Defendants' less scientific approach to market definition. Dr. Hill cogently explained his execution of the HMT and persuasively rebutted Defendants' criticisms of it. And those (ultimately unsuccessful) criticisms of Dr. Hill's analysis did nothing to undercut the HMT's usefulness as an analytical tool for determining how to define the relevant product market. *See Sanford*, 926 F.3d at 963 (the HMT "is commonly used in antitrust actions to define the relevant market.") (citing *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015)).

2. *Brown Shoe* factors

[22] **[23]** **[24]** The HMT is not the only method for determining a relevant product market, however. Following the Supreme Court's decision in *Brown Shoe*, courts also often consider whether a candidate market is characterized by certain "practical indicia," including "industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct consumers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325, 82 S.Ct. 1502. These factors are not rigidly applied.[11] *See Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 614 (8th Cir. 2011) ("[T]he presence of some [indicia], and absence of others, is not dispositive."). Ultimately, "the determination

of the relevant market ... is 'a matter of business reality – [ ] of how the market is perceived by those who strive for profit in it.' " *Cardinal Health*, 12 F. Supp. 2d at 46 (quoting *F.T.C. v. Coca–Cola Co.*, 641 F.Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987)).

Both sides have argued persuasively that certain *Brown Shoe* factors support ***893** the Court's use of their preferred market. Specifically, Defendants have established that there is robust industry and public recognition of interfuel competition and that the prices for SPRB coal are affected by the prices of other fuels. The **FTC**, meanwhile, has demonstrated industry recognition of an SPRB coal market, plus it has established that SPRB coal has distinct customers, distinct and desirable characteristics, and unique production facilities. The **FTC** has even shown that SPRB coal prices are sufficiently distinct to satisfy *Brown Shoe*. On the whole, therefore, although Defendants again remind the Court of the competition between SPRB coal and other fuel sources, they do not undermine the **FTC's** argument that the SPRB coal market has the "practical indicia" of a relevant product market. The fact that Defendants' proposed product market might also satisfy certain *Brown Shoe* factors does nothing to counter the evidence—both quantitative and qualitative—that SPRB coal qualifies as a relevant product market within which to evaluate the effects of the proposed JV.

a. Industry or public recognition

[25] The first *Brown Shoe* factor evaluates how industry participants recognize competitive realities. "The industry or public recognition of the submarket as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986) (quotation marks omitted). Defendants focused exhaustively on this factor, presenting voluminous evidence reflecting industry assessments that coal is in competition with rival fuels in an expansive **energy** market. *See* DPFFCL ¶¶ 77-100. The **FTC** countered with evidence of industry acknowledgment that SPRB coal companies compete principally against each other. *See* PPFF ¶¶ 11-15. Unfortunately for Defendants, the industry recognition arguments presented by the two sides are not mutually exclusive. The Court finds both sides' narratives to be true.

Defendants provided evidence from four sources showing industry recognition of interfuel competition: the EIA; SPRB coal customers; coal producers; and industry analysts. First, they point out that the EIA has recognized competition among fuels used to generate electricity, explaining that "[t]he competition of coal and natural gas for electricity generation plays an important role in setting wholesale electricity prices." DX8007-0002; *see also* DX8746-0001 ("The primary driver of [2016] low wholesale electricity prices was the sustained low cost of natural gas, which is the fuel that often determines the marginal generation cost in most power markets."). The EIA has observed that the increase in natural-gas fired generation has come "largely at the expense of coal-fired generation," DX8746-0001, and that the "primary driver" in the decline in coal-fired generation is "increased output from natural gas-fired plants and wind turbines." DX8012-0001. The EIA confirms what Drs. Bailey and Israel explained: A decline in utilization "leads to a decline in revenues at a plant, which generally translates to lower operating margins, less ability to cover costs, and in many cases, retiring that capacity." DX8743-0002. Moreover, the EIA predicts that this interfuel competition will continue. *Id.* ("Because of more competitive natural gas prices, more advanced natural gas combined-cycle generators, and the increasing efficiency of the natural gas generator fleet, the EIA expects more coal-fired generators to retire, especially within the next decade.").

Second, Defendants point to statements from their customers acknowledging competition ***894** between SPRB coal and other electricity generation sources. [Redacted] testified that "[c]oal generation competes against gas every hour of every day." [Redacted] stated that "[t]he decline in coal-fired generation, the decline in coal production, the decline in coal prices have been caused by the **energy** market, not caused by competition between the coal producers." [Redacted] testified the "primary source of competition" facing SPRB coal today is "the overall **energy** market," including "lower cost alternatives like wind and natural gas, solar, nuclear and hydro." [Redacted] And [Redacted] agreed that "[n]atural gas is by the far the biggest threat to coal demand." [Redacted] Defendants were even able to cite testimony from more than half a dozen customers who were called as witnesses by the **FTC**, acknowledging the competition between natural gas and coal. DPFFCL ¶ 84 (collecting testimony). These statements accord with the reality of merit-order dispatch

within ISOs. *See, e.g.,* [Redacted] (describing how MISO compares EGUs "based on the operating costs of that unit," regardless of fuel source); *see also* DPFFCL ¶¶ 85-86 (collecting witness statements on the effects of ISO/RTOs on interfuel competition).

In addition to customer testimony, Defendants cite customers' ordinary course documents as evidence that SPRB coal customers recognize the significance of interfuel competition. *See* DPFFCL ¶ 87. For example, NIPSCO's 2018 Integrated Resource Plan ("IRP") states:

> The market is currently undergoing change as coal capacity retires and the generation mix shifts toward renewables and natural gas. In recent years, low natural gas prices have resulted in efficient natural gas plants displacing coal-fired generation in the dispatch stack. This dynamic has altered **energy** prices and has negatively impacted the economics of coal plants.

DX1012-0019. An economic consultant for [Redacted] stated that one of the "key drivers" of its coal demand forecast was "how the relationship between natural gas and coal commodity prices influences fuel-switching between coal and natural gas." DX2061-0009; *see also* [Redacted] (discussing DX2061). And in an internal email, an employee of [Redacted] an SPRB coal customer, stated, "the play here is not coal to coal competition, but really coal versus [natural gas], solar, etc." DX7015-0001; *see also* DX6071 ("I can certainly understand how this gas market is impacting Powder River Basin. We will end the year with surplus inventories at all of our power plants since our plans did not see this low of gas prices in the forecast.").

Third, Defendants cite evidence of coal producers' own recognition of the reality of interfuel competition. *See* DPFFCL ¶ 89. Virtually every employee of Arch or **Peabody** to testify at the hearing spoke to this competition. *See, e.g.*, Tr. Vol. 3A (Smith) 58:25-59:9; 67:20-68:25; Tr. Vol. 5A (Kellow) 14:15-21. And Defendants submitted evidence that other coal producers, [Redacted], likewise recognize the significance of competition from other fuel sources, particularly natural gas. *See* DPFFCL ¶¶ 91-93.

The Court recognizes the risk of relying on such testimony, particularly when it comes from Defendants' employees. However, these opinions do not appear to have been concocted for the purposes of this hearing. They are reflected pervasively in Defendants' ordinary course documents, which "courts often pay close attention to" when determining the relevant product market. *H & R Block*, 833 F. Supp. 2d at 52; *see* DPFFCL ¶ 94. Defendants' ordinary course documents support their testimony that coal producers view other fuels ***895** to be their competitors, as well as other SPRB coal producers. *See, e.g.*, DX5004-0007 ("We are also focused on developing creative contract structures to increase burn and to provide our customers cost competitive coal to compete against other alternatives."); DX6023-0049 [Redacted] DX6089-0020 [Redacted]; DX6191 [Redacted] DX6078 [Redacted] DX5022 ("The forward gas curves are so low, that [Redacted] plans to wait for 2023 purchases."); DX6073 [Redacted] DX6081 [Redacted] DX1040-0001 [Redacted]

Taken together, these ordinary course documents make abundantly clear that SPRB coal producers, including Defendants, take themselves to be competing in the **energy** marketplace with other fuels, especially natural gas. *Contrast United States v. Aetna*, 240 F. Supp. 3d 1, 44-45 (D.D.C. 2017) (regular course documents showed that each merging party viewed the other as their greatest competition); *H & R Block*, 833 F. Supp. 2d at 52-54 (same).

Finally, Defendants point to the fact that industry analysts recognize that other fuels used to generate electricity are a competitive constraint on SPRB coal. *See* DPFFCL ¶¶ 95-100. One industry observer, [Redacted] found that "PRB coal is ... greatly challenged by wind and natural gas competition," and that "[n]atural gas is by far the biggest threat to coal demand" and "has displaced hundreds of millions of [tons of] annual coal demand," DX1501-0009,-0018. [Redacted] further reported that it was "seeing a tight relation to coal burn and natgas prices. Even the small pickup in natgas pricing last week resulted in a pickup in coal burn. Therefore, the dismal outlook is very much predicated on natural gas prices. Any lift in natgas prices would temper this, but that does not appear likely." DX1001-0002. And numerous other industry observers have made similar observations. DX8003 (IHS Markit); [Redacted] DX8033 (PA Consulting); DX1002 (S&P Global Platts); DX5146 (S&P Global Market Intelligence).

The **FTC** spills somewhat less ink on the "industry recognition" prong of the *Brown Shoe* analysis, but the Commission still points to ample evidence that industry actors treat the SPRB coal market as a distinct submarket. For example, the **FTC** demonstrates that Defendants themselves study and analyze SPRB coal as a distinct commodity, citing high-level documents tracking and discussing SPRB production, supply and demand, and market shares separately from other coal sources and other **energy** sources. *See* PPFF ¶ 11 (collecting sources). They point out that Defendants track SPRB sales opportunities and SPRB RFPs separately from other non-coal fuels and fuel basins. *Id.* ¶¶ 12-13 (collecting sources). And the **FTC** points to examples of industry analysts and the EIA discussing SPRB-specific market dynamics and price predictions. *Id.* ¶¶ 14-15 (collecting sources).

[26] The **FTC's** lower-key approach to this factor reflects an aspect of market definition that is easy to forget in the point-counterpoint of litigation—that the **FTC** does not have to *disprove* Defendants' theory of the relevant product market. It has to show only that the SPRB coal market satisfies the criteria for a relevant product market. *See* *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. There may also be *other* product markets in which the JV's effects would be less harmful or even innocuous; that would not undermine the viability of SPRB coal as a relevant product market for the purpose of antitrust analysis, particularly if the SPRB coal market is narrower than those rival candidates. *See* *H & R Block*, 833 F. Supp. 2d at 58-60. In other words, market definition is not a zero-sum game; each proposed relevant ***896** product market stands or falls on its own merits, and the narrowest market principle determines which of the qualifying markets a court should use for the rest of its merger analysis. *See* *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. Therefore, the **FTC** does not have to be concerned (at least at the market definition phase) with disproving Defendants' claim that SPRB coal competes with natural gas and other fuels in a broader **energy** market. True or not, it does not affect whether the market for SPRB coal qualifies as a relevant product market under applicable standards and precedents.

Based on the evidence of industry recognition produced by both sides, there is little doubt that SPRB coal providers compete *both* among themselves in a market for SPRB coal *and* against other fuels in a broader market for electricity generation. Therefore, both sides' proposed market definitions satisfy the industry recognition prong of the *Brown Shoe* analysis.

b. Distinct prices

Defendants have provided compelling anecdotal and statistical evidence that SPRB coal prices are closely related to the price of other fuels, and particularly natural gas. On the other hand, the **FTC's** economic analysis of the SPRB market, discussed above, demonstrates that demand for SPRB coal is relatively inelastic, and that SPRB coal-reliant power producers are relatively insensitive to price increases. Thus, again, both sides invoke this factor in support of their positions. Unlike the industry recognition prong, though, the strength of Defendants' argument here does actually detract from the strength of the **FTC's**. Still, the **FTC** has produced sufficient evidence that its proposed relevant product market, SPRB coal, satisfies this prong.

Supporting Defendants' view, the Court heard uncontested testimony that Defendants set the prices that form the basis of their RFP negotiations, in part, based on natural gas prices. **Peabody's** price-setting process includes a Market and Pricing Committee ("MPC") that recommends SPRB coal price changes based in large part on the forecasted price of natural gas. *See* DPFFCL ¶¶ 36-37; Tr. Vol. 6B (Galli) 14:23-16:10, 17:6-20; 18:2-14; 19:14-25; 21:12-23:15. Defense witness Bryan Galli, who had sat on **Peabody's** Market and Pricing Steering Committee ("MPSC"), which reviews the MPC's recommendations, testified that that body analyzes natural gas prices and forwards in every meeting. Tr. Vol. 6B (Galli) 21:22-22:2. He gave two examples from the past year alone—in September 2019 and March 2020—when **Peabody** reduced its SPRB coal prices in response to falling natural gas prices. *Id.* at 17:6-18:1; 21:12-23:15.

Similarly, the Court heard evidence that "two main things" Arch considers in pricing its SPRB coal are [Redacted] Tr. Vol. 5A (Lang) 103:17-24; *see also* Tr. Vol. 3A (Smith) 58:25-59:9 (testifying that the natural gas price is "the very first thing" in Arch's weekly Domestic Thermal Updates because [Redacted]

SPRB coal consumers recognize that low natural gas prices affect SPRB coal demand and prices. Defendants cite a cavalcade of customers who admit to considering other fuel prices, including natural gas prices, when determining how

much coal to purchase and when to issue a coal RFP. *See* DPFFCL ¶ 112; Tr. Vol. 1B (Meyer) 32:25-33:20; [Redacted] Tr. Vol. 7B (Fuller) 22:3-23:3. Defendants also elicited testimony from both suppliers and customers of SPRB coal showing that they evaluate coal prices in direct comparison to natural gas prices, informing fuel purchasing decisions and resource planning. *See, e.g.*, [Redacted]

***897** The **FTC** counters with evidence that SPRB coal's prices are distinct from the prices of other fuels. First, it points to industry reports that track SPRB coal prices separately from prices of other types of coal and other non-coal fuel sources. *See* PX9026-002; PX4775-0130-31, Fig. 8-11 (study projecting PRB coal pricing less than half of other coals as far out as 2040); PX8001 (Hill Report) ¶ 91; *see also* *Tronox*, 332 F. Supp. 3d at 200-01 (distinct prices and consistent market share for chloride titanium dioxide relative to sulfate titanium dioxide supported a finding of a separate market). It also notes that SPRB coal has different production costs and different supply and demand influences from non-coal fuels. In reference to natural gas in particular, the **FTC** points out that "natural gas is a byproduct of crude oil extraction, so oil market dynamics impact significant amounts of supply," and "[n]atural gas prices are also influenced by demand for natural gas used to heat homes in winter." PX8001 (Hill Report) ¶ 91 (relying on EIA publications); PX9188; PX9189; PX6006 (Kellow) IH Tr. 165:1-167:1.

The **FTC** also argues that the relationship between natural gas price assumptions and MPC prices is not as tight as Defendants would have the Court believe. Although Mr. Galli's testimony was compelling, it paints an incomplete picture. Dr. Hill plotted the relationship between **Peabody's** natural gas price assumptions and MPC prices from May 2015 through November 2019 based on data provided by **Peabody** through Dr. Israel. PX8006 (Hill Rebuttal Report) Fig. 63. While the two figures tracked each other closely from May 2015 through approximately January 2016, they then began to diverge, with natural gas continuing to fall roughly another 20% from its January 2016 levels, while MPC prices fell only slightly. *Id.* There was intense competition with natural gas throughout that time period, and as described above, **Peabody** ended up cutting MPC prices twice within the last year. Still, the fact that **Peabody** was willing and able to hold the line on prices for three years, despite ever-lower natural gas prices, suggests that the relationship between natural gas prices and MPC prices—and therefore the relationship between natural gas prices and SPRB coal prices—is not as tight as Defendants have characterized it.

But the core of the **FTC's** argument—a refrain that the **FTC** has sounded over and over throughout the litigation—is that SPRB coal prices are set through *SPRB-specific* competitive interactions among *SPRB suppliers*. *See, e.g.*, PPFF ¶¶ 17-18. The Court heard a great deal of testimony from SPRB coal customers about the RFP and contracting process, by which SPRB coal is usually procured. *See* [Redacted] PPFF ¶ 18 (collecting customer testimony). The **FTC** cites customer testimony that only SPRB suppliers are invited to participate in RFPs for SPRB coal. *See* PPFF ¶ 20. And it points out, based on Defendants' own documents and testimony, that when Defendants analyze their competition for bids to SPRB customers, they compare their own bids to other SPRB suppliers—without reference to natural gas suppliers or other non-coal suppliers. *Id.* ¶ 21. Finally, the **FTC** attests that SPRB coal suppliers recognize that, when they receive an RFP for SPRB coal, they are competing against other SPRB coal suppliers. [Redacted] The **FTC** argues that this RFP process, and not the price of natural gas, determines coal prices. *See, e.g.*, *Staples II*, 190 F. Supp. 3d at 119 (RFPs for multi-year contracts supports finding of distinct prices).

This question—i.e., what determines the price that customers pay for SPRB coal—has been the most hotly contested issue in ***898** this litigation. As described above, **Peabody's** witnesses persuasively testified that the MPC and MPSC [Redacted] taking into account, among other things, the price of natural gas, and that [Redacted] Tr. Vol. 6B (Galli) 16:22-17:20, 23:16-23, 26:6-20, 27:20-28:13. Yet, the **FTC** presented droves of documents and testimony suggesting that the RFP process puts SPRB coal suppliers—and most often, Arch and **Peabody**—into head-to-head competition with one another. That is the competition they contend would be lost if the JV goes forward.

Once again, both parties' narratives ring true. The fact that a significant amount of the price variation for SPRB coal over the past several years is attributable to rapidly changing gas prices does not rule out the possibility that some remaining amount of price variation is attributable to head-to-head competition among coal providers. It also does not rule out the possibility that the loss of that remaining variation could constitute a cognizable harm to competition in a relevant product market. In fact, the price of natural gas could be the most powerful driver of coal prices by a wide margin, and it could still be the case that there is enough head-to-head competition between SPRB coal producers for those producers to constitute a distinct product market. Thus, while

Defendants effectively presented their case, they did not refute the **FTC's**—especially given the evidence that a 5% increase in the price of SPRB coal would not drive customers to purchase an alternative fuel source and [Redacted] *See* Section II.C, *infra.* This Court therefore finds that, however powerful the effect of natural gas prices on the prices of SPRB coal, the evidence suggests that there is still room for enough non-natural-gas-related variation to characterize SPRB coal prices as "distinct."

c. Distinct customers

The parties take differing approaches to this factor. Defendants point out that no SPRB coal customers who participated in this proceeding generate electricity exclusively from SPRB coal. Instead, the record shows that customers who purchase SPRB coal also procure other fuels to generate electricity. DPFFCL ¶ 104; DX2049-0003 ("Southern Company Fuel Diversity: 'All Arrows in the Quiver' "); Tr. Vol. 3B (Sandlin) 110:8-17 (agreeing that WFA believes all generation resources are important). In addition to purchasing other fuels to generate power, utilities also have the option to purchase power from electricity markets if it is more cost-effective than generating power themselves. *See, e.g.,* Tr. Vol. 2B (Ruhl) 85:10-86:2, 86:23-87:11 (OPPD has purchased power from the market when it was more economic to do so); Tr. Vol. 7B (Fuller) 10:11-20 (Southern purchases electricity on wholesale power market when it is cheaper than to generate it itself); [Redacted] DPFFCL ¶ 106.

The **FTC** counters that SPRB coal has distinct customers with distinct needs because it is bought by utilities with SPRB-fueled power plants, which are long-lived, expensive, and configured for SPRB coal's distinct characteristics (discussed further below). *See* PPFF ¶ 35. Virtually no one other than an owner of an SPRB coal-fired power plant buys SPRB coal, and conversely, an owner of an SPRB coal-fired EGU can only buy SPRB coal for that unit. Such plants cannot easily switch to using other types of coal or other non-fuel coal sources without costly modifications, higher costs, or inefficiencies. *Id.* (collecting statements).

The **FTC's** interpretation is the correct one. The fact that SPRB coal customers also purchase resources other than SPRB coal to generate electricity does not mean that SPRB coal companies do not have ***899** *distinct* customers; it means that they don't have *exclusive* customers, which is not at issue. By Defendants' logic, markets would have to be incomprehensibly large to qualify as relevant product markets for antitrust analysis, which would in turn defeat the whole enterprise. All humans eat more than one type of food, but that does not mean that no particular kind of food has a distinct customer base. Put differently, the customer base for tofu burgers is no less distinct because the same customers also eat kale. And "all food" would not be a useful market for antitrust analysis. *See* *H & R Block*, 833 F. Supp. 2d at 59 (rejecting a proposed market of all methods of tax preparation because it left "no conceivable alternatives besides going to jail, fleeing to Canada, or not earning any taxable income," which would cause "the usual tools of antitrust analysis—such as the hypothetical monopolist test—[to] cease being useful because it is self-evident that a monopolist ... in that situation could essentially name any price since taxpayers would have no alternative but to pay it").

SPRB coal-fired EGUs are distinctive power plants with very specific requirements. PX7011 ¶ 11 ("[Redacted] has explored the use of coals from basins outside the PRB, such as Illinois Basin coal, but the operational and environmental compliance risks, the major permit amendment requirements, and the potentially higher cost of coal and railroad transportation make the use of Illinois Basin coal uneconomic."); Tr. Vol. 2A (Peterson) 42:25-43:10 (Evergy estimated that it would cost over $100 million and require up to four years to convert one of its generating stations from coal to natural gas); *see also* *Aetna*, 240 F. Supp. 3d at 26-28 (evidence showing customers have "durable preference" for one product and are unlikely to switch supports finding of distinct customers). Short of shutting down a plant (which is not an immediate option for utilities with load-carrying obligations), utilities with SPRB coal plants require a distinct input—controlled overwhelmingly by Defendants—in order to operate. *See Whole Foods*, 543 F.3d at 1039 (a core group of "particularly dedicated" customers may support a finding of a relevant market when "particular circumstances dictate that a product 'is the only realistic choice' ") (quoting *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1278 (8th Cir. 1981)). At the same time, no entity *other than* an electricity-generating utility with a SPRB-coal-fired EGU would have any use for SPRB coal. Therefore, there are distinct customers for SPRB coal.

d. Distinct characteristics

The **FTC** has presented extensive evidence that SPRB coal has distinct and desirable properties relative to other coals and other fuels more generally. *See generally* PPFF ¶¶ 24-34. Because SPRB coal sits in thick beds close to the surface of the earth, SPRB mines are more cost effective than mines in other U.S. coal basins. PX2758-013; PX9168-001. SPRB coal also has low sulfur, sodium, and ash contents relative to other coals. PPFF ¶¶ 25-27; PX9038-001; Tr. Vol. 1B (Meyer) 20:1-19 (Ameren solicits bids for what it calls "ultra-low sulfur" coals to remain compliant with emissions standards); [Redacted] PX8001 (Hill Report) ¶ 94 n.227. SPRB coal also has a specific heat content, typically in the 8,400-8,800 Btu range. PPFF ¶ 29; PX8001 (Hill Report) ¶ 96.

SPRB coal customers consistently testified that they value SPRB coal because of its distinctive properties. *See* PPFF ¶ 28; *see, e.g.*, [Redacted] values ultra-low sulfur coal and has even rejected the lowest-price bid from Eagle Butte in favor of higher priced offerings that met its sulfur needs); Tr. Vol. 2B (Romer) 96:4-7 (Xcel sources ***900** SPRB coal to generate power because "our boilers were designed for [SPRB coal]"); [Redacted] plants burn only SPRB coal because SPRB coal "has the characteristics that the units were designed for."); [Redacted] coal-fired units are designed to burn low sulfur PRB coal); Tr. Vol. 2A (Peterson) 34:10-35:6 (SPRB coal works best in Evergy's coal-fired generating units because of its sulfur dioxide, sodium and ash content); [Redacted] does not purchase coal from the Illinois basin because of its higher sulfur and sodium). Failure to use SPRB coal can result in operational issues and harm to boilers. Tr. Vol. 8A (Benham) 72:19-73:8 (SPRB coal is important to Minnesota Power's generation because higher sodium content in NPRB coal can plug boilers); Tr. Vol. 2B (Ruhl) 20:3-11 (SPRB coal is typically between 8,300 to 8,900 Btu, which OPPD can burn in its coal-fired units).

SPRB customers also testified that they see the ability to stockpile SPRB coal as an advantage over alternative fuels. PPFF ¶ 30; Tr. Vol. 3B (Sandlin) 125:9-126:4 (the ability to stockpile and "survive off [ ] inventory piles for a while" is an advantage of coal); *see also* Tr. Vol. 2B (Romer) 96:4-7 (describing ready availability as a reason why Xcel sources SPRB coal to generate power). Natural gas cannot be stockpiled, leaving power producers at risk of interruptions due to frozen pipelines or capacity constraints during periods of high demand. *See* [Redacted] (the ability to stockpile is an advantage of coal over natural gas); [Redacted] ("Natural gas has restrictions on delivery in winter, capacity restrictions in winter months, like the recent polar vortex, and therefore, the natural gas could not get delivered to our —our combined-cycle gas plants. With coal, we store coal on the ground, so we always know we're reliable. That's the backbone of our reliability to our customers and to the market because we already have the **energy** on-site, ready to be used."). Renewable **energy** sources also cannot be stockpiled and are subject to natural fluctuations in sunlight, wind, or precipitation. *See* Tr. Vol. 3B (Sandlin) 93:23-94:18 (power plants fueled by wind were unable to run during the polar vortex while coal plants were able to run and supply electricity); Tr. Vol. 1B (Jones) 81:12-24 (SPRB coal-fired capacity is more valuable than the same amount of wind capacity because coal is reliable and wind is intermittent). And transmission constraints affect the availability of wind **energy**. Tr. Vol. 2A (Peterson) 43:13-44:6 (testifying that wind is not a reliable source of **energy** for Evergy because the wind does not always blow, and transmission can become constrained).

Defendants made little effort to dispute the plain fact that SPRB coal has the above distinct characteristics. Therefore, the Court has no trouble finding that the SPRB coal market satisfies this factor of the *Brown Shoe* analysis.

e. Unique production facilities

It is even easier for the **FTC** to satisfy the "unique production facilities" prong of *Brown Shoe*. Only coal suppliers operating in the SPRB produce SPRB coal. JSUF ¶¶ 17-21. SPRB coal suppliers' production facilities—i.e., coal mines and related processing facilities—are entirely different from facilities related to the production of natural gas or other fuels. *Compare* PX6031 (Gurgenli) 42:4-23 (describing surface coal mining), *and* PX9168-0001-03 (EIA article on mining and transportation of coal) *and* PX8001 (Hill Report) ¶¶ 24-26, *with* PX8001 (Hill Report) ¶ 71 (describing production and transportation of natural gas). Defendants do not deny these obvious facts.

f. Conclusion of *Brown Shoe* analysis

Defendants have established that there is industry and public recognition of a ***901** broader **energy** market and that SPRB coal prices are, to some extent, related to natural gas prices. But their success does not entail the **FTC's** failure. On the contrary, the **FTC** has established not just industry

recognition of a distinct SPRB coal market, but also that SPRB coal has distinct and desirable characteristics, distinct customers, and unique production facilities. And while the strength of Defendants' showing of the relationship between the prices for natural gas and SPRB coal does weaken somewhat the **FTC's** claim that SPRB coal has "distinct prices," the Court finds that the **FTC** produced enough evidence to satisfy that *Brown Shoe* factor as well.

3. Conclusion: SPRB coal is a relevant product market.

[27] The **FTC** has presented both economic analysis (in the form of the HMT) and practical evidence that the SPRB is a relevant product market under traditional antitrust analytical methods and precedents. That is all they needed to do to justify the Court analyzing the effects of the proposed JV in that market, and they accomplished it. *See* *Cont'l Can Co.*, 378 U.S. at 458, 84 S.Ct. 1738.

The Court is persuaded that there is meaningful competition between SPRB coal and other sources of fuel used to generate electricity, and that the cost of natural gas influences the price of SPRB coal. Ultimately, though, Defendants' arguments do not cohere into a powerful enough case to persuade the Court to ignore both the narrowest market principle and the standard analytical and economic tools provided by the **FTC**, which overwhelmingly support the existence of a distinct market for SPRB coal in which consumers likely would be forced to accept a SSNIP.

For the foregoing reasons, the Court finds that there is an "economically significant submarket" of SPRB coal only. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. The Court will conduct the remainder of its analysis of the proposed JV in the context of that market.

B. Relevant geographic market

[28] **[29]** The second half of market definition is to determine the relevant geographic market. *Sysco*, 113 F. Supp. 3d at 48. The Supreme Court has stated that, for Section 7 of the Clayton Act, the relevant geographic market is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *Marine Bancorp.*, 418 U.S. at 620-21, 94 S.Ct. 2856. Stated differently, "[t]he proper question to be asked ... [is] where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Phila. Nat'l Bank*, 374 U.S. at 357, 83 S.Ct. 1715; *see also* *Cardinal Health*, 12 F. Supp. 2d at 49 (citation omitted) (internal quotation marks omitted) (stating that the relevant geographic market is "the area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition"). Like the product market, the geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe*, 370 U.S. at 336-37, 82 S.Ct. 1502 (footnote omitted) (internal quotation marks omitted).

[30] SPRB coal supplier mines are located exclusively within the Southern Powder River Basin near Gillette, Wyoming. PX8001 (Hill Report) Fig. 2. SPRB coal cannot be mined outside the SPRB, *id.* ¶ 87, and customers cannot purchase SPRB coal from any mines outside of the SPRB. [Redacted] Tr. Vol. 2B (Ruhl) 10:14-17. By finding the SPRB coal market to be the relevant product market, then, ***902** the Court has effectively also defined the relevant geographic market. Defendants have not argued otherwise. Accordingly, the Court finds that the SPRB is the relevant geographic market.

II. FTC's Prima Facie Case for Likelihood of Anticompetitive Effects

Having found that the **FTC** has carried its burden of establishing a relevant market for SPRB coal, the Court turns next to "the likely effects of the proposed [JV] on competition within that market." *F.T.C. v. Swedish Match,* 131 F. Supp. 2d 151, 166 (D.D.C. 2000). "If the **FTC** can make a prima facie showing that the [JV] will result in a significant market share and an undue increase in concentration" in the relevant market, then "a presumption is established that [the JV] will substantially lessen competition." *Id.*; *see also* *Phila. Nat'l Bank*, 374 U.S. at 363, 83 S.Ct. 1715 ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.").

[31] **[32]** "Market concentration is a function of the number of firms in a market and their respective market shares."

Arch Coal, 329 F. Supp. 2d at 123. A common tool used to measure changes in market concentration is the Herfindahl–Hirschmann Index (HHI). *F.T.C. v. H. J. Heinz,* 246 F.3d 708, 716 (D.C. Cir. 2001); *see also* Guidelines § 5.3. HHI figures are "calculated by summing the squares of the individual firms' market shares," a calculation that "gives proportionately greater weight to the larger market shares." Guidelines § 5.3. "Sufficiently large HHI figures establish the **FTC's** prima facie case that a merger is anticompetitive." *Heinz,* 246 F.3d at 716.

[33] In support of its prima facie case, the **FTC** makes a market share argument based on the HHI, which it then supports with evidence of head-to-head competition between **Peabody** and Arch; evidence that SPRB coal customers would not be able to protect themselves from a price increase; and an argument that just such a price increase is likely from the proposed JV.

A. Market share calculation

The Merger Guidelines, which provide "a useful illustration of the application of HHI," *F.T.C. v. PPG Indus., Inc.,* 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986), state that a market with an HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated," Guidelines § 5.3. Also according to the Guidelines, mergers that result in "highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* In *Heinz,* for example, the D.C. Circuit held that an increase in HHI by 510 points "creates, by a wide margin, a presumption that the merger will lessen competition." 246 F.3d at 716.

Dr. Hill calculated that **Peabody** and Arch have a combined market share of 68% when measured by production volumes. PX8001 (Hill Report) Fig. 22. Dr. Hill's calculation is consistent with **Peabody's** ordinary-course documents, *see, e.g.,* PX1681-007; PX1141-004, and documents from third parties, *see* PX5536-001; PX3021-001; PX5535-001. Dr. Hill calculated market shares and the HHI using 2019 mine production data, and he found that the JV will increase the SPRB coal market's ***903** HHI by 2,258 points, from 2,707 to 4,965. PX8001 (Hill Report) Fig. 22, ¶¶ 155, 158. In other words, the JV would take an already "highly concentrated" market—at 2,707—and make it *far* more concentrated by *nearly doubling* its HHI—to 4,965. The increase of 2,258 points is fully *four times* the increase that the D.C. Circuit deemed to have created a presumption of anti-competitive effects "by a wide margin." *Heinz,* 246 F.3d at 716. Dr. Hill performed the same calculations based on HHI figures in all years from 2008 to present, and the JV would have been presumptively illegal in every one of those years. PX8001 (Hill Report) ¶ 160 and Fig. 24.

Tellingly, Defendants' experts do not contest the accuracy of Dr. Hill's calculations of market share or market concentration. PPFF ¶ 65. Even more here than in *Heinz,* then, the HHI calculation "creates, by a wide margin, a presumption that the merger will lessen competition." 246 F.3d at 716.

B. Head-to-head competition

[34] "Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition." *Sysco,* 113 F. Supp. 3d at 61; *see also* *Heinz,* 246 F.3d at 717-19 (holding that elimination of competition between second-and third-largest jarred baby food manufacturers would weaken competition); *Swedish Match,* 131 F. Supp. 2d at 169 (finding a likelihood of unilateral price increase where merger would eliminate one of Swedish Match's "primary direct competitors"); *Staples I,* 970 F. Supp. at 1083 (finding anticompetitive effects where the "merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the ... market."); Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). In such circumstances, a merger "is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H & R Block,* 833 F. Supp. 2d at 81.

There is extensive evidence in the record that SPRB coal customers benefit from head-to-head competition between **Peabody** and Arch. *See* PPFF ¶¶ 70-71; PX2376-001 [Redacted] The parties' own bidding databases, as well as shipment data maintained by the EIA, show [Redacted]

See PX8001 (Hill Report) ¶¶ 169-78, Figs. 25-28. Those lost business opportunities are reflected in the parties' ordinary course documents describing customer negotiations in response to competing bids from each other. *See* PPFF ¶¶ 76-77 (collecting sources).

Some of this head-to-head competition manifests as competitive bidding through the RFP process. Tr. Vol. 5B (Lang) 17:8-11 (agreeing that, "in general," "the price that Arch receives for SPRB coal is determined by negotiations between Arch and its customers"). At the hearing, Mr. David James, a **Peabody** Director of Sales & Marketing, and Mr. Rowdy Smith, Arch's Senior Vice President of Domestic Thermal Coal, discussed several examples in which the offers provided by competing SPRB coal suppliers, including from **Peabody** and Arch, affected negotiations with potential buyers of their SPRB coal. PPFF ¶¶ 79-81. Similarly, customers called by both sides testified to specific instances where they benefited from competition through the RFP process and secured more advantageous pricing. *Id.* ¶¶ 82-87, 89, 91-92 (collecting testimony from representatives of [Redacted] Other customers ***904** did not testify to specific instances of competition but spoke more generally from their business experience of the value they perceive from a competitive bidding process. *Id.* ¶¶ 88, 93-97 (collecting testimony from representatives of [Redacted] Other evidence shows that customers benefit on non-price terms (*e.g.*, volume flexibility, which allows a customer to bring forward or push back SPRB coal deliveries based on expected versus actual demand) because of head-to-head competition between **Peabody** and Arch. *Id.* ¶¶ 98-101.

C. Customers' inability to protect themselves from a price increase

A number of **FTC's** SPRB coal customer witnesses testified that they could not protect themselves against an SPRB coal price increase. For instance, a representative of [Redacted] testified that it would continue buying SPRB coal for its coal units even if the mine-mouth price for SPRB coal increased by 10 percent because its units would still be profitable, but the higher prices for SPRB coal would mean that ratepayers would ultimately pay a higher price. PPFF ¶ 102; [Redacted] A representative of [Redacted] testified that it would not stop purchasing SPRB coal if prices increased by 5 percent because it lacks enough generating capacity from all other forms of power to meet its obligations without SPRB coal. PPFF ¶ 103; [Redacted] A representative of [Redacted] testified that it would not switch to fuels other than SPRB coal if prices increased by 5 percent because its EGUs are designed to burn SPRB coal. PPFF ¶ 104; [Redacted] Other customers provided similar testimony. PPFF ¶¶ 105-09.

In response to the **FTC's** impressive showing, Defendants point to the testimony of one customer who reluctantly conceded counsel's assertion that "there is some negotiating power in the hands of the coal consumers," [Redacted] and one letter from an economic consultant containing a single sentence to the effect that, due to [Redacted] Based on that evidence alone, Defendants ask the Court to find that coal purchasers are sufficiently sophisticated entities to resist a price increase, even from an entity that controls a two-thirds share of the SPRB coal market. *See* DPFFCL ¶ 233 (quoting *Gen. Dynamics*, 341 F. Supp. at 559 ("sophisticated, knowledgeable purchasers wield[ ] great economic power and hav[e] formidable bargaining strength")). Considering the volume of documents, testimony, and analysis produced in this matter, that is a slender reed.

In addition to a lopsided evidentiary showing, the Court has the benefit of a real-world event study to facilitate the evaluation of the parties' competing arguments: the recent increase in the Black Lung Excise Tax ("BLET"). The BLET, which is imposed by Congress, increased at the beginning of 2020. PX6046 (Galli) 134:18-135:6. [Redacted] *See* Tr. Vol. 3A (Smith) 16:16-17:11. [Redacted] PPFF ¶ 141—despite the supposed downward pressure exerted by low natural gas prices and the risk of coal plant retirements. *See* Section I.A.1.b.*iii, supra.* And the **FTC** presented testimony from five different customers that they did not reduce their coal burn or consider reducing the amount of coal they will buy in 2020 as a result of that increase. PPFF ¶ 141. While the BLET increase was not quite as large as what economists use to represent a SSNIP (typically 5 percent), this recent, real-world example nonetheless provides corroborating evidence that some customers will indeed be unable to avoid a non-negligible price increase.

Counsel for **Peabody** suggested during closing arguments that, as a matter of contract, it has always been the case that ***905** the BLET, along with any other government surcharge, is passed through to the customer, and the parties do not know in advance when such a surcharge will be imposed, so it is not an apt comparison to other types of price increases. Closing Arguments (Hassi) at 94:12-96:9. Counsel further pointed out that Dr. Hill's analysis was of contracts entered into in 2019, arguing that the **FTC** did not show whether the early 2020 increase has had an effect in the market because the market participants are now aware of the price increase. *Id.* As a

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result, he described the BLET as a "red herring" with respect to determining customers' ability to protect themselves from an SPRB price increase. *Id.*

Counsel's arguments have merit. It is true that Dr. Hill did not perform a systematic analysis of the effect on coal purchaser behavior of the early 2020 BLET surcharge. But the case study is more than a red herring for two reasons. First, the Court heard testimonial evidence from five utilities that the BLET pass-through did not affect their SPRB coal procurement or burn behavior. While an economic analysis of the BLET's effects would have been welcome, the testimonial evidence allows the Court to discern that at least some of Defendants' customers must absorb price increases. Moreover, Defendants could have produced evidence to the contrary in the form of customer testimony or sales data, but they did not. Therefore, those customers' testimony stands unrebutted.

Second, the fact that such pass-through language is a standard part of coal contracts does not lessen the BLET's relevance. If the cost of SPRB coal went up 3% and customers did not change their coal burns or purchasing plans, that is relevant no matter the cause of the increase. If customers could readily switch to burning natural gas or use negotiating power to avoid a price increase, they would, whether the increase was caused by taxes or something else. SPRB coal customers' responses (or lack thereof) to the BLET, together with the related testimony elicited by the **FTC**, suggest that they cannot.

D. Likelihood of price increases

Currently, Defendants are both pursuing business strategies that focus explicitly on reducing output from their SPRB mines. **Peabody's** President and CEO stated in a Q4 2018 earnings call that its thermal operations, including in the SPRB, "continue to emphasize value over volume in the face of reduced coal demand" to generate higher margins for investors. PX9104-007. At that time—less than a year before the JV was announced—he stated that **Peabody** intended to reduce production at NARM by 10 million tons because they "[were] not generating margins [they found] acceptable for [their] investors." *Id.* The year before, **Peabody's** CFO and Executive Vice President stated that "new **Peabody** isn't about volumes but about margins and return." PX9098-004. Meanwhile, Arch's strategy is "to harvest the remaining cash flows [from its SPRB mines] and use the proceeds to invest in [non-SPRB] assets or return capital to shareholders." PX2628-002.

Defendants argue that this Court cannot simply assume, based on the **FTC's** showing of "increased concentration in a narrowly defined market" that the JV will have anticompetitive effects. DPFFCL ¶ 223. Such effects are the result of "purposeful business choices made by the corporation's management calculated, affirmatively or by effect, to achieve those ends." *Deutsche Telekom*, 439 F. Supp. 3d at 245. According to Defendants, they have presented evidence showing that it would be self-defeating for the JV to raise prices, while the **FTC** has produced "no evidence ***906** that Defendants intend to raise prices" post-JV. DPFFCL ¶¶ 223-24. In light of the above statements of corporate strategy, the argument that "coal producers have no incentive to raise prices and further erode future coal demand," DPFFCL ¶ 222, is not well-taken.

That finding is bolstered by Dr. Hill's Cournot model, which economists use to predict the effect of changes in concentration in a market, especially in concentrated markets with a relatively homogenous product like SPRB coal. PX8001 (Hill Report) ¶ 180. In order to make the analysis more favorable to Defendants, Dr. Hill assumed that Defendants would achieve and pass through the 5.5 percent marginal cost efficiencies that they claim will result from the JV and that they would follow through on a pledge to implement a 15-cent discount on all contracted tons between the date the JV closes and the end of 2022. *Id.* ¶ 179. He also included the price elasticity of demand, which captures competition with other fuels. Tr. Vol. 4A (Hill) 76:1-5.

Dr. Hill implemented two versions of the Cournot model. The first "baseline" model assumes that demand for SPRB coal remains constant over time. PX8001 (Hill Report) ¶ 191. That version predicts that the JV will lead to significantly higher prices for SPRB coal in every year from 2021 to 2030, causing total harm to consumers with a net present value of almost $1.7 billion. *Id.* ¶¶ 195-96, Figs. 31-32. The second version of the Cournot model assumes an annual decline in demand for SPRB coal of [Redacted] per year from 2021 to 2030, [Redacted] *Id.* ¶ 198; PX1621-034. This model still predicts significantly higher prices for SPRB coal over the next ten years, causing total harm with a net present value of over $1 billion. PX8001 (Hill Report) Figs. 33-34. According to Dr. Hill, "[t]hese results show that neither the parties' 15-cent discount nor their claimed marginal cost efficiencies will likely prevent the joint venture from substantially reducing competition, raising prices, and harming customers." *Id.* ¶ 197.

Defendants object to Dr. Hill's applications of the Cournot model on a number of grounds, most notably that they fail to incorporate dynamic risks such as coal plant closures, the growth of renewables, or the effect of SPRB coal prices on demand, and that his model's predicted margins do not match observed margins. DPFFCL ¶¶ 227-28. Defendants argue that Dr. Hill's hypothesized harm falls away when dynamic effects are incorporated

Dr. Hill's analysis stands up to Defendants' critiques. His margins are based on Defendants' own accounting data. Tr. Vol. 9B (Hill) 52:12-53:2; PX8001 (Hill Report) ¶ 250 and Fig. 52 (citing PX2755 and PX1614). And he does not ignore dynamic competition, as Defendants argue. In his declining demand version of the Cournot model, he used **Peabody's** own projections of SPRB coal production volumes, which, according to Mr. Galli, take dynamic competition from other fuels into account. PX8001 (Hill Report) ¶ 198 (citing PX1621-031); Tr. Vol. 6B (Galli) 7:10-19 (**Peabody** considers natural gas prices to be the "biggest factor" affecting their SPRB coal forecasts). In his report, Dr. Hill also calculated the total harm to consumers using faster and slower decline rates of demand for SPRB coal, as well as a variable decline rate based on **Peabody's** exact annual projections formulated earlier this year. *Id.* ¶ 256. No matter which figures Dr. Hill used, the Cournot model predicted substantial harm to consumers. *Id*. at Fig. 56.

Dr. Hill also explained the underlying logic for these results: The JV's anticompetitive effect "is rooted in the fact that it combines the two SPRB coal suppliers that ***907** own the largest, most important mines in the SPRB. It puts in one set of hands assets that would otherwise compete vigorously with one another, even as demand fell and other mines ceased to produce." *Id.* ¶ 202. According to [Redacted] another SPRB coal producer, the JV will "have enough 8800 production capacity and market share to control the 8800 market pricing which will set the market for 8400" and will "have the production capacity to take over the entire PRB forecasted demand from 2021 on." PX3021-001.

E. Conclusion: FTC has established a presumption of anticompetitive effects.

[35] "Ultimately, this Court need not decisively sift through various models and theories." *Tronox*, 332 F. Supp. 3d at 212; *see also* *Sysco*, 113 F. Supp. 3d at 36-37 (noting that the court "hesitates to rely on" an expert's precise calculations where such calculations are subject to valid criticism, and concluding that "when evaluated against the record as a whole, [the expert's] conclusions are more consistent with the business realities" of the relevant market). The Court's task is to determine whether the **FTC** "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the **FTC** in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15 (internal quotation omitted); *see also* *Tronox*, 332 F. Supp. 3d at 212. The **FTC** has cleared that bar.

The **FTC's** HHI analysis created a "presumption ... that [the JV] will substantially lessen competition" by "showing that the [JV] will result in a significant market share and an undue increase in concentration" in the SPRB coal market. *Swedish Match,* 131 F. Supp. 2d at 166. The **FTC** then reinforced that presumption with evidence that the JV would eliminate head-to-head competition between Defendants and increase Defendants' already-existing incentives to engage in strategic output withholding, to the detriment of its customers. The **FTC** therefore has firmly established a presumption that the proposed JV will have anticompetitive effects in violation of the Clayton Act.

III. Defendants' Case Against Likelihood of Anticompetitive Effects

[36] The presumption that the JV will substantially lessen competition is rebuttable. Defendants can either "discredit[ ] the data underlying the initial presumption in the government's favor," or "affirmatively show[ ] why [the JV] is unlikely to substantially lessen competition." *Baker Hughes*, 908 F.2d at 991. "The more compelling the [**FTC's**] prima facie case, the more evidence [Defendants] must present to rebut it successfully," though, and here the **FTC's** case is quite compelling. *Id.*

The proposed JV involves the two biggest producers of the relevant product in an already concentrated market, and it would create a single entity with 68% market share. That share far exceeds what the Supreme Court has held to be a concerning level of concentration. *See* *Phila. Nat'l Bank*, 374 U.S. at 364–65, 83 S.Ct. 1715 (a merger resulting in a single firm controlling at least 30% of the relevant market was sufficient to "raise an inference that the effect

of the contemplated merger ... may be substantially to lessen competition"); *Continental Can*, 378 U.S. at 461, 84 S.Ct. 1738 (a merger resulting in a company with 25% market share "falls squarely within the principle that where there has been a history of tendency toward concentration in the industry[,] tendencies toward further concentration are to be curbed in their incipiency.").

***908** Some courts have found market share to be too crude and have preferred a focus on HHI. *F.T.C. v. PPG Indus., Inc.*, 798 F.2d at 1503 ("The **FTC** and the Department of Justice, as well as most economists, consider [HHI] superior to such cruder measures as the four- or eight-firm concentration ratios which merely sum up the market shares of the largest four or eight firms."). The result in this case is the same. An increase of over 2,000 in the HHI index is more than ten times the threshold for a presumption of enhanced market power. Guidelines § 5.3; *Heinz*, 246 F.3d at 716. And the **FTC** has produced substantial evidence that the JV would eliminate head-to-head competition; that SPRB coal customers would have trouble resisting a price increase; and that such an increase is likely. Thus, Defendants have an uphill climb to rebut the resulting presumption that the JV will harm competition.

To that end, Defendants argue that customers have multiple strategies available for resisting a potential price increase. They contend that customers will continue to substitute other fuels for coal because of changes in relative prices, thereby constraining the JV in both the short term—by reducing coal burn, deferring deliveries and purchasing less coal—and in the long term—by retiring their coal EGUs. DPFFCL ¶ 234. Defendants also argue that the JV will face competitive constraints from other SPRB coal producers, including through possible expansion by other SPRB coal producers at their mines. *Id.* ¶ 235.

[37] None of Defendants' arguments can defeat the presumption of anticompetitive effects created by the **FTC's** showing.

A. Competition from other fuels and other SPRB coal suppliers

Defendants argue that, "[e]ven if other fuels are not a substantial enough constraint to be included in the relevant product market, customers will continue to substitute (through generation or purchasing) other fuels for coal due to relative changes in price and thereby constrain the Joint Venture in both the short term, by reducing coal burn, deferring deliveries and purchasing less coal, and the longer term, by retiring their coal EGUs." DPFFCL ¶ 234. Additionally, they argue that the JV "will also continue to face critical competitive constraints from other coal producers." *Id.* ¶ 235.

As discussed in Section I.A.1.a, above, Dr. Hill's actual elasticity of demand calculation incorporates competition from other fuels. Tr. Vol. 4A (Hill) 47:21-49:14. There is no dispute that natural gas and renewables impose some amount of competitive pressure on SPRB coal producers; the key question is whether such competition is likely to constrain the JV from harming competition, and Dr. Hill's HMT analysis strongly suggests that it is not.

In addition, multiple SPRB coal customers testified about the challenges of switching from SPRB coal to another fuel source. Renewables are not dispatchable baseload units; they are intermittent fuel sources that are difficult to store. Customers cannot replace baseload units with non-dispatchable, intermittent resources. PPFF ¶ 144 (collecting witness testimony). Natural gas prices are projected to rise relative to SPRB coal prices in coming years, making them a less effective constraint moving forward. *Id.* ¶ 145. And even at current low prices, natural gas generation is still more expensive than SPRB coal for many customers. *Id.* ¶¶ 146-47 (collecting witness testimony).

Professor Julie Carey, Managing Director at National Economic Research Associates, Inc., argued that Defendants would not want to raise SPRB coal prices ***909** if it meant that coal units would dispatch less power because their bids would exceed the market-clearing price. She determined that a 5 percent SPRB coal price increase translated to a $0.28/MwH increase in the cost of generating power for an average SPRB coal plant. Tr. Vol. 6A (Carey) 85:18-24. She then applied the price increase to several dispatch stacks, comparing the generating costs of SPRB coal units supplied by Defendants to the costs of the next units in the dispatch stacks that are not also supplied by Defendants, *id.* at 91:8-23, finding that even small cost differences affect the likelihood of an EGU bidding below the market-clearing price and being dispatched. *Id.* at 51:3-53:9

Surely it is true that the lower the price of coal, the lower a unit costs to operate, the lower the utility can bid into the ISO, making that unit marginally more likely to dispatch.

And so, all other things being equal, a modest increase in the cost of coal, translated directly into an increase in a utility's bid for its coal EGU, could move the unit up the dispatch stack, reducing its odds of dispatching. But all other things are not equal. Tr. Vol. 6A (Carey) 73:25-74:5 ("In the real world, the sale of electricity and the competition that exists is highly complicated.") Professor Carey's analysis tells us nothing about *how much* any particular unit's odds of dispatching would be impacted by the hypothesized price increase, which would depend on not just the commodity cost of coal but also many other factors, starting with where the unit's original bid was situated relative to the market-clearing price. If it started out well below the market-clearing price, a modest increase in its bid would be unlikely to affect whether it dispatches. [12] Also relevant would be all of the other factors that go into the utility's *bid* for that unit, as ISOs make dispatch decisions based on utilities' bids, rather than their costs. PX6029 (Kimm) 30:18-25 (units dispatch "based on their offer ... not necessarily their cost"). Witnesses testified that the factors affecting bids are manifold. Tr. Vol. 1B (Meyer) 42:11-43:2 (bids into MISO account for a "whole host of other parameters" beyond cost to operate EGUs); Tr. Vol. 6A (Carey) 79:6-25 (EGUs in ISOs employ multiple bidding strategies). Plus there are various considerations that might cause a unit to be dispatched out of order or self-committed. [13] *See, e.g.*, Tr. Vol. 1B (Meyer) 40:11-42:2 (coal units may self-commit because the RTO day-ahead market does not capture the costs associated with starting and stopping a coal-fired generating unit); [Redacted] (ISOs may pick a higher cost generating unit over a lower cost generating unit if the higher cost unit provides another benefit such as reliability or alleviation of transmission constraints); [Redacted] (same).

In sum, the dispatch of generation units in wholesale electricity markets is complex and involves many interrelated factors. PPFF ¶¶ 155-165. It seems unlikely that ***910** an increase in the mine-mouth price of coal would translate neatly into a single effect over all units bid in by all utilities into all ISOs. But even if it did, it would be impossible to know how much of a deterrent it might be to increasing coal prices without knowing how such an increase would affect the ability of coal EGUs to *dispatch.* Tr. Vol. 6A (Carey) 74:19-75:24 (an EGU's variable cost is not the sole determinant of whether that unit generates electricity).

The **FTC** also points out that ISOs already operate today, so SPRB coal buyers are presumably already exercising any leverage they may have in their negotiations with SPRB coal suppliers based on the fact of inter-fuel competition in the ISO market. PPFF ¶¶ 153-54. Moreover, as discussed in Section II.C, above, the BLET pass-through illustrates that a price increase of a similar magnitude to that which was considered by Professor Carey is unlikely to have a meaningful effect on coal purchases, suggesting that it is unlikely to meaningfully affect coal dispatch. Professor Carey's analysis does not suggest anything to the contrary.

And as will be described at greater length in Section III.C, below, it is unlikely that the other SPRB coal producers, which collectively control about 32% of SPRB coal production, will be able to expand output sufficiently to impose a meaningful competitive constraint on the JV. A representative from NTEC, the third-largest SPRB coal producer and the owner of the Antelope mine, [Redacted] PX6009 (Tipton) 166:12-167:3. Kiewit, another SPRB coal producer, believes that the JV will [Redacted] PX3021-001.

B. Arch's diminished competitiveness in the but-for world

The Eighth Circuit has instructed that "when examining a merger, a court must necessarily compare what may happen if the merger occurs with what may happen if the merger does not occur." *Nat'l Tea Co.*, 603 F.2d at 700. And Defendants argue that Arch, in particular, will struggle if the JV is enjoined. *See also* *Arch Coal*, 329 F. Supp. 2d at 153 ("A weak financial condition, or limited reserves, may mean that a company will be a far less significant competitor than current market share, or production statistics, appear to indicate.").

Arch argues that it will become a far less important SPRB coal supplier and [Redacted] DPFFCL ¶ 232. Arch recently has operated at a loss in the SPRB, with losses in the second quarter of 2020 of [Redacted] cents per ton. Tr. Vol. 5A (Lang) 82:4-13. The company claims that, absent the JV, it will [Redacted] which would allow Arch to focus on its most profitable operations in the hopes of earning positive margins and [Redacted] *Id.* at 100:8-25.

First, the Court notes that Arch's underlying logic—[Redacted]—supports the Court's finding that the parties have the incentive and intention to maximize profits by cutting output.

Second, Defendants explicitly disclaim any reliance on the "failing firm" defense; rather, they draw the Court's

attention to "the industry's struggles and the impact they have on Defendants' employees and local economies and communities when assessing the balance of equities." DPFFCL ¶ 256. The Court certainly does take note of all of those circumstances. But no matter the outcome of this proceeding, Arch "[has] made [its] decision" to "pivot[ ] away" from SPRB coal production. Tr. Vol. 5A (Lang) 102:8-15. In other words, while Arch and the State of Wyoming believe that the JV may help avoid unplanned job losses, Arch ultimately intends to [Redacted] with or without the JV. [Redacted] *Id.* at 100:8-25. To the extent that these realities ***911** affect the balance of equities, the Court will consider those arguments at the proper time. They do not alter the Court's analysis of the JV's likely competitive effects.

C. Expansion by other SPRB coal producers

Lastly, Defendants argue that other SPRB coal producers will expand to offset any decrease in production caused by the JV.

As an initial matter, **Peabody** and Arch agree that greenfield entry into the SPRB coal market is "unlikely." PPFF ¶ 181. The financial and regulatory barriers to entering the SPRB or obtaining licenses to expand into new areas within the SPRB are immense, and Dr. Hill testified, without rebuttal from Defendants, that it would take "a very long time" for a competitor to enter the market or expand existing mines. *Id.* ¶¶ 182-184. In light of this uncontroverted testimony, together with the facts that coal plants are retiring and no new coal plants are being built, the Court finds that it is unlikely that any new coal mines will open in the SPRB or existing mines will obtain regulatory approval for an expansion into new areas within the SPRB.

Undeterred, Defendants argue that the JV will face competition from other coal producers who can expand output at their existing mines without need for regulatory approval or substantial up-front expense. DPFFCL ¶¶ 235-38. Dr. Bailey estimated that SPRB coal producers other than **Peabody** and Arch had at least 70.5 million tons of excess capacity in 2019, which roughly equals Black Thunder's annual output. DX4001 (Bailey Report) ¶ 91. Defendants contend that this excess capacity will only grow as demand continues to decline due to additional coal EGU retirements and shifts towards natural gas and renewables. DPFFCL ¶ 236. They point to Kiewit and NTEC in particular, [Redacted]. ¶ 238. They also note that other SPRB coal suppliers "compete and frequently win business in RFPs against Defendants today, and there is no reason to believe they would not continue doing so." *Id.* ¶ 237.

Citing testimony from industry participants, the **FTC** counters that "existing firms are unlikely to invest capital in increasing output in hopes of capturing share from a massive JV with a dominant position." PPFF ¶ 185. NTEC's Antelope mine, the closest rival to Black Thunder and NARM, is [Redacted] *Id.* ¶ 186. [Redacted] Tr. Vol. 2B (Romer) 101:17-102:17. That testimony aligns with the deposition testimony of Mr. Harry Tipton, NTEC's Chief Marketing and Operating Officer, who stated that [Redacted] PX6009 (Tipton) 127:15-128:6.

FM Coal's mines are smaller and produce lower-heat and higher-sulfur coal that is a poor substitute for coal from NARM or Black Thunder. PPFF ¶ 135. Kiewit plans to [Redacted] PX3022-009. No one contends that Blacks Hills or WFA, which both own much smaller mines that produce lower-heat and higher-sulfur coal, could replace any meaningful portion of the coal currently supplied by NARM and Black Thunder. PPFF ¶ 189.[14] Additionally, some customers do not even solicit bids from suppliers other than Defendants because of the design of their EGUs. *Id.* ¶ 191.

Dr. Bailey's argument about possible expansion by Defendants' competitors rests on an assumption that every one of them could expand their annual production to their maximum annual delivered tons from ***912** 2010 through 2019. DX4001 (Bailey Report) Fig. 60. While that measure may describe what is geologically *possible* (although her methodology is debatable), it is not the relevant measure for antitrust analysis. *F.T.C. v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011) ("Defendants must show both that entry is *likely*—meaning both technically possible [ ] and economically feasible—and that it will *replace* the competition that existed prior to the merger.") (citing *Cardinal Health*, 12 F. Supp. 2d at 56) (emphasis in original). Dr. Bailey has not provided the Court with what is economically and geologically *feasible* in the next several years. On the other hand, the **FTC** has presented ordinary course business documents and statements from decision-makers at rival SPRB coal producers that clearly indicate that no other producer has the desire or wherewithal to expand production to an extent that would meaningfully reduce the likely anticompetitive effects of the JV.

Lastly, the Court notes that Defendants' argument that SPRB coal suppliers would provide meaningful competition with

the JV through the RFP process is in tension with their broader argument that the RFP process plays a comparatively insignificant role in constraining the cost of SPRB coal. Moreover, as noted above, Defendants' ordinary course documents show that the individual Defendants are more likely to lose bids to one another, as opposed to other SPRB coal producers.

Accordingly, the Court concludes that expansion of rival SPRB coal producers is unlikely to offset the likely anticompetitive effects of the proposed JV.

D. Conclusion: Defendants fail to rebut evidence of likely anticompetitive effects.

Based on all of the evidence presented, the Court finds that, "because the proposed [JV] would eliminate head-to-head competition between the number one and number two competitors in the market for [SPRB coal]," the JV is likely to lead to anticompetitive effects in that market. *Sysco*, 113 F. Supp. 3d at 65. Evidence of probable unilateral effects strengthens the **FTC's** prima facie case that the merger will lessen competition in the national customer market. *See Heinz*, 246 F.3d at 717 (footnote omitted) (finding that "the **FTC's** market concentration statistics are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties"); *Whole Foods*, 548 F.3d at 1043 (Tatel, J., concurring) (citation omitted) (internal quotation marks omitted) ("[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market."). This finding is bolstered by both Defendants' stated goal to restrain production in order to increase margins.

Defendants present several rebuttal arguments, but they are unavailing. While there is evidence that SPRB suppliers compete with each other and with other non-coal fuel sources, many customers testified that they cannot resist a price increase or substitute to other fuels in response to one, and their experience with the BLET validates those claims. Arch is evidently [Redacted] whether or not this Court enjoins the proposed JV, and any other discussion of Arch's competitive position in the but-for world is more appropriate for the balancing of the equities. There is no prospect for new SPRB coal mines to open, and existing SPRB coal suppliers are unlikely to expand their mines to make up for any reduction in SPRB coal supply by the JV. Thus, Defendants have failed to rebut **FTC's** showing that the proposed JV ***913** is likely to have anticompetitive effects in the SPRB coal industry.

IV. Defendants' Claimed Efficiencies

Defendants' other response to the **FTC's** prima facie case is that the JV will achieve significant efficiencies that are likely to enhance competition, rather than hinder it.

[38] The Supreme Court has not sanctioned an "efficiencies" defense in a case brought under Section 7 of the Clayton Act. *See F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 580, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."). However, appellate courts and the Horizontal Merger Guidelines recognize that, in some instances, efficiencies resulting from the merger may be considered in rebutting the government's prima facie case. *Heinz*, 246 F.3d at 720 (citations omitted). Where, as in this case, a court finds high market concentration levels, defendants must present "proof of extraordinary efficiencies" to rebut the government's prima facie case. *Id.* (citations omitted) (requiring "extraordinary" efficiencies to rebut an increase in HHI of 510 points); *see also Sysco*, 113 F. Supp. 3d at 81-82.

[39] The Court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's prima facie case on the strength of the efficiencies. *See CCC Holdings*, 605 F. Supp. 2d at 72 (stating that "courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies"). Yet even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be "relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal*, 329 F. Supp. 2d at 151 (citations omitted).

[40] **[41]** The Court must "undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. Specifically, the Court must determine whether the efficiencies are "merger-specific"—

meaning they represent "a type of cost saving that could not be achieved without the merger"—and "verifiable"—meaning "the estimate of the predicted saving must be reasonably verifiable by an independent party." *H & R Block*, 833 F. Supp. 2d at 89 (internal quotation marks omitted) (citing Guidelines § 10); *Cardinal Health*, 12 F. Supp. 2d at 62 ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger.").

[42] **[43]** Defendants bear the burden of demonstrating that their claimed efficiencies are merger-specific, *H & R Block*, 833 F. Supp. 2d at 90, which requires demonstrating that the efficiencies "cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 722. Defendants must also demonstrate that their claimed efficiencies would benefit customers. *CCC Holdings*, 605 F. Supp. 2d at 74; *see also* Guidelines § 10 ("Cognizable efficiencies have the potential to reverse competitive harm only if they are likely to be "passed through to customers."); *id.* ("It "is incumbent upon the ***914** merging firms to substantiate efficiency claims.").

[44] Defendants claim that the JV will generate significant efficiencies by optimizing production across mines that are currently operated separately, thereby reducing the cost of operations and increasing the output of coal. DPFFCL ¶ 240. Dr. Israel estimated that the JV will achieve $337.4 to $495.1 million in variable cost savings through the end of the mines' lives and $164.4 to $277.8 million in variable cost savings in its first five years. *Id.* Defendants argue that these "[s]ignificant variable cost reductions are most likely to encourage further coal production, reduce coal prices, and to be pro-competitive." *Id.* ¶ 241. As a result, the JV "will result in lower prices than would prevail in the but-for world, and will thereby enhance competition and benefit customers." *Id.* ¶ 242. Further, the JV will better position Defendants to compete in today's **energy** marketplace, ensuring that their mines will continue to operate and providing customers "access to a stable and reliable supply of SPRB coal in the future." *Id.* ¶ 243.

A. Verifiability

Defendants argue that their claimed efficiencies are verifiable because the "bulk" of them "result from joining Arch and **Peabody's** contiguous SPRB mines and reducing incremental production costs." *Id.* ¶ 245. Mr. Brock Haas, **Peabody's** Vice President of Mine Finance, testified about the "Clean Team" process used by Defendants, which involved professionals from both companies with experience in mining and incorporating contiguous mine operations in developing a joint mine plan, comparing that joint mine plan to Defendants' stand-alone plans, and estimating the JV's efficiencies. Tr. Vol. 8B (Haas) 30:2-39:16. Mr. Haas described the projected efficiencies that would result from combining formerly separate production operations to reduce incremental production costs by using more efficient mining methods, better utilizing mining equipment, reducing mine reclamation costs, and reducing purchasing costs. *Id.* at 40:3-46:24. Mr. Lang also testified about these efficiencies, describing how the combination of adjoining mines would enable more efficient mining. Tr. Vol. 6B (Lang) 8:25-14:15.

Defendants argue that their projected efficiency figures are credible because they have achieved—in fact, exceeded—similar efficiencies in similar transactions in which they integrated contiguous mines into Black Thunder. DPFFCL ¶ 246. In 2004, Arch acquired the North Rochelle mine from Triton, dissolving more than five miles of common boundary, and in 2009, Arch acquired the Jacobs Ranch mine from Rio Tinto and dissolved a six-mile boundary. *Id.* ¶ 59. In both acquisitions, Arch projected significant cost-saving efficiencies due to removing the common boundaries and integrating the stand-alone mines. *Id.* ¶ 60. Mr. Lang, who was integrally involved in both of those previous transactions, testified that Arch exceeded the projected efficiencies in both transactions. *Id.* ¶ 61; Tr. Vol. 5A (Lang) 114:9-118:25; DX8845-0019. For instance, at closing of the Jacobs Ranch transaction in 2009, Arch projected roughly [Redacted] million in lifetime cost savings; in 2014, after achieving substantial returns in the first few years after the transaction, Arch projected total savings at roughly [Redacted] million. DPFFCL ¶ 61; DX6029. [15]

***915** The **FTC** argues that Defendants' efficiencies are not verifiable because the mine plans that form the basis of the efficiencies calculations are long-term forecasts based on assumptions that change over time, and they are a "closed box". PPFF ¶¶ 197-99. In particular, the JV mine plan is not an ordinary course document, and Defendants did not disclose the assumptions and factual foundations that would allow the individual claimed efficiencies to be verified. *Id.* ¶ 200. Dr. Israel accepted these assumptions and used them in his calculations, *id.* ¶ 204, but Dr. Mark Zmijewski, the

FTC's efficiencies expert, found that many of the numbers in the spreadsheets underlying Dr. Israel's calculations were hard-coded, meaning that the cells contained digits with no references to other figures or calculations, rendering them impossible to verify without more explanation. *Id.* ¶ 202.

The **FTC** provided several examples of the problems that result from Defendants' reliance on such assumptions. For instance, the JV mine plan includes hard-coded numbers related to equipment productivity, which measures the amount of dirt a machine can move in a given pit. Productivity estimates are based on the judgment and expertise of one of **Peabody's** engineers. PX6031 (Gurgenli) 165:14-173:17. Dr. Zmijewski complains that he cannot verify such as assumption without the historical data used to determine equipment productivity or an explanation why the equipment productivity would change by the specified amount if the JV were consummated. Tr. Vol. 9B (Zmijewski) 140:23-141:3.

The **FTC** also criticizes the "unfounded assumptions" in Defendants' calculations. PPFF ¶ 204. As an example, the **FTC** points to Defendants' assumption that, [Redacted] PX1048-004. [Redacted] PX7013 ¶ 6.

Also problematic, according to the **FTC**, is Defendants' assumption that increasing volume in purchasing will lead to an additional [Redacted] discount across suppliers. PPFF ¶ 205. Defendants base the [Redacted] figure on the responses they received from a subset of suppliers who provided nonbinding responses to Defendants' inquiries; they have not verified that the informal predictions of suppliers would materialize if the JV were consummated. Tr. Vol. 9B (Zmijewski) 153:5-155:19.

Additionally, the **FTC** argues that Dr. Israel did not verify the efficiencies because he failed to independently identify the assumptions, factual foundations, and calculations underpinning the JV mine plan, and his reliance on the parties' business judgment and private conversations renders his analysis unverifiable. PPFF ¶ 206. Also, Dr. Israel claimed to test the efficiencies with a "sensitivities" analysis, but his analysis was less rigorous than **Peabody's** ordinary course standards. *Id.* ¶ 208.

Finally, the **FTC** rejects the notion that evidence from Arch's past transactions substantiates their claimed efficiencies, because verification of current claimed efficiencies with past-achieved efficiencies requires a mapping of the individual claims. *Id.* ¶¶ 213-14. As an example of efficiencies from the Triton transaction that do not map onto the efficiency claims in this case, the **FTC** points to the fuel efficiency in the ***916** Triton transaction, which concerned more efficient routes that consumed less fuel, while the [Redacted] efficiency in this transaction is based on [Redacted] *Id.* ¶ 214.

Defendants respond that the JV mine plan is, by definition, outside the current ordinary course of Defendants' business. DPFFCL ¶ 247. They point out, however, that they used the same ordinary course methodologies and processes that they use in their stand-alone mine planning. Tr. Vol. 8B (Haas) 35:9-36:3.

The bulk of the JV's efficiencies derive from the physical reality that the seven-mile boundary separating Black Thunder from NARM is geologically arbitrary and the operational reality that operating as one mine instead of two will make for a more efficient operation. A customer witness suggested that the possible efficiencies were apparent to anyone who had visited the mines and seen the manner in which they are separated. [Redacted] Based on testimony from Defendants' employees and several customers, as well as the results of previous analogous mergers undertaken by Arch, it seems clear that the projected efficiencies are more than a mirage. While Dr. Zmijewski's testimony identified several flaws with Defendants' process, and the Court commends his rigor, the Court also has no doubt that there is truth to Defendants' claim that the JV is likely to achieve significant efficiencies.

The Court is, of course, concerned about the fundamental unverifiability of efficiencies that are grounded in the business judgments of Defendants' employees. Also, as the **FTC's** examples make clear, some portion of Defendants' projected efficiencies are unrealistic or oversimplified. But Defendants have shown that they used a process substantially similar to that used in the ordinary course of business to determine the anticipated efficiencies arising from this transaction, and they have supported their claims with evidence from past transactions. Thus, the issues identified by the **FTC** do not render Defendants' efficiencies wholly unverifiable.

B. Specificity

In addition to being verifiable, claimed efficiencies must also be specific to the JV. Efficiencies are merger-specific if they "cannot be achieved by either company alone." *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001); *see*

also Guidelines § 10 (agencies "credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in [its] absence").

Most of Defendants' projected efficiencies result from combining Defendants' contiguous NARM and Black Thunder mines and optimizing them under a joint mine plan. DPFFCL ¶ 251. Mr. Haas testified that neither **Peabody** nor Arch alone could achieve the synergies offered by the JV because it "would just be impractical .... By getting rid of the border, it allows you to unlock all these synergies." Tr. Vol. 8B (Haas) 38:19-39:16. Defendants also point to their bankruptcy filings within the last five years as evidence that they have done everything they can to make their separate operations as efficient as possible. DPFFCL ¶ 250. They claim to have very limited scope to continue cutting costs as separate entities. *Id.*

The **FTC** counters that it is incorrect to assume that any differences between the standalone and JV mine plans are attainable only through the JV. One significant component of the claimed efficiencies is [Redacted] and Arch has bought and sold used draglines, at least one of which is involved in the projected efficiencies in this case. Tr. Vol. 5B (Lang) 19:5-22. While the parties may prefer not to [Redacted] Defendants have not shown that such a sale could not be accomplished in the absence of the JV. Similarly, the **FTC** points out ***917** that [Redacted] is not merger-specific because Arch could learn **Peabody's** best practices through means other than the JV. PPFF ¶ 220; PX8002 (Zmijewski Report) ¶¶ 160-62.

The **FTC** also argues that Defendants incorrectly assume that any current differences between Arch and **Peabody's** pricing today derives from differences in purchasing volumes, which is belied by evidence showing that certain pricing differences reflect different preferences and tradeoffs during negotiations. PPFF ¶¶ 221-23. Per the **FTC**, "Arch and **Peabody** do not need the JV to make different contracting choices." *Id.* ¶ 222 (citing PX8002 (Zmijewski Report) ¶¶ 133-41).

The Court agrees with the **FTC** that some portion of Defendants' claimed efficiencies are probably achievable without the JV. *See generally* PX8002 (Zmijewski Expert Report) ¶¶ 131-72. Still, the underlying logic of the JV is undeniable. While some of the anticipated efficiencies may not be merger-specific, operating the mines jointly will clearly make possible substantial efficiencies.

C. Other considerations

The **FTC** raises several other objections to Defendants' efficiencies calculations. The first, and most compelling, objection is that Defendants' forecasts use, on average a 20-year horizon. Tr. Vol. 9B (Zmijewski) 125:5-19. All forecasts, including financial forecasts, become less accurate as the time horizon lengthens. *Id.* For that reason, the Merger Guidelines are skeptical of claimed efficiencies in the distant future, Guidelines § 10 n.15, and parties presenting efficiencies claims commonly limit the claims to five years or less, Tr. Vol. 9B (Zmijewski) 125:20-127:13, as Arch did in the Triton merger. PX2760; PPFF ¶ 211. It is therefore noteworthy that Defendants present their claimed efficiencies here over the life of the mine, rather than over a five-year time horizon. This longer time horizon increases the net present value of the variable cost savings from [Redacted] (over five years) to [Redacted] (over the life of the mine). DX4003 (Israel Report) ¶ 138. [16]

The **FTC** also argues that the JV has not demonstrated that it will share efficiencies with customers because the price forecast included in Defendants' claimed efficiency analysis shows [Redacted] PPFF ¶ 224. It points to Defendants' own price forecast, as well as statements from customers who reported that Defendants told them frankly that they did not expect the price of SPRB coal fall as a result of the JV. *Id.* at ¶¶ 224-25.

That argument is intuitive but unavailing. The Court's objective is to determine the JV's likely effect on competition compared to the but-for world in which the JV is not allowed. *Nat'l Tea Co.*, 603 F.2d at 700 ("[W]hen examining a merger, a court must necessarily compare what may happen if the merger occurs with what may happen if the merger does not occur."). The fact that the world with the JV does not have lower prices than the present is not, in itself, dispositive. Defendants told at least one customer that the JV will forestall price increases. [Redacted] In other words, Defendants stated that prices would rise faster in the but-for world without the JV. If true, then the JV's forestalling of price increases is a cognizable benefit to Defendants' customers.

D. Conclusion: Even with efficiencies, Defendants do not rebut presumption of likely anticompetitive effects.

"Even if the savings are neither as great as defendants have claimed nor capable of ***918** precise quantification based on the evidence presented by defendants," the Court is convinced that combining the adjacent Black Thunder and

North Antelope Rochelle mines "will inevitably allow [the JV] to achieve some measure of lower costs and higher productivity." *Arch Coal*, 329 F. Supp. 2d at 153. These efficiencies, therefore, are "relevant to an assessment" of the likely state of competition in the post-JV SPRB coal market and provide "some limited additional evidence to rebut the claim of post-merger anticompetitive effects." *Id.*

That said, even granting Defendants every dollar of their claimed efficiencies (which, based on the foregoing, is not wholly justified) and making the implausible assumption that they would pass every penny of those efficiencies on to their customers, Defendants' claimed efficiencies still would not offset the likely competitive harm to those same customers predicted by the more conservative version of Dr. Hill's Cournot model. *See* Section II.D, *supra.* Therefore, the Defendants' claimed efficiencies add little to the Defendants' effort to rebut the **FTC's** case that the proposed JV would likely have anticompetitive effects in the SPRB coal market.

Even giving Defendants the full benefit of the doubt as to efficiencies, then, they still have failed to "produce evidence showing that the **FTC's** *prima facie* case 'inaccurately predicts the relevant transaction's probable effect on future competition.' " *Sanford Health*, 926 F.3d at 962-63 (quoting *Baker Hughes*, 908 F.2d at 991). The **FTC** has succeeded in showing that JV is likely to lead to anticompetitive effects in the SPRB coal market and is thus likely to succeed on the merits of its challenge under Section 7 of the Clayton Act. 15 U.S.C. §§ 18, 53(b).

V. The Equities

[45] **[46]** The Court's finding that the **FTC** has established a likelihood of success on the merits creates a presumption in favor of a preliminary injunction. *Swedish Match*, 131 F. Supp. 2d at 172. Despite this presumption, "Section 13(b)'s 'public interest' standard still requires the court to weigh the public and private equities of enjoining the [JV]." *Sysco*, 113 F. Supp. 3d at 86 (citing *Heinz*, 246 F.3d at 726). In conducting that analysis, the Court is mindful that "no court has denied a Section 13(b) motion for a preliminary injunction based on weight of the equities" where the **FTC** has demonstrated a likelihood of success on the merits. *Sanford*, 2017 WL 10810016, at *31.

[47] **[48]** The principal equitable consideration weighing in favor of a preliminary injunction is the "strong public interest in effective enforcement of the antitrust laws and in the **FTC** having the ability to order effective relief if it succeeds in an administrative proceeding." *Id.* "[C]ompetition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy." *Phila. Nat'l Bank*, 374 U.S. at 372, 83 S.Ct. 1715. The purpose of the preliminary injunction is to preserve the **FTC's** ability to obtain effective relief if the JV is ultimately found to violate Section 7 of the Clayton Act. Allowing the transaction to proceed and then later " 'unscrambling' the eggs" upon a finding of illegality by the **FTC** is a "daunting and potentially impossible task," *Sysco*, 113 F. Supp. 3d at 87, which supports the issuance of an injunction.

[49] On the other side of the ledger, the Court is convinced that the JV will generate substantial efficiencies, and blocking the transaction will prevent those synergies from being realized before the ***919** completion of the **FTC's** administrative proceeding. [17] Also, according to the State of Wyoming in its amicus brief, unforeseen abrupt mine closures and bankruptcies could result in immediate layoffs affecting the entire state of Wyoming. Doc. [273-1] at 14. The way the State sees it, the Court's choice is between a haphazard consolidation via bankruptcies and "[t]he thoughtful planned consolidation of coal mines in Wyoming ...." *Id.* Similarly, although Defendants do not make a "failing firm" defense, DPFFCL ¶ 256, they did present evidence that Arch faces an uncertain future in the SPRB if the JV is enjoined. Tr. Vol. 5A (Lang) 101:1-4 (stating "full **energy** ... has been on this JV" and that "it is best not only for our customers but especially for our employees"); Tr. Vol. 3A (Smith) 65:20-22 [Redacted]

The Eighth Circuit has instructed that a court "ought to exercise extreme caution" when considering a request for a preliminary injunction, especially "in an industry ... experiencing significant and profound changes." *Tenet Health*, 186 F.3d at 1055. SPRB coal, as well as the **energy** industry more broadly, is certainly such an industry. Yet the Court cannot conclude, on this record, that the JV's likely benefits—which are not insubstantial, including significant efficiencies for Defendants and some mitigation of the decline of Arch and other entities in the Wyoming coal industry—will outweigh the potential harm to consumers from the lost competition between the two largest producers in the SPRB. PX8001 (Hill Report) Figs. 31-34 (finding net present value

of predicted harm to customers from 2021-2030 of between $1.092 billion and $1.946 billion). At the very least, the record in this case "rais[es] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the **FTC** in the first instance ...." *Tenet Health*, 186 F.3d at 1051 (internal quotations omitted). Accordingly, upon weighing the relevant equities, the Court finds that a preliminary injunction enjoining the JV pending a full administrative hearing on the merits is in the public interest.

CONCLUSION

Having considered all of the evidence presented in this case, the Court cannot help but return to Judge Tatel's observation in *Whole Foods*: "[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market." *Whole Foods*, 548 F.3d at 1043 (Tatel, J., concurring) (citation omitted) (internal quotation marks omitted). The **FTC** has satisfied its burden of showing a "reasonable probability" that a JV between the two largest SPRB coal suppliers would harm competition in the SPRB coal market. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. The JV is likely to cause unduly high market concentration in the market for SPRB coal, which, despite the headwinds facing the coal industry, is projected to continue supplying a significant portion of the fuel for electricity generation in the United States for decades to ***920** come.[18] The evidence offered by Defendants to rebut the **FTC's** prima facie case makes clear that there is meaningful competition between SPRB coal and other fuels, but it does not rebut the **FTC's** central claim that there is meaningful coal-on-coal competition that would be lost if the parties were allowed to consummate the JV. The equities also favor granting a preliminary injunction.

The **FTC** has thus succeeded in showing that, "weighing the equities and considering the Commission's likelihood of ultimate success, [the preliminary injunction] would be in the public interest." *Tenet Health*, 186 F.3d at 1051 (quoting 15 U.S.C. § 53(b)). Accordingly, the Court grants the **FTC's** Motion for Preliminary Injunction (Doc. [137]). A separate order accompanies this Memorandum Opinion.

All Citations

492 F.Supp.3d 865

Footnotes

1 Citations to exhibits are in the format "exhibit number—page number." For example, "PX9010-002" refers to page 2 of Plaintiff's Exhibit 9010. Expert reports are cited by paragraph number, where available.

2 Functionally, ISOs and RTOs serve similar purposes in the electricity industry, and this opinion uses those terms interchangeably.

3 In lieu of, or in addition to, generating electricity, utilities can also purchase electricity from the ISO. *See, e.g.*, [Redacted] elected to buy electricity from MISO rather than purchase Black Thunder coal and run its own units). A utility may elect to purchase electricity from an ISO if it is able to purchase it below the utility's cost to generate. Tr. Vol. 6B (Clark) 76:22-25. Therefore, in at least some circumstances, if an SPRB price increase makes it more economical for a utility to buy electricity from the ISO than to burn SPRB coal, the utility may decide to purchase that power at a price lower than its cost to generate. *Id.* at 77:23-78:3.

4 A resource is "dispatchable" if a utility can control when they generate power. Tr. Vol. 7B (Fuller) 18:22-19:8. If a unit's production is determined by forces outside of a utility's control—like the blowing of the wind or the shining of the sun—then that resource is "non-dispatchable." *Id.*

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5 Cloud Peak **Energy**, Inc., ("Cloud Peak") previously operated the Antelope and Cordero Rojo mines prior to filing for bankruptcy protection in May 2019. *Id.* ¶ 27. NTEC acquired those mines during Cloud Peak's bankruptcy proceedings.

6 Blackjewel, LLC ("Blackjewel") previously operated the Eagle Butte and Belle Ayr mines. *Id.* ¶ 28. Blackjewel filed for bankruptcy protection in July 2019, resulting in a temporary shutdown of its two mines. *Id.* ¶ 29.

7 Due to late-breaking coronavirus-related developments, the preliminary injunction hearing—which involved dozens of attorneys, 24 live witnesses, plus security, Clerk's Office, and chambers staff over nine court days—nearly had to be held entirely via video conferencing technology. At the eleventh hour, the Eastern District of Missouri Clerk's Office devised a way to hold it safely with a dozen attorneys and most witnesses appearing in person (scrupulously socially-distanced and masked); several examining attorneys and witnesses appearing by video conference; many more attorneys connected via a secure audio line; and the general public listening in by telephone. It was a staggering logistical and technological challenge, and the Court commends all involved—including attorneys, paralegals, support staff, and courthouse personnel—for their flexibility, resourcefulness, and professionalism.

8 A hearing before an administrative law judge is scheduled to begin on December 1, 2020. Counsel for Defendants has represented to the Court that the administrative hearing will never happen, and that **Peabody** and Arch will abandon the JV if the Court grants a preliminary injunction. The Court has no reason to doubt Counsel's representation, but Defendants' intentions do not affect the legal standard that this Court must apply.

9 Both parties cite to the Guidelines, published by the U.S. Department of Justice and the Federal Trade Commission, extensively in their briefing. Although they are not binding, the Guidelines "have [ ] been repeatedly relied on by the courts" in evaluating merger challenges. *F.T.C. v. Tronox Ltd.*, 332 F. Supp. 3d 187, 206 (D.D.C. 2018).

10 Dr. Hill points out in his rebuttal report that Dr. Bailey changed her "Before" and "After" time periods for this analysis between the **FTC's** pre-complaint investigatory proceeding and her expert report in this case. PX8006 (Hill Rebuttal Report) ¶¶ 122-23. That shift supports Dr. Hill's argument that, within a certain range, the time period selected by Dr. Bailey is essentially arbitrary, which casts further doubt on the helpfulness of an event study without an underlying event.

11 The *Brown Shoe* approach to market definition has been criticized as "free-wheeling," and out of step with "modern merger practice." *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1058-59 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Nevertheless, it remains good law and is still regularly invoked in antitrust challenges. *See, e.g.*, *RAG-Stiftung*, 436 F. Supp. 3d at 293 n.3 (quoting *Sysco*, 113 F. Supp. 3d at 27 n.2) ("*Brown Shoe* remains the law, and this court cannot ignore its dictates.")

12 One utility representative testified that its coal units are so far "in the money" that an increase of 50% in the cost of coal would not cause them not to run: "[T]he units still run, it's just that that margin that they were making shrinks and shrinks and shrinks as the coal gets more expensive, and all that means is that my customer rates ultimately are higher and higher and higher." [Redacted]

13 Self-commitment is an exception to the "least-cost dispatch" rule: when certain EGUs are bid into ISOs as "self-committed" or "must run," the utility is directing the ISO to operate the unit regardless of its variable costs. Tr. Vol. 6A (Carey) 80:1-5; [Redacted] In most circumstances, self-committed units dispatch economically,

PX9191-001; Tr. Vol. 6A (Carey) 81:17-82:1, and uneconomic self-commits are highly discouraged by ISOs and regulatory authorities, as they are inconsistent with least-cost dispatch. Tr. Vol. 6A (Carey) 33:9-33:14.

14 Dr. Bailey argues that these mines are competitively meaningful because any coal purchased from these two mines would free up coal at rival mines. DX4001 (Bailey Report) ¶ 90. However, she discusses magnitudes of several hundred thousand tons per year, *id.*, which is around one percent of the annual production of Black Thunder alone.

15 Defendants argue that Arch's customers benefited from both prior transactions because North Rochelle and Jacobs Ranch were both struggling as stand-alone assets, and the combination allowed Arch to increase production and lower costs relative to the prior owners' stand-alone plans. DPFFCL ¶ 63; PX9065-002. While the **FTC** argues that these transactions did not benefit customers because SPRB coal prices increased following these acquisitions, PPFF ¶ 216, the record does not support the **FTC's** claim. There is a critical distinction between lower prices in absolute terms and lower prices relative to those that would have prevailed absent the acquisition, and the **FTC** has not shown that Arch's prices were higher post-merger than they would have been absent the merger.

16 The very fact that Dr. Israel calculated and included a five-year efficiencies calculation suggests that he was aware of the difficulty of projecting savings over the life of the mine.

17 The Court notes again that counsel for Defendants has indicated that they will not litigate an administrative proceeding and will instead abandon the JV if this Court issues a preliminary injunction. As a result, the practical effect of granting an injunction will be to terminate the JV. However, "the parties' stated intention to abandon the transaction prior to the merits proceeding is a private equity, and cannot on its own overcome the public equities that favor the **FTC**." *F.T.C. v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 74 (D.D.C. 2018) (citing *Heinz*, 246 F.3d at 727, and *Sysco*, 113 F. Supp. 3d at 87).

18 *See* EIA Annual **Energy** Outlook 2020, Table 66, *available at* https://www.eia.gov/outlooks/aeo/tables_ref.php (projecting that almost 200 million tons of SPRB coal will be consumed in 2030, and that annual consumption will remain around 150 million tons per year through 2050).

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 5

HIGHLY CONFIDENTIAL — CN0000185-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 6

HIGHLY CONFIDENTIAL — *BN/SANTA FE* EXCERPT, VERIFIED STATEMENT OF JOSEPH P. KALT. (FILED OCT. 1994)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 7

COMMENTS OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CO., MAJOR RAIL CONSOLIDATION PROCEDURES – ADVANCE NOTICE OF PROPOSED RULEMAKING, STB EX PARTE NO. 582 (SUB-NO. 1) (FILED NOV. 17, 2000)

200433

MAYER, BROWN & PLATT

1909 K STREET, N.W.

WASHINGTON, D.C. 20006-1101

ERIKA Z. JONES
DIRECT DIAL (202) 263-3232
ejones@mayerbrown.com

MAIN TELEPHONE
202-263-3000
MAIN FAX
202-263-3300

November 17, 2000

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

Re: Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Comments of The Burlington Northern and Santa Fe Railway Company, including the verified statements of Robert D. Krebs, Professors José A. Gómez-Ibáñez and Joseph P. Kalt. Professor Richard J. Pierce, Jr., and Professor Bradford Cornell. Also enclosed is a 3.5 inch disk, containing the text of the Comments in WordPerfect 9 format.

I would appreciate it if you would date-stamp the enclosed extra copy of the Comments and return it to the messenger for our files.

Sincerely,

Erika Z. Jones

Erika Z. Jones

Enclosures

cc: All Parties of Record

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Office of the Secretary
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Jeffrey R. Moreland
Richard E. Weicher
Michael E. Roper
Sidney L. Strickland, Jr.
The Burlington Northern and
Santa Fe Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76131-0039
(817) 352-2368

Erika Z. Jones
David I. Bloom
Robert M. Jenkins III
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

Attorneys for The Burlington Northern and Santa Fe Railway Company

November 17, 2000

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TABLE OF CONTENTS

Page

I. EXECUTIVE SUMMARY 5

II. INTRODUCTION 8

III. DISCUSSION 17

A. It Is Vital That Merger Proceedings Be Handled Expeditiously, Within Periods Consistent with the Requirements of the Economy and Capital Markets 17

B. The Presumptions Underlying the Proposed Rules Are Wrong 23

1. There Is No Basis for the Presumption That Future Rail Mergers Will Not Produce Significant Public Benefits, and Any Such Presumption Would Violate Congressional Intent 23

2. There Is No Basis for the Presumption That Mergers Will Produce Generalized Competitive Harms 32

3. There Is No Basis for the Presumption That Mergers Will Cause Transitional Service Harms 34

C. Imposing a Substantially Heavier Burden, Including the Requirement of Unrelated Competitive Enhancements, on Future Railroad Mergers Would Be Bad Policy and Law 36

D. Applicants Should Be Required to Address Only Concrete Downstream and Crossover Effects of a Proposed Merger 43

E. Applicants Should Not Be Subject to the Future Imposition of Conditions to Their Mergers or Required to Guarantee the Specific Projected Benefits of a Merger 46

F. The Board Should Not Dictate the Structure of Future Business Relationships 49

G. The Board Should Require Merger Applicants to File Service Assurance Plans and Should Monitor Post-Merger Implementation 50

H. The Board Should Require That Affected Major Gateways Remain Open, 2-to-1 Situations Be Remedied, Including Build-In/Build-Out and Transload Opportunities, and "Contract Exception" Rights Be Retained 51

I. Other Issues Raised by the NPR 52

1. Transnational Transactions 52

2. Labor Issues 52

3. Market Data in Support of a Merger Application 53

4. Upstream Effects 54

5. Technical Changes 55

IV. CONCLUSION 55

VERIFIED STATEMENTS:

Robert D. Krebs

Professors José A. Gómez-Ibáñez and Joseph P. Kalt

Professor Richard J. Pierce, Jr.

Professor Bradford Cornell

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby files its comments, including the verified statements of Robert D. Krebs, Professors José A. Gómez-Ibáñez and Joseph P. Kalt, Professor Richard J. Pierce, Jr., and Professor Bradford Cornell, in response to the "Notice of Proposed Rulemaking" ("NPR") issued by the Surface Transportation Board ("Board") on October 3, 2000. In the NPR, the Board has requested comments on proposed changes in its merger rules that would significantly raise the bar for future mergers of Class I railroads.

I. EXECUTIVE SUMMARY

BNSF supports those narrow changes proposed by the NPR that would refine the Board's current pro-merger policy to address the precise concerns raised by recent mergers. Specifically, BNSF supports the requirements that future merger applications include (i) detailed service assurance plans, and (ii) proposals for maintaining competition through an open major gateway policy and the preservation of the "contract exception" right for shippers affected by a merger.

However, BNSF strongly opposes the unduly prolonged schedule proposed by the Board for handling Class I railroad mergers, which could stretch to 19 months or longer.

Such a schedule is not consistent with the demands of the economy in general or of shippers, other carriers and ports. It could adversely affect the access of railroads to capital markets, reduce the benefits generated by rail mergers, and place merger applicants in a state of regulatory limbo that would be harmful to shippers and the railroad industry. Therefore, BNSF proposes herein a maximum review period of one year from the date of the pre-filing notification. Moreover, given the end-to-end nature of likely future Class I transactions, there is no reason why the Board cannot process mergers within even shorter periods, using the same simplified procedures as other agencies do in reviewing mergers of comparable scope and size, much as the Board's predecessor itself suggested in 1995.

Further, BNSF strongly opposes those provisions of the NPR that would reverse the statutory presumption in favor of mergers and require all merger applicants to propose "competitive enhancements" to offset unrelated and ill-defined presumed harms supposedly arising from irremediable reductions in geographic and product competition and unavoidable transitional service problems. BNSF also believes that the Board must carefully limit the categories of "downstream" and "crossover" effects it will review in merger cases to those that are sufficiently concrete to be suitable for analysis and are related directly to the actual merger pending before the Board. Furthermore, the Board's oversight of a consummated merger should be limited to policing the efficacy of competitive remedies adopted in that merger proceeding and addressing merger-related service problems. The Board should not penalize a merged railroad, or impose new conditions on a merger, merely because all projected benefits of the merger are not realized on schedule or because a future merger produces some new, unanticipated harm.

Taken together, the provisions of the NPR opposed by BNSF would impose unacceptable delay in merger review, remove predictability and finality from Board review of mergers, and signal a return by the Board to discredited interventionist policies that would result in significant harm to the rail industry and to rail shippers. As a result, the NPR could prevent the proposal or consummation of beneficial mergers and encourage the flight of capital from the rail industry at precisely the time when the industry must invest to expand its capacity and improve its competitive position and services.

Therefore, in any final rule, the Board should: (i) adopt procedural rules that will result in final Board action no later than one year after the pre-filing notification of a merger; (ii) require merger applicants to submit a detailed service assurance plan and proposals (such as open gateways, contract exception rights, and protection for 2-to-1 shippers) that would preserve effective competitive alternatives for those shippers who now have them; (iii) eliminate the presumption that mergers can no longer produce significant public benefits; (iv) eliminate the presumption that future mergers will cause competitive or service harms that must be offset by unrelated competitive enhancements; (v) limit the scope of Board review of downstream and crossover effects; and (vi) avoid post-merger review of issues other than the efficacy of competitive remedies adopted as conditions of the merger and the need for temporary remedies for any merger-related service failures.

If so revised, the final rules would protect shippers against the repetition of past service problems and preserve effective competitive rail options, while still giving railroads the tools and ability to attract the capital necessary to meet the service and competitive challenges of the new century. Such rules also would provide the timely, predictable and final action that capital markets, railroads, shippers and other interested parties require.

II. INTRODUCTION

The U.S. rail industry has made significant progress in the last twenty years, rationalizing capacity, increasing productivity and decreasing real rates for shippers. Mergers have been a critical tool in attaining these benefits for the Nation.

The rail industry now faces different problems from those of the past. Although a primary focus of mergers once was the elimination of excess capacity, many industry participants agree that the industry now requires new capacity, new services and improved efficiency in order to meet the requirements of its customers and respond to pressures from competitors.

To meet the needs of the industry and its customers, railroads must have the ability to move quickly. However, the proposed rules would impose a lengthy procedural schedule that is incompatible with the requirements of today's economy, particularly those of capital markets. In contrast, mergers of major companies in other industries, including regulated industries, routinely are reviewed by other government agencies in a matter of months. *See* Attachment 2 to these comments. A prolonged schedule for rail mergers would impose unnecessary direct and indirect costs on merging railroads, shippers, other carriers and ports. An extended procedural schedule would expand the uncertainty that capital markets abhor, deny shippers the timely benefits of rail mergers, and limit the ability of railroads and shippers to respond to changed circumstances and new opportunities during the review period. By deferring merger benefits and creating uncertainty, the unnecessarily protracted proposed schedule for handling merger applications could, in and of itself, result in a "good" merger becoming a "bad" merger. This would be unsound and destructive

public policy.[1] The Board, therefore, should complete its review of future merger applications no later than one year after the filing of the pre-filing notification.

The Board's merger policy should continue to favor mergers because mergers can still produce public benefits. Mergers can help the rail industry quickly, inexpensively and effectively expand capacity through the more efficient use of existing capital assets. Mergers also can enable railroads to reduce their costs. They can encourage new investment, as evidenced by the investments triggered by recent mergers in the industry, and enable enhanced services to be offered to shippers. By expanding the scope of networks, mergers can help railroads meet a greater range of shippers' transportation needs, thereby attracting new business and improving their overall competitive position in the national transportation market. The ability to pursue mergers, when warranted, can reassure investors about the future of a rail industry that today is not earning its cost of capital. Accordingly, both public policy and a clear Congressional mandate require that the Board continue to favor and approve efficiency-producing mergers.

However, by creating unfounded substantive and procedural obstacles to future mergers, the proposed rules would deepen the capital problems of the rail industry and impede railroads' efforts to create new capacity and improve their competitive positions. Adoption of the proposed rules also would raise fears that the Board is returning to the intrusive and failed policies of the past. While merger applicants today understand what issues they must address when contemplating and then pursuing a merger, the proposed

[1] "Markets do not stand still while the Board is deliberating. The longer the Board takes, the longer the merging parties are caught in limbo. Investors and stockholders are well aware of the adverse effects that can have on profitability, and their perception of the risk will be reflected both in the value of the railroad's stock and in their decisions to invest in the industry." Verified Statement of Bradford Cornell ("V.S. Cornell") at 10.

rules would remove the essential element of predictability required for sound business planning and regulatory policy. Furthermore, because the Board's proposed rules contemplate the imposition of additional conditions during an extended oversight period and require merged railroads to guarantee projected benefits, the parties will lack the finality, closure and certainty the regulatory process should provide.[2]

Key elements of the proposed merger rules are based on unsound economic analysis and regulatory policy, and are contrary to law. For example, even though the proposed rules would create new requirements (the maintenance of open major gateways and contract exception rights) that supplement the Board's traditional approach to competitive issues, the rules would presume, perhaps irrebuttably, that competitive harms would be produced by any future merger of Class I railroads. This presumption cannot be justified. The Board has adequate tools to define and then address with narrowly crafted remedies the actual extent of competitive harms that might be produced by any specific merger proposal, particularly with respect to the end-to-end mergers of the future. Furthermore, even under its proposed rules, the Board would have to engage in a detailed analysis of the presumed competitive harms in order to determine what level of competitive enhancements would be required to offset those presumed harms.

Even though the proposed merger rules would require the submission of extremely detailed service assurance and transition plans and provide for extensive post-approval

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[2] "Investors have choices. If the long-term prospects of the railroad industry are significantly clouded by regulatory restrictions and regulatory uncertainty, investors will be reluctant to risk their funds in the industry. This, in turn, may reduce the industry's access to funds in the capital markets and raises their cost of capital. This higher cost of capital translates into a reduced stock price, which hurts the firm's shareholders and further discourages new investment." V.S. Cornell at 9.

operational monitoring by the Board, the NPR presumes that significant transitional service problems will nevertheless accompany all future mergers. In so doing, the NPR does not properly recognize that the unique transitional service problems of the UP/SP and CSX/NS/Conrail transactions are unlikely to be repeated. UP acquired a railroad that had underinvested for years, and CSX and NS divided an existing carrier's assets in a manner unprecedented in the past and unlikely to be repeated in the future. The NPR also does not recognize that the end-to-end mergers of the future are far less likely to raise significant service issues. Finally, railroads face powerful financial incentives not to repeat past service problems, which led to sharply reduced earnings, litigation, and damaged relations with customers.

The proposed rules also underestimate or, perhaps, do not value at all the intermodal competition that mergers produce, the evidence that intramodal competition has remained strong after prior mergers (as demonstrated by real rate reductions for all classes of shippers), and the investments that merged railroads have made in improving service and hence their competitive positions. Moreover, the NPR would require the Board to speculate whether the benefits projected for a specific merger could be replicated through an alliance or joint marketing effort that no one has actually proposed.[3] However, given the

[3] "It would be irrational for two railroads to propose an end-to-end merger unless they believed that the merger would generate cost savings and service improvements that they could not gain by other means. The cost, delay, and uncertainty of the merger process give railroads strong incentives to seek their ends by other means. The fact that railroads continue to pursue end-to-end mergers is thus strong evidence that mergers can provide benefits that are unavailable via other types of transactions. Railroads' preference in many cases to achieve integration through merger rather than alternative contractual arrangements is driven by the underlying economics of the rail industry. In order to move traffic from origin to destination while meeting the service needs of shippers, railroads must solve a technical coordination problem. Railroads allocate resources and coordinate decision-making regarding scheduling, routing, allocating locomotives, prioritizing car

additional costs of a merger, including the substantial expense of preparing the environmental review and the risk that unacceptable competitive and service conditions will be imposed or the merger rejected, the Board can assume that merger applicants have reviewed their alternatives thoroughly before subjecting themselves to the merger review process.

By presuming harms that have not been shown to be either likely or significant and then requiring merger applicants to offset these hypothetical harms with unrelated competitive enhancements, the proposed rules would make it impossible for future merger applicants reasonably to forecast Board action. Furthermore, the rules would encourage interested parties to seek "rents" by demanding non-merger-related benefits, based on a claim that these benefits would compensate for the unidentified and unquantified harms caused by the merger. Because the remedies would be unrelated to the posited harms, the Board would have no predictable or reasoned basis for selecting among competing remedies, deciding what cumulative level of remedies is necessary, or determining which shippers should receive such windfall benefits.[4] The lack of predictability would impede

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switching, moving trains through congested yards, etc. These decisions interact in ways that can affect numerous portions of a railroad's operations and the shippers who use that system. As a result, railroads establish complex operations, procedures, and protocols that attempt to balance the needs of all of their shippers, and rail managers are constantly deciding in real time which trains should have priority and what actions to take when unplanned contingencies occur." Verified Statement of José Gómez-Ibáñez and Joseph P. Kalt ("V.S. Gómez-Ibáñez/Kalt") at 23.

[4] "In the absence of a clear standard, it will be difficult [for the Board] to limit or constrain the requests for favors and difficult to prevent arbitrary outcomes based on the success of shippers' bargaining." V.S. Gómez-Ibáñez/Kalt at 18. "The unfairness inherent in providing benefits to one class of shippers, rather than another, is a key reason why remedies should be designed to offset specific harms to specific groups." Verified Statement of Richard J. Pierce, Jr. ("V.S. Pierce") at 17.

beneficial change and harm the ability of the rail industry to raise necessary capital, and therefore is strongly undesirable from a public policy perspective.[5]

The NPR's proposal on the analysis of "crossover" and "downstream" effects also is far too broad. Merging railroads should be required to demonstrate that their merger will not produce adverse crossover effects by creating service problems for other railroads.[6] However, with respect to downstream effects, it would be speculative for any merger applicant to forecast the actions of its competitors. Such speculation would invite meaningless debate and abuse of the merger review process, as competitors and other interested parties posit downstream responses that somehow require the rejection or conditioning of the merger actually before the Board.[7] Furthermore, it would be inappropriate policy and contrary to the statute to remedy competitive or other problems arising from a potential (or a future) merger with new conditions on an already

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[5] "[B]y adopting a presumption that future mergers are inherently harmful and making it more difficult to justify future mergers, the proposed new merger policy signals investors that the Board is satisfied with the status quo of rail sector financial performance and capital investment." Verified Statement of Robert D. Krebs ("V.S. Krebs") at 3.

[6] "While a railroad has the clear economic incentive to prevent disruption of its own system, it can rationally ignore the effects of its disruptions on *other* railroads' service, revenue, and profits. . . . Of course, the foregoing does not mean that merging railroads will always under-protect against service disruption. Recent mergers, such as those between BN and the ATSF and the Canadian National/Illinois Central transactions, provide counterexamples that make it clear that the generalized disruption of the rail network is not an inevitable consequence of mergers. It is clear that the presence of service disruption is directly related to the method by which a merger is implemented. . . . [and] the Board has a legitimate role in protecting the public against merger-related service disruptions." V.S. Gómez-Ibáñez/Kalt at 13.

[7] "[P]roposed mergers should not be impeded by a proposal that imposes substantial new burdens on applicants, elevates speculation to the role of evidence, and opens a Pandora's box of political pressures and temptations while adding nothing of value to the merger review process." V.S. Gómez-Ibáñez/Kalt at 29.

consummated merger. Therefore, the middle ground proposed by BNSF in response to the ANPR remains the only feasible proposal – if a second rail merger is announced and notice of it is filed with the Securities and Exchange Commission ("SEC") by the date that initial comments are due with respect to the first merger, the parties to the first merger proceeding should address whether any new competitive problems would be created by the two mergers.

Finally, the Board should limit its post-merger oversight to a review of whether the conditions imposed to maintain shippers' competitive options have worked; whether service assurance plans have been followed and updated to maintain service integrity for rail shippers, shortlines and regional carriers and ports; and whether temporary remedies are required to alleviate any temporary merger-related service problems that may have developed. A merged railroad should not be subject to the post-merger imposition of conditions in response to unforeseen circumstances or a future merger.[8] Further, a merged railroad cannot be the guarantor of merger benefits in today's dynamic economy. Indeed, such a policy would encourage a merged railroad to make bad decisions – such as laying off employees, making unnecessary capital investments, or rushing implementation instead of proceeding with step-by-step caution – only to satisfy the post-merger review. Moreover, a merged railroad might not achieve all projected benefits precisely because the merger triggered competitive responses by intra- and intermodal competitors. Thus, it is not clear how the Board could – or why it should – unscramble a merger or impose significant new

[8] "I cannot imagine any firm that would be willing to merge, or even to consider a merger, under conditions in which an agency can impose unknown and unknowable conditions on the merged firm years after the merger is approved and implemented." V.S. Pierce at 20.

conditions if all projected benefits were not achieved on precisely the schedule originally forecast.

If the proposed rules are adopted without significant changes, good mergers – those that create public and private benefits, maintain effective competitive options for shippers who now have them, preserve and improve the quality of service, and create the efficiencies and attract the new traffic necessary to justify further investment in the rail industry – would be discouraged, if not prohibited. Indeed, good mergers may not even be proposed because railroads may conclude that the procedural and substantive bars to mergers have been raised too high to be satisfied at a fair cost. Even if the rules do not discourage railroads from initiating mergers, the policy could result in the rejection of a good merger without any showing that the merger would produce an irremediable concrete harm. This is not sound economic or regulatory policy; it is bad law, and it would undermine the progress of the last two decades.

Regulators across the United States and around the world have recognized that regulation should be crafted as narrowly as possible, aimed at only those issues that cannot be better handled through competition in the marketplace. In particular, there is broad consensus among economists, regulators and legislators that merger policy should focus on the specific competitive effects of a proposed merger.[9] Therefore, absent

[9] "[I]n non-regulated industries, where the harm to competition and the risk of the exercise of market power is the primary focus of merger policy." V.S. Gómez-Ibáñez/Kalt at 4 (citing Horizontal Merger Guidelines, U.S. Dept. of Justice and Federal Trade Commission, April 12, 1997, as amended April 18, 1997). Even regulated industries have moved in this direction. For example, the Federal Energy Regulatory Commission ("FERC") has streamlined its merger approval process over time to focus almost exclusively on the effects on competition. V.S. Pierce at 7-11 (describing FERC's regulatory procedures).

significant irremediable effects, market-driven mergers should be permitted to go forward. Merger policy should not encourage unaffected parties to seek rents or conditions unrelated to the merger, nor should it be used as a blunt instrument for regulators to force the restructuring of an entire industry. Merger policy should defer to market forces except when identified competitive and service harms are threatened. Merger policy should recognize the high costs of regulatory delay and the need to provide industry participants with clear guidance that can be used reasonably to project regulatory outcomes.

Until the start of the Ex Parte No. 582 process, the Board seemed committed to the same kind of market-driven merger policies that guide other U.S. antitrust and regulatory authorities. Yet by expanding the scope of Board review and increasing the uncertainty of Board actions, the NPR would move the Board in the opposite direction from general regulatory policy in the United States. This would lead to underinvestment in the railroad industry, a loss of inter- and intramodal competition, and a return to the problems of the past.

Therefore, the Board's revised merger policy statement should not disfavor mergers, but instead should maintain the pro-merger policy prescribed by Congress. The Board's merger policy should call for a balanced review, based on concrete and widely understood standards, to determine whether the proposed merger would result in the elimination of effective competitive alternatives for those shippers who currently have such alternatives or produce transitional or permanent service problems. If a merger is likely to produce public benefits, and identified competitive and service harms are avoided or appropriately mitigated, the Board's merger policy should result in the timely review and approval of that merger – without injecting presumptions of harms, the need to counterbalance such

hypothetical harms with unrelated competitive enhancements, or the ability of third parties to extract rents as the price of approval. Accordingly, the Board should adopt the focused, but meaningful, changes in its merger policies proposed by BNSF in response to the ANPR, accelerate its review of rail mergers so that all mergers are reviewed within one year of the pre-filing notification, and otherwise leave intact its current general approach to rail mergers.

III. DISCUSSION

A. It Is Vital That Merger Proceedings Be Handled Expeditiously, Within Periods Consistent with the Requirements of the Economy and Capital Markets. The NPR proposed that evidentiary proceedings be completed within one year after an application is filed, with a Board decision to be issued within 90 days after closure of the evidentiary proceeding. Proposed 49 C.F.R. § 1180.4(e), NPR at 27. With a prefiling period of 90 to 180 days, this could result in merger reviews taking almost 2 years to complete, a period that is simply too long given the financial realities of today's economy. The deadline for Board action on a merger application should be reduced to a maximum of one year, including the pre-filing period and a six-month period for any required evidentiary proceedings.

The unwarranted regulatory delay proposed by the NPR would create significant harm for the rail industry and shippers. In his Verified Statement, Robert Krebs states that:

> First, there is no reason to delay the benefits of a good merger for shippers. Yet, extended procedural schedules defer those benefits for shippers and can even lead to the complete loss of those benefits because good mergers are either not proposed or are undone by the delay and uncertainty of the review process. Second, during the period when a merger is pending before the Board, the applicants and other parties are placed in a regulatory limbo, unsure how to plan for the future or how to respond to other opportunities.

> Regulatory limitations on a railroad's use of its assets and uncertainty about future limitations act not only as disincentives for the railroads to invest in particular projects but also as disincentives for outside investors to invest in the railroad . . . . Investors have choices. If the long-term prospects of the rail industry are significantly clouded by regulatory restrictions, investors will be reluctant to risk their funds in the industry. This, in turn, may reduce the industry's access to funds in the capital markets and raises their cost of capital. V.S. Cornell at 8-9.

Professor Cornell further explains that:

> Each of these regulatory taxes diminishes the prospective benefits of possible merger transactions. It is quite conceivable that a merger that otherwise promised to make the merging railroads more efficient, improve their services, and help them cover their cost of capital – with no unremedied competitive harms – would effectively be defeated by such taxes. That is not in the railroads' interest, it is not in their customers' interest, and it is not in the public interest. *Id.* at 13.

The BN/SF and UP/SP mergers demonstrated the positive benefits that mergers can produce. In both cases, competitive options were retained for those shippers who had such options prior to the mergers. Post-merger, BNSF and UP made significant investments in infrastructure improvements, new locomotives, and additional or advanced rolling stock. Both BNSF and UP offered new services to their shippers, including efficient and competitive services that finally delivered the unfulfilled promises of earlier joint ventures. The Board should not turn its back on the benefits that future mergers can produce, such as the benefits that the proposed combination of BNSF and CN would have produced. V.S. Krebs at 7 - 8.

Furthermore, any "paradigm shift" in the current pro-merger policy reflected in the Board's current regulations must come from Congress. Congress established the pro-merger statutory policy, and only Congress can reverse that policy. Even if the proposed rules did not incorporate an overt anti-merger bias, but rather only adopted a neutral stance

hypothetical harms with unrelated competitive enhancements, or the ability of third parties to extract rents as the price of approval. Accordingly, the Board should adopt the focused, but meaningful, changes in its merger policies proposed by BNSF in response to the ANPR, accelerate its review of rail mergers so that all mergers are reviewed within one year of the pre-filing notification, and otherwise leave intact its current general approach to rail mergers.

III. DISCUSSION

A. It Is Vital That Merger Proceedings Be Handled Expeditiously, Within Periods Consistent with the Requirements of the Economy and Capital Markets. The NPR proposed that evidentiary proceedings be completed within one year after an application is filed, with a Board decision to be issued within 90 days after closure of the evidentiary proceeding. Proposed 49 C.F.R. § 1180.4(e), NPR at 27. With a prefiling period of 90 to 180 days, this could result in merger reviews taking almost 2 years to complete, a period that is simply too long given the financial realities of today's economy. The deadline for Board action on a merger application should be reduced to a maximum of one year, including the pre-filing period and a six-month period for any required evidentiary proceedings.

The unwarranted regulatory delay proposed by the NPR would create significant harm for the rail industry and shippers. In his Verified Statement, Robert Krebs states that:

> First, there is no reason to delay the benefits of a good merger for shippers. Yet, extended procedural schedules defer those benefits for shippers and can even lead to the complete loss of those benefits because good mergers are either not proposed or are undone by the delay and uncertainty of the review process. Second, during the period when a merger is pending before the Board, the applicants and other parties are placed in a regulatory limbo, unsure how to plan for the future or how to respond to other opportunities.

> Third, capital markets cannot tolerate uncertainty or delay. The mere threat of an extended regulatory proceeding would cause capital to seek other investment opportunities and place downward pressure on railroad stocks. V.S. Krebs at 3-4.[10]

In the rail industry, capital markets see a review process that takes much longer than that of other industries. The markets also remember that the Board already has imposed an effective 34-month moratorium[11] on rail mergers, ostensibly so that it could more effectively – not in a more cumbersome way – process merger applications. Finally, as the Board has implicitly recognized in its proposal to discount future benefits, there is a time value of money, so the length of the review process can, by delaying the realization of merger benefits, turn a "good" merger into a "bad" merger or lead railroads to choose not to pursue good mergers.

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[10] Robert Krebs further states that "[T]he bottom line is that shareholders and shippers alike suffer when they must defer enjoyment of the benefits accruing from a beneficial rail merger until the conclusion of the lengthy STB review process." V.S. Krebs at 6. This position is supported by Professor Cornell in his verified statement, where he states "[d]elay in the approval process is particularly insidious from a financial standpoint. Not only does it delay the cash benefits of the merger, thereby significantly reducing the present value of the transaction, but it prevents the railroads that plan to merge from determining their optimal capital expenditure levels and allocation of assets while they are enmeshed in regulatory limbo." V.S. Cornell at 4.

Professor Cornell further explains that "[A] 19-month delay imposes a serious tax on the finances of any combination. In effect, it would set back by nearly two years the merging railroads' ability to begin to realize the benefits of the transaction. Moreover, it would make it impossible during that time period for either of the merging parties to determine their optimal capital expenditure levels and allocation of assets. . . . Investors and stockholders are well aware of the adverse effect this can have on profitability, and their perception of the risk will be reflected in both the value of the railroads' stock and in their decisions to invest in the industry." V.S. Cornell at 10.

[11] On March 17, 2000, the Board announced a moratorium on the filing of merger applications until its new merger rules are issued in June 2001. Because any future merger would be subject to at least a 3-month pre-filing notification period and the proposed 16-month review period, the result would be an effective moratorium of 34 months.

There is no reason for merger review to take as long as the NPR proposes. Given the additional detailed information that the NPR would require to be part of any application, the express requirement that many procedural and case management issues be handled during the pre-filing period, and the end-to-end nature of the mergers likely to be proposed in the future, any final rule adopted by the Board should significantly accelerate the merger review process.

BNSF has reviewed the time taken for mergers to be processed in both regulated and unregulated industries; the results are shown in Attachment 2 to these comments. Of 48 mergers of large corporations that were subject to review by the Federal Trade Commission ("FTC") or the Department of Justice ("DOJ"), including large telecommunications mergers in which the Federal Communications Commission had a significant role, 34 were resolved in six months or less. Similarly, between 1995 and the present, the Federal Energy Regulatory Commission ("FERC") was able to resolve 29 of 49 merger proposals in less than six months, including several mergers that created new utility giants.[12] FERC was able to improve its merger processing time significantly when it narrowed the scope of its merger review and defined more precisely for applicants what issues must be addressed in any application. FERC also has been able to process most mergers without the need to supplement the initial filings of the parties with third-party discovery, depositions or other evidentiary proceedings. The Board should do the same.[13]

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[12] *See* V.S. Pierce at 7-11 for a discussion of FERC procedures.

[13] Even if the Board determines that discovery is required, the Interstate Commerce Commission showed in the BN/SF merger proceeding that the merger review process can be completed in less than one year. In that proceeding, the applicants' notice of intent was filed on July 8, 1994. The proceeding was suspended for a period of 3 months from December 5, 1994, to March 9, 1995. The Commission's final decision was issued on

Furthermore, the mere size of a merger should not dictate the time it takes to analyze the merger. In fact, large mergers that do not raise difficult competitive issues often are handled by DOJ/FTC and other agencies in only a few months. Many agencies are able to process mergers without significant evidentiary proceedings, relying instead on paper hearings without discovery. The Board should adopt this approach, so that rail mergers that do not raise competitive or other complicated issues are handled on an expedited basis.

For these reasons, BNSF requests that the Board adopt the procedural schedule for Class I mergers set forth in Attachment 1. This schedule would result in final Board action on merger applications within 270 days of the filing of a complete merger application, or approximately one year from the date that the pre-filing notification is submitted to the Board. This schedule is closer to the timetables for final review in other industries with which the rail sector competes for capital and, equally important, this schedule is consistent with schedules that the Board's predecessor itself has stated are ample to ensure full review of a merger application.

In a notice of proposed rulemaking, the Interstate Commerce Commission proposed to complete its merger proceedings within 180 days after the filing of a Class I merger application. Ex Parte No. 282 (Sub-No. 19), New Procedures in Rail Acquisitions, Mergers and Consolidations (served January 26, 1995). The Commission concluded that such a time frame would fully preserve the opportunity for effective participation by affected persons and the public at large, would provide for reasoned consideration of the arguments

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August 23, 1995. The proceeding thus encompassed 10 months, excluding the period of suspension.

for and against a proposed application, and would permit consideration of competing applications, proposed conditions and amendments offered by the applicants to meet objections to a proposed transaction.[14] The schedule proposed by BNSF would do likewise and, in fact, would add 90 days to the Commission's 1995 proposed schedule.

A review period of one year for Class I mergers also would accommodate the environmental review required under the National Environmental Policy Act ("NEPA") and the Board's existing environmental regulations. The Board, in cooperation with the applicants, could initiate many of the steps involved in the NEPA process as soon as applicants filed the pre-filing notification, instead of waiting for the filing of the application. These steps could include publication in the Federal Register of the notice of intent to prepare an Environmental Impact Statement ("EIS") (should the decision be made that an EIS is required), selection of the third party contractor, coordination with other federal and state agencies, and initiation of the scoping process.

Even if the Board were to decide not to initiate one or more of these steps in a given proceeding until after an application was filed, BNSF's proposed procedural schedule still provides ample time for completion of the environmental review in advance of final action by the Board. For example, under BNSF's proposed schedule, the notice of intent to prepare an EIS and request for comments on the scope of the EIS would be issued 7 days

[14] In fact, a variant of the Commission's proposed 180-day schedule was applied to the then pending BN/SF merger proceeding, and, excluding the period when the proceeding was suspended, the Commission completed the evidentiary portion of the proceeding in approximately 6 months. *See* Burlington Northern Inc., et al. – Control and Merger – Santa Fe Pacific Corp., et al., Finance Docket No. 32549, Decision No. 10 (ICC March 7, 1995). The time allotted for briefing, oral argument and the Commission's decision was substantially less than BNSF has proposed here, and the Commission was nonetheless fully able to review the issues raised by the proposed merger, identify necessary conditions, and complete the environmental review process.

after the filing of the application, and the final notice concerning the scope of an EIS would be issued 45 days after the filing of the application. A Draft EIS would be published 110 days after the application was filed,[15] with comments on the Draft EIS due 155 days after the application was filed. The Final EIS would be issued 205 days after the application was filed, making it available to the Board 5 days in advance of oral argument and 15 days before the voting conference.

BNSF's proposed environmental schedule is not significantly shorter than those adopted by the Board in recent rail merger proceedings[16] and would clearly meet the key time periods established under the Council of Environmental Quality NEPA requirements for conducting an EIS. They require that the comment period on the Draft EIS be a minimum of 45 days and that the final agency action cannot occur sooner than 90 days after the Draft EIS or 30 days after the Final EIS. 40 C.F.R. § 1506.10.

Therefore, the Board should adopt a procedural schedule that requires review of a proposed merger to be completed within one year of the pre-filing notification. Such a

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[15] To facilitate a timely environmental review process, parties contemplating the filing of inconsistent or responsive applications should be required to file any responsive environmental reports 20 days prior to the filing of such applications (or 70 days after filing of the primary application), unless the responsive applicant can certify that the transaction proposed in such responsive application would fall within the exception criteria of 49 C.F.R. § 1105.6 (c)(2).

[16] In all of the recent merger cases, with the exception of the Conrail acquisition, an Environmental Assessment was completed within 270 days. Although the EIS in Conrail was completed in slightly less than 11 months, the schedule included 45 days for the development of a Safety Integration Plan, a requirement that was established by the Board after the application was filed and therefore was not envisioned in the original environmental schedule. *See* CSX Corporation, et al. – Control and Operating Leases/Agreement – Conrail Inc., et al., Finance Docket No. 33388 ("Conrail"), Decision No. 89 (STB July 20, 1998) at 155.

schedule would recognize the need of all parties for timely Board action and ample time for any necessary environmental review.

B. The Presumptions Underlying the Proposed Rules Are Wrong. The NPR is premised on the view that the primary virtue of rail mergers is the elimination of excess capacity, a process the Board believes is essentially complete. *See* NPR at 10. The NPR, therefore, concludes that national policy should no longer favor mergers. Proposed 49 C.F.R. § 1180.1(a), NPR at 11. The NPR further presumes, apparently irrebuttably, that future mergers will produce competitive and service harms. *See* Proposed 49 C.F.R. § 1180.1(c), NPR at 12. As a result, the NPR requires that any merger must include "competitive enhancements" to offset these harms, effectively creating a presumption against mergers. Proposed 49 C.F.R. § 1180.1(d), NPR at 16.

Each of the NPR's premises is wrong. Furthermore, the Board lacks the authority to conclude that Congress' pro-merger policy is no longer justified and, therefore, could be reversed by the Board. Only Congress can reverse that policy.

1. There Is No Basis for the Presumption That Future Rail Mergers Will Not Produce Significant Public Benefits, and Any Such Presumption Would Violate Congressional Intent. The NPR presumes that mergers should no longer be favored because the past problem of excess capacity and the need to rationalize the rail industry have been resolved. This presumption is wrong.[17]

[17] Concerns about reducing excess capacity hardly register at all in the legislative history of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (Pub. L. No. 104-88, 109 Stat. 803). In fact, in defending the continuation of the existing pro-merger standard, Senator Pressler barely referred to excess capacity issues at all. Instead, to the extent that excess capacity concerns figured in his position, they were subordinate to other concerns that continue to justify a pro-merger policy in the present day: "Mergers and consolidations allow the rail industry to maximize the use of its tracks, cut down on

The rail industry continues to face four significant and interrelated problems: (1) the need to add capacity; (2) the need to become more efficient in its operations; (3) the need to improve service to shippers; and (4) the need to earn a return that is adequate to attract the capital necessary to resolve the first three problems. Contrary to the assumptions of the NPR, mergers can play a crucial role in solving these problems, but only if artificial regulatory barriers to good mergers are not erected.

First, the most efficient and timely way to increase capacity is to better utilize existing assets. Mergers can expand capacity at the least possible cost. A merged railroad will have a better ability to manage its assets to maximize capacity than two railroads acting separately or through an alliance or joint venture, because it will be able to make decisions based upon the requirements of its entire network, rather than on a compromise between the competing self-interests of two allied partners.[18]

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interchange points, get the most out of switching yards, consolidate terminals, and, in short, provide better service to its customers at lower cost." 141 Cong. Rec. S17,588 (Nov. 28, 1995). Similarly, the ICC Chair, Gail McDonald, noted that the driving forces behind the anticipated future railroad mergers were the industry's desire to "become more efficient and offer 'seamless service.'" Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings before the Subcommittee on Railroads of the Committee on Transportation and Intrastructure, House of Representatives, 104th Cong., 1st Sess. 106 (1995).

[18] "The fact that railroads continue to pursue end-to-end mergers is thus strong evidence that mergers can provide benefits that are unavailable via other types of transactions." V.S. Gómez-Ibáñez/Kalt at 23.

Second, a merged railroad can be more efficient in its operations.[19] A merged railroad can combine many functions, such as information technology and accounting. A merged railroad also can achieve purchasing efficiencies that, because they require a centralized approach to asset management, can be attained only by a unified entity. A merged railroad can reduce the inputs required to achieve a given level of output, thereby producing public and private benefits. Through economies of scope and scale and the ability to make decisions based on optimizing system performance, a merged railroad can do more with less.

Third, single-line service can offer shippers more reliable service, while enabling railroads to craft new services that can attract traffic from competitors and other transportation modes. An expanded, integrated rail network can provide shippers with access to new markets. A merged railroad also can benefit from the different commodity and product expertise of the pre-merger railroads. If a merged railroad becomes a better competitor and shippers gain access to new markets and services, there will be beneficial effects for the railroad, shippers and the Nation.[20]

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[19] For example, "[s]ingle-line service enhances efficiency by eliminating costs and uncertainty associated with making and managing interline movements. In addition, expansion of single-line service typically represents a dramatic improvement in the quality of service a railroad offers its shippers. As railroads expand their offerings of single-line service, they can increase the speed of their service, make service more reliable, reduce damage and loss, and reduce capital requirements by making more efficient use of rail (and shipper) facilities." V.S. Gómez-Ibáñez/Kalt at 10.

[20] "The revitalization of the rail industry is one of the success stories of U.S. public policy over the last 25 years. Beginning with major regulatory reforms in the 1970s and culminating with the passage of the Staggers Act of 1980, the U.S. railroad industry has improved its performance substantially. Greater rate flexibility, deregulation of rates in certain markets, and opportunities for negotiated, tailored service offerings are among the factors that have brought railroads under the discipline of the marketplace. Regulatory reform has also allowed market forces to shape the ownership structure of railroad assets.

Fourth, a regulatory policy that continues to favor mergers will enable railroads to attract capital by reassuring investors that railroads will be free to pursue their preferred business strategies, as long as they will not eliminate competition for 2-to-1 shippers[21] or threaten shippers with service problems. Industries that depend upon capital investment in long-lived assets require the assurance that regulators will not restrict their ability to respond to market requirements unless, and then only to the extent, necessary to prevent identifiable and cognizable harms to the public interest. Capital will not be freely available to an industry in which regulators assert the right to reject one merger combination because regulators prefer a different, but unproposed outcome.

In his Verified Statement, Professor Bradford Cornell explains that:

> Limitations on a railroad's (or any other business's) use of its assets function as a tax. They reduce the assets' expected return by restricting the ways that the assets can be utilized. An investment that might otherwise have a positive net present value will not be undertaken if regulatory limitations so tax the expected stream of revenues that the value turns negative vis-a-vis the costs. The deterrent to investment is obvious when we know exactly what the regulatory limitations are, but the tax can be substantially compounded by delay and by an uncertain regulatory environment. When the amount of the regulatory tax cannot be established, railroads may choose not to make the investment at all. Alternatively, they may require a much higher return to cover the regulatory risk. Either way, the regulatory tax can kill an investment, or re-investment, that otherwise would have made good economic sense.

Increased freedom to abandon low-density, unprofitable service and to consolidate rail systems in order to exploit network economies has contributed to improvements in the industry. The result has been a dramatic improvement in the nation's rail system. While there have been bumps in the road at times, these benefits have been shared both by the nation's railroads, who have improved their financial health, and by the nation's shippers, who have access to a railroad system that is more cost-effective, can provide quality service, and has shown rates that have trended clearly downward." V.S. Gómez-Ibáñez/Kalt at 8.

[21] The effect of a merger on any 3-to-2 shippers would continue to be reviewed on a case-by-case basis.

> Regulatory limitations on a railroad's use of its assets and uncertainty about future limitations act not only as disincentives for the railroads to invest in particular projects but also as disincentives for outside investors to invest in the railroad . . . . Investors have choices. If the long-term prospects of the rail industry are significantly clouded by regulatory restrictions, investors will be reluctant to risk their funds in the industry. This, in turn, may reduce the industry's access to funds in the capital markets and raises their cost of capital. V.S. Cornell at 8-9.

Professor Cornell further explains that:

> Each of these regulatory taxes diminishes the prospective benefits of possible merger transactions. It is quite conceivable that a merger that otherwise promised to make the merging railroads more efficient, improve their services, and help them cover their cost of capital – with no unremedied competitive harms – would effectively be defeated by such taxes. That is not in the railroads' interest, it is not in their customers' interest, and it is not in the public interest. *Id.* at 13.

The BN/SF and UP/SP mergers demonstrated the positive benefits that mergers can produce. In both cases, competitive options were retained for those shippers who had such options prior to the mergers. Post-merger, BNSF and UP made significant investments in infrastructure improvements, new locomotives, and additional or advanced rolling stock. Both BNSF and UP offered new services to their shippers, including efficient and competitive services that finally delivered the unfulfilled promises of earlier joint ventures. The Board should not turn its back on the benefits that future mergers can produce, such as the benefits that the proposed combination of BNSF and CN would have produced. V.S. Krebs at 7 - 8.

Furthermore, any "paradigm shift" in the current pro-merger policy reflected in the Board's current regulations must come from Congress. Congress established the pro-merger statutory policy, and only Congress can reverse that policy. Even if the proposed rules did not incorporate an overt anti-merger bias, but rather only adopted a neutral stance

toward rail mergers and increased the regulation of such mergers, the rules would be inconsistent with the Board's statutory authority.[22]

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[22] If the Board actually intended to bar any future mergers, such an animus against mergers would contravene the unambiguous language of the Board's authorizing statute, as well as the clear intent of Congress. The ICCTA states that the STB "shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. § 11324(c) (emphasis added); *see also* 49 U.S.C. §§ 11323-11325 (provisions relating to merger approval procedures and standards). This Congressional directive would be undermined by rules that preclude or discourage mergers that are in the public interest.

By the same token, the Board does not have the authority to institute a presumption that the benefits of mergers are outweighed by their disadvantages. The ICCTA clearly contemplates that the public interest may be served by (at least some) railroad mergers and that the relative benefits and harms of mergers are to be determined on a case-by-case basis. For instance, section 11324(b) states that:

> In a proceeding under this section * * * the Board shall consider at least * * *
>
> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; [and]
>
> * * * *
>
> (5) whether the proposed transaction would have an adverse effect on competition. * * * *

49 U.S.C. § 11324(b) (emphasis added). *See also id.* § 11324(c) (directing the Board to approve "a transaction" upon a finding that "the transaction" is in the public interest). These ICCTA provisions, which make clear that "each proposed transaction" is to be judged on its own merits, are inconsistent with a categorical presumption, such as the Board has proposed in its rules, that mergers are contrary to the public interest. Accordingly, the Board does not have the statutory authority to adopt rules that would preclude or discourage mergers, or that it would incorporate a presumption that mergers are contrary to the public interest.

Moreover, even if Congress had been silent on the issue of whether mergers could be precluded altogether by the Board, the Board would not have the authority to promulgate anti-merger rules, such as the ones it now proposes. After all, railroad merger policy is of fundamental importance both to national transportation policy and the economy more generally. Thus, it would be completely implausible, and highly improper, to assume that Congress intended to delegate to the agency, sub silentio, the authority to promulgate

Existing law clearly favors mergers that increase efficiency. Both the 4R Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31) and the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895) reflected "Congress' endorsement of mergers that enhance railroad efficiency." Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295, 302 (D.C. 1983). The ICCTA was intended to continue this pro-merger policy.

In enacting the ICCTA, Congress knew that the Class I railroads were entering a "new round of consolidation." 141 Cong. Rec. H12,253 (daily ed. Nov. 14, 1995) (statement of Rep. Shuster). Congress assumed that, as a result of such consolidations, "thousands of miles of track, whether we like or not, are going to be abandoned." *Ibid.* Notwithstanding Congress's knowledge of the very factors that the Board now invokes to justify replacing the existing Congressional merger policy, Congress, in the ICCTA, elected to continue the existing merger policy. *See, e.g., id.* at S17,588 (daily ed. Nov. 28, 1995) (statement of Sen. Pressler) ("Absent some compelling reason for change, which has yet to appear, the current process should stand."); *id.* at S17,821 (daily ed. Nov. 29, 1995) (corrected version of Senator Pressler's remarks); *id.* at S17,590 (daily ed. Nov. 28, 1995) (statement of Sen. Hutchison) (noting concerns about railroad mergers, but stating that "[w]e have the ability to judge the issues under the standards we have had before"); *see also* Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings before the Subcommittee on Railroads of the Committee on Transportation and

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rules forbidding private restructuring initiatives. As the Supreme Court noted in a similar context, "Congress could not have intended to delegate a decision of such economic and political significance in so cryptic a fashion." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct. 1291, 1315 (2000).

Infrastructure, House of Representatives, 104th Cong., 1st Sess. 106 (1995) (testimony c. Gail C. McDonald, Chair of the ICC, stating that "[a]nother round of major rail consolidations is anticipated as the railroad industry strives to become even more efficient and offer 'seamless service'").

In fact, the Senate rejected a proposal to respond to increasing rail industry concentration by subjecting merger proposals to an antitrust analysis that would have been more rigorous than the existing public interest analysis used by the ICC. *See* 41 Cong. Rec. S17,585-17,590 (daily ed. Nov. 28, 1995) (debate among Sens. Dorgan, Bond, Pressler, and Hutchison). In arguing against the proposal, Senator Pressler noted that, although "[i]n the last 15 years, there have been roughly a dozen rail mergers, a tremendous increase in concentration when just measured by the number of railroads," the public interest standard used by the ICC should not be changed. *Id.* at S17,588; *see also id.* at S17,820 (daily ed. Nov. 29, 1995) (corrected version of Senator Pressler's remarks). In the course of the debate on the proposal, Senator Pressler pointed out that "many rail efficiencies can be achieved only through mergers." *Ibid.*

The Board's proposed rules, however, would undermine Congress' considered decision to maintain the then-existing pro-merger policy in the ICCTA. Accordingly, promulgation of these rules would contravene the Board's statutory authority.

The proposed rules also would be invalid because they are inconsistent with Congress's expressed intent that the ICCTA continue and advance a policy of deregulation of the railroad industry. The ICCTA was intended to reduce the regulation of railroads, not expand it. *See, e.g.*, ICCTA, § 10101(2), Pub. L. 104-88 (articulating U.S. policy "to minimize the need for Federal regulatory control over the rail transportation system"); H.R.

Rep. No. 104-311, at 82, 1995 U.S.C.C.A.N. 793, 793 ("The bill substantially deregulates the rail and motor carrier industries."); *see also* Ex Parte No. 529, Class Exemption for Acquisition or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902, 1996 WL 339192, at *17 (served June 21, 1996) (Morgan, Chair, commenting) (referring to "deregulatory direction" of the ICCTA).

Congress's intent to continue its existing deregulatory policy was and is one of the most important features of the ICCTA. As noted, in deciding to stay the deregulatory course, Congress acted with full knowledge that the industry was likely to become more concentrated in the future. *See* 141 Cong. Rec. S17,579 (daily ed. Nov. 28, 1995) (statement of Sen. Pressler) (rejecting argument that increasing concentration in the industry required "reregulation," noting that "I am not convinced a return to a pre-Staggers approach is the answer"); *see also id.* at H12,253 (daily ed. Nov. 14, 1995) (statement of Rep. Shuster) ("[T]he rail part of this legislation repeals and reduces numerous regulatory requirements."); *ibid.* (statement of Rep. Shuster) ("The bill continues the basic structure of the Staggers Act under which the freight railroad industry has seen remarkable recovery, primarily due to the benefits of deregulation."); *id.* at S17,579 (daily ed. Nov. 28, 1995) (statement of Sen. Pressler) ("As a general principle, S. 1396 continues the deregulation theme of the past 15 years by providing further regulatory reductions in the surface transportation industries."); *id.* at S17,581 (statement of Sen. Exon) ("This legislation represents the latest chapter in a thoughtful and deliberate effort to reform and deregulate America's great transportation sector. The more we can deregulate it, the better it will be and the more service it will provide."); *id.* at H15,600 (daily ed. Dec. 22, 1995) (statement of Rep. Shuster) (["The conference report] continues the basic structure of the Staggers

Act, under which the railroad industry has seen a remarkable recovery primarily due to the benefits of deregulation.").

The Board's proposed rules, however, would greatly expand the regulatory burdens facing potential merging railroads and would upset the "careful balance," *id.* at S17,580 (daily ed. Nov. 28, 1995) (statement of Sen. Pressler), that Congress struck with respect to the appropriate level of regulation. Accordingly, the proposed rules clearly violate the expressed intent of Congress.

The proposed rules cannot be salvaged by pointing to the need to address the growing concentration of the industry or by arguing that there no longer is a need to reduce excess capacity. As noted above, Congress was well aware that the industry would likely experience further concentration in the coming years, but nevertheless opted for a continuation of the pro-merger policy. If Congress determines that mergers are no longer in the public interest, it – but only it – can establish such a paradigm shift by revising the statutes that define the proper scope of Board review.

2. <u>There Is No Basis for the Presumption That Mergers Will Produce Generalized Competitive Harms</u>. There is no basis for the broad presumption that any future merger will necessarily cause generalized competitive harms. *See* Proposed 49 C.F.R. § 1180.1(a), NPR at 11.

The Board's current policies already require that a merger plan preserve competitive options for 2-to-1 shippers, 2-to-1 shortlines and regionals, build-in and build-out

opportunities, and transloads. Thus, any merger applicants already know, even without the NPR, that they must mitigate any such competitive harms.[23]

Despite these precedents, the Board apparently is concerned about the potential loss of more generalized competition, such as product and geographic competition. However, it is not clear how geographic and product competition would be adversely affected by the end-to-end mergers that are likely to be proposed in the future, particularly given the open gateway and contract exception proposals contained in the NPR.[24]

Furthermore, if these concerns are legitimate, there is no reason why the Board cannot consider, as it has in the past, whether geographic and product competition would be reduced, under the facts of an actual merger, in specific markets and, if so, what specific remedies are required to offset any identified harms.[25] A focused review of geographic and

[23] "[A]s railroads have consolidated, the Board (and its predecessor, the ICC) has been vigilant in protecting the rail options of shippers. In the context of merger policy, the Board has established a strong precedent to preserve options for a shipper who had access to two rail options prior to a proposed merger. Indeed, merging parties no longer appear before the Board without . . . first ensuring that their transaction preserves access to at least two rail options. This bespeaks clear and forceful policy aimed at protecting competition and the public interest." V.S. Gómez-Ibáñez /Kalt at 12-13.

[24] "For the loss of geographic competition to be a significant issue in a merger proceeding, one needs to show that geographic competition was, prior to the merger, the constraining factor on the potential for the exercise of market power, and that the merger would eliminate such competition.

"Previous mergers have involved extensive evidentiary findings regarding the process of competition—inter-modal, intra-modal, and geographic—and the likely effect of the merger. Evidence and previous Board rulings indicate that most proposed mergers have not presented significant risks of competitive harm, once competition-preserving conditions have been granted. . . . The Board's ability to obtain similar evidence and perform similar analyses are unaffected by previous rail consolidation." V.S. Gómez-Ibáñez /Kalt at 16-17.

[25] "The Board has successfully obtained and evaluated evidence on the prospective competitive harm that a merger could pose. . . . There is no reason that the Board will be unable to make similar evaluations in the future." V.S. Gómez-Ibáñez/Kalt at 17. *See, e.g.*,

product competition issues also would ensure that any relief is directed at the shippers who otherwise would suffer a loss of competitive pressure on rail rates, rather than providing a windfall to competitors or other unaffected shippers. (Ironically, if the NPR is adopted, Board policy would irrebuttably presume that geographic and product competition would be harmed by any merger, while the Board's policies on shipper rate challenges would presume that geographic and product competition do not constrain the rates charged by railroads.)

Finally, mergers produce competitive benefits by increasing intermodal competition, encouraging railroads to invest in infrastructure and provide new service, and providing shippers with access to new markets. The general decline in real rail rates also demonstrates that mergers have maintained or enhanced intramodal competition. Therefore, the Board's presumption is based on an unwarranted projection of non-remediable competitive harm and a dismissal of the general competitive benefits that rail mergers can continue to produce in the future.

3. There Is No Basis for the Presumption That Mergers Will Cause Transitional Service Harms. There is no basis for the presumption that a merger will necessarily cause transitional service problems. *See* Proposed 49 C.F.R. § 1180.1(c)(2), NPR at 15.

First, the problems of the UP/SP and NS/CSX/Conrail transactions were truly unique. UP acquired a railroad that had under-invested for years and then, as UP has

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Union Pacific Corporation, et al. – Control and Merger – Southern Pacific Rail Corporation, et al., Finance Docket No. 32760 ("UP/SP") Decision No. 44 (STB August 12, 1996) at 124-32 (geographic competition), 146 (transloads and build-in/build-outs); Conrail, Decision No. 89 at 61-62 (build-in/build-outs and transloads).

acknowledged, there were some transitional personnel and operating problems. NS/CSX/Conrail involved an unprecedented – and unlikely to be repeated in the foreseeable future – division of the assets of an existing railroad. Neither of these facts is likely to recur in a future end-to-end merger.[26]

Second, the detailed service assurance plans and post-merger monitoring proposed by the NPR – and supported fully by BNSF – will ensure that merging railroads engage in a more detailed analysis of potential service problems and that interested parties have the ability to probe those plans. Proposed 49 C.F.R. § 1180.1(h), NPR at 20. The proposed rules build on the experiences of the past and require merger applicants to address in detail those areas that have led to problems in past mergers. Given the detail of these plans and the high level of review and monitoring the plans will receive from shippers and the Board, the final plans approved by the Board should minimize any such service problems.

In addition, BNSF proposed, in response to the ANPR and in public statements about the BNSF/CN combination, that merging railroads negotiate meaningful service guarantees with their shippers. BNSF also proposed that merger applicants provide evidence that their post-merger plans will generate the capital to support the infrastructure improvements necessary for the benefits of the proposed merger to be realized. Both elements would further lessen the likelihood of future major service disruptions.[27]

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[26] The Board itself has recognized that despite the difficulties associated with the implementation, the UP/SP merger remains in the public interest. *See* UP/SP, Decision No. 15 (STB Nov. 29, 1999) at 5-6.

[27] *See* V.S. Gómez-Ibáñez/Kalt at § IV for a discussion of appropriate methods for minimizing service disruptions.

Third, merged railroads will have every incentive to maintain service quality and to learn from the problems of the past. UP, CSX and NS paid a very high price, in lost revenues, damages, and credibility with their shippers, for their service problems. No railroad will want to repeat that experience.

Fourth, the NPR proposes to offset potential and transitory service harms with concrete and permanent competitive conditions. Proposed 49 C.F.R. § 1180.1(d), NPR at 16. This is not an appropriate matching of problems with remedies. Instead, any remedies should provide shippers with alternate access during any period in which the merged railroad is experiencing merger-related service problems.

In sum, the NPR already contains the appropriate approach to any service problems of the future – the filing of detailed service assurance plans, aggressive post-merger monitoring, and prompt service relief (including temporary access to other carriers) for adversely affected shippers. With these strategies and potential remedies in place, it is not appropriate to presume that more regulatory intervention is required. Accordingly, the final rule should not include this presumption.

C. Imposing a Substantially Heavier Burden, Including the Requirement of Unrelated Competitive Enhancements, on Future Railroad Mergers Would Be Bad Policy and Law. Because rail mergers can be structured to mitigate identified competitive harms, there is no basis for a presumption that generalized competitive harms must somehow be offset. Proposed 49 C.F.R. § 1180.1(d), NPR at 16. As Professors Jose Gómez-Ibáñez and Joseph Kalt explain in their Verified Statement:

> Previous experience and the recent evolution of the railroad industry do not suggest that future mergers will reduce competition in ways that cannot be identified or mitigated. . . . [P]ast mergers do not appear to have

> reduced the competitive pressures on the railroads. Competition has been preserved in part because railroads are subject to many sources of competition that are usually not affected by mergers. Railroads compete intensely with trucks and barges for many commodities and shipments, for example, and this inter-modal competition is not reduced by rail mergers. . . .
>
> The Board has also played an important role in preserving competition by insisting that merger applicants offer trackage rights or other remedies that insure that any shipper served by two or more railroads before the merger still has a choice of at least two railroads after. Substantial evidence over the past several years and mergers indicates that Board-imposed and/or privately negotiated trackage, haulage and other conditions to preserve competition have been effective. V.S. Gómez-Ibáñez/Kalt at 14-15.

Similarly, for reasons discussed above, a presumption should not be adopted that rail mergers invariably produce service failures affecting rail customers, communities, or employees. Therefore, there is no basis for requiring merging railroads to offer unrelated "competitive enhancements" that could deter future mergers that would serve the public interest.

BNSF has supported the concept of raising the bar for mergers in the specific areas that have been identified as problems in recent mergers, including transitional service problems and the problems that might be created by transcontinental mergers, such as open gateways. However, that process should not become a means to alter the statutory basis of determining the public interest or a vehicle to reject the benefits of good mergers. There is a fundamental difference between raising the bar, as BNSF has proposed, and creating potentially insurmountable barriers, as the NPR proposes.

It is not appropriate to require that rail mergers enhance competition.[28] If a merger would maintain effective intramodal competition for those shippers who now have it (as, for example, Board policy requires that it must for all 2-to-1 shippers) and would offer significant public benefits, it would be a mistake to deny the public and the railroads the benefits of the merger. That policy would harm shippers and adversely affect the ability of railroads to attract the capital necessary to invest in infrastructure. Therefore, applicants should not be burdened with the requirement that they offset abstract presumed losses in competition with unrelated competitive enhancements.

Although the Board has disavowed a blanket "open access" requirement, merger applicants would appear to be compelled to make at least limited access concessions in order to meet the requirement for competitive enhancements. In his Verified Statement, Professor Richard J. Pierce explains why the Board's proposal to require applicants to incorporate proposals for enhanced competition is a bad idea.

> First, if the Board is convinced that some major change in its regulatory policy, like an equal access requirement, would yield significant public benefits, the efficacy of that policy change will depend primarily on its scope. It would make little sense, and do little good, to impose it selectively on railroads that propose to merge. Instead, the agency should consider whether to apply the new approach to all railroads.
>
> Second, adopting a policy of approving mergers only if the applicants agree to adopt a major change in their methods of operation that they consider highly undesirable is much more likely to discourage railroads from proposing socially beneficial mergers than to produce a legal regime in which many railroads agree to the change as a condition on approval of a merger.

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[28] The NPR appears to ignore the pro-competitive aspects of rail mergers, which often result in increased inter- and intramodal competition. V.S. Krebs at 6-7. "This new presumption ignores the fact that modern rail mergers have made railroads more effective competitors thereby improving the competitive marketplace served by all modes of transportation." *Id.* at 7.

> Third, the policy would require the Board to determine what level of enhancements are necessary to offset possible harms and then allocate those enhancements to shippers who are not, by definition, directly affected by the potential harm. The unfairness inherent in providing benefits to one class of shippers, rather than another, is a key reason why remedies should be designed to offset specified harms to specific groups.
>
> Fourth, and most important, no agency should consider adopting a major change in its regulatory policy, like an equal access rule, without considering carefully and in detail all of the implications and effects of adopting the new policy. That cannot be done as an add-on to a merger review proceeding. It requires instead a separate rulemaking in which the agency addresses with care the scores of important issues that are raised by such a proposed policy change. V.S. Pierce at 17-18.

Further, if some shippers would suffer cognizable competitive harms as a result of a proposed merger, relief should be crafted to address those specific harms. The pursuit of broader remedies would be unfair to the harmed shippers and would raise very significant questions about the future regulatory structure of the rail industry.

For example, as the Board stated, one potential competitive enhancement could be the adoption of a limited system of open access or the elimination of paper and steel barriers for Class II and III railroads. NPR at 16-17 (discussion of Board's authority under Proposed § 1180.1(d)). However, unless such remedies were imposed on a uniform national basis, the merged railroad would be placed at a significant competitive disadvantage. The Board also could expect to hear pleas for relief from shippers and Class II and III railroads who would not benefit from the specific enhancements proposed in a merger proceeding.[29] Again, any such structural changes should be imposed only on a uniform basis.

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[29] "The problem of rent-seeking will be exacerbated by shippers seeking relief before the Board and the Board needing to decide which shippers will get what kind of benefit from 'enhanced competition' and in what form this condition will occur." V.S. Gómez-Ibáñez /Kalt at 19.

The NPR also would create barriers to future mergers by allowing the Board to decide whether the claimed benefits of any merger could be achieved through means short of merger, such as alliances and marketing arrangements, that no party has actually proposed. Proposed 49 C.F.R. § 1180.1(c), NPR at 12-13. However, there are sound economic reasons to believe that mergers will be more efficient in the long-run than joint ventures.[30] Furthermore, proper market incentives exist for management to choose the

[30] "We can imagine a hypothetical rail network in which each successive mile of track is owned by a different railroad. In such a situation, . . . decisions . . . would need to be coordinated through negotiations or complex contracts involving multiple parties that set out as many foreseeable contingencies as possible, perhaps simplifying or ignoring certain economic interactions. Since there are significant costs associated with writing complex contracts or engaging in ongoing negotiations, we do not see the foregoing ownership structure in railroading. Rather, we observe integrated railroads with significant geographic scope to their ownership and operations. . . .

"Contractual relationships often require parties to bear large transaction costs, particularly when agreements must be closely monitored to ensure compliance. Real world negotiations include a high level of uncertainty and differences in expectation about both the current state of the world (e.g., the ability of coordinated service to attract new business immediately) and the future (e.g., how the agreement will evolve). This makes it difficult to reach, monitor, and enforce mutually beneficial marketplace agreements. When parties have different information, different expectations, and different alternative opportunities, they will also tend to value the benefits of a relationship differently. . . .

"Even when firms can agree on the benefits, they tend to have their own financial interests and priorities. Under such circumstances, writing sufficiently complex contracts to incorporate the myriad details and contingencies needed for successful integration is quite difficult. . . . [F]irms behave reasonably and tend to protect their individual interests, insisting on their individual priorities and strategies. This can make full coordination infeasible. Customers' needs go unserved and 'money is left on the table' . . . . Capturing such business provides the lure to mergers that improve network coordination by bringing the problems and incentives under the control of single ownership.

"The problem of inducing mutually beneficial arm's-length arrangements is doubly hard when durable capital needs to be sunk and shared to realize the benefits of economic success. Issues related to how to apportion capital expenditures across parties are especially difficult when the benefits that accrue from such an investment will be distributed across the network. . . . These factors act to limit independent firms' willingness to commit necessary capital to investments that an integrated firm would readily undertake. Under such circumstances, customers' needs can go under-served and, to capitalize on the business opportunities this creates, efficient marketplace forces push companies to bring

more efficient alternative as between mergers or joint ventures in each particular instance, and there is no reason to believe that the Board would make better decisions by second-guessing management.[31] Thus, it would be bad public policy for the Board to reject a merger that creates no concrete harm and promises public benefits merely because the Board prefers alliances to mergers.

In addition, the NPR would create barriers to future mergers by adopting rules that are unacceptably vague. Under the current rules and precedents, merger applicants know precisely what competitive harms they must mitigate, and the Board can review whether each such harm is adequately mitigated by proposed conditions. However, the NPR requires that merger applicants propose competitive enhancements to offset unrelated presumed competitive and transitional service harms. Proposed 49 C.F.R. § 1180.1(d), NPR at 16. It would be impossible for merger applicants to propose offsets to harms that cannot be precisely identified or quantified. Neither the Board nor interested parties would have any meaningful guidelines for identifying the type or extent of enhancements required to offset harms that the parties may be unable to identify or assess.[32]

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operations that need to be coordinated over the use of long-lived, sunk capital under the roof of one firm." V.S. Gómez-Ibáñez/Kalt at 23-25.

[31] In fact, Board-imposed "conditions are likely to be more unwieldy, arbitrary, and inefficient than arrangements reached through private two-party negotiation." V.S. Gómez-Ibáñez/Kalt at 19.

[32] Moreover, the Board's proposed rules are so vague that they would render merger review virtually standardless. For instance, the proposed rules make merger approval contingent on whether some undefined quantum of "competitive enhancements" will outweigh some unspecified level of harm that is presumed to result from any and all railroad mergers. Such criteria for determining whether to approve a merger are devoid of any "intelligible principle" to cabin the agency's exercise of its discretion. J. W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). Accordingly, the Board's proposed rules, if promulgated, would constitute an unconstitutional delegation of legislative authority,

Finally, the proposed rules would encourage abuse of the regulatory process by interested parties.[33] For example, a competing railroad could propose enhancements in its competitive position (or, more subtly, encourage shippers, shortlines or communities to propose such enhancements) to offset the hypothetical problems of its competitors' proposed merger. Shippers could seek new options to offset presumed losses of geographic competition that do not even affect them. The Board would have no reasoned basis for weighing these requests, and the regulatory process would be held hostage by parties who would be encouraged to use any merger proceeding as an opportunity for regulatory blackmail. Further, the proposed rules also would place the Board in the unprecedented and unjustified position of picking winners and losers in the general economy by deciding which shippers or sectors of the economy will be the beneficiaries of any enhanced competition conditions. The Board, for example, would have to decide which chemical shippers receive additional competitive benefits or, instead, whether coal shippers will be targeted for benefits, rather than agricultural shippers. This is not a role the Board should fill, and the problem of selecting winners and losers demonstrates why the Board

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particularly since, as the Board itself has acknowledged, railroad mergers and merger policy affect the entire economy. *See* American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034-37, modified on reh'g, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 120 S. Ct. 2003 & 120 S. Ct. 2193 (2000); International Union, UAW v. OSHA, 938 F.2d 1310, 1317-1318 (D.C. Cir. 1991); STB Ex Parte No. 582, Public Views on Major Rail Consolidations, slip op. at 2 (served March 7, 2000) (rail merger policy and potential disruptions caused by mergers may affect "the national economy and defense").

[33] "Any and all shippers, regardless of the merit of their position, will have the incentive to seek conditions that grant them more than they currently have." V.S. Gómez-Ibáñez/Kalt at 18. The proposed rule "would maximize the opportunities for competitors and other third parties to abuse the merger approval process by using it to stop or to delay a pro-competitive merger or to use it as means to extract special favors unrelated to the proposed merger." V.S. Pierce at 12.

should limit its review to imposing specific conditions designed to offset or remedy specific merger-related harms.

D. Applicants Should Be Required to Address Only Concrete Downstream and Crossover Effects of a Proposed Merger. The NPR would require that merger applicants address the downstream and crossover effects of the proposed merger. Proposed 49 C.F.R. § 1180.1(i), NPR at 21. In its comments on the ANPR, BNSF proposed that merger applicants (i) demonstrate that they will not create crossover effects by exporting service problems to other railroads, and (ii) assess any new competitive problems with their merger that would be created by any subsequent merger that is filed with the SEC by the time that the first round of intervenor comments is due under the procedural schedule.

The Board's concern with downstream effects runs directly contrary to its presumption that future mergers will not produce competitive and other public benefits. After all, a "responsive" merger would be "necessary" only if the first merger creates new competitive pressures. If a merger did not produce a more efficient competitor, there would not be a responsive merger.

Furthermore, it is not clear what the Board would or could do with these projections. If a pending merger would produce public benefits, the Board should not reject the merger because a potential responsive merger might be harmful to the public interest. Instead, the Board should reject or condition the responsive merger if it is actually filed. It would be inappropriate for the Board to cure any potential deficiencies in a subsequent merger by imposing conditions on a prior merger.

Injecting these issues, without appropriate limits, into the merger review process would inevitably result in an abuse and prolongation of the regulatory process. Contesting

railroads and shippers would have the incentive to posit responses and problems simply to delay, complicate and defeat a pending merger proposal. Furthermore, it would be impossible and speculative for any railroad to present a case on all the potential strategic reactions to its proposed transaction, and the Board would have no reasoned basis to select among various hypotheticals announced by the parties.

The NPR could be read to suggest that the Board has preferred outcomes in any further consolidation of the rail industry. However, experience teaches that the selection of merger partners is best left to the forces of the market, subject to the protection of competition. Furthermore, if the Board, quite improperly, rejects a proposed merger because it favors another combination, the Board would lack the authority to force unwilling partners to combine, and it would be bad policy for it to attempt to do so.

The NPR also could be read to suggest that the Board favors a "competitive balance," one in which railroads compete at the margins but are guaranteed a basic market share. While the Board's governing statutes call for the preservation of essential services to shippers, the reforms of the 4R Act and the Staggers Act were explicitly intended to end the days when regulators allocated markets.

The broad downstream effects analysis proposed by the Board could lead to perverse results. For example, suppose that Merger 1 would be considered to be in the public interest, under whatever standards the Board adopts, except that Merger 1 might provoke the filing of Merger 2, a merger that the Board believes would not be in the public interest. The Board should not reject Merger 1 based on the speculation that Merger 2 might be filed in response and might have bad results. Merger 2 can be dealt with on its

own merits. In no event should the Board impose conditions on Merger 1 to remedy problems that are created by, and internal to, Merger 2.[34]

Similarly, suppose that Merger 1 is a surprise to the Board, either because of the timing or the identity of the parties. This does not mean that the Board should refuse to approve Merger 1 because it prefers a different pairing. Congress has rejected this command-and-control approach to regulation of railroads. Further, if the Board has views on the appropriate regulatory structure of the industry, such as open access issues, those views should, to the extent allowed by statute, be addressed through a rulemaking of general applicability.

However, there are legitimate downstream and crossover issues for the Board to consider, as BNSF noted in its comments on the ANPR. These issues are tied directly to the appropriate scope of Board review of mergers – competitive and service issues. Thus, it would be appropriate for the Board to review whether an actual responsive merger somehow vitiated the effectiveness of remedies imposed to protect 2-to-1 shippers. Similarly, the Board should assure that a merger will not result in the export of service problems to other railroads. Of course, both of these concerns are already covered in other areas of the NPR.

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[34] "Even if it were possible to predict future mergers with accuracy, it would be inappropriate to use such predictions to block a proposed merger. Each application should be judged on its own merits, according to the principles of sound merger policy. The 'looming possibility' of subsequent merger applications is no reason to prevent a proposed combination that meets traditional merger policy criteria. . . .

"The goals of sound merger policy would be better served by a more limited measure that would require a merger applicant to consider the effect of any concurrent merger application." V.S. Gómez-Ibáñez/Kalt at 29.

E. Applicants Should Not Be Subject to the Future Imposition of Conditions to Their Mergers or Required to Guarantee the Specific Projected Benefits of a Merger. Merger applicants and other parties require assurances that Board action with respect to any merger will be final, except as necessary to remedy any transitional service problems or any competitive conditions that prove to be inadequate. The use of the Board's post-merger conditioning power to remedy these narrow categories of merger-related problems could be appropriate, in some circumstances, because it would be crafted to preserve the service and competitive results promised by the merger applicants and approved by the Board. However, the NPR proposes to reserve to the Board the authority to impose post-merger conditions under a much wider variety of circumstances.

The NPR proposes that the Board will retain the right to impose new conditions on a merger in response to unforeseen circumstances or subsequent mergers. The "unforseen circumstances" test is so broad that a merged railroad always would be subject to the risk that the Board would impose conditions that would not have been acceptable as an original precondition to the merger. The industry requires certainty, but this proposal removes it entirely. Furthermore, if a subsequent merger takes place, any problems created by the second merger should be remedied only through conditions imposed on that merger, without requiring a previously merged railroad to contribute to the resolution of service or competitive problems that were created by the second merger.

The NPR also states that merger applicants must propose how they would be held accountable for the benefits and service improvements they claim. Proposed 49 C.F.R. § 1180.1(c)(1), NPR at 14. The Board's proposal is overly broad, mixing areas where continued Board oversight is necessary and appropriate with areas where continued Board

oversight would be harmful and contrary to sound public policy. The proposal would deny merging railroads the ability to weigh a complete set of conditions in deciding whether to proceed with their merger after receiving Board approval.[35] The threat to impose additional conditions if projected public benefits are not met is bad public policy.[36]

Oversight by the Board of implementation of competitive conditions is appropriate. If remedies for 2-to-1 shippers or the new open gateway policies do not work, for example, it would be appropriate for the Board to act, using its conditioning powers. The Board has done so in the past.

The Board also should monitor service implementation with a readiness to use its service order power to address service breakdowns, as it has done in the past. In fact, the Board has clarified and expanded its procedures, as a result of the UP/SP and Conrail problems.

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[35] As the Board itself has recognized, once a merger has been consummated and the applicants can no longer walk away from it, the "imposition of disproportionate new conditions becomes increasingly inconsistent with notions of commercial certainty and fairness." Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al. [Houston/Gulf Coast Oversight], Finance Docket No. 32760 (Sub-No. 26), Decision No. 10 (STB Dec. 21, 1998), at 3.

[36] "This proposal completely misses the point of a dynamic marketplace – shippers can benefit from competitive responses to mergers that may deprive the merging parties of the expected traffic, but which in fact produce lower rates or better service for shippers. Such a result cannot be considered harmful to the public interest, and no intervention from the Board should be needed to address the failure of merging carriers to gain as much new traffic as they had hoped to gain." V.S. Krebs at 10–11. "The estimated public benefits of a merger are inevitably based on forecasts of many uncertain variables. . . . Actual benefits may diverge from projected because of events that are unexpected and completely outside the control of the merger applicants. Everything from changes in the overall economy or the weather could result in forecasts being inaccurate – in either direction – after the fact." V.S. Gómez-Ibáñez/Kalt at 30-31.

However, beyond that, it is not clear what role government appropriately can have to ensure "accountability" for the claimed improvements. It is manifestly in the applicants' best interest to do all they can to make the service improvements and implement the efficiencies of the transaction as seamlessly as possible. But the applicants cannot be held responsible for unforeseen developments in their shippers' businesses, in the competitive dynamics of the industry, or in the economy as a whole that may adversely affect their projections.[37]

For example, the NPR could be read to suggest that, somehow, a merged railroad could be subject to the imposition of additional conditions if the results of traffic diversion studies were not realized. However, a merged railroad might not capture projected traffic precisely because of the competitive ("downstream") responses of other railroads, trucks and barges, with the result that shippers receive even more benefits than the merging parties suggested. Similarly, a merged railroad might not achieve projected labor savings because of unanticipated success in attracting new traffic or because it decides to be more cautious in implementing future personnel reductions in the interest of service integrity, again to the benefit of shippers. This is why the current Board merger policy – focused on the competitive and service effects of a merger – is both the correct policy and the only policy that can be enforced with any logic or reason.

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[37] "Some mergers produce disappointing results – results that fall well short of the firm's expectations. Agencies do not approve mergers because they expect all mergers to be successful. Such an expectation would be absurd. It is contradicted by history. Some mergers yield spectacular results; some yield terrible results. Agencies approve mergers that do not have anticompetitive effects because they know that many will yield good results and because they know that the firms that propose to merge are in a much better position than any agency to predict the results of the merger." V.S. Pierce at 20.

Finally, the proposed accountability standard could have the result of discouraging the merged railroad from rethinking its plans in light of changing circumstances. The proposed review would encourage railroads to take unwise actions solely in order to reach regulatory benchmarks, rather than to achieve competitive and service results. The review also could force a merged railroad to proceed to the next step of its integration plan, even if problems have been identified and remain unresolved. These are not desirable results.

In summary, the Board's current policy is the correct one. The Board should act to protect shippers when competition-related conditions prove to be ineffective. The Board should act to provide shippers with relief when service is disrupted due to merger-related problems. However, there is not a broader post-merger role for the Board to play.

F. The Board Should Not Dictate the Structure of Future Business Relationships. The NPR states that, in assessing whether a merger is in the public interest, the Board will consider whether the claimed benefits could be realized in other ways, such as joint marketing ventures, alliances and other mechanisms. Proposed 49 C.F.R. § 1180.1(c), NPR at 12-13. However, railroads recognize the extensive time and effort that mergers require. When they choose mergers over alliances and other types of voluntary coordination agreements, they do so because mergers are more likely to achieve the efficiencies they need.[38] A merged entity will be better positioned to respond to future problems, including natural disasters, because of its ability to make decisions that reflect the balancing of the requirements of the entire system, rather than that part of the system served by each railroad in an alliance.

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[38] *See* § VI of V.S. Gómez-Ibáñez/Kalt for a discussion of non-merger transactions.

Railroads will choose among alliances, other forms of voluntary cooperation, and mergers based upon their assessment of which form will produce the greatest benefits. These decisions will be made with a full awareness of the requirements that the Board will impose on any merger. Indeed, given the burdens imposed on merger applicants, if alliances and joint ventures are an efficient means of increasing efficiencies and becoming competitive, railroads will continue to pursue them. However, in the final analysis, sound economic and regulatory policy requires that the Board defer to the decisions by capital markets on the best way to structure business enterprises, unless those decisions would result in identifiable harms that cannot be mitigated.[39]

G. The Board Should Require Merger Applicants to File Service Assurance Plans and Should Monitor Post-Merger Implementation. The NPR proposes that merger applicants prepare an extensive service assurance plan to address the risks of service problems and implementation. Proposed 49 C.F.R. § 1180.1(h), NPR at 20. BNSF has already endorsed the concept of service integration plans and would continue to support "service assurance plans" as an addition by rule to the requirements of an application, as suggested in our comments in the ANPR phase. The plans would involve protection of service integrity for shippers during the merger implementation process, and include plans made in conjunction with connecting rail carriers, including Class II and Class III carriers, as well as ports. However, as discussed above, the filing and testing of a service assurance plan should negate any presumption that a merger will produce transitional

[39] "Regulatory limitations on a railroad's use of its assets and uncertainty about future limitations act not only as disincentives for the railroads to invest in particular projects but also as disincentives for outside investors to invest in the railroad." V.S. Cornell at 9.

service problems that must be weighed against the merger as part of the public interest balancing.

The NPR also proposes that the Board conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate. Proposed 49 C.F.R. § 1180.1(h), NPR at 20. BNSF supports this proposal. The merging carriers should propose the relevant datapoints to be monitored, the specific metrics to be provided to the Board and others, and the processes to be used to conduct the post-approval operational monitoring.

H. The Board Should Require That Affected Major Gateways Remain Open, 2-to-1 Situations Be Remedied, Including Build-In/Build-Out and Transload Opportunities, and "Contract Exception" Rights Be Retained. In proposed Section 1180.6(b)(10), the NPR proposes that merger applicants must demonstrate how the use of major gateways will be preserved. BNSF supports adoption of a requirement that applicants demonstrate how access to markets and viable service offerings through major open gateways would be maintained operationally and financially. However, this requirement should apply only to points directly affected by the merger; there is no merger-related policy basis for extending this requirement to gateways not affected by a merger.

The NPR proposes that merger applicants must demonstrate how build-in/build-out and transload options would be preserved. Proposed 49 C.F.R. § 1180.6(b)(10), NPR at 31. To the extent that a shipper would lose such options, such a demonstration would be appropriate with respect to 2-to-1 situations, along the lines of the CMA Agreement and the conditions adopted in UP/SP.[40]

[40] *See*, UP/SP, Decision No. 44, at 18.

The NPR proposes that merger applicants must demonstrate how they would preserve the bottleneck contract exception. Proposed 49 C.F.R. § 1180.6(b)(10), NPR at 31. To the extent a shipper would lose a remedy as a result of a proposed merger, BNSF agrees that preservation of the contract exception would be appropriate.

I. Other Issues Raised by the NPR.

1. Transnational Transactions. The NPR proposes that a full-system competitive analysis and operating plan must be provided in cases involving Canadian or Mexican railroads. Proposed 49 C.F.R. § 1180.1(k), NPR at 21-22. BNSF does not oppose reasonable requirements in this area relating to railroads operating in Canada and Mexico as well as the U.S., particularly as they relate to North American Free Trade Agreement ("NAFTA") traffic and influences on each country's international trade abilities and commitments, issues of safety requiring involvement or cooperation with the Federal Railroad Administration, issues of conflicting economic regulation in Canada and/or Mexico as they affect the operation of the free market in the United States, or issues relating to national defense.

However, the Board should not presume transnational transactions to be contrary to the public interest, and should not discriminate against them. For example, it would not be appropriate for the Board to attempt to forestall the traffic shifts that might result from shippers' responses to the creation of a rail network that is more efficient and has a broader geographic scope.

2. Labor Issues. The NPR proposes that merger applicants must file additional employee impact information, including cross-border data for transnational

mergers. *See* Proposed 49 C.F.R. § 1180.1(e), NPR at 21-22. BNSF supports this position.

The NPR also states that contract override of labor agreements ("cramdown preemption") is to be very narrowly applied, and it states that the Board may impose additional labor conditions if appropriate. Proposed 49 C.F.R. § 1180.1(e), NPR at 17. However, Congress has defined when cramdown conditions are to be used and the scope of such conditions. Any change in this area should come from Congress.

While BNSF does not believe that the Board can ignore the statutory mandates when voluntary efforts fail, BNSF supports direct negotiations between unions and the merger candidates as the best mechanism for resolving labor issues. BNSF was successful in reaching agreements with labor when it was pursuing its combination with CN, and it would hope for similar success in connection with any future combination proposals. Furthermore, if such negotiations are to succeed, the Board need not and should not involve itself in reviewing or approving voluntary labor implementation agreements.

3. Market Data in Support of a Merger Application. The NPR proposes that an application include expanded market data, including detailed market share data that previously has not been furnished in merger cases. *See* Proposed 49 C.F.R. § 1180.7, NPR at 33-34. BNSF would not oppose reasonable requirements in this area, but the requirements should reflect what is practical from a data standpoint and recognize intermodal competition and the Board's precedents on the types of competitive effects that need to be remedied as part of the merger review process.

For example, proposed Section 1180.7(a)(3) appears to require actual and projected market share data by origin/destination area and major commodity group for individual transportation modes. Such data may not be available for trucks and barges at the level of specificity that the proposed rule may contemplate. Similarly, such detailed data may be unavailable, for example, in Mexico for any mode. The Board should make clear that its data requirements are not hard and fast, but are tempered by what is practical to obtain.

The Board also should ask whether the added burden of collecting and analyzing this data is justified. Because of its unique operating characteristics, traditional market share analysis is not appropriate in the rail industry, where a large number of shippers have always been sole-served and where many markets are subject to competition, but served by a single carrier due to long-term contracts. Instead, Board review has looked to the loss of existing competitive alternatives, not changes in market shares.

More fundamentally, the Board should reject any implication that it will use market data to ensure that a merger does not affect the market shares of other railroads. The competition created by mergers is good for the general public and shippers, and no railroad should be insulated from the changes in market shares that such competition brings.

4. Upstream Effects. The NPR specifically addresses "downstream" effects, although, as discussed above, the proposal is far too broad. There also is an issue concerning "upstream" effects – that is, the effects on conditions imposed on a prior merger when that merged railroad is itself an applicant in a subsequent merger.[41]

[41] As noted above, it would be contrary to statute and bad policy for the Board to remedy the problems associated with a proposed merger by imposing conditions (including the reopening of old conditions) on other parties.

BNSF believes that it is appropriate for the Board to take such "upstream effects" into account, provided that the emphasis remains on protecting the competitive interests of shippers and not the competitive position of railroads. For example, if a condition was imposed to protect a 2-to-1 shipper in a prior merger involving one of the merger applicants, it would be appropriate to review whether the condition would remain viable after the merger.

5. Technical Changes. The NPR proposes various technical revisions to the existing merger rules to codify a number of the Board's current practices and to conform the rules to the waivers and clarifications that the Board has granted in recent merger proceedings. BNSF is in agreement with the proposed revisions and notes that their adoption should enable the Board to process and complete its review of a proposed merger transaction within the maximum review period of one year from the date of the pre-filing notification which BNSF has proposed above.

IV. CONCLUSION

BNSF supports those specific elements of the NPR that would require merger applicants to file an application that addresses how the merged railroad will implement the merger, whether 2-to-1 shippers will retain effective competitive options after the merger, and whether the merged railroad will have an open gateway policy and preserve "contract exception" rights for affected shippers.

However, the Board must expedite its merger review process to meet the demands of capital markets and shippers. No merger review should take longer than one year, and some mergers can and should be handled in even less time. Further, the Board should not – and cannot legally – presume that mergers have no further role to play in improving the

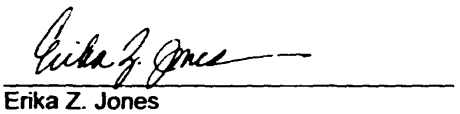
existing railroad system, in creating new efficiencies, or in providing the capacity and services necessary to provide shippers with the services they need in the modern economy. The Board should not presume that future mergers will create competitive and service problems that must be offset by unrelated competitive enhancements. Instead, the Board should review closely the details of each merger proposal, identify any probable competitive or service harms, and review the adequacy of the applicants' proposals for preventing those harms on the record in that case. The Board's review should be specific, not presumptive, and remedies should focus on correcting identified problems, not offsetting presumed, unidentified harms.

The Board should not require merger applicants to address purely hypothetical responsive mergers, nor should the Board reject a merger because it does not fit into the Board's preconceived notions of what shape the final North American rail system should take. The Board should adopt rules that allow all parties to make reasonable predictions about Board action, and the Board should not construct a system which encourages opportunistic parties to seek self-serving conditions to "offset" unspecified, unquantified, hypothetical but presumed harms.

These actions will ensure that future mergers serve the public interest; that Board policy does not discourage mergers that would produce public and private benefits; and that the Board acts in a timely fashion, given the demands of today's economy. These actions will raise the bar in an appropriate fashion, without creating presumptions that are contrary to sound economic and regulatory policy and in violation of law. These actions also will provide the signal of regulatory stability that is essential if the railroad industry is

to attract and retain the capital necessary to meet the Nation's requirements for a competitive and reliable rail sector.

Respectfully submitted,



Erika Z. Jones
David I. Bloom
Robert M. Jenkins III
Adiran L. Steel, Jr.
Roy T. Englert, Jr.

Mayer, Brown & Platt
1909 K Street, N.W.
Washington, DC 20006-1101
(202) 263-3000

Jeffrey R. Moreland
Richard E. Weicher
Michael E. Roper
Sidney L. Strickland, Jr.

The Burlington Norther and
Sante Fe Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76131-0039
(817) 352-2368

November 17, 2000

Attachment 1

PROPOSED PROCEDURAL SCHEDULE

(The term "F" designates the date of filing of the application and "F+n" means "n" days following that date.)

F	Primary application and any related applications filed.
F+7	Notice of intent to prepare an EIS and request for comments on proposed EIS scope published in the Federal Register.
F+15	Board notice of acceptance of primary application (and any related applications) published in the Federal Register.
F+30	Safety Integration Plan due.
F+45	Draft of final EIS scoping.
F+60	Notification of intent to participate in proceeding due. Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due with respect to such applications.
F+90	Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application due. Comments by U.S. Department of Justice ("DOJ") and U.S. Department of Transportation ("DOT") due.
F+105	Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
F+110	Date of draft EIS.
F+120	Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due.
F+150	Rebuttal in support of inconsistent and responsive applications due.
F+155	Comments on draft EIS due.
F+180	Briefs due, all parties (not to exceed 60 pages for applicants and not to exceed 30 pages for others).
F+205	Date of final EIS.
F+210	Oral argument (close of evidentiary record).
F+220	Voting conference (at Board's discretion).
F+270	Date of service of final decision.

Attachment 2

Merger Summary/Timeline (1997-2000)

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
1	AirTouch Communications Inc./ Vodafone Group Plc	$62 billion transaction value	January 15, 1999	June 30, 1999	5+ months	• FTC grants early termination of HSR Act waiting period March 3, 1999; • EC conditional approval May 24, 1999; • Shareholder approval June 1, 1999; • FCC approval June 23, 1999.
2	American Stores Company/ Albertson's, Inc.	$11.7 billion transaction value	August 3, 1998	June 2[illegible], 1999	10+ months	• FTC files HSR Act request for additional information October 2, 1998; • Stockholder approval 11/12/98; • Divestiture agreement with FTC clears merger June 22, 1999.
3	Ameritech Corp./ SBC Communications Inc.	$62 billion transaction value; $146 billion combined assets	May 11, 1998	October 8, 1999	16+ months	• EC & other European entities approval July 23, 1998; • Application filed with FCC July 24, 1998; • Divestiture agreement with DOJ clears merger March 23, 1999; • State entities approval August 9 through September 23, 1999; • FCC conditional approval October 8, 1999.
4	Amoco/ BP	$55 billion transaction value	August 11, 1998	December 31, 1998	4+ months	• EC approval December 14, 1998; • Divestiture agreement with FTC clears merger December 30, 1998.
5	AMP Inc./ Tyco International Ltd.	$12.22 billion transaction value	November 23, 1998	April 2, 1999	4+ months	
6	Asda Group plc/ Wal-Mart Stores, Inc.	$10.8 billion transaction value	June 14, 1999	July 27, 1999	1+ month	• EC approval July 26, 1999.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
7	Ascend Communications Inc./ Lucent Technologies Inc.	$24 billion transaction value	January 13, 1999	June 24, 1999	5+ months	• DOJ requests additional information March 9, 1999; • DOJ and EC approval April 12, 1999.
8	BankAmerica Corporation/ NationsBank Corporation	$45 billion transaction value; $570 billion combined assets	April 13, 1998	September 30, 1998	5+ months	• Divestiture agreement with DOJ clears merger August 14, 1998; • FRB approval August 17, 1998; • Shareholder approval September 24, 1998.
9	BankBoston/ Fleet Financial Group	$16 billion transaction value; $180 billion combined assets	March 14, 1999	October 1, 1999	6+ months	• Shareholder approval August 11, 1999; • Divestiture agreement with DOJ clears merger September 2, 1999; • FRB approval September 7, 1999; • Massachusetts Board of Bank Incorporation approval September 30, 1999.
10	Barnett Banks, Inc./ NationsBank Corporation	$14.6 billion transaction value; $310 billion combined assets	August 29, 1997	January 9, 1998	4+ months	• Divestiture agreement with DOJ clears merger December 9, 1997; • FRB approval December 10, 1997; • Shareholder approval December 19, 1997.
11	Beneficial Corp./ Household International	$8.6 billion transaction value	April 7, 1998	June 30, 1998	2+ months	• FTC grants early termination of HSR Act waiting period May 15, 1998.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
12	Boatmen's Bancshares Inc./ Nationsbank Corp.	$9.8 billion transaction value; $233 billion combined assets	April 30, 1996	January 7, 1997	8+ months	• FRB approval December 16, 1996.
13	Case Corporation/New Holland N.V.	$6 billion transaction value	May 17, 1999	November 12, 1999	5+ months	• Shareholder approval August 17, 1999; • EC approval October 28, 1999; • DOJ approval November 4, 1999.
14	Chrysler Corporation/ Daimler-Benz AG	$92 billion transaction value	May 7, 1998	November 12, 1998	6+ months	• EC approval July 23, 1998; • FTC approval July 31, 1998; • Shareholder approval September 18, 1998.
15	Citicorp/ Travelers Group Inc.	$140 billion transaction value; $300 billion combined assets	April 6, 1998	October 8, 1998	6+ months	• DOJ approval (date unavailable); • Shareholder approval July 22, 1998; • FRB conditional approval September 23, 1998.
16	Corestates Financial Corp./ First Union Corp.	$16.6 billion transaction value; $220 billion combined assets	November 18, 1997	April 27, 1998	5+ months	• Shareholder approval February 27, 1998; • Divestiture agreement with DOJ clears merger April 10, 1998; • FRB approval April 13, 1998.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
17	Crestar Financial Corporation/ SunTrust Banks, Inc.	$8.3 billion transaction value, $87 billion combined assets	July 20, 1998	December 31, 1998	5+ months	• FRB approval October 28, 1998; • Shareholder approval December 23, 1998.
18	First Chicago NBD Corporation/ Banc One Corporation	$29 billion transaction value; $279 billion combined assets	April 13, 1998	October 2, 1998	5+ months	• FRB public meeting August 13, 1998, • Divestiture agreement with DOJ clears merger September 8, 1998; • FRB approval September 14, 1998; • Shareholder approval September 15, 1998.
19	Frontier Corporation/ Global Crossing Ltd.	$30 billion combined assets; $11.2 billion transaction value	March 17, 1999	September 28, 1999	6+ months	• New York Public Service Commission approval September 17, 1999; • FCC approval September 21, 1999; • Shareholder approval September 22,1999.
20	General Re Corp./ Berkshire Hathaway Inc.	$22 billion transaction value	June 19, 1998	December 21, 1998	6+ months	• FTC grants early termination of HSR Act waiting period October 15, 1998.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
21	GTE Corp./ Bell Atlantic	$53 billion transaction value	July 28, 1998	June 16, 2000	22+ months	• Application filed with FCC October 2, 1998; • State entities approval process March 16, 1999 – March 2, 2000; • Divestiture agreement with DOJ clears merger May 7, 1999; • Shareholder approval May 18, 1999; • FCC consideration suspended April 14, 1999 per applicants' request; • Application supplement to FCC January 27, 2000; • FCC called for public comments re: applicants' subsequent filings April 28, 2000; • FCC conditional approval June 16, 2000.
22	HBO & Co./ McKesson Corp.	$12 billion transaction value	October 18, 1998	January 12, 1999	2+ months	• Waiting period expired under HSR Act November 30, 1998; • Shareholder approval January 12, 1999.
23	HFS Incorporated/ CUC International Inc.	$8.7 billion transaction value	May 27, 1997	December 18, 1997	5+ months	• Divestiture agreement with FTC clears merger December 17, 1997.
24	Honeywell Inc./ AlliedSignal Inc.	$14 billion transaction value; $24 billion combined assets	June 7, 1999	December 1, 1999	5+ months	• DOJ requests additional information July 26, 1999; • EC enters Phase II of DOJ review August 30, 1999; • Applicants & DOJ reach divestiture agreement in principle October 4, 1999; • DOJ clearance November 8, 1999; • EC clearance December 1, 1999.
25	Hughes Electronics Corporation/ Raytheon Company	$9.5 billion transaction value	January 16, 1997	December 18, 1997	11+ months	• Divestiture agreement with DOJ clears merger October 2, 1997.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
26	ITT Corporation/ Starwood Hotels & Resorts Worldwide	$13.3 billion transaction value	October 20, 1997	February 24, 1998	4+ months	• FTC grants early termination of HSR Act waiting period December 4, 1997; • Shareholder approval February 13, 1998; • State regulatory approval February 20, 1998.
27	McDonnell Douglas/ Boeing Co.	$13.3 billion transaction value	December 15, 1996	August 1, 1997	7+ months	• EC statement of objections to merger May 21, 1997; • FTC unconditional approval July 1, 1997; • Shareholder approval July 25, 1997; • EC final approval July 30, 1997.
28	MCI/ World Com	$44 billion transaction value	November 10, 1997	September 14, 1998	10+ months	• Application filed with FCC October 1, 1997; • EC continues review March 4, 1998; • Shareholder approval March 11, 1998; • Divestiture agreement with DOJ clears merger July 15, 1998; • FCC approval September 14, 1998; • EC final approval (date unavailable).
29	Mobil Corporation/ Exxon Corporation	$75 billion transaction value	December 1, 1998	December 1, 1999	12 months	• Pre-Merger Notification filed with EC May 3, 1999; • Shareholder approval May 27, 1999; • EC second phase inquiry opened June 9, 1999; • EC approval September 29, 1999; • Divestiture agreement with FTC clears merger November 30, 1999.
30	Morgan Stanley Group Inc./ Dean Witter, Discover & Co.	$10 billion transaction value	February 5, 1997	May 31, 1997	3+ months	• Shareholder approval May 28, 1997.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
31	Netscape Communications Corporation/ America Online, Inc.	$4.2 billion transaction value	November 24, 1998	March 17, 1999	3+ months	• DOJ approval March 12, 1999.
32	Network Solutions, Inc./ Verisign, Inc.	$21 billion transaction value	March 7, 2000	June 9, 2000	3+ months	
33	Nynex Corp./ Bell Atlantic Corp.	$25.6 billion transaction value	April 22, 1996	August 14, 1997	15+ months	• Shareholder approval November 1996; • State entities approval January 1997 through April 1997; • DOJ approval April 24, 1997; • Applicants propose mitigating commitments to FCC July 19, 1997; • FCC conditional approval August 14, 1997.
34	PacifiCorp/ ScottishPower	$7.9 billion transaction value	December 7, 1998	November 30, 1999	11+ months	• Early termination of HSR Act waiting period February 16, 1999; • State entities approval January 1999 through November 1999; • UK regulatory clearance April 13, 1999; • FERC approval June 17, 1999; • Shareholder approval June 18 & 19, 1999; • Nuclear Regulatory Commission approval November 12, 1999.
35	Pacific Telesis Group/ SBC Communications, Inc.	$16.5 billion transaction value	April 1, 1996	April 1, 1997	12 months	• DOJ approval November 5, 1996; • FCC approval January 28, 1997; • State entities approval December 1996 through March 1997.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
36	Pioneer Hi-Bred International Inc./ DuPont	$7.7 billion transaction value	March 15, 1999	October 1, 1999	6+ months	• Applicants agree to give DOJ additional time to complete its initial review April 22, 1999; • DOJ approval May 21, 1999; • EC approval June 21, 1999; • SEC approval August 31, 1999; • Shareholder approval October 1, 1999
37	SBC Communications/ So. New England Tele.	$6.5 billion transaction value	January 5, 1998	October 23, 1998	10+ months	• Connecticut regulators approval September 3, 1998; • DOJ approval (date unavailable); • FCC approval October 23, 1998.
38	SunAmerica Inc./ American International Group, Inc.	$18 billion transaction value	August 20, 1998	January 1, 1999	4+ months	• SEC approval October 8, 1998; • Shareholder approval November 18, 1998.
39	Tele-Comm. (TCI)/ AT&T Corp.	$48 billion transaction value	June 24, 1998	March 9, 1999	8+ months	• Application filed with FCC September 14, 1998; • Divestiture agreement with DOJ clears merger December 30, 1998; • FCC approval February 18, 1999.
40	Teleport Comm. Group (TCG)/ AT&T Corp.	$11.3 billion transaction value	January 8, 1998	July 23, 1998	6+ months	• Application filed with FCC February 3, 1998; • FCC approval July 23, 1998.
41	Transamerica Corporation/ AEGON NV	$9.7 billion transaction value	February 18, 1999	July 21, 1999	5+ months	• FTC grants early termination of HSR Act waiting period March 30, 1999; • June 7, 1999 approved by EC; • June 18, 1999 approved by SEC.
42	Travelers Group/ Salomon Inc.	$9 billion transaction value	September 24, 1997	November 28, 1997	2+ months	

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
43	U.S. Bancorp/ First Bank System, Inc.	$9 billion transaction value; $72 billion combined assets	March 20, 1997	August 1, 1997	4+ months	• FRB approval June 23, 1997; • Shareholder approval July 31, 1999.
44	US West/ Qwest Communications	$42 billion transaction value	July 18, 1999	June 30, 2000	11+ months	• Application filed with FCC & state entities August 19, 1999; • DOJ approval August 12,1999; • SEC approval August 13, 1999; • Shareholder approval November 2, 1999; • State entities approval January 7, 2000 through June 2000; • FCC approval March 10, 2000.
45	Warner-Lambert Co./ Pfizer Inc.	$90 billion transaction value	February 7, 2000	June 19, 2000	4+ months	• EC approval May 22, 2000; • FTC grants early termination of HSR Act waiting period June 19, 2000.
46	Waste Management, Inc./ USA Waste Services, Inc.	$13.5 billion transaction value	March 11, 1998	July 16, 1998	4+ months	• Shareholder approval July 15, 1998; • Divestiture agreement with DOJ and state entities clear merger July 16, 1998.
47	WebMD, Inc./ Healtheon Corp./ (& MEDE America Corp. & Medcast Networks)	$10 billion transaction value (Healtheon & WebMd)	May 20, 1999 (Healtheon & WebMD)	November 11, 1999	5+ months	• Merger with MEDE America Corp. announced April 21, 1999; • MedCast Networks merger announced July 1, 1999.

Attachment 2

No.	Principal Merging Entities	Market Value (approximate)	Announcement Date	Completion Date	Total Time	Procedural History & Relevant Factors
48	Wells Fargo & Company/ Norwest Corporation	$34 billion transaction value; $196 billion combined assets	June 8, 1998	November 2, 1998	4+ months	• Divestiture agreement with DOJ clears merger October 13, 1998; • FRB approval October 14, 1998.

CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Comments are being served on all parties of record this 17th day of November, 2000.

David I. Bloom

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

VERIFIED STATEMENT
OF
ROBERT D. KREBS

I am Robert D. Krebs, Chairman and Chief Executive Officer of Burlington Northern Santa Fe Corporation, which owns and operates The Burlington Northern and Santa Fe Railway Company ("BNSF"). A summary of my background is attached as an appendix to this statement.

The Board has proposed numerous changes to its rail merger policies. Many of these changes make sense in today's environment, and I have addressed many of the sensible proposals in previous statements and testimony in this and related proceedings. In this statement, I want to address several major issues raised by the proposed rules that could adversely affect the rail sector's ability to attract investment capital.

In an earlier decision in a related proceeding, the Board concluded:

> "Looking forward, the key problem faced by railroads — how to improve profitability through enhancing the service provided to their customers — is ***linked to adding to insufficient infrastructure***, not to eliminating excess capacity." STB Ex Parte No. 582 Decision (March 17, 2000), page 6. (Emphasis added).

The Board was correct in this observation. I believe that the greatest challenges facing the railroad industry and its customers today are (1) the challenge of improving service to rail shippers and (2) the challenge of attracting the capital

investment needed to obtain efficiencies from the existing rail infrastructure and, where necessary, to construct new infrastructure to support improved rail service offerings. Given the fact that the rail sector lags behind other industry sectors in growth and return on invested capital, it is already challenging to attract investment capital to the rail sector. Moreover, investor focus on short-term profits does not reward companies that make investments in the long-term infrastructure improvements that will be needed to improve service and handle additional capacity. Therefore, if the Board is serious about encouraging improvements in rail service, it should ensure that its policies do not discourage private investment in the rail sector and that its policies affirmatively encourage adequate revenues for rail businesses.

A vitally important factor to investors in today's economic climate is the speed with which they will see an appropriate return on their investments. When regulatory approvals are required for transactions, investors need predictable and expeditious outcomes. To avoid discouraging investment in the rail sector, the Board must accelerate its merger review process to reach quickly the core issues that need to be addressed in a rail merger. The lengthy proceedings permitted (but not required) under the statute, coupled with the vague new standards identified in the proposed rules, could chill a good merger proposal from even being made. To prevent that result, and to assure investors that the Board is sensitive to the need for expeditious decisionmaking, the Board should adopt a pro forma procedural schedule that permits full public participation and environmental review, yet results in a final Board decision within one year of the parties' filing of a notice of intent.

As I noted above, the proposed new merger policy appropriately addresses many of the needs of today's transportation market. For example, the proposal to

require the preparation of detailed Service Assurance Plans to accompany future merger applications is an excellent idea that should aid the agency and the public in reviewing whether the merger applicants will be able to deliver adequate service in the post-merger environment. I also support the Board's proposal to ensure that major gateways remain open following a merger, that the "contract exception" right is maintained, and that build-in and transload opportunities are preserved for shippers.

In many other respects, however, the proposed new merger policy introduces serious new risks of delay and uncertainty into the regulatory process, signaling investors that the rail sector may be an unpredictable market in the foreseeable future. On a related point, by adopting a presumption that future mergers are inherently harmful and making it more difficult to justify future mergers, the proposed new merger policy signals investors that the Board is satisfied with the status quo of rail sector financial performance and capital investment.

I am not satisfied with the status quo of rail sector financial performance. I believe that there are substantial opportunities for growth in the rail sector. These opportunities will not come to pass, however, if the industry cannot improve its ability to attract investment capital. Unfortunately, the proposed new merger policy is a step in the wrong direction, and will make it harder, rather than easier, for the rail industry to attract the capital it needs to fulfill the Board's vision of improved service to rail shippers.

I therefore intend to address the following points in detail in this statement.

First, there is no reason to delay the benefits of a good merger for shippers. Yet, extended procedural schedules defer those benefits for shippers and can even lead to the complete loss of those benefits because good mergers are either not

proposed or are undone by the delay and uncertainty of the review process. Second, during the period when a merger is pending before the Board, the applicants and other parties are placed in a regulatory limbo, unsure how to plan for the future or how to respond to other opportunities. Third, capital markets cannot tolerate uncertainty or delay. The mere threat of an extended regulatory proceeding would cause capital to seek other investment opportunities and place downward pressure on railroad stocks. I believe that the proposed new merger policy statement does not adequately consider this issue, and I will urge that the Board adopt a policy committing to an expeditious review of any proposed rail merger in the future.

I also will suggest that the new policy inappropriately presumes that future rail merger proposals are inherently harmful, a presumption that will strongly discourage future investment in the rail sector. I will urge the Board to revisit this presumption, as well.

The Public Interest Requires More Expeditious Consideration of Railroad Merger Applications

In citing some of the tenets of the Rail Transportation Policy in support of its proposed new merger policy, the Board overlooked one provision of the Policy that is extremely important to investors: the Rail Transportation Policy's call for "fair and expeditious regulatory decisions."

Delay is the enemy of capital investment. Investors are not ordinarily willing to park their investment dollars awaiting lengthy regulatory approvals of a transaction. Investors make an exception when they perceive that a transaction will add value to the investment in the long run, but only when the regulatory process is expeditious and predictable. In connection with our recent proposal to combine with the Canadian National Railway Company ("CN"), our investors made it clear to

us that they could not tolerate the additional delay that was introduced by the Board's moratorium, coupled with the already lengthy regulatory review process. Because our two companies could not risk the flight of investment capital that would likely have resulted from waiting for the moratorium and approval process to run their courses, we jointly terminated the transaction this summer, notwithstanding the significant shipper benefits that could have resulted from that proposed combination.

There is no other U.S. industry that must routinely endure merger approval processes that are as lengthy and expensive as the Board's merger review process. To be sure, there are isolated examples of transactions that have become embroiled in lengthy regulatory reviews, but these are rare. Far more commonly, federal regulatory clearances for major mergers — including transactions far larger in value than any modern rail merger — occur in a matter of a few months. And, it would be parochial (and wrong) to presume that mergers in other industries have less significant effects on the U.S. economy than end-to-end rail mergers. Recent consolidations in the banking, telecommunications and energy sectors have dwarfed recent rail mergers, and have reshaped markets in many industrial sectors.

There is simply no public policy justification for stretching out railroad merger reviews to nineteen months (or longer). Mergers in other industries do not require protracted evidentiary proceedings, depositions or environmental reviews. While I understand that the Board could not eliminate all of the procedures now required, there are many steps (such as interrogatories and depositions) that are not required by the statute and add substantial delay and expense to the process. The Board could retain each of the rail merger procedural steps mandated by the statute, as well as complete an environmental review, and still complete the evidentiary portion of the case within six months after an application is filed. BNSF's comments contain

a template for a 270-day procedural schedule that provides ample opportunities for public participation, environmental review and Board consideration, allowing a decision to be rendered within nine months of the filing of an application. There is simply no reason why the entire merger review process could not be completed by the Board quickly enough to permit closing of an approved transaction within one year of the parties' filing their notice of intent to apply for merger approval.

The bottom line is that shareholders and shippers alike suffer when they must defer enjoyment of the benefits accruing from a beneficial rail merger until the conclusion of the lengthy STB review process. The delays inherent in the current process are a severe deterrent to investors and deprive shippers of the improved services, transit times and other benefits that can accompany end-to-end rail mergers. The Board should reexamine its procedural rules, eliminate unnecessary steps and commit publicly to a streamlined, expedited review of future rail merger proposals in order to remove a significant obstacle to investment in the rail sector.

It is Wrong to Presume that All Remaining Potential Mergers in the Rail Sector Are Inherently Harmful

The Notice of Proposed Rulemaking proposes to create a new presumption that any future rail mergers will be inherently harmful to competition and rail service (at least temporarily) and proposes to require future merger applicants to come up with a plan to "enhance" competition as a way of mitigating against these perceived harms.

This new presumption ignores the fact that modern rail mergers have made railroads more effective competitors, thereby improving the competitive marketplace served by all modes of transportation. Shippers have benefitted from this improved competitive market through lower rates, better service and innovative service offerings.

If we had been allowed to file our application for review of the proposed combination of BNSF and CN, it would have shown how the combination would have advanced the public interest in many ways. These included offering shippers improved routing options, faster transit times on major routes, bypassing congested urban areas and providing unprecedented gateway and service guarantees. Our proposed combination would have produced improved asset utilization, thus increasing the capacity of the combined system without the need for additional equipment and infrastructure investment. The combination would also have yielded substantial economic synergies, freeing capital for infrastructure investment where that investment may be needed; and it would have substantially advanced the interests of North American trade as embodied in the North American Free Trade Agreement ("NAFTA"). We believe we would have shown that these public interest benefits were achievable without introducing competitive harm, without adverse effects on employee or public safety, and with only minimal effects on employment or the environment.

The application would have described estimated total merger benefits of approximately $800 million annually, including over $300 million in additional net revenue from traffic gains, a substantial portion of which came from attracting business back to the rail system. We also projected approximately $500 million in operating synergies per year, of which $400 million would have been reduced operating costs and $100 million in avoided capital expenditures. These savings would have made the combined railroads even stronger financially, better able to compete for new business and make infrastructure investments. Even more important, the new system would have provided owners with returns in excess of the company's cost of capital. Unless and until we can earn our cost of capital, BNSF's

ability to make infrastructure and equipment investments is questionable. Indeed, we may find that further consolidation is necessary to assure the rail industry's financial health for the benefit of its customers, employees and the country.

Therefore, there is absolutely no basis for the proposed new presumption and no reason to saddle future mergers with the substantial costs of "enhancing" competition. What it means to "enhance" competition is not precisely spelled out, but the proffered examples all have one thing in common: the merging carriers would have to open up some amount of business to new competition without receiving any counterpart access to new customers from the other rail carriers. Unlike existing merger policy, which ensures the preservation of two carrier service for shippers that enjoyed that competition before the merger, the new presumption and remedy proposal would bestow new competition on shippers that do not now have any rail-to-rail competition.

I know of no other U.S. industry that is expected to give away its customers without compensation as a condition of obtaining federal approval to merge. This proposal is particularly ill-advised, because the "enhanced" competition is not required to be related to the specific alleged harm and there is therefore no way for an applicant to know what level of enhancements will be required by the Board as a condition of approval. The net effect of this new presumption of harm, and mandated remedy is to increase the costs of future mergers, while providing a windfall to the rail carriers that are not among the first to merge under the new policy. This will make it much more difficult to persuade investors to support future mergers, and will likely result in deterring beneficial mergers that would have passed muster under the existing merger policy. Shippers will suffer the loss of merger-related efficiencies and benefits that they would have enjoyed from mergers that are

discouraged by the proposed new policy.

The Board's proposal cannot be reconciled with the public interest. Notwithstanding the serious service disruptions that followed the Union Pacific/Southern Pacific merger, no one could seriously suggest that rail shippers would be better served today with an independent (but financially crippled) Southern Pacific. Yet, it is unlikely that any carrier would have been willing to take on the problems and expense of rebuilding the Southern Pacific franchise if it also had to "enhance" competition as a price of obtaining federal approval to merge.

Moreover, this proposal puts the Board in the role of central planner for the railroad industry, by deciding which shippers will benefit from enhanced competition and which will not. This proposal is a giant step toward reregulation that itself will discourage future investment in the rail sector, as the Board was clearly told at its public hearings in March 2000 in a proceeding related to this rulemaking.

I also want to comment on the proposal to require applicants to prove during the oversight proceedings that they have actually achieved the projected benefits of the merger. This proposal completely misses the point of a dynamic marketplace — shippers can benefit from competitive responses to mergers that may deprive the merging parties of the expected traffic, but which in fact produce lower rates or better service for shippers. Such a result cannot be considered harmful to the public interest, and no intervention from the Board should be needed to address the failure of merging carriers to gain as much new traffic as they had hoped to gain. Moreover, it is unclear what remedies are available to the Board in such a circumstance.

Finally, I want to comment on the proposal to require applicants to accept the possibility of indeterminate conditions that may be imposed years after the merger

in order to address some perceived harm arising from a ***future*** consolidation. Such a new requirement would impose unacceptable uncertainty on the first carriers to merge under the new policy. Investors could not possibly evaluate the economics of a transaction that has no finality and that could be converted, retroactively, from a beneficial transaction to an economically unattractive one. This concept is anathema to investors and will seriously harm the industry's ability to attract investment capital in the future.

Conclusion

If the Board wants rail service improvements, it must establish policies that encourage, rather than discourage, investment in the rail sector to finance those improvements. The Board's proposed new merger policy sends the wrong signals to the capital markets about the likelihood of damaging reregulation. Moreover, the proposed policy would increase the costs of mergers, perhaps to the point of making them economically infeasible, sending yet another negative signal to the capital markets. Finally, the proposed policy misses the opportunity to streamline and expedite the rail merger approval process, an essential step if railroads are to compete effectively for investment capital with other industries that enjoy much swifter reviews of their merger proposals.

ROBERT D. KREBS
CHAIRMAN AND CHIEF EXECUTIVE OFFICER

A native of Sacramento, California, Mr. Krebs began his career in the railroad industry when he joined the Southern Pacific Company in June of 1966 on special duty in the operating departments of Southern Pacific Transportation Company ("SPT") and the St. Louis Southwestern Railway Company, becoming Vice President-Operations of SPT in 1980; a Director of SPT in 1981; President of SPT and St. Louis Southwestern Railway Company in 1982; President and Chief Operating Officer of Santa Fe Southern Pacific Corporation ("SFSP") in 1983; President and Chief Executive Officer of SFSP in 1987; Chairman, President and Chief Executive Officer of SFSP on May 24, 1988; Chairman and Chief Executive Officer of The Atchison, Topeka and Santa Fe Railway Company ("ATSF") on June 1, 1989; and Chairman, President and Chief Executive Officer of ATSF on June 4, 1991.

On September 22, 1995, he was named President and Chief Executive Officer of Burlington Northern Santa Fe Corporation. On April 17, 1997, he was named Chairman, President and Chief Executive Officer of Burlington Northern Santa Fe Corporation. On June 1, 1999, he was named Chairman and Chief Executive Officer of Burlington Northern Santa Fe Corporation and Chairman and Chief Executive Officer of The Burlington Northern and Santa Fe Railway Company.

Mr. Krebs earned a Bachelor of Arts degree at Stanford University in 1964. He graduated with distinction and was elected to Phi Beta Kappa. He earned a Master of Business Administration at the Harvard Graduate School of Business in 1966.

VERIFICATION

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

Executed on November 16, 2000.

Robert D. Krebs

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (Sub-No. 1)
PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

VERIFIED STATEMENT OF

JOSÉ A. GÓMEZ-IBÁÑEZ
AND
JOSEPH P. KALT[1]

I. INTRODUCTION

The railroad industry is a vital part of the modern US economy, fulfilling a critical role in keeping the nation's logistics system efficient and competitive in today's global economy. Accordingly, the public has an important stake in ensuring that the industry is structured and regulated in ways that provide the benefits of a well-functioning rail sector. The restructuring of the rail sector and the framework of governmental oversight employed over the last twenty-five years have helped to bring the sector to the point where it is now clearly a strong contributor to, rather than an anachronistic drag on, the nation's business. Mergers and related ownership restructurings have played significant and, on net, positive roles in the industry's turnaround.

Given the stake that the public has in a healthy and efficient rail system, and given problems of service disruptions that have followed on the heels of some recent consolidations, it is appropriate that policymakers now address the questions of whether and how merger policy might be /improved. The current proposals of the Surface Transportation Board provide the opportunity to appropriately focus public discussion. The Board has solicited comments on the need for policy changes and received voluminous responses from

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[1] José Gómez-Ibáñez is the Derek C. Bok Professor of Public Policy and Urban Planning at Harvard University's John F. Kennedy School of Government and Graduate School of Design in Cambridge, Massachusetts. He has served as the faculty chair of the Public Policy Program at the Kennedy School and the chair of the Department of Urban Planning and Design at the Graduate School of Design. In addition, Gómez-Ibáñez has served as a consultant to governments and international lending agencies on infrastructure privatization and regulation. Joseph P. Kalt is the Ford Foundation Professor of International Political Economy at the John F. Kennedy School of Government at Harvard University in Cambridge, Massachusetts. At the Kennedy School, he has served as chair of the economics and quantitative methods cluster, faculty chair and Academic Dean for Research, chair of degree programs, and chair of the Ph.D. program. In addition, he works as a senior economist with Lexecon Inc. Attachment 1 provides information on the authors' professional and academic backgrounds.

railroads, shippers, and other interested parties. In our view, the resulting proposed rules constitute a mixed picture, holding promise for improving merger policy in key dimensions, but risking harm to the nation's economic health in others.

On the promising side, the Board's efforts to protect against merger-related service disruptions in its proposed rules are both well-timed and consistent with principles of sound public policy. Until the recent UP/SP merger, the railroad industry and its regulators arguably had underestimated the transitional problems that mergers could pose. The UP/SP experiences, followed by implementation difficulties attendant to the breakup of Conrail, have driven home the lesson that mergers, consolidations, and restructurings can adversely affect service not only on the merging carriers' systems, but on connecting carriers as well. Consequently, rail industry stakeholders nationwide—including the Board, the railroads, shippers, and the general public—have a vital interest in ensuring that such service disruptions do not recur. The present proceeding provides the Board with a valuable opportunity to make substantive improvements to its merger policy so as to minimize the prospects of future merger-related service disruptions.

On the dangerous side, the analysis of the competitive implications of mergers and consolidations in the proposed rules oversteps the traditional and appropriate role of merger review and opens unnecessarily a Pandora's box of political temptations and difficulties. In particular, we are troubled by the proposals to require (1) that a proposed merger not only protect, but enhance, competition, (2) that merging railroads demonstrate that the benefits they seek can not be achieved by any other means short of consolidation, (3) that merging parties analyze the effects of future consolidations that the merger in question might provoke, and (4) that they provide specific guarantees of the benefits that consolidation will provide.

As the Board notes, these features of its proposed new rules constitute a "paradigm shift" in merger policy. Stated bluntly, the Board appears to have concluded that future railroad mergers are unlikely to be in the public interest, and, based on this conclusion, the Board has proposed a set of rules that would do much to discourage future rail mergers. Indeed, it is notable that these proposed rules are not just more restrictive than the rules the Board has applied to railroads in the past, but are far more restrictive than the tests that anti-trust regulators generally apply to other industries.

While the Board's concern with service disruptions is warranted, we believe that the competition-related elements of the proposed rules will effectively act as an unnecessary and harmful "tax" on efficient merger transactions, raising risks and other costs faced by future merger applicants. The proposed requirement that mergers enhance competition is a clear example of this. The test commonly applied by the Board to prior railroad mergers (and by other regulators to their industries) has evolved into a standard of "do no harm to competition." Where there is a risk of reduced competition, Board precedent now clearly compels merger applicants to pre-condition their transaction with remedies if a consolidation is to have any chance of being approved by the Board. In practice, this is a strict test in that it does not admit to the possibility that even small reductions in competition might be tolerable if a merger's benefits (in improved railroad efficiency or service) were sufficiently large. Effectively, current policy holds that mergers are disallowed unless competition is protected, regardless of the other benefits that might be achieved. To now go further and require that a merger enhance competition would result in the discouragement and denial of mergers that do not harm competition and do provide other public benefits. Worse, the requirement to enhance competition is so open ended that it will empower intervenors to "hold up" merger applicants for concessions that are completely unrelated to the specific competitive or other concerns a merger raises. In short, it is an invitation to politicize the merger review process.

Indeed, we fear that some of the proposed rules have less to do with the evaluation of whether a proposed merger is in the public interest than with an effort to overturn the reforms to railroad regulation ushered in under the Staggers Act of 1980. The Staggers Act led to a dramatic revival of the railroad industry that benefits both railroads and shippers alike. After decades of minimal returns and decaying service, railroad profitability finally improved to the point where major new investments could be financed from private capital markets. Improvements in railroad efficiency made possible dramatic reductions in average railroad rates, enhanced service reliability, and a resurgence in railroad traffic. Mergers and consolidations were key tools the industry used to reduce costs and improve service in the Staggers era. Effective merger policies should not now be abandoned in misguided attempts to respond to shifting political winds. Merger policy should be improved where it has failed to adequately protect the ***public*** interest.

II. THE LOGIC OF CURRENT MERGER POLICY

II.A The Board's Current Merger Policy

In its current merger policy, as implemented in recent merger reviews, the Board has focused the bulk of its resources on addressing the protection of competition. In particular, the Board has required that merger applicants identify every case where a merger would cause a shipper to lose a meaningful competitive option and take steps to remedy that loss.

The Board's current merger policy is, in fact, more restrictive than seems to be required under the Staggers Act. The Staggers Act provides that the Board apply a "net public benefits" test. That is, the Board is to weigh the possible benefits of a merger against its potential costs, and to determine whether the public would be, on the whole, better off with the merger or not. The benefits might include reductions in railroad costs or improvements in railroad service, while the costs might include reduced competition and service disruptions during the transition. In practice, however, the merger review process devotes relatively little attention to merger benefits, in effect applying a test that a merger must impose little or no costs, regardless of its benefits. [2]

II.B The Focus on Protecting Competition

The Board's vigilant attention to protecting competition puts it in the "mainstream" of merger and antitrust policy as it is practiced in other industries. Mergers, like most business conduct in a private enterprise economy, are motivated by private gain to the decision-making parties. Such gain can result from all sorts of causes, many of which generate public benefits. Of course, one source of potential private gain not in the public interest arises if a merger might create or enhance the use of market power. For this reason, while our economic system properly gives wide berth to private incentives, merger policy, broadly applied, is properly concerned with protecting competition. This holds even in non-regulated industries, where the harm to competition and the risk of the exercise of market power is the primary focus of merger policy.[3]

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[2] The Staggers Act calls for the Board to consider a number of factors, such as the effect on labor and the environment as part of the merger review process.

[3] See *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, April 2, 1992 as amended April 8, 1997.

Economic analysis provides the tools for analyzing competition and the risk that a merger will enhance market power. Market power, either unilateral or in conjunction with other firms, is the ability to maintain prices above competitive levels. When firms that compete in a market merge, the merger reduces the number of competitors in that market. Depending on the facts and circumstances of the merger, this reduction in competitive rivalry between the merging parties may reduce competition and present a significant risk of competitive harm through the prospective use of market power. Factors such as concentration, entry, and ease of engaging in coordinated anticompetitive action need to be evaluated.

By focusing primarily on preventing harm to competition, traditional merger policy recognizes that it is important to establish appropriate boundaries between private and public decision making. The government has a legitimate role in ensuring that mergers do not harm the public, primarily through the loss of competition. But there is a concomitant need to ensure that regulatory policy does not kill off private incentives to seek efficient and high quality business strategies. Individual companies are in a much better position than the government to understand the intricacies of the industry and customer needs so as to efficiently organize business activities and capital investment.

In short, sound merger policy, as has been generally implemented across other industries, is properly focussed on ensuring specific public policy interests are preserved—such as the protection from the exercise of market power. To the extent these policy objectives are met, private companies are properly free to risk their capital and make their investments as they see fit. Failure to heed these principles is a recipe for counter-productive policies when it comes to serving the public interest.

II.C The Application of Merger Policy to Railroads

This standard approach of protecting competition has been applied to the railroad industry in a fairly straightforward way by the Surface Transportation Board in the past. The Board has examined proposed mergers on a case-by-case basis, using the tools of economic analysis to assess the risk of competitive harm. In many, many situations in the railroad industry, a merger poses no threat to competition because it does not even alter the number of railroads that particular shippers have access to at their particular shipping points. Moreover, even where a rail merger might reduce the number of rail alternatives, intermodal, geographic and source competition all can serve to limit the potential exercise of market power. Applying these tests to a particular proposed rail merger depends on the facts and circumstances of that merger and the specific markets in which the merging railroads are found to compete. The de facto standard that has emerged from recent merger cases is that the evidence presented to the Board must demonstrate that a merger will not reduce the number of independent rail options serving a shipper to less than two, regardless of the extent of alternative competitive options from other sources.[4] Where a merger would reduce the number of rail alternatives, for example, from three to two, additional factual inquiry appropriately ensues.

One difference between the railroads and most other industries, however, is that merger oversight is not the only protection against railroad market power. Unlike most of the U.S. economy, the rail industry is subject to economic regulation. This arises, in part, because some shippers are served by a single railroad. As a result of the economies of density, scale and scope in the rail industry, most rail shippers will not have (and never have had) a choice of numerous independent rail transportation alternatives. And while much rail traffic is subject to intense competition from trucks, barges or other sources, some shippers will have few if any competitive alternatives to the one railroad serving them. The existing regulatory structure incorporates this reality and provides protections to captive shippers through oversight and capping of rates, while at the same time providing the possibility (but

[4] The Board has applied the same standard to potential rail competition in the form of preserving build-in and build-out opportunities.

not the assurance) of railroads being able to earn a sufficient return to support the fixed and common costs of the rail infrastructure.

Over the years, the system of economic regulation has had to learn the importance of striking an appropriate balance between protecting captive shippers and railroad financial health. Railroads typically have fixed and network costs that are very high while their variable costs for moving any particular shipment are often very low. One of the chronic problems of the railroad industry is that services that are subject to intense intra- or intermodal competition seldom make any significant contributions to those high fixed or variable costs. If the railroad is to avoid bankruptcy, it must raise these contributions from those services where competition is not as intense. The Staggers Act of 1980 explicitly recognized this problem by granting the railroads the right to charge different shippers different prices but within specified limits. In doing so it both protected captive shippers (by capping their prices) and the railroads' viability (by allowing them rate flexibility).

The Staggers Act does not conflict with the traditional merger policy of protecting against competitive harm. Indeed, the Act supplements merger review by providing an additional layer of protection for shippers who have few competitive options. But the wisdom of the Staggers Act is that it recognizes the reality that competition is unlikely to be extremely intense on every service, and that if it ever were the railroad industry would be forced into financial decline or required to seek public subsidy. In other words, maintaining some modest market power and differential pricing, within strictly regulated limits, is in the long-term interests of shippers.

A second difference between the railroads and most other industries is that harm to competition is not the only major potential public cost of mergers. In particular, railroads connect with one another and exchange traffic, so that service disruptions caused by the merger of two carriers can affect other carriers in the industry. The merging carriers may not consider the costs of the disruptions caused on other parts of the rail network, so the Board has a legitimate role in protecting third parties from this harm. The Board has gradually strengthened its review of the risk of service disruptions from mergers, and the proposed rules are an additional step in this direction. In effect, the Board is adding "no harm through service disruption" to its traditional standard of "no harm through lost competition."

III. THE EFFECTS OF MERGERS ON THE RAILROAD INDUSTRY

The Board's mainstream approach to merger policy has served shippers, railroads, and the public well. While it is difficult to isolate precisely the share that mergers have contributed to the dramatic benefits of the past two decades of regulatory reform in the rail sector, there can be no doubt that mergers have played a significant role. Clearly, the nation's rail network would not be a better network if we had foregone the elimination of outmoded facilities, the end-to-end joining of previously balkanized systems into more seamless networks, and the additions of service and capital that mergers have permitted. Critics of rail mergers sometimes lament the declining number of Class 1 railroads, but it is not credible to maintain that railroads, shippers, or the U.S. economy would be better off if today's Class 1 railroads were split up into thirty separate systems, and the systems restored to their pre-merger configurations.

III.A Revitalization of the Rail Industry in the Staggers Era

The revitalization of the rail industry is one of the success stories of U.S. public policy over the last 25 years. Beginning with major regulatory reforms in the 1970s and culminating with the passage of the Staggers Act of 1980, the U.S. railroad industry has improved its performance substantially. Greater rate flexibility, deregulation of rates in certain markets, and opportunities for negotiated, tailored service offerings are among the factors that have brought railroads under the discipline of the marketplace. Regulatory reform has also allowed market forces to shape the ownership structure of railroad assets. Increased freedom to abandon low-density, unprofitable service and to consolidate rail systems in order to exploit network economies has contributed to improvements in the industry. The result has been a dramatic improvement in the nation's rail system. While there have been bumps in the road at times, these benefits have been shared both by the nation's railroads, who have improved their financial health, and by the nation's shippers, who have access to a railroad system that is more cost-effective, can provide quality service, and has shown rates that have trended clearly downward.

In response to opportunities provided by reformed regulation, the railroad industry has:

- Reduced average rates in nominal and real (inflation-adjusted) terms;

- Improved productivity of labor and capital;
- Increased capital expenditures on infrastructure; and
- Improved financial health for the railroads.

Some of these results are summarized in Figure 1. Nearly all measures available demonstrate that the improvements in the rail industry have benefited shippers, railroads, and the economy. As a result, this efficient rail system has become a key component in supporting the flow of goods and materials in an internationally competitive economy.

III.B The Role of Mergers in Industry Revitalization

Ownership restructurings have had an important role in the revitalization of the U.S. rail system. In the pre-Staggers era, the boundaries between rail systems were dictated more by history and politics than by the logic and incentives of the marketplace. The result was a rail network with boundaries between railroads that were largely economically arbitrary. The industry's declining physical condition was evidence that capital markets did not and would not invest in rail systems that could not realize efficiencies because of historically imposed structures and ownership patterns.

Many of the earliest mergers in the Staggers era involved railroads whose lines ran parallel to one another. The principal benefits from these parallel mergers were the elimination of lightly-used duplicative main lines and yards and improvements in traffic density. Later mergers have tended to be of railroads that meet end-to-end. The primary motive for end-to-end mergers has been to reduce the delays, unreliability, and transactions costs caused when traffic is handed from one railroad to another. The resulting increases in single-line service and longer hauls have not only increased speed and reliability of service for shippers, but also reduced railroad costs by improving the productivity of equipment and train crews. Research confirms that the post-Staggers mergers contributed substantially to increased efficiency in the rail sector—and to lower costs for shippers.[5]

While not disputing that past mergers have been beneficial, the Board asserts in its proposed rules that future mergers and other corporate restructurings are unlikely to produce

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[5] Research shows that the mergers of the 1980s significantly reduced railroad costs; see, for example, Vellturo, Christopher, et al., "Deregulation, Mergers, and Cost Savings in Class I U.S. Railroads, 1974-1986," Journal of Economics and Management Strategy (Summer 1992), 339-369.

public benefits through further rationalization of rail networks.[6] In making this assertion, the Board overemphasizes the role that capacity reduction has played as a source of merger benefits and discounts the other ways mergers generate benefits, such as reducing operating costs and improving service quality. As an example of merger-related cost savings, BNSF's operating ratio declined from 84.4 in 1994 to 75.4 in 1999—a decline of over 10% and a savings of approximately $800 million in 1999.[7] Over the same time period, operating ratios for other Class 1 railroads *increased* almost 5%, from 82.5 to 86.5.[8]

The Board's current overemphasis on capacity reduction overlooks the public benefits that mergers generate by enabling railroads to improve the service they offer their shippers. In particular, recent end-to-end mergers have been targeted at enhancing efficiency and output through the extension of single-line service offerings. Indeed, railroads that have participated in major mergers in the 1990s have increased their average length of haul by 21% (UP, SP, and CNW) and 23% (BN and ATSF) from 1994 to 1999, compared to a 6% increase in average length of haul for other, non-merging railroads.[9]

Single-line service enhances efficiency by eliminating costs and uncertainty associated with making and managing interline movements. In addition, expansion of single-line service typically represents a dramatic improvement in the quality of service a railroad offers its shippers. As railroads expand their offerings of single-line service, they can increase the speed of their service, make service more reliable, reduce damage and loss, and reduce capital requirements by making more efficient use of rail (and shipper) facilities. In the past, the Board has recognized that single-line service is a major source of public (and shipper) benefits:

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6 "[O]ur proposed revision to the rules would recognize that this process [of rationalizing the nation's rail system and eliminating excess capacity] has now largely been completed, and that the efficiencies and service improvements to be realized from further downsizing of rail route systems are limited." Surface Transportation Board Decision, STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, Notice of Proposed Rulemaking , October 3, 2000, at 11.

7 *Quarterly Progress Report of the Burlington Northern and Santa Fe Railway Company*, Finance Docket No. 32760, January 18, 2000, at 80.

8 *Analysis of Class I Railroads*, American Association of Railroads, 1994-1999.

9 *Analysis of Class I Railroads*, 1993-1999.

> Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly... As a result of the new single-line service capability of the combined BNSF/Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange. The transaction costs shippers incur in initial rate negotiations, in arranging equipment supply, tracking shipments, and in billing and payment procedures, will likely be reduced.[10]

The Board's view that extension of single-line service is an important source of benefit is confirmed by experience. Evidence reviewed below indicates that railroads have been notably successful in attracting substantial volumes of traffic to expanded single-line service options following merger. This demonstrates eloquently that shippers benefit from these services.

In sum, the available evidence does not suggest that the benefits from network integration have been exhausted. Figure 1 shows steady improvement in the performance of the industry through the mergers of the 1980s and the 1990s. Simple inspection of a map of the North American rail systems, moreover, shows that there are still opportunities to achieve integration of existing networks through end-to-end mergers. The most discussed opportunities, of course, are mergers that would form two transcontinental railroads in the United States.

III.C The Effects of Mergers on Competition

Critics of the post-Staggers merger policy argue that Staggers-era mergers have harmed shippers by significantly reducing the number of railroads. In particular, critics often cite the fact that the number of Class I railroads declined from approximately 30 in 1980 to fewer than 10 in 2000, largely as a result of mergers.[11] This statistic is extremely misleading and its use is demagogic.

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[10] Decision No. 38 of the Interstate Commerce Commission, Burlington Northern and Santa Fe Pacific, August 16, 1995, Finance Docket No. 32549, at 65.

[11] The other main reason the number of Class I railroads declined was because the Federal Railroad Administration increased the minimum size a railroad had to be to be classified as Class I. Six railroads operating today as independent regionals or shortlines were classified as Class I railroads in 1980.

In the first place, the total number of railroads in the nation as a whole is not a measure of the number of railroads individual shippers have to choose from. Since long before the Staggers Act, the vast majority of rail shipping points have been served by only one, or at most two or three, railroads. Moreover, the number of railroads serving a particular point is a misleading measure of competition. It is with good reason that merger policy admonishes that simple measures of market structure—including counting firms and measuring the concentration of their shares via such devices as HHIs[12]—are but a "starting point" for assessing marketplace competitiveness.[13]

In the case of railroads, competition from other modes, especially trucks and barges, is often very significant. The nature and potency of competition also depends on competition from other geographic locations and products. A steam coal mine might be served by only one railroad, for example, but that railroad will be constrained in raising its rates by the fact that the delivered price of the mine's coal must be competitive with the delivered price of coal from other mines and with the costs of alternative energy sources such as oil, natural gas, or hydro power. Indeed, the Staggers Act greatly increased the potential for geographic and product competition by making it possible for railroads and their customers to sign confidential long-term contracts. Under such contracts, the railroads have strong incentives to agree to reasonable rates because otherwise shippers will invest over time in other places and/or lines of business.

The fact that average rail rates have continued to decline even though the frequency of direct railroad to railroad contact has been relatively low is consistent with potent competitive forces from such sources as other modes, geographic locations and products. Despite the fact that most shippers served directly by a railroad continue to be served by only one railroad, average rail rates continued to decline in real terms during the 1990s.

Finally, as railroads have consolidated, the Board (and its predecessor, the ICC) has been vigilant in protecting the rail options of shippers. In the context of merger policy, the Board has established a strong precedent to preserve options for a shipper who had access

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[12] The Hirschman-Herfindahl Index, comp .ted as the sum of the squared values of firms' market shares.

[13] See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 1997, Section 2.0, "Overview."

to two rail options prior to a proposed merger. Indeed, merging parties no longer appear before the Board without first ensuring that their transaction preserves access to at least two rail options. There is no evidence that rail mergers have increased the number of solely-served shippers; the opposite is true. This bespeaks clear and forceful policy aimed at protecting competition and the public interest.

IV. APPROPRIATE PROTECTION AGAINST MERGER-RELATED SERVICE DISRUPTIONS

By their nature as networks, railroad systems are vulnerable to disruptions that can spread throughout the network. Vulnerability to these spillover effects was most dramatically demonstrated when disruption on the UP/SP system around Houston quickly backed up and disrupted the operations not only of other parts of UP but even completely separate systems. While a railroad has the clear economic incentive to prevent disruption of its own system, it can rationally ignore the effects of its disruption on *other* railroads' service, revenue, and profits. This implies an inefficiently weak effort to prevent disruption.

Of course, the foregoing does not mean that merging railroads will always under-protect against service disruption. Recent mergers, such as those between BN and the ATSF and the Canadian National/Illinois Central transaction, provide counterexamples that make it clear that the generalized disruption of the rail network is not an inevitable consequence of mergers. It is clear that the presence of service disruption is directly related to the method by which a merger is implemented.

In any case, as noted earlier, the Board has a legitimate role in protecting the public against merger-related service disruptions. In this respect, railroad mergers differ significantly from those in most other industries, where network externalities are not a significant factor. Further, the Board is correct in finding in this proceeding that its current policies are insufficient to protect against such disruptions, and to take the present opportunity to introduce policies that can provide necessary protection in the event of future mergers.

Such protection does not imply either a ban on mergers or the imposition of merger conditions that would discourage mergers by raising costs and risks to merging parties. Instead, we believe it is appropriate that the Board adopt mechanisms appropriately targeted

at addressing its concerns about prospective merger-caused service quality degradation. Such mechanisms would reasonably include:

- A financial plan, endorsed by an independent expert, that demonstrates that the merger applicants have the wherewithal to undertake both those investments that are foreseen as necessary to achieve the planned merger of the parties' rail systems, as well as those investments whose need is unforeseen but that might be necessitated by service disruptions that arise unexpectedly.
- A thorough operating plan, including contingencies for possible service disruptions, that enables the Board and potentially affected parties to identify the ways service on other rail systems might be adversely affected by the merger.
- Post-merger quality-of-service guarantees that compel the merging parties to internalize the costs to their own and other railroads' systems and customers in the event of disruption that can be clearly attributed to a merger.

V. PROTECTING COMPETITION VERSUS "ENHANCING" COMPETITION

In a dramatic break from its current policy the Board now proposes to require merger applicants not just to protect competition that would otherwise be lost as a result of the merger, but to *enhance* competition:

> Applicants are expected to propose measures to mitigate and offset merger harms. These conditions should not simply preserve, but also enhance, competition. (p. 31)

This proposal assumes that future mergers will harm competition in ways that cannot be anticipated, so that competition must be enhanced by other means to compensate. But the presumption of competitive harm seems unwarranted, and the proposed remedy is of doubtful practicality and opens the door for political pressures and interference.

V.A The Presumption Of Competitive Harm From Future Mergers Is Unjustified

Previous experience and the recent evolution of the railroad industry do not suggest that future mergers will reduce competition in ways that cannot be identified or mitigated. As noted earlier, past mergers do not appear to have reduced the competitive pressures on the railroads. Competition has been preserved in part because railroads are subject to many sources of competition that are usually not affected by mergers. Railroads compete intensely with trucks and barges for many commodities and shipments, for example, and this inter-

modal competition is not reduced by rail mergers. Railroads also face competition from other geographic areas and products, and the extent of geographic and product competition was greatly enhanced when the Staggers Act made it legal for shippers to sign long-term contracts with railroads.

The Board has also played an important role in preserving competition by insisting that merger applicants offer trackage rights or other remedies that insure that any shipper served by two or more railroads before the merger still has a choice of at least two railroads after. Substantial evidence over the past several years and mergers indicates that Board-imposed and/or privately negotiated trackage, haulage and other conditions to preserve competition have been effective. For example, the I-5 agreement in the UP-SP merger and the Shared Asset Areas in the Conrail Transaction have increased the number of shippers that have had access to two or more railroads. The pro-competitive outcomes from rail mergers have typically occurred as a result of private negotiations to rationalize the operation of the rail network rather than a regulatorily imposed transaction cost on the merging process. The UP/SP oversight process has demonstrated the general effectiveness of these conditions. The rights granted to BNSF in this transaction gave competitive rail options to many shippers on the UP and SP systems. BNSF attracted over 340,000 loaded units of traffic in 1999 on the routes to which it was granted rights as part of the UP/SP merger.[14]

Most recent railroad mergers involve railroads whose route networks connect end-to-end rather than running parallel to one another. Economic analysis indicates that end-to-end mergers are unlikely to cause competitive harm. Unlike parallel mergers, end-to-end mergers do not involve significant network overlaps, so that few or no shippers face a potential reduction in the number of railroads that serve them. Moreover, end-to-end mergers are the equivalent to vertically integrating the various routes served by railroads, and the overall impact of integrating and rationalizing the ownership of the rail network is pro-competitive through reduced costs and improved overall service. Indeed, the ability to reduce costs by making the most of economies of scale and scope and offering improved single-line service has motivated recent mergers.

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[14] *Quarterly Progress Report of the Burlington Northern and Santa Fe Railway Company*, Finance Docket No. 32760, January 18, 2000.

The Board appears to recognize that future mergers are also likely to be end-to-end, and thus that threats to multiple rail access are likely to be less of an issue in the future than they have been in the past. The proposed BN-CN transaction that was withdrawn following the STB merger moratorium, for example, involved little network overlap and little loss of multiple rail access prior to the granting of conditions. And the most plausible remaining opportunities would involve end-to-end mergers to create transcontinental carriers.

Instead, the Board has identified potential reductions in geographic and product competition as a major concern and the primary reason why future merger applicants should be required to enhance competition. Geographic competition occurs when a product is available from many locations, so that transportation rates are constrained by the need to meet the delivered prices from elsewhere.[15] Similar forces work in the origin markets. Geographic competition is typically most effective in the case of relatively fungible commodities, such as grains, coal, or other raw materials that are available from a variety of sources and have numerous customer outlets.

It is puzzling why the Board appears to believe that potential reductions in geographic competition cannot be identified and mitigated in the same ways that potential reductions in multiple railroad access have been dealt with in the past. Potential losses in geographic competition have been raised in previous rail mergers, and the steps for assessing those losses are relatively straightforward. For the loss of geographic competition to be a significant issue in a merger proceeding, one needs to show that geographic competition was, prior to the merger, the constraining factor on the potential for the exercise of market power, and that the merger would eliminate such competition. Such a demonstration would involve identifying an economically relevant product and set of shipments for which intramodal, intermodal and product competition were ineffective competition, for which the merging railroads were competing in delivering those shipments to the same general locations, and for which the combination of the two rail carriers altered the process of geographic competition with the other carriers delivering the product so that there was a significant risk for the creation and use of market power.

[15] Product competition works in a similar manner via other similar products that satisfy customers' needs that serve to restrain delivered pricing.

Similarly, the steps to mitigate any threatened reduction in geographic competition seem equally straightforward. The merger applicants would be expected to offer trackage rights or similar remedies to preserve geographic competition, much as they have been expected to offer trackage rights to preserve shipper access to multiple railroads. And if the applicants did not volunteer a satisfactory remedy, the Board would be free to impose a remedy as a condition for the approval of the merger.

The Board's concerns are also hard to understand because future mergers are unlikely to pose serious threats to geographic competition. When the issue has been raised in previous rail mergers, the evidence has not supported a finding of competitive harm through the loss of geographic competition. Moreover, the factors that contribute to the loss of geographic competition are less likely to be in evidence in future mergers than they were in the past. Several of the major mergers in the 1990s, while predominantly end-to-end, at least involved railroads operating in the same broad geographic areas, such as the BN/SF, the UP/SP, and the Conrail transaction. In a proposed merger of one of the western and eastern railroads, for example, the railroads would not for the most part serve the same regions for most of the traffic. Thus, unlike the case of the western railroads that transported similar products (e.g. grain) that originated over the region for delivery to similar locations (e.g. the Gulf Coast ports), a merger between one of the western and one of the eastern railroads is likely to have greater differences in product and geographic overlap than in previous mergers.

Previous mergers have involved extensive evidentiary findings regarding the process of competition—inter-modal, intra-modal, and geographic—and the likely effect of the merger. Evidence and previous Board rulings indicate that most proposed mergers have not presented significant risks of competitive harm, once competition-preserving conditions have been granted. The Board has successfully obtained and evaluated evidence on the prospective competitive harm that a merger could pose. The Board's ability to obtain similar evidence and perform similar analyses are unaffected by previous rail consolidation. There is no reason that the Board will be unable to make similar evaluations in the future.

V.B "Enhanced" Competition and Rent-Seeking

The requirement to "enhance" competition—through whatever means the Board decides would meet its new standard—would undoubtedly encourage rent-seeking by intervenors. The Board proposes no clear standard for how and how much competition must

be enhanced. This vagueness stands in sharp contrast to the clear and traditional merger standard of identifying and protecting against specific likely harms to competition. This vagueness creates uncertainty and will encourage intervention and rent-seeking by all comers who could benefit from a regulatorily imposed condition as part of a merger. Any and all shippers, regardless of the merit of their position, will have the incentive to seek conditions that grant them more than they currently have.

Rent-seeking occurs when there are benefits being bestowed whose value exceeds their price. In the situation established by the proposed rule, the Board would bestow access to enhanced competitive conditions on shippers that are otherwise not harmed by the merger. These conditions could, for example through the introduction of trackage rights, provide a shipper that possessed ample competitive options with access to new single-line service on a non-merging railroad. To the extent that the conditions being offered or imposed have value to shippers, shippers will have the incentive to negotiate directly with the railroad, intervene in the proceeding, and/or appeal to the Board to impose conditions. Every shipper will have the incentive to seek as much of the available "rent" for itself as possible.

Administrative rent-seeking wastes society's resources. The need to "buy off" intervenors will likely result in expensive and inefficient outcomes that dissipate benefits from further vertical integration in the rail industry. These "payments," expressed in terms of "enhanced competition conditions" or other concessions to shippers, are likely to be expensive to the railroad. In the absence of a clear standard, it will be difficult to limit or constrain the requests for favors and difficult to prevent arbitrary outcomes based on the success of shippers' bargaining. While the railroads have the incentive to meet the enhanced competition rule in as efficient a method as possible, the dispensation of favors is likely to reflect the perceived effectiveness of different shippers in proceedings before the Board. Indeed, in this type of negotiated process with no clear standard, the railroad may need to make private concessions to shippers that have nothing to do with enhancing competition. Instead they will represent a bribe to prevent further intervention and delay in the rail proceeding.

While the free-for-all between shippers and merging railroads to dispense favors is wasteful, inserting the Board deeply into the process is likely to make it worse. Unlike the railroad negotiating with its customers, the Board generally will lack the information (e.g., knowledge of traffic patterns) to establish sets of conditions that have value to the shipper

and can be provided efficiently. The problem of rent-seeking will be exacerbated by shippers seeking relief before the Board and the Board needing to decide which shippers will get what kind of benefit from "enhanced competition" and in what form this condition will occur. To the extent the Board imposes enhanced competition as a merger standard, these imposed conditions are likely to be more unwieldy, arbitrary, and inefficient than arrangements reached through private two-party negotiation.

V.C Problems of Implementation

While the Board calls for enhanced competition, it does not specify what that means beyond providing a list of alternatives. At the very least, the Board seems to want to expand the trackage, haulage, third-party access, and other forms of organization that have occasionally been introduced in previous mergers. In the future, however, these measures would not be limited to situations where they were needed to mitigate potential competitive harm due to the loss of a rail competitor. Instead, they would be applied more widely.

The widespread introduction of trackage rights and similar measures would transform the rail industry by essentially dividing train operations and infrastructure maintenance into separate companies. The typical railroad might still both operate trains and maintain track, signals, way, yards and other infrastructure. Increasingly, however, the trains it operated would run on other railroads' tracks while the tracks it maintained would be used by other railroads' trains.

While trackage rights and similar measures have been effective when used selectively to mitigate specific competitive harms, their generalized application would pose serious difficulties. All forms of access—whether trackage, haulage, joint access areas, or mandated access—require the resolution of complex coordination problems between the railroad granting the access and the railroad using it. Although successful, the BNSF/UPSP agreement, for example, has been the subject of ongoing dispute and review by the Board regarding operations and infrastructure investment.[16] The service problems in the East following the Conrail transaction have, at least in part, resulted from the difficulty of solving

[16] For examples, see STB Finance Docket 32760 Decision No. 61 (November 19, 1996); Decision No. 81 (September 30, 1998); Decision No. 86 (July 9, 1999); and Decision No. 89 (May 31, 2000).

the coordination problem in the shared areas.[17] Indeed, the history of disputes over shared assets goes back to the earliest days of the rail industry.[18] These agreements permit the sharing of expensive network resources, but also involve disputes, inefficiencies and, sometimes, third-party intervention by the Board to resolve disputes over coordination issues such as the need to share tight capacity.

The coordination problems introduced by separating train operations from infrastructure are similar to those that occur when two railroads interline traffic. Indeed, as we have noted, a primary driver of recent mergers in the railroad industry has been the need to solve the coordination problems of interlining so as to improve service to customers.[19] The problem of interchanges is one of coordination: how are priorities met?; what investment needs to be made?; which train gets priority to scarce yard capacity? When infrastructure capacity is slack, the problem of prioritizing activities is less difficult. When capacity is tighter and more valuable, the problem of coordinating access to that capacity in a shared environment becomes more difficult. The integrated firm can make these decisions internally with a common incentive to maximize profits through meeting customers' demands. When assets are shared and incentives are misaligned, negotiations must take place and agreement is not assured.

There are strong reasons for believing that the coordination problems created by mandated access or other arm's-length approaches to "enhancing" competition are more serious in railroads than in other network industries such as electricity, natural gas, and telecommunications. Unlike electricity and natural gas, for example, rail freight service is not fungible—freight must travel between a particular origin and destination, and the terms of service, cost, speed and provision of reliability vary among shippers and products.[20]

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[17] STB Finance Docket 33388, First General Oversight Report of Norfolk Southern Corporation and Norfolk Southern Railway Company, June 1, 2000, pp. 12-13.

[18] See, e.g., Atchison, Topeka & Santa Fe Ry. Co.—Operating Agreement, 331 I.C.C. 367 (1967); Atchison, Topeka & Santa Fe Ry. Co.—Operating Agreement, 8 I.C.C.2d 297 (1992).

[19] See the discussion in section VI regarding the success of the arm's-length negotiated Avard agreement compared to a vertically-integrated merged railroad as an example.

[20] José A. Gómez-Ibáñez, "Regulating Coordination: The Promise and Problems of Vertically Unbundling Private Infrastructure," Discussion Paper, John F. Kennedy School of Government, Harvard University, December 1999.

Excess (and often relatively low cost) capacity reduce the problems of coordination in telecomm systems. On the other hand, the interdependence of different geographic portions of congested rail networks and between operations and necessary investments in track, signaling, and other infrastructure facilities are significant. Similarly, the fixed and sunk costs of the common infrastructure are high relative to the value of the service provided and require returns over very long lifetimes. Each of these factors raises the bar to cooperative, negotiated outcomes. The incentive to share expensive, congestible infrastructure capital and improve service is high; the fact that railroads have had difficulty doing this effectively demonstrates the difficulty of achieving these gains through arm's-length negotiations.

The experiences of the few countries that have attempted to enhance competition by effectively de-merging portions of the rail sector (e.g., through mandated access) confirm the difficulties of across-firm coordination. The case of mandated access on the rail network in Great Britain, for example, has been well-studied and is illustrative.[21] The problems of negotiating shared access to the infrastructure as it reaches capacity limits and, especially, investments to expand capacity and improve infrastructure have been large. Negotiations frequently are three-way—two private parties and the rail Regulator. While simple and obviously valuable projects do get approved and implemented, high transaction and negotiation costs and delay discourage many worthwhile projects that would otherwise be undertaken by a vertically integrated railroad.

Experience in the U.S. and abroad confirms the significant risks that a policy of extensive and imposed "enhanced" competition brings. Focussed and small scale arrangements that enhance competition where the interests of the parties sharing access are similar can be effective. The broader and more intrusive these conditions become, and the more they are imposed by third-parties, the greater the coordination costs become. Indeed, these types of arrangements can ultimately become a bar to efficient investment and service, when incentives diverge.

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[21] See the discussion in Section IV of Gómez-Ibáñez, "Regulating Coordination: The Promise and Problems of Vertically Unbundling Private Infrastructure," Discussion Paper, John F. Kennedy School of Government, Harvard University, December 1999.

V.D Competition "Enhancement" and the Regulatory Paradigm

The requirement of enhanced competition, in whatever form, also threatens to undo, in the context of merger policy, the underlying structure of post-Staggers rate regulation. Thus, the Board's proposed rule represents a "paradigm shift" not only in merger policy, but in the fundamental principles of rail regulation as it is practiced in the Staggers era. Such a comprehensive change should not be introduced without careful consideration of all of its effects.

Existing regulatory policy recognizes that the rail industry is a network industry with high fixed costs that serves different shippers with different competitive alternatives. Differential pricing, in which railroads can charge some shippers more than other shippers that may have better competitive options, subject to regulatory protections on the higher rates, provides the mechanism by which railroads have the possibility of obtaining a return on capital adequate to support past and future investments. This policy, for the most part, has worked well for both railroads and shippers. In the absence of differential pricing, there is no source for revenue to maintain the shared costs of the rail network.

The imposition of enhanced competition as a condition of merger will hamper the railroads' ability to engage in differential pricing and reduce their revenue in a manner unrelated to cost reductions the merger might bring. In effect the requirement to enhance competition is a tax on the merging parties. This tax would not only discourage mergers that would be in the public interest, but also exacerbate the problem of providing a sufficient return to railroad investment. Without an adequate return the railroads will be unable to attract capital for maintenance of the existing networks and for future infrastructure expansion.

The imposition of its proposed competition enhancement standard may have other impacts that the Board either has not foreseen or has not sufficiently considered. Such dramatic policy changes require a level of analysis and debate far more comprehensive than the current proceeding—focused on *merger* policy—has provided.

VI. NON-MERGER ALTERNATIVES

The Board proposes to introduce a new standard for the quantification of the net benefits of a proposed merger. In quantifying net public benefits of the proposed

transaction, the Board would apparently include only those benefits that can be shown affirmatively to be unachievable by non-merger alternatives:

> [T]he Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public. (p. 44)

Implementation of this new net benefits standard would substitute the regulator's judgment, mediated through contentious litigation, for the demonstrated judgment of the market players who put their capital at risk when deciding on the efficiency of merger and non-merger coordination transactions.

It would be irrational for two railroads to propose an end-to-end merger unless they believed that the merger would generate cost savings and service improvements that they could not gain by other means. The cost, delay, and uncertainty of the merger process give railroads strong incentives to seek their ends by other means. The fact that railroads continue to pursue end-to-end mergers is thus strong evidence that mergers can provide benefits that are unavailable via other types of transactions. Railroads' preference in many cases to achieve integration through merger rather than alternative contractual arrangements is driven by the underlying economics of the rail industry. In order to move traffic from origin to destination while meeting the service needs of shippers, railroads must solve a technical coordination problem. Railroads allocate resources and coordinate decision-making regarding scheduling, routing, allocating locomotives, prioritizing car switching, moving trains through congested yards, etc. These decisions interact in ways that can affect numerous portions of a railroad's operations and the shippers who use that system. As a result, railroads establish complex operations, procedures, and protocols that attempt to balance the needs of all of their shippers, and rail managers are constantly deciding in real time which trains should have priority and what actions to take when unplanned contingencies occur.

We can imagine a hypothetical rail network in which each successive mile of track is owned by a different railroad. In such a situation, the types of decisions described above would need to be coordinated through negotiations or complex contracts involving multiple parties that set out as many foreseeable contingencies as possible, perhaps simplifying or ignoring certain economic interactions. Since there are significant costs associated with

writing complex contracts or engaging in ongoing negotiations, we do not see the foregoing ownership structure in railroading. Rather, we observe integrated railroads with significant geographic scope to their ownership and operations. The extent of a railroad's system provides the reach over which key capital and operating decisions can be resolved more efficiently and at a lower cost by managerial discretion rather than through the use of contracts or other coordination mechanisms between separately owned firms. Operations within a single firm allow management to coordinate operations and to align operational and marketing priorities. When it is recognized that the use of arm's-length mechanisms is hardly costless and efficient in the face of the challenges of running a network, making judgment calls about these priorities is properly placed inside firms, not out on the market between firms.[22]

Contractual relationships often require parties to bear large transaction costs, particularly when agreements must be closely monitored to ensure compliance. Real world negotiations include a high level of uncertainty and differences in expectation about both the current state of the world (e.g., the ability of coordinated service to attract new business immediately) and the future (e.g., how the agreement will evolve). This makes it difficult to reach, monitor, and enforce mutually beneficial marketplace agreements.[23] When parties have different information, different expectations, and different alternative opportunities, they will also tend to value the benefits of a relationship differently. For example, railroads may have differing infrastructure capacities, equipment needs, costs of providing service, and/or marketing priorities. It can be difficult and costly for parties to reach and implement an agreement when they cannot even agree on the benefits that they will share.

Even when firms can agree on the benefits, they tend to have their own financial interests and priorities. Under such circumstances, writing sufficiently complex contracts to incorporate the myriad details and contingencies needed for successful integration is quite difficult. Since many of the benefits are shared over the network as a whole, independent firms must properly concern themselves with how those benefits will be divided between them. As a result, firms behave reasonably and tend to protect their individual interests,

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[22] This is the Coasian explanation for the existence of firms. See Coase, R.H., "The Nature of the Firm," *Economica*, November 1937, at 386-405.

[23] Williamson, O. E., ***Markets and Hierarchies: Analysis and Antitrust Implications, A Study in the Economics of Internal Organization***, 1975, at 234-247.

insisting on their individual priorities and strategies. This can make full coordination infeasible. Customers' needs go unserved and "money is left on the table"—i.e., business that could be gained through more efficiently organized and coordinated operations. Capturing such business provides the lure to mergers that improve network coordination by bringing the problems and incentives under the control of single ownership.

The problem of inducing mutually beneficial arm's-length arrangements is doubly hard when durable capital needs to be sunk and shared to realize the benefits of economic success.[24] Issues related to how to apportion capital expenditures across parties are especially difficult when the benefits that accrue from such an investment will be distributed across the network. Indeed, basic economic reasoning indicates that there may exist no equilibrium set of arm's-length contractual relationships by which to decide efficiently who should pay what share of costs and who should receive what share of revenues under conditions in which network assets are jointly used by independent parties.[25] Moreover, it is often infeasible for contract duration to be as long as the useful life of investments in an industry with such long-lived, sunk capital as railroading. These factors act to limit independent firms' willingness to commit necessary capital to investments that an integrated firm would readily undertake. Under such circumstances, customers' needs can go under-served and, to capitalize on the business opportunities this creates, efficient marketplace forces push companies to bring operations that need to be coordinated over the use of long-lived, sunk capital under the roof of one firm.

Therefore, combinations are driven by the desire and need of the industry to invest in infrastructure and capacity. Therein lie the pressures that have been driving railroads to rationalize previously balkanized ownership boundaries by building and consolidating integrated rail networks in the post-Staggers era. Second guessing these pressures by opening up proposed mergers to intervention by third parties able to garner private benefits from merger approval proceedings is poor policy.

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[24] Klein, B., R.G. Crawford, and A.A. Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," *The Journal of Law and Economics*, October 1978, at 297-326.

[25] See, for example, Gómez-Ibáñez, José, "Regulating Coordination: The Promise and Problems of Vertically Unbundling Infrastructure," Taubman Center for State and Local Government, John F. Kennedy School of Government, December 1999.

These implications from economics are supported by recent railroad industry experience. The consolidation of the Burlington Northern (BN) and the Atchison, Topeka & Santa Fe (Santa Fe) provides a clear "natural experiment" by which to compare inter-railroad contractual coordination as a substitute for merger. In the early 1990s, several years before their merger, BN and Santa Fe instituted a cooperative marketing agreement to move intermodal traffic over Avard, Oklahoma, via a haulage agreement. The railroads were particularly interested in high priority intermodal service between the West Coast, served by Santa Fe, and the Southeast, served by BN to Memphis and beyond. Because of differing management priorities, however, the agreement did not work as effectively as might have been hoped. The issue that impeded the cooperative effort was primarily that operating departments could not coordinate sufficiently to get one intermodal train in each direction to run consistently on time. Without a high degree of reliability, the service was not attractive to the high priority customers that it was targeting.

In 1995, BN and Santa Fe consummated their merger, and operating decisions have since been coordinated within a single firm, rather than through contractual relationship. Tellingly, since the merger, intermodal traffic has increased sharply. As shown in Figure 2, and notwithstanding strong pre-merger incentives and concerted effort to find non-merger mechanisms for capturing new business available through coordination, these increases have been seen at multiple points in the BNSF nexus. Traffic through Memphis, for example, has increased by 68%. As a point of comparison, intermodal traffic for the US as a whole increased 14% from 1995 to 1999. The results realized post-merger by BNSF dwarf this figure. This is true not only for the Memphis traffic, but holds in such areas as Texas to California (up 56%), Chicago to California (up 49%), Chicago to the Pacific Northwest (up 40%), and between Minnesota and California, Arizona, and New Mexico (up 170%). This burst in performance is clearly merger-related: Prior to their merger, BNSF had no incentive to ignore this business if there had been viable non-merger alternatives for chasing it.

BNSF's post-merger success in increasing its movements of Midwestern agricultural products provides further evidence that coordinating operations within a single firm can enable railroads to improve service and attract customers. Prior to the merger, Santa Fe had very few corn origins and transported relatively small amounts of corn to the livestock destinations it served. By combining BN's corn origins with Santa Fe's livestock destinations, the merger has enabled BNSF to increase its share of corn delivery to these

destinations. For example, pre-merger Santa Fe transported less than 20% of the corn delivered to feedlots in the Texas Panhandle. After the merger, BNSF was able to attract the construction of two high capacity unloading facilities in the Hereford, Texas area, and BNSF now transports 50% of the corn delivered to Texas Panhandle feedlots. BNSF has had similar success in shipping corn from the Midwest to dairy, poultry, and feedlot facilities in California. The former Santa Fe transported only 10% of the corn delivered to these markets. After the merger, BNSF was able to attract the construction of four high capacity unloading facilities in the central California area and BNSF now transports 40% of the corn delivered to these markets.

VII. CUMULATIVE IMPACTS AND CROSSOVER EFFECTS

The Board proposes to require that merger applicants predict whether their merger will provoke other mergers in the future and then analyze the "cumulative impacts and crossover effects" of their proposed merger and the subsequent mergers they think most likely. This requirement stems from a fear that otherwise the Board will be reviewing individual mergers in isolation, without any understanding of their subsequent or wider implications. While the Board's concern is perhaps understandable, the proposed remedy is flawed and the concern seems exaggerated or misplaced.

The Board's proposal is flawed in so far as it is extremely difficult to predict the future configuration of the railroad industry with much accuracy. As noted earlier, the industry's incentives continue to push it toward efficient rationalization of ownership boundaries through end-to-end consolidation. However, statements about which companies will merge with others and when, if ever, in response to those incentives are necessarily highly speculative. The few economic analyses that have sought to predict mergers among firms are plagued by thorny methodological issues and generate results that relate acquisition likelihood to general firm characteristics (such as to firm size and R&D intensity), rather than providing the predictions of specific merger pairs that the Board appears to be seeking.[26] Moreover, the record of past accurate predictions is relatively poor. Figure 3 delineates the tumultuous events that resulted in the Conrail transaction. Figure 4 shows that the path to merger for Burlington Northern and Santa Fe was similarly tortuous. A review of the contemporaneous trade press shows that the course of events surrounding these highly

[26] See, for example, "Estimation of the Probability of Acquisition in an Equilibrium Setting" by Hall, Bronwyn H., University of California at Berkeley Working Paper in Economics: 8887, August 1988.

contested mergers was generally unforeseen. Thus, there is a real danger that applicants and the Board will waste time analyzing combinations that may never come to pass and still end up being surprised by actual events.

Equally important, the fear that a merger can not be assessed unless all of its future implications are known seems exaggerated. The concern seems to be that the Board's approval of one merger might compel other railroads to merge defensively, and that the cumulative effects of all these mergers might not be in the public interest. But why would other railroads be forced into defensive mergers? It could not be because the merged railroad had gained more market power over "captive shippers" since the current Board policy requires that the options of shippers not be reduced by the merger; and a merger that somehow enhanced market power would improve the lot of other railroads who are thereby made more attractive to customers. If one consolidation triggers a "defensive" merger by other parties it will be because the merged railroad has gained some service or cost advantage over other railroads by virtue of its merger—i.e., the merged entity is more efficient and better able to meet customers' needs. And if that is the motive that is compelling the defensive mergers, then the defensive mergers must logically be in the public interest too.

In this context, there is no sound economic reason to believe that the case-by-case approach that the Board (and the regulators of other industries) has traditionally followed is inappropriate. As long as the Board continues to approve only mergers that protect competition and prevent service disruptions, mergers which occur will enhance efficiency and performance. The pressure this may put on other railroads is precisely the result policy should seek. There is no reason to think that the Board will be "forced" by the results of a current merger to approve future mergers that are not in the public interest.

Indeed, the proposed requirement to consider cumulative and crossover effects could well be expected to have the undesirable effect of increasing the political pressures on the Board to step in and manage the structure and timing of railroad consolidations. The temptations for the Board to try to manage the industry structure are strong—its predecessor, the ICC, attempted to do so many times, most notably with its consolidation plans in the 1920s and 1970s. But pre-planning of the industry structure oversteps the regulator's proper role of protecting competition. Moreover, such planning is bound to increase the number of intervenors in merger cases and intensify the political pressures on the Board simply

because this type of planning necessarily creates winners and losers. The Board is unlikely to be able to second-guess the industry as to which combinations are likely to offer the greatest gains in efficiency and service quality. Worse, faced with so many pressures, the process will be pushed to abandon difficult and careful analysis and instead fashion a plan that simply attempts to compromise or balance all the claims and issues raised by the many parties. The historical experience of the rail industry under the previous regulatory regime shows the deleterious effects of the political system's involvement in the micro-management of business decisions and industry structure.

In short, even if it were possible to predict future mergers with accuracy, it would be inappropriate to use such predictions to block a proposed merger. Each application should be judged on its own merits, according to the principles of sound merger policy. The "looming possibility" of subsequent merger applications is no reason to prevent a proposed combination that meets traditional merger policy criteria. And proposed mergers should not be impeded by a proposal that imposes substantial new burdens on applicants, elevates speculation to the role of evidence, and opens a Pandora's box of political pressures and temptations while adding nothing of value to the merger review process. The goals of sound merger policy would be better served by a more limited measure that would require a merger applicant to consider the effect of any concurrent merger application. While burdensome, such a requirement would be consistent with a desire to analyze predictable (as opposed to unpredictable) competitive effects.

VIII. BENEFIT GUARANTEES

The Board proposes that future merger applications should include mechanisms to guarantee the achievement of forecast public benefits:

> [A]pplicants must suggest additional measures that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner. (p. 32)

This rule appears to be designed to offset any incentives that merger applicants might have to overstate merger benefits. The rule would hold the applicants' feet to the fire by punishing railroads that failed to achieve the benefits they projected in their application. The Board does not discuss specific mechanisms that might be used for this purpose.

The Board's presumption that applicants have incentives to overstate merger benefits is plausible. The Board currently does not apply sanctions if projected benefits do not materialize, so there is little reason for applicants not to present benefits optimistically. Nevertheless, the Board's remedy appears both unnecessary and impractical. It is unnecessary from a public policy perspective as long as the Board continues its current policy of approving mergers only when it is convinced that the merger will cause no competitive or other harms. If a merger causes no harm, then it will still be in the public interest no matter how small the benefits ultimately prove to be. This is why mainstream merger policy as practiced in other industries—and as reflected in the Board's current policy—presumes that regulators need not overly concern themselves with merger benefits.

Moreover, mergers are properly seen as promising significant benefits because it would be irrational for applicants to propose one that did not. As explained above, mergers impose substantial risks and costs on the applicants and would not rationally be proposed unless they promised efficiency and service gains that could not be achieved by other means. Thus, even if we assume that applicants present benefits optimistically, they also have powerful incentives to invest in only those prospective mergers that they expect will produce substantial benefits.

Additionally, railroads have clear and powerful incentives to try to realize the benefits they expect once the merger is approved. The estimated public benefits—such as cost savings and better service (leading to increased volumes and revenues)—are also the main source of private benefits to the shareholders. If the public benefits fail to materialize, shareholders suffer directly and immediately through lower profits and falling stock prices. As a result, railroads have strong internal incentives to implement a merger skillfully so that the benefits they had hoped for actually materialize.

Finally, there are serious practical problems with implementing a rule to guarantee the achievement of estimated benefits. Such a rule presumably would be designed to punish merging parties only for those after-the-fact benefit shortfalls that resulted from the applicants' before-the-fact exaggerations. The estimated public benefits of a merger are inevitably based on forecasts of many uncertain variables, however, such as the rates of growth of the economy, of specific regions and industries, and of freight shipments along particular corridors. Actual benefits may diverge from projected because of events that are unexpected and completely outside the control of the merger applicants. Everything from

changes in the overall economy or the weather could result in forecasts being inaccurate—in either direction—after the fact. Drawing an analytically and procedurally robust line between shortfalls that result from supposed exaggeration and other shortfalls (or overruns, for that matter) would be problematic, procedurally expensive, and politicized, to say the least. This is not consistent with sound regulatory approaches to ensuring serving the public's interest.

Attachment 1

José A. Gómez-Ibáñez

José A. Gómez-Ibáñez is the Derek C. Bok Professor of Public Policy and Urban Planning at Harvard University, where he holds a joint appointment at the John F. Kennedy School of Government and the Graduate School of Design. He teaches courses in economics, policy analysis, infrastructure and transportation policy in both schools.

Professor Gómez-Ibáñez has published numerous articles on transportation policy and regulation and is co-author of several books including *Essays in Transportation Economics and Policy: A Handbook in Honor of John R. Meyer* (with William Tye and Clifford Winston; Brookings, 1999); *Going Private: The International Experience with Transport Privatization* (with John R. Meyer; Brookings, 1993); *Regulation for Revenue: The Political Economy of Land Use Exactions* (with Alan Altshuler; Brookings, 1993); *Autos, Transit and Cities* (with John R. Meyer; Harvard, 1981); and *Cases in Microeconomics* (with Joseph Kalt; Prentice-Hall, 1990).

At the University, Gómez-Ibáñez currently serves as the faculty chair of the Masters in Urban Planning Program at the Design School and the faculty co-chair (with Henry Lee) of the Infrastructure in a Market Economy executive program at the Kennedy School. In the past he has served as the chairman of the Masters in Public Policy program at the Kennedy School, and as Chair of the Department of Urban Planning and Design and of doctoral programs at the Graduate School of Design.

In addition, Professor Gómez-Ibáñez has served as a consultant and advisor on transportation policy and regulation issues to government agencies both here and abroad. He served as senior staff economist to the President's Council of Economic Advisors (1980-81), where he was responsible for regulation, transportation and environmental issues. He has chaired the Mayor's Transportation Advisory Committee in Boston (1985-86) and has been consultant to the governments of Singapore, Indonesia, Guatemala, Bolivia, Chile, Argentina, Spain and other countries. He is a member of the American Economic Association, the American Planning Association, and the Transportation Research Forum.

Ph.D., Public Policy	Harvard University (1975)
M.A., Public Policy	Harvard University (1972)
A.B., Government	Harvard University (1970)

Joseph P. Kalt

Joseph P. Kalt is the Ford Foundation Professor of International Political Economy and chair of the Economics and Quantitative Methods Cluster at the John F. Kennedy School of Government at Harvard University. Professor Kalt is a specialist in the economics of antitrust and regulation, with particular emphasis on the natural resource and transportation sectors. His publications in the area include: *The Economics and Politics of Oil Price Regulation*; *Drawing the Line on Natural Gas Regulation* (with Frank C. Schuler); *Petroleum Price Regulation: Should We Decontrol?* (with Kenneth Arrow); and *New Horizons in Natural Gas Deregulation* (with Jerome Ellig). Professor Kalt has testified frequently before the U.S. Congress, federal and state regulatory commissions, and in state and federal legal proceedings on matters of competition policy, mergers, and industry regulation.

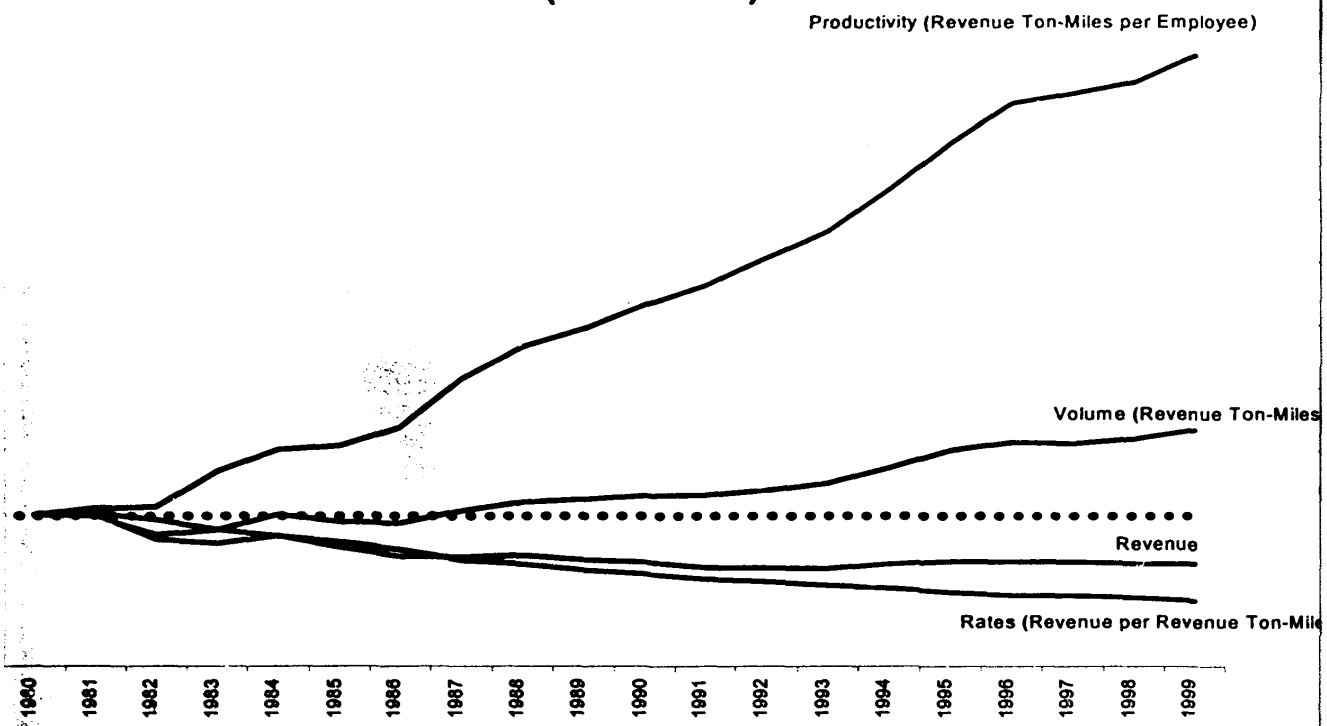
Professor Kalt is also co-director with Stephen Cornell and Manley Begay of The Harvard Project on American Indian Economic Development and the National Executive Education Program for Native American Leadership. In addition, he is the co-editor with Stephen Cornell of *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development.* Since 1987, the Harvard Project has worked for and with tribes and tribal organizations, providing research, advisory services, and education on issues of nation-building in Indian Country.

Professor Kalt has served as the Kennedy School's Academic Dean for Research, chair of degree programs, and chair of Ph.D. programs. He is also a member of the Board of Trustees of the Fort Apache Heritage Foundation of the White Mountain Apache Tribe (Arizona), the Board of Trustees of the Foundation for American Communications, and the Faculty Advisory Board of the Harvard University Native American Program. He served as advisor to the Royal Commission on Aboriginal Peoples, a commissioner on the President's Commission on Aviation Safety, and on the Steering Committee of the National Park Service's *National Parks for the 21st Century.*

Ph.D., Economics	University of California at Los Angeles (1980)
M.A., Economics	University of California at Los Angeles (1977)
B.A., Economics	Stanford University (1973)

Figure 1

CLASS 1 RAILROAD PERFORMANCE: 1980 - 1999
(1980 = 100)



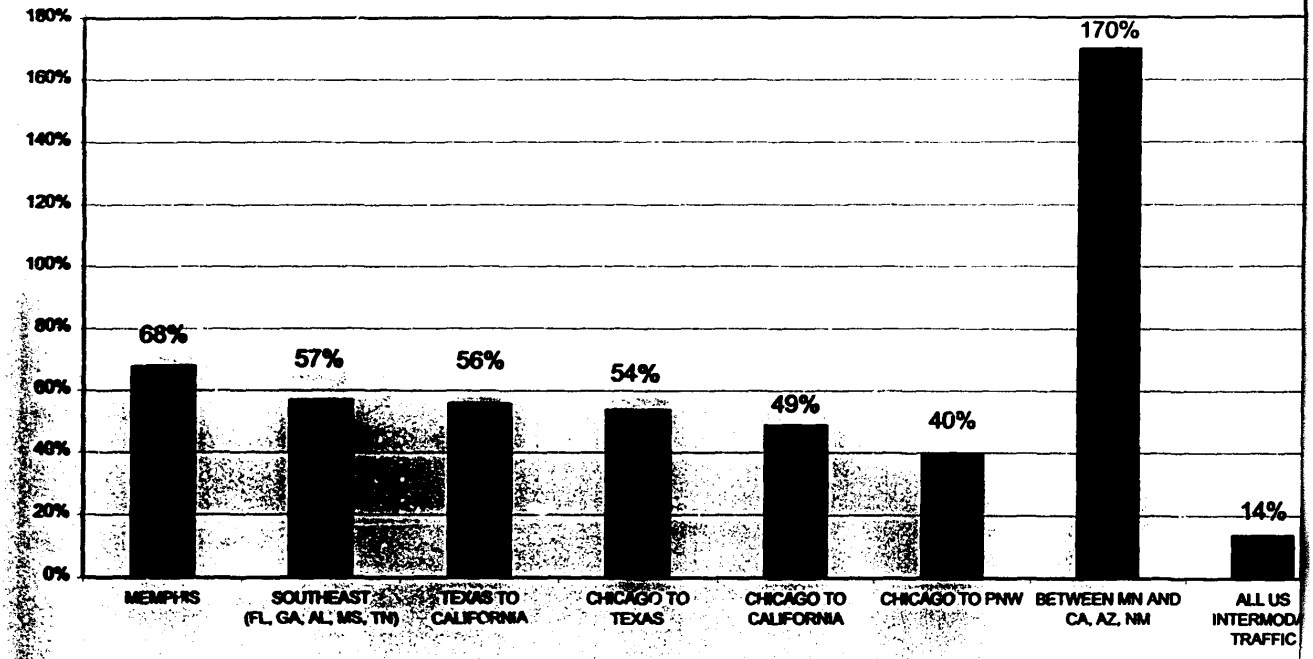
3 Real Dollars.
AAR Railroad Facts 1984, 1986, 1999; AAR Railroad Ten-Year Trends 1984-1993, 1989 -1998; AAR
Class 1 Railroads, 1999; The Economic Report of the President, 2000.

35

[redacted]

Figure 2

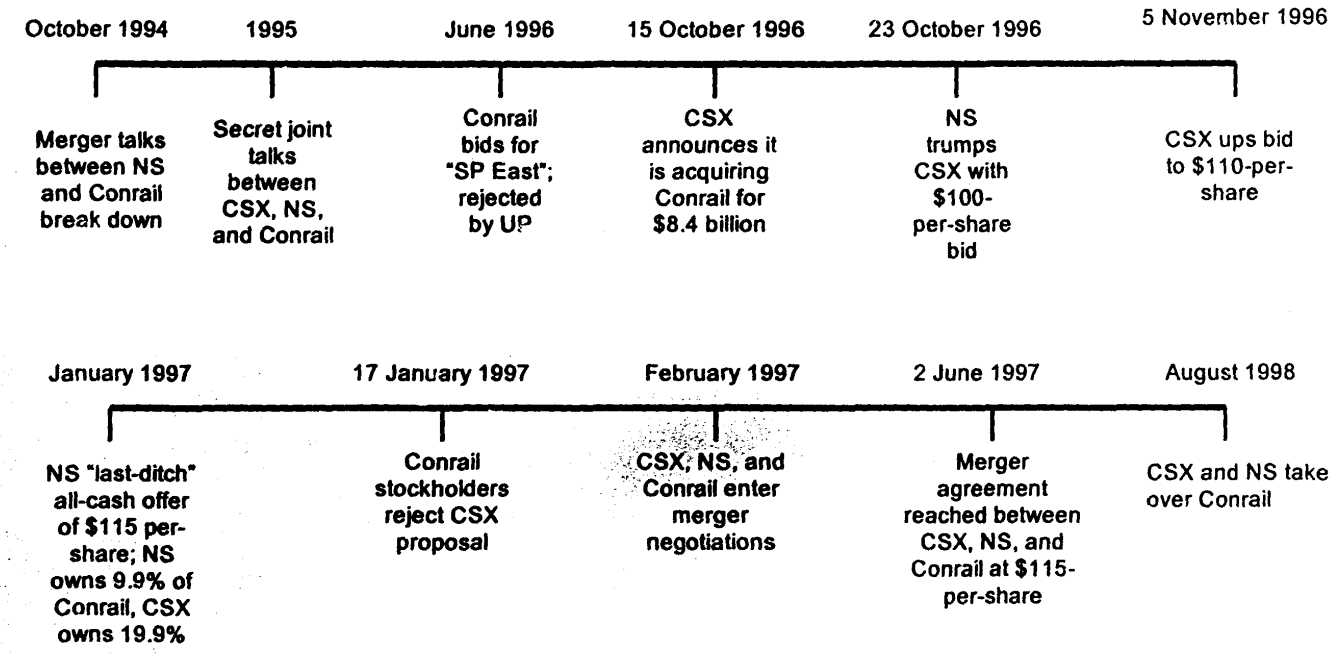
INCREASES IN BNSF INTERMODAL TRAFFIC ON SELECTED ROUTES, 1995-1999



Sources: BNSF Quarterly Progress Report in Union Pacific and Southern Pacific General Oversight, January 18, 2000, Finance Docket No. 32760, at 35; Association of American Railroads, *Railroad Facts*, 1999, at 26.

Figure 3

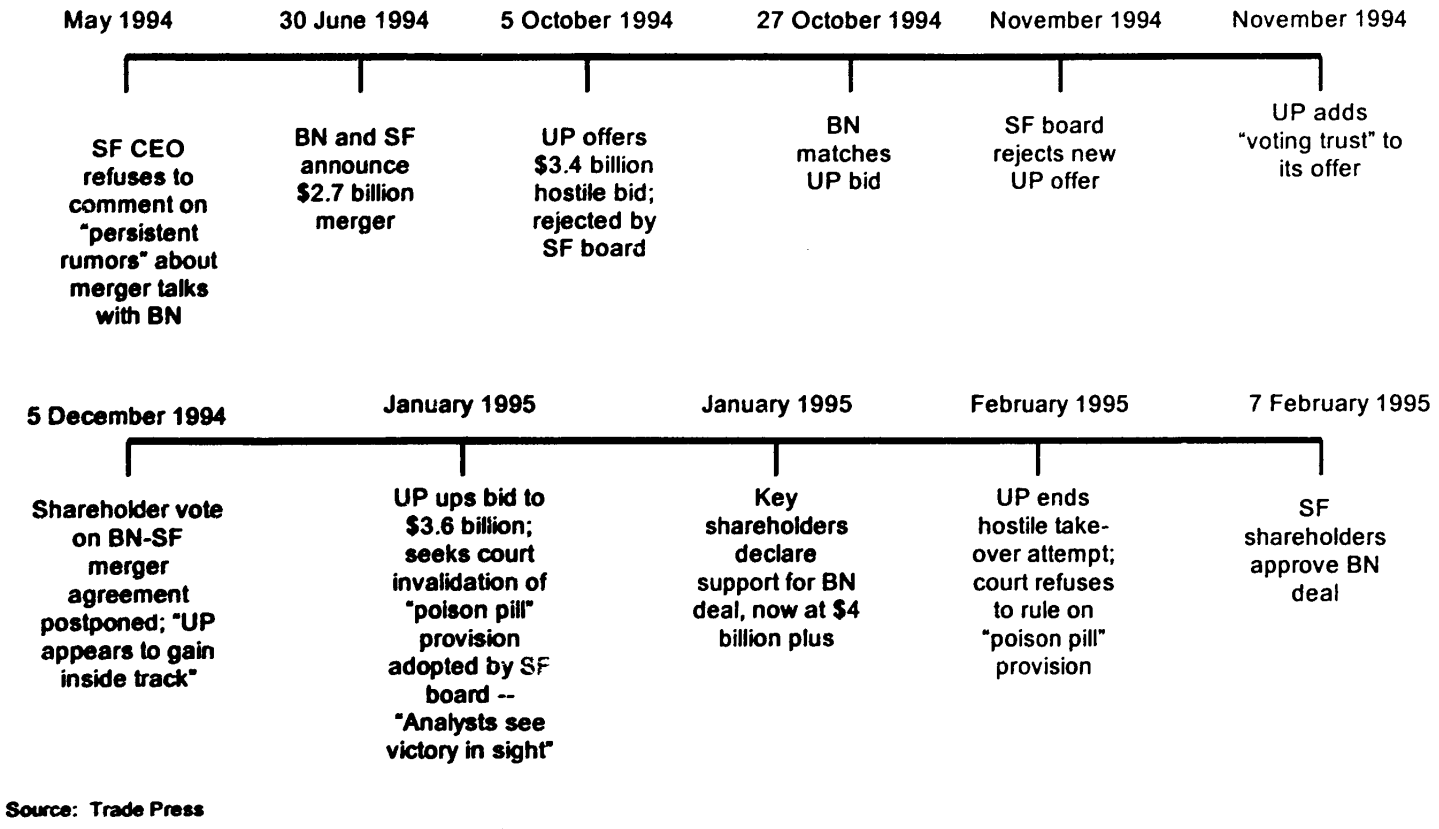
Conrail Transaction



Source: Trade Press; CSX press announcements

Figure 4

BNSF Merger



Source: Trade Press

38

VERIFICATION

I, José Gómez-Ibáñez, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed the 16th day of November, 2000.

José Gómez-Ibáñez

VERIFICATION

I, Joseph P. Kalt, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed the 16th day of November, 2000.

Joseph P. Kalt

BEFORE THE SURFACE TRANSPORTATION BOARD

EX PARTE 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

VERIFIED STATEMENT OF RICHARD J. PIERCE, JR.

My name is Richard J. Pierce, Jr. I am the Lyle T. Alverson Research Professor of Law at George Washington University, 720 20th Street, N.W., Washington, D.C. 20052. I have been asked by The Burlington Northern and Santa Fe Railway Company (BNSF) to provide my opinions on the new rail merger policy the Surface Transportation Board (STB or Board) proposed in Ex Parte No. 582 (Sub-No. 1). I will begin by describing my background and experience relevant to that task. I then will summarize the history of economic regulation, deregulation, and regulatory reform in the U.S. over the last three decades. I will follow that with a description of the merger policies currently implemented by other agencies, with emphasis on the current policy of the Federal Energy Regulatory Commission (FERC), an agency that, like the STB, applies a public interest standard, rather than pure antitrust review. After that, I will identify the characteristics of the STB's proposed policy that I believe to be inappropriate, counterproductive, and a major step backward from the regulatory reform efforts that have produced outstanding results in numerous markets, including the rail market, over the past 30 years.

I conclude that any final rules adopted by the STB should: (i) result in timely review of mergers; (ii) eliminate the presumption that future rail mergers will not produce efficiencies; and

(iii) eliminate the presumptions that future rail mergers will produce competitive harms and service disruptions. The STB should not require merger applicants to propose "competitive enhancements" to offset presumed harms, and the scope of post-merger review should be limited to the efficacy of competitive conditions adopted in the merger and the temporary remedy of any merger-related service disruptions.

BACKGROUND AND EXPERIENCE

I have been a law professor for 23 years. The courses I regularly teach include Regulated Industries, Antitrust Law, and Administrative Law. My research and scholarly writings correspond with the subjects I teach. I have written a dozen books and over 80 articles. I have attached a copy of my resume, including a list of my publications, as Appendix A to this report. My central interest in teaching, research, and writing is the effects of various forms of government intervention – including economic regulation and antitrust law – on the performance of markets. My writings have been relied upon by numerous agencies and courts, and are found in many opinions of the U.S. Supreme Court. I have played an active role in the process of restructuring, and reforming the regulation of, many markets in North America, Europe, Asia, and Australia. In addition, I have provided consulting services to a wide variety of private and governmental participants in those processes of restructuring and regulatory reform, including the General Accounting Office, the U.S. Agency for International Development, the Organization for Economic Coordination and Development, and The World Bank.

THE RECENT HISTORY OF ECONOMIC REGULATION

In the early 1970's, the U.S. relied primarily on economic regulation to govern the performance of many markets, including rail, trucking, air travel, financial services, natural gas, electricity, oil and petroleum products, and telecommunications. Regulatory agencies used a

combination of rate regulation and regulatory restrictions on market entry and exit to implement a system of central planning. All of those regulated markets performed poorly.

The U.S. responded by deregulating the markets that were not characterized by natural monopoly conditions – specifically, trucking, airlines, oil and petroleum products, and financial services. The results were so socially beneficial that the U.S. turned its attention to markets with more complicated characteristics. The natural gas, telecommunications, and electricity markets include many functions that are susceptible to performance in an unregulated, structurally competitive market, but they also include some functions, like transmission of electricity, that continue to be natural monopolies. In each of these markets, the U.S. has reduced significantly the role of government regulation as a governance mechanism, and has increased its reliance on unregulated competitive market forces to obtain socially beneficial changes in the performance of the markets. Generally, the U.S. has separated the natural monopoly functions from the functions that are susceptible to governance by competitive markets, deregulated the functions that are susceptible to performance in a competitive market, and switched to new methods of regulating the residual natural monopoly functions that are compatible with, and supportive of, the newly deregulated market-based functions.

The results have been impressive. Each of these markets performs much better today than it did when we attempted to rely on central planning and pervasive regulation to govern it. As scholars from the Brookings Institution and George Mason University concluded in an important study published in 1997, consumers have obtained scores of billions of dollars in annual benefits as a result of this movement toward deregulation and regulatory reform. Robert Crandall & Jerry Ellig, Economic Deregulation and Consumer Choice (1997). I have described this process and its many socially beneficial results at greater length and in greater detail elsewhere. See, e.g.,

Richard J. Pierce, Jr. & Ernest Gellhorn, Regulated Industries (4th ed. 1999); Richard J. Pierce, Jr., Economic Regulation (1994); Richard J. Pierce, Jr., Reconstituting the Natural Gas Industry from Wellhead to Burnertip, 9 Energy L. J. 1 (1988).

The extraordinary success of the U.S. deregulation and regulatory reform process, combined with the enviable performance of the U.S. economy and the collapse of the centrally planned Soviet economy, has inspired nations on every continent to emulate the U.S. approach. Almost every country is in some stage of attempting to apply the lessons of the U.S. movement toward deregulation and regulatory reform, with the same kind of resulting substantial improvements in market performance that the U.S. has experienced.

As the Board well knows, the history of the U.S. rail industry is similar to the history of the other industries that have been the subject of deregulation and regulatory reform. In the early 1970s, the U.S. rail market was on the verge of total collapse. Most railroads were either bankrupt or nearly so. The cause was easy to identify. Implementation of a central planning approach to the market through application of rate regulation and regulatory restrictions on market entry and exit had nearly destroyed the market. The rail regulatory regime that was being implemented at the time cost the U.S. economy between $9.7 and $16.2 billion per year. C. Barnekov & A. Kleit, The Costs of Railroad Regulation (1988).

Congress responded by enacting the 4R Act and the Staggers Act. As they were ultimately implemented by first the ICC and then the STB, those statutes went a great distance toward replacing central planning with reliance on markets to determine prices, terms and conditions of service, and market entry and exit. Those statutes were predicated on the well-supported belief that railroads confront effective competition in most markets from a combination of other railroads and other modes of transportation. The STB continues to perform

some important regulatory roles, e.g., regulation of rates charged where a railroad has "market dominance." Even in those narrow contexts, however, the STB has come increasingly to rely on regulatory methods that reflect market forces, e.g., differential or Ramsey pricing, rather than traditional cost-of-service regulation. As a result, the rail market is much healthier than it was prior to the regulatory changes mandated by Congress. By any conceivable measure, shippers and the U.S. economy have experienced significant benefits attributable to the movement from primary reliance on regulation to primary reliance on market forces to govern the rail market.

The Board's revised merger policy should reflect these general and rail-specific directions in economic regulation.

MERGER POLICY

Any country needs a merger policy that accomplishes two goals. First, it should enable an agency to identify, and potentially to block, proposed mergers that would have the potential to create unacceptable anticompetitive effects. Second, it should enable all other proposed mergers to be reviewed and approved quickly and easily. We often tend to emphasize the first goal in talking about merger policy, but the second goal is even more important than the first. Only a small fraction of proposed mergers pose any plausible threat of harm to the performance of any market. The vast bulk pose no such threat. In an economy as diverse and dynamic as the U.S. economy, it is essential that firms be able to order, and to reorder, their structures and relationships quickly and easily in response to constantly changing marketplaces.

The U.S. legal regime applicable to most mergers furthers both goals admirably. In most areas, the Department of Justice and the Federal Trade Commission (DOJ/FTC) share responsibility to determine whether a proposed merger is likely to have intolerable anticompetitive effects and to attempt to block any such merger that they so identify. They fulfill

those responsibilities in a highly pragmatic manner that has helped to give the U.S. the best performing economy in the world. A high proportion of proposed mergers do not even meet the threshold criteria that trigger a duty to notify the DOJ/FTC of the merger. Of those that do, the DOJ/FTC attempt to block only a handful of proposed mergers each year. A high proportion of the proposed mergers that do meet those criteria elicit only a quick review by the DOJ/FTC that is sufficient to allow them to conclude that the merger poses no plausible threat to harm the performance of any market. The DOJ/FTC identify only a small fraction of proposed mergers that raise plausible concerns sufficient to justify detailed scrutiny. Even within that small class of proposed mergers, in most cases the DOJ/FTC ultimately conclude either that the proposed merger does not, in fact, threaten competitive harm or that any such threat can be mitigated adequately through undertakings that the firms are willing to make as conditions on the DOJ/FTC's acquiescence in the proposed merger. Through this process, the vast majority of proposed mergers in the U.S. are completed quickly and inexpensively. In most cases, the DOJ/FTC complete the process of reviewing a proposed merger within sixty days. Thus, as it is designed and implemented, U.S. merger policy reflects a presumption that most mergers are socially beneficial. That presumption can be rebutted only by demonstrating that a proposed merger has the clear potential to harm the performance of a market.

It is even more important to have a merger policy that allows mergers to be completed quickly and inexpensively in the context of a previously regulated market that is undergoing a transition to greater reliance on market forces. Regulation always distorts firms' decisionmaking and induces firms to choose inefficient structures. It also distorts their decisionmaking in many other contexts, e.g., it induces them to make poor investment decisions, to invest in the wrong kinds of assets in the wrong places, to hire the wrong numbers and types of personnel, and to

make other decisions based on regulation, rather than economic efficiency. When previously regulated firms are freed from regulatory restraints and subjected instead to competitive market forces, they invariably conclude that they must make major changes in order to be efficient enough to survive and prosper in their new environment. Many discover that they must make major structural changes through mergers and acquisitions. Any agency that is responsible for considering proposed mergers in that context must adopt a merger policy that will both allow it to identify, and to block, the occasional proposed merger that poses intolerable risks of harm to the performance of markets, and, even more important, allow the quick and inexpensive consummation of the many mergers that do not pose such risks.

Of course, regulatory agencies review mergers under a "public interest" standard that is not necessarily the same as the antitrust analysis performed by the DOJ/FTC. However, even in this area, regulators have, over time, narrowed the scope of their review considerably.

For example, FERC has jurisdiction over mergers in the electric utility industry, an industry that is undergoing a transition from pervasive regulation to primary reliance on competitive market forces. FERC originally used a six-factor test for merger review: (1) the effect of the proposed merger on competition; (2) the effect of the proposed merger on the applicants' operating costs and rate levels; (3) the reasonableness of the purchase price; (4) the degree of coercion, if any, the acquiring utility has applied to the to-be-acquired utility to accept the merger; (5) the impact of the merger on state and federal regulation; and (6) the contemplated accounting treatment. In a high proportion of cases, FERC applied that policy through the use of lengthy oral adjudicatory hearings.

However, in 1996, FERC concluded that its policy was no longer appropriate for application to an industry that was undergoing a transition to primary reliance on market forces,

and announced a new policy that was designed to fit the new environment. See FERC Order No. 592, Docket No. RM96-6-000 (Dec. 18, 1996) (policy statement) and Order No. 592-A, Docket No. RM96-6-001 (June 2, 1997) (order on reconsideration); FERC Order No. 642, 93 F.E.R.C. ¶61.164 (November 15, 2000). See also Richard J. Pierce, Jr., Antitrust Policy in the New Electricity Industry, 17 Energy L. J. 29 (1996).

In justifying its changed policy, FERC identified several major defects in its old policy, each of which also is relevant to the Board's proposed revisions to its merger policy. First, many of the factors it considered were not appropriate for consideration by an agency that was reviewing mergers proposed by firms that are subject to market forces. Second, FERC concluded that its old policy was too unpredictable in its outcome, imposed undue burdens, and required far too much time to implement in many cases. FERC recognized that most proposed mergers are socially beneficial, and that a policy that is difficult to predict, burdensome, and slow deters many firms from even attempting to enter into socially beneficial mergers. Third, FERC recognized that its old policy was highly susceptible to abuse by badly motivated protestors and intervenors. Those included competitors who wanted to stop, or at least to delay, a transaction that would create a more formidable competitor, and rent seekers who used their ability to protest, or to demand a costly hearing, as a source of leverage to extract from the merging firms a variety of special interest concessions on issues unrelated to the proposed merger. Fourth, FERC recognized that its old policy tended to discount and to submerge the issue that should dominate its merger policy in the new environment – whether a proposed merger is likely to cause serious harm to the performance of any market.

To remedy these problems, FERC's new policy reduced to three the factors that FERC will consider in acting on a proposed merger: (1) effects on competition; (2) effects on rates;

and (3) effects on regulation. As a practical matter, FERC places almost exclusive emphasis on effects on competition in most cases. In applying the first factor – effects on competition – FERC has largely adopted the DOJ/FTC Merger Guidelines. This enables FERC to screen proposed mergers, so that mergers that do not raise significant competitive issues can be handled on an expedited basis. The second factor – effects on rates – is unique to FERC's method of ratemaking. It usually can be satisfied simply by applicants agreeing not to file for rate increases directly attributable to the merger. The third factor – effects on regulation – reflects potential jurisdictional problems that sometimes are raised by a merger as a result of some judicial interpretations of the Public Utility Holding Company Act. Those opinions suggest that some utility mergers can have the effect of precluding both FERC and state regulators from regulating transactions among corporate affiliates. That factor usually can be satisfied simply by applicants agreeing not to use the merger as a vehicle to avoid state or FERC regulation of matters that were subject to state or FERC regulation before the merger.

FERC's revised policy had positive results. FERC has applied its new policy to 42 proposed mergers in the last four years, excluding the few merger applications that were filed and withdrawn when the applicants changed their minds about the desirability of the proposed merger. See List of Mergers Filed with the Commission Since 1995, available at http://www.ferc.fed.us./electric/mergers/mgrpag.htm (last updated July 31, 2000). FERC approved each of these mergers, though it approved some on the condition that the parties adopt mitigating measures. FERC completed its review and approval process in less than six months in 37 of the 42 cases, and its average processing for merger applications has been 117 days since it revised its policy. It completed the process in less than a year in all but one of the cases. That case raised extremely difficult and unprecedented issues. Even in those cases where competition

issues were raised, FERC has been able to resolve most mergers on the basis of the filing submitted by the merger applicants, pleadings filed by interested parties, and supplemental data requests from its staff. Most mergers handled by FERC do not result in formal discovery by the parties and are resolved through "paper hearings," without the use of formal discovery or evidentiary hearings. Courts have repeatedly upheld and often applauded this type of decisionmaking procedure by agencies that are acting under broader statutory standards in cases in which the dominant issues are economic. See, e.g., Louisiana Energy and Power Authority v. FERC, 141 F.3d 364 (D.C. Cir. 1998); Union Pacific Fuels v. FERC, 129 F.3d 157 (D.C.Cir. 1997); SBC Communications v. FCC, 56 F.3d 1484 (D.C. Cir. 1995). See generally Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 8.2 (3d ed. 1994 and annual supplements). The advantages of this procedure are obvious and substantial. It permits the agency to make decisions on the basis of high quality data and analysis with limited consumption of agency resources. It expedites the decisionmaking process. It also reduces the ability of third parties to abuse the merger review process by using it to block or to delay a competitor's merger or to extract special interest benefits by threatening to try to block the merger or to delay the proceeding.

FERC's policy has, over time, moved toward the focused approach used by the DOJ/FTC and other agencies that are engaged solely in antitrust review. Under this approach, the agency first defines the appropriate markets and the effects on those markets of the proposed merger. If the agency identifies a market in which it fears that the merger creates an undue risk of harming the performance of the market, it works with the applicants to identify an effective means of mitigating the potential harm it has identified. In a high proportion of the relatively few cases that reach this stage of the decisionmaking process, the agency is able to identify effective

mitigation measures that the firm is willing to implement as a condition on the completion of its merger, e.g., divestiture of assets in a market in which the merged firm otherwise would have an unduly high share of the market. If the agency identifies a market in which the merger poses a significant risk of anticompetitive behavior that is not amenable to effective mitigation, the agency looks at the potential social benefits of the merger to determine whether they are sufficient to justify its approval notwithstanding the existence of some risk that the merger might harm the performance of some market. These are the relatively rare hard cases that sometimes elicit an order disapproving a proposed merger.

One characteristic of this decisionmaking process is particularly noteworthy. Each step is contingent on the results of the prior step. Thus, for instance, the agency does not engage in detailed economic analysis unless and until it has applied some simple screens to see whether such an analysis is necessary. It does not look for mitigation measures unless and until it has concluded that the merger would pose an undue risk to the performance of a market in the absence of mitigation measures. It does not look for social benefits of a merger unless and until it concludes that the merger poses otherwise unacceptable and unmitigatable risks to the performance of a market.

This clear, simple, contingent, and sequential approach has many advantages. It conserves the resources of the agency and the parties. It minimizes the amount of time required to review a proposed merger. Finally, it permits any firm that is considering a potential transaction to perform its own analysis early in its own decisionmaking process and to make a reasonably reliable prediction of the likely results of the agency's decisionmaking process.

Following this general trend, the Board's final merger rules should focus principally on competitive issues, with additional review of issues that are unique to the rail industry, such as

service issues. A narrow scope of review, coupled with expedited review, would be consistent with the Board's application of a broad "public interest" standard.

THE STB'S PROPOSED POLICY

The STB is wise to reconsider its merger policy to determine whether conditions have changed in the past twenty years in ways that justify a change in policy and to reflect the general trends in the area of economic regulation. The proposed new policy is severely flawed in a number of respects, however. Before I discuss each of the elements of the proposed policy that are inappropriate and counterproductive, I will describe the problems that would be created by adoption of the policy as a whole.

The proposed policy would require the STB to apply at least four factors in addition to the potential adverse effect on competition in evaluating a proposed merger: (1) the adequacy of the firms' plan to improve service; (2) the adequacy of the firms' plan to enhance competition; (3) the adequacy of the firms' plan to minimize service disruptions during the post-merger transition period; and (4) the adequacy of the firms' attempt to anticipate and then to evaluate the likely responses of the firms' competitors to the proposed merger, including additional mergers that might be proposed as a competitive response to the proposed merger. The inclusion of "enhanced competition" and downstream effects in this analysis would impose extraordinarily heavy burdens on both the applicants and the STB's staff. It would produce long, expensive, and complicated proceedings. It would maximize the opportunities for competitors and other third parties to abuse the merger approval process by using it to stop or to delay a pro-competitive merger or to use it as a means to extract special favors unrelated to the proposed merger. It would require the STB to select winners and losers if it adopts remedies or conditions that are not specifically designed to offset identified harms. Finally, the use of such factors in reviewing

mergers would render prediction of the likely results of the merger review process nearly impossible. Through each of those effects, the proposed policy would deter firms from even attempting to identify, negotiate, and propose socially beneficial mergers.

The factors beyond competitive and service effects that the STB has proposed also represent a major step back to the bad old days in which agencies acted on the assumption that agency-implemented central planning will yield better results than primary reliance on market forces to determine the most efficient structure of a market. As stated in the recently released "Final Report of The International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust" (2000) [hereinafter Attorney General's Advisory Committee, available at www.usdoj.gov.atr/icpac/icpac.htm]:

> As a best practice or discipline, with limited exceptions (such as national security), noncompetition factors should not be applied in antitrust merger review. If a jurisdiction's law recognizes noncompetition factors (such as preservation of jobs, promotion of exports, or international comparative advantage), such factors should be applied transparently and in a manner narrowly tailored to achieve their ends. *Executive Summary*, Attorney General's Advisory Committee.

While the Board reviews mergers under a public interest standard, the analysis of merger-related competitive effects should, for reasons discussed above, be the core of that analysis. Moreover, the Board's proposed policy would reduce the transparency of its decisions and expand the scope of its review and remedies.

I will now discuss each of the factors the STB proposes to apply in reviewing proposed mergers.

Presumption That All of the Efficiency Enhancing Mergers Have Been Completed

The Board's proposed "paradigm" shift in merger policy review is premised on the unprecedented and unsupported presumption that the rationalization of the nation's rail system

and the elimination of excess capacity have been completed. Specifically, the Board cites substantial reductions in excess capacity and improvements in efficiency that have resulted from the prior rail mergers that rationalized the nation's rail system, and then concludes that "this process has now largely been completed, and [] the efficiencies and service improvements to be realized from further downsizing of rail route systems are limited." Comments to Proposed § 1180.1(a), Notice of Proposed Rulemaking (NPR) at 11.

To my knowledge, no agency has ever announced a merger policy that presumes that future mergers are unlikely to improve the performance of a market. The STB reasons that, since prior mergers yielded large efficiency gains, future mergers are unlikely to produce significant further improvements. That is a classic non sequitur. The STB provides no support for its belief, and it is hard to imagine how any agency could support such a belief. It is highly unlikely that any market in history has been characterized by optimal structural efficiency. If any market ever reached that state of structural euphoria, that state would exist only for a very short time. The U.S. economy is extraordinarily dynamic. Firms in every market must engage in a continuous process of reevaluating their structure to determine whether it continues to allow them to participate in constantly changing markets in an efficient manner.

The Presumption of Anticompetitive Effects

The Board has also proposed to adopt a presumption that any proposed merger of Class I railroads would have anticompetitive effects. Thus, the Board says that "[a]ny railroad combination entails a risk that the merged carrier will acquire and exploit increased market power." Proposed § 1180.1(c)(2)(i), NPR at 15. In another place, the Board says that it "expects that any merger of Class I carriers will create some anticompetitive effects . . . ." Proposed § 1180.1(d), NPR at 16. That presumption seems to drive many of the other elements of the

Board's proposed policy. Thus, for instance, because mergers would have anticompetitive effects, the Board says that it "does not favor consolidations . . . unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved." Comments to Proposed § 1180.1(a), NPR at 11.

A presumption that an entire class of potential mergers will have anticompetitive effects is again unprecedented and unsupportable. There are over 120 merger policies currently in effect around the world. To the best of my knowledge, none of those policies includes a presumption that an entire class of mergers will have anticompetitive effects. The Board has provided no support for this presumption.

Some proposed mergers pose significant risks that they will impair the performance of one or more markets. Others do not. The only way to distinguish among them is to apply standard tools of economic analysis to each market that is potentially affected by a specific proposed merger. The Board can fulfill its responsibilities in the merger review process only by identifying each product and geographic market that is potentially affected by a proposed merger and evaluating the potential effects of the merger on the performance of each of those markets.

Presumption of Significant Service Disruptions

The Board discusses at length its concerns about potential service disruptions during the period following a merger. It then adopts a presumption that rail mergers will necessarily create substantial service disruptions. It says: "Our recent experience has shown that, even with substantial advance planning, implementing large rail mergers may cause substantial service disruptions that delay or outweigh expected efficiency gains that should flow to the public. Under our proposed rule, these potential harms would be included in our balancing test." Comments to Proposed § 1180.1(c), NPR at 13.

However, only some of the most recent consolidations produced those unfortunate results. Two cases are not sufficient to support a sweeping generalization, particularly when those two cases involved unusual factors and when there are numerous cases in which mergers did not yield serious service disruptions. There is no justification for a presumption that rail mergers will cause substantial service disruptions, particularly when the Board also is proposing that merger applicants address their transitional plans with a new level of detail and that a heightened regime of post-merger monitoring of service be implemented.

Moreover, merger applicants will have every incentive to minimize service disruptions in the future. Markets punish firms severely for service disruptions. The financial performance of UP during the period in which it experienced severe service problems illustrates the point. During its service crisis, UP's quarterly earnings per share dropped from $0.96 in September 1997 to a low of a loss of $1.70 per share in June, 1998. UP's earnings did not recover until the second half of 1999. UP was hit with several lawsuits, and the STB imposed emergency service orders on UP during the depths of its crisis. UP's experience serves as an effective object lesson to other firms that might otherwise be tempted to try to implement a merger with inadequate planning.

Because the Board believes that the risk of service disruptions is serious enough to warrant consideration in merger review proceedings, it clearly can require applicants to submit their plans to avoid those problems for the Board's review, as the Board has proposed. (I understand that BNSF supports this requirement.) However, the Board should then limit its consideration of the proposed plan to avoid service disruptions to a simple yes or no determination with respect to the adequacy of the plan. It should not attempt to assign a value to the risk of service disruptions that must then be offset with unrelated enhancements. That is the

antithesis of the "transparent" and "narrowly tailored" consideration of noncompetition factors recommended by the Attorney General's Advisory Committee.

Mandatory "Enhanced Competition" Conditions

The Board proposes "to require applicants to incorporate proposals for enhanced competition . . . ." Comments to Proposed § 1180.1(c), NPR at 13. The Board refers to an "equal access" rule as an example of such a mandatory proposal. It also says that inclusion of such a proposal is "likely to be extremely important to us in determining whether to approve a particular application." Id. at 14. This is a bad idea for at least four reasons.

First, if the Board is convinced that some major change in its regulatory policy, like an equal access requirement, would yield significant public benefits, the efficacy of that policy change will depend primarily on its scope. It would make little sense, and do little good, to impose it selectively on railroads that propose to merge. Instead, the agency should consider whether to apply the new approach to all railroads.

Second, adopting a policy of approving mergers only if the applicants agree to adopt a major change in their methods of operation that they consider highly undesirable is much more likely to discourage railroads from proposing socially beneficial mergers than to produce a legal regime in which many railroads agree to the change as a condition of approval of a merger.

Third, the policy would require the Board to determine what level of enhancements are necessary to offset possible harms and then allocate those enhancements to shippers who are not, by definition, directly affected by the potential harm. The unfairness inherent in providing benefits to one class of shippers, rather than another, is a key reason why remedies should be designed to offset specified harms to specific groups.

Fourth, and most important, no agency should consider adopting a major change in its regulatory policy, like an equal access rule, without considering carefully and in detail all of the implications and effects of adopting the new policy. That cannot be done as an add-on to a merger review proceeding. It requires instead a separate rulemaking in which the agency addresses with care the scores of important issues that are raised by such a proposed policy change.

Requiring only one participant in a market to allow its competitors to use its assets is a radical step. In the vast majority of circumstances, this would be a terrible idea, whether or not open access or similar regimes would be beneficial if implemented on a broad basis.

Mandatory Post-Merger Oversight

The Board proposes to establish an elaborate "formal oversight process" applicable to all mergers. Proposed § 1180.1(g), NPR at 19; see also Proposed § 1180.1(i), NPR at 20. Because the Board's review extends beyond the efficacy of any competition-related merger conditions and merger-related service problems to include unforeseen circumstances, subsequent mergers, and conditions related to the achievement of all projected benefits exactly when projected, this proposal would undercut the transparency and finality that is required in merger proceedings. Indeed, unless the scope of post-merger review is properly limited to the efficacy of the competitive remedies adopted in the merger and the identification and resolution of merger-related service problems, I cannot imagine any firm that would be willing to propose a merger that would be subject to such an extraordinary, open-ended post-merger oversight process and subject to the risk of after-the-fact imposition of new, impossible-to-predict conditions.

The Board's proposal would vastly expand the scope of post-merger review beyond that undertaken by other agencies. Agencies sometimes approve mergers subject to mitigation

conditions, e.g., divest fifty percent of your retail gasoline outlets in Los Angeles. Agencies act in that manner when they conclude that a proposed merger would have unacceptable effects on the performance of a market in the absence of the mitigation condition. When an agency approves a merger subject to a mitigation condition, it retains the power to enforce the condition, or even to dissolve the merger, if the merged firm fails to comply with the condition. All merger applicants understand and accept the need for an agency to retain that power. The applicants know what the mitigation conditions on approval are before they merge. If they conclude that the conditions are unacceptable, they simply decline to merge. I have never heard of any agency attempting to retain an open-ended power to impose new conditions on a previously approved and completed merger based on the agency's determination that the merger has not produced exactly the results that the applicants expected or that the agency later prefers.

First, as I noted earlier, under the proper scope of review in today's economy, the Board should not require submission of evidence that a merger will produce benefits unless it concludes that the merger poses a significant risk of adversely affecting the performance of a market and that risk cannot be effectively mitigated. However, I understand that this is an accepted practice in the rail industry, even without the expansion the Board is currently providing. Nonetheless, an agency certainly should not attempt to engage in post-merger oversight to ensure that the merger produced precisely the benefits the applicants projected.

Second, it would be extremely difficult to determine whether any "shortfall" in benefits is a result of the problems relating to the merger. The performance of any firm depends on a myriad variables, many of which are beyond the firm's control. If a merged firm's performance falls short of its expectations and those of the Board, the Board would have to determine the extent to which its performance is attributable to the merger versus the extent to which it is

attributable to any number of other potential sources, e.g., an economic downturn, the responses of competitors, an increase in fuel or labor costs, or a tightening of capital markets.

Third, no transaction ever goes exactly as planned or as the parties anticipated that it would. That basic truth certainly applies to all mergers. I doubt that any merger in history has produced exactly the results the firm expected. The results of a merger depend on how it interacts with numerous other factors, including changes in market conditions, responses of competitors, and changes in general economic conditions. Sometimes a merger produces benefits that differ significantly from the firm's expectations. Thus, for instance, a firm might project large savings in labor costs, but unexpected increases in demand for the firm's services might persuade it to retain its original workforce and to reassign many of its employees in ways that permit it to meet the increased demand efficiently and effectively. Would the Board consider that a failure to fulfill the firm's benefit projections? Would it order the firm to fire enough employees to fulfill its original projected labor cost savings? Some mergers produce disappointing results – results that fall well short of the firm's expectations. Agencies do not approve mergers because they expect all mergers to be successful. Such an expectation would be absurd. It is contradicted by history. Some mergers yield spectacular results; some yield terrible results. Agencies approve mergers that do not have anticompetitive effects because they know that many will yield good results and because they know that the firms that propose to merge are in a much better position than any agency to predict the results of the merger.

Fourth, and most important, unless the scope of post-merger is properly limited, I cannot imagine any firm that would be willing to merge, or even to consider a merger, under conditions in which an agency can impose unknown and unknowable conditions on the merged firm years after the merger is approved and implemented.

Requirement to Anticipate and to Analyze Responses of Competitors

The proposed policy would require merger applicants to predict the responses of their competitors, including any mergers their competitors might propose in an effort to remain competitive with the merged firm, and to evaluate the effects of those potential responses. The Board would then hold the applicants responsible for the effects of their competitors' responses by denying the application if the Board concludes that the competitors' responses would have unacceptable effects.

The Board should not adopt this policy. First, it is extremely difficult for a firm to predict the actions of its competitors with any degree of confidence and accuracy. Of course, firms attempt to do this all of the time, but they can never do better than to predict a relatively wide range of potential responses. Second, any firm is understandably reluctant to disclose to its competitors its evaluation of the likely effects of the range of actions it believes that its competitors might take. No agency should compel any firm to disclose that information. Markets do not perform well when competitors are required to share with each other their predictions and evaluations of their competitors' potential actions. Third, this requirement will force applicants to speculate and will make merger proceedings unmanageable. That is why the STB wisely refrained from imposing such a requirement in the past. Those reasons remain valid and persuasive today. Fourth, this requirement would provide competitors of merger applicants an ideal vehicle to abuse the merger review process by blocking a socially beneficial merger. The competitor would need only to allege that it would respond to the merger by proposing a patently outrageous merger in order to block approval of the proposed merger. Fifth, it makes no sense to disapprove an otherwise socially beneficial merger because it might induce a competitor to

propose a socially destructive merger. If that happens, the Board should simply disapprove the second proposed merger.

CONCLUSION

The Board should not adopt those proposed changes in its merger policy that would expand the scope of its merger review or create new presumptions against mergers. Such changes would return the Board to a central planning role, threaten the transparency and predictability of Board review, and result in a mismatch of actual harms and actual remedies. The Board should maintain the approach that is clearly reflected in the 4R Act and the Staggers Act and that has produced excellent results in so many other markets. It should rely primarily on market forces to produce good results, and it should rely on regulation only in those few contexts in which market forces alone are unlikely to produce good results.

Therefore, any final rules adopted by the Board should: (i) eliminate the presumption that rail mergers will no longer produce public benefits; (ii) eliminate the presumptions that future rail mergers will cause competitive and service harms; and (iii) eliminate the requirement that merger applicants propose "competitive enhancements" to offset these presumed harms. Final rules also should not require applicants to "guarantee" the projected benefits of mergers or to forecast the responsive actions of their competitors. The Board's rule also should limit the scope of post-merger review to the efficacy of competition conditions adopted as part of the merger and the temporary remedy of merger-related service problems. Most importantly, any final merger rules should contain an expedited schedule and provide railroads and interested parties with transparency and finality in Board actions.

RICHARD J. PIERCE, JR.
122 Madison Place
Alexandria, Virginia 22314

Birthdate: July 15, 1943
Married: Jill Birdwhistell Pierce
Children: Gabriel, 1974; Danielle, 1976

PRESENT POSITION: Lyle T. Alverson Research Professor of Law
George Washington University Law School
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-1549

COURSES:

Administrative Law, Antitrust Law, Regulated Industries, Energy Law, Oil and Gas Law, Energy Tax Policy, Evidence, Torts, Conflicts, Economic Analysis of Law

EMPLOYMENT:

June 1989 - June 1995 - Paul J. Kellner Professor of Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027-7297

June 1986 - June 1989 - George W. Hutchison Professor of Energy Law
Southern Methodist University School of Law
Dallas, TX 75275

July 1984 - June 1986 - Dean and Professor of Law
University of Pittsburgh School of Law
3900 Forbes Avenue
Pittsburgh, PA 15260

July 1981 - June 1984 - W. R. Irby Professor of Law
and Director, Energy Law Program
Tulane University School of Law
New Orleans, LA 70118

August 1980 - June 1981 - Visiting Professor of Law
University of Virginia School of Law
Charlottesville, VA 22901

August 1977 - August 1981 - Professor of Law
University of Kansas School of Law
Lawrence, KS 66045
(Associate Professor until June 1980)

June 1972 - August 1977 - Sutherland, Asbill & Brennan
1666 K Street, N. W.
Washington, D. C. 20006

May 1969 to Sept. 1969- Instructor, United States Coast Guard
Reserve Training Center
Yorktown, VA 23690

May 1968 to May 1969 - Assistant Chief, Aids to Navigation Branch
U.S. Coast Guard District Headquarters
1520 Market Street
St. Louis, MO 63103

June 1966 to May 1968 - Operations Officer
United States Coast Guard
Cutter Sedge
Cordova, AK 99501

February 1966 to June 1966 Officer Candidate School
United States Coast Guard
Reserve Training Center
Yorktown, VA 23960

June 1965 to February 1966 Financial Management Trainee
General Electric Company
Switchgear Department
6901 Elmwood Avenue
Philadelphia, PA 19142

EDUCATION:

September 1969 to June 1972 - University of Virginia School of Law
Charlottesville, VA 22901
J. D.: 1972
Managing Editor, Virginia Law Review
Order of the Coif
Michie Legal Writing Award
Student Assistant to Prof. Richard Merrill

September 1961 to June 1965 - Lehigh University
Bethlehem, PA 18017
B.S.: Economics

September 1958 to June 1961 - Harriton High School
Rosemont, PA 19072

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VERIFICATION

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

Executed on November 16, 2000.

Richard J. Pierce, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

VERIFIED STATEMENT OF BRADFORD CORNELL

Background and Qualifications

I am a Professor of Finance and Director of the Bank of America Research Center at the Anderson Graduate School of Management at the University of California, Los Angeles (UCLA). I earned my doctorate in Financial Economics from Stanford in 1975, and have held positions as a finance professor at the University of Arizona, University of Southern California, California Institute of Technology, and UCLA. At UCLA, I have twice served as Vice-Chairman of the Anderson School and have twice served as chairman of the finance department. I am a past Vice-President of the Western Finance Association. I am also a past director of both the American Finance Association and the Western Finance Association.

I have written more than 70 articles and two books on finance and securities, including *Corporate Valuation: Tools for Effective Appraisal and Decision-Making,* published by McGraw-Hill, and *The Equity Risk Premium and the Long-run Future of the Stock Market,* published by John Wiley. I have also served as an associate editor of numerous professional journals – including *The Journal of Finance, the Journal of Futures Markets,*

The Journal of Financial Research and The Journal of International Business Studies – and I have served as a reviewer for nearly a dozen other professional journals. I have received prizes and grants for my research from the Chicago Board of Trade, the Chicago Mercantile Exchange and the Institute for Quantitative Research in Finance.

My background is described more fully in my *curriculum vitae*, which is attached hereto as Exhibit 1.

Factual Background

On October 3, 2000, the Surface Transportation Board ("Board") announced proposed modifications to its regulations at 49 CFR part 1180 governing proposals for major rail consolidations. According to the summary disseminated by the Board:

> These proposed new rules would substantially increase the burden on applicants to demonstrate that a proposed transaction is in the public interest, requiring them, among other things, to demonstrate that the transaction would enhance competition as an offset to negative impacts resulting from service disruptions and competitive harms likely to be caused by the merger.[1]

The Board is seeking public comment on these proposed modifications before they are codified. I have been asked by The Burlington Northern and Santa Fe Railway Company ("BNSF") to comment on these modifications with respect to the railroad industry's ability to invest in and maintain its operating assets while earning a sufficient return on those assets to cover its economic cost of capital over the long term.

[1] STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures (served October 3, 2000) ("NPR"), p. 1.

In the text of proposed 49 CFR 1180.1(a)-(d), the Board appears to presume that any merger between Class I railroad companies results in harm in the form of reduced competition and disruption in service. The merging parties must show that, as an offset to the presumptive harm caused by reduced competition and service disruption, the proposed merger offers "competitive enhancements." Furthermore, the Board would require the merging parties to project the public benefits of the proposed merger and suggest possible remedial steps for the Board to take if those benefits are not realized.[2] The merging parties would also be required to anticipate additional Class I merger applications that might be filed in response to their own application, to measure their benefits in light of the anticipated downstream mergers, and to discuss how conditions imposed in their proposed merger would have to be altered, or new conditions imposed, if any future consolidation(s) were approved.[3] Before the proposed merger would be allowed to proceed, there would be a lengthy review process: (i) a minimum notice period of three months, (ii) an application acceptance period of one month, (iii) an evidentiary proceeding lasting a year, and (iv) a final decision period of three months.[4] Thus, a proposed combination between two Class I railroad companies may be delayed for up to 19 months.

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[2] Proposed 49 CFR 1180.1(a)-(d), NPR pp. 11-16.

[3] Proposed 49 CFR 1180.1(i), NPR p. 20.

[4] Proposed 49 CFR 1180.4 (e) (2)-(3), NPR p. 27; 49 CFR 1180.4(b)(1) and (c)(7).

Discussion

As a general matter, anything that creates additional investor uncertainty and/or limits the ability of a firm's managers to utilize its assets in a manner that it feels is consistent with the interest of the stockholders adversely affects the firm's stock price and its cost of capital. The Board's proposed merger rules could have significant adverse effects on railroad investment incentives and the terms on which outside investors will continue to provide funds to the industry. The business of railroading is highly capital-intensive and requires billions in annual investment of private capital. Despite the important financial strides the industry has made under deregulation, it has yet to earn a sufficient return on its investment, according to accounting data published by the Board itself.

Regulatory limitations on the railroads' use of their assets effectively function as a tax, reducing the expected return on the assets. Delay in the approval process is particularly insidious from a financial standpoint. Not only does it delay the cash benefits of the merger, thereby significantly reducing the present value of the transaction, but it prevents the railroads that plan to merge from determining their optimal capital expenditure levels and allocation of assets while they are enmeshed in regulatory limbo. Investors do not look kindly on such delay, and they will lower their earnings expectations commensurately. The fundamental question that the Board must answer is whether the proposed changes will, in fact, add delay and increase uncertainty. If they do either, then the value of railroad assets will fall and the incentive to invest in railroad assets will decrease.

Even when mergers offer railroads the opportunity to use their assets more efficiently and do not diminish competition, the proposed merger rules require that the merging parties offer "competitive enhancements," which can significantly reduce the return promised by the merger. If, as here, the rules create significant uncertainty – not only about the level of "competitive enhancements" required, but also about whether new or revised conditions may be imposed in the future, and "measures" may be taken if all public benefits are not realized – the perceived risk significantly increases the cost of capital for the merging parties. Prospective investors will recognize that a railroad's ability to take advantage of merger opportunities that could help it cover its system costs is significantly diminished.

A rational response to such a regulatory tax, in order to protect shareholder value, is to shelve promising merger plans and scale back to projects, if any, that can be expected to earn the cost of capital. If the existing rail system as a whole does not hold out the promise of such returns, the railroads cannot be expected to continue making investments designed to maintain their overall capacity. They can be expected to make targeted investments in lines and services that offer the necessary returns and, over time, disinvest in the rest.

Railroad Industry Performance Under Deregulation. Freight railroads in this country are like other private businesses in that they must offer a competitive return on investment in order to attract and retain capital. It was largely because of the railroads'

inability to attract and retain capital under regulation, with returns falling well below the returns of other U.S. corporations, that the industry was substantially deregulated in the late 1970's and early 1980's.[5] One of the most significant aspects of the regulatory reforms instituted by Congress and implemented by the Interstate Commerce Commission in the late 1970's and early 1980's was the express recognition that railroads must be permitted to cover their capital costs if a sound transportation system was to be preserved in this country.[6] The railroad industry is very capital-intensive. In 1998 alone, Class I railroads invested $7.2 billion, or 21.7 percent of their revenues, in plant and equipment. Over the past ten years, their capital expenditures have totaled $49 billion.[7]

The railroads' willingness to pour money back into the industry is largely attributable to the prospect that deregulation opened up for competitive financial returns in the industry. In the wake of Congress's passage of the Staggers Rail Act of 1980, the railroads abandoned a third of their track, reduced crew sizes, and used contracts to customize services and align their prices to the requirements of individual shippers. Aided by mergers, which were encouraged by the ICC and the Board, railroads streamlined their systems, diminished interchange costs, and made more effective use

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[5] Keeler, Theodore E., *Railroads, Freight, and Public Policy* (1983), Brookings.

[6] 49 U.S.C. 10704(a)(2); *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981).

[7] Association of American Railroads, *Railroad Facts* (1999).

of their assets. Their real operating costs per ton-mile fell 60% between 1980 and 1998.[8] Rail traffic grew from a low of 19.5 million originating carloads in 1985 to 25.7 million in 1998.[9]

All of these factors helped boost the railroad's profitability. But the industry's financial improvement has not yet resulted in long-term accounting returns on investment at or near the levels calculated by the ICC and the Board as indicative of revenue adequacy for the industry. Railroads cannot simply raise rates to achieve greater profitability. Deregulation has unleashed cost reductions and productivity improvements for the railroads. At the same time, real rail rates to shippers have declined by half on average.[10] As shown in Exhibit 2 to this statement, in every year from 1978 through 1999, the industry's composite accounting return on investment has been less, and often substantially less, than its cost of capital as determined by the ICC and the Board. While the methods used by the Board and its predecessors to perform this calculation have been much debated, the figures in Exhibit 2 are so dramatic that it is unlikely,

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[8] Morrison, Steven A. and Clifford Winston, "Regulatory Reform of U.S. Intercity Transportation," in *Essays in Transportation, Economics and Policy: A Handbook in Honor of John H. Meyer,* edited by Jose Gomez-Ibanez, William B. Tye, and Clifford Winston (1999), Brookings.

[9] Association of American Railroads, *Railroad Facts* (1999).

[10] General Accounting Office, *Railroad Regulation: Changes in Railroad Rates and Service Quality Since 1990* (1999) (46% real rate reduction between 1982 and 1996); Association of American Railroads, *Railroad Facts* (1999) (57% real rate reduction between 1981 and 1998).

regardless of adjustments, that anyone could argue that the railroads' returns on investment have consistently exceeded their economic cost of capital.

The performance of railroad stocks indicates that railroads are having a difficult time earning their cost of capital. Exhibit 3 shows indexed monthly price change data for the Dow Jones Railroad Index–America plotted against the Standard & Poor's 500 Stock Index, an established proxy for the general market. From January 1995 onward, that railroad index substantially underperforms the S&P 500 and remains relatively stagnant over the period. When the comparison is made with the Standard & Poor's Railroad Index – which includes only the four largest railroads, BNSF, UP, Norfolk Southern, and CSX – the result is the same, as shown in Exhibit 4. Such a sustained period of stagnation during a raging bull market suggests considerable question in the investment community about the railroads' ability to cover the costs of their current systems over the long term. The last thing the Board should do under these circumstances is to enact ill-advised regulations that would reduce the railroads' long-term prospects for covering their capital costs.

Regulatory Risk and Railroad Investment Incentives. Limitations on a railroad's (or any other business's) use of its assets function as a tax. They reduce the assets' expected return by restricting the ways that the assets can be utilized. An investment that might otherwise have a positive net present value will not be undertaken if regulatory limitations so tax the expected stream of revenues that the value turns

negative vis-a-vis the costs. The deterrent to investment is obvious when we know exactly what the regulatory limitations are, but the tax can be substantially compounded by delay and by an uncertain regulatory environment. When the amount of the regulatory tax cannot be established, railroads may choose not to make the investment at all. Alternatively, they may require a much higher return to cover the regulatory risk. Either way, the regulatory tax can kill an investment, or re-investment, that otherwise would have made good economic sense.[11]

Regulatory limitations on a railroad's use of its assets and uncertainty about future limitations act not only as disincentives for the railroads to invest in particular projects but also as disincentives for outside investors to invest in the railroad. Every year, railroads make large investments in track, rolling stock, and other related facilities to maintain their infrastructure and handle increased traffic. Many of these investments are fixed and sunk, and the assets involved have very long lives.[12] Investors have choices. If the long-term prospects of the rail industry are significantly clouded by regulatory restrictions and regulatory uncertainty, investors will be reluctant to risk their funds in the industry. This, in turn, may reduce the industry's access to funds in the capital markets and raises their cost of capital. This higher cost of capital translates into a reduced stock price, which hurts the firm's shareholders and further discourages new investment.

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[11] I recognize that in some cases, the Board may choose to block a merger that increases shareholders' wealth if there is a greater cost to the public interest. This should be examined on a case-by-case basis.

[12] For a list of the types of long-lived assets involved, see 49 CFR Part 1201, Subpart A (Uniform System of Accounts).

The provisions of the Board's proposed rules indisputably serve to limit railroad companies' use of assets. If the Board uses the full 19-month period allowed,[13] it would significantly delay any proposed merger transaction between Class I railroads when compared with BNSF's proposed 12-month review period.[14] As BNSF has represented in its comments, mergers of major companies in other regulated industries can be accomplished in a matter of months.[15] A 19-month delay imposes a serious tax on the finances of any combination. In effect, it would set back by nearly two years the merging railroads' ability to begin to realize the benefits of the transaction. Moreover, it would make it impossible during that time period for either of the merging parties to determine their optimal capital expenditure levels and allocation of assets. Markets do not stand still while the Board is deliberating. The longer the Board takes, the longer the merging parties are caught in limbo. Investors and stockholders are well aware of the adverse effects this can have on profitability, and their perception of the risk will be reflected in both the value of the railroads' stock and in their decisions to invest in the industry.

The substantive criteria the Board proposes to use to assess Class I mergers also would impose a significant tax on the finances of proposed transactions. The justification the Board states for requiring merging parties to offer "competitive enhancements" is that

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[13] Proposed 49 CFR 1180.4(e)(2)-(3), NPR p. 27; 49 CFR 1180.4(b)(1) and (c)(7).

[14] BNSF in its Comments is proposing that the Board limit its merger review and decision time to one year, which would be a significant improvement from the standpoint of regulatory delay over a permitted 19-month schedule.

[15] BNSF Comments, Section III.A.

such enhancements are necessary to offset the presumed deleterious effects a merger will have on geographic and product competition and customer service.[16] But, as Professors Gómez-Ibáñez and Kalt explore in some detail in their verified statement on behalf of BNSF, the Board nowhere explains why those deleterious effects must be presumed or why conditions could not be fashioned that address any demonstrated deleterious effects directly. The result of setting up a hurdle of presumed but undefined and unquantified adverse merger effects, which must be overcome with unrelated "competitive enhancements," is that neither the railroads nor their investors can know with reasonable certainty what amount of "enhancements" will be required to overcome the presumed adverse effects. This makes it difficult to determine whether the transaction as planned will be approved or, if it is approved, whether the "enhancements" required will so diminish the benefits to the merging parties as to make the transaction uneconomic.

This uncertainty is compounded by proposals like those the Board makes, if it approves a merger, to closely monitor the public benefits that the merging railroads estimated would result from the merger and to seek "measures" to impose if those public benefits are not realized.[17] Merging railroads have every incentive to work to realize all of the benefits they have projected, and more, but railroads and their investors are acutely aware that they cannot control the markets for transportation services or the responses

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[16] Proposed 49 CFR 1180.1(c)-(d), NPR pp. 12-16.

[17] Proposed 49 CFR 1180.1(c)(1), NPR p. 14.

of the railroads' competitors. As it is currently worded, the Board's proposal provides a disincentive for railroads to contemplate combinations, even if they feel that they are the most profitable and efficient use of their assets, for fear of retributive behavior on the part of the Board. This possibility of retributive behavior acts as an uncertain tax upon the railroad companies' assets, which lowers the expected return to be earned on those assets. To threaten that undefined "measures" will be taken if the merging railroads fall short of their goals sets up another disincentive to merge at all. At the least, it requires that a further risk premium be assigned to the return that the railroads and their investors will require even to propose a merger transaction.

Similarly troubling from a financial standpoint is the proposed requirement that railroads anticipate possible responsive mergers, measure their benefits in light of those possible mergers, and discuss how conditions that may be imposed in their proposed merger would have to be altered, or new conditions imposed, if any future mergers were approved.[18] It would be hard enough to have to anticipate even in general terms what, if any, mergers might be proposed in reaction to a present merger proposal, without having to quantify the effects of the various possibilities on the benefits of the present proposal. The suggestion that the Board's approval of a future merger could result in new or altered conditions being imposed on a present merger further exacerbates the uncertainty for railroads and their investors in attempting to determine whether the

[18] Proposed 49 CFR 1180.1(i), NPR pp. 20-21.

present value of the flow of net revenues from the transaction will cover the capital costs.

Each of these regulatory taxes diminishes the prospective benefits of possible merger transactions. It is quite conceivable that a merger that otherwise promised to make the merging railroads more efficient, improve their services, and help them cover their cost of capital – with no unremedied competitive harms – would effectively be defeated by such taxes. That is not in the railroads' interest, it is not in their customers' interest, and it is not in the public interest.

Adverse Financial Effects of Burdensome Merger Regulation. The adverse effects of burdensome regulation are no secret in the rail industry. There is widespread agreement that much of the blame for the poor financial condition of the industry in the 1970's can be laid at the feet of overly restrictive regulation.[19] Investors cannot be compelled to invest their money in an industry that is constrained from covering its costs. When Congress passed the Staggers Act in 1980, it estimated that capital shortfall in the industry would grow to $16-20 billion by 1985 unless regulatory reforms were enacted.[20]

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[19] *See, e.g.,* General Accounting Office, *Railroad Regulation: Economic and Financial Impacts of the Staggers Rail Act of 1980* (1990), *Changes in Railroad Rates and Service Quality Since 1990* (1999); Braeutigam, R., "Consequences of Regulatory Reform in the American Railroad Industry," *Southern Econ. J.* 468 (Jan. 1993) ("Although regulatory reform has occurred in many American industries in the past two decades, in few of these industries was the need for reform as clear and urgent as in the domestic railroad industry during the 1970's").

[20] P.L. 96-448, Section 2(7).

As discussed earlier, the reforms that were enacted, including a policy that promoted efficient mergers, had the desired effect of reversing the railroads' decline and encouraging new investment in the industry. But the railroads' past improved performance cannot justify renewed investment in their overall systems unless it holds out the promise of enabling them to cover their overall costs.

Mergers, and the prospect of mergers, are one of the ways that the industry can justify reinvestment in systems that have not historically covered their cost of capital. If mergers provide the means to improve operating efficiency and build markets by offering new and improved rail services, then railroads may have reason to maintain and upgrade their systems in anticipation of future combinations that can meet the financial requirements of the market. If, on the other hand, the kinds of regulatory taxes contained in the Board's proposed merger rules overly burden mergers that make good economic and competitive sense, then those mergers either will not happen, or their benefits will be significantly reduced. The predictable result will be a reduced expected return for the railroads' assets, a reduction in capital spending, a higher cost of capital, harm to shareholders, and, ultimately, harm to shippers if the services they want cannot be supported.

Exhibit 1

Charles
River
Associates

BRADFORD CORNELL — *Professor of Financial Economics*,
Anderson Graduate School of Management, UCLA

Ph.D.	Financial Economics, Stanford University, 1975
M.S.	Statistics, Stanford University, 1974
A.B.	(Interdepartmental) Physics, Philosophy and Psychology, Stanford University, 1970

ACADEMIC AND PROFESSIONAL POSITIONS

1987-Present:	Professor of Finance and Director of the Bank of America Research Center, Anderson Graduate School of Management, UCLA
1990-1999:	President, FinEcon: Financial Economic Consulting
1988-1990:	Vice-President and Director of the Securities Litigation Group, Economic Analysis Corporation
1979-1986:	Assistant and Associate Professor of Finance, UCLA
1983-1984:	Visiting Professor of Finance, California Institute of Technology
1977-1979:	Assistant Professor of Finance, University of Southern California
1975-1977:	Assistant Professor of Finance, University of Arizona

Courses Taught

Corporate Valuation
The Law and Finance of Corporate Acquisitions and Restructurings
Corporate Financial Theory
The Theory of Finance (in the UCLA Law School)
Security Valuation and Investments
A wide variety of executive and community education programs

Special Education Programs Include

The U.S. Business School in Prague — Special Finance Program, Summer 1991
The Nissan Program for Historically Black Colleges, Director, Summer 1989

The Lead Program for Business Education of Minority High School Students, 1987-Present

CONSULTING AND PROFESSIONAL ACTIVITIES

Selected Service at UCLA

Twice Chairman of Finance Department
Twice Vice Chairman of the Anderson School
Three-time member of the staffing and promotion committee

Service to Scholarly Journals and Organizations

Served as an associate editor for a variety of scholarly and business journals including: *Journal of Finance*, *Journal of International Business Studies*, *Journal of Business and Economics*, *Journal of Financial Research*, *Journal of Futures Markets*, and the *Investment Management Review*.

Served as a reviewer for numerous finance and economics journals including: *American Economic Review*, *Journal of Political Economy*, *Journal of Financial Economics*, *Journal of Business*, *Journal of Financial and Quantitative Analysis*, and the *Review of Economics and Statistics*.

Memberships in Professional Societies

American Finance Association: 1973-Present
  Member of Board of Directors: 1987-1989
Western Finance Association: 1973-Present
  Member of Board of Directors: 1982-1985
  Vice President: 1987
American Economic Association: 1973-Present
American Bar Association: 1995-Present
American Statistical Association: 1992-Present
International Association of Financial Engineers: 1993-Present
American Law and Economics Association: 1995-Present
Human Behavior and Evolution Society: 1995-Present

Research Evaluation

Project reviewer for the National Science Foundation: 1979-Present
Program committee for the Western Finance Association: 1982-1988

Selected Board and Committee Memberships

Chairman, Mayor Riordan's Blue Ribbon Commission on Los Angeles' Municipal Investments
Pension Policy Board, The Aerospace Corporation: 1985-Present
Forms Engineering Corporation: 1976-1997
Trustee, Kellow Trust: 1982-1991

Selected Consulting Clients

Merrill Lynch (obtained futures broker's license, owned a seat on the International Monetary Market of the Chicago Mercantile Exchange)
Chase Manhattan Bank
Thrifty Corporation
Wynn Oil
Resorts International

Expert Witness

Numerous cases involving the application of financial economics

Media Experience

Occasional contributor to *The Wall Street Journal* and *The Los Angeles Times*
Occasional commentator for local television and radio stations
Lecturer on valuation theory, appraisal practice, and securities pricing

PUBLICATIONS

Books

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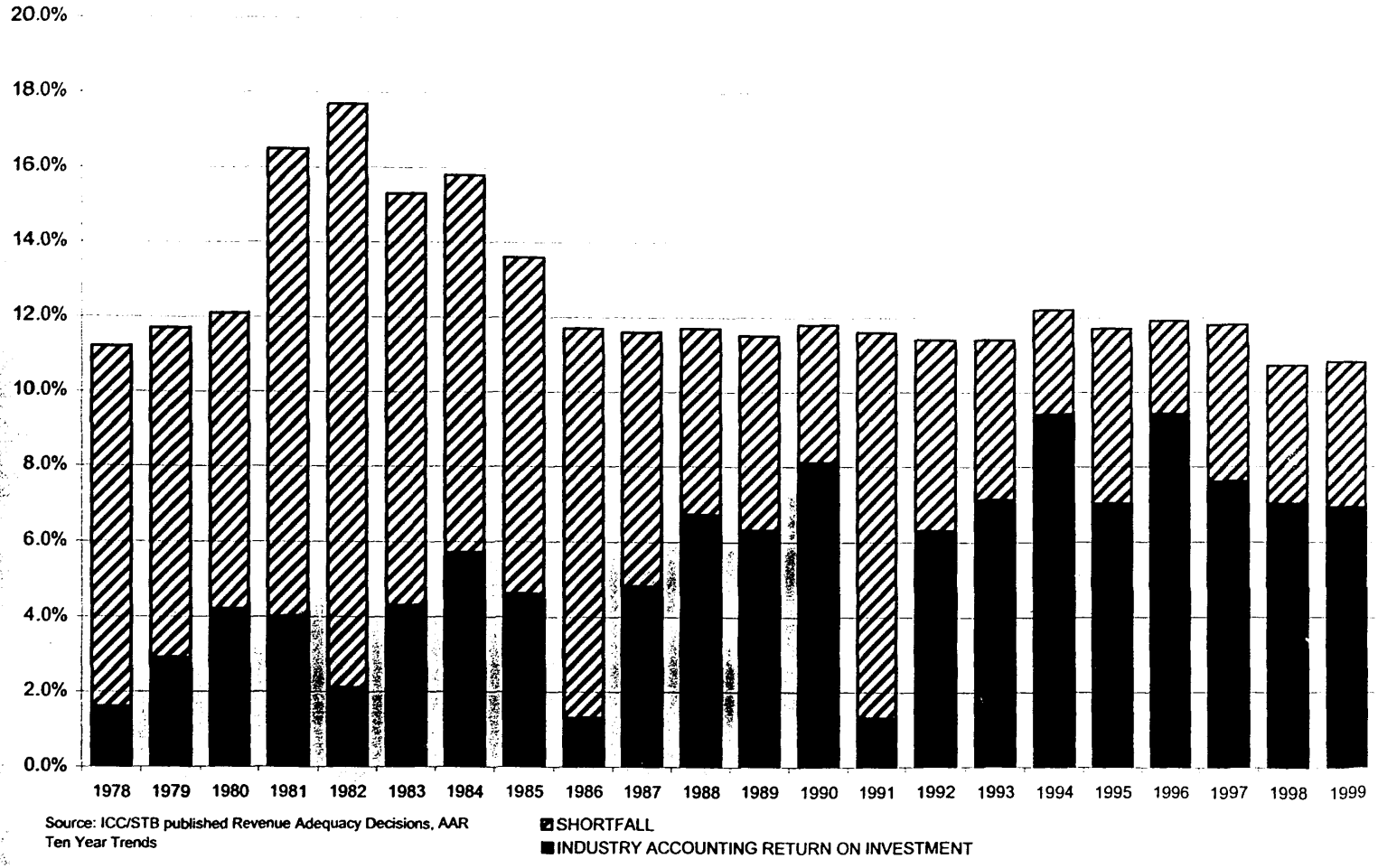
Phi Beta Kappa, Stanford University, 1970

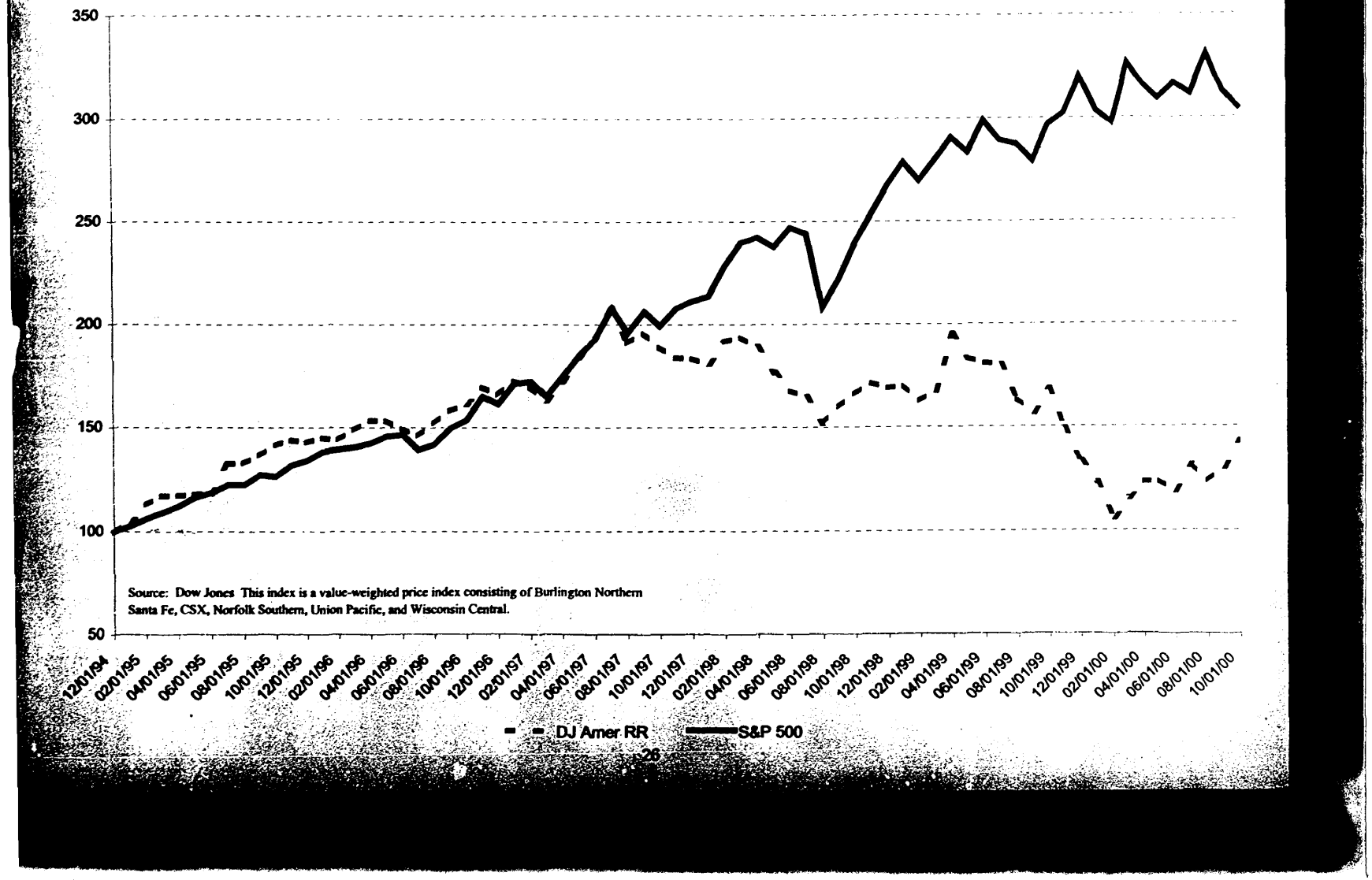
Graduated with distinction, Stanford University, 1970

Exhibit 2
Accounting Return on Investment and STB-Determined Cost of Capital Shortfall
1978 - 1999



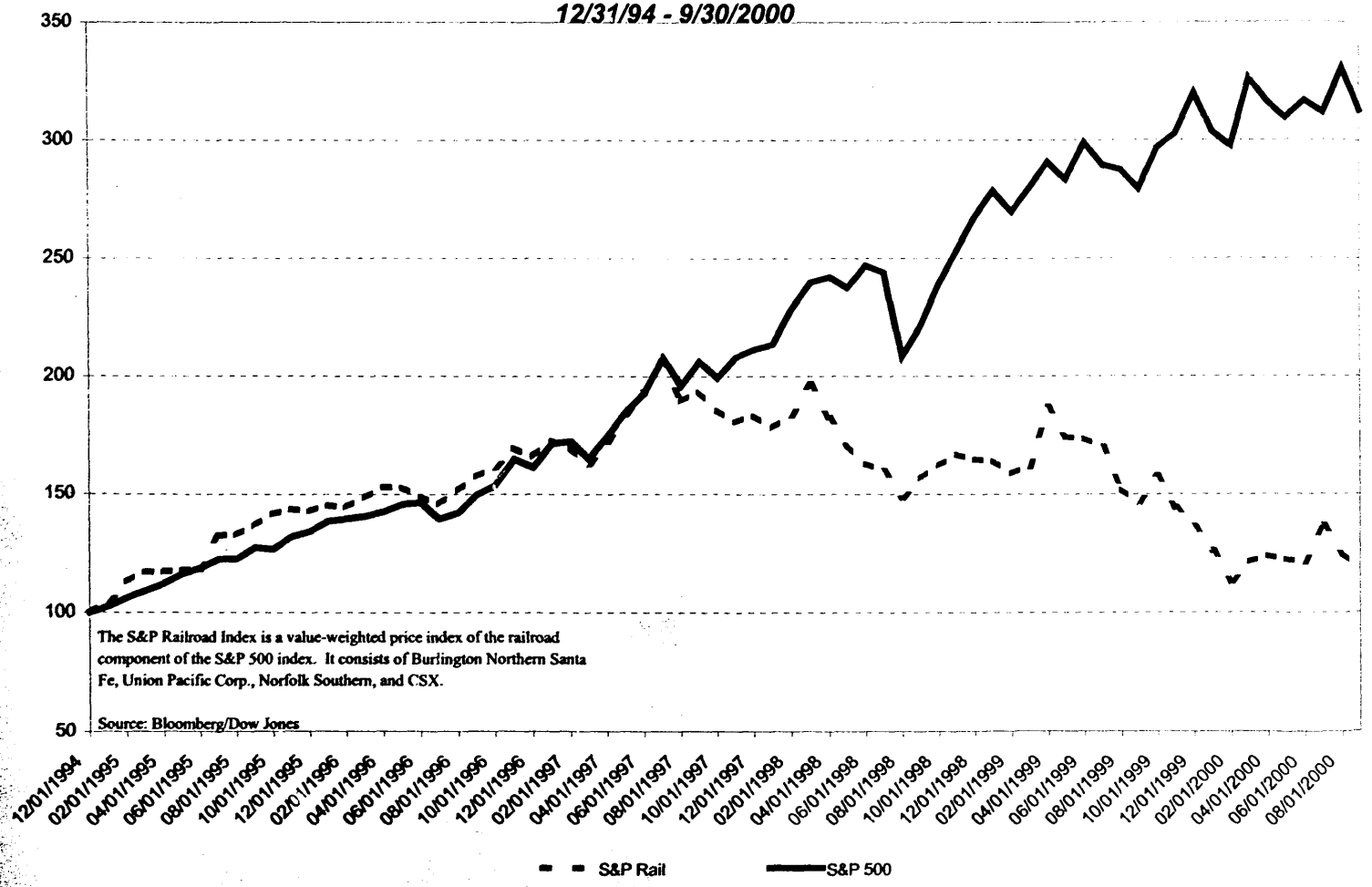
Source: ICC/STB published Revenue Adequacy Decisions, AAR Ten Year Trends

Exhibit 3
Indexed Price Performance
Dow Jones American Railroad Index and S&P 500 Index
12/31/94 - 10/30/2000



Source: Dow Jones This index is a value-weighted price index consisting of Burlington Northern Santa Fe, CSX, Norfolk Southern, Union Pacific, and Wisconsin Central.

Exhibit 4
Indexed Price Performance
S&P Railroad and 500 Indices
12/31/94 - 9/30/2000



The S&P Railroad Index is a value-weighted price index of the railroad component of the S&P 500 index. It consists of Burlington Northern Santa Fe, Union Pacific Corp., Norfolk Southern, and CSX.

Source: Bloomberg/Dow Jones

VERIFICATION

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

Executed on November 16, 2000.

Bradford Cornell

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 8

BNSF0001135 (APPLICANTS' BRIEF IN BN/SF)

REDACTED – TO BE FILED ON THE PUBLIC RECORD

BN/SF-48

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket Nos. 32549, 32549 (Sub-No. 1) et al.

BURLINGTON NORTHERN INC. AND
BURLINGTON NORTHERN RAILROAD COMPANY

– CONTROL AND MERGER –

SANTA FE PACIFIC CORPORATION AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

APPLICANTS' BRIEF
(PUBLIC VERSION)

Jeffrey R. Moreland
Richard E. Weicher
Santa Fe Pacific Corporation and
The Atchison, Topeka and
Santa Fe Railway Company
1700 East Golf Road
Schaumburg, Illinois 60173
(708) 995-6000

Erika Z. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn A. Kusske
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

Attorneys for Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company

Edmund W. Burke
Douglas J. Babb
Janice G. Barber
Michael E. Roper
Thomas J. Knapp
Burlington Northern Inc. and
Burlington Northern Railroad Company
3800 Continental Plaza
777 Main Street
Ft. Worth, Texas 76102-5384
(817) 333-2367

Betty Jo Christian
Samuel M. Sipe, Jr.
Timothy M. Walsh
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Attorneys for Burlington Northern Inc. and Burlington Northern Railroad Company

June 29, 1995

TABLE OF CONTENTS

		PAGE
I.	THE PRIMARY APPLICATION SHOULD BE APPROVED	2
	A. The Consolidation Will Result in Substantial Public Benefits	3
	B. The Proposed Transaction Will Not Have an Adverse Effect On Competition	8
	C. All Criteria For Authorization Are Satisfied	15
II.	THE REQUESTS FOR CONDITIONS AND RESPONSIVE APPLICATIONS SHOULD BE DENIED	17
	A. The Commission's Strict Standards Require That the Requests for Conditions and Responsive Applications Be Denied	17
	B. The Commission Should Not Modify Negotiated Trackage Rights Compensation Terms	20
	C. No Party Has Satisfied the Commission's Requirements for Imposing Conditions	23
	1. Utility Interests	23
	2. Phillips Petroleum	38
	3. Other Shippers	40
	4. Other Railroads	40
	5. Amtrak and SCRRA	45
	6. Labor	47
CONCLUSION		50

TABLE OF AUTHORITIES

PAGE

CASES

American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994) 48

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PAGE

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PAGE

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908 F.2d 127 (7th Cir. 1990) 21

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Consolidation Proceedings, 366 I.C.C. 112 (1982),
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v. Atchison, Topeka & Santa Fe Ry.,
1 I.C.C.2d 684 (1985) 26,34,35

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2 I.C.C.2d 709 (1986) 33

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360 I.C.C. 582 (1977) 19,31

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F.D. No. 21215 (Sub-No. 5)(served Mar. 27, 1995) 19,24,42

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Union Pac. Corp. et al. – Control – Chicago & North Western Transp. Co. et al., F.D. No. 32133 (served June 22, 1995) 16

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TREATIES

North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., reprinted in 32 I.L.M. 296 (1993) 5

PAGE

STATUTES

49 U.S.C. § 10501(b) 46
49 U.S.C. § 10505 17
49 U.S.C. § 10701a 19
49 U.S.C. § 10704 19
49 U.S.C. § 10705(e) 19
49 U.S.C. § 10707 19
49 U.S.C. § 10707a 19
49 U.S.C. § 10709 19
49 U.S.C. § 11103 28
49 U.S.C. § 11301 16
49 U.S.C. § 11341 48
49 U.S.C. § 11344(b)(1) 2,8
49 U.S.C. § 11344(c) 2
49 U.S.C. § 24308 46
49 U.S.C. § 24309 46

CODE OF FEDERAL REGULATIONS

49 C.F.R. § 1144 19
49 C.F.R. § 1180.1(c) 2,3,25
49 C.F.R. § 1180.1(d)(1) 17
49 C.F.R. § 1180.1(f) 47

APPLICANTS' BRIEF

The common control, consolidation and merger of BN and Santa Fe will yield substantial – and undisputed – public benefits by creating an integrated rail network that will give shippers efficient new single-line rail service to virtually all key domestic and export gateways in the Western United States. Because this is predominantly an end-to-end combination, situations in which there might be a potential reduction in competition have been limited from the outset. Competitive options have been preserved in all of those situations under the settlement agreements Applicants have entered into with SP and UP.[1/] Equally important, the combination of BN and Santa Fe will enhance competition, both between rail carriers and between rail and truck transportation. All other criteria for Commission approval are satisfied, and the Commission should accordingly authorize the common control, consolidation and merger that Applicants propose.

In doing so, the Commission should deny the requests for conditions and responsive applications that have been filed by certain utilities, short line railroads and other parties. As detailed below, none of the relief those parties seek is necessary to remedy any adverse effect of this transaction. Indeed, many of those requests seek relief unrelated to this transaction and seek to place their proponents in a better competitive position than they are in today. They consequently offer no valid basis to grant such relief.

[1/] A map showing the proposed Burlington Northern and Santa Fe Railway is provided in Appendix A, and a map showing it in relation to SP, UP and the rights named in Section 1 of the NIT League Stipulation is provided in Appendix B. A list of the abbreviations, acronyms and short forms for citations to decisions and pleadings used in this brief is provided in Appendix C.

I. THE PRIMARY APPLICATION SHOULD BE APPROVED

The "single and essential standard of approval is that the Commission find the [transaction] to be consistent with the public interest" under 49 U.S.C. § 11344(c). UP/CNW at 53 (internal quotation marks omitted). The statute defines five public interest factors to be considered in reviewing a transaction, such as this, that involves two or more Class I railroads:

> (A) the effect of the proposed transaction on the adequacy of transportation to the public; (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (C) the total fixed charges that result from the proposed transaction; (D) the interest of carrier employees affected by the proposed transaction; and (E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

UP/CNW at 53 (citing 49 U.S.C. § 11344(b)(1)).

In assessing effects on the adequacy of transportation, the Commission examines the public benefits that will result from the transaction. UP/CNW at 53. Those benefits include efficiency gains from cost reductions, service improvements, the ability to provide rail service with fewer resources and "economies of scale, scope, and density." Id. Public benefits may also flow from "marketing opportunities that can make the consolidated carrier financially stronger and, therefore, a better competitor that can more easily provide adequate service on demand," as well as from the "elimination of duplicative facilities and the use of more direct routings." Id. at 56 (citing 49 C.F.R. § 1180.1(c)(1)).

In assessing effects on competition, the Commission looks both to the Rail Transportation Policy set forth at section 10101a, which emphasizes "reliance on competitive forces, not government regulation, to modernize railroad actions and to promote efficiency," and to the "policies embodied in the antitrust laws." UP/CNW at 54. The Commission

> must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider

> them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. . . .

Id. (quoting McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944)). The Commission does not "sit as an antitrust court," but rather balances any anticompetitive effects of the transaction against its anticipated benefits. UP/CNW at 55. "In essence," the Commission performs "a balancing test weighing 'the potential benefits to applicants and the public against the potential harm to the public.'" Id. at 55-56 (quoting 49 C.F.R. § 1180.1(c)).

The other considerations set forth in section 11344 are "Special Public Interest Factors" as to which the Commission makes "special, narrowly focused public interest findings." UP/CNW at 55. These include the effect of the transaction on the applicants' railroad employees. See id. at 94-95. In addition, the Commission reviews the financial terms of the transaction and their fairness to shareholders. See Schwabacher at 198, 201; see also UP/MKT at 515-16; UP/MP/WP at 635. Finally, the environmental laws, as implemented through the Commission's environmental regulations, require the Commission to consider "the effects of the transaction on the environment." UP/CNW at 55.

A. The Consolidation Will Result in Substantial Public Benefits

The proposed transaction is consistent with the public interest and should be approved because it promises public benefits that far outweigh any potential harm. "Public benefits may be defined as efficiency gains which may or may not be shared with shippers and which include both cost reductions and service improvements." Id. at 53. Applicants' showing of extensive service improvements and substantial cost reductions from the proposed transaction is essentially undisputed.

Shippers and the consuming public will benefit from the enhanced single-line service provided by the consolidated carriers. The Commission has emphasized that "[t]here are substantial efficiencies in single-line service compared to joint-line service." Id. at 66-67. Indeed, the public benefits of single-line service are a recurrent theme in Commission merger decisions. RGI/SP at 877-78; CSX Control at 552; BN/Frisco at 935-40. Applicants' evidence establishes that the combined BN/Santa Fe will be able to provide extensive new single-line service, including but not limited to service (1) between points in California and the Southwest served by Santa Fe and points in the Southeast served by BN; (2) between points in the Northern Tier states served by BN and points in the Southwest and California served by Santa Fe; and (3) between Canada and Mexico. Krebs V.S., BN/SF-7 at 151-54; Lewis V.S., BN/SF-7 at 220-41.

Single-line service benefits shippers by improving transit times and eliminating the uncertainties associated with interchanging traffic, thereby permitting shippers to reduce their inventory costs. Marlier V.S., BN/SF-7 at 179; Lewis V.S., BN/SF-7 at 246. By dealing with one carrier rather than two, shippers also can reduce transaction costs for activities such as negotiating rates, arranging equipment supply, tracking shipments and making payments. Id.

Single-line service will also benefit the public interest and the consolidated railroads themselves by allowing the combined BN/Santa Fe to compete more effectively against other rail carriers and trucks. Marlier V.S., BN/SF-7 at 172-80; Kalt V.S., BN/SF-7 at 453; Cane V.S., BN/SF-7 at 352-55. The Commission has found that enhanced competition is a public benefit because it leads to improved service or reduced rates. UP/CNW at 64. The extended single-line hauls and diversions from other carriers projected by Applicants' traffic studies reflect enhanced competitive strength that will result in increased traffic for the BN/Santa Fe system. Kalt V.S., BN/SF-7 at 490-91. The proposed consolidation is the only way that these projected benefits can be fully realized: Applicants' evidence demonstrates that efforts to improve service

and enhance competitiveness through other cooperative arrangements have fallen short of producing the benefits of actual single-line service. Krebs V.S., BN/SF-7 at 153-54; Kalt V.S., BN/SF-7 at 53-55; Cane V.S., BN/SF-7 at 363-73.

Two aspects of the enhanced competitive strength of the combined BN/Santa Fe system warrant special mention because of the public benefits they offer.

The first is the expanded network coverage that will allow Applicants to compete more effectively against the other major western railroads – UP and SP – and to reach all key West Coast export and mid-continent gateways. Grinstein V.S., BN/SF-7 at 141-42; Kalt V.S., BN/SF-7 at 453-69. Neither BN nor Santa Fe currently possesses network coverage as extensive as that of UP or SP. BN lacks direct access to Central and Southern California, the Southwest, and Mexico. BN's West Coast port coverage is limited to the Pacific Northwest. Santa Fe does not reach the Pacific Northwest, the Upper Midwest or Canada. The combination of BN and Santa Fe will overcome these limitations. Expanded access to West Coast and Gulf Coast ports will permit Applicants to serve the needs of U.S. shippers better in the increasingly competitive global marketplace. Grinstein V.S., BN/SF-7 at 142. The ability to provide single-line service between Canada and Mexico will also enable the combined railroad to assist American industry in realizing the opportunities created by NAFTA. Lewis V.S., BN/SF-7 at 226-41.

A second major benefit of Applicants' enhanced competitive strength will be their ability to divert truck traffic from the overcrowded highways to the safer and more energy-efficient rail system. Marlier V.S., BN/SF-7 at 179; Stone V.S., BN/SF-7 at 682; Roberts V.S., BN/SF-7 at 724-25. The projected movement of additional containers and trailers on Applicants' trains will further the intermodal partnerships that Santa Fe has been at the forefront of developing. Krebs V.S., BN/SF-7 at 154-56; Marlier V.S., BN/SF-7 at 170. The public will

benefit from a more efficient use of the national transportation infrastructure, from reduced energy consumption and from improved air quality.

The combination of BN and Santa Fe will produce quantifiable benefits that are projected to exceed $560 million annually. Applicants project total cost savings of $453 million annually. Ice V.S., BN/SF-7 at 336. The increased traffic Applicants expect to realize through extended hauls, diversions from other rail carriers and diversions from trucks are projected to yield gross annual revenues of $306 million, with a net revenue gain to Applicants of $107 million. Id. Together, the net revenue gain and the cost savings yield projected benefits in excess of $560 million annually.

The vast majority of the $560 million in projected benefits constitute public benefits. "Cost reductions, regardless of whether they are passed on to shippers, are public benefits because they permit a railroad to provide the same level of rail services with fewer resources or a greater level of rail services with the same resources." UP/CNW at 53. Professor Kalt examined the $453 million in projected cost savings and concluded that "the overwhelming portion of the cost savings identified by the merging companies constitutes reduced use of resources and thus qualifies as public benefits." Kalt V.S., BN/SF-7 at 482; see also Schmalensee R.V.S. at 26-27.

The Operating Plan shows that the consolidation will result in annual operating savings of nearly $107 million. Operating Plan, BN/SF-8 at 135. The operating efficiency benefits include, among others, improved equipment utilization due to integrated dispatching and scheduling, consolidation and specialization of system mechanical shops, more efficient utilization of personnel, lower equipment maintenance and maintenance of way costs, integrated train operations and consolidation of duplicative yard and terminal functions. Ice V.S., BN/SF-7 at

331-32; Robinson V.S., BN/SF-8 at 295-306; Operating Plan, BN/SF-8 at 113-29. Applicants' Operating Plan

> projects that the combined system could offer shippers single-line service with internal reroutes that, in the aggregate, would have moved the base 1993 traffic with reductions of 37 million car miles, 2.67 billion gross ton miles, and 1.8 million locomotive unit miles compared to operations over the separate railroads. These reductions in route miles will also result in a savings of 4 million gallons of fuel per year.

Ice V.S., BN/SF-7 at 332 (as corrected by Errata submitted Nov. 7, 1994); see also Robinson V.S., BN/SF-8 at 296. Such savings from more efficient train operations are clearly public benefits. See, e.g., RGI/SP at 879-80; BN/Frisco at 935-37; NS Control at 203.

Extensive savings will be realized from the reduction of duplicative general administrative and support functions – $346 million annually. These savings, which are a key element of the public benefits of this transaction, will be achieved by operating the combined company with unified executive offices, an integrated and consolidated management information system, a centralized customer support function and just-in-time inventory practices, as well as through rationalization and specialization in various support and clerical areas. Ice V.S., BN/SF-7 at 333; Hund/Snyder V.S., BN/SF-8 at 339-50; Robinson R.V.S. at 3-6.

The additional traffic Applicants expect to carry after the consolidation will result from the provision of higher quality rail service, which, as Professor Kalt explains, is a public benefit. Kalt V.S., BN/SF-7 at 483. However, the annual net revenue gain of $107 million that Applicants project is not the measure of the net benefits of service improvements to the shipping public. Id.; see also UP/CNW at 67 ("[O]nly the service improvements and cost savings associated with traffic diversions can be counted as public benefits."). Because of data limitations, the public benefits associated with improved service – e.g., reduced inventory costs and reduced transaction costs for shippers – are difficult to quantify. Nonetheless, such public benefits are

likely to be substantial given the magnitude of traffic gains projected by Applicants. Kalt V.S., BN/SF-7 at 482-83, 488-90; Schmalensee R.V.S. at 10-14, 27-28.

The public benefits identified by Applicants are essentially unchallenged. Although a number of parties are participating in this proceeding in an opportunistic attempt to obtain conditions, Applicants' showing of public benefits is essentially unchallenged.[2/] As DOJ acknowledges, "[i]t is likely a merger of two railroads having combined revenues of $7 billion would create significant efficiencies." Woodward V.S., DOJ-2 at 1 n.1.

The extensive support for the consolidation by shippers and government officials further attests to the public benefits of the transaction. Some 600 shippers and more than 60 governmental entities have filed statements or letters supporting the proposed consolidation. See BN/SF-10, 11, 21, 34. This broad-based and enthusiastic support for the transaction confirms the substantial public benefits that will flow from the combination of BN and Santa Fe. A list of statements supporting the proposed transaction is provided in Appendix D.

B. The Proposed Transaction Will Not Have an Adverse Effect On Competition

In evaluating "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," 49 U.S.C. § 11344(b)(1)(E), the Commission does not limit its consideration of competition to the number of rail carriers alone, but rather determines whether the consolidated carrier in fact will have market power.[3/] At the out-

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[2/] Dr. Christensen, a witness for certain utility interests, contends that the proposed transaction would not create scale economies. However, the Commission has recognized that there are substantial efficiencies associated with single-line service. See UP/CNW at 66-67. Moreover, Dr. Christensen does not dispute that the vast preponderance of the $453 million in cost savings projected by Applicants are public benefits.

[3/] See UP/MP/WP at 516 n.46 (defining market power as the "ability profitably to sustain higher prices or lower service quality"); accord UP/MKT at 433; Central Vermont at 335.

set, the Commission generally examines a consolidation's effects on the existing railroad network, with particular attention to whether the consolidation is primarily parallel – combining routes between the same points – or end-to-end – combining routes that may serve some of the same points but generally serve separate, if neighboring, parts of the country. The Commission has recognized that "consolidations of end-to-end railroads rarely raise competitive concerns." UP/CNW at 70; see also Schmalensee R.V.S. at 16-23.

The BN/Santa Fe consolidation is predominantly end-to-end. Kalt R.V.S. at 5. There is no overlap between BN and Santa Fe in the three major transcontinental corridors. BN's principal transcontinental route is over the Northern Corridor, whereas Santa Fe operates over the Southern Corridor; neither carrier has a through route in the Central Corridor. With very few exceptions, the small number of routes where BN and Santa Fe do overlap are served by one or more additional railroads. Moreover, BN and Santa Fe are complementary not only in their route structure, but also in the commodities they carry, in that BN's principal strength is in coal and grain transportation and Santa Fe's in intermodal movements. Kalt V.S., BN/SF-7 at 451-53.

In fact, the BN/Santa Fe consolidation will be affirmatively procompetitive because it creates a strong carrier to compete with UP's and SP's long-haul options. Id. at 519-20; see also NS Control at 229 (benefits of competition between NS and CSX). Not only are the procompetitive effects of this consolidation prominent, but, as Professor Kalt explains, it presents only narrow issues of horizontal competition; the vertical combination of BN and Santa Fe "does not pose a threat of competitive harm to shippers." Kalt R.V.S. at 100.[4/]

[4/] The vertical foreclosure claims that have been raised lack merit for the reasons explained in Commission precedents (e.g., UP/CNW at 72-76, 87-89; UP/MP/WP at 537-43), in Kalt R.V.S. at 42-100 and Schmalensee R.V.S. at 28-44, and in the discussions of particular claims, infra.

In contrast to the substantial benefits of this transaction, only a few localized claims of reduced rail competition have been raised. Such alleged reductions do not equate to actual competitive harm, particularly in light of the settlements reached in this proceeding. In its competition analysis, the Commission – because of its pragmatic focus on "meaningful reduction[s] in . . . transportation competition" that result from actual market power (UP/CNW at 64) – may give "dominant weight" to factors other than intramodal competition. Central Vermont at 336. This is because the Commission begins its analysis of the competitive impact of a consolidation by defining the relevant markets that would be affected. RGI/SP at 885. "A relevant market is the area of effective competition" – the zone of modes, products, sources, and destinations within which "consumers shift their consumption in response to a change in relative price or quality." UP/CNW at 57 (emphasis added).[5/]

For some long-haul movements of dense bulk commodities, the relevant market may consist only of rail transportation. For shorter movements, or movements of other commodities, transportation by truck, barge, pipeline, or electrical transmission may be substituted for rail transportation if prices increase too much. Different products, different sources or, for multi-plant shippers, different destinations may be substituted in some cases.

Fuel for the generation of electricity is an example: electricity is fungible, most purchasers use a variety of fuels delivered by a variety of rail carriers and other modes, and all purchasers may substitute competitively priced power generated by other plants or other utilities for power that is supracompetitively priced because of high rail transportation costs. For these reasons, the Commission has recognized that competition from other modes, other sources or

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[5/] USDA contends that the consolidation of BN and Santa Fe will reduce competition for the transportation of wheat, but fails to define the market for such transportation in economically meaningful terms and ignores source competition. Kalt R.V.S. at 31-34.

other products may force a carrier to price competitively even if it does not compete directly with another railroad. E.g., UP/MKT at 433, 477; Milwaukee I at 227-28; Spine Line at 930-32.

Applying this analytic framework to the markets that BN and Santa Fe serve, the significant anticompetitive effects of the proposed consolidation have been few and far between from the outset. Moreover, Applicants have taken steps to address the limited problem areas through the settlement agreements discussed below.[6/] Applicants' stipulation with NIT League, which represents a broad range of shipper interests, identifies the areas of competitive concern and provides assurance that the settlements will be implemented. See BN/SF-33.[7/] Adoption of the NIT League Stipulation as a condition to the Commission's approval of the transaction will resolve any genuine competitive problems. Kalt R.V.S. at 4, 7; Ice R.V.S. at 17-26.

With respect to the first location named in the NIT League Stipulation, Applicants have agreed to give UP overhead trackage rights between Superior, NE and Abilene, KS, with access to all shippers served by both BN and Santa Fe in Superior. Kalt R.V.S. at 2-3; Ice R.V.S.

[6/] In addition to the agreements related to the competitive effects of the consolidation, Applicants have entered into several agreements that actively enhance rail competition in areas where the consolidation would not otherwise affect competition. Kalt R.V.S. at 6, 16, 21; Ice R.V.S. at 3-16; see also BN/SF-32 & BN/SF-33 (settlement agreements).

[7/] In their stipulation with NIT League (BN/SF-33, Stip. ¶ 1), Applicants have agreed to grant the following to unaffiliated Class I carriers:

> (1) overhead trackage rights between Abilene, KS, and Superior, NE, with access to all facilities at Superior that are served by both BN and Santa Fe;
>
> (2) overhead trackage rights over Santa Fe's lines between Pueblo, CO, and Stratford, TX, and over BN's lines between Dalhart and Fort Worth, TX, along with access to all industries served by either BN or Santa Fe at Amarillo, Lubbock, and Plainview, TX, and access to SWGR;
>
> (3) access to TPW at Bushnell, IL; and
>
> (4) access to all industries served by either BN or Santa Fe at Ft. Madison, IA, and Galesburg, IL.

at 18-19. The agreement ensures that every Superior shipper that has access to two railroads at the time of the consolidation will continue to be served by two railroads after the consolidation (Ice R.V.S. at 18-19), and actually increases competition over the present level. Only Santa Fe now has a route leading south from Superior, but after the consolidation UP will compete for this traffic for the first time. Kalt R.V.S. at 10-11. It is therefore unsurprising that the single Superior shipper to comment on the consolidation supports it in the wake of the UP agreement (see Ice R.V.S. at 19; Kalt R.V.S. at 14), and that DOJ also recognizes that, assuming proper trackage rights compensation terms, the UP agreement solves any competitive problems at Superior (Woodward V.S., DOJ-3 at 11-12).

Applicants' agreement with SP preserves and indeed enhances two-carrier competition in the other areas where concerns about transaction-related reductions in rail competition might arise. Applicants will provide SP with trackage rights that, when combined with SP's existing line between Stratford and Dalhart, TX, will give SP the ability to carry overhead traffic from Pueblo, CO to Fort Worth, TX. Ice R.V.S. at 9-10, 19. Moreover, SP will have direct access to all shippers in Amarillo, with haulage rights providing access to all shippers in Lubbock and Plainview. Id. at 19-23. The haulage rights to Lubbock also allow SP to interchange traffic with SWGR in Lubbock – without paying the switching charge now applicable to BN-SWGR interchanges. As Mr. Ice and Professor Kalt point out, those haulage rights provide SP with more efficient and thus more competitive access to shippers in Plainview and Lubbock, because SP need not attract enough volume to justify running entire trains of its own over the short haul to Amarillo. See id. at 18; Kalt R.V.S. at 12-13. Moreover, the Amarillo-Lubbock-Plainview arrangement will increase the options for shippers in those locations. They will continue to have single-line service to the entire range of destinations now served by BN and Santa Fe, and they will gain new single-line service to SP destinations as well – including competing single-line service

to California and the Southwest. Ice R.V.S. at 21-22; Kalt R.V.S. at 10-11. DOJ recognizes that the SP agreement will solve its competitive concerns in this area, assuming proper compensation terms. Woodward V.S., DOJ-3 at 12-13.

Finally, Applicants' agreement with SP addresses the potential diminution of competition in southeastern Iowa and the adjoining portion of Illinois. SP now has trackage rights over a BN line from Kansas City to Chicago through Galesburg, IL and Bushnell, IL (but without access at those points). Under the agreement, SP will have the right to interchange traffic with TPW at Bushnell, along with the ability to serve all shippers in Galesburg. SP also will receive haulage rights to serve all shippers in Ft. Madison, IA. Ice R.V.S. at 23-26.

These arrangements will give shippers in southeastern Iowa and neighboring portions of Illinois an improved range of westbound shipping options. Whereas Keokuk, IA shippers previously could either interchange directly with BN, or send traffic over a KJRY-TPW-Santa Fe routing – often only to connect with SP to reach their shipping destinations (see id. at 25) – they now will have single-line service from Keokuk to all destinations served by either BN or Santa Fe, and will have SP destinations available over a KJRY-TPW-SP routing. As DOJ recognizes, this addresses all legitimate competitive concerns at Keokuk. Woodward V.S., DOJ-3 at 13 & n.16; see also Kalt R.V.S. at 20. Ft. Madison and Galesburg shippers will gain direct access to SP, in addition to their existing access to BN and Santa Fe, preserving two-carrier competition in those locations.

Various parties to this proceeding recognize that the UP and SP settlement agreements solve any competitive problems in the areas where they apply but ask the Commission to impose them as conditions to its approval of the transaction. Imposition of the agreements as conditions is inappropriate and unnecessary. In their stipulation with NIT League, Applicants have agreed to submit to the Commission implementing agreements to carry out all trackage

rights granted in the settlement agreements described above no later than 180 days from the date of the stipulation, and to implement haulage rights identified in the NIT League Stipulation promptly after receiving approval for the consolidation. BN-SF 33, Stip. ¶ 2.

In addition, Applicants and NIT League have agreed to ask the Commission to impose their stipulation as a condition to approval of this transaction (id. ¶ 4), which Applicants hereby request. Imposing the stipulation as a condition makes it unnecessary to impose any other conditions to preserve competition; compliance with the stipulation will sufficiently protect competitive alternatives without further regulatory involvement.

The settlement agreements result from arm's-length negotiations between sophisticated commercial entities. For that reason, the Commission can be confident that the agreements are workable. See Kalt R.V.S. at 22-23 (the "contextual tailoring that is obtained through business negotiations of trackage and haulage agreements" make the agreements "work effectively"); see also Schmalensee R.V.S. at 44-51. Moreover, the accord with NIT League ensures that the results of inter-carrier negotiations will benefit shippers as well as the carriers themselves.

Applicants thus have fashioned appropriate remedies to the potential harms to competition resulting from the consolidation. The substantial efficiencies that will be achieved manifestly outweigh the minimal and scattered potential competitive harm alleged here. See UP/MP/WP at 564; Kalt V.S., BN/SF-7 at 515-19; see also Schmalensee R.V.S. at 9-15. Precedent and sound policy fully justify approval of this transaction.

C. All Criteria For Authorization Are Satisfied

All applicable criteria for authorization of the common control, consolidation and merger of BN and Santa Fe, the associated securities and financial matters, and Applicants' related petitions for exemption in Sub-Nos. 1-12 have been fully satisfied.

Section 11344: The consolidation of BN and Santa Fe will substantially enhance competition and, as Applicants demonstrate, will have no "adverse effect on competition among rail carriers." Moreover, the substantial and unchallenged public benefits Applicants have shown will greatly improve the "adequacy of transportation to the public." The only allegations of potential adverse effects on such service are very limited and wholly unfounded. As detailed below, claims by Amtrak and SCRRA that the transaction will adversely affect certain passenger and commuter operations are speculative and ignore existing contractual arrangements. Moreover, while KJRY, GNBC and SWGR loosely refer to "essential services," they plainly fail to show that essential rail services would be lost under applicable Commission standards.[8/]

The effects of the transaction on employees are detailed in Applicants' evidence.[9/] Any effects are adequately addressed by the already extensive statutory labor protection. See Northrup R.V.S. at 25-28.

[8/] The Commission requires proof that a railroad "will incur revenue losses that threaten its ability to provide service throughout its system," and that "the threatened services are essential, rather than peripheral," considering "the public need for the services" and whether alternative service is currently available or would likely be provided by other carriers if necessary. UP/MP/WP at 546. KJRY, GNBC and SWGR do not even purport to meet those tests, and Applicants show that no essential services in fact are threatened. See BN/SF-35&36, Overview at 104-05, 110; infra pages 42-45.

[9/] See Labor Impact Exh., BN/SF-8 at 425; Hund-Snyder V.S., BN/SF-8 at 335-51; Hund-Speaker V.S., BN/SF-8 at 433-37; Robinson R.V.S. at 1-6; BN/SF-35&36, Overview at 119-20.

The BNI-SFP merger and the common control, consolidation and merger of BN and Santa Fe will not increase total fixed charges. See Hund-Snyder Supp. V.S. at 3, 4. No other rail carrier has sought inclusion in the transaction.

Securities: Applicants have requested authorization under 49 U.S.C. § 11301 to the extent it may apply to BN's succession to Santa Fe obligations. See BN/SF-7 at 7, 57. Any such assumption of liabilities fully satisfies the standards for approval, as it will be for the purpose of implementing a transaction the Commission will have found to be consistent with the public interest and will not impair the merged carrier's ability to provide service. See id. at 7; Hund-Snyder Supp. V.S. at 4-5 & Exhibits. No party has contested Applicants' request for section 11301 approval.

Financial Terms: The financial terms of the transaction, including the stock exchange ratio, were agreed to on an arm's-length basis, and their fairness to stockholders has been confirmed by the parties' expert financial advisors. See BN/SF-25, SEC Form S4, Post-Effective Amendment No. 4 at 42-49 & Apps. C&D. The final terms reflect the market's determination of a fair exchange ratio and provide a premium for SFP shareholders. See id. at 12; UP/CNW Financial Terms at 3.[10/] The merger was overwhelmingly approved by the shareholders of both BNI and SFP, and no party has challenged the exchange ratio or any other financial term. The Commission should accordingly find those terms to be just, fair and reasonable.

Related Petitions for Exemption: The related petitions for exemption in Sub-Nos. 1-12 seek authorization for the control of WUTR and for eleven minor construction projects designed to achieve efficiencies described in the Operating Plan. No party has contested any

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[10/] Those terms are summarized in BN/SF-25 and set forth in detail in the accompanying SEC filings. As explained in BN/SF-25 at 2-4 & n.2, they include an alternative merger structure that would involve an additional holding company entity, BNSF Corporation, and two subsidiaries it would create for that purpose. Applicants have asked the Commission to join all of those entities as additional Applicants in this proceeding. Id. at 3 n.2.

of those petitions, and the requirements for exemption under 49 U.S.C. § 10505 have been met in each case. Regulation of the underlying transactions is not necessary to carry out the rail transportation policy or to protect shippers from abuse of market power, and each transaction is limited in scope. The exemptions accordingly should be granted.

Environmental Matters: Both the draft EA served June 6, 1995 and Applicants' environmental evidence (BN/SF-14) conclude that the Application and the construction in Sub-Nos. 2-12 will not result in any significant adverse environmental effects. In fact, the substantial, uncontested truck-to-rail diversions projected (see BN/SF-14 at 107-12, 144-46) will yield significant environmental benefits in improved air quality and reduced energy consumption.

II. THE REQUESTS FOR CONDITIONS AND RESPONSIVE APPLICATIONS SHOULD BE DENIED

Applicants have agreed that compliance with the NIT League Stipulation should be made a condition of Commission approval. No other conditions are justified.

A. The Commission's Strict Standards Require That the Requests for Conditions and Responsive Applications Be Denied

The Commission imposes conditions sparingly because they tend to reduce the benefits of a consolidation for both the carriers and the public. UP/CNW at 56; 49 C.F.R. § 1180.1(d)(1). Thus, a condition will not be imposed unless the Commission finds

> that the consolidation may produce effects harmful to the public interest (such as an anticompetitive reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

UP/MP/WP at 565. In light of the settlements, none of the requests for conditions or responsive applications in this proceeding meets these tests.

To be granted, a condition must first address an effect of the transaction. The Commission will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will it impose conditions that "are in no way related either directly or indirectly to the involved merger." BN/Frisco at 952 (footnote omitted); see also UP/CNW at 97.

While showing that a condition addresses effects of the transaction is necessary, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. The Commission will not use its conditioning power "to make consolidation proceedings vehicles for rail system restructuring," UP/MP/WP at 564, and will not impose a condition that would put its proponent in a better position than it occupied before the consolidation. UP/CNW at 97; Milwaukee II at 455. If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option and should not extend to creating new options that did not exist before consolidation. E.g., Milwaukee II at 455; Wisconsin Central at 233; UP/MP/WP at 564. Moreover, conditions are not warranted to offset revenue losses by competitors as a result of the transaction. BN/Frisco at 951.

Operational feasibility is another key factor. For example, in evaluating requests for trackage rights, the Commission considers the capacity of the line involved to handle the increased traffic the trackage rights would add (UP/MP/WP at 572, 587), the risk of congestion at yards and terminal facilities (id. at 571), the potential for disrupting the operations of the landlord or other connecting carriers and downgrading service to shippers (id. at 584), and the workability of the responsive applicant's operating plan (id.).

Even if those tests are satisfied, the Commission will not impose a condition whose ameliorative benefits are outweighed by the harm it would inflict on the consolidation itself. For example, the Commission has long found that traffic protective conditions, and the artificial constraints on divisions and routings they entail, are anticompetitive and should not be imposed, because they inhibit the efficient pricing of divisions and routing of traffic in accordance with market forces.[11/]

The Commission also will not impose conditions to address potential problems for which adequate remedies are already provided by law. Traffic protective conditions again provide a good example: the Commission has held that a merger proceeding is not the appropriate forum to address concerns over potential cancellations of joint rates or through routes because adequate protection against such cancellations exists under 49 U.S.C. § 10705(e) and 49 C.F.R. § 1144. See RGI/SP at 932; CSX Control at 579; Seaboard I at 603. The same reasoning applies to conditions seeking the prescription of rates or rate levels, such as the "parity" conditions that have been sought by certain parties here. The Interstate Commerce Act contains detailed standards that must be applied in reviewing the reasonableness of filed rates and prescribing maximum reasonable rates. See 49 U.S.C. §§ 10701a, 10704, 10707, 10707a, 10709. Those provisions of the statute are the exclusive remedies on rate matters, making rate-related conditions both unnecessary and inappropriate.[12/]

[11/] See, e.g., Seaboard II at 5; N&W/DTI at 527; Traffic Protective Conditions at 114; Milwaukee I at 263. Notwithstanding this precedent, two parties have asked the Commission to resuscitate the long-interred "DT&I" traffic protective conditions by requesting that Applicants be required to set divisions on the basis of mileage or a "mileage equivalency" rule. See IC-12 at 4; AEPC-5 at 3 & Crowley V.S. at 6.

[12/] See UP/MKT at 477 (rate reasonableness proceeding, rather than merger proceeding, is appropriate forum for rate challenge); see also 49 U.S.C. § 10707a(h); National Grain & Feed at 432; Union Pac. R.R., 867 F.2d at 649.

These Commission standards dispose of a number of the requests for conditions made in this case without any need to address specific facts. The responsive applications of HL&P (Sub-No. 13) and SPS (Sub-No. 14) and the requests for conditions granting trackage rights to carriers that have not filed responsive applications themselves, such as those of WRI and OG&E, should be denied because they fail to present sufficient information for evaluation of the operational feasibility of such trackage rights and their impact on Applicants' own operations. The Commission cannot adequately evaluate such operational matters without concrete evidence regarding the proposed operations of the carrier that would use the trackage rights. The requests by IC and AEPCO for traffic protective conditions should also be denied, based on the Commission precedent set forth above and because they would undermine the public benefits of this transaction. See Kalt R.V.S. at 105. Similarly, the requests by AEPCO, Chaco, CP&L, WCTL and MWBC for rate "parity" conditions or rate caps (see AEPC-5 at 3 & Crowley V.S. at 7; CEC-1 at 1, 5; CP&L-7 at 9-10; WCTL-4 at 15; MWBC Comments at 8-9) should be rejected because such rate matters cannot properly be addressed by means of conditions on a consolidation.

B. The Commission Should Not Modify Negotiated Trackage Rights Compensation Terms

DOJ, UP and various shippers request conditions that would modify terms of negotiated trackage rights agreements. Those requests should be denied.

The Commission has made clear that it will not modify the terms of privately negotiated trackage rights agreements to address competitive concerns raised by a consolidation. In UP/MKT, the Commission rejected DOJ's argument for such modifications, holding that:

> where the opposing parties have reached a voluntary agreement on trackage rights in a rail consolidation proceeding, our role ... is a limited one. In this context, "we will approve any reasonable terms agreed to by the parties."

UP/MKT at 468 (quoting UP/MP/WP at 589). That holding is consistent with the Commission's well-established preference for trackage rights compensation to be set by private agreement rather than by regulatory fiat – as well as its policy of favoring negotiated solutions, in both control cases and other proceedings. See UP/MP/WP at 589; UP/MKT at 417; NS Control at 182 & n.21; BN/Frisco at 953; A&M I at 620; RGI/CMW at 982.

As Professor Kalt confirms, negotiated settlements are preferable to terms imposed by a regulator because they are more likely to reflect the parties' efficiency considerations and independent business goals. Kalt R.V.S. at 7-8. Moreover, Applicants' evidence establishes that the compensation terms of these arm's-length agreements are set at levels customary in the industry, eliminating any concern that they will not permit competition between tenant and landlord. Ice R.V.S. at 3, 16; see also UP-7 at 3-4; SP-39 at 2.

DOJ's argument in support of modifying the compensation terms is substantially the same as that rejected in UP/MKT. While acknowledging that "in several of the markets of competitive concern identified by [DOJ] in its Comments, trackage or haulage rights granted to UP or SP may solve the competitive problems," DOJ speculates that those rights might not be an effective remedy if their compensation terms are so high that they would result in higher post-merger rates for shippers. DOJ-3 at 3. DOJ asks the Commission to modify the settlement agreements by imposing "cost-based" rates in place of those negotiated by the parties, endorsing at least in part an approach presented by NIT League witness Crowley before NIT League abandoned that request. Woodward V.S., DOJ-3 at 7-10. However, DOJ offers no evidence to suggest that the negotiated compensation terms are in any way unreasonable or would not in fact permit vigorous competition between the landlord and tenant railroads. In contrast, both UP and SP have stated that the terms of their respective agreements are commercially reasonable

and that they intend to compete vigorously pursuant to those rights. UP-7 at 3-4; SP-39 at 2, 8-10.

Even if the Commission had occasion to set trackage rights compensation, the approach advocated by Mr. Crowley would run afoul of the Commission's methodology for setting reasonable compensation failing agreement by the parties. To derive such compensation, the Commission adds to the landlord's variable costs and proportional maintenance and operation expenses an interest rental component based on the value of the line involved, multiplied by the pre-tax equivalent of the railroad industry cost of capital and prorated by a usage measure.[13/] The compensation levels produced by Mr. Crowley's original cost approach would be only a fraction of those produced by the Commission's methodology.

In fact, it is not clear that DOJ's endorsement of Mr. Crowley's approach extends to his reliance upon original cost. DOJ's witness Woodward states that "any trackage rights fees should allow the landlord a return on its track investment sufficient to maintain the track at pre-merger levels. ... [T]he landlord should receive a payment equal to the opportunity cost of the funds needed to maintain the track." Woodward V.S., DOJ-3 at 8. If the landlord is to remain in business over the long term, it will need to earn funds sufficient to replace the track. Thus, to the extent that Dr. Woodward implicitly recognizes the appropriateness of replacement costs, his endorsement of Mr. Crowley's approach is qualified.

Separately, UP asks the Commission to delete a negotiated provision from Applicants' agreement with SP that provides for the reopening and adjustment of compensation

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[13/] See, e.g., SSW I at 779-80; SSW II at 682-83, 687. To value the line, the Commission uses either the Capitalized Earnings or the Reproduction Cost New Less Depreciation approach – both of which are designed to produce a current value for the property. See SSW I at 786; ATSF III at 5; ATSF II at 305. The Commission has explicitly rejected the sort of "original cost," "historical cost" or "book value" approach advocated by Mr. Crowley. Compare ATSF I at 376, 379; SSW II at 674 with Crowley V.S., NITL-8 at 11.

terms in the event that UP were to acquire control of SP. Contrary to UP's suggestion, this provision is neither unreasonable nor anticompetitive. Reopening and adjustment of compensation terms is a logical consequence of the changed circumstances if both UP and SP were to operate over Applicants' lines between Pueblo and Fort Worth. Today UP has its own line serving this corridor. If UP were to control SP, it could route significant overhead traffic over Applicants' lines. A change in compensation could be required to defray increased operating and capital costs, including costs attributable to congestion on Applicants' lines. Recognizing the significant and predictable volume of coal traffic in the Pueblo-to-Fort Worth corridor and the possibility that a combined UP/SP could tax the capacity of Applicants' lines by shifting significant coal volumes to those lines, Applicants and SP negotiated a charge to apply in the event of UP control of SP that would compensate for the potential impact of such a shift.

C. No Party Has Satisfied the Commission's Requirements for Imposing Conditions

1. Utility Interests

Various utility interests claim that the proposed consolidation would reduce actual or potential competition. All seek to expand – not simply preserve – their competitive options through regulatory "hand-outs." None has satisfied the Commission's strict standards for imposing merger-related conditions.

The predominant complaint of the utility interests is alleged vertical foreclosure: because the merger will combine a single destination carrier with a formerly independent origin carrier, the utility interests claim that the benefits of origin competition will be lost. The Commission has rejected this "neutrality" argument whenever it has been raised by utilities or carriers seeking to serve them. In UP/MP/WP, the Commission rejected BN's request for trackage rights to serve utilities served solely by MP at destination, reasoning that prior to a merger

> A carrier with a destination monopoly will likely push the through rate as high as possible and keep the monopoly profits to itself by playing off competing connecting carriers against one another in setting divisions ....
>
> Therefore, the market power faced by an existing utility is not created, or increased, by consolidation of a monopoly destination carrier with an origin carrier . . . .

UP/MP/WP at 538-39.

In two subsequent cases, Milwaukee II and UP/MKT, the Commission described what the record "must clearly show" in order for a non-merging carrier even to "qualify" for trackage rights to a utility served by a single destination carrier:

> First, it must show that prior to the merger the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier . . . .
>
> Second . . . there must be an additional showing that such a competitive flow-through will be significantly curtailed by the merger.
>
> Thus, a mere showing that a grant of trackage rights to [a non-merging carrier] would enhance competition is not sufficient to warrant our approval.

Milwaukee II at 455 (emphasis added); see also UP/MKT at 476.[14/] A party seeking relief must satisfy both the first and second prongs of this "Milwaukee/MKT" test.

Furthermore, the Commission has rejected the assumption that merged carriers that can provide through service will engage in vertical foreclosure by refusing to submit bids with unaffiliated railroads, recently reiterating "that merged railroads ... have the incentive to encourage full use of the most efficient routing, even when it entails a joint-line alternative to a single system route." Seaboard II at 5; see also Traffic Protective Conditions at 126.

The utility interests seek to make their vertical foreclosure case by alleging that any decline in their rates was due exclusively to origin competition and by asserting that the

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[14/] While a party might "qualify" for a condition under this standard, the condition should not be granted unless it satisfies the Commission's general standards for granting conditions, including the requirement that the trackage rights sought be operationally feasible.

combined entity will no longer bid with unaffiliated origin carriers or pass on future rate declines. Such "evidence" fails to meet the Commission's test for conditions in three critical respects. It does not "clearly show," as the Milwaukee/MKT test requires, (1) that any particular declines in rates were caused by "origin competition"; (2) that the benefits of origin competition were not "captured by the destination monopoly carrier"; or (3) that any pre-merger "competitive flow-through" would be curtailed significantly post-merger.

By contrast, Professor Kalt demonstrates that the general decline in rates from the PRB since the mid-1980s – which occurred without regard to the number of origin carriers – resulted in part from competition from alternative fuels; that a profit-maximizing destination carrier rationally reduces through rates when upstream rates fall and nonetheless captures its full "lump" of profits; and that BN/Santa Fe will in the future, as each does today, jointly bid with other carriers, so long as it is efficient to do so. Kalt R.V.S. at 49-52, 54-62, 66-75. This latter point has been reaffirmed repeatedly throughout this proceeding by witnesses from both BN and Santa Fe. OG&E Comments, Carter Dep. at 38-40; Quilici R.V.S. at 6 & n.2; Shalah R.V.S. at 22 & n.3.

Although vertical arguments predominate, some utilities also complain that horizontal competition will decline after the merger because BN and Santa Fe will no longer compete for origin, destination or bridge traffic. In analyzing such complaints, the Commission requires convincing evidence that such competition had a beneficial impact before the consolidation, and that afterward there would be a lessening of competition. See 49 C.F.R. § 1180.1(c). As is demonstrated below, the utilities fail this test as well.

In deciding whether conditions are warranted in either the vertical or horizontal context, the Commission has considered whether other competitive forces might discipline rail pricing post-merger. In UP/MKT, it stated that "resort to product competition and the threat to

build out[] have been, and will continue to be, an effective competitive force." UP/MKT at 477 (footnote omitted). Moreover, the Commission long has recognized that a utility's "ability to interchange power among utilities and plants" may prevent it from being "captive" to a single railroad at a single generating station. Salt River II at 687. Thus, a utility's fuel and transportation options must be viewed on a "systemwide" basis, not plant by plant in isolation. Id. at 687-88.

Despite these clear Commission precedents, the utility interests have consistently ignored or underplayed the extent to which alternative fuels and alternative sources of power provide a competitive option to rail transportation. Dr. Avera has described the ever-increasing competitive options enjoyed by utilities. While utilities once were run as geographically isolated, stand-alone entities dependent on their own generating capacity, they now operate across transmission grids, routinely buying and selling power among themselves and from a growing number of non-utility generators. And, although utilities once looked to coal as the fuel of choice, natural gas has emerged to challenge the continued use of coal in existing generating plants and frequently to replace it as the primary fuel in new facilities. Today utilities can choose whether to generate or purchase power and whether to use coal or natural gas, and these choices provide competitive leverage that offsets any potential diminution of intramodal rail competition. Avera R.V.S. at 3-4.

No utility interest has satisfied the strict tests required to justify conditions.

HL&P, whose Parish plant near Houston is served by Santa Fe, contends that the proposed consolidation will foreclose origin competition between BN and UP for movements from the PRB because BN/Santa Fe allegedly would be unwilling to interchange with UP. HLP-10 at 16-17. As a remedy for this alleged loss of origin competition, HL&P asks the Commission

to create destination competition by granting trackage rights to UP or SP for the movement of coal trains over Santa Fe's line to Parish. Id. at 19.

In an attempt to meet the Milwaukee/MKT test, HL&P asserts that it obtained the benefits of origin competition between BN and UP beginning in 1990, by soliciting bids for movements of incremental tonnage. However, the evidence

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Despite HL&P's efforts to dismiss these factors, it remains undisputed that they were the principal influences on BN. In light of this evidence, HL&P has not "clearly shown" that it obtained benefits from origin competition, as opposed to other competitive forces – forces that will not be affected by the proposed consolidation.

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Its ability to pursue this construction will be totally unaffected by this transaction.

Moreover, as Dr. Avera notes and HL&P confirms, HL&P is committed to gas-fired generation. Avera R.V.S. at 38-40; Brackeen R.V.S. at 9, 15, 18, 19. It has announced that its new units will be fueled by gas, and its current gas-fired capacity is nearly four times greater than the generating capacity at Parish and substantially underutilized. Avera R.V.S. at 38-40. And in its own words, HL&P is "one of the largest purchasers of cogenerated power in the world." Brackeen R.V.S. at 25.

Commission precedent precludes HL&P from using this proceeding to expand destination competition when its competitive situation post-merger will be identical to its current situation.

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CP&L, which has an SP-served generating facility near Corpus Christi, TX, contends that the proposed merger will eliminate competition between BN and Santa Fe for the bridge portion of coal movements from an SP-served mine at Colowyo, CO to its plant. It asks the Commission to require SP – a non-applicant – to quote proportional rates for the origin and destination segments of the haul. CP&L-7 at 9-10.

CP&L's request should be rejected. First, the Commission's authority to impose conditions on a non-applicant is limited to the extraordinary relief permitted by 49 U.S.C. § 11103, and does not extend to rate prescription. See UP/MP/WP at 574-75. Second, CP&L admits that bridge competition has "had no tempering effect on SP's dominance over coal deliveries," thus conceding the absence of any benefit from competition between BN and Santa Fe prior to the consolidation. CP&L-7 at 3-4. Third, as a result of the Applicants' grant of trackage rights to SP between Pueblo and Fort Worth – precisely the relief sought by CP&L in this proceeding less than three months ago (CP&L-2 at 2) – CP&L will continue to have two rail carriers

capable of handling the bridge segment of the Colowyo movement. Fourth, CP&L has publicly stated its intention to shift a substantial portion of its coal purchases to PRB mines this year, giving it a new competitive option of moving coal via UP-SP. Shalah R.V.S., Exh. 20. Finally, CP&L has considerable negotiating leverage stemming from the fact that it is part of the Central and South West Corporation integrated utility system, which has coal, natural gas and nuclear capabilities with a total capacity more than 20 times that of the CP&L facility in question. Avera R.V.S. at 46-47. Having thus failed to make any showing of pre-merger benefit or post-merger harm, CP&L has no factual or legal basis for its extraordinary request. See UP/MKT at 476.

SPS operates two coal-fired generating stations: Harrington Station in Amarillo, TX, which is served by both BN and Santa Fe, and Tolk Station, southwest of Amarillo, which is served only by Santa Fe. Its concern with a loss of horizontal competition between BN and Santa Fe at its Harrington Station is fully addressed by Applicants' agreement with SP, which enables SP to serve Harrington directly.

With respect to its Tolk Station, SPS contends that the proposed consolidation would foreclose origin competition between BN and UP due to the loss of a neutral connection with Santa Fe. As a remedy, SPS seeks the imposition of trackage rights to permit another carrier to serve Tolk.

SPS has failed to satisfy either part of the Milwaukee/MKT test.

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Moreover, Professor Kalt shows that coal transportation rates from the PRB have steadily declined since 1984 due to several factors, including a general "softening" in demand, and that reduced rates are evident without regard to the number of origin carriers. As Professor Kalt also testifies, the mere fact that rates have been reduced does not mean that the full lump of profits was not, in the Commission's language, "captured by the destination monopoly carrier." Milwaukee II at 455; see also Kalt R.V.S. at 54-62, 67-75. In fact, Professor Kalt cites evidence of Santa Fe's bids to the SPS coal plants confirming that Santa Fe sought to capture its full lump of profit at Tolk. Id. at 85-88.

Beyond this, SPS concedes that fuel alternatives have constrained rail rates at Tolk.

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SPS admits that the rate reductions it has obtained from BN and Santa Fe on these volumes have not been caused by "[i]ntramodal competition" but are the "result of product competition (gas) or end-use competition (wholesale power market conditions)." SPST-10 at 16 n.5. Both types of competition "have been, and will continue to be, an effective competitive force." UP/MKT at 477.

Nor can SPS seriously contend that it will be disadvantaged at Tolk. SP's ability to serve the Harrington Station will give SPS significant bargaining power at the Tolk Station, permitting SPS to shift Harrington tonnage away from BN/Santa Fe if its rates for Tolk are not competitive. Additional leverage will result from the ability to shift some of Tolk's coal generation to natural gas generation and wholesale power purchases. Avera R.V.S. at 43. SPS's substantially underutilized gas-fired capacity exceeds the coal-fired capacity at Tolk by more than 70%,

and SPS is currently selling wholesale power in 15 states, from Mississippi to Washington. Id. at 44-45; see also UP/MKT at 477.

WRI focuses on two small, old plants – its Lawrence and Tecumseh Energy Centers – located near Topeka, KS, and now exclusively served by Santa Fe. According to WRI, the proposed transaction will result in the vertical foreclosure of competition from UP-served mines in the Hanna Basin of Wyoming and SP-served mines in Colorado, because a combined BN/Santa Fe would favor BN-served PRB origins. As a remedy for the alleged loss of origin competition, WRI requests that the Commission create new destination competition by granting SP and/or UP trackage rights to the two plants, at Commission-prescribed rates.

The proposed consolidation will have no impact on origin competition between UP and SP. Redacted Material there is no basis for WRI's assertion that BN/Santa Fe could divert traffic to PRB origins. Further, even though Santa Fe today can offer single-line service to Lawrence and Tecumseh, Redacted Material This confirms Professor Kalt's analysis and the Commission's prior holdings that it is not in the self-interest of vertically integrated destination monopolists to preclude unaffiliated carriers from upstream moves. Kalt R.V.S. at 51; Seaboard I at 5; Traffic Protective Conditions at 126. In short, if the proposed consolidation is approved, WRI will still have the same two competing sources of coal supplies – Colorado and Wyoming – and the same two competing origin carriers – SP and UP.

In addition, WRI will continue to be able to exert competitive leverage in negotiating rates for Lawrence and Tecumseh.

Redacted Material BN/SF-39&40, Counsel Exh. C23. It could shift generation from these facilities to its larger, more modern, coal-fired Jeffrey Energy

Center. And it could use the leverage of substantial excess gas-fired capacity and participation in two major regional power pools. Avera R.V.S. at 32-36; see also UP/MKT at 477. In light of all these options, the Commission should reject WRI's effort to use this proceeding to "enhance competition" by expanding the number of carriers serving its facilities. See Milwaukee II at 455.

WFA contends that the proposed consolidation will foreclose potential origin competition between BN and UP for PRB coal movements to the Holcomb, KS plant of its member utility, Sunflower, which is now served solely by Santa Fe. It requests trackage rights for a WFA affiliate – WFSC – to operate as a Class III carrier over the jointly operated SP-Santa Fe line from Denver to Holcomb. WFA Comments at 2.

Although it asserts that there "presently [is] origin competition" from UP for these PRB movements, WFSCAPP at 5, WFA does not cite a single instance in which UP has competed for the origin portion of this move. Indeed, WFA states that it "would not dispute that the carriers currently capture monopoly rent by virtue of [Santa Fe's] destination monopoly." Id. at 8-9 n.4. By conceding there were no pre-transaction benefits of origin competition, WFA also concedes that it cannot meet the Commission's test for imposing conditions. Further,

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The Commission should not make WFA's post-merger situation better than its situation pre-merger. See Milwaukee II at 455. In any event, WFA's proposed condition would require SP's consent to operations over the jointly-owned Denver-Pueblo line – consent that non-applicant SP has not granted. See SP-39 at 11-12; BNSF-39&40, Counsel Exh. C24.

OG&E operates two coal-fired plants: Sooner Station near Red Rock, OK is served solely by Santa Fe, and Muskogee Station at Fort Gibson, OK is served solely by UP. OG&E

contends that the proposed transaction will eliminate horizontal competition at Sooner between Santa Fe – which serves the plant now – and BN – which OG&E claims could serve the plant if a spur were built. OG&E requests that the Commission grant UP trackage rights to Sooner over Santa Fe's line and prescribe compensation.[15/]

The requested relief is unwarranted and vastly disproportionate to any harm to OG&E that could possibly result from this transaction. To begin with,

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[15/] To Applicants' knowledge, the Commission has never granted a condition in response to a build-out threat. The only instance in which the Commission even hinted a condition might be appropriate involved a shipper that located its plant "expressly to ensure availability of service by both [merging] railroads and control by neither." See SFSP at 803. Here, however, OG&E has not argued that it relied on destination competition in locating its Sooner plant and apparently did not even consider the possibility of a second rail spur until eleven years after the Sooner plant came on line. See OG&E Comments at 8 & Holloway V.S. at 6.

[16/] OG&E also argues that it faces a risk of vertical foreclosure at Sooner. Not only are OG&E's arguments unavailing for all the reasons set forth in the rebuttal statements of Professors Kalt and Schmalensee (e.g., Kalt R.V.S. at 51-53, 68-69; Schmalensee R.V.S. at 28-39),

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As a matter of policy, the Commission should not attempt to fashion relief for OG&E that is based only on a remote possibility of harm thirteen years in the future. This is especially so because OG&E will continue to have significant leverage in negotiating with the consolidated company. The Commission has long understood that a utility's ability "to inter-change power among . . . plants" may prevent it from being "captive" to a destination carrier at a single generating station. Salt River II at 687. OG&E already has the ability to shift coal volumes from its Sooner plant to its larger plant at Muskogee (Shalah R.V.S. at 28-29); Muskogee

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has 50% more capacity than Sooner and has been operating at less than two-thirds of capacity (Avera R.V.S. at 28-29). A shift of even a portion of the Sooner burn to Muskogee would cost BN/Santa Fe millions of dollars in revenue, presenting a powerful constraint on rates. See, e.g., Salt River II at 691; Aluminum Ass'n at 489.

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Factors other than rail competition will provide further constraints. OG&E can exert leverage as a result of its ability to burn natural gas and to purchase power from other utilities. OG&E's gas-fired capacity is three times the capacity of Sooner. The unused capacity at its gas-fired Seminole plant alone could produce all the electricity Sooner generated in 1994. Avera R.V.S. at 29-30. In addition, OG&E plans to increase its gas-fired generation from 18% to 28% by 1998, and has demonstrated its commitment to gas by maintaining a gas production, processing, transportation and marketing subsidiary. Id. at 30. OG&E also will be able to take advantage of the growing opportunities to purchase or sell wholesale power as the electricity grid moves to an open access regulatory regime. Id. at 31-32. OG&E's "flexibility in determining how much power it will produce . . . at which plants" and with which fuels – as well as whether and how much power to buy from or sell to other utilities – further protects it from any exercise of market power by BN/Santa Fe. Salt River II at 689.

In terms of rail competition, the consolidation improves OG&E's situation. OG&E now has joint-line service from UP/Santa Fe with a speculative prospect of competing single-line BN service – if a $15 million spur were constructed. After the consolidation, without any conditions, OG&E will have actual single-line service available from BN/ Santa Fe, as well as the continuing possibility of joint-line service between BN/Santa Fe and UP. OG&E wants this already

improved situation to be enhanced further by adding a second single-line option through trackage rights for UP.

The conditions that OG&E seeks would be excessive even if this transaction did have some adverse competitive effect at Sooner. If OG&E had been seeking to preserve the potential competition that it alleges, then logically it would have asked that another carrier be granted trackage rights on the BN line, with the right to operate over a prospective rail spur that would serve the Sooner Station. For example, overhead trackage rights to enable KCS to operate from Neosho, MO to the vicinity of Perry, OK, or to enable UP to operate to the vicinity of Perry from UP's own line in Tulsa – with the opportunity for a build-out – would replicate or even enhance OG&E's pre-transaction competitive options.

When faced with a choice between approving a consolidation that may have minimal anticompetitive effects, and imposing an ill-fitting condition, the Commission should approve the transaction without the condition. See UP/MP/WP at 564. Even if it believes that OG&E has raised a bona fide competitive issue, the Commission should adhere to that course and approve this transaction without imposing conditions wholly disproportionate to the harm they purport to address. Milwaukee II at 449-50; Kalt R.V.S. at 39-40.

TEP and AEPCO[18/] both contend that the proposed transaction will eliminate potential competition between Santa Fe – which currently serves as origin carrier for their New Mexico coal – and BN – which could provide bridge service between Pueblo, CO and Dalhart, TX for SP-originated and SP-delivered Colorado coal. TEP Comments at 22-23; AEPC-5 at 3. Any legitimate concern these utilities might have is fully satisfied by the SP settlement, which

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[18/] TEP's claims involve its SP-served Irvington station in Tucson, AZ. AEPCO's Apache generating station near Tucson is also served by SP.

gives SP access to this bridge segment. Their remaining requests for prescription of trackage rights compensation or proportional rates should be rejected. See supra pages 11-12.[19/]

APS also burns New Mexico coal, but the entire 114-mile movement to its Cholla Station near Joseph City, AZ is handled by Santa Fe – a fact that will not be changed by this transaction. Its claim that BN/Santa Fe would foreclose potential source competition for PRB coal movements when its current contract expires in 2001 (APS-1 at 5, 10-11) fails the first element of the Milwaukee/MKT test: APS cannot establish that it benefited from pre-merger rail competition **Redacted Material**

[20/]

WCTL, an association primarily of Western utilities, requests either a network of trackage rights over Santa Fe lines in Colorado, Texas and New Mexico or prescription of a rate cap on new BN/Santa Fe coal traffic originating in the San Juan and Raton Basins. Its request is based on the premise that the proposed transaction will reduce the number of carriers serving the Western "market" from four to three, resulting in a "dangerous concentration" of market power. Borts V.S., WCTL-4 at 5-6.

WCTL's market concentration arguments are premised on a gerrymandered definition of the market for Western coal and pure speculation regarding anticipated rate increases.

[19/] AEPCO's claims that it has benefited from competition between BN and Santa Fe are greatly exaggerated: since 1986 BN has made only one unsuccessful bid and participated in a handful of isolated spot moves. Quilici R.V.S. at 9. Moreover, post-merger, AEPCO will continue to have a variety of source and railroad options, including Colorado coal via SP single-line, New Mexico coal via BN/Santa Fe-Deming-SP and PRB coal via BN/Santa Fe-Denver-SP or UP-Denver-SP.

[20/] APS's real complaint is that it has no competitive alternative to its current routing and that its current rates are allegedly too high. APS-1 at 4, 5. APS is already pursuing this complaint, which pre-dates and is entirely unrelated to the proposed transaction, in a pending rate case. See Arizona Public Serv. Co. & PacifiCorp v. Atchison, Topeka and Santa Fe Ry., Docket No. 41185 (complaint filed Jan. 3, 1994). As the Commission has noted, if a utility "has remedies before this Commission and is pursuing them," the imposition of a condition is not warranted. UP/MKT at 477.

Kalt R.V.S. at 26-28. WCTL does not identify any shipper that would be served by its proposed trackage rights and makes no effort to establish their operational feasibility. It fails to recognize that the same rail carriers will continue to compete for transportation from the various coal fields in the same relative competitive positions after the consolidation and ignores the competitive impact of alternative fuels and purchased power. Quilici R.V.S. at 16, 19. Accordingly, the Commission should reject both WCTL's request for trackage rights and its proposed rate cap.

Finally, **Chaco**, which owns coal deposits in the San Juan Basin (CEC-1 at 2), alleges that the proposed transaction will place BN/Santa Fe in control of multiple coal origins and surmises that the combined company will either deny Chaco service or provide service at discriminatory rates. Chaco asks that the Commission impose a rate cap for coal traffic moving on BN/Santa Fe from the San Juan Basin.

The Commission summarily rejected a similar contention in RGI/SP (at 933) and should also do so here. Chaco's coal reserves are undeveloped, its coal customers are not yet identified, and the rail line that will serve the reserves is incomplete. BN/SF-35&36, Overview at 74-75. Its contentions are all fully addressed by its existing contracts and regulatory remedies. Id.; Ice R.V.S. at 37-38. Chaco's requested rate cap would modify the rate provisions of its contracts with Santa Fe – a result that is both inappropriate and unnecessary.

2. Phillips Petroleum

Phillips' refinery in Borger, TX is currently served only by a Panhandle Northern line that connects with Santa Fe. It nonetheless seeks a trackage rights condition, claiming that this transaction will reduce potential horizontal competition at Borger by removing a purported BN build-out possibility and will lead to vertical foreclosure of competition as well.

The 25- to 30-mile build-out from Borger to the BN line was and remains infeasible given its $28-35 million cost and the relatively small amount of traffic available there. Fisher R.V.S. at 6-7, 11; Carter R.V.S. at 4-5. Phillips quibbles with the exact mileage and cost (Watson R.V.S., PPC-10 at 3-4), but does not challenge two critical facts. First, Santa Fe never considered the possibility of such a build-out in its pricing decisions for Borger traffic. Carter R.V.S. at 3-5. Second, Phillips never tried to use the build-out "threat" to gain rate concessions from Santa Fe. BN/SF-39&40, Counsel Exh. C35. Given this undisputed evidence, the build-out possibility could not have had any competitive effect. Kalt R.V.S. at 40-41.[21/]

Phillips' trackage rights request is further undermined by the fact – disclosed in discovery – that Redacted Material of its "rail-competitive" Borger traffic moves by pipeline. BN/SF-35&36, Overview at 77 & n.32; Kalt R.V.S., Exh. 13; BN/SF-39&40, Counsel Exh. C34. Phillips' own data thus refute its assertion that no effective intermodal competition exists for Borger traffic. PPC Comments at 32-34. Moreover, Phillips does not dispute that source competition is a significant constraint on rail rates to Borger. See Carter R.V.S. at 2-3, 9-10.[22/] And even apart from the lack of any factual basis for Phillips' proposed condition, it is plainly disproportionate to the competitive harm alleged. In short, Phillips' request lacks any competitive justification and should be rejected.

[21/] Phillips' attempt to undermine BN's cost estimate on rebuttal does nothing to change this conclusion. Phillips is wrong in asserting, with no support, that the grading is substantially in place along most of the build-out route, and in any event there is no basis for its claim that BN should have used a lower track construction cost estimate. Given the hazardous nature of all of Phillips' Borger traffic, it is absurd to suggest that Phillips' six-year old internal estimate of $400,000 per mile to construct limited use "above-the-grade" rail spurs has any relevance to the major construction the build-out would have required. Phillips also ignores the existence of buildings and other competing uses along the right-of-way for the proposed spur. See Fisher R.V.S. at 10.

[22/] Phillips' vertical foreclosure claims are based on erroneous factual premises (see Carter R.V.S. at 6-9) and suffer from the same failings as those of several utilities (Kalt R.V.S. at 44 n.29). In fact, this transaction will increase competitive options for Borger shippers, not reduce them – as recognized in the statement of support filed by Sid Richardson Carbon Co., a prominent Borger shipper.

3. Other Shippers

Although some 600 shippers have submitted testimony supporting the proposed transaction (see BN/SF-10, 11, 21, 34), a small number of shippers, shipper groups and government agencies seek to burden the consolidation with trackage or haulage rights, rate caps, routing restraints, car access guarantees and a series of other conditions that are designed to improve only the economic position of a particular private interest, while detracting from the public benefits and efficiencies that the consolidation would produce.[23/] The record evidence shows that none of these shippers will lose competitive options as a result of the transaction. Lewis R.V.S. at 40-49; Ice R.V.S. at 35-43; BN/SF-35&36, Overview at 82-92. Instead, the requested conditions are designed to enhance existing competitive options, address operational or other non-merger-related concerns, respond to settlements or maintain competitive relations between shippers and their competitors – none of which offers any valid basis for imposing conditions. See UP/CNW at 64, 71; UP/MKT at 469, 477 & n.68.

4. Other Railroads

Each of the railroad parties seeking protective conditions – IC, KJRY, FMRC/GNBC and SWGR – is obviously prompted by a perceived opportunity to enhance its commercial interests at Applicants' expense. None of them has met the burden of demonstrating that the condi-

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[23/] These shippers and other entities include Montana Wheat and Barley Committee (rate cap condition); Bunge Corporation (trackage rights); Chaparral Steel (trackage access); Public Utilities Commission of California (trackage rights); Arkansas City Businesses (trackage rights); American Maize-Products Company (haulage rights); Kansas Department of Transportation and Kansas Shippers Ass'n (competitive access, line sale, car access and other conditions); "K" Line America, Inc. (trackage rights and operational guarantees); Universal Forest Products (competitive access); Society of the Plastics Industry, Inc. and Cargill, Inc. (mandated interchange of traffic, prohibitions against certain route closures and more); and Chicago Board of Trade (trackage rights). In addition, Gore's Feed and Fertilizer, Farmland Industries, Occidental Chemical Corporation and Owens-Corning sought conditions that have been addressed in the Cen-Tex settlements (see CTSO-3 at 2-3) or the NIT League Stipulation.

tions sought are justified by a threatened reduction in competition or loss of essential services stemming from the proposed transaction. See UP/CNW at 56-57; UP/MKT at 437; BN/Frisco at 951-52.

IC seeks a 15-year condition requiring Commission-prescribed mileage-prorated rates or divisions designed to equalize Applicants' per-mile revenue regardless of the point of interchange for traffic moving between IC points in three southeastern states and BN/Santa Fe points in ten midwestern and northwestern states. Alternatively, IC requests haulage rights for 15 years in those ten states at a similarly fixed rate.

IC seeks sweeping rate equalization conditions notwithstanding undisputed evidence that this transaction will hardly affect IC's traffic and will have no detrimental effects on movements in which IC participates. BN and Santa Fe do not significantly compete today for origin or destination hauls interchanged with IC. Lewis R.V.S. at 2-4. Further, IC will see only a minuscule loss from diversions of about 0.1% in its very healthy operating revenues. Id. at 22.

IC's requests, supported by only one shipper, are based entirely on speculation that the combined BN/Santa Fe will close efficient routes to maximize its long haul, even when doing so would not constitute rational profit-maximizing behavior. Mohan V.S. at 4-9. This is based on IC's claims that BN engages in this practice today. Id. The evidence shows, however, that the market dictates present BN-IC routings, contradicting IC's claims that BN has "promoted" its own long hauls at IC's expense and closed gateways regardless of efficiency considerations. Lewis R.V.S. at 4-14; BN/SF-35&36, Overview at 95-96. IC's allegation that the consolidated railroads will act contrary to their own economic self-interest by routing traffic inefficiently is also unsupported by economic logic. Schmalensee R.V.S. at 40-44.

Granting IC's requested conditions would effectively reverse more than 15 years of Commission precedent rejecting DT&I-type conditions. Rate equalization is not required in merger cases because the free market – not regulatory intervention – is the best guarantor of efficiency. See Seaboard II at 15-16; N&W/DTI at 527; CSX Control at 578-79; Kalt R.V.S. at 105. Here, IC proposes conditions more regressive than DT&I, asking the Commission to prescribe new divisions and rates, a result entirely at odds with sound economic policy and Commission precedent.

This proceeding is not the right forum for addressing IC's unsubstantiated concerns about the cancellation of joint rates and through routes or the commercial closure of gateways. IC has other avenues for addressing the former issue, and has failed to demonstrate the likelihood of the closing of any gateways.

KJRY persists in contending that conditions are needed to improve competition in Keokuk, IA, even though DOJ recognizes that Applicants' agreement with SP solves any competitive problem there. See DOJ-3 at 13 & n.16. Asserting that the consolidation will have anti-competitive consequences for rail services in the markets served by its 33-mile line, KJRY asks for trackage rights to connect with SP and NS lines at West Quincy and Hannibal, MO, which would more than double the scope of its operations, increase the number of railroads with which it now connects and allow it to serve shippers now served only by BN.[24/]

KJRY shippers, however, will continue to experience vigorous competition post-merger because Applicants' settlement with SP opens a new KJRY-TPW-SP routing (replacing a KJRY-TPW-Santa Fe routing) that fully replaces the competition between BN and Santa Fe. Ice

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[24/] KJRY claims that it will not exercise its right to interchange with NS provided that TPW offers satisfactory service. See KJRY-4 at 3. On rebuttal, KJRY abandoned its request for trackage rights to Louisiana, MO for interchange with GWWR. Id.

R.V.S. at 24-25; Hatzenbuhler R.V.S. at 6-10; Kalt R.V.S. at 19-20.[25/] KJRY's concerns about the length of this new routing for westbound traffic are misplaced. Applicants have shown that any added mileage is de minimis relative to this traffic's overall length of haul, and that operational efficiencies will be realized. Hatzenbuhler R.V.S. at 5-6; Ice R.V.S. at 24-25. Its criticism of the Bushnell interchange between TPW and SP is likewise unwarranted. Hatzenbuhler R.V.S. at 9-10; see also SP-39 at 8-10 & Hord V.S. at 1-2; TPW-1 at 14-15 & Wyss V.S. at 5-6; BN/SF-35&36, Overview at 101-02. KJRY's trackage rights request is thus unjustified, as is its request for reciprocal switching at Quincy, IL, a point that warrants no Commission attention because Quincy will see no post-merger reduction in competition. See UP/CNW at 64, 71; UP/MKT at 440, 448, 451-52.

KJRY concedes that its unprecedented request that BN be forced to sell its Keokuk yard – which is worth more than $3 million – is intended only to offset, at Applicants' expense, revenue losses predicted by KJRY. See BN/SF-35&36, Overview at 103. KJRY admits that the sale would in fact produce a windfall of over $1 million a year for KJRY. Id. at 104. Moreover, it is not required to address any impact of the proposed transaction. See UP/MKT at 458; BN/Frisco at 951-52. Finally, KJRY has failed to sustain its half-hearted "essential services" claim, which its own President admitted was not really serious (BN/SF-39&40, Counsel Exh. C44 at 75-76; KJRY-4, Warfield V.S. at 4), because it has not adduced convincing evidence that its viability is at risk or that any shipper will lose transportation options. See Hatzenbuhler R.V.S. at 16-17; Kalt R.V.S. at 16-21; see also UP/CNW at 91, 94; UP/MKT at 474-75; UP/MP/WP at 546.

FMRC/GNBC, two commonly owned short lines, initially requested a condition eliminating from the 1987 BN/GNBC line sale agreement a provision that requires the payment

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[25/] KJRY improperly raises for the first time on rebuttal a claim that Santa Fe controls TPW and that any routing over TPW therefore would be of illusory competitive value. No evidence has been offered that could sustain KJRY's unfounded control claim, which in any event has no merit.

of compensating charges to BN when GNBC interchanges with other railroads traffic BN can transport at origin or destination (see Keck R.V.S. at 4-6) – a requirement the Commission has held does not reduce competition. Montana Rail Link at 20.[26] Applicants have explained that the consolidation would have no impact on this provision, because it will not be interpreted by Applicants to apply to traffic moving to or from current Santa Fe stations not presently served by BN. Keck R.V.S. at 11; BN/SF-39&40, Counsel Exh. C40. GNBC concedes on rebuttal that Applicants thereby "allay[ed] GNBC's concern" (Betke R.V.S., GNBC-5 at 4), and its request that the Commission impose that interpretation as a condition is wholly unjustified.

FMRC/GNBC also seek a condition amending an existing trackage rights agreement between BN and GNBC to allow GNBC to connect with FMRC at Altus, OK, to serve industries at Altus, and to connect with SP at Quanah, TX, where GNBC has only recently exercised its long-held trackage rights to connect with BN. The mere prospect that FMRC/GNBC might experience modest diversion losses of $86,000 annually, the primary justification offered for these additional rights, does not justify a condition. Keck R.V.S. at 13-15; BN/Frisco at 951. The additional justification originally advanced for the connection with SP – to provide a new competitive option for southbound shipments – also fails because the existing competitive options for such shipments, BN and UP (which connects with FMRC through WTJ, a UP short line at Altus), will remain unaffected by the transaction. Keck R.V.S. at 14-15; Kalt R.V.S. at 35; UP/CNW at 97; BN/Frisco at 951.[27]

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[26] Such charges maintain BN's participation in GNBC traffic and thereby allowed BN to sell the line at a lower price. Keck R.V.S. at 4-6. Other BN agreements with short lines are similar, but GNBC is the only BN short line that has not fully supported this transaction. Id. at 6.

[27] On rebuttal, FMRC/GNBC criticize Professor Kalt's conclusions about post-consolidation competitive options for certain wheat shipments, claiming that SP is not a viable competitor for the traffic they handle. Professor Kalt never claimed that SP was a viable competitor for the traffic of these particular short lines, only that it serves certain points also served by UP, which does compete for (continued...)

On rebuttal, GNBC presents an altogether new "justification" for expanded trackage rights, i.e., the claimed loss of competition for Altus traffic. GNBC ignores the fact that UP provides a competitive option at Altus through WTJ. The imposition of a condition that would restructure GNBC's operations, particularly where Altus traffic will retain rail (BN and UP) and truck competition, thus is entirely unwarranted. UP/MKT at 461-63; UP/MP/WP at 564.

SWGR, a Lubbock-area short line, seeks 67 miles of trackage rights to connect with UP. SWGR has failed to show that those rights are in any way justified by this transaction. The settlement with SP maintains the current level of competition by providing for interchange between SP and SWGR with no reciprocal switch fee. Ice R.V.S. at 21-23; Kalt R.V.S. at 12-13. This solves any possible competitive problem.

The other conditions SWGR seeks address non-merger-related commercial arrangements with BN and Santa Fe with respect to divisions, car supply and other matters. Ice R.V.S. at 22-23. On their face, these conditions do not address any legitimate public interest concerns arising from the consolidation of BN and Santa Fe. See UP/CNW at 56-57; UP/MKT at 437; BN/Frisco at 951-52; see also Kalt R.V.S. at 12-13. SWGR's vague suggestion that essential services are at risk is likewise completely unsupported. See UP/MP/WP at 546.

5. Amtrak and SCRRA

Amtrak and **SCRRA** ask the Commission to modify certain existing contractual relationships with BN and Santa Fe and to impose conditions that would significantly alter – for the sole benefit of Amtrak and SCRRA – the bargained-for terms of those contracts. Amtrak asks the Commission to impose an 80% on-time performance requirement for the operation of its

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27/ (...continued)
FMRC/GNBC traffic. Kalt R.V.S. at 33-34; BN/SF-39&40, Counsel Exh. C39. Further, FMRC and GNBC acknowledge that some 40% of the wheat shipped from Western Oklahoma is transported by truck. Kalt R.V.S. at 34.

trains over Applicants' lines and to require Applicants to pay certain potential future line upgrading costs. SCRRA also seeks conditions regarding performance and future investments.

Applicants have projected no detrimental effects on either passenger or commuter services as a result of the consolidation, and neither Amtrak nor SCRRA has produced evidence demonstrating the contrary. See Ice R.V.S. at 30-35; Jackson R.V.S. at 9-12, 15-19; Mitchell R.V.S. at 5-6; Operating Plan, BN/SF-8 at 112. Amtrak and SCRRA are attempting to use this proceeding to have the Commission reform the terms of their private contracts with Applicants – a type of request the Commission has consistently rejected. See Guilford at 413 (Commission declined to "intervene to adjust contractual relationships"); BN/Frisco at 953, 956-57 (same). Both Amtrak and SCRRA already have significant protections and remedies – through statutes and/or existing contractual provisions – to address the specific concerns they have raised with the Commission. See, e.g., Ice R.V.S. at 32; Mitchell R.V.S. at 2-5. Aside from its contracts with Applicants, both of which expire in April 1996, Amtrak has extensive remedies under the Rail Passenger Service Act – including requirements that its trains have preference over freight traffic and that its contracts with rail carriers "shall include a penalty for untimely performance" – which provide adequate alternatives to its requested conditions. See 49 U.S.C. § 24308(a); see also id. §§ 24308(c), 24309. SCRRA already has comprehensive agreements with Santa Fe that address the issues it seeks to raise here. See Ice R.V.S. at 34-35; see also Jackson R.V.S. at 3-12.[28/]

[28/] In any event, SCRRA's operations are purely intrastate and thus not subject to Commission jurisdiction. See 49 U.S.C. § 10501(b); Durango & Silverton Narrow Gauge R.R. at 2; Staten Island Rap. Transp. Op. Auth. at 2; Magner-O'Hara Scenic Ry. at 2. Even if SCRRA's requests manifested a sufficient nexus to interstate transportation, those requests would necessarily interject the Commission into the day-to-day functions (e.g., funding, dispatching and oversight of traffic flows) of an intrastate commuter service, an area clearly beyond the scope of the Commission's jurisdiction.

6. Labor

Several labor organizations, employee representatives and an individual have asked for protective conditions in excess of those required by statute – currently New York Dock.[29/] They seek attrition conditions and alternatively request various enhancements of the New York Dock conditions. They also seek rulings as to the continuing effect, post-consolidation, of certain provisions in collective bargaining agreements and prior protective arrangements. The Commission has denied similar requests in other cases, and should do so here as well. See, e.g., UP/CNW at 95-96.

Attrition conditions impose enormous costs and inefficiencies on the merging railroads. See Northrup R.V.S. at 11-20. Since New York Dock was first adopted, the Commission has never imposed attrition conditions. See CSX Control at 589; see also UP/MP/WP at 620. As the Commission has recently held, "[a]ttrition-type conditions are calculated to preserve unnecessary jobs, and unduly restrict a carrier's ability to establish economical operations." UP/CNW at 96; see also Northrup R.V.S. at 11-20. Their imposition would seriously undermine the public benefits of this transaction and would place BN/Santa Fe at a substantial disadvantage compared to its principal competitor – UP – which has not been subjected to attrition conditions in any of its mergers. See Northrup R.V.S. at 17. Finally, nothing in the unions' evidence even begins to show the "unusual circumstances" required in order to justify imposing more than the statutory conditions. See UP/CNW at 95-96 and cases cited therein; 49 C.F.R. § 1180.1(f); BN/SF-35&36, Overview at 121-22 & n.62.

Enhancements of New York Dock should also be denied. The statutory conditions stand on their own; there is no basis for specially imposing portions of them. Equally important,

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[29/] Comments were filed by ARU, BLE, IAM, TCU, UTU, Patrick W. Simmons, John D. Fitzgerald and William Stinson Purdy.

the Commission should not through that device be drawn into making anticipatory rulings as to the preemptive effect, under 49 U.S.C. § 11341, of its approval on existing agreements and arrangements. The Commission recently affirmed that it

> has never required applicants to identify all anticipated changes that might impact on [collective bargaining agreements] or [Railway Labor Act] rights. Such a requirement could negate many benefits from changes that only become apparent after consummation. Moreover, there is no legal requirement for identification, since section 11341(a) is "self-executing," that is, its exemptive power is effective when necessary to permit the carrying out of a project. Put another way, the exemption does not depend on a Commission finding that it is applicable. We will not limit the use of section 11341(a) by declaring that it is available only in circumstances identified prior to approval. Cf. American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994).

UP/CNW at 101. For those reasons, the unions' requests for rulings as to the "necessity" of specific actions set forth in the Operating Plan, or the preemptive effect of any other actions, should be denied. See id.

In any event, the actions on which the unions seek such rulings are not merely necessary but integral to achieving the transportation benefits of this consolidation. See BN/SF-35&36, Overview at 120. Applicants' ability to efficiently utilize its combined workforces, such as by transferring employees to the locations at which the work will be performed – even though such transfers may be between BN and Santa Fe, across existing seniority districts, beyond existing residence locations or beyond what would otherwise be possible under existing agreements and arrangements – is essential "to realize the full potential of the consolidation for improved service, operating economies and reduced investment." Operating Plan, BN/SF-8 at 43; see also id. at 44, 130; Hund-Snyder V.S., BN/SF-8 at 348; Robinson R.V.S. at 1-6.[30/]

[30/] The need for that flexibility in order to achieve the transportation benefits of this transaction also means that the union requests for the Commission to impose as conditions provisions of certain existing agreements should also be denied.

The miscellaneous conditions sought by rail labor, including the effort to extend labor protection to GWWR employees, should also be denied. As Applicants have demonstrated, Santa Fe does not control GWWR, nor are GWWR's personnel "joint employees" of Santa Fe. See BN/SF-35&36, Overview at 119-21 & n.61; Ice R.V.S. at 26-29. In order to obtain the substantial public benefits that will flow from achieving the efficiencies this transaction offers, the Commission should impose no more than the minimum conditions mandated by statute. See BN/SF-35&36, Overview at 122-23.[31/]

[31/] ARU also contends that certain recent Santa Fe layoffs are attributable to merger-related debt, but in fact they are not. See BN/SF-39&40, Counsel Exh. C43 (McInnes Dep.).

CONCLUSION

The Application should be approved, Applicants' related petitions for exemption in Sub-Nos. 1-12 should be granted, the responsive applications in Sub-Nos. 13-18 should be denied, and the only conditions imposed should be compliance with the NIT League Stipulation and the minimum labor protective conditions required by statute. Applicants' proposed findings and order are provided in Appendix E.

Respectfully submitted,

Jeffrey R. Moreland
Richard E. Weicher
Santa Fe Pacific Corporation
and The Atchison, Topeka and
Santa Fe Railway Company
1700 East Golf Road
Schaumburg, Illinois 60173
(708) 995-6000

Erika Z. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn A. Kusske
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

Attorneys for
Santa Fe Pacific Corporation
and The Atchison, Topeka and
Santa Fe Railway Company

Edmund W. Burke
Douglas J. Babb
Janice G. Barber
Michael E. Roper
Thomas J. Knapp
Burlington Northern Inc. and
Burlington Northern Railroad Company
3800 Continental Plaza
777 Main Street
Ft. Worth, Texas 76102-5384
(817) 333-2367

Betty Jo Christian
Samuel M. Sipe, Jr.
Timothy M. Walsh
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Attorneys for
Burlington Northern Inc. and
Burlington Northern Railroad Company

June 29, 1995

CERTIFICATE OF SERVICE

Copies of Applicants' Brief containing "highly confidential" material pursuant to the Protective Order (BN/SF-47) have been served this 29th day of June, 1995, by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all counsel for parties designated by the Commission as parties of record in Finance Docket No. 32549 for whom Applicants have received an undertaking for "highly confidential" materials executed pursuant to the Protective Order.

Copies of Applicants' Brief as redacted for the public docket (BN/SF-48) have today been served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all other persons designated by the Commission as parties of record in Finance Docket No. 32549.

Copies of Applicants' Brief in both its confidential and public form have today been served by hand delivery on:

Director of Operations
Antitrust Division
Room 3218
Department of Justice
Washington, D.C. 20530

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Betty Jo Christian

Betty Jo Christian

APPENDIX A

PROPOSED BURLINGTON NORTHERN AND SANTA FE RAILWAY

APPENDIX A



C.E. 12944.(

APPENDIX B

PROPOSED BURLINGTON NORTHERN AND SANTA FE RAILWAY AND RIGHTS NAMED IN SECTION 1 OF NIT LEAGUE STIPULATION

BNSF0001195

Public

APPENDIX B

VANCOUVER
SEATTLE
SPOKANE
PORTLAND
GREAT FALLS
BISMARCK
ABERDEEN
BOISE
GILLETTE
ST.PAUL
MILWAUKEE
CHICAGO
SALT LAKE CITY
DES MOINES
OAKLAND
LINCOLN
OMAHA
GALESBURG
FT. MADISON
PEORIA
ST.JOSEPH
KANSAS CITY
BUSHNELL
DENVER
SUPERIOR
TOPEKA
ABILENE
ST. LOUIS
PUEBLO
HUTCHINSON
WICHITA
LAS VEGAS
AVARD
DALHART
STRATFORD
TULSA
LOS ANGELES
LONG BEACH
ALBUQUERQUE
OKLAHOMA CITY
AMARILLO
MEMPHIS
VAUGHN
LITTLE ROCK
SAN DIEGO
PHOENIX
PLAINVIEW
AMORY
BIRMINGHAM
LUBBOCK
FT.WORTH
DALLAS
SWEETWATER
EL PASO
PENSACOLA
SAN ANTONIO
HOUSTON
NEW ORLEANS
EAGLE PASS
CORPUS CHRISTI

LEGEND

BURLINGTON NORTHERN
SANTA FE
SOUTHERN PACIFIC
UNION PACIFIC
RIGHTS NAMED IN SECTION 1 OF N.I.T. LEAGUE STIPULATION
LOCATIONS

C.E. 13062.

Public

APPENDIX C

ABBREVIATIONS, ACRONYMS AND SHORT-FORM CITATIONS TO DECISIONS, PLEADINGS AND VERIFIED STATEMENTS

ABBREVIATIONS, ACRONYMS AND SHORT-FORM CITATIONS TO DECISIONS, PLEADINGS AND VERIFIED STATEMENTS

I. ABBREVIATIONS AND ACRONYMS

AEPCO	Arizona Electric Power Cooperative, Inc.
Amtrak	National Railroad Passenger Corporation
Application	Railroad Control and Merger Application filed October 13, 1994[1/]
Applicants	BNI, BN, SFP and Santa Fe[2/]
APS	Arizona Public Service Company
ARU	Allied Rail Unions
BLE	Brotherhood of Locomotive Engineers
BN	Burlington Northern Railroad Company
BNI	Burlington Northern Inc.
Chaco	Chaco Energy Company
CNW	Chicago and North Western Railway Company (formerly Chicago and North Western Transportation Company)
Conrail	Consolidated Rail Corporation
CP&L	Central Power & Light Company
CPUC	Public Utilities Commission of the State of California
CSX	CSX Transportation, Inc.
CTSO	Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd.
DOJ	United States Department of Justice

[1/] From time to time also referred to as "Primary Application".

[2/] From time to time also referred to as "Primary Applicants"; from time to time the "Applicants" designation also embraces BNSF Corporation and the contemplated subsidiaries thereof to be used in the alternative merger structure described in BN/SF-25.

DOT	United States Department of Transportation
DRGW	Denver and Rio Grande Western Railroad Company
EA	Draft Environmental Assessment served June 6, 1995
FMRC	Farmrail Corporation
FRA	Federal Railroad Administration
GNBC	Grainbelt Corporation
GWWR	Gateway Western Railway Company
Georgetown	Georgetown Railroad Company
HL&P	Houston Lighting and Power Company
IADOT	Iowa Department of Transportation
IAM	International Association of Machinists
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
KCS	Kansas City Southern Railway Company
KJRY	Keokuk Junction Railway
KSW	Kansas Southwestern Railway, L.L.C.
Kyle	Kyle Railroad Company
MPRR	Missouri Pacific Railroad Company
MWBC	Montana Wheat and Barley Committee
NAFTA	North American Free Trade Agreement
NIT League	National Industrial Transportation League
NS	Norfolk Southern Corporation
OG&E	Oklahoma Gas and Electric Company
Phillips	Phillips Petroleum Company

POS	Port of Seattle, Washington
POT	Port of Tacoma, Washington
PRB	Powder River Basin
R.V.S.	Rebuttal Verified Statement
Santa Fe	The Atchison, Topeka and Santa Fe Railway Company
SCRRA	Southern California Regional Rail Authority
SEA	ICC Section of Environmental Analysis
SFP	Santa Fe Pacific Corporation
SP	SPT, DRGW, SSW, and SPCSL
SPCSL	SPCSL Corp.
SPI	Society of the Plastics Industry, Inc.
SPS	Southwestern Public Service Company[3/]
SPT	Southern Pacific Transportation Company
SSW	St. Louis Southwestern Railway Company
Sunflower	Sunflower Electric Power Corporation
S.V.S.	Supplemental Verified Statement
SWGR	Seagraves, Whiteface & Lubbock Railroad Corporation
TCU	Transportation•Communications International Union
TEP	Tucson Electric Power Company
TPW	Toledo, Peoria and Western Railway Corporation
TUCO	TUCO Inc.
UFP	Universal Forest Products Company

[3/] From time to time, the "SPS" designation also embraces TUCO.

UP	Union Pacific Railroad Company[4/]
USDA	United States Department of Agriculture
UTU	United Transportation Union
V.S.	Verified Statement
WCTL	Western Coal Traffic League
WFA	Western Fuels Association, Inc.[5/]
WFSC	Western Fuels Service Corp.
WRI	Western Resources, Inc.
WTJ	Wichita, Tillman & Jackson Railway Company
WUTR	Wichita Union Terminal Railway Company

[4/] From time to time, the "UP" designation also embraces MPRR and/or CNW.

[5/] From time to time, the "WFA" designation also embraces Sunflower and/or WFSC.

II. SHORT-FORM CITATIONS TO DECISIONS

Aluminum Ass'n	Aluminum Ass'n v. Akron, Canton & Youngstown R.R., 367 I.C.C. 475 (1983)
A&M I	Arkansas & Missouri R.R. v. Missouri Pac. R.R., 6 I.C.C.2d 619 (1990)
ATSF I	Atchison, Topeka & Santa Fe Ry. – Operating Agreement – Southern Pac. Co., 331 I.C.C. 367 (1967)
ATSF II	Atchison, Topeka & Santa Fe Ry. – Operating Agreement – Southern Pac. Co., 8 I.C.C.2d 297 (1992)
ATSF III	Atchison, Topeka & Santa Fe Ry. – Operating Agreement – Southern Pac. Co., F.D. No. 22218 (served Mar. 26, 1993)
BN/Frisco	Burlington Northern, Inc. – Control & Merger – St. Louis-San Francisco Ry., 360 I.C.C. 784 (1980), aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981)
Central Vermont	Central Vermont Ry. v. ICC, 711 F.2d 331 (D.C. Cir. 1983)
CSX Control	CSX Corp. – Control – Chessie Sys., Inc. & Seaboard Coast Line Indus., 363 I.C.C. 521 (1980), aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315 (7th Cir. 1983)
Durango & Silverton Narrow Gauge R.R.	Durango & Silverton Narrow Gauge R.R. – Petition for Declaratory Order or Exemption, F.D. No. 31024 (served Aug. 21, 1987, Nov. 28, 1988 & July 24, 1989) (not printed)
Guilford	Guilford Transp. Co. – Control – Delaware & Hudson R.R., 366 I.C.C. 396 (1982), modified sub nom., Lamoille Valley R.R. v. ICC, 711 F.2d 311 (D.C. Cir. 1983)
Magner-O'Hara Scenic Ry.	Magner-O'Hara Scenic Ry. – Operation – In the State of Michigan, F.D. No. 29161 F (served May 12, 1981) (not printed), aff'd sub nom. Magner-O'Hara Scenic Ry. v. ICC, 692 F.2d 441 (6th Cir. 1992)
Milwaukee I	Chicago, Milwaukee, St. Paul & Pac. R.R. – Reorganization – Acquisition by Grand Trunk Corp., 2 I.C.C.2d 161 (1984)

Milwaukee II	Chicago, Milwaukee, St. Paul & Pac. R.R. – Reorganization – Acquisition by Grand Trunk Corp., 2 I.C.C.2d 427 (1985), appeal dismissed sub nom. In re Chicago, Milwaukee, St. Paul & Pac. R.R., 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987)
Montana Rail Link	Montana Rail Link, Inc. – Exemption Acquisition & Operation – Certain Lines of Burlington Northern R.R., F.D. No. 31089 (served May 26, 1988)
National Grain & Feed	National Grain & Feed v. Burlington Northern R.R., 8 I.C.C.2d 421 (1992), aff'd in part and remanded in part sub nom. National Grain Feed Ass'n v. United States, 5 F.3d 306 (8th Cir. 1993)
New York Dock	New York Dock Ry. – Control – Brooklyn Eastern Dist. Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979)
N&W/DTI	Norfolk & Western Ry. – Control – Detroit, Toledo & Ironton R.R., 360 I.C.C. 498 (1979), aff'd in part and remanded in part sub nom. Norfolk & Western Ry. v. United States, 639 F.2d 1096 (4th Cir. 1981)
NS Control	Norfolk Southern Corp. – Control – Norfolk & Western Ry., 366 I.C.C. 171 (1982)
RGI/CMW	Rio Grande Indus. – Purchase & Trackage Rights – Chicago, Missouri & Western Ry. – Line Between St. Louis, MO & Chicago, IL, 5 I.C.C.2d 952 (1982), petition for review dismissed sub nom. RLEA v. ICC, 894 F.2d 915, petition for reh'g denied, 908 F.2d 127 (7th Cir. 1990)
RGI/SP	Rio Grande Indus. et al. – Control – Southern Pac. Transp. Co., 4 I.C.C.2d 834 (1988)
Salt River II	Salt River Project Agricultural Improvement & Power Dist. v. Atchison, Topeka & Santa Fe Ry., 1 I.C.C.2d 684 (1985)
Seaboard I	Seaboard Coast Line R.R. – Invest. of Control, 360 I.C.C. 582 (1977).
Seaboard II	Seaboard Air Line R.R. – Merger – Atlantic Coast Line R.R., F.D. No. 21215 (Sub-No. 5) (served Mar. 27, 1995)
SFSP	Santa Fe Southern Pac. Corp. – Control – Southern Pac. Transp. Co., 2 I.C.C.2d 709 (1986)

Spine Line	Midwestern Rail Properties, Inc. – Purchase (Portion) – Chicago, Rock Island & Pac. R.R. – Lines in Minnesota, Iowa & Missouri, 366 I.C.C. 915 (1983)
SSW I	St. Louis Southwestern Ry. – Trackage Rights Over Missouri Pac. R.R. – Kansas City to St. Louis, 1 I.C.C.2d 776 (1984), aff'd mem., No. 88-1186 (Oct. 30, 1992), cert. denied, 113 S. Ct. 2442 (1993)
SSW II	St. Louis Southwestern Ry. – Trackage Rights Over Missouri Pac. R.R. - Kansas City to St. Louis, 4 I.C.C.2d 668 (1987)
Schwabacher	Schwabacher v. United States, 334 U.S. 182 (1948)
Staten Island Rap. Transp. Op. Auth.	Staten Island Rap. Trans. Op. Auth. – Petition for Declaratory Order, F.D. No. 30879 (served Oct. 6, 1987) (not printed)
Traffic Protective Conditions	Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings, 366 I.C.C. 112 (1982), rev'd on other grounds and remanded, Detroit, Toledo & Ironton R.R. v. United States, 725 F.2d 47 (6th Cir. 1984)
UP/CNW	Union Pac. Corp. et al. – Control – Chicago & North Western Transp. Co. et al., F.D. No. 32133 (served Mar. 7, 1995)
UP/CNW Financial Terms	Union Pac. Corp. et al. – Control – Chicago & North Western Transp. Co. et al., F.D. No. 32133 (served June 22, 1995)
UP/MKT	Union Pac. Corp. et al. – Control – Missouri-Kansas-Texas R.R. et al., 4 I.C.C.2d 409 (1982), petition for review dismissed sub nom. RLEA v. ICC, 883 F.2d 1079 (1989), modified, 929 F.2d 742 (D.C. Cir. 1991)
Union Pac. R.R.	Union Pac. R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989)
UP/MP/WP	Union Pacific Corp. et al. – Control – Missouri Pac. Corp. et al., 366 I.C.C. 459, aff'd in part and remanded in part sub nom. Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985), modified, 4 I.C.C.2d 668 (1987)
Wisconsin Central	Wisconsin Central Transp. Corp. et al. – Continuance in Control – Fox Valley & Western Ltd., 9 I.C.C. 2d 233 (1992)

III. SHORT-FORM CITATIONS TO PLEADINGS AND VERIFIED STATEMENTS

AEPC-5	Comments of Arizona Electric Power Cooperative Inc. (May 10, 1995)
APS-1	Comments of Arizona Public Service Company (May 10, 1995)
ARU-6	Comments of the Allied Rail Unions (May 10, 1995).
BLE-1	Comments of Brotherhood of Locomotive Engineers (March 9, 1995)
BN/SF-7 to 14	Railroad Control and Merger Application (Oct. 13, 1994)
BN/SF-21	Volume IV Part III – Supplement; Statements of Shippers and Others in Support of Application (Nov. 30, 1994)
BN/SF-25	Applicants' Submission of Supplemental Materials (Feb. 17, 1995)
BN/SF-28	Applicants' Submission of Materials Pursuant to 49 C.F.R. § 1180.6(b) (1994 Form 10-Ks of Burlington Northern Inc. and Burlington Northern Railroad Company and 1994 Burlington Northern Inc. Annual Report) (March 21, 1995)
BN/SF-29	Applicants' Submission of Materials Pursuant to 49 C.F.R. § 1180.6(b) (1994 Form 10-Ks of Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company and 1994 Santa Fe Pacific Corporation Annual Report) (April 10, 1995)
BN/SF-32	Applicants' Submission of Settlement Agreements (May 11, 1995)
BN/SF-33	Applicants' Notice of Stipulation With National Industrial Transportation League (May 31, 1995)
BN/SF-35 to 40	Applicants' Response to Comments, Requests for Conditions and Responsive Applications and Rebuttal in Support of Primary Application (June 19, 1995)
BUNG-2	Comments of Bunge Corporation and Request for Conditions (May 10, 1995)
Cargill Comments	Comments of Cargill, Incorporated (May 8, 1995)
CEC-1	Comments of Chaco Energy Company (May 10, 1995)

CP&L-2	Description of Anticipated Responsive Application of Central Power & Light Company (April 10, 1995)
CP&L-7	Comments of Central Power & Light Company (May 10, 1995)
CPUC Comments	Comments of the Public Utilities Commission of the State of California (May 9, 1995)
CTSO-3	Notice by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. (June 20, 1995)
DOJ-2	Comments of the United States Department of Justice & Verified Statement of Dr. Peter A. Woodward (May 10, 1995)
DOJ-3	Response of the United States Department of Justice to Comments and Responsive and Inconsistent Applications (June 9, 1995)
DOT Comments	Preliminary Comments of the United States Department of Transportation (May 10, 1995)
GNBC-3	Comments, Evidence and Supporting Statements of Farmrail Corporation and Grainbelt Corporation (May 8, 1995)
GNBC-4	Responsive Application of Grainbelt Corporation (May 8, 1995)
GNBC-5	Rebuttal of Farmrail Corporation and Grainbelt Corporation (June 19, 1995)
HLP-10	Comments of Houston Lighting & Power Company (May 10, 1995)
IAM Comments	Comments of the International Association of Machinists (May 10, 1995)
IC-12	Request by Illinois Central Railroad Company for Imposition of Condition to Preserve Competitive Routing (May 10, 1995)
JDF-4	John D. Fitzgerald Protest, Comments, Evidence and Appeal From ALJ's Ruling (May 10, 1995)
KDOT Comments	Kansas Department of Transportation Comments on Applicants' Merger Application (May 10, 1995)
KJRY-3	Responsive Application of Keokuk Junction Railway and Opposition to Primary Application (May 10, 1995)
KJRY-4	Rebuttal Evidence and Argument of Keokuk Junction Railway (June 19, 1995)

KSA Comments	Comments of the Kansas Shippers Association (May 8, 1995)
MWBC Comments	Protest & Request for Condition of Montana Wheat and Barley Committee (May 10, 1995)
NITL-8	Comments, Evidentiary Submission and Request for Conditions on Behalf on the National Industrial Transportation League (May 10, 1995)
NRPC-1	Comments and Request for Conditions of National Railroad Passenger Corporation (Amtrak) (May 10, 1995)
OG&E Comments	Requests for Conditions and Comments of Oklahoma Gas & Electric Company (May 10, 1995)
PPC Comments	Request for Conditions and Comments Submitted on Behalf of Phillips Petroleum Company (May 10, 1995)
PPC-10	Rebuttal Verified Statement of Fred E. Watson (June 19, 1995)
SCRRA-4	Southern California Regional Rail Authority's Request for Conditions (May 10, 1995)
SP-39	Comments of Southern Pacific Lines on the Comments and Request for Conditions of Central Power & Light Company; Keokuk Junction Railway; and Western Fuels Association, Inc. (June 9, 1995)
SPI-1	Comments of the Society of the Plastics Industry, Inc. (May 10, 1995)
SPST-9	Comments of TUCO Inc. and Southwestern Public Service Company On Proposed Merger (May 10, 1995)
SPST-10	Comments of TUCO Inc. and Southwestern Public Service Company On Proposed Merger (May 10, 1995)
SWGR-3	Responsive Application of Seagraves, Whiteface & Lubbock Railroad Co. (May 10, 1995)
TCU-4	Transportation●Communications International Union Comments to Proposed Railroad Control and Merger Application (May 10, 1995)
TEP Comments	Request for Conditions and Comments of Tucson Electric Power Company Vol. II (May 10, 1995)

TPW-1	Response of the Toledo, Peoria & Western Railway Corporation In Opposition to Responsive Application of Keokuk Junction Railway (June 9, 1995)
UFP Comments	Comments of Universal Forest Products Company (May 10, 1995)
UP-7	UP's Response to May 10 Filings (June 9, 1995)
USDA Comments	Comments of United States Department of Agriculture (May 10, 1995)
UTU Comments	Comments of United Transportation Union (May 9, 1995)
UTUI-2	Protest and Comment of Patrick W. Simmons (May 10, 1995)
WCTL-4	Comments of the Western Coal Traffic League (May 10, 1995)
WFA Comments	Comments of Western Fuels Association, Inc. (May 10, 1995)
WFSCAPP	Application for Trackage Rights by Western Fuels Service Corp. Over the Line of Track Operated by The Atchison, Topeka and Santa Fe Railway Company Between Denver, Colorado and Holcomb, Kansas (May 10, 1995)
WRI Comments	Requests for Conditions and Comments of Western Resources, Inc. (May 10, 1995)

APPENDIX D

STATEMENTS OF SHIPPERS AND OTHERS IN SUPPORT OF APPLICATION

STATEMENTS OF SHIPPERS AND OTHERS IN SUPPORT OF APPLICATION

SUPPORTER*

A & J Enterprises

ABF Freight System, Inc.

Achilles USA, Inc.

Affiliated Rice Milling, Inc.

Agrex, Incorporated

Agricultural Minerals Company

Agripac, Inc.

AHR Trucking & Storage, Inc.

Ainsworth Lumber Co. Ltd.

Akzo Nobel

Alabama Public Service Commission

Alabama River Pulp Company, Inc.
Alabama Pine Pulp Company
Alabama River Newsprint Company

Alabama, Governor of
(Hon. Fob James, Jr.)

Alabama State Docks Department

Alameda Liquid Bulk Terminals

Alchem, Ltd.

Alderman-Cave Milling & Grain Company

Alliance Shippers Inc.

SUPPORTER

Alliance Steel Service and Brokerage Company

Allied Tube & Conduit

Aluminum Company of America

American Cast Iron Pipe Company

American Continental Freight

American Honda Motor Co., Inc.

American International Marketing Agricultural Commodities

American Isuzu Motors Inc.

American Maize-Products Company

American National Can Company

American Plant Food Corporation

American Stud Co.

Americold Transportation Systems

Amerigas Propane Inc.

Amory, City of

Ampel Corporation

Anderson Trucking Service, Inc

Applied Industrial Materials Corporation

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* Entities filing more than one statement (e.g. separate divisions of the same company) are listed here once.

SUPPORTER

ARCO Coal Company

ARCO Products Company
Division of Atlantic
Richfield Company

Aristech Chemical Corporation

Arizona Central Railroad

Arizona Corporation Commission

Arizona, Governor of
(Hon. Fife Symington)

Arkansas & Missouri Railroad
Company

Arkansas, Governor of
(Hon. Jim Guy Tucker)

Armstrong World Industries, Inc.

Asarco

Asbury Graphite Inc. of California
Asbury Fluxmaster of Utah, Inc.
Divisions of Asbury Graphite
Mills of New Jersey

Ash Grove Cement Company

Ashland Petroleum Company

Atlantic Container Line

Atlas Columbia Warehouse

Atlas Intermodal Trucking Service

Atlas Metal & Iron Corp.

Aurora Cooperative Elevator Company

Bartlett and Company, Grain

Battle Creek Farmers Cooperative

SUPPORTER

Baxter Healthcare Corporation

Bay Area Piggyback, Inc.

Bay Zinc Company, Inc.

Bellingham Cold Storage Company

Bennett Hardwoods, Inc.

Bennett Lumber Products Inc.

Benson-Quinn Company

Bent River Lumber Co.

Bernalillo County Transp. Development
District

Bevill, Hon. Tom
(U.S. House of Representatives)

Birmingham Steel Corporation

Black Hills Bentonite

Blandin Paper Company

Blue Circle Cement

Blue Valley Cooperative

Bluebonnet Milling Company

Boeing

Bohemia Resources Inc.

Borden, Inc.
North America Foods-Pasta

Bottineau Farmers Elevator

Bridgeway Trading Corporation

Briggs, Eddie
(State Representative, Mississippi)

SUPPORTER

Brookhurst Mill

BRT Transfer Terminal, Inc.
Subsidiary of Vulcan Materials Company

Builders Marts of America

Builders Square

Burrows Lumber, Inc.

Bushland Grain Co-Op

C & N Corporation

C. H. Robinson Company

C.R. England & Sons, Inc.

Cajun Electric Power Cooperative, Inc.

Calcot Ltd.

California & Hawaiian
Sugar Company

California Portland Cement Company

California, State of
(Hon. Pete Wilson)

California Steel Industries, Inc.

Camrin Company, Inc.

Canada Colors and Chemicals, Ltd

Cannon Express Corp.

Canton Lumber Company

Carol Wright Sales, Inc.

Carolina Freight Corporation
Carolina Freight Carriers
Corporation
G. I. Trucking Company

SUPPORTER

Red Arrow Freight Lines, Inc.
Cardinal Freight Carriers, Inc.
The Complete Logistics Company
Innovative Logistics Incorporated
CaroTrans International, Inc.

Carrier Lumber

Cascade Mountain Resources, Inc.

Cascade Timber, Inc.

Cascade Warehouse Company

Caterpillar Inc.

Cattle-Lac Liquids, Inc.

Cedar Chemical Corporation
New Mexico Potash Corp.
Eddy Potash, Inc.

Cedar Creek Wholesale, Inc.

The Celotex Corporation

CEMEX

Centennial Gas Liquids, L.P.

Centex American Gypsum Company

Central Freight Lines, Inc.

Central Kansas Railway, L.L.C.

Central Marketing Coop

Central Montana Rail, Inc.

Challenge Dairy Products, Inc.

The Chamber of Commerce of Walker County

Champion International Corporation

Charlie Myers Grain Company

SUPPORTER

Chem-Rail Transport, Inc.

Chemical Lime Company

Chicago Rail Link

Chickasha Cotton Oil Company

Chief Ethanol Fuels, Inc.

Citizens Grain Co., Inc.

City Carton Company, Inc.

Clipper Exxpress Company
Agricultural Express of America

Cloud Ceramics

Coast Grain Company

Coastal Chem, Inc.
Subsidiary of The Coastal Corporation

Coastal Refining & Marketing, Inc.
Subsidiary of The Coastal Corporation

Cobb Lumber Company

Cold Spring Granite Company
U.S.A.

Colorado, State of
(Hon. Roy Romer)

Columbia Falls Aluminum Company

Columbia Metals Company

Columbus and Greenville Railway Company

Cominco Fertilizers (U.S.) Incorporated
Subsidiary of Cominco Fertilizers Ltd.

Commerce Express, Inc.

Commercial Metals Company

SUPPORTER

Commercial Terminal Service, Inc.

Compass Consolidators Inc.

ConAgra, Inc.

Condon Brothers, Inc.

Conex Freight Systems, Inc.

Consolidated Oil &
Transportation Company, Inc.

Consolidated Services, Inc.
DBA CSI Logistics

Consolidated Stores

Continental Lumber Co., Inc.

Convoy Systems Inc.

Con-Way Intermodal, Inc.

Cook, John R.
(State Representative, Texas)

Coors Brewing Company

COSCO North America, Inc.

Crestbrook Forest Industries Ltd.

Crestland Cooperative

Crossroads Cooperative Association

Crystal Forest Industries Ltd.

Cyprus Amax Coal Sales Corporation
Subsidiary of Cyprus Amax Coal Company
Subsidiary of Cyprus Amax Minerals
Company

Dakota Catalyst Products, Inc.

Dakota Gasification Company

SUPPORTER

Dakota Granite

The Dallas Morning News

Dan's Feed and Seed Inc.

Darling International Inc.

Daschle, Hon. Tom
(United States Senate)

Davenport Mammoet Heavy Transport Inc.

Davidson, Charles
(State Senator, Alabama)

DeBruce Grain, Inc.

DeGussa Corporation

Delta Rocky Mountain Petroleum, Inc.

Demler Enterprises

Denver Brick Company

The Denver Post

Desticon Transportation Services Inc.

Diamond Express Incorporated

Diamond Pacific Products Company

Diamond Shamrock, Inc.

Dicalite

Dick Irvin Inc.

Distribution Fulfillment Services

Distribution Specialists Inc.

Dixie Warehouse & Cartage Co.

SUPPORTER

Dixieply
Dixie Plywood Company

Dorchester Farmers Cooperative

Dow Canada

The Dow Chemical Company

Drummond Company Inc.
Drummond Coal Sales, Inc.
Caballo Rojo, Inc. (Mine)
Fort Union Coal Company (Mine)

Dumas Co-op Elevators and
General Mercantile

Dyno Nobel Inc.

E. & J. Gallo Winery

Eades Commodities Company

Eagle Systems

Eagle Veneer, Inc.

Empire Lumber Company

Encinal Terminals

Eurocan Pulp & Paper Co.
Division of West Fraser Mills Ltd.

Evergreen America Corporation
General Agent for Evergreen
Marine Corporation

Express System Intermodal, Inc.

F. H. Stoltze Land & Lumber Co.

Fairrington

Farm Service Cooperative

Farmers Cooperative Assn.

SUPPORTER

Farmers Cooperative Co.
Hinton & Oyens

Farmers Coop Elevator Assn.
(Mitchell, SD)

Farmers Co-Operative Elevator Co.
(Beresford, SD)

Farmers Cooperative Elevator Co.
(Plymouth, NE)

Farmers Co-Op Gin & Elevator

Farmers Milling Company, Inc.

Farmers Plant Food, Inc.

Farrell Lines Incorporated

Ferrell North America

Fibreboard Corporation
Fibreboard Wood Products Company

Fini Enterprises, Inc.

Florida Department of Transportation

Ford Motor Company

Ford, Tim
(State Representative, Mississippi)

Forest City Trading Group, Inc.
American International Forest Products, Inc.
Birmingham Int'l Forest Products, Inc.
Buckeye Pacific Corporation
Cascade Empire Corporation
Plateau Forest Products
Division of Cascade Empire
Olympic Industries, Inc.
Seaboard International Forest Products, Inc.
Tampa International Forest Products, Inc.
VFP DBA Viking Forest Products, Inc.
Richmond International Forest Products, Inc.
Western International Forest Products, Inc.

SUPPORTER

Fox Dispatch

Foxley Cattle Co.

Foxley Grain Co.

Franklin Industrial Minerals

Freight Agency Inc.

The Freight Connection, Inc.

Freight Services Incorporated

Friona Industries, L.P.
Hi-Pro Feeds Division

Frisco Wholesale Lumber, Inc.

Galloway Lumber Company Ltd.

Gangi Bros. Packing Company

Garnett Wood Products

Gateway Western Railway

Gaylord Container Corporation

GC Western Transportation

General Motors Corporation

GENEX

Georgetown Railroad Company

Georgia-Pacific Corporation

Goodwin Transportation, Inc.

Grand River Dam Authority

Great Northern Trans-port Inc.

Great Plains Grain Terminal, Inc.

SUPPORTER

Great Western Malting Co.

Great Western Railway of Colorado, L.L.C.

Great Western Railway Company of Iowa, L.L.C.

Greenbelt Farmers Cooperative

Grimmway Farms
Division of Grimmway Enterprises, Inc.

GS Roofing Products Company, Inc.

GST Corporation

GST Steel Company

GTS Drywall Supply Co.

Guin, City of

Guthrie Corporation

H. O. Wolding Truck Transportation

Hallett Dock Company

Hanley Falls Farmers Elevator

Hardeman Grain and Seed, Inc.

Harrison Gypsum Company, and Allied Custom Gypsum, Inc.

Harvest States Cooperatives

Hawkeye Building Supply

Henningsen Cold Storage Co.

Henry Vogt Machine Company

Herman Norcross Ag Services

Holnam Inc.

SUPPORTER

House Grain Company

Howard Zuker Associates, Inc.

Hubbard Milling Company
Pet Food Division

Hyundai Intermodal, Inc.
Hyundai Merchant Marine Co., Ltd.

IMCO Recycling Inc.

Independent Dispatch, Inc.

Inland Empire Paper Company

Inland Quarries
Division of Americold Corp.

Intalco Aluminum Corporation

Interamerican Transport Systems Inc.

Interdom Partners, Ltd.

Intermodal Transport Company

Intermountain-Orient, Inc.

International Dispatch Company

International Forest Products Limited
Adams Lake Lumber Division

International Reload Systems (1986) Ltd.

Interstate Agricultural Grain Marketing Commission

Interstate Consolidation Service, Inc.

Interstate Power Company

Interwest Commodities Co.

SUPPORTER

Intsel Southwest

Ipsco Inc.

Irsik & Doll Feed Services, Inc.

Italia Di Navigazione

J. B. Hunt Transport Services Inc.
J. B. Hunt Logistics, Inc.
J. B. Hunt Special Commodities, Inc.
J. B. Hunt Flatbed Division
J. B. Hunt Transport of Texas
TMM/Hunt de Mexico

J. E. Meuret Grain Company, Inc.

J&H Forest Products, Inc.
Merritt Brothers Lumber Company, Inc.
Tri-Pro Cedar Products, Inc.
MFP of Oregon

James River Corporation

Jasper Farmers Elevator

Johnson Controls, Inc.

Junell, Robert
(State Representative, Texas)

Kansas Southwestern Railway

Kansas, Governor of
(Hon. Bill Graves)

KC Reload Center, Inc.

Kellogg USA Inc.

Kennecott Energy Company
Subsidiary of Kennecott Corporation

Ketcham Forest Products, Inc.

Keystone Terminals, Inc.

SUPPORTER

Kiamichi Railroad Company, Inc.
Chaparral Railroad Company, Inc.

Kiewit Mining Group Inc.

KLLM Transport Services

Konoike-Pacific
Tacoma Terminals, Inc.

Kruger Inc.

L & R Timber Co., Inc.

L. B. Foster Company

L. G. Everist, Inc.

Lafarge Canada Inc.

Lake States Lumber, Inc

Lake Superior Paper Industries

Landstar Gemini
Landstar System, Inc.
Gemini Transportation Services Inc.

Lange-Stegmann Company

Laser Networking, Inc.

Les Industries Valleypac Inc.

Lewis Grain Company

Liberty Glass Company
Division of American National Can

Liberty Shippers Inc.

Lignum Ltd.

Liquid Carbonic Industries Corporation
United States Industrial Gas Business Unit

Liquid Sugars, Inc.

SUPPORTER

Louisiana-Pacific Corporation

Lowe's Companies, Inc.

Luzenac America

M E Franks, Inc.

M Rinus Boer Company, Inc.

MacMillan Bloedel Inc.

MacMillan-Piper

The Madden Corporation

Maiers Transport & Warehousing, Inc.

Manufacturers Consolidation Service, Inc.

Manufacturers' Junction Railway, L.L.C.

Mark VII Transportation

Martindale Feed Mill Division of Alan Ritchey, Inc.

Marubeni Transport Service Corporation

Matson Intermodal System

Maytag & Admiral Products Subsidiary of Maytag

MC Forest Products Inc.

McAnally Enterprises, Inc.

McDonald North American

McFarland Cascade L. D. McFarland Company

McNeill Grain Company

SUPPORTER

Meeker Cedar Products (1967) Ltd.

Merced Milling Company, Inc.

Mercury Dispatch, Inc.

Meridian Aggregates Company

Meridian Oil Hydrocarbons Inc.
Meridian Oil Company
Natural Gas Liquids Division

Mid America Steel Inc.

Midwest Walnut Company

Mike Brooks, Inc.

Mike Yurosek & Son, L.P.

Minnesota Agri-Growth Council, Inc.

Minnesota Commercial Railway Company

Minnesota Corn Processors

Minnesota Department of Transportation

Minnesota Mining & Manufacturing Company, Inc.

Mississippi Department of Transportation

Mississippi Potash, Inc.

Mississippi, Governor of (Hon. Kirk Fordice)

Mitsubishi Electronics America Inc.

Mobile Beer and Wine Co.

Mobile, City of

Modesto and Empire Traction Co.

Montana Rail Link, Inc.

SUPPORTER

Montana Refining Company

Montana Western Railway Co.

Montgomery Ward and Co., Inc.

Morgan Southern, Inc.

Mountain View Reload Inc.

Murphy Warehouse Company

Muscatine Power and Water

National Gypsum Company

NationsWay Transport Service, Inc.

Nebraska Boiler Company

Nebraska Iowa Kansas Non-Stock
Marketing Cooperative

Nebraska, Governor of
(Hon. E. Benjamin Nelson)

Nestle Distribution Company

New Albany, City of

New Mexico, Governor of
(Hon. Gary E. Johnson)

New Mexico State Corporation Commission

New Mexico State Highway and
Transportation Department

New Mexico Economic
Development Department

Newstech Recycling

NGL Supply Company Ltd.

Nippondenso America, Inc.

SUPPORTER

Nissan North America, Inc.

Norbord Industries Inc.
Sales Agent for Northwood
Pulp & Timber Co. and Normick Perron Inc.

Norpac Food Sales

North Dakota Public Service Commission

North Dakota Grain Growers Association

North Star Forest Materials

Northern States Power Company

Novacor Chemicals Ltd.

NSA
Division of Southwire Company

NuChem

Nucor-Yamato Steel Company

O'Neal Steel, Inc.

Ochoco Lumber Company

The Oeser Company

Ohio Valley Reload, Inc.

Oil-Dri Corporation of America

Oklahoma, Governor of
(Hon. David Walters)

Olive Branch, City of

Omak Wood Products

Onan Shipping Ltd.

O'Sullivan Industries, Inc.

OOCL (USA) Inc.

SUPPORTER

Oregon, Governor of
(Hon. John A. Kitzhaber)

Oregon-Canadian Forest Products Inc.

Otter Tail Valley Railroad

Outboard Marine Corporation

Owens Forest Products

Pacific Coast Coal Company
John Henry Mine

Pacific Coast Container

PacifiCorp

Packwood Lumber Company

Panhandle Northern Railway Company, L.L.C.

Paper Recycling International

The Pas Lumber Company Ltd.

Pasquier Panel Products, Inc.

Paul L. Broussard & Associates

PCS Sales
Subsidiary of Potash Corporation of
Saskatchewan, Inc.

Pennzoil Sulphur Company
Division of Pennzoil Company

Pensacola, City of

Pet Incorporated

Petroleum Distributing Company, Inc.

Phelps Dodge Mining Company
Phelps Dodge Corporation

Phibro Energy USA, Inc.

SUPPORTER

Phillips Recycling Systems, Inc.

Piggyback Consolidators, Inc.

Pioneer Chlor Alkali Company, Inc.

Pipestone Chamber of Commerce

Pitt-Des Moines, Inc.

Pitts' Inc.

Place, Allen D.
(State Representative, Texas)

Plantation Foods, Inc.

Plum Creek Manufacturing, Inc.

Ponderosa Products

Pope & Talbot, Inc.

Port of St. Helens

Port of Portland

Port of Seattle and Port of Tacoma

Port of Shelby

Port Townsend Paper Corporation

Portage Creek Railyard, Inc.

Potlatch Corporation

ProFlame, Inc.
Wholesale Division

ProForm Fitness Products, Inc.

Pronto Pig, Inc.

Pruitt Trucking

Python's Inc.

SUPPORTER

QC Corporation

Quality Intermodal Corporation

Quality Wood Treating Co., Inc.

Quanah Farmers Co-Op

Quantum Chemical Company

Quebecor Printing
Mt. Morris Inc.

R. R. Donnelley and Sons

Radial Warehouse Company

Rail Van, Inc.

Railroad Commission of Texas

Ram Universal, Inc.

Raven Logistics, Inc.

Raven Panel Sales, Inc.
Agent for Proboard Ltd.

Ray's Transfer Co.

Red River Valley & Western Railroad
Company

Regional Disposal Company

Reliance Metalcenter

Reload Mo Inc.

Repap Enterprises Inc.

Republic Gypsum Company

Riley Creek Lumber Company

Riss Intermodal

SUPPORTER

River Cement Company

River City Intermodal Consolidators, Inc.

Riverside Cement Company

Riverside Forest Products Limited

Roadway Services, Inc.

Robert Ice Truck Line, Inc.

Rocky Mountain Export Trading & Marketing
Rohrer & Associates, Inc.

Romar Transportation Systems, Inc.

Ross Enterprises

RSG Forest Products, Inc.

RT Services, Inc.
Division of RT Systems, Inc.
RT Companies

Ryan-Walsh, Inc.

Ryans Express, Inc.

Ryerson
Joseph T. Ryerson/Central
Division of Joseph T. Ryerson & Son, Inc.

Salyer American

San Joaquin Refining Co., Inc.

Santa Fe Southern Railway Inc.

Schoenmann Produce Company
MountainKing Potatoes

Scott Worldwide
Scott Paper Company

Sea-Tac Piggyback, Inc.

SUPPORTER

7RCCI, Inc.

Shaw Industries, Inc.

Shawnee Milling Company

Shintech Inc.

Sibley, David
(State Senator, Texas)

Sid Richardson Carbon Co.

Silver Express Trucking

Simpson Paper Company

Sinclar Enterprises Ltd.

Skyline Steel Corporation

Slocan Forest Products Ltd.
Slocan Group

Snokist Growers

Snyder Industries, Inc.

Solar Gas, Inc.

Solar International Shipping Agency, Inc.
General Agent for Yang Ming Line
Yangming Marine Lines

Solvay Polymers

Sonoco Products Company

South Dakota, State of

South Kansas & Oklahoma Railroad

Southdown, Inc.

SUPPORTER

Southeast Kansas Railroad
Osage Railroad
Blue Mountain Railroad
Palouse River Railroad
Eastern Idaho Railroad

Southern Company Services, Inc.
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company
Southern Electric International
The Southern Investment Group
Southern Electric Railroad Company, Inc.
Southern Nuclear Operating Company, Inc.

Southwest Grain

The Spectrum Network

Sprenger Midwest, Inc.

Springfield Area Chamber of Commerce

The Springfield Group
Springfield Forest Products
Fitzgerald Forest Products

St. Hilaire Co-Op Elevator

Stanislaus Food Products

Star Freight, Inc.

Steelcase, Inc.

Stevens Transport

Stillwater Milling Company

Stimson Trading Company

Stockton Transmodal, Inc.

Stogner, Joseph T.
(State Senator, Mississippi)

SUPPORTER

Stone Container Corporation

Streamline Shippers Association, Inc.

Suburban Propane

Sun Country Transportation, Inc.

Sunbeam Outdoor Products Co.
Subsidiary of Sunbeam-Oster Company

Sutton Co-op Grain Co.

Swanson-Superior Forest Products, Inc.

Sweetman Const. Co.

Synergistic Transportation

SYSCO Corporation

T&K Evans Grain, Inc.

Temple-Inland Forest Products Corporation
Bleached Paperboard Division

Tennessee Department of Economic and
Community Development

Tennessee Department of Transportation

Tennessee Public Service Commission

Tennessee, Governor of
(Hon. Don Sundquist)

Terminal Consolidation Company
DBA Kansas City Piggyback, Inc.

Texaco Refining and Marketing Inc.
Division of Texaco Inc.

Texas Department of Transportation

Texas Industries, Inc.

Texas North Western Railway Company

SUPPORTER

Texas, Governor of
(Hon. George W. Bush)

Thompson Agriplex, Inc.

Tobacco Valley Lumber Co.

Toledo, Peoria & Western Railway
Corporation

Tolko Industries Ltd.

Total Petroleum, Inc.

Tower Group International, Inc.

Town & Country Landscape Supply Co.

Toyota Motor Sales, U.S.A., Inc.

Trade One, Inc.

Trans Load Limited, Inc.

Transbulk Distributing Centers

Transcontinental Refrigerated Lines Inc.

Transnet, Inc.

Trees Unlimited, Inc.

Tri-City Transport, Inc.

Tricom Shipping Agencies, Inc.
General Agents of Neptune Orient Lines,
Ltd.

Tri-Line Farmers Cooperative

Trinidad, City of

Trinidad-Las Animas County
Economic Development Inc.

Tripp Lumber Co. Inc.

SUPPORTER

Truck Lease Services, Inc.

Truitt Bros., Inc.

Trumark Industries, Inc.

Tubafor Mill, Inc.

Tulare Valley Railroad Company

Tulsa, Metropolitan, Chamber of Commerce

Turner, Robert R.
(State Representative, Texas)

Twin City Foods, Inc.

Twin Modal, Incorporated

U.S. Borax Inc.

U.S. Silica Company

Union County Development Association

Union Storage and Transfer Company

United Building Centers

United Co-Op, Inc.

United Parcel Service

United Purchasers Association, Inc.

United Salt Corporation

United States Gypsum Company

United States Shippers, Inc.

United Sugars Corporation

Unocal

SUPPORTER

USS-Posco Industries
Joint Venture of U.S. Steel Corporation &
Pohang Iron & Steel Co. Ltd.

Vaagen Bros. Lumber, Inc.

Valvoline

Van Camp Seafood Company, Inc.

Ventura-Lesbro
Lesbro Co.
Ventura Transfer Company

Vetrotex CertainTeed Corp.

Volkswagen of America, Inc.

Vulcan Materials Company

Wal-Mart Stores, Inc.

Warehouse Specialists, Inc.

Warren Petroleum Company
Division of Chevron U.S.A. Inc.

Washington Central Railroad Company, Inc.

Washington, Governor of
(Hon. Theodore O. Torve)

Washington-Oregon Shippers
Cooperative Association

Wayne Dalton

Wedron Silica Company
Fairmont Minerals

Weirton Steel Corporation

Welch's
Welch Foods

Welco Lumber Company

SUPPORTER

Wendland's Farm Products, Inc.

West Central Cooperative

West Fraser Timber Co. Ltd.

West Fraser Pulp Sales
Division of West Fraser Mills Ltd.

Western Intermodal Services Ltd.

Western Management Services

Western Road Rail Systems USA

Western Rock Products
Division of Hanson Natural
Resources Company

Westran Services Limited

Westside Grain Company

Westway Trading Corporation

Westwood Shipping Lines

Weyerhaeuser Company

Wheels International Freight Systems Inc.

Wichita Area Chamber of Commerce

Wickes Lumber

Wilbur-Ellis Company

Willard Grain & Feed, Inc.

Wm. Bolthouse Farms, Inc.

Wisconsin Power & Light Company
Subsidiary of WPL Holdings, Inc.
Parent Company of South Beloit
Water, Gas and Electric Company

Witco Corporation

SUPPORTER

Worley Enterprises, Inc.

Wyo-Ben, Inc.

Yale Farmers Cooperative

Yellow Freight System, Inc.

APPENDIX E

APPLICANTS' PROPOSED FINDINGS AND ORDER

APPLICANTS' PROPOSED FINDINGS AND ORDER

FINDINGS

In Finance Docket No. 32549, we find: (a) that the common control, consolidation and merger of Burlington Northern Railroad Company ("BN") and The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") through the proposed transaction is within the scope of 49 U.S.C. § 11343 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include such railroads will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges; (e) that interests of employees affected by the proposed transaction will be adequately addressed by the conditions imposed herein; (f) that the transaction will not significantly reduce rail competition in any market; and (g) that the terms of the transaction, including all issuances of securities incident thereto, are just, fair and reasonable. We further find that good cause has been demonstrated to join as applicants BNSF Corporation and its contemplated subsidiaries to be formed in order to effect the alternative merger structure, and to waive the requirements of 49 C.F.R. §§ 1180.4 - 1180.9 with respect to them. We further find that the proposed assumptions of liabilities and securities obligations: (a) are consistent with the proper performance of transportation by the carriers to be controlled by BNI and BNSF Corporation; (b) will not impair the ability of the controlled carriers to provide public transportation; (c) are otherwise consistent with the public interest; and (d) are for objects within the lawful corporate purposes of the applicants involved and reasonably appropriate for those purposes. We further find that any rail employees of the primary applicants affected by the transaction authorized in Finance Docket No. 32549

should be protected by the minimum conditions required by 49 U.S.C. § 11347 (New York Dock, 360 I.C.C. 60, 84-90 (1979)) unless different conditions are provided for in a labor agreement entered into subsequent to this decision and prior to consolidation, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32549 (Sub-No. 1), we find that the acquisition and exercise of control of the Wichita Union Terminal Railway Company by the merged company is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 2), we find that the proposed construction of a 3,134 foot connection between the Santa Fe main line and the Southwestern Public Service Company power plant near Amarillo, Texas is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 3), we find that the proposed construction of a 930 foot connection between the BN and Santa Fe rail lines in Amarillo, Texas is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 4), we find that the proposed construction of a 1,100 foot connection in the southeast quadrant of the intersection between BN and Santa Fe rail lines in Dobbin, Texas is exempt from prior Commission review and approval pursuant

to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 5), we find that the proposed construction of a 2,970 foot connection between BN and Santa Fe rail lines in Dobbin, Texas is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 6), we find that the proposed construction of a 4,165 foot connecting track with a proposed wye track which is 2,390 feet long connecting BN and Santa Fe rail lines near Cameron, Illinois is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 7), we find that the proposed construction of a 7,000 foot connection between BN and Santa Fe rail lines at Enid, Oklahoma is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 8), we find that the proposed construction of a 468 foot connection between the BN and Santa Fe rail lines at Fairmont, Oklahoma is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the

transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 9), we find that the proposed construction of a 1,268 foot connection between BN and Santa Fe rail lines at Perry, Oklahoma is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 10), we find that the proposed construction of a 1,090 foot connection between BN and Santa Fe rail lines in Perry, Oklahoma is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 11), we find that the proposed construction of a 1,255 foot connection between BN and Santa Fe rail lines in Saginaw, Texas is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 12), we find that the proposed construction of a 6,142 foot connection between BN and Santa Fe rail lines in Saginaw, Texas is exempt from prior Commission review and approval pursuant to 49 U.S.C. § 10505(a) because the proposed construction is limited in scope and such review is unnecessary to carry out the

transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 13), we find that the application filed by Houston Lighting and Power Company for trackage rights is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 14), we find that the application filed by Southwestern Public Service Company and Tuco Inc. for trackage rights is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 15), we find that the application filed by Grainbelt Corporation for trackage rights is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 16), we find that the application filed by Western Fuels Service Corporation for trackage rights is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 17), we find that the application filed by Keokuk Junction Railway for trackage rights and terminal access is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 18), we find that the application filed by the Seagraves, Whiteface and Lubbock Railroad Company for trackage rights and other conditions is not consistent with the public interest.

We find that requiring Applicants to comply with the NIT League Stipulation, as provided in ¶ 4 thereof, is consistent with the public interest.

We find that all other conditions requested by any party to this proceeding are not consistent with the public interest.

We find that this action will not significantly affect the quality of the human environment or the conservation of energy resources.

ORDER

It is ordered:

1. In Finance Docket No. 32549, BNSF Corporation and its contemplated subsidiaries to be formed in order to effect the alternative merger structure are joined as applicants, the requirements of 49 C.F.R. §§ 1180.4 - 1180.9 are waived with respect to them, the application is approved (subject to the condition that the applicants comply with the requirements of their May 26, 1995 Stipulation with NIT League) and the assumptions of liabilities and securities obligations incident thereto are approved.

2. If the applicants consummate the approved transaction, they shall confirm in writing to the Commission, within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Commission three copies of the journal entries recording consummation of the transaction.

3. All notices to the Commission as a result of any authorization shall refer to this decision by date and docket number.

4. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Commission.

5. In Finance Docket No. 32549 (Sub-No. 1), the petition for exemption is granted.

6. In Finance Docket No. 32549 (Sub-No. 2), the petition for exemption is granted.

7. In Finance Docket No. 32549 (Sub-No. 3), the petition for exemption is granted.

8. In Finance Docket No. 32549 (Sub-No. 4), the petition for exemption is granted.

9. In Finance Docket No. 32549 (Sub-No. 5), the petition for exemption is granted.

10. In Finance Docket No. 32549 (Sub-No. 6), the petition for exemption is granted.

11. In Finance Docket No. 32549 (Sub-No. 7), the petition for exemption is granted.

12. In Finance Docket No. 32549 (Sub-No. 8), the petition for exemption is granted.

13. In Finance Docket No. 32549 (Sub-No. 9), the petition for exemption is granted.

14. In Finance Docket No. 32549 (Sub-No. 10), the petition for exemption is granted.

15. In Finance Docket No. 32549 (Sub-No. 11), the petition for exemption is granted.

16. In Finance Docket No. 32549 (Sub-No. 12), the petition for exemption is granted.

17. In Finance Docket No. 32549 (Sub-No. 13), the application filed by Houston Lighting and Power Company for trackage rights is denied.

18. In Finance Docket No. 32549 (Sub-No. 14), the application filed by South-western Public Service Company and Tuco Inc. for trackage rights is denied.

19. In Finance Docket No. 32549 (Sub-No. 15), the application filed by Grainbelt Corporation for trackage rights is denied.

20. In Finance Docket No. 32549 (Sub-No. 16), the application filed by Western Fuels Service Corporation for trackage rights is denied.

21. In Finance Docket No. 32549 (Sub-No. 17), the application filed by Keokuk Junction Railway for trackage rights and terminal access is denied.

22. In Finance Docket No. 32549 (Sub-No. 18), the application filed by the Seagraves, Whiteface and Lubbock Railroad Company for trackage rights and other conditions is denied.

23. The authority granted in Finance Docket No. 32549 and Finance Docket No. 32549 (Sub-No. 1) is subject to the minimum labor protective conditions required by 49 U.S.C. § 11347 (New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979)).

24. All other conditions requested by any party to this proceeding are denied.

25. This decision shall be effective thirty days from the date of service.

26. The requirement of an initial decision is waived pursuant to 49 U.S.C § 11345(f). The decisions embraced herein are final decisions within the meaning of 49 U.S.C. § 10327. Any administrative appeal will be entertained only under 49 U.S.C. § 10327(g), which permits appeal only on the basis of material error, new evidence, or substantially changed circumstances.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 9

MAJOR RAIL CONSOLIDATION PROCEDURES, EX PARTE NO. 582 (SUB-NO. 1) NORFOLK SOUTHERN' S COMMENTS (FILED MAY 16, 2000) (Excerpts)

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES
NEW YORK

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711

HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

FOUNDED 1866

WRITER'S DIRECT NUMBER
(202) 736-8252

WRITER'S E-MAIL ADDRESS
vprada@sidley.com

198601

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MANAGEMENT
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May 16, 2000

By Messenger

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

ENTERED
Office of the Secretary
MAY 16 2000
Part of
Public Record

Re: Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*

Dear Mr. Williams:

Enclosed for filing on behalf of Norfolk Southern Corporation and Norfolk Southern Railway Company in the above-referenced docket are a signed original and 25 copies of the "Comments of Norfolk Southern in Response to Advance Notice of Proposed Rulemaking." Also enclosed is a computer disk containing a copy of this filing in WordPerfect 7/8/9 format.

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate copy and returning it with our messenger. Thank you for your attention to this matter.

Very truly yours,

Vincent F. Prada

G. Paul Moates
Vincent F. Prada

Enclosures

cc: All Parties of Record (w/encls.)

198601

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

Office of the Secretary
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MAY 16 2000
Public Record

COMMENTS OF NORFOLK SOUTHERN IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING

J. Gary Lane
Joseph C. Dimino
George A. Aspatore
Maquiling B. Parkerson
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2600

G. Paul Moates
Jeffrey S. Berlin
Vincent F. Prada
Krista L. Edwards
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Attorneys for Norfolk Southern Corporation and Norfolk Southern Railway Company

DATED: May 16, 2000

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

DISCUSSION 6

I. ELEMENTS OF A REVISED MERGER POLICY STATEMENT 8

A. Raising the Bar -- The Analytical Framework for Assessing the Public Interest . . 8

B. Merger-Related Public Interest Benefits 12

C. Safeguarding Rail Service 16

1. Service Improvements as A Primary Factor in the Board's Public Interest Determination 17

2. Requirement of a Service Integration or Merger Implementation Plan 19

3. Remedies for Service-Related Service Disruptions 20

D. Promoting Adequate Infrastructure and Capacity 24

E. Competitive Effects 27

1. Preserving Competition 30

(a) "2-1" Issues 31

(b) "3-to-2" Issues 32

(c) "One-Lump" Doctrine 33

(d) Maintenance of Efficient Gateways 34

2. Attempting to Inject New Rail-to-Rail Competition Through Forced Access 39

(a) General Defects in Forced Access Proposals 41

(1) Increased Costs 42

Page

(2) Reduced Revenues 43

(3) Reduced Investment in Infrastructure and Capacity 45

(b) Defects in Specific Forced Access Proposals 46

(1) Mandatory Switching 46

(2) Open Gateways 48

(3) "Bottleneck" Rate Regulation 49

(4) Abrogation of the "One-Lump" Doctrine 50

F. Downstream Effects 51

G. Maintaining Safe Operations 52

H. Short-Line and Regional Railroad Issues 53

I. Employee Issues 55

J. Cross-Border Issues 62

II. PROCEDURES IN MAJOR RAIL CONSOLIDATION PROCEEDINGS 63

A. Evidentiary Requirements for Major Rail Consolidation Applications 64

B. Procedural Schedule 66

C. Production of Applicants' Traffic Data 67

D. Protective Order 68

CONCLUSION 69

ATTACHMENT A -- Verified Statement of James W. McClellan

E. Competitive Effects

In assessing proposed major rail consolidations under the statutory public interest test, the Board and the ICC have always given careful, if not primary, consideration to the effects of the proposed transaction on competition. The governing statute directs the Board to consider impacts on rail competition, and the Board's existing merger policy statement similarly emphasizes impacts on competition as a key consideration in reviewing rail merger proposals.[21]

The Board and ICC have long recognized, however, that railroad mergers can have both positive and negative impacts on competition. By reducing existing competitive transportation alternatives available to shippers, rail consolidations (particularly parallel transactions) may increase the ability of the merged system to exercise undue market power by charging higher rates and/or providing degraded service. Such effects are correctly treated as transaction-related public harms and, unless remediable through conditions, weigh against approval of a proposed combination. But railroad mergers may also enhance or increase competition -- both between railroads and, importantly, between railroads and other transportation modes -- by enabling the merged system to offer improved service, reduce costs, achieve operating efficiencies and, generally, enhance the long-term financial viability that alone permits the railroad to maintain, replace and expand its infrastructure and provide safe, reliable and efficient service. This principle reflects the need for railroads (like any business) to earn adequate revenues and cover their full

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[20](...continued)
UP/SP merger decision in order to impose open switching within the Houston terminal area. *See* STB Finance Docket No. 32760 (Sub-No. 26), *Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp. [Houston/Gulf Coast Oversight]*, Decision No. 10 (served Dec. 21, 1998) ("*Houston/Gulf Coast Oversight*").

[21] *See* 49 U.S.C. § 11324(b)(5); 49 C.F.R. § 1180.1.

costs of service if the competition they provide is to be sustainable. A significant issue in every railroad merger proceeding has been how to weigh these various effects to promote competitive, sustainable rail transportation.

In assessing the impacts of proposed rail consolidations on competition between rail carriers, the Board and ICC have long adhered to the principle that merger review should be focused on the preservation of pre-existing rail-to-rail competition and the imposition of conditions only to ameliorate merger-related reductions in rail-to-rail competition. The agency has also looked with favor on voluntary proposals by rail merger applicants to expand direct rail-to-rail competition, such as the Shared Assets Areas that were created in the recent Conrail transaction,[22] just as it has welcomed competition-enhancing projects (such as rail line "build-outs" and other rail line construction projects) that are fostered by the market. But the agency has steadfastly resisted efforts to use the merger review process (much less regulation generally) as a vehicle for expanding or injecting, through various types of involuntary "open" access measures, rail-to-rail competition that the marketplace itself has not fostered.[23]

The Board reaffirmed this rule less than two years ago when it rejected the requests of various parties to impose an "open access" merger condition that would have required Union Pacific to open up all solely served shippers within the entire Houston terminal switching district to access by other railroads.

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[22] *See Conrail*, Decision No. 89 (served July 23, 1998), at 133; McClellan VS at 15-16.

[23] *See, e.g., Conrail*, Decision No. 89 (served July 23, 1998), at 70-71 (rejecting requests by various shippers served solely by Conrail prior to the proposed joint CSXT/NS/Conrail transaction to receive post-transaction service from both CSXT and NS).

> Well-established transportation law recognizes that some shippers are served by a single railroad. It also recognizes that such "captive shippers" may pay higher rates under "demand-based differential pricing" legal principles that govern the railroad industry, to reflect the economies of the railroad industry and the fact that some rail traffic is more captive and some more competitive. Because the railroad industry is not an open access industry, and because some shippers may pay more than others under the law that we administer, merger proceedings are not used as vehicles to equalize the competitive positions of shippers generally. The Board does adopt competitive conditions to ensure that a merger does not put shippers into a worse position than they were in before . . . . But a well-established principle of rail merger law is that the conditions the Board imposes in a merger proceeding are designed to ameliorate specific merger-related harm, not to simply add more competitors.

Houston/Gulf Coast Oversight, *supra*, at 2-3.

The Board also emphasized in that case that, because the requested "open access" condition (dubbed the "Consensus Plan" by its proponents) was unrelated to any actual merger-related harm, there was no principled basis for limiting the relief to the Houston terminal area. "The Consensus Plan is premised on the idea that shippers should, wherever possible, be served by more than one railroad . . . . If we adopt the Consensus Plan, then there is no basis on which we could refuse to provide for open access throughout the rail system." *Id.* at 2. The Board properly recognized that such a regime of open access could prevent the railroads from using differential pricing to recover their large fixed and common costs and undermine their ability to invest in needed plant and facilities. For this reason, the Board concluded that the requested "open access regulatory scheme" is "not provided for in the statute the Board currently administers, and thus, in our view, is a matter more appropriately debated in Congress." *Id.*

Notwithstanding these findings, the Board has now declared in its ANPR that "we believe that the time has come to consider whether we should alter our rail merger policy to place a greater emphasis on enhancing, rather than simply preserving, competition." ANPR at 7. The

Board outlined various proposals for such forced access conditions, and invited comment on these or any other proposals to use merger conditions to "promote and enhance competition in the rail industry." *Id.*

Norfolk Southern respectfully suggests that the radical change in rail merger policy raised in the ANPR would be unlawful for the reasons the Board itself articulated in *Houston/Gulf Coast Oversight*, unnecessary in light of competitive market forces and fundamentally bad public policy in any event. The Board's competitive-effects analysis of proposed major rail consolidations should continue to be focused on preserving rail-to-rail competition, not using regulation in a misguided attempt to manufacture an artificial, and ultimately unsustainable, form of rail-to-rail competition. Norfolk Southern recommends a number of changes in the way the Board assesses and remedies genuine merger-related competitive harms, but the reregulatory forced access proposals outlined in the ANPR should be rejected.

1. Preserving Rail-to-Rail Competition

In previous rail consolidation proceedings, the analysis of rail-to-rail competitive effects and of appropriate conditions to ameliorate merger-related competitive harms has tended to focus on several recurring issues, including (a) "two-to-one" issues, (b) "three-to-two" issues, (c) the "one-lump" doctrine, and (d) other vertical effects issues such as the maintenance of efficient gateways. The Board's ANPR invited comment on how some of these issues should be treated in revised merger rules. ANPR at 7-8.

(a) "2-to-1" Issues

Although all of the major rail mergers approved by the Board and ICC over the past 20 years have been largely end-to-end combinations, with little horizontal overlap in the merging carriers' lines, most transactions have involved some number of rail shippers that were directly served before the merger by both of the combining carriers and that, as a result of the proposed combination, would experience a reduction in the number of direct rail options from two to one. The Board and ICC have consistently concluded that such "2-to-1" shippers would suffer merger-related competitive harm and that such harm warranted remedial relief in the form of a merger condition granting an independent rail carrier the right to serve the affected shippers by means of trackage rights, reciprocal switching or other measure. This practice has become so common that most recent merger applicants have proactively identified such "2-to-1" shippers in their application and have proposed or even voluntarily negotiated a competitive remedy at or sometime after the filing of their railroad consolidation application.

In light of this consistent practice, Norfolk Southern suggests that the Board codify its recent practice by providing in its revised merger policy statement that, absent unusual circumstances, a major rail consolidation proposal should include voluntary arrangements (subject to Board prescription of reasonable terms in the event of disagreement) for trackage rights, switching or other appropriate access by an independent carrier to replicate two-carrier rail service for those individual shipper facilities whose direct rail alternatives would be reduced from two to one as a result of the proposed transaction. The Board's merger policy should require such a remedy whenever it is practicable, and should in any event impose a burden on the

applicant carriers to identify affected "2-to-1" shippers and attempt to come up with an appropriate plan to remedy merger-related competitive h to these shippers.

(b) "3-to-2" Issues

In recent major rail consolidation proceedings, the Board and ICC have generally concluded that a merger-related reduction from three to two in the number of independent railroads serving a particular shipper facility does not result in a significant diminution in competition sufficient to warrant the imposition of conditions.[24] The agency has concluded that the remaining two-carrier rail competition was sufficient to prevent increased exercise of market power in the setting of rates and services and, in the case of the UP/SP merger, that the combination of two of the three serving railroads would actually enhance competition by strengthening the combining railroads' systems and long-term financial viability.

The Board's ANPR invites comment on how the proposed new merger policy should address such "3-to-2" shippers. ANPR at 9. Norfolk Southern believes that this issue should best be left to case-by-case examination based on the individual circumstances of each case. Few rail markets can support viable three-carrier rail service, while experience (including NS's experience in competing head-to-head with CSXT in numerous markets) teaches that two-carrier rail service will normally preserve effective, robust competition. In the relatively few situations where three-carrier service remains, the issue whether a merger-related reduction from three to two direct serving rail carriers causes harm to competition is likely to turn on the character of the particular services involved and the condition of the serving railroads. These

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[24] *See* STB Finance Docket No. 32760, *Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp.* ("*UP/SP*"), Decision No. 44 (served Aug. 12, 1996), at 119-21.

issues are best left for case-by-case adjudication, especially because the specific infrastructure available will greatly determine whether a reduction in the number of carriers serving the market enhances or reduces rail service options.

(c) "One-Lump" Doctrine

The Board has invited comment on whether it should consider proposals to revise "the application of the 'one-lump' theory to rail mergers" by requiring that trackage rights be granted to another carrier when a railroad that exclusively serves a shipper merges with one of several connecting carriers. The argument is that, although the Board and reviewing courts have accepted the validity of expert economic evidence demonstrating that the exclusively served shipper in such situations does not suffer a reduction in competition for its traffic,[25] the Board should nonetheless impose a condition mandating trackage rights for another carrier to access the exclusively served shipper's facilities in order to promote or enhance competition.

In short, proponents of this "remedy" simply seek to use the fact of an end-to-end consolidation transaction as a convenient opportunity to force two-carrier rail access to exclusively served shippers whose situations would not change at all as a result of the transaction. In addition to consistently rejecting the economic theory on which these claims are based, the Board and ICC have found that the relief that shippers have sought in order to address this phantom competitive harm -- a grant of trackage rights over the lines of the carrier that provided exclusive

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[25] *See, e.g., Conrail*, Decision No. 89 (served July 23, 1998), at 67-70, 78; ICC Finance Docket No. 32549, *Burlington Northern Inc. -- Control & Merger -- Santa Fe Pacific Corp.* ("*BN/Santa Fe*"), Decision No. 38 (served Aug. 23, 1995), *aff'd sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997).

rail service before the proposed consolidation -- would be enormously overbroad and would go far beyond simply restoring pre-merger rail competitive options.

The "one-lump" doctrine is not an immutable principle foreclosing all opportunity for relief to exclusively served shippers which claim that the merger of their serving railroad with a connecting carrier would cause competitive harm. The doctrine erects only a presumption, which is rebuttable in individual cases, that such end-to-end mergers do not harm competition. Shippers have the opportunity to rebut the theory and its applicability in individual cases. That rule should be continued. But there is no proper basis on which to declare the theory essentially "null and void" simply by ignoring what it demonstrates.

(d) Maintenance of Efficient Gateways

During the post-Staggers period, the ICC and Board have consistently found that vertical, or end-to-end, railroad consolidations generally have no adverse effects on competition but, to the contrary, strengthen competition by expanding single-line service opportunities and allowing railroads to provide better, more efficient service in competition with other rail carriers and other modes. Consistent with the agency's treatment of vertical effects claims subject to the "one-lump" doctrine, the Board and ICC have uniformly rejected arguments that an end-to-end rail merger would reduce competition through the foreclosure of independent connecting railroads. Specifically, the agency has rejected claims that railroads would have an incentive to close efficient interchanges with other carriers and favor the extended single-line routes created by an end-to-end merger over more efficient joint-line routes.[26]

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[26] *See, e.g., Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982), *aff'd sub nom. Detroit, Toledo & Ironton Railroad Co.*

(continued...)

Despite these consistent rulings, various shipper interests continue to raise concerns about the potential effects of an end-to-end railroad merger in closing efficient gateways and requiring shippers to utilize a merged system's long-haul single-line routes in preference to other efficient interline routes. These concerns have assumed increased significance as consolidations have reduced the number of major railroad systems and as the railroad industry faces the imminent prospect of mergers creating the first transcontinental rail systems. For example, if one of the western carriers were to propose a combination with Norfolk Southern, shippers that are today exclusively served at origin by that western carrier and that could utilize either NS or CSXT to complete their freight shipments in the eastern U.S. (through an interchange at a gateway such as Chicago) might be concerned that, as a result of this hypothetical merger, they would be foreclosed from using CSXT on an interline basis with the merging western carrier and would be forced instead to use single-line NS service. This concern is sometimes expressed in terms of an end-to-end merger extending a "bottleneck" line segment.

Norfolk Southern believes that, although railroads have no incentives to close efficient gateways and interchanges, concerns about the merger-related closure of major gateways has assumed such significance in the light of the current structure of the railroad industry that it would be appropriate for the Board to include in its revised merger policy a provision to preserve,

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[26](...continued)
v. ICC, 725 F.2d 47 (6th Cir. 1984); ICC Finance Docket No. 21215 (Sub-No. 5), *Seaboard Air Line Railroad Co. -- Merger -- Atlantic Coast Line Railroad Co. -- Petition to Remove Traffic Protective Conditions* (March 27, 1995); *Guilford Transportation Industries, Inc. -- Control -- Boston & Maine Corp.*, 5 I.C.C.2d 202, 218 (1988); ICC Docket No. 39176 (Sub-No. 1), *Pittsburgh & Lake Erie Railroad Co. v. Consolidated Rail Corp.* (decided April 3, 1985), *aff'd sub nom. Pittsburgh & Lake Erie Railroad Co. v. ICC*, 796 F.2d 1534 (D.C. Cir. 1986); *CSX Corp. -- Control -- American Commercial Lines, Inc.*, 2 I.C.C.2d 490, 528 (1984), *aff'd sub nom. Crounse Corp. v. ICC*, 781 F.2d 1176 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986).

for solely served interline rail shippers that today have rail alternatives for a portion of their freight movements, the post-merger availability of efficient pre-merger gateways that have actually handled the interchange of significant amounts of freight traffic. This measure would allay concerns about the potential adverse end-to-end effects of a possible future transcontinental rail merger and claims that such transactions may serve to extend "bottlenecks" to the competitive disadvantage of "captive" rail shippers.

The serious challenge in fashioning such a new rule to safeguard major efficient gateways, however, is to avoid unwittingly resurrecting the discredited *DT&I* traffic protective conditions of the past. Under those conditions, the ICC required as a condition to approval of railroad mergers that the combining railroads maintain, and keep commercially open, *all* pre-merger interchanges with other railroads. The concern about having too many interchange points is even more valid today. Then, the issue was too much capacity and too many expensive, low-volume points. Today's reality is that the infrastructure to support low-volume interchange points does not exist. And the increased switching which results from having more interchange points can cause deterioration in service for many other customers that use the rail network of the affected carriers. As the ICC long ago recognized, these gateway protection conditions had the effect of freezing inefficient gateways, insulating connecting railroads from competition from new, expanded single-line service offerings of the merged railroads and destroying the ability of the railroads to consolidate traffic on higher-density longer-haul routes and thereby to improve service and reduce costs.[27] The gateway protection conditions also had the anti-competitive effect

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[27] *See, e.g., Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982); *Seaboard Air Line*, *supra*.

of freezing railroad rates over competing routes because the conditions locked railroads into maintaining all existing joint-line routes and adoption of market-based rates at different levels for different routes could be challenged as a "commercial closing" of the frozen interchanges.

For this reason, any measure to protect efficient gateways must take care to insure that it does not result in a requirement that every pre-merger interchange point, regardless of the level of its actual use and regardless of its relative efficiency, be kept open and frozen for all time. That would simply handcuff the railroads in modifying their traffic routing practices to take account of market conditions and, perversely, would retard rate and service competition between alternative single-line and joint-line routes. Rather, the new policy NS is suggesting should be focused on requiring the maintenance of truly important, major, operationally feasible and efficient gateways for those exclusively served shippers who could credibly claim that an end-to-end merger would extend a "bottleneck" and reduce the competitive rail alternatives they enjoyed pre-merger. As an initial proposal, Norfolk Southern suggests that, for possible future east-west U.S. transcontinental consolidations, such a gateway protection measure could appropriately apply to the major Midwestern and Mississippi River gateways of Chicago, Kansas City, St. Louis, Memphis and New Orleans. For other particular transactions, it could be extended to comparable major gateways that handle significant traffic volumes. Because this measure would be focused on *preserving* the competitive routing options that existed prior to a proposed major rail consolidation, moreover, the protection should be afforded only to individual shippers that are exclusively served at origin or destination by one of the combining railroads, that prior to the proposed merger could complete their freight shipment only through an interchange at a gateway served by another one of the railroads and at least one other independent railroad, and that

actually used the covered gateway for a significant volume of freight traffic prior to the proposed railroad consolidation.[28]

Norfolk Southern suggests that this proposed gateway protection policy be implemented by requiring major rail consolidation applicants to establish, upon reasonable request by eligible solely served rail shippers, a common carrier or contract rate to apply to the movement of the shipper's traffic over the merged carriers' lines to/from a covered interchange point for use in conjunction with another railroad not involved in the proposed consolidation. The shipper would then be free to interchange its traffic with another connecting rail carrier at that connection and to use interline transportation service to complete the shipment. If the affected shipper were dissatisfied with the rate offered by the merged system, the shipper could bring a complaint seeking prescription of a reasonable rate to apply to the movement. This mechanism would have the effect of preserving the competitive routing options that existed pre-merger, and preventing the merger from extending the scope of the "bottleneck." To illustrate using the hypothetical example discussed previously, if a western rail carrier and Norfolk Southern merged, and a particular shipper that is solely served by the western carrier prior to the merger had used interline service via the western carrier and CSXT over Chicago for a significant volume of freight traffic, the gateway preservation provision would require the merged NS system to offer the shipper a common carrier or contract rate to apply over the former western carrier's lines to or via Chicago for use in conjunction with CSXT to complete the shipment. In this way, the shipper's pre-merger alternative of using either NS or CSXT service would be preserved, and it would do so

[28] Because the purpose of this measure would be to prevent reductions in competition resulting from a merger, it would be inappropriate to extend it to exempt traffic (such as intermodal and automotive traffic) that, by definition, is subject to effective competition.

without requiring (as the old *DT&I* conditions did) railroads to freeze or equalize their rates over competing routes or embroiling the parties (or the Board) in disputes over the establishment of joint rates and divisions.

Norfolk Southern believes that a provision, along these lines, to preserve major, efficient gateways would go a long way toward meeting the concerns of shipper interests that another major rail consolidation -- and especially a transaction that creates the first U.S. transcontinental rail system -- would reduce competitive routing options for shippers. At the same time, by confining the measure to the most important, heavily used (and unquestionably efficient) interchanges, the proposal strikes an appropriate balance between maintaining competitive routing options and the opportunity for efficient long-hauls for all involved carriers and avoiding the recreation of the disastrous mandated open-routing policies of the past.

2. Attempting to Inject New Rail-to-Rail Competition Through Forced Access

As noted above, the Board has announced that, contrary to its longstanding and consistent interpretation of rail merger standards, it may wish to consider in this rulemaking the imposition of various forced or open access, "bottleneck" rate or other reregulatory requirements designed to inject new rail-to-rail competition as a condition to approval of future major rail consolidation transactions. ANPR at 7-8. Such attempts to "remedy" perceived or claimed competitive imbalances that are not generated by a particular transaction would be unsound, both because they would work to discourage what might otherwise be meritorious transactions and because they are inherently suspect in terms of their legal and economic rationale. Forcing additional competition for the sake of competition, without appropriate consideration of the

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 10

MAJOR RAIL CONSOLIDATION PROCEDURES, EX PARTE NO. 582 (SUB-NO. 1) UNION PACIFIC' S COMMENTS (FILED MAY 16, 2000)

REDACTED PUBLIC RECORD VERSION

192640



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

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Public Record

UNION PACIFIC'S
COMMENTS AND INITIAL PROPOSALS

ENTERED
Office of the Secretary
MAY 16 2000
Part of
Public Record

James V. Dolan
Lawrence E. Wzorek
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5357

J. Michael Hemmer
David L. Meyer
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

Carl W. von Bernuth
Union Pacific Corporation
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-6304

Attorneys for Union Pacific Corporation
and Union Pacific Railroad Company

May 16, 2000

UP-1

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S
COMMENTS AND INITIAL PROPOSALS

Union Pacific Corporation and Union Pacific Railroad Company (collectively "UP") appreciate the opportunity to offer comments in response to the Board's Advance Notice of Proposed Rulemaking served March 31, 2000 (the "ANPR").

As the comments in Public Views on Major Rail Consolidations establish, the Board's policies and rules regarding Class I rail mergers[1] must be revised. The Board's current rules are based on the outdated assumption that the railroad industry suffers from excess capacity -- a condition that no longer exists.[2] The shipping community's broad hostility toward additional mergers under current policies and regulations underscores the need for this revision.

UP questions whether additional Class I consolidations will ever be in the public interest, even though mergers have provided important benefits in the past.

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[1] We use the term "merger" to refer to mergers and other forms of consolidation and changes of control involving Class I rail carriers that are treated as "major transactions" under the Board's merger rules.

[2] As UP urged in its Comments in Ex Parte No. 582, the Board should strike from its rules the outdated first two sentences of 49 U.S.C. § 1180.1(a).

They helped eliminate the excess capacity that pre-Staggers Act regulation had forced the railroads to maintain. They combined traffic flows onto fewer routes and via fewer interchanges, allowing railroads to take advantage of economies of density. They helped the railroads achieve major productivity gains, many of which were passed along to shippers in the form of lower rates. And they provided homes for financially weak railroads that had little or no prospect of remaining viable on their own, including the Western Pacific, M-K-T, and Southern Pacific railroads.

Today the Board and stakeholders in rail transportation confront new realities that require a paradigm shift in the way we think about these mergers. The process of eliminating large-scale excess capacity in the rail industry is mostly complete. With far fewer railroads interacting, the opportunities for cooperation to achieve benefits traditionally ascribed to mergers are brighter than ever. For example, studies suggest that alliances are both increasing popular in American business and provide better returns on investment than mergers. Technology is about to alter this 165-year-old industry. More than one railroad has said publicly that e-commerce will "revolutionize" the railroad industry. Most important, additional Class I mergers would likely result in only two major railroads north of the Mexican border.

UP encourages the Board to develop policies and rules that are appropriate for considering merger proposals in this new environment. The Board should evaluate the impact of and need for any additional Class I mergers on the assumption that any such merger is part of an "end game" resulting in transcontinental mergers and only two major railroads in North America. It should condition any mergers it approves in a manner that

protects the public interest and shipper interests under that industry structure. Only by adopting this perspective can the Board develop realistic and consistent public policies.

UP will propose and discuss several potential rule changes designed to respond to some of the concerns its customers voiced in the Ex Parte No. 582 proceeding and to adapt the Board's rules to the prospect of transcontinental and trans-border mergers. Our proposals are detailed but should be considered as only initial concepts for further discussion. We expect to revise or reconsider them in response to comments from other parties.

UP discusses its proposals in the order of the topics listed in the ANPR, not in order of their importance.

I. Downstream Effects

When Burlington Northern Santa Fe and Canadian National notified the Board of their consolidation plans, the Board quickly recognized that their transaction would lead to "downstream" effects, including responsive merger applications likely to yield only two remaining North American rail systems. It promptly suspended the "one case at a time" rule set forth in 49 C.F.R. § 1180.1(g). Under the Board's ruling, parties in a BNSF/CN proceeding would have been expected to consider downstream effects.

UP believes the Board acted wisely, and it encourages the Board to impose the same requirements on all proposed Class I merger proposals. Any combination among the six largest remaining railroads in North America would be part of and would drive what many parties at the Board's public hearing described as the "end game" in rail consolidations. Before approving any additional Class I merger, the Board should consider whether the "end game" is in the public interest. This is the overriding public policy question before the Board.

UP offers two specific proposals. First, although we believe that there are still too many possible permutations to expect parties to address every imaginable combination of Class I carriers and that such an exercise would involve too much speculation, it is not too early to require parties to address in future applications whether a two-railroad North American rail system would be in the public interest. For example, applicants and other parties should address whether a single railroad serving Florida, the Northeast, Western Canada, and California would be manageable and responsive to its shippers. Second, to provide a more realistic analysis of proposals that reach the Board in the same time frame, the Board should announce now that it may consider such proposals in a single, combined proceeding.

UP recommends that the Board replace 49 C.F.R. 1180.1(g) with the following provisions:

> (g) *Downstream effects.*
>
> (1) Applicants proposing a major transaction must evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads. Applicants need not identify specific combinations, but should evaluate the implications of an industry structure consisting of two major railroads.
>
> (2) The Board may, on its own motion or on request of an interested party, consolidate for hearing and decision any application proposing a major transaction filed before the date set for the filing of inconsistent applications in another pending proceeding arising out of another application proposing a major transaction.

II. Maintaining Safe Operations

UP is satisfied that current safety requirements in connection with Class I mergers adequately protect the public interest. The Board's safety compliance programs,

developed in conjunction with the Federal Railroad Administration, appear to be effective in ensuring that mergers are implemented safely. The Board should take equal care to ensure that any conditions applied to future Class I mergers can be implemented with similar attention to safety.

III. Safeguarding Rail Service

Service failures following recent major mergers are a primary cause of shipper disaffection with railroads and rail mergers. The Ex Parte No. 582 record rings with shipper complaints about promises unfulfilled and service that declined after mergers. We expect all railroads to propose more stringent measures to prevent future mergers from causing service to decline. Like other railroads, UP proposes more comprehensive implementation planning.

UP believes that railroads proposing future mergers should also accept greater responsibility for effects of their mergers by providing remedies for any significant service deterioration. We believe that the Board has the power to condition mergers in the public interest by establishing an expedited procedure for customers to obtain either temporary substitute service or recovery of substitute transportation costs. Following its 1997-98 service crisis, UP paid hundreds of millions of dollars in such costs to its customers, well beyond its likely liability in the courts.

Remedies must be based on quantifiable and detailed performance data that measure railroad performance in a way that is meaningful to individual shippers. Shippers and the railroads that serve them should be able to compare service before and after a

consolidation using consistent measurements.[3] UP proposes that applicants create and maintain databases showing both on-line transit times and on-line cycle times for individual shipments, as well as the extent of variability in each measurement.

UP would also be interested in developing performance measurements for car supply, but we have not been able to identify a way to solve several problems. During car shortages, when the parties most need accurate data, some shippers order more cars than they need to protect their minimum requirements, thereby distorting the railroad's performance. Also, a railroad's ability to satisfy a car order depends on how far in advance the shipper orders the car. Railroads will more frequently fail to fill requests for cars on the same day than requests for cars in three days. UP would be interested in suggestions regarding this performance measurement.

The applicants should be required to develop these data for the base year used in their merger application and compile comparable data throughout the merger implementation period. They should retain all such data throughout the implementation period.

UP proposes an expedited Board procedure to provide effective remedies if, despite all reasonable precautions, service declines significantly after a merger. Customers could request either access by another carrier during the service failure or compensation for reasonable additional transportation costs, such as the cost of moving products by truck.

UP proposes the following addition to 49 C.F.R. § 1180.8:

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[3] During its service crisis, UP encountered great difficulty in reconciling its performance data with shipper records. Our proposal solves that problem by requiring comparable data for pre-merger and post-merger periods.

(c) (1) For *major* transactions, provide a detailed implementation plan (exhibit __) explaining how the consolidated entity will perform all of the important actions necessary to implement the consolidation and how it will provide adequate capacity for post-consolidation service. These actions should include at least the following:

(i) labor agreement consolidations;
(ii) computer-system integration;
(iii) significant personnel reductions;
(iv) major reroutes and extended hauls;
(v) capacity expansions and track upgrades;
(vi) acquisition of locomotives and freight cars; and
(vii) facility consolidations and expansions.

Applicants should state the major assumptions underlying the implementation plan. The implementation plan should also set forth the schedule on which public benefits will be achieved. Unlike the operating plan, which is based only on the incremental effects of the consolidation, the implementation plan should accommodate reasonably expected changes in traffic volume that would occur without the consolidation during the implementation period.

(2) The implementation plan should give shippers warning of critical time periods during which service might be affected by major changes, such as computer-system integration. For each major change, the applicants should describe contingency plans and procedures to recover from any service problems that might arise. After consolidation, the combined carrier must update the implementation plan, including the timing of the actions listed in (c)(1)(i)-(vii) above, in quarterly reports to the Board until all of the important implementation actions have been completed. The combined carrier must also transmit notices to potentially affected shippers and other carriers not less than 30 days in advance of implementation actions that might cause disruption, unless circumstances prevent issuing such notices.

UP also proposes the following new section of Part 1180:

1180._ Remedies for service deterioration as a result of consolidation

(a) For the base year, applicants in a *major* transaction must prepare and maintain a database from which it is possible to obtain pre-consolidation (1) transit times and variability of transit times for all shipments; (2) cycle times and variability of cycle times for all applicable shipments; and (3) [supply of empty cars] (collectively, "Service Measurements"). If the consolidation is approved, the combined carrier must maintain this database for five years after the effective date of the Board's decision approving the consolidation, and provide Service Measurements to affected shippers or Class III rail carriers that have a legitimate need for the information in order to demonstrate service deterioration.

(b) The following provisions apply for a period of five years after the effective date of the Board's decision approving the consolidation:

(1) If a shipper (not a third-party beneficiary) or Class III rail carrier that has shipped more than 100 cars over 12 months in a corridor can show that a Service Measurement for its traffic has deteriorated by an average of more than 50 percent from pre-consolidation levels for more than 60 consecutive days, it may give the consolidated carrier written notice asking the railroad to cure service within 60 days from the date of receipt of the notice and to provide historical and current Service Measurements for the affected traffic.

(2) If the carrier is unable to restore service to the 50 percent level by the end of the 60-day cure period, the shipper or Class III rail carrier may file a service complaint with the Board seeking a remedy for inadequate service. To file a service complaint, the shipper or Class III rail carrier must show that the carrier's service, as measured by any of the Service Measurements, deteriorated by an average of more than 50 percent from the base period for 120 or more consecutive days (through the cure period), that it cooperated with the carrier in efforts to restore service, and that it has incurred increased transportation costs as a result of the deteriorated service. Unless the carrier can establish in a reply to be filed within ten days after receipt of the service complaint (x) that the service decline is attributable to factors other than implementation of the consolidation or (y) that the complaining party did not reasonably cooperate with remediation efforts, the Board may grant either of the following remedies within 30 days after the complaint is filed:

(i) temporary access by reciprocal switching or trackage rights (including, if necessary, temporary trackage rights over other carriers) to the complainant's facility, if the Board concludes that access will result in improved service to the shipper and will not adversely affect service to other shippers or further degrade the operations of the consolidated carrier; or

(ii) reimbursement of incremental transportation costs that could not reasonably be mitigated and that were incurred by the complainant or, if complainant is a Class III rail carrier, by shippers located on that carrier.

(3) Pursuant to 49 U.S.C. § 11123, the Board will reconsider the need for the service remedy after 30 days, and the service remedy will automatically expire, if not previously terminated, after 270 days. The consolidated railroad may at any time petition for termination of a service remedy on the ground that service has been restored to the 50 percent level.

(4) If the Board grants temporary access and the railroads cannot agree on compensation, the Board will apply compensation standards under 49 U.S.C. §§ 11102 and 11123.

(5) The entity obtaining access must be a rail carrier with operating authority from the Board, and the Board must determine that such carrier can operate safely to address the service problem.

(6) Remedies are available only to shippers lacking existing rail alternatives; provided, however, that the complainant may seek compensation if it can show that the other serving carriers are disabled by the merger-related service problem.

(7) If necessary to effectuate the temporary access remedy, the Board may temporarily suspend a shipper's contractual duty to ship specified volumes of traffic under rail service contracts with the consolidated carrier. The suspension would apply only for the time period necessary to alleviate the service problem.

IV. Promoting and Enhancing Competition

The Board seeks comment on various mechanisms by which rail merger policy might be used to promote and enhance, rather than simply preserve, competition. Most of these mechanisms address the effects of railroad mergers on so-called "bottleneck segments," which are rail segments that connect shipper facilities exclusively served by one carrier with gateways where that carrier connects with other carriers.[4]

UP does not favor using the Board's jurisdiction over rail mergers to alter the competitive structure of the rail industry other than to address the effects of a merger. UP recognizes, however, that most shippers do not want railroad mergers to affect their

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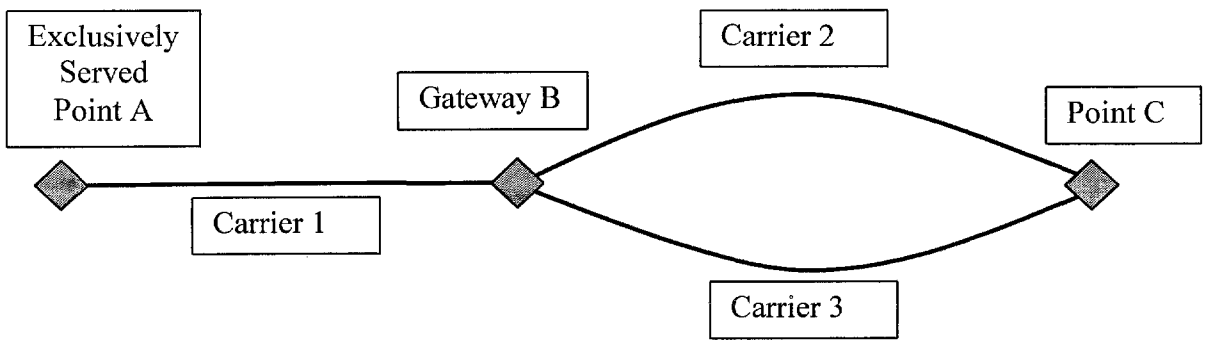
[4] As the Board's March 31, 2000 decision notes, it is well established that the ICCTA generally does not require rail carriers to establish separately challengeable rates for bottleneck segments. The Board's so-called "Bottleneck" rate decisions clarify the specific circumstances under which carriers may be required to establish, and shippers permitted to challenge, bottleneck rates. See Docket No. 41242, Central Power & Light Co. v. Southern Pac. Transp. Co., Decision served Dec. 31, 1996, clarified in Decision served Apr. 30, 1997, aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir.), cert. denied, 120 S. Ct. 372 (1999); Union Pacific R.R. v. STB, 202 F.3d 337 (D.C. Cir., 2000).

future opportunities to use established interline routing options. Shippers also do not want mergers either to create new bottlenecks or expand existing bottlenecks. Some shippers are concerned that combinations may eliminate competitive routing options that were previously available for the portion of the overall movement between the gateway and either the origin or destination of the traffic – in effect extending the bottleneck segment. Some shippers are also concerned that, where carriers have established separately challengeable bottleneck rates, a combination with another carrier capable of completing the movement could extinguish the shipper's ability to challenge the bottleneck rate.

UP does not share the view of many shippers that end-to-end mergers generally have anticompetitive vertical effects, and the Board must retain the basic economic and legal principles that guided its Bottleneck decisions. Nevertheless, if the nation's rail system is to be restructured into two transcontinental systems, the Board should take action to keep traditional gateways open. Vague assurances that gateways will stay open are not sufficient because there are too many ways to close them commercially.

UP proposes that the Board modify its rules to require combining carriers to make available at a shipper's request separately challengeable bottleneck rates between exclusively served facilities on their system and the predominant pre-merger gateway for the applicable traffic from those facilities. In the classic "rat-tail" diagram set forth below, if



Carriers 1 and 2 combined, they would be obligated, at the shipper's request, to establish a rate for the "bottleneck" segment between exclusively served Point A and Gateway B. This would preserve the shipper's pre-merger options, because the shipper could combine the A-to-B rate with rates offered by Carrier 3 to complete the movement from origin (Point A) to destination (Point C) and, if necessary, challenge the reasonableness of the A-to-B rate. In fact, such a condition would go somewhat beyond merely preserving the exclusively served shipper's routing options. In some cases, as where the traffic is now moving under joint or proportional rates, the reasonableness of the rate between Point A and Gateway B is not separately challengeable today.

The following specific language for a new section in Part 1180 would implement the proposal outlined above:

1180.__ Preservation of gateways and rate challenge options.

(a) A Class I rail carrier participating as a Primary Applicant in a *major* transaction approved by the Board (a "Participating Carrier") shall, upon request of an affected shipper, establish a rate for transportation (a "Segment Rate") applicable to traffic as to which no Participating Carrier served both the origin and destination of the traffic prior to consummation of the transaction (the "Subject Traffic"), between:

(1) any Exclusively Served Shipper Facility, which means any shipper facility (i) other than an automotive distribution ramp, intermodal facility, or transload facility (ii) that is located at any point on the carrier's system served exclusively by that carrier and no other rail carrier (either directly or via reciprocal switching, joint facility or other service arrangement) (iii) where traffic originated or terminated during the twelve months preceding the pre-filing notice under 49 C.F.R. § 1180.4(b) pertaining to the transaction; and

(2) the Pre-Transaction Gateway, which means the point of interchange, if one exists, that during the twelve months preceding the pre-filing notice under 49 C.F.R. § 1180.4(b) pertaining to the transaction, was (i) an actual interchange between the Participating Carrier and two or more other rail carriers, one of which was another Class I carrier participating in the transaction as a Primary Applicant, (ii) the interchange point most frequently used to move the Subject Traffic (or comparable traffic if the rate

would apply to new traffic) between the Exclusively Served Shipper Facility and the origin or destination of the traffic, and (iii) used by at least 100 cars of traffic originating or terminating at the Exclusively Served Shipper Facility.

(b) The shipper at whose request a Segment Rate is established pursuant to this rule shall be entitled to combine the Segment Rate with a rate or rates offered by a carrier other than the Participating Carrier for movement between the Pre-Transaction Gateway and the origin or destination of the Subject Traffic.

(c) The shipper at whose request a Segment Rate is established pursuant to this rule shall be entitled to challenge the Segment Rate as unreasonably high to the same extent and under the same standards as applicable to rate reasonableness challenges under 49 U.S.C. §§ 10701 and 10707. In determining whether the Participating Carrier is "market dominant," the Board will examine whether there is an absence of effective competition on the entire origin-to-destination route, rather than on the segment between the Exclusively Served Shipper Facility and the Pre-Transaction Gateway.

(d) A shipper facility served exclusively by a Class III rail carrier that is incapable of interchanging traffic with any carrier other than the Participating Carrier, or that is obligated by contract to interchange the majority of its traffic with the Participating Carrier, shall be treated as a facility served exclusively by the Participating Carrier for purposes of this rule. If the Participating Carrier lacks authority to establish a Segment Rate between the Exclusively Served Shipper Facility and the Pre-Transaction Gateway, it shall instead establish a Segment Rate between the point of interchange with the Class III carrier and the Pre-Transaction Gateway.

(e) The obligation to establish a Segment Rate shall also apply to any rail carrier (a "Trackage Rights Carrier") that receives trackage rights or other access to the lines of a Participating Carrier as a result of settlement agreements with the Primary Applicants or conditions imposed on the Primary Applicants by the Board. The Trackage Rights Carrier shall be obligated to establish a Segment Rate pursuant to subparts (a)-(d) above only (1) for traffic capable of being handled using the rights or other access granted to the Trackage Rights Carrier and (2) between Exclusively Served Shipper Facilities located on the Trackage Rights Carrier's system as it existed prior to the transaction and the applicable Pre-Transaction Gateway, if any, where such traffic was interchanged, during the twelve months preceding the pre-filing notice under 49 C.F.R. § 1180.4(b) pertaining to the transaction, with the Participating Carrier over whose lines access was granted.

Such a rule would preserve shippers' pre-merger routing and rate challenge options in a straightforward manner that would not unduly constrain the ability of the combined carrier to achieve efficiencies associated with the combination. Because it would

make use of existing mechanisms for challenging rates, the merging carriers would be able to estimate the costs of this condition in advance. And the condition would ensure that the major pre-transaction gateways would remain open.[5]

This approach is preferable to the options suggested by the Board:

- The Board's contract option would require the shipper to carry the burden of negotiating an agreement with the non-merging carrier on rates and all other attributes of the transportation. That commercial agreement might not be reached.

- The Board's through route alternative would require the merged carrier and connecting carriers to agree. Again, they might not reach agreement.

- The Board's reciprocal switching and trackage rights proposals would run afoul of the fundamental policy basis for the Board's Bottleneck decisions, which affirmed bottleneck carriers' traditional routing discretion and statutorily-recognized right to select their long-hauls.[6] Those proposals would go far beyond what is needed to offset effects of the merger.

No new rule should require the merged carrier to short-haul itself, depriving the carriers of the returns upon which they depend to attract capital, reinvest in their rail networks, and maintain and improve service.

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[5] Our proposed rule clarifies that the existence of transportation alternatives providing effective competition will be evaluated with respect to the entire movement from origin to destination, which is the transportation service of interest to the shipper. This will avoid the anomalous outcomes that would result were market dominance determinations based on competition for the bottleneck segment only, for example where intermodal competition between origin and destination provides a competitive constraint on rail rates but does not exist at a remote rail gateway where there is no reason at all for competition to exist. See, e.g., STB Docket No. 42038, Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry., Decision served July 8, 1999 (ignoring rail-truck alternative between coal mine and utility because there was no evidence of transportation competition at interchange point).

[6] Docket No. 41242, Central Power & Light Co. v. Southern Pac. Transp. Co., Decision served Dec. 31, 1996, pp. 4-11.

Our rule is also far superior to the long-discredited "DT&I" conditions. Those conditions imposed draconian and inefficient requirements to allow routing over all possible gateways and required rate and service parity regardless of the relative efficiencies of various routes. Any such requirement would create significant impediments to efficiency.

UP's proposed rule would supplement existing precedent governing Board analysis of the potential vertical competitive effects of proposed rail combinations. The Board has not established a hard-and-fast rule that end-to-end combinations can never have anticompetitive effects. Rather, the Board's so-called "one-lump" theory establishes a presumption that end-to-end mergers do not have such effects. The presumption can be rebutted, and shippers can seek additional remedies. See, e.g., Finance Docket No. 32549, BN/Santa Fe, Decision No. 38, served Aug. 23, 1995, p. 71, aff'd, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997).

V. Shortline and Regional Railroad Issues

All of the concerns expressed by shortline (Class III) and regional (Class II) railroads (collectively, "smaller railroads") can be addressed by the Board's general rules addressing competition and service issues. The service and bottleneck rate protections set forth in other new rules that UP has proposed would provide significant protections for Class III railroads and the shippers they serve. Additional rules specifically addressing shortline issues are not needed.

In particular, concerns regarding the appropriateness of contractual limits on interchange (sometimes called "paper barriers") are not the proper subject of general merger rules. The underlying contractual obligations did not arise from mergers and often are unaffected by mergers, particularly on UP. Issues relating to such contractual provisions were addressed in Ex Parte No. 575, Review of Rail Access and Competition Issues, and

they are the subject of a comprehensive industry agreement negotiated between the Association of American Railroads ("AAR"), on behalf of Class I railroads, and the American Short Line and Regional Railroad Association, on behalf of smaller railroads. AAR has formally invited ASLRA to negotiate regarding that agreement. These issues have also been addressed in individual merger cases on a case-by-case basis.[7]

VI. Employee Issues

UP joins in the Comments of the National Railway Labor Conference.

VII. "Three-to-Two" Issues

UP disfavors any hard-and-fast assumption that anticompetitive effects arise only when the number of rail carrier alternatives drops from two to one. UP believes that the Board should clarify that it will not constrain its analysis of the competitive effects of future transactions in this manner. In past cases, the Board has recognized the potential competitive effects of proposed combinations that reduce the number of rail carrier alternatives from three to two, such as where the combination involves the shippers' two most efficient alternatives.[8] The Board can assess the competitive effects of any proposed transaction only by considering the individual circumstances of each situation.

The Board should therefore consider the following new rule, which could be inserted at the end of 49 C.F.R. § 1180.1(c)(2)(i):

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[7] See also Finance Docket No. 33388, CSX/NS/Conrail, Decision No. 89, served July 23, 1998, p. 77.

[8] See, e.g., Finance Docket No. 32760, UP/SP, Decision No. 63, served Dec. 4, 1996 (explaining the need for conditions to preserve competitive options for shippers at Lake Charles, Louisiana, served pre-merger by UP, SP and KCS, because of circuity in KCS's route structure).

> The Board will evaluate on a case-by-case basis all claims that a proposed transaction would adversely affect competition by reducing the number of rail carrier alternatives serving an individual shipping point, an origin-destination corridor, or some other properly-defined transportation market. In evaluating such claims, the Board will not apply any rigid numerical standard based on the number of rail carriers serving the market before and after the transaction. Rather, the Board will examine all of the circumstances relevant to the competitive effects of the transaction, including such factors as the nature of the transportation service at issue; the effectiveness of the competition provided by each of the rail carriers serving the corridor, point or market; constraints on rail rates from intermodal, geographic or product competition; and the transaction's effects on the strength of competition among the serving rail carriers.

VIII. Merger-Related Public Interest Benefits

UP recommends that the Board establish a higher threshold for claims of merger benefits. The Board's existing rules indicate that it will "consider whether the benefits claimed by the applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." 49 C.F.R. § 1180.1(c). In practice, however, the Board has been reluctant to find that particular claimed merger benefits could be achieved by means other than merger.[9] Recent changes in the structure of Class I railroads, advances in technology, and various innovations in cooperative relationships among rail carriers have made it much more likely that categories of public benefits historically associated with railroad combinations can be achieved via other means. These include:

- Alliances among connecting carriers, such as the KCS-CN-IC alliance;

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[9] See, e.g., Finance Docket No. 33556, CN/IC, Decision No. 37, served May 25, 1999, pp. 46-49; Finance Docket No. 32760, UP/SP, Decision No. 44, served Aug. 12, 1996, pp. 109-13.

- Industry initiatives, such as AAR's "Interline Service Management" program, which expects to resolve remaining data exchange issues this summer;
- Operational coordinations, such as CN and CP's recent agreement on directional running in British Columbia and the efforts currently underway to streamline operations in the congested Chicago terminal;
- Service initiatives, such as the recently announced NS-BNSF transcontinental intermodal trains; and
- Potentially revolutionary changes in railroading as a result of "business-to-business" e-commerce.

All hold the potential for achieving many of the types of public benefits that historically have been associated with railroad combinations.

Mergers should not be credited with benefits that are practicably achievable through other means that would not cause irreversible changes in the structure of the railroad industry. Indeed, mergers may impair benefits achievable through alternative arrangements. For example, the KCS-CN-IC alliance probably will be lost if BNSF and CN merge.[10] Accordingly, the Board should modify its rules to clarify that it will treat as public benefits only those benefits that can practicably be achieved only through mergers.

UP proposes replacing the last sentence of 49 C.F.R. § 1180.1(c), immediately preceding sub-part (1), with the following:

> The Board will treat as public benefits only those improvements in cost, efficiency, service, competitiveness, or other benefits that applicants demonstrate are incremental to the benefits that could practicably be achieved through means other than a major transaction. The Board will also consider whether, as a result of the applicants' pursuit of the proposed transaction, any improvements in cost, efficiency, service,

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[10] At the Ex Parte No. 582 hearing, Michael R. Haverty, President and Chief Executive Officer of the Kansas City Southern Railway predicted that, if BNSF and CN combine, "We do not feel that long term the CN-IC-KCS marketing alliance is going to survive."

> competitiveness, or other benefits that would likely be achieved without the transaction would be reduced or lost as a result of the proposed transaction.

IX. Cross-Border Issues

UP believes that the Board should clarify two aspects of its rules as they relate to potential combinations involving non-U.S. carriers.

First, the Board's rules should explicitly acknowledge the extensive relationships among all aspects of the North American rail network by requiring, in the case of a proposed combination involving a carrier within the Board's jurisdiction that has foreign operations, that applicants submit with their application the same information for the foreign service as would be required if the participating carriers operated wholly within the United States. The Board cannot effectively carry out its obligation to evaluate whether a proposed Class I combination is in the national public interest unless it is able to evaluate all aspects of a transaction that affect the United States.

Because of the network characteristics of the railroad industry, changes brought about by a combination that directly affect one part of a railroad system can have significant indirect effects on other parts of the system or, indeed, on the entire North American rail network. This interrelationship was borne out clearly in connection with UP's 1997-1998 service difficulties, when congestion in the Houston area led "to a lengthy and damaging service breakdown dramatically affecting rail transport throughout the West."[11]

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[11] Finance Docket No. 32760 (Sub-No. 26), UP/SP Houston/Gulf Coast Oversight, Decision No. 10, served Dec. 21, 1998, p. 6.

The same is true with respect to the competitive impacts of a proposed transaction. Because huge volumes of Canadian-originating rail traffic move into the U.S.,[12] transactions that affect competitive alternatives in one part of the continent – in one province of Canada, for example – may have an impact on U.S. interests.

Given these interrelationships among all parts of the North American rail network, the Board and other interested parties participating in a merger proceeding cannot be assured of having access to all the information needed to protect the public interest unless the applicants treat their proposed transaction, for purposes of the analysis to be performed by the Board, as if it were occurring entirely within the United States. Applicants should be required to submit to the Board a system-wide operating plan and a system-wide implementation plan. Applicants should similarly be required to address in their application all the competitive effects of their proposed combination, including effects that might seemingly involve competition outside the United States. Applicants should also address the potential effects of public policies in the foreign jurisdiction on U.S. rail service and viability.[13]

UP recommends that the Board's rules be clarified by adding the following new subsection 1180.6(d):

> In major transactions involving carriers with foreign operations, the information required to be included in the application by this section and sections 1180.7, 1180.8, and 1180.9 shall address the entire transaction and all of its

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[12] For example, more than 80 percent of British Columbia Railway's traffic flows into the United States.

[13] For example, the Canadian government recently ordered CN and CP to reduce grain rates by 18 percent. If applied to all traffic, such policies could impair the viability of the Canadian portion of a combined rail system.

> impacts, including competitive impacts, operating changes and financial effects outside the United States.

Second, it is well established that the Board has broad power to impose conditions designed to mitigate adverse effects of the proposed transaction by indirect means if necessary. For example, the Board can require applicants to enter into agreements with third parties that remedy adverse consequences of their proposed transaction even where the Board itself could not impose upon the applicants the relief embodied in the agreement.[14] The Board's rules should make clear that the Board will impose conditions to remedy potential adverse consequences of transactions involving foreign operations, even where jurisdictional limits on the Board's authority may preclude the Board from granting relief directly. If necessary to make such conditions enforceable by the Board, the Board could require that applicants consent to Board jurisdiction with respect to disputes concerning compensation or other aspects of the conditions the Board imposes.[15]

UP proposes that the Board clarify its rules in this regard by adding the following language to the end of section 1180.1(d)(1):

> In *major* transactions involving carriers with foreign operations, the Board may impose conditions to ameliorate potential adverse effects arising outside the United States. The Board may, for example, as a condition to approving the application, require applicants to enter into legally enforceable private agreements that would remedy potential harms.

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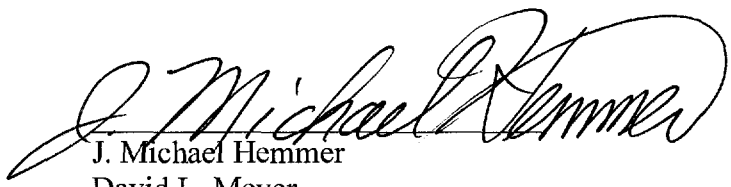
[14] See, e.g., Finance Docket No. 32760, UP/SP, Decision No. 44, served Aug. 12, 1996, p.146 (requiring UP, as condition of consummating proposed acquisition of SP, to modify contracts with shippers at 2-to-1 points to allow BNSF access to at least 50% of volume).

[15] Agreements entered into to carry out conditions imposed by the Board are routinely enforced by the Board notwithstanding that similar agreements among carriers that do not stem from Board-imposed conditions would be outside the Board's jurisdiction. Canadian Pac. Ltd. v. United States, 379 F. Supp. 128, 133 n.12 (D.D.C. 1974).

CONCLUSION

UP believes that this proceeding is among the most important to come before the Board since the Staggers Act. The rules and policies established here will shape the future structure of the railroad industry and may determine whether the industry grows or atrophies. UP will continue to participate with those high stakes in mind.

Respectfully submitted,



J. Michael Hemmer
David L. Meyer
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

Attorneys for Union Pacific Corporation and Union Pacific Railroad Company

James V. Dolan
Lawrence E. Wzorek
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5357

Carl W. von Bernuth
Union Pacific Corporation
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-6304

May 16, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2000, a copy of the foregoing "Union Pacific's Comments and Initial Proposals" was served by regular mail, postage pre-paid, or a more expeditious manner of delivery on all parties and non-parties of record to this proceeding.



J. Michael Hemmer

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 11

HIGHLY CONFIDENTIAL — VERIFIED STATEMENT OF RICHARD SCHMALENSEE IN BN/SF AT 34

(EXCERPT)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 12

UNION PACIFIC RAILROAD COMPANY'S COMMENTS FILED IN *KANSAS CITY SOUTHERN – CONTROL – THE KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL.*, FINANCE DOCKET NO. 34342 ("KCS/TEX MEX") (FILED AUGUST 4, 2003)

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

UNION PACIFIC RAILROAD COMPANY'S COMMENTS

VOLUME 1 of 2: NARRATIVE

J. MICHAEL HEMMER
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

CAROLYN F. CORWIN
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5582

Attorneys for Union Pacific Railroad Company

August 4, 2003

Contains Color Images

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF POSITION 5

II. THE BOARD SHOULD CONSIDER THE EFFECTS IN THE UNITED STATES OF THE ENTIRE KCS/TFM/TEX MEX TRANSACTION 14

A. KCS's Acquisition of Control of Tex Mex and TFM Constitutes a Single Transaction 15

B. The Board Has Consistently Evaluated the Full Range of Effects in the United States from Proposed Transactions and Related Non-Jurisdictional Events 19

C. The Board May Fashion Remedies Addressing the Effects of the KCS/Tex Mex/TFM Transaction in the United States, Including Effects Arising from Its International Aspects 26

D. Imposing Conditions to Remedy Adverse Effects of the KCS/Tex Mex/TFM Transaction on Transportation in the United States Would Not Violate Principles of Jurisdiction or Comity 30

Mexican Competition Commission 32

U.S. Department of Justice 33

Mexican Foreign Investment Commission 34

III. UNCONDITIONED KCS CONTROL OF TEX MEX AND TFM WOULD RESULT IN SUBSTANTIAL LESSENING OF COMPETITION IN THE UNITED STATES 34

A. The Laredo Gateway Is Vitally Important to U.S.-Mexico Rail Transportation 35

1. The Board's Grant of Trackage Rights to Tex Mex in *UP/SP* Was Predicated on a Finding that Rail Competition Via the Laredo Gateway Must Be Protected 35

2. U.S.-Mexico Rail Shippers Overwhelmingly Prefer Routes Via Laredo 37

3. The Laredo Gateway Offers Important Advantages for Shippers 39

B. Unconditioned KCS Control of Tex Mex and TFM Threatens to Undermine Competition Via the Laredo Gateway 42

1. Shippers Benefit from Competition Between UP and KCS/Tex Mex Routes for Traffic Moving Via Laredo 43

2. KCS Will Have Incentives and Opportunities to Use Its Control of Tex Mex and TFM to Deprive Shippers of the Price and Service Benefits of UP-TFM Routings 45

a) KCS Can Use Its Control of TFM to Degrade UP-TFM Options 48

b) KCS Control Will Create New Opportunities for KCS/TFM to Exploit TFM's Market Power By Selectively Raising Rates on Cross-Border Traffic 54

c) KCS Control Will Create New Incentives and Opportunities for Tex Mex and TFM to Manipulate Operations at the Laredo Bridge 55

3. The Lack of Procompetitive Benefits Elevates the Threat to Competition 58

a) Existing KCS Coordination with TFM and Tex Mex 60

b) No Further Coordinations Are Planned 62

4. Many Shippers Have Expressed Concerns About the Competitive Impacts of the Proposed Transaction 63

5. Professor Grimm's Competitive Analysis Ignores the Anticompetitive Effects of KCS Control 67

C. Applicants' Arguments Do Not Overcome the Likely Anticompetitive Effects 70

1. Other Transportation Alternatives Will Not Prevent Anticompetitive Effects 71

2. UP's Supposed "Bargaining Leverage" Will Not Prevent KCS Control of Tex Mex and TFM from Having Anticompetitive Effects 74

3. UP Does Not Have a "Chokehold" Over KCS and Tex Mex 77

Trackage Rights Operations and Dispatching 78

Capacity on the Trackage Rights Lines 81

D. Mexico's Regulatory Regime Will Not Prevent KCS Control from Having Anticompetitive Consequences 82

IV. THE BOARD SHOULD IMPOSE CONDITIONS AIMED AT PROTECTING COMPETITION VIA THE LAREDO GATEWAY 85

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

UNION PACIFIC RAILROAD COMPANY'S COMMENTS

Union Pacific Railroad Company ("UP") submits these comments on Kansas City Southern's ("KCS's") proposed common control of the Texas Mexican Railway ("Tex Mex"), Kansas City Southern Railway ("KCSR"), and Gateway Eastern Railroad (collectively "Applicants"), as well as its control of Transportación Ferroviaria Mexicana ("TFM"). In a separate volume, UP is submitting the verified statements of John T. Gray, UP's Vice President-Interline; Stephen R. Barkley, UP's Regional Vice President-Southern Region; Jerry Hausman, an MIT professor and leading industrial organization economist; and Francisco Fuentes Ostos, UP's Mexican counsel.

I. INTRODUCTION AND SUMMARY OF POSITION

KCS proposes to acquire control of the entire TFM rail system. The Board's conclusions here will determine the structure, routing, competitiveness, and vitality of rail-borne international trade between the U.S. and Mexico far into the future, probably for as long as railroads survive. In addition, the Board's handling of the international components of this transaction will affect the structure and course of all future transnational rail proceedings.

UP is not concerned about actions taken in Mexico. It is concerned about decisions that will be made and actions taken in the headquarters of KCS in Kansas City, Missouri, where KCS will exercise its control of Tex Mex and TFM. We ask the Board to consider the effects of this international transaction in the United States, not Mexico.

The Board should not doubt its authority and responsibility to review all potential effects of this transaction on international transportation affecting U.S. shippers. The NAFTA Rail proponents recently broke TFM's rail system into segments – for no reason that we can discern other than to restrict the Board's review of the transaction. But TFM before then had controlled a rail system stretching from Lázaro Cárdenas, Mexico, on the Pacific Ocean to Beaumont, Texas, hundreds of miles into the United States. If UP or BNSF sought to acquire control of CN or CP, and employed a similar device of splitting the Canadian railroad's U.S. operations into a separate transaction, the Board surely would not blindfold itself to the competitive effects in the United States of combining two of North America's major railroads. The Board should be equally vigilant here.

Although we are filing an extensive submission to satisfy the Board's call for substantial evidence, UP's position is simple. The Board should require Applicants to honor their commitments in a meaningful and enforceable way, and that requirement should be a condition of Board approval. Applicants have made several commitments to reassure the Board and the shipping community that NAFTA Rail will not harm competition for international rail traffic. KCS has agreed in writing to accept a condition requiring non-discrimination at the Laredo Bridge, and during the Board's July 31 hearing said it expects the Board to impose conditions requiring it to keep the Laredo Gateway open commercially as well. We agree with KCS that those commitments, if honored meaningfully, will prevent

adverse impacts on competition in the United States. As it has in all recent consolidation proceedings, the Board should hold the Applicants to their promises.

As we will show, relying on NAFTA Rail voluntarism to honor these commitments in the years and decades to come carries too much risk. NAFTA Rail's rational economic incentives will lure it away from those promises. Moreover, the risks to competition are real, while offsetting public benefits of the transaction are modest at best.

Public Benefits. KCS disavows most of the traditional public benefits of end-to-end consolidations. It claims no improvements in train service, no new run-through trains, no new blocking, and no cost reductions through consolidated facilities or functions. KCS, Tex Mex, and TFM rightfully brag that they already provide "seamless service." KCS makes much of its plans to extend its computerized operating system to Tex Mex and TFM, but KCS announced this step long ago and independently of this transaction.

KCS argues that this transaction will strengthen it financially, but that is doubtful, unless it uses the leverage from its new control over Tex Mex and TFM to shift substantial UP traffic to its lines and raise shippers' rates. To effect the transaction, KCS must take on hundreds of millions of dollars of additional debt. Its financial position is already weak, and the debt will not help. We assume that KCS's ultimate goal is to position itself for acquisition by another carrier.

Competitive Effects. If the Board were to accept KCS's recent statements at face value, the TFM transaction would have no effect whatsoever. KCS asserts that not a single shipper will reroute its traffic from UP routes to KCS's routes. Those assertions are not credible. Indeed, KCS has told the Board one story but given Wall Street another. KCS has told the financial community that it will use control over TFM to reroute U.S.-Mexico

traffic over its lines. Of course it will. NAFTA Rail may and should pursue its private interests using pro-competitive means, by improving rail service across the border and eliminating inefficiencies.

At the same time, however, NAFTA Rail will have the power to act anti-competitively. It could increase costs for its competitors, reduce the quality of service provided to competitors, and increase prices or reduce value to customers. NAFTA Rail will enjoy market power over significant flows of international traffic. The market power NAFTA Rail will possess arises in part from its control of the Laredo Gateway. A "gateway" is both a physical place and a set of commercial relationships, and NAFTA Rail will have a stranglehold on both.[1] It will have the power to control all movements over the International Bridge at Laredo, the physical gateway. And through TFM it will control the price and quality of all international traffic flows between Mexico and the United States via Laredo, the commercial gateway. With TFM, NAFTA Rail's "share" of traffic moving via Laredo will be 100 percent. No traffic will be able to flow in either direction over that gateway without TFM's cooperation on the total price and the quality of the international service.

This Board's precedents establish that competition via the Laredo Gateway must be preserved and that other gateways and modes do not provide effective alternatives. The Board granted Tex Mex the right to connect with KCS over UP's tracks on the basis of precisely this determination. Thus, NAFTA Rail's very existence is founded on the essential

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[1] As the map set forth as Exhibit A to Mr. Gray's Verified Statement ("V.S.") shows, and as Mr. Barkley and Mr. Gray explain, international traffic flows via Laredo must traverse *both* Tex Mex's trackage across the Laredo Bridge and TFM's network that serves the points in Mexico to/from which shippers need rail transportation.

competitive role of the Laredo Gateway. In the six years since the Board found the Laredo Gateway to be "of separate and surpassing importance to U.S.-Mexico rail transportation" and acted to avoid any reduction in competition there,[2] the Laredo Gateway has assumed even greater importance for NAFTA trade between Mexico and the rest of North America.

KCS claims that NAFTA Rail's economic interests will compel it to cooperate with UP and BNSF. That is so for those traffic flows for which KCS/Tex Mex cannot compete, such as movements to and from points served only by UP. The opposite is true for the majority of Laredo rail traffic, which KCS/Tex Mex could carry in the United States. *See* Gray V.S., Exh. J. NAFTA Rail will want to push traffic to its own routes unless the benefits of a competitor's route are compelling.

NAFTA Rail also will enjoy market power because of the continuing inability of Mexico to carry out the goals of rail privatization, initiated in 1997. Six years later, the two private railroads in the northern part of Mexico, TFM and Ferromex, continue to litigate rather than compete as foreseen by the privatization plan. As UP's Mexican counsel explains, the regulatory and legal structures in Mexico are unable to bring these conflicts to a close. More than twenty injunctions ("*amparos*") block regulatory decisions. Critically, the trackage rights fees for Ferromex to operate over TFM (and vice versa) are more than twice those used in similar situations in the U.S., and are commercially non-viable for almost all traffic. While the Board can do nothing to change that, it should

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[2] *UP/SP*, 1 S.T.B. 233, 448 (1996). In that case, one of the Applicants here, Tex Mex, argued to the Board that U.S. policy regarding NAFTA required that the Board "give heightened scrutiny to transactions within its jurisdiction that present a danger of diminishing competition for transportation of U.S.-Mexican traffic." *UP/SP*, Brief of the Texas Mexican Ry. (TM-39) (June 3, 1996) at 17 (Exhibit 1).

understand that it cannot rely on competition within Mexico to alleviate the anticompetitive threat posed by this transaction in the United States.

One of America's leading economists, Professor Jerry Hausman, evaluates NAFTA Rail's economic power and its ability to use that power to harm the public interest. He asks the right question: not whether UP will be hurt (it will), but whether shippers would be hurt. He concludes that NAFTA Rail will have the incentive and the opportunity to extract higher prices and reduce the quality of service to shippers, unless KCS abides by the commitments it has made in the course of this proceeding.

KCS offers no analysis whatsoever of these competitive effects. Its economist declined to consider the vertical aspects of the NAFTA Rail transaction. However, his prior analysis of the same traffic flows confirmed that substantial amounts of U.S.-Mexico rail traffic are not subject to effective competition by other modes or gateways. In discovery, other parties sought information regarding competitive effects, including data in the possession of TFM (which KCS had a contractual right to procure). But KCS refused to provide such information, limiting UP's and others' ability to explore the most important issues in this proceeding. KCS should not now be allowed to remedy its failure and present evidence of competitive effects of the TFM transaction.

KCS's own commitments, if meaningfully enforced, would prevent the competitive harms likely to arise from the NAFTA Rail transaction. KCS commitments are as follows:

- To administer the International Bridge in a non-discriminatory manner.[3]
- To continue to support international service with BNSF and UP via the Laredo Gateway by providing blocking, run-through trains, car supply, competitive service, and prompt rate quotes.[4]
- To "keep the Laredo Gateway open on commercially reasonable terms."[5] If this means anything, it means that NAFTA Rail will ensure that TFM continues to offer commercially viable connecting rates for UP traffic moving via Laredo.[6]

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[3] Specifically, Applicants have committed to (a) "work cooperatively with UP toward efficient utilization of the Laredo Bridge" and (b) negotiate "in good faith with UP to develop new dispatching protocols." Supplement to Application (KCS-11/TM-11) ("Supplement") at 4, 26-27 & Davies V.S. at 15-16; *see also* Letter from William A. Mullins, Esq., to David L. Meyer, Esq., dated July 21, 2003 (filed with Board and served on all parties of record) ("Applicants' July 21 Letter") (Exhibit 2). Applicants have stated that they are willing to make their commitment "a condition of common control of Tex Mex." Applicants' July 21 Letter, p. 2.

[4] Specifically, Applicants have committed to use KCS's control of TFM to (a) ensure that "UP and BNSF are provided the same level of service they have experienced in the past, and to making improvements on that level of service where possible;" (b) "require TFM to cooperate with both UP and BNSF on pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipment, accommodating run-through train service, providing excellent service and promptly quote rates;" and (c) "work with UP and BNSF on development of a methodology for measuring service standard, and to develop a method by which such standards could be enforced," as to all traffic handled by TFM via the Laredo Gateway. Applicants' July 21 Letter, p. 2 (Exhibit 2); Supplement at 4, 24-25 & Davies V.S. at 14-15.

[5] Applicants' July 21 Letter, p. 2 (Exhibit 2); Supplement at 4 & Davies V.S. at 15.

[6] Keeping a gateway open means more than simply preventing physical impediments to the interchange of freight from one railroad to another at the point of interchange. It means ensuring that one railroad's (here KCS's) acquisition of another railroad on the other side of the gateway (here TFM) does not lead the acquired railroad to discontinue cooperating with other connecting carriers (here UP) on all of the commercial terms that go into competitive interline service offerings to shippers whose freight is moving across the gateway. Otherwise, the merged carrier can close the gateway "commercially," making it

(footnote continued ...)

UP urges the Board to require KCS to honor these commitments in a meaningful and enforceable manner.[7]

We recommend a procedure under which interested parties would have 90 days to negotiate implementing agreements with KCS. If negotiations fail, the Board could resolve disputes, providing an unbiased final decision on any unresolved issues. KCS cannot complain about unfairness in being required to live up to its own promises, if hose promises were honestly made.

Requiring KCS to abide by its commitments would not curtail the potential benefits of NAFTA Rail or NAFTA Rail's ability to compete. Non-discriminatory management of the International Bridge can only benefit the shipping public and international trade. Continued support of TFM routings with UP can only benefit competition and, again, promote trade. If NAFTA Rail can improve service and efficiency, it can attract new customers to its better service, or lower rates.

This is not a Mexican matter, as Applicants have suggested. The traffic at issue here is international cross-border traffic, and the benefit of that competition for shippers occurs primarily in the United States. The Board has consistently acted to protect U.S. shippers in precisely these circumstances. Lest there be a doubt about the appropriateness of Board action here, Applicants acknowledge that keeping this gateway

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(... footnote continued from previous page)
impossible for the other connecting carriers' transportation options (here, UP-TFM options) to compete effectively for traffic moving via the gateway.

[7] UP has heard from many of its shippers that they were less inclined to voice concerns about KCS's acquisition of Tex Mex and TFM in light of Applicants' commitments.

open is a matter of interest to "all affected parties."[8] And they have made their commitments – including commitments respecting KCS's use of its control over TFM – in this U.S. proceeding.

Finally, Mexican sovereignty would be unaffected by enforcing KCS's commitments. Mexican law, although difficult to enforce, is fully consistent with KCS's promises. It requires non-discriminatory service and rates to all customers, including connecting carriers. Requiring NAFTA Rail management in the United States to honor its commitments with respect to TFM cross-border movements will not affect any regulatory power within Mexico.

Only this agency has the opportunity to evaluate and address the effects of this transaction on international rail commerce in the United States. Mexico's Competition Commission acted on an ex parte basis and considered only effects within Mexico. This Board's authority and remedial powers are much broader than those of the U.S. Department of Justice.

When the Board adopted new rules for Class I mergers, it fundamentally changed merger policy. Supported by UP and KCS, it decided that traffic flows over major, efficient gateways should be preserved. It also stressed the U.S. interest in ensuring that international transactions do not undermine rail competition for U.S. shippers. While those rules do not apply directly here, KCS's commitments in this proceeding are faithful to those principles. The Board should require NAFTA Rail to stand behind these commitments.

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[8] Applicants' July 21 Letter at 2 (Exhibit 2).

II. THE BOARD SHOULD CONSIDER THE EFFECTS IN THE UNITED STATES OF THE ENTIRE KCS/TFM/TEX MEX TRANSACTION

Consistent with its past practice, the Board should analyze the competitive effects in the United States of the entire KCS/Tex Mex/TFM transaction. To the extent the transaction threatens to produce anticompetitive effects in the United States, the Board should impose conditions that will mitigate those effects.[9] Any other outcome would undermine the Board's authority to respond to future international rail consolidations, including mergers of U.S. and Canadian railroads.

Applicants have artificially segregated KCS's acquisition of control of Tex Mex for the Board's approval. The Board should not be deterred from exercising its full authority to review the effects of the entire transaction by KCS's strategy of segregating its acquisitions of Tex Mex and TFM. Before KCS's strategic use of a purchase and voting trust to temporarily insulate it from Tex Mex, TFM controlled Tex Mex. As the indirect owner of a railroad operating in the United States, TFM would be before the Board (as an applicant, with KCS) seeking approval for a KCS/Tex Mex/TFM transaction. The Board should reject any effort to limit its exercise of authority to review transactions in which carriers seek to acquire both U.S. and foreign rail assets through a strategy of restructuring corporate relationships.

Contrary to Applicants' assertions, considering the effects of the entire transaction and imposing conditions to mitigate any adverse effects are entirely consistent with Board precedent and principles of jurisdiction and comity. The Board plainly has

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[9] The governing legal standard, set forth in 49 U.S.C. § 11324(d), and in the Board's broad conditioning power under Section 11324(c), is discussed at pages 88-90, below.

jurisdiction to address effects on transportation *within the United States*, including international transportation. Imposing conditions to address any adverse effects on U.S. transportation would not intrude on the sovereignty of Mexico.

A. KCS's Acquisition of Control of Tex Mex and TFM Constitutes a Single Transaction

From its inception, the KCS/ Tex Mex/TFM transaction has been a cohesive transaction that will have significant impacts in the United States. Although TFM is a Mexican railroad, in March 2002 it acquired 100 percent of Mexrail. Mexrail is the holding company for Tex Mex, a railroad located entirely within the United States.[10] Thus, KCS's acquisition of control of TFM, the indirect 100 percent owner of a railroad providing transportation in the United States, would normally be subject to the Board's jurisdiction.

However, just a few days before it filed the Application, KCS acquired 51 percent of TFM's Mexrail shares and placed them into a voting trust. In this manner, it removed TFM's controlling link with Tex Mex temporarily (until KCS could complete its acquisition of both, reuniting TFM with its 100 percent of Tex Mex).[11] KCS then insisted that only its acquisition of control of Tex Mex was subject to Board approval, since TFM no longer controlled a subsidiary that provided transportation in the United States. This was clearly an effort to evade Board jurisdiction by artificially breaking a single corporate family into separate segments, insulating TFM from its Tex Mex operations in the United States.

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[10] As the Application portrays, under TFM's "existing structure" (*i.e.*, prior to KCS purchasing 51% of Mexrail from TFM), TFM owned 100 percent of Mexrail and through it Tex Mex. Application at 13.

[11] TFM today continues to hold a 49% interest in Mexrail and Tex Mex.

While this purchase and voting trust strategy may have technically avoided the need for KCS and TFM to seek Board approval of the acquisition of TFM, it cannot oust the Board's authority to examine the effects of the entire KCS/Tex Mex/TFM transaction. Nor does it preclude the Board from fashioning conditions that would address any adverse effects on competition of KCS's acquisition of control of both TFM and Tex Mex. Nothing in the KCS purchase of Mexrail and placement of the shares in a voting trust changes the competitive impact of the entire transaction. It is simply an intermediate restructuring of corporate relationships. The effects of the transaction will be the same as if TFM still owned Tex Mex (indirectly through Mexrail).

It is inconceivable that the Board would permit any other U.S. Class 1 railroad to avoid agency review through the sort of maneuver KCS has engaged in here. If UP of BNSF were to announce plans to acquire control of CN or CP, parties would raise concerns about the effect of such a combination on competition both north and south of the border, as well as at the border. There would be questions about whether the merger partners would continue to offer commercially reasonable terms to connecting railroads or would attempt to foreclose competition through withdrawal of reasonable rate factors offered to connecting carriers at significant gateways. If UP or BNSF were to attempt to evade examination of such concerns about competition at international border gateways by carving off and acquiring the U.S. assets of its merger partner, then placing those assets in a voting trust, there would surely be vehement protests from both shippers and other railroads.

If the Board were to conclude here that KCS's purchase/voting trust strategy deprived the agency of the ability to consider the effects of the KCS acquisition of TFM in conjunction with its acquisition of Tex Mex, the result would be highly detrimental. The

message would be that parties to a transaction may evade Board jurisdiction by creative shuffling of assets and use of a voting trust. With the increasing NAFTA ties among the United States, Canada, and Mexico, there likely will be more cross-border transactions in the future. When that occurs, the parties will follow the road map laid out by KCS here. As a result, the Board would never again have the opportunity to review all the aspects of a transnational rail consolidation.

Despite the transparency of KCS's effort to artificially remove TFM from the Board's purview, Applicants assert that the KCS acquisition of control of Tex Mex is independent of its acquisition of control of TFM, and that either of the two "transactions" could occur independently of the other.[12] In fact, the KCS/Tex Mex/TFM combination was {{

}} and it was announced and explained to the public and the investor community as a single event.[13]

KCS's business people, and their financial advisers, have consistently described and analyzed KCS's acquisition of control of TFM and Tex Mex (through Tex Mex's parent Mexrail) as a {{

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[12] *See* Reply to the Petition of Canadian National Railway Company to Reopen Decision No. 2 and to Reject Application (KCS-16/Tex Mex-16) at 14-15.

[13] *See* KCS-Grupo TMM Press Release, April 21, 2003 (Exhibit 3).

}} KCS and Grupo TMM have consistently presented a single "NAFTA Rail Transaction" to the public, stressing that NAFTA Rail will be a single, seamless rail system.[16]

Given that Tex Mex is the critical link that connects the KCS and TFM systems,[17] it is hard to imagine that KCS would embark upon the TFM acquisition as a stand-alone transaction without acquiring control of Tex Mex. Even if it did choose to delay acquisition of Tex Mex by divesting the 51 percent of Mexrail shares held in a voting trust, KCS might well gain effective control of both entities as soon as it completed its acquisition of TFM. KCS would own 100 percent of both KCS and TFM, the two connections on which Tex Mex depends the most, and through TFM 49 percent of Tex Mex. In these circumstances, even if KCS were to divest the Mexrail shares it has placed in a voting trust,

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14 *See* Exhibit 4, p. 5. {{

}} *Id.* at 40.

15 For example, the {{

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16 KCS's website (www.kcsi.com) includes various documents that consistently describe the "NAFTA Rail Transaction" as a single transaction. *See, e.g.*, "NAFTA Rail Transaction Summary" (available at <www.kcsi.com/pdf/nafta_rail.pdf>) (describing the series of agreements as a single "transaction" and analyzing the financial effects of a combination with "Grupo TFM consolidated") (Exhibit 6).

17 *See* Exhibit 7 (KCS presentation characterizing Tex Mex as "a key link to the NAFTA Railway").

the 49 percent indirect ownership of Tex Mex that it would acquire by virtue of its ownership of TFM likely would give it effective control of that carrier, thereby reuniting TFM and Tex Mex.[18]

The notion that the TFM and Tex Mex acquisitions are independent appears confined to the pleadings filed by KCS and Tex Mex in this proceeding. The Board was clearly correct when it concluded in Decision No. 2 that, "[n]otwithstanding that the two transactions nominally are separate and independent of each other, in reality they are two components of a single, larger transaction with broader implications in the U.S." Decision No. 2, p. 11. KCS's attempt artificially to separate TFM from Tex Mex operations for the duration of this proceeding and its characterization in its pleadings is no basis for the Board now to disregard those broader implications. Rather, the Board should analyze the effects of the entire transaction in the United States and develop conditions that are appropriate to remedy any adverse effects.

B. The Board Has Consistently Evaluated the Full Range of Effects in the United States from Proposed Transactions and Related Non-Jurisdictional Events

Because the KCS acquisition of control of Tex Mex is part of the larger KCS/Tex Mex/TFM transaction, the Board must examine the full range of effects of that larger transaction in the United States. There is no basis for segmenting the analysis and examining only one component of the overall transaction at a time.

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[18] *See Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control – Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co.*, 9 I.C.C.2d 939, 947-48 (1993) ("*UP/CNW-Control*").

In the past, the Board and its predecessor, the ICC, have examined effects associated with transnational mergers, so long as those effects relate to transportation in the United States.[19] In one such transaction,[20] two Canadian carriers, Canadian National ("CN") and Canadian Pacific ("CP"), sought ICC approval to purchase Conrail's interests in three separate companies. The principal acquisition was of Canada Southern Railway Co. ("Canada Southern"), a Canadian carrier whose assets (a line from Windsor to Niagara Falls, Ontario, and various branch lines) were located entirely in Canada. The other two companies were the Detroit River Tunnel Company, which owned a tunnel at the Detroit/Windsor gateway that extended a very short distance into the United States, and the Niagara River Bridge Company, which owned a bridge at the Niagara Falls gateway that also extended a short distance into the United States. Despite the fact that one component of the transaction involved assets located entirely outside the United States, the applicants submitted the entire transaction for ICC approval.

The ICC concluded that, because the tunnel and the bridge extended for a short distance into the United States, it had jurisdiction "to the extent transportation in this country is involved." *Canada Southern* at 8. The agency proceeded to analyze all aspects of the transaction, including claims involving the movement of international traffic on the Canada Southern lines in Canada. Among other things, it examined whether sale of the Canadian line would reduce competition in the Detroit-Niagara Falls/Buffalo corridor (for

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[19] Under 49 U.S.C. § 10501(a)(2), the Board's statutory jurisdiction is defined in terms of "transportation in the United States."

[20] *Canadian National Ry. & Canadian Pacific, Ltd. – Acquisition – Interests of Consolidated Rail Corp.,* ICC Finance Docket No. 30387 (ICC served Aug. 29, 1984) ("*Canada Southern*").

which one route passed through Canada) and whether control of the Detroit and Niagara Falls/Buffalo gateways by CN and CP would adversely affect competition for U.S.-Canada traffic flowing across those gateways. The analysis included an inquiry into whether control of Canadian Southern would permit CN to discriminate against U.S. carriers by diverting traffic to its preferred gateway. *Id.* at 8-11. Ultimately, the agency approved the acquisition because it concluded that the *overall transaction* – including its Canadian components – would not have anticompetitive effects in the United States. *Id.* at 11.

Applicants point out that in *Canada Southern* the ICC declined to require CN and CP to enter into agreements with U.S. rail carriers because "'the interchange practices of Canadian carriers in Canada are beyond our jurisdiction.'" KCS-16/TM-16 at 14 (quoting *Canada Southern* at 7). However, the specific claim the ICC was addressing involved alleged refusal of Canadian carriers to enter into agreements with U.S. carriers for container traffic *between two Canadian points*, supposedly "forcing" the traffic to U.S. ramps. *Canada Southern* at 7. The Commission concluded that the claim was directed to problems that were "not related to this transaction." *Id.* at 11. Moreover, the claim plainly related to competition in Canadian markets, not competition in the United States. Had the Commission found that the challenged practices were related to the transaction and had an adverse effect on transportation in the United States (not just in Canada), it likely would have come to a different conclusion regarding jurisdiction.

The Board also had no hesitation in considering the overall effects of a transnational merger in another proceeding involving a Canadian carrier.[21] In its *CN/WC* decision, the Board considered the effect of a reduction from two shippers to one at Oba, Ontario (served by WC's subsidiary Algoma Central Railway, Inc., which operated only in Canada), and concluded that no U.S. shippers would face a merger-related reduction in competition for rail movements to or from Oba. *CN/WC* at 11 n.19. The Board considered aspects of the transaction in Canada to be relevant to the extent a reduction in competition might affect the United States.

In their Supplement, Applicants try to distinguish cases involving Canadian railroads. They argue that TFM is different because CN and CP have long operated under Board jurisdiction within the United States, whereas "TFM has never operated in the U.S."[22] Applicants have very short memories. As noted above, until May 9, 2003, when KCS acquired 51 percent of the Mexrail shares and placed them into a voting trust as a part of this transaction, TFM's system extended into the United States through its 100 percent control of

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21 *See Canadian National Ry, Grand Trunk Corp., & WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corp., Wisconsin Central Ltd., Fox Valley & Western Ltd, Sault Ste. Marie Bridge Co., & Wisconsin Chicago Link Ltd*, STB Finance Docket No. 34000 (STB served Sept. 7, 2001) ("*CN/WC*").

22 Supplement at 6.

Tex Mex.[23] Thus, just as CN and CP historically operated in the United States through their various U.S. subsidiaries, TFM has been operating in the U.S. through Tex Mex.[24]

Applicants also attempt to invoke the older "one merger at a time" decisions (*see* KCS-16/TM-16 at 16-17). However, these cases are inapposite. They address whether the Board, when reviewing separate mergers involving *different sets of parties,* should consider the effects of one speculative merger while reviewing another.[25] The KCS/TFM transaction is clearly not some "speculative" event that may or may not happen. Indeed, Applicants have acknowledged that that transaction may already be consummated by the time the Board renders its decision in this proceeding.[26] More importantly, none of the cases Applicants cite comes close to addressing the question presented here: should two parties to

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[23] In fact, Tex Mex has been a U.S. subsidiary of Mexican railroads since the early 1900s, when its stock was indirectly owned by Ferrocarriles Nacionales de Mexico. *See Mexrail, Inc. v. Union Pacific R.R.*, STB Finance Docket No. 32980 (STB served July 13, 2000) at 2 n.4.

[24] TFM has acknowledged that it participates in international traffic moving in the United States by virtue of participation in a car pooling agreement, and it has applied for and obtained authorization from the Board for its participation in that agreement. *See Transportation Ferroviaria Mexicana – Pooling of Car Service Regarding Multilevel Cars,* STB Finance Docket No. 29653 (Sub-No. 7) (STB served Sept. 28, 1999). Under 49 U.S.C. § 11322, the Board could have granted such approval only upon a finding that TFM was a carrier providing transportation within the Board's jurisdiction.

[25] *See, e.g., Burlington Northern Inc. & Burlington Northern R.R. – Control & Merger Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry.,* ICC Finance Docket No. 32549 (STB served Sept. 21, 1995) at 6. Moreover, KCS ignores that fact that the Board more recently has recognized that it is appropriate to depart from its "one merger at a time" principle in some circumstances. *See Major Rail Consolidation Procedures,* STB Ex Parte No. 582 (Sub-No. 1) (STB issued June 25, 2001) at 46. Here the Board properly called for Applicants to provide information about the TFM acquisition on the ground that the broader KCS/Tex Mex/TFM transaction could be very significant and that the role TFM plays in the U.S.-Mexico corridor is significant. *See* Decision No. 2, p. 10.

[26] *See* KCS-16/TM-16 at 14-15.

a transaction be permitted to avoid consideration of the overall effect of an international transaction by artificially bifurcating the jurisdictional and non-jurisdictional components?

In fact, the Board's consideration of aspects of an international transaction that involve transportation in the United States is simply a reflection of its regular practice of examining matters that, while they may not require approval, are nevertheless "related" to a transaction before the agency. For example, in the proceeding to approve the CN/Illinois Central ("CN/IC") control transaction, the Board considered the effects of an Alliance Agreement entered into by the applicants and KCS. It concluded that the agreement did not require regulatory approval, but, because it was "an important settlement agreement related to this merger, . . . it is appropriate for us to scrutinize carefully all of the issues relating to it that have been raised in this proceeding."[27]

The Board made it clear in *CN/IC* that, even if a loss of competition arises from a non-jurisdictional arrangement related to the transaction formally under review, it is appropriate to consider those effects in connection with the transaction. Three shippers complained that another CN/KCS settlement agreement (the "Access Agreement") negotiated in connection with the control proceeding would result in loss of build-in/build-out opportunities.[28] The agency examined this allegation, noting that loss of such an option may "constitute a significant loss of competition."[29] The Board explicitly rejected CN's argument that the Board could not consider such a loss because it resulted

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27 *See Canadian National Ry., Grand Trunk Corp., & Grand Trunk R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., & Cedar River R.R.*, STB Finance Docket No. 33556 (STB served May 25, 1999) ("*CN/IC*") at 25.

28 *Id.* at 33.

29 *Id.*

from a non-jurisdictional settlement agreement, explaining that the agreement was "clearly merger-related."[30]

Applicants recently invoked a decision involving UP and Chicago & North Western ("CNW")[31] for the proposition that the Board will look only to the "specific" transaction at issue. *See* KCS-16/TM-16 at 16-17. However, in evaluating UP's agreement to purchase a sufficient amount of stock to gain effective control, the ICC stated that it would confine its consideration of the application "to the specific stock transaction *and related events*."[32] The Commission went on to make clear that other scenarios UP had presented were relevant to the analysis because they were indications of "what UP intend[ed] to do," provided the basis for findings on the competition and public benefits issues, and therefore "must be considered" as part of the applicant's operating plan.[33]

The precedents discussed above make it clear that the Board's longstanding practice has been to investigate transnational aspects of a transaction, including where pertinent activities that physically occur outside the United States, that may have an effect on transportation in the United States, and to examine matters "related to" a merger when analyzing effects of the merger. KCS's acquisition of control of TFM has effects on transportation in the United States and is related to KCS's acquisition of control of Tex Mex. The Board should have no hesitation in considering the effects of the entire KCS//Tex Mex/TFM transaction in the United States as part of this proceeding.

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30 *Id.*

31 *UP/CNW – Control,* 9 I.C.C.2d at 943.

32 9 I.C.C.2d. at 949 n.14 (emphasis added).

33 *Id.*

C. The Board May Fashion Remedies Addressing the Effects of the KCS/Tex Mex/TFM Transaction in the United States, Including Effects Arising from Its International Aspects

The Board may properly impose conditions that address any adverse effects of the KCS/Tex Mex/TFM transaction on transportation in the United States. This is particularly appropriate in the circumstances of this case, in which important NAFTA traffic flows are at stake. Moreover, Applicants have already made commitments involving TFM in recognition of effects that TFM's conduct will have on competition in the United States, and KCS's Mr. Davies stated at the July 31 hearing that Applicants expect that the Board will impose conditions in connection with those commitments.

The Board's precedents fully support the conclusion that the agency may impose conditions that address effects of a transnational transaction in the United States, even when those conditions will affect non-U.S. carriers and conduct outside the United States. For example, in the *CN/IC* proceeding, the Board imposed a merger condition in an effort to protect international traffic flows, despite the fact that its condition affected an Ontario partnership, owner of the Detroit River Tunnel Company. The Board considered a claim by CP and another party that, due to CN's new investment in IC, CN would be less inclined to allow needed improvements to the Detroit River Tunnel ("DRT"). Their argument was that CN would have a stronger incentive to impede the flow of CP's cross-border traffic in order to shift traffic to CN lines in Canada and the United States.[34] The Board concluded that the protesting parties had failed to demonstrate a significant causal link between the transaction and the pre-existing DRT situation. It nevertheless imposed a

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[34] *CN/IC* at 34-35.

condition holding applicants to their representation that they would not use their control of the Detroit River Tunnel Company – through the Ontario partnership – to frustrate necessary improvements to the tunnel, "because of the importance of the DRT to international trade."[35]

In the *CN/WC* proceeding, which involved a minor transaction, the Board declined to impose the terms of an agreement between CN and the National Industrial Transportation League ("NITL") as a condition to approval of the transaction because doing so did not appear necessary to remedy adverse consequences of the transaction.[36] However, the Board did state that it would hold applicants to representations they had made about the meaning and reach of the agreement.[37] The NITL/CN agreement included interchange protection provisions that included, among other things, a commitment by CN/WC to establish and maintain "commercially reasonable contract through rates and charges" for traffic originating in or destined to points on the Wisconsin Central system over any existing interchange between Wisconsin Central and another carrier.[38] This commitment covered all of the North American rail carrier subsidiaries of Wisconsin Central Transportation Corporation, including Algoma Central, which operated only in Canada.[39] Thus, the Board held the applicants to a commitment regarding rates they would charge for transportation that occurred in part within Canada.

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35 *Id.* at 35.

36 *CN/WC* at 12.

37 *Id.*

38 *Id.* at 34.

39 *Id.* at 3 n.3; *see also* NIT League-CN Settlement Agreement (Exhibit 8).

Of course, the rate context is one in which the Board has long awarded relief that extends across national boundaries. It is well established that the Board may assess the reasonableness of joint rates involving a domestic carrier and a foreign carrier, even though its remedial powers do not extend directly to the foreign carrier. In such cases, the Board orders relief for an unreasonable international through rate against the United States carrier participating in the route, even though the agency lacks jurisdiction over the foreign segment of the through route and rate.[40] The Board "remains free to take corrective action such as assessing reparations from domestic U.S. carriers participating in such rates."[41]

In this case, requiring KCS, as a condition to Board approval of the Tex Mex transaction, to agree to use its control of all NAFTA Rail carriers (including TFM) to cause TFM to refrain from certain practices that would have anticompetitive effects in the United States would be entirely appropriate and consistent with past practice. The Board has previously emphasized the importance of protecting NAFTA flows.[42] The conditions UP proposes – aimed at fair treatment for U.S. carriers using the Laredo Bridge and keeping the

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40 *See, e.g., Great Northern Ry. v. Sullivan,* 294 U.S. 458 (1935); *Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry.,* 385 U.S. 182, 183-84 (1966).

41 *Canadian Pacific Ltd. v. United States*, 379 F. Supp. 128, 134 (D.D.C. 1974).

42 For example, in *UP/SP*, 1 S.T.B. at 421, the Board stated:

> "We are particularly sensitive to our responsibility to ensure that this merger will foster the goal of North American economic integration embodied in NAFTA. After all, our regulatory powers are derived from the "Commerce Clause" of our nation's constitution, which, in a very real sense, has resulted in the creation of a "free trade zone" within these United States, leading to our emergence in this century as an economic superpower."

Laredo Gateway open – are all directed at preserving competition and efficiency for NAFTA traffic flows. They would not pertain to TFM's transportation of rail traffic solely between points within Mexico. As explained in later sections, in order to preserve competition at the vital Laredo Gateway and to avoid anticompetitive effects north of the border for U.S.-Mexico traffic movements, BNSF and UP require cooperation from TFM on international interline shipments on commercially reasonable terms, as KCS has promised.

Remedying effects arising out of KCS's acquisition of control of TFM (in combination with its acquisition of control of Tex Mex) is particularly appropriate here. Applicants have already made commitments to the Board and to other parties in this proceeding regarding their intention to treat other carriers fairly in operation of the Laredo Bridge, to keep the Laredo Gateway open on commercially reasonable terms, and to avoid discrimination against connecting carriers.[43] In testifying at the Board's hearing on July 31, 2003, in this proceeding, Mr. Davies of KCS stated specifically that KCS expects that the Board will impose a condition involving preservation of commercially reasonable access to the Laredo Gateway. Because Applicants have already conceded the appropriateness of such commitments, there should be no objection to the Board's imposition of conditions ensuring the enforceability of those commitments.[44]

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[43] Applicants' July 21 Letter (Exhibit 2).

[44] *See, e.g.*, *CN/WC* at 8, 12 (Board will "hold applicants to representations they have made in this record about the meaning and reach of [the applicants' settlement agreement], including applicants' pledge not to "engage in vertical foreclosure by closing efficient gateways").

D. Imposing Conditions to Remedy Adverse Effects of the KCS/Tex Mex/TFM Transaction on Transportation in the United States Would Not Violate Principles of Jurisdiction or Comity

Applicants have suggested that imposing conditions relating to effects of KCS control of TFM and Tex Mex would somehow exceed the Board's jurisdiction and violate principles of comity. This is not the case.

UP is not asking the Board to assert "extraterritorial jurisdiction." We anticipate that the Board would impose any condition not to TFM or any other Mexican entity, but on a U.S. entity – KCS – over which the Board clearly has jurisdiction. Such conditions would be directed at NAFTA Rail management decisions made in the United States, in Kansas City, Missouri. Most importantly, the conditions would affect movements into and out of the United States and commercial arrangements relating to those movements (*e.g.*, establishment of origin-to-destination rates for U.S.-Mexico cross-border shipments). UP is concerned with any effects of the entire transaction on transportation *in the United States*, *i.e.,* on competition north of the border. The Board would order KCS, a U.S. Applicant, to negotiate with other parties and ultimately to exercise its control over TFM to cause it to refrain from conduct that would adversely affect competition north of the border.[45]

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[45] Of course, it is well established that U.S. law can apply to foreign economic actors to the extent that the effects of their conduct are felt in the United States. For example, in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993), the Supreme Court upheld the applicability of the U.S. laws to London-based insurance companies and stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Based on this "effects test," the U.S. antitrust agencies routinely review proposed mergers involving foreign companies, and routinely impose conditions on such mergers. *See, e.g.,* FTC Press Release, "FTC Accord in Ciba Geigy/Sandoz Merger to Prevent Slowdown in Gene Therapy

(footnote continued ...)

Nothing in the conditions UP seeks would violate Mexican sovereignty in any way. No Mexican agency has the power to redress anticompetitive effects in the United States. No Mexican agency has even looked at that subject. What UP is proposing here is merely prescription of concrete steps to accomplish broad commitments that KCS has already made. These steps – negotiation of dispatching protocols requiring fair treatment of carriers using the Laredo Bridge, avoiding discrimination against UP on matters of service, and providing commercially reasonable terms for through movements over the Laredo Gateway – would not require KCS to order TFM to violate any Mexican law or regulation. *See* Fuentes V.S. at 9-10.

Applicants have also suggested that the Board should refrain from considering the overall effects of KCS's acquisition of TFM and Tex Mex because other regulatory bodies have some role in reviewing the TFM portion of the transaction. KCS-16/TM-16 at 11-12. The Board should reject this suggestion. The issue in this proceeding is the effects of the transaction on highly significant rail traffic flows into and out of the United States at the most important rail gateway on the U.S./Mexico border. The fact that other agencies are also reviewing the transaction (or have already reviewed it) does not suggest that the Board should relinquish its authority to examine effects of the transaction in the United States. No Mexican body will be concerned with competition north of the border. The fact that other agencies with different responsibilities review this transaction should not

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(... footnote continued from previous page)
Development & Preserve Competition in Corn Herbicides, Flea-Control Markets" (Dec. 17, 1996) (<http://www3.ftc.gov/opa/1996/12/ciba.htm>) (describing settlement agreement requiring two Swiss pharmaceutical companies to undertake substantial divestitures of foreign assets).

deter the Board from taking appropriate action to safeguard competition in the United States. Certainly no Mexican agency is in a position to regulate in this area. Fuentes V.S. at 7-9.[46]

We briefly review the status of the three investigations Applicants to which Applicants have alluded.

Mexican Competition Commission

As Applicants report, the Mexican Competition Commission (the Commission Federal de Competencia ("CFC")) decided not to block KCS's acquisition of TFM under Mexico's competition law. However, this action does not indicate that the transaction will have no anticompetitive effects on U.S.-Mexico cross-border traffic or within the United States. CFC expressly limited its analysis to the competitive situation *within* Mexico. It considered only an intra-Mexico market, defined as {

} CFC apparently viewed the transaction as {

} The CFC decision included no analysis of effects on international transportation, or effects of NAFTA Rail control of TFM on competition within the United States. Thus, the decision has no bearing on the issues that this Board must determine.

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[46] The Board has recognized that Canadian and Mexican authorities will be reviewing proposed transnational railroad combinations simultaneously with the Board's review. *See* 49 C.F.R. § 1180.1(k)(2).

[47] *See* Fuentes V.S., Exh. A (KCS-C-0188).

[48] *Id.* at KCS-C-0189.

Moreover, CFC's review was performed on an *ex parte* basis, without allowing participation by parties other than KCS/TFM. The CFC rejected Ferromex's comments, apparently based on a belief that Mexican law precluded it from considering the views of other parties.[49] Even after limiting its analysis, CFC voted to approve the transaction on a tie vote (2-to-2). Under CFC procedures, the vote of a commissioner who supported the transaction was counted as the tie-breaking vote. Fuentes V.S. at 7-8.

U.S. Department of Justice

UP understands that KCS and/or Grupo TMM made Hart-Scott-Rodino notifications pertaining to KCS's acquisition of TFM, and that the statutory waiting period has expired. However, the agency that would have reviewed the transaction was aware that the Board is conducting its own review of the transaction, and that the Board (in Decision No. 2) has expressed its intention to consider the competitive effects of KCS's acquisition of both TFM and Tex Mex. Given DOJ's limited enforcement resources, its limited enforcement options relative to the Board's broad remedial authority,[50] and its awareness of the Board's pending proceeding, it should not be too surprising that DOJ did not take action regarding the TFM acquisition. Whatever action the Board chooses to take in this case will not create a conflict with DOJ's disposition of the matter.

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[49] UP attempted to participate in the CFC proceeding, but, pursuant to the CFC's standard operating practices, it refused to consider submissions by parties other than KS/TFM. Fuentes V.S. at 8.

[50] Unlike the Board, DOJ has no power to impose competition-preserving conditions. It must secure the parties' agreement to a consent decree or sue in federal court to enjoin the transaction.

Mexican Foreign Investment Commission

As Applicants note, KCS's acquisition of TFM is also subject to review by Mexico's Foreign Investment Commission ("FIC"). FIC is charged with considering whether control of TFM "would contribute to increasing the competitiveness of Mexican industry and promoting regional and technological development, and protect the sovereign integrity of the Nation. The primary focus of this inquiry is on "internal Mexican economic matters." Fuentes V.S. at 8. FIC's review is ongoing, and the precise scope of its inquiry remains unclear. Whatever the outcome of that review, however, it will not involve any evaluation of the effects of KCS control on competition in the United States.

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Thus, there is no jurisdictional bar and no principle based on comity that precludes the Board from analyzing the effects of the entire KCS/Tex Mex/TFM transaction in the United States or from imposing conditions to remedy any adverse effects. The Board is the only agency that is in a position to address the effects of the overall transaction on transportation in the United States. It should proceed with this analysis and, on that basis, impose conditions that will make concrete and effective the commitments Applicants have previously stated in this proceeding.

III. UNCONDITIONED KCS CONTROL OF TEX MEX AND TFM WOULD RESULT IN SUBSTANTIAL LESSENING OF COMPETITION IN THE UNITED STATES

Under 49 U.S.C. § 11324(d), the Board's focus in this case is on competition. UP recognizes that the Board must "approve the transaction" unless it finds there is a likelihood that it will cause a "substantial lessening of competition" that cannot be overcome through conditions without sacrificing public interest benefits stemming from the

transaction.[51] This transaction likely will have such an effect, unless the Board exercises its broad power under 49 U.S.C. § 11324(c) to impose conditions that protect competition. As we explain below, the Laredo Gateway plays a uniquely important role in U.S.-Mexico rail transportation, for which competition among U.S. carriers north of the border provides significant benefits. KCS control of Tex Mex and TFM will give it control of all U.S.-Mexico traffic moving across this vital gateway. Unless Applicants' conditions are implemented by the Board in meaningful and enforceable ways, KCS will use its control to cause anticompetitive shifts of traffic from UP-TFM routes to KCS/Tex Mex routes, degrading services provided to shippers and raising rates.

A. The Laredo Gateway Is Vitally Important to U.S.-Mexico Rail Transportation

The gateway at Laredo, Texas, where Tex Mex and TFM connect, is at the center of this case. The Board has long recognized the vital importance of the Laredo Gateway for competition in the United States.

1. The Board's Grant of Trackage Rights to Tex Mex in *UP/SP* Was Predicated on a Finding that Rail Competition Via the Laredo Gateway Must Be Protected

In 1996, the Board concluded that Laredo was "the most important U.S.-Mexican rail gateway,"[52] occupying a position of "separate and surpassing economic

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51 *See Kansas City Southern Industries, Inc., KCS Transportation Co. & The Kansas City Southern Ry. – Control – Gateway Western Ry. & Gateway Eastern Ry.,* STB Finance Docket No. 33311 (STB served May 1, 1997) at 4 (if the transaction is likely to cause a substantial lessening of competition, Board may approve the transaction only "if the public interest benefit outweighs any anticompetitive impact that cannot be mitigated through conditions").

52 *UP/SP*, 1 S.T.B. at 422.

significance" in U.S.-Mexico commerce.[53] These conclusions were based in significant part on Tex Mex's representations to the Board that:

> "Laredo is the principal gateway for rail traffic between the United States and Mexico. A majority of all rail traffic moving between the United States and Mexico moves over this gateway. Of all the U.S.-Mexico rail border crossings, it is supported by the strongest infrastructure of customs brokers and provides an effective routing in Mexico to the major Mexican destinations."[54]

Based on these representations and the Board's own findings, the Board granted extensive trackage rights to Tex Mex in order to ensure that there was no reduction in rail competition for rail traffic moving via Laredo.

The Board justified this grant based on the need to "ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo." 1 S.T.B. at 424.[55] The Board defended its action in the Court of Appeals on the same basis, explaining that it was "undisputed that the merger without conditions would have resulted in significant competitive harm south of Houston, particularly in the U.S.-Mexico trade over the important Laredo gateway, which is used only by UP and Tex Mex."[56] Unless the Board

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[53] *Id.* The Board also found that that Laredo was "the premier Eastern Mexico gateway," in part because it was the "most efficient Mexican rail gateway" and in part because of its "excellent infrastructure and customs facilities." *Id.* at 565, 566.

[54] *UP/SP*, Responsive Application of The Texas Mexican Ry. (TM-23) (Mar. 29, 1996) at 8-9 (Exhibit 9). Similarly, in this case, Applicants acknowledge that Laredo's importance is "due to [its] superior infrastructure, such as customs brokers, and its location on the shortest route between major Mexican industrial and population centers and the Midwest and Eastern U.S." Application, Grimm V.S. at 84.

[55] *See also UP/SP, Houston/Gulf Coast Oversight*, Decision No. 10 (STB served Dec. 21, 1998) at 10 (noting that Tex Mex's trackage rights over UP were designed to address "the potential loss of competition at Laredo").

[56] *Western Coal Traffic League v. STB,* No. 96-1373, Brief of Respondent STB (Dec. 1997) at 46 (Exhibit 10). The Board defended the grant of Tex Mex's trackage rights as

(footnote continued ...)

were to conclude in this case that there have been "substantially changed circumstances"[57] – in which case the justification for a continuation of Tex Mex's trackage rights would evaporate – it would be impossible for the Board to find there are sufficient alternatives to rail transportation via Laredo (*e.g.*, alternative gateways or modes) to put aside the concern for protecting rail competition at this vital gateway.

2. U.S.-Mexico Rail Shippers Overwhelmingly Prefer Routes Via Laredo

As important as Laredo was in 1996, it is even more important today. The volume of traffic moving across the Laredo Gateway has more than doubled since 1995, as shown in Exhibit F to Mr. Gray's verified statement.[58] Strengthened by the Board's grant of trackage rights in *UP/SP*, Tex Mex has increased its own Laredo Gateway volumes three-and-a-half fold since 1995. *Id.*[59]

Laredo's importance relative to other border gateways is striking. More than 75 percent of all U.S.-Mexico rail traffic (by dollar value) crosses the border at Laredo. Gray V.S. at 10. Laredo's share of aggregate U.S.-Mexico rail commerce understates its importance. Basic geography makes the three gateways in western Mexico – Calexico, Nogales and El Paso – unacceptable alternatives to Laredo for most of the rail traffic flowing between the central and eastern United States (and Canada) and the most populous

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(... footnote continued from previous page)
"preserv[ing] a limited role for Tex Mex in providing part of an alternate route for shipments moving to and from Mexico." *Id.* at 46-47.

57 49 C.F.R. § 1115.4.

58 *See* Gray V.S. at 12 & Exh. F.

59 *See also* Gray V.S. at 12.

and industrialized regions of Mexico. Those gateways are for the most part limited to handling traffic moving between the western United States and points in western Mexico. *Id.*

Of the three eastern Mexico gateways – Laredo, Eagle Pass/Piedras Negras, and Brownsville/Matamoros – Laredo's share is by far the largest. In 2002, Laredo handled over 75 percent of the rail traffic (by dollar value), and over 50 percent of the rail carloads, that crossed the border at these three gateways.[60] The principal alternative to Laredo is Eagle Pass/Piedras Negras, where UP and BNSF connect with Ferromex.[61] Laredo handles more than three times the volume of traffic crossed at Eagle Pass, and Laredo's share continues to grow.[62]

Perhaps even more telling is the share of *UP's* traffic moving via Laredo. Despite having acquired a 26 percent equity interest in Ferromex in 1997, UP's cross-border traffic has shifted increasingly *toward the Laredo Gateway*, because shippers demand the benefits that Laredo offers. In 1995, Eagle Pass accounted for { } percent of UP's (and

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60 Gray V.S., Exh. D.

61 Brownsville/Matamoros is of very limited importance. Because of geography, inferior infrastructure and other factors, Brownsville is used principally for traffic moving between the United States and Mexican points just across the border from Brownsville, and for the routing of empties to relieve congestion at Laredo. It does not offer an effective substitute for routes via Laredo. In any event, Brownsville provides a connection only with TFM and no competitive alternative. Gray V.S. at 11.

62 In 1995, Laredo accounted for { } percent of the total cross-border rail traffic at these two gateways. By 2002, Laredo's share had grown to { } percent. *See* Gray V.S. at 12 & Exh. F.

SP's) total cross-border traffic at the Laredo and Eagle Pass gateways.[63] By 2002, Eagle Pass's share of UP's traffic moving via these two gateways had fallen to only { } percent.[64]

Even these impressive statistics mask the true importance of the Laredo Gateway, because they focus on aggregate U.S.-Mexico flows. Examining individual state-to-state flows reveals even more clearly shippers' overwhelming preference for Laredo. For movements between the central and eastern portions of the United States and Canada, on the one hand, and the Mexican states in the industrialized heartland of northeastern and central Mexico that are served by TFM's superior route network, on the other hand, the share of traffic moving via Laredo is in many cases well in excess of { } percent. *See* Gray V.S. at 11-12; Hausman V.S. at 7 & Exh. B.

3. The Laredo Gateway Offers Important Advantages for Shippers

As John Gray, UP's Vice President-Interline, explains in detail, Laredo has several attributes that account for its preeminent role in cross-border rail transportation:

First, as a result of extensive investments over many years by the railroads serving Laredo and by governmental agencies and third parties, Laredo has unparalleled infrastructure devoted to the handling of cross-border shipments. Laredo has uniquely well-developed capabilities for handling the customs, agricultural, immigration, narcotics and (increasingly in the post 9/11 world) security-related inspections required at an international

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[63] In 1995, UP handled { } loads via Laredo; SP handled { } via Laredo in conjunction with Tex Mex; and SP handled { } loads via Eagle Pass. Gray V.S. at 12 n.13 & Exh. F.

[64] *See* Gray V.S. at 12 & Exh. F.

border. Laredo also has an unmatched community of brokers, freight forwarders and other third parties who assist shippers with customs and other aspects of the border crossing process. Gray V.S. at 14-15; Barkley V.S. at 3.[65] In significant part, these advantages are associated with the large volume of rail and truck traffic that moves through Laredo. Laredo's volume is more than twice that at the next largest U.S./Mexico crossing point (El Paso). Eagle Pass is a distant eighth, with barely eight percent of Laredo's volume. Gray V.S. at 15 & Exh. D.

The railroads serving Laredo also have made extensive investments to make it a uniquely efficient point for interchanging large volumes of cross-border rail shipments. UP has spent tens of millions on extensive yard facilities, mainline capacity, railcar inspection facilities, and other infrastructure needed to make Laredo work as a high volume rail border crossing point. Tex Mex and TFM have also made significant investments. Gray V.S. at 15-16; Barkley V.S. at 3. No other gateway has the basic infrastructure in place to handle the volumes of traffic that move via Laredo, much less to do it efficiently. Gray V.S. at 15-16; Barkley V.S. at 12-13.

Second, the Laredo Gateway provides the only efficient connection with TFM's Mexican rail network, which KCS regards as Mexico's "crown jewel system."[66] KCS understands that TFM is the Mexican railroad {{

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[65] Applicants and the Board recognize these advantages, as noted above (at notes 53 & 54)

[66] Transcript of KCS Presentation to Analysts, April 29, 2003, Tr. at 13 (Exhibit 11).

}} TFM serves many important points in Mexico exclusively – such as Toluca, San Luis Potosí and much of Monterrey – and it has more efficient routes between the U.S. border and many other important Mexican points – including Monterrey and the industrialized areas in and around Mexico City. Gray V.S. at 18.

Two of TFM's significant advantages stem from failures in the Mexican privatization process that created both TFM and Ferromex. Under the privatization plan, Ferromex was to have received extensive access to TFM-served industries in the Monterrey area in order to create two-railroad competition there. However, TFM has taken advantage of the vagaries of Mexico's legal and regulatory systems to block Ferromex's access to Monterrey. *See* Fuentes V.S. at 6-7; Gray V.S. at 18-19.

In addition, Ferromex's Concession included a grant of hundreds of miles of trackage rights over TFM's Laredo-Mexico City mainline – between Ramos Arizpe (a point near Saltillo) and Querétaro – in order to give Ferromex an efficient route between the U.S. border and central Mexico (especially the so-called "Valle de Mexico" region encompassing Mexico City).[68] Ferromex's own route from Eagle Pass to Mexico City is 57 percent (407 miles) longer than TFM's route from Laredo. Ferromex's trackage rights over TFM reduce this disadvantage to only 48 miles, but they do not provide Ferromex with a useful or cost-effective alternative. Gray V.S. at 17-18. TFM has successfully imposed strict limitations on the traffic Ferromex can handle using these rights, and the limited traffic TFM allows

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[67] *See* {{
}} (Exhibit 4); *see also* note 54, above.

[68] These rights are shown on the map set forth in Exhibit A to the Gray Verified Statement.

Ferromex to carry incurs extraordinarily high trackage rights fees. Ferromex must pay TFM the equivalent of $0.71 per car-mile to use these rights, which is more than twice what BNSF and Tex Mex pay to use their extensive trackage rights over UP in the United States. *See* Gray V.S. at 17 & Exh. H. UP estimates that Ferromex's variable costs via these trackage rights are approximately 75 percent higher than TFM's costs for movements between the border and Mexico City. A large portion of this gap is accounted for by the unreasonably high fees. Gray V.S. at 18.[69]

Finally, as Mr. Gray explains, shippers also benefit from the uniquely efficient and well-developed rail transportation service offerings via Laredo. TFM has cooperated extensively with both UP and Tex Mex (and its interchange partners KCS and BNSF) to develop highly efficient operating practices (such as pre-blocking), joint service offerings, and customs pre-clearance processes. *See id.* at 19-20.

B. Unconditioned KCS Control of Tex Mex and TFM Threatens to Undermine Competition Via the Laredo Gateway

In the *UP/SP* case, the Board recognized the importance of preserving effective two-railroad competition for international traffic moving via the Laredo Gateway. Concerned that the second railroad serving Laredo from the north – Tex Mex – would be threatened by diversion of SP-Tex Mex traffic to UP single-line routes, the Board granted

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[69] KCS is well aware of the crippling competitive disadvantages these fees impose on Ferromex. In discussions with Ferromex and Mexican regulatory agencies in connection with the TFM acquisition, KCS has steadfastly refused to consider any material reduction in the level of those fees. *See* Fuentes V.S. at 9. KCS has insisted that any method for establishing fees take into account the $1.4 billion price paid by KCS and Grupo TMM to acquire the TFM Concession in 1996, which underlay the calculation on which the current fee level was based. *Id.* KCS defends this position in a white paper provided to shippers and others in Mexico, *see* Gray V.S., Exh. K, but the fact remains that Ferromex's viability as a competitive alternative is severely hampered by the high fees.

Tex Mex hundreds of miles of trackage rights over UP to forge a direct connection with KCS at Beaumont, Texas. The Board understood not only that Laredo was a vitally important gateway for growing NAFTA trade, but also that competition between U.S. railroads north of the border must be protected.

KCS's proposal to acquire control of Tex Mex and TFM calls for the Board to protect that competition once again.

1. Shippers Benefit from Competition Between UP and KCS/Tex Mex Routes for Traffic Moving Via Laredo

Today, as in 1996, Laredo is served by a single Mexican railroad. Before 1996 that railroad was Mexico's government-owned railroad system, the Ferrocarriles Nacionales de Mexico ("FNM"). Since 1996 that railroad has been TFM, which is controlled by Grupo TMM. TFM (like FNM before it) has interacted with its U.S. connections in an equitable and even-handed manner. TFM has sought to attract traffic to its system in Mexico without regard to which U.S carrier handles the traffic north of the border. TFM has cooperated extensively with both UP and Tex Mex to develop highly efficient cross-border transportation options. Gray V.S. at 19-20. And, consistent with the requirements of Mexican railroad law and TFM's Concession, TFM has charged the same rate factors for its portion of the movement, regardless of which carrier it is working with. *Id.*; *see also* Fuentes V.S. at 4-5.

TFM's equitable behavior has created an environment in which competition between TFM's connections north of the border provides significant benefits for cross-border rail shippers. In *UP/SP*, Tex Mex described this competitive dynamic to the Board: "Because FNM [TFM's predecessor] sets its rates for the Mexican portion of international traffic without regard to the rates for the U.S. portion, the vigorous competition that now

exists between U.S. railroads for that traffic directly benefits the shippers, and any reduction in that competition will harm them."[70]

Consistent with the Board's objective in *UP/SP*, Tex Mex – in close cooperation with both KCS and BNSF – has provided strong competition for UP-TFM routes via Laredo. KCS/Tex Mex routes compete for traffic moving between Mexico and the territory served directly by KCS's system[71] as well as all points in the East, Midwest and Canada reached via KCS's connections with Eastern and Canadian railroads. KCS has important alliances with Canadian National, with which it connects at Jackson, Mississippi; with Norfolk Southern, with which it connects at Meridian, Mississippi; and with DM&E/IC&E, which provides KCS with access to Chicago and also allows KCS to tap grain traffic from IC&E's territory in northern Iowa.[72]

Even before KCS announced this transaction the KCS and Tex Mex have worked together to develop "seamless" services that compete against UP-TFM routes for traffic moving via Laredo. In 2002, KCS touted the fact that "KCS with its partners, TM

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70 *UP/SP*, Responsive Application of the Texas Mexican Ry. (TM-23) (Mar. 29, 1996), Ellebracht V.S. at 79 (Exhibit 9).

71 Among the important traffic points served by KCSR's system are chemical plants in Baton Rouge, Lake Charles, and elsewhere along the Gulf Coast, forest products shippers on KCSR's former-Midsouth lines in Mississippi, industrial shippers in the Kansas City area, and grain origination points in Iowa and Nebraska reached via KCSR's haulage rights north of Kansas City. Gray V.S. at 24.

72 *See id.* As KCS itself recognizes, one of the strengths of its system is that its {{ }}. *See* {{ }} (Exhibit 4).

and TFM, are second to none in servicing markets in Mexico."[73] UP and KCS/Tex Mex are frequent rivals in bidding for shippers' traffic, as Mr. Gray explains.

In addition, Tex Mex competes for traffic to and from points throughout the West (including western Canada) in conjunction with BNSF. Although KCS's plans for Tex Mex appear to be creating frictions in the Tex Mex-BNSF relationship, Tex Mex cooperates very closely with BNSF on substantial volumes of traffic moving via Laredo.[74]

2. KCS Will Have Incentives and Opportunities to Use Its Control of Tex Mex and TFM to Deprive Shippers of the Price and Service Benefits of UP-TFM Routings

Until now, TFM has not skewed the competitive playing field to favor KCS/Tex Mex routes via Laredo. Instead, although KCS/Tex Mex have cooperated closely with TFM to develop efficient cross-border transportation services, they have faced stiff and often successful competition from efficient UP-TFM services.

Armed with control of both Tex Mex and TFM, however, KCS will have the incentive and ability to manipulate competitive outcomes to favor routes in which its U.S. railroads (KCS and Tex Mex) participate. The incentives to do so will be extreme. KCS has strong incentives to increase its profits by capturing more traffic north of the border, in part to capture the margins on that traffic (Hausman V.S. at 10; Gray V.S. at 23-24) and in part to pay off the substantial debt it will be taking on when it acquires TFM. Substantial volumes of Laredo Gateway traffic will be available to KCS if it can impede UP-TFM

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[73] KCS NEWS, *"Despacho Previo Process Clarified,"* March 5, 2002 (available on www.kcsi.com) (Exhibit 12).

[74] The fact that BNSF moves so much joint-line traffic across the Laredo gateway with Tex Mex – despite having its own single-line route to Eagle Pass – underscores the importance of the Laredo Gateway.

competition. As shown in Gray Exhibit J, only a small portion of the traffic now moving across the Laredo Gateway – { } percent – is not subject to handling by KCS and/or Tex Mex.

For this portion of UP TFM traffic, KCS may well have incentives to permit TFM to continue its cooperation with UP. However, the balance of the Laredo Gateway traffic – { } percent – is either handled by KCS/Tex Mex today or would be available to them were KCS to implement strategies aimed at degrading the transportation services available from UP via the Laredo Gateway. Gray V.S. at 25.

Applicants have told the Board that they do not anticipate any diversions of traffic resulting from KCS's control of TFM beyond the very modest decreases expected from the Tex Mex acquisition.[75] However, it is clear that KCS will be eager to seize every available opportunity to shift traffic from UP-TFM routes to KCS-Tex Mex-TFM (or BNSF-Tex Mex-TFM) routes. It would behave that way to lengthen hauls on the "NAFTA Rail" system and thereby earn greater profits.

And KCS has told Wall Street that it plans to do exactly that. Soon after KCS announced its plan to acquire control of Tex Mex and TFM, KCS's Chairman and CEO Michael Haverty told securities analysts that acquiring control of TFM will allow KCS to shift TFM's U.S.-Mexico traffic to Tex Mex/KCS routes, because the combined KCS/Tex Mex/TFM system would have "a lot of influence o[n] traffic that moves between Mexico

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[75] Mr. Mutén forecasts that KCS control of Tex Mex alone – on the assumption that TFM would still be controlled by Grupo TMM – would lead to diversions to KCS/Tex Mex routes totaling 6,313 carloads annually. *See* Application, Mutén V.S. at 124. Applicants say they will seek this traffic because it will bring "additional revenues" to the combined system. Application, Haverty V.S. at 65.

and the United States," and would thereby "draw more traffic to the combined system."[76] He made clear that KCS will be "looking to lengthen the [existing TFM] haul" for "as much traffic . . . as we can."[77] Similarly, KCS's website describes the "strategic rationale" of the KCS/Tex Mex/TFM transaction as including the aim of "lengthen[ing] hauls through an 'across-the-border' view."[78] KCS's recent decision to tell the Board the opposite of this "strategic rationale" should be viewed with healthy skepticism.

Were this transaction to enable KCS/Tex Mex to attract additional traffic to their lines north of Laredo solely by improving services or lowering rates, those effects would be procompetitive rather than anticompetitive. Although UP might lose traffic, shippers would not be harmed and UP would not favor Board intervention.

In this case, however, KCS control of Tex Mex and TFM poses serious threats to the competitive process by undermining the transportation options available to shippers at the Laredo Gateway. And it will do so without promising any significant improvements in KCS/Tex Mex/TFM offerings. See pages 58-63, below. KCS emphasizes that it is acquiring *only* control, but control is all it needs to disrupt the competitive process by degrading UP-TFM competitive options and forcing traffic to KCS/Tex Mex lines. Competition for U.S.-Mexico cross-border traffic depends on efficient access to the Laredo

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76 KCS Presentation to Analysts, April 29, 2003, Tr. at 12, 20 (Exhibit 11).

77 *Id.* at 10. Mr. Haverty declined to identify "just exactly what the revenue synergies are" – *i.e.*, the traffic diversions and increases in revenue on existing traffic that KCS expects – because KCS had based its initial financial analysis of the transaction on a static analysis. *Id.* at 20; *see also* Supplement at 9. Nevertheless, Mr. Haverty made quite clear that KCS in fact did anticipate traffic shifts stemming from its control of TFM.

78 *See* KCS PowerPoint Presentation regarding NAFTA Rail transaction (available at www.kcsi.com/pdf/nafta_rail.pdf) at 4 (excerpts at Exhibit 6).

Bridge and effective cooperation from TFM, which is an indispensable link in all traffic moving across the border at Laredo. With control of both Tex Mex and TFM, KCS will have effective control of 100 percent of the Laredo Gateway traffic. KCS control of TFM will also allow NAFTA Rail to circumvent – in the United States – the non-discrimination requirements imposed by Mexican law and TFM's Concession so as to extract additional profits from those cross-border shippers that are most dependent on rail. These strategies will not merely shift traffic away from UP-TFM routes, they will do so in *anticompetitive* ways by forcing shippers to pay more and accept poorer service.

KCS control threatens competition in three ways, as explained by economist Jerry Hausman and UP's John Gray and Stephen Barkley.

a) KCS Can Use Its Control of TFM to Degrade UP-TFM Options

When KCS controls both Tex Mex and TFM, it will be in a position to make UP-TFM transportation options less attractive to shippers. It could use its control to cause TFM to discontinue cooperation with UP on operational or service matters, which would degrade the service available to customers from UP-TFM routes and increase shipper costs. KCS could, among many potential steps, cause TFM to cease pre-blocking traffic for UP, to withdraw from participation in efficient customs pre-clearance processes for UP traffic, to delay placement of empty equipment for UP shipments, or to increase transit times on shipments destined for or received from UP. Alternatively, KCS could cause TFM to stop working with UP to *improve* UP-TFM service offerings. Gray V.S. at 31-33. Any of these actions would not merely harm UP, but would deprive shippers of valuable competitive transportation options and thereby disrupt the competitive process. Hausman V.S. at 9-11; Gray V.S. at 33.

An even more serious threat to competition is the prospect that KCS would use its control of TFM to increase TFM rate factors in order to disable competition from UP-TFM offerings.[79] TFM's rate factors are perhaps the single most important aspect of TFM cooperation for U.S.-Mexico traffic. UP could have routes north of the border that were clearly the most efficient, UP services north of the border could be preferred hands-down over those offered by KCS-Tex Mex and BNSF-Tex Mex, and UP could have unrestricted use of the Laredo Bridge to cross its trains. But if TFM's rate factors were too high, shippers would lose the benefit of UP competition. Gray V.S. at 26. For the past six years, TFM has fostered effective competition among U.S. carriers by quoting comparable rates to both of its U.S. connections. TFM has done this in part because its parent, Grupo TMM, has no economic interest in favoring KCS routes over UP routes, and in part because of Mexican legal requirements. *Id.*; Fuentes V.S. at 4-5.

When it acquires control of TFM, however, KCS will have the power to manipulate TFM's rate factors to make UP-TFM services more expensive for shippers, causing them to pay more, and in some cases forcing them to switch to inferior KCS/Tex Mex/TFM offerings. KCS could accomplish this objective without refusing to quote TFM rate factors to UP, and even without discriminating between UP and KCS/Tex Mex in the rate factors it does quote. All that KCS needs to do is cause TFM to raise its rates in relation to KCS rates north of the border which Mexican non-discrimination rules would allow. Gray V.S. at 27; Fuentes V.S. at 4.

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[79] This especially significant if the Board holds Applicants to their commitment to work with UP to develop methodologies for measuring and enforcing service standards for UP-TFM traffic via the Laredo Gateway.

A simple numerical example (spelled out in Table 1 below) helps illustrate how such a strategy might work. Assume that before KCS gains control of TFM, TFM has provided both UP and KCS/Tex Mex a rate factor of $100 for traffic to an eastern gateway (these numbers are purely illustrative), and that UP and KCS compete to handle the traffic north of Laredo. Assume that UP has the more efficient route and also charges a rate factor of $100. KCS's rate factor is $105. In today's fair competitive process, the shipper will chose the UP-TFM option and pay $200. This outcome is shown in the left-hand portion of the bottom row of Table 1.

After KCS acquires control of Tex Mex and TFM, it can change this result to the disadvantage of shippers. All it needs to do is instruct TFM to raise its rate factor by at least six dollars, as shown in Example 1 in the table. If it did that, the combination UP-TFM rate would now be $206, while KCS/TFM could charge $205 and win the business. KCS would collect this total amount by lowering its own factor to $99, a step it could take because it will get those dollars back through its ownership of TFM. The combined KCS/Tex Mex/TFM would make more money (and more profit, because KCS's previous $105 factor included some return), but the shipper would pay more and lose its preferred route north of the border. *See* Gray V.S. at 27; Hausman V.S. at 9-11.

TABLE 1			
	BEFORE KCS/TFM CONTROL	AFTER KCS/TFM CONTROL	
		Example 1	Example 2
UP Factor	**$100**	**$100**	**$100**
KCS Factor	**$105**	**$99**	**$95**
TFM Factor	**$100**	**$106**	**$120**
UP-TFM Rate	**$200**	**$206**	**$220**
KCS-TFM Rate	**$205**	**$205**	**$215**
Outcome	**UP wins; shipper pays $200**	**KCS wins; shipper pays $205**	**KCS wins; shipper pays $215**

As Mr. Gray explains, KCS could use a similar strategy to increase its profits to shippers' detriment where service rather than rates had led shippers to prefer UP-TFM routings in the pre-transaction period. Alter the above example to assume that UP and KCS/Tex Mex had offered to handle traffic from Laredo to an eastern gateway at comparable $100 rate levels, taking advantage of TFM's non-discriminatory ($100) rate factor, but that the shipper had chosen the UP route because it offered consistently faster transit times. After the transaction, TFM could increase its rate factor by $5 to both UP and KCS/Tex Mex, with KCS/Tex Mex lowering its factor by $5 to offset TFM's increase. To avoid a rate increase (from $200 to $205) the shipper would be forced to use the less attractive KCS/Tex Mex route north of Laredo. Alternatively, the shipper may conclude that it has a sufficiently strong preference for UP service that it is willing to pay $5 more to use it (a fact TFM likely would not have known until KCS/TFM attempted this strategy). Either way, KCS/Tex Mex/TFM would earn additional profits and the shipper would lose. Gray V.S. at 28.

KCS would have a great deal of latitude to manipulate TFM's rates even more than shown in the example, thereby making it even more difficult for UP-TFM service offerings to remain price-competitive. There are no effective Mexican regulatory limits on the level of TFM's rates for transportation within Mexico, as Mr. Fuentes explains. Fuentes V.S. at 3-4, 6. KCS could cause TFM to increase its rate factors as much as necessary to assure that UP was effectively disabled from competing, with KCS reducing its portion of the through rate enough to win the business and increase profits, but not so much that the traffic would dry up. The right-hand portion of Table 1 (Example 2) demonstrates the effect of a 20 percent increase in TFM's factor, which would allow KCS/TFM to win the business while simultaneously increasing the customer's rates significantly. *See* Gray V.S. at 28-29.

As Professor Hausman and Mr. Gray explain, KCS's implementation of such a strategy would hurt shippers and competition, not just UP. For a number of reasons, TFM does not extract from each piece of traffic moving via Laredo the last dollar of revenue that might conceivably be available by virtue of TFM's market power. Most rates are quoted to customers on a "Rule 11" basis, which involves each railroad charging the customer its own, separate rate to the U.S./Mexico border, typically without any agreement by the carriers about what the overall origin-to-destination price should be. This limits the degree to which TFM can differentiate among customers based on their specific circumstances and demand factors. For many shippers, moreover, TFM quotes one rate to the Mexican receiver (or shipper), while the U.S. carrier quotes its rate to a separate entity (either the shipper or receiver) in the United States. TFM's practice of quoting non-discriminatory rates also limits the extent to which it can effectively charge the highest rate that each piece of traffic can bear. *See* Gray V.S. at 29; *see also* Hausman V.S. at 11-12.

Meanwhile, north of the border, for traffic that is competitive between UP and KCS/Tex Mex (and its connections), competition between the U.S. railroads keeps rates competitive today – preventing either U.S carrier from picking up the dollars TFM leaves on the table. Because of this competition, UP would not have significant room to reduce its own revenue requirement in order to offset any higher TFM factors imposed by KCS. As a result, when such strategies extinguish competition from UP north of the border, they will remove constraints on KCS's rates, causing rate increases and reductions in the level of rail service for shippers. Hausman V.S. at 10-11; Gray V.S. at 30.

KCS likely would conclude that this strategy would not work to the same extent for all shippers. For those shippers with relatively better access to other transportation options (such as truck or barge) or more elastic demand for other reasons, KCS could offer lower rates by reducing its factor north of the border by somewhat more. For traffic that UP could efficiently route via Eagle Pass in conjunction with Ferromex, KCS might chose to maintain the status quo so that TFM could keep its existing Mexican portion of the revenues. But for significant amounts of existing Laredo traffic (both UP-TFM and Tex Mex-TFM), rates will increase and service will suffer. Gray V.S. at 30.

This strategy would be even easier for KCS/TFM to implement if Mexican law did not require TFM to offer its U.S. connections comparable rate factors for comparable traffic. If TFM could discriminate overtly against UP, KCS could simply cause TFM to raise its revenue requirements to UP but not to Tex Mex and/or KCS, and the result would be the same: UP's costs effectively would go up, KCS could win the business despite charging higher rates, and shippers would lose. *Id.*

b) KCS Control Will Create New Opportunities for KCS/TFM to Exploit TFM's Market Power By Selectively Raising Rates on Cross-Border Traffic

In addition to disabling a substantial amount of UP competition north of the border, KCS control of TFM would enable NAFTA Rail to increase rates where that TFM alone could not. As Applicants point out, Mexican law and TFM's Concession impose limits on the degree to which TFM can discriminate with respect to rates among similarly situated shippers or TFM's U.S. connections.[80] As Professor Hausman explains, to the extent these non-discrimination rules constrain TFM's ability to differentiate freely among shipments based on their transportation alternatives or other factors affecting their demand elasticity, TFM cannot exploit the full measure of its market power within Mexico. Hausman V.S. at 12; *see also* Gray V.S. at 29. In effect, TFM's rate factors are constrained by the competitive options of the *most elastic* shipments, causing it to charge lower rates than it otherwise would if it had perfect freedom and perfect knowledge. *Id.* Consumers benefit from this situation. The lower TFM rates get passed along to cross-border shippers, because the U.S. carriers' rates are constrained by rail-to-rail competition north of the border.

KCS control of TFM will change this environment by giving the commonly-controlled company will have the ability to price discriminate freely. KCS could simply cause TFM to raise its rate factors to levels that extract the full measure of TFM's market power for its least-elastic shipments. These shippers would suffer rate increases, even if they continued to use UP-TFM routings. Meanwhile, by manipulating the KCS/Tex Mex

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80 Supplement at 30; *see also* Fuentes V.S. at 4-5.

rate factor north of the border, KCS could hold rates constant for traffic that could least sustain a rate increase. An illustrative example is given in Table 2 below. *See* Hausman V.S. at 11-15.

TABLE 2

	Before KCS/TFM Control		**After KCS/TFM Control**	
	Elastic Traffic	Inelastic Traffic	Elastic Traffic	Inelastic Traffic
TFM Factor for Elastic Traffic	$100	$100	$120	$120
KCS/Tex Mex Factor	$100	$100	$80	$100
UP Factor	$100	$100	$100	$100
Outcome	Shipper pays $200 (Traffic moves UP-TFM or KCS-TM-TFM)	Shipper pays $200 (Traffic moves UP-TFM or KCS-TM-TFM)	Shipper pays $200 (Traffic moves KCS-TM-TFM)	Shipper pays $220 (Traffic moves UP-TFM or KCS-TM-TFM)

The overall effect would be rate increases for significant numbers of shippers.

c) KCS Control Will Create New Incentives and Opportunities for Tex Mex and TFM to Manipulate Operations at the Laredo Bridge

A further immediate threat to competition involves operation of the Laredo Bridge. This crucial connection between the United States and Mexico is controlled by Tex Mex and TFM, which own the track structure on the northern and southern halves of the Bridge, respectively. Barkley V.S. at 2. TFM interchanges with both UP and Tex Mex at Laredo, with UP-TFM movements constituting approximately 75-80 percent of the freight moving across the gateway. *Id.* at 3. Operations over the Bridge are governed by a 1951 agreement between UP and Tex Mex, but that agreement leaves open the potential for Tex Mex to manipulate operations to favor its own trains even while claiming that UP is

receiving "equal" treatment. As long as Tex Mex was controlled by an independent TFM, Tex Mex's incentives to restrict UP's use of the Bridge have been held in check. Once Tex Mex is under KCS control, Tex Mex and TFM will have greater incentives to prefer Tex Mex-TFM traffic over UP-TFM traffic. Preferential treatment would reduce service levels for UP customers and inefficiently divert traffic to Tex Mex-TFM routes.

TFM's increased incentive to give preferential treatment to Tex Mex at Laredo Bridge presents a serious concern. As explained by Stephen R. Barkley, UP's Regional Vice President - Southern Region, it is highly important for UP and its customers to have an operation at Laredo that is efficient and that provides even-handed treatment for UP trains. Movements over the single-track Laredo Bridge involve a delicate operational balance. Barkley V.S. at 4. Like all international border crossings, crossings at Laredo take extra time due to government paperwork and inspections. *Id.* With two railroads north of the border connecting with one railroad south of the border, interchanges must be carefully coordinated. It is essential to stage trains carefully, so that they are ready to move onto the Bridge quickly as soon as the previous interchange is complete. *Id.* at 5. To maximize Bridge capacity, the railroads have set aside alternating six-hour "windows" for northbound and southbound traffic. *Id.* at 6.

When there are more trains waiting than can be moved across the Bridge during a window, the priority in which trains are given access to the bridge becomes very important. Mr. Barkley explains that, in recent years, the Border Superintendent (a TFM employee since 2001) has been generally even-handed in his treatment of UP and Tex Mex trains, providing priority to each railroad in the approximate proportion of its traffic over Laredo. Barkley V.S. at 7, 8-9. Thus, TFM, which today has an interest in maximizing its

traffic volumes without regard to the identity of its partner north of the border, has overridden Tex Mex's impulses to favor Tex Mex-TFM traffic. However, when the economic interests of TFM and Tex Mex become more closely aligned due to common control, the Border Superintendent is more likely to find subtle (or not so subtle) ways to give preference to Tex Mex trains. In particular, the Border Superintendent may accept an argument that Tex Mex personnel have pressed in the past – that each railroad should receive 50 percent of the available Bridge slots, even though Tex Mex carries only 20 to 25 percent of the freight that moves through Laredo. *See id.* at 9, 10-11. Such a 50-50 allocation would leave UP trains at the end of the queue, unable to cross when there were more trains waiting than could move across the Bridge during a window.

Applicants deny that the Laredo Bridge operations will change under common control. They point out that Bridge operations are governed by written agreements and that UP could enforce Tex Mex's contractual obligations.[81] However, the written agreements they cite speak in very general and perhaps conflicting terms. The 1951 agreement between Tex Mex and a UP predecessor provides that "Joint Switching Service" shall be "performed impartially" and that "no preference shall be given to movement of cars of one of the parties."[82] The agreement does not specify what these words mean, how the obligations apply in the context of today's operations (which differ from those described in the 1951 agreement in significant ways), or just how impartial treatment is to be accomplished.

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81 *See, e.g.,* Reply to UP's Petition For Declaratory Order (KCS-11/TM-11) (June 23, 2003) at 7-10; Supplement at 27.

82 1951 Agreement, § 4(III) (Barkley V.S., Exh. B).

The 1951 Agreement is not enough to protect against the changed incentives created by common control. There must be more specific guidance addressing how the "no preference" requirement is to be implemented. Otherwise, Tex Mex and TFM could argue that a one-for-one priority system is acceptable because it gives "no preference" to either carrier, even though UP's shippers, which today account for the great majority of traffic at Laredo, would be shortchanged under such an allocation. *See* Barkley V.S. at 13-14.

In view of the competitive threat presented by Tex Mex's increased incentives to give preference to Tex Mex trains at Laredo, it is appropriate for the Board to impose conditions that will constrain the ability of the railroads to act in this manner. . And, in light of Applicants' assertion that the NAFTA Rail carriers would not and could not change operations at Laredo Bridge following acquisition of common control,[83] they should have no serious objection to imposition of conditions that will provide greater assurances on this point. As discussed in Section IV, below, UP urges the Board to impose a narrow condition requiring Applicants to negotiate a new protocol governing Bridge operations that will effectively avoid any potential competitive abuse and ensure that the Bridge will continue to be operated in an efficient and fair way.

3. The Lack of Procompetitive Benefits Elevates the Threat to Competition

In many rail merger cases, the Board must weigh the potential anti-competitive harms against the pro-competitive efficiencies that might flow from the transaction. The applicants typically will anticipate significant traffic and revenue gains

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[83] *See* KCS-11/TM-11 at 7-10.

stemming from their transaction, and the Board must assess the extent to which those private gains are the result of *pro-competitive* improvements in rates and service, rather than the product of anticompetitive actions made possible by the transaction. In this case, however, there is no need to engage in such an analysis. Combining KCS, Tex Mex, and TFM under common control will not achieve any significant efficiencies that could not be accomplished without KCS control.[84] The *only* effect of this transaction will be to transfer control of Tex Mex and TFM from Grupo TMM to KCS. *See* KCS-16/TM-16. As the Applicants have made abundantly clear, KCS, Tex Mex, and TFM have already aligned their operations closely, and they are planning to keep the three carriers intact and separate.[85] But control is all that KCS needs to accomplish the anticompetitive harms described above. Control will enhance KCS's profits, but it will do so at the cost of higher rates and poorer service.

Common control will not strengthen KCS/Tex Mex/TFM as a competitive alternative to UP-TFM: the KCS/Tex Mex/TFM alliance known today as the "NAFTA Railway" already provides that alternative, and nothing about KCS control will make it stronger, except financially by forcing anticompetitive shifts in U.S.-Mexico traffic flows. Importantly, however, if UP has overlooked important benefits stemming from common

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[84] It is well established that benefits are "merger-related" only if they would not – or could not – be achieved without the transaction. The Board's new major merger rules codified the principle that "when evaluating the public interest, the Board will consider whether the benefits claimed by Applicants could be realized by means other than the proposed consolidation." *See Major Rail Consolidation Procedures* at 16, 21 (discussing 49 C.F.R. § 1180.1(c)).

[85] The Application does claim that some efficiencies will be created through elimination of duplicative Tex Mex administrative functions. Application, Riney V.S. at 62. However, given Tex Mex's size compared to KCS and TFM, those savings will be relatively small in the context of the combined NAFTA Rail. No such efficiencies are claimed as to TFM.

control – such that shippers might in the future choose to route via KCS/Tex Mex routes because of service or rate improvements that this transaction makes possible – the conditions UP is asking the Board to impose to prevent anticompetitive harms would not stand in the way of those benefits.

a) Existing KCS Coordination with TFM and Tex Mex

Since at least 1999, KCS has sought to integrate its operations with both Tex Mex and TFM – as part of their extant "NAFTA Railway" alliance – to provide the efficiencies associated with single-line service. These railroads have already put in place numerous coordinations that have nothing to do with KCS control, including:

- pre-blocking of trains moving to and from Mexico over KCS, Tex Mex, and TFM;[86]
- consolidation of KCS and Tex Mex dispatching, crew calling, and timekeeping;[87]
- transfer of Tex Mex's operations center to KCS's operations center;[88] and

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[86] Last July, KCS reported on progress achieved by a joint KCS/Tex Mex/TFM team responsible for achieving improved coordination among these carriers: "[e]ach week, the team covers service performance related to KCS' new pre-blocking plan for traffic going southbound into Mexico, despacho previo and clearances that will help expedite traffic." KCS also reported that the partners were working on an initiative "to create a similar plan for operational efficiency going northbound, to include the possibility of TFM pre-blocking traffic to save handling and transit time on traffic moving from Mexico to US Markets." KCS NEWS, "*NAFTA Railway Partners Reflect and Pursue New Opportunities*," July 9, 2002 (available on www.kcsi.com) (Exhibit 12); *see also* Application, Riney V.S. at 136 ("KCSR, Tex Mex and TFM implemented a plan to pre-block trains moving to and from Mexico").

[87] As KCS has reported, the NAFTA Alliance partners have already put into effect "the consolidation of KCS and Tex Mex dispatching, crew calling and timekeeping to KCS's System Transportation Center in Shreveport." KCS NEWS, "*Nafta Railway Partners Reflect and Pursue New Opportunities,*" July 9, 2002 (Exhibit 12).

- participation by KCS in Tex Mex capital improvement projects, including applications for federal funding of Tex Mex investments.[89]

KCS has repeatedly touted these and other coordinations with Tex Mex and TFM as having allowed these railroads to provide "seamless, one stop service" for U.S.-Mexico traffic.[90] According to KCS, together with its partners Tex Mex and TFM it is "second to none in servicing markets in Mexico."[91]

Applicants emphasize that the fact they are already so closely coordinated will facilitate the transition to common control, rather than that control will bring major benefits.[92] The one operational improvement that Applicants claim is in fact already in progress and is not dependent on approval of the transaction. Applicants assert that KCS control of Tex Mex and TFM will enhance rail safety because both Tex Mex and TFM will implement KCS's Management Control System ("MCS").[93] However, long before KCS announced its acquisition of Tex Mex and TFM, KCS announced that it was installing MCS

(... footnote continued from previous page)

88 *See* Application, Haverty V.S. at 62 ("Tex Mex's operations center has been transferred to KCSR's operation center and KCSR pre-blocks trains for Tex Mex. KCSR also handles Tex Mex's dispatching.").

89 *See* Application at 15 (KCS *already* assisting Tex Mex in applying for funding); *id.*, Riney V.S. at 135-39; KCS NEWS, "*NAFTA Railway Partners Reflect and Pursue New Opportunities*, July 9, 2002 (available on www.kcsi.com); KCS NEWS, "*State of the Railroad: From the Desk of Michael R. Haverty, Chairman, President and CEO,*" Dec. 17, 2002 (available on www.kcsi.com) (Exhibit 12) (explaining that that KCS was seeking funding for several projects, including Tex Mex projects).

90 KCS NEWS, "*NAFTA Railway Partners Reflect and Pursue New Opportunities*," July 9, 2002 (available on www.kcsi.com) (Exhibit 12). Applicants' Environmental Appendix (KCS-13/TM-13) similarly emphasizes that KCSR and Tex Mex already "have achieved near seamless operation." *See id.,* Safety Implementation Plan at 3.

91 KCS News, "*Despacho Previo Process Clarified,*" March 5, 2002 (Exhibit 12).

92 *E.g.,* Application, Riney V.S. at 135.

93 Application, Riney V.S. at 140; Supplement at 32.

on Tex Mex.[94] Likewise, prior to KCS's proposal to acquire TFM, KCS and TFM personnel were meeting to "formulate a business case for implementing the [MCS system] on TFM." That meeting was one of "many steps toward a projected implementation of MCS on TFM in the first quarter of 2004" and, according to KCS, marked "another important step toward creating a more seamless NAFTA Railway operation."[95]

b) No Further Coordinations Are Planned

Aside from implementing MCS on TFM, the Applicants do not plan any further operational improvements following either the Tex Mex or TFM acquisitions. The Application explicitly disclaims operational changes on either railroad:

- "The TFM transaction will not alter the basic structure or operations of TFM." (Supplement at 25).
- "Even though KCSR will become affiliated with TFM, the two carriers are not merging nor is TFM acquiring or taking control of KCSR. TFM will continue to be operated from Mexico City, with separate officers and boards of directors from KCS and KCSR." (Supplement at 7).
- The transaction will result in "no significant changes . . . to operations" because KCS and Tex Mex already "have achieved near seamless operation." (Environmental Appendix, Safety Implementation Plan at 3).

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[94] More than a year ago KCS reported that the NAFTA partners planned to implement MCS on both KCS and Tex Mex. KCS NEWS, "*NAFTA Railway Partners Reflect and Pursue New Opportunities*," July 9, 2002 (available on www.kcsi.com) ("another key topic was that of future projects like the implementation of MCS on KCS this summer and on Tex Mex later this year"). Mr. Haverty indicated in December 2002 – still long before KCS proposed to acquire control of Tex Mex – that KCS intended to implement MCS on Tex Mex in 2003. KCS NEWS, "*State of the Railroad: From the Desk of Michael R. Haverty, Chairman, President and CEO,*" Dec. 17, 2002 (available on www.kcsi.com) (Exhibit 12). In fact, KCS and Tex Mex are proceeding with these plans without regard to Board approval of the Application. Applicants' Safety Implementation Plan reports that, "[i]n the 3d and 4th quarters of 2003, MCS will be implemented on Tex Mex." Environmental Appendix (KCS-13/TM-13), Safety Implementation Plan at 11.

[95] KCS NEWS, "*KCS, TFM Move Toward More Seamless Operation*," July 9, 2002 (available on www.kcsi.com) (Exhibit 12).

- "Operations of Tex Mex and KCS have become closely coordinated in a number of areas as the volume of traffic moving over Tex Mex's trackage rights has increased. Because of this existing coordination, bringing [KCS] and [Tex Mex] under control of the same holding company should not result in any disruption of service because no fundamental changes in service patterns will occur." (Application, Riney V.S. at 136).

- "KCSR and Tex Mex train and yard operations will not change significantly as a result of the transaction," and "it is not anticipated that bringing the two companies under common control will have a significant effect on traffic levels or other basic operating indicators." (Application, Hefley V.S. at 150.)[96]

Absent significant efficiencies – of which there are none – KCS control of all aspects of Tex Mex and TFM actions, from marketing and pricing to the day-to-day operational matters upon which connecting railroads such as UP depend, will pose uniquely severe threats to competition. The Board can avoid that harm through simple conditions that embody promises Applicants have already made and preserve the ability of KCS/Tex Mex/TFM to become more efficient under common control if new opportunities present themselves.

4. Many Shippers Have Expressed Concerns About the Competitive Impacts of the Proposed Transaction

UP is not alone in expressing concerns about the adverse impacts that KCS's control of Tex Mex and TFM would have if KCS's commitments are not implemented in an effective and enforceable manner through Board conditions. UP is providing, at Exhibit 13, a compilation of more than 20 letters and statements from shippers who have called upon the Board to ensure that competition via the Laredo Gateway is protected.

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[96] *See also id.* at 153 (transaction "will not perceptibly change day-to-day train or yard operation of the two companies").

For example:

- AK Steel, which ships rolled steel from the Midwest to Mexico over the Laredo Gateway, writes:

  "AK Steel is concerned that once the formation of the NAFTA Railway is completed, TFM will favor traffic that originates on its affiliated companies, i.e., KCS and TexMex, over interchange traffic received from UP or [BNSF]. If such discriminatory practices occur, there were be a detrimental impact on cycle times, which would greatly impact AK Steel's ability to obtain reliable and efficient transportation service into Mexico.

  "In addition, AK Steel is concerned that the formation of the NAFTA Railway could impact on the ability of competing carriers to provide service to Mexico on commercially reasonable terms. . . . The combination of KCS/TexMex/TFM . . . presents an incentive for TFM to favor KCS/TexMex to the detriment of other carriers, like UP and BNSF, that connect with TFM at the Laredo Bridge. . . . Such practices would greatly limit UP's and BNSF'a ability to provide competitive priced service for AK Steel's transportation needs to the Mexican gateway."

- Badger Mining, which ships silica sand from Wisconsin mines to TFM-served foundries in Monterrey and Saltillo, writes:

  "We are concerned that the proposed NAFTA Rail transaction might affect the rates and service that UP can offer for our shipments moving over the Laredo Gateway. Our Mexico traffic moves over the Chicago Gateway, so it is susceptible to routings involving KCS. If the NAFTA Rail transaction improves those routings, we would welcome the additional competitive options. However, Mexico is an important growth market for Badger Mining, and we want to ensure that the transaction does not interfere with our ability to use the existing, efficient UP-TFM service.

  ". . . . It is our experience in the railroad business that there are many subtle ways to discriminate against competition, so clear, enforceable standards are important."

  Chicago Sweeteners, which ships manufactured food products to and from Mexico over the Laredo Gateway, explains that "[a]nything that would discriminate against Union Pacific

would be a direct discrimination against all that use is lines to ship to and from Mexico."

- General Chemical, which is a member of an export cooperative that ships soda ash to Mexico over the Laredo Gateway, explains that "UP has coordinated service with the TFM set up via Laredo, TX, including several daily run-through trains with pre-blocking of railcars," and that "UP has spent significant capital to improve border facilities and to automate customs activities to help the flow of international shipments between the U.S. and Mexico." It asks the Board to impose conditions "to ensure continued competitive and efficient rail service via the Laredo gateway for customers using the current UP-TFM rail routing."

- Hub Group, which wrote the Board in support of the Application, subsequently filed an additional letter to state that it "strongly supports conditions that will guarantee continued competitive and efficient UP/TFM rail service via the Laredo gateway."

- International Paper, which shipped more than 186,000 tons of paper products over the Laredo Gateway, states that it has "a number of concerns about the possibility of potential discrimination against either UP or BNSF traffic at the International Bridge at Laredo and, through its affiliation with TFM, in Mexico." It explains that the "cooperation of interlining railroads in establishing equitable and efficient car supply and car hire agreements, compatible train schedules and fair divisions of interline freight revenues."[97]

- Reagent Chemical & Research, which exports hydrochloric acid to Mexico via the Laredo Gateway, states that it has "concerns that the ownership of the International Bridge at Laredo be [sic] under the sole control of the NAFTA Rail carries, and that those controlling the bridge continue to offer the UP complete and uninhibited access to the bridge crossing."

- Unimin, which ships ball clay from Texas and Tennessee plants to the Monterrey area over the Laredo Gateway writes:

  "Until now, TFM had no reason to favor ball clay shipments that originate in Tennessee over shipments that originate in Texas, or vice versa. Following the proposed transaction, TFM will have reason to favor KCS, because they will be under common ownership. If the combined entity raises the price of transporting Unimin's Troup, Texas ball clay from Laredo to Monterrey or uses

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[97] International Paper's letter was filed directly with the Board and is not included at Exhibit 13.

> its control over the Laredo Bridge to make UP's service slower or less predictable, Mexican tile and sanitaryware producers may shift to the Tennessee producers. This will benefit KCS because KCS can carry Gleason, Tennessee ball clay from New Orleans, Louisiana (where CSX connects to KCS) to Laredo. ...
>
> "We respectfully request that the Board impose detailed conditions of neutrality and non-discrimination in order to preserve competition among rail carriers and to enable Unimin to compete fairly for sales to Mexican customers. The Laredo Bridge cannot be duplicated by competitors, and the other rail crossings from Texas into Mexico are far inferior to it. This Board should not allow control of Laredo Bridge to confer a competitive advantage on the combined KCS-TFM."

- Weyerhaeuser Company, which has packaging plants and distribution facilities for its forest products across the United States, Canada, and Mexico, asks the Board to address several concerns, including concerns that Applicants "must insure that all existing gateways will remain open" and that they "must provide the Board with assurances and process, which can be monitored to insure the impartiality of [their] Mexican partner in dealings with other railroads."

In all, a broad cross-section of more than twenty shippers of products ranging from chemicals, to grain, to forest products, to intermodal, to steel – and including shippers that also filed comments expressing support for the transaction – have asked the Board to impose conditions to make concrete and enforceable KCS's commitments to preserve competition for traffic moving over the Laredo Gateway. Even DuPont, which did not ask the Board to impose conditions on the transaction, nonetheless considered "significant" the "KCS commitment to abide by all existing agreements governing operations of over the Laredo Bridge and to keep the Laredo gateway open on commercially reasonable terms."[98] Other shippers have no doubt refrained from participating actively in this case based on their

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[98] *See* Prepared Remarks by E.I. DuPont de Nemours, STB Finance Docket No. 34342, filed July 29, 2002 at 3.

expectation that the Board will act – as it has done in every other recent case – to hold Applicants to their well-publicized commitments. [99]

5. Professor Grimm's Competitive Analysis Ignores the Anticompetitive Effects of KCS Control

Applicants' analysis of the effects of their proposed transaction fails to consider the potential that an end-to-end (or "vertical") transaction can have anticompetitive effects. Applicants' competition witness – Professor Curtis Grimm – explicitly limited his analyses to potential "horizontal" competitive effects for 2-to-1 or 3-to-2 shippers,[100] and thus ignored the potential harms from this vertical transaction. *See* Hausman V.S. at 20-21. Professor Grimm applied the federal antitrust agencies' 1992 "Horizontal Merger Guidelines," which on their face apply only to "horizontal merger[s]."[101] As explained in the joint agency statement announcing those Guidelines, they "do not include a discussion of horizontal effects from non-horizontal mergers (*e.g.*, elimination of specific potential entrants and competitive problems from vertical mergers)."[102]

Based on Professor Grimm's unduly narrow analysis – and the observation that TFM is an indispensable link in every cross-border movement via Laredo and is thus a part of every "independent railroad routing"[103] – Applicants assert that their transaction cannot possibly have anticompetitive effects. Instead, they characterize the effects of which

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99 *See* page 89, *infra*.

100 Application, Grimm V.S. at 77-78; Supplement, Grimm V.S. at 2-3.

101 Application, Grimm V.S. at 78; Horizontal Merger Guidelines § 0.2 (available at. http://www.ftc.gov/bc/docs/horizmer.htm).

102 *See* http://www.ftc.gov/bc/docs/horizmer.htm (excerpts at Exhibit 14).

103 KCS-14/TM-14 at 13-14 (KCS/Tex Mex responses to Interrogatories 3, 5) (excerpts at Exhibit 15).

UP and others complain as impacts solely on competing carriers rather than impacts on competition.

As Professor Hausman explains, however, Applicants are wrong. It is well recognized that vertical transactions *can* have significant anticompetitive effects. Although many vertical mergers are often not anticompetitive, this transaction poses unique competitive dangers. Applicants' analytical approach sweeps under the rug the unique dynamic of competition for U.S.-Mexico traffic moving via the Laredo Gateway. TFM's incentives (commercial and regulatory) to behave equitably via-à-vis UP and Tex Mex at the Laredo Gateway have created an environment in which competition north of the border has flourished and in which TFM has not fully exploited its market power with respect to U.S.-Mexico cross-border movements. Although this transaction is "end-to-end," KCS control of Tex Mex and TFM will nevertheless adversely affect the existing two-carrier competition for traffic moving via Laredo. Gray V.S. at 20-33; Hausman V.S. at 9-18.

Professor Hausman explains that vertical mergers can produce anticompetitive effects when the merged entity can decrease the service quality or increase the costs of its rivals. Hausman V.S. at 21. By discriminating against a competitor and causing its service quality to be lower, a firm can increase its own demand and often charge higher prices. *Id.* As Professor Hausman explains, the risk is more than theoretical in the circumstances of this case, because for many shippers, neither other U.S.-Mexican gateways nor intermodal competition significantly constrains a "hypothetical monopolist" from increasing price. *Id.* at 6-7.

This is precisely the risk that Mr. Gray describes. Gray V.S. at 31-33. For example, if KCS/Tex Mex/TFM increase UP's costs by interfering with operations at the

Laredo Bridge or by declining to participate in blocking or run-through trains or through other tactics, UP will be forced to raise its rates (or shippers suffering service reductions will feel as if their costs have increased), thereby allowing KCS/Tex Mex/TFM to capture the traffic of those shippers despite offering higher prices or lower service levels. Hausman V.S. at 10. This result is not merely a shift in traffic from UP to KCS, but a genuine loss of competition and harm to shippers. *Id.* at 11.

Professor Hausman also describes a second type of anticompetitive effect that might flow from the end-to-end transaction in this case. He explains that vertical mergers can lead to evasion of regulation and allow the combined firm to better price discriminate. *Id.* at 22.[104] As Professor Hausman explains, to the extent that Mexican law requires TFM to charge the same price for similar movements to and from Laredo for similar commodities, TFM is constrained in the prices it can charge. *Id.* at 12. If TFM attempted to increase the price it charges between Laredo and a given point in Mexico, the increased revenues from less-price-elastic customers would be offset by revenue losses from relatively more price-elastic customers who switch to alternative transportation modes or gateways. *Id.* Thus, TFM's prices to less-elastic customers are lower than they would be if TFM could price discriminate freely. *Id.* Moreover, competition among U.S. railroads north of Laredo prevents TFM's connecting carriers from capturing the extra revenue. *Id.* The proposed transaction will change this dynamic by allowing KCS/Tex Mex/TFM to increase prices to

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[104] "Evasion" does not refer to any act that would violate Mexican law, but to conduct that TFM could not accomplish today but which a combined KCS/TFM could undertake. Hausman V.S. at 13 n.16.

less-elastic customers while maintaining prices to more-elastic customers at existing levels in order to retain TFM's existing traffic. *Id.* at 13.

Once again, the risk of anticompetitive harm is present in the circumstances of this case. Mr. Fuentes concludes that Mexican regulation would likely not prevent a commonly-controlled KCS/Tex Mex/TFM from engaging in such tactics as long as TFM continued to offer "non-discriminatory" rates for the Mexican portion of the movement. Fuentes V.S. at 3. Mr. Hausman examined the amount of traffic on which KCS/Tex Mex/TFM could potentially employ the rebate strategy and concluded that it is considerably more than needed to result in significant price increases to shippers. Hausman V.S. at 16.

C. Applicants' Arguments Do Not Overcome the Likely Anticompetitive Effects

In its filings in this proceeding and in other public comments about the proposed KCS/Tex Mex/TFM transaction, Applicants have argued that the Board and other interested parties should not be concerned about potential adverse competitive effects of KCS acquiring control of Tex Mex and TFM for four reasons. First, Applicants assert that there is "pervasive truck and barge competition for the U.S./Mexico trade." Supplement at 25; *see also id.* at 13-19. Second, they point out that approximately three-fourths of TFM's interchange traffic at Laredo is with UP, which they assert gives UP substantial "bargaining leverage over a combined KCSR/Tex Mex/TFM System." Supplement at 25. Applicants contend that TFM would have no choice but to continue working with UP, lest UP otherwise shift its traffic "away from the Laredo gateway and away from TFM."[105] Third, Applicants

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105 Supplement at 24.

argue that UP has a "chokehold" over KCS/Tex Mex's ability to compete that would prevent KCS/Tex Mex from gaining traffic from UP-TFM routes. Fourth, Applicants emphasize that the commitments they have made in this proceeding will successfully avoid anticompetitive harm.

None of these arguments has merit. We address the first three here and turn to the fourth in Section IV.

1. Other Transportation Alternatives Will Not Prevent Anticompetitive Effects

Applicants' suggestion that intermodal competition is "pervasive" for U.S.-Mexico traffic flows is a significant overstatement, directly contradicted by the evidence and Applicants' own representations made in the course of securing Tex Mex's trackage rights over UP. To be sure, there are competitive options for *some* of the rail traffic that Tex Mex and UP interchange with TFM at Laredo. Some could be moved by truck, some could be moved to the border by rail and transloaded into trucks for final delivery, and some could be moved by water between points in the United States near ports and points in Mexico readily accessible to Mexican ports, such as Veracruz. The views of the handful of shippers that appeared at the July 31 hearing no doubt reflect the existence of alternatives for *some* shippers.

However, as Mr. Gray explains, these competitive options are by no means "pervasive." Gray V.S. at 35-38. If they were, the Board would not have had a valid basis for imposing conditions in *UP/SP* designed to protect *railroad* competition at the

Gateway.[106] The Board has regarded competitive rail transportation for NAFTA trade as vitally important precisely because much of the traffic that flows in the corridors anchored by the Laredo Gateway could not move *economically* via other modes.[107]

In *UP/SP*, KCS and Tex Mex both emphasized the importance of rail as the only viable means of transportation for many shippers engaged in U.S.-Mexico trade. Tex Mex stressed to the Board that, "[a]lthough most of the transportation of freight between the United States and Mexico is carried by truck, truck and water transportation are not practical alternatives for almost all of the shipments now transported by rail."[108] Tex Mex contended that the merger "would likely cause a substantial lessening of competition for rail transportation of goods between the United States and Mexico," because "this is not traffic that can feasibly move by other modes."[109] Testifying on behalf of Tex Mex, Professor Grimm (who is Applicants' competition witness in this case) testified that, "[a]lthough truck and water play an important role in transportation of goods between the U.S. and Mexico,

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106 *See* pages 35-37, *supra.*

107 As Tex Mex explained to the Board in 1996, "Tex Mex's arguments and evidence concerning competition [in *UP/SP*] focused primarily on the importance of preserving competition in the market for rail services between the United States and Mexico, because that is the market in which Tex Mex is currently an important participant and because preserving competition in that market is vital to the policies of both countries as reflected in the North American Free Trade Agreement." *UP/SP*, Tex Mex Petition to Reopen (TM-44) (Sept. 3, 1996) at 4 (Exhibit 16).

108 *UP/SP*, Responsive Application of Texas Mexican Ry. (TM-23) (March 29, 1996), Verified Statement of Larry Fields at 44 (Exhibit 9). Similarly, Tex Mex's brief represented that "[s]ignificant volumes of grain and other agricultural products, minerals, woodpulp, paper products, automobiles and automobile parts, and other metals flow through the Laredo gateway. Much of this is bulk traffic that moves long distances and for which truck transport is not a viable alternative." *UP/SP*, Brief of the Texas Mexican Ry. (TM-39) (June 3, 1996) at 10 (Exhibit 1).

109 *UP/SP*, Responsive Application of Texas Mexican Ry (TM-23) at 14 (Exhibit 9).

many shippers of many commodities are dependent upon rail competition for competitive transportation options."[110] Similarly, Mr. Grimm explained that "[g]rain is the most important commodity, and there is well-established evidence as to the ineffectiveness for trucks for the long-haul movements of this commodity."[111] Another Tex Mex witness opined: "Truck and water competition are not sufficient to constrain significantly rates for rail transportation between the U.S. and Mexico."[112]

KCS (also relying on testimony of Professor Grimm) emphasized the same point in *UP/SP*: "Although truck competition can supplement inadequate intramodal competition for some products and markets, it is not an effective substitute for rail to rail competition . . . . Other modes cannot provide an adequate counterbalance for diminution of rail competition in the proposed transaction."[113]

The Applicants' assertions in this case – echoed with respect to grain by USDA – reach the opposite conclusion only by focusing on highly aggregated data. In essence, they emphasize that much freight moves by truck and water. But examining the traffic flows in particular origin-to-destination markets tells a different story.

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110 *Id.*, Verified Statement of Curtis Grimm at 128 (Exhibit 9).

111 *Id.* at 129. This view was echoed by the Department of Agriculture in *UP/SP*: "rail is also an important mode of transportation of grain exported overland to Mexico." *UP/SP*, Comments of the USDA (March 29, 1996) at 3.

112 *UP/SP*, Rebuttal of Texas Mexican Ry. (TM-34), Verified Statement of Joseph Ellebracht (May 10, 1996) at 3 (Exhibit 17); *see also UP/SP*, Responsive Application of Texas Mexican Ry. (TM-23), Ellebracht V.S. at 93 ("Truck competition will not be an effective constraint on rail prices in the absence of effective rail-to-rail competition . . . . Water competition will not be a effective constraint on rail prices in the absence of effective rail-to-rail competition") (Exhibit 9).

113 *UP/SP*, KCSR Comments and Request for Conditions, Volume I (KCS-33) (March 29, 1996), Grimm V.S. at 208 (Exhibit 18).

As Mr. Gray explains, for most shippers that use rail today, truck and water alternatives are not available. For example, there are no efficient intermodal alternatives available to shippers of bulk commodities – such as Unimin, Badger Mining, and others – whose facilities and customers are not located adjacent to ports. Trucks may offer a theoretical alternative for some shippers. However, as Mr. Gray describes, for most of the major flows of U.S.-Mexico traffic that move by rail today, railroad transportation offers significant and growing cost advantages relative to available truck and water alternatives. Gray V.S. at 35-37.[114]

Indeed, the fact that so much traffic moved by rail before the privatization of Mexico's railroads in the late 1990's, *despite* the horrible inefficiency of the Mexican rail network at the time (*see* Gray V.S. at 8-9), is a stark reminder of how dependent much traffic is on rail movement. The advantages of rail transportation have only increased with the significant improvements in the efficiency of the Mexican rail system over the past six years. *Id.* at 9. One reflection of this improvement is the drop in TFM's operating ratio, from 93.6 in 1997 to 76.2 in 2002. *Id.*

2. UP's Supposed "Bargaining Leverage" Will Not Prevent KCS Control of Tex Mex and TFM from Having Anticompetitive Effects

Applicants also claim that TFM would not act to adversely affect UP-TFM options because it faces the threat that UP would respond by shifting traffic to another of its Mexican gateways – such as Eagle Pass, served by Ferromex. KCS-16/TM-16 at 20-21.

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[114] The truck and water alternatives available to some shippers will not protect those who lack equally economical non-rail options. KCS would target its anticompetitive strategies at other UP-TFM traffic. Gray V.S. at 38.

However, as Mr. Gray and Mr. Barkley explain, UP is not in a position to shift large amounts of traffic to gateways served by Ferromex. Laredo is the preeminent gateway for many reasons. *See* pages 35-42, above. Some traffic would be impossible to move via Eagle Pass because it is dependent on TFM's rail network within Mexico, in substantial part due to Ferromex's inferior routes, high trackage rights fees and lack of access to important Mexican points, such as San Luis Potosí, Toluca and much of Monterrey. Gray V.S. at 17-18. For other traffic, UP-TFM routes via Laredo offer important cost and service advantages. Switching gateways would result in a lower level of service for UP's customers. Given UP's 26 percent equity investment in Ferromex since 1997,[115] it is reasonable to expect that UP has already shifted to Eagle Pass the traffic that would move most efficiently via that gateway. In recent years, however, UP-TFM traffic via Laredo has grown much faster than UP-Ferromex traffic via Eagle Pass, providing a telling indication of Laredo's advantages. Gray V.S. at 12. For most shippers, other gateways are simply less efficient than Laredo.

Moreover, alternative gateways do not have significant excess capacity. Eagle Pass could not accommodate a substantial amount of new traffic. It would take many years to build up significant infrastructure and develop enough capacity for Eagle Pass to present a serious threat to TFM's traffic volumes at Laredo. Massive investments in new rail capacity and border crossing infrastructure would be needed at Eagle Pass before significant volumes of Laredo traffic could move via Eagle Pass. Many of the decisions

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[115] By contrast, nether TFM nor its parent Grupo TMM has any equity interest in KCS that would give TFM incentives (absent the control by KCS achieved through this transaction) to favor KCS routings.

about additional investments at Eagle Pass would be in the hands of government and third parties, and there would be considerable uncertainty whether those investments would be made. In addition, a significant shift of traffic to Eagle Pass would strand tens of millions of dollars of investments UP made at Laredo to support efficient UP-TFM cross-border commerce. Gray V.S. at 13-16; Barkley V.S. at 3.

Finally, the fact that UP could divert *some* traffic from Laredo to Eagle Pass when KCS acquires control of TFM would not deter KCS/TFM from implementing strategies aimed at selectively disabling UP-TFM competitive options. KCS will be able to target its strategies against that traffic which is most dependent on the advantages of Laredo and/or TFM. Moreover, having chosen to bring TFM under the control of a UP competitor, KCS rationally will already have accepted the prospect that UP might do what it could to shift traffic to Eagle Pass in order to remove it from potential interference by KCS. There would be no reason for KCS to expect that its strategies would cause additional, incremental shifts of traffic away from Laredo and TFM. Thus, it would be irrational for KCS to pass up opportunities to use control over TFM to raise rates and shift profitable traffic to KCS and Tex Mex routes. Gray V.S. at 38-39.

Applicants' suggestion that they would be deterred from implementing anticompetitive strategies out of fear that UP (or BNSF) traffic would be diverted to other gateways – and thus "away from TFM" – is also belied by evidence that KCS *already has undertaken or plans to undertake* actions that would adversely affect competition. KCS has announced that it plans to increase the rate factors that Tex Mex has quoted to BNSF for international traffic moving via BNSF-Tex Mex-TFM routes. KCS says that it views those rates as "too low" and "inappropriately" priced. The Application explains that the problem

with Tex Mex's rates is that they were set by TFM and Tex Mex – which until now had no incentives to favor KCS – rather than by KCS:

> "Because KCSR has been a minority investor in Tex Mex and because TFM and Tex Mex have been responsible for their own pricing and marketing arrangements, there may be some agreements that would not provide adequate revenues to a combined KCSR/Tex Mex system. ... [A]ny agreement that does not provide adequate revenues will be reviewed and, if necessary, cancelled pursuant to the terms of that agreement."

Application at 26 n.19.

KCS is obviously undeterred by hypothetical diversions of BNSF-Tex Mex traffic to Eagle Pass or to other modes. Its intention to increase the Tex Mex rate factors available to BNSF for movements via Laredo offers a chilling preview of KCS's strategies using its control of TFM. Increases in the TFM factors available to UP would reap even greater profits for a combined KCS/Tex Mex/TFM system, while having much more severe adverse impacts on the transportation options available to shippers.

3. UP Does Not Have a "Chokehold" Over KCS and Tex Mex

In several of Applicants' filings, they claim that KCS and TFM could not give preference to Tex Mex and KCS traffic because UP has a "chokehold" on lines Tex Mex uses.[116] Applicants are referring to Tex Mex's operations over UP's track between

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[116] Applicants' Rebuttal to Comments Filed in Reply to Applicant's [sic] Petition to Establish Procedural Schedule (KCS-6/TM-6) (June 9, 2003) at 28 n.20; *see also* Applicants' Reply to UP's Petition For Declaratory Order (KCS-11/TM-11) (June 23, 2003), at 9 n.5. Applicants similarly claim that UP holds a "trump card" because Tex Mex operates over UP trackage. Supplement at 22.

Beaumont, Texas, and Robstown/Corpus Christi, Texas, under trackage rights the Board granted in *UP/SP*. There is no basis for Applicants' claim.[117]

Trackage Rights Operations and Dispatching

Tex Mex first blithely suggests that UP "unfairly dispatches Tex Mex trains."[118] UP has not discriminated against Tex Mex operations in the past, nor could it do so in the future. The Tex Mex trackage rights operations are subject to extensive protections – including Board oversight – that ensure that UP does not discriminate against Tex Mex trains.

Tex Mex's trackage rights are governed by a detailed set of terms, including a protocol governing UP's dispatching of Tex Mex trains negotiated by UP and Tex Mex personnel in 1996. That protocol is substantially the same as the dispatching protocol governing BNSF's trackage rights granted in the *UP/SP* case, which the Board concluded would ensure that the tenant's service was not "subject to dispatching discrimination by applicants." 1 S.T.B. at 403.

Under the protocol, UP must issue written instructions to its dispatchers that Tex Mex trains are to be dispatched "exactly as if they were trains of the same class of [UP] and given equal treatment with trains of [UP]."[119] In evaluating performance of its

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117 However, Applicants' recognition that fair and nondiscriminatory use of UP's trackage north of Robstown is important to competition *does* underscore the need for the Board to impose conditions in this case that are no less effective in protecting UP's use of the Laredo Bridge and UP's commercial access to TFM's network via the Laredo Gateway than the trackage rights protocols that guarantee Tex Mex fair and nondiscriminatory use of UP's trackage between Beaumont and Robstown.

118 KCS-6/TM-6 at 28 n.20.

119 Dispatching Protocols, § 3 (Barkley V.S., Exh. C).

dispatchers, UP must consider performance of the Tex Mex trains and effectiveness in cooperating with Tex Mex personnel and meeting Tex Mex service requirements.[120] Tex Mex has the right to request meetings with UP personnel to discuss any disagreement about compliance with the protocol and to present such disagreements to a Joint Service Committee comprised of the chief transportation officers of UP and Tex Mex.[121] Tex Mex may submit any disagreement to binding arbitration before a neutral official if it is not satisfied with the Joint Service Committee's action.[122] Ultimately, Tex Mex would be entitled to return to the Board to seek relief if it were dissatisfied with UP's administration of the trackage rights.

UP has never violated the protocol governing movement of Tex Mex trains on UP track or otherwise taken action to disadvantage Tex Mex's trains vis-à-vis UP trains. Barkley V.S. at 19-20. As Mr. Barkley explains, from time to time, the sorts of operational problems common to all railroads (*e.g.*, maintenance curfews) have contributed to slow velocities on the track, but these problems have not been specific to Tex Mex. Rather, they have occasionally slowed the movement of both UP trains and Tex Mex trains using the tracks. *Id.* at 19. Contrary to Tex Mex's assertions, however, the impact of delays on these lines falls much more heavily on UP than Tex Mex, in part because UP operates many more trains than Tex Mex over these lines. *See* Barkley V.S. at 21-22 & Exh. D.

Tex Mex has invoked its right to convene the Joint Service Committee only once, in early 2003. At that time, Mr. Barkley met with a KCS official to discuss concerns

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120 *Id.* at § 12.

121 *Id.* at § 13.

122 *Id.*

about delays Tex Mex trains had experienced while using UP's tracks. Barkley V.S. at 19-20. In addition, in recent months, UP personnel have met with Tex Mex representatives weekly to discuss concerns about individual trains. In each case in which Tex Mex identified a train delay, UP personnel investigated and explained the relevant circumstances to Tex Mex personnel. After reviewing the information provided to them, Tex Mex personnel have not identified any UP violation of the dispatching protocol.[123]

Operating statistics confirm that Tex Mex trains suffer fewer delays than UP trains in this part of Texas. Mr. Barkley reports that in November 2002 the Spring Dispatching Center (which Tex Mex has been invited to join, but has declined) conducted a four-day study of trains operating on UP's Angleton and Brownsville Subdivisions, parts of which are used by Tex Mex trains operating via trackage rights. This study showed that on average, as among UP, BNSF, and Tex Mex trains, UP trains suffered the most minutes of delay per train, while Tex Mex trains experienced the fewest minutes of delay per train. Barkley V.S. at 21 & Exhibit D.

There is no reason to believe that UP would choose to discriminate against Tex Mex in connection with these trackage rights in the future. UP uses the same lines for

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[123] Barkley V.S. at 20. Mr. Barkley notes that a major factor causing many Tex Mex crews to expire due to hours of service regulations during movements over the trackage rights is that the Tex Mex crew districts are quite long, much longer than UP's crew districts in this area. *Id.* at 20-21.

Mr. Barkley notes that the UP dispatchers probably give Tex Mex trains better treatment than UP trains as a result of this situation. UP's dispatchers generally attempt to give priority to a train when the crew is about to exceed its hours of service. Because of the length of the Tex Mex crew districts, Tex Mex crews are often in danger of exceeding their hours of service. Since UP's crew districts are shorter, UP crews are less likely to be in this situation and thus the UP trains are less likely to receive priority. *Id.* at 21.

its own trains. Any actions UP took to delay Tex Mex trains would increase congestion on the lines, and this would delay UP trains as well. Barkley V.S. at 21-28. Moreover, Tex Mex could control UP's conduct by enforcing rights under the protocol. As noted above, Tex Mex can raise concerns with UP and seek binding arbitration if it believes UP has violated the protocol. *See* Barkley V.S. at 27. Ultimately, it can seek relief from the Board if it believes the 1996 protocol does not give it the necessary protection in connection with the trackage rights.

In addition, Tex Mex is welcome to participate in the Spring Dispatching Center, the joint command center UP and BNSF established at Spring, Texas in the late 1990s.[124] Placing a representative at the Spring Center would give Tex Mex a better opportunity to coordinate with the UP dispatchers and head off delays, where possible. Despite previous invitations, Tex Mex has declined to participate at Spring. Barkley V.S. at 20.

Capacity on the Trackage Rights Lines

In arguing that UP has a "chokehold," Applicants also have asserted that UP has not invested in the lines Tex Mex uses and that there is insufficient capacity on the Tex Mex trackage rights lines for Tex Mex to add even one more train.[125] However, as Mr. Barkley explains, UP's statistics show that there is sufficient capacity on the trackage rights lines and that Tex Mex should be able to add traffic without the need for additional

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[124] Barkley V.S. at 22; *UP/SP, Houston Gulf Coast Oversight*, Decision No. 10, p. 24.

[125] *See* KCS-6/TM-6 at 28 n.20; KCS Reply to CN Petition to Reopen Decision No. 2 (KCS-16/TM-16) at 22.

investment. *Id.* Indeed, UP's statistics show that the trackage lines are less constrained than UP's line between San Antonio and Laredo, which is UP's route to the Laredo Gateway. *Id.*

In addition, if Tex Mex believes its operations on UP's tracks are limited by a lack of capacity, it could take at least two steps to help alleviate the problem. First, the 1996 trackage rights agreement permits Tex Mex to fund new sidings and other capital improvements on the trackage rights lines, and UP may not veto such proposals. Tex Mex has never invoked this provision, but this continues to be an available option. Barkley V.S. at 23-24. UP sold to Tex Mex the old SP Wharton line, which runs between Victoria and Rosenberg. Tex Mex and KCS view the rehabilitation of this line as the "next major capital project on Tex Mex" and they will use it in place of approximately more than 100 miles of trackage rights on UP.[126] This would shorten Tex Mex's route from Beaumont to Laredo and reduce concerns about delays on the trackage rights lines.[127]

D. Mexico's Regulatory Regime Will Not Prevent KCS Control from Having Anticompetitive Consequences

In their Supplement, Applicants misleadingly suggest that provisions of Mexican law and TFM's Concession will prevent TFM from engaging in the type of discriminatory conduct that would harm shippers who use UP.[128] Francisco Fuentes Ostos, Mexican counsel experienced in rail matters, explains in his verified statement that Mexican law and regulation will not effectively prevent such anticompetitive behavior. As Mr. Fuentes explains, Mexico's rail regulatory regime is still in its infancy, which means that

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126 Supplement, Riney V.S. at 141.

127 Barkley V.S. at 24.

128 *See* Supplement at 29-30.

courts and regulators have had almost no occasion to interpret or enforce the relevant provisions of Mexican railroad law. It is thus unclear how courts and regulators would respond to complaints of discriminatory treatment following KCS control. The only certainty is that disputes would take years to resolve. Fuentes V.S. at 2.

Moreover, Mexican law would not prevent KCS/Tex Mex/TFM from engaging in one of the key tactics for exploiting common control described by Messrs. Gray and Hausman: raising TFM rates between Laredo and TFM-served points on a non-discriminatory basis, with KCS selectively reducing its rates for its U.S.-Mexico traffic. Mexican law does not place any practical limits on how high TFM could raise its rates within Mexico in order to carry out this strategy. *Id.* at 3.[129] The law does contain various provisions that purport to require TFM to set rates in a non-discriminatory manner. *See id.* at 4. However, as Mr. Fuentes explains, Mexican authorities likely would not address the overall TFM/Tex Mex/KCS rate. They would consider only whether the *TFM portion of the rate* was offered to all shippers in a nondiscriminatory manner. *See id.* Thus, a strategy involving the use of across-the-board rate increases with (partially) offsetting rate reductions in the United States probably would not be actionable. *See id.* at 3.

Mexican law does purport to prohibit discriminatory behavior by TFM. But KCS/Tex Mex/TFM likely will not be deterred by potential enforcement of Mexican regulatory provisions against TFM discrimination as to matters of operations and service. The Mexican Secretary of Communications and Transport ("SCT"), which is charged with

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[129] As Mr. Fuentes explains, Mexican law contains procedures through which certain parties theoretically could challenge a carrier's maximum rates, but no rate has ever been challenged using those procedures, and there are many questions about how they would apply. *See* Fuentes V.S. at 3-4.

enforcing these laws, has never had occasion to rule on a dispute involving an allegedly discriminatory practice. *Id.* Thus, there are many unanswered questions about how the SCT would interpret the applicable provisions. *Id.* In fact, according to Mr. Fuentes, it is unclear whether the anti-discrimination provisions would even apply to discrimination by TFM between KCS/Tex Mex and other U.S. connecting carriers if TFM came under KCS control. *Id.* at 5.

Even if UP or affected shippers could in theory successfully challenge discriminatory conduct by TFM, the process for obtaining a favorable SCT resolution, and then enforcing it against TFM, would likely involve years of protracted litigation before administrative agencies and courts in Mexico. *See id.* at 6. All resolutions issued by Mexican administrative agencies such as the SCT are subject to complicated appeal and review by Mexican courts – and can be blocked by "*amparos*" (a type of injunction) filed by parties seeking to delay resolution. *Id.* The judicial process can last years longer than in the U.S., especially where untested issues of law are involved. *Id.*

One illustration of the difficulty in obtaining and then enforcing SCT resolutions is Ferromex's attempt to enforce certain provisions of the TFM Concession. As Mr. Fuentes explains, Ferromex's efforts to obtain an SCT ruling enforcing TFM's obligation to grant Ferromex access to certain shippers in Monterrey began on July 4, 2001 after years of unsuccessful negotiation. More than a year later, on August 7, 2002, the SCT issued a resolution requiring that TFM grant access under specified terms and conditions. TFM then obtained a court order that suspended the SCT's resolution and prevented Ferromex from exercising the rights granted to it by the SCT. The suspension still remains in effect. *See id.* at 7. This experience is typical of efforts to enforce TFM's Concession

and applicable railroad regulations. *See id.* Just as TFM has successfully used "*amparos*" to block full realization of Mexico's privatization plan, KCS/TFM likely could delay for years attempts to enforce Mexican law against its discriminatory practices.

Mexican law thus cannot realistically protect U.S. shippers against the anticompetitive effects of KCS control on traffic moving between the United States and TFM-serviced points in Mexico.

IV. THE BOARD SHOULD IMPOSE CONDITIONS AIMED AT PROTECTING COMPETITION VIA THE LAREDO GATEWAY

To ensure that this transaction does not substantially lessen competition, the Board must fashion conditions that will preserve effective competition for traffic moving over the Laredo Gateway. In order for UP to offer competitive service for U.S.-Mexico rail traffic moving through the Laredo Gateway in competition with a consolidated KCS/Tex Mex/TFM, it must have the continued cooperation of TFM in providing shippers with competitively-viable rates between the U.S. and Mexico (*i.e.*, the gateway must remain open on commercially reasonable terms); it must have the continued cooperation of TFM on all the aspects of service that are required to make UP-TFM offerings competitively viable; and UP's cross-border traffic must receive fair treatment at the Laredo Bridge. Each of these elements is interdependent,[130] and each is threatened by KCS control of Tex Mex and TFM.

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[130] UP's ability to quote competitive rates would mean nothing if it could not promise its customers efficient service on TFM within Mexico or if its trains were hindered by Tex Mex in crossing the Laredo Bridge. Similarly, UP's ability to provide efficient service for U.S.-Mexico cross-border traffic would mean nothing if it could not offer its customers competitive rates within Mexico or assure them that their traffic will receive equal treatment at the Bridge. Finally, UP's access to the Bridge would mean nothing if it could not offer its

(footnote continued ...)

Applicants' three sets of commitments (*see* page 11, above) are the starting point – but only the starting point – for effective remedial measures that would avoid the threat to competition posed by unconditioned KCS control of Tex Mex and TFM. Standing by themselves, however, Applicants' commitments will not suffice. They lack definition in crucial respects, and they would be utterly unenforceable unless imposed as conditions in this case. Without concrete and enforceable agreements, Applicants will act in accord with their powerful incentives to enhance profits by using control of Tex Mex and TFM to interfere with the competition provided by efficient UP-TFM transportation options.

Converting Applicants' commitments into effective remedial measures is not complicated, and the Board has ample authority to achieve this aim. UP is asking the Board to take three simple steps:

1. Require Applicants, as a condition of Board approval of this transaction, to abide by the commitments they have made in this proceeding;

2. Require them to negotiate in good faith with UP (and other interested parties) to develop agreements that would implement their commitments in effective and enforceable ways, as they have said they are willing to do (with Board guidance as to the objectives of such implementing arrangements where appropriate); and

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(... footnote continued from previous page)
customers competitive rates and efficient service on UP-TFM international routes between the United States and Mexico.

3. Retain jurisdiction to resolve disputes and impose appropriate implementing arrangements should the parties fail to reach agreement within a reasonable period of time, perhaps 90 days.[131]

Each of these steps is consistent with Applicants' own promises, and with the Board's broad remedial authority. Each is also consistent with the need to protect competition without interfering with the Applicants' legitimate interests in pursuing pro-competitive efficiencies and other improvements that may one day stem from their proposed common control. UP proposes specific language that the Board could impose in Exhibit 19.

At the July 31 hearing, KCS's Gerald Davies complained that Board-imposed conditions would require KCS to negotiate agreements implementing its promises with a "gun to its head." But unless KCS does not intend to negotiate in good faith over effective and enforceable measures to implement its commitments, it has nothing to fear from Board oversight. If parties other than KCS make overreaching demands, UP would expect the Board to favor KCS's position rather than that of its opponents.

The alternative to Board involvement is unacceptable. If the Board did not reserve the ability to impose an appropriate implementing arrangement in the event the

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[131] This is the Board's standard approach. For example, in *Conrail*, the Board required parties to negotiate agreements implementing various conditions and stated that it would initiate a proceeding if the parties failed to reach an agreement. *Conrail*, 3 S.T.B. at 388-89 (Condition No. 28: requiring negotiations over an agreement to grant CP haulage or trackage rights and stating that the Board will initiate a proceeding to address the matter if the parties have not reached an agreement); *id.* at 391 (Condition No. 64: requiring negotiations over an agreement to grant NECR trackage rights and setting a date for the parties to submit final proposals if negotiations are not fully successful). Similarly, in *UP/SP*, the Board required UP and Tex Mex to negotiate agreements implementing the Board's trackage rights condition, and it resolved several disputed issues when the parties failed to reach agreement on every term. *UP/SP*, 1 S.T.B. at 425; *UP/SP*, Decision No. 47, 1 S.T.B. 591 (1996).

parties fail to agree, there likely would be no agreement. KCS's incentives would be to reserve maximum flexibility for itself, requiring shippers and other affected parties to rely on KCS to act against its self-interest and refrain from the anticompetitive actions that common control of Tex Mex and TFM would allow.

A. The Board Has Authority to Impose Conditions to Mitigate Potential Anticompetitive Effects of the Transaction

The Board "has broad authority to place conditions on approval of [railroad control] transactions."[132] That authority is provided by 49 U.S.C. § 11324(c), which grants the Board authority impose conditions that are in the public interest in connection with approval of a transaction.[133] That authority applies to all control cases, including those governed by 49 U.S.C. § 11324(d). In cases under § 11324(d), the Board must grant the application unless there "likely" will be "substantial" adverse competitive impacts.[134] But the Board also has an obligation to mitigate such effects "through conditions" that serve the public interest.[135] In this case, UP's witnesses demonstrate that unconditioned approval likely would pose a substantial threat to competition for international traffic moving via the Laredo Gateway. The imposition of conditions to mitigate those effects is plainly warranted.

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132 *CN/WC* at 10 n.18; *see also Dakota, Minnesota & Eastern R.R. & Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern R.R.*, STB Finance Docket No. 34178 (STB served Feb. 3, 2003) at 13 n.32.

133 *Lamoille Valley R.R. Co. v. ICC,* 711 F.2d 295, 300 n.3 (D.C. Cir. 1983).

134 *CN/WC* at 10.

135 *Kansas City Southern Industries, Inc., KCS Transportation Co. & The Kansas City Southern Ry. – Control – Gateway Western Ry. & Gateway Eastern Ry.*, STB Finance Docket No. 33311 (STB served May 1, 1997) at 4; *see also CN/WC* at 10; *Dakota, Minnesota & Eastern R.R. & Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern R.R.*, STB Finance Docket No. 34178 (STB served Feb. 3, 2003) at 13.

There is another basis for imposing conditions in cases such as this one, where Applicants have made commitments on the record designed to forestall competitive concerns. The Board's routine policy is to require that applicants abide by their representations during the course of the proceeding as a condition of approval. For example, in *CN/WC*, another "minor" transaction, the Board imposed as a condition that "Applicants must adhere to all of the representations they made on the record during the course of this proceeding."[136] The Board has specifically required applicants to abide by commitments to keep open gateways on commercially reasonable terms. For example, in *CN/WC*, the Board stated that it would "hold applicants to [their] representation" to "'keep all existing active gateways affected by the Transaction open on commercially reasonable terms.'"[137] In this proceeding, Applicants have made various substantive commitments on the record, and they have also said that they are willing to negotiate agreements to implement those commitments.

UP's proposed conditions are consistent with the Board's criteria. Ameliorative conditions must: (1) be "operationally feasible," (2) "ameliorate or eliminate the harm," and (3) "result in greater benefit to the public than detriment to the transaction." *See Grainbelt Corp. v. STB*, 109 F.3d 794, 796 (D.C. Cir. 1997). As explained further

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136 *CN/WC* at 28; *see also CN/IC* at 57 ("Applicants must adhere to all of the representations they made on the record during the course of this proceeding . . . ."); *Conrail*, 3 S.T.B. at 387 ("Applicants must adhere to all of the representations they made during the course of this proceeding . . . .").

137 *CN/WC* at 13. The Board also held applicants to their commitment "to work directly with connecting carriers" to establish rates for movements over affected gateways. *Id.*; *see also CN/IC* at 37 ("[W]e will impose a condition holding applicants to their representation to keep [the CP/IC] gateway open and competitive.").

below, UP's proposal that the Board hold Applicants to their commitments in this proceeding meets each of these standards. It allows the Board to achieve an ideal outcome in this case: protecting competition at the vital Laredo Gateway while simultaneously allowing Applicants to pursue whatever pro-competitive efficiency gains common control might create (however unlikely those efficiencies may be, as discussed above).

B. The Board Should Implement Applicants' Commitments by Imposing Narrowly Tailored Conditions

The commitments Applicants have offered during the course of this proceeding reflect their recognition that a consolidated KCS/Tex Mex/TFM will have new incentives and abilities to harm competition for rail traffic moving over the Laredo Gateway. However, the potential for harm will remain unchecked if the Board does not require Applicants to abide by their commitments and implement them through enforceable agreements. UP's proposed framework for implementation will accomplish this aim with respect to each of Applicants' important commitments.

1. Keeping the Laredo Gateway Open on "Commercially Reasonable Terms"

Applicants have pledged "to keep the Laredo gateway open on commercially reasonable terms."[138] They have also stated that they are "willing to enter into private discussions with UP or any other party to discuss this commitment and reach a private agreement to ensure that [they] abide[] by this commitment."[139]

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138 Supplement at 24.

139 Applicants' July 21 Letter (Exhibit 2).

This is a good start. However, Applicants have never explained how they would define "commercially reasonable terms" or how they would ensure that UP and others that depend on the Laredo Gateway have access to such terms. Nor is there any mechanism for enforcing this crucial promise. Thus, even if it imposes Applicants' basic commitment as a condition, the Board cannot be confident that rail carriers other than KCS and its partners will be able to offer competitive rates for U.S.-Mexico movements via Laredo in conjunction with TFM.

Shippers should not have to rely on Applicants' nebulous commitment to keep the Laredo Gateway open. In addition to requiring Applicants to abide by their basic commitment to keep the Laredo Gateway open on commercially reasonable terms, the Board should require them to negotiate in good faith with UP to develop an agreement that ensures that the gateway will remain open on commercially reasonable terms. In *Major Rail Consolidation Procedures*, the Board concluded that "major existing gateways should be kept open in future mergers."[140] The Board required future applicants to "present an effective plan to keep open major existing gateway" and stated that it would "impose conditions on any transaction that [it] approve[s] to ensure that result."[141] Even if this case does not technically involve a "major" transaction, the Laredo Gateway is plainly a "major existing gateway" worthy of protection.[142] Even in minor cases, and even where it has not formally found any anticompetitive effects, the Board has imposed conditions aimed at

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140 *Major Rail Consolidation Procedures* at 25.

141 *Id.*

142 *See CN/WC* at 20 (noting that "applicants have provided a Service Assurance Plan, usually required for major transactions").

protecting gateways. The Board should require Applicants to negotiate with UP to develop an agreement that effectively preserves competition for traffic moving over the Laredo Gateway. If a suitable agreement could not be reached within a reasonable period of time (perhaps 90 days), the Board should conduct further proceedings to develop and impose an appropriate condition.[143]

There is no doubt that a workable arrangement could be arrived at if both sides are motivated to negotiate constructively. UP believes that there are only two basic requirements of any implementing agreement:

- First and foremost, the agreement would have to include some mechanism that provided UP (and other carriers) with the ability to offer shippers competitively-viable services in conjunction with TFM, including TFM commercial terms (*e.g.*, rates, rate factors, etc.) that would allow (but not guarantee) UP-TFM rates on cross-border shipments to remain competitive.
- Second, it must ensure that KCS/Tex Mex/TFM have sufficient flexibility to adjust their rates to reflect transaction-related efficiencies.

There may be a variety of mechanisms available to achieve these goals. In *Major Rail Consolidation Procedures*, UP recommended that the goal of preserving gateways be implemented by requiring that combining carriers make available at a shipper's request separately challengeable "bottleneck" rates between exclusively-served facilities on their system and the affected gateway.[144] The ability to challenge the "bottleneck" rates would ensure that rates were reasonable, and applicants would have flexibility to adjust their

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143 *See, e.g., UP/SP*, 1 S.T.B. at 425.

144 UP's Comments on Proposed Merger Rules in Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Nov. 17, 2000) at 13, 32-34 (Exhibit 20).

rates, subject to reasonableness constraints.[145] However, UP's proposal could not be implemented here, where the Board is not in a position to apply its stand-alone cost methodologies to TFM rates in Mexico, and there is no effective maximum rate regulation in Mexico.[146]

One potentially effective approach may be a form of "proportional rate" agreement modeled on the I-5 Proportional Rate Agreement between UP and BNSF approved by the Board in the *UP/SP* merger.[147] As Mr. Gray explains in his Verified Statement, the I-5 Agreement has a proven track record of preserving competition for traffic moving over the Portland Gateway. Gray V.S. at 43.[148] It was adopted to address a situation very similar to that present here: BNSF was acquiring former-UP trackage that gave it a new single-line route between the BNSF-served points in the Pacific Northwest and points in Southern California and the Southwest. SP had long had its own single-line route between Portland and the Southwest, but relied on joint-line cooperation from BNSF to serve points in Washington, Idaho and western Canada. UP was concerned that BNSF would discontinue cooperation with UP once it acquired its own single-line route, thereby depriving BNSF-served shippers of the benefits of competition from a second carrier. The I-5 Agreement remedied this problem by establishing a matrix of rate factors that UP could use to compete head-to-head with BNSF single-line routes (albeit on a joint-line basis with the continued cooperation of BNSF). *Id.* at 42-43. The I-5 Agreement has allowed UP to

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145 *Id.* at 34-35.

146 *See* Fuentes V.S. at 3-4, 6.

147 *UP/SP*, 1 S.T.B. at 253-54, 419.

148 The I-5 Agreement is Gray Exhibit M.

compete, while simultaneously allowing BNSF to grow its traffic using its new single-line routes. The Agreement has not frozen the status quo. *Id.* at 43.

An agreement modeled on the I-5 Agreement could effectively implement the goal of preserving the Laredo Gateway on commercially reasonable terms. UP believes that an adaptation of that agreement to the Laredo setting would preserve its essential elements, as set forth in Gray Exhibit C, although these and all other issues would be open for negotiation with Applicants.

Such an agreement would meet the first essential requirement of an effective gateway condition – it would create a mechanism for obtaining reasonable TFM rate factors. The rate factors would be reasonable because they would be derived from rates that are actually moving traffic – that is, TFM-Tex Mex-KCS origin-destination rates for similar traffic.

It would also meet the second essential requirement – it would not prevent Applicants from adjusting their rates to reflect merger efficiencies. In *Major Rail Consolidation Procedures* and other cases,[149] the Board properly expressed concern about imposing "rate equalization" conditions reminiscent of those developed in *DT&I Control*[150] and later repudiated in *Traffic Protective Conditions*.[151] "*DT&I* conditions," which formerly were imposed almost automatically and identically in every merger proceeding, essentially required consolidated railroads to freeze in place the relationships with other railroads that

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149 *See, e.g., CN/IC* at 37.

150 *Detroit, Toledo & Ironton R.R. Control*, 275 I.C.C. 455 (1950).

151 *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Procedures*, 366 I.C.C. 112 (1982).

existed before the merger at every interchange point on their systems, no matter how inefficient.[152] The ICC interpreted the conditions to require "rate equalization." This meant that a consolidated carrier "was generally prohibited from maintaining rates on its new single-line routings resulting from consolidation below the rates on any competing joint-line routes in which it participated."[153]

The *DT&I* conditions were problematic because they eliminated consolidating carriers' incentives to reduce rates for their new single-line routings by prohibiting them from offering origin-to-destination rates below those available for competing joint-line routes. Consolidating carriers could not reduce rates to reflect merger efficiencies without first negotiating with connecting carriers to ensure that equal rates would be offered over all competing origin-to-destination routes.[154] Consolidating carriers had no choice but to keep rates high enough to cover the costs of less efficient-joint line movements in the event that shippers, who would have no monetary incentive to chose the more efficient route, chose a joint-line option.[155] Moreover, *DT&I* conditions were applied at every interchange point without regard to whether the joint-line relationship being preserved were efficient ones at major gateways or inefficient ones at minor, little-used junctions.[156]

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152 *See id.* at 112. The ICC had imposed similar traffic protective conditions on mergers since the 1920's. In *Detroit, Toledo & Ironton R.R. – Control*, 275 I.C.C. 455, 492 (1950), these conditions were distilled to a set of six standard conditions.

153 *Id.* at 13.

154 *See Traffic Protective Conditions*, 366 I.C.C. at 121-22.

155 *See id.* at 123.

156 *See id.* at 122.

An agreement modeled on the I-5 Agreement would easily avoid these concerns. It would be narrowly tailored to solving the competitive problems UP has identified without interfering with Applicants' ability to become more efficient and compete with UP. As Mr. Gray explains, it would not involve rate equalization. It would provide a process for developing rate factors that Applicants could not manipulate to disable UP competition, but Applicants would remain free to charge shippers using their own single-system routes whatever they wished without seeking UP's concurrence. UP would never learn what rate Applicants were offering for a particular customer or route, as the rate factors would be based on aggregated and averaged data prepared by a third party. Gray V.S. at 45.

Moreover, Applicants would have strong incentives to realize efficiencies from their transaction in order to reduce rates and compete against UP. The TFM rate factor available to UP would always lag behind changes in the rates that Applicants were offering. UP's proposal contemplates only quarterly adjustments to the TFM rate factor, and the adjusted factor would reflect *all* comparable traffic moving in the previous quarter, not just new movements. Thus, Applicants would always be able to offer shippers a lower rate per-ton-mile than is reflected in the TFM rate factor available to UP, if they continued to reduce costs. There could be no stronger incentive for Applicants to improve their efficiency as a means of competing with UP. *Id.* at 45-46.

Furthermore, there would be no danger that Applicants would be deterred from reducing rates to reflect their own single-line efficiencies out of concern that they will end up subsidizing inefficient interchange operations at inefficient gateways. First, the condition would apply only to the Laredo Gateway, which is plainly an efficient gateway.

Second, UP and TFM already have a highly efficient interchange at Laredo. Third, KCS/Tex Mex and TFM do not expect to achieve any additional operational efficiencies at the Laredo Gateway as a result of the transaction. As we discuss above, they already tout their "seamless" service, and they have stated that KCS control of TFM is not expected to result in any operational changes.

UP has considered the remedial options suggested by other recent transactions, but these approaches would not resolve the competitive issues in this case. For example, in *Conrail*, CSX and NS agreed "to keep open all major interchanges with other carriers as long as they are economically efficient."[157] That type of broad, vague commitment may have sufficed where no party had demonstrated the competitive harms associated with closing a particular efficient gateway, but where specific harms have been identified, an effective plan for addressing that harm is warranted, as the Board concluded in *Major Rail Consolidation Procedures.*[158]

In *CN/WC*, the applicants made a similar open gateway pledge.[159] They also entered into an agreement with NIT League to establish commercially reasonable contract through rates for all active gateways on request and to freeze their portion of common carrier through rates for five years.[160] However, as in *Conrail*, the Board never found that a

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157 *Conrail*, 3 S.T.B. at 255.

158 *Major Rail Consolidation Procedures* at 25.

159 *CN/WC* at 13.

160 *Id.* at 12.

condition was appropriate to address potential competitive harms; it simply required the applicants to abide by their commitments.[161]

A short-term rate freeze or other short-term remedy would not be effective in this case.[162] In situations where carriers have multiple gateway options, a short-term remedy may be sufficient, because it would allow potentially affected carriers to develop new routes before one of those options is closed. That is not the situation here, where Laredo is and will for the foreseeable future remain indispensable to much U.S.-Mexico rail commerce. A short-term solution would merely postpone temporarily the adverse competitive effects of the transaction.

2. Enforceable Commitments Regarding Non-Rate Forms of TFM Cooperation for Movements Via Laredo.

Applicants have pledged "to continue to work with both UP and BNSF" with respect to traffic moving between the U.S. and Mexico.[163] They have committed "to seeing that UP and BNSF are provided the same level of service that they have experienced in the past, and to making improvements on that level of service where possible."[164] They have also committed to "use [KCS's] control of TFM . . . to require TFM to cooperate with both UP and BNSF on pre-blocking cars, improving automated customers pre-clearance procedures, supplying cars for shipments, accommodating run-through train service,

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161 *Id.* at 13-14.

162 Applicants' vague promise to keep the gateway open on "commercially reasonable terms" is no more effective than CN's longer-term commitment to provide "commercially reasonable contract through rates" (*id.* at 12). It would leave unresolved the question of what was "commercially reasonable."

163 Supplement at 25.

164 Applicants' July 21, 2003 Letter (Exhibit 2)

providing excellent service, and promptly quoting rates."[165] And they have committed "to work with UP and BNSF on development of a methodology for measuring service standards and to develop a method by which such standards could be enforced."[166]

In making these commitments, Applicants have appropriately recognized that continued strong competition for U.S.-Mexico traffic depends on the ability to UP and other railroads to offer their customers competitive service as well as competitive rates. UP's competitive concerns relating to TFM service would be met if Applicants abided by these commitments. However, until the parties develop a methodology for measuring service standards and develop a method by which such standards could be enforced, neither the parties nor the Board will be able to assess whether Applicants are living up to those commitments.

In addition to requiring Applicants to abide by their various commitments to work with UP to maintain and improve current service levels, the Board should require them to negotiate in good faith to develop a methodology for measuring service standards and to develop a method by which such standards could be enforced. Like the proposed Gateway Condition, this Service Condition would implement Applicants' various service commitments without interfering with any potential benefits arising from KCS control of Tex Mex and TFM. Applicants have repeatedly asserted that they will have "every

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165 *Id.*

166 *Id.*

incentive to preserve other carriers' access to and efficient operation with TFM."[167] Thus, there is no conceivable harm in holding Applicants to their service commitments.

Moreover, Applicants' efforts to achieve efficiencies would not be hindered by a requirement that they agree upon methodologies for measuring and enforcing service standards. As Mr. Gray explains, UP and BNSF developed effective methodologies for measuring service performance in the context of the *UP/SP* merger. Gray V.S. at 49. The Board has also required post-approval operational monitoring in other recent transactions.[168] The parties should be able to use these examples as the basis for developing methodologies suitable to this transaction. The Board would thus have a firm basis on which to act in the unlikely event that the parties were unable to reach a negotiated agreement within a reasonable period of time. Again, if a suitable agreement could not be reached within a reasonable period of time (perhaps 90 days), the Board should conduct further proceedings to develop and impose an appropriate condition.[169]

3. The Laredo Bridge

Finally, the Board should impose a Bridge Condition as a condition in this case. Applicants have represented that they would accept a condition holding them to their

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167 Supplement at 25.

168 *See Conrail* at 55; *CN/WC* at 19-22. In *Major Rail Consolidation Procedures*, the Board imposed new requirements that applicants provide service benchmarks and indicated that it will conduct significant post-approval operational monitoring. *Major Rail Consolidation Procedures* at 40, 62-65; 49 C.F.R. §§ 1180.1(h), 1180.10(k).

169 Again, this comports with the Board's standard practice. *See* note 131, *supra*.

commitments respecting the Laredo Bridge, including a requirement to negotiate a new bridge operating protocol.[170]

As Mr. Barkley explains, UP believes that a new Bridge protocol should accomplish three key objectives, and UP urges the Board to provide guidance to the parties that would ensure that their implementing agreement meets these criteria:

- First, it should establish a joint operations center that would control operations on the Laredo Bridge and the trackage approaching the Bridge. Establishing such a center would give UP a formal role in decisions about Bridge operations and priority for movements over the Bridge. Joint dispatching centers have proved to be a highly successful way to administer trackage used by more than one railroad, ensuring neutral treatment of the trains of each railroad. The joint dispatching operations of UP and BNSF for the Houston area and other congested terminals are prime examples of how well such centers have worked. Barkley V.S. at 15-16.[171]

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[170] *See* Applicants July 21 Letter (Exhibit 2). Applicants had previously suggested that conditions pertaining to the Laredo Bridge were not warranted because operations were governed by pre-existing agreements. Supplement at 26-27. Applicants, however, ignore the effect that KCS control of Tex Mex would have on Tex Mex's incentives to interpret and apply those agreements in a manner that protected competition via the Laredo Bridge. There is precedent supporting the imposition of conditions to address potential effects caused by changes in carriers' incentives with respect to the implementation of pre-existing agreements. *See Union Pacific Corp. – Control – Chicago & North Western Transportation Co.*, Finance Docket No. 32133 (ICC served Mar. 7, 1995) at 90 (imposing condition precluding CNW from withholding consent to potential assignments by Soo Line of its rights to operate over the Polo Line (between Kansas City and Polo, Missouri) under a longstanding trackage rights/ paired track agreement because "common control will broaden the circumstances in which CNW will have reason to exercise its veto power").

[171] The Board has recognized these benefits. *See UP/SP Houston/Gulf Coast Oversight*, Decision No. 10 (STB served Dec. 21, 1998) at 11, 25-26.

In view of the extensive efforts the three railroads have already made to coordinate their operations at the Bridge, establishment of a joint command center should not be a burden for TFM and Tex Mex. In fact, such a condition is likely to yield greater efficiency in Bridge operations and thus more capacity for all three railroads.

- Second, the new protocols should require the railroads to manage Bridge operations in a manner that will achieve non-discriminatory and efficient operation of the Bridge. Such a provision would enable the railroads to invoke a formal obligation ensuring that each continues to participate in practices that maximize the total capacity and operating efficiency of the Bridge and that do not favor any one user.

- Third, the new protocols should establish a methodology for allocating Bridge capacity that is proportionate to each railroad's share of traffic at the Laredo crossing at any given time. As explained above, UP is concerned that the NAFTA Rail carriers will attempt to impose a 50-50 allocation of priority slots for Bridge crossings. Such a one-for-one protocol would guarantee superior treatment for the carrier with less traffic – and in substance impose an anticompetitive market allocation – since it would receive half of the available slots, while the carrier with the majority of the traffic would receive all of the lowest priority slots. As a result, when there are more trains waiting than can be accommodated during a window, the carrier that enjoys greater market demand for its services would always be the one that is unable to cross all of its trains during that window. The result would be to diminish service levels for the railroad that currently has the majority of the traffic, in this case UP. UP recognizes, of course, that this principle would not create any entitlement to any particular share of Bridge capacity: each party's share would fluctuate with its volume of traffic. If Tex Mex-TFM crossings came to exceed those of UP

as a result of legitimate competitive forces, UP would accept that Tex Mex should be entitled to more than half of the available slots. Barkley V.S. at 16-18.

C. The Proposed Conditions Are Consistent With the Board's Policy Towards End-to-End Transactions

Although Applicants have asserted that it would be inappropriate to impose conditions on their end-to-end transaction, UP's requests for conditions are fully in accord with Board policy for at least three reasons.

First, UP has demonstrated that Applicants' transaction is likely to cause a substantial lessening of competition. UP believes that end-to-end consolidations typically present much less risk of harm than parallel consolidations, but they can nonetheless give rise to anticompetitive effects in certain circumstances. In this case, Applicants will have the ability and the incentives to increase the rates shippers pay or reduce the quality of service they receive in order to generate more revenues for KCS/Tex Mex/TFM. The evidence shows that Applicants' control of the Laredo Gateway and their ability to alter the existing relationship between U.S. carriers and TFM will create opportunities for KCS/Tex Mex/TFM to undermine the competitive process and thereby harm shippers. Hausman V.S. at 9-18. The Board has made it clear that in such circumstances it will exercise its broad conditioning authority in order to reduce the risks to competition.

Second, Board policy recognizes the potential for competitive harm that end-to-end transactions create at major gateways and affirmatively seeks to prevent those harms. In most end-to-end transactions in the past, concerns about closing gateways were unwarranted. In most instances, the transaction eliminated only one of many potential connections at a gateway, and it did not affect the many alternative combinations of gateways and connections that were equally able to compete for the same business.

However, as the Board and UP have recognized, as more and more consolidation have occurred, situations now exist in which the commercial closure of a gateway would pose genuine competitive concern. The risk of closure and the potential for anticompetitive harm are as great as in any major transaction, because the transaction involves the only connection on one side of the gateway, and alternative U.S.-Mexico gateways are not adequate substitutes for the Laredo Gateway.[172] Thus, the Board's policy as expressed in *Major Rail Consolidation Procedures* not only recognizes that end-to-end mergers may present competitive concerns, it would require a gateway-preservation condition in this case.

Third, Applicants have made significant, on-the-record commitments not to engage in discriminatory conduct with respect to rates and service for traffic moving over the Laredo Gateway. As we have shown, the Board's uniform practice has been to impose such commitments as conditions. *See* page 89, above. The Board's policy of holding applicants to their commitments is the same for major and minor transactions, whether they are largely parallel or largely end-to-end.

Applicants have tried to suggest that those conditions would be vastly overreaching. They have implied that UP is seeking to equalize rates for movements over the Laredo Gateway, require special treatment for UP's shipments within Mexico, and freeze the competitive conditions at Laredo. However, as UP has always made clear, it wants none of that.[173] UP does not wish to constrain any efforts by Applicants to provide

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172 *See* Gray V.S. at 12-20.

173 For example, in response to a letter sent by Applicants seeking clarification of UP's position regarding appropriate relief in this case, UP explained in detail why its proposals for implementing Applicants' commitments would allow Applicants to take advantage of

(footnote continued ...)

shippers with more efficient competitive alternatives. Rather, UP is seeking concrete and enforceable conditions that will prevent Applicants from exercising their new, post-consolidation abilities and incentives act anticompetitively to impede effective competition by UP for movements between the U.S. and Mexico. UP is asking for nothing more than a binding set of requirements holding Applicants to the commitments they have already made on the record in this proceeding.[174] Board policy is fully in accord with that request.

V. CONCLUSION

This case will be the Board's only opportunity to ensure the preservation of rail competition for traffic moving to and from the United States over the most important U.S.-Mexico Gateway. Control of Tex Mex is the linchpin in a transaction that will give KCS control of both the Laredo Gateway and the only Mexican railroad that serves that gateway, which until now has cooperated with both U.S. railroads at Laredo on an equitable basis.

The Board plainly has jurisdiction to address competition for rail traffic moving over the Laredo Gateway in this case. In *UP/SP*, the Board imposed remedies for the sole purpose of preserving competition for this traffic. Applicants have asserted that the Board's jurisdiction in this case is confined because they severed Tex Mex from TFM and placed shares in a voting trust before filing their Application. But that maneuver does not

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(... footnote continued from previous page)
their improved efficiencies, if any, in competing for traffic moving via Laredo. *See* Letter from David L. Meyer to William A. Mullins, dated July 30, 2003 (Exhibit 21).

174 *See id.*

affect the Board's responsibility to consider the impacts of the broader transaction on competition for traffic within the United States

The likely anticompetitive impacts are clear. Unless the Board conditions its approval, this transaction is likely to result in a the substantial lessening of competition for rail service between the United States and Mexico. UP and other railroads depend on Tex Mex and TFM for physical access to the Laredo Bridge and on TFM for commercial access to points in Mexico. However, as UP's witnesses explain, once NAFTA Rail headquarters in Kansas City, Missouri, gains control of both Tex Mex and TFM., it will have incentives and opportunities to disrupt other U.S. railroads' ability to compete for cross-border traffic and thus reduce competition for that traffic within the United States. U.S. shippers will face higher rates and lower service quality, because most of them have no efficient alternative to rail service over the Laredo Gateway.

Applicants have recognized the anticompetitive potential of their transaction. They offer three commitments designed to forestall concerns. They also offer to negotiate agreements to implement their commitments. UP believes that these commitments, if made concrete and specific through negotiated agreements, would adequately address the competitive problems this transaction presents. The conditions would not grant UP special benefits or interfere with Applicants' efforts to obtain whatever efficiencies they can from their transaction. They are fully in accord with the Board's policies of preserving major gateways and holding applicants to their on-the-record representations in control cases.

UP's request for conditions is straightforward: The Board should require Applicants to abide by their commitments, including their promises to negotiate agreements that implement these commitments. Only the Board can make those commitments

enforceable. The Board should direct the Applicants to negotiate appropriate agreements. If those negotiations are not successful, the Board must be prepared to impose reasonable terms that make Applicants' commitments meaningful and enforceable.

Respectfully submitted,

J. MICHAEL HEMMER
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

CAROLYN F. CORWIN
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5582

Attorneys for Union Pacific Railroad Company

August 4, 2003

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 4th day of August, 2003, I caused a copy of Union Pacific's Comments to be served by hand on:

William A. Mullins
David C. Reeves
Baker & Miller PLLC
915 Fifteenth Street, NW
Suite 1000
Washington, DC 20005-2318

Richard H. Streeter
Barnes & Thornburg
750 Seventeenth Street, NW
Suite 900
Washington, DC 20006

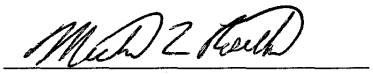
and by overnight mail on:

Allan Van Fleet, Esq.
Vinson & Elkins
2300 First City Tower
1001 Fannin
Houston, TX 77002-6760

I further certify that I caused a copy of the Public Version of Union Pacific's Comments to be served by overnight mail on:

W. James Wochner
Thomas J. Healy
Kansas City Southern
427 West 12th Street
Kansas City, MO 64105

and by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all other parties of record in Finance Docket No. 34342.



Michael L. Rosenthal

Exhibits

TABLE OF EXHIBITS

Exhibit 1	Excerpts from the Brief of the Texas Mexican Railway Company in *UP/SP* proceeding (TM-39) (June 3, 1996)
Exhibit 2	Letter from William A. Mullins to David L. Meyer, July 21, 2003 (filed with Board and served on all parties of record) ("Applicants' July 21 Letter")
Exhibit 3	Grupo TMM Press Release, April 21, 2003.
Exhibit 4	{{ }}
Exhibit 5	{{ }}
Exhibit 6	KCS PowerPoint Presentation: Nafta Rail Transaction Summary
Exhibit 7	KCS 3rd Quarter Presentation Slide
Exhibit 8	Agreement between the National Industrial Transportation League and Canadian League and the Canadian National Railway Co., Apr. 27, 2001
Exhibit 9	Excerpts from the Responsive Application of the Texas Mexican Railway Company in *UP/SP* proceeding (TM-23) (March 29, 1996)
Exhibit 10	Excerpts from *Western Coal Traffic League v. STB*, No. 96-1373, Brief of Respondent STB (Dec. 1997)
Exhibit 11	Transcript of KCS Presentation to Analysts, April 29, 2003
Exhibit 12	Excerpts from KCS NEWS
Exhibit 13	Submissions from Shippers Requesting Conditions
Exhibit 14	Excerpt from the DOJ/FTC 1992 Horizontal Merger Guidelines
Exhibit 15	KCS/Tex Mex Responses to Interrogatories 3, 5, and 7 (KCS-14)
Exhibit 16	Excerpt from the Texas Mexican Railway Company's Petition to Reopen Decision No. 44 in the *UP/SP* proceeding (TM-44) (Sept. 3, 1996)

Exhibit 17	*UP/SP*, Rebuttal in Support of the Responsive Application of the Texas Mexican Railway Company (TM-34), Verified Statement of Joseph Ellebracht (May 14, 1996)
Exhibit 18	*UP/SP*, Comments of the Kansas City Southern and Request for Conditions, Volume I (KCS-33) (March 29, 1996), Verified Statement of Curtis Grimm
Exhibit 19	Union Pacific's Condition Proposals
Exhibit 20	Union Pacific's Opening Comments on Proposed Merger Rules in STB Ex Parte No. 582 (Sub-No.1), Major Rail Consolidation Procedures
Exhibit 21	Letter from David L. Meyer to William A. Mullins, July 30, 2003

1

Comments Exhibit 1
Public

REDACTED - To be filed on the public record TM-39

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND
MISSOURI PACIFIC RR CO.
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC
TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO.,
SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

Finance Docket No. 32760, Sub No. 13

THE TEXAS MEXICAN RAILWAY CO.
-- TRACKAGE RIGHTS OVER LINES OF
THE UNION PACIFIC RR. CO. AND SOUTHERN PACIFIC TRANS. CO.

Finance Docket No. 32760, Sub No. 14

THE TEXAS MEXICAN RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS OVER LINES OF
THE HOUSTON BELT & TERMINAL RAILWAY CO.

BRIEF OF
THE TEXAS MEXICAN RAILWAY COMPANY

Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660
Attorneys for The Texas
Mexican Railway Company

June 3, 1996

TM-39

BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	Finance Docket No. 32760

BRIEF OF THE TEXAS MEXICAN RAILWAY COMPANY

INTRODUCTION AND SUMMARY

The Texas Mexican Railway ("Tex Mex"), chartered in 1875, is one of the oldest railroad companies in the United States. It owns and operates 157 miles of railroad between Corpus Christi, Texas on the Gulf of Mexico and Laredo, Texas on the Rio Grande. Tex Mex and UP are the two U.S. railroads serving Laredo. Laredo is the main rail gateway between the United States and Mexico; in 1994 Laredo handled 55% of the total tonnage moving by rail between the two countries.

Tex Mex connects with SP at Corpus Christi. Tex Mex and SP together provide the only competition to UP for traffic moving through Laredo. Although UP carries most of that traffic, the competition from Tex Mex and SP has been very effective in keeping UP's rates and service reasonable.

Industries, Inc. ("KCSI"), which controls KCS, to bid on rail lines or concessions (e.g., trackage rights) in Mexico that will be sold later this year as part of the privatization of Mexico's rail system, and to operate any lines or concessions acquired. In November, 1995 KCSI also purchased 49 percent of the stock of Mexrail from TMM.

2. Laredo and the Other U.S.-Mexican Rail Gateways

As noted, Tex Mex serves Laredo, where it interchanges traffic with FNM. The only other U.S. railroad serving Laredo is UP, which serves it via a line running south from San Antonio.

Laredo is the principal rail gateway between the United States and Mexico. In 1994, 55 percent of the total tonnage moving by rail through the eight U.S.-Mexico gateways moved through Laredo.[4/] This fact is due to its superior infrastructure and its location on the shortest route between many U.S. and Mexican origins and destinations. TM-34, Ellebracht RVS at 5.

Significant volumes of grain and other agricultural products, minerals, woodpulp, paper products, automobiles and automobile parts, and other metals flow through the Laredo gateway. Ellebracht VS, TM-23 at 91. Much of this is bulk traffic that moves long distances and for which truck transport is not a viable alternative. Id. at 92.

4/ The other seven gateways are: Calexico, Naco, Nogales, El Paso, Presidio, Eagle Pass and Brownsville.

Although UP traditionally has handled most of the freight that moves over the Laredo gateway, the SP-Tex Mex route has accounted for a substantial amount of that traffic and offers "customers an alternative . . . of significant value." Id. at 67-68. In fact, for shipments originating on other railroads not including UP, the SP-Tex Mex route has been the overwhelming choice of those railroads and shippers for traffic moving to Laredo. Id. at 66. As we discuss more fully in the Argument, the Tex Mex-SP route has provided the only competition to UP for traffic through the Laredo gateway and the principal competition for UP for U.S.-Mexican traffic in general.

Although Laredo is the preferred rail gateway to Mexico and has a number of advantages, other gateways also handle a substantial amount of U.S.-Mexican rail traffic, and, as we will discuss further in the Argument, serve as alternative routes for many movements. The significant gateways for rail traffic to and from the industrial centers of Mexico are, in order of volume, Laredo, El Paso, Brownsville and Eagle Pass.[5/] UP currently serves Laredo, El Paso and Brownsville. SP serves Laredo (with Tex Mex), El Paso and Eagle Pass. BNSF serves El Paso; since the

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5/ Presidio, the fifth Texas gateway, is served by BNSF and the South Orient Railroad. The three non-Texas gateways are all served by SP and will be served by UPSP following the merger. The BNSF Settlement does not grant BNSF access to any non-Texas gateways.

BNSF merger, it also serves Eagle Pass via haulage rights over SP's line and will obtain trackage rights to Eagle Pass and Brownsville under the BNSF settlement. In 1994, UP and SP together accounted for percent of the rail tonnage between the U.S. and Mexico via all gateways. Ellebracht VS, TM-23 at 77, as corrected by TM-28, errata filed April 12, 1996.[6/]

ARGUMENT

I. TEX MEX IS A VITAL LINK IN MAINTAINING COMPETITIVE RAIL SERVICE BETWEEN THE UNITED STATES AND MEXICO.

As noted in the Statement of facts, the SP-Tex Mex route provides the only competition today to UP for rail traffic moving between the United States and Mexico via Laredo and provides the principal competition to UP for U.S.-Mexican traffic moving via all gateways. That competition is substantial and extremely important in keeping the rates for that traffic down and the quality of service up.

As Mr. Ellebracht discusses, although UP has carried most of the freight over the Laredo gateway, for traffic where the shipper at origin has a choice of routings "the SP-Tex Mex route has a respectable market share." Ellebracht VS, TM-23 at 67. Indeed, his analysis of traffic data shows that "neutral origins

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6/ This percentage figure includes traffic that SP moved to and from Mexico with Tex Mex but does not include traffic that Tex Mex moved to and from Mexico without SP -- i.e., Mexican traffic to or from Tex Mex's local customers, like Corpus Christi Grain Company. This "Tex Mex-only" traffic accounted for percent of the total U.S.-Mexican rail tonnage in 1994 and percent of the U.S.-Mexican rail tonnage moving through Laredo.

Settlement as a competitive remedy reflects Applicants' recognition of that fact. Although the Mexican rail system is currently state owned, Mr. Ellebracht explains that, for many reasons, rates for the Mexican portion of international moves are, in the vast majority of cases, established without regard to the rates established for the U.S. portion of the moves. Rates for most Mexican moves are established according to a distance-based formula, and through international rates are rare. Ellebracht VS, TM-23 at 78-79. Accordingly, he concludes, "the vigorous competition that now exists between U.S. railroads for that traffic directly benefits the shippers, and any reduction in that competition will harm them." Id. at 79. Applicants have not disputed this.

In this regard, it is also important to stress that ensuring the most vigorous competition for the transportation of goods between the United States and Mexico is clearly consistent with the national policies of both nations as reflected in the North American Free Trade Agreement ("NAFTA"). The central purpose of NAFTA is to promote trade between the two countries. Strong competition among transportation providers is a tremendous stimulus to trade, just as lack of competition suppresses it.[8/]

8/ A number of the statements and letters submitted in support of Tex Mex's responsive application have noted that NAFTA provides a great potential for expanding their businesses which they belief would be seriously threatened by the reduction in the number of railroads serving the U.S.-Mexico market. See, e.g., Feldman VS at 1, TM-23 Ex. 24.

For that reason, NAFTA contains provisions specifically designed to increase competition in cross border transportation services.[9/] As former Secretary of Transportation Andrew Card stated, the purpose of these provisions is to "ensure that the increased trade resulting from the agreement can be carried across the border efficiently and competitively."[10/] The same policy, Tex Mex submits, requires this Board to give heightened scrutiny to transactions within its jurisdiction that present a danger of diminishing competition for transportation of U.S.-Mexican traffic. Cf. McAllen, TX Commercial Zone -- Passenger Operations, Ex Parte No. MC-37 (Sub No. 43) (served Oct. 24, 1995) (ICC should exercise its discretion consistently with the policies of NAFTA).[11/]

9/ Section 1202 of NAFTA and Annex II- Mexico. While most of these pertain to motor carriers, according to the Department of Transportation NAFTA also "opens the Mexican market for U.S. railroads and intermodal companies" and

> "affirms the market-oriented reforms already undertaken by the Mexican government which allow U.S. railroads and intermodal companies to:
> -- Market their services directly to customers;
> -- Carry cargoes directly to Mexican destinations using their own equipment;
> -- Own and operate terminals and other facilities; and
> -- Finance the building of tracks and other rail infrastructure."

DOT News Release 71-92, "Transportation Facts," p. 2 (August 12, 1992).

10/ Remarks of Secretary Card as reported in DOT Release 71-92, issued August 12, 1992.

11/ As we discuss in Part V, below, granting the rights sought by Tex Mex will provide a strong competitive alternative to a merged UPSP and to BNSF for U.S.-Mexican traffic by linking Tex Mex with the KCS system and with KCS's eastern railroad

$19.92 million in the absence of the UP/SP merger. With the UP/SP merger and the BNSF Settlement, he concludes that Tex Mex's revenues would be $13.24 million, or 34 percent less. Ellebracht VS, TM-23 at 98-106.

Based on Mr. Ellebracht's traffic and revenue projections, Tex Mex witness Patrick Krick conducted a financial analysis of the impact of the merger, both as conditioned by the BNSF Settlement and as conditioned by the BNSF Settlement and the rights Tex Mex requests, on Tex Mex's net income. Mr. Krick's analysis shows that a post-merger Tex Mex would immediately go from profitability to unacceptably heavy losses, and he quite simply concludes that Tex Mex "would not survive the UP/SP merger if it is not conditioned by the rights [Tex Mex] requests in its responsive application." Krick VS, TM-23 at 190. On the other hand, Mr. Krick concludes that if Tex Mex is granted the trackage rights it seeks, Tex Mex would remain a viable railroad. Id. at 193.

If Tex Mex did not survive, many of its shippers would lose essential rail service for which they have no feasible transportation alternatives. As described in the Statement of Facts, Tex Mex local shippers like Barr Iron and Metal Co., Corpus Christi Grain Co., and Global Grain Co. have shown that they depend on Tex Mex to transport their products to their markets and that neither trucks nor other railroads are practical alternatives. For example, to ship grain from Corpus Christi to Mexico City or other points in central Mexico, trucks are

obviously not feasible and any rail routing other than Tex Mex would have to go through San Antonio, at least doubling the distance to Laredo and drastically increasing the costs. Furthermore, UP and SP have shown no interest in providing reasonable or reliable service to those shippers. See statements of William E. Bailey and Abel Gonzalez, Jr., TM-23, Ex. 24.

Applicants' chief response to Tex Mex's "loss of essential services" showing is to dispute Mr. Ellebracht's diversion study and claim that Tex Mex will be healthier, rather than gravely damaged, by the merger and Applicants' settlement with BNSF. Applicants do not address or refute Mr. Krick's showing that Tex Mex cannot sustain operations with the loss of traffic that Mr. Ellebracht projects that the merger will cause to Tex Mex.

The criticisms of Mr. Ellebracht's traffic study by Applicants' traffic witness, Richard Peterson, are completely unfounded. First, as Mr. Ellebracht shows in his rebuttal statement, Mr. Peterson's very rosy forecasts about the additional traffic BNSF will supposedly bring to Tex Mex at Robstown are highly improbable on their face. Since Tex Mex already gets 73% of the traffic originated by BNSF destined for Laredo and 99% of the Laredo-bound traffic originated by SP, even if BNSF post merger funneled <u>all</u> of its remaining traffic to Tex Mex, that would not nearly make up for the SP traffic Tex Mex is almost certain to lose. TM-34, Ellebracht RVS at 26-27. Furthermore, it is highly unlikely that BNSF will funnel all of its remaining traffic to Tex Mex after the merger. Indeed, since

the BNSF Settlement will give BNSF trackage rights to Eagle Pass in place of BNSF's current haulage rights and since Eagle Pass is a shorter route for many BNSF moves from western origins than a BN-Tex Mex-Laredo route, it is quite likely that Tex Mex will lose much of the traffic it could expect to receive from BNSF origins in the absence of the merger. Id. at 27.

Mr. Peterson also disparages some of the adjustments Mr. Ellebracht made to Tex Mex's 1994 traffic based on the BNSF merger and other developments since 1994 as "inventing" traffic. Such adjustments, however, are inherent in the methodology used by both Mr. Peterson and Mr. Ellebracht and are common in traffic studies. Mr. Ellebracht's adjustments are no more "invention" than the many adjustments Mr. Peterson made in his traffic study, such as his projections of additional traffic for UP and SP as a result of the UP/CNW and BNSF mergers. Furthermore, Mr. Ellebracht explains in detail why the assailed adjustments are "well founded and entirely reasonable." Id. at 28-29.

In contrast, some of the major assumptions Mr. Peterson made about Tex Mex's post merger traffic are patently unrealistic. Of particular note is Mr. Peterson's assumption that half of the traffic from SP origins that are now routed SP-Tex Mex will continue to be routed to Tex Mex after the merger. This is fanciful. As Mr. Ellebracht noted in his verified statement: "Today there is a tiny trickle of UP-Tex Mex traffic through Robstown to Laredo for which there is a competing UP direct route through San Antonio to Laredo." Ellebracht VS, TM-23 at 105-106.

possible, and transportation between the United States and Mexico would be dominated entirely by a merged UPSP.

The trackage rights sought by Tex Mex will also ensure that Tex Mex and its shippers will not be completely dependent on a connection with BNSF which, for the reasons discussed, is extremely doubtful. As shown by Mr. Ellebracht and Mr. Krick, these rights are likely to generate sufficient traffic and revenues to permit Tex Mex to remain viable and thus to continue providing essential rail services to its shippers.

CONCLUSION

The Board should grant the responsive application and the application for terminal trackage rights of the Texas Mexican Railway Company in this proceeding.

Respectfully submitted,



Richard A. Allen
Andrew R. Plump
John V. Edwards
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006-3939
202/298-8660

Attorneys for Texas Mexican Railway Company

Dated: June 3, 1996

Comments Exhibit 2
Public

BAKER & MILLER PLLC
ATTORNEYS AND COUNSELLORS

SUITE 1000
915 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2318
TELEPHONE: (202) 637-9499
FACSIMILE: (202) 637-9394

July 21, 2003

BY HAND DELIVERY
David L. Meyer, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401

RE: Your Letter of June 30 Regarding Kansas City Southern's Application For Authority to Control The Texas Mexican Railway Company, STB Finance Docket No. 34342

Dear David:

As you know, Kansas City Southern ("KCS") and Union Pacific Railroad Company ("UP") are currently in private discussions regarding UP's concerns over KCS's plans to acquire control of The Texas Mexican Railway Company ("Tex Mex") and TFM, S.A. de C.V. ("TFM"), along with other commercial issues impacting the two companies. You also know that KCS and UP have a confidentiality agreement governing those discussions. Given that background, your July 16 letter asking KCS to respond to your June 30th letter, both of which you served on all parties of record, seems more of an effort by UP to gain some sort of perceived leverage in those negotiations rather than an honest attempt to resolve UP's concerns over the two transactions. Bringing these issues into the public arena, while at the same time negotiating in private, leads one to question UP's motives and its willingness to truly negotiate in good faith.

KCS realizes that there may be other parties, in particular shippers and shipper associations, who would like some clarification of KCS's commitments made in the Application and the Supplement. KCS is talking to these parties. If it is true as you state in your letter that there are other parties unbeknownst to KCS who share UP's concerns, KCS, as always, remains willing to discuss those concerns with these parties in private. Nonetheless, if there are parties who need further clarification on the public record, KCS offers the following:

Laredo Bridge

KCS of course expects that Tex Mex and TFM will continue to cooperate with UP regarding the utilization of the International Bridge across the Rio Grande River at Laredo. As you know, operations over the International Bridge are governed by a series of

agreements dating back to 1951. KCS will honor all existing agreements governing operations over the bridge. In addition, KCS is willing to work cooperatively with UP toward efficient utilization of the bridge and will work in good faith with UP to develop dispatching protocols acceptable to both parties. KCS is confident that it can reach agreement with UP over such dispatching protocols as part of its private discussions with UP. Nonetheless, KCS would be willing to make its commitment to negotiate in good faith new dispatching protocols a condition of its common control of Tex Mex.

Working With UP and BNSF

As KCS has said publicly on many occasions, regardless of whether KCS obtains additional ownership in TFM, it will continue to be in TFM's best interest to work cooperatively with UP and BNSF. KCS remains committed to seeing that UP and BNSF are provided the same level of service they have experienced in the past, and to making improvements on that level of service where possible. KCS further commits that it will use its control of TFM (assuming this transaction is consummated) to require TFM to cooperate with both UP and BNSF on pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through train service, providing excellent service, and promptly quoting rates. KCS is also willing to work with UP and BNSF on development of a methodology for measuring service standards and to develop a method by which such standards could be enforced.

Keeping the Laredo Gateway Open

KCS believes that all affected parties are interested in keeping the Laredo Gateway open on commercially reasonable terms. KCS is willing to enter into private discussions with UP or any other party to discuss this commitment and reach a private agreement to ensure that KCS abides by this commitment.

Existing Tex Mex and TFM Agreements

In conjunction with this commitment, KCS will abide by all existing agreements between TFM and Tex Mex and any other carrier, including any agreements providing for rates and divisions at the Laredo gateway, until the termination date set forth in those agreements. KCS, however, is not willing to simply renew or indefinitely extend all agreements under the old terms without undertaking a good faith negotiation. KCS would not expect UP and BNSF to do so either, and does not believe that either did so in their most recent mergers. KCS is not willing to agree to an anticompetitive "freezing" of existing rates or divisions.

General Issues

Depending on the exact form any final agreement would take with respect to settlement of the foregoing issues, KCS expects to be able to agree to the imposition of its commitments on the Laredo Bridge and on working with UP and BNSF (particularly on operational monitoring) as conditions upon the STB's order approving the KCS-Tex Mex

transaction. However, because the Board has no jurisdiction to impose conditions on TFM, any agreements relating to TFM would have to remain a matter of contract between the parties.

UP's Commitments Regarding the Trackage Rights Lines

As you know, over the past three years, UP and Tex Mex officers have been discussing the congestion problems on UP's lines over which Tex Mex operates under trackage rights, and when UP was going to take promised steps to alleviate those problems. UP made commitments in its 1998 Infrastructure Plan, as well as contractual commitments, to maintain adequate infrastructure to prevent deterioration of service over the trackage rights lines. KCS and others do not believe UP has lived up to these commitments. So in response to your questions, KCS asks when UP is going to meet the contractual and public commitments regarding maintaining the infrastructure and transit times on the UP lines used by Tex Mex, particularly the Brownsville Subdivision?

Sincerely,



William A. Mullins

cc: The Honorable Vernon A. Williams
All Parties of Record


3

Comments Exhibit 3
Public



Date: April 21, 2003

Media Contact: William H. Galligan, 816-983-1551 or william.h.galligan@kcsr.com

KCS and TMM Announce Agreements Placing TFM, Texas Mexican Railway and The Kansas City Southern Railway Under Common Control

Kansas City Southern (KCS) (NYSE: KSU) and Grupo TMM, S.A. (Grupo TMM) (NYSE: TMM) today announced a series of agreements that have been approved by their respective boards of directors, that will, following shareholder and regulatory approval, place The Kansas City Southern Railway Company (KCSR), the Texas Mexican Railway Company(Tex-Mex), and TFM, S.A., de C.V. (TFM) under the common control of a single transportation holding company, NAFTA Rail, to be headquartered in Kansas City, Missouri. As part of the transaction, KCS will change its name to NAFTA Rail, which will trade on the New York Stock Exchange (NYSE).

The common control of The Kansas City Southern Railway Company and the Texas Mexican Railway under NAFTA Rail, would require approval of the Surface Transportation Board in the United States. Additionally, the acquisition of Grupo TFM shares by NAFTA Rail would require the approval of the Competition Commission and the Foreign Investment Commission in Mexico.

"Common control of these three railroads, which are already physically linked in an end-to-end configuration, will enhance competition and give shippers in the NAFTA trade corridor a strong transportation alternative as they make their decisions to move goods between the United States, Mexico and Canada," said Michael R. Haverty, chairman, president, and chief executive officer of KCS. "KCS already owns KCSR and has significant investments in Tex-Mex and TFM, so these agreements are just a natural business progression offering KCS and Grupo TMM shareholders greater value through the operating efficiencies that will come from common ownership and control."

Jose Serrano, chairman and chief executive officer of Grupo TMM, said, "These transactions will be pro-competitive and allow Mexico to strengthen its position in the North American economy. NAFTA Rail will provide a viable rail alternative, while still preserving existing competitive gateways at the border between Mexico and the United States."

"I am very pleased that we have been able to complete these agreements and that they have been approved by the boards of both companies. We believe that the shareholders of both companies will benefit from bringing these three companies under common ownership," said Serrano. "Both NAFTA Rail and Grupo TMM will continue to work closely together in the future and have agreed to enter into a marketing agreement to further our shared goals of providing end-to-end transportation for our customers."

Mr. Haverty will serve as chairman, president, and chief executive officer of NAFTA Rail. Mr. Serrano will serve as vice chairman of NAFTA Rail and chairman of TFM, while also joining the NAFTA Rail

-more-

board of directors along with Javier Segovia, president of Grupo TMM. The remainder of the 10-person board will be made up of existing KCS directors. Mario Mohar will remain as chief executive officer of TFM.

Under the Grupo TFM acquisition agreement, TMM Mulitimodal, a subsidiary of Grupo TMM, will receive 18 million shares of NAFTA Rail representing approximately 22 percent (20% voting, 2% subject to voting restrictions) of the company, $200 million in cash and a potential incentive payment of between $100 million and $180 million based on the resolution of certain future contingencies.

Grupo TFM owns 80 percent of the common stock of TFM and all the shares entitled to full voting rights. The Mexican Government owns the remaining 20% of TFM. TFM holds the concession to operate Mexico's Northeast Rail Lines for 50 years ending June 2047, and has the option to extend the concession for an additional 50 years. The TFM rail network consists of more than 2,600 miles of main track.

KCSR will remain headquartered in Kansas City, Missouri; Tex-Mex in Laredo, Texas; and TFM in Mexico City.

KCS is a transportation holding company that has railroad investments in the United States, Mexico, and Panama. Its primary holding is The Kansas City Southern Railway Company. Headquartered in Kansas City, Missouri, KCS serves customers in the central and south central regions of the U.S. KCS's rail holdings and investments are primary components of a NAFTA Railway system that links the commercial and industrial centers of the United States, Canada, and Mexico

Headquartered in Mexico City, Grupo TMM is the premier Mexican multimodal transportation company and logistics provider. Through its branch offices and network of subsidiary companies, Grupo TMM provides a dynamic combination of ocean and land transportation services within Mexico. Grupo TMM also has the controlling interest in TFM, which operates Mexico's Northeast Rail Lines and carries over 40 percent of the country's rail cargo.

In connection with the proposed transaction, Kansas City Southern will file relevant materials with the Securities and Exchange Commission ("SEC"), including a proxy statement soliciting shareholder approval of the transaction. Shareholders are urged to read the proxy statement, as well as any amendments and supplements to the proxy statement (if and when they become available) and any other relevant documents filed with the SEC, because they will contain important information about the transaction. Shareholders may obtain the proxy statement and any other relevant documents free of charge at the SEC's Internet web site at www.sec.gov. The proxy statement and any other relevant documents may also be obtained free of charge by contacting the office of the Corporate Secretary at Kansas City Southern's principal executive offices at (816) 983-1538. Written requests should be mailed to P.O. Box 219335, Kansas City, Missouri 64121-9335 (or if by federal express or other form of express delivery to 427 West 12th Street, Kansas City, Missouri 64105).

Media/Analysts Conference Call Notice:
There will be a 10:00 A.M. Central Daylight Time (11:00 A.M. Eastern Daylight Time) conference call today, April 21st, discussing the proposed common control agreement hosted by Michael Haverty, Jose Serrano, and Ronald Russ, KCS executive vice president and chief financial officer. The call will be to discuss the NAFTA Rail transaction. Questions relating to TMM and its financial statement will be handled separately by TMM. A discussion of the transaction is available at the KCS website at www.kcsi.com. Those interested in participating are invited to call 1-800/955-1795 (U.S. and Canada) or 1-706/643-0096 or 001-800-514-7616 (International).

Press Release
April 21, 2003

Participants should call at least five minutes before the conference call begins. A replay of the discussion will be available for one week after the conference call. Replay numbers are 1-800/642-1687 (U.S. & Canada) or 1-706/645-9291 (International).

Included in this press release are certain forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. Such forward-looking statements are based on the beliefs of the Companies' managements as well as on assumptions made. Actual results could differ materially from those included in such forward-looking statements. Readers are cautioned that all forward-looking statements involve risks and uncertainty. The following factors could cause actual results to differ materially from such forward-looking statements: global, US and Mexican economic and social conditions; the effect of the North American Free Trade Agreement on the level of US-Mexico trade; the condition of the world shipping market; the success of the Companies' investment in TFM, S.A. de C.V. and other new business risks. These risk factors and additional information are included in Grupo TMM's and KCS' reports on file with the Securities and Exchange Commission.

4

Comments Exhibit 4
Public

EXHIBIT FILED UNDER SEAL



Comments Exhibit 5
Public

EXHIBIT FILED UNDER SEAL


6

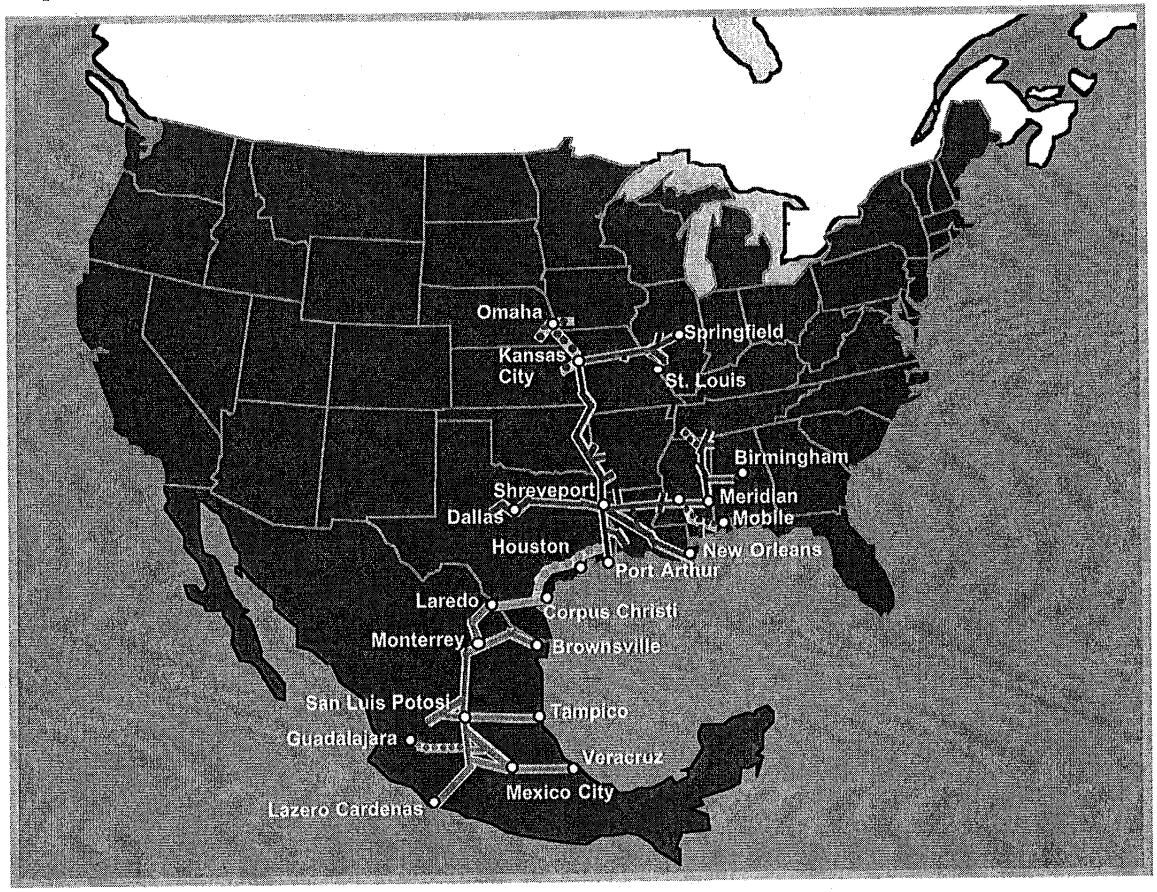
Comments Exhibit 6
Public

NAFTA Rail

transaction summary

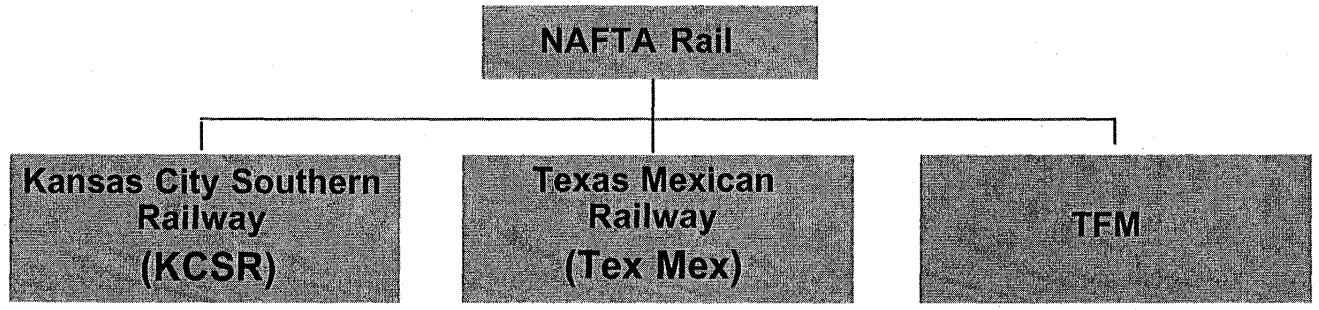
NAFTA
Rail

KCSR, Tex Mex, TFM
Operating Under Common Control



NAFTA Rail

Common Control



- **NAFTA Rail will be a U.S. corporation, headquartered in Kansas City, with three separate railroad companies that connect end to end and operate under integrated management**
  - **KCS and Tex Mex are U.S. corporations**
  - **TFM is a Mexican corporation**
- **Surface Transportation Board approval of the common control of KCSR and Tex Mex is required**
- **Mexico's Foreign Investment Commission will review the foreign control of TFM**
- **Mexico's Competition Commission will review the transaction for competitive effects**

NAFTA Rail

Strategic Rationale for NAFTA Rail

- Enhance shareholder value by achieving consolidation of rapidly expanding TFM affiliate in Mexico, with U.S. ownership
- Accretive from day one
- Improve Tex Mex infrastructure and operations to better link the Kansas City Southern Railway with TFM
- Strengthen KCSR/Tex Mex/TFM as the "NAFTA Railroad" in North America
- Increase EPS contribution from faster-growing rail operations in Mexico
- Lengthen hauls through an "across-the-border" view

NAFTA Rail

Enhanced Competition

- **Three railroad companies connecting end to end to end**
  - Maintain the unique culture of each company
  - Operating under integrated management
  - Only *enhances* competition–no reduction of competitors in any market
    - No "2 to 1 points"
    - No overlaps
- **Common operating platform, MCS: planned implementation on Tex Mex in September 2003, and on TFM in Q1 2004**
  - MCS now operating smoothly at KCSR
  - Common customer access
  - Pro-active service management
- **Tightly managed service across U.S.-Mexico border**
- **Seamless service**
  - Southern Mexico to the heart of the U.S.
  - Integrated operating system
  - Integrated customer service

NAFTA Rail

Enhanced Competition (continued)

- **Combined resources lead to enhanced product offerings**
  - 965 locomotives
  - 25,206 freight cars
  - 140 transload/reload locations
  - 14 intermodal ramps
  - 13 ports
  - 181 interchange points with other railroads

NAFTA Rail

NAFTA RAIL Governance and Management

- **Board of Directors, initially ten members:**
  - Mike Haverty, Chairman
  - Pepe Serrano, Vice-Chairman
  - Seven (in addition to Mike Haverty) current KCS Board members; plus Javier Segovia, President of TMM
- **Management of NAFTA RAIL**
  - Chairman, President & CEO: Mike Haverty
- **Management of Kansas City Southern Railway**
  - Chairman, President & CEO: Mike Haverty
- **Management of TFM**
  - Chairman: Pepe Serrano
  - CEO: Mario Mohar

NAFTA Rail

Transaction Summary

- **To NAFTA RAIL from GTMM**
  - 38.8% of effective ownership of TFM
- **To GTMM from NAFTA RAIL**
  - 18 million shares of NAFTA RAIL
  - $200 million cash
  - Potential incentive payment of $100 million-$180 million based on a resolution of certain contingencies
- **51.0% of Mexrail acquired by NAFTA RAIL for $32 million**

NAFTA Rail

Financial Summary

Income statement data *

(US$mm)

	KCS consolidated	Grupo TFM consolidated	combined
2002 Revenue	$ 566	$ 712	$ 1,278
growth vs. '01	(1.9 %)	6.6%	2.7%
2002 EBITDA	$ 109	$ 259	$ 368
margin	19.3%	36.4%	28.8%
2002 EBIT	$ 48	$ 176	$ 224
margin	8.5%	24.7%	17.5%

* NOTES:

KCS consolidated 2002 EDITDA and EBIT exclude KCS' equity in earnings of Grupo TFM, resulting from existing 37.3% of effective ownership in TFM.

Combined amounts are presented only to demonstrate the relative size of NAFTA Rail if the transaction is consummated. The combined amounts do not reflect the impacts of the application of purchase accounting and do not purport to reflect *pro forma* financial results as if the transaction had been consummated at the beginning of 2002.

NAFTA Rail

Financial Summary (continued)

Balance Sheet data *

(US$mm)

	KCS consolidated	Grupo TFM consolidated	combined
Cash	$ 19	$ 30	$ 49
Debt	$ 583	$ 1,023	$ 1,606
Net debt	$ 564	$ 992	$ 1,556

* NOTES:

Balance sheet data before acquisition financing. Source: Balance sheet data as of 12/31/02.

Combined amounts are presented only to demonstrate the relative size of NAFTA Rail if the transaction is consummated. The amounts do not reflect the impacts of the application of purchase accounting and do not purport to reflect *pro forma* balance sheet data as if the transaction had been consummated at December 31, 2002.

NAFTA Rail

Value Added Tax (VAT) Update

- TFM filed a lawsuit against the Mexican Government in 1997 alleging that the Government failed to make a value added tax refund in the amount of $206 million
- October 11, 2002: the Mexican Magistrates Court (the appellate court) unanimously ruled in favor of TFM and ordered the lower Fiscal Court to issue a new ruling consistent with the appellate court's opinion
- December 10, 2002: the lower Fiscal Court issued a ruling denying TFM the right to receive the VAT refund
- TFM appealed the December 10th ruling to the Mexican Magistrates Court on January 29,2003

NAFTA Rail

Purchase Price Summary

No VAT/ No Put

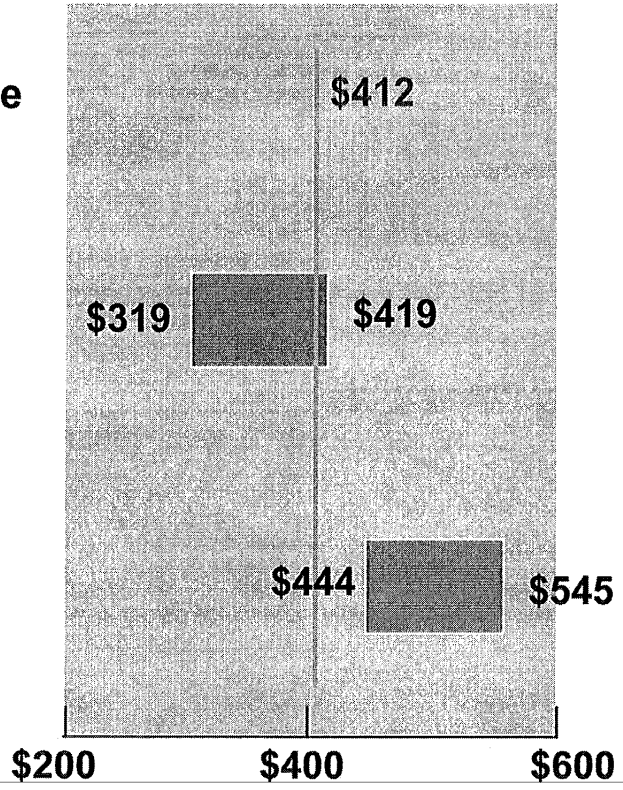
18.0M shares issued @ $11.77 (closing 4/17/03)	$ 211.9
Cash	$ 200.0
Purchase total	$ 411.9
Total value for TMM's interest	$ 411.9
TMM's interest in TFM	38.8%
Implied equity value of TFM	$ 1,061.5
TFM debt	$ 1,023.1
TFM cash	$ 30.2
Implied Total Enterprise Value	$ 2,054.4

Implied multiples:	TFM metrics	
2002 revenue	$ 712.1	2.9x
2002 EBITDA	$ 259.2	7.9x
2002 EBIT	$ 176.1	11.7x

NAFTA Rail

Valuation Summary: 38.8% of GTFM

Valuation Method	Valuation Range	Relevant Parameter
Purchase Price	$412	$200 million plus 18 million shares @ $11.77 per share
Rail Industry Trading Comparables	$319 – $419	LTM EBITDA multiple: 7.0x – 8.0x
Rail Industry Transaction Comparables	$444 – $545	LTM EBITDA multiple: 8.25x – 9.25x



NAFTA Rail

Earnings Impact

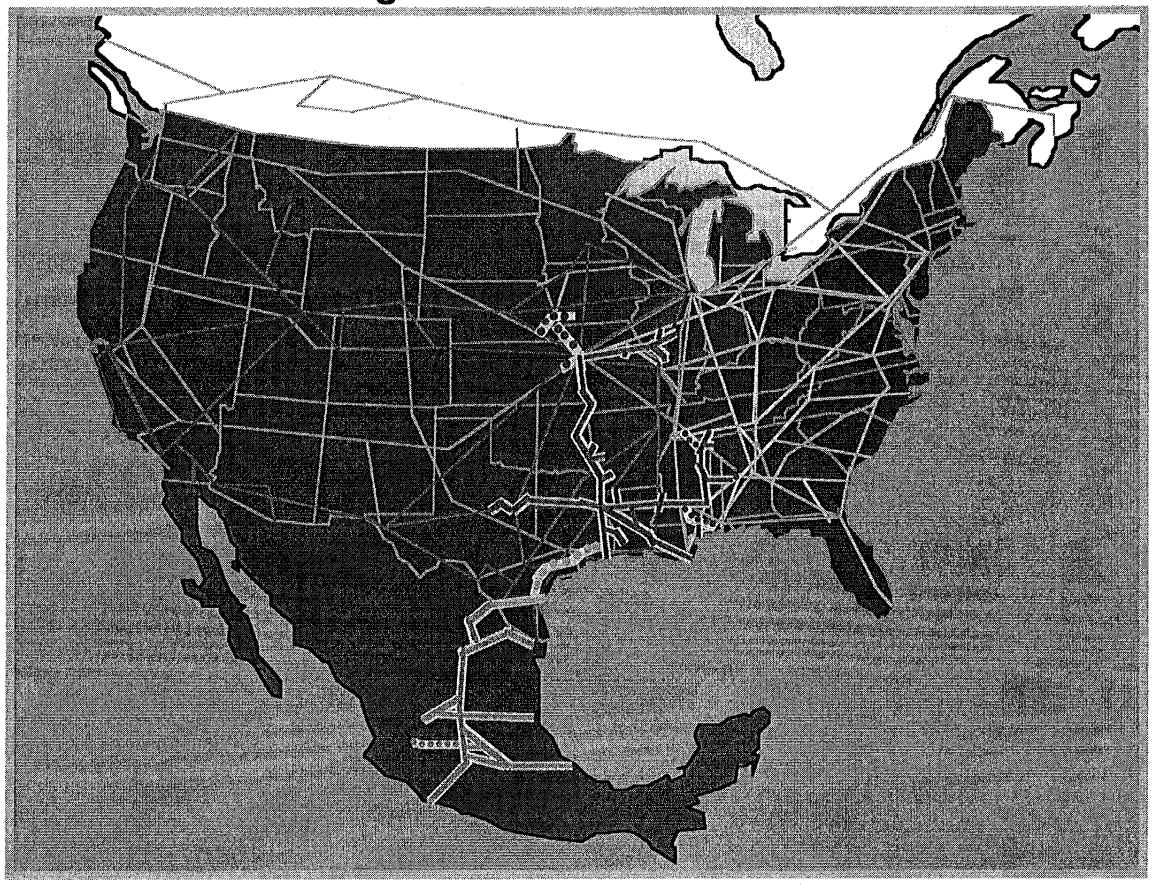
No VAT/ No Put

	2003E *	2004E *
KCS standalone EPS	$ 0.79	$ 1.05
NAFTA Rail EPS	Higher	Higher
Benefit to NAFTA Rail shareholders	Accretive	Accretive

* First Call Estimates 4/17/03

NAFTA
Rail

North American Rail Coverage
with marketing alliances and connections



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KCSI

Welcome to the Monday, October 26, 1998 Third Quarter Presentation. An audio replay of the presentation is available for the next several days at 888-203-1112 or 719-457-0820. Reference meeting #542111. Subsequently the replay will be available on this web site if there is interest.

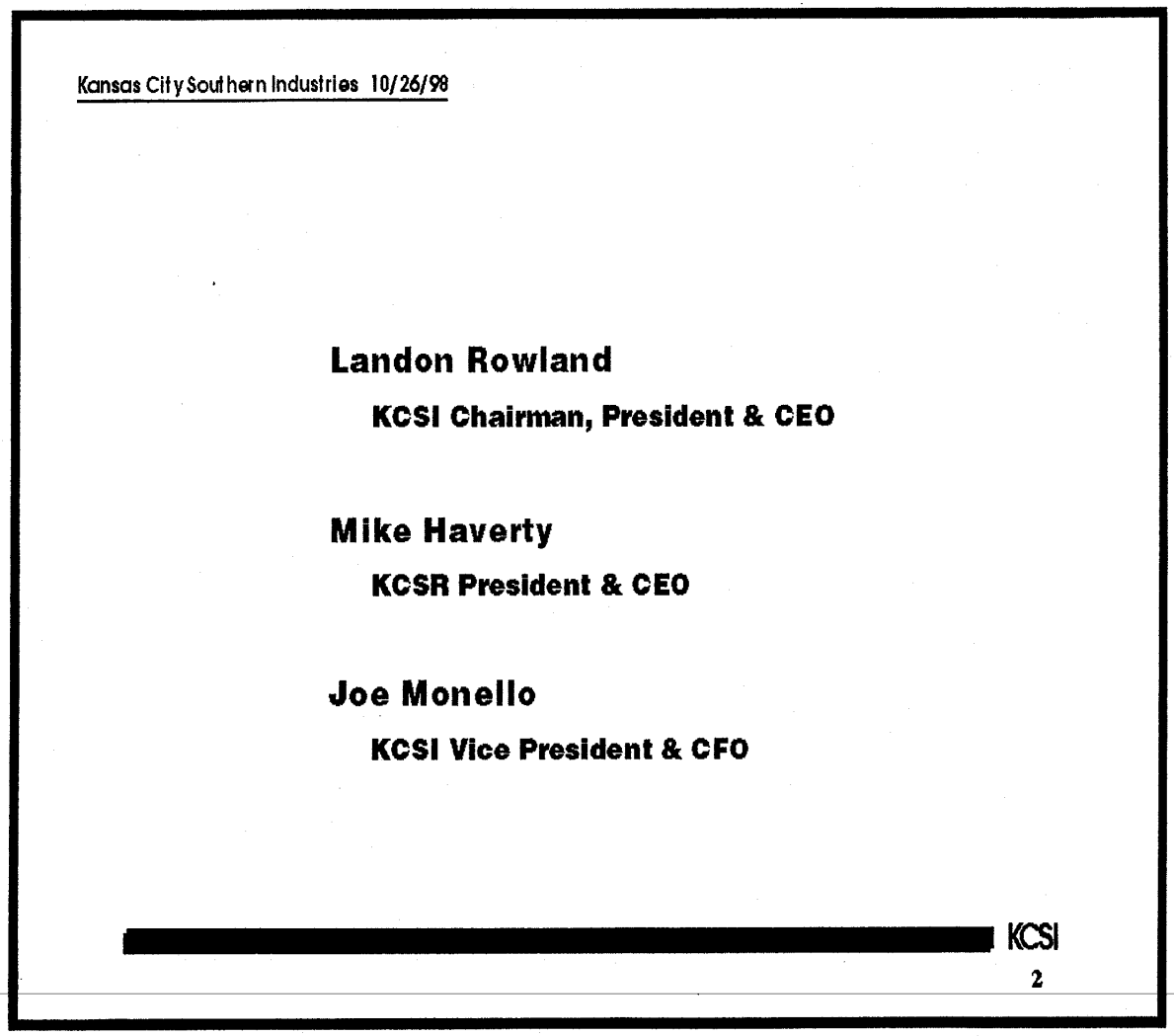
Please **WAIT** now for all the slides to load before advancing to the next slide; your "browser" software (preferably Netscape ver 4+, but any browser will do) will indicate when it has finished loading. No special software is needed. Once all the slides have loaded, it is no longer necessary for you to maintain an internet connection to watch the slide program on most computers. You may disconnect. Disconnecting from the audio is not advised, as there is much wisdom here, not to be missed.

If your browser software has finished and all is well you can skip reading this long boring section and click "next" below to advance to the next slide. Reports on how long loading the slides takes vary from a couple of seconds on a very fast fast system (cable modem) to about 2-3 minutes on a typical 28.8 system and even 2X, 3X longer with a 14.4 modem on an older computer and/or a marginal quality phone-line connection. The worst-case we have observed in a properly operating but slow modem setup was about 10 minutes. If your browser is still actively loading much beyond that, you may want to reconsider. Please note that there are issues involved with choices of particular platforms/hardware/operating systems/browser software conbinations that can make internet access speed problematical. There are bad modems and there are bad T1 implementations.

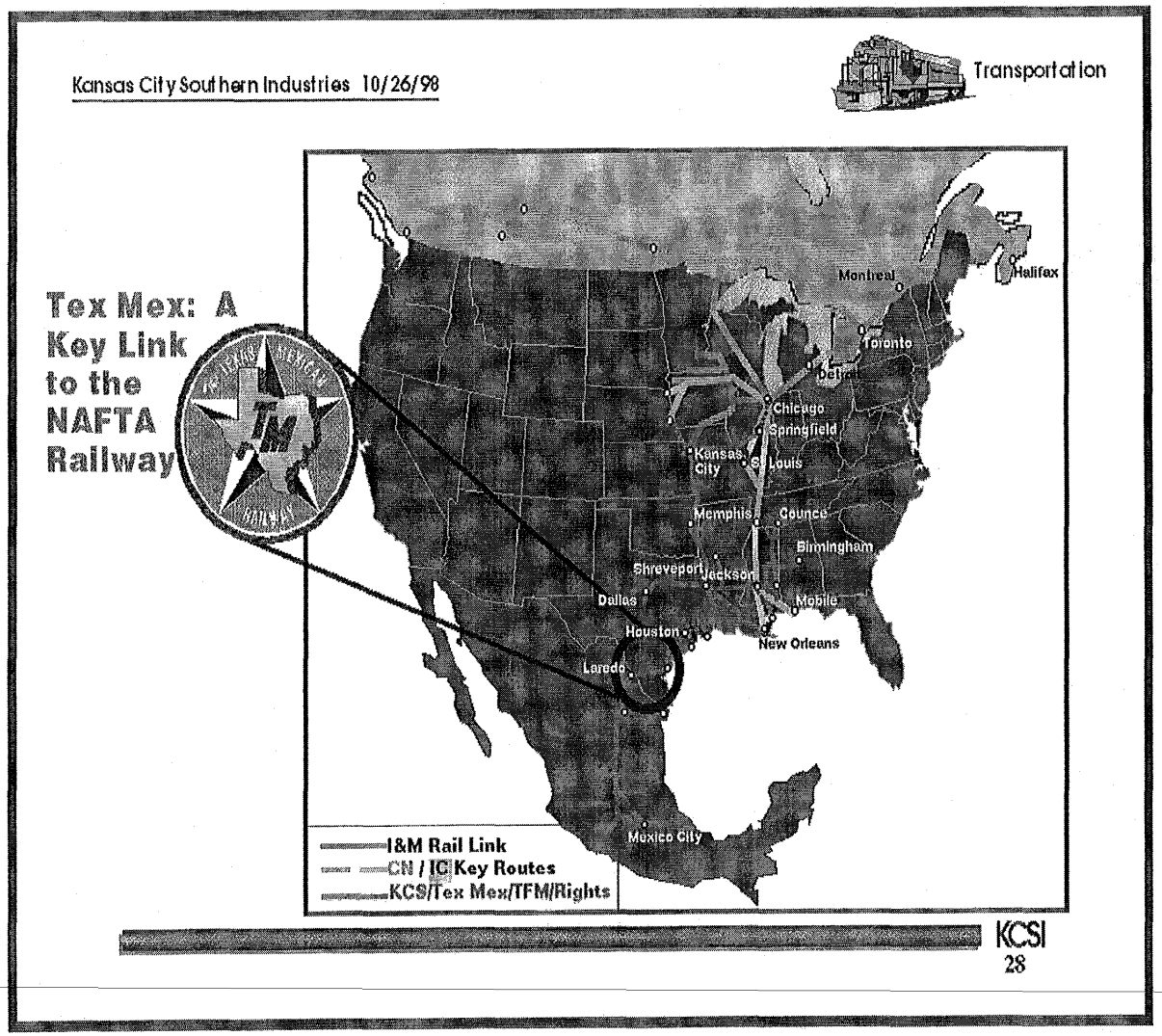
If you do not wait for the entire show to load now, you may encounter some "empty" slide frames as you advance through the program. You may be able to see these slides by clicking on the picture "icon" in the empty slide frame to load that individual slide. A "restart" option is available if all else fails. Depending on your installed software & settings, you may have to scroll to see the entire slide and the "next" prompt. Some very old software "browsers" will not scale the slides properly (the unscaled originals are very large).

Finally, these are screen images and will not print well.

next



next back [restart] ----------Speaker: Landon Rowland, KCSI CEO



next back [restart] ----------Speaker: Mike Haverty, KCSR CEO

8

Comments Exhibit 8
Public

Agreement between the National Industrial Transportation League
And
The Canadian National Railway Company

This Agreement is made this 27th day of April 2001 between The National Industrial Transportation League ("League"), and the Canadian National Railway Company and its affiliated rail carriers ("CN").

Whereas,

CN and Wisconsin Central Transportation Corporation ("WC") (together, "Rail Carriers"), have filed an Application before the Surface Transportation Board ("STB") seeking the STB's approval of the acquisition of control of WC by CN ("Transaction");

The League and CN desire to record the terms on which the League, having reviewed the Application, has agreed to support the Transaction and the treatment of the Transaction before the STB as a "minor transaction;" and

The League and CN desire to record the promises given by CN to the League for the benefit of the members of the shipping public in exchange for the League's support,

Now, therefore, in consideration of the mutual covenants contained herein, CN and the League agree as follows:

1) **League Support.** The League agrees to support STB approval of the Transaction. Within a reasonable time after the execution of this Agreement and no later than April 27, 2001, the League will submit a statement to the STB supporting the Transaction and the treatment by the STB of the Rail Carriers' Application for approval of the Transaction as one for approval of a "minor transaction" as that term is used in 49 C.F.R. §1180.2(c).

2) **Service Protection Agreements.** Upon the request of any shipper or receiver of property on CN and/or WC ("Shipper"), the Rail Carriers shall make a good faith offer to enter into an agreement with that Shipper with respect to that Shipper's traffic affected by the Transaction that, at a minimum:

a) Identifies that Shipper's base service level as the average transit time during each base period for each of the commodities shipped or received by that Shipper between each pertinent origin/destination pair affected by the Transaction. The base periods will be the twelve calendar months preceding the month in which the Transaction is consummated, or such other specific time periods agreed to by the Rail Carriers and that Shipper.

b) Assures that average transit-time at the base service level will not be adversely affected by the Transaction.

c) Provides for (i) Shipper notice to CN if that Shipper's average transit-time for any calendar month after consummation of the Transaction is adversely affected relative to that Shipper's average transit for the corresponding base period calendar month and (ii) a period of not more than 30 days after the date of receipt of such Shipper notice for CN to bring the average transit-time for the movement or movements in question up to the base service level for the corresponding base calendar month..

d) Provides remedies if that Shipper's average monthly transit-time continues to be adversely affected by the Transaction for more than 30 days after the date of such notice. Such remedies, to be applied during the period of degraded service, will include, at a minimum, on-the-ground management flexibility and top-level backing with whatever resources are necessary to effect a complete and timely resolution. The Shipper and Rail Carriers may agree to remedies for service level declines in addition to or in lieu of the remedies provided for in this Agreement. During the two year period after consummation of the Transaction, if a Shipper's average transit time calculated over a calendar month for a particular movement exceeds that for the corresponding base period calendar month, the Rail Carriers shall have the burden of showing that the adverse effect was not a result of the Transaction.

e) The Shipper and Rail Carriers may agree to provide for a sliding scale of charges based on the Rail Carrier's performance for that Shipper after the Transaction relative to that Shipper's base service levels.

f) Unless otherwise agreed to by the Shipper and the Rail Carriers, any agreement made pursuant to this section 2 shall expire five years after the consummation of the Transaction.

3) **Interchange Protection.**

a) At the request of a Shipper, subject to any necessary concurrence of Rail Carriers' connections, Rail Carriers will establish and maintain in effect commercially reasonable contract through rates and charges that are applicable to the transportation of property for that Shipper originating on or destined to points on WC over any existing interchange between WC and any other rail carrier that was active during the 12 months prior to the date of this Agreement.

b) Within the five year period subsequent to the consummation of the Transaction, Rail Carriers, except as provided below, will not increase their portion of common carrier through rates that are in effect upon the date of the consummation of the Transaction and that are applicable to the transportation of property via interchanges to or from origin or destination points on WC and have been used to ship the commodity in question in the prior 12 months. The Rail Carriers' portion of such existing common carrier through rates may be

increased by no more than the change, if any, in the Unadjusted Rail Cost Adjustment Factor ("RCAF-U") or, if the Rail Carriers so choose, the change in the RCAF-U minus any fuel cost element of the RCAF-U plus any cost-based fuel surcharge applied by the Rail Carriers.

c) After the expiration of the five-year period subsequent to the consummation of the Transaction, Rail Carriers will not close, by any commercially unreasonable means, any interchange between WC and any other rail carrier then in active use.

4) **Applicability of this Agreement.** This Agreement was negotiated on the expectation that CN will consummate the acquisition of control of WC. Other than the League's obligations under paragraph 1 hereof, the rights and obligations set forth in this Agreement are contingent upon and will become effective only on the date of such consummation. This Agreement will have no continuing force or effect if the STB does not authorize or CN does not consummate the Transaction. However, if CN does consummate the transaction, then any individual Shipper over CN or WC affected by any of the provisions of this Agreement shall be a third-party beneficiary of this Agreement. No party other than such a Shipper, the League and the Rail Carriers shall be a beneficiary of this Agreement.

5) **Dispute Resolution.** If a dispute arises under this Agreement or any agreement formed pursuant to this Agreement, the exclusive means by which any party to or beneficiary of this Agreement or any agreement formed pursuant to this Agreement may unilaterally seek third party dispute resolution shall be arbitration as provided in an agreement between a Shipper and the Rail Carriers or, if no such provision has been made, under the Commercial Arbitration Rules administered by the American Arbitration Association. In any case, arbitration shall be decided no more than 90 days from the selection of the arbitrator.

6) **Governing Law.** This agreement will be governed by the law of the District of Columbia, without regard to rules pertaining to choice of law.

Canadian National Railway Company

Edward M. Emmett, President
The National Industrial
Transportation League

ATTACHMENT 2

CN Sales and Marketing

455 Cityfront Plaza Drive
Chicago, IL
60611-5317

April 25, 2001

Mr. Edward M. Emmett
President
The National Industrial Transportation League
1700 N. Moore Street, Suite 1900
Arlington, VA
22209-1904

Dear Ed,

This will confirm that, upon the execution of the NITL/CN Agreement regarding NITL's support for the CN/WC Transaction and the acceptance by the Surface Transportation Board of the CN/WC Application as one for STB approval of a minor transaction, CN will request that the STB impose a condition on the approval of the Transaction that Applicants will adhere to the following representation made in their Application:

Applicants will also waive any defenses they might otherwise have as a result of the Transaction, under the Board's general rule that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the Transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule.

Sincerely,

James Foote
Executive Vice President Sales and Marketing

9

REDACTED - To be filed on the public record

TM-23

Comments Exhibit 9
Public

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND
MISSOURI PACIFIC RR CO.
– CONTROL AND MERGER –
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC
TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO.,
SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

Finance Docket No. 32760, Sub No. 13

THE TEXAS MEXICAN RAILWAY CO.
– TRACKAGE RIGHTS OVER LINES OF
THE UNION PACIFIC RR. CO. AND SOUTHERN PACIFIC TRANS. CO.

Finance Docket No. 32760, Sub No. 14

THE TEXAS MEXICAN RAILWAY COMPANY
– TERMINAL TRACKAGE RIGHTS OVER LINES OF
THE HOUSTON BELT & TERMINAL RAILWAY CO.

RESPONSIVE APPLICATION OF THE TEXAS MEXICAN RAILWAY COMPANY

Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660
Attorneys for The Texas
Mexican Railway Company

March 29, 1996

TM-23

BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	**Finance Docket No. 32760**

RESPONSIVE APPLICATION OF
THE TEXAS MEXICAN RAILWAY COMPANY

The Texas Mexican Railway Company ("Tex Mex"), hereby applies under 49 U.S.C. §§ 11343-45[1/] and the Board's Railroad Consolidation Procedures, 49 C.F.R. part 1180, for the grant of conditions upon the merger transaction proposed by the Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company,

---

1/ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the "Act"), enacted on December 29, 1995 and effective January 1, 1996, abolished the Interstate Commerce Commission ("ICC") and transferred certain functions and proceedings to the Surface Transportation Board ("Board"). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This responsive application relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to the Board's jurisdiction pursuant to Sections 11323 through 11325 of the Act. Therefore, this responsive application is submitted pursuant to the law as it was in effect prior to the Act, and citations are to the former sections of the statute and regulations, unless otherwise indicated.

SECTION 1180.6(a)(1)(iii)
PURPOSE

On November 30, 1995, the Applicants filed an application for the merger of the Union Pacific and the Southern Pacific railroad systems. Tex Mex has analyzed the Applicants' Railroad Merger Application in light of the Board's Railroad Consolidation Procedures and General Policy Statement (49 C.F.R. § 1180.1). As set forth in more detail below and in the verified statements of its witnesses, Tex Mex has determined that both potential harms to the public identified in the Board's regulations at 49 C.F.R. § 1180.1(c)(2) (reduction in competition and harm to essential services) will result from the proposed railroad consolidation.

Applicants entered into an agreement with the Burlington Northern Railroad Company and the Atchison, Topeka and Santa Fe Railway Company which the Applicants claim addresses these competitive concerns. Analysis of the effects of the agreement conducted by Tex Mex witnesses Larry Fields, Brad Skinner, Curtis Grimm, and Joseph Ellebracht indicate, however, that the BN/Santa Fe Agreement falls far short of remedying the serious anticompetitive effects and threat to essential services of the merger, particularly as to U.S.-Mexico rail traffic moving through the Laredo rail gateway. The purpose of this responsive application is to address the competitive problems and loss of essential services that will result from the proposed merger and that are not remedied by the BN/Santa Fe Agreement.

The Southern Texas-Mexico Railroads and the Laredo Gateway:

Laredo is the principal gateway for rail traffic between the United States and Mexico. A majority of all rail traffic moving between the United States and Mexico moves over this

gateway. Of all the U.S.-Mexico rail border crossings, it is supported by the strongest infrastructure of customs brokers and provides an effective routing in Mexico to the major Mexican destinations.

Laredo is served by two railroads: Tex Mex and the UP. Tex Mex is a Class II railroad that has been providing rail service since 1875 over its 157-mile line of railroad from Laredo, Texas on the U.S.-Mexico border to Robstown, Texas, where it meets up with UP, and on to Corpus Christi, Texas on the Gulf of Mexico where it meets up with a branch line of UP.

UP is a Class I railroad that stretches the length and breadth of the Western United States. In South Texas, UP has a line that runs from San Antonio, Texas to Laredo. UP also has a line that runs along the Gulf of Mexico from Algoa, Texas (located just south of Houston) to Brownsville, Texas on the U.S.-Mexico border (the "Brownsville Line"). Tex Mex connects with UP's Brownsville Line at Robstown. Tex Mex also connects with UP at Corpus Christi which is on a branch off the Brownsville Line.

The Southern Pacific Transportation Company ("SP") has trackage rights over portions of UP's Brownsville Line and its Corpus Christi branch line that permit it to interchange traffic there with Tex Mex. Although Tex Mex meets both UP and SP in Corpus Christi, nearly all of traffic that it has interchanged at Corpus Christi has been with SP. For many years Tex Mex and SP have provided the competitive alternative to the UP's San Antonio-Laredo service for U.S.-Mexican rail traffic through the Laredo U.S.-Mexico gateway.

urge the Surface Transportation Board to condition any approval of the merger at least upon granting the rights that Tex Mex seeks in this responsive application.

SECTION 1180.6(a)(2)(i)
EFFECTS ON COMPETITION

Each of the witnesses who present verified statements for Tex Mex addresses the effects of the proposed merger, as conditioned by the BN/Santa Fe Agreement, and as further conditioned by the rights requested herein. This section summarizes the more detailed analysis presented in those statements.

1. Effects On Competition of the Proposed Merger and the BN/Santa Fe Agreement Without the Rights Sought Here.

The general conclusion of Tex Mex's witnesses is that the proposed merger would reduce competition in the markets served by Tex Mex -- especially the market for the transportation of goods between the United States and Mexico -- to a serious and unacceptable degree. They also conclude that the BN/Santa Fe Agreement would do little to restore the competition that would otherwise be lost, for two principal reasons.

First, even if the agreement enabled BN/Santa Fe to function as a perfect competitive substitute for an independent SP, the merger would still result in an unacceptable loss of competition in the markets served by Tex Mex because it would eliminate one of the three major U.S. railroads serving U.S.-Mexican gateways and would thus leave many shippers throughout the United States with only two railroads competing for their business where now they have three. Curtis M. Grimm, Professor of Transportation, Business and Public Policy at the College of Business and Management, University of Maryland, explains in his verified

statement how this loss of one of the three competitors in the market for transportation of goods between the United States and Mexico will cause a very substantial loss of competition. Professor Grimm's conclusions about the general anticompetitive effects of reducing the competitors in a market from three to two are supported by empirical studies and are reflected in the Department of Justice's merger guidelines. Larry Fields, Tex Mex's president, and transportation consultant Joseph Ellebracht, also testify on the basis of their many years experience in the railroad industry, including Mr. Ellebracht's 14 years marketing rail services for SP, that shippers benefit significantly in rates and service from having three railroads rather than two competing for their business.

Furthermore, BN/Santa Fe's probable share of the market for U.S.-Mexico traffic is likely to be too small compared to a merged UP/SP's share to induce it to devote the resources needed to compete effectively for the traffic. Consequently, a merged UP/SP will dominate the market so substantially, that BN/Santa Fe's capacity to constrain UP/SP's pricing for most shippers will be minimal. For most shippers, therefore, the reduction in carriers will effectively be from two to one.

Second, the agreement will not enable BN/Santa Fe to function as a perfect, or even acceptable, competitive substitute for an independent SP -- certainly not in the markets served by Tex Mex, in any event. As both Mr. Ellebracht and Allen Haley explain, in place of SP's current operations over its own tracks, the agreement proffers as a substitute BN/Santa Fe operations via trackage or haulage rights, subject to UP/SP's traffic control, over a UP line that is substantially more congested and, for much of the traffic, more circuitous than SP's lines. Mr. Fields and Brad Skinner, a director of Tex Mex, and

Director of Multimodal Operations for Tex Mex's ultimate parent, Transportacion Maritima Mexicana ("TMM"), also describe a number of specific reasons to believe that BN/Santa Fe will have little interest in devoting the resources and efforts necessary to be an effective competitor to a merged UP/SP for this traffic, and that is why the Applicants gave BN/Santa Fe these rights and refused to give Tex Mex the rights it seeks.

Accordingly, if the proposed merger with the BN/Santa Fe agreement were approved, it would very likely cause a substantial lessening of competition for rail transportation of goods between the United States and Mexico. Professor Grimm and Mr. Ellebracht show that this is not traffic that can feasibly move by other modes. More than 80 shippers who depend on Tex Mex have also submitted statements expressing their concerns about the expected loss of competitive alternatives and their support for the rights Tex Mex seeks.

As Brad Skinner discusses, the result of this lessening of competition will seriously undermine the benefits that the United States, Mexico and Canada expect to derive from the North American Free Trade Agreement. It is also likely to undermine Mexico's present efforts to bring new efficiency and competition to the Mexican rail system through privatization. It will also frustrate the efforts that TMM is making, in partnership with Kansas City Southern Industries, Inc. ("KCSI"), to create a rail network between central Mexico and the central United States that will provide a strong competitive alternative to a merged UPSP system for rail transportation between Mexico and the United States and between Mexico and Canada.

SECTION 1180.6(a)(2)(iv)
EFFECT ON ADEQUACY OF TRANSPORTATION

Tex Mex believes that granting the rights sought in this responsive application is necessary to preserve adequate rail transportation services to the public in two respects:

First, it is necessary to prevent an unacceptable loss of competition in the markets served by Tex Mex for the reasons previously summarized in Section 1180.6(a)(2)(i).

Second, in light of Mr. Krick's conclusion that the merger without these rights is likely to result in Tex Mex's going out of business, granting the requested rights is necessary to prevent a loss of all Tex Mex's rail service. As shown by their supporting statements, a number of Tex Mex shippers are very dependent on Tex Mex for their transportation needs and cannot practically use other modes of transport. Corpus Christi Grain Company, for example, depends entirely on Tex Mex to transport its grain to Mexican customers; neither trucks nor any other railroad is a feasible alternative for that traffic. Indeed one shipper, Barr Iron and Metal Company in Alice, Texas states that it "would probably have to close our operations down" if Tex Mex went out of business. Accordingly, without the requested conditions, the merger will cause the loss of essential rail services as well as an unacceptable reduction in competition.

SECTION 1180.6(a)(2)(v)
EFFECT ON EMPLOYEES

Imposing the conditions Tex Mex requests will not result in the abolition or transfer of any Tex Mex employee position. On the contrary, Tex Mex anticipates that it will need to hire between 30 and 40 employees to operate the traffic anticipated from the rights Tex

SIGNATURES, OATHS, AND CERTIFICATIONS OF APPLICANT'S EXECUTIVE OFFICERS SECTION 1180.4(c)(2)(i)[25]

STATE OF TEXAS)
)
COUNTY OF WEBB)

Larry Fields, being duly sworn, deposes and says that he is President of the Texas Mexican Railway Company, applicant herein, that he is one of the executive officers duly authorized to sign, to verify and to file this Responsive Application on behalf of The Texas Mexican Railway Company, that he has knowledge of the matters contained in this Responsive Application, and that his statements made in this Responsive Application are true and correct to the best of his knowledge and belief.

Larry W Fields
LARRY FIELDS

Subscribed and sworn to before me this 26th day of March 1996.

Notary Public, State of Texas
My Commission Expires 08-14-1997

Linda Sue Webber
NOTARY PUBLIC

My commission expires as of 8-14-97.

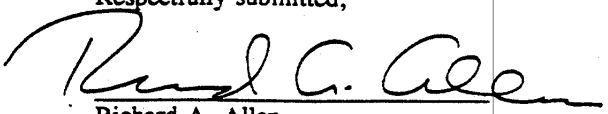
I, Walter L. Winters, II, hereby certify that I am Secretary of The Texas Mexican Railway Company, the applicant herein, and that Larry Fields, President of The Texas Mexican Railway Company, is duly authorized to sign, to verify, and to file this Responsive Application on behalf of The Texas Mexican Railway Company.

Secretary

Dated this 21 day of March, 1996, at Laredo, Texas.

[25] In UP/SP, Decision No. 14 the Board waived compliance with 49 C.F.R. § 1180.4(c)(2)(i) requiring that "[a]ny person controlling an applicant shall also sign the application" as that requirement relates to Transportacion Maritima Mexicana S.A. de C.V. ("TMM") and Mexrail. Slip op. at 4.

Respectfully submitted,



Richard A. Allen
Andrew R. Plump
John V. Edwards
ZUCKERT, SCOUTT & RASENBERGER, LLP
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006-3939
(202) 298-8660

Attorneys for Texas Mexican Railway Company

Dated: March 29, 1996

VERIFIED STATEMENT

OF

LARRY FIELDS

My name is Larry Fields. I am the President of the Texas Mexican Railway Company ("Tex Mex"), headquartered at 1200 Washington St, Laredo, Texas 78042. I am submitting this statement in support of the responsive application being filed by Tex Mex in Finance Docket 32760 seeking trackage rights over UP and SP lines between Robstown, TX and Beaumont, TX.

I have worked in the railroad industry since going to work for the Kansas City Southern Railroad's ("KCS") maintenance of way department in 1965. I worked for KCS in various capacities between 1965 and 1991; my last position was Vice President Operations. From 1991 to 1993 I consulted on rail operations and privatization of lines in Africa and Russia. In 1993 and 1994 I was general manager of a short line railroad. I became president of the Tex Mex on December 1, 1994. I have a bachelor of science degree from Kansas State Teachers College and a masters of business administration degree from Rockhurst College.

INTRODUCTION AND SUMMARY

Currently, the Southern Pacific ("SP"), in conjunction with Tex Mex, provides the only effective competition to the Union Pacific Railroad ("UP") over a vital rail corridor that accounts for a majority of the railroad traffic between the United States and Mexico. In my opinion, it is absolutely critical to

successful, those efforts will enable TMM, KCS and Tex Mex together to provide rail service in both Mexico and the United States that could, in the right circumstances, compete very effectively with a merged UPSP for rail traffic between the United States and Mexico. They will not be able to provide truly competitive service, however, unless Tex Mex connects directly with KCS at Beaumont, TX. In my opinion, UP and SP know this to be true, and that is why they refused KCS's and Tex Mex's request for trackage rights that would provide such a connection and instead granted the rights to BNSF.

II. IMPACT OF THE UP/SP MERGER ON COMPETITION IN MARKETS SERVED BY TEX MEX

As discussed in greater detail in the verified statements of Professor Grimm and Mr. Ellebracht, unless it is properly conditioned, merger of the UP and SP would effectively eliminate rail competition in transportation markets served by Tex Mex. The most important such market is for the transportation of goods between the United States and Mexico. Without conditions, the merger would give the merged UPSP complete control over the all-important Laredo gateway. In 1994 that gateway handled 57% of the rail traffic between the two countries.

An unconditioned merger would also give the merged UPSP compete control of the Brownsville gateway and substantial control of the gateway at Eagle Pass, TX which is currently served by SP's line and access to which BNSF has only via haulage rights. Laredo, Brownsville and Eagle Pass together accounted for 80% of the rail traffic between the U.S. and Mexico and

virtually all of the traffic between the U.S. and Mexico's industrial centers in central and eastern Mexico. Ellebracht V.S. at 17.

That loss of rail competition will have an extremely adverse affect on rail shippers, who have no feasible transportation alternatives. Although most of the transportation of freight between the U.S. and Mexico is carried by truck, truck and water transportation are not practical alternatives for almost all of the shipments now transported by rail. Ellebracht V.S. at 31-34; Professor Grimm concurs in this conclusion and cites supporting evidence provided by many of Tex Mex's shippers.

UP and SP are well aware that an unconditioned merger would eliminate rail competition in the market for U.S.-Mexico rail transportation. That is why they have proposed to give trackage rights and haulage rights to BNSF over the UP line from Algoa, just south of Houston, to Robstown (where BNSF may connect with Tex Mex) and continuing to Brownsville (where BNSF may connect with Ferrocarriles Nacionale de Mexico ("FNM")), and also to give BNSF trackage rights over SP's line to Eagle Pass (to replace BNSF's current haulage rights.) UP and SP claim that those rights will preserve the competition that would otherwise be lost, and they would certainly never have granted such rights unless they recognized that an unconditioned merger would result in an unacceptable loss of competition in this market.

The problem with the solution that UP and SP have proposed is that there is a very high likelihood that BNSF will <u>not</u> be an

adequate substitute for an independent SP in this market, for many reasons which are summarized below. It is, of course, not possible to predict the impact of future events and future competitive behavior with absolute certainty, but that is a risk that the United States and Mexico cannot afford to take.[2/]

III. WHY BNSF WILL NOT BE AN ADEQUATE COMPETITIVE SUBSTITUTE FOR AN INDEPENDENT SP.

Professor Grimm, Mr. Ellebracht and Mr. Haley discuss in detail the reasons why BNSF will not be an adequate competitive substitute for an independent SP for U.S.-Mexican traffic under the terms of BNSF's agreement with UP and SP. The first, and perhaps most important, is the simple fact that today there are three major Class I railroads with access to Mexican gateways. After the merger, even as conditioned on the BNSF settlement agreement, there will be only two major railroads with access to Mexican gateways -- UPSP and BNSF. As Professor Grimm explains, the evidence is compelling that the reduction of the number of railroads serving a market from three to two will cause a significant loss of competition that is likely to result in substantial increases in rates.

[2/] If I am correct that BNSF will not be as effective a competitor for traffic between the U.S. and Mexico, particularly through Laredo, the result would not only be an unacceptable loss of competition for that traffic but would also probably put Tex Mex out of business, as shown by the traffic study performed by Mr. Ellebracht and the financial pro formas developed by Patrick Krick. That event would cause a number of shippers that are now dependent on Tex Mex for transportation to lose essential rail services, as I discuss below.

VERIFICATION

I, **Larry D. Fields**, certify under penalty of perjury the foregoing is true and correct. Executed on March 25, 1996.

LARRY D. FIELDS

VERIFIED STATEMENT

OF

JOSEPH F. ELLEBRACHT

My name is Joseph F. Ellebracht. I am an independent railroad transportation consultant. My office is at 1015 Jackson Avenue, River Forest, Illinois 60305.

Qualifications and Experience

Before establishing my consulting practice in March of 1993, I was employed for nineteen years in the railroad industry in a variety of marketing positions. My most recent railroad employer was the Southern Pacific Transportation Company, where I worked for fourteen years, and before that I worked for the Chicago, Rock Island and Pacific Railroad. I hold a B.A. degree from Washington University and a M.B.A. from the University of Missouri.

During my railroad employment I worked with dozens of railroads, hundreds of railroad customers and thousands of railroad marketing and operating personnel. This experience provided me with knowledge of what buyers and sellers of rail transportation want, and also of the means employed to achieve those wants. During my employment at SP, and after, as a consultant, I participated in a number of railroad acquisition cases as well as other proceedings before the Interstate Commerce

the Mexico-U.S. gateways. BNSF may make minor gains at Eagle Pass, Brownsville and Laredo from the trackage rights granted, but in every case BNSF has been given an inferior route to these gateways compared to that of SP, and an even more inferior route compared to that of UPSP. If the merger is approved as proposed, UPSP will handle nearly all of the traffic to and from Mexico.

The elimination of SP as an independent competitor for U.S-Mexican traffic and the resulting control that UPSP will have over virtually all of that traffic will cause a very substantial loss of competition and will create the climate for a significant increase in rail rates.

While it is true that there is currently only one railroad in Mexico, FNM, the state-owned railroad, that fact has not diminished the benefits shippers have enjoyed to date from the competition among U.S. railroads for that traffic. For a number of reasons, including FNM's ratemaking practices, the different currencies used by the two countries, the unpredictable fluctuations in the exchange rates and the normal transition of ownership of the freight at the border, nearly all U.S. rail rates for traffic to or from Mexico are established only for the U.S. portion of the move. Similarly, FNM rates cover only the Mexican portion. Few rates are established with FNM on a through or joint-rate basis. In my years of marketing for SP, I was directly involved in a few efforts to establish through rates for selected traffic. Such rates, however, have not generally been encouraged by FNM, entail significant administrative and

potential tax burdens, and are requested by very few customers. The vast majority of international rates are made by combining the rate within Mexico and the rate within the United States.

Furthermore, FNM's rates are generally set on a distance basis and, in my experience, have rarely been set in consideration of the rates charged by U.S. railroads for the U.S. portion. As a recent study of U.S.-Mexico traffic by the University of Texas states: "FNM continues to set its rates using the old fixed-rate system. Under this fixed rate system, prices are set according to a distance-based tariff. FNM gives each commodity a class number. Prices are then determined by cross-referencing the class number with the distance to be travelled. The distance factor is set independent of any other variables such as geography and accessibility."[7/]

Because FNM sets its rates for the Mexican portion of international traffic without regard to the rates for the U.S. portion, the vigorous competition that now exists between U.S. railroads for that traffic directly benefits the shippers, and any reduction in that competition will harm them. UP, SP and their witnesses have not disputed this fact. Indeed, the Applicants' settlement agreement with BNSF, which Applicants argue will preserve that competition, clearly reflects their recognition of the serious anticompetitive effect that an

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7/ Lyndon Johnson, School of Public Affairs, the University of Texas at Austin, U.S.-Mexico Trade and Transportation: Corridors, Logistics Practices and Multimedia Partnerships, Policy Research Project Report Number 113 (Austin, Texas: 1995).

unconditioned merger would have on competition for U.S.-Mexico rail transportation. Unfortunately, as I discuss later, Applicants are wrong that the settlement agreement will preserve the competition that now exists for that traffic.[8/]

B. The Elimination of SP As An Independent Competitor For U.S.-Mexico Traffic Will Cause A Substantial Reduction in Competition.

Contrary to Applicants' claims, BNSF trackage rights or, more likely, haulage rights operations between Houston, Corpus Christi and Brownsville will provide a significantly inferior level of competition to UP for traffic through Laredo than UP now faces from SP in conjunction with Tex Mex or than UPSP would face from Tex Mex if Tex Mex could connect directly in Houston and Beaumont with railroads serving those points. This is true for several reasons that I discuss more fully in the following Section 4.C.

A more fundamental, threshold problem with the proposed UP/SP merger and the BNSF settlement, however, is that, even if one assumed that BNSF would be just as effective a competitor using its trackage and haulage rights as SP is now operating over its own lines, the fact remains that today there are three major

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[8/] As I have discussed, because FNM sets its rates without regard to the rates charged by U.S. railroad's, FNM's monopoly over the Mexican portion of international moves has not prevented the benefits of competition among U.S. railroads from flowing through to the shippers. As I discuss in Section 4.E, below, the converse situation cannot be expected to hold true. If Mexico establishes a significant degree of competition in its rail system, as is expected, the benefits of that competition would not be likely to flow through to shippers if the U.S. portion of the transportation becomes noncompetitive.

conjunction with KCS, intends to bid for both of those divisions. UP, in conjunction with its Mexican partner, is expected to be another major bidder. TMM expects that the Mexican government will require the purchaser of the first, and perhaps the second, division to provide trackage rights to another carrier to ensure competition over those lines. The process is expected to be completed before the end of the year.

Mexico's efforts to bring competition and efficiency to its rail system, however, would be largely undermined if competition is lost on the U.S. side of the border. UP, SP and BNSF are all very sophisticated in setting rates to maximize profits. Each of them, including a merged UPSP, can be expected to set rates as high as competitive constraints will permit them. To the extent that UPSP and BNSF, both individually or together, will control gateways and routes within the U.S., they can be expected to use that control to the fullest to maximize their revenues on U.S.-Mexico traffic. If competition among Mexican carriers reduces rates for the Mexican portion of such moves, U.S. carriers with control over the U.S. portion can be expected to appropriate those reductions for their own benefit, not the shippers' benefit.

F. Intermodal Competition Alone Is Not Enough to Constrain Rail Prices on Shipments to and from Mexico via Laredo

The table below shows the major commodities handled via Laredo by rail in 1994.

Truck competition will not be an effective constraint on rail prices in the absence of effective rail-to-rail competition.

The inland location of Mexico's major industrial and population centers reduces the attractiveness of water service for the commodities listed in the above table. Generally, for the traffic handled via Laredo, a water-borne shipment would require a relatively long inland leg in both the United States and Mexico. Mexico City is 419 kilometers from the major port of Veracruz. Monterrey is approximately 160 kilometers from the coast. Guadalajara is 313 kilometers from the port of Manzanillo, which is a Pacific port, and would require a long water voyage in addition to a land leg for most of the shipments that are transported through Laredo. Water competition will not be an effective constraint on rail prices in the absence of effective rail-to-rail competition.

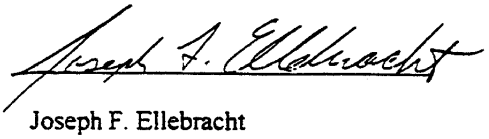
G. There Are Serious Risks Associated with the UP/SP-BNSF Settlement Agreement

BNSF may simply fail to exercise its trackage rights. BNSF is under no obligation to fully exercise its trackage/haulage rights to Corpus Christi. Traffic that SP found attractive, with SP's more direct route, may be unattractive to BNSF, which has been relegated to a less direct route. BNSF's bids to shippers will reflect its more circuitous route, as well as the more variable level of its payments for track and maintenance. As a result, BN's bids are likely to be higher than those made by SP, allowing UP to also raise its bids. As a result, the customers will pay more, either to BNSF or to UPSP. BNSF will pursue only

VERIFICATION

I, Joseph F. Ellebracht, certify under penalty of perjury the foregoing is true and correct.

Executed on March 25, 1996.



Joseph F. Ellebracht

VERIFIED STATEMENT

OF

CURTIS M. GRIMM

I. INTRODUCTION AND SUMMARY

My name is Curtis M. Grimm, and I am Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

My background includes extensive exposure to public policy issues regarding transportation, including Interstate Commerce Commission ("ICC") merger adjudication. I have previously been employed by the Wisconsin Department of Transportation, the ICC, and the Australian Bureau of Transport and Communication Economics, and I have provided consulting services to several other government agencies and private firms regarding transportation issues. I served as Assistant to the Chief of Intercity Transport Development, Planning Division, Wisconsin Department of Transportation on two separate occasions between 1975 and 1978, with a focus on rail policy issues such as abandonments and the creation of shortline railroads. I also worked on a consolidation involved competing bids from Burlington

provided our company with competitive rates and service. In the near future we would like to begin moving product from various points in the U.S. to Laredo for transfer from rail to truck for delivery into Mexico. This would open up the possibility of backhauling our cars from Laredo to the Eastern U.S. Obviously, we are looking for optimum utilization of our equipment and would like to continue to have several railroads competing for our business. (Cascade Warehouse Company)

Our company plans to extends its reach into Mexico. Within six to twelve months, we plan to begin moving Mexican pine from points within Mexico into the U.S. We believe that the Mexican pine can be marketed in the Midwestern and Southeastern U.S. Although we currently do not ship via rail from Mexico (we have conducted one test shipment via truck), we believe that rail could be a less expensive option versus trucks in this market. (Idaho Timber Corporation)

Much of our traffic moves from warehouse to warehouse and thus is particularly sensitive to transit times. We believe that the logical and economical way to move our business should be on the railroads. (Hudson Foods, Inc.-Turkey Division)

The Mexico market provides great potential for the expansion of Procter and Gamble's products. Again, the reduction in available carriers into and out of Mexico does not fit with this emerging opportunity. We therefore recommend the Surface Transportation Board reject the Union Pacific's acquisition request stated in Docket #32760. (Procter and Gamble)

IV. FOR THE COMMODITIES AT ISSUE HERE, TRUCK AND WATER WILL BE INEFFECTIVE ALTERNATIVES FOR MANY SHIPPERS

Although truck and water play an important role overall in transportation of goods between U.S. and Mexico, many shippers of many commodities are dependent upon rail competition for

competitive transportation options. In his statement, Mr. Ellebracht shows the 23 largest commodities by volume handled by rail through Laredo and the average distance for each commodity shipped between Laredo and the U.S. origin or destination. For the types of commodities involved and the distances involved (which do not even include the Mexican portion of the moves), I fully agree with Mr. Ellebracht that neither truck nor water carriage are alternatives that would provide for most shippers an effective restraint on rail prices in the absence of rail-to-rail competition.

Grain is the most important commodity, and there is well-established evidence as to the ineffectiveness of trucks for the long-haul movements of this commodity, as indicated by the recent Klindworth and Mortinsen report for USDA, cited earlier:

> In the United States, semi-tractor trailer combinations are typically used for relatively short-distance movements of bulk grain from the first collection point to processing plants and subterminal and terminal markets. Occasionally, trucks are also used for the movement of grain from nearby producing areas to U.S. ports for export. (p. 29)
>
> Overland truck delivery is a viable alternative for the movement of U.S. grain into Mexico under two general circumstances: (1) where U.S. production areas are near the border and the Mexican demand is composed of a large number of smaller firms without rail service, and (2) where a Mexican grain demand exists immediately across the border and border rail facilities are either not present or are inadequate. (p. 30)

While water is an option for many shippers, that option also has limitations, as noted in the same USDA report:

> Between 1990 and 1994 51% of U.S. grain exports to Mexico were via water. This number varies significantly by commodity. Most of this traffic has been via Gulf Ports, although Mexico's Pacific Coast ports have superior vessel draft and natural harbors. (p. 49)
>
> Due to the draft limitations and to the short distances from the U.S. Gulf grain export elevators, the vessels servicing the Mexican Gulf ports tend to be small ...built in the early 1970's or before. Normally, these bulk carriers do not have the efficient discharge gear (cranes) of the later class of larger bulk carriers, and discharge rates for these vessels are low... (p. 51)
>
> Other than the discharge capabilities at port, inland distribution is perhaps the most critical component of moving grain into Mexico via maritime routes. While maritime vessel is generally the lowest cost mode of transporting bulk commodities, the efficiencies of maritime transportation can be lost by the slow discharge at port or by the lack of adequate inland transport capacity. ...especially ...where several ports rely entirely on truck for inland distribution and where the national rail system is capacity-constrained. (p. 56)

Two studies by James M. McDonald contain significant evidence as to the harmful impact on rail rates for agricultural commodities from reduction in rail competition.[2/] One study, using 1983 data for shipments of corn, soybeans and wheat, performs regressions to ascertain the relationship between rates and rail competition. A second study draws on data from 1981-1985 regarding grain shipments. MacDonald has provided a statement in this case thoroughly and completely rebutting the

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2/ McDonald, James M., "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat," *Rand Journal of Economics*, Vol. 18, 1987; and McDonald, James M., "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," *Journal of Law and Economics*, Vol. 32, April 1989, pp. 63-95.

criticisms of his work by Applicant's witness Willig. His statement includes the following comments:

> In his statement, Professor Willig (pp. 570-572) argues that my finding of a strong connection between the Herfindahl index of railroad concentration and railroad prices probably reflects the influence of monopoly: "Of course it might be the case that concentration does matter positively for price, but the finding of the statistical correlation would not reliably prove it, because the correlation would be in evidence just from the monopoly effect, regardless of the behavior of the three to two cases" (p. 571).
>
> However, I specifically considered Professor Willig's question in my 1991 publication (4). The late professor Leonard Weiss asked me to summarize my 1987 article, and add several new bits of information, for the well-known book that he edited, Concentration and Price (MIT Press, 1991). One of the things that Professor Weiss asked me to do was to reestimate my equations without observations from monopoly districts. His letter explained that he wanted to know whether the results were driven by monopoly, or also held as one moved from three to two sellers; that is, he had precisely the same question in mind as Professor Willig. In my article for that book ("Concentration and Railroad Pricing"), I summarize the distribution of estimated Herfindahl indexes and railroad numbers across districts, and report the effects of dropping observations from monopoly districts. I quote from that article (p210): "The regressions were remarkably similar to the old. Coefficient values and significance levels showed hardly any change at all. In particular the coefficients on rail competition in the corn and wheat samples each increased imperceptibly, to -.283 in corn and -.111 in wheat (or changes of 0.001 and 0.002). The degree of oligopoly appears to matter, as does the transition to monopoly." That article showed that the rail results were not driven by the monopoly results, and that the results of the analysis remain the same, even when we exclude those least competitive markets. (Pages 11-13).

In addition to grain, there are many other commodities involved in U.S.-Mexico rail traffic. My statement for KCS discusses the abundant evidence showing the limitations of truck

and water in competing with rail for many of these commodities. Tex Mex's shippers transport a broad range of commodities, and their statements reflect their dependence on rail to move those commodities. For example:

> Eagle Picher is a manufacturer of Diatomaceous Earth products which are primarily used in the filtration, filler, and absorbent markets. We have been a significant railroad customer for nearly 50 years, shipping approximately 1250 cars per year and generating an annual revenue of over $6,000,000 to the SP and UP combined. (Eagle-Picher Minerals Inc.)
>
> Our company is in the business of exporting U.S. feed grain commodities by rail to Mexico. (Global Grain Co.)
>
> Skill is an advisor to the Kansas Shippers Association which is comprised of the UP-MP, SFE and SSW Shippers Groups. A total of 38 companies are involved in these groups. The individual companies are shippers/receivers of agricultural products, lumber, cement, and plastics. (Skill Transportation Consulting, Inc.)
>
> Badger Mining operates three mines in Wisconsin, which produce silica sand, a specialty sand used in the oil, gas, foundry, glass, abrasive, and water filtration industries. Badger Mining's three Wisconsin mines produce and ship by rail in excess of 600,000 tons of silica sand annually to points throughout the United States, Canada, Mexico, South America, and the Far East. Badger Mining pays more than $6,000,000 per year in rail freight charges. (Badger Mining Corporation)
>
> L. B. Foster Company manufactures, fabricates and distributes steel pipe and tabular products, railway track rails and trackwork, structural steel, and construction and highway products, with both national and international markets.(L.B. Foster)
>
> I am the Traffic Manager of Kreher Steel Co. and have held that position for the past two years,. I am responsible for the movement of 50,000 net tons of steel bars and billets annually by rail, truck, and water transport. (Kreher Steel Co.)
>
> Faremount Minerals ships via rail to south Texas and Mexico primarily from Wedron (silica sand) and Troy Grove (coated sand), IL. We move the sand to Laredo for export from Wedron via BN-Kansas City-UP and from Troy

> Grove via UP direct. We also ship sand to two rail-to-truck transfer points located at Laredo and Alice, TX on the TexMex Railroad. (Fairmount Minerals, Ltd.)
>
> The company's major products are lumber, cedar fencing, trusses, laminates, treated lumber, hardwoods, specialty boards and lumber-related products. These products ship from our ten remanufacturing facilities and from various mills to all states in the contiguous U.S. (Idaho Timber Corporation)
>
> BHP manufactures copper rods and cathode at several facilities in Nevada and Arizona. (BHP Copper Company)

Many of these shippers provide specific details regarding the ineffectiveness of other modes for their particular shipping needs:

> Trucks cannot compete with the railroads for much of our business. We ship bulk loads over a distance that the railroads can handle at a significantly lower cost. Therefore, we cannot depend on truck competition to replace the SP/TexMex on our business moving into Mexico. (Wilbur-Ellis Company)
>
> Fundamental to maintaining and growing business, International Paper Company depends on reliable rail transportation service at competitive prices. Because the distance from many of our facilities to our customers in mexico exceeds 1,000 miles, rail transportation is the only viable mode of transportation that can be used to competitively place our products in this market. (International Paper Company)
>
> Overall, we find rail shipments to be more cost effective than trucks, especially over long distances. Therefore, trucks are not the best option from a price standpoint for our shipments moving from the Laredo gateway into the U.S. (Cascade Warehouse Company)

V. THE BNSF TRACKAGE RIGHTS WILL NOT BE AN EFFECTIVE ALTERNATIVE FOR THIS LOST COMPETITION.

VERIFICATION

I, Curtis M. Grimm, certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement on behalf of The Texas Mexican Railway Company. Executed on this 25th day of March, 1996.

Curtis M. Grimm

Comments Exhibit 10
Public

CASE NOT SCHEDULED FOR ORAL ARGUMENT
AS OF THIS FILING

No. 96-1373, et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN COAL TRAFFIC LEAGUE, ET AL.,
Petitioners

v.

SURFACE TRANSPORTATION BOARD
AND UNITED STATES OF AMERICA,
Respondents

and

UNION PACIFIC, ET AL.,
Intervening Respondents

ON PETITIONS FOR REVIEW OF ORDERS OF
THE SURFACE TRANSPORTATION BOARD

BRIEF OF RESPONDENT
SURFACE TRANSPORTATION BOARD

HENRI F. RUSH
General Counsel

LOUIS MACKALL, V
Attorney
Surface Transportation Board
Washington, D.C. 20423-0001

TYPEWRITTEN COPY

DECEMBER 1997

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to grant access to others. The Board has consistently approved such procompetitive, voluntary agreements as in the public interest. Moreover, the Board has imposed procompetitive agreements as conditions consistent with the public interest at the request of applicants and settlement parties, even if it would not have imposed such conditions absent the agreement. But the Board has consistently refused to require the parties to such agreements to extend them to other shippers. *See, e.g.*, BNSF, slip op. at 99, rejecting similar arguments of Bunge Corporation, and Decision No. 44, at 183 rejecting similar arguments of various Montana interests.[42] Enterprise has not shown that the agency's longstanding approach, which fosters pro-competitive settlement agreements, is arbitrary and capricious.

IV

THE BOARD PROPERLY GRANTED TEX MEX TRACKAGE RIGHTS OVER BNSF'S OBJECTIONS

BNSF obtained a voluntary settlement agreement, which, with numerous modifications mostly favorable to BNSF, was imposed by the Board as a merger condition. As a result, BNSF obtained access to hundreds of new shippers and the right to use new, more efficient routes for any of its traffic over thousands of miles of new lines as a result of this merger. Yet BNSF is not

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[42] In any event, Enterprise stands in somewhat of a different position than Chevron, Amoco, and Exxon, since they supported UP's application to build the Mt. Belvieu branch, and made contractual commitments to use it. Enterprise provided no support and made no commitments.

satisfied. Apparently, BNSF believes that the Board has infringed upon its exclusive proprietary right to use these new trackage rights by permitting Tex Mex to overlap them over a tiny, 50-mile segment. BNSF has this situation exactly backwards. BNSF is only operating over these lines as a result of the Board's approval of this merger, and its approval (and imposition as conditions) of various related settlement agreements as in the public interest. With the merger or without it, BNSF would have needed the approval of the STB under section 11343 to obtain such trackage rights.

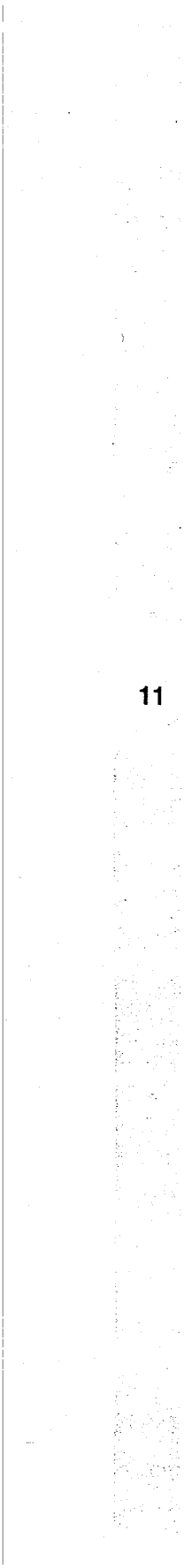
It is well settled that the Board has broad discretion in determining what conditions are necessary in a merger proceeding. It is also undisputed that the merger without conditions would have resulted in significant competitive harm south of Houston, particularly in the U.S.-Mexico trade over the important Laredo gateway, which is served only by UP and Tex Mex. The Board had a wide range of options available to it to preserve competition; by no means was the Board constrained to choose the solution proposed by the applicants, total reliance on BNSF. The Board could have declined to approve or permit this portion of BNSF's trackage rights, and could have given Kansas City Southern Railway Company, Tex Mex, or some other carrier exclusive trackage rights over UP to replace the service formerly provided by SP. Instead of choosing either of these exclusive options, the Board chose an option that preserved a limited role for Tex Mex in providing a part of an alternative route for shipments

moving to and from Mexico. At the same time, the Board also approved BNSF's trackage rights service under the BNSF settlement agreement to preserve access to the extensive BNSF system for shippers.

It is true that the Board has a policy of not imposing protective conditions in a merger proceeding except where necessary to preserve essential services or to prevent significant competitive harm. As BNSF correctly points out, the ICC and the Board have generally subjected parties seeking such relief to an exacting standard of proof. The situation here is unusual in that the potential harm to Tex Mex, and in turn to this important alternative Laredo routing, would be caused not just by the merger itself, but also by the settlement agreement, which gave BNSF a new role in this region.

The settlement agreement was a voluntarily negotiated merger condition that for the most part was procompetitive and in the public interest. Indeed, without the settlement agreement, it would have been impossible to approve this merger. But that does not mean that the Board was required to endorse or permit every part of the agreement and impose it alone as a condition. The Board properly declined to impose conditions giving exclusive access south of Houston to BNSF, conditions that could have resulted in Tex Mex being forced out of the market, and its assets being sold to some other carrier, most likely BNSF.

It is not clear to us how BNSF was harmed by the Board's remedy other than by the fact that it has lost the ability to use



Comments Exhibit 11
Public

EVT 05:40 Final Event Transcript of KSU conference call, 29-Apr-03 1:00pm

Q1 2003 Kansas City Southern Earnings Conference Call

Boston, Apr 30, 2003 (CCBN StreetEvents) -- Event Transcript of Kansas City Southern conference call, 29-Apr-03 1:00pm ET.

THIS CCBN STREETEVENTS TRANSCRIPT IS AVAILABLE AS PART OF A FREE TRIAL UNTIL APRIL 30TH. TO ACCESS THIS CONTENT AFTER THAT DATE, YOU NEED TO BE A STREETEVENTS SUBSCRIBER. FOR ADDITIONAL INFORMATION PLEASE TYPE CCBN <GO>, CALL 617-603-7969 OR EMAIL STREETEVENTS@CCBN.COM.

Corporate Participants

* Michael Haverty
  Kansas City Southern - Chairman President and Chief Excutive Officer
* Gerald Davies
  Kansas City Southern - Executive Vice President and Chief Operating Officer
* Ronald Russ
  Kansas City Southern - Executive Vice President and Chief Financial Officer
* Jim Jones
  Manatt Phelps and Phillips - Board Member

Conference Call Participants

* Jennifer Ritter
  Lehman Brothers
* Tom Waterditz
  Bear Stearns
* Orlando Mushan
  Great T Capital
* Arthur Shield
  Roosevelt Investment Group

Presentation

Operator [1]

Good afternoon, my name is Amy, and I'll be your conference facilitator today. At this time, I'd like to welcome everyone to the Kansas City Southern 1st quarter earnings conference call. All lines have been placed on mute to prevent any background noise. If you should need assistance during the call, please press star then zero, and an operator will come back on line to assist you.

Thank you, I will now turn the call over to Mr. Michael Haverty, Chairman,

President and CEO of Kansas City Southern. Sir, you may begin.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [2]

Good afternoon to all of you here in New York and all of you who have joined us on the telephone and welcome to Kansas City Southern's combination 1st quarter 2003 presentation as well as a presentation that we want to talk about that deals with the announcement that we made last week regarding the NAFTA Rail transaction, where we will put Kansas City Southern, Tex-Mex and TFM under a single company.

Joining me today as speakers in the presentation, dealing with the 1st quarter will be Gerald Davies, our Executive Vice President and Chief Operating Officer, and also, Ron Russ our Executive Vice President and Chief Financial Officer.

As we look at the first quarter earnings, there's not really a way to put a good face on this thing. I think very clearly, it's obvious that the quarter was a lousy quarter. When you look at the ongoing earnings per share, 8 cents versus 19 cents a year ago, but there are some things clearly that led to having a poor first quarter.

Let me say, first of all, that the first quarter historically for both Kansas City Southern and TFM is the worst quarter of the four. But this quarter was really exacerbated by two things, number one, the uncertain economy in the United States and Mexico tags onto what goes on in the United States and as a result there were some effects on revenues in Mexico. In addition to that, the peso value in Mexico and half of our revenues coming from pesos, we saw a downturn on the revenues there, I'll talk about that in just a little bit.

But also, in addition to the economy and the peso devaluation, fuel prices clearly affected the company in the U.S., the fuel prices were up about 45%, or about $3.3 million and in Mexico, they were up about $5 million or about 40%. We hedged in the United States, about 32% of our purchases, and in Mexico, we were unhedged or we had not purchased fuel forward as we did in the United States.

So, between the economy and the fuel prices, it clearly affected the earnings negatively in the first quarter. In spite of that, I think there are a lot of good news things that we can talk about in this quarter. First of all, we paid down in a very lousy quarter, just about a million dollars in debt, and we did not draw down on our revolver at the KCS level. We also increased the cash on hand from the end of the 4th quarter of 2002 to the end of this quarter from $19 million to $64 million, a $45 million increase or about a 240% increase in cash on hand.

Also this quarter, the increase of our ownership in group-O TFM that took place in July of last year helped us out on the equity earnings side of TFM where last year at this time we had 36.9% compared to 46.6% of the ownership this year compared to last year. And in the U.S., nearly 60% of the commodity categories

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showed a year-over-year revenue increase, and four out of five of the business units showed they made the forecast that we had projected for this quarter and so we were on target with four out of the five business units.

Another good news story, is MCS that we implemented during the 3rd quarter of last year, is working. All the congestion we had in the past is a thing of the past, and the railroad is running very smoothly. And when you look at the expense side in the U.S., in spite of a 3% wage increase and in spite of increases in health and welfare benefits that were about 5%, and if you exclude the $3.3 million expense of the fuel cost increase, KCS held the line, and in Mexico, we actually would have reduced expenses had it not been for the fuel increase, the fuel increase there, as I said, was about $5.5 million and they only ended up being above on expenses a year ago of $1.5 million. So in reality, without the fuel, they actually reduced the expenses.

So, in spite of a performance that we do not certainly think was good this quarter, there were some good things that happened. And I think we've got some projections looking forward that are going to be positive, and as we talk about our transaction later on in this meeting, I think you'll find that there are some very, very positive opportunities for our shareholders in that transaction.

With that, I'm going to turn it over to Gerald Davies and let Gerald take the presentation and talk about some of the revenues.

Gerald Davies, Kansas City Southern - Executive Vice President and Chief Operating Officer [3]

Thanks, Mike and good afternoon, it's good to be here this afternoon. I'm going to be relatively brief this afternoon, because we're going to spend a good deal of our time this afternoon talking about the transaction, so I'm going to go through this relatively quickly.

As Mike has already said, despite weak revenue results for the 1st quarter of this year, there have been a number of signs that are very positive for our company. We talked about most of the revenue shortfalls that we expect to see this quarter in our prior meetings, especially the last two. We have three sizable revenue hurdles in each of three business units, one customer in each. We expected in the 1st quarter that we would have been able to offset those revenue declines, but we didn't get much help from the economy, frankly.

In addition, the war as it broke out, which normally helps the railroads, did help us much. Most of our military traffic is related to training exercises. With the war going on, you don't need to move military equipment around for training exercises, so we have far fewer military movements in the 1st quarter of this year than either we had expected or is normally the case.

We track normally 42 individual commodity groups and watch their performance and see what's happening during the course of, frankly, each day. Through the 1st quarter, the majority of those lines of business registered increases and

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even though those that didn't, the increases were relatively small, which as I said, the three exceptions. Four of the five business units as Mike said, registered revenue growth that was ahead of our plan for the year. We had a lot of initiatives that were in place that brought on new customers that expanded the services rendered to existing customers, and brought in additional market share from those existing customers that showed some dramatic improvement in sectors of the business which I'll talk more about in a minute.

Overall, we began the year with a real challenge, as I said. The three areas that we have problems with were coal, plastics and automotive, I have talked about each of these before with you. Coal performed very well, despite the regular decline. The quarter-over-quarter result is skewed by two things, first of all, as I reported before, we had a contract that ended just about a year ago, and, of course, it was not there in the 1st quarter of this year.

In addition, in the 1st quarter of 2002, there were substantial inventory building going on at the utilities we served. This year we didn't have that. Nonetheless, we offset a substantial portion of the revenue decline from the loss of the contract and that inventory loss. If we hadn't had an unexpectedly long maintenance outage, we would have come closer to offsetting it. In the process, we also registered about a 4.5% yield increase in our coal business, that also helped us a lot.

Plastics also performed relatively well, especially given the fact that we had one customer that had a build-in where we lost roughly $2 million a quarter in revenue for that building. With the growth in business at the other plastics customers and other new customers, we were able to offset roughly half of that loss in the 1st quarter, and we'll continue to work on that growth as we go forward to fully offset it.

The automotive losses that we talked about continue to plague us through this quarter. The contract that we lost in the 2nd quarter of last year, was a major one for us. I continue to believe that we have the service quality and the assets in place to be a major player with the automobile industry. I believe and continue to believe that will happen overtime, we continue to work on it constantly.

With the economic recovery being pretty spotty, as Mike already talked about. We had to be pretty nimble in looking for opportunities to gain business. Our gains in the pulp and paper business really exemplified what went on in the business units in Kansas City Southern in the 1st quarter. The pulp and paper business saw a gain of a quarter of a point in production. This is an ongoing saga for almost three years now in the pulp and paper industry. Nonetheless, the pulp and paper business on KCS increased 14% year over year in the quarter. Pretty sizable gain.

Now, part of that was due to a yield increase. We had about a 3% yield increase in the quarter for paper. So we saw market share gain and a yield increase simultaneously that helped us a great deal. Our intermodal including the college business also grew, about 10% in the quarter, and we saw about a $900,000

revenue gain for that line of business in the quarter over a year ago period. The other groups generated relatively small gains, but none--or small decreases, but together, as a whole, they were positive in the smaller sections.

As we worked through the first quarter, we kind of look forward to the rest of the year, we see the second quarter promising slightly higher revenue gains year-over-year, and the 3rd and 4th quarter similarly. Part of that in the 3rd and 4th quarter, will be due to the impact we saw from our MCS implementation last year, we talked about -- we expect to see year-over-year gains from the revenue side as we go through.

Finally, on the revenue side, our Mexico traffic continues to grow. In the 1st quarter of this year, that traffic to and from Mexico over the KCS was up 17%, so it continues its double-digit growth year-over-year.

On the comp side of our equation, we also had two key elements that drove our cost performance. The first is fuel. Mike has already talked a bit about it. The fuel cost increases represent more than 80% of our cost increase year over year in the 1st quarter. Fuel prices were up about 43% over the prior year quarter and our cost increase, 34%, the actual expense that we incurred. That means we had a dramatic increase or improvement in our fuel utilization rates. We had a decline of about 6% in our fuel usage and that is far bigger than the roughly 3% decline than the units handled year-over-year period.

So, we demonstrated the ability to more efficiently use our power building train size and controlling train size, and the production team at KCS performed very well in managing the fuel used in the 1st quarter. Purchase services also saw an increase in expenses. There's a lot of items in purchase services and point to any one as a key driver, there isn't one that really stands out much, except I think there's a major story here in terms of what we pay others to repair our freight cars and locomotives. That price went up relatively sharply, but it really is part of what is a good news story.

Let me explain here. Car hire expenses really have two elements to them. The first is what we pay others for the use of their cars on our system. And the second is what others pay us for our cars on our system and on theirs. In the 1st quarter of this year, we saw the amount that we pay others for the use of their cars drop 8%. That's pretty impressive improvement. We also saw the amounts that others paid us for the use of our cars increase 43%, a huge increase in the 1st quarter. That is the demonstration of the power of MTS in the hands of our managers. They're able much more effectively to target the management of our operations to clearly see what they need to do in the performance.

But there's a bit of a negative on that, when our cars and locomotives are off on other railroad's lines and they do repair for pieces of equipment, they bill us back, so it's an increase in purchase services, which is car repairs and locomotive repairs done by others, because we did a better job at managing our fleet and had it offline a higher portion of the time. That offset some of the gain here but of the 3.4 million saved in car hire, about 2.5 million of that

was due to the benefits of MTS.

On the smaller increases, wages were up about 1.5%, which I think is a good news story, given that our labor costs increased about 3% in our labor agreement. Fringe benefits were up 4.5%, but a gain with health care costs going up nearly 20%, period over period, there's some good news represented in that too.

Let me talk a little more about fuel. Since it was such a large piece of our cost increase for the quarter. Our fuel usage for the quarter decreased 6%, as I said, that's far greater than the 3% decline in units handled for the period. The growth, as a growth indicator, the fuel consumed dropped per carload handled about 3% period over period. That's a major increase, especially since this is the third year we had to focus on fuel utilization and fuel usage. We continue to see major benefits from it. A gain or indicator of MTS to help us.

Our hedging and over price management activities in the fuel side also helped us. We're about 32% hedged or forward bought in the 1st quarter, which helped us control expenses. In fact, if we hadn't done that, we estimate that our fuel prices -- or fuel costs would have been about 4 1/2 million higher than they were. So the bottom line, the fuel increase of 3.3 million was a result to a good deal of management efforts and control.

Let me summarize real quickly here, as Mike said, we've been through the MTS start-up. That's behind us, we're now in the phase of gaining benefits from MTS. Benefits both for the management of our operations and for the service that we're delivering to our customers. The investment is showing results, and I've given you an example here in the car hire and in the fuel savings.

Our performance measures continue to improve and there's some examples of those at the end of the presentation. I won't take the time to go through them today. But we continue to improve things like train speed on the railroad, but I don't have a bullet on this chart.

I also want to mention safety. In the 1st quarter we had 1.49 incidence for 200,000 hours worked. In the rail car industry, that would put us at 2nd place, the first place carrier has an incidence rate of 1.19 for 200,000 hours of work. So our safety performance continues to improve and we continue our intense focus on the safety of our people, the goods we carry and the communities that we serve.

With that, let me turn this over to Ron Russ, our CFO.

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [4]

Thanks, Gerald and good afternoon. It was a very difficult quarter, to reiterate what Mike said. I'll be very brief.

Ignoring the SFAS 143 benefit, ongoing EPS was 8 cents for the quarter, 3 cents from U.S. rail operations and 5 cents from international rail operations. The retirement benefit was from SFAS 143 was about 14 cents a share. On a consolidated basis,KCS operating revenues declined about 2.6% or $3.7 million. Operating income which Mike and Russ have talked at length about was down about $6.6 million from the prior year and that is comparable to a situation where we had $4.4 million of gain last year for the sale of Tex-Mex to TFM in the first quarter of 2002. All in all, KCS earned about 4.7 million down from 9 million on an adjusted basis from the prior year.

Next slide is the pictorial of how we got from 2002 to 2003, in terms of operating profit, I guess again the highlights here, we had good cost controls in a very tough environment, we want you to note the minor increases in labor costs that Mike and Gerald have highlighted, improved equipment utilization from MCS, that gave us a very major upside benefit for the quarter and a disciplined approach on purchasing and cap ex kept us in line on that side. Higher fuel costs and the loss of the coal contract really are the bullet points of the pain that was suffered in the 1st quarter here, ending up at $6.8 million for the quarter.

On the next slide, it is just for informational purposes, I think Gerald explained quite efficiently the benefits we did get from hedging. Going forward this quarter, we're 40% hedged, 21% hedged going into Q3 and 16% hedged in Q4. Our price for the quarter was about 90 cents a gallon and that compares unfavorably with 63 cents a gallon the prior year.

On the next slide I want to emphasize -- I guess this is some of the pleasing aspects of our report this quarter, even in a difficult operating environment in this 1st quarter, our credit measures continue to improve. The debt reduction program began following the 3rd quarter of 2001 continued with focusing on monetizing surplus assets, accelerating collections, basic blocking impacts and running the business. We've held off paying off debt in view of the proposed transaction, and our cash balances are now at the end of March, are $64 million.

A brief word about debt to total cap ratio, there has been some commentary about NAFTA Rail's future debt to total cap post consummation. Our preliminary efforts on a proforma consolidation, pre-acquisition financing utilizing12/31/2002, is nowhere near close to the 70% numbers. TFM results for the quarter were impacted heavily by the devaluation in two ways, one is on the operating side they were impacted not only in person on materials and goods, but also that the revenue line was impacted heavily by the paying customers about $13 million year over year. The operating ratio for the company on a U.S. cap basis was 83.5%, given this economic environment, is still comparable with that experienced by all the North American railroads this year.

Finally, a brief note about the preferred taxes, once again KCS has benefited from the inflation rates in Mexico, which are running at a 4.5% per annum basis right now, and the peso exchange rate is about 10.8 for the quarter, though it has strengthened in the last couple weeks, it's now at about 10.37 pesos to the U.S. dollar. All in, for the first quarter, the net benefit deferred taxes from

the devaluation of the peso and inflation was $6.7 million.

In terms of guidance the quarter, we are cautious in our view for the 2nd quarter and are monitoring the situation. But as usual, we are caveated that TFM's numbers are a bit of a wild card given the swings created by the peso and inflation on the deferred tax line.

We are cautiously optimistic about the 2nd half, with FCS fully imbedded and with good cost controls in the system, and with new movements of traffic coming online, there is potential to see improvement in our U.S. operations in the second half. With that, I'll throw it over to Mike.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [5]

Well, now, we'll turn to the second part of our presentation, and one of the things I forgot to do at the beginning of the first presentation was read the safe harbor message that I'm supposed to read at both of these, so I'll just combine the safe harbor for both.

These presentations include statements concerning potential future events involving the company which could materially differ from events that actually occur. The difference could be caused by a number of factors, including those factors identified in a current report of form 8K dated 12/11/ 2000, one filed by the company with the S.E.C., file number 1-4717. The company will not update any forward looking statements in the presentation to reflect future events or developments.

This presentation will cover our NAFTA Rail transaction. I will obviously be a speaker, Ron Russ will also cover part of this, and a little bit later in the program, we are going to ask Jim Jones, who is the former U.S. Ambassador to Mexico and a member of the Kansas City Southern Board to join us on the telephone from Mexico at the end of the presentation to give us his view on where we stand on the value added tax dispute that is ongoing in Mexico. So, he'll be on in just a few minutes.

Before I get started talking about the transaction, let me just say that we view this as a very, very exciting transaction, not only Kansas City Southern, but also for TMM. We cannot think of any strategic move that we could make at this point in time that would create more value for both the Kansas City Southern shareholders and the TMM shareholders. We have had a vision of a NAFTA Rail system for many, many years, and this is an opportunity to put this system together.

And as you hear in the presentation, you will understand that Mexico is clearly the greatest revenue producing opportunity in North America. It's proven to be that in the past, and we believe it's proved to be that in the future. We want to capitalize on that opportunity for both the shareholders of Kansas City Southern and TMM.

So, as we talk about the transaction, first of all, I think everyone understands that NAFTA Rail will replace the holding company name of Kansas City Southern. NAFTA Rail will purchase from group-O TMM 38.8% their ownership of TMM. In exchange for that, NAFTA rail will give to group OTMM 18 billion shares of NAFTA Rail stock, $200 million in cash, plus, there's a potential incentive payment for TMM for $100 to $180 million dollars based on a favorable resolution of the tax dispute that is ongoing at this point in time in Mexico. And then, we will immediately pay to TFM $32.7 million for its 51% of MEX-Rail, and we will put that in a blind trust pending approval of the Surface Transportation Board in the United States.

You cannot commonly control two railroads in the United States without Surface Transportation Board's approval, but we will move quickly to carry this transaction out and we will put in a blind trust. The structure of the company's next bill is pretty simple, as I said, NAFTA Rail will replace the Kansas City Southern Holding Company, and it will own all of Kansas City Southern Railway, it will own all of Tex-Mex Railway, and it will own about 86%, excuse me, 76% of TFM, the Mexican Government still owns about 24%. You can look at the map here and see Kansas City Southern and Tex-Mex and TFM on the map, and you can understand how they link together on an end-to-end-to-end type configuration.

We will keep the railroads independent, and the reason that we want to keep the companies independent is that we respect the rights of TFM to operate in Mexico, with Mexican employees and Mexican management manage the company on a day-to-day basis. The holding company will provide guidance, clearly on marketing aspects and utilization, financial advice, information technology and so on, but we understand that because of cultural differences and language differences it's important that we not try to put these companies together.

We also respect the historical significance of the Texas Mexican Tailway that's been headquartered in Texas for well over 100 years, and we will keep that company independent and, of course, Kansas City Southern, that's been around since 1887 will be independent, but the entire network will work together as a single network cooperating very closely together.

The corporate governance and management of the company, I will be the Chairman of NAFTA Rail, Pepe Serrano, TFM, will be the Vice Chairman, and he will continue to be the Chairman of the TFM. The seven current Kansas City Southern Board members will be on the new NAFTA Rail board and also joining the Board will be the President of TMM, Javier Segovias. I will also be President and CEO of NAFTA Rail and at least for the time being, President and CEO of Kansas City Southern Railway, managed by TFM, Mario Mohar, who has been the CEO since the start of the company, will continue to be President and CEO of TFM.

The next slide, the strategic rational for why we are doing what we're doing. Clearly, it is to enhance shareholder value by achieving consolidation of the rapidly expanding TFM affiliate in Mexico with the U.S. ownership. Not only do we have the growth in Mexico, but also, the opportunity to flow more traffic over the combined system which is going to add to the value of the new company.

Also, we've got an increase in earnings per share that will result with the faster growing rail operations in Mexico, and I think it's important to understand -- and Ron will talk about this a little more, that this transaction is accretive from day one. It's a good move for our shareholders. Also, we intend to improve the Tex-Mex infrastructure and operations, that is the critical link between Kansas City Southern and TFM, we will work on that to improve that.

We want to strengthen the three railroads as the NAFTA railroads, we referred to ourselves for some time as the NAFTA railroads, we want to give the shippers that as they use the NAFTA trade corridor, a stronger transportation alternative, we'll be better as a single company, stronger as a single company than we were as three independent companies. And then also we are looking to lengthen the haul through across the border view. Instead of looking from Meridian to Beaumont and from Beaumont to Laredo, we'll be looking from Mexico City to Meridian, and Mexico City to Kansas City and different connections on the Kansas City Southern that lengthen the haul of as much traffic and improve service as we can through competitive service and rates.

Next, as we look at what it's going to take to complete the transaction, bank group consent to consummated, we announced last night that we have gotten that consent from our bank group, headed by J.P. Morgan and the approval was 93%. We also need the approval of TMM bond holders, we need approval of the share holders of both Kansas City Southern and TMM. In order to control two U.S. railroads as I said earlier, Tex-Mex and KCS, we have to have the U.S Surface Transportation Board Approval. Tex-Mex is a class II railroad, Kansas City Southern is a class I.

Ordinarily a transaction like this would not be considered a significant transaction. Clearly the transaction is end-to-end. There are no points on the railroad where you're going to go from two competitors to one, or even three competitors to two. It's clearly end to end and there's no overlap at all. So we feel that this will be approved and we hope that it's approved in an expedited manner.

We also need the approval of Mexico's competition commission. That's kind of like, as you may view in the United States, the Antitrust Division of the Department of Justice. And again, we don't see any competitive problems here. We think if anything, this will strengthen competition for Mexico so that there's not as much dominance as there is today.

Mexico's Foreign Investment Commission must also approve it under Mexican law, Mexican Company or Mexican National has to own controlling interest of the company, but over the last few years, there have been waivers to that law that have been pretty consistently given, Citibank taking over BaniMex is probably one of the primary examples, and there are many others, telecom companies taking control. There's several examples and we don't see a problem with this, there will still be 20% voting control in the hands of a Mexican company, and you'll have additional ownership beyond that, so there's going to be a significant

position by Mexican shareholders in this company, and we intend to, as I say, operate TFM independently, so we don't see that this will be a major problem.

Next slide, why are we so excited about this opportunity, well, we were excited when we invested in Mexico back in 1997. We saw the opportunity for NAFTA coming, and it was not nearly as clear in 1996 as it was today. This shows that the U.S. trade with Mexico exceeds $260 billion a year. It's four times what it was 10 years ago. Seventy-seven percent of the trade of Mexico goes to the United States and a few weeks ago if it's in Mexico, with a small meeting of businessmen with President Fox, and he talked about how Mexico purchases more from the United States than from England, France, Germany, Italy and Spain combined and Mexico will surpass Canada as the number one U.S. trade partner in the next eight years if we follow the current trends.

Eighty-five percent of Mexico's imports from the U.S. today are manufactured goods, in the past, that was primarily petroleum products and agricultural products. Now you have automobiles and may other types of manufacturing that is done, you have steel and so on moving into the United States, and Mexico is also developing from a low-cost assembly manufacturing area to a value added manufacturing area.

In the past I think some people looked at Mexico as just a low cost manufacturing point. I have talked to representatives of all three of the U.S. manufacturers of automobiles and they tell us that not only are their lowest cost vehicles produced in their entire worldwide network in Mexico, but also their highest quality, Mexican workers do an outstanding job, so it has a value-added aspect to it. Also, we think that Mexico is positioned because of its geographic location and its far-reaching free trade agreements could be an international manufacturing hub, not only from North America to the western hemisphere, but also for the world.

So, anybody that thinks that NAFTA has not been successful only needs to look at some of these numbers, and when you think about the opportunities going forward, this is a great railroad transportation opportunity and that is why we forward, this is a great railroad transportation opportunity and that is why we want to put these three companies together.

Now, do we have to go down to the United States, excuse me, down to Mexico and improve the railroads? No, that has already been done, since 1996 really we started operating in '97 although we began preparing for capital improvements as far back as 1996, we have put into the Mexican railroad all the things that you will find in the United States, centralized traffic control, the communication systems, the technology where we detect defects along the track, smaller crews, like you find in the United States, and so on.

In addition to that, the main railroad routes have been improved, we have installed welded rail, we have improved the car capacity over the Laredo bridge by three times by better operating practices, there have been over 150 new locomotives purchase for that railroad, 75 from G.E. and 75 from E.M.B., we put in new capacity and siding, there are 7 intermodal facilities down there to

date, 5 of which are brand new and 70 transload facilities with 12 new facilities planned.

The next slide, if you just look at the revenue growth and just for clarification, '97 was only a five month period of when we took the railroad over, but you can see the kind of revenue growth and clearly there has been some of the flattening from 2000 through 2002, but that is because, again the U.S. economy has been sluggish and as a result of that, I showed you what the trade is between the two countries which clearly is going to affect Mexico.

But, if you look at the next slide, and you look at the revenue increases that have been enjoyed by the Mexican railroad compared to all of the U.S. class one railroads combined, between 1998 and 2000, clearly, TFM is the fastest growing revenue opportunity in North America.

The next slide shows what Kansas City Southern's growth has been since the investment back in 1997 in terms of the volume of traffic that is moving between Mexico and the United States and in the first quarter of this year we have experienced a 17% increase in the number of units going to or from Mexico compared to last year and obviously, when the three railroads are put together, we expect that number to go up substantially as we put more focus on taking advantage of better service and a better opportunity for single pricing from Mexico to the United States and vice versa, that will increase substantially.

The next slide, from an operations and marketing perspective, the three railroad companies will connect end to end so what we will do is design a system that looks not at the three individually, but we will schedule trains from origin to destination from Mexico to the United States and from the United States to Mexico. We will use a common computer system, our MCS system that we are planning on putting on Tex-Mex in September and then 1st quarter of next year, Mexico, and we will closely watch the movement across the border, we think we can improve that, we have already made a lot of improvement.

It will be seamless service, as I said, from Mexico to the heartland of the United States, we will have a common transportation service plan and schedules in place for cars that go from one country to another. The integrated customer service will be easier for customers to communicate with all companies in both countries and we will have through rates between Mexico and the United States and the United States to Mexico that will be easier for customers to understand. And you can see here that the combined resources will be much greater, 965 locomotives, 25,000 cars, and you can see some of the other things, also, we will have about $1.3 billion in revenues which will make this company a stronger company.

True, we are still going to be the smallest company but we are going to have a lot of influence of traffic that moves between Mexico and the United States and we will certainly improve our financial situation longer term and continue to build our revenue base and become stronger per long term.

Now, TFM recently did a study in Mexico with 200 customers, 134 are those that

represented 70% of their current volume in revenue and then 66 potential customers and as you can see here, existing customers identified potential shift in business to TFM that could add as much as 40% to TFM's total volume over the next two years and the potential customers, the 66 identified conversion potentials that would add nearly 10% to TFM. And most of that, as you can see here in this pie chart, comes from trucking, about 73% of the total traffic, I think, shows that it would come from trucking.

Some of those that have been invested in us for some time or in TMM or TFM or KCS bonds may remember that we talked about the opportunities to convert from truck to rail at the time when we made the investment back in 1997. At that time, the railroad had gone down to 11% of the inner city market in Mexico and today, we are up at around 15 or 16%, but are objective was to get back to only 20%, if we felt we could get back to 20% of the inner city market we could justify our investment.

Well, as it's turned out, we have really justified our investment with far less market share and we have not converted over the last five years as much intermodal traffic from truck to rail as we had anticipated because what we did is concentrated on traditional rail traffic such as automobiles, auto parts, grains, steel, cement, appliances and different things. We intend to concentrate much more so on intermodal in the future and we are going to be able to provide certainly truck competitive service, we have got 7 intermodal facilities now, 5 of them are almost brand new and that is going to give us the opportunity to move forward in this truck conversion.

So, this map here just shows the location of these intermodal facilities, and as I said, 5 of those are brand new, if you look at the next map then, you can see how Kansas City Southern fits into the entire rail network in North America and I think you can see where Kansas City Southern, soon to be NAFTA Rail, will fit into the North American scheme.

So, from a strategic standpoint, this combined company could not be better positioned than it is right now, and I think all of us have recognized for a long time that the crown jewel system in Mexico has been Laredo to Mexico City. With that, I am now going to turn the call over to Ron Russ, and then we are going to ask Ambassador Jones to come on the phone here.

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [6]

Thanks again, Mike. I just want to take a moment to expand on a few points we made last week on our conference call and also bring everyone up to speed on where we are.

As Mike mentioned earlier, I want to focus a bit more on the process and approvals needed to complete the transaction. Mike showed a slide earlier of the approvals and the key constituents, now let us address each one in more detail. First, you saw our announcement last night, we have made good progress with our

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banks. The bank group has consented to consummate the transaction, to acquite group-O TFM shares and to our consent to acquire 51% of Mex-Rail shares. By the way, that approval was at 93% of our bank group.

The bank group also consented to the use of KCS cash on hand to acquire the 51% interest in Mex-Rail for $32.7 million. Again, cash on hand at the end of the quarter, $64 million, up from 19 at the end of the year.

After other approval, let's take a look at TMM bond holders. Their F-4 has been amended and that went effective yesterday, the offer is to exchange their notes due on May 15, 2003 and in 2006. The new notes maturity is May 15, 2004, there is a interest rate coupon improvement to 12% per annum, and the exchange offer expires on May 12th of this year. Both groups of shareholders need to approve the transaction and we will be moving forward with that shortly, we expect that to take place within the next 90 days.

From a regulatory perspective, the U.S. Surface Transportation Board gets involved with the Mex-Rail transaction. NAFTA Rail acquired 51% for $32.7 million, the Mex-Rail shares will be placed in a voting trust while the S.T.D. reviews the application for common control. The application will be filed shortly, and we consider it to be a minor transaction.

Mexico's regulators will also review the transaction, first, Mexico's Competition Commission. We believe that common control of the three railroads is pro-competitive. The estimated time line for the approval is within 120 days.

Mexico's Foreign Investment Commission will also review the transaction. Again, as Mike said earlier, we believe that there are precidents in the marketplace Citibank Group and BaniMex, Anheuser Busch and Modelo, Wal-Mart, et cetera, just to name a few. Again, the estimated time line there, we anticipate this to be completed within 120 days.

Now let's spend a few moments talking about VAT, keep in mind that we view VAT and the VAT lawsuit as an asset even before the magistrate's court decision. TFM filed this suit in 1997 alleging that the government failed to make a value added tax refund to the tune of $206 million. On October 11th of this past year, the Mexican magistrate's court unanimously ruled in the favor of TFM and ordered the lower fiscal court to issue a new ruling consistent with their decision. On October 10th, the lower fiscal court issued a ruling denying TFM the right to receive that refund. TFM has appealed the October 10th ruling on January 29, 2003

With respect to the government, a lot happens before they turn to us. First, there is the decision to proceed with the public quote and that decision takes place prior to October 31, 2003. Second, the 20% interest is put to first group-O TFM, they will have 60 days in which to make a decision. Finally, the 20% interest, if group-O TFM decides not to take up on the put is then put to NAFTA Rail, ie. Kansas City Southern and group-O TMM, the time frame for this is January to February 2004.

Again, this is the end of February, it is nine months but the primary objective of this transaction is to close first, to better deal with the put on a rolled up basis. As perspective, we think about the VAT put issue in the context of probabilities. First, we believe that the probability of VAT being equal to or greater than the put is high based on the high court's decision of this past fall.

Second, no event recovery is a very remote probability, third, we believe Mexico will not execute the put without knowing the resolution of the VAT dispute. It just makes basic common sense, you are looking at $485 million not knowing if you have a potential obligation downstream of better than $800 million.

Now let's turn to the transaction details and financing, first let's spend a moment on the consideration to be paid. The consideration paid for group-O TMM for group o-TFM shares is 18 million shares of NAFTA rail plus $200 million cash. Or at NAFTA Rail's option, NAFTA Rail could pay $120 million cash, plus $80 million worth of NAFTA Rail's shares, approximately 6.4 million shares in total. Finally, the separate transaction of 51% of Mex-Rail for $32.7 million.

Now, let's talk about where we are, at least $120 million is the consideration we're focused on. We're very confident this will be done very quickly. The bank group has consented, we believe $120 million will be raised. You have seen these pages before on the next slides. I just wanted to give everyone a sense of the financial scale of the combined entity.

No VAT, no put case is a very conservative case. The valuation portrayed on this next slide is based on yesterday's close, a valuation of $406 million. Again the multiples, 2.9 times the revenue, 7.9 times EBITDA, and 11.6 times of EBIT, that's the lowest multiple that's been seen in any transaction except for th BNCN, a deal that never went through.

In terms of earnings impact, again, this slide displays our view, that is it's accretive from day one, even if it is entirely equity financed. It's again, the lowest multiple paid for any major rail transaction in recent history that's been concluded, and accretive even without synergy even when financed with all equities

We're very excited about this proposition. I'm excited about the opportunity of getting $360 million of EBIDTA. In that regard I'll throw it over to Mike Haverty.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [7]

Before we entertain questions here, I'd like to ask if Ambassador Jim Jones is on the telephone and could maybe give us his views on the value added tax dispute in Mexico. Are you there, Jim?

Jim Jones, Manatt Phelps and Phillips - Board Member [8]

Yeah, I'm here, Mike. I'm here in Mexico city at another meeting, but I heard most of your presentation -- recently on the value added tax issue, perhaps everyone there is familiar with it, very briefly, and simply, this is a question as to who issued the valued tax refund. Who filed for that refund, who was entitled to file for that refund even who received that refund back in 1997, which at that time was roughly -- a little over $200 million.

When TFM brought its case before the fiscal court, which is called the tax court also, the tax court is, to put it in context, is a division of the ministry of finance. To speak anecdotally, when U.S. firms had some difficulties before the tax quarter or disputes on tax issues and it came to us for some assistance, I found that the tax court, without exception, ruled on what the ministry of finance position was and, if justice was to be done, it was done at the appellate level. That's where the appellate court overruled the tax court, and remanded it back to the tax court with the instruction to vacate its prior judgment, to weigh the evidence again and issue a new ruling that is consistent with the appellate court's interpretation.

In January of this year, when TFM was notified that the tax court again ruled against it, it appears that most of that decision or that opinion was based on an article in a new law. A new fiscal code that was passed by the Mexican Congress in 2001, four years after this event was in dispute. And so when TFM appealed again at the end of January of this year to the appellate court, it cited several violations of TFM's protection under the Mexican constitution. I might add the case is in front of the same panel that saw the case before and it seems the same lead judge is in charge of the case.

Now, in trying to predict what's going to happen, it's even more difficult in a Latin country that has the civil code because it's substantially different from the English common law. It's hard to tell what the decision is going to be made because the concept of legal precedence that we have in English common law is not the same.

However, having said that, we first look to the attorneys that are representing TFM and how they look at the case, and particularlyry relying on Dr. Herbert Bettincourt, who is the lead attorney for TFM and one of the most respected constitutional lawyers in Mexico, from the beginning of filing this case a few years ago, he has been very confident on the outcome, based upon the constitutional protections for TFM. And short enough, on appeal, he was proven correct.

The attorneys are still very, very positive about the outcome of the case, and as you know, under NAFTA, there's been several reforms, political and economic reforms and the legal and judicial reforms are in the process of taking place. But particularly, at the appellate levels of the Mexican judicial system, the quality and transparency of the judges and the decision has significantly improved.

So I would agree with Ron, that based upon the constitutional basis, that the TFM should be able to prevail on the law and on the constitution. Now, what will that mean in terms of dollar amount? Well, the original claim was for 200-plus million dollars, and then when you add the interest and the other items, it could be in the 8-900 million range, but clearly, by almost any measure, you would believe that it would be equal to or in excess of the value added tax refund.

With the put not having to be exercised for clearly until February of next year -- I think that those two events clearly can take place. Then the question is, of how that refund will be applied. Will it be applied to pay for the put or in what other manner. And that is how I see the case now and as I say, I think we're quite positive on the outcome. Thank you very much, Ambassador and thank you for joining us from Mexico..

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [9]

With that, we will open it up to questions here in the room here in New York. This young lady right here. First of all, I think we need to, Bill, individually identify themselves and the company that they're with over one of these microphones.

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Questions and Answers

Jennifer Ritter, Lehman Brothers [1]

Jennifer Ritter with Lehman Brothers, a couple questions on Mexico. First in the quarter, first quarter results, did I hear you say, Ron, that if we -- there was $13 million kind of delta due to the peso devaluation, if we were to try to get an apples to apples comparison, we would add $13 million to the Mexican, or toTFM's revenue?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [2]

That's correct, Jennifer, the peso devaluation has impacted the Mexican peso customer base, paying base, which is something in the order of 47% of the customer base of TFM and that was the order of $13 million year-over-year in the 1st quarter.

Jennifer Ritter, Lehman Brothers [3]

So revenues, in fact, did grow in TFM?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [4]

Yes, that's correct.

Jennifer Ritter, Lehman Brothers [5]

And then just to be ultra clear on the put and how it works, the second step is 20% interest put to group OTFM, they can refuse to make good on that put and then it goes to KSU and GTMM?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [6]

That's correct, that is the original bargain and how it was structured. If the group OTFM passes, then it goes to the two consortium partners in the original concession, Group OTMM and Kansas City Southern. Their obligations are joining several, if one of the partners declines under the old arrangement, the entire obligation fell on the other partner. In this instance, the rollup of the three companies, NAFTA Rail, it will become the payer of that put.

Jennifer Ritter, Lehman Brothers [7]

So really, because NAFTA Rail is going to earn 95% of group OTFM. You're making the decision for group OTFM as well in many ways?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [8]

To be clear, if we were to acquire the interest in the put, there would still be that interest or group OTFM held by its subsidiary, TFM. So there still would be residual interest, but we would be control of the situation, and we would more than likely influence the way the decision was made.

Jennifer Ritter, Lehman Brothers [9]

Thanks for your time.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [10]

I think I may follow-up on that, the importance of what Ron has talked about, and the question you asked, Jennifer, is I think there's been kind of a misconception in the financing of this transaction that we raised the $200 million, and then "bang" all of a sudden, we have to come up with $500 million.

The fact is, as Ron as pointed out, you have until next February to come up with this. The VAT is still outstanding and does the Mexican government really want to exercise the put with this issue that's still outstanding. And I think that's an important issue.

So, anybody that has the misconception that is like "bang bang" we really have to raise $700 million right away, that's not the case. We're taking it one step at a time. The 200 million first of which we already targeted really, the number is 120 that we have to raise, we can use stock for the other 80 million if we need to. The cash needs are not there hitting us in the face immediately. Next question, Tom?

Tom Waterditz, Bear Stearns [11]

Hi, it's Tom Waterditz from Bear Stearns. I have one question for you, Michael and two for Jim. Can you give us a sense of your view of how much political influence there is on this foreign investment commission, how much room there is for I guess meddling from other parties that might want to cause trouble. Just your opinion on that?

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [12]

Jim, are you still on here? He may have had to go, he was actually down there for an Anheuser-Busch board meeting, and he may have had to go.

You know, I certainly don't have the expertise on that, I think our partner in Mexico has a lot of experience with that, and we depend upon his advice and I think what we can say best here, Tom, is that we have found the competition commission to be very fair, and not to be politically motivated. They look at a situation, and this is what our partners told us, and they determined whether or not they think it is competitive or anti-competitive, and they rule accordingly, and that it is not greatly politically influenced.

Tom Waterditz, Bear Stearns [13]

Okay. Maybe if I can -- two more for you, Michael, one of the opportunities seems to be taking some of the traffic away at Laredo that goes to either primarily UP, but also to Burlington, I guess Burlington would be through El Paso or Eagle Pass.

But to get some of that business, can you give us a sense of how you're going

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to do that, given that UP does have a route structure advantage to say Chicago or other places, and maybe the magnitude of the revenue that you really think you can take from other railroads?

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [14]

Let me clarify one thing. B&S does not go to Laredo and TFM does not go to El Paso. Where TFM interchanges with B&S is at Brownsville, which goes across the border point, and then also at Robbs town, which is located on Tex-Mex at the east end near Corpus Christi, and then UP operates at Laredo, but clearly UP is the dominant carrier through Laredo, and that's why we think that this offers one of the opportunities for shippers to look at more equally of spreading traffic between competitors ad I know the railroad business well. We clearly are a competitor in certain markets with the UP.

I can give you an example of -- we were handling Volkswagen automobiles going to Nova Scotia, and competing with the UP in and transit time via Canadian national through Jackson was four days faster, so there are ways you can structure trains, schedules, planning and so on that can make our system competitive.

Are we going to close the gateways at Laredo and Brownsville? Absolutely not. Are UP and B&S, that's still going to be important connections, and U.S. partners for TFM, we plan for that to happen. And what we think is that over time with the new service that we can provide, when it's much more competitive, that we could draw more traffic to the combined system. And we will add more focus on pricing over the combined system.

But does that mean that we're going to take everybody else's business? Absolutely not. That's not going to happen. And I'm not going to identify at this point in time just exactly what the revenue synergies are, because what we've done is we've based this transaction not looking at synergies, and we are saying that it's accretive without synergies.

Tom Waterditz, Bear Stearns [15]

Second question? If I can sneak one last one in here. Can you give us a sense of what the basket is right now in terms of what can be paid dividends from TFM and over what time horizon do you think you can really begin to meaningfully exact cash, because they have a great operating ratio, great tax dividends, do you think at some point you could have a cash payout out of that or pay down debt?

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [16]

I think right now it's pretty premature to think in dividends. Our number one objective is going to be to pay debt down in Mexico. And also, to make capital investments and remember, you can also put capital investments into equipment, and equipment can flow between the different systems, we're a long way, I think, away from worrying about extracting cash out of Mexico.

I have one other thing I might add that I don't think Ron touched on this, but one of the advantages, we think, of rolling these companies together is then having it as a U.S.-based company, as we go to the markets out here,debt markets and so on, that we think we can have a better opportunity to get some better financing opportunities and strengthen the balance sheet and recapitalize longer term, and that's one of the things that we're going to be clearly focusing on, but we did not intend to be paying any dividends or taking any cash out. We're going to be focusing on debt reduction.

Tom Waterditz, Bear Stearns [17]

Congratulations on the transaction, thanks for the time.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [18]

Thank you.

Orlando Mushan, Great T Capital [19]

Orlando Mushan Great T Capital, how long do you think it will take you to have financing in place, and are you looking at a bond issue or are you going to borrow more from the banks?

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [20]

Okay. Ron, I'm going to let you answer that question.

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [21]

Yeah, thanks, Mike. We're right now in the process of working with our financial advisers, we expect a very near term resolution on this, with the door opening with the consensus yesterday, that gave us the ability to conclude a transaction. So we'll be working with our financial advisers and coming up with a near term plan shortly.

As to the type of instrument, capital raising, we're going to follow right now,

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I'm not at liberty to say. We thought in the past of debt and equity, and we're pursuing both of those.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [22]

I might also comment that one of the things we've seen in -- from the publications is that KCS has a 70 debt total cap ratio. And we're not sure where that number comes from, if you look at without leases it's 43% with leases it's been about 58.

If you combined the two systems and took all the debt and equity and figured this out between the two companies, it still comes out to about 58, so we're not sure where the 70 was calculated, but that's a number that keeps showing up. In many publications, and that's where I think people think this company is going to be 70% leveraged, and that's not the case.

Orlando Mushan, Great T Capital [23]

And the second question is regarding the VAT ruling. Is this going to be a final ruling, or can the decision be appealed? And let's say that instead of getting cash, you get to offset the put from the government, does TMM still get an incentive payment or not?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [24]

I can answer that, Mike.

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [25]

Okay.

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [26]

First off, in terms of the appeal, it is our understanding from our legal advisers that this will be a final decision. It more than likely will be directed to the governments to pay the certificate -- to give the certificate directly to TFM.

Your second part of this question was with regards to, I believe, the incentive payments to TMM. Those incentive payments are not payable unless the VAT is

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equal to the put. And that begins the mechanism of payment output to TMM.

Orlando Mushan, Great T Capital [27]

What if the payment is not in cash?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [28]

It is my -- our understanding from our financial -- our legal advisers in Mexico, that if the certificate is received, we have to hold it, and there's been discussion whether we hold it for 60 days or six months, there's some interesting discussion on that, but leave it to be said, once received in hand, it's held and not utilized for payment of taxes, it converts to cash in the six month or sixty day time frame. That's what generates the cash, which we hope is logically offset to the put, and potentially funds to TFM.

Arthur Shield, Roosevelt Investment Group [29]

Yes, Arthur Shield, Roosevelt Investment Group. First of all, congratulations, I think it's a terrific transaction. Three short questions, if I can, first one, is the amount in question on the VAT, in other words, if, in fact, you win, do you win the full amount, including interest and so on, or is that a separate issue that will be addressed?

Michael Haverty, Kansas City Southern - Chairman President and Chief Excutive Officer [30]

I think I can probably address that, the legal counsel that we have in Mexico says that you go back to 1997 when this was first filed and then the value of the VAT at that time was $206 million. And then overtime, this escalates, I think as Ambassador Jones said, that we calculate that value today to be somewhere between 800 and $900 million.

Now, the value of the put, I think last time we looked was about $485 million based on the value of the peso at that time. So, you know, do you end up settling it and getting cash, or do you end up settling it and getting a wash on the settlement. Or just how it works out if that is what works out, we'll see.

But the thing that we're concentrating on at this point in time is the legal process, and the VAT decision. And that's what I think Ambassador Jones was saying that based on his indication, that hopefully in the next 60 days we would have a decision that would come out of Mexico.

Arthur Shield, Roosevelt Investment Group [31]

Okay. And two related questions, looking at your bullet points on the approval process, did I understand it correctly that the TMM bond holders could negate this transaction?

Ronald Russ, Kansas City Southern - Executive Vice President and Chief Financial Officer [32]

That is correct. They do have the ability to not want to exchange their notes. We believe that they now have incentive to be paid in full as a result of the transaction entered between KCS and Group-O TMM. So we're very confident that they will look at TMM being in the position of receiving $200 million in consideration immediately, and being able to use that to take care of their obligations.

Arthur Shield, Roosevelt Investment Group [33]

Thank you. And finally, is the number of shares that TMM will get in this transaction with the stand still agreement, or could they, if they had the wherewithal, buy more stock?

Michael Haverty, Kansas City Southern - Chairman President and Chief Executive Officer [34]

There is a -- if you heard the conference call a week ago, Pepi Serrano was on and talked a bit about the stand still, I will just go over that again, there was a stand still for about six months, at which time he is freed, but he has to sell his shares in a perscribed fashion. TMM has entered into a registration statement which will allow for various disbursements into the public marketplace overtime. He is constrained from selling the controlling block to any interest of strategic or investment -- potential financial investors. Any more questions? Okay, it lasted a little longer than we anticipated. Thank you very much for joining us today. Thank you.

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12

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NAFTA RAILWAY

KANSAS CITY SOUTHERN www.kcsi.com

March 5, 2002

Despacho Previo Process Clarified

Previous Article / Next Article / KCS News Menu

KCS with its partners, TM and TFM are second to none in servicing markets in Mexico. At times, the process of clearing southbound cars at the border is confusing. However, as representatives of the NAFTA Railway, it is important for KCS employees to understand this process, which is known as, "despacho previo".

From a transportation standpoint, despacho previo serves two main functions. The first is to notify the broker when cars are billed to Mexico. The second is to release the cars for movement into Mexico when all paperwork between the forwarder, broker and customs is complete. For KCS, notification to the broker begins when a car is billed for movement to Mexico, regardless of origin carrier. When TM receives the waybill transmission, an email notification or "despacho previo notice" is automatically generated to the broker (freight forwarder). This notification begins a flow of paperwork, which when done properly, ensures the car will move transborder without delay.

The following steps occur when pre-clearing a railroad car moving from the U.S. into Mexico:
1. The origin shipper documents the car with the origin railroad carrier and provides the information to the U.S. freight forwarder.
2. The U.S. railroad at the border issues a despacho previo notice.
3. The U.S. freight forwarder furnishes the necessary documentation for an export movement into Mexico (including copies of the waybill) to the Mexican Customs broker.
4. The customer establishes how export duties or other dues will be paid with the U.S. freight forwarder. The Mexican Customs broker pays the import duties.
5. The Mexican Customs broker pre-documents the shipment with Mexican Customs.
6. The Mexican Customs broker pre-documents the shipment with TFM.
7. The Mexican Customs broker delivers the pre-filed documentation to the U.S. freight forwarder.
8. The U.S. freight forwarder delivers copies of all documents to the U.S. connecting railroad at the border, and pays any document delay or demurrage/per diem, if applicable.
9. Finally, the U.S. railroad pre-notifies the car to cross into Mexico.

With despacho previo, cars cross into Mexico for final delivery without being detained at the border. The exception to this process is when Mexican authorities (Hacienda = Treasury) randomly check cars at Nuevo Laredo. Once the car is cleared for Mexico and TM receives the necessary information from the forwarder, a release is entered into their computer system, which automatically updates the KCS system and allows KCS operating personnel to move the car to Mexico.

While the steps for clearing a car into Mexico are clearly defined, the process can be delayed when documents and payments are not received in a timely manner. Long ago, KCS determined that it would not allow uncleared cars to move to TM, so KCS holds all uncleared cars at its Beaumont Yard. This is to prevent congestion on TM, to promote the free flow of traffic to and from the border, and to facilitate the movement of cars held for document delay. KCS has the ability to switch cars from a hold track and to move them toward Mexico within 24 hours after release. Cars delayed at Beaumont are almost always delayed due to clearance problems.

KCS offers a number of other services of which customers may not be aware. Unlike other railroads, KCS and TM offer free time of 72 hours, or the time needed for the car to reach Beaumont, depending on which is greater. Since KCS generates notification at the time of billing, this can add many days free time to the clearance process. KCS' Customer Service Center also proactively monitors the cars being held for clearance into Mexico and will even

provide interface between the shipper and forwarder to ensure paperwork problems are held to a minimum. Document delay charges on TM are significantly less than other railroads.

An upcoming issue of the *KCS News* will outline the process for moving cars northbound from Mexico to the United Sates and the Automated Manifest System, which was implemented in 2001.

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NAFTA RAILWAY

KANSAS CITY SOUTHERN

July 9, 2002

NAFTA Railway Partners Reflect and Pursue New Opportunities

Previous Article / Next Article / KCS News Menu

On July 28th, NAFTA Railway alliance partners KCS, TFM and Tex Mex met in Houston for a quarterly meeting to pursue new opportunities for NAFTA Railway growth. Operating, marketing and customer service representatives were present to discuss, among other topics, freight traffic opportunities both north and southbound. All partners agreed that there are tremendous opportunities to grow the business and improve service, especially in conjunction with the recent alliance with BNSF, as well as more established alliances such as those with CN, NS and IMRL.

Recently, the synergies of the three partners have again proven successful with the operational improvements seen on Tex Mex since March. The three groups reported on efficiencies already in effect, such as the consolidation of KCS and Tex Mex dispatching, crew calling and timekeeping to KCS' System Transportation Center in Shreveport.

Since the consolidation, customer service representatives from all three partners, talk weekly about the joint operation. "The team has developed a seamless, one-stop customer service approach for moving traffic in and out of Mexico on the NAFTA Railway," said Jan McNeal, KCS' AVP customer service. "Each week, the team covers service performance related to KCS' new pre-blocking plan for traffic going southbound into Mexico, despacho previo and clearances that will help expedite traffic, technology updates such as Electronic Data Interchange (EDI) performance and billing, as well as current customer issues. The team will continue to resolve issues and provide regular updates to senior leadership."

Since the meeting, KCS and Tex Mex have begun working on an initiative with TFM to create a similar plan for operational efficiency going northbound, to include the possibility of TFM pre-blocking traffic to save handling and transit time on traffic moving from Mexico to the US Markets.

In a final note regarding the NAFTA Railway Alliance meeting, another key topic was that of future projects like the implementation of MCS on KCS this summer and on Tex Mex later this year. The shared computer system will help KCS and Tex Mex to provide more accurate and timely information to customers, and further improve the convenience of doing business on the NAFTA Railway.

NAFTA RAILWAY

TFM KANSAS CITY SOUTHERN

December 17, 2002

State of the Railroad: From the Desk of Michael R. Haverty, Chairman, President and CEO

Previous Article / Next Article / KCS News Menu

As we near the end of 2002, I would like to share with you my thoughts on the state of the railroad, and where I believe we need to be headed next year.

This year is best described as a pivotal turning point. In 2002, we set out to strengthen our balance sheet by increasing revenue, decreasing expenses and paying down debt. A variety of initiatives targeted at meeting these objectives were implemented and significant progress was made. In 2003, we must seize this opportunity to build on our progress, especially taking advantage of the tools now available to us and moving full speed ahead.

In the transportation industry, freight scheduling technology is the greatest opportunity to improve customer service and decrease operating costs. On a technology scale of one to ten, KCS instantaneously went from a one to a ten with the cutover from the Legacy System to the state-of-the-art, operating system, MCS. We are long past the point of implementation. Now, with a comprehensive understanding of our customers' needs, we must utilize the more accurate and timely information provided by MCS to plan and then execute with discipline, in order to meet our customers' requirements. More timely and reliable service gives us the ability to simultaneously grow our revenue and reduce our costs. This spring, MCS will be implemented on Tex-Mex, and on TFM in the fall, further extending the power of information for creating seamless interchange among our family of railroads.

For the customer, MCS offers the greatest benefits to the most service sensitive traffic. The largest growth potential for this type of traffic is over the Meridian to Dallas and Meridian/Jackson to Laredo corridors. In the year ahead, enhancements to the Meridian Speedway, such as added capacity and sidings, will provide a turning point toward improving transit times to better serve existing customers, as well as to support new business, such as the Nissan plant in Canton, Miss. By the second quarter, 12 power-assisted switches will be installed in dark territory on the Vicksburg and Meridian Subdivisions, allowing train crews to control the switches within their authority from the lead locomotive on their train instead of on the ground. New tracks will be added through and to the west end of Jackson's High Oak Yard to facilitate traffic flow between the yard and the transload facility, which will also be expanded. The Jackson transload facility is one of the most significant revenue-generating links in KCS' Transload Center (TLC) network.

KCS continues to reap the benefits of its investment in Mexico, as traffic continues to grow at 15 percent a year. Our working relationship with TFM has become very close in 2002, and we expect to further strengthen and build this relationship in 2003. With the reauthorization of the Transportation Equity Act for the 21st century (TEA-21) legislation and other legislative efforts, KCS could seek public participation in several projects, including Tex-Mex projects that would benefit both the public and KCS.

KCS' alliance with CN remains advantageous for both partners - a relationship that will celebrate its fifth anniversary in early 2003. Our alliance with IC&E has already seen huge gains in grain

traffic, while our alliance with BNSF is just beginning to pick up steam. These strategic alliances continue to strengthen our position as the NAFTA Railway, and when fully realized will promote greater industry cooperation, increase revenue and extend market reach.

In 2003, BELTPACK will be one of the most effective tools for KCS reducing yard incidents and providing productivity gains. We will have 57 jobs in 21 yards operating BELTPACK locomotive remote control systems. KCS must fully utilize BELTPACK to remain competitive.

Everyday, we build for the future, a culture in which safety is a value, not a priority subject to change. In 2002, attentions were diverted and individual safety performance suffered as a result. However, progress is already being made with extensive training in all craft areas and enhancement of the operations testing process. The derailment prevention initiative that began this year demonstrated a 50 percent cost reduction for reportable derailments. Practice of Responsible Care codes is 85 percent in place, and as of November, crossing collisions have decreased year over year by 16 percent. KCS further extends outreach efforts into the community with education, training and local coordination. The combined efforts of all employees will help KCS to achieve our safety vision of becoming the safest railway in North America.

Finally, in the first half of 2003, KCS will implement Enterprise Workforce Management (EWM), a computerized system to increase payroll accuracy and timeliness, and provide daily operations expense reports to improve the management of the railroad. In scope and investment, EWM is second only to MCS. This state-of-the-art system will play a major role in assuring that each paycheck is right and on time.

While these investments provide tremendous opportunities to improve service to customers and increase shareholder value, KCS like the rest of the industry and North America face some daunting challenges. For yet another year, the economy remains uncertain, as does the potential for acts of terrorism. In response, we will continue to tighten our belts and tighten the reins on security. Our industry has been repeatedly complimented for the security measures taken, but we must not let down our guard. The key is cooperation between shippers and carriers to certify a shipment at origin and ensure its security throughout the trip to its ultimate destination.

The steps we must take to succeed in 2003 are clear. Every KCS employee must understand how his/her role affects both revenue and expenses. We must focus on understanding and serving our customers' needs and meeting their requirements consistently. By doing so, we will move in the right direction toward critical measures, such as improving safety performance, decreasing dwell time, completing work orders promptly and improving on-time origins and departures. By working together, communicating and utilizing the technology available to us, we will at the close of 2003, be able to say that we have accomplished much.

On behalf of our board of directors and senior management, I would like to express our heartfelt thanks to KCS' employees and friends who have donated financial resources, as well as to those who have tirelessly volunteered their time to ensuring the success of the 2002 Holiday Express. This project generates tremendous goodwill in many of the communities KCS serves and provides assistance to families in need during the holiday season through contributions to The Salvation Army. Your efforts are important to our Company and to the greater community.

As stated on the back of the 2003 KCS calendar, the men and women of the NAFTA Railway are the heart, soul and backbone of our operation and our most valuable resource. I want to take this opportunity to salute your efforts, thank you for your dedication to our customers and wish you a safe and happy holiday season. Right now is the turning point toward a more successful future for our railroad.

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NAFTA RAILWAY

KANSAS CITY SOUTHERN

April 8, 2003

KCS, TFM move toward more seamless operation

Previous Article / Next Article / KCS News Menu

This week marks another important step toward creating a more seamless NAFTA Railway operation. TFM officials, Manuel Zulaica, chief transportation officer, Federico Diaz, director fleet management and transportation support, and Steve Radney, project leader, are at KCS' corporate headquarters in Kansas City, Mo., working with Scott Arvidson, KCS chief information officer, and others to formulate a business case for implementing the Management Control System (MCS) on TFM.

Although MCS is a state-of-the art computer operating system that has been successful on KCS, TFM has different opportunities for cost reduction and improved business value that must be considered in the planning stages. The two companies are establishing templates for various components of the project plan, including system integration, change management and training. For each component, effort, expenses and benefits are analyzed. This meeting is one of many steps toward a projected implementation of MCS on TFM in first quarter of 2004.

Copyright & Legal Disclaimer / FAQ



Comments Exhibit 13
Public

SUBMISSIONS FROM SHIPPERS REQUESTING CONDITIONS

Agriliance, LLC

AK Steel Corporation

Badger Mining Corporation

Chicago Sweeteners Incorporated

Compass Consolidators, Inc.

Concannon Lumber Company

C.W.S., Inc.

Dal-Tile

FMC Corporation

General Chemical Industrial Products, Inc.

Global Motors S.A. de C.V.

Griffin Industries, Inc.

Hub Group, Inc.

IMC Chemicals Inc.

Incon Container USA Ltd.

Knichel Logistics, LP

Larson Grain Company

Pacesetter Steel Service, Inc.

Reagent Chemical & Research, Inc.

Solvay Engineered Polymers

Unimin Corporation

United Farmers Cooperative

Westwood Forest Products Inc.

Weyerhauser Company



AGRILIANCE

P.O. Box 64089, MS 345
St. Paul, MN 55164-0089

5500 Cenex Drive
Inver Grove Heights, MN 55077

July 22, 2003

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am Logistics Manager for Agriliance, LLC. We are involved in regular rail trade of fertilizer products to destinations in Mexico.

Agriliance is the agronomy marketing joint venture owned by Land O'Lakes, Inc., Arden Hills, MN; CHS Cooperatives, Inc., St. Paul, MN; and Farmland Industries, Kansas City, MO. Agriliance markets crop nutrients, crop protection products, seed (through Croplan Genetics) and related agronomy services to farmers and ranchers through local cooperatives and independent dealers in all 50 states, Canada and Mexico.

A large percentage of our traffic to Mexico originates on the Union Pacific Railroad.

Agriliance is very much in support of the creation of NAFTA Rail provided the NAFTA Rail carriers agree not to discriminate against traffic originating on the Union Pacific and if TFM continues to support competitive UP-TFM services and rates.

Agriliance is concerned however, that the NAFTA Rail carriers will have opportunities and incentives to undermine competing service on TFM-UP routes. We believe that NAFTA Rail carriers should be willing to back their commitments regarding competitive issues with enforceable conditions or agreements which will insure that the NAFTA Rail carriers will not discriminate against Union Pacific traffic and that TFM will continue to support competitive UP-TFM services and rates.

Provided the board can appropriately secure the competitive structure described, Agriliance supports of the creation of NAFTA Rail.

I, Tracy Mack, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement. Executed on July 22, 2003

Tracy S Mack

Tracy Mack
Logistics Manager
Agriliance, LLC
P.O. Box 64089, MS 345
Inver Grove Heights, MN 55164-0089
5500 Cenex Drive,
Inver Grove Heights, MN 55077

** TOTAL PAGE.03 **

AK Steel Corporation
703 CURTIS STREET
MIDDLETOWN, OHIO 45043-0001

July 25, 2003

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

Re: Finance Docket No. 34342, *Kansas City Southern/NAFTA Rail*

Dear Secretary Williams:

This letter is being submitted in response to the Board's request for comments relating to the July 31, 2003 public hearing on Kansas City Southern's ("KCS") plans to acquire control of Texas Mexican Railway ("TexMex") and the Transportacion Ferrovaria Mexicana ("TFM"). As explained below, AK Steel does not oppose this transaction, provided that the Board assures that the approval of the transaction will not result in any service or competitive harms to our service.

AK Steel is engaged in the production of flat-rolled carbon, stainless and electrical steels for use in automotive, appliance construction and manufacturing markets. AK Steel employs approximately 11,500 men and women at major steel-working plants and offices in Indiana, Kentucky, Ohio and Pennsylvania. These plants include AK Steel's manufacturing facilities at Rockport, Indiana, Middletown Works and Zanesville, Ohio, and Butler, Pennsylvania. AK Steel relies on railroad transportation to deliver its steel products to end-users located throughout the United States and Mexico. This transportation includes AK Steel shipments of approximately 120,000 tons of rolled steel per year to Mexico.

Currently, AK Steel transports its products to Mexico pursuant to a rail transportation agreement under which CSX Transportation, Inc. ("CSXT") originates steel products from the Middletown Works and Rockport Plants and transports them to Salem, Illinois, where the steel is interchanged to the Union Pacific Railroad Company ("UP"). UP then transports the steel to Laredo, Texas, where it is interchanged with TFM at the International Bridge for final delivery to various manufacturing concerns in Mexico, including General Motors. AK Steel has several alternative routings that are available to move its product to the

Mexican gateway, including routes that involve originations on the Norfolk Southern Railway ("NS"), and/or joint-line movements involving BNSF or KCS.

One of AK Steel's primary concerns in transporting steel products to Mexico is transit time. The transit time of these shipments is affected by a variety of factors, most notably including the amount of time taken to interchange with TFM at the International Bridge at Laredo. AK Steel is concerned that once the formation of the NAFTA Railway is completed, TFM will favor traffic that originates on its affiliated companies, i.e., KCS and TexMex, over interchange traffic received from UP or The Burlington Northern & Santa Fe Railway Company ("BNSF"). If such discriminatory practices occur, there would be a detrimental impact on cycle times, which in turn would greatly impact AK Steel's ability to obtain reliable and efficient transportation service into Mexico.

In addition, AK Steel is concerned that the formation of the NAFTA Railway could impact on the ability of competing carriers to provide service to Mexico on commercially reasonable terms. As noted above, AK Steel currently has a variety of alternative transportation routings that it can use to transport its products to Mexico. The combination of KCS/TexMex/TFM, however, presents an incentive for TFM to favor KCS/TexMex to the detriment of other carriers, like UP and BNSF, that connect with TFM at the Laredo Bridge. In so doing, TFM can exercise bottleneck control to assure that AK Steel's only transportation options will be those involving the NAFTA Railway. Such practices would greatly limit UP's and BNSF's ability to provide competitively priced service for AK Steel's transportation needs to the Mexican gateway.

At various times in this proceeding, KCS has represented that it would not "make any changes in the way the Laredo Bridge is dispatched and operated," and that it would "keep the Laredo gateway open on commercially reasonable terms." AK Steel believes that each of these commitments is critical to assuring that the creation of the NAFTA Railway does not harm AK Steel's ability to move its products into Mexico efficiently and at competitively priced transportation rates.

Accordingly, AK Steel hereby requests that the STB condition any approval of the KCS' acquisition of control of TexMex and TFM to protect shippers like AK Steel from potential discriminatory service and pricing practices relating to the Mexican gateway. AK Steel specifically requests that the Board

impose conditions that assure that all carriers interchanging traffic at the Laredo bridge be treated fairly by TFM. In addition, AK Steel requests that the Board impose a condition that prevents TFM from exercising bottleneck control. There are currently three carriers that can be used to reach the Mexican gateway at Laredo. Any approval of the acquisition of control sought by KCS must assure that all of these carriers can continue to provide service at commercially reasonable terms.

Thank you for your consideration and attention to this matter.

Sincerely,

Gary L. Kidwell /gk

Gary L. Kidwell

cc: All Parties of Record

AK Steel Corporation

VERIFICATION

I, GARY L. KIDWELL, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on July 24, 2003.

Gary L. Kidwell 7-24-03

BADGER MINING CORPORATION
409 SOUTH CHURCH ST., P.O. BOX 328, BERLIN, WI 54923
(920) 361-2388 • FAX (920) 361-2826
www.badgerminingcorp.com

July 29, 2003

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

My name is Robert Bartol. I am the Manager of Transportation Services for Badger Mining Corporation.

Badger Mining is a privately held international corporation that manufactures industrial silica sand, limestone, zeolite, and other aggregates. Our primary industrial markets include hydraulic fracturing, gravel packing, foundry core and molding applications, industrial and construction fillers, boiler sand, wet grinding media, and fluxing agents. Our products are also used for environmental purposes, such as water filtration, sewage treatment, monitoring wells, remediation wells, and odor control.

Badger Mining ships approximately 40-50 cars per week to Mexico. Our Mexico business consists primarily of silica sand moving to foundries served by TFM in Monterrey and Saltillo. The sand is used in castings to make engine parts for the auto industry. This traffic moves most efficiently from our Fairwater Plant in Wisconsin via the Chicago and Laredo gateways.

We are concerned that the proposed NAFTA Rail transaction might affect the rates and service that UP can offer for our shipments moving over the Laredo Gateway. Our Mexico traffic moves over the Chicago Gateway, so it is susceptible to routings involving KCS. If the NAFTA Rail transaction improves those routings, we would welcome the additional competitive options. However, Mexico is an important growth market for Badger Mining, and we want to ensure that the transaction does not interfere with our ability to use the existing, efficient UP-TFM service.

We understand that KCS has offered several commitments to preserve efficient UP-TFM service over the Laredo Gateway and in Mexico. We appreciate those commitments, but we believe that the Board should make those commitments solid and enforceable. It is our experience in the railroad business that there are many subtle ways to discriminate against competition, so clear,

Our mission is to become the quality leader in the industrial minerals industry with a team of people committed to excellence and a passion for satisfying our customers.

enforceable standards are important. KCS and its partners should be required to provide UP with a fair share of the capacity at Laredo Bridge, continue to cooperate with UP with respect to the service that TFM provides in Mexico and not discriminate against UP routings in terms of service, and provide UP with competitive rate factors for UP-TFM routings via the Laredo Gateway. The Board should solidify these requirements by making them enforceable conditions to its approval of the KCS Application.

Thank you for considering our views.

I, Robert Bartol, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this ~~verified statement~~.
Executed ~~on July 29~~, 2003.

Signature _____

Dynnette K Wilde
State of Wisconsin
County of Green Lake
7-29-03

DC: 915530-2

csi

Chicago Sweeteners Incorporated

1700 Higgins Road Suite 610 Des Plaines, Illinois 60018
Phone: 847/299-1999 Fax: 847-299-1669 800/367-6975
www.chisweet.com

June 27,2003

Dear Sir:

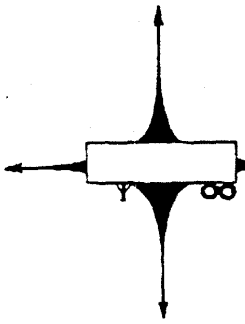
Chicago Sweeteners, Inc is the parent company of Batory De Mexico, which is a manufacturer of food products located in Matamoras MX. We have been a steady shipper of manufactured food products to and from Mexico since 1997. In doing so Batory De Mexico has relied on the Union Pacific and TFM rail systems for an important segment of its logistics network.

Batory De Mexico has learned that the Kansas City Southern Railroad has recently proposed a transaction that would result in its acquisition of Transportacion Ferroviaria Mexicana and the Texas Mexican Railway, and the operation of the three railroads as **NAFTA Rail**. While Batory De Mexico is not opposed to mergers and acquisitions we are opposed strongly to unfair practices in the logistics of border crossings via Union Pacific Railroad. Anything that would discriminate against Union Pacific would be a direct discrimination against all that use its lines to ship to and from Mexico.

Batory De Mexico feels very strongly that any approval of the merger of the KCS, TFM, and the Tex-Mex must be conditioned upon the binding commitment of NAFTA Rail that it will not engage in **unfair practices** to those of us who use Union Pacific to reach Mexican markets or the U.S.. Free trade between our company and companies in Mexico and the U.S. is very important. Unfair practices at the border crossing would greatly impair that business. The service that we have enjoyed over the last 4 years via the existing rail lines has been very efficient. We ask that whatever ventures are allowed in the future that you keep the efficiencies and competitiveness in place for all rail lines.

Sincerely,

Robert V. Tinkham
Executive Vice President



COMPASS
CONSOLIDATORS, INC.

47 Stephen Street
Lemont, IL 60439
Phone: (630) 243-0200
Fax: (630) 243-0250

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am John Pollack, Vice President of Marketing at Compass Consolidators, Lemont, IL Compass Consolidators Compass Consolidators has been serving the shipping public as an agent specializing in domestic trailerload, boxcar and stack train services since 1976.

Ever since NAFTA was enacted, Compass Consolidators Mexico traffic has been increasing. We look forward to continued Mexico growth as our customers markets expand with business opportunities.

Compass Consolidators does not oppose the merger of the KCS, Tex Mex and TFM railways as long as there is 1. No discrimination against UP traffic at the Laredo Bridge. 2. UP-TFM shipments via the Laredo gateway are not discriminated against and 3. KCS's commitments are concrete and enforceable conditions to STB approval of the transaction.

I, John M. Pollack, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement. Executed on July 24, 2003.

John M. Pollack
Vice President of Marketing
Compass Consolidators



P.O. BOX 14444
PORTLAND, OREGON 97293
PHONE (503) 231-8681
FAX #(503) 236-5614

July 22, 2003

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

My name is Stephen Shaw, and I am the Sales Manager here at Concannon Lumber. We do significant business with Mexico currently and expect that component of our business to do nothing but grow. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

Stephen Shaw, Sales Manager
Concannon Corporation

208538 ENTERED
Office of Proceedings
JUL 28 2003
Part of
Public Record

CWS *Specialists in handling and shipping steel.*

July 24, 2003

RECEIVED
JUL 28 2003
MANAGEMENT
STB

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am George Drain, General Manager. Our company, CWS, Incorporated, has an established and growing business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Rates and Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

George Drain, Jr.
General Manager
CWS, Incorporated

C.W.S., Inc. 5137 Indianapolis Blvd.; E. Chicago, IN 46312 FAX: 219-391-0021

Dal-Tile

July 23, 2003

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am responsible for the cost of rail shipments of raw materials to our plants in Mexico and the U.S.. Our company, Dal-Tile, has an established and growing business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

Charles F. Boulter
Manager Industrial Purchasing
Corporate Purchasing

7834 C.F. Hawn Freeway Dallas, TX 75217 Office 214-309-4130
Fax 214-309-4324
Email charles.boulter@daltile.com

FMC Corporation

Alkali Chemicals Division
1735 Market Street
Philadelphia Pennsylvania 19103
215 299 6000

FMC

July 17, 2003

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

Dear Secretary Williams:

This is in reference to Kansas City Southern/NAFTA Rail Finance Docket No. 34342.

My name is John L. Abbott, Distribution Strategy Manager for FMC Corporation, which is located at 1735 Market Street in Philadelphia, PA 19103. FMC is the world's largest producer of natural soda ash (sodium carbonate; STCC 2812322) and is the market leader in North America. We manage one of the industry's largest and private covered hopper car fleets to transport this commodity from our mines in Westvaco, WY to domestic and international markets. FMC is a member of ANSAC (American Natural Soda Ash Corporation), which markets soda ash to worldwide markets. These exports move in trainload quantities from Wyoming to ports located on the west coast and in the Gulf. FMC also moves over 100,000 tons a year via the Laredo, TX interchange to markets located in Mexico.

FMC supports the creation of the NAFTA rail system as long as it does not discriminate nor disadvantage the UP at the International Bridge at Laredo. The Surface Transportation Board needs to ensure shippers such as FMC that the UP-TFM services and rates remain competitive with NAFTA Rail.

I, John L. Abbott, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement executed on July 17, 2003.

John L Abbott

Mary Ellen DiVito

MARY ELLEN DiVITO
COMMONWEALTH OF PENNSYLVANIA
COMMISSIONER OF DEEDS
My Commission Expires April 20, 2004



[illegible]

90 East Halsey Road
Parsippany, NJ 07054
Tel: 973-515-[illegible]
Fax: 973-515-1[illegible]

July 16, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Kansas City Southern/NAFTA Rail
Finance Docket No. 34342

Dear Secretary Williams:

My name and position title is Karl L. Shetler, General Manager-Transportation for General Chemical Industrial Products, Inc., 90 East Halsey Road, Parsippany, NJ 07054. I have been the General Manager-Transportation for 17 years, responsible for finished product and raw material transportation costs and service.

General Chemical Industrial Products is a leading producer of soda ash and calcium chloride in North America. Soda ash is used in the manufacture of glass, sodium-based chemicals including baking soda, detergents, paper and many familiar consumer products. Calcium chloride is used primarily in highway and road maintenance for dust control and roadbed stabilization during the summer and for de-icing during the winter.

The Company's active soda ash facility is located in Green River, WY. This location is the third largest soda ash facility in North America with an annual production capacity of 2,800,000 NT. Our primary mode of shipment is via rail in private cover hopper cars. In 2002 we shipped in excess of 20,000 railcars from our Green River, WY location which is serviced by the Union Pacific Railroad (UP). The Company is a member of ANSAC, a soda ash export cooperative organized in 1984 under the Webb-Pommerene Act. Through ANSAC a portion of our Wyoming shipments are directed to Mexico via the Laredo, TX rail gateway.

The purpose of this letter is to provide our comments regarding the impact of the Kansas City Southern's (KCS) proposed acquisition of the Transportacion Ferroviaria Mexicana (TFM) and The Texas Mexican Railway (TexMex). Finance Docket No. 34342 considers approval by the Surface Transportation Board of the application by the KCS for this new entity to be called "NAFTA Rail".

The UP currently has coordinated service with the TFM set up via Laredo, TX, including several daily run-through trains with pre-blocking of railcars. The UP has spent significant capital to improve border facilities and to automate customs activities to help the flow of international shipments between the U.S. and Mexico. There is significant automotive, grain and intermodal traffic shipped via the UP-TFM route through Laredo. Our ANSAC shipments to Mexico are routed in this same manner.

Our Company requests that the Surface Transportation Board impose specific conditions on the approval of this application by the KCS to ensure continued competitive and efficient rail service via the Laredo gateway for customers using the current UP-TFM rail routing.

Sincerely yours,

General Chemical Industrial Products, Inc.

Karl L. Shetler

Karl L. Shetler
General Manager-Transportation

I, Karl L. Shetler, declare under penalty of perjury that the forgoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement. Executed on July 16, 2003.

Karl L. Shetler

Global Motors

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

July 21, 2003

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am Peter Rafael Rodriguez. Our company, Global Motors S.A. de C.V., has an established and growing business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Rates and Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

Rafael Rodriguez
Director General



Rio Tiber 87 – 401
Col. Cuauhtemoc
Mexico D.F. 06500

Tel. 5533-0417
5533-0416

GRIFFIN INDUSTRIES, INC.

July 14, 2003

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

Re: Kansas City Southern/NAFTA Rail
Finance Docket No. 34342

Dear Secretary Williams,

I am Mike Gilbert and I am Senior Product Manager for Griffin Industries in Cold Spring, KY. My company is manufacturer of animal proteins and fat. We ship approximately three to four hundred railcars per year to Mexico. Most all of this routed over the Union Pacific Railroad.

We have some concern over the proposed NAFTA RAIL. Specifically, we do not want to be put in a situation where rates will increase sharply and make it more difficult to do business. We wish to state our support for conditions that will guarantee continued competitive, efficient UP-TFM rail service via the Laredo gateway and that NFTA Rail will abide by KCS's promises. If this is done, we are then in support of the proposal.

I, Mike Gilbert, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement. Executed on July 14, 2003

Mike Gilbert

NOTARY PUBLIC KENTUCKY STATE AT LARGE

ELLEN C. GOINS
Notary Public, State-at-Large, Ky
My Commission Expires December 5, 2005

HUB GROUP, INC.
3050 HIGHLAND PARKWAY, SUITE 100
DOWNERS GROVE, IL 60515

THOMAS L. HARDIN
PRESIDENT AND
CHIEF OPERATING OFFICER

July 17, 2003

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: *Kansas City Southern -- Control -- The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company* (STB Finance Docket No. 34342)

Dear Mr. Williams:

This is to further supplement my earlier letter to you dated April 28, 2003 (copy attached) whereby Hub Group has registered its support for the KCS control application.

This is to further clarify our position whereby Hub Group also strongly supports conditions that will guarantee continued competitive and efficient UP/TFM rail service via the Laredo gateway. We believe the UP connection at Laredo must be preserved, as it is vitally important to the continued success of NAFTA.

Please consider our views.

Thomas L. Hardin



IMC Chemicals Inc.
9401 Indian Creek Parkway
Building 40, Suite 1000
Overland Park, Kansas 66210
913.344.9500

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am William J. McGinn, Director of Distribution for IMC Chemicals Inc. IMC Chemicals Inc. operates a chemical manufacturing facility in Trona California and its cooperate office is located in Overland Park Kansas. Our facility in Trona California manufactures approximately 1,700,000 tons of chemicals including sodium carbonate, sodium sulfate and various sodium borates. Our products are shipped through out North America and to 30 countries around the world.

IMC shipments to Mexico of sodium sulfate and sodium borates total approximately 20,000 tons annually. All shipments are made via the Union Pacific Railroad and the Laredo Texas gateway is used exclusively.

While IMC supports the proposed NAFTA rail transaction, IMC is very concerned about the effect of the merger on UP customers using the Laredo Texas gateway. IMC hopes the Surface Transportation Board proposes conditions that ensure that NAFTA Rail lives up to the stated Kansas City Southern Railway Company commitments.

I, William J. McGinn, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.
Executed on July 23, 2003 William J. McGinn



3125 Fortune Way, Suite 16
Wellington, FL 33414

Tel (561) 791-4544
Fax (561) 791-4550

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

July 25th, 2003.

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am Chet A. Biernat and President. Our company, INCON Container has an established and growing business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Rates and Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

Chet A. Biernat

Chet A. Biernat,
President.

Knichel Logistics

July 24, 2003

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

Re: Kansas City Southern / NAFTA Rail,
Finance docket No. 34342

Dear Secretary Williams:

My name is William Knichel, and I am President and CEO of Knichel Logistics, LP, a transportation company based in western Pennsylvania.

We are active in arranging for the transportation of goods to and from Mexico for a major shipper and manufacturer of power tools via the gateway of Laredo, Texas. Currently we are quoting on potential rail volumes of 20-50 shipments per day. In the past we have moved various other commodities to include furniture, chemicals and other finished goods.

My concern is regarding the recent proposed NAFTA rail transactions that may affect the competitive impacts of rail service via the Laredo gateway. It is of the utmost importance that their be clearly defined controls regulating the fair handling of traffic between the Union Pacific Railroad and the NAFTA Rail. Otherwise our customers will be held captive to a monopoly of rates and services that can undermine the current benefits of utilizing the Laredo gateway.

In order to protect our interest as well as the interests of our manufacturing partners in Mexico, we request that their be enforceable terms established for the fair handling of service between the KCS-TFM option that the NAFTA Rail transaction might bring and the UP TFM for service between Mexico and the U.S. via the Laredo bridge.

I, William Knichel, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on July 24, 2003.

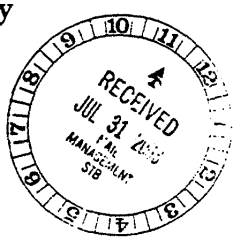
Wrk/

5319 Wm. Flynn Hwy., Suite 200 I Gibsonia, PA 15044 I phone: (724) 449-3300 I fax: (724) 449-3310

208562

Lason Grain Company

Englevale, ND



July 22, 2003

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am Tom Gilley, General Manager of Larson Grain Company, Englevale, ND. Our company, Larson Grain Company, has an established and growing business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP and BNSF today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP and BNSF so that service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Service in Mexico
- Equitable and Competitive Rate Factors for BNSF and UP Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

July 23, 2003



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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am Robin Farner, Logistics Manager of Pacesetter Steel Service, Inc. Our company has potential growth business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,

Robin Farner,

P.O. BOX 100007 KENNESAW, GEORGIA 30144-9207 770.919.8000 800.749.6505 FAX: 770.919.7225 www.pacesetter.com

Rec'd 7/17/03

REAGENT® CHEMICAL

Reagent Chemical & Research, Inc.

1300 POST OAK BLVD., SUITE 680, HOUSTON, TX 77056
OFFICE: (713) 628-1843 • FAX: (713) 963-0951

July 10, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

RE: Kansas City Southern/Nafta Rail
Finance Docket No. 34342

Dear Secretary Williams:

My name is Edwin E. Vigneaux, Traffic Manager for Reagent Chemical & Research, Inc., responsible for rail transportation.

Reagent Chemical is a distributor of Hydrochloric Acid (HCL), doing business in North America. We are currently exporting approximately 5,000 tons of HCL to Mexico and occasionally importing small amounts of HCL from Mexico. The HCL we ship to and from Mexico is routed via UP-TFM or KCS-TFM, via the Laredo gateway.

This letter concerns the announced plans of the Kansas City Southern (KCS) to acquire control of the Transportacion Ferrovaria Mexicana (TFM) and The Texas Mexican Railway (Tex-Mex), thereby operating all three railroads as "NAFTA Rail". Reagent Chemical is not opposed to this acquisition. We believe the joining of these three railroads will offer competitive and safe transportation of our product between the United States and Mexico.

However, we do have concerns that the ownership of the International Bridge at Laredo be under the sole control of the NAFTA Rail carriers, and that those controlling the bridge continue to offer the UP complete and uninhibited access to the bridge crossing. In order for our company to receive the most economical and consistent transportation of our product to Mexico, we must have open competition between the UP and the NAFTA rail carriers. We believe the only way to achieve this is for the NAFTA carriers to keep this gateway open on commercially reasonable terms.

Reagent Chemical & Research, Inc.
Registered to ISO 9002
File # A6831

We understand that the current KCS management has promised the UP neutrality and non-discrimination of current and future traffic flows. We would prefer that the KCS make these promises concrete and enforceable through private agreements or through conditions prescribed by the STB. If the KCS agrees to make these conditions enforceable, then shippers like Reagent would be assured of having the UP-TFM option that is in place today, as well as whatever improved KCS-TFM option the NAFTA rail transaction might bring. We at Reagent Chemical urge the STB to ask the KCS and its partners to commit to concrete and enforceable terms and that current service between the U.S. and Mexico be preserved by preventing discrimination against the UP at the International Bridge in Laredo.

I, Edwin E. Vigneaux, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement. Executed on July 10, 2003.

Edwin E. Vigneaux

SOLVAY
ENGINEERED POLYMERS

100 South Mitchell Road, Mansfield, TX 76063
Telephone: (817) 792-1883
Fax: (817) 792-2856

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

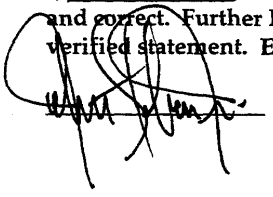
I am John Staben, Jr., Distribution Specialist at Solvay Engineered Polymers. We are a plastics manufacturer.

We ship railcars to Mexico City and Monterrey to support our Automotive customers. Our business consists of plastics to Mexico from the Midwest. Our shipments move via the Laredo gateway into Mexico.

I understand that Kansas City Southern (KCS) is asking for approval to acquire control of the The Texas Mexican Railway (Tex-Mex) as well as the International Bridge at Laredo and the Mexican railroad that also serves the Laredo gateway, the TFM. My company is not opposed to this transaction, if there are firm and enforceable conditions established by the STB which will require KCS to operate the Laredo bridge and the connection with TFM fairly and without discrimination so the current service offered by UP-TFM over this gateway can continue to be offered efficiently and without interference.

The major concern for us is the potential congestion at the border in Laredo, Texas. Our shipments must be delivered in a timely manner so that our customers continue to buy product from us. We rely on efficient transportation over the gateway. We expect KCS to agree to conditions that will preserve and improve the efficient use of the Laredo Bridge.

I, John Staben, Jr., declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement. Executed on July 23, 2003 .



Unimin Corporation
258 Elm Street, New Canaan, CT 06840
Phone: 203-966-8880 Telex: 99-6355
Fax: 203-966-3453 or 203-972-1870

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24

July 23, 2003

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

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Re: Finance Docket No. 34342

Dear Secretary Williams:

I am Vice President/Distribution of Unimin Corporation. Unimin is one of the nation's largest suppliers of industrial minerals. We mine industrial minerals from over forty locations in the United States. Our products include, among other things, a wide variety of industrial sand, ball clay, feldspar, kaolin, high purity quartz, olivine, bentonite and dolomite. I am writing because we are concerned that Kansas City Southern's (KCS") proposed acquisition of Transportación Ferroviaria Mexicana ("TFM") could raise the cost of shipping industrial minerals to Mexico, which in turn would adversely affect Unimin's business.

Ball Clay

Ball clay is used to make ceramic tile and sanitaryware (toilets, sinks, tubs, etc.). Much of North America's production of ceramic tile and sanitaryware used to be in the Midwestern United States. Over the last 10 years or so, many manufacturers have moved these operations to Mexico, especially the Monterrey area.

Unimin produces ball clay at Gleason, Tennessee, as do three competitors, K-T Clay Corporation, Old Hickory Clay Company, and H.C. Spinks Clay Company. All four Gleason, Tennessee producers are on the CSX line. That line connects to various other carriers, including KCS. In addition, Unimin produces ball clay at Troup, Texas; our plant there is on the Union Pacific ("UP") line.

Our Troup, Texas plant has a transportation advantage over the Tennessee producers for shipments into Mexico by reason of its relative proximity. Accordingly, in 2002, approximately 59 percent of the Troup plant's revenues were from sales to customers in Mexico. About 47 percent of the Troup plant's revenues are from sales to a single customer –

Dal-Tile in Monterrey. Our customers in Mexico purchase f.o.b. our plant and arrange their own freight. Freight costs for customers in the Monterrey area are almost as much as the cost of the ball clay itself. Truck transportation is not a viable option for these customers, because it is approximately twice as expensive as rail.

Ball clay from the Gleason, Tennessee area is still an excellent substitute for ball clay from our Troup, Texas plant, however. The Tennessee deposits are of a higher quality, and the Tennessee producers enjoy certain efficiencies that allow them to sell at a lower price. Accordingly, a very small change in delivered prices (about half of which are freight) would induce Dal-Tile and other Mexican customers to switch their purchases from our Troup plant to one of the Tennessee plants.

Shipments from our Troup plant to the Monterrey area travel on the UP to Laredo, Texas, and then to Monterrey on the TFM. This is a well-traveled route with consistent service, particularly because UP has invested heavily in the infrastructure at Laredo.

Until now, TFM has had no reason to favor ball clay shipments that originate in Tennessee over shipments that originate in Texas, or vice versa. Following the proposed transaction, TFM will have reason to favor KCS, because they will be under common ownership. If the combined entity raises the price of transporting Unimin's Troup, Texas ball clay from Laredo to Monterrey or uses its control over the Laredo Bridge to make UP's service slower or less predictable, Mexican tile and sanitaryware producers may shift to the Tennessee producers. This will benefit KCS because KCS can carry Gleason, Tennessee ball clay from New Orleans, Louisiana (where CSX connects to KCS) to Laredo. Similarly, TFM and KCS could offer preferential traffic packages to Tennessee customers to enable KCS to carry Gleason, Tennessee ball clay from New Orleans to Laredo.

If Dal-Tile, which is by far the Troup plant's largest customer, were to shift to another supplier, the Troup plant likely would not be viable, and twenty-six Unimin jobs in Troup, Texas would be lost. If this were to happen, TFM would still be shipping the same volume of ball clay into Mexico, but KCS would be shipping more than it currently ships.

We note that UP could carry ball clay from Troup to Eagle Pass, and connect to Ferrocarril Mexicano ("FXE"), which could then haul it to the Monterrey area. However, this FXE routing has several significant disadvantages. First, it is more circuitous, which means that shipments will take longer and cost more. Second, shipments from the United States move much more quickly through Laredo than through Eagle Pass (or Brownsville, for that matter) because there has been much more investment at Laredo. In this business, time is money, and slower service is a significant disadvantage. Similarly, because ball clay moves in carloads instead of unit trains, the less frequent service on the Eagle Pass-FXE route is also a disadvantage. Since the Eagle Pass-FXE route is used much less intensively than the

Laredo Bridge, it takes longer on the FXE routing to assemble a trainload of empty cars to return from Mexico to the United States, thus further slowing the cycle time and increasing costs.

Fracturing Sand

Fracturing sand, sometimes known as frac sand, is a type of industrial sand. Fracturing sand is used in secondary recovery for oil and gas wells. Unimin is the largest supplier of fracturing sand in the United States. About 10 percent of the fracturing sand revenues at Unimin's principal fracturing sand plants, located in Kasota and Ottawa, Minnesota, is for shipments to Mexico. Those plants are on the UP. Unimin's main competitor in this area, Badger Mining Corporation in Taylor, Wisconsin, is served by the Canadian National ("CN"), which now owns the former Illinois Central, from which it connects to KCS. The CN and KCS are parties to a marketing agreement.

Again, the entity created by the proposed transaction could discriminate against shipments of Unimin products on the UP, which could shift purchases to Unimin's major competitor that utilizes KCS.

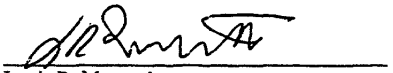
Protecting Competition

We respectfully request that the Board impose detailed conditions of neutrality and non-discrimination in order to preserve competition among rail carriers and to enable Unimin to compete fairly for sales to Mexican customers. The Laredo Bridge cannot be duplicated by competitors, and the other rail crossings from Texas into Mexico are far inferior to it. This Board should not allow control of the Laredo Bridge to confer a competitive advantage on the combined KCS-TFM.

Unimin does not oppose the proposed transaction as long as the Board imposes conditions that will protect competition among KCS, UP, and other carriers. Specifically, the Board should insure that (i) the Laredo Bridge will not be used to discriminate against UP traffic, and (ii) TFM will not discriminate against connecting traffic from carriers other than KCS. This non-discrimination obligation must apply to both price and service to be effective. Indeed, unless the Board makes sure that all aspects of service are covered – including transit times, switching service, and car supply – its remedy will be ineffective.

I, Louis R. Mastandrea, declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to file this verified statement.

Executed on July 23rd, 2003.



Louis R. Mastandrea
Vice President/Distribution

UNITED FARMERS COOP
P.O. BOX 67
GEORGE, IOWA 51237

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

RE: Kansas City Southern/NAFTA Rail.
Finance Docket No. 34342

Dear Secretary Williams:

I am Dave Reinders, General Manager at United Farmers Cooperative, George, Iowa.

Our Cooperative is a 100 car-rail shuttle grain shipper. We export via rail approximately 16 million bushels of corn and 4 million bushels of soybeans annually. Many of these trains especially the soybean are shipped to the Mexico market.

I am very concerned about the NAFTA Rail, however it is going to be of the utmost importance that NAFTA Rail lives up to KCS's commitments. I am also concerned about the effect of the proposed transaction on U.P. – TFM service and the treatment of the Union Pacific customer at the Laredo bridge.

Please give these maters your thoughtful consideration

Thank You & Sincerely,
Dave Reinders
General Manager
United Farmers Cooperative
George, Iowa
51237

I Dave Reinders, declare under penalty of perjury, that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.
Executed on July 17 ,2003.

Dave Reinders

Westwood Forest Products Inc.
2707 Colby Avenue, suite 701, Everett, WA 98201
Phone: 425-259-3836 Fax: 425-339-5554
1-800-359-2238
July 25, 2003

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

Re: Kansas City Southern/NAFTA Rail,
Finance Docket No. 34342

Dear Secretary Williams:

I am Steve Fitzgerald, Mexico & US Pulp Fiber Logistics Manager. Our company, Westwood Forest Products, Inc., has an established and growing business with Mexico. I expect the proposed NAFTA rail transaction, which will result in KCS acquiring control of Tex Mex and TFM, will affect rail transportation between the United States and Mexico. As a result, we are taking this opportunity to communicate our views to the Surface Transportation Board.

We support all efforts to guarantee that there will be competitive and efficient rail service via the Laredo Gateway. Any restrictions on access to the Gateway will have a negative impact on our business as well as that of our suppliers and receivers. UP today provides U.S.-Mexico service with TFM via Laredo. I understand that KCS has given assurances to the STB that it will work with UP so that UP-TFM service via the Laredo gateway will be handled fairly, efficiently and without discrimination. Therefore, we ask the STB to impose conditions on approval of the transaction. Those conditions will ensure that we continue to receive efficient UP-TFM service offerings. In short, we ask that the STB require the KCS and its partners to commit in concrete and enforceable terms to competitive rail service between the U.S. and Mexico.

We ask that the STB require NAFTA Rail to abide by KCS's promises to provide the following:

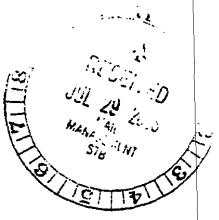
- Fair Treatment and Efficient Operations at the Laredo Bridge
- Non-Discrimination for Service in Mexico
- Equitable and Competitive Rate Factors for UP-TFM Routings via the Laredo Gateway

I appreciate the Board's consideration of these views.

Sincerely,
Steve Fitzgerald

Pulp Fiber Logistics Manager

BEFORE THE
SURFACE TRANSPORTATION BOARD
UNITED STATES DEPARTMENT OF TRANSPORTATION



Finance Docket No. 34342

KANSAS CITY SOUTHERN

-- CONTROL --

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY
and
THE TEXAS MEXICAN RAILWAY COMPANY

SUBMISSION OF
WEYERHAEUSER COMPANY

Introduction:

My name is John B. Ficker. I am employed by Weyerhaeuser Company as its Logistics Development Manager. My business address is: Weyerhaeuser Company, PO Box 9777 Federal Way, WA 98063-9777. I am familiar with all of Weyerhaeuser's facilities and its transportation requirements. I have worked in the transportation industry for thirty years. I have worked for Weyerhaeuser since 1986. For the first four years of my employment, I was Southern Transportation Manager. In that position, I was responsible for transportation from and to eleven (11) Weyerhaeuser manufacturing facilities and forty (40) distribution centers east of the Rocky Mountains. In 1990, I assumed my current responsibilities, which include reviewing Weyerhaeuser's transportation agreements, determining whether they comply with applicable regulations and statutes, and representing Weyerhaeuser before regulatory agencies. I am a registered practitioner before the Surface Transportation Board and am authorized to represent Weyerhaeuser before federal and state regulatory bodies and present this statement on behalf of Weyerhaeuser.

Background -- Weverhaeuser is a large user of rail:

Weyerhaeuser is a multi-plant forest products company with facilities across North America. Our 2002 annual sales were over $18 billion. We manufacture, distribute, and sell logs, woodchips, lumber, plywood, particleboard, hardboard, oriented strandboard, woodpulp, paper, pulpboard, shipping containers, chemicals, and related products. We own and operate large mill complexes in Alabama, Georgia, Mississippi, Kentucky, West Virginia, North & South Carolina, Oklahoma, Oregon, Washington, Louisiana, Tennessee, Pennsylvania, and Wisconsin, and the Canadian provinces of British Columbia, Alberta, Saskatchewan, Ontario, and New Brunswick. We have numerous packaging plants and distribution facilities across the United States, Mexico, and Canada. We also own and operate five Class III shortline common carrier railroads. Weyerhaeuser is a significant user of rail transportation services in both the United States, Canada and Mexico.

Comments on the Proposed Transaction:

Weyerhaeuser believes that the proposed transaction will have a positive impact on the rail environment in both the United States and Mexico, and as such we support the transaction. Weyerhaeuser has some concerns, which we believe the Board should address in this case. The commonly controlled railroad must insure that all existing gateways will remain open and it will not provide undue preference to any gateway. The commonly controlled railroad must continue to offer competitive rates to and from other connecting railroads.

Weyerhaeuser's major concern is the need for the commonly controlled railroad to provide a 'firewall' between its marketing effort and that of the Mexican carrier TFM who will become a partner in the new NAFTA railway. Without such protection, the KCS/TM will have an unfair advantage over the other connecting railroads. The commonly controlled carrier must provide the Board with assurances and process, which can be monitored to insure the impartiality of its Mexican partner in its dealings with other railroads.

Summary:

Weyerhaeuser supports the proposed transaction with the provision that a verifiable 'firewall' can be developed between the Mexican partner and its US partners.


14

Comments Exhibit 14
Public

1992 HORIZONTAL MERGER GUIDELINES
[WITH APRIL 8, 1997, REVISIONS TO SECTION 4 ON EFFICIENCIES]

The U.S. Department of Justice ("Department") and Federal Trade Commission ("Commission") today jointly issued Horizontal Merger Guidelines revising the Department's 1984 Merger Guidelines and the Commission's 1982 Statement Concerning Horizontal Merger Guidelines. The release marks the first time that the two federal agencies that share antitrust enforcement jurisdiction have issued joint guidelines.

Central to the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines is a recognition that sound merger enforcement is an essential component of our free enterprise system benefitting the competitiveness of American firms and the welfare of American consumers. Sound merger enforcement must prevent anticompetitive mergers yet avoid deterring the larger universe of procompetitive or competitively neutral mergers. The 1992 Horizontal Merger Guidelines implement this objective by describing the analytical foundations of merger enforcement and providing guidance enabling the business community to avoid antitrust problems when planning mergers. The Department first released Merger Guidelines in 1968 in order to inform the business community of the analysis applied by the Department to mergers under the federal antitrust laws. The 1968 Merger Guidelines eventually fell into disuse, both internally and externally, as they were eclipsed by developments in legal and economic thinking about mergers.

In 1982, the Department released revised Merger Guidelines which, reflecting those developments, departed dramatically from the 1968 version. Relative to the Department;s actual practice, however, the 1982 Merger Guidelines represented an evolutionary not revolutionary change. On the same date, the Commission released its Statement Concerning Horizontal Mergers highlighting the principal considerations guiding the Commission's horizontal merger enforcement and noting the "considerable weight" given by the Commission to the Department's 1982 Merger Guidelines.

The Department's current Merger Guidelines, released in 1984, refined and clarified the analytical framework of the 1982 Merger Guidelines. Although the agencies' experience with the 1982 Merger Guidelines reaffirmed the soundness of its underlying principles, the Department concluded that there remained room for improvement.

The revisions embodied in the 1992 Horizontal Merger Guidelines reflect the next logical step in the development of the agencies' analysis of mergers. They reflect the Department's experience in applying the 1982 and 1984 Merger Guidelines as well as the Commission's experience in applying those guidelines and the Commission's 1982 Statement. Both the Department and the Commission believed that their respective Guidelines and Statement presented sound frameworks for antitrust analysis of mergers, but that improvements could be made to reflect advances in legal and economic thinking. The 1992 Horizontal Merger Guidelines accomplish this objective and also clarify certain aspects of the Merger Guidelines that proved to be ambiguous or were interpreted by observers in ways that were inconsistent with the actual policy of the agencies.

The 1992 Horizontal Merger Guidelines do not include a discussion of horizontal effects

from non-horizontal mergers (e.g., elimination of specific potential entrants and competitive problems from vertical mergers). Neither agency has changed its policy with respect to non-horizontal mergers. Specific guidance on non-horizontal mergers is provided in Section 4 of the Department's 1984 Merger Guidelines, read in the context of today's revisions to the treatment of horizontal mergers.

A number of today's revisions are largely technical or stylistic. One major objective of the revisions is to strengthen the document as an analytical road map for the evaluation of mergers. The language, therefore, is intended to be burden-neutral, without altering the burdens of proof or burdens of coming forward as those standards have been established by the courts. In addition, the revisions principally address two areas.

The most significant revision to the Merger Guidelines is to explain more clearly how mergers may lead to adverse competitive effects and how particular market factors relate to the analysis of those effects. These revisions are found in Section 2 of the Horizonal Merger Guidelines. The second principal revision is to sharpen the distinction between the treatment of various types of supply responses and to articulate the framework for analyzing the timeliness, likelihood and sufficiency of entry. These revisions are found in Sections 1.3 and 3.

The new Horizontal Merger Guidelines observe, as did the 1984 Guidelines, that because the specific standards they set out must be applied in widely varied factual circumstances, mechanical application of those standards could produce misleading results. Thus, the Guidelines state that the agencies will apply those standards reasonably and flexibly to the particular facts and circumstances of each proposed merger.

0. PURPOSE, UNDERLYING POLICY ASSUMPTIONS AND OVERVIEW

These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agency") concerning horizontal acquisitions and mergers ("mergers") subject to section 7 of the Clayton Act,[1]

to section 1 of the Sherman Act,[2]

or to section 5 of the FTC Act.[3] They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers.[4] By stating its policy as simply and clearly as possible, the Agency hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.

Although the Guidelines should improve the predictability of the Agency's merger enforcement policy, it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. Moreover, information is often incomplete and the picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines. Therefore, the Agency will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger.

0.1 Purpose and Underlying Policy Assumptions of the Guidelines

The Guidelines are designed primarily to articulate the analytical framework the Agency applies in determining whether a merger is likely substantially to lessen competition, not to describe how the Agency will conduct the litigation of cases that it decides to bring. Although relevant in the latter context, the factors contemplated in the Guidelines neither dictate nor exhaust the range of evidence that the Agency must or may introduce in litigation. Consistent with their objective, the Guidelines do not attempt to assign the burden of proof, or the burden of coming forward with evidence, on any particular issue. Nor do the Guidelines attempt to adjust or reapportion burdens of proof or burdens of coming forward as those standards have been established by the courts.(5) Instead, the Guidelines set forth a methodology for analyzing issues once the necessary facts are available. The necessary facts may be derived from the documents and statements of both the merging firms and other sources.

Throughout the Guidelines, the analysis is focused on whether consumers or producers "likely would" take certain actions, that is, whether the action is in the actor's economic interest. References to the profitability of certain actions focus on economic profits rather than accounting profits. Economic profits may be defined as the excess of revenues over costs where costs include the opportunity cost of invested capital.

Mergers are motivated by the prospect of financial gains. The possible sources of the financial gains from mergers are many, and the Guidelines do not attempt to identify all possible sources of gain in every merger. Instead, the Guidelines focus on the one potential source of gain that is of concern under the antitrust laws: market power.

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.(6) In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-coordinated conduct--conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.

Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

While challenging competitively harmful mergers, the Agency seeks to avoid

unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral. In implementing this objective, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

0.2 Overview

The Guidelines describe the analytical process that the Agency will employ in determining whether to challenge a horizontal merger. First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. The process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or to facilitate its exercise.

1. MARKET DEFINITION, MEASUREMENT AND CONCENTRATION

1.0 Overview

A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.

The analytic process described in this section ensures that the Agency evaluates the likely competitive impact of a merger within the context of economically meaningful markets--i.e., markets that could be subject to the exercise of market power. Accordingly, for each product or service (hereafter "product") of each merging firm, the Agency seeks to define a market in which firms could effectively exercise market power if they were able to coordinate their actions.

Market definition focuses solely on demand substitution factors--i.e., possible consumer responses. Supply substitution factors--i.e., possible production responses--are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry. See Sections 1.3 and 3. A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test. The "small but significant and non-transitory" increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price

15

Comments Exhibit 15 **KCS-14**
Public **TM-14**

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S AND THE TEXAS MEXICAN RAILWAY COMPANY'S RESPONSES AND OBJECTIONS TO CANADIAN NATIONAL RAILWAY COMPANY'S FIRST SET OF DOCUMENT PRODUCTION REQUESTS AND INTERROGATORIES TO APPLICANTS

Pursuant to 49 C.F.R. §§ 1114.21-.31, Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, The Texas Mexican Railway Company, and Mexrail, Inc. (collectively "Respondents") respond to the discovery requests served by Canadian National Railway Company ("CN") on June 17, 2003 (the "Requests") as follows:

GENERAL RESPONSES

Respondents hereby provide the following general objections to the June 17, 2003 discovery requests served by CN:

1. The use of "KCS" in these responses shall include Kansas City Southern, The Kansas City Southern Railway Company and Gateway Eastern Railway Company.

2. The use of "Tex Mex" in these response shall mean The Texas Mexican Railway Company and Mexrail, Inc.

reduction of source competition." Produce all documents considered by Mr. Grimm in connection with this presumption.

RESPONSE: The "strong presumption" referenced by Dr. Grimm arises from a review of the systems referred to in his statement. The fact that the Mexican and U.S. systems connect at the Laredo Bridge (and KCS and Tex Mex connect at Beaumont) with no overlapping routes serves as the bases for the presumption.

2. State whether Curtis Grimm considers source competition to be a form of horizontal competition or some other type of competition, and, if some other type of competition, identify the type and explain why it is not a form of horizontal competition.

RESPONSE: Source competition, as Dr. Grimm defines it in his two verified statements, involves a reduction in independent railroad routings and could be considered a form of horizontal competition.

3. State whether Curtis Grimm examined the possibility and extent of competition between (a) movements of a commodity originating in Mexico, moving over TFM, and terminating at U.S. destinations, on the one hand, and, on the other, (b) movements of the same or a substitutable commodity originating on or otherwise moving over KCS or Tex Mex and terminating at the same U.S. destinations. If the answer is affirmative, describe the results of the examination and produce all documents considered in connection with the examination. If the answer is negative, explain why Mr. Grimm did not examine the possibility and produce all documents considered by Mr. Grimm in connection with the answer.

RESPONSE: Dr. Grimm did not consider the possibility referenced in Interrogatory No. 3 because it would not result in a reduction of independent railroad routings.

4. Does Curtis Grimm contend that there are no imports to the U.S. from Mexico that move by rail over TFM and compete with U.S.-originated products that move by rail over KCS or Tex Mex and terminate at the same U.S. destinations as the imports from Mexico? Please explain the answer and produce all documents considered by Mr. Grimm in connection with the answer.

RESPONSE: Dr. Grimm makes no such contention.

5. State whether Curtis Grimm examined the possibility and extent of competition between (a) movements of a commodity originating in Mexico and terminating on TFM, on the one hand, and, on the other, (b) movements of the same or a substitutable commodity originating on or otherwise moving over KCS or Tex Mex and terminating at the same TFM destinations. If

the answer is affirmative, describe the results of the examination and produce all documents considered in connection with that examination. If the answer is negative, explain why Mr. Grimm did not examine the possibility and produce all documents considered by Mr. Grimm in connection with the answer.

RESPONSE: Dr. Grimm did not consider the possibility referenced in Interrogatory No. 5 because it would not result in a reduction of independent railroad routings.

6. Does Curtis Grimm contend that there are no exports from the U.S. to Mexico that move by rail over KCS or Tex Mex and compete with Mexican-originated products that terminate at the same Mexican destinations and that move by rail over TFM? Please explain the answer and produce all documents considered in connection with the answer.

RESPONSE: Dr. Grimm makes no such contention.

7. State TFM's stated reasons for desiring, and KCS's reasons for agreeing to, Article VII of the Stock Purchase Agreement.

RESPONSE: Respondents object to Interrogatory No. 7 on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiver of these objections, to the best of Respondents' recollection, TFM did not state any reason for desiring Article VII of the Stock Purchase Agreement. KCS proposed the call right by TFM so that if the Tex Mex transaction were rejected by regulators, TFM could regain possession of Tex Mex (or at least control its disposition). In addition, if the conditions placed on KCS's control of Tex Mex are too onerous that it damages TFM's access to improved competitiveness, the call right allows TFM to repurchase Tex Mex, returning the situation to the status quo.

8. Explain whether and how Article VII of the Stock Purchase Agreement will, during the period prior to termination of the repurchase right, affect KCS's incentives to maintain and invest in Tex Mex, or enhance Tex Mex service, and why Article VII is consistent with the public interest.

Respectfully submitted,

Richard H. Streeter
BARNES & THORNBURG
750 Seventeenth Street, NW
Suite 900
Washington, DC 20006
Tel: (202) 289-1313
Fax: (202) 289-1330

Attorney for The Texas Mexican Railway Company and Mexrail, Inc.

William A. Mullins
Sandra L. Brown
TROUTMAN SANDERS LLP
401 Ninth Street, NW
Suite 1000
Washington, DC 20004-2134
Tel: (202) 274-2950
Fax: (202) 654-5621

W. James Wochner
Thomas J. Healey
KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1303
Fax: (816) 983-1227

Attorneys for Kansas City Southern, The Kansas City Southern Railway Company, and Gateway Eastern Railway Company

July 2, 2003

16

Comments Exhibit 16
Public

REDACTED - To be filed on the public record **TM-44**

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND MISSOURI PACIFIC RR CO.
– CONTROL AND MERGER –
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO., SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

THE TEXAS MEXICAN RAILWAY COMPANY'S PETITION TO REOPEN DECISION NO. 44

Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660

Attorneys for The Texas
Mexican Railway Company

September 3, 1996

TM-44

BEFORE THE
SURFACE TRANSPORTATION BOARD

Union Pacific Corp., Union Pacific RR. Co. and Missouri Pacific RR Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Trans. Co., St. Louis Southwestern Rw. Co., SPCSL Corp. and The Denver and Rio Grande Western Corp.	**Finance Docket No. 32760**

THE TEXAS MEXICAN RAILWAY COMPANY'S
PETITION TO REOPEN DECISION NO. 44

Pursuant to 49 C.F.R. § 1115.3, the Texas Mexican Railway Company ("Tex Mex") files this petition to reopen the Board's Decision No. 44 in this proceeding.

Introduction and Summary

By this petition, Tex Mex requests the Board to remove the limitation imposed in that decision on the trackage rights granted to Tex Mex in Sub-Nos. 13 and 14 restricting Tex Mex's use of such rights to "the transportation of freight having a prior or subsequent movement on [Tex Mex's] Laredo-Robstown-Corpus Christi line." That limitation will have a relatively minor effect on Applicants' traffic but will have a major adverse effect on Tex

as a viable competitor to a merged UPSP. The evidence of Tex Mex's witnesses showed that granting unrestricted rights will produce $822,000 more in revenues and $250,000 more in net income to Tex Mex in the first year of operation that granting rights limited to traffic having a prior or subsequent movement on Tex Mex's line. In fact, the evidence showed that granting limited rights would leave Tex Mex with only $19,000 in net income in the first year of operation (instead of $269,000 with unrestricted rights). That income, though not negative, provides Tex Mex with little margin for weathering business cycles and, more importantly, competing aggressively for traffic.

These errors in the Board's decision are discussed more fully below and in the attached verified statements of Tex Mex's economic witnesses, Dr. Curtis Grimm and Joseph Ellebracht.[2/]

STATEMENT OF FACTS

On March 29, 1996, Tex Mex filed a responsive application seeking trackage rights over SP and UP lines from Robstown and Corpus Christi, Texas through Houston to a connection with KCS at Beaumont, Texas (Finance Docket No. 32760, Sub-No. 13) together with an application for terminal trackage rights over lines of the HB&T in Houston (Finance Docket No. 32760, Sub-No. 14). In those applications (contained in TM-23), Tex Mex stated:

[2/] This petition for reopening is based on material error and, to the extent the attached verified statements present new evidence, on new evidence. 49 C.F.R. § 1115.3(b). These statements appear as Appendices A and B hereto.

> Tex Mex seeks rights over those lines to permit it to carry overhead traffic and to serve all local shippers currently capable of receiving service from both the Union Pacific Railroad ("UP") and the Southern Pacific Transportation Company ("SP"), directly or through reciprocal switching, with full rights to interchange traffic with UP, SP and any other railroad at any interchange point on such lines.

TM-23 at 3. See also TM-23 at 158-174 (Operating Plan).

Tex Mex contended that the foregoing trackage rights were needed to preserve competition that would otherwise be lost as a result of the merger. Tex Mex also contended that they were needed to keep Tex Mex viable and thereby preserve essential rail services provided by Tex Mex for which there are no other transportation alternatives. Tex Mex's arguments and evidence concerning competition focused primarily on the importance of preserving competition in the market for rail services between the United States and Mexico, because that is a market in which Tex Mex is currently an important participant and because preserving competition in that market is vital to the policies of both countries as reflected in the North American Free Trade Agreement.

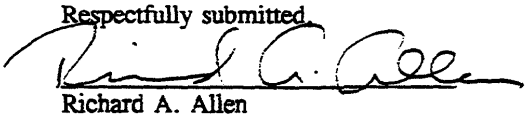
Tex Mex's arguments and evidence, however, were not limited to just that market. By seeking the right to use the trackage rights to serve all shippers currently capable of receiving service from both UP and SP and by seeking full interchange rights with all other railroads at any point on the lines, such as HB&T and the Port Terminal Railway Association ("PTRA") in Houston, Tex Mex's applications served to preserve the existing level of competition for all shippers on the lines in question with respect to <u>all</u> their traffic, not just that moving to and from Mexico or to and from points on Tex Mex's current line. Thus, the traffic and revenue projections in Tex Mex's traffic study, performed by Joseph Ellebracht,

Although Tex Mex correctly stated in its rebuttal statement that it could survive without this traffic, it should be apparent that its survival will be extremely tenuous under the limitation imposed by the Board.[7/] Its marginal income will hardly be sufficient to permit it to weather adverse business cycles of any substantial duration, and will make it very difficult to compete aggressively against UPSP and BNSF with its trackage rights.

CONCLUSION

The Board should reopen Decision No. 44 in this proceeding and remove the routing restriction on the trackage rights granted to Tex Mex in Sub-No. 13 and Sub-No. 14.

Respectfully submitted,



Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
Suite 600
888 17th Street, N.W.
Washington, D.C. 20036-3939

Attorneys For Texas Mexican Railway Company

Dated: September 3, 1996

7/ As noted earlier, Tex Mex's submission of evidence showing that it could survive without this traffic was not to suggest that the traffic was unimportant but was for the purpose of ensuring that the Board would not reject is applications in their entirety if it concluded, contrary to Tex Mex's contention, that the right to carry it had not been justified.

REDACTED - To be filed on the public record

TM-34

Comments Exhibit 17
Public

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORP., UNION PACIFIC RR. CO. AND MISSOURI PACIFIC RR CO.
– CONTROL AND MERGER –
SOUTHERN PACIFIC RAIL CORP., SOUTHERN PACIFIC TRANS. CO., ST. LOUIS SOUTHWESTERN RW. CO., SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN CORP.

Finance Docket No. 32760, Sub No. 13

THE TEXAS MEXICAN RAILWAY CO.
– TRACKAGE RIGHTS OVER LINES OF
THE UNION PACIFIC RR. CO. AND SOUTHERN PACIFIC TRANS. CO.

Finance Docket No. 32760, Sub No. 14

THE TEXAS MEXICAN RAILWAY COMPANY
– TERMINAL TRACKAGE RIGHTS OVER LINES OF
THE HOUSTON BELT & TERMINAL RAILWAY CO.

REBUTTAL IN SUPPORT OF THE RESPONSIVE APPLICATION OF THE TEXAS MEXICAN RAILWAY COMPANY

Richard A. Allen
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W., Suite 600
Washington, D.C. 20006-3939
(202) 298-8660
Attorneys for The Texas
Mexican Railway Company

May 14, 1996

REBUTTAL VERIFIED STATEMENT

OF

JOSEPH F. ELLEBRACHT

1. INTRODUCTION

My name is Joseph F. Ellebracht. I am an independent transportation consultant, and I previously submitted a verified statement in support of Tex Mex's responsive application, in TM-23. Two errata statements were also filed in connection with that verified statement. In this statement I will respond to some of the comments made about my verified statement and the Tex Mex responsive application.

2. SUMMARY OF MY PREVIOUS STATEMENT.

My previous statement in TM-23 included the following principal findings and conclusions:

Tex Mex and SP, operating together, have been effective and aggressive competitors to UP for rail traffic to and from Mexico. Shippers of that traffic have benefitted from this competition among U.S. railroads notwithstanding the current state ownership of the rail system in Mexico.

SP has been essential to Tex Mex's ability to serve its international and local markets. Also, the impact of the recent BNSF merger will likely be positive for SP-Tex Mex service, absent a UP/SP merger.

3. UNREBUTTED TESTIMONY

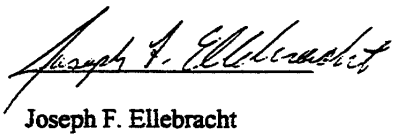
While many comments were made by various parties about my testimony, none of Applicants' witnesses or BNSF's witnesses took issue with the following conclusions that I reached:

- The SP-Tex Mex route has been an effective competitor to UP for traffic through Laredo.
- SP has made extraordinary efforts to develop the Mexican market with Tex Mex, by maintaining a substantial sales force in Mexico, by establishing a special marketing group to eliminate barriers to using the SP-Tex Mex route, and by making substantial investments to help the Mexican railway system develop its capabilities.
- Truck and water competition are not sufficient to constrain significantly rates for rail transportation between the U.S. and Mexico.
- Shippers of goods by rail between the United States and Mexico have benefitted from competition between U.S. railroads despite the state ownership of the Mexican rail system.
- Railroad marketing personnel know that there is generally a range of prices that *may* be charged for rail transportation, due to modal and geographic competition, but the price that *will* be charged is a function of the amount and character of rail-to-rail competition. Railroad marketing personnel are acutely aware of the rail-to-rail competition they face when bidding on significant traffic flows. (The testimony of SP's Mr. Gazzetta, in UP-SP - 231, Volume 2, Part A, shows this awareness very clearly.)

VERIFICATION

I, Joseph F. Ellebracht, certify under penalty of perjury the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on May 10, 1996.



Joseph F. Ellebracht


18

Comments Exhibit 18
Public

KCS-33

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND REQUEST FOR CONDITIONS

VOLUME I

Richard P. Bruening
Robert K. Dreiling
The Kansas City Southern
Railway Company
114 West 11th Street
Kansas City, Missouri 64105
Tel: (816) 556-0392
Fax: (816) 556-0227

James F. Rill
Sean F.X. Boland
Virginia R. Metallo
Collier, Shannon, Rill & Scott
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
Tel: (202) 342-8400
Fax: (202) 338-5534

John R. Molm
Alan E. Lubel
William A. Mullins
David B. Foshee
Troutman Sanders LLP
601 Pennsylvania Avenue, N.W.
Suite 640 - North Building
Washington, D.C. 20004-2609
Tel: (202) 274-2950
Fax: (202) 274-2994

Attorneys for The Kansas City Southern
Railway Company

March 29, 1996

VERIFIED STATEMENT

OF

CURTIS M. GRIMM

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY --CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

I. INTRODUCTION

My name is Curtis M. Grimm, and I am Professor and Chair of Transportation, Business and Public Policy, College of Business and Management, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

My background includes extensive exposure to public policy issues regarding transportation, including Interstate Commerce Commission ("ICC") merger adjudication. I have previously been employed by the Wisconsin Department of Transportation, the ICC, and the Australian Bureau of Transport and Communication Economics, and I have provided consulting services to several other government agencies and private firms regarding

> In short, Baumol and the others have documented that, with very easy entry and exit, a natural monopoly has almost all the attractive characteristics of a competitive market, eliminating the need for regulation. They appropriately call such a natural monopoly a 'contestable' natural monopoly.

VI. RAIL IS THE APPROPRIATE PRODUCT MARKET

In my academic writings and previous ICC testimony, I have consistently argued that rail is the appropriate product market, and that we should reject a market definition that includes other modes within the product market. In determining whether or not a shipper received access to BNSF, Applicants did not consider the type of commodity shipped or the distance the commodity was shipped to the receiver. All 2-to-1 shippers, as defined by Applicants, received BNSF access whether or not the commodity in question may also be easily transported by truck, barge, or air. In other words, Applicants have accepted the notion that the relevant product market was the transportation of products by rail, *i.e.*, reduction of intramodal competition.[61]

Focusing on whether or not there is a reduction in intramodal competition, *i.e.*, competition between rail carriers, is entirely consistent with Commission precedent. *SFSP*, 2 I.C.C. 2d 709, 758 (1986)("[T]he relevant product market here is railroad freight transportation. Equally as clear is the necessity . . . for this Commission to assure the continuation of adequate levels of rail intramodal competition."); *BNSF*, slip op. at 59 ("We rest this conclusion primarily upon continued intramodal competition."). *See also* the *UP/MP/WP* case basing the decision largely on econometric estimates of low cross-elasticity

[61] It would be fundamentally unfair to apply a different standard of what constitutes the relevant product market to KCS while at the same time imposing Applicants' proposed conditions which rely on a completely different definition of the relevant product market.

of demand between rail and truck;[62] and *Chicago, Milwaukee, St. Paul, and Pacific Railroad Company-Reorganization-Acquisition by Grand Trunk Corporation*, 2 I.C.C.2d 161, 224-225 (1984)("*MILW-GTW*")(defining the relevant product market as the transportation of freight by rail).

While the Commission has examined whether or not freight transportation by other modes should be included in the same product market as rail freight transportation for the purpose of determining the competitive effects of a proposed transaction,[63] the focus of most, if not all, prior merger cases has been the reduction of transportation in the intramodal market. Even in the *UP/MKT* proceeding, where the Commission did consider intermodal and intramodal transportation in defining the relevant product market, the Commission's ultimate conclusion rested on the continued presence of intramodal competition as an effective constraint on rates.[64] Accordingly, in defining the relevant product market, focusing primarily on intramodal competition is appropriate. The Commission has supported

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[62] *Union Pacific Corporation, Pacific Rail System, Inc. and Union Pacific Railroad Company -- Control -- Missouri Pacific Corporation and Missouri Pacific Railroad Company, Finance Docket No. 30,000*, 366 I.C.C. 459, Appendix E, at 673 (1982) ("*UP\MP\WP*").

[63] *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Missouri-Kansas-Texas Railroad Company*, 4 I.C.C.2d 409 (1988) ("*UP/MKT*").

[64] "We conclude that, post-merger, ample transportation competition will remain throughout the MKT service territory. We rest this conclusion primarily upon continued intramodal competition." *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Missouri-Kansas-Texas Railroad Company, et al.* 4 I.C.C.2d 409 (1988) ("*UP/MKT*").

this position in important rail merger cases by rejecting efforts to include motor carrier and barge in its definition of relevant markets.

Although truck competition can supplement inadequate intramodal competition for some products and markets, it is not an effective substitute for rail to rail competition. The relative costs of truck and rail, and thus the extent to which motor carriers are competitive with rail in a particular market, depend on the commodity being transported and the distance between origin and destination.[65] For longer distances and for movements of bulk products, rail usually has a significant cost advantage. The nature of products, volume and commercial value are factors present that would tend to limit intermodal applications. Furthermore, given that railroads set prices to a large degree individually on a movement-by-movement basis, the fact that some shippers may have truck or source alternatives to a monopoly rail firm for some movements does not help other shippers -- or even those same shippers, for their movements where no competitive alternatives exist.

As will be discussed in more detail below, other modes cannot provide an adequate counterbalance for the diminution of rail competition in the proposed transaction.

VII. TRUCKS WILL NOT PROVIDE AN EFFECTIVE ALTERNATE MODE OF TRANSPORTATION FOR MOST OF THE COMMODITIES INVOLVED IN THE 2-TO-1 AND 3-TO-2 MARKETS

A careful assessment of the record confirms that truck competition is not as pervasive as UP suggests and does not provide a discipline on rail rates for the vast majority of all

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[65] Keeler, Theodore, *Railroads, Freight and Public Policy*, Brookings, Washington, D.C., 1983; *accord* "In evaluating the effect of the consolidation on long-haul movements of bulk commodities, the focus may be on retaining effective intramodal competition." 49 CFR 1180.1(c)(2)(i).

VERIFICATION

Personally appeared the undersigned Curtis Grimm, PhD.,who under oath states that the information contained in the foregoing Verified Statement is true and correct.

Curtis Grimm

Curtis Grimm, PhD.

Sworn to and subscribed
before me this 26 day
of March, 1996.

Kathleen M. Louth
Notary Public

My Commission Expires: 8/1/97



Comments Exhibit 19
Public

UNION PACIFIC'S CONDITION PROPOSALS

If the Board approves KCS control of Tex Mex, it should impose the following conditions on the Applicants:

1. Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

2. Applicants must adhere to their commitments in this proceeding that KCS will:

   a. work cooperatively with UP toward efficient utilization of the Laredo Bridge;

   b. negotiate in good faith with UP to develop new dispatching protocols for the Laredo Bridge;

   c. use its control over TFM to ensure that UP and BNSF are provided the same level of service they have experienced in the past and to making improvements to that level of service where possible;

   d. use its control over TFM to require TFM to cooperate with UP and BNSF on pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through train service, providing excellent service, and promptly quoting rates;

   e. work with UP and BNSF to develop a methodology for measuring and enforcing service standards for traffic handled by TFM via the Laredo Gateway; and

   f. keep the Laredo Gateway open on commercially reasonable terms.

   Each of these commitments will be enforceable as if it were a condition imposed directly by the Board.

3. To implement the commitment set forth in Condition 2(b), Applicants must negotiate in good faith with UP to develop new dispatching protocols for the Laredo Bridge. Unless the parties agree otherwise, such protocols should provide for (i) a jointly staffed operations center responsible for Laredo Bridge operations, (ii) an express obligation to manage Bridge operations in a manner that is nondiscriminatory and that will achieve maximum efficiency in operation of the Bridge, and (iii) a mechanism for assuring that each U.S. carrier serving the Laredo Gateway has, at any given time, access to Bridge capacity commensurate with the percentage of traffic for which customers have selected that carrier for the movement north of the Laredo Gateway. Applicants shall submit agreed protocols for the Laredo Bridge to the Board within 90 days of the effective date of this Decision. If they have not reached an agreement within that period (or jointly with UP sought additional time for further negotiations), the Board will initiate a proceeding to develop terms that will implement this condition.

4. To implement the commitments set forth in Conditions 2(c)-(e), which will remain enforceable independent of this condition, Applicants must negotiate in good faith with UP to develop an agreement establishing methods for measuring compliance by Applicants with the commitments regarding TFM service and mechanisms for enforcing compliance with those commitments. Applicants shall submit their agreement to the Board within 90 days of the effective date of this Decision. If they have not reached an agreement within that period (or jointly with UP sought additional time for further negotiations), the Board will initiate a proceeding to develop terms that will implement this condition.

5. To implement the commitments set forth in Conditions 2(f), which will remain enforceable independent of this condition, Applicants must negotiate in good faith with UP to develop an agreement to ensure that the Laredo Gateway remains open on commercially reasonable terms. The parties should consider implementing this commitment through an agreement having the in accord with an agreement having the attributes outlined in Appendix C to the Verified Statement of John T. Gray. Applicants shall submit their agreement to the Board within 90 days of the effective date of this Decision. If they have not reached an agreement within that period (or jointly with UP sought additional time for further negotiations), the Board will initiate a proceeding to develop terms that will implement this condition.

20

Comments Exhibit 20
Public

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S OPENING COMMENTS ON PROPOSED MERGER RULES

James V. Dolan
Lawrence E. Wzorek
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5357

Carl W. von Bernuth
Union Pacific Corporation
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-6304

J. Michael Hemmer
David L. Meyer
Raymond A. Atkins
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

Attorneys for Union Pacific Corporation and Union Pacific Railroad Company

November 17, 2000

The Board should give merger applicants credit for all proposals that enhance competition. Applicants usually identify enhancements to competition in their applications, and some of those improvements are broader than remedies for competitive harms. For example, UP's agreement with BNSF in the UP/SP proceeding to create two competing rail routes in the West Coast's Interstate 5 Corridor created competition that had never before existed. The Board should not, however, impose new competition on a merger. If competitive harms cannot be addressed and are not offset by sufficient public benefits, the Board should reject the merger.

b. Open gateways

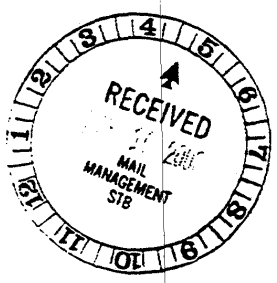
UP agrees with the thrust of the Board's proposal but believes that it does not provide sufficient guidance to potential applicants about what constitutes an "effective plan" for preserving established routes. The Board's proposed rules instead defer developing substantive standards for this rule until the next merger case. UP recommends that the Board consider establishing specific protection for gateways along the lines proposed by UP in Appendix A, pp. 33-34.

V. Shortline and Regional Railroad Issues

UP argued that all of the concerns expressed by shortline and regional railroads could be addressed in the Board's general rules addressing competition and service issues. Appendix A, pp. 36-37. UP notes that the Board's proposed rules appear to adopt this approach. UP also joins AAR's comments addressing shortline and regional issues.

VI. Three-to-Two Issues

UP's Initial Comments. UP asked the Board to affirm that the Board will evaluate on a case-by-case basis the effects of transactions that reduce the number of rail carrier alternatives from three to two. Appendix A, pp. 37-38.



BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

UNION PACIFIC'S
COMMENTS AND INITIAL PROPOSALS

James V. Dolan
Lawrence E. Wzorek
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5357

J. Michael Hemmer
David L. Meyer
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

Carl W. von Bernuth
Union Pacific Corporation
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-6304

Attorneys for Union Pacific Corporation
and Union Pacific Railroad Company

May 16, 2000

(4) If the Board grants temporary access and the railroads cannot agree on compensation, the Board will apply compensation standards under 49 U.S.C. §§ 11102 and 11123.

(5) The entity obtaining access must be a rail carrier with operating authority from the Board, and the Board must determine that such carrier can operate safely to address the service problem.

(6) Remedies are available only to shippers lacking existing rail alternatives; provided, however, that the complainant may seek compensation if it can show that the other serving carriers are disabled by the merger-related service problem.

(7) If necessary to effectuate the temporary access remedy, the Board may temporarily suspend a shipper's contractual duty to ship specified volumes of traffic under rail service contracts with the consolidated carrier. The suspension would apply only for the time period necessary to alleviate the service problem.

IV. Promoting and Enhancing Competition

The Board seeks comment on various mechanisms by which rail merger policy might be used to promote and enhance, rather than simply preserve, competition. Most of these mechanisms address the effects of railroad mergers on so-called "bottleneck segments," which are rail segments that connect shipper facilities exclusively served by one carrier with gateways where that carrier connects with other carriers.[4]

UP does not favor using the Board's jurisdiction over rail mergers to alter the competitive structure of the rail industry other than to address the effects of a merger. UP recognizes, however, that most shippers do not want railroad mergers to affect their

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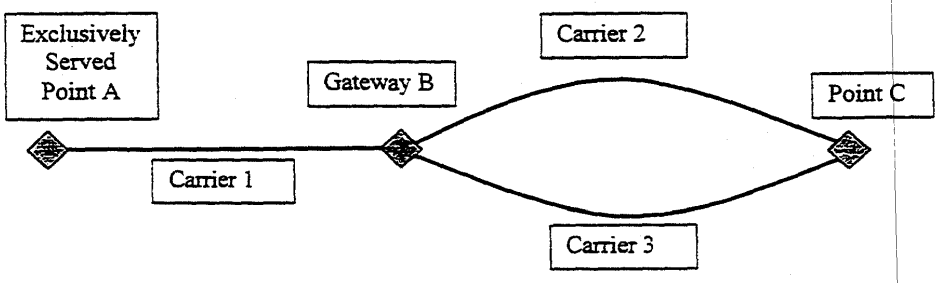
[4] As the Board's March 31, 2000 decision notes, it is well established that the ICCTA generally does not require rail carriers to establish separately challengeable rates for bottleneck segments. The Board's so-called "Bottleneck" rate decisions clarify the specific circumstances under which carriers may be required to establish, and shippers permitted to challenge, bottleneck rates. See Docket No. 41242, Central Power & Light Co. v. Southern Pac. Transp. Co., Decision served Dec. 31, 1996, clarified in Decision served Apr. 30, 1997, aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir.), cert. denied, 120 S. Ct. 372 (1999); Union Pacific R.R. v. STB, 202 F.3d 337 (D.C. Cir., 2000).

future opportunities to use established interline routing options. Shippers also do not want mergers either to create new bottlenecks or expand existing bottlenecks. Some shippers are concerned that combinations may eliminate competitive routing options that were previously available for the portion of the overall movement between the gateway and either the origin or destination of the traffic – in effect extending the bottleneck segment. Some shippers are also concerned that, where carriers have established separately challengeable bottleneck rates, a combination with another carrier capable of completing the movement could extinguish the shipper's ability to challenge the bottleneck rate.

UP does not share the view of many shippers that end-to-end mergers generally have anticompetitive vertical effects, and the Board must retain the basic economic and legal principles that guided its Bottleneck decisions. Nevertheless, if the nation's rail system is to be restructured into two transcontinental systems, the Board should take action to keep traditional gateways open. Vague assurances that gateways will stay open are not sufficient because there are too many ways to close them commercially.

UP proposes that the Board modify its rules to require combining carriers to make available at a shipper's request separately challengeable bottleneck rates between exclusively served facilities on their system and the predominant pre-merger gateway for the applicable traffic from those facilities. In the classic "rat-tail" diagram set forth below, if



Carriers 1 and 2 combined, they would be obligated, at the shipper's request, to establish a rate for the "bottleneck" segment between exclusively served Point A and Gateway B. This would preserve the shipper's pre-merger options, because the shipper could combine the A-to-B rate with rates offered by Carrier 3 to complete the movement from origin (Point A) to destination (Point C) and, if necessary, challenge the reasonableness of the A-to-B rate. In fact, such a condition would go somewhat beyond merely preserving the exclusively served shipper's routing options. In some cases, as where the traffic is now moving under joint or proportional rates, the reasonableness of the rate between Point A and Gateway B is not separately challengeable today.

The following specific language for a new section in Part 1180 would implement the proposal outlined above:

1180.__ Preservation of gateways and rate challenge options.

(a) A Class I rail carrier participating as a Primary Applicant in a *major* transaction approved by the Board (a "Participating Carrier") shall, upon request of an affected shipper, establish a rate for transportation (a "Segment Rate") applicable to traffic as to which no Participating Carrier served both the origin and destination of the traffic prior to consummation of the transaction (the "Subject Traffic"), between:

(1) any Exclusively Served Shipper Facility, which means any shipper facility (i) other than an automotive distribution ramp, intermodal facility, or transload facility (ii) that is located at any point on the carrier's system served exclusively by that carrier and no other rail carrier (either directly or via reciprocal switching, joint facility or other service arrangement) (iii) where traffic originated or terminated during the twelve months preceding the pre-filing notice under 49 C.F.R. § 1180.4(b) pertaining to the transaction; and

(2) the Pre-Transaction Gateway, which means the point of interchange, if one exists, that during the twelve months preceding the pre-filing notice under 49 C.F.R. § 1180.4(b) pertaining to the transaction, was (i) an actual interchange between the Participating Carrier and two or more other rail carriers, one of which was another Class I carrier participating in the transaction as a Primary Applicant, (ii) the interchange point most frequently used to move the Subject Traffic (or comparable traffic if the rate

would apply to new traffic) between the Exclusively Served Shipper Facility and the origin or destination of the traffic, and (iii) used by at least 100 cars of traffic originating or terminating at the Exclusively Served Shipper Facility.

(b) The shipper at whose request a Segment Rate is established pursuant to this rule shall be entitled to combine the Segment Rate with a rate or rates offered by a carrier other than the Participating Carrier for movement between the Pre-Transaction Gateway and the origin or destination of the Subject Traffic.

(c) The shipper at whose request a Segment Rate is established pursuant to this rule shall be entitled to challenge the Segment Rate as unreasonably high to the same extent and under the same standards as applicable to rate reasonableness challenges under 49 U.S.C. §§ 10701 and 10707. In determining whether the Participating Carrier is "market dominant," the Board will examine whether there is an absence of effective competition on the entire origin-to-destination route, rather than on the segment between the Exclusively Served Shipper Facility and the Pre-Transaction Gateway.

(d) A shipper facility served exclusively by a Class III rail carrier that is incapable of interchanging traffic with any carrier other than the Participating Carrier, or that is obligated by contract to interchange the majority of its traffic with the Participating Carrier, shall be treated as a facility served exclusively by the Participating Carrier for purposes of this rule. If the Participating Carrier lacks authority to establish a Segment Rate between the Exclusively Served Shipper Facility and the Pre-Transaction Gateway, it shall instead establish a Segment Rate between the point of interchange with the Class III carrier and the Pre-Transaction Gateway.

(e) The obligation to establish a Segment Rate shall also apply to any rail carrier (a "Trackage Rights Carrier") that receives trackage rights or other access to the lines of a Participating Carrier as a result of settlement agreements with the Primary Applicants or conditions imposed on the Primary Applicants by the Board. The Trackage Rights Carrier shall be obligated to establish a Segment Rate pursuant to subparts (a)-(d) above only (1) for traffic capable of being handled using the rights or other access granted to the Trackage Rights Carrier and (2) between Exclusively Served Shipper Facilities located on the Trackage Rights Carrier's system as it existed prior to the transaction and the applicable Pre-Transaction Gateway, if any, where such traffic was interchanged, during the twelve months preceding the pre-filing notice under 49 C.F.R. § 1180.4(b) pertaining to the transaction, with the Participating Carrier over whose lines access was granted.

Such a rule would preserve shippers' pre-merger routing and rate challenge options in a straightforward manner that would not unduly constrain the ability of the combined carrier to achieve efficiencies associated with the combination. Because it would

make use of existing mechanisms for challenging rates, the merging carriers would be able to estimate the costs of this condition in advance. And the condition would ensure that the major pre-transaction gateways would remain open.[5]

This approach is preferable to the options suggested by the Board:

- The Board's contract option would require the shipper to carry the burden of negotiating an agreement with the non-merging carrier on rates and all other attributes of the transportation. That commercial agreement might not be reached.
- The Board's through route alternative would require the merged carrier and connecting carriers to agree. Again, they might not reach agreement.
- The Board's reciprocal switching and trackage rights proposals would run afoul of the fundamental policy basis for the Board's Bottleneck decisions, which affirmed bottleneck carriers' traditional routing discretion and statutorily-recognized right to select their long-hauls.[6] Those proposals would go far beyond what is needed to offset effects of the merger.

No new rule should require the merged carrier to short-haul itself, depriving the carriers of the returns upon which they depend to attract capital, reinvest in their rail networks, and maintain and improve service.

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[5] Our proposed rule clarifies that the existence of transportation alternatives providing effective competition will be evaluated with respect to the entire movement from origin to destination, which is the transportation service of interest to the shipper. This will avoid the anomalous outcomes that would result were market dominance determinations based on competition for the bottleneck segment only, for example where intermodal competition between origin and destination provides a competitive constraint on rail rates but does not exist at a remote rail gateway where there is no reason at all for competition to exist. See, e.g., STB Docket No. 42038, Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry., Decision served July 8, 1999 (ignoring rail-truck alternative between coal mine and utility because there was no evidence of transportation competition at interchange point).

[6] Docket No. 41242, Central Power & Light Co. v. Southern Pac. Transp. Co., Decision served Dec. 31, 1996, pp. 4-11.

Our rule is also far superior to the long-discredited "DT&I" conditions. Those conditions imposed draconian and inefficient requirements to allow routing over all possible gateways and required rate and service parity regardless of the relative efficiencies of various routes. Any such requirement would create significant impediments to efficiency.

UP's proposed rule would supplement existing precedent governing Board analysis of the potential vertical competitive effects of proposed rail combinations. The Board has not established a hard-and-fast rule that end-to-end combinations can never have anticompetitive effects. Rather, the Board's so-called "one-lump" theory establishes a presumption that end-to-end mergers do not have such effects. The presumption can be rebutted, and shippers can seek additional remedies. See, e.g., Finance Docket No. 32549, BN/Santa Fe, Decision No. 38, served Aug. 23, 1995, p. 71, aff'd, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997).

V. Shortline and Regional Railroad Issues

All of the concerns expressed by shortline (Class III) and regional (Class II) railroads (collectively, "smaller railroads") can be addressed by the Board's general rules addressing competition and service issues. The service and bottleneck rate protections set forth in other new rules that UP has proposed would provide significant protections for Class III railroads and the shippers they serve. Additional rules specifically addressing shortline issues are not needed.

In particular, concerns regarding the appropriateness of contractual limits on interchange (sometimes called "paper barriers") are not the proper subject of general merger rules. The underlying contractual obligations did not arise from mergers and often are unaffected by mergers, particularly on UP. Issues relating to such contractual provisions were addressed in Ex Parte No. 575, Review of Rail Access and Competition Issues, and

COVINGTON & BURLING

Comments Exhibit 21
Public

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON, DC
NEW YORK
LONDON
BRUSSELS
SAN FRANCISCO

DAVID L. MEYER
TEL 202.662.5582
FAX 202.778.5582
DMEYER@COV.COM

July 30, 2003

BY HAND

William A. Mullins, Esq.
Baker & Miller PLLC
915 Fifteenth Street, NW
Suite 1000
Washington, DC 20005-2318

Dear Bill:

This letter responds to questions regarding UP's position raised in your July 21 letter.

First, you ask what UP means when it says that it does not oppose the creation of NAFTA Rail "if the NAFTA Rail carriers agree not to discriminate against UP traffic at the International Bridge at Laredo, and if TFM continues to support competitive UP-TFM service and rates." I believe that UP has made its position clear in a number of settings, but I am happy to respond to your specific questions:

a. "What do you mean by 'not discriminate?'"

UP's Response: By seeking protections to ensure that NAFTA Rail carriers "not discriminate," UP refers to any step that Tex Mex or TFM might take that would inappropriately favor TFM-Tex Mex traffic over UP-TFM traffic at the Laredo Bridge. One example of such discrimination would be efforts by Tex Mex and TFM to limit UP to 50 percent of the Bridge's capacity when more than 50 percent of Laredo traffic volumes were moving on UP routes north of Laredo.

b. "As you know, operations as the Bridge are governed by a series of agreements dating back to 1951 and KCS has committed to abide by such agreements. Does UP contend that such agreements currently "discriminate" against UP?"

UP's Response: UP believes that existing agreements may be open to multiple interpretations, but since TFM's creation have not been applied in a discriminatory way. However, those agreements contain inadequate protections against potential discriminatory

behavior by Tex Mex and TFM once their incentives change due to KCS's acquisition of control of Tex Mex and TFM.

c. "If UP believes the agreements discriminate against it, why has UP not sought to enforce its rights under those agreements, rather than seek STB intervention over purely private contacts?

UP's Response: As noted above, the problem is not existing discrimination, but the change in incentives caused by KCS's acquisition of control. In the past, when Tex Mex was controlled by TFM rather than KCS (and when TFM was controlled by Grupo TMM rather than KCS), Tex Mex carried out TFM's interest in maximizing rail traffic moving via Laredo regardless of which U.S. carrier handled it north of the border. KCS, by contrast, will have incentives to discriminate against UP-TFM traffic.

d. "What does UP mean by 'competitive UP-TFM service and rates?'

UP's Response: "Competitive UP-TFM service and rates" refers to UP-TFM rates and service offerings that reflect continued cooperation from TFM rather than efforts by TFM (under KCS control) to tilt the competitive playing field in favor of KCS/Tex Mex by causing UP-TFM options to become less attractive to customers.

e. "By 'competitive UP-TFM service and rates,' does UP believe that TFM should give UP the exact same divisions as it would give KCS and Tex Mex?"

UP's Response: No, UP does not propose that TFM should be required to give UP the exact same divisions as it would give KCS and Tex Mex. In fact, a requirement of equal divisions would not protect competition following KCS's acquisition of control because Nafta Rail could manipulate upward the TFM portion of its origin-to-destination rates, thereby rendering UP-TFM service offerings unattractive to shippers, while lowering the KCS/Tex Mex portion.

Applicants have committed in this case to keep the Laredo Gateway open on "commercially reasonable terms," but they have not provided any explanation of what terms they would regard as "commercially reasonable" or how their commitment would otherwise be implemented. UP believes the concept of "commercially reasonable terms" requires definition, and UP would be open to a number of potential ways of ensuring that shippers continue to have access to reasonably-priced UP-TFM services.

Second, you inquire about UP's position that UP and its customers should receive a share of Laredo Bridge capacity "commensurate with their share of the rail traffic crossing the Bridge:"

a. "By this suggestion, is UP claiming that if, for example, it currently has 80% of the market share for U.S./Mexico traffic at Laredo that it should be guaranteed the right to use the Bridge 80% of the time?"

UP's Response: No. UP is not seeking to lock in its current share of traffic moving via Laredo. If UP's share of traffic declines because Tex Mex wins more business, UP's allocation of Laredo Bridge capacity should decline commensurately. UP's position is that, at any given point in time, it should be allotted a share of Laredo bridge capacity equivalent to whatever share of traffic is moving in UP-TFM service via Laredo. Tex Mex and TFM should not be in a position to impose artificial constraints on UP's access to Laredo Bridge capacity by, for example, insisting that UP receive only 50 percent of the Bridge's capacity at a time when its share of traffic exceeds 50 percent. UP is prepared to discuss how best this principle could be implemented.

b. "If KCS were to guarantee UP's use of the Bridge based upon UP's current market share usage over the Bridge, how would KCS ever be able to increase its market share for U.S./Mexico traffic?"

UP's Response: The question misstates UP's position. As explained above (in response to item 2(a)), if KCS increased its market share, it would be entitled to a larger share of Laredo Bridge capacity.

c. "Under this suggestions [sic], wouldn't UP have 'locked-in' the Bridge's capacity so as to prevent NAFTA Rail from increasing their use and from being able to effectively compete against UP?"

UP's Response: There would be no "lock-in," for the reasons explained in 2(a) above.

Third, you ask what UP means when it says that TFM should not "discriminate against" UP connecting traffic in favor of Nafta Rail carriers with respect to service.

a. "What does UP mean by the word 'discriminate?'"

UP's Response: UP believes that this concept is quite straightforward. Under KCS control, TFM should cooperate with UP in providing existing levels of service on UP-TFM movements and working to improve those services, to the same extent that it cooperates with its Nafta Rail partners, unless circumstances (such as the relative volume of traffic) warrant different treatment. UP desires to impose no limitations on the degree to which TFM could cooperate with its Nafta Rail partners.

Fourth, you ask about UP's statement that KCS should use its control of TFM to cause TFM to continue providing UP with "equitable TFM rate factors."

a. "Please confirm that UP is requesting that TFM provide it with rates/divisions from or to the Laredo Gateway for only the TFM portion of the entire rail move."

UP's Response: There may be many ways to implement Applicants' commitment to keep the Laredo Gateway open "on commercially reasonable terms," not all of which would necessarily involve TFM rates or divisions. If Nafta Rail were to elect to keep the gateway open by making enforceable commitments regarding TFM's rates or divisions, UP confirms that the TFM rates or divisions would necessarily cover the portion of the movement on TFM's system, *i.e.*, between Laredo and the Mexican point served by TFM or its connections within Mexico.

b. "Please confirm that even if a rail movement could originate and terminate on NAFTA Rail (meaning a commonly controlled KCSR, Tex Mex, and TFM) that UP is still requesting that NAFTA Rail provide it with a rate/divisions requirement for only the TFM portion of the movement?"

UP's Response: See my response to item 4(a), above. If Nafta Rail were to agree with UP to keep the gateway open by making enforceable commitments regarding TFM's rates or divisions, UP believes that it would be especially important that such commitments apply to TFM rates or divisions for movements as to which UP and KCS/Tex Mex compete. If such commitments did not apply in those situations, competition would be extinguished.

c. "If a UP-TFM routing competes against a KCSR/Tex Mex/TFM routing, would UP consider the TFM portion of the route to be the 'bottleneck segment?'"

UP's Response:

UP is uncertain what meaning you intend by your use of the phrase "bottleneck segment," which has been used in different ways in different contexts by various parties. UP does believe that for a large portion of the traffic moving between the United States and Mexico via the Laredo gateway, the TFM portion of the route is an indispensable element of any competitive origin-to-destination transportation service offering, in part due to excessive trackage rights charges in Mexico.

d. "Is UP requesting KCS to provide UP with the same or 'equal' rates over the TFM bottleneck segment that KCS would provide itself over TFM?"

UP's Response: Not necessarily. See my response to item 1(e), above.

e. "Please confirm that if KCS is required to provide UP with 'equitable' rates at Laredo for the TFM portion of an entire origin/destination through route to/from the U.S. to Mexico that such a requirement would prevent NAFTA Rail from providing long haul pricing and instead would require NAFTA Rail to 'short haul' itself for the TFM portion of the move?"

UP's Response: UP is not seeking to prevent KCS from offering "long haul pricing." KCS should be free to price KCSR-Tex Mex-TFM movements as it wishes to attract traffic to its Nafta Rail system, and to lower those rates to reflect any efficiencies that KCS control might achieve. However, KCS should not force shippers to use less efficient long hauls on the Nafta Rail system by extinguishing competition provided by UP-TFM options, such as by establishing non-competitive TFM rate factors.

f. "For any location where UP currently has the ability to interchange with KCSR or Tex Mex, but interchanges with other carriers instead, is UP willing to give KCS the same rates/divisions that it gives to other carriers at that location?"

UP's Response: No, just as UP is not proposing that KCSR or Tex Mex provide UP with the same rates/divisions that it gives other carriers.

Also, your question is not germane to the competitive concerns raised by KCS's acquisition of control of Tex Mex and TFM. Applicants have made a commitment in this case to keep the Laredo Gateway open on commercially reasonable terms. As discussed above, implementing that commitment may or may not involve commitments respecting TFM's rates or divisions. But the need for some form of concrete and enforceable commitment arises in this case – but does not arise with respect to other existing interchange situations – because KCS control will adversely affect competition via the Laredo Gateway. .

Fifth, you ask several questions about the concept of "neutrality and non-discrimination."

a. "When UP speaks of 'neutrality' are they talking about neutral TFM rates (divisions) at the Laredo Gateway?"

b. "Does 'neutral' TFM rates mean 'equal' TFM rates – equal as being between UP and KCSR/TFM?"

UP's Response to (a) and (b): No. See my response to item 1(e), above.

c. "If UP does not mean neutral TFM rates between KCSR/Tex Mex and UP, then what commitment of 'neutrality' is UP referring to?"

d. "What 'non-discrimination' commitment is UP referring to in this section?"

UP's Response to (c) and (d): UP is referring to neutrality and non-discrimination with respect to the operation of the Laredo Bridge and the entire array of TFM cooperative steps on matters of interline service that have heretofore provided shippers with attractive UP-TFM transportation options via the Laredo Gateway, and which would continue to do so absent KCS's acquisition of control of Tex Mex and TFM. UP's concept of non-discrimination is described further in my response to item 3(a), above.

Finally, you suggest that UP's positions appear contrary to previous positions UP has taken before the Board and Congress. UP disagrees, as our comments in the Board's Class 1 merger rules proceeding confirm. UP will be explaining in its August 4 Comments in this proceeding why its request for Board conditions in this case is supported by existing Board precedent and Congress' rail transportation policies.

Sincerely,

David L. Meyer

bcc: J. Michael Hemmer
Lawrence E. Wzorek
Michael L. Rosenthal
Carolyn F. Corwin
Christopher D. Oatway
Ronald J. Baumgarten, Jr.

UP-7B

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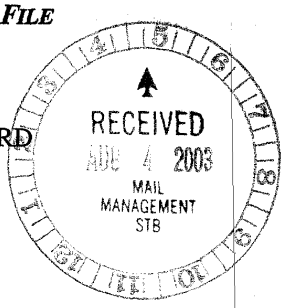

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

UNION PACIFIC RAILROAD COMPANY'S COMMENTS

VOLUME 2 of 2: VERIFIED STATEMENTS

J. MICHAEL HEMMER
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

CAROLYN F. CORWIN
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5582

Attorneys for Union Pacific Railroad Company

August 4, 2003

Contains Color Images

Gray

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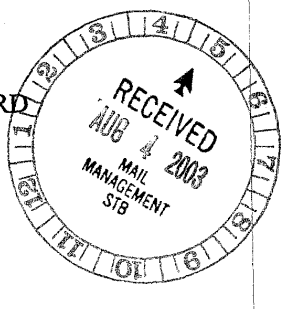

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

VERIFIED STATEMENT

OF

JOHN T. GRAY

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 5

II. KCS CONTROL OF TFM AND TEX MEX THREATENS TO UNDERMINE EFFECTIVE COMPETITION FOR U.S.-MEXICO RAIL TRAFFIC 8

A. Rail Transportation Plays a Vital Role in Trade between Mexico and Its NAFTA Trading Partners 8

B. The Laredo Gateway Is Increasingly Vital to U.S.-Mexico Rail Traffic 10

1. Shippers' Routing Choices Reflect Laredo's Importance 10

2. Laredo Has Significant Advantages Over Other U.S.-Mexico Gateways 12

a) Laredo's Extensive Border Infrastructure 13

b) TFM's Routes South of Laredo Offer Significant Advantages 16

c) TFM Has Cooperated Extensively With UP and Tex Mex to Develop Efficient Cross-Border Transportation Via Laredo 19

C. Unconditioned KCS Control of Tex Mex and TFM Will Harm Competition 20

1. TFM Has Acted Neutrally Under TMM Control, Allowing for Effective Competition by U.S. Carriers North of the Border 21

a) TFM has Cooperated Extensively with UP to Develop Efficient and Attractive UP-TFM Rail Transportation Offerings 22

2. KCS Control of both Tex Mex and TFM Will Create New Incentives to Tilt the Competitive Playing Field 22

3. KCS Will Be Able to Use Its Control of Tex Mex and TFM to Make UP-TFM Options Less Attractive to Customers 26

a) Anticompetitive Rate-Based Strategies 26

b) Anticompetitive Service-Based Strategies 31

4. There Are No Meaningful Efficiencies Flowing from the Transaction to Offset the Threat of Anticompetitive Effects 33

5. The Availability of UP-FXE Routes Via Eagle Pass or Other Transportation Options Would Not Allow Shippers to Avoid the Transaction's Anticompetitive Effects 35

III. UP'S PROPOSED LAREDO GATEWAY AND SERVICE CONDITIONS ARE NARROWLY TAILORED TO REMEDY THE ADVERSE COMPETITIVE EFFECTS OF AN UNCONDITIONED TRANSACTION WITHOUT INTERFERING WITH APPLICANTS' EFFORTS TO COMPETE USING NEW SINGLE-SYSTEM ROUTES 39

A. The Laredo Gateway Condition 41

B. The Service Condition 47

APPENDIX A EXISTING UP-TFM COOPERATION 51

APPENDIX B KCS ACCESS TO MAJOR EASTERN GATEWAYS 56

APPENDIX C ONE EFFECTIVE APPROACH FOR KEEPING THE LAREDO GATEWAY OPEN ON COMMERCIALLY REASONABLE TERMS 58

VERIFIED STATEMENT

OF

JOHN T. GRAY

My name is John T. Gray. I am Executive Director, Interline for Union Pacific Railroad Company ("UP"). In this capacity I am responsible for analysis of strategic issues and interline relationships with other Class I railroads and short lines. Previously, I was UP's Vice President and General Manager, Business Development. In this position I was responsible for interline management, and industrial development, as well as UP's Mexico business group. Prior to that I was Vice President and General Manager of UP's Industrial Products Business Unit with responsibilities for a business line with approximately $2 billion in annual revenue.

I came to Union Pacific in 1996 as a result of the UP/SP merger. Prior to the merger, I served as SP's Vice President-Network and Corporate Development. In that position I was responsible for SP's Service Design and Planning group, Joint Facilities and Operating Contracts, Strategic Analysis and Capital Planning. During 1995 and 1996 I managed SP's activities associated with the merger of SP and UP.

After earning a Bachelor's degree in Civil Engineering and a Master's degree in Civil Engineering from Tulane University, I served in the Army as executive officer of a transportation unit. I then took Ph.D. courses in transportation systems analysis and developed railroad cost models as a Research Assistant in the Transportation Center at Northwestern University. As Assistant Professor of Transportation at the University of Alaska, I subsequently taught transportation courses and developed transportation analysis tools.

I began my railroading career as Manager-Marketing and Sales for The Alaska Railroad. I later became the Director of Transportation for ARCO Alaska, Inc. I then spent five years at BN, first as Director-Marketing and Business Analysis and later as Assistant Vice President-Chemicals. I moved to SP in 1992 as Managing Director-Yield Management. I was promoted to Vice President-Network and Corporate Development in 1994.

I. INTRODUCTION AND SUMMARY

I explain in this statement why Kansas City Southern's ("KCS's") proposed control of The Texas Mexican Railway ("Tex Mex"), in conjunction with its acquisition of control of the most important Mexican railroad, Transportación Ferroviaria Mexicana ("TFM"), poses serious threats to competition for U.S.-Mexico rail shipments. Unless appropriately conditioned by the Board, KCS's proposed transaction will impair the competitive options available to shippers at the vital Laredo Gateway.

In 1996, the Board recognized that "Laredo is the principal rail gateway between the United States and Mexico,"[1] and it imposed conditions aimed at preserving effective two-railroad competition north of the border for U.S.-Mexico rail traffic moving via Laredo.[2] Laredo's importance is even greater today. International rail traffic via Laredo has more than doubled since 1995, far outpacing growth at other eastern Mexico rail gateways.

The Board's vision of effective two-carrier competition at Laredo has been achieved. TFM has worked closely with both UP and Tex Mex to develop highly efficient cross-border rail transportation services. Although shippers have chosen efficient UP-TFM

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1 *Union Pacific Corp., et al. – Control & Merger – Southern Pacific Rail Corp.*, 1 S.T.B. 233, 410 (1996).

2 The Board granted Tex Mex extensive trackage rights over UP, allowing Tex Mex to connect with KCS at Beaumont. *See id.* at 422-25.

routes for the great majority of traffic flowing across the border via Laredo, by working with both KCS and BNSF, Tex Mex has increased its international traffic by almost { } percent since 1995.

Effective competition for rail traffic moving via Laredo depends on the cooperation of *both* Tex Mex and TFM. First, Tex Mex (with its parent Mexrail) controls the northern half of the Laredo International Bridge, which is the critical facility that all international rail traffic must use to cross the Rio Grande River at Laredo.[3] Second, TFM is the only Mexican carrier serving the Laredo gateway. KCS regards TFM and its Laredo-Mexico City main stem as the "the crown jewel system in Mexico."[4] The only way for UP to offer interline transportation services over the Laredo gateway – and thus the only way for the Laredo Gateway to be "open" – is with the cooperation of TFM.[5]

UP does not oppose efforts by KCS to become a more effective competitor and in the process attract additional U.S.-Mexico traffic via the Laredo Gateway. UP is not participating in this case out of a concern that KCS might become more efficient. Based on Applicants' statements about their plans for TFM – which involve KCS's acquisition of control but no operational changes – the prospect of significant improvements seems unlikely. To the extent the proposed KCS-Tex Mex-TFM transaction makes "NAFTA Rail" routes (or TFM-Tex Mex-BNSF routes) more efficient, UP would regard those changes as

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[3] As Mr. Barkley explains, UP can only reach the Mexican border by using trackage rights over Tex Mex.

[4] KCS Conference Call with Analysts (April 29, 2003) (included as an Exhibit to UP's Comments).

[5] A map of the proposed KCS-Tex Mex-TFM system, which depicts the lines of TFM and other railroads within Mexico, is Exhibit A hereto.

procompetitive, even if UP loses traffic and revenues in the process. In any event, none of the relief UP is seeking in this case would interfere with KCS's ability to achieve efficiencies by combining KCS, Tex Mex and TFM into a single, commonly controlled system.

The reason UP is participating in this case is because, in the unique circumstances present here, unconditioned KCS control of Tex Mex and TFM poses serious dangers to competition. When KCS gains control of Tex Mex and TFM, these carriers will have new incentives and new abilities to distort the competitive playing field for traffic moving via the Laredo Gateway between TFM-served points and points in the United States and Canada. KCS actions based on those incentives are likely to eliminate rather than enhance competition. As I will explain, KCS will have incentives to increase the collective profits of its controlled entities by raising rates to shippers and rendering the efficient UP-TFM options that many shippers now prefer more costly, less efficient and thus less attractive.

Applicants have made three commitments on the record in this proceeding. They represent that: (1) KCS will treat UP fairly at the Laredo Bridge; (2) KCS's TFM subsidiary will continue to work with UP for movements via Laredo; and (3) KCS will keep the Laredo Gateway open on commercially reasonable terms. These commitments reflect a proper recognition of the Board's role in safeguarding rail competition via the Laredo Gateway. At the very least, the Board should impose KCS's commitments as conditions in this case. However, KCS's commitments by themselves do not offer sufficient protection. Although aimed at the right problems, Applicants' promises are not sufficiently concrete or enforceable.

UP therefore asks the Board to implement KCS's three commitments by doing three simple things:

1. The Laredo Bridge: Impose a condition requiring KCS to work with UP to reach an agreement respecting new protocols governing operation of the Bridge (as it has already committed to do). The need for such a condition is discussed in the verified statement of Stephen R. Barkley.

2. TFM Service: Impose a condition requiring KCS to develop an agreement that establishes methods for measuring compliance by Applicants with their commitments regarding TFM service and methods for enforcing those commitments. This is also something that Applicants have already committed to do, but it should be done under Board auspices for the reasons I explain below.

3. Keeping the Laredo Gateway Open Commercially: Impose a condition requiring KCS to develop an agreement with UP to ensure that Applicants live up to their commitment to "keep the Laredo Gateway open on commercially reasonable terms." The critical feature of any such agreement would be a mechanism for assuring that the commercial terms of TFM's participation in international rail service offerings (*e.g.*, rates, rate factors, etc.) would allow joint UP-TFM international rail services to remain competitive. There may be many ways to implement this condition effectively, as I explain below.

UP's proposed conditions are carefully tailored to permit KCS, Tex Mex and TFM to develop and capitalize on their potential single-system efficiencies, while preserving the effective competition for U.S.-Mexico traffic among U.S. railroads north of the border that shippers enjoy today.

II. KCS CONTROL OF TFM AND TEX MEX THREATENS TO UNDERMINE EFFECTIVE COMPETITION FOR U.S.-MEXICO RAIL TRAFFIC

As explained below, KCS control of TFM and Tex Mex is likely to undermine effective competition for U.S.-Mexico rail traffic.

A. Rail Transportation Plays a Vital Role in Trade between Mexico and Its NAFTA Trading Partners

As a result of the North American Free Trade Agreement and the privatization of Mexico's rail system, U.S.-Mexico rail traffic has grown dramatically. Since 1994, total cross-border rail traffic has increased by 158 percent to account for nearly $31 billion in

international trade between the U.S. and Mexico.[6] Privatization of the antiquated, government-owned system brought massive investment in Mexico's rail infrastructure, tremendous improvement in the operating efficiency of Mexico's railroads, and increasingly effective cooperation between those railroads and their U.S. interchange partners north of the border. For example, since 1996 TFM has spent $1 billion on capital improvements, completely overhauling its mainline and building five completely new intermodal facilities. It has shed thousands of workers and invested in over 150 efficient new locomotives. TFM revamped its operations, and has begun offering innovative services. Among other things, TFM now cooperates with its U.S. connections to operate efficient 100-car unit "shuttle trains" that move grain from U.S. producers to major Mexican receiving points, replacing the former system of handling this traffic one car at a time at a much higher cost. As a result of such steps, TFM has lowered its operating ratio from 93.6 percent when it began operations in 1997 to 76.1 percent in 2002.[7]

Because of improvements like these, rail transportation has become the mode of choice for growing numbers of companies engaged in trade between Mexico and the rest of North America. Rail increasingly offers those shippers significant cost and/or service advantages relative to other transportation options. For many rail shippers of bulk commodities to or from points not served by water, of course, rail has been and remains effectively the only option.

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[6] *See* Bureau of Transportation Statistics, "U.S. Merchandise Trade with Mexico by Rail, April 1993-December 2002" (available at http://www.bts.gov/ntda/tbscd/reports/us_mex_2002_Rail.html) (Exhibit B hereto).

[7] *See* Post-Effective Amendment No. 2 to Form F-4, Registration Statement under the Securities Act of 1933, Grupo TMM, S.A. and TMM Holdings, S.A. de C.V., Apr. 23, 2003, at 95 (excerpts are Exhibit C hereto).

B. The Laredo Gateway Is Increasingly Vital to U.S.-Mexico Rail Traffic

In the arena of U.S.-Mexico rail traffic, the Laredo gateway has unique importance for rail traffic between Mexico and the United States (and Canada). In 1996, when the Board acted to preserve effective two-railroad competition via Laredo, it recognized Laredo's important role in cross-border rail commerce. Laredo has become even more important in the past six years.

1. Shippers' Routing Choices Reflect Laredo's Importance

The clearest indication of the vital role the Laredo gateway plays in U.S.-Mexico trade is the vast amount of rail traffic handled there. Rail traffic moving via Laredo accounts for approximately 75 percent (by dollar value) of all rail traffic between the United States and Mexico.[8] However, even this figure greatly understates Laredo's importance. Geography plays an important role in limiting most shippers' gateway options. For example, movements between UP's points in the western United States and points in western Mexico naturally flow via the three gateways in western Mexico: Calexico, Nogales and El Paso. Traffic between points in the central and eastern United States (and Canada) and points in eastern and central Mexico cannot effectively use these western gateways.

Of the three gateways in eastern Mexico – Laredo/Nuevo Laredo, Eagle Pass/Piedras Negras and Brownsville/Matamoros – Laredo is preferred by the vast majority of shippers. Laredo accounted for 86 percent of the rail traffic (by value) moving via these three

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[8] The figure is based on 2001 Bureau of Trade Statistics data on the value of shipments moving between the United States and Mexico. *See* Bureau of Transportation Statistics, U.S. International Trade and Freight Transportation Trends 2003, "Table 24: Top 10 U.S. Land Ports by Value of U.S.-NAFTA Surface Trade: 2000 and 2001" (available at http://www.bts.gov/publications/us_international_trade_and_freight_transportation_trends/2003/html/table_24.html) (Exhibit D hereto).

gateways.[9] Data on the carloads crossed at these gateway tells the same story. In 2002, Laredo accounted for more than { } of all traffic moving via these gateways, as shown in Exhibit E. Eagle Pass, where UP and BNSF connect with Ferromex, handled only { } percent of the loads crossing the border in eastern Mexico.[10] Brownsville, where UP and BNSF connect with TFM, handled only { } percent of the loads. Brownsville's role is quite limited, because it is deficient in all of the attributes that make Laredo important. For example, Brownsville has few brokers and weak border infrastructure. Routes via Brownsville are quite circuitous for shipments to most of the central and eastern Mexico and the capacity of TFM's secondary line from Matamoros to the south is quite limited as is the capacity of UP's line south of Robstown, Texas. For these reasons, most of the traffic moving via Brownsville is traffic to and from *maquiladora* plants near Matamoros and other points just across the border from Brownsville in the Mexican states of Tamaulipas and eastern Nuevo Leon, which cannot be reached as efficiently via Laredo or other gateways.[11]

Even these figures understate Laredo's importance. For certain markets such as for traffic moving between the eastern and midwestern United States and eastern Canada and the industrialized regions of central and eastern Mexico, UP's data indicates that Laredo accounts for even higher shares of all rail traffic, frequently well above { } percent. For example, Laredo handles over { } percent of all UP movements from origins in Michigan

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9 *Id*.

10 I discuss the reasons for Eagle Pass' limited role at pages at page 16, below.

11 *See* Map at Exhibit A. In addition, as noted below, UP and TFM use Brownville for empties that would ordinarily move via Laredo in order to maximize the efficiency of both gateways.

and Illinois (the two largest origins for Mexican rail traffic) to destinations in Mexico Distrito Federal (Mexico City) and the industrialized Mexican states of Puebla and Querétaro.

Another useful perspective is the rate of growth in rail traffic via Laredo. The volume of traffic moving across the Laredo Gateway has more than { } since 1995, as shown in Exhibit F. Tex Mex, strengthened by the Board's grant of trackage rights in the *UP/SP* case, has increased its volume of Laredo traffic nearly { } fold. *Id.*

At the same time, Laredo has also grown in importance relative to the other border crossing gateways. In 1995, as today, the principal alternative to Laredo was Eagle Pass/Piedras Negras. In 1995, Laredo accounted for { } percent of the total cross-border loads at these two gateways. By 2002, Laredo's share had grown to { } percent.[12]

Laredo's growing importance is perhaps best reflected in the fact that UP has seen its greatest growth occur at Laredo despite having acquired a 26 percent ownership interest in Ferromex, the sole Mexican railroad serving Eagle Pass. In 1995, Eagle Pass accounted for { } percent of UP's and SP's total cross-border loads at the Laredo and Eagle Pass gateways.[13] In 2002, Eagle Pass's share of UP's loads via these two gateways had fallen to { } percent.[14]

2. Laredo Has Significant Advantages Over Other U.S.-Mexico Gateways

Laredo's importance stems from several factors. In part Laredo's advantages are due to the relative efficiency of the U.S. rail routes serving Laredo from the north. But

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[12] *See* Exhibit F.

[13] In 1995, UP handled { } loads via Laredo; SP handled { } loads via Laredo in conjunction with Tex Mex and { } via Eagle Pass.

[14] In 2002, UP handled { } loads via Laredo and { } via Eagle Pass. (BNSF handled { } loads).

that is a relatively small factor. Laredo's principal advantages over other Mexico gateways are three:

(1) Laredo has a uniquely well-developed international border crossing infrastructure – including well-developed facilities and procedures for customs and other governmental services, a strong broker community, and an extensive rail infrastructure that supports the special requirements of efficient international rail border crossings;

(2) TFM's network serving Laredo from the south offers significant advantages. These include TFM's highly-efficient direct route between the border and the industrial centers of San Luis Potosí and Toluca, which it serves exclusively, as well as Monterrey, Querétaro, Mexico City and other points in the industrialized heartland of northeastern and central Mexico; and

(3) TFM offers well developed and very efficient rail transportation services in close cooperation with both of its interline partners, UP and Tex Mex.

a) Laredo's Extensive Border Infrastructure

As a result of its central role in U.S.-Mexico cross-border trade, Laredo now has a uniquely well-developed infrastructure to accommodate the efficient handling of large volumes of international rail traffic. This infrastructure is the result of many years of planning and investment by the U.S. and Mexican governments, by the railroads serving Laredo, and by third party brokers, warehousing firms, and others that have located at Laredo. These investments were made not just because of Laredo's important role in cross-border rail

transportation, but because of its importance for truck transportation as well. Laredo is by far the leading crossing point for U.S.-Mexico trade by all surface modes.[15]

At any high-volume international crossing point, a well-developed infrastructure is essential to accommodate the need for customs, agricultural, narcotics and immigration inspections. The number of inspections has grown significantly with heightened scrutiny at international border crossings since 9/11. As a result of investments by governments and railroads, Laredo has unusually efficient inspection processes. While still time consuming, these processes have helped to expedite clearance at the border and significantly improve the fluidity of train movements between the United States and Mexico.

Customs, agricultural and other inspection forces of both countries are on duty 24 hours a day at Laredo to facilitate prompt movement of rail traffic. In 1999, UP installed a state-of-the-art, $1.5 million federal customs inspection facility at its Port Laredo yard. The UP facility has a support building for offices of Customs, USDA, and other federal agencies. It also contains a secure location for federal agency personnel to inspect up to sixteen rail cars and eight over-the-road trailers at a time. UP has installed facilities that allow it to switch out cars for inspection while minimizing delays to other movements. U.S. Customs has also invested in facilities for x-raying railcars, the high-tech Vehicle and Cargo Inspection System ("VACIS"), to facilitate detection of illegal immigrants and, especially since 9/11, to assist U.S. government anti-terrorism efforts. Tex Mex also invested a quarter of a million dollars

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[15] In 2001, Laredo accounted for over $79 billion of U.S.-Mexico surface trade (both highway and rail). Eagle Pass was a distant eighth, with $6.7 billion of total cross-border commerce. *See* Bureau of Transportation Statistics, U.S. International Trade and Freight Transportation Trends 2003, "Table 24: Top 10 U.S. Land Ports by Value of U.S.-NAFTA Surface Trade: 2000 and 2001" (available at http://www.bts. gov/publications/us_international_trade_and_freight_transportation_trends/2003/html/table_24.html) (Exhibit D hereto).

to support this system. TFM has recently opened a SAGAR (the Mexican equivalent of USDA) post at its Sanchez Yard in Nuevo Laredo.

Cross-border shippers (rail and truck) also require extensive support from brokers and other third parties, such as freight forwarders, in dealing with the customs clearance process. Customs brokers and freight forwarders assist shippers in preparing customs forms for the U.S. and Mexican authorities. They utilize electronic pre-clearance procedures that have been implemented by customs agencies on both sides of the border. Laredo has a uniquely well developed broker community, in large part because it is also a very important crossing point for international highway traffic. Compared to other rail crossings, Laredo has a far greater concentration of brokers and freight forwarders. For example, Eagle Pass has only 15 U.S. brokers and 40 freight forwarders, whereas Laredo has 160 U.S. brokers and 500 freight forwarders.

The railroad infrastructure in the vicinity of Laredo is equally important. Although the railroads' pre-cleared run-through services at Laredo are relatively efficient, the railroads still must have extensive rail infrastructure for staging trains and railcars as they await inspection and customs clearances and access to the International Bridge. As a result of millions of dollars of investment by UP, TFM and Tex Mex, Laredo is uniquely positioned to handle high volumes of cross-border rail traffic. Mr. Barkley describes some of the changes UP and the other railroads have made in recent years to facilitate the efficient operation of the Laredo Bridge. All three railroads have built and expanded rail yards to support the growth of traffic moving through Laredo and to maintain the fluidity of the Laredo Bridge operation. At UP's Port Laredo facility, for example, UP has implemented nine phases of expansion since 1990, including the addition of sixteen classification tracks and an intermodal yard. UP and

TFM have also added to mainline track capacity in order to support Laredo crossing operations. For example, UP recently spent ${ } installing an additional siding on its line between Port Laredo and the Laredo Bridge.

UP estimates that the rail infrastructure at Laredo is currently capable of handling approximately { } trains per day across the border. At Eagle Pass, by contrast, UP estimates that there is sufficient capacity to cross only { } trains per day. Significant investments in both railroad and customs-related infrastructure would have to occur for Eagle Pass to be capable of handling volumes of traffic that approach those currently moved via Laredo. In the recent past the Eagle Pass gateway has operated close to capacity. Furthermore, the Mexican customs office at Eagle Pass has limited weekend hours, and Eagle Pass lacks the extensive supporting infrastructure the railroads have developed at Laredo. Regulatory constraints also make it difficult to put in place the required customs support services at Eagle Pass. Mexican law limits customs brokers to no more than four locations. Thus, many brokers that would open a new outlet at Eagle Pass may be required to close an existing location at another border crossing.

b) TFM's Routes South of Laredo Offer Significant Advantages

Another significant advantage favoring the Laredo Gateway is the fact that, unlike Eagle Pass, it provides access to TFM's route network. FXE and TFM were formed following the Mexican government's decision to privatize its national rail system in the mid-1990's. FXE operates primarily in western Mexico, while TFM holds what was referred to at the time of privatization as the "Northeast Concession." *See* Map at Exhibit A. TFM lines run from the Laredo and Brownsville gateways south into the most populous and industrialized regions of Mexico. TFM directly serves leading rail freight centers in Mexico,

including: Monterrey, Saltillo, San Luis Potosí, Querétaro, Mexico City, and Veracruz. *See* Exhibit A, and TFM's System map (Exhibit G hereto).[16]

FXE's lines are predominantly in the western part of Mexico. While FXE and TFM both serve a number of the same Mexican points, TFM's route has geographic advantages for movements between eastern Mexico gateways and much of eastern and central Mexico. A comparison of the TFM and FXE routes between the border and the area surrounding Mexico City, Mexico's largest population and consumption center, is illustrative. FXE's route between Eagle Pass and Mexico City is approximately 407 miles longer than the TFM route between Laredo and Mexico City.[17] Using trackage rights over TFM (between a point near Saltillo and Querétaro, as shown on the map), FXE can narrow that differential to 48 miles, but FXE's trackage rights have serious shortcomings. First, TFM has, to date, enforced strict limitations on the origins and destinations of the traffic FXE can handle using these rights. Second, FXE must pay onerous trackage rights fees to use the rights. FXE's trackage rights carry a rate of $0.71 per car-mile, or more than double the rate BNSF pays to use its trackage rights over UP in the United States.[18] Tex Mex pays UP similarly low fees –

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[16] TFM's system is also shown in more detail on the "NAFTA Railway" map submitted with the Application.

[17] TFM's route from Laredo to Mexico City is 709 miles. FXE's route from Eagle Pass to Mexico City is 1,116 miles. *See* Map at Exhibit A.

[18] BNSF pays UP the equivalent of $0.27 per car-mile for the trackage rights it obtained in the *UP/SP* merger. In the *UP/SP* case, various parties challenged the trackage rights fees to be paid by BNSF as unduly high. *See UP/SP,* 1 S.T.B. at 413-17. FXE's rates are far higher, create a much greater cost disadvantage, and come close to consuming the entirety of the revenue available to FXE from rail movements using these rights.

only $0.31 per car mile – for its trackage rights between Robstown and Beaumont it obtained in the UP/SP merger.[19] Not surprisingly, FXE has used these trackage rights very sparingly.

Many points in Mexico that in theory could be served by both TFM and FXE are in reality not competitive, due to these inherent cost differentials. As shown in Exhibit H, the high trackage rights fees impose a serious cost disadvantage – on the order of 75 percent – relative to TFM for traffic moving between the United States and Mexico City and points south.[20] FXE can reduce this differential by using its own route, but at the cost of significant service penalties, and FXE's costs still are significantly higher – on the order of 57 percent – than TFM's.

Moreover, a significant portion of current international traffic through Laredo is moving to or from points in Mexico served solely by TFM. For example, TFM has the only access to eighty percent of the shippers in the industrialized region surrounding Monterrey, and it provides the only service to the industrial centers of San Luis Potosí and Toluca. Although FXE, in theory, obtained access to TFM-served shippers in Monterrey as part of the privatization process, to date, TFM has successfully blocked FXE from implementing that access. As Mr. Fuentes explains, Mexican legal and regulatory processes do not yet allow for prompt resolution of disputes involving railroads.[21] TFM's legal challenges have forestalled

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[19] BNSF and Tex Mex rates are based on application of the gross-ton-mile rates they pay to a 30-ton railcar loaded with 100 tons of freight moved one mile (and averaged for the loaded and empty mile). Lighter weight intermodal and automotive movements incur even lower charges in the United States.

[20] The chart on the right side of Exhibit H compares FXE's costs with TFM's costs, using uniform assumptions about the two railroads' operating costs per mile.

[21] For example, TFM was able to obtain a court order staying an August 2002 regulatory decision that would have given FXE access to shippers in Monterrey as anticipated by the Mexican privatization plan. Fuentes V.S. at 7.

FXE competition in the Monterrey area for several years, with no end in sight. In large part because of intractable regulatory processes, the Mexican privatization process has not yet secured the degree of competition originally envisioned.

c) TFM Has Cooperated Extensively With UP and Tex Mex to Develop Efficient Cross-Border Transportation Via Laredo

Finally, a key to the effectiveness of the Laredo Gateway stems from the extensive cooperative steps that TFM has undertaken with both of its connections at Laredo. Since privatization, TFM – controlled by its Mexican parent Grupo TMM – has cooperated extensively with both UP and Tex Mex to develop efficient cross-border rail transportation offerings. TFM has also worked with Tex Mex, KCS, and BNSF to ensure that Laredo is an efficient and cost-effective gateway for shipping goods to and from Mexico.

TFM's cooperation with UP has taken a myriad of forms that benefit shippers both north and south of the border. TFM has provided UP with reasonable rates and rate factors to enable effective competition between UP-TFM routes and those involving KCS-Tex Mex and BNSF-Tex Mex. In addition, TFM has worked with UP on a wide array of operational issues, including pre-blocking of rail cars, directional handling of empties, and cooperation at Laredo Bridge. The two railroads have coordinated on border crossing issues, such as data exchange for blocking and customs purposes. And TFM has helped UP support customer requirements through the supply of railcars and related services. The cooperation between the two railroads has extended into marketing, including TFM's provision of rapid and responsive rate quotes and UP's one-stop customer service offering known as "MexDirect." I discuss this cooperation in more detail below, at page 22.

TFM has cooperated with Tex Mex and its U.S. connections, KCS and BNSF, as well. KCS and TFM, for example, pre-block traffic for one another, which "relieves Tex

Mex of the cost and responsibility for switching cars and trains, and allows more rapid movement of freight to and from Mexico."[22] Moreover, TFM has taken many of the same cooperative steps for BNSF traffic moving via Tex Mex. Taken together, these steps have made Laredo into an efficient and low-cost rail gateway for U.S.-Mexico trade.

C. Unconditioned KCS Control of Tex Mex and TFM Will Harm Competition

Many railroad consolidations have created improved transportation options for rail shippers and had generally pro-competitive effects. UP has extensive experience with such consolidations, having implemented the UP/MP/WP merger, the UP/MKT merger, the UP/CNW merger and most recently the UP/SP merger. All of those transactions, as conditioned by the Board, allowed the merged company to offer new, more efficient single-line services in competition with single-line routes of its rivals.

If the proposed transaction enables KCS/Tex Mex/TFM to offer improved single-system services, it too may have procompetitive effects. However, there are important differences between this transaction and other end-to-end transactions of the past. Those differences create unusually high risks that, unless subject to effective conditions, the transaction will cause significant harm to competition for traffic moving via the Laredo gateway. The unusual threats posed by this transaction stem from the following factors:

- The transaction would give a single U.S. carrier control over the only Mexican railroad serving the vital Laredo Gateway as well as the vital Laredo Bridge. Until now, U.S. carriers have competed vigorously with one another north of the border, relying on TFM (and TFM's subsidiary, Tex Mex) to cooperate with each of them in a neutral and

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[22] Application (KCS-3/TM-3), Riney V.S. at 136.

efficient manner. Mexican law has required that TFM cooperate neutrally with both Tex Mex and UP, and with TFM under Grupo TMM control that requirement has coincided with TFM's self-interest.

- Shifting control over TFM from its Mexico parent (Grupo TMM) to a U.S. carrier (KCS) will extinguish TFM's cooperation with UP in situations where UP-TFM services compete with KCS/Tex Mex services. KCS will gain effective control over competition between UP and KCS/Tex Mex in the United States. Shippers have in the past indicated strong preferences for UP-TFM routes via Laredo. KCS will be able to disrupt UP-TFM services by using its control over TFM and Tex Mex, and many shippers relying upon UP-TFM services will face higher costs and poorer service from KCS's unconditioned control of Tex Mex and TFM.

- It appears unlikely that the transaction will produce significant pro-competitive benefits to offset anticipated effects. KCS/Tex Mex/TFM already regard their "NAFTA Alliance" as providing seamless service and do not anticipate any changes in operations as a result of KCS control. Any gains to KCS will stem not from meaningful steps to improve TFM/Tex Mex/KCS offerings, but from anticompetitive efforts to make UP-TFM services less attractive to customers.

1. TFM Has Acted Neutrally Under TMM Control, Allowing for Effective Competition by U.S. Carriers North of the Border

Since privatization in 1996, TFM has been controlled by Grupo TMM, a large Mexican conglomerate. The U.S. carriers that participate with TFM in international rail movements – UP, KCS (via Tex Mex) and BNSF (also via Tex Mex and to a limited extent via the Brownsville gateway) – have competed against one another north of the border, while

relying on TFM's neutral cooperation with respect to the Mexican portion of international movements.

a) TFM has Cooperated Extensively with UP to Develop Efficient and Attractive UP-TFM Rail Transportation Offerings

TFM's neutral role as the sole Mexican carrier serving the vital Laredo Gateway is reflected in the extensive cooperation between UP and TFM to improve UP-TFM services. Just as TFM and Tex Mex (with KCS) have cooperated to expand Tex Mex's international traffic, TFM and UP have built an effective partnership that has brought important benefits to U.S.-Mexico rail shippers for movements via Laredo. That cooperation has covered the full array of activities associated with developing and improving effective and competitively-priced interline rail services options via the Laredo Gateway. TFM has cooperated by providing UP with reasonable rates and rate factors, cooperating on service design and improvements, streamlining border crossing processes, ensuring prompt car supply for UP's Mexican customers, and numerous other steps. I describe the UP-TFM cooperation in these areas in more detail in Appendix A.[23]

2. KCS Control of both Tex Mex and TFM Will Create New Incentives to Tilt the Competitive Playing Field

The many cooperative measures described above and in Appendix A have allowed the continued improvement of UP-TFM transportation options. These improvements largely explain why UP-TFM traffic via Laredo has almost doubled since 1995. At the same

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[23] UP and TFM hold frequent meetings on a multitude of issues related to cooperation at Laredo. At the assistant vice president level, the railroads convene process improvement meetings every other month. The railroads also hold quarterly executive sessions at the vice president level. Through such management coordination, UP and TFM have been able to provide customers with better U.S.-Mexico rail service.

time, consistent with the Board's intent in imposing conditions on the UP/SP merger, two-railroad competition north of Laredo has become stronger. TFM has worked cooperatively with Tex Mex and its connections (KCS and BNSF) to improve these carriers' US-Mexico interline services as well. Tex Mex's cross-border traffic (with both BNSF and KCS) has grown by { } percent since 1995. Shippers in the United States and Canada that wish to route U.S.-Mexico traffic through Laredo already have several strong competitive options.

Once it gains control of both Tex Mex and TFM, however, KCS will have new incentives and new abilities to limit shippers' choices by making UP-TFM options less attractive to customers, unless the Board imposes appropriate conditions to implement Applicants' generalized commitments not to undertake such strategies. By themselves, the commitments do not offer sufficient protection. It is essential that the Board impose conditions that make these commitments more definite and enforceable – which can be done without sacrificing any potential efficiencies flowing from KCS control. Otherwise, the interests of shippers and the competitive process will suffer.

KCS's incentives to use its control of Tex Mex and TFM to disrupt the competitive process are obvious. For many U.S.-Mexico rail movements, UP routes compete directly with KCS-Tex Mex-TFM and BNSF-Tex Mex-TFM routes. By increasing the costs of UP-TFM options or making them less attractive from a service perspective (and by discouraging TFM cooperation with UP in pursuing service improvements), KCS will be able to enhance its profits in ways that are detrimental to shippers. In shifting traffic to KCS and Tex Mex, allowing the NAFTA Rail system to earn additional profits north of the border, KCS will (1) deprive shippers of efficient UP-TFM services they enjoy today, and (2) allow

KCS-Tex Mex-TFM to increase rail rates to reflect the cost penalties it has managed to impose on UP.

Although UP today handles the majority of traffic moving via the Laredo Gateway, most of that traffic can be handled via KCS and Tex Mex. KCS/Tex Mex can compete head-to-head with UP-TFM routings for traffic moving to Canada, the Eastern United States, and the U.S. Midwest. KCS has connections with the eastern and Canadian railroads at most of the important mid-continent gateways. It also has its own routes to Kansas City, Chicago and St. Louis and other important traffic points.[24] Moreover, KCS has well-developed "alliance" relationships with many of its connecting carriers that allow it to take advantage of efficient run-through and coordinated train services and joint marketing of KCS-Tex Mex-TFM services.[25]

For example, KCS's alliance with IC&E/DM&E gives it efficient access to Chicago, as well as extensive reach in the grain-gathering regions of Iowa and southern Minnesota. KCS also has very efficient connections with alliance partner Norfolk Southern at Meridian, Mississippi, for traffic moving between Mexico and the East, and with alliance partner CN at Jackson, Mississippi, for traffic moving between Mexico and the upper Midwest and Canada, as well as the U.S. east and Midwest via the Chicago and Memphis gateways. I describe KCS's access to the eastern gateways in more detail in Appendix B.

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[24] Among the important traffic points served by KCS's system are chemical plants in Baton Rouge, Lake Charles and elsewhere along the Gulf Coast, forest products shippers on KCS's former-Midsouth lines in Mississippi, industrial shippers in the Kansas City area, and grain origination points in Iowa and Nebraska reached via KCS's haulage rights north of Kansas City.

[25] *See generally* KCS's own map of its network of routes and alliance partners. This map shows how KCS serves the major gateways (Exhibit I hereto). The NAFTA Railway map submitted with the Application also depicts most of KCS's alliance routes.

In addition, in conjunction with BNSF and TFM, Tex Mex can participate in traffic moving between Mexico and many of the points served by UP's network in the West. As shown in Exhibit J, more than { } percent of the rail traffic moving via Laredo is subject to competitive movement via KCS/Tex Mex and its connections in the United States, including BNSF.

Shippers have benefited from head-to-head competition between UP and KCS/Tex Mex for participation in U.S.-Mexico traffic via Laredo. In many instances, UP has won the business, reflecting shippers' preferences for highly efficient UP-TFM service offerings. For example, {

} Sometimes KCS/Tex Mex prevails, where these carriers can present rate and service offerings more attractive than UP's offerings. For example, {

} UP competed for this business, but did not prevail. These examples demonstrate the extent to which competition for U.S.-Mexico rail traffic has flourished. In these situations and many others, competition among rail carriers north of the border – all able to compete on a level playing field, because of TFM's neutrality – has led to lower rates and improved service offerings. KCS's acquisition of control of TFM and Tex Mex – unless conditioned – will alter the competitive landscape and extinguish these benefits for many shippers.

3. KCS Will Be Able to Use Its Control of Tex Mex and TFM to Make UP-TFM Options Less Attractive to Customers

The viability of two-railroad competition at Laredo depends on TFM cooperation with both of the U.S. carriers serving that vital gateway. Under Grupo TMM control, TFM's cooperation with both UP and Tex Mex has flourished, because TFM has treated its two connections at Laredo neutrally. After KCS takes control of both Tex Mex and TFM, however, this situation will change. KCS will have powerful incentives to use its control of TFM to render UP-TFM options that compete with KCS/Tex Mex routes less attractive to shippers by raising the costs of those options or unwinding cooperative steps that have led to service improvements.

a) Anticompetitive Rate-Based Strategies

TFM's rates (or rate factors) are perhaps the single most important aspect of TFM cooperation for U.S.-Mexico traffic. UP could have routes north of the border that were clearly the most efficient, UP could have completely unconstrained services to the Laredo Bridge, and shippers could prefer UP services hands-down over those offered by KCS-Tex Mex and BNSF-Tex Mex. However, if the rates TFM charges shippers for UP-TFM movements were too high, shippers would lose the benefits of UP competition.

For the past six years, TFM has fostered effective competition among U.S. carriers by quoting comparable rates and rate factors to both UP and Tex Mex for Laredo traffic. As I explained above, TFM has done this in part because its parent, Grupo TMM, has no economic interest in favoring KCS routes over UP routes, and in part because of Mexican non-discrimination requirements.

When it acquires control of TFM, KCS will have the power to manipulate TFM's rates (or rate factors) to make competing UP-TFM services more expensive for

shippers causing them to pay more, and in some cases forcing them to switch to less desirable KCS/Tex Mex offerings. KCS could accomplish this without causing TFM to refuse outright to quote TFM rates to UP, and even without causing TFM to discriminate between UP and KCS/Tex Mex in the rates it does quote. All KCS would need to do is cause TFM to raise its rates, which Mexican law would allow.

A simple numerical example (spelled out in Table 1 below) helps illustrate how such a strategy might work. (The numbers are purely illustrative.) Assume that before KCS gains control of Tex Mex and TFM, TFM has provided both UP and KCS/Tex Mex a rate factor of $100 for traffic to an eastern gateway, and that UP and KCS/Tex Mex compete to handle the traffic north of Laredo. Assume that UP has the more efficient route and charges a rate factor of $100. KCS's rate factor is $105. In a fair competitive process, UP will win the business, and the shipper will pay a total of $200. This outcome is shown in the left-hand portion of the bottom row of Table 1.

After KCS acquires control of Tex Mex and TFM, it can change this result to the disadvantage of shippers. All it needs to do is instruct TFM to raise its rate factor by at least six dollars, as shown in Example 1 in the table. If it did that, the combination UP-TFM rate would now be $206, while KCS TFM could charge $205 and win the business. KCS would develop the $205 rate by lowering its own factor to $99, a step it could take because it can now get those dollars back through its ownership of TFM. The combined KCS/Tex Mex/TFM would make more money (and more profit, assuming KCS's previous $100 factor included some return), but the shipper would pay more and lose its preferred route north of the border.

TABLE 1			
	BEFORE KCS-TFM CONTROL	AFTER KCS-TFM CONTROL	
		Example 1	Example 2
UP Factor	**$100**	**$100**	**$100**
KCS Factor	**$105**	**$99**	**$95**
TFM Factor	**$100**	**$106**	**$120**
UP-TFM Rate	**$200**	**$206**	**$220**
KCS-TFM Rate	**$205**	**$205**	**$215**
Outcome	**UP wins; shipper pays $200**	**KCS wins; shipper pays $205**	**KCS wins; shipper pays $215**

KCS could use a similar strategy to increase its profits to shippers' detriment where service rather than rates had led shippers to prefer UP-TFM routings prior to KCS's acquisition of control of Tex Mex and TFM. In the above example, assume that UP and KCS/Tex Mex had offered to handle traffic from Laredo to an eastern gateway at comparable $100 rate levels, taking advantage of TFM's non-discriminatory ($100) rate factor, but that the shipper had chosen the UP route because, for example, it offered consistently faster transit times. After the transaction, TFM could increase its rate factor by $5 to both UP and KCS/Tex Mex, with KCS/Tex Mex lowering its factor by $5 to offset TFM's increase. To avoid a rate increase (from $200 to $205) the shipper would be forced to use KCS/Tex Mex's route north of Laredo, which it did not prefer. Alternatively, the shipper may conclude that it has a sufficiently strong preference for UP service that it is willing to pay $5 more to use it (a fact TFM likely would not have known until KCS/TFM attempted this strategy). Either way, KCS/Tex Mex/TFM would earn additional profits and the shipper would lose.

It is my understanding that KCS would have a great deal of latitude to increase TFM's rates even further than suggested by these examples, thereby making it even more

difficult for UP-TFM service offerings to remain price-competitive. Mr. Fuentes explains that there are no effective Mexican regulatory limits on the level of TFM's rates for transportation within Mexico. Within the experience of UP's Mexico Group, statutory rates published by the Mexican government (the so-called "TUCE" rates) are so high as to be unusable. Thus, KCS apparently could cause TFM to increase its rate factors as much as necessary to assure that UP was effectively disabled from competing. KCS would reduce its portion of the through rate enough to win the business and increase its profits, but not so much that the traffic would dry up. The right-hand portion of Table 1 (labeled Example 2) demonstrates the effect of a $20 increase in TFM's factor, which would allow KCS/TFM to win the business while simultaneously increasing the customer's rates significantly.

KCS's implementation of such a strategy would hurt shippers and competition, not just UP. For a number of reasons, TFM does not extract the last dollar of revenue that might conceivably be available by virtue of TFM's market power from each piece of traffic moving via Laredo. Most rates are quoted to customers on a "Rule 11" basis, which involves each railroad charging the customer its own, separate rate to the U.S./Mexico border, typically without any agreement by the carriers about what the overall origin-to-destination price should be. This limits the degree to which TFM can differentiate among customers based on their specific circumstances and demand factors. For many shippers, moreover, TFM quotes one rate to the Mexican receiver (or shipper), while the U.S. carrier quotes its rate to a separate entity (either the shipper or receiver) in the U.S. TFM's practice of quoting non-discriminatory rates also limits the extent to which it can effectively charge the highest rate that each piece of traffic can bear. In UP's experience, TFM's rates generally do not exploit the full measure of TFM's potential market power today.

North of the border, for traffic that is competitive between UP and KCS/Tex Mex (and its connections), competition among the U.S. railroads keeps rates competitive today – preventing either U.S carrier from picking up the dollars TFM leaves on the table. Because of this competition, moreover, UP would not have significant room to reduce its own revenue requirement in order to offset higher TFM factors that KCS could impose. As a result, when KCS's strategies extinguish existing competition from UP north of the border, they will remove constraints on KCS's rates and cause rate increases (and reductions in the level of rail service) available to shippers.

KCS likely would conclude that this strategy would not work the same way or to the same extent for all shippers. For those shippers with better access to other transportation options (such as truck or barge) or that otherwise have more elastic demand, KCS could offer lower rates by reducing its factor north of the border by a greater amount. For traffic that UP could efficiently route via Eagle Pass in conjunction with Ferromex, KCS might choose to maintain the status quo, so that TFM could be certain of retaining the Mexican portion of the revenues. But for significant amounts of existing Laredo traffic (both UP-TFM and Tex Mex-TFM), a profit-maximizing KCS strategy would be to increase rates selectively and deteriorate UP-TFM services overall.

This strategy would be even easier for KCS/Tex Mex/TFM to implement if Mexican law did not limit TFM's ability to provide its U.S. connections different rate factors for comparable traffic. If TFM were permitted to discriminate against UP overtly, KCS could simply cause TFM to raise its revenue requirements to UP but not to KCS/Tex Mex, and the result would be the same: UP's costs effectively would go up, KCS could win the business despite charging higher rates, and shippers would lose.

KCS appears to believe that its acquisition of control of TFM would change the way Mexican law applies, and allow TFM to discriminate overtly in favor of KCS-Tex Mex-TFM routes once KCS acquired control of TFM. In a presentation delivered in Mexico a few weeks ago, KCS disagreed with suggestions that TFM would be required to "provide 'equal' rates to the Mexico/U.S. border" once KCS acquired it. KCS criticized any such requirement as precluding NAFTA Rail from offering, "in the form of lower prices to the Mexican shipping public, the benefits of the long haul on its system."[26] UP has no desire to prevent KCS from offering *lower* rates to shippers to reflect any single-system benefits stemming from the proposed transaction. Based on Applicants' statements to the Board in this case, however, the transaction does not appear likely to achieve any such benefits, as discussed below (at pages 33-34). But if KCS is correct that TFM could discriminate by charging lower rates to favor long-haul KCS routings, it is necessarily also true that it could discriminate by charging *higher rates* to shift traffic away from efficient UP-TFM routings.

b) Anticompetitive Service-Based Strategies

Wholly apart from presenting the opportunity to increase UP-TFM rates by manipulating TFM's rate factors, KCS control of both Tex Mex and TFM provides opportunities for KCS to make UP-TFM transportation offerings less attractive (or more costly) in many other ways. As I explained above, the efficient UP-TFM services available to shippers today depend on many forms of cooperation by TFM. KCS – with very different incentives from today's TFM – could unwind many of those cooperative steps, or implement them with less vigor, in order to make UP-TFM options less attractive to shippers.

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[26] KCS White Paper, p. 4 (Exhibit K hereto).

The measures available to KCS extend to most of the ways TFM cooperates with UP today. In the area of operations, TFM could discontinue pre-blocking cars south of the border or reduce the movement of empties through Brownsville/Matamoros. Eliminating pre-blocking would result in innumerable delays for UP shippers, causing those using private cars to incur additional car ownership costs and slower transit times. TFM could also give less priority to trains carrying UP traffic, or a lower priority to premium UP-TFM trains relative to KCS/Tex Mex/TFM trains. It could delay spotting empty equipment, setting out loads at customer sidings, or pulling loaded cars when the traffic is coming from or destined for UP at Laredo. Shippers would pay the ultimate price through delays and increased costs.

In addition, KCS could cause TFM to become less cooperative in pursuing commercial and marketing opportunities. For example, KCS could cause TFM to delay in providing revenue requirements to UP or rate quotes to customers using UP north of the border. TFM could also discontinue participation in cooperative arrangements, such as MexDirect, that provide customers with one-stop shopping for movements to and from Mexico. With reduced TFM cooperation, shippers would receive less favorable commercial terms, effectively increasing their costs.

In the vital area of customs processes, which can account for significant delays at the border, TFM could reduce its cooperation with respect to automated customs pre-clearance processes for shipments that are moving to or from UP. Because effective implementation of pre-clearance processes requires proactive efforts by both connecting railroads, even subtle reductions in TFM's cooperation could have significant consequences for the efficiency of UP-TFM cross-border movements and the level of service shippers receive.

Any of these steps would degrade the competitive rail transportation options that shippers enjoy today, or preclude UP from continuing to improve its cross-border services in ways that would otherwise have occurred naturally over time absent KCS control of Tex Mex and TFM. KCS says that it will not take any of these steps, and that it will instead "continue to cooperate" with UP in all of these areas.[27] UP welcomes KCS's commitment. As I discuss below (at pages 40-42 and 47-48), however, KCS's commitment needs to be embodied in a concrete and enforceable condition imposed by the Board in this case.

4. There Are No Meaningful Efficiencies Flowing from the Transaction to Offset the Threat of Anticompetitive Effects

Applicants have indicated in their Application and Supplement that the KCS/Tex Mex/TFM transaction will not result in any significant efficiencies that might offset the potential anticompetitive effects I describe above. To the extent the transaction leads to diversions of traffic to Tex Mex and KCS routes, those diversions will not be the product of procompetitive improvements due to increased efficiency from single-system routes. As the Applicants have repeatedly acknowledged, KCS and its "NAFTA Railway Alliance" partners already cooperate very closely today. As of a year ago, the NAFTA Railway Alliance had "developed a seamless, one-stop customer service approach for moving traffic in and out of Mexico on the NAFTA Railway."[28] Similarly, KCS and Tex Mex had put into effect "the

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[27] *See* Supplement to Application (KCS-10/TM-10) at 25; Letter from William A. Mullins to David L. Meyer, July 21, 2003 (filed with Board and served on all parties of record) ("Applicants' July 21 Letter"), p. 1 (included as an Exhibit to UP's Comments); KCS White Paper (Exhibit K), p. 2.

[28] KCS NEWS, "*NAFTA Railway Partners Reflect and Pursue New Opportunities*," July 9, 2002 (available on www.kcsi.com) (Exhibit L hereto).

consolidation of KCS and Tex Mex dispatching, crew calling and timekeeping to KCS's System Transportation Center in Shreveport."[29]

The operational efficiencies Applicants acknowledge having already achieved are similar to those UP and TFM have achieved, without common control. KCS does not plan any further integration of TFM beyond what has already occurred: the Application states that "the TFM transaction will not alter the basic structure or operations of TFM."[30] Thus, unlike mergers that promise to reduce administrative expenses or allow for service improvements, KCS control of TFM will not produce any direct synergies.

Nor is it plausible that, in the absence of cost savings or efficiencies arising from the transaction, KCS's control will lead it to lower KCS-Tex Mex-TFM rates to attract traffic. If it wished, it could take this step today. KCS's efforts to "lengthen hauls" by shifting UP-TFM traffic to Tex Mex-TFM and KCS-Tex Mex-TFM routes must inevitably focus on measures that harm shippers and competition. As I described above, this would include efforts to raise the costs of UP-TFM movements or make UP-TFM movements less attractive to shippers by manipulating TFM's rate factor upward or by discontinuing (or freezing in place) TFM cooperative efforts that have helped to produce efficient UP-TFM service offerings.

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29 *Id.* UP's Comments provide further details on the existing degree of integration among the NAFTA Railway Alliance partners.

30 Supplement at 25.

5. The Availability of UP-FXE Routes Via Eagle Pass or Other Transportation Options Would Not Allow Shippers to Avoid the Transaction's Anticompetitive Effects

Applicants have suggested that KCS could not or would not cause TFM to manipulate the competitive landscape in the manner I describe above because some shippers have other transportation options. Applicants argue that many rail shippers have truck and water transportation options, and that UP could divert traffic from the Laredo Gateway to Ferromex routes via Eagle Pass. These options, Applicants suggest, will deter KCS/TFM from closing the Laredo Gateway or otherwise acting anticompetitively. In addition, Applicants suggest that TFM's dependence on traffic that it currently interchanges with UP for a significant portion of its revenues will deter TFM from taking actions to shift this traffic to Tex Mex and KCS routes. I disagree.

To be sure, there are competitive options for some of the traffic that UP interchanges with TFM at Laredo. Some could be moved by truck, or moved to the border by rail and transloaded into trucks for final delivery. Some could be moved by water to or from the Mexican Gulf ports. And some could be moved by rail via the Eagle Pass gateway. For most shippers, however, these options will not avoid the potential anticompetitive effects of the transaction, for at least three reasons.

First, most shippers using rail transportation via Laredo today do not have equally attractive non-rail options. For them, shifts to alternative modes of transportation would impose additional costs or other disadvantages. As discussed above, rail transportation has distinct advantages over truck or barge movements for important traffic flows at Laredo because of geography (*i.e.*, distance of the shipper from ports and cargo transfer costs at ports, both in the United States and Mexico), cost advantages of rail relative to trucks, and other factors. Competition between railroads in the United States ensures that the cost and other

advantages of rail are passed on to shippers. If that competition were disabled, many shippers likely would sustain increased rates or reduced service levels before choosing an inferior option provided by another mode.

Notwithstanding Applicants' broad assertion that TFM faces substantial intramodal and intermodal competition, there are significant U.S.-Mexico traffic flows for which TFM provides a significant advantage in terms of price and service over the next best alternative. Applicants (and USDA) discuss options available to grain shippers, but their discussion focuses on movements in the aggregate rather than considering the options available for particular origin-to-destination markets. In fact, trucks are used only to transport relatively small quantities of grain produced in the area between Corpus Christi and San Antonio, Texas. Water transport handles larger volumes in the aggregate, but it is an effective option only for locations in the United States efficiently served by the Mississippi River system and then only for shipments destined to points in Mexico that are effectively served by Veracruz and other Mexican ports. For grain moving from most of the U.S. Midwest to large portions of eastern and central Mexico, rail is the only viable option, and for much of that traffic, including large receivers in San Luis Potosí and Querétaro, the only rail service available is provided by TFM.

Applicants also tell only half the story with respect to automobile parts and finished automobiles. For shippers and receivers of relatively small quantities of auto parts – typically parts moving to a third-party supplier in Mexico – truck is often a more attractive option than rail. However, for large volume shipments moving directly between parts manufacturers or consolidation centers in the East and Upper Midwest and automobile manufacturers in Mexico, the economics of boxcar or intermodal service are vastly superior to

truck service. The difference involves a combination of volume and service – when a large receiver such as Chrysler or General Motors pays the freight, they are able to smooth the border clearance process and take advantage of the lower rates rail can offer. Moreover, for some receivers, such as Chrysler's plant in Toluca, TFM is not only the most efficient rail option, it is the only option.

With respect to finished automobiles moving from Mexico to the United States, truck is not a viable option. Water transport is an option for some automobiles manufactured in the Mexico City area, primarily for shipments to the East Coast. For finished automobiles moving from Mexican locations to U.S. points that are not on the coast, rail is the only option. And, as with auto parts, for certain manufacturers, TFM is the only rail option.

Applicants did not even attempt to discuss competition for other significant flows of U.S.-Mexico traffic that move by rail today. Producers of many other commodities also depend heavily on rail transportation to provide seamless, efficient transportation between the U.S., Canada and Mexico. Rail transportation offers many such commodity producers the ability to ship more volume at one time directly to a given location, and often for a lower rate than by truck. For example, shippers such as AK Steel move large volumes of steel (especially coiled steel for auto manufacturing) from U.S. origins to TFM-served industrial facilities in central Mexico. That traffic could not move efficiently via truck or water. Likewise, shippers such as Unimin and Badger Mining move large volumes of specialized minerals (like ball clay and industrial sand, respectively) from U.S. production facilities to TFM-served plants in Mexico. That traffic cannot move by water between inland points and it cannot move economically by truck to large, rail-served receivers.

Second, significant amounts of traffic moving via Laredo could not effectively be shifted to alternative rail routes via Eagle Pass. Laredo is the preeminent gateway for many reasons. *See* pages 10-20. Some traffic (including traffic of shippers served only by TFM) could not be moved via Eagle Pass because it is dependent on TFM's rail network within Mexico. For other traffic, UP-TFM routes via Laredo offer important cost and service advantages, as discussed above. The fact that UP-TFM traffic via Laredo has grown much faster than UP-FXE traffic via Eagle Pass – despite UP's equity interest in FXE – provides a telling indication of Laredo's advantages. *See* Exhibit F.

Equally important, Eagle Pass's existing infrastructure could not accommodate a significant shift of all potential traffic from Laredo. Massive and wasteful investments in new rail capacity and border crossing infrastructure would be needed at Eagle Pass before significant volumes of Laredo traffic could be switched to Eagle Pass. A diversion of traffic to Eagle Pass would also strand tens of millions of dollars of UP investments that have supported efficient UP-TFM cross-border commerce at Laredo.

Third, to the extent some shippers do have readily available and equally attractive transportation operations for their rail movements over the Laredo Gateway, those options would not protect other shippers. NAFTA Rail can identify traffic that could shift gateways or modes and focus their anticompetitive strategies on traffic with less attractive options. They would thereby retain TFM's current revenues on traffic that could shift, while increasing NAFTA Rail's profits on traffic more dependent on rail service over the Laredo Gateway.

In addition, it is highly unlikely that KCS would be deterred from applying these strategies to the UP-TFM traffic that cannot effectively be diverted to Eagle Pass out of

fear that UP might retaliate by diverting some *different* UP-TFM traffic away from TFM. KCS no doubt already expects that – as a result of KCS acquiring control of TFM – UP will attempt to shift traffic to Eagle Pass where possible in order to remove it from potential interference by KCS. Thus KCS would not expect its implementation of anticompetitive strategies to lead to any additional, incremental diversions beyond what UP would be able to accomplish in any event. KCS therefore will not pass up opportunities to use control over TFM to shift profitable traffic to KCS and Tex Mex routes.

III. UP'S PROPOSED LAREDO GATEWAY AND SERVICE CONDITIONS ARE NARROWLY TAILORED TO REMEDY THE ADVERSE COMPETITIVE EFFECTS OF AN UNCONDITIONED TRANSACTION WITHOUT INTERFERING WITH APPLICANTS' EFFORTS TO COMPETE USING NEW SINGLE-SYSTEM ROUTES

The Applicants recognize that there are legitimate concerns about the effect of KCS control of Tex Mex and TFM on competition for U.S.-Mexico traffic, but their proposed solution is insufficient to protect against the potential harms. In an effort to convince the Board and the shipping community that competitive harms will not materialize, Applicants have made three important commitments:

- KCS will use its control of TFM to keep the Laredo gateway open on "commercially reasonable terms";[31]

- KCS will use its control over TFM to (a) ensure that UP and BNSF are provided the same level of service they have experienced in the past and to making improvements to that level of service where possible; (b) require TFM to cooperate with UP and BNSF on pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through train service, providing excellent

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[31] Applicants' July 21 Letter, p. 2; Supplement at 4 & Davies V.S. at 15.

service, and promptly quoting rates; and (c) work with UP and BNSF to develop a methodology for measuring and enforcing service standards for traffic handled by TFM via the Laredo Gateway;[32] and

- Applicants will (a) work cooperatively with UP toward efficient utilization of the Laredo Bridge and (b) negotiate in good faith with UP to develop new dispatching protocols for the Laredo Bridge.[33]

Although Applicants have focused on the right issues, their commitments are too vague to be effective. UP urges the Board to condition its approval in this case on Applicants' adherence to their commitments *and* on Applicants' negotiating in good faith with UP to establish concrete and enforceable agreements to implement those commitments. The Board should establish as a basic guideline that the final agreements should allow Applicants to pursue whatever efficiencies they might accomplish as a result of their transaction, while preserving competition for traffic moving over the Laredo Gateway.

In the sections below, I describe UP's view of how best to implement Applicants' commitments to keep the Laredo Gateway open on commercially reasonable terms and to continue to work with UP on cross-border traffic. In a separate statement, Stephen R. Barkley, UP's Regional Vice President - Southern Region, addresses Applicants' pledge to treat UP fairly at the Laredo Bridge. We offer only the broad outlines of implementing arrangements, because we believe that it would be most desirable for the precise terms to be the product of negotiations between Applicants and UP under the Board's supervision.

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32 Applicants' July 21 Letter, p. 2; Supplement at 4, 24-25 & Davies V.S. at 14-15.

33 Applicants' July 21 Letter, pp. 1-2; Supplement at 4, 26-27 & Davies V.S. at 15-16.

A. The Laredo Gateway Condition

Acknowledging that NAFTA Rail will have incentives to preclude competition from competing interline routes via Laredo, Applicants have committed "to keep the Laredo gateway open on commercially reasonable terms." Supp. at 24. The underlying competition-preserving principle is easy to articulate: for the Laredo Gateway to remain open on commercially reasonable terms, TFM must not effectively close off UP-TFM interline movements via the gateway by insisting on rates that are too high for UP-TFM routings to be competitively viable. This commitment is crucial. Even if UP received nondiscriminatory treatment at the Laredo Bridge and nondiscriminatory service for UP-TFM movements, those operating conditions would be irrelevant if UP could not attract any traffic because of high TFM rates for the TFM portion of the movement.

However, Applicants never explain what they consider to be "commercially reasonable terms." Nor do they explain how those terms will be established and made available to shippers who use UP. In short, their commitment is in the right spirit, but it is too vague to ensure the preservation of commercially viable TFM-UP routings in the face of their own strong incentives to force shippers to use NAFTA Rail routings. KCS recognized as much in a July 21, 2003 letter, in which it stated that it was "willing to enter into private discussions with UP or any other party to discuss this commitment and reach a private agreement to ensure that KCS abides by this commitment."[34]

The Board should hold Applicants to their basic commitment to keep the Laredo Gateway open. It should also hold them to their commitment to negotiate with UP to

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[34] Applicants' July 21 Letter, p.2.

establish a workable agreement to implement their commitment. However, the Board should not regard implementation as a purely private matter. It should be prepared to impose an appropriate solution if the parties fail to reach agreement.

UP believes there may be a variety of mechanisms that would offer a workable means of converting Applicants' vague commitment into an effective and enforceable remedy that preserves for shippers commercially-viable and competitive UP-TFM services, while at the same time allowing NAFTA Rail sufficient flexibility to adjust its rates to reflect merger efficiencies.

One effective approach might be a form of "proportional rate" agreement, perhaps modeled on an agreement reached between UP and BNSF in order to keep the Portland Gateway open on commercially reasonable terms following the UP/SP merger. In that case, the merging carriers and BNSF entered into an agreement that enhanced competition by transferring to BNSF a former-UP line in northern California, thereby creating a new BNSF single-line route between the Canadian border and the U.S. Southwest (the so-called "I-5 Corridor"). However, the railroads recognized that BNSF would no longer have incentives to work with UP on an interline basis via the Portland, Oregon gateway for traffic moving between BNSF-served points north of Portland (including points in Canada reached by BNSF indirectly) and points in UP's territory south of Portland. BNSF and SP had previously cooperated closely on such movements. In order to preserve the UP-BNSF interline option as a competitive alternative to BNSF's new single-line routes, UP and BNSF negotiated a mechanism – the I-5 Proportional Rate Agreement ("I-5 Agreement"). The I-5

Agreement allows UP to quote competitive rates for the full origin-to-destination movement of such traffic without the need for BNSF concurrence.[35]

The I-5 Agreement has been quite successful. UP has been able to compete for traffic originating and terminating at the BNSF-served points subject to the Agreement, providing those shippers with a valuable competitive option. At the same time BNSF has been able to grow its own traffic volumes using its new single-line route. The I-5 Agreement and associated line sale have not frozen the pre-existing situation, but have created a dynamic, competitive environment that has benefited shippers using both UP and BNSF options.

The I-5 Agreement is not a rate equalization agreement. It provides a methodology for developing "BNSF rate factors" for the portion of the movement north of Portland, and UP pays BNSF a division based on those factors. BNSF cannot manipulate those factors to disable UP competition, but at the same time BNSF is free to charge shippers using its single-line route whatever it wishes. UP never learns what BNSF's competitive single-line rates are. In Appendix C I have summarized the basic principles underlying the I-5 Agreement, as they might be adapted to fit the situation presented in this case, where it is vital to keep the Laredo Gateway open for commercially reasonable UP-TFM offerings. Such an arrangement could effectively permit UP to provide shippers with competitive UP-TFM services via Laredo, just as the I-5 Agreement allows UP to offer competitive UP-BNSF services via the Portland gateway notwithstanding BNSF's incentives to inhibit competition with its single-line services.

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[35] A copy of the I-5 Agreement as filed with the Board in 1997 (excluding the highly confidential rate matrix appendices) is Exhibit M.

UP is not asking the Board to require Applicants to agree to a condition based on the I-5 Agreement or even the basic attributes described in Appendix C. UP recognizes that the parties, through private negotiations, may be able to develop a more appropriate means of protecting competition for traffic moving over the Laredo Gateway. UP offers the example of its I-5 Agreement both as starting points for negotiations and to demonstrate that an effective, pro-competitive agreement is possible.

UP is well aware of concerns that gateway preservation conditions not resurrect the rate equalization requirements of the long-discredited *DT&I* conditions. Those requirements inhibited competition by discouraging consolidating carriers from reducing rates on new single-line routes to capture traffic. Consolidating carriers could not reduce their own rates without negotiating with connecting carriers to ensure that equal rates would be offered over all competing routes. They also had little incentive to attract traffic by reducing rates because they had to make those rates available to competitors before locking up the business. Competitors could thus free-ride on the consolidating carrier's marketing and cost-reduction efforts and "cherry-pick" the attractive business. In fact, consolidating carriers were forced to keep their rates high enough to cover the costs of a less efficient joint-line movement in the event that shippers chose a joint-line routing.

The gateway agreement that UP envisions would not undermine Applicants' incentives to pursue whatever pro-competitive benefits might arise from KCS control of Tex Mex and TFM. An agreement modeled on the I-5 Agreement that reflects the essential attributes in Appendix C would contain four specific features designed to preserve Applicants' pro-competitive incentives:

First, Applicants would be free to change their rates as market conditions allowed. *DT&I* conditions imposed a tremendous burden on any effort to reduce rates because consolidating carriers were required to negotiate with their connections to ensure that equal rates would be offered over all competing routes. Under an arrangement similar to the I-5 Agreement, Applicants would be free to reduce (or increase) their rates for any traffic at any time, without engaging in a separate round of negotiations with UP.

Second, Applicants would not be required to inform UP every time they quote a shipper a new rate for handling competitive business. Unlike *DT&I* conditions, which allowed competing carriers to "cherry pick" attractive business, UP's proposal would not require Applicants to provide lower, equalized rates in advance of moving traffic. UP would be entitled only to the TFM rate factors contained in the rate matrix. It would not be entitled to learn what rates Applicants intend to quote or have quoted a particular shipper. The Applicants could thus target business without revealing their activities to UP, and they could reduce their rates in order to attract that business without making those same reduced rates immediately available to UP.

Third, Applicants would always be able to offer shippers a lower TFM rate factor than the matrix factor available to UP, if they continue to reduce costs. Unlike *DT&I* conditions, which required immediate rate equalization, an arrangement like the I-5 Agreement contemplates only periodic adjustments to the rate matrix. In other words, UP would not be entitled to use a TFM rate factor based on NAFTA Rail's most recent, lowest rates. The TFM rate factor available to UP would always lag behind the rates that NAFTA Rail was offering. The Applicants would thus have strong incentives to improve their efficiency and reduce costs, because such actions would allow them to remain ahead of UP in

their ability to reduce rates and capture traffic moving over the Laredo Gateway.[36] Moreover, Applicants' cost advantage over UP would last far longer than one quarter. As described above, TFM rate factors would reflect aggregated and averaged net revenues and divisions received by NAFTA Rail for *all* comparable traffic moving in the previous quarter, not just new movements. In other words, if Applicants reduced their rates to capture one shipper's business during a particular quarter, but they also moved other traffic under older, higher rates, then the next quarter's rate factor would reflect a blended rate, not just the most recent, lower rate.[37] Applicants would thus have strong incentives to pursue whatever legitimate efficiencies they might accomplish as a result of their transaction.

Fourth, Applicants would have the "first look" at all new business that would create a new matrix cell. Under the I-5 Agreement, if a shipper asks UP to move business with a STCC/car type combination for which there is no pre-existing BNSF rate factor, UP must ask BNSF for a rate factor as if there were no agreement in place. If this practice were applied here, it would preserve NAFTA Rail's incentives to develop new business opportunities that might arise as a result of their transaction.

These four features address valid criticisms of *DT&I* rate equalization conditions that have been offered in past cases. In particular, they address criticisms that *DT&I* conditions reduce pro-competitive incentives because they require consolidating carriers to share efficiencies related to their elimination of interchanges at gateways and thus

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[36] Of course, UP would remain free to reduce its portion of a joint rate in order to respond to competition for traffic over the Laredo Gateway, just as if there were no Gateway Condition.

[37] The Gateway Condition thus not only allows Applicants to take advantage of any ability to reduce costs, but it also allows them to "cherry pick" certain business without making available the same low rates to UP.

subsidize less efficient connecting carriers. However, even without these features, those concerns would be far less significant in this case, because Applicants do not plan to achieve any efficiencies relating to the operation of the Laredo Gateway. *See* pages 33-34 above. Thus, a gateway condition would not undermine Applicants' incentives to reduce their own rates; it would work only to ensure that they do not unfairly discriminate by raising rates for shippers that use UP.

Moreover, as discussed above, UP and TFM have developed their own highly efficient interline services via the Laredo Gateway. NAFTA Rail carriers are unlikely to develop a more efficient interchange than the UP-TFM interchange, particularly if TFM remains an independent company, and particularly if it continues to cooperate with UP. Thus, this is not a case in which a gateway condition would unfairly subsidize a non-applicant by requiring the sharing of merger benefits. The condition would simply guarantee that the existing, highly efficient UP-TFM interchange at the Laredo Gateway would remain open on commercially reasonable terms.

B. The Service Condition

Just as Applicants have incentives to preclude competition by manipulating TFM rate factors, they have incentives to preclude competition by manipulating TFM service provided as part of interline movements with non-NAFTA Rail carriers. In recognition of these anticompetitive incentives, Applicants have committed to "continue to cooperate with UP" regarding "pre-blocking rail cars, automated customers pre-clearance procedures, supplying cars, accommodating run-through train service, and promptly providing rate

quotes."[38] In its letter of July 21, 2003, KCS also committed "to seeing that UP and BNSF are provided the same level of service they have experienced in the past, and to making improvements on that level of service where possible."[39] It further committed to use its control of TFM "to require TFM to cooperate with both UP and BNSF on pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through train service, providing excellent service, and promptly quoting rates."[40] Finally it stated that it was willing "to work with UP and BNSF on development of a methodology for measuring service standards and to develop a method by which such standards could be enforced."[41]

On this issue, UP believes that Applicants' commitments offer an effective solution – especially their commitment to "work with UP and BNSF to develop a methodology for measuring and enforcing service standards for traffic handled by TFM via the Laredo Gateway" – provided they are required to adhere to those commitments as a condition to Board approval. Moreover, as with the Gateway Condition, when the Board requires Applicants to live up to their commitment to negotiate with UP, it should not leave the process solely in private hands. The Board should condition its approval on a requirement that Applicants negotiate in good faith with UP to develop an agreement establishing methods for measuring compliance with their commitments regarding TFM service and mechanisms

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38 Supplement at 25.

39 Applicants' July 21 Letter, p.2.

40 *Id.*

41 *Id.*

for enforcing compliance with those commitments, and it should be prepared to impose an appropriate solution should the parties fail to reach agreement.

Experience implementing the conditions imposed in the UP/SP merger demonstrates that there would be effective ways to implement mechanisms for measuring and enforcing Applicants' adherence to the Service Condition. In connection with the UP/SP merger, UP and BNSF jointly developed measures for monitoring train performance to ensure non-discriminatory treatment of trackage rights trains moving over each other's lines. The implementation of similar service measurements to monitor the treatment of UP-TFM traffic as compared to traffic moving via TFM-Tex Mex routings would go a long way toward fulfilling Applicants' commitment. UP believes that it would be important for the parties to develop additional measures that address other important aspects of TFM cooperation issues – including, for example, measures to compare train schedules, car supply, switching frequency, and customer service responsiveness – but UP's past positive experience demonstrates that good faith negotiations can produce an appropriate solution.

As I discussed above, active cooperation between UP and TFM has been indispensable in developing efficient U.S.-Mexico rail service. History has shown that active coordination of services and operations, including customs clearance processes, blocking, and run-through service, as well as the level of service TFM provides within Mexico on UP-TFM interline business, is essential to attracting and retaining U.S.-Mexico traffic. If the current level of coordination and cooperation between UP and TFM decreased as a result of the transaction, or if TFM discriminated against UP in working to improve existing services, customers would quickly switch to alternative services provided by Tex Mex and KCS, even if they were more costly or less efficient. The Applicants have repeatedly asserted that they

have every incentive to continue cooperating with UP. UP seeks nothing more than an enforceable condition requiring Applicants to back those assertions with action.

APPENDIX A

EXISTING UP-TFM COOPERATION

Reasonable Rate Factors

- TFM has consistently quoted UP reasonable and non-discriminatory rates and rate factors to facilitate effective competition between UP-TFM routes and routes involving KCS-Tex Mex and BNSF-Tex Mex. For the most part, railroad rates break at Laredo, with the carrier(s) north of the border collecting its freight charges with TFM charging and collecting its own rate. To our knowledge, TFM has provided the same rates to both of its connecting carriers at Laredo, in accord with principles of neutrality established under Mexican law and the Concession that privatized TFM. *See* Fuentes V.S. at 4-5.

Marketing and Service Design

- An important feature for growing any transportation market is the ability to respond quickly and effectively to customer requests for pricing. Railroads must be able to quickly analyze the market environment and develop prices which help our customers participate in the ever changing opportunities they encounter. TFM has always proven to be an effective and aggressive market partner that has quickly responded to these opportunities with prices that are competitive. Similarly, TFM has also been a good partner in developing the service packages needed to attract and retain business.
- TFM and UP have implemented a "one-stop" shipping system called MexDirect that helps to expedite the movement of products across the Mexican border. The railroads offer customers "quick quote" rates between UP-served

origins and destinations in the United States and TFM-served origins and destinations in Mexico. Other important MexDirect features include a single-point-of-contact serving both sides of the border; easily understood information on doing business in the two countries, such as instructions on how to obtain credit, place car orders, create bills of lading and trace cars; a single bill, in U.S. dollars; and multiple warehouse and trans-load options. These services could not be offered without proactive TFM cooperation. This recent program offers our customers dramatic simplification for cross-border commerce.

- TFM and UP hold semi-annual marketing meetings. At these gatherings, executives from both railroads explain the successes resulting from UP-TFM cooperation and discuss on-going interline opportunities. The respective marketing departments can then make actual and potential customers aware of the benefits resulting from UP-TFM cooperation.

Operational Coordinations

- UP and TFM have cooperated to develop efficient pre-blocking for traffic moving via Laredo. Pre-blocking involves the delivery by a connecting railroad of blocks of cars all of which are moving to some intermediate point on the receiving railroad's system. Pre-blocking is an important way for interchange partners to reduce each other's costs and improve service levels, since pre-blocked cars do not need to be reclassified at the border and then reclassified again closer to destination.

- At its San Antonio Yard, UP blocks manifest traffic and intermodal "Z" trains for TFM destinations deep within Mexico, such as Mexico City. In return, TFM prepares northbound "Z" trains, which do not require reclassification on UP's system from the time they leave the Mexico City area until reaching Chicago. TFM also pre-blocks general merchandise trains for UP. For example, TFM prepares blocks for UP's Alton & Southern Yard at East St. Louis and for the Livonia Yard near Baton Rouge.
- Accommodating run-through train service. Run through trains are an important method of improving service to customers by avoiding the disruptions that can be caused by the process of interchanging freight cars between connecting railroads. It is particularly useful in an international situation, such as Laredo, where clearance procedures can further disrupt the free flow of goods. Expedited services are particularly dependent on run through trains if they are to be effective.[42]
- Directional handling of empties. TFM and UP also have implemented a cooperative policy regarding empty cars. The two railroads have agreed to route many empties through Brownsville/Matamoros to the extent possible (although many still go through Laredo). This routing of empties helps to keep the key gateway of Laredo less congested, thereby maximizing the ability of

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[42] An important part of run-through service is the air testing and inspections that both parties perform before handing off trains to one another. UP tests and inspects cars headed for Mexico, and TFM does the same for UP on northbound cars. Although the FRA has not yet fully accepted the results of the TFM testing on northbound trains, UP nevertheless saves an hour on re-testing north of the border due to the assistance TFM provides. UP and TFM are working closely together to achieve FRA recognition of Mexican testing.

Laredo to move loaded railcars. In order to keep the Laredo Gateway fluid, it is important that this practice continue.

- Cooperation at the Laredo Bridge. At the key crossing of Laredo, TFM has worked closely with UP and Tex Mex to improve the management of the Laredo Bridge, allowing the railroads to increase daily throughput over the Bridge dramatically.

Border Crossing Coordinations

- In addition to the investment in infrastructure at and near Laredo, UP and TFM have engaged in important cooperative efforts aimed at smoothing the border crossing process. The railroads must cooperate extensively in order to facilitate obtaining customs and other pre-clearances while customers are en route to the border to avoid the need for customers to spend days waiting at the border to cross. The same degree of cooperation is needed to coordinate efficient operations. For example, local operations managers from both railroads talk twice daily to prioritize operational issues and to handle any anomalies. UP and TFM also exchange data that identifies the blocks that need to be made.

Car Supply and Related Services

- For northbound shipments, TFM is responsible for arranging to supply empty rail cars for loading by customers. This is critical to efficient satisfaction of customer demand. Also of importance has been TFM's ability to efficiently manage empty cars that have moved loaded onto their railroad southbound.

Their ability to match these cars with the requirements of customers shipping northbound is an important factor in keeping costs under control and permitting both railroads to participate in markets that would otherwise have been unavailable. This is supported by TFM's additional services, including prompt switching of loaded and empty cars from customer sidings and empty car cleaning when necessary.

APPENDIX B

KCS ACCESS TO MAJOR EASTERN GATEWAYS

CHICAGO

KCS trackage does not reach Chicago, but it has several ways of reaching the gateway:

- KCS's primary access to the Chicago gateway is via its Alliance partner CN, via a connection at Jackson, MS. As part of the CN-KCS Alliance, this routing also provides KCS with access to traffic to/from CN-served points in Iowa, Wisconsin, Michigan and Canada.

- KCS also reaches Chicago via Kansas City under a Marketing Agreement with the Iowa, Chicago & Eastern ("IC&E"), which operates between Kansas City and Chicago.

- KCS has haulage rights over UP between Springfield, Illinois (which KCS reaches via Kansas City) and Chicago. This agreement dates to 1989, when SP acquired its St. Louis-Springfield-Chicago line.

ST. LOUIS

KCS serves the St. Louis gateway via Kansas City. (Its route includes the Kansas City-St. Louis line of the former Gateway Western Railroad, which is now an integrated part of KCS.) At East St. Louis, KCS connects with CN, CSX and NS for traffic to/from the East and Southeast.

KANSAS CITY

KCS serves Kansas City directly. At Kansas City, KCS connects with its alliance partner IC&E/DM&E, which provides a direct route to Chicago and also serves grain origin points in Iowa and Minnesota. KCS also connects with NS for traffic to/from other points in the Midwest and East.

MEMPHIS

KCS does not serve Memphis, but can access the major southeastern carriers (CSX and NS) at other gateways, as noted. KCS's primary route for traffic to/from points in the Memphis area is via the CN connection at Jackson, Mississippi.

NEW ORLEANS

KCS serves New Orleans, where it connects with CN, CSX and NS for traffic to and from the east. KCS's primary interchange at New Orleans is with CSX, because most traffic to/from CN and NS is interchanged elsewhere, as noted below.

JACKSON, MS

KCS serves Jackson, Mississippi, which is the primary KCS-CN gateway for traffic to/from much of the CN system, including Canada. The two carriers operate coordinated train service via this gateway.

MERIDIAN, MS

KCS serves Meridian, Mississippi, which is its primary junction with NS for traffic to/from the east. The two carriers operate run-through train service via this gateway.

BIRMINGHAM, AL

KCS serves Birmingham, Alabama, where it can interchange with CSX.

APPENDIX C

ONE EFFECTIVE APPROACH FOR KEEPING THE LAREDO GATEWAY OPEN ON COMMERCIALLY REASONABLE TERMS

Purpose

- The agreement should ensure that UP (and carriers participating with it in joint-line routings) can offer shippers rates that include a commercially reasonable TFM factor for traffic moving via the Laredo Gateway between points in Mexico and points in the United States and Canada.

Scope

- The agreement should provide TFM rate factors that UP and other participating carriers could use for traffic moving between:

  (a) any point in Mexico served by TFM (directly or through interchange with carriers other than FXE), and

  (b) points in the United States and Canada served by UP or through UP via its connections.

- The agreement should cover all commodities (carload, bulk and intermodal).

- The agreement should cover both southbound and northbound movements.

- The agreement should cover shipments moved in railcars owned by railroads and third parties.

TFM Rate Factors

- The agreement should provide a matrix of TFM rate factors, in the form of net ton-mile rates (net of refunds, allowances, rebates, ancillary charges, and transload charges) for different commodities and car types.

- The net ton-mile rates in each cell of the matrix would be applied to the TFM mileage and the associated net tons between points in Mexico and the Laredo Gateway to develop the TFM factor.

- The agreement may provide for separate TFM rate factors applicable to different geographical regions within Mexico or the United States/Canada.

Development of TFM Rate Factors

- The initial rate factors should be determined based on the TFM portion of rates used in conjunction with UP-TFM interline movements (net of refunds, allowances, rebates, ancillary charges, and transload charges) in effect and actually moving business as of some reasonable benchmark prior to the announcement of KCS's acquisition of control of TFM and Tex Mex. A third party, such as a major accounting firm or other established transportation consultant (the "consultant") should be employed to compute rates for the TFM portion of UP-TFM movements.

- The net ton mile rate for each commodity/car type should be a weighted average of the rates applicable to movements of each such commodity/car type between the covered points.

- New rates should be derived each subsequent quarter based on KCS/Tex Mex-TFM and other Tex Mex/TFM rates or TFM rate factors actually moving business during the quarter. For Rule 11 rates, KCS/Tex Mex rate factors and route miles would need to be included for the portion of the movement north of Laredo.

- Once a cell in the matrix was filled, the rate factor should not be removed from the matrix if no traffic moved in a given quarter. Instead, the rate in the matrix should be adjusted to reflect rate changes for comparable traffic.

- The agreement should establish procedures to ensure that in settling interline accounts UP's and KCS/Tex Mex's revenues north of the Laredo Gateway are not disclosed to one other.

Service

- The agreement should provide for KCS to use its control of TFM to require that TFM provide service (including car supply, switching, pre-blocking and other handling) for movements as to which the agreement establishes TFM rate factors as TFM must provide in accordance with the other conditions imposed in this case.

Third Party Consultant

- The third party consultant should be jointly employed by UP and KCS/Tex Mex/TFM. The parties should share equally in the expense of employing the consultant. The parties should have the right to audit the consultant's work. The consultant should be required to remain impartial between UP and KCS/Tex Mex/TFM.

VERIFICATION

STATE OF NEBRASKA)
) **ss**
COUNTY OF DOUGLAS)

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

JOHN T. GRAY

Sworn to and subscribed before me this 4th day of August, 2003.

GENERAL NOTARY-State of Nebraska
MARY R. HOLEWINSKI
My Comm. Exp. Oct. 15, 2004

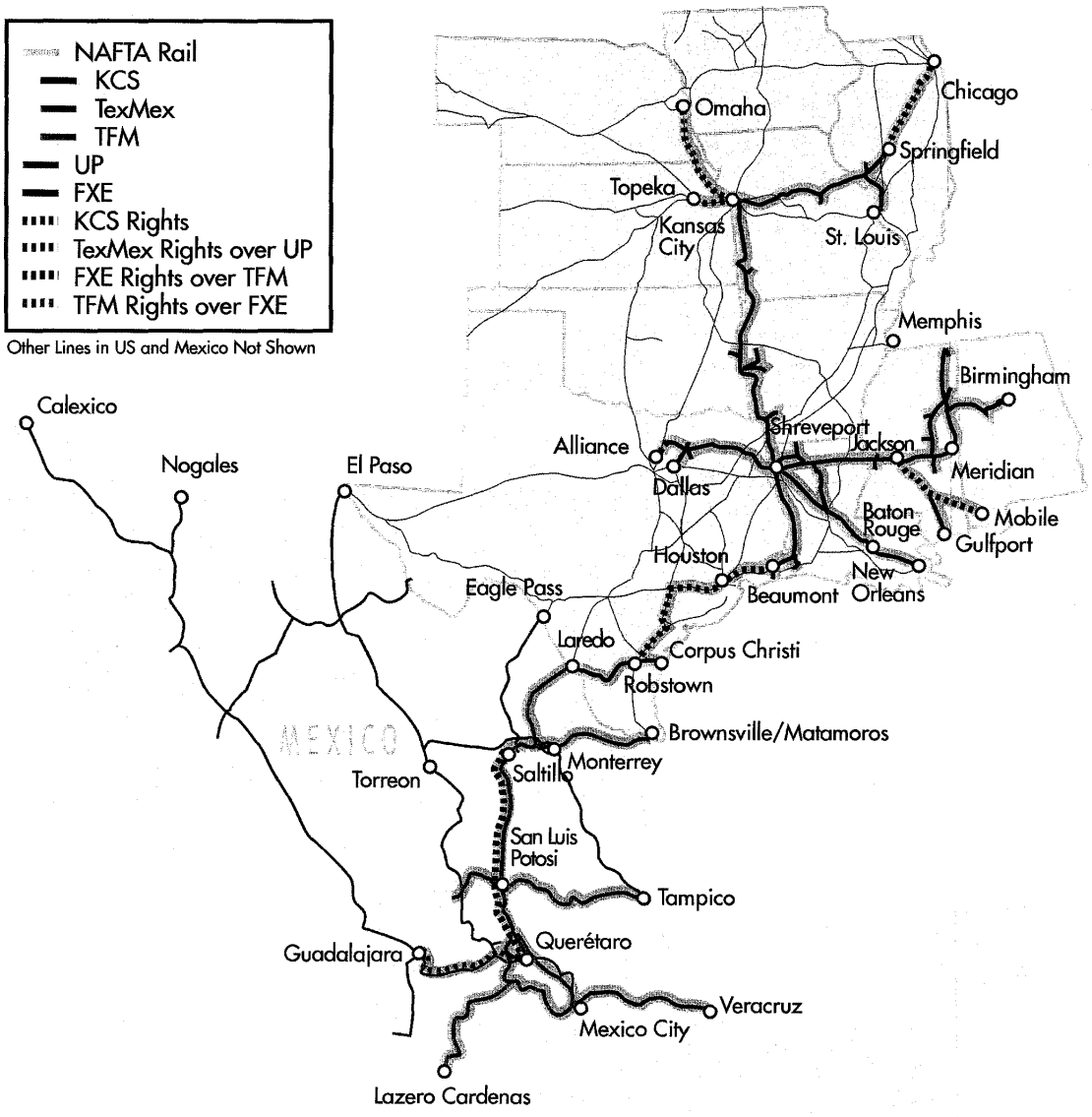
Notary Public

My Commission expires October 15, 2004

A

Gray Exhibit A
Public

KCS - TexMex - TFM



B

Gray Exhibit B
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U.S. Merchandise Trade with Mexico by Rail, April 1993-December 2002

(Value in current U.S. dollars) CSV

Year	U.S. Imports from Mexico by Rail	U.S. Exports to Mexico by Rail	Total US-Mexico Trade by Rail
1993 (Apr-Dec)	$6,222,798,108	$2,103,568,900	$8,326,367,008
1994	$7,769,002,773	$4,192,037,736	$11,961,040,509
1995	$9,137,946,078	$4,694,439,969	$13,832,386,047
1996	$12,297,683,361	$5,119,248,882	$16,992,123,330
1997	$12,646,931,446	$5,648,002,070	$18,294,933,516
1998	$12,029,664,622	$6,188,777,197	$18,218,441,819
1999	$14,693,445,318	$5,710,614,158	$20,404,059,476
2000	$21,056,113,884	$10,495,792,020	$31,551,905,904
2001	$22,056,776,869	$10,389,405,439	$32,446,182,308
2002	$20,790,689,267	$10,143,004,235	$30,933,693,502

Note that data between 1993-1996 include transshipment activity (i.e., shipments which entered or exited the United States by way of a US Customs port on the northern or southern borders but whose origin or final destination was other than Canada or Mexico). Data beginning with January 1997 **do not** include transshipment activity. Users should note these differences before comparing figures for 1993-1996 with 1997 and subsequent year data. Also note that the category "OTHER" was further subdivided into "OTHER" and Foreign Trade Zones (FTZ) beginning with the April 1995 data month.

SOURCE: U.S. Department of Transportation, Bureau of Transportation Statistics, Transborder Surface Freight Data.

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As filed with the staff of the Securities and Exchange Commission on April 23, 2003

Registration Statement No. 333-99075

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Post-Effective Amendment No. 2
to
Form F-4
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

GRUPO TMM, S.A.
(Exact name of registrant as specified in its charter)
TMM Group
(Translation of Registrant's name into English)
United Mexican States
(State or other jurisdiction of incorporation or organization)
6770
(Primary Standard Industrial Classification Code Number)
Not applicable
(I.R.S. Employer Identification Number)
Avenida de la Cúspide, No. 4755
Colonia Parques del Pedregal,
14010 Mexico, D.F.
(Address of principal executive offices)
CT Corporation System
111 Eighth Avenue
New York, NY 10011
(212) 894-8700
(Name, address, including zip code, and telephone number, including area code, of agent for service)

TMM HOLDINGS, S.A. DE C.V.
(Exact name of registrant as specified in its charter)
TMM Holdings
(Translation of Registrant's name into English)
United Mexican States
(State or other jurisdiction of incorporation or organization)
6770
(Primary Standard Industrial Classification Code Number)
Not applicable
(I.R.S. Employer Identification Number)
Avenida de la Cúspide, No. 4755
Colonia Parques del Pedregal,
14010 Mexico, D.F.
(Address of principal executive offices)
CT Corporation System
111 Eighth Avenue
New York, NY 10011
(212) 894-8700
(Name, address, including zip code, and telephone number, including area code, of agent for service)

with copies to:

Thomas C. Janson, Jr.
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street
30th Floor
Los Angeles, California 90017
(213) 892-4473

David Lopez
Cleary, Gottlieb, Steen & Hamilton
One Liberty Plaza
New York, New York 10006
(212) 225-2632

Approximate date of commencement of proposed sale to the public: As soon as practicable after the effective date of this Registration Statement and all other conditions to the exchange offers and consent solicitations described in the accompanying prospectus have been satisfied or waived.

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. / /

Our railroad operations consist of TFM and the Tex-Mex Railway.

TFM Railroad

TFM, through 2,641 miles (4,251 km) of main track and 637 miles (1,025 km) of trackage rights, operates the primary corridor of the Mexican railroad system which allows us to participate in the growing freight traffic moving between Mexico, the United States and Canada. TFM's rail lines connect the most populated and industrialized regions of Mexico with the principal border gateway between the United States and Mexico at Laredo-Nuevo Laredo. In addition, TFM's rail system serves three of Mexico's four primary seaports at Veracruz and Tampico on the Gulf of Mexico and Lázaro Cárdenas on the Pacific Ocean. TFM serves 15 Mexican states and the cities of Monterrey and Mexico City, representing approximately 70% of the country's population. TFM also expects to serve Guadalajara, Mexico's third largest city, through trackage rights with rail service to Laredo, Texas, the largest freight exchange point between the United States and Mexico, where TFM provides exclusive access from Mexico and also access from the United States through connections with the Tex-Mex Railway and the Union Pacific Railroad. We believe the Laredo gateway is the most important interchange point for freight between the United States and Mexico. Approximately 82% of TFM's total revenue in 2002 was attributable to international freight. The majority of this international freight was bound to or from the United States and Canada, crossing the U.S.-Mexico border at Nuevo Laredo, and most of the remainder came from overseas, principally through Mexico's seaports.

TFM's route structure enables it to benefit from the growing trade resulting from the increasing integration of the North American economies through NAFTA. Mexican foreign trade increased at an average annual rate of 18.8% from 1992 to 2000, increasing by 15.1% in 1999 from 1998 and by 22.5% in 2000 from 1999. Notwithstanding a decrease of 4.1% in Mexican foreign trade in 2001 from 2000 as a result of the slowdown of the U.S. and global economies, TFM's foreign trade increased 0.77% in 2002 from 2001.

TFM has significantly improved the operations of its rail lines by focusing on providing reliable and comprehensive customer service, implementing U.S. and Canadian railroad operating practices and making capital improvements to its track, systems and equipment designed to reduce costs and increase operating efficiencies. In 2002, TFM's operating ratio was 76.1% (78.5% including Mexrail), compared with an operating ratio of 93.6% for the first six months following commencement of its operations. TFM's operating ratio is better than the average operating ratio for the eight Class I railroads in the United States.* Operating ratio is an industry efficiency measure, which represents a railroad's operating expenses as a percentage of its transportation revenues.

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* Source: American Association of Railroads

The principal commodities hauled over TFM's rail lines are: industrial products, metals and minerals; agro-industrial products; automotive products; chemical and petrochemical products; and intermodal freight. TFM currently operates intermodal terminals located in Monterrey, Toluca and San Luís Potosí, and has access to intermodal terminals at Querétaro, Guadalajara, Ramos Arizpe and Encantada. In addition, TFM has direct access to Grupo TMM's intermodal facilities at the ports of Tampico, Veracruz and Lázaro Cárdenas and to intermodal terminals in Altamira and Manzanillo (through interline service with Ferromex) and in Mexico City (through the Mexico City Railroad Terminal). TFM also has access to intermodal terminals at Laredo operated by the Tex-Mex Railway and the Union Pacific Railroad, which it is using to develop international intermodal business.

TFM's rail lines serve major automobile and other manufacturing facilities at the intermodal terminals at Monterrey and Ramos Arizpe, important industrial and commercial districts, as well as at the facilities of many major customers.

Mexican Government Interests

In connection with the original formation of Grupo TFM, the Mexican government purchased a 24.6% non-voting interest in Grupo TFM for $198.8 million. The Mexican government also granted the original shareholders of Grupo TFM an option (the "call option") to purchase the government's equity interest in Grupo TFM. On July 29, 2002, TFM purchased all of the call option shares for an aggregate purchase price of $256.1 million. The purchase price for the call option shares was financed through (1) a portion of the proceeds of the issuance of $180.0 million of debt securities by TFM and (2) $85.2 million (based on the applicable exchange rate as of March 31, 2002) payable to TFM by the Mexican government as a result of TFM's recent transfer of a redundant portion of its track to the government, together with cash from TFM's operations. As a result of the acquisition of the call option shares, TFM expects to achieve financial benefits and reduce the Mexican government's involvement in its business. The Mexican government retains a 20% non-voting direct equity interest in TFM.

The Mexican government has the right to sell its 20.0% direct equity interest in TFM by October 31, 2003 in a public offering, subject to the approval of Grupo TMM and KCS. If a public offering of TFM shares does not occur by that date and the Mexican government exercises

its put option, Grupo TFM will have the obligation to purchase the Mexican government's interest in TFM at the original peso purchase price per share paid by Grupo TFM for its 80.0% equity interest in TFM, indexed to Mexican inflation. If Grupo TFM does not purchase the Mexican government's TFM shares, the Mexican government may require Grupo TMM and KCS, or either Grupo TMM or KCS alone, to purchase the TFM shares at such price and release Grupo TFM from its obligation. There is no assurance that Grupo TFM, Grupo TMM or KCS will have sufficient funds to acquire the Mexican government's interest. If the TFM Sale is completed, KCS will assume all of our obligations under the put option and will indemnify us from any losses incurred as a result of the exercise by the Mexican government of the repurchase right.

Following its privatization in 1997, TFM and its shareholders have negotiated with the Mexican government the resolution of certain matters related to the granting of the concession and its acquisition of related railroad assets.

In connection with these negotiations, on February 9, 2001, the Mexican government, through the Ministry of Transportation, issued an official statement pursuant to which TFM and the Mexican government agreed to the transfer by TFM of the redundant *La Griega-Mariscala* portion of its track back to the Mexican government. On February 12, 2001, the Mexican government amended TFM's concession title to reflect the reversion of the *La Griega-Mariscala* line to the Mexican government. The consideration for the transfer of the track was approximately Ps. 653.6 million, plus applicable value added tax, or approximately Ps. 751.6 million (approximately $81.9 million as of December 31, 2001). The Mexican government paid the consideration for the *La Griega-Mariscala* line to TFM, amounting to $85.2 million, in conjunction with the acquisition by TFM of the Mexican government's 24.6% interest in Grupo TFM on

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July 29, 2002. The *La Griega-Mariscala* track is a redundant 32-kilometer stretch of track which is part of TFM's dual track running between Mexico City and the city of Querétaro. The Mexican government subsequently granted the *La Griega-Mariscala* track to Ferromex to fulfill its obligation to provide Ferromex with a track along this route to facilitate transport by Ferromex through Querétaro.

At the same time, TFM's concession was also amended to relieve TFM from responsibility for the maintenance of the electrified catenary over the portion of its dual line between Huehuetoca and Querétaro and to authorize TFM's dismantling of the catenary over that portion of the line, which TFM completed in 1999. In addition, the amendment requires TFM to complete certain railway improvements which TFM believes will not involve material expenditures.

In addition to the foregoing, after a period of negotiation with Ferromex, TFM's principal Mexican rail competitor, and the Mexican government regarding the terms relating to the trackage rights required to be granted by TFM to Ferromex and by Ferromex to TFM under their respective concessions, TFM and Ferromex were unable to reach an agreement with respect to the fees to be paid by TFM and Ferromex for usage of the other's track. Therefore, in accordance with TFM's rights under the Mexican railroad services law, TFM asked the Ministry of Transportation to set these trackage rights using the applicable criteria under the Mexican railroad services law. In March 2002, the Ministry of Transportation issued its trackage rights ruling, which TFM is now appealing. See "Risk Factors—The rates for trackage rights set by the Ministry of Transportation may not adequately compensate TFM" and "—Legal Proceedings" for more information.

The Concession

TFM holds a 50-year concession title, renewable under certain conditions for an additional 50 years, to provide freight transportation services over its rail lines. This right is exclusive for the first 30 years of TFM's operations, subject to certain trackage rights to be granted to other Mexican rail operators. Under the concession, TFM has the right to use, during the full term of the concession, all rights of way, track, buildings and related maintenance facilities that are necessary for the operation of its rail lines. Under the terms of the concession, TFM is required to pay the government a fee equal to 0.5% of our gross revenues during the first 15 years of the concession period, and 1.25% of such revenues during the remainder of the period.

TFM is required to grant trackage rights along our rail lines to Ferromex, Ferrosur and the Mexico City Terminal Railroad. The Ministry of Transportation has the right to grant exclusive passenger service concessions utilizing TFM's rail lines to a concessionaire other than TFM. Under the concession and the Mexican railroad services law, TFM may freely set its rates unless the Mexican Antitrust Commission determines that there is no effective competition, taking into account alternative rail routes and modes of transportation. If the Mexican Antitrust Commission determines that there is a lack of competition in the railroad system, the Ministry of Transportation will establish the basis for TFM's rates. TFM's rates must be registered and applied in accordance with the Mexican railroad services law and regulations. In applying its rates, TFM must not make cross-subsidies, engage in tied sales or engage in other discriminatory pricing tactics. TFM is required to provide railroad services to all users on a fair and non-discriminatory basis and in accordance with the efficiency and safety standards approved periodically by the Ministry of Transportation. In the event that TFM collects from customers rates higher than the registered rates, it must reimburse those customers with interest.

The concession requires TFM to make investments and undertake capital projects in accordance with a business plan approved by the Mexican government. TFM is also responsible for compliance with efficiency and safety standards set forth in the concession, which are based

D

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Table 24
Top 10 U.S. Land Ports by Value of U.S.-NAFTA Surface Trade: 2000 and 2001

(Value in millions of current U.S. dollars)

Excel | CSV

Rank in 2001	U.S. port	All surface modes			Truck			Rail		
		2000	2001	% Change	2000	2001	% Change	2000	2001	% Change
	U.S.-North American trade	**575,713**	**547,312**	**-4.9**	**428,700**	**395,425**	**-7.8**	**94,198**	**92,617**	**-1.7**
1	Detroit, MI	94,442	91,982	-2.6	85,468	79,762	-6.7	8,598	11,909	38.5
2	Laredo, TX	83,674	79,607	-4.9	60,047	55,298	-7.9	23,465	24,179	3.0
3	Buffalo-Niagara, NY	70,132	60,478	-13.9	54,659	47,196	-13.7	14,473	10,497	-27.5
4	Port Huron, MI	59,704	55,648	-6.8	32,770	29,955	-8.6	24,645	22,914	-7.0
5	El Paso, TX	39,376	37,931	-3.7	36,008	34,697	-3.6	1,433	1,575	9.9
6	Otay Mesa Station, CA	18,773	19,401	-3.3	18,760	19,385	3.3	0	0	NA
7	Champlain-Rouses Pt., NY	17,260	16,163	-6.4	15,326	14,271	-6.9	1,041	1,098	5.5
8	Nogales, AZ	13,631	12,509	-8.2	11,046	9,964	-9.8	2,576	2,543	-1.3
9	Hidalgo, TX	12,594	12,423	-1.4	12,444	12,211	-1.9	0	0	NA
10	Blaine, WA	12,303	11,687	-5.0	10,692	9,914	-7.3	1,536	1,724	12.3
	Top 10 as % of total	**73.3**	**72.7**		**78.7**	**79.1**		**82.6**	**82.5**	
	U.S.-Canada trade	**365,118**	**346,515**	**-5.1**	**257,642**	**234,824**	**-8.9**	**62,646**	**60,171**	**-4.0**
1	Detroit, MI	94,347	91,906	-2.6	85,375	79,687	-6.7	8,597	11,908	38.5
2	Buffalo-Niagara, NY	70,004	60,341	-13.8	54,531	47,059	-13.7	14,473	10,497	-27.5
3	Port Huron, MI	59,622	55,539	-6.8	32,689	29,846	-8.7	24,644	22,914	-7.0
4	Champlain-Rouses Pt.,	17,237	16,137	-6.4	15,303	14,246	-6.9	1,041	1,098	5.5

	NY									
5	Blaine, WA	12,303	11,687	-5.0	10,692	9,914	-7.3	1,536	1,724	12.3
6	Alexandria Bay, NY	11,987	10,621	-11.4	11,981	10,615	-11.4	0	0	NA
7	Pembina, ND	10,577	8,886	-16.0	9,661	8,252	-14.6	180	107	-40.7
8	Sweetgrass, MT	7,773	8,269	6.4	6,446	6,888	6.9	470	564	19.9
9	Portal, ND	6,596	6,799	3.1	4,376	4,426	1.2	2,193	2,341	6.8
10	Eastport, ID	2,711	6,513	140.3	1,580	1,222	-22.6	907	819	-9.7
	Top 10 as % of total	**80.3**	**79.9**		**90.3**	**90.3**		**86.3**	**86.4**	
	U.S.-Mexico trade	**210,595**	**200,797**	**-4.7**	**171,058**	**160,600**	**-6.1**	**31,552**	**32,446**	**2.8**
1	Laredo, TX	83,674	79,607	-4.9	60,047	55,298	-7.9	23,465	24,179	3.0
2	El Paso, TX	39,376	37,931	-3.7	36,008	34,697	-3.6	1,433	1,575	9.9
3	Otay Mesa, CA	18,773	19,401	3.3	18,760	19,385	3.3	0	0	NA
4	Nogales, AZ	13,631	12,509	-8.2	11,046	9,964	-9.8	2,576	2,543	-1.3
5	Hidalgo, TX	12,594	12,423	-1.4	12,444	12,211	-1.9	0	0	211.2
6	Brownsville-Cameron, TX	12,108	10,911	-9.9	11,307	10,139	-10.3	746	735	-1.5
7	Calexico East, CA	8,320	7,348	-11.7	8,238	7,207	-12.5	81	140	72.4
8	Eagle Pass, TX	7,285	6,739	-7.5	4,135	3,599	-13.0	3,140	3,129	-0.3
9	Del Rio, TX	2,387	2,375	-0.5	2,387	2,375	-0.5	0	0	NA
10	San Luis, AZ	1,226	1,007	-17.8	1,226	994	-18.9	0	0	NA
	Top 10 as % of total	**94.7**	**94.7**		**96.8**	**97.1**		**99.7**	**99.6**	

KEY: NA = not applicable

NOTE: Truck and rail will not sum to total land trade by port, because not all land modes are included here. Other land modes include pipeline, mail, unknown, and miscellaneous. Ports are ranked by totals for all surface modes.

SOURCE: U.S. Department of Transportation, Bureau of Transportation Statistics, Transborder Surface Freight Data, as of January 2002.

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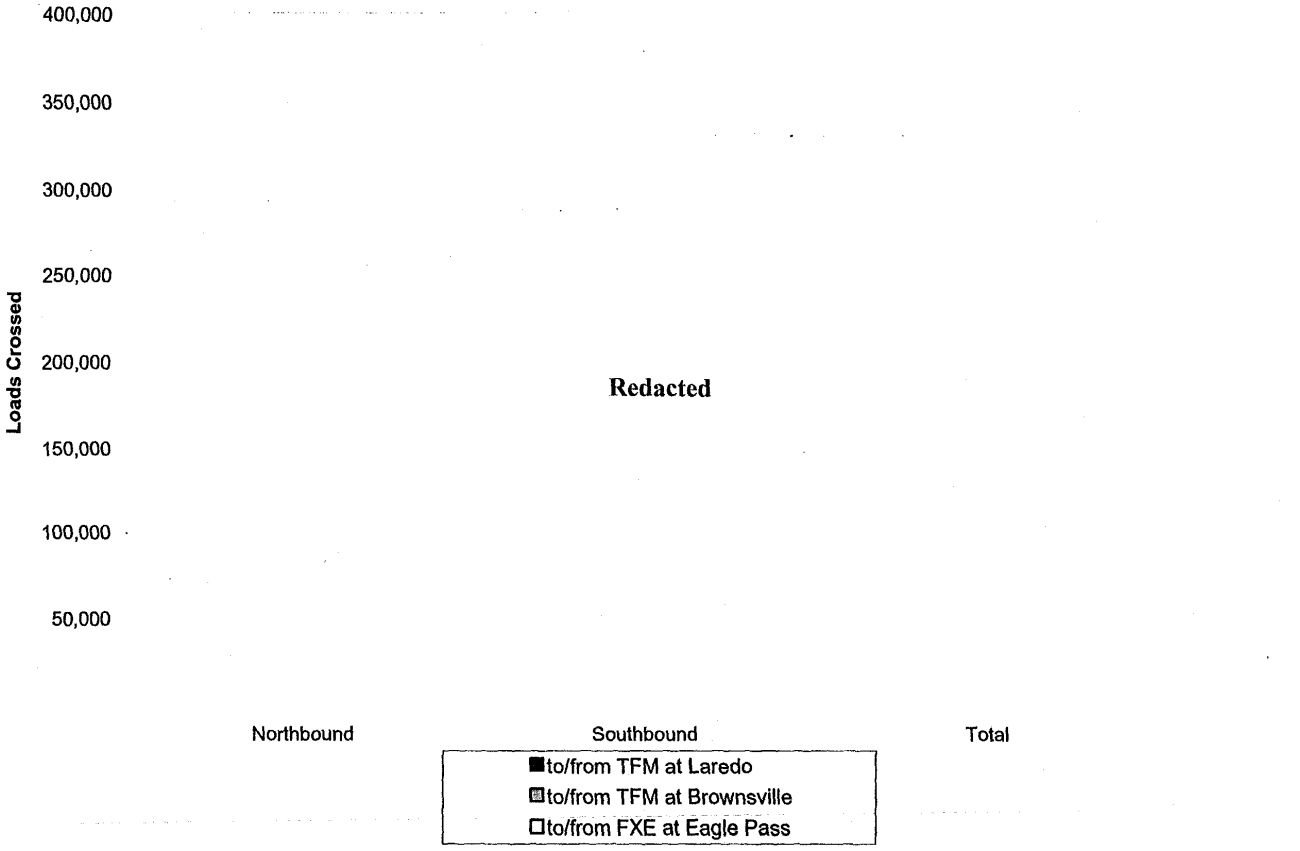
FedStats | FirstGov | White House

U.S. Department of Transportation
Bureau of Transportation Statistics
400 7th Street, SW • Room 3103 • Washington, DC 20590
L'Enfant Plaza Metrorail Station (7th and D Streets)
800-853-1351 • answers@bts.gov
Directions

E

2002 U.S. Mexico Rail Traffic at Eastern Mexico Gateways
(All U.S. Carriers)



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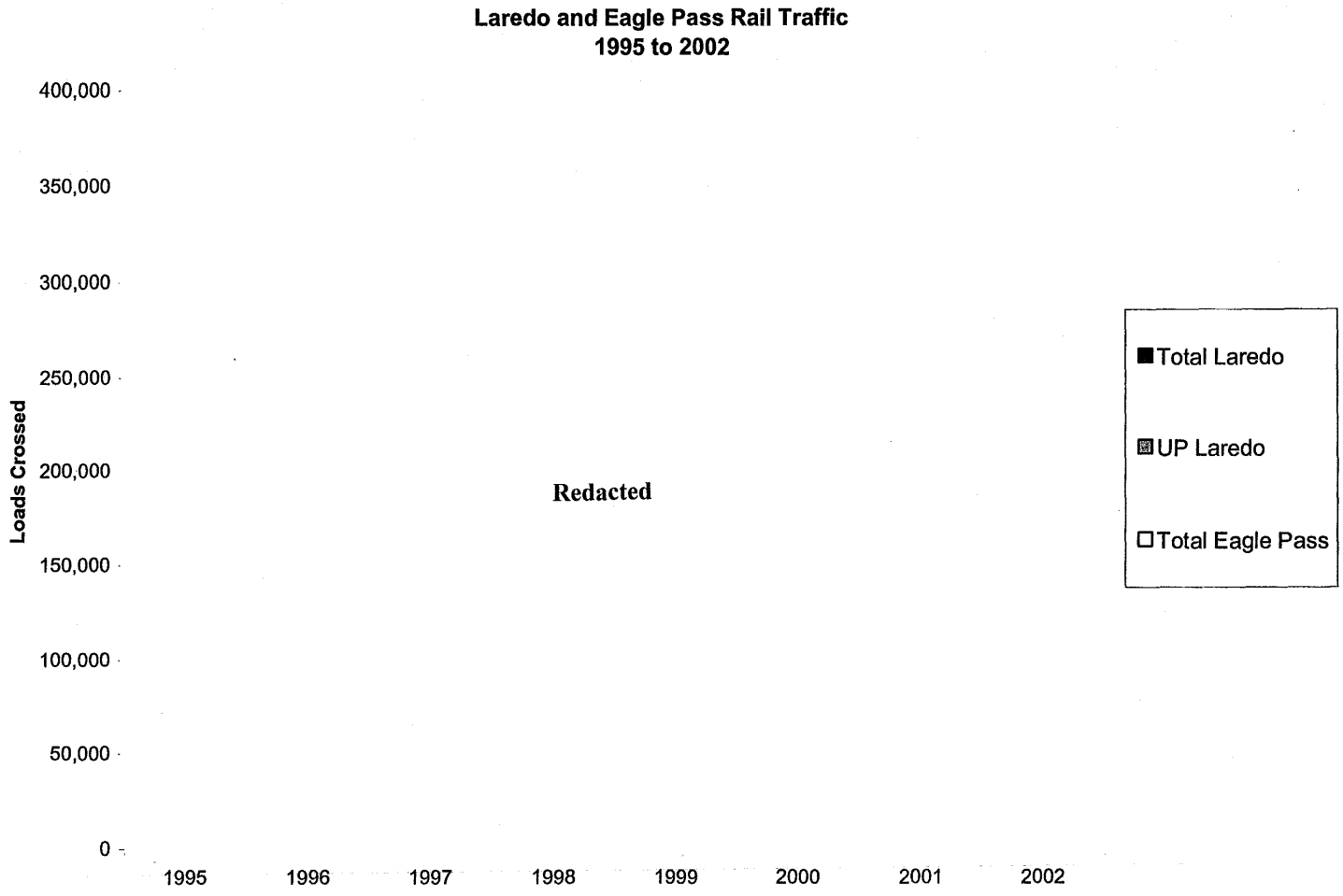

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ROUTES

Routes : Map 1 | Map 2 | Map 3 | Map 4
Map 5 | Map 6 | Map 7 | Map 8 | Map 9

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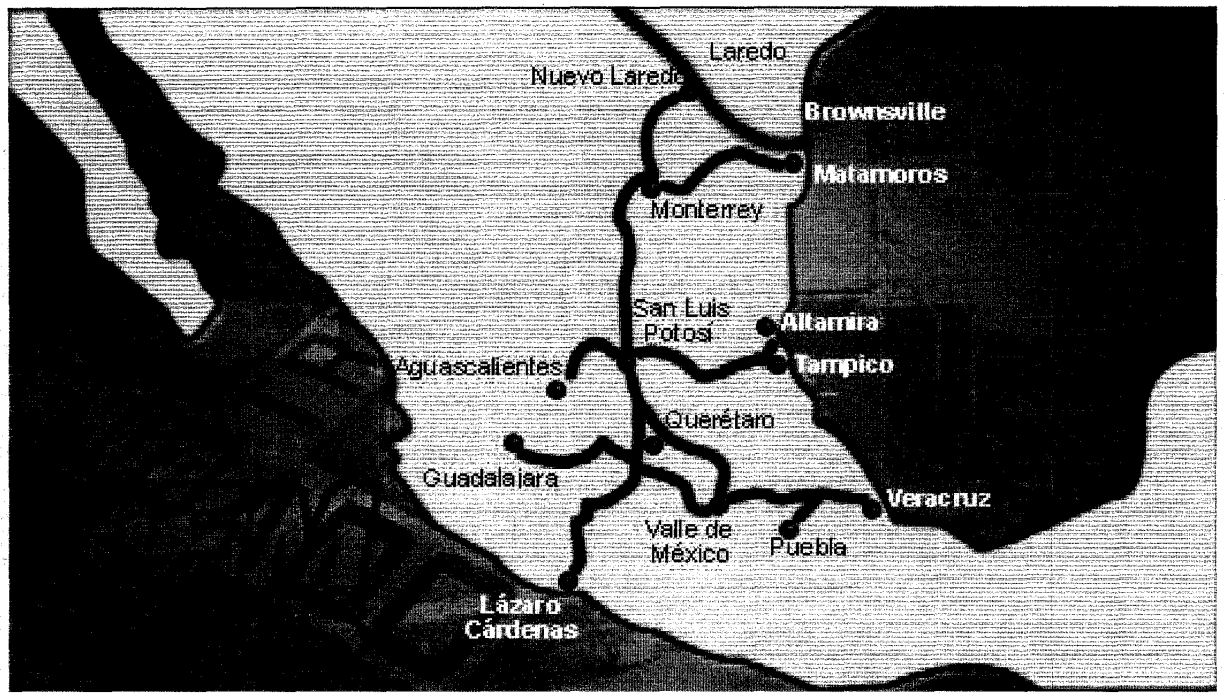

TFM serves Mexico's main industrial districts, including Mexico City, Queretaro, San Luis Potosi, Aguascalientes, Monterrey, Saltillo and Guadalajara, among others, and the ports of Veracruz, Lazaro Cardenas and Tampico/Altamira.

TFM provides the shortest route between major cities in Mexico and the U.S.A., and links up to the North American rail network at the border crossing points of Nuevo Laredo/Laredo and Matamoros/Brownsville, where more than 60% of commercial traffic between Mexico and the USA crosses the border.

Map 1 | Map 2 | Map 3 | Map 4 | Map 5 | Map 6 | Map 7 | Map 8 | Map 9

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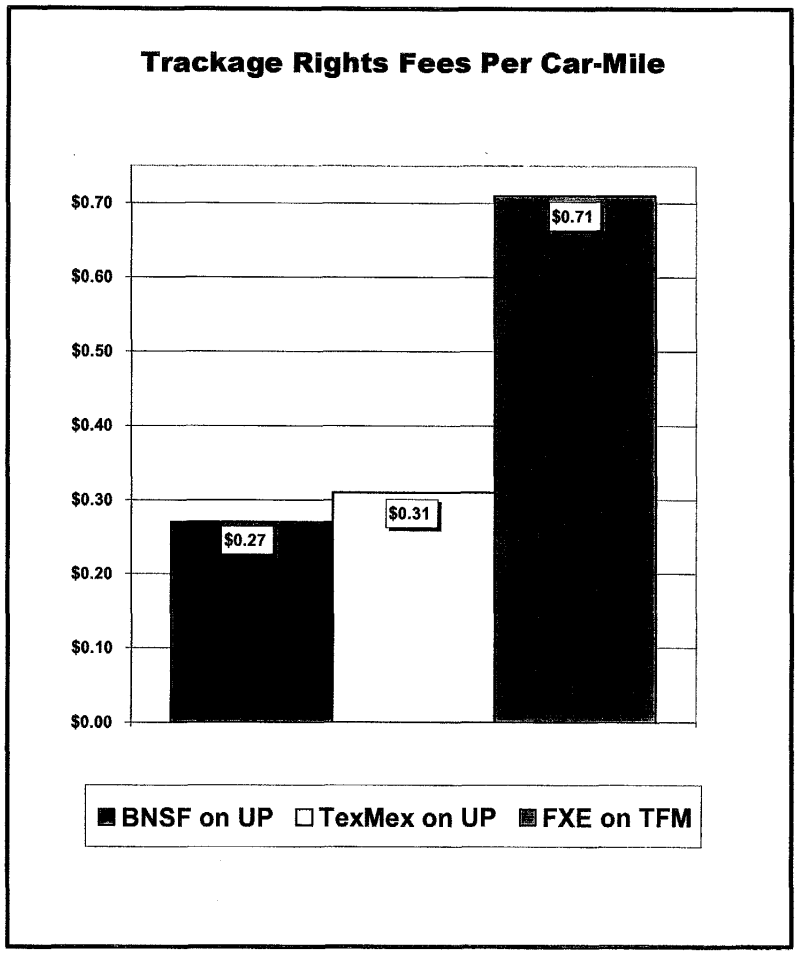
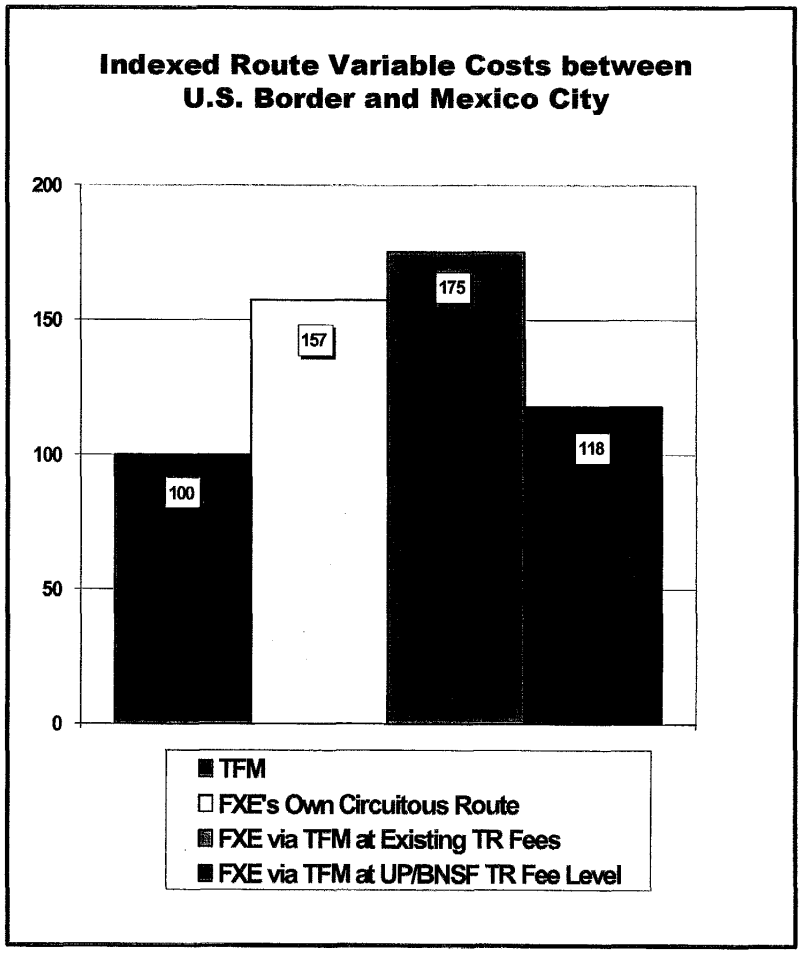
H

TFM Trackage Rights Fees Make FXE Non-Competitive



FXE's Trackage Rights Fees Are Very High



Those Fees Have A Major Impact on FXE's Costs

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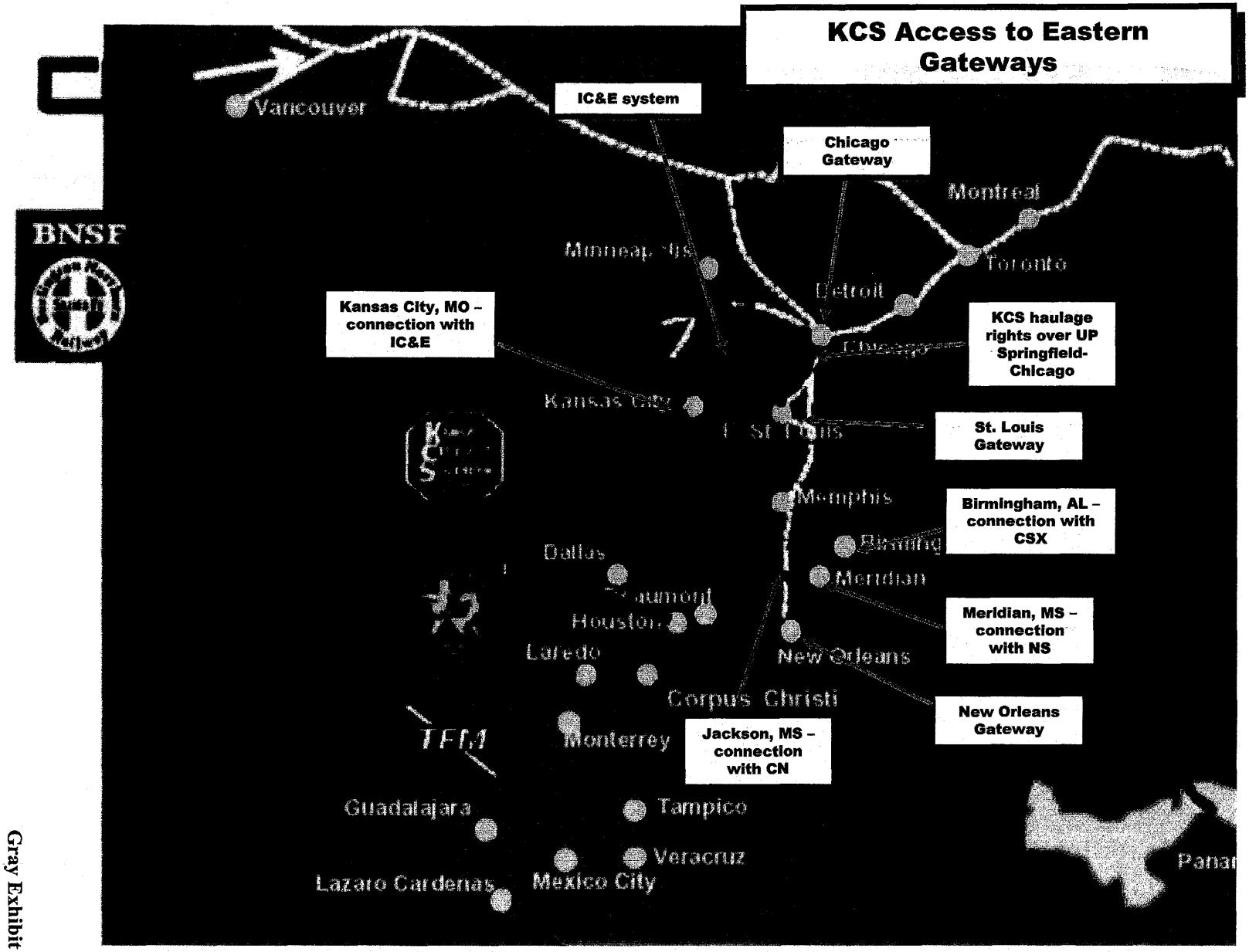

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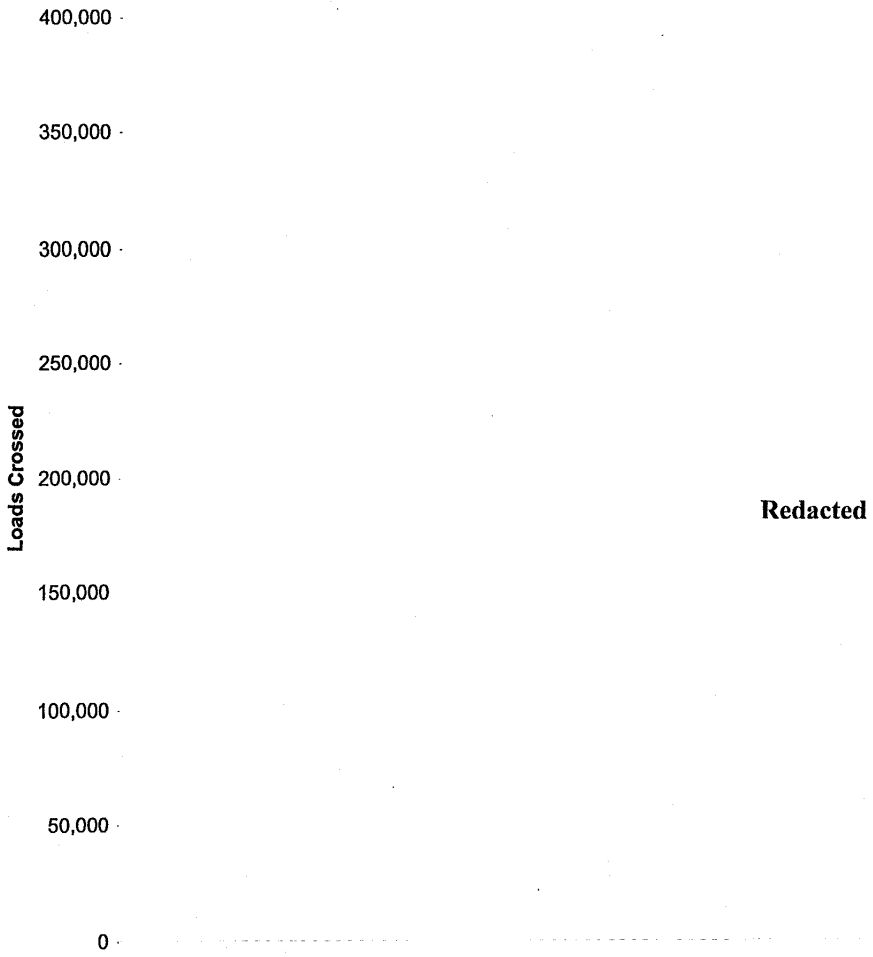
2002 Laredo Cross-Border Rail Traffic
(Traffic Subject to KCS/Tex Mex Competition)



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NAFTA Rail

NAFTA Rail Will Enhance Mexico/U.S. Rail Competition Providing Shippers A Strong Rail Alternative

The agreements announced between Grupo TMM and Kansas City Southern to create **NAFTA Rail** (a common-control holding company for TFM, The Kansas City Southern Railway, and the Texas Mexican Railway) will enhance Mexican/U.S. rail competition and provide shippers with a strong, new rail alternative in the NAFTA trade corridor.

This is the next step in the effort to develop an effective rail competitor in cross border traffic which was found to be in the public interest by the U.S. Surface Transportation Board in the Union Pacific/Southern Pacific merger in 1996. NAFTA Rail will be that competitor. It will provide seamless, efficient and competitive rail service to shippers in North America and strengthen the ability of the three carriers to invest in their infrastructure, equipment and technology, improving their ability to compete.

NAFTA Shippers Need An Effective Cross Border Rail Competitor; NAFTA Rail Will Be That Competitor

NAFTA Rail is focused on enhancing competition. Because of Union Pacific's dominance of the current Mexico/U.S. rail traffic, shippers need a second rail competitor in this market that is economically viable and able to provide a competitive alternative to UP's dominance. Shippers should have a choice. NAFTA Rail will give shippers a choice.

Today, Union Pacific is the dominant rail carrier between Mexico and the U.S.:

- UP carries 90% of the northbound traffic and 79% of the southbound traffic between Mexico and the U.S. via all six rail gateways;
- At the Laredo, Texas gateway, UP controls 91% of the market share for northbound traffic and 71% of the market share for southbound traffic;
- From Chicago to Laredo, UP controls 98% of the rail traffic;
- From St. Louis to Laredo, UP controls 98% of the rail traffic;
- From Houston to Laredo, UP controls 86% of the rail traffic; and,
- UP currently operates to and from Mexico through all six international gateways.

By comparison:

- At Laredo, BNSF/Tex-Mex has just 5% of the northbound traffic and just 12% of the southbound traffic;
- At Laredo, KCS/Tex-Mex has just 3% of the northbound traffic and just 12% of the southbound traffic;

- BNSF has one direct gateway to Mexico and reaches two more gateways via trackage rights over UP; and,
- KCS/Tex-Mex has only one gateway to Mexico at Laredo, and it depends on trackage rights over approximately 350 miles of UP in Texas to reach this gateway where it competes with UP for Mexican rail traffic.

In addition, Union Pacific has a 26% ownership in Mexico's largest railroad concession, Ferromex, which is TFM's competitor in Mexico. Clearly, Union Pacific dominates rail traffic to and from Mexico.

Trade between Mexico and the United States is the fastest growing trade relationship in the world. Economic growth in both countries relies on this trade and on competitive transportation alternatives to keep it flowing.

Protecting the domination of this vital rail market by one carrier as exists today is not in the shippers' interests nor is it in the public interest. Shippers need an effective cross border rail competitor to provide a viable alternative to the market dominant carrier.

It is in the public's interest to have such a competitor. NAFTA Rail will be that competitor by providing seamless, efficient and competitive rail service to shippers in North America while strengthening the ability of TFM, the Kansas City Southern, and Texas Mexican railroads to invest in their infrastructure, equipment and technology improving their ability to compete.

It's In NAFTA Rail's And Its Customers' Interests To Work With All Carriers In North America

While NAFTA Rail will provide shippers with a competitive alternative to UP in certain markets, NAFTA Rail will also need to cooperate with UP and BNSF in a substantial number of other markets. UP is an important interchange partner with TFM, generating important revenues for its future. UP and BNSF together control approximately 90% of the rail traffic in the United States west of the Mississippi River. Both serve vast territories that NAFTA Rail will not reach. As such, NAFTA Rail will and must continue to cooperate with both carriers on interline services, but also will be a vigorous competitor wherever it can provide alternative rail service to the customer. Working with other carriers is and will be a business necessity for TFM.

UP's chairman, Dick Davidson said recently about TFM, "...we became quite good business partners down there and I would anticipate that would continue." KCS agrees. Under NAFTA Rail, its carriers will continue to cooperate with UP, BNSF and other carriers on:

- Pre-blocking rail cars;
- Improving automated customs pre-clearance procedures;
- Supplying cars for shipments;
- Accommodating run-through train service;
- Providing excellent service: and,

- Promptly quoting rates.

Under NAFTA Rail, the Laredo gateway will be kept open to UP, and Tex-Mex will provide the same fair service to UP at the Laredo bridge as it has in the past. Tex-Mex will also work with BNSF to route traffic via Laredo, even though BNSF has other gateways to Mexico. It is in NAFTA Rail's and its customers' best interests to work with all carriers in North America.

Proposals to Limit Competitive Rail Pricing in Mexican Market Undermine Competitive Rail Service

Rail service pricing in the Mexican market has numerous similarities to the U.S. with the exception that effective competitive options in Mexico are even more available than in the U.S. Consequently, rail pricing in Mexico is very constrained by truck and water competition.

When the Mexican railroads were privatized in 1996-97, their estimated market share was less than 10%. This low market share was driven by the relatively short distance between Mexican freight markets which, in turn, facilitates vigorous truck competition. Easy access to deep water ports on both the Pacific and Gulf Coasts; difficult railroad operating conditions from both Mexican coasts to the interior; and a very inefficient railroad operation with low quality rail service, prior to privatization, also made truck competition successful over rail. As a result, the Mexican economy became and continues to be very dependent on trucks. These were some of the elements that led the Mexican Government to conclude that privatization of the rail system was the right course of action for Mexico.

Since privatization, there have been enormous changes in the rail system. The Mexican rail system was broken up to create three primary rail competitors: TFM, Ferromex, Ferrosur. Competition among the newly privatized rail lines and intensive port and truck competition have led the railroads to rapidly improve service, freight car availability, infrastructure, information systems and customer service. At TFM, for example, more than $1 billion (U.S.) has been invested in freight cars, rail, ties, locomotives and information systems during the last 6 years. The result has been a success for the Mexican shippers and the Mexican public. The rail market share now is estimated to be in the 16% to 17% range. While this gain is significant, rail market share in Mexico is only about one-third of what it is in the U.S. As an indicator of the future growth potential of rail, the border crossing at Nuevo Laredo/Laredo reported the passage of more than one million trucks in 2002.

The current balance between the two largest rail franchises in Mexico – Ferromex and TFM – has produced good results for Mexico. Ferromex is the largest of the rail franchises in Mexico and covers more of the country than does TFM. Ferromex serves four of the six U.S. border crossings while TFM serves only two. Ferromex serves the majority of the grain destinations in Mexico but TFM serves more of the auto parts manufacturers and automobile plants.

Proposals being floated by Union Pacific (UP) would undermine rail competition in Mexico and lead to virtual control of the Mexican rail market by UP. To understand these proposals, it is helpful to remember than UP owns 26% of Ferromex and controls nearly 90% of all the rail traffic between Mexico and the U.S.

In an effort to maintain its control of Mexico-U.S. trade flows, UP has offered two dramatic proposals to protect it from competitive alternatives like NAFTA Rail:

- **Proposal I**

This proposal would give Ferromex additional mandatory trackage rights over TFM so that Ferromex could serve the Laredo gateway directly. Such a broadening of Ferromex was not contemplated by the government's privatization plan nor included in the rail franchises when they were offered for privatization. This expansion of Ferromex would upset the competitive balance achieved in the privatization process and have the effect of allowing Ferromex to serve five of the six routes between Mexico and the U.S. Because UP owns 26% of Ferromex, this would guarantee UP's continued dominance over Mexico-U.S. trade. The Mexican and the U.S. shipping public would, however, be precluded from ever benefiting from competitive rail service.

- **Proposal II**

This proposal is for TFM to provide "equal" rates to the Mexico/U.S. border. Such a proposal would deprive NAFTA Rail of the ability to offer, in the form of lower prices to the Mexican shipping public, the benefits of the long haul on its system from, for example, Mexico City to Meridian, Mississippi or Birmingham, Alabama. In addition, Ferromex is TFM's primary rail competitor. With UP controlling Ferromex's pricing (through its 26% ownership), with enforced "equal" rates as suggested by UP, UP could control the economic viability of both primary rail systems in Mexico and the prices paid by Mexican shippers. In short, "equal" rates give UP a way to control its 90% market share and deprive the Mexican and U.S. shipping public of the benefits of competitive rail service. Moreover, UP's proposal is contrary to Mexican law and regulations which grant each rail carrier in Mexico the right to freely set their own rates in the competitive marketplace.

NAFTA Rail is an effective way to bring a new rail service offering into the NAFTA trade corridor. NAFTA Rail will bring competitive discipline to the NAFTA trade corridor. And, NAFTA Rail will benefit both Mexican and U.S. shippers so NAFTA trade can reach its full potential.

NAFTA Rail Will Remain The Smallest Class I Rail Carrier

Despite strengthening its ability to compete, improving its ability to invest in infrastructure and being the effective rail competitor for cross border traffic that shippers need, NAFTA Rail still will be, by far, the smallest Class I rail carrier in the United States.

In 2002:

- UP had annual revenues of approximately $12.5 billion (U.S.) making it the largest Class I rail carrier in the United States;
- KCS had revenue of under $600 million (U.S.) making it the smallest Class I carrier in the United States;
- If the NAFTA Rail transaction is approved, its combined revenues will be about $1.3 billion (U.S.), just over 10% of UP's 2002 revenues;
- UP has stated that just under 10% of its annual revenues, or about $1 billion (U.S.) is derived from traffic between Mexico and the U.S.; and,
- KCS/Tex-Mex revenues from traffic between Mexico and the U.S. are less than $70 million annually.

Obviously, UP has enormous economic power in the cross border market. NAFTA Rail will enhance Mexico/U.S. rail competition and provide shippers a strong rail alternative in the future.

Questions?

If you have questions about NAFTA Rail or any of these issues, please contact us at 816-983-1500, or send us an e-mail at NAFTA.Rail@kcsr.com and we will respond promptly. NAFTA Rail will be good for shippers, good for competition, and is in the public interest.

NAFTA RAILWAY

KANSAS CITY SOUTHERN

July 9, 2002

NAFTA Railway Partners Reflect and Pursue New Opportunities

Previous Article / Next Article / KCS News Menu

On July 28th, NAFTA Railway alliance partners KCS, TFM and Tex Mex met in Houston for a quarterly meeting to pursue new opportunities for NAFTA Railway growth. Operating, marketing and customer service representatives were present to discuss, among other topics, freight traffic opportunities both north and southbound. All partners agreed that there are tremendous opportunities to grow the business and improve service, especially in conjunction with the recent alliance with BNSF, as well as more established alliances such as those with CN, NS and IMRL.

Recently, the synergies of the three partners have again proven successful with the operational improvements seen on Tex Mex since March. The three groups reported on efficiencies already in effect, such as the consolidation of KCS and Tex Mex dispatching, crew calling and timekeeping to KCS' System Transportation Center in Shreveport.

Since the consolidation, customer service representatives from all three partners, talk weekly about the joint operation. "The team has developed a seamless, one-stop customer service approach for moving traffic in and out of Mexico on the NAFTA Railway," said Jan McNeal, KCS' AVP customer service. "Each week, the team covers service performance related to KCS' new pre-blocking plan for traffic going southbound into Mexico, despacho previo and clearances that will help expedite traffic, technology updates such as Electronic Data Interchange (EDI) performance and billing, as well as current customer issues. The team will continue to resolve issues and provide regular updates to senior leadership."

Since the meeting, KCS and Tex Mex have begun working on an initiative with TFM to create a similar plan for operational efficiency going northbound, to include the possibility of TFM pre-blocking traffic to save handling and transit time on traffic moving from Mexico to the US Markets.

In a final note regarding the NAFTA Railway Alliance meeting, another key topic was that of future projects like the implementation of MCS on KCS this summer and on Tex Mex later this year. The shared computer system will help KCS and Tex Mex to provide more accurate and timely information to customers, and further improve the convenience of doing business on the NAFTA Railway.

M

US OFFICE PRODUCTS

Gray Exhibit M
Public

UP Counterpart

PROPORTIONAL RATE AGREEMENT

THIS AGREEMENT made as of this 22 day of May, 1997, between The Burlington Northern and Santa Fe Railway Company, a Delaware corporation and its railroad affiliates (The Burlington Northern and Santa Fe Railway Company and all of its railroad affiliates, and, where appropriate in the context, their predecessors, are hereinafter referred to collectively as "BNSF"), on the one hand, and Union Pacific Railroad Company, a Utah corporation ("UPRR"), and Southern Pacific Transportation Company, a Delaware corporation ("SP") and all of their railroad affiliates (UPRR, SP and all of their railroad affiliates, and, where appropriate in the context, their predecessors, are hereinafter referred to collectively as "UP"), on the other hand.

WITNESSETH:

WHEREAS, BNSF and UP are parties to an agreement dated September 25, 1995, as supplemented by agreements dated November 18, 1995 and June 27, 1996 (the "Settlement Agreement"), and

WHEREAS, pursuant to Section 2c of the Settlement Agreement, BNSF and UP agreed, using the procedures established in Section 9f of the Settlement Agreement, to establish a Proportional Rate Agreement incorporating the terms of the "Term Sheet for UP/SP-BNSF Proportional Rate Agreement Covering I-5 Corridor" attached as Exhibit B to the Settlement Agreement (the "Term Sheet"), and

WHEREAS, by Letter Agreement dated January 8, 1997 (the "Letter Agreement"), BNSF and UP settled certain disputes regarding the terms of the Proportional Rate Agreement.

NOW, THEREFORE, it is mutually agreed by and between the parties:

1. General.

This Agreement allows UP unilaterally to establish rates for all commodities in all car types moving between (a) BNSF-served facilities or interchanges in the Northern Region as shown on the attached Exhibit A and further defined below and (b) UP origins and destinations or interchanges in the Southern Region as shown on Exhibit A and further defined below. For purposes of this Agreement, (i) "BNSF-served facility" shall mean any facility at which rail traffic originates or terminates now or in the future (including, but not limited to, plants, storage facilities, transload facilities, automobile ramps, intermodal facilities, port facilities, and team tracks), served directly or through any switching arrangement (including, but not limited to, reciprocal switching, joint facility switching, and third party switching) by BNSF regardless of whether the facility is served by more than one railroad but excluding (A) those facilities also served by UP directly, through haulage, or through any switching arrangement as described above and (B) intermodal and transload facilities located now or in the future within 75 miles of a UP served intermodal or transload facility, (ii) "origins" and "destinations" shall mean any point (including, but not limited to, plants, storage facilities, transload facilities, automobile ramps, intermodal facilities, port facilities and team tracks) at which rail traffic originates or terminates, regardless of whether such origins and destinations are served by more than one railroad,

and (iii) "interchanges" shall mean any point of interchange between railroad companies regardless of whether more than one railroad interchanges with the connecting railroad or railroads at the interchange in question. All movements under this Agreement shall be handled in interline BNSF-UP service and be interchanged at Portland, Oregon. Rates shall be available under this Agreement regardless of the route used by UP between Portland and the UP origins, destinations or interchanges in the Southern Region. UP may negotiate with the Canadian National Railway Company ("CN") for an agreement under which proportional rates established under this Agreement can be used directly in conjunction with BCRAIL, Ltd. ("BCOL"). BNSF shall provide reasonable assistance to UP in such negotiation. UP may not establish rates under this Agreement for use directly in conjunction with BCOL until UP has first reached such an agreement with CN.

Northern Region - "Northern Region" shall mean and include all (a) BNSF-served facilities for purposes of determining points to and from which UP can establish rates under this Agreement and all BNSF origins and destinations for purposes of identifying movements of traffic used to calculate rate factors under Section 2, whether served now or in the future in British Columbia, in the State of Washington, in the State of Oregon north of Portland (excluding BNSF-served facilities in Portland and including BNSF's Astoria Branch), in the State of Idaho north of an east-west line drawn through the state at the geographic latitude of Portland, Oregon, and in the State of Montana west of a line drawn through Billings and Havre, (b) existing or future interchanges between Canadian railroads and BNSF for traffic originating or terminating in the Provinces of British Columbia, Alberta or Saskatchewan including, but not limited to, interchanges at

Vancouver, North Vancouver, Brownsville, and New Westminster, British Columbia, at Huntingdon, British Columbia/Sumas, Washington and at Coutts, Alberta/Sweet Grass, Montana, (c) existing or future interchanges with railroads except UP that are line haul carriers participating in interline revenue settlements (such as Central Montana Rail, Inc.) in the State of Washington, in the State of Oregon north of Portland, in the State of Idaho north of an east-west line drawn through the state at the geographic latitude of Portland, Oregon, and in the State of Montana west of a line drawn through Billings and Havre, and (d) origins and destinations on connecting railroads that are not line haul carriers participating in revenue settlements (such as Montana Rail Link) in the State of Washington, in the State of Oregon north of Portland, in the State of Idaho north of an east-west line drawn through the state at the geographic latitude of Portland, Oregon, and in the State of Montana west of a line drawn through Billings and Havre.

Southern Region - "Southern Region" shall mean and include (a) all UP origins and destinations whether served now or in the future by UP in the States of Arizona, California, Colorado, New Mexico, Nevada, Oregon (excluding Portland as an origin or destination and excluding any portion of Oregon included in the Northern Region), Utah and Texas west of a line drawn between Monahans and Sanderson, and including, but not limited to, origins and destinations now or in the future served in common by UP and BNSF (and/or any other railroad) as well as origins and destinations now or in the future served exclusively by UP and (b) existing or future interchanges with (i) Mexican railroads and (ii) other railroads in the states listed above.

For purposes of excluding it from the geographic coverage of this Agreement, "Portland" shall be defined as all stations in Multnomah County, Oregon excluding stations designated by UP Freight Station Accounting Codes ("FSAC") 6248 through 6269.

2. Rate Factors.

a. Rate factors to determine BNSF's revenue for rates established under this Agreement shall be developed on a per net ton-mile basis. Except as provided in Section 2g(4)(a), the rate factors shall be listed in matrices developed and maintained by an independent third party consultant employed by the parties pursuant to Section.

The horizontal axis of each matrix shall list all commodities by three digit Standard Transportation Commodity Code ("STCC"). In the event STCC ceases to be used the parties shall agree on an appropriate substitute that most closely matches STCC. The vertical axis of each matrix shall contain listings for each car type shown on the attached Exhibit B which may be amended from time-to-time to reflect the addition or removal from service of car types at the level of commercial distinction reflected in the exhibit, used in the railroad industry. Separate matrices shall cover southbound movements from and northbound movements to (i) BNSF interchanges with Canadian railroads at or in the vicinity of Vancouver, North Vancouver, Brownsville, and New Westminster, British Columbia and Huntingdon, British Columbia/Sumas, Washington; (ii) BNSF-served origins, destinations, and interchanges north of Seattle, Washington and west of the Cascade Mountain Range; (iii) BNSF origins, destinations, and interchanges south of and including Seattle, Washington and west of the Cascade Mountain Range in the State of Washington and in the State of Oregon north of and excluding Portland;

(iv) BNSF origins, destinations, and interchanges in the State of Washington and in the Province of British Columbia east of the Cascade Mountain Range; and (v) BNSF origins, destinations, and interchanges in the State of Idaho and west of Billings and Havre, Montana, including Sweet Grass, Montana/Coutts, Alberta. For each of these ten geographic combinations, separate matrices shall be prepared for trainload and non-trainload traffic, and for "railroad-owned equipment" as defined in Section 2b(1)(f) below and for "private-owned equipment" as defined in Section 2b(1)(g). Trainload traffic shall mean movements of 67 cars or more of one commodity in one car type. The intersection of each STCC and car type in each matrix is referred to herein as a "cell" of the matrix. Rate factors shall be calculated for each cell as specified in this Section 2. An example of a matrix is attached as Exhibit C to this Agreement.

This Agreement applies to all present and future origins, destinations, and interchanges located within the areas described in subsections 2a(i)-(v). The origins, destinations and interchanges presently covered by this Agreement are listed, to the best of the parties' ability to do so, by four position Standard Point Location Code ("SPLC") and/or BNSF FSAC on the attached Exhibit D which may be amended from time to time as necessary to reflect the addition of origins, destinations and interchanges in the areas described in subsections 2a(i)-(v).

b. The following procedures shall govern the development and maintenance of rate factors:

(1) As used in this Agreement, the terms "equipment allowance," "refunds and rebates," "BNSF single-line traffic," "BNSF-UP interline traffic," "UP

proportional rate traffic," "railroad-owned equipment," and "private-owned equipment" shall have the following meanings:

(a) "Equipment allowance" is any consideration including, but not limited to, cash payments and credits, for use of private-owned equipment.

(b) "Refunds and Rebates" shall include (i) all reductions in revenue, except (A) reimbursements to shippers or other parties for the actual cost of services (e.g., weighing) which relieve BNSF of an obligation to perform such service in connection with providing line-haul rail services, (B) liquidated damages for service failures, (C) switching charges absorbed by BNSF, (D) charges by connecting railroads absorbed by BNSF, and (E) funds advanced to BNSF by a shipper for improvements to railroad facilities serving the shipper and repaid to the shipper in the form of an allowance and (ii) the cost to BNSF of providing any service other than line-haul rail services, including, but not limited to transloading, warehousing, waivers of track lease rent, barge charges and drayage charges. No items within the exceptions to clause (i) shall be treated as a refund or rebate pursuant to clause (ii).

(c) "BNSF single-line traffic" is traffic (excluding movements of company materials, movements of BNSF-UP interline traffic and movements of UP proportional rate traffic) that BNSF handles on a through basis between any BNSF origin, destination, or interchange in the Northern Region and any origin, destination, or interchange in the Southern Region including movements between any of BNSF's affiliated railroads regardless of how the movements between the affiliated railroads are billed. For

purposes of this Agreement "BNSF's affiliated railroads" means any railroad controlled by or under common control with BNSF.

(d) "BNSF-UP interline traffic" is traffic (excluding movements of company materials) that moves between a BNSF origin, destination, or interchange in the Northern Region and a UP origin, destination, or interchange in the Southern Region. BNSF-UP interline traffic must move in interline BNSF-UP service and does not include UP proportional rate traffic.

(e) "UP proportional rate traffic" is traffic moving under rates established pursuant to this Agreement.

(f) "Railroad-owned equipment" is equipment owned or controlled by any railroad company including equipment owned by non-carrier third parties, such as TTX Company, which are typically paid for use of their equipment only by the railroad using the equipment.

(g) "Private-owned equipment" is any equipment that is not railroad-owned equipment, including but not limited to, equipment owned by customers and non-carrier third party lessors, where the railroad using the equipment may be obligated to pay equipment allowances for the use of such equipment.

(2) The rate factor to be included in each cell of a matrix shall be an arithmetic average of the rates for all traffic in the following categories: (i) BNSF single-line traffic, (ii) BNSF interline traffic, and (iii) for only the first eight quarterly matrices developed pursuant to this Agreement, UP proportional rate traffic. The rate factors shall be calculated each calendar quarter of the year using the following methodology:

(a) For each movement of traffic in each of the categories listed in the preceding paragraph determine BNSF's revenue for the commodity, car type, and car ownership in question. Revenue shall be net of all refunds and rebates except in the case of revenue for BNSF single-line traffic reaching an exclusively served UP point in the Southern Region via transload and moving on a single bill of lading and for a single rail price which includes transload and drayage charges for delivery to the UP exclusively served point in the Southern Region. In those cases revenue shall include transloading and drayage charges (but no other charges) required for BNSF single-line traffic to reach such exclusively served UP point in the Southern Region. For traffic moving in railroad-owned equipment, car hire paid by BNSF for use of such equipment shall not be deducted from revenue. For traffic moving in private-owned equipment, equipment allowances paid by BNSF for use of such equipment shall be deducted from revenue. The amount of the equipment allowance deducted from BNSF revenue for traffic moving in private-owned equipment shall be the actual equipment allowance paid by BNSF. BNSF shall continue to pay reimbursements, allowances and charges described in Section 2b(1)(b)(A), (C), (D), and (E) (which, as provided in Section 2b(1)(b), are not to be deducted from revenue) on traffic moving under this Agreement on the same terms and conditions as it absorbs those charges for BNSF single-line and BNSF-UP interline traffic. The revenue data (net of all refunds and rebates) included in the computation shall be the most current available single-line and settled interline revenues on a per-car basis for movements in the calendar quarter immediately preceding the calendar month in which the computation is made.

(b) Determine for (i) BNSF single-line traffic, BNSF's official distance between each BNSF origin or interline junction and each BNSF destination or interline junction for the traffic in question as published in BNSF's Mileage Tariff BN 6003 Series or the then current mileage guide ("BNSF's Mileage Tariff"), (ii) BNSF-UP interline traffic, BNSF's official distance between each BNSF origin, destination, or interline junction and the BNSF-UP interline junction for the traffic in question as published in BNSF's Mileage Tariff; and (iii) UP proportional rate traffic, BNSF's official distance between each BNSF origin, destination, or interline junction and Portland, Oregon as published in BNSF's Mileage Tariff. When connecting railroad revenues are included in BNSF's revenue (i.e., BNSF has authority to quote rates for the connecting railroad and the connecting railroad is not a linehaul carrier participating in revenue settlements), the connecting railroad's mileage shall also be included in the BNSF route mileage.

(c) Identify net tons for each move using the lading weight used in calculating freight charges where weight is used for billing purposes or, in the case of traffic moving pursuant to a rate per car, a weight agreed upon by UP and BNSF. If the foregoing measure of lading weight is not available, the actual lading weight shall be used. If the actual lading weight is not available, estimated lading weight shall be used. When estimated lading weights are used they shall be the same estimates as used for other business purposes associated with the traffic in question, e.g., billing, revenue accounting, and operating systems. If none of the foregoing measures are available, net tons shall be measured by the weight capacity of the car or intermodal unit handling the move in question as identified in the Universal Machine Language Equipment Register ("UMLER").

In the event UMLER ceases to be published, the parties shall determine the most appropriate substitute that most closely matches UMLER.

(d) Using the data developed in steps (a) through (c) above calculate the per net ton-mile rate for each movement in each cell. The per net ton-mile rate shall be rounded to a hundredth of a cent. The rounding rule shall be that any fraction less than one half shall be dropped while any fraction equal to or greater than one-half shall be rounded up to the next higher value.

(e) Calculate an arithmetic average of the per net ton-mile rates resulting from step (d) above for each cell.

c. Rate matrices shall become effective two months after the end of the preceding calendar quarter. BNSF and UP agree to provide the third party consultant with the data needed to compute the rate factors in sufficient time to allow the consultant to issue updated rate matrices at least thirty days after the start of the calendar quarter in which such updated rate matrices are to become effective. Once a matrix is issued and until the matrix is updated, UP may use the rate factors in that matrix to establish rates for traffic moving on or after the effective date of the matrix.

d. UP may establish rates under this Agreement in any manner, including, but not limited to, tariffs, contracts, letter quotes, and exempt circulars, provided, however, that UP may not establish rates for handling by BNSF of traffic in the account of a railroad other than UP, and provided further that such tariffs, contracts, letter quotes and exempt circulars shall not, without BNSF's prior consent, impose any obligation on BNSF beyond those established by this Agreement. UP shall have the right to establish rates for

movement in private equipment which may or may not include a mileage allowance, provided that if a rate does include a mileage allowance, UP shall fully defray any mileage payment while the car is on BNSF lines in the Northern Region. The amount paid to BNSF shall be derived (i) for rates established pursuant to contract, from the rate factor in place as of the effective date of the contract and (ii) for rates established pursuant to tariff, letter quote, exempt circular or other mechanism establishing a rate, from the rate factor in place as of the date traffic is tendered (i.e., waybill date) by a customer for movement. The rate factor from which the payment to BNSF is derived for rates established pursuant to contract shall be adjusted in accordance with any adjustment provision included in the contract.

e. If no movements of traffic have taken place for any given cell, the cell shall remain empty until a BNSF single-line or a BNSF-UP interline movement takes place for the commodity and car type creating the cell. However, once a cell has been filled with a rate factor, it shall remain filled. When a rate factor in a cell has not been changed by virtue of a new movement or movements taking place in the preceding quarter, the rate factor in such cell shall be adjusted, using (a) the average rate of change between the preceding and second preceding quarter in the values in the same column of the matrix (i.e., for the same 3-digit STCC code) for which there are new data, or, if this procedure is not applicable because there are no cells in the column with new data, (b) the average rate of change between the preceding and second preceding quarter in the value of all cells in the row of the matrix (i.e., for the same car type) for which there is new data.

f. Should BNSF on its own or at the request of UP establish rates in the future based on factors other than weight, distance, car type or commodity (including but not limited to, the charges for handling by BNSF of traffic in the account of another railroad (i.e., "haulage")), such rates shall be included in the calculation of separate matrices to be used by UP pursuant to this Agreement.

g. (1) Except as provided in Section 2b(2)(c) where estimated weights may be used, this Agreement contemplates that the data used to compute rate factors pursuant to Section 2b(2) shall be actual data. The parties agree that during the Interim Period, as defined below, estimates of rates, equipment allowances, refunds and rebates, mileage, and weights may be used in lieu of actual data. BNSF agrees that the estimates it uses shall be the best estimates available to BNSF and the same estimates that are used for other business purposes at BNSF.

(2) "Interim Period" shall mean the period between (i) the date UP and BNSF close the Keddie-Bieber sale, implement the Chemult-Bend trackage rights, and implement this Agreement as called for in Section 2 of the Settlement Agreement, and (ii) the date BNSF is able to compute rate factors pursuant to Section 2b(2) using actual data.

(3) BNSF agrees to move forward diligently to continue refining the accuracy of its estimating systems used to produce the rate matrix and within 24 months, unless waived by UP, to develop systems necessary to produce a rate matrix derived from actual, rather than estimated data.

(4) During the Interim Period, BNSF shall develop estimated data as described above for the production of rate matrices pursuant to Section 2b(2) and with the following modifications to the procedures in Section 2b(2).

(a) The initial matrix shall be the attached Exhibit E. Updated matrices may be issued by BNSF until the third party consultant is able to begin developing and maintaining the matrices. BNSF and UP agree to provide the third party consultant with the data needed to compute the rate factors for subsequent matrices during the Interim Period in sufficient time to allow the third party consultant to issue updated rate matrices at least 30 days after the start of the calendar quarter in which such updated matrices are to become effective.

(b) New rate matrices shall be developed every quarter during the Interim Period and shall become effective on the later of (i) two months after the end of the preceding calendar quarter or (ii) 15 days (or less, at BNSF's option) after UP substitutes a rate factor or provides additional data as specified in Section 2g(4)(c). The rate matrices shall be derived from data for the calendar quarter immediately preceding the calendar quarter in which the matrix becomes effective. For example, the first updated matrix shall be provided to UP on August 1, 1997 and shall be effective on September 1, 1997. That matrix shall be derived from data for the preceding April, May and June, 1997.

(c) During the first 24 months of the Interim Period, UP shall have the right to substitute a rate factor from the original matrix for a rate factor in the same cell of any subsequent matrix. Any rate factor substituted by UP under the provisions of this Section 2g(4)(c) shall be adjusted in the manner provided in Section 2e.

UP shall also have the right to provide additional rate data which shall be used to recompute the rate factor in any cell of an updated rate matrix based upon UP's additional data and the data used by BNSF. Any substitution of a rate factor or the provision of additional data must be completed no later than 15 days after the rate matrix is issued.

3. Service Standards.

BNSF shall supply and distribute equipment and shall accept, handle, switch and deliver traffic moving under this Agreement without any discrimination whatsoever, including, but not limited to, in promptness, quality of service or efficiency, for both loaded and empty equipment, in favor of comparable traffic moving in BNSF's account. BNSF shall adopt no policies, including but not limited to demurrage and absorption of switching fees or shortline connection fees, that discriminate in any way against traffic moving under this Agreement, provided, however, that BNSF may grant its customers relief from the application of a particular policy on a case-by-case basis if granting such relief is consistent with business practice in the railroad industry and is not used to defeat the requirements of this Agreement not to discriminate against traffic moving under this Agreement. BNSF and UP shall cooperate to establish necessary blocks to provide efficient and competitive service on traffic moving under proportional rates pursuant to this Agreement. To the extent justified by business volumes, BNSF shall continue operating Vancouver, British Columbia-Portland (SPT interchange) trains comparable to BN Nos. 111 and 112 as of September 25, 1995.

4. Equipment Supply.

a. BNSF shall have the same obligation to supply equipment (including, but not limited to, as regards quantity, quality and type) for traffic moving under this Agreement as it has for traffic that does not move under this Agreement.

b. Requests for cars for loading shall be received by BNSF personnel from customers and handled pursuant to the procedures specified in AAR Car Service Rule 15. In the event AAR Car Service Rule 15 ceases to be used the parties shall agree on an appropriate substitute that most closely matches AAR Car Service Rule 15. BNSF shall not require customers to indicate when ordering equipment whether a car shall be used to handle traffic moving under rates established pursuant to this Agreement but may require specific destinations and routing information in accordance with BNSF's customary car ordering procedures. Customers whose traffic moves under this Agreement shall also be permitted to contact UP to order cars. UP shall promptly advise BNSF of the car order and whether it wishes BNSF to fill the car order or whether UP shall provide equipment for such order under the provisions of Section 4c.

c. UP shall have the right, but not the obligation, to provide equipment for any traffic which can move under rates established pursuant to this Agreement. When UP provides equipment, UP shall provide BNSF with information that meets BNSF's car ordering requirements necessary to handle the traffic in question and BNSF agrees to accept the equipment supplied by UP at any interchange between UP and BNSF in response to such orders, provided that the mileage between the interchange in question and the BNSF origin in the Northern Region is no greater than the BNSF mileage between

Portland, Oregon and the origin in question. BNSF shall provide trackage at strategically located car distribution points in the Northern Region to stage UP supplied equipment ordered by customers. Such trackage shall be provided by BNSF at no charge provided, however, that BNSF shall have no obligation to store UP equipment without charge unless such equipment is applied to specific orders for UP supplied equipment.

d. Subject to applicable AAR Car Service Rules, Car Service Directives, and bilateral agreements governing the payment of car hire, the parties shall be responsible for all car hire charges while such cars are on their respective lines.

e. All empty equipment shall be returned by UP or BNSF pursuant to this Agreement, as the case may be, in accordance with applicable AAR Car Service Rules, Car Service Directives and bilateral agreements between UP and BNSF governing the handling of equipment.

f. The parties agree to develop and refine procedures for receiving car orders as necessary to address any inefficiencies that may occur such as duplicate car orders.

5. Billing and Payment.

The parties agree to develop and refine procedures to ensure the efficient processing and exchange of information needed to administer this Agreement. The initial accounting and billing procedures are described on the attached Exhibit F which may be amended from time to time to reflect new and refined procedures developed by the parties as provided in the preceding sentence.

In order to preserve the confidentiality of UP's rates, UP may elect to utilize an agent to handle billing and payment. The agent shall, among other things, issue and receive bills of lading, apply any transportation service contract escalation provisions, issue freight bills to customers, and collect freight payments from customers.

The amount to be paid to BNSF for a particular movement subject to this Agreement shall be derived by multiplying (i) the applicable rate factor by (ii) the net tons shipped by (iii) BNSF's official distance as published in BNSF's Mileage Tariff between the BNSF interline junction, origin or destination on the one hand and Portland, Oregon, on the other hand. Lading weights used to calculate net tons for billing purposes shall be derived in the same manner as specified in Section 2b(2)(c).

Payments to BNSF shall be made by UP or its agent within 15 days after the end of the preceding month. Payment shall cover movements during the preceding month for which UP has received waybills.

6. Third Party Consultant.

The parties may use a third party consultant or consultants to develop and maintain the rate matrices pursuant to this Agreement. The third party consultant shall be jointly employed by BNSF and UP and be required to remain impartial between BNSF and UP. Each party may request the third party to prepare reports using data derived from the rate matrices, provided that (1) such report shall not disclose to UP or BNSF information about the volume of the other's business, (2) the party requesting such report shall be solely responsible for the cost of preparing such report, and (3) such report shall be shared with the other party upon payment by the other party to the party requesting the

report of one half the cost of such report. Within two weeks after being requested by one party to prepare a report, the third party shall give the other party written notice of the request to prepare a report. The third party consultant shall be terminated for any breach of the impartiality requirement of this Section 6 and may also be terminated by mutual agreement of the parties.

7. Right to Audit.

Each party shall have the right to audit, at all reasonable times, so much of the books, accounts and records of the other party as are related to the data required to be supplied by them under the terms of this Agreement. Except as provided below, the expense of any such audit shall be borne by the party undertaking the audit unless errors or information are discovered that have a material adverse effect on the party conducting the audit in which case the party in whose records the errors or information were discovered shall bear the entire expense of the audit.

The right to audit includes the right by either party to require a complete or partial (one or more cells) audit of the rate matrices. The expense of any audit of the rate matrices shall be split evenly between UP and BNSF. When rate factors in a cell or cells of a matrix are found to be in error, the rate factors shall be corrected to reflect accurate data as determined by the audit and the corrected rate factors shall remain in place and unchanged until BNSF or UP, as the case may be, can demonstrate that it has more accurate data to update the rate factor or factors found to be inaccurate. If upon audit, (a) a rate factor derived from BNSF data is found to exceed the rate factor computed using data developed in the audit by 20% or more, or (b) a rate factor derived from UP data is

found to be 20% or more below the rate factor computed using data developed in the audit, then the party whose rate data was inaccurate agrees to reopen to competitive bidding any contracts entered into by such party for the pertinent traffic on the basis of competitive bidding between UP and BNSF while the inaccurate rate factor was in effect, and UP and BNSF may bid on such contract with UP using the corrected rate factor.

BNSF shall have the right to cause an audit by a disinterested third party as provided below, at all reasonable times, of the books, accounts and records of the agent retained by UP to handle billing and payment pursuant to Section 5. BNSF shall bear the expense of any such audit unless material errors are discovered upon audit in which case UP shall bear the entire expense of the audit.

Any audit of the books and records of the third party consultant employed by the parties pursuant to Section 6 of the Agreement shall be a joint audit and the cost of the audit shall be split equally between UP and BNSF.

To the extent any audit requires access to confidential information, the parties agree to enter into an appropriate confidentiality agreement and, if necessary to preserve confidentiality, to use a disinterested third party such as a national accounting firm to conduct such audit. Each party and their agents shall retain, for at least five years, the books, accounts and records used to develop information necessary for the operation of this Agreement.

8. Settlement Agreement.

The terms of the Settlement Agreement, as amended and supplemented from time to time, and to the extent that such terms are not contradictory or inconsistent with the Letter Agreement or this Agreement, shall survive the parties' entry into this Agreement.

9. Arbitration.

All disputes under this Agreement shall be referred to binding arbitration under Section 15 of the Settlement Agreement.

10. Term.

This Agreement shall become effective upon the first day of the Interim Period and shall continue for a term of 99 years and thereafter, subject to renegotiation after 99 years as described below, for so long as BNSF or any other party operates a route between the general vicinity of Bieber and the general vicinity of Stockton wholly within the State of California. After 99 years, the Agreement shall, at the request of either UP or BNSF, be renegotiated to determine terms for continuation of the Agreement in accordance with the purposes of the Agreement and conditions and circumstances at the time of renegotiation, including any then revised conditions of BNSF's operations between Bieber and Stockton. Any disputes over the renegotiation of the terms for continuation of the Agreement shall be submitted to arbitration. This Agreement shall terminate if BNSF shall no longer be able to enter into through rates, haulage or any other transportation arrangement between BNSF points in the Northern Territory and BNSF points in the Southern Territory over a route crossing the Oregon-California border, via either its own lines or those of a railroad other than UP. This Agreement also may be terminated at any

time by (i) mutual consent of the parties or (ii) UP's election to terminate this Agreement by giving one year written revocable notice.

11. Successors and Assignability.

This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, lessees and assigns. This Agreement is not assignable without written consent of either party, except that either party may assign the Agreement in the event of a sale, assignment, mortgage, or lease of its entire railroad. In the event BNSF sells or leases part or all of its lines in the Northern Territory, BNSF agrees that any such sale or lease shall be subject to this Agreement to the extent BNSF retains the exclusive authority to quote rates for traffic moving subject to this Agreement to and from points on such lines. If BNSF does not retain exclusive authority to quote rates for traffic moving subject to this Agreement to and from points on such lines, BNSF agrees that any such sale or lease shall not be structured in a manner, and that BNSF shall not take any action, that would in any way inhibit or prevent the purchaser or lessee from working with UP to handle in any manner, including on an interline, haulage, proportional rate or any other manner traffic subject to this Agreement originating or terminating on the lines sold.

UP's rights under this Agreement with respect to traffic moving subject to this Agreement to and from points on such a sold or leased line shall be satisfied if (i) proportional rates under this Agreement apply to points on such lines or (ii) UP has direct access or access via interchange (with interchange handled by BNSF for a fee equal to the handling charges called for in haulage agreements entered into between UP and BNSF in connection with implementation of the Settlement Agreement) to the shortline for

traffic covered under this Agreement or (iii) proportional rates under this Agreement apply to the junction with the shortline, and in the case of (ii) or (iii), BNSF has not inhibited or prevented the shortline from working with UP to handle traffic subject to this Agreement in any manner.

12. Miscellaneous.

a. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

b. When the context requires, singular nouns include the plural and conversely, when plural nouns are used they shall include the singular.

IN WITNESS WHEREOF, the parties have caused this Proportional Rate Agreement to be fully executed as of the date first above written.

UNION PACIFIC RAILROAD COMPANY

By: _____
Title: Executive Vice President - Marketing & Sales

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

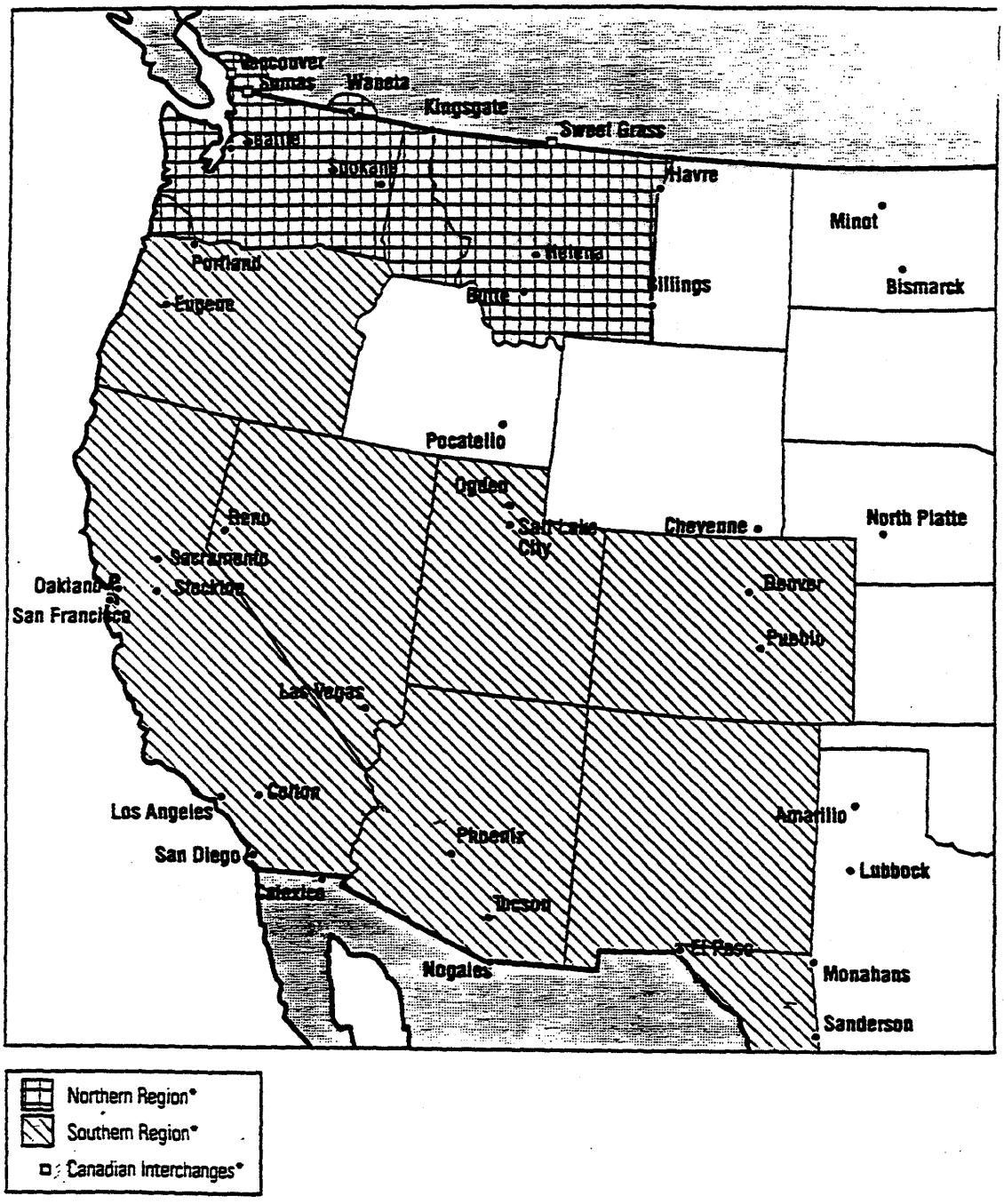
By: _____
Title: Sr Vice-Pres

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: _____
Title: Executive Vice President - Marketing & Sales

Exhibit A

UP/SP I-5 Proportional Rate Agreement



* Points and interchanges are for geographic reference only and do not define origins, destinations and interchanges covered by this Agreement

Exhibit B

Car Type Designation for I-5 Proportional Rate**

A
B
C (Other than C1, C2, C3)
C1
C2
C3
D
E
F
G
H
J
K
L
M
P
Q
RB (RX0X, RX1X)
RM (RX5X, RX6X, RX7X, RX8X, RX9X)
S
T
U (Other than U2, U5, U7)
U2*
U5*
U7*
V
Z (Other than Z2, Z5, Z7, Z9)
Z2*
Z5*
Z7*
Z9*

* Need separate cell for well cars vs. conventional flat.

** Car type designations will be changed from time-to-time to reflect the addition or removal from service of car types, at the level of commercial distinction reflected in this exhibit, used in the railroad industry. These car type designations are taken from UMLER. If UMLER ceases to be published the parties will agree on a means of designating car types that most closely matches the designations drawn from UMLER.

[Exhibit C Not Provided]

Exhibit D

Origins, Destinations and Interchanges Included
in the Areas Described in Subparagraphs 2a(i)-(v)

Subparagraph 2a	Points by SPLC and/or FSAC
(i)	BN FSAC: 15091-15150; 66504; 66565; 66089; 66095 All interchanges at these FSACS
(ii)	SPLC 8441, 8443, 8446, 8447 and 845112, 845114, and 845115
(iii)	SPLC 8467, 8463, 8460, 8461, 8462, 8450, 8451 (except 845112, 845114 and 845115), 8452, 8453, 8491, 8494, 8496, 8499, 8531, 8532, and 853413
(iv)	1356-1394; 11011, 11021, 32561-32590; 30854, 30836, 32557 BN FSAC: 62126-62185; 62235-62247; 99460, 61239 SPLC: 8401, 8403, 8411, 840522, 840523, 840555, 840573, 840518, 840516, 840514, 840513 8301, 8303, 8307 71, 7031, 7033, 7035, 7036, 7037, 7067, 7061, 7064, 7057, 7092, 7091, 7096, 7094
(v)	SPLC: All remaining SPLC's in Washington and Idaho

This Exhibit will be modified from time-to-time as necessary to reflect the addition of origins, destinations and interchanges in the areas described in subsections 2a(i)-(v).

[Exhibit E Not Provided]

May 22, 1997

EXHIBIT F
ACCOUNTING AND BILLING PROCEDURES

BNSF Proportional Rate Alternatives Selected for Implementation

I ORIGINATING ON BNSF OR TERMINATING ON BNSF IN NORTHERN TERRITORY

A. Procedures for BNSF Proportional Rate Traffic when BNSF, or a BNSF handling carrier, Originates the Shipment in the Northern Territory

Details for Southbound Moves:

1. No BNSF PNW stations need to be adopted by the UP. UP (and connections other than BNSF, if any) establishes through rate by contract, confidential letter quote or tariff via a BNSF-Portland-UP-Destination or Interchange route which stipulates that UP will arrange for service over the BNSF portion of the route; the rate matrix is the BNSF Rule 11 contract rate with UP.
2. Car Orders - to BNSF (subject to Section 4. Equipment Supply in the Agreement)
3. Car Releases - to BNSF
4. Bill of Lading - to BNSF showing I-5 indicator (i.e., reference to UP I-5 rate authority).

   As per AAR Accounting Rule 11 B. (3), BNSF will generate a Rule 11 '417' waybill showing UP as the patron responsible for payment of BNSF's freight charges and the consignee or consignor (as the case may be) as the patron responsible for payment of the through freight charges.

   If customer does not provide the I-5 Indicator, BNSF will generate a revenue waybill for the shipment as an Interline Settlement Movement subject to correction as per AAR Accounting Rule 61. In the event a movement which should have moved under a through rate created under this Agreement is settled between BNSF and UP through interline settlement, BNSF and UP shall settle any discrepancies, including but not limited to duplicate payments, through overcharge claim channels within six months of the waybill date.
5. BNSF creates '417' transportation waybill with the I-5 indicator, a movement route of BNSF to Portland with BNSF flagged as a Rule 11 carrier, and BNSF sends a '417' waybill to other roads in the route.
6. BNSF creates a "parent" Rule 11 '426' waybill and sends it to Central ISS.
7. UP concurs to the "parent" Rule 11 entry in ISS.
8. If UP or a UP "handling" carrier is the destination carrier, UP creates a revenue '426' waybill without BNSF in the revenue route, from Portland to destination showing a prior or true origin as the origin location for the shipment. If another interline carrier terminates the shipment, that

destination carrier creates a revenue '426' "child" waybill with a Rule 11 entry in ISS for the route north of Portland.

9. If the shipment is prepaid, UP creates freight bill and bills the customer the through rate. If the shipment is collect, the destination interline carrier creates freight bill and bills the customer the through rate.
10. BNSF does not bill customer for its Rule 11 portion and does not create a Rule 11 "child" waybill in ISS.
11. UP pays BNSF its proportional rate for its Rule 11 move to Portland. As soon as practicable, payment shall be electronically.
12. If other interline railroads are involved, (e.g., SP/UP) settling carrier pays other roads their divisions or factors as agreed between UP and the connections.
13. BNSF pays car hire for its segment of the move.
14. Freight claims will be handled in accordance with AAR Accounting Rule 116. Any unallocated claims shall be allocated in accordance with the AAR Freight Claim Rules.

B. Procedures for BNSF Proportional Rate Traffic when BNSF, or a BNSF handling carrier, Terminates the Shipment in the Northern Territory and when UP/SP, or a UP/SP handling carrier, Originates the Shipment in the Southern Territory

Details for Northbound Moves:

1. No BNSF PNW stations need to be adopted by the UP. UP establishes through rate by contract, confidential letter quote or tariff via a Origin-UP-Portland-BNSF-Destination route which stipulates that UP will arrange for service over the BNSF portion of the route; the rate matrix is the BNSF Rule 11 contract rate with UP.
2. Car Orders - to UP
3. Car Releases - to UP
4. Bill of Lading - to UP showing I-5 indicator (i.e., UP I-5 rate authority).

As per AAR Accounting Rule 11 B. (3), UP will generate a Rule 11 '417' waybill showing UP as the patron responsible for payment of BNSF's freight charges and the consignee or consignor (as the case may be) as the patron responsible for payment of the through freight charges.

If customer does not provide the I-5 Indicator, and UP does not initially generate a Rule 11 waybill, UP may issue a corrected waybill in accordance with AAR Accounting Rule 61. In the event a movement which should have moved under a through rate created under this Agreement is settled between BNSF and UP through interline settlement, BNSF and UP shall settle any discrepancies, including but not limited to duplicate payments, through overcharge claim channels within six months of the waybill date.

5. UP creates a '417' transportation waybill with the I-5 indicator, a route of UP-Portland-BNSF with BNSF flagged as a Rule 11 carrier, and sends to other roads in the route.
6. UP creates a "parent" Rule 11 '426' waybill and sends it to Central ISS.
7. BNSF concurs to the "parent" Rule 11 entry in ISS.
8. UP creates revenue waybill without BNSF in the revenue route, from the origin to Portland with an ultimate or true destination as the destination location for the shipment; but if UP and SP are both in the route, then UP will create the necessary "child" waybills.
9. UP creates freight bill and bills the customer the through rate.
10. BNSF does not bill the customer for its Rule 11 portion.
11. UP pays BNSF its proportional rate for its Rule 11 move from Portland. As soon as practicable, payment shall be electronically.
12. BNSF pays car hire for its segment of the move.
13. Freight claims will be handled in accordance with AAR Accounting Rule 116. Any unallocated claims shall be allocated in accordance with the AAR Freight Claim Rules.

C. Procedures for BNSF Proportional Rate Traffic when BNSF, or a BNSF handling carrier, Terminates the Shipment in the Northern Territory and when an Interline Carrier Originates the Shipment in the Southern Territory

Details for Northbound Moves:

1. No BNSF PNW stations need to be adopted by the UP. UP and its connections establish through rates by contract, confidential letter quote or tariff via a Origin-Connection-Interchange-UP-Portland-BNSF route which stipulates that UP will arrange for service over the BNSF portion of the route; the rate matrix is the BNSF contract Rule 11 rate with UP.
2. Car Orders - to Origin Interline Carrier
3. Car Releases - to Origin Interline Carrier
4. Bill of Lading - to Origin Interline Carrier showing I-5 indicator (i.e., UP I-5 rate authority)

   As per AAR Accounting Rule 11 B. (3), Origin Interline Carrier will generate a Rule 11 '417' waybill showing UP as the patron responsible for payment of BNSF's freight charges and the consignee or consignor (as the case may be) as the patron responsible for payment of the through freight charges.

   If customer does not provide the I-5 Indicator, Origin Interline Carrier will generate a revenue waybill for the shipment as an Interline Settlement Movement subject to correction as per AAR Accounting Rule 61. In the event a movement which should have moved under a through rate created under this Agreement is settled between BNSF and UP through interline settlement, BNSF and UP shall settle any discrepancies, including but not

limited to duplicate payments, through overcharge claim channels within six months of the waybill date.

5. Interline Origin Carrier creates '417' transportation waybill with the I-5 indicator, and a route of Origin-Interline Origin Carrier-Interchange-UP-Portland-BNSF with BNSF flagged as a Rule 11 carrier, and sends to other roads in the route.
6. Origin Interline Carrier creates a "parent" Rule 11 waybill and sends to Central ISS.
7. BNSF concurs to the "parent" Rule 11 entry in ISS.
8. Origin Interline Carrier creates revenue waybill without BNSF in the revenue route from the origin to Portland with an ultimate or true destination as the destination location for the shipment.
9. If prepaid, the Origin Interline Carrier creates freight bill and bills the customer the through rate. If collect, UP creates the freight bill and bills the customer the through rate.
10. BNSF does not bill the customer for its Rule 11 portion.
11. UP pays BNSF its proportional rate for its Rule 11 move from Portland. As soon as practicable, payment shall be electronically. UP and Origin Interline Carrier settle through interline settlement procedures.
12. BNSF pays car hire for its segment of the move.
13. Freight claims will be handled in accordance with AAR Accounting Rule 116. Any unallocated claims shall be allocated in accordance with the AAR Freight Claim Rules.

II TRAFFIC MOVING OVERHEAD ON BNSF IN NORTHERN TERRITORY

Procedures for BNSF Proportional Rate Traffic if BNSF, or a BNSF handling carrier, bridges traffic through the Northern Territory via Portland

A. Details for Southbound Moves:

1. UP adopts the BNSF interchange stations with the Northern Territory Interchange Carriers (e.g., CN, CM, CP, etc.) Origin Carrier or UP establishes a through rate in contract, letter quote or tariff with a route showing UP as serving the adopted interchange location.
2. Car Order - to Origin Carrier
3. Car Release - to Origin Carrier
4. Bill of Lading - to Origin Carrier showing I-5 indicator (UP I-5 rate authority or adopted junction).

   If customer does not provide the I-5 indicator, any waybills are subject to correction as provided by AAR Accounting Rule 61. In the event a movement which should have moved under a through rate created under this Agreement is settled between BNSF and UP through interline settlement, BNSF and UP shall settle any discrepancies, including but not

limited to duplicate payments, through overcharge claim channels within six months of the waybill date.

5. Origin Carrier creates '417' transportation waybill with the I-5 indicator, an operating route of Origin Carrier-Adopted Interchange-BNSF-Portland-UP with BNSF flagged with an IMA=HM "handling" segment and the R2 BNSF segment flagged as "H", and sends to other roads in the route.
6. Settling carrier (origin if prepaid and destination if collect) creates a revenue waybill without BNSF in the route, UP replaces BNSF in the revenue route.
7. Settling carrier (origin if prepaid and destination if collect) creates a freight bill and bills the customer the through rate.
8. BNSF systems will not expect nor look for a revenue waybill reporting in ISS.
9. UP pays BNSF a proportional rate for its "handling" service in the Northern Territory. As soon as practicable, payment shall be electronically.
10. For the other interline carriers in the route in the '426' waybill, the settling carrier pays the interline carriers their proportion through the normal ISS settlement process.
11. BNSF pays car hire for its segment of the move.
12. Freight claims will be handled in accordance with AAR Accounting Rule 116. Any unallocated claims shall be allocated in accordance with the AAR Freight Claim Rules.

B. Details for Northbound Moves:

1. UP adopts the BNSF interchange stations with the Northern Territory Interchange Carriers (e.g., CN,CM,CP, etc.). Destination Carrier or UP publishes a through rate in contract, letter quote or tariff with UP serving the adopted interchange location.
2. Car Order - to Origin Carrier
3. Car Release - to Origin Carrier
4. Bill of Lading - to Origin Carrier showing I-5 indicator, UP I-5 rate authority or adopted junction.

   If customer does not provide the I-5 indicator, any waybills are subject to correction as provided by AAR Accounting Rule [71]. In the event a movement which should have moved under a through rate created under this Agreement is settled between BNSF and UP through interline settlement, BNSF and UP shall settle any discrepancies, including but not limited to duplicate payments, through overcharge claim channels within six months of the waybill date.
5. Origin Carrier creates '417' transportation waybill with the I-5 indicator, a route of Origin-UP-Portland-BNSF-Adopted Interchange-Destination carrier with BNSF flagged with an IMA=HM segment and the R2 BNSF segment flagged as "H", and sends it to other roads in the route.

6. Settling carrier (origin if prepaid and destination if collect) creates a revenue waybill without BNSF in the route. UP or SP replaces BNSF in the revenue route.
7. Settling carrier (origin if prepaid and destination if collect) creates a freight bill and bills the customer the through rate.
8. BNSF systems will not expect nor look for a revenue waybill reporting in ISS.
9. UP pays BNSF a proportional rate for its "handling" service in the PNW. As soon as practicable, payment shall be electronically.
10. If other interline carriers are in the route, settling carrier pays other roads their proportion through the normal ISS settlement process.
11. BNSF pays car hire for its segment of the move.
12. Freight claims will be handled in accordance with AAR Accounting Rule 116. Any unallocated claims shall be allocated in accordance with the AAR Freight Claim Rules.

In the event AAR Accounting Rules or AAR Freight Claim Rules cease to be used or are modified, the parties shall agree on an appropriate substitute that most closely matches the AAR Accounting Rules, AAR Freight Claim Rules, or particular Rule, as the case may be.

Barkley

VERIFIED STATEMENT
OF
STEPHEN R. BARKLEY

TABLE OF CONTENTS

Page No.

I. LAREDO BRIDGE 2

Importance of Laredo Bridge to UP 2

Laredo Bridge Crossings 4

Bridge Operations 4

Sequencing of Trains 8

Effect of Common Control of TFM and Tex Mex on Bridge Operations 10

The Need for a Remedy 12

What the Board Should Do 14

II. TEX MEX TRACKAGE RIGHTS OPERATIONS 18

The UP-Tex Mex Dispatching Protocol 18

Tex Mex Delay Claims 19

Capacity Issues 23

Exhibit A - Laredo and the International Bridge

Exhibit B - 1951 Agreement (excerpt)

Exhibit C - UP-Tex Mex Trackage Rights Terms (including dispatching protocol)

Exhibit D - Average Train Delay (Angleton and Brownsville Subdivisions)

VERIFIED STATEMENT
OF
STEPHEN R. BARKLEY

My name is Stephen R. Barkley. I am Regional Vice President - Southern Region of Union Pacific Railroad Company ("UP"). My office is located at 24125 Aldine Westfield Road, Spring, Texas 77373. I have held my current position since January 1998.

I joined UP from Illinois Central Railroad in 1980. From 1980 to 1989, I held positions in the UP Operating Department, including several trainmaster positions, Director of Train Management, and Manager of Train Operations. In 1989 and 1990, I worked in UP's Marketing and Sales Department, initially as Director of the National Customer Service Center and subsequently as General Director of Service Design. I then returned to the Operating Department, serving as Division Superintendent in Stockton, California and Houston, Texas. From 1994 to 1996, I served as General Manager of the Southern Region. In 1996 and 1997, I was Assistant Vice President in charge of the Harriman Dispatching Center in Omaha.

In my position as Regional Vice President - Southern Region, I am responsible for management of UP's operations in the States of Texas, Oklahoma, and Louisiana. In connection with my duties in my current position and prior positions since 1994, I have become familiar with operations on UP's lines in these states and with operations at UP's border crossings between Texas and Mexico.

Kansas City Southern has recently announced that it intends to create Nafta Rail through acquisition of control of both The Texas Mexican Railway Company ("Tex Mex") and TFM, S.A. de C.V. ("TFM"), a Mexican railroad. I am submitting this

statement to explain UP's concerns about the effect of the proposed Nafta Rail transaction on operations at the International Railroad Bridge, which connects the United States and Mexico at Laredo, Texas, and Nuevo Laredo, Mexico. I suggest how the Board should frame conditions to ensure fair treatment of all railroads at the Bridge. In addition, I address comments Applicants have made about Tex Mex operations over UP lines in Texas under trackage rights granted in connection with approval of the 1996 merger of UP and Southern Pacific Transportation Company ("SP").

I. LAREDO BRIDGE

The International Railroad Bridge at Laredo, Texas ("Laredo Bridge" or "Bridge"), which spans the Rio Grande River, is a crucial link for rail transportation between the United States and Mexico. Of the multiple rail border crossings between the United States and Mexico, the Laredo crossing has the highest volume of rail traffic moving between the two countries. TFM, the successor to the northeast portion of the National Railways of Mexico, owns the southern half of the Laredo Bridge. Tex Mex owns the track on the northern half of the Bridge and the approach track at the north end of the Bridge, while Mexrail (owner of Tex Mex) owns the bridge structure on the northern half. The connection between the U.S. railroads and the TFM system is at the middle of the Bridge. Exhibit A to this statement is a schematic of the Laredo Bridge and nearby tracks.

Importance of Laredo Bridge to UP

UP serves six border crossings between the United States and Mexico. However, the Laredo crossing is by far the most important. UP's principal route between the United States and Mexico runs from San Antonio, Texas to the Mexican border at

Laredo. The Laredo crossing provides the most efficient way for U.S. railroads to serve numerous shippers on TFM's system in the industrialized heartland of northeastern and central Mexico. For most movements between the United States and the regions of Mexico served by TFM, the TFM route to Laredo is much more efficient than the route of Ferrocarril Mexicano ("Ferromex"), which connects to the border crossing at Eagle Pass, Texas. (The TFM route to Laredo is also more efficient than TFM's route to the crossing at Brownsville, Texas.) Moreover, the Laredo crossing has an infrastructure that is unmatched. Over the years, numerous brokers have set up major operations in the Laredo area, and U.S. and Mexican government agencies (including customs, immigration officials, and agricultural and narcotics inspectors) have established significant operations there. The three railroads serving this crossing have built extensive yards, holding tracks, and other facilities in the area. In recent years, UP has invested heavily in facilities at Laredo, Port Laredo (10 miles to the north), and other locations further north of Laredo in order to support the import and export traffic that moves over the Laredo Bridge.

In 2002, UP interchanged 382,723 rail cars (both loads and empties) with TFM at the Laredo Bridge, out of 519,882 rail cars that crossed the Bridge in that year. In the past few years, UP's share of the rail cars that moved over the Laredo Bridge has been in the range of 70 to 75 percent. UP's share of loaded rail cars is between 75 and 80 percent. (UP and TFM have agreed to route many empty UP rail cars over the Brownsville crossing to free up more capacity at Laredo. Thus, UP's share of empties moving over the Bridge is lower than its share of loaded cars.) Tex Mex, which also

interchanges with TFM at the Laredo Bridge, accounts for the remainder of the rail cars that cross at Laredo.

The following table shows UP's share of Laredo Bridge crossings (total loaded and empty rail cars) during the years 1998 through 2002:

Laredo Bridge Crossings
(1998-2002)
(Rail Cars - Loaded and Empty)

	Northbound			Southbound			Northbound and Southbound		
	UP Cars	Total Cars	UP as % of Total	UP Cars	Total Cars	UP as % of Total	UP Cars	Total Cars	UP as% of Total
1998	114,805	168,044	68%	117,408	176,237	67%	232,213	344,281	67%
1999	133,455	201,414	66%	137,055	204,319	67%	270,510	405,733	67%
2000	145,458	187,045	78%	145,310	208,357	70%	290,768	395,402	74%
2001	166,705	237,837	70%	177,575	248,773	71%	344,280	486,610	71%
2002	185,059	253,525	73%	197,664	266,357	74%	382,723	519,882	74%

Bridge Operations

UP and its customers have a keen interest in preserving efficient and fair operations at Laredo Bridge. If Bridge operations do not remain fluid, or if UP trains do not receive even-handed treatment for movements over the Bridge, service levels for UP customers using the Laredo gateway will decline.

Rail operations over the Laredo Bridge present significant operational challenges. As with any border crossing, extra time is required because of the need for government paperwork and inspections. In addition, the Laredo Bridge has only a single track. Thus, trains can operate in only one direction at a time. In order to obtain as much capacity as possible from the Bridge, trains must be carefully staged so that they are

ready to move as soon as the previous train has moved off the Bridge. Interchanges occur while the train is on the Bridge. Thus, crews of the receiving carrier must be prepared to move quickly onto the Bridge, so that the train does not block the Bridge longer than necessary.

Only one railroad -- TFM -- approaches the Bridge from Mexico, but two railroads -- UP and Tex Mex -- approach from the U.S. side. Thus, it is necessary to coordinate the movement of two railroads moving south onto the Bridge. Northbound movements must also be coordinated carefully, since TFM delivers separate trains or blocks of cars to each U.S. carrier. The railroads must time movements so that the receiving railroad's tracks are clear when a train moves off the Bridge. All three railroads must adhere to strict timelines in order to maintain fluid operations over the Bridge.

In recent years, the three railroads that use the Laredo Bridge have made great strides in improving the efficiency of movements over the Bridge. The railroads have worked with brokers and government agencies to expedite customs clearance, agricultural inspections, and inspections for narcotics and illegal aliens. In addition, the railroads have made extensive infrastructure improvements to increase their ability to stage trains crossing the border in an efficient manner and to minimize interference between northbound and southbound trains in the Laredo area. The railroads have also worked to reduce disruption to the local communities by making changes to minimize the number of grade crossings blocked by waiting trains.

In addition, the railroads have made extensive efforts to improve their operating practices, so that movements across the Bridge are as fluid as possible. One

aspect of these operational improvements involves interchange "windows." For many years, the railroads have agreed on particular time periods during which trains will move in a single direction, in order to maximize the available capacity on the Bridge. Certain hours of the day are set aside for northbound movements across the Bridge, and other hours are set aside for southbound movements. Before 1994, there were just two 12-hour windows each day. As a result, traffic often backed up on both sides of the border as trains waited for the window to change. In 1994, after a series of meetings, the railroads agreed to change to four six-hour windows, two in each direction. As a result, yard capacity requirements on both sides of the border were cut in half, traffic moved more efficiently to and from the Bridge, and the railroads were able to coordinate their interchanges more effectively.

In recent years, the railroads have worked hard to coordinate the timing of movements over the Bridge. The three railroads now exchange extensive information on their operating arrangements, so that each railroad can position its trains according to a predictable timeline. This allows each railroad to assemble blocks of cars and position trains so they are ready to move onto the Bridge and be interchanged at the time a railroad on the other side of the border is prepared to receive those blocks. Railroad personnel have also agreed on priorities for certain categories of trains (for example, intermodal and automotive) that should cross ahead of others.

In addition, the railroads have pre-blocked cars for each other, allowing some trains to bypass the yards of the receiving carrier in the Laredo area. For example, UP creates blocks of cars destined for Monterrey and Mexico City, allowing TFM to avoid classifying these cars at its Sanchez Yard. Similarly, TFM creates blocks of UP

cars destined for East St. Louis and Chicago, allowing UP to avoid classifying the cars at Port Laredo. This pre-blocking helps keep train operations more fluid on both sides of the border, which makes the Bridge crossing process more efficient.

Despite carefully developed operating plans, many unexpected events occur in the course of each day. Representatives of the railroads that handle trains crossing the Laredo Bridge hold two conference calls each day to discuss such developments. During these calls, held at 9 a.m. and 6 p.m., the railroad representatives exchange up to date information and negotiate about how to resolve competing demands and respond to unexpected events. Railroad employees also speak with the Border Superintendent (a TFM employee, since mid-2001) at other times during the day to provide updates and discuss the progress of interchange activity. The Border Superintendent acts as the traffic cop, making ultimate decisions about which trains will move across the Bridge and the order in which they will proceed.

The many operational improvements the railroads have made over the years, along with infrastructure additions and improvements in government clearance and inspection procedures, have resulted in major improvements in efficiency. In turn, this has permitted very substantial increases in the amount of traffic that moves over the Bridge. I recall that in 1994, when I first became involved with UP's rail operations to and from Mexico, the largest number of cars that moved across the Bridge in one direction in a 24-hour period was in the range of 300 to 400. Today, between 900 and 1,100 cars move in each direction on the highest volume days. Thus, the various improvements that are now in place have essentially tripled the capacity of the Bridge since 1994.

With current government requirements and operating procedures, the Bridge is operating close to capacity now. Even with the impressive efficiency improvements made in recent years, there are times when more traffic builds up at the border than can be moved across the Bridge in a six-hour window. With the forecasted growth in rail traffic between the United States and Mexico, the Bridge will be at or over its capacity within the next few years.

The current Laredo Bridge operations involve a very delicate balance. While some of the operational improvements that have been made are well established and likely to continue in place (for example, expedited customs procedures), other practices that have helped to expedite operations are highly dependent on the good faith cooperation of the personnel of all three railroads. The advance exchange of operating information, discussion of operating problems on daily conference calls among the railroads, cooperative resolution of differences to maximize efficiency, and even-handed decisions about which trains will receive priority are all dependent on the continuation of a strong spirit of cooperation among the parties.

Sequencing of Trains

Decisions about the order in which trains will move across the Bridge are particularly sensitive. Ultimately, one individual (TFM's Border Superintendent) makes the final decisions about train movements. This individual decides, for example, whether to extend a window to permit an additional train to travel southbound before switching to the northbound window. When trains of more than one railroad are waiting to cross southbound, the Border Superintendent decides which train will move onto the Bridge ahead of the others. Thus, the Border Superintendent exercises a substantial amount of

discretion and is in a position to favor one railroad over another if he should choose to do so.

UP believes that in recent years TFM's Border Superintendent has administered Laredo Bridge operations in an even-handed manner. In general, he has avoided showing favoritism to either one of the U.S. railroads. My perception is that the Border Superintendent has generally made crossing decisions in a manner that has permitted UP to move cars across the Bridge in proportion to its overall percentage of Laredo traffic. In other words, if there are more trains waiting than can cross within a southbound window, the Border Superintendent has cleared UP trains to cross first more than half of the time, reflecting UP's higher percentage of the southbound traffic. The same has been true for northbound TFM blocks intended for UP. As a result, for loaded cars, the allocation of slots for Bridge crossings has approximately reflected the market demand for the UP and Tex Mex services. (This is not the case for empty cars. As I noted above, UP has shifted a large number of empty movements to the Brownsville gateway in order to ease the burden at Laredo.)

However, in the past, when the number of trains waiting to cross was greater than the number that could cross during a six-hour window, Tex Mex has argued that its southbound trains, or blocks of cars TFM is sending northbound to Tex Mex, should receive 50 percent of the available slots. In other words, despite the fact that it currently carries far less than 50 percent of the traffic that moves via the Laredo crossing, Tex Mex has requested a one-for-one allocation, so that when there are more UP and Tex Mex trains waiting than can cross during a window, Tex Mex would receive every other slot. Under such an allocation, UP trains would always be the ones that would have to

wait for the next window (even when they had been in position to cross before the last Tex Mex train arrived).

To date, TFM's Border Superintendent has resisted the Tex Mex arguments. He has continued to give Bridge access to UP and Tex Mex trains in a way that reflects approximately the railroads' relative percentages of Laredo traffic.

Effect of Common Control of TFM and Tex Mex on Bridge Operations

I and other UP personnel are concerned that a transaction that brings TFM and Tex Mex under the common control of Kansas City Southern would upset the efficient and even-handed operation that now exists in connection with Laredo Bridge operations. As a result of common control, the economic interests of TFM, Tex Mex, and Kansas City Southern Railway ("KCSR") will be more closely aligned. Under the control of KCS, Tex Mex and TFM will have greater incentives to take subtle, incremental steps that would disadvantage UP and cause its service to deteriorate. For example, a Border Superintendent who favored Tex Mex based on its Nafta Rail affiliation might decide to extend interchange windows to permit Tex Mex trains to move south over the Bridge, while making no such exceptions for UP trains. Eventually, such incremental steps would have the effect of moving traffic from UP-TFM routings to KCSR-Tex Mex-TFM routings, or to Tex Mex-TFM routings that include The Burlington Northern and Santa Fe Railway Company ("BNSF").

In addition, under common control with Tex Mex, TFM will have less incentive to resist the argument that Tex Mex trains should receive access to the Bridge on a one-for-one basis, *i.e.*, at a rate that exceeds Tex Mex's share of Laredo traffic. A Border Superintendent affiliated with Nafta Rail is much more likely to take the position

that Tex Mex trains should have Bridge access 50 percent of the time, even though Tex Mex currently carries only 25 percent of the traffic to and from the Laredo Bridge. Because the Bridge is operating close to capacity now, this sort of allocation of slots would give special preference to KCSR-Tex Mex-TFM and BNSF-Tex Mex-TFM movements while significantly disadvantaging UP-TFM movements. Whenever there are more cars waiting than can move across the Bridge during a window, the delayed cars (*i.e.*, those at the end of the queue) will be UP cars.

For example, if eight UP trains and two Tex Mex trains were waiting, but only six trains could move across the Bridge during a southbound window, under a 50 percent allocation all of Tex Mex's trains would cross, but only half of UP's trains could cross. The remaining four UP trains would have to wait six more hours, until the next southbound window opened. If train volumes continued to exceed the Bridge capacity, UP trains would continue to be delayed through subsequent windows. As a result, the overall efficiency of UP-TFM movements would decrease, while KCSR-Tex Mex-TFM and BNSF-Tex Mex-TFM movements would become more efficient and thus more attractive to shippers. Eventually some of the UP traffic would shift to Tex Mex in order to continue moving via Laredo.

We have already seen signs that TFM's attitude toward UP is changing. In the past, the relationship between UP personnel and TFM personnel has been highly cordial on a personal level. Since KCS announced its proposed transaction, however, TFM personnel have become more distant and more formal in their relations with us. While at least for now we are able to work with TFM's Border Superintendent to resolve Bridge issues, he has been less accessible than previously.

The Need for a Remedy

If the Nafta Rail transaction is approved, it will be important for the Board to take steps to ensure that UP receives fair treatment for its trains at the Laredo Bridge. If TFM and Tex Mex choose to engage in even subtle discrimination against UP trains at the Bridge (which we expect they will, once under common control by KCS), this will reduce the efficiency of UP-TFM routes and disadvantage UP's customers. There would be significant reductions in the efficiency of the UP-TFM routes if TFM were to shift to a 50-50 allocation of Bridge slots. As described above, though on its face even-handed, such a system would have a disproportionate effect on the carrier that has attracted the majority of the traffic (currently UP).

With a one-for-one allocation of Bridge slots, the majority carrier's trains would always be the ones left to wait until the next window when there were too many trains waiting to cross. (And, as noted above, if more trains arrive to fill up the next window, the delays to the majority carrier's trains continue through additional periods.) By reducing the number of UP trains that could cross during a six-hour window, and thereby artificially reducing the efficiency of UP-TFM movements, the Nafta Rail carriers would be able to shift traffic to what would otherwise be a less efficient KCSR-Tex Mex-TFM or BNSF-Tex Mex-TFM route.

Applicants have claimed that UP could avoid any such discrimination by threatening to move traffic to other border crossings. But UP could not simply shift a large volume of trains to other crossings, as Applicants have suggested. As explained above, other crossing points are much less efficient than Laredo. Moreover, there is far less of the necessary infrastructure at Eagle Pass, and thus much less capacity there. Eagle Pass today has less infrastructure than Laredo had 10 years ago. It would take

many years to build up yard facilities, main track, a large broker community, and government services to a point where Eagle Pass could absorb a large amount of UP's Laredo traffic. The Brownsville crossing has even fewer facilities. Moreover, at Brownsville, UP would depend on TFM's cooperation.

UP also could not avoid the effects of discriminatory treatment by constructing a new bridge at Laredo. Construction of a new bridge and related facilities would be quite expensive (probably close to $100 million) and could not be undertaken without approval from the Mexican government. UP took steps toward construction of a new bridge in the early 1990s, but encountered delays in obtaining approvals from the Mexican government and dropped its plans without having obtained that approval. In my opinion, such approvals would be no easier to obtain today. Moreover, UP operations over a new bridge would still require cooperation from TFM.

Applicants also suggest that the written agreements governing Bridge operations provide UP with sufficient protection. I disagree. A 1951 written agreement between a predecessor of UP and Tex Mex sets out various terms for the joint operations at the Laredo Bridge. Section 4(III) of this agreement provides that "Joint Switching Service" shall be "performed impartially" and that "no preference shall be given to movement of cars of one of the parties." (Exhibit B to this statement shows the relevant provision of the 1951 agreement.) However, the agreement does not specify what this means, how it applies in the context of today's operations (which differ from those described in the 1951 agreement in various ways; for example, the parties no longer perform switching services for each other), or how it is to be accomplished. The agreement does not foreclose Tex Mex's argument that "no preference" means a 50/50

allocation, even when the traffic percentages are not 50/50. I do not believe the 1951 agreement or any of its amendments would be sufficient to ensure even-handed treatment for UP trains once TFM and Tex Mex are under common control.

I am aware that Applicants have stated that they will continue to cooperate with UP regarding utilization of the Laredo Bridge and that they will honor existing agreements governing operations over the Bridge. We welcome these statements. However, Applicants' assurances to date have been stated in very general terms. In order to ensure that all parties receive fair treatment in Bridge operations, there is a need for more clearly defined commitments that would be enforceable. In a letter dated July 21, 2003, counsel for KCS has said it is willing to commit to negotiate in good faith to develop new dispatching protocols for the Bridge and to have this be a condition of its common control of Tex Mex. We believe this is a sensible approach to the Bridge issue. But in order to ensure that all railroads do in fact receive fair treatment, we believe the Board, in imposing such a condition, should set out more specific guidance to the parties and retain jurisdiction to impose an appropriate arrangement if the parties cannot arrive at a consensus solution.

What the Board Should Do

To help ensure that all parties will receive even-handed treatment in connection with operation of the Bridge, the Board should require the parties to adopt new Bridge protocols that adhere to the following principles (unless the parties agree that appropriate protections can be achieved in other ways).

First, UP's role in Bridge operations should be formalized through establishment of a joint operations center responsible for Bridge operations. As

described above, UP personnel currently participate in regular exchanges of operating information and daily conference calls relating to Bridge operations, and UP has had the opportunity to communicate freely with TFM personnel responsible for decisions on Bridge crossing sequence. If the Nafta Rail transaction goes forward, there is a real danger that UP will be shut out of the decisionmaking process and that TFM employees will make unilateral decisions that favor TFM-Tex Mex movements over TFM-UP movements. Prior to mid-2001, when Tex Mex controlled movements over the Bridge, UP faced difficulty in communicating with Tex Mex and having its input considered in management of the Bridge crossing operation. Communication and coordination improved greatly after TFM took control of the Bridge operation. However, UP's perception is that TFM and Tex Mex both regard the Bridge as their "franchise." We believe that, under common control, TFM and Tex Mex will reduce the level of communication and coordination we have seen in recent years and deny UP an influential role in management of the Bridge crossing operation.

The best way to ensure that all three railroads, including UP, continue to have input into decisions about Bridge operations and about whose trains should receive priority when the number of trains waiting exceeds the capacity of a Bridge window is to establish a joint operations center that will control the flow of traffic across the Laredo Bridge. This center should dispatch trackage that extends from UP's Port Laredo Yard to Tex Mex's Serrano Yard, across the Bridge, to TFM's Sanchez Yard.

Joint operations centers are used to coordinate operations when more than one railroad uses the same track and to ensure that all railroads are treated in a neutral manner. In such centers, employees of all railroads sit together in the same dispatching

facility and play a role in the dispatching operation. Dispatchers at a joint operations center have an obligation to act in a neutral manner toward the trains of all participating railroads. The railroads generally agree to structure incentives of these employees to reward the efficient movement of all trains, not just the trains of a particular carrier.

Joint dispatching operations have worked well for trackage in a number of locations, including the Houston area, the Powder River Basin in Wyoming, San Bernadino, California, Kansas City, and the Chicago area. For example, the Spring Dispatching Center in Houston, which is responsible for joint dispatching of jointly owned lines in Houston and between Houston and New Orleans, has been very effective. BNSF, which shares with UP in the joint dispatching, has praised the Spring Center for promoting both efficiency and fairness. (KCS and Tex Mex have been invited to join, but have declined.) Including as part of the condition a requirement that the Nafta Rail carriers and UP negotiate to establish a joint operations center for Bridge movements should not pose a burden. If anything, it should make coordination easier and more effective.

The Board would not need to prescribe the details of a joint operation. Railroads have successfully negotiated these arrangements in the past. At this point, the Board should simply establish the general principle of a joint operations center and allow the parties to work out the operational details.

Second, Applicants should accept an express obligation to manage Bridge operations in a manner that is non-discriminatory and that will achieve maximum efficiency in operation of the Bridge. UP would subscribe to such a commitment. Such an arrangement would allow each carrier to invoke a formal commitment that the others

will continue to participate in practices that maximize the total capacity and operating efficiency of the Bridge, rather than favoring any one user.

Third, the protocols should make clear that, at any given time, Bridge capacity will be allocated in proportion to each railroad's share of traffic at the Laredo crossing. As explained above, UP is concerned that the Nafta Rail carriers will impose a 50-50 allocation of available Bridge slots. Such a one-for-one protocol would guarantee superior treatment for the carrier with less traffic (currently Tex Mex), which would receive half of the slots. When there are more trains waiting than can be accommodated during a window, the carrier that enjoys greater market demand for its services (currently UP) would always be the one that lost the opportunity to cross some of its trains during that window.

Under a fair allocation, when multiple trains are waiting to cross the Bridge in one direction, each railroad should receive slots that would permit it to use the Bridge in accordance with its percentage of the rail traffic that moves via Laredo. Of course, there should be some flexibility in applying a percentage-based formula. It would not be appropriate for the railroads to follow this formula rigidly on a daily basis if doing so would substantially reduce the number of cars moving over the Bridge during a particular day. There should be exceptions for expedited trains (for example, intermodal trains) that need special priority. Moreover, if a railroad could not use all of its allocation, the unused time should be available for the other railroad.

Again, it should not be necessary for the Board to prescribe all of the details of a slot allocation process. Rather, the Board should simply require the parties to negotiate an agreement that would provide slots in proportion to the amount of each

carrier's Laredo traffic. The parties should be able to work out details, such as how to divide capacity into slots. If the parties could not reach agreement, the Board could fashion an appropriate protocol with input from the parties. However, the parties themselves are in the best position to determine how such a system could be implemented, and I believe they will be able to reach agreement following negotiations.

II. TEX MEX TRACKAGE RIGHTS OPERATIONS

I have reviewed certain allegations the Applicants have made in their filings concerning Tex Mex operations over UP track. Applicants claim that UP has a "chokehold" on Tex Mex and could interfere with Tex Mex movements to and from Laredo if it wished to do so. (I assume Applicants are referring to Tex Mex's operations over UP's track between Beaumont, Texas and Robstown/Corpus Christi, Texas, under trackage rights Tex Mex obtained in connection with the Board's 1996 approval of the UP/SP merger.) However, UP has not interfered with Tex Mex operations in the past; moreover, we would not and could not take any such action in the future. The Tex Mex trackage rights operations are subject to extensive protections to ensure that UP does not discriminate against Tex Mex's trains. Ultimately, the trackage rights operations are subject to Board oversight.

The UP-Tex Mex Dispatching Protocol

The Tex Mex trackage rights are governed by a detailed dispatching protocol, negotiated by UP and Tex Mex personnel in 1996 in connection with the Board's award of the trackage rights. A copy of this protocol is attached as Exhibit C to this statement. Under the terms of the protocol, there are numerous specific requirements for administration of the trackage rights.

Under Section 3 of the dispatching protocol, UP dispatchers in this territory must be instructed to treat all trains equally, whether they are UP or Tex Mex trains. Under Section 12 of the protocol, in evaluating performance of its dispatchers, UP must consider performance of Tex Mex trains and effectiveness of meeting Tex Mex service requirements. Under Section 13 of the protocol, Tex Mex has the right to request a meeting with UP personnel to discuss any disagreement about compliance with the protocol and to present such disagreements to a Joint Service Committee comprised of the chief transportation officers of UP and Tex Mex. Tex Mex may submit a disagreement to binding arbitration before a neutral official if it is not satisfied with the Joint Service Committee's action.

I am not aware of a single instance in which UP has violated the protocol governing movement of Tex Mex trains on UP track or otherwise taken action to disadvantage these Tex Mex trains vis-à-vis UP trains. From time to time, various operational problems common to all railroads have contributed to slow velocities on portions of the UP track Tex Mex uses. However, these problems have not been specific to Tex Mex. Rather, they have slowed the movement of all trains (including UP trains) using the tracks.

Tex Mex Delay Claims

Tex Mex has raised concerns about delays its trains have experienced while using UP's tracks. Tex Mex reports that, in a number of cases, the hours of service of a Tex Mex train crew have expired before the train reaches a crew change point, and Tex Mex has had to recrew the train. Earlier this year Tex Mex requested a meeting of the Joint Service Committee established under the UP-Tex Mex dispatching protocol in

order to discuss its concerns about this situation. This was the first time Tex Mex had ever requested such a meeting. In March 2003, I and one of my staff met with Jerry Heavin, Senior Vice President of Operations for KCSR, to review the Tex Mex concerns. We had a productive session in which we discussed these concerns. I advised Mr. Heavin that the velocities of two Tex Mex trains (AJAMXJ and AMXJAX) had improved over the preceding four months. We agreed on steps to follow up on various issues, as well as weekly meetings between UP and Tex Mex personnel for the future. During the March 2003 meeting Mr. Heavin did not identify any respect in which Tex Mex or KCS believed that UP had violated the protocol.

Since the March meeting, UP and Tex Mex personnel have held meetings each Friday to review any concerns about operation of the Tex Mex trains over UP track. In each case in which Tex Mex identified a train delay, UP personnel investigated and explained the relevant circumstances to Tex Mex personnel. Together the UP and Tex Mex personnel identified factors that appear to have been responsible for any delays to the Tex Mex trains. After reviewing the information provided to them, Tex Mex personnel have not identified any UP violation of the protocol.

In my view and that of others at UP, one major factor that causes many Tex Mex crews to expire due to hours of service regulations during movements over the trackage rights is the fact that the Tex Mex crew districts are quite long, much longer than UP's crew districts in the same corridor. Between Houston and Laredo, Tex Mex has just two crew districts -- between Houston and Victoria (216 miles) and between Victoria and Laredo (242 miles). In contrast, most of UP's crew districts in this corridor are between 50 miles and 160 miles in length, and none is as long as the Tex Mex

districts. With such long crew districts, it is not surprising to me that Tex Mex crews frequently expire due to hours of service regulations.

In fact, I believe that the UP dispatchers probably give Tex Mex trains better treatment than UP trains as a result of this situation. UP's dispatchers generally attempt to give priority to a train when the crew is about to expire due to hours of service regulations (in order to allow the train to reach a terminal, rather than tying up mainline capacity). Because of the length of the Tex Mex crew districts, Tex Mex crews are often in danger of exceeding their hours of service. Due to UP's shorter crew districts, UP crews are less likely to be in this situation and thus the UP trains are less likely to receive priority.

Operating statistics UP has collected confirm that Tex Mex trains are suffering fewer delays than UP trains in this part of Texas. In November 2002, the Spring Dispatching Center conducted a four-day study of trains operating on UP's Angleton and Brownsville Subdivisions, parts of which are used by Tex Mex trains operating via trackage rights. This study showed that on average, as among UP, BNSF, and Tex Mex trains, UP trains suffered the most minutes of delay for each train, while Tex Mex trains experienced the fewest minutes of delay per train. Exhibit D to this statement shows the data on minutes of delay per train for UP, BNSF, and Tex Mex trains from the November 2002 study.

There is no reason to believe that UP would choose to discriminate against Tex Mex in connection with these trackage rights in the future. UP uses all of the trackage rights lines for its own trains. Any actions UP took to delay Tex Mex trains would increase congestion on the lines, and this would result in delay to UP trains as

well. In addition to this natural check on any discriminatory conduct, Tex Mex can control UP's conduct by enforcing Tex Mex's rights under the protocol. Tex Mex can monitor performance of its trains, raise its concerns with UP, and seek a binding arbitration award if it cannot obtain a satisfactory resolution through discussions with UP. If it believes the trackage rights are not operating in the manner the STB intended, Tex Mex could seek relief from the Board.

The Board should note that Tex Mex has had opportunities to participate more fully in oversight of the operations on the trackage rights lines, but it has failed to take full advantage of these opportunities. As noted above, under the protocol, Tex Mex has the right to request a Joint Service Committee meeting any time there is a disagreement about compliance with the protocol. As also noted above, Tex Mex has requested only one meeting since it began use of the trackage rights in 1997. Moreover, Tex Mex has never sought binding arbitration of a claim that UP has violated the protocol, although it is entitled to do so under the terms of the protocol.

In addition, Tex Mex is free to participate in the Spring Dispatching Center, the joint operations center UP and BNSF operate at Spring, Texas. If Tex Mex agreed to participate in the Spring joint operation, it could have a managerial employee sitting in the same room as the UP and BNSF dispatchers who control train movements on the trackage rights lines. This would facilitate communications and coordination of the Tex Mex train movements over the trackage rights. Despite previous invitations, Tex Mex has declined to participate at Spring. UP and BNSF continue to welcome Tex Mex as a participant in the Spring joint operation.

Capacity Issues

Applicants have also suggested that there is insufficient capacity on the trackage rights lines Tex Mex uses. UP's Network Planning Department, which prepares analyses of line capacity, regularly studies line capacity related to traffic volumes. Based on these analyses, UP has found that there is more than enough capacity to accommodate actual traffic volumes on most of the lines Tex Mex uses. For a portion of the Brownsville Subdivision, Network Planning has concluded that there is sufficient capacity to carry current traffic volumes, although traffic would exceed capacity if several trains per day were added. However, there is enough capacity that Tex Mex could add new traffic to this line without additional investment. Network Planning's analyses also indicate that the trackage rights lines Tex Mex uses are considerably less constrained than the line between San Antonio and Laredo used by UP's trains, where traffic volumes exceed capacity by several trains per day.

Applicants have asserted that UP failed to meet commitments to expand the capacity of the trackage rights lines. In fact, since UP and Tex Mex entered into the trackage rights agreement, UP has spent many millions of dollars on capital projects that benefit lines that Tex Mex uses. If Tex Mex believes that UP has violated that agreement or some other contract by failing to make certain capital investments, it could raise this claim. However, Tex Mex has never informed UP of a capital improvement it believes should have been made on the trackage rights lines.

If it believes its operations on UP's tracks are limited by a lack of capacity, Tex Mex could take at least two steps to help alleviate the situation. First, Section 5 of the 1996 trackage rights agreement gives Tex Mex the right to identify and fund construction of sidings and other capital improvements on the trackage rights lines,

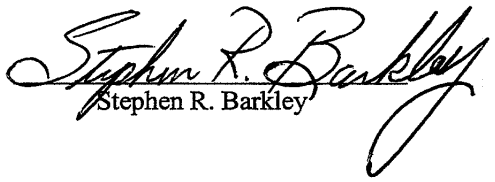
without UP having any veto. Tex Mex has never invoked this provision in the period since it began using the trackage rights, but this continues to be an available option. Second, UP has sold to Tex Mex the old SP Wharton line, which runs between Victoria and Rosenberg. Tex Mex could proceed with plans to rehabilitate this line and use this shorter route in place of approximately 100 miles of trackage rights on UP. This would shorten Tex Mex's route from Houston to Laredo and eliminate any concern about capacity on one portion of the UP lines.

* * *

In summary, there is no realistic prospect that UP could impose a "chokehold" on Tex Mex operations to and from Laredo. UP has not interfered with Tex Mex's operations in the past, and we have no intention of doing so in the future. In any event, Tex Mex can take effective steps to obtain relief if it believes UP is discriminating against Tex Mex trains or otherwise acting in violation of the 1996 dispatching protocol. In addition, Tex Mex has the right to fund capacity additions to the lines it uses. These protections are far more effective than any rights UP could invoke today in connection with the Laredo Bridge operations.

I, Stephen R. Barkley, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on August 1, 2003.



Stephen R. Barkley

EXHIBITS

Exhibit A - Laredo and the International Bridge

Exhibit B - 1951 Agreement (excerpt)

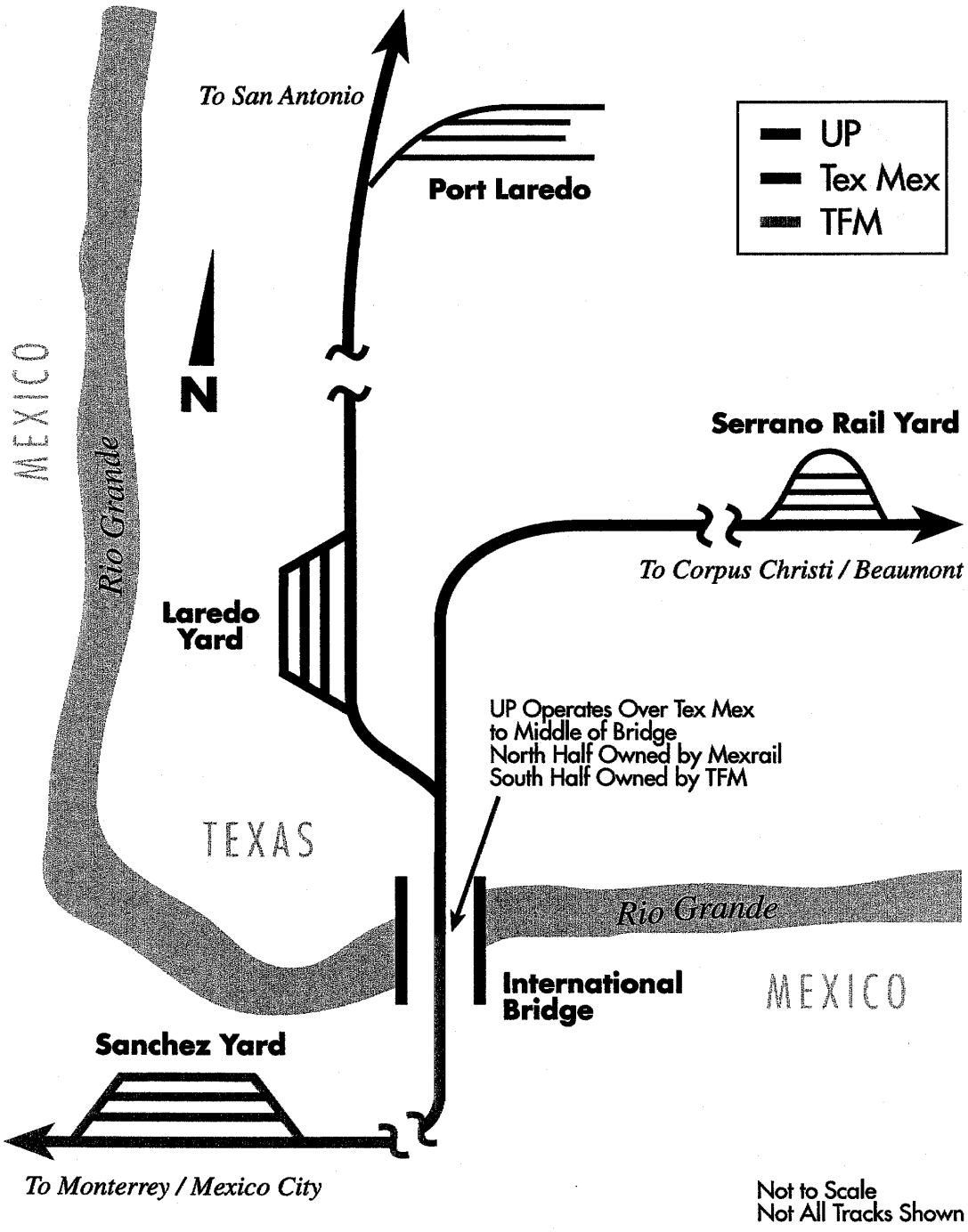
Exhibit C - UP-Tex Mex Trackage Rights Terms (including dispatching protocol)

Exhibit D - Average Train Delay (Angleton and Brownsville Subdivisions)

A

Barkley Exhibit A
Public

Laredo and the International Bridge



B

Barkley Exhibit B
Public

AGREEMENT

between

GUY A. THOMPSON, Trustee,
INTERNATIONAL-GREAT NORTHERN
RAILROAD COMPANY, DEBTOR,
(Herein Called International Trustee)

and

THE TEXAS MEXICAN RAILWAY COMPANY
(Herein Called Tex-Mex Company)

Covering, among other things, the use of certain tracks, improvements and motive power of each International Trustee and Tex-Mex Company, and the performance by certain employes of International Trustee and Tex-Mex Company of certain switching, terminal and other services, incident to the interchange of passenger train cars, and any passengers, baggage, mail and express contained therein, and of freight train cars, and any freight contained therein, between the National Railways of Mexico and each the International Trustee and the Tex-Mex Company at the U. S.-Mexican Boundary Line.

Laredo, Texas.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

JAN-18172

(III) Joint Switching Service shall be performed impartially for the account of the parties hereto; and no preference shall be given to movement of cars of one of the parties hereto over cars of the other party hereto.

(IV) Movement of International Trustee's passenger train cars shall have precedence over the movement of freight train cars over Tex-Mex Green Tracks at all times. Subject to foregoing, Joint Switching Service shall have preference over all other movements on Tex-Mex Green Tracks except that Tex-Mex Company shall have preference in the use of Tex-Mex Green Tracks by Tex-Mex Company's sole engine and crew performing sole switching service for Tex-Mex Company on Tex-Mex Company's tracks now or hereafter located near and just easterly of Tex-Mex Green Track No. 1 and intermediate Ventura Street and Lincoln Street, the Tex-Mex Company hereby agreeing to so perform its sole switching service as to not unnecessarily or unreasonably interfere with the movement over Tex-Mex Green Tracks in Joint Switching Service of freight train cars.

Section 5. **Persons Employed In Performing Services Hereunder.**

(A) Each party shall have the right, at such party's sole expense and with such party's sole employes, to handle all papers required by the United States and Mexican governmental authorities for the movement of export and import cars of such party; and shall cause such party's said sole employes to cooperate with the supervisory officer and yard clerks hereinafter referred to in expediting the movement of said export and import cars. Not more than one such sole employe of each party shall be stationed at the Yard Office at the International Bridge at any one time for the purpose aforesaid; and said sole employe may examine only records pertaining to his employer's business.

C

Barkley Exhibit C
Public

TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS

The following terms (hereinafter referred to as the "Terms") shall govern rights provided by MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation ("MP"), and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("SP"), with MP and SP jointly and severally referred to as "MP/SP" or "Owner," on the one hand, to THE TEXAS MEXICAN RAILWAY COMPANY ("Tex Mex" or "User"), on the other hand, with MP/SP and Tex Mex sometimes referred to collectively as "Parties," pursuant to the decision of the Surface Transportation Board ("STB") in Finance Docket No. 32760 served August 12, 1996 (the "Decision").

RECITALS

A. MP/SP owns lines of railroad consisting of track structure extending between Robstown, Texas and Odem, Texas, and between Corpus Christi, Texas, and Beaumont, Texas, by way of Odem, Texas, identified as follows:

> MP's line between Robstown, Texas, in the vicinity of MP Milepost 141.48 and Placedo, Texas, in the vicinity of MP Milepost 224.2;
>
> MP's line between Corpus Christi, Texas, in the vicinity of MP Milepost 145.59, and Odem, Texas, in the vicinity of MP Milepost 132.2, via Savage Lane to MP's Viola Yard;
>
> SP's line between Placedo, Texas, in the vicinity of SP Milepost 14.2, and West Junction, Texas, in the vicinity of SP Milepost 12.6, via Victoria, Texas, and Flatonia, Texas;
>
> SP's line between West Junction, Texas, in the vicinity of SP Milepost 12.6, and T&NO Junction, Texas, in the vicinity of SP Milepost 4.6;
>
> SP's line from West Junction through Bellaire Junction to Chaney Junction, in the vicinity of SP Milepost 2.8;
>
> SP's line from Chaney Junction, in the vicinity of SP Milepost 2.8, to Tower 26, in the vicinity of SP Milepost 360.7, via the Houston Passenger station;

SP's line from Chaney Junction, in the vicinity of SP Milepost 2.8, to Tower 26, in the vicinity of SP Milepost 360.7, via the Hardy Street yard;

MP's line from Settegast Junction, in the vicinity of MP Milepost 381.61, to the connection with HB&T at Interstate Junction, in the vicinity of MP Milepost 7.60;

SP's line from T&NO Junction, in the vicinity of SP Milepost 4.6, to the connection with PTRA, in the vicinity of Katy Neck (GH&H Junction), in the vicinity of SP Milepost 1.3;

SP's line from SP Milepost 360.7 near Tower 26 to the connection with HB&T at Quitman Street, in the vicinity of SP Milepost 1.45;

MP's line between Gulf Coast Junction, Texas, in the vicinity of MP Milepost 377.98, and Amelia, Texas, in the vicinity of MP Milepost 451.4;

MP's line between Amelia, Texas, in the vicinity of MP Milepost 451.4, and the connection with SP at Langham Road, Texas, in the vicinity of MP Milepost 456.7;

SP's line between Langham Road, Texas, in the vicinity of MP Milepost 456.7, and Tower 74, in the vicinity of MP Milepost 458.8;

MP's line between Tower 74, in the vicinity of MP Milepost 458.8, and (1) the connection with The Kansas City Southern Railway Company ("KCS") at GLC Jct., Texas, in the vicinity of MP Milepost 460.36 (KCS Milepost 766.7), and (2) the connection with KCS at the Neches River Draw Bridge in Beaumont, Texas, in the vicinity of KCS Milepost 766.0;

as shown by bold line on the attached prints dated September 23, 1996 (and identified as Exhibit "A") and further described in Section 1.7 of Exhibit "B," which shall be referred to herein as the "Joint Trackage."

B. The STB in Finance Docket No. 32760 approved the common control and merger of the rail carriers controlled by Union Pacific Corporation ("UPC"), including MP and Union Pacific Railroad Company ("UPRR") (UPC, UPRR and MP are referred to collectively as "UP"), and the rail carriers controlled by Southern Pacific Rail Corporation ("SPR"), including SP, conditioned on, among other things, partial grant of the Responsive Application of Tex Mex, dated March 29, 1996.

C. In order to exercise its authority to acquire control of SPR as granted by the STB in Finance Docket No. 32760, MP/SP is willing to provide Tex Mex with the rights specified in the Decision.

D. Tex Mex desires to receive said rights and desires to conduct operations over said rights. Tex Mex and MP/SP now wish to assist the STB in specifically defining the terms and conditions under which said rights shall be exercised.

E. It is the position of Tex Mex and MP/SP that these Terms do not constitute the acquiescence by either of them in the Decision and shall not preclude either of them from seeking any reopening, reconsideration or judicial review of the Decision.

TERMS

1. General Conditions:

The General Conditions set forth in Exhibit "B" attached hereto are hereby made a part of these Terms. All capitalized Terms used and not otherwise defined in these Terms shall have the meaning ascribed to them in the General Conditions. If any conflict between the General Conditions and these Terms shall arise, the provisions of these Terms shall prevail.

2. Rights of Tex Mex:

(a) Subject to the terms and conditions contained herein, MP/SP shall grant to Tex Mex the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in Tex Mex's account over the Joint Trackage in common with MP/SP and such other railroad company or companies as MP/SP has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in these Terms), such other railroad company or companies to be considered MP/SP for the purposes of these Terms, it being understood and agreed that Tex Mex shall not have the right to:

(i) Switch industries upon the Joint Trackage, except as otherwise provided in Section 2(g);

(ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in Sections 2.11, 2.12 and 2.13 of Exhibit B;

(iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located along the Joint Trackage, except as otherwise provided in Section 2(g);

(iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of Tex Mex; provided, however, that the foregoing shall not prevent Tex Mex, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under these terms;

(v) Connect with or interchange with any other railroad, except as otherwise provided in Section 4; or

(vi) Establish any transload facilities on the Joint Trackage or build into or out from any facility from/to the Joint Trackage.

(b) The rights granted in Section 2 shall be only for rail traffic of all kinds and commodities, both carload and intermodal, in Equipment that meets all applicable specifications established by the Association of American Railroads and the Federal Railroad Administration, provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi Line.

(c) User shall have the right to establish crew change points at points on the Joint Trackage as from time to time may be mutually agreed to in writing by Owner and User. However, User agrees that if sufficient trackage is not available at such locations(s) to facilitate crew changes of User, Owner may require User to construct additional trackage ("Crew Change Facilities") in the vicinity of such location as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such Crew Change Facilities are necessary, the Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such Crew Change Facilities are constructed at the cost and expense of User, and Owner shall choose to use such Crew Change Facilities, Owner shall pay User fifty percent (50%) of the cost of constructing such Crew Change Facilities. Should Owner decline to participate, Owner shall be denied access to such Crew Change Facilities. However, should Owner elect at a later date to use such Crew Change Facilities, such right shall be granted to Owner by User upon payment of fifty percent (50%) of User's initial costs plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by User commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the Improvements. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's

interest rate (i.e. the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

In addition, Owner shall lease to User, by separate written agreement at reasonable and customary charges, existing facilities for office, locker, change and lunchroom purposes by User's personnel upon request of User to Owner, and as reasonably available, or property of Owner as reasonably available for User to establish its own facilities.

(d) User agrees that when entering or exiting the Joint Trackage or using the Joint Trackage to set out or pick up ("User's Operations"), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage in the vicinity of such location(s) as may be required, in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. If User does not agree that such additional trackage is necessary, the Owner may nevertheless insist that it be constructed, with the question of its necessity, and the User's obligation to bear its cost and expense, to be determined by arbitration pursuant to Section 6 of the General Conditions. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage plus interest as calculated pursuant to Section 2(c) above.

(e) User shall have the right to such use of SP's Glidden Yard at Glidden, Texas, as is reasonably necessary to effectuate the rights granted by these Terms and on such terms and conditions (including reasonable compensation terms) as may be agreed to in writing by the parties or determined by arbitration pursuant to Section 6 of the General Conditions if the parties fail to agree; provided, however, that such use by User shall not unreasonably interfere with Owner's operations. Any dispute between User and Owner regarding the reasonableness of User's use of Glidden Yard shall be submitted to arbitration pursuant to Section 6 of the General Conditions.

(f) If Owner implements a directional flow of operations between Houston, Texas, and Beaumont, Texas, Owner will assure that User's operations are not adversely affected thereby.

(g) User shall have the right to serve all shippers that, as of September 10, 1996, were capable of receiving service from both MP and SP and no other railroad, directly or through reciprocal switching.

3. GTM Rate:

(a) In addition to other payments to be made under these Terms, User shall remit to Owner monthly for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of 3.84 mills per GTM for all Equipment, which sum per GTM ("GTM Rate") shall be deemed to include ordinary and programmed maintenance of the Joint

Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes.

(b) For the purpose of computing the GTM Rate under this Section 3, the distance between the designated points of the Joint Trackage shall be determined by reference to MPRR's EPMS Engineering Mileage Master or SP's Station Pair Master File, whichever is applicable, both of which shall be subject to verification by User.

(c) The GTM Rate set forth in Section 3(a) of these Terms shall be subject to adjustment annually, commencing as of July 1, 1997, as follows:

All trackage rights charges under this Section 3 shall be subject to adjustment annually beginning as of the effective date of these Terms to reflect seventy percent (70%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the ICC or successor agency or other organizations. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration.

4. Interchange:

In exercising the rights granted by these Terms, Tex Mex shall have the right to interchange traffic (a) with carriers other than MP/SP at the existing interchange points with those carriers on the Joint Trackage, i.e., (i) at Houston, Texas, with the Port Terminal Railroad Association ("PTRA"), the Houston Belt Terminal Railway Company ("HBT"), The Atchison, Topeka & Santa Fe Railway Company ("ATSF") and Burlington Northern Railroad Company ("BN") (ATSF and BN are referred to collectively as "BNSF"), and (ii) at Beaumont, Texas, with BNSF and The Kansas City Southern Railway Company ("KCS"); (b) with BNSF at Robstown and Corpus Christi and at any new interchange point on the Joint Trackage that may hereafter be established between MP/SP and BNSF; and (c) with MP/SP at Houston, Beaumont and such other points as may mutually be agreed. Any interchange between Tex Mex and PTRA or between Tex Mex and HBT at Houston, Texas, shall be governed by agreements entered into between those parties or terms imposed by the STB.

5. Additions:

(a) Owner and User shall conduct a joint inspection to determine what connections ("Connections") and sidings or siding extensions associated with Connections ("Sidings") are necessary in the reasonable judgment of Owner to implement the rights granted under Section 2 of these Terms. User, at its sole cost and expense, shall pay the cost of such Connections and Sidings. If User does not agree that such Connections and Sidings (other than those described in subsections (i) and (ii), the necessity for which is not in dispute, and to which this sentence does not apply) are necessary, Owner may nevertheless insist that they be constructed, with the question of their necessity, and the User's obligation to bear their cost and expense, to be

determined by arbitration pursuant to Section 6 of the General Conditions. In the event that the User bears the sole cost and expense of any such Connections and Sidings, no other railroad shall have the right to use them except upon terms agreed to by User and such other railroad. In the event Owner shall elect to use such Connections and Sidings, Owner shall pay to User fifty percent (50%) of the cost to User of constructing the Connections and Sidings, plus interest as calculated pursuant to Section 2(c) above, and, having made such payment, Owner may also admit other railroads to the use of such Connections and Sidings. Owner shall maintain the part of any Connection or Siding on its property at its sole cost and expense, and User, at its sole cost and expense, shall maintain the part of any Connection or Siding on its property or property of others. Such necessary Connections and Sidings shall include, but are not necessarily limited to, those described in subsections (i) and (ii) below:

(i) User shall construct a connection to access MP at Robstown, Texas, to include track 8500 feet in length to permit Tex Mex trains to clear the MP main line (the "Robstown Connection"). The design for the Robstown Connection shall be submitted to Owner for its written approval within forty-five (45) days following the effective date of these Terms, which approval shall not be unreasonably withheld, and User's operation thereover shall be subject to Owner's prior written acceptance of the Robstown Connection. User agrees that the Robstown Connection shall be constructed within one hundred eighty (180) days of acquisition of the required property and approval by Owner of its design. Owner grants User the right to use, as daily dispatching conditions reasonably permit, the existing connection between Tex Mex and Owner at Robstown and 8500 feet of Owner's main line south of that connection, for a period of six (6) months following the date of Owner's approval of the design of the Robstown Connection, which connection and trackage shall be deemed part of the Joint Trackage during the period of Tex Mex's usage thereof, including any extensions of the period as provided below. Owner will extend the period of User's use of the existing connection for an additional six (6) months in the event (a) User is unable to complete the Robstown Connection within the time frame specified in the preceding sentence and User is making a bona fide effort to complete the construction of the new connection, and (b) User's continued operations over the existing connection will not, in Owner's judgment, unreasonably interfere with Owner's operations. If BNSF constructs the Robstown Connection, Tex Mex shall have the right to use the Robstown Connection on terms agreed to by Tex Mex and BNSF. If the Robstown Connection is not constructed by BNSF, Tex Mex shall construct the Robstown Connection as provided above.

(ii) User shall also construct a connection to access SP at Flatonia, Texas, to include track parallel to SP's Victoria Subdivision, Port LaVaca Branch, 8500 feet in length to permit Tex Mex trains to clear the SP main line (the "Flatonia Connection"). The design for the Flatonia Connection shall be submitted to Owner for its written approval within forty-five (45) days following the effective date of these Terms, which approval shall not be unreasonably withheld, and

User's operation thereover shall be subject to Owner's prior written acceptance of the Flatonia Connection. User agrees that the Flatonia Connection shall be constructed within one hundred eighty (180) days of acquisition of the required property and approval by Owner of its design. Owner grants User the right to use the existing connection between SP's Victoria Subdivision, Port LaVaca Branch, and SP's Glidden Subdivision at Flatonia and siding south of Owner's main line West of that connection for a period of six (6) months following the date of Owner's approval of the design of the Flatonia Connection, which existing connection and trackage shall be deemed part of the Joint Trackage during the period of Tex Mex's usage thereof.

(b) Except as provided in Section 5(a) above, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings, Centralized Traffic Control, grade separations, and future connections, shall be handled as follows: (i) if the Change in and/or Addition to the Joint Trackage is for the sole benefit of one party, that party shall be solely responsible for the entire cost and expense thereof; (ii) all other Changes in and/or Additions to the Joint Trackage shall be shared by MP/SP and Tex Mex on the basis that the parties' respective GTM's operated over the Joint Trackage bear to total GTM's operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced. The use of Joint Trackage by any third party shall be attributed to MP/SP for purposes of computing respective GTM's for purposes of this Section 5(b).

(c) In the event such Changes in and/or Additions to the Joint Trackage are constructed at the sole cost and expense of one party (party of the first part), the other party (party of the second part) shall be denied access to such Change in and/or Addition to the Joint Trackage. If the party of the second part at some future date shall choose to use such Changes in and/or Additions to the Joint Trackage, such right shall be granted to party of the second part by party of the first part upon payment of fifty percent (50%) of party of the first part's initial costs plus per annum interest calculated pursuant to Section 2(c).

6. Notices:

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to these Terms shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for MP/SP:

Executive Vice President-Operation
Room 1206
1416 Dodge Street
Omaha, Nebraska 68179

With a copy to:

Director Joint Facilities
Room 1200
1416 Dodge Street
Omaha, Nebraska 68179

If intended for Tex Mex:

The Texas Mexican Railway Company
1200 Washington Street
P.O. Box 419
Laredo, Texas 78042

Notice of address change may be given any time pursuant to the provisions of this Section 6.

7. Term:

These Terms shall be effective upon consummation of the control authority granted in the Decision for a term of ninety-nine (99) years. These Terms shall terminate, and all rights conferred pursuant thereto shall be canceled and deemed void ab initio, if, in a Final Order, the application for authority for UP to control SPC has been denied or has been approved on terms unacceptable to the applicants or has been granted on terms that do not require the rights provided herein, provided, however, that if these Terms become effective and are later terminated, any liabilities arising from the exercise of rights under Sections 1 through 5 during the period of its effectiveness shall survive such termination. For purposes of this Section 7, "Final Order" shall mean an order of the Surface Transportation Board, any successor agency, or a court with lawful jurisdiction over the matter which is no longer subject to any further direct judicial review (including a petition for writ of certiorari) and has not been stayed or enjoined.

Approved:

For MP/SP: James V. Dolan

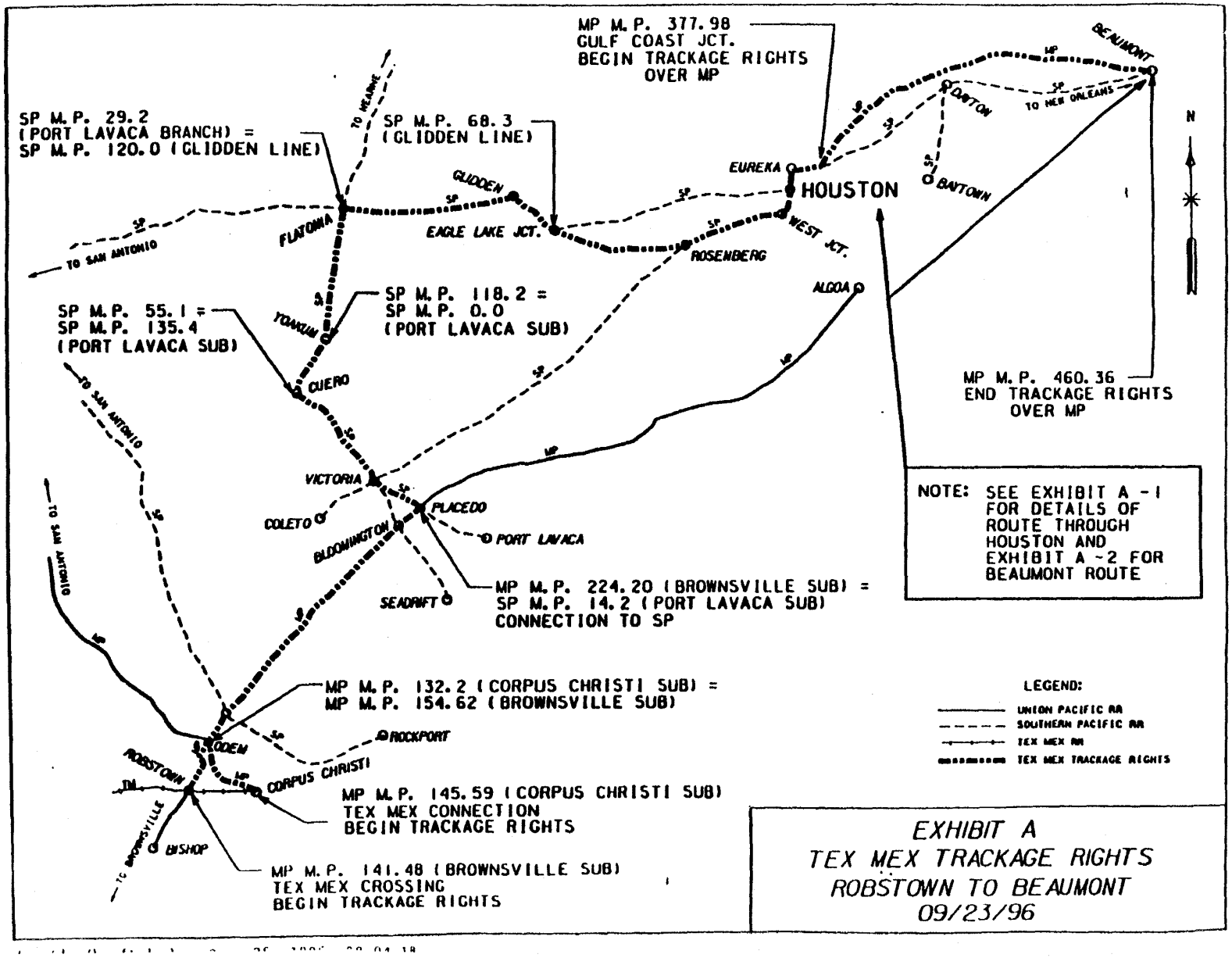
Position: Vice President - Law

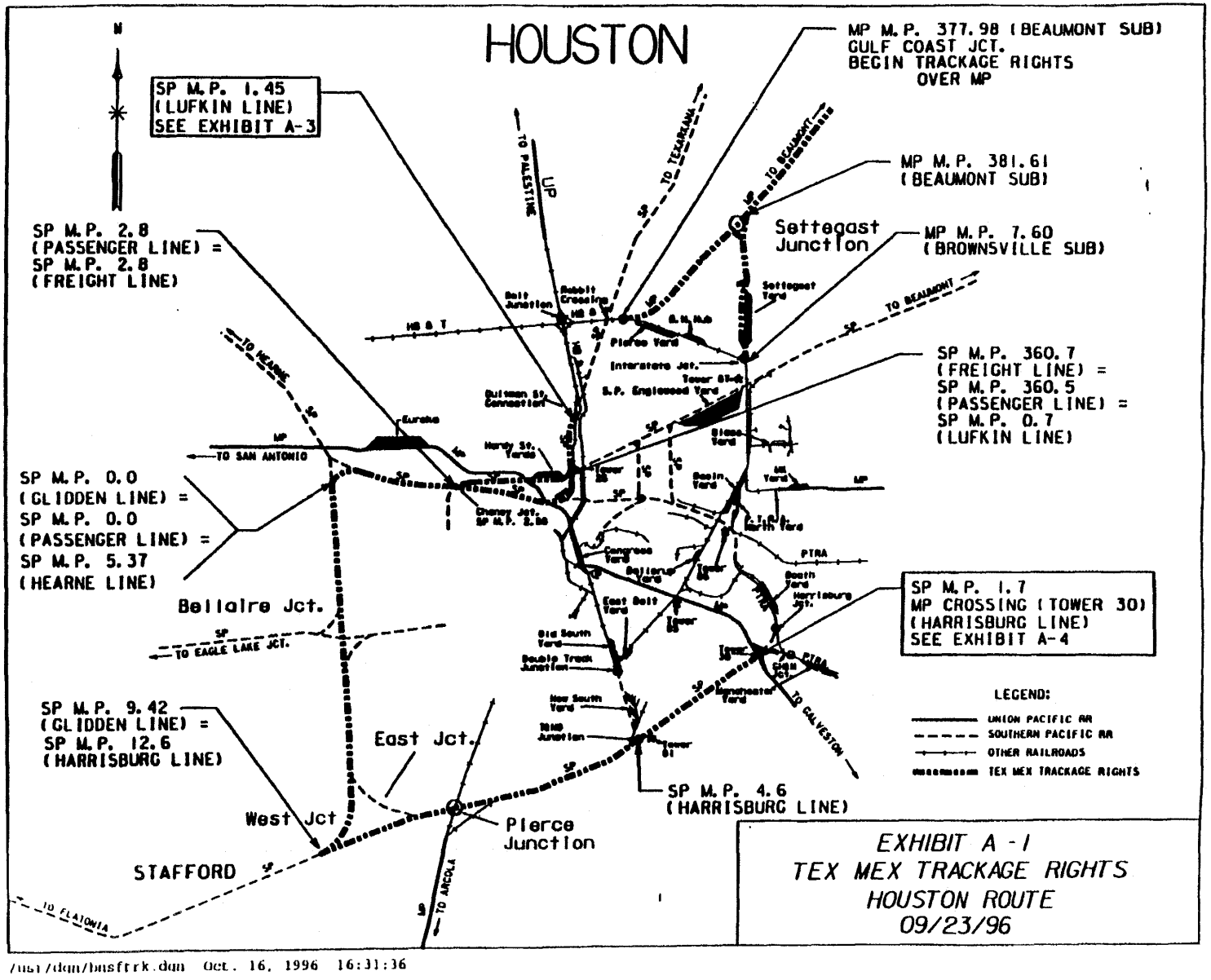
Date: DEC 1 2 1996

For Tex Mex: Jerry W. Fields

Position: President

Date: Nov 20, 1996


MP M. P. 377.98
GULF COAST JCT.
BEGIN TRACKAGE RIGHTS
OVER MP
SP M. P. 29.2
(PORT LAVACA BRANCH) =
SP M. P. 120.0 (GLIDDEN LINE)
SP M. P. 68.3
(GLIDDEN LINE)
TO HEARNE
BEAUMONT
DAYTON
TO NEW ORLEANS
EUREKA
HOUSTON
BAYTOWN
GLIDDEN
FLATONIA
EAGLE LAKE JCT.
WEST JCT.
ROSENBERG
TO SAN ANTONIO
ALGOA
SP M. P. 55.1 =
SP M. P. 135.4
(PORT LAVACA SUB)
SP M. P. 118.2 =
SP M. P. 0.0
(PORT LAVACA SUB)
YOAKUM
CUERO
MP M. P. 460.36
END TRACKAGE RIGHTS
OVER MP
VICTORIA
PLACEDO
COLETO
BLOOMINGTON
PORT LAVACA
SEADRIFT
NOTE: SEE EXHIBIT A - 1
FOR DETAILS OF
ROUTE THROUGH
HOUSTON AND
EXHIBIT A - 2 FOR
BEAUMONT ROUTE
MP M. P. 224.20 (BROWNSVILLE SUB) =
SP M. P. 14.2 (PORT LAVACA SUB)
CONNECTION TO SP
MP M. P. 132.2 (CORPUS CHRISTI SUB) =
MP M. P. 154.62 (BROWNSVILLE SUB)
ROCKPORT
ROBSTOWN
CORPUS CHRISTI
MP M. P. 145.59 (CORPUS CHRISTI SUB)
TEX MEX CONNECTION
BEGIN TRACKAGE RIGHTS
BISHOP
TO BROWNSVILLE
MP M. P. 141.48 (BROWNSVILLE SUB)
TEX MEX CROSSING
BEGIN TRACKAGE RIGHTS
N
LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
TEX MEX RR
TEX MEX TRACKAGE RIGHTS
EXHIBIT A
TEX MEX TRACKAGE RIGHTS
ROBSTOWN TO BEAUMONT
09/23/96


HOUSTON
N
SP M.P. 1.45
(LUFKIN LINE)
SEE EXHIBIT A-3
MP M.P. 377.98 (BEAUMONT SUB)
GULF COAST JCT.
BEGIN TRACKAGE RIGHTS
OVER MP
MP M.P. 381.61
(BEAUMONT SUB)
Settegast
Junction
MP M.P. 7.60
(BROWNSVILLE SUB)
SP M.P. 2.8
(PASSENGER LINE) =
SP M.P. 2.8
(FREIGHT LINE)
SP M.P. 360.7
(FREIGHT LINE) =
SP M.P. 360.5
(PASSENGER LINE) =
SP M.P. 0.7
(LUFKIN LINE)
SP M.P. 0.0
(GLIDDEN LINE) =
SP M.P. 0.0
(PASSENGER LINE) =
SP M.P. 5.37
(HEARNE LINE)
Bellaire Jct.
SP M.P. 1.7
MP CROSSING (TOWER 30)
(HARRISBURG LINE)
SEE EXHIBIT A-4
SP M.P. 9.42
(GLIDDEN LINE) =
SP M.P. 12.6
(HARRISBURG LINE)
East Jct.
West Jct
Pierce
Junction
SP M.P. 4.6
(HARRISBURG LINE)
STAFFORD
TO PALESTINE
TO TEXARKANA
TO BEAUMONT
TO HEARNE
TO SAN ANTONIO
TO EAGLE LAKE JCT.
TO GALVESTON
TO ANGOLA
TO FLATONIA
LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
OTHER RAILROADS
TEX MEX TRACKAGE RIGHTS
EXHIBIT A-1
TEX MEX TRACKAGE RIGHTS
HOUSTON ROUTE
09/23/96
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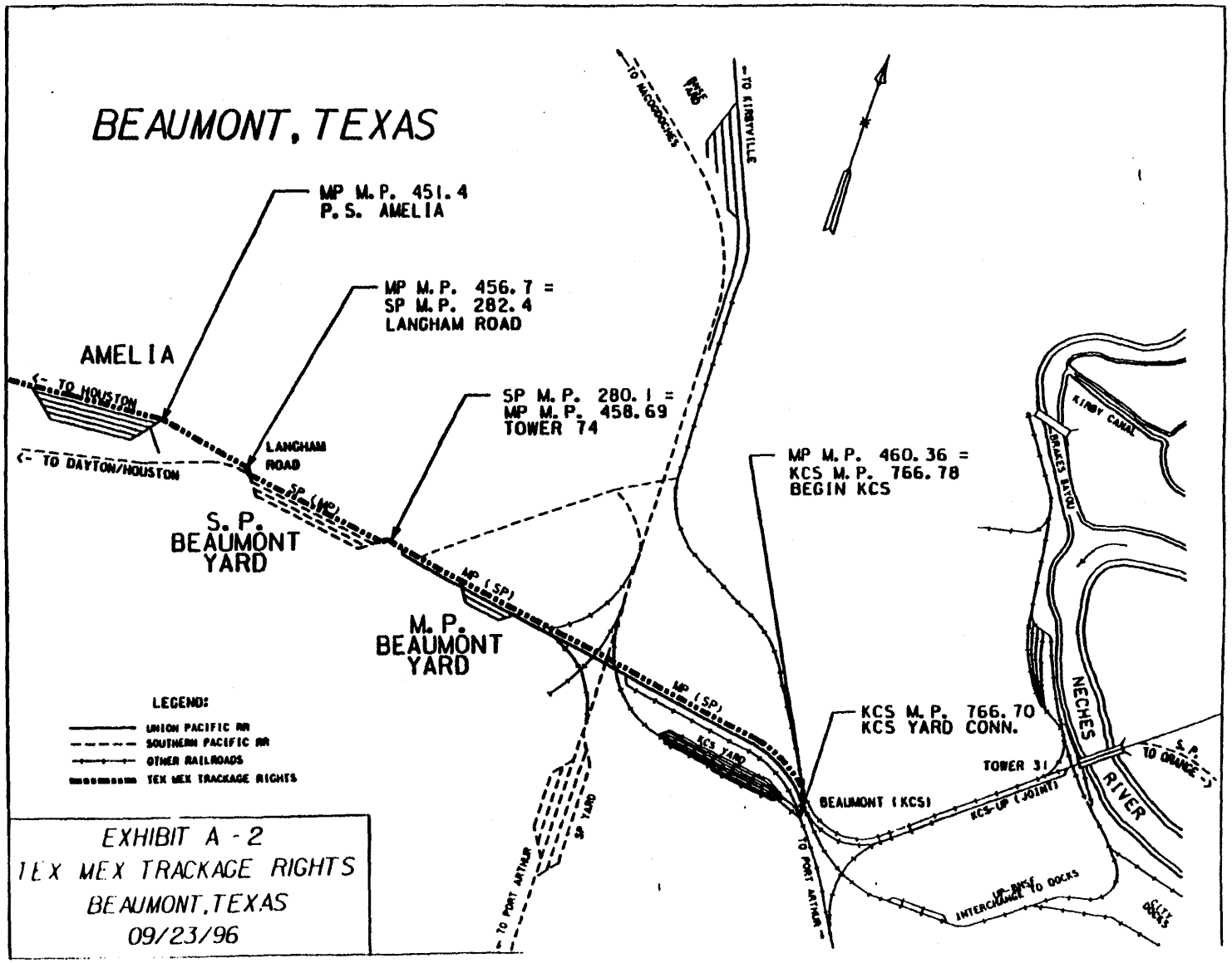
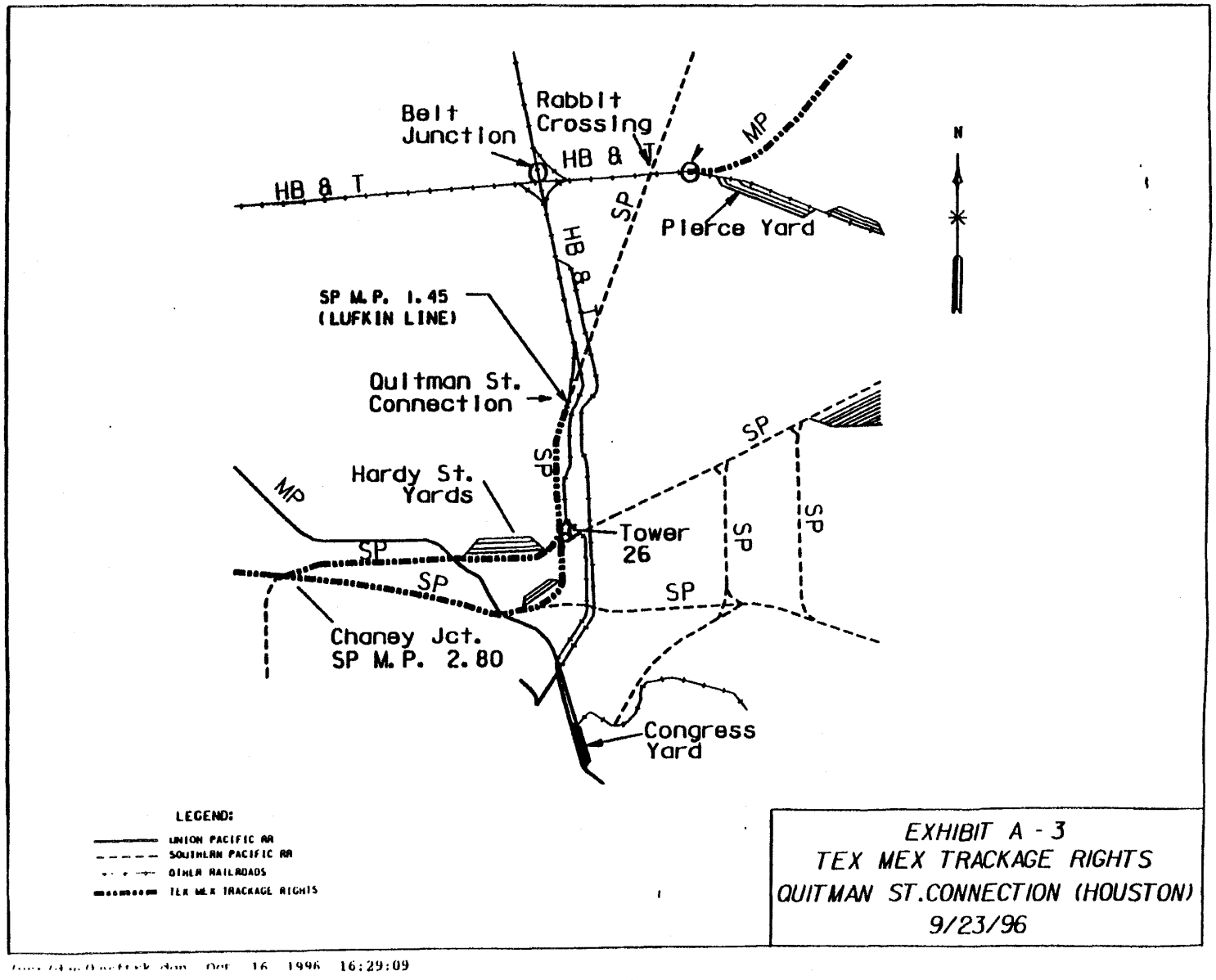

BEAUMONT, TEXAS
MP M.P. 451.4
P.S. AMELIA
MP M.P. 456.7 =
SP M.P. 282.4
LANGHAM ROAD
SP M.P. 280.1 =
MP M.P. 458.69
TOWER 74
MP M.P. 460.36 =
KCS M.P. 766.78
BEGIN KCS
KCS M.P. 766.70
KCS YARD CONN.
AMELIA
TO HOUSTON
TO DAYTON/HOUSTON
LANGHAM ROAD
S.P. BEAUMONT YARD
M.P. BEAUMONT YARD
TO MACGORDON
TO KIRBYVILLE
PIPE LINE
KIRBY CANAL
SNAKES BAYOU
NECHES RIVER
TOWER 31
BEAUMONT (KCS)
KCS YARD
S. YARD
TO PORT ARTHUR
TO ORANGE
INTERCHANGE TO DOCKS
ACCESS TRACKS
LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
OTHER RAILROADS
TEX MEX TRACKAGE RIGHTS
EXHIBIT A - 2
TEX MEX TRACKAGE RIGHTS
BEAUMONT, TEXAS
09/23/96


Belt Junction
Rabbit Crossing
HB & T
MP
HB & T
SP
Pierce Yard
N
HB & T
SP M.P. 1.45
(LUFKIN LINE)
Quitman St. Connection
SP
SP
Hardy St. Yards
MP
Tower 26
SP
SP
SP
SP
SP
Chaney Jct.
SP M.P. 2.80
Congress Yard
LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
OTHER RAILROADS
TEX MEX TRACKAGE RIGHTS
EXHIBIT A - 3
TEX MEX TRACKAGE RIGHTS
QUITMAN ST.CONNECTION (HOUSTON)
9/23/96
Oct 16 1996 16:29:09

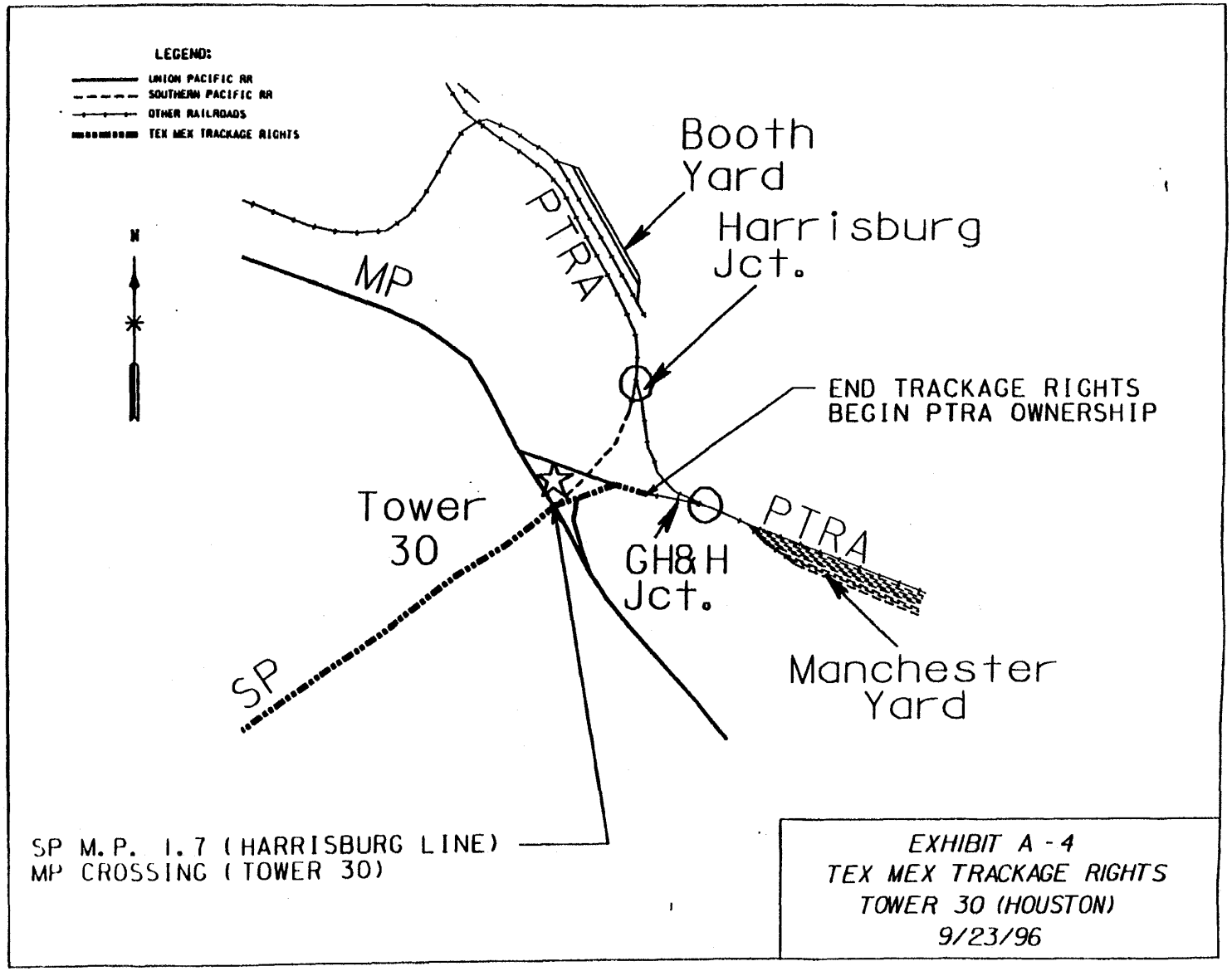

LEGEND:
UNION PACIFIC RR
SOUTHERN PACIFIC RR
OTHER RAILROADS
TEX MEX TRACKAGE RIGHTS
N
Booth
Yard
Harrisburg
Jct.
MP
PTRA
END TRACKAGE RIGHTS
BEGIN PTRA OWNERSHIP
Tower
30
GH&H
Jct.
PTRA
SP
Manchester
Yard
SP M.P. 1.7 (HARRISBURG LINE)
MP CROSSING (TOWER 30)
EXHIBIT A-4
TEX MEX TRACKAGE RIGHTS
TOWER 30 (HOUSTON)
9/23/96

EXHIBIT "B"
GENERAL CONDITIONS

Section 1. DEFINITIONS

1.1 "Annual" shall mean a calendar year.

1.2 "Car" shall mean one (1) rail car; provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.

1.3 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of the Terms.

1.4 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purposes of the maintenance or repair of such railroad tracks.

1.5 "GTM" shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.7 "Joint Trackage" shall mean the track structure of Owner as described in the Terms including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.8 "Mill" shall mean one-tenth of a cent ($0.001 US).

1.9 "Owner" shall have the meaning given to it in the Terms.

1.10 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.11 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.12 "Terms" shall mean those certain Terms for Texas Mexican Railway Company Trackage Rights to which this Exhibit "B" is attached.

1.13 "User" shall have the meaning given to it in the Terms.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Terms, including special instructions for the Joint Trackage as of the date of the Terms, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Terms (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Terms. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage, for such use as is permitted by Section 2 of the Terms, equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement

of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner and User shall be treated equally. All operating, dispatching and maintenance decisions by Owner affecting the movement of Equipment on the Joint Trackage shall be made pursuant to the Tex Mex-UP SP Dispatching Protocols attached hereto as Attachment 1. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities the same as Owner's trains so utilize. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.

2.5 A Joint Service Committee ("Committee"), comprised of the chief transportation officers of Owner and User (or their designees) shall be established, and shall be responsible for establishing rules and standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance and efficient joint use of the Joint Trackage. The Committee shall meet on a regular basis, but not less often than every three (3) months during the first year of operation under the Agreement, and thereafter when any party serves upon the other party thirty (30) days' written notice of its desire to meet to review the overall performance of equipment on the Joint Trackage, conflicts, if any, experienced between Equipment of Owner and Equipment of User, grievances over the handling of particular Equipment or operational events, maintenance of the Joint Trackage, ways in which future conflicts may be minimized, ways of improving operations and maintenance of the Joint Trackage and such other relevant matters as the Committee may decide to consider. The Committee may issue standards or rules to prevent unnecessary interference or impairment of use of the Joint Trackage by either party or otherwise insure fair and equal treatment as between Owner and User. Either party may request a special meeting of the Committee on reasonable notice to the other. Informal telephonic conferences shall be held by the Committee where appropriate to address immediate concerns of either party. It is expected that the work of the Committee shall be undertaken in a spirit of mutual cooperation consistent with the principles expressed in the Terms.

2.6 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.7 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Terms for use by User provided there shall at all times be afforded User a continuous route of equal utility and quality for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Terms shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.8 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.9 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in the Terms, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.10 Except as otherwise may be provided in the Terms, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint Trackage. At User's request, Owner shall furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage.

2.11 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be suspended by User from working on the Joint Trackage unless and until requalified to return to work and approved to do so by Owner. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases; and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

2.12 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.13 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.12), or to any other cause not resulting from an accident or

derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.12), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.15 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.16 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Terms, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

Section 3. BILLING

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Terms User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive

adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of the Terms shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Terms, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under the Terms; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Terms.

Section 4. COMPLIANCE WITH LAWS

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). Except with Owner's prior consent, User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and Section 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to

observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the parties hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of the Terms as a result of the other party's failure to perform or observe any other obligation or duty created by the Terms. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and

other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;

(b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

(c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;

(d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

(e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the partes hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural

resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment;

(f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4, shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;

(h) Any railroad not a party to the Terms heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of the Terms for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

(i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Terms be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Terms, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to the Terms;

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;

(e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars ($100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars ($100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.

(f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit.

if the claim or suit involves Loss and/or Damage to third parties. Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit: and if such claim or suit involves Loss and/or Damage to third parties. Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident. Owner shall investigate and defend such claim or suit: provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident:

(g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

(a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and or Damage came about shall be apportioned between Owner, User and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party's gross ton miles over the Joint Trackage for the preceding twelve (12) months or, if such Loss and/or Damage occurs during the first twelve (12) months following the effective date of the Terms, the usage of each party between the occurrence of such Loss and/or Damage and the effective date of the Terms, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER

INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Terms upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.

6.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may

be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Terms shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

6.5 Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all partes to the arbitration.

6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

Section 7. GOVERNMENTAL APPROVAL AND ABANDONMENT

7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval or authority from any governmental agency for the sanction of the Terms and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure all such necessary consent, approval or authority.

7.2 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Terms without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment").

Owner shall, concurrent with its Notice of Abandonment, if legally able to do so, give to User the option to purchase the part or parts of the Joint Trackage thereof to be abandoned at the Net Liquidation Value thereof, on the date of said notice; provided, however, it is understood that Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company (collectively, "BNSF") shall be given an option upon the Terms set forth in this Section 7.3, prior to that given User, to purchase the Placedo, Texas to Robstown, Texas segment of the Joint Trackage, subject to User's trackage rights, if BNSF is operating over that segment at the time of its proposed abandonment. "Net Liquidation Value" shall mean fair market value of land and salvage value of track components and other facilities less estimated cost of removal. User shall have three (3) months from the date of receipt of Owner's notice to exercise its option and shall evidence the exercise of its option by giving Owner written notice thereof. Thereafter User shall immediately make appropriate application to secure all necessary governmental authority for such transaction. Within thirty (30) days following the effective date of all requisite governmental approval of the transaction, User shall pay to Owner the amount of money required to purchase said Joint Trackage to be abandoned at the aforesaid Net Liquidation Value. Upon the receipt of payment of such sum, the Terms shall terminate as to the part of the Joint Trackage so purchased by User. Contemporaneously with such payment, by instrument or instruments, Owner shall convey and assign by good and sufficient quit claim deed or deeds, bills of sale or other instruments, all of Owner's right, title, interest and equity, in and to the Joint Trackage so purchased. Owner agrees that it shall promptly take all necessary action to obtain from the trustees of its mortgages all releases or satisfactions covering the same and shall deliver to User such instruments.

If User fails to exercise the option herein granted within the time and in the manner above specified, Owner may forthwith proceed free of all obligation to User to abandon the portion of Joint Trackage or make appropriate application, if necessary, to secure all necessary governmental authority for such abandonment. User agrees that at such time it shall concurrently make application for all necessary governmental authority for abandonment of its right to operate over such Joint Trackage. The Terms shall terminate as to the section of Joint Trackage so abandoned upon the effective date of such approval by governmental authority.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars ($100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM

9.1 User shall have the right to terminate the Terms upon twelve (12) months' prior written notice to Owner. Liabilities created under the Terms, if it becomes effective and is later terminated, shall survive such termination.

9.2 Upon termination of the Terms, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Terms, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Terms, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT

The Terms and any rights granted hereunder may not be assigned in whole or in part by User without the prior written consent of Owner except (i) as provided in Section 3.5, and (ii) to the purchaser of substantially all of User's rail properties. The Terms may be assigned by Owner without restriction. In the event of an authorized assignment, the Terms and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Terms (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Terms claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Terms under which such claim of default is made.

11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default

relates to the provisions and terms of the Terms, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Terms.

11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to affect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

12.1 The Terms and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.2 If any covenant or provision of the Terms not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Terms be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Terms.

12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Terms, the provisions of the Terms shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.

12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Terms.

12.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

END OF EXHIBIT "B"

TEX MEX - MP/SP DISPATCHING PROTOCOLS

1. Scope: These protocols apply on all segments of the Joint Trackage.

2. Purpose: To ensure that Tex Mex and MP/SP trains operating on Joint Trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiently and that the competitiveness of Tex Mex operations on the Joint Trackage is not adversely affected by the fact that MP/SP owns the track.

3. General Instructions: MP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on the Joint Trackage that Tex Mex trains are to be dispatched exactly as if they were trains of the same class of MP/SP and given equal treatment with trains of MP/SP. These instructions will be issued at agreed intervals or at the request of Tex Mex.

4. Monitoring Systems: MP/SP will provide Tex Mex with timely and accurate information about the status of Tex Mex trains operating over the Joint Trackage.

5. Train Information: Tex Mex will provide the MP/SP, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over the Joint Trackage, preferably using electronic data interchange. Tex Mex and MP/SP will establish run time standards by train category based on expected train volumes for Tex Mex. If train volumes are different than expected then adjustments to run time standards will be made by mutual agreement. Tex Mex will provide reliable and current information about trains approaching the Joint Trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching the Joint Trackage, sufficiently in advance to allow dispatchers to plan for them. MP/SP will provide to Tex Mex advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions. Tex Mex and MP/SP will consult in advance about maintenance-of-way windows resulting from planned maintenance projects so as to minimize disruptions to the operations of both carriers.

6. Specific Instructions: MP/SP will permit Tex Mex to transmit instructions regarding the requirements of specific trains and shipments to designated dispatching center employees responsible for handling those trains.

7. Train Priorities/Run Time Standards: MP/SP will provide to Tex Mex current procedures for assigning dispatching priorities or rankings to trains and information sufficient to show how those procedures are applied to their own trains. Tex Mex will assign priorities or rankings to its trains operating on the Joint Trackage using MP/SP's procedures, and MP/SP will dispatch Tex Mex trains in accordance with those priorities or rankings. It is understood that

technological advances in computer aided dispatching might result in changes to priority assignment methodologies. The parties agree to discuss technological changes which might affect priority assignment methodologies prior to implementation. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads.

8. Entry to Joint Trackage: At points where Tex Mex trains enter the Joint Trackage, entry will be provided by MP/SP on a first-come first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. If operating circumstances make strict application of this principle difficult or uncertain, Tex Mex and MP/SP may jointly establish standards for determining sequence of entry to Joint Trackage. The parties will communicate daily on any conflicts concerning entry to the Joint Trackage to gain resolution.

9. Communication: MP/SP will provide to Tex Mex, and keep current, lists of dispatching personnel responsible for dispatching the Joint Trackage and contact numbers. Tex Mex and MP/SP will designate more supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.

10. Access to Dispatching Center: Appropriate officials of Tex Mex will be admitted at any time to dispatching facilities and personnel responsible for dispatching the Joint Trackage to review the handling of trains on the Joint Trackage (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to the review). It is understood that management and supervision of dispatching operations is the responsibility of MP/SP.

11. Performance Measurement: Tex Mex and MP/SP will cooperate to develop train performance evaluation methods under which train performance of Tex Mex trains on the Joint Trackage can be compared to train performance of MP/SP's trains on the Joint Trackage for the same train category and priority.

12. Personnel Incentives and Evaluation: In evaluating the performance of employees and supervisors responsible for dispatching the Joint Trackage, MP/SP will consider train performance of Tex Mex trains and effectiveness in cooperating with Tex Mex personnel and meeting Tex Mex service requirements in the same manner as such factors are considered with respect to MP/SP's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of MP/SP's trains, performance of Tex Mex's trains shall be considered on the same basis to the extent feasible.

13. Disagreements: The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.

14. Modifications: As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of Tex Mex and MP/SP on the Joint Trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

D

Barkley Exhibit D
Public

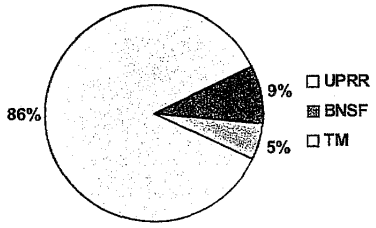
BUILDING AMERICA

Union Pacific Railroad
Spring Dispatching Center

Delay and Train Meet Study
For the Angleton and Brownsville Subs
November 13, 2002 to November 16, 2002

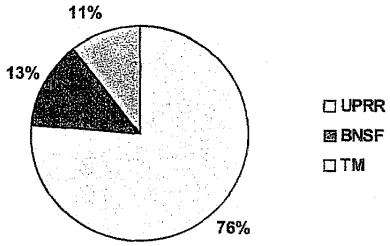
Delays Incurred By Each Railroad

Magnitude Of Delays = UPRR - 16482 Min
BNSF - 1669 Min
TM - 989 Min



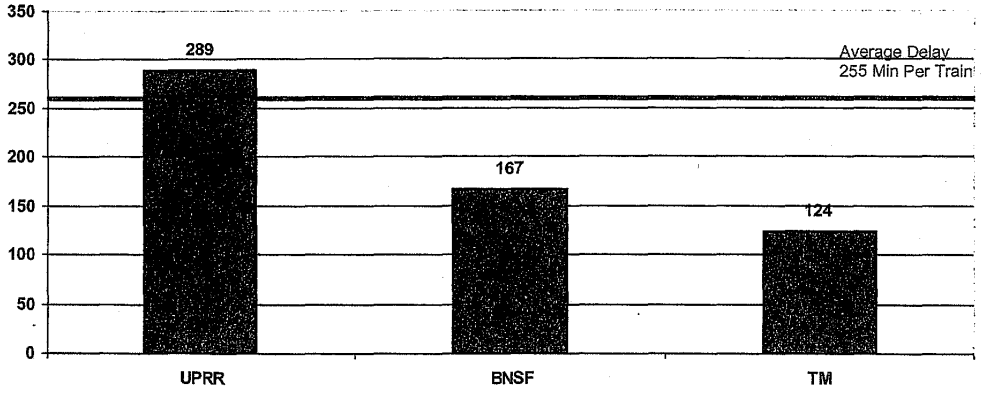
Total Number Of Trains On The Subdivisions

Trains Per Railroad = UPRR - 57
BNSF - 10
TM - 8



Average Train Delay Incurred By Each Train

Total Average Delays - Expressed in Minutes



Hausman

Public Version

VERIFIED STATEMENT

OF

JERRY A. HAUSMAN

1. I am the MacDonald Professor of Economics at the Massachusetts Institute of Technology ("MIT") in Cambridge, Massachusetts. I graduated from Brown University in 1968. I received a D.Phil. (Ph.D.) in economics from Oxford University in 1973 where I was a Marshall Scholar. I have been at MIT since completing my D.Phil. My academic specialties are econometrics, the application of statistical methods to economic data, and applied microeconomics, the study of behavior by firms and by consumers. I teach a graduate course in applied industrial organization, which is the study of how markets operate. The effect of regulation is a primary topic in the course.

2. I have been an associate editor of *Econometrica*, the leading economics journal, and the *Rand (Bell) Journal of Economics*, the leading journal of applied microeconomics. In December 1985, I received the John Bates Clark Award of the American Economic Association, awarded every other year for the most "significant contributions to economics" by an economist under the age of 40. In 1980, I was awarded the Frisch Medal of the Econometric Society. I have been a member of numerous government advisory committees for both the U.S. government and the Commonwealth of Massachusetts. I have published over 130 academic research papers in leading economic journals including the *American Economic Review*, *Econometrica*, and the *Rand (Bell) Journal of Economics*. I recently published a paper on the effects of

regulation on railroads: "Regulating the U.S. Railroads: The Effects of Sunk Costs and Asymmetric Risk," *Journal of Regulatory Economics*, 2002. My curriculum vitae is attached as Exhibit A.

3. I have submitted declarations to the Board previously. These declarations evaluated the economic effects of the UP/SP merger, the economic principles of dominant carrier regulation, and an economic analysis of conditions that arise in mergers of large railroads.[1] I have extensive experience evaluating the effects of mergers. I have published numerous academic papers discussing the evaluation of the effects of mergers and consulted on over 100 mergers before regulatory agencies including the DOJ, FTC, FCC and numerous foreign countries including the EU, UK, Germany, and Australia.

I. Introduction and Summary of Conclusions

4. I am providing this statement at the request of Union Pacific Railroad Company (UP) in connection with the Surface Transportation Board's review of the proposed acquisition of control of the Texas Mexican Railway Company (Tex Mex) and TFM, S.A. de C.V. (TFM) by Kansas City Southern (KCS).

5. In my economic analysis of the proposed transaction I will use prices charged to shippers and the quality of service to shippers who serve as consumers of railroad services as the basis for my evaluation. If prices to shippers decrease, a transaction is typically pro-competitive. To the contrary, if prices to shippers increase (or if service levels decline) the transaction is typically anticompetitive. I do not consider the

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[1] *See* Statement of Jerry Hausman submitted in STB Ex Parte, No. 582 Public Views on Major Rail Consolidations; Verified Statement of Prof. Jerry Hausman, submitted in *Union Pac. Corp., et al. – Control – So. Pac. R. Corp., et al.* – Houston/Gulf Coast Oversight, STB Finance Docket, No. 32760 (Sub-No 26).

effects of the transaction on KCS, nor do I consider the effects of the transaction on competitors to KCS, including UP, except as the transaction affects prices (and service levels) provided to shippers.

6. My economic analysis leads to the following conclusions:

A. A significant amount of traffic goes through the Laredo gateway. TFM is the only Mexican railroad that connects to the Laredo gateway. TFM has significant market power for many transportation markets that use the Laredo gateway. TFM's ability to exercise that power today is limited by several factors, one of which is Mexican regulations requiring that TFM offer non-discriminatory pricing between the border and points in Mexico.

B. KCS control of Tex Mex and TFM will have significant anticompetitive effects in the United States and on U.S.-Mexico cross-border commerce for at least two reasons. (1) NAFTA Rail will have the incentive and ability to raise the costs and decrease service levels of competing carriers that interchange with TFM, thereby shifting traffic to less-efficient routes and allowing anticompetitive increases in rates and/or reductions in service quality for U.S. shippers. (2) The transaction may produce higher prices to certain U.S. shippers through evasion of the Mexican regulatory provisions prohibiting price discrimination.

C. In its application KCS has not claimed the presence of any significant efficiencies. Thus, efficiencies will not offset the anticompetitive effects that arise in this transaction.

D. UP's proposed remedies are appropriate for the transaction. The possible remedial approach that UP's Mr. Gray outlines would not be unduly regulatory or interfere with Applicant's ability to compete with other railroads. It also would not lead to decreased competition because of the possibility of increased coordinated interaction among the competing railroads. The approach is similar to a pro-competitive arrangement that the Board has previously approved in the UP/SP merger.

II. Economic Basis for Evaluation of the Transaction

7. Economists judge transactions depending on whether they have pro-competitive or anticompetitive effects. In judging competitive outcomes, we typically consider the effects on consumers. Transactions can affect many economic agents: consumers, merging firms, competing firms, shareholders in these firms, and debt holders in these firms. Often a transaction will favorably affect some groups and disadvantage other groups. However, the DOJ and FTC have determined that consumer welfare should be the objective in evaluating transactions.[2] I agree with this approach. Consumers are harmed when prices increase or product quality decreases. Thus, while a transaction may lead to more efficient and lower cost production, the relevant question is whether consumers will benefit from lower prices.[3] I discuss this viewpoint in my paper, "Efficiencies from the Consumer Viewpoint," *George Mason Law Review* 7 (1999). In the current situation I will use prices charged to shippers and the quality of service to

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[2] *See, e.g.,* U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (*Merger Guidelines)*, 1992, ¶ 0.1.

[3] I focus on the price effect of mergers here. Higher quality is similar to a lower price from an economic analysis viewpoint.

shippers who serve as consumers of railroad services to evaluate competitive effects. Typically, if prices to shippers increase, final consumers will pay higher prices for products they purchase.

8. If prices to shippers decrease, a transaction is typically pro-competitive. To the contrary, if prices to shippers increase (or if service levels decline) the transaction is typically anticompetitive. This reasoning holds in the more common situation of horizontal mergers, or in the current situation of a vertical transaction. Thus, I do not consider the effects of the transaction on the KCS, nor do I consider the effects of the transaction on competitors to the KCS, including UP, except as the transaction affects prices (and service levels) provided to shippers.[4]

III. Framework for Economic Analysis

9. I perform my economic analysis within the framework of origin-destination (O-D) markets for a given type of commodity. A shipper will want to ship a commodity from an U.S. origin to a Mexican destination (or vice versa).[5] The shipper typically chooses from a set of alternatives that includes competing railroads that can transport the commodity as well as alternative modes of transportation to the extent they are available - most often trucks and sometimes barges depending on the commodity. The shipper will make the best choice that combines price, shipping time, other service

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[4] Only in the case of a failing firm (or division) does merger analysis typically consider financial effects on merging firms, *e.g. Merger Guidelines*, ¶ 5.1-5.2. KCS has made no claims regarding a possible failure of the merging firms.

[5] Thus, my analytical approach differs markedly from Applicants' approach, which does not consider O-D markets. *See* Applicants' Supplement pp. 13-19. Instead, it only considers all US-Mexican freight traffic. This approach does not make economic sense because it obscures important competitive differences among different O-D markets.

attributes, and other economic characteristics, such as variability in shipping time, presence of schedules, and possible damage to shipments. O-D markets typically comprise antitrust markets because if all carriers that serve the O-D pair joined together as a "hypothetical monopolist," they could increase prices by at least a "small but significant and nontransitory" amount.[6]

10. The proposed transaction would combine control of one Mexican carrier, TFM, with one of the two U.S. railroads, KCS/Tex Mex (KCS), that interchange traffic with TFM at the U.S.-Mexican border. TFM is the only Mexican carrier that serves the Laredo gateway between the U.S. and Mexico. A substantial proportion of traffic transits the Laredo gateway, approximately 75% of all US-Mexican rail traffic (by value), and (as noted below) much higher shares for many O-D markets.

11. While intermodal competition exists for some movements of some commodities, mainly from trucks, TFM routes via the Laredo gateway have significant cost and service advantages over these other transportation alternatives for many O-D pairs for given commodities. TFM routes have similar advantages over other Mexican gateways, such as Eagle Pass, which TFM does not control. Overall, TFM controls the majority of traffic entering Mexico and has even higher shares of traffic that uses the gateways in eastern Mexico. *See* Gray V.S. pp. 10-12.

12. For numerous O-D pairs for given commodities, the alternative gateways are at a significant cost, distance, and service disadvantage, and rail service via the

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[6] *See Merger Guidelines* ¶ 1.2. The geographic market definition can expand if competition exists from other origins that limits the ability of the hypothetical monopolist to increase prices. Given the position of the TFM, as I explain below, this consideration is not important in the current transaction.

alternative gateways thus does not effectively constrain the price that TFM can charge. Thus, for many O-D pairs for given commodities, TFM has significant market power. For example, Eagle Pass, an alternative gateway, lacks many of the infrastructure advantages that make Laredo a highly efficient border crossing point.[7] Eagle Pass also has limited capacity. My empirical analysis, attached as Exhibit B, demonstrates that for UP southbound traffic an extremely high share of the traffic to important Mexican destinations uses the Laredo gateway, consistent with TFM having significant market power.[8] For example, { } originates the most southbound traffic, and three of the largest destination states in Mexico are the{ }. Note that over { }% of this O-D traffic uses the Laredo gateway with only very small amounts going over the Eagle Pass gateway. For { }, which originates the second most southbound traffic, over { }% of that traffic to the three largest Mexican destination states uses the Laredo gateway. These shipment data demonstrate the importance of the Laredo gateway and the non-economical alternative that the Eagle Pass gateway yields for this traffic.[9]

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[7] *See* Gray V.S. pp. 13-16, for a further discussion of the competitive advantages of the Laredo gateway.

[8] A map showing these Mexican destination states and the TFM and FXE route networks is attached as Exhibit C. I limit the analysis to UP data because the data that KCS and BNSF produced in discovery do not indicate the Mexican destinations, so I could not analyze O-D markets. UP's data include destinations within Mexico based on customs information, but that information is only available for southbound shipments.

[9] UP has an economic incentive to use Eagle Pass since it has a 26% ownership interest in FXE, the Mexican railroad that connects at the Eagle Pass gateway.

13. In the current (pre-transaction) situation KCS owns a significant minority stake in TFM.[10] However, TFM is controlled by Grupo TMM. Under Mexican law, TFM faces no effective constraints imposed by maximum rate regulation. However, under Mexican law and the terms of TFM's Concession, TFM must provide non-discriminatory pricing between the border and points in Mexico it serves (or points where it connects with other Mexican carriers, such as Ferrosur), as KCS emphasizes in its application.[11] In addition, under TMM control, TFM has significant economic incentives to cooperate closely with competing U.S. railroads that connect at Laredo. By cooperating with competing railroads at Laredo, the U.S. component of the cost of a rail shipment between a U.S. location and a Mexican location is minimized. Thus, this cooperation keeps the U.S. component of US-Mexican traffic at a minimum price and allows rail traffic to increase through Laredo, providing greater feed to the TFM along with higher revenues and higher profits. Indeed, I understand that TFM has cooperated closely with UP in terms of service levels and price quotes.[12] Further, as Mr. Gray points out, traffic through the Laredo gateway has expanded greatly, largely because of NAFTA and the improved service provided by TFM on the Mexican segment of the traffic.

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[10] KCS currently has a 49% voting interest in TFM. Because the Mexican government holds a substantial block of shares without voting rights, KCS's direct economic interest in TFM is 36.9%.

[11] *See* Applicants' Supplement p. 30; s*ee also* Memorandum of Kuri Brena et. al. submitted by Applicants, June 19, 2003: "Section 2.15 of the TFM Concession specifically restricts TFM from promoting tie-in or tie-out sales, price discrimination and cross subsidies".

[12] *See* Gray V.S. p. 22.

IV. The Proposed Transaction Will Have Anticompetitive Effects

14. KCS control of Tex Mex and TFM will have anticompetitive effects in the United States for at least two reasons. First, NAFTA Rail will have the incentive and ability to raise the costs and decrease the service levels of competing carriers that interchange with TFM at Laredo, thereby allowing an anticompetitive rate increase in rates or reduction in service levels relating to existing competitive rate levels. Second, the transaction creates the potential for higher prices to certain relatively inelastic shippers through evasion of the Mexican regulatory provisions prohibiting price discrimination. These effects will be felt in the United States, because that is where competition between the carriers north of the border occurs. Because the cooperation of TFM is essential to that competition, control of TFM by one of the two competing U.S. carriers will adversely affect competition for cross-border U.S.-Mexico traffic.

A. Anticompetitive Strategies to Disable UP Competition

15. As a result of the transaction, NAFTA Rail will be able to implement strategies aimed at increasing the costs (and degrading the service quality) of competing carriers that connect with TFM. Those carriers, primarily UP, will then be forced to raise rates, thereby allowing NAFTA Rail to match the increase for shippers who are relatively less price elastic.

16. Shippers currently use UP and KCS/Tex Mex (and its connections, including BNSF) as competitive options for rail movements via Laredo to serve destinations in Mexico. For many O-D markets, as I discussed above, the Laredo gateway is the economical choice. Neither other U.S.-Mexican gateways nor intermodal competition significantly constrains a "hypothetical monopolist" from increasing prices. Thus, economic analysis should focus on these individual O-D markets using Laredo.

Because KCS will control the Laredo gateway if the transaction occurs, NAFTA Rail can increase prices for less-price-elastic shippers using the gateway by disadvantaging UP for shipments that are dependent economically on the use of the Laredo gateway.

17. Currently, TFM has an economic incentive to cooperate fully with all three competing railroads to maximize traffic utilizing the Laredo gateway. The greater the U.S. competition, the higher the service quality and the lower the price for the U.S. segments of a rail movement. Thus, TFM seeks to foster the greatest degree of competition among the U.S. railroads. Conversely, for price-elastic shippers, a deterioration in service or increase in price by TFM would cause some number of the more-price-elastic shippers to send their traffic over other gateways or shift to an alternative transportation mode.

18. However, subsequent to the transaction, the economic incentives for TFM will change. KCS/Tex Mex potentially serves a significant proportion of the UP traffic via Laredo, as I discuss in the next section. To the extent that KCS/TFM can increase the TFM rate factors that are part of the overall price shippers must pay for UP-TFM options, or create a lower level of service quality for UP shipments through the Laredo Gateway, some shippers will choose to shift their traffic from UP to KCS.[13] KCS will increase the profit from its U.S. operations because price exceeds the marginal cost of the additional traffic, given the high level of fixed costs in the railroad industry.

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[13] The specific means by which NAFTA Rail could facilitate those shifts are explained in the verified statement of John Gray, pp. 26-31. Note that this strategy is distinct from the "raising rivals costs" literature where imposing a cost increase on your competition creates additional costs for the dominant firm. Here no additional costs occur for NAFTA Rail.

19. This strategy will not merely shift incremental margins (profits) from UP to KCS: it will also decrease competition and harm shippers. If UP service levels decrease or its costs increase, competition will decrease and KCS will be able to charge higher prices than currently to less-price-elastic shippers, even though its services were not preferred in the pre-merger environment. That is because UP would have to increase its prices in response to an increase in costs.[14] Thus, less-price-elastic shippers will pay higher prices for the current competition among the U.S. railroads. At the same time, KCS can give rebates (or not charge higher prices) to relatively more-price-elastic shippers who would choose other options if their prices increase. However, for relatively less elastic shippers, KCS will be able to charge a higher price because these shippers do not have alternatives that are closely competitive to shipping via Laredo to many certain Mexican destinations. The anticompetitive result from the transaction is harm to these relatively less elastic shippers.

B. Increases in U.S.-Mexico Rates Through Evasion of Mexican Non-discrimination Regulation

20. Mexican law prohibits TFM from discriminating among customers or among the competing U.S. railroad carriers it connects with at Laredo. Thus, while Mexican railroads face no binding maximum rate regulation, the prohibition on price discrimination today limits the exercise of TFM's market power in connection with U.S.-Mexico cross-border shipments to the extent TFM charges the same price for similar movements to and from Laredo for similar commodities. Shippers who are relatively

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[14] The strategy thus has similarities to the price discrimination strategy discussed next. KCS only increases prices to less-price-elastic customers, which is similar to increasing all prices and giving rebates to the relatively price-elastic customers.

price elastic, because they have other rail options though alternative gateways or have better intermodal options, constrain the price that TFM can charge to some degree. Today, if TFM attempted to increase the price it charges between Laredo and a given Mexican destination, the increased revenues from less-price-elastic customers, who would continue shipping on the TFM, would be more than offset by revenue losses from relatively more-price-elastic customers who switch to alternative transportation modes.[15] Thus, although TFM would typically try to set the highest price it could to maximize its profits (but could not do so perfectly in light of incomplete information, *etc.*), it does so subject to the constraints limiting its ability to charge different prices for movements between a given point in Mexico and Laredo. These constraints necessarily mean that TFM's prices to less elastic customers are lower than they would be if TFM could price discriminate freely.

21. Competition among U.S. railroads for the traffic north of the Mexican border prevents TFM's connecting carriers from capturing this extra revenue for the less price-elastic customers. If UP attempted to increase prices to less-elastic Mexican traffic on the U.S. segment, BNSF, KCS or another competing railroad would offer a lower price and gain the traffic. Thus, the U.S. component of a given rail movement is set at competitive levels, while the Mexican component for the less price-elastic customers is above the competitive price, given the limited competition that TFM faces south of the

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[15] In economic terminology the more price-elastic customers are "marginal" customers while the less price-elastic customers are "infra-marginal" customers. Almost all commodities and services have both types of customers.

border, but below the price that TFM could charge if it were not subject to Mexican non-discrimination rules.

22. The proposed transaction changes this situation. The combination of KCS and TFM will be able to increase rates to the less-price-elastic shippers, *i.e.* those who have relatively fewer competitive options, while still maintaining non-discriminatory rates south of the border. NAFTA Rail will be able to increase prices by "evading" Mexican non-discrimination legislation.[16] The following example demonstrates how this price increase could occur. Consider two shippers of the same commodity at two hypothetical origins in the United States who ship to a single destination that TFM serves (exclusively) in Mexico. Call the shippers A and B, from the origins O1 and O2, and to the Mexican destination D. Both ship via the Laredo gateway. Currently, TFM charges the same rate for its portion of each movement, since both go via Laredo to Mexican destination D. U.S. railroads serving the two origins, O1 and O2, compete with each other for the traffic. However, shippers A and B differ in their competitive alternatives. Shipper A can also ship via an alternative mode (or gateway, *e.g.*, Eagle Pass) for only a slightly higher price than by rail via Laredo.[17] Shipper B has no closely competing options, either via an alternative gateway or via intermodal competition. Thus Shipper A is relatively price elastic compared to Shipper B. Mexican regulation constrains TFM

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[16] By "evasion," I do not refer to illegal conduct. Instead evasion refers to steps that would be possible for a commonly-controlled railroad to take on international shipments because of its U.S. presence that would be impossible for a railroad operating only in Mexico to achieve.

[17] Alternatively, the price could be similar but the quality via Eagle Pass could be slightly lower (*e.g.*, longer shipping time).

from increasing the price to Shipper B, because it would also be required by law to increase the price to Shipper A, and TFM would then lose Shipper A's traffic.

23. However, if KCS gains control of TFM the result will be an increase in price to shipper B, which means in the O2-to-D market prices will increase, and Shipper B (and others) will suffer competitive harm. Thus, an anticompetitive effect will occur to customers in a well-defined (antitrust) market.

24. I now explain how NAFTA Rail will be able to increase the price to Shipper B in a profitable manner after the transaction takes place. When KCS acquires control it could direct TFM to increase its price from Laredo to Mexican destination D for comparable movements of a given commodity, thereby preventing TFM from explicitly engaging in price discrimination from the border to a Mexican origin. Shipper B, who has no economic alternative, will pay the higher price and will suffer competitive harm from the transaction.

25. So as not to lose business from Shipper A, however, KCS will keep shipper A's overall rate constant by rebating to that shipper an amount that offsets the increased price from Laredo to destination D. This option was not available to TFM before the transaction. If TFM had tried to raise rates on cross-border movements, Shipper A would have chosen another transportation option rather than pay a higher price for shipment from the United States to Mexico. While KCS earns less on the U.S. part of the movement, the amount is exactly offset by the increase on the Mexican part of the movement. Thus, Shipper A pays the same overall through price and continues to ship through Laredo. Further, while NAFTA Rail earns the same overall profits from Shipper A, it earns increased profits from Shipper B, who now pays a higher total price since the

Laredo to destination D price has increased, while the price of the U.S. component of the shipment has remained the same. Thus KCS/TFM, *i.e.* NAFTA Rail, earns higher overall profits. NAFTA Rail has the economic incentive and the ability to increase prices in an anticompetitive manner. Shipper B suffers economic harm from this anticompetitive outcome in a well-defined antitrust market.

26. Rail movements for which trucks may be a competitive alternative would also provide opportunities for the same type of anticompetitive price discrimination. For some shipments, trucks may be a viable competitive option, but only for movements where the U.S. point is relatively close to the border. Thus, those shippers have a choice of using an all-rail option via Laredo (and thereby utilizing TFM), or relying on an all-truck route. Assuming the costs of transloading are significant, a shipper from a more distant U.S. point would be restricted to rail based on distance of haul. Thus, in the face of a price increase by TFM, the second shipper would pay the increased price, while KCS could rebate the increase to the shipper having an intermodal option.

27. A limitation of this strategy is that KCS (or Tex Mex) must serve the various "shipper A's" (representing the high-elasticity traffic) so that it can provide the rebate after TFM increases its overall price from Laredo to the Mexican destination. KCS need not serve all such high-elasticity shippers. So long as it serves some of them, prices will increase. The amount of high-elasticity shippers that KCS serves will determine by how much prices will increase, but not the fact of the price increase. Also, note that KCS need not serve the less-elastic shippers (shipper B), because they will pay the higher price and no rebate is necessary.

28. I have investigated the amount of overall traffic that UP carries that KCS could also carry to determine whether KCS could carry a sufficiently large percentage to make the price increase significant. My calculations find that currently approximately 50% of the total traffic via Laredo is directly competitive for KCS using its own facilities. Including interline movements with or trackage rights over BNSF, approximately 75% of existing UP traffic could be served by KCS.[18] *See* Exhibit J to Gray V.S. Thus, the amount of traffic on which KCS could employ the rebate strategy (*i.e.* Shipper A in the hypothetical) is considerably more than needed to make the strategy profitable.

29. One further economic consideration arises in considering the transaction. Mexican regulation also stops TFM from decreasing price to even more price-elastic customers who currently use an alternative gateway or another transportation mode. If TFM decreased prices to these shippers, it would need to decrease prices to all shippers, which would not be a profitable strategy. However, conditions aimed at preventing anticompetitive price increases need not interfere with these beneficial price reductions. In the proposed conditions that I discuss subsequently, TFM could offer lower prices to these shippers who would benefit from the transaction, while not increasing prices to Shipper B.

C. The Overall Anticompetitive Effect is Greater Because of Interaction

30. The two strategies that I have discussed, disabling of UP competition and evasion of Mexican regulation, reinforce each other and enhance the overall

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[18] It would be incorrect to use the current amount of traffic carried by KCS, UP, and BNSF to make this calculation because currently shippers pay the same price for the Laredo to Mexico component, regardless of which U.S. shipper they use. After the transaction, this situation would change because of the rebate strategy.

anticompetitive effect. Although the two are not interdependent, *i.e.*, either strategy could be implemented and result in anticompetitive harm on it own, the combined ability to increase its rival's costs and to price discriminate without explicitly varying TFM rates to comparably situated shippers increases NAFTA Rail's harms to shippers.

31. Absent the ability to price discriminate, the strategy of disabling UP competition would be less economically attractive because the NAFTA railway would lose traffic when KCS increases its prices. However, the ability of KCS to provide rebates to relatively more elastic shippers increases the return from this strategy because the traffic lost from the price increase can be limited.

32. Similarly, the ability of TFM to extract profits through price discrimination (made possible by using KCS to circumvent Mexican regulation) increases because of the decreased competition from UP. As KCS gains more traffic because of the decreased service levels of UP, NAFTA Rail is able to provide rebates to a larger group of customers, thus making the price discrimination strategy more effective. TFM will be able to increase prices by more than it would in the absence of the ability to disadvantage UP-bound traffic. Thus, the interaction of the two anticompetitive strategies reinforce each other and leads to a larger anticompetitive effect that the sum of the two strategies acting in isolation.

33. UP can divert some of its traffic to other gateways, *e.g.*, Eagle Pass, to avoid the decreased service levels at Laredo. However, this traffic diversion will lead to higher costs and prices and decreased service levels for shippers. Otherwise, if no difference existed for a given O-D movement through Laredo or Eagle Pass, UP would

already be using Eagle Pass.[19] The additional costs incurred from such diversions decreases economic efficiency, without any corresponding increase in production. Shippers will end up paying higher prices and receiving decreased service levels on this diverted traffic. The result is anticompetitive.

34. TFM, in cooperation with the U.S. railroads, has already achieved efficiencies at Laredo. Shippers have demonstrated the high level of efficiencies by choosing to use Laredo as their Mexican gateway. Further, the high level of efficiencies between UP and TFM cannot be re-created with other railroads because no economical replacement exists for either Laredo or TFM for many O-D markets.

V. Efficiencies Will Not Offset the Anticompetitive Effects of the Transaction

35. Efficiencies can sometimes offset anticompetitive effects that arise in a transaction. If cost saving efficiencies are large enough, they can lead to overall decreases in prices, as I discuss in my previous research.[20] The cost savings typically need to be cost savings in variable (marginal) costs to have a decreasing effect on price. Cost savings in overhead and other types of fixed costs typically do not lead to lower prices.

36. In the proposed acquisition neither KCS nor its economist, Professor Grimm, has claimed that any savings will occur, either variable cost savings or fixed cost savings. KCS has explained that the proposed transactions will not achieve any

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[19] UP owns a 26% share in FXE, which is the Mexican railroad that connects at Eagle Pass.

[20] *See* J. Hausman, "Competitive Analysis with Differentiated Products," *Annales, D'Economie et de Statistique* 34 (1994); "Economic Analysis of Differentiated Products Mergers Using Real World Data," *George Mason Law Review* 5 (1997), and "Efficiencies from the Consumer Viewpoint, " *George Mason Law Review* 7 (1999). The *Merger Guidelines* also discuss the role of efficiencies in Section 4.

operational or service improvements that are not already available through existing cooperation among KCS, Tex Mex, and TFM. KCS, Tex Mex, and TFM already have exceptionally close working relationships and offer what they describe as "seamless service" for traffic moving between the United States and Mexico. They do not anticipate that the NAFTA Rail transaction will allow them to obtain any operational benefits that they are not already pursuing without common control.

37. Some of the public statements by KCS regarding the proposed transaction indicate that efficiencies have already been realized:

- More than a year ago, KCS reported that the "NAFTA Railway Alliance partners KCS, Tex Mex and TFM had "developed a seamless, one-stop customer service approach for moving traffic in and out of Mexico on the NAFTA Railway." KCS explained that "[e]ach week, the team covers service performance related to KCS' new pre-blocking plan for traffic going southbound into Mexico, despacho previo and clearances that will help expedite traffic." KCS also reported that the partners were working on an initiative "to create a similar plan for operational efficiency going northbound, to include the possibility of TFM pre-blocking traffic to save handling and transit time on traffic moving from Mexico to U.S. Markets."[21]

- KCS's CEO Michael R. Haverty reported in December 2002 that, even without common control, KCS's "working relationship with TFM has become very close in 2002, and we expect to further strengthen and build this relationship in 2003."[22]

- The KCS-Tex Mex Control Application reported that, earlier this year, "KCSR, Tex Mex and TFM implemented a plan to pre-block trains moving to and from Mexico."[23]

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21 KCS NEWS, "NAFTA Railway Partners Reflect and Pursue New Opportunities," July 9, 2002 (available on www.kcsi.com).

22 KCS NEWS, "*State of the Railroad: From the Desk of Michael R. Haverty, Chairman, President and CEO,*" Dec. 17, 2002 (available on www.kcsi.com).

23 KCS Application, Riney V.S. p. 136.

38. Thus, with no offsetting efficiency effects for the anticompetitive price increases that I discussed earlier, the net result will be price increases in antitrust markets that injure shippers and consumers. Even if there were cost savings, however, the conditions needed to prevent anticompetitive conduct need not interfere with them. The Applicants have claimed that UP and others "do not seem to understand that KCS's transaction with TFM is an acquisition of control, not a merger."[24] The anticompetitive strategies outlined above only require common control, not a full integration of operations. In fact, an outright merger might be preferable from an economics standpoint because it might produce cost savings from reduced overhead. In any event, the continued separate corporate existence of TFM is immaterial to the above analysis, so long as TFM and KCS share a common economic interest in maximizing overall profit, which common control will provide.

VI. Applicants Incorrectly Analyze the Competitive Effects of the Transaction

39. Professor Grimm attempts to analyze the transaction solely on a horizontal basis.[25] His approach is incorrect. The transaction is vertical, not horizontal, since KCS and TFM do not compete for traffic. Instead, TFM is either the upstream or downstream provider of rail transportation from Laredo to Mexican destinations and has market power as the only Mexican railroad serving Laredo. Based on a purely horizontal analysis, I agree with Professor Grimm that no problems arise because no 2-to-1 (or other)

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[24] KCS Reply to Petition of CN to Reopen Decision No. 2 and to Reject Application (KCS-16), July 21, 2003, p. 19.

[25] Grimm Supplemental V.S. pp. 2-4: "The main body of my initial statement examined the horizontal competitive effects from the transaction....The KCS/Tex Mex/TFM transactions are purely end-to-end with no horizontal anticompetitive effects."

reductions in the number of competing carriers will occur. But the correct analysis is as a vertical merger. While vertical mergers typically do not create the potential for anticompetitive effects in the same way as horizontal mergers, the potential for vertical mergers to lead to anticompetitive outcomes is well recognized, especially when regulation is involved.[26]

A. Vertical Mergers that Facilitate Disadvantaging Competitors

40. The economics literature recognizes that vertical mergers can produce anticompetitive effects where the merged entity can decrease the service quality or increase costs of its rivals.[27] By discriminating against a competitor and causing its service quality to be lower, a firm can increase its own demand and often charge higher prices. For example, prior to the AT&T divestiture, an AT&T long distance customer dialed 10 digits (e.g. 202-368-3543) to make a long distance call while a Sprint or MCI customer typically had to dial a significant amount of extra digits beyond the 10 digits. The extra time and inconvenience of dialing the extra digits decreased Sprint's and MCI's long distance demand. More recently, the U.S. DOJ required a vertical merger party to offer guarantees via a consent decree that it would cooperate with downstream competitors and not degrade the quality of service the combined firm offered to

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[26] *See, e.g.*, D. Carlton and J. Perloff, *Modern Industrial Organization*, (Reading, MA, 3rd Ed., 2001, p. 386): "Firms may vertically integrate to evade or avoid government price controls, taxes, and regulations." *See* M. Riordan and S. Salop, "Evaluating Vertical Mergers," *Antitrust Law Journal,* 63, 1995: "A vertical merger also can help a firm to evade statutes or regulations that prohibit price discrimination." (p. 520); *see also*, A. Kahn, *The Economics of Regulation*, (New York, 1971, vol. II, pp. 296-297).

[27] *See, e.g.*, Riordan and Salop, op. cit.

competitors.[28] The recent FTC challenge to the acquisition of two interstate natural gas pipelines by a monopoly gas utility in Michigan provides a further example of the potential for anticompetitive behavior through vertical integration.[29]

B. Vertical Mergers and Regulatory Evasion

41. Regulation attempts to eliminate the exercise of market power, which is defined as the ability to charge prices above the competitive level for a significant period of time. The economics literature recognizes that vertical mergers can lead to the evasion of regulation and to allow the combined firm to better price discriminate.[30] For example, prior to the breakup of AT&T, the U.S. government alleged that AT&T evaded regulation on its monopoly local telephone service by charging higher prices on equipment from its unregulated equipment subsidiary, Western Electric.[31] This regulatory evasion was completely vertical in nature and allegedly led to higher prices to consumers. Similarly, the regulatory evasion by TFM of Mexican regulation will lead to higher prices to relatively less elastic shippers.

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[28] *See U.S. v. Northrop Grumman & TRW*, 2003-1 TRADE CAS. ¶ 74,057 (D.D.C. 2003).

[29] *See CMS Energy Corp.*, No. 991-0046, 64 FED. REG. 14,725 (1999) (Aid to Public Comment). The FTC alleged that the merged entity would restrict access to its solely served customers in Michigan by non-affiliated pipelines, thereby allowing it to increase rates for gas transportation on its affiliated pipelines into Michigan. The anticompetitive service restrictions of concern to the FTC are analogous to the behavior potentially available to NAFTA Rail. The FTC consent decree imposes service conditions to ensure equal access for non-affiliated pipelines.

[30] See footnote no. 26 for regulatory evasion. For the ability to price discriminate, *see, e.g.*, M.K. Perry, "Vertical Integration: Determinants and Effects," in *Handbook of Industrial Organization*, eds. R. Schmalensee and R. Willig, Amsterdam: North Holland, 1989.

[31] *U.S. v. American Tel. & Telegraph*, 552 F.Supp. 131 (D.D.C. 1982).

42. Vertical mergers can also sometimes have anticompetitive horizontal effects related to regulatory evasion. To the extent that TFM can disable UP and BNSF and make them less competitive with KCS, KCS will be able to increase its prices because UP and BNSF will offer inferior service. Again, one illustration of this problem was the U.S. government's allegation that AT&T used its monopoly over local phone service to discriminate against its long distance rivals such as MCI and Sprint, and these actions allowed AT&T to maintain higher long distance prices. AT&T's actions allegedly occurred despite active regulatory oversight by the FCC and state Public Utility Commissions.[32] Similarly, the DOJ has challenged vertical mergers between natural gas pipelines and electric utilities that could produce anticompetitive effects.[33] Here no active regulatory oversight occurs at the Laredo gateway, so anticompetitive strategies would be more easily implemented.

C. Potential Diversions Do Not Eliminate Anticompetitive Effects

43. The ability for TFM to implement anticompetitive strategies both at the current time and in the future after the transaction is constrained to some extent by intermodal competition and competition from other gateways.[34] But these constraints are already reflected in current prices that limit the amount of market power that TFM can exercise. These competitive constraints will not change with the transaction, so that

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32 *See id.*

33 *See, e.g., United States v. Enova Corp.,*107 F. Supp. 2d 10 (D.D.C. 2000). In *Enova,* an electric utility was required to divest gas-fired generating plants prior to acquiring a gas utility with monopoly control over a natural gas pipeline into southern California. The competitive concern was that the merged firm would cause higher electric prices by limiting access of its competitors.

34 *See* Applicants' Supplement pp. 13-19; Davies V.S. pp. 7-13.

prices will increase following the transaction as my analysis demonstrates. Also, UP will have the potential to divert some amount of current UP-TFM traffic to UP-FXE routes, such as by using the Eagle Pass gateway.[35] But this traffic diversion will lead to higher costs and prices or lower service quality; otherwise UP would have already implemented this diversion.[36] Thus, to the extent that UP is forced to divert traffic to UP-FXE routes by higher prices or by discrimination, the outcome will be anticompetitive.

VII. Previous STB Merger Policy

44. I understand that the Board has traditionally accepted the "one-lump" doctrine in previous merger cases.[37] My conclusions about the adverse competitive dangers in this case are not inconsistent with the Board's past application of the doctrine. The factual circumstances of this situation are different from those at issue in the usual end-to-end merger case.

45. The distinctions arise from the nature of the Laredo Gateway and the competition north of the border that has occurred because of the neutral and non-discriminatory behavior of TFM south of the border. As an international gateway, Laredo presents a different regulatory context than the usual case. TFM's existing rate levels are subject to different regulation than a domestic gateway in the U.S. In the U.S., dominant carrier regulation remains in place both before and after a merger. Further, in the U.S., where vertical mergers have combined railroads on both sides of major

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35 *See* Applicants' Supplement pp. 21-24; Davies V.S. pp. 13-14.

36 UP has an economic incentive to use FXE given its 26% ownership interest in FXE.

37 *See Erie-Niagara Steering Committee v. Surface Transportation Board*, 247 F.3d 437, 443 (2d Cir. 2001).

gateways, there typically have been several independent routes for given O-D markets, which limits the ability of the merging railroads to exercise significant market power. Past mergers that formed new single-line routes thus caused other railroads to form similar pairings using the same major gateways (*e.g.,* at Cincinnati, where separate end-to-end mergers formed the CSX and Norfolk Southern systems, both of which operate on both sides of the former-gateway). In the current situation, the traffic data that I discussed above demonstrate the importance of the Laredo Gateway, and only TFM provides rail service on the Mexican side of the Laredo Gateway. Indeed, the Board has recognized that, in an age of declining opportunities to form alternative connections at gateways, it is necessary to impose conditions to keep major existing gateways open.[38]

VIII. The Remedies that UP has Proposed are Appropriate

46. KCS has offered commitments not to engage in anticompetitive strategies.[39] Economists typically believe that firms will engage in anticompetitive activities to increase profits so long as the firms' actions are not illegal. Indeed, many influential management textbooks discuss at length the use of business strategies to disable competitors to increase profits. Thus, most economists are extremely hesitant to take the "word" of merging firms that they will not increase prices after a transaction if they have the ability to do so given the economic incentives to do so. Thus it is important that KCS's commitments be made enforceable.

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[38] *See Major Rail Consolidation Procedures*, STB Ex Parte 582 (Sub-No. 1) (STB served June 11, 2001) at 25.

[39] *See, e.g.*, Applicants' Supplement p. 4, p. 25, p. 26, Davies V.S. pp. 14-16.

47. As Mr. Gray describes, the Board could require KCS to implement its commitments in an effective and enforceable way without posing any risks or hampering competition. Three criteria are relevant in considering proposed regulatory remedies: (1) remedies should be workable and not unduly regulatory; (2) remedies should be designed to affect only the potential adverse consequences; and (3) remedies should not interfere with the Applicants' ability to compete more effectively against other railroads and transportation modes by exploiting possible pro-competitive benefits of the transaction. UP's proposed remedies satisfy each of these criteria.

48. UP has proposed that KCS, as a condition for approval, be required to negotiate an agreement to implement its vague commitment to "keep the Laredo gateway open on commercially reasonable terms." UP has also suggested that one appropriate way that the commitment might be made concrete and enforceable is via a "proportional rate matrix approach" that would attempt to limit anticompetitive price increases by TFM following the transaction. Such an approach would be consistent with the remedial principles described above and has been successfully employed in the "I-5 Proportional Rate Agreement" between UP and BNSF, which the Board approved as part of the UP/SP merger. The agreement would only apply to traffic interchanged between UP and TFM at Laredo so it would not restrict NAFTA Rail's ability to compete for traffic using KCS-Tex Mex routes north of the border. Further, it does not create an increased opportunity for coordinated interaction among the railroads since they gain no knowledge of their competitor's prices. But the proportional rate matrix approach does cause TFM on average to offer UP similar rates to what it "charges itself." The approach is similar to the "imputation approach" used in telecommunications regulation in the similar situation

of a monopoly provider competing in other non-regulated markets.[40] Thus, if NAFTA Rail is more efficient in a given O-D market for a commodity, the proposed regulation will not hinder NAFTA Rail from winning the movement away from UP.

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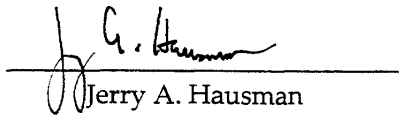
[40] I discuss the pro-competitive aspects of imputation in J. Hausman, "Efficient Local Exchange Competition," *Antitrust Bulletin*, 1995

I, Jerry A. Hausman, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on August 1, 2003.



Jerry A. Hausman

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Hausman Exhibit A
Public

JERRY A. HAUSMAN
Massachusetts Institute of Technology
Department of Economics
Building E52-271A
Cambridge 02139
(617) 253-3644

EDUCATION:

OXFORD UNIVERSITY
D. Phil. 1973 (Ph.D)
B. Phil. 1972

BROWN UNIVERSITY
A.B. (Summa Cum Laude), 1968

THESIS: "A Theoretical and Empirical Study of Vintage Investment and Production in Great Britain," Oxford University, 1973.

FELLOWSHIPS, HONORS AND AWARDS:

Phi Beta Kappa
Marshall Scholar at Oxford, 1970-1972
Scholarship at Nuffield College, Oxford, 1971-1972
Fellow, Econometric Society, 1979.
Frisch Medal of the Econometric Society, 1980
Fisher-Schultz Lecture for the Econometric Society, 1982
John Bates Clark Award of the American Economic Association, 1985
Jacob Marschak Lecture for the Econometric Society, 1988
Fellow, National Academy of Social Insurance, 1990
American Academy of Arts and Sciences, 1991.
Fellow, Journal of Econometrics, 1998.
Shann Memorial Lecture for the Australian Economics Society, 2003

EMPLOYMENT:

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

1992-	John and Jennie S. MacDonald Professor
1979-	Professor, Department of Economics
1976-79	Associate Professor, Department of Economics
1973-76	Assistant Professor, Department of Economics
1972-73	Visiting Scholar, Department of Economics

VISITING APPOINTMENTS:

1986-87	Visiting Professor, Harvard Business School
1982-83	Visiting Professor, Harvard University Department of Economics
	Visiting Positions: University of Washington, Brigham Young University, Australian National University, Ecole Normale Supérieure, Oxford University, University of Sydney, Wuhan University, Beijing University, University of Western Australia

U.S. ARMY, ANCHORAGE, ALASKA

1968-70	Corps of Engineers

PROFESSIONAL ACTIVITIES:

Associate Editor, Bell Journal of Economics, 1974-1983
Associate Editor, Rand Journal of Economics, 1984-1988
Associate Editor, Econometrica, 1978-1987
Reviewer, Mathematical Reviews, 1978-1980
American Editor, Review of Economic Studies, 1979-82
Associate Editor, Journal of Public Economics, 1982-1998
Associate Editor, Journal of Applied Econometrics, 1985-1993
Advisory Editor, Economics Research Network and Social Science Research , 1998-
Advisory Editor, Journal of Sports Economics, 1999-
Member of MIT Center for Energy and Environmental Policy Research, 1973-
Research Associate, National Bureau of Economic Research, 1979-
Member, American Statistical Association Committee on Energy Statistics, 1981-1984
Special Witness (Master) for the Honorable John R. Bartels, U.S. District Court for the Eastern District of New York in Carter vs. Newsday, Inc., 1981-82
Member of Governor's Advisory Council (Massachusetts) for Revenue and Taxation, 1984-1992
Member, Committee on National Statistics, 1985-1990
Member, National Academy of Social Insurance, 1990-
Member, Committee to Revise U.S. Trade Statistics 1990-1992
Director, MIT Telecommunications Economics Research Program, 1988-
Board of Directors, Theseus Institute, France Telecom University, 1988-1995
Member, Conference on Income and Wealth, National Bureau of Economic Research, 1992-
Member, Committee on the Future of Boston, 1998
Member, GAO Expert Panel to advise USDA on Econometric Models of Cattle Prices, 2001-2
Advisor, China Ministry of Information on Telecommunications Regulation, 2002-

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I. Econometrics

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B

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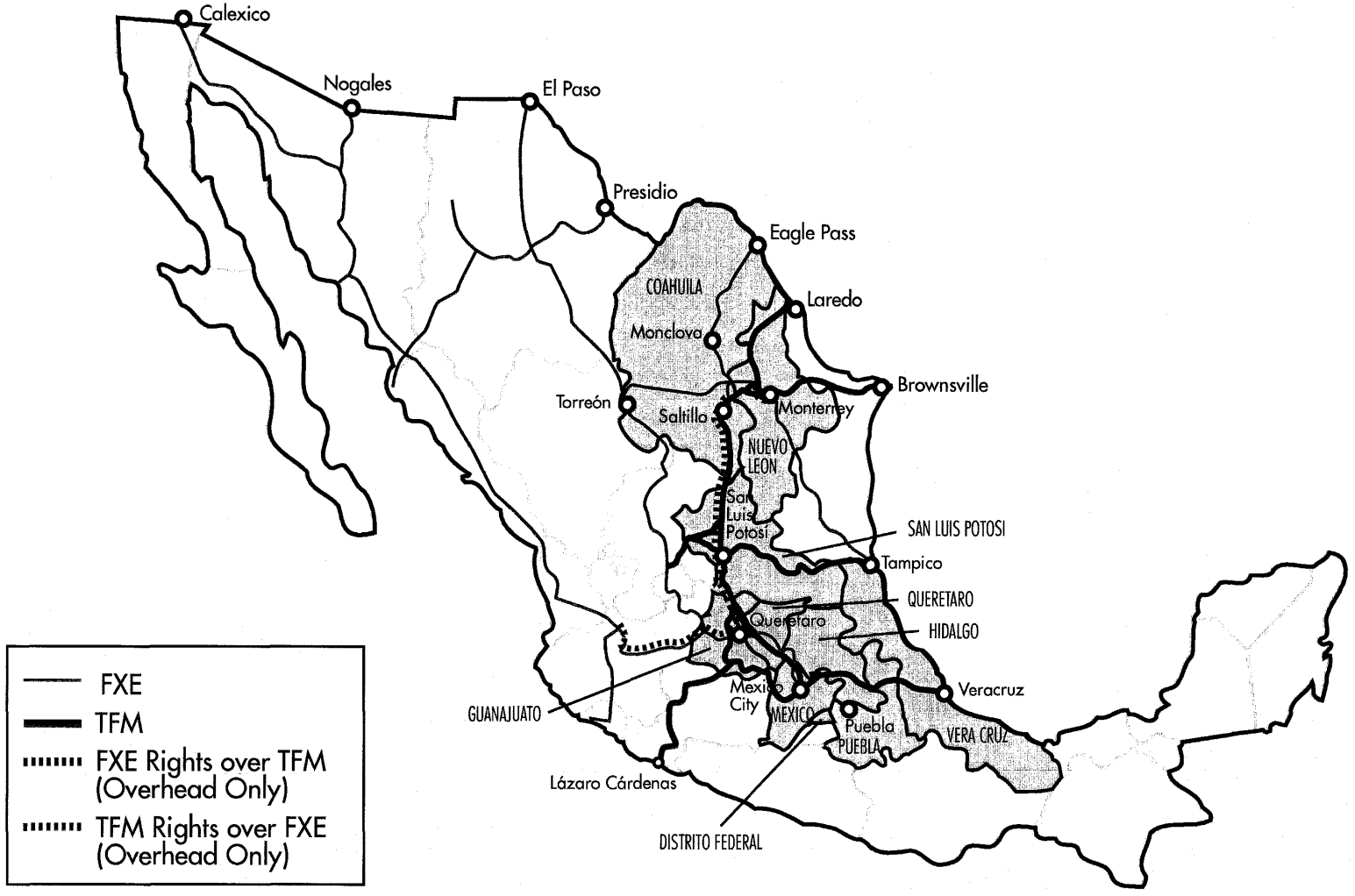
Share of State-to-State Traffic To Mexico Moving Via Laredo Gateway
(2001 UP Southbound Movements)

Redacted

C

Key Mexican States for Which TFM/Laredo Share Data Provided



Hausman Exhibit C
Public

Fuentes

PUBLIC VERSION

VERIFIED STATEMENT

OF

FRANCISCO FUENTES OSTOS

My name is Francisco Fuentes Ostos. I have been a partner in the Mexican law firm of Mijares, Angoitia, Cortés y Fuentes, S.C. since the firm's inception in 1994. I was admitted to practice in Mexico (Escuela Libre de Derecho) in 1990 and obtained a Masters of Law degree from Cambridge University, UK in 1992. I have regularly advised clients on competition issues in Mexico since Mexico's antitrust laws were enacted in 1993. Our firm acted as legal counsel to the financial advisor appointed by the Mexican Federal Government in 1996 for the privatization of the railroad companies, and since then has advised clients on legal issues related to railroad transportation services.

I have acted as the principal competition counsel to the Union Pacific Railroad Company ("UP") with respect to the Mexican issues raised by the proposed acquisition of control by Kansas City Southern ("KCS") of TFM, S.A. de C.V. ("TFM").

UP has asked me to discuss how Mexican law and regulation governing railroads relate to the KCS-TFM transaction. In Section I of this statement, I explain that Mexican law and regulation could not be expected to prevent KCS control of TFM from having adverse effects on competition in the United States for U.S.-Mexico cross-border rail shipments. I note that some of the potential anticompetitive conduct that concerns UP is simply beyond the reach of Mexican law and regulation. I also discuss the fact that the regulatory authorities and courts in Mexico have not implemented the pertinent Mexican railroad regulations, and that it is highly unlikely that a dispute concerning TFM's future compliance with Mexican regulatory requirements could be resolved in an efficient manner.

And I explain how Mexican legal and regulatory processes have for several years allowed TFM to block steps by Ferrocarril Mexicano, S.A. de C.V. ("Ferromex") to enforce rights that it was entitled to under TFM's Concession and Mexican law. In Section II, I describe the Mexican regulatory approval processes applicable to KCS's acquisition of control of TFM and discuss how the relevant Mexican agencies have approached the proposed merger. In Section III, I explain that action by the U.S. Surface Transportation Board ("STB") to enforce commitments made by KCS relating to U.S.-Mexico international rail traffic would not interfere with Mexican law or sovereignty.

I. MEXICAN LAW CANNOT BE RELIED UPON TO PREVENT ANTICOMPETITIVE EFFECTS ON CROSS-BORDER RAIL TRAFFIC

It would not be reasonable to expect that UP or other parties could effectively prevent potential anticompetitive conduct by KCS/TFM by attempting to enforce provisions of Mexican law or TFM's Concession. It is critically important to realize that Mexico's railroad regulatory regime is still in its infancy, which means that Mexican regulators and courts have had almost no occasion to interpret or enforce these provisions.[1] Thus, there is considerable uncertainty regarding how regulators and courts would respond to a complaint of discriminatory treatment. What is certain, however, is that a dispute that raises novel issues of discrimination would likely take years to resolve.

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[1] Before 1996, the Mexican state owned all railroad assets in the country. In 1995, the Congress amended the constitution in order to allow for private ownership, and then passed a privatization statute. Over the next several years, the various railroad concessions were auctioned off to private investors, with the last sale taking place in 1999.

A. Mexican Law and Regulations Would Not Prevent Across-the Board Increases in TFM Rates

Some of the anticompetitive conduct discussed in UP's Comments is not addressed at all by Mexican railroad law. If the combined KCS/Tex Mex/TFM entity were to engage in the sort of conduct described by Professor Hausman in his verified statement, which would involve TFM raising its rates between Laredo and TFM-served origins and destinations on a non-discriminatory basis (i.e., across-the-board), with KCS selectively granting rebates by lowering its portion of the overall rate on U.S.-Mexico traffic, such conduct would probably not be reviewable under Mexican law.

By statute, there are no practical limits on how high TFM could raise its rates within Mexico. Article 170 of the Railroad Regulations provides that carriers may freely set their rates.[2] Carriers must file their maximum rates with the SCT for each of their routes, and once a maximum rate is registered, the carrier cannot charge more than that rate. There is no limitation, however, on a carrier's ability to return to the SCT and file a higher rate whenever it chooses.

Although rates are freely set by the concession holders, the Authorizing Statute and its regulations contain a procedure through which certain parties can challenge a carrier's registered rates upon having a ruling from the Federal Competition Commission ("CFC") that effective competition does not exist. *See* Authorizing Statute, Article 47; Regulation, Articles 171-73. No rate has ever been challenged pursuant to these provisions.

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[2] The Regulations were issued in 1996 by the Secretary of Communications and Transport (SCT) pursuant to the terms of the Rail Service Authorizing Statute (*Ley Reglamentaria Del Servicio Ferroviario*) ("Authorizing Statute") that Congress passed as part of the privatization of the Mexican railroad system.

As discussed below, there are numerous questions about how this procedure would be applied.

Mexican authorities likely would have no say about the overall TFM-Tex Mex-KCS rate if the *TFM portion of the rate* was offered in a nondiscriminatory manner to all shippers under equal conditions. Mexican railroad law and TFM's Concession[3] contain various provisions that purport to require TFM to set rates in a non-discriminatory manner. Under Article 170, a carrier's maximum rates "shall be applied in a non-discriminatory manner and shall be the same for users in equal conditions." Carriers are permitted to charge less than their maximum rates as long as they grant such discounts to "users in equal circumstances, in a fair and non-discriminatory manner, in accordance with the specific characteristics of each service, according to the classifications established by this in keeping with the present Regulations."

The TFM Concession also includes several provisions regarding non-discriminatory behavior. Section 2.1 states that TFM "is obligated to provide rail services to requesting users in a permanent and uniform manner and under equitable and nondiscriminatory conditions with respect to opportunity, quality and price, according to the terms laid out in Chapter VII, title three, of the Regulation. Section 2.2 of the TFM Concession requires that TFM "provide terminal and interconnection services at all points connecting with the railroads of other concessionaires or with connecting railroads of other countries under fair and non-discriminatory conditions in regard to timeliness, quality and price." Section 2.2 goes on to say that "[a]ny difference in the timeliness of the service or in

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3 *See* Supplement to Application (KCS-10/TM-10), Exh. A.

the rates applied must be based on specific circumstances that justify such distinctions being made."

An increase in TFM's rates that was the same for both connections at Laredo, as part of a strategy by KCS/TFM to increase the overall rates on origin-to-destination cross-border shipments, does not appear to be addressed by these provisions.

B. Parties Could Not Rely on the Ability to Enforce Any Provisions of Mexican Railroad Law or TFM's Concession to Prevent Anticompetitive Discrimination By TFM Resulting from KCS Control

The provisions of Mexican law and TFM's Concession noted above do address discriminatory behavior by TFM. However, even if these provisions would in theory apply to the anticompetitive strategies described by UP, efforts to enforce them against TFM would not be effective. To my knowledge, the SCT, which is charged with enforcing the Authorizing Statute and the Regulations, has never had occasion to rule on a dispute involving an allegedly discriminatory practice. Thus, there are numerous open questions regarding, *inter alia*, how the SCT would interpret the applicable nondiscrimination provisions, what sort of relief might be ordered, and what actions TFM might take to delay the enforcement of remedial measures. For example, there is no definitive precedent on whether the anti-discrimination provisions would apply to discrimination by TFM between KCS and other U.S. connecting carriers if KCS and TFM were under common control.

Even if UP or another affected party were successful in challenging TFM's conduct, the process for obtaining a favorable SCT resolution, and then enforcing it against TFM, would involve protracted litigation before multiple administrative agencies and courts in Mexico.

First, the procedures for obtaining a resolution from the SCT can be very time-consuming. Certain types of actions, including challenges to registered maximum rates, require, as mentioned above, that the parties obtain an opinion from the CFC before the SCT will entertain the complaint. For other types of actions, including complaints regarding interconnection services, the parties must first attempt to reach a voluntary agreement within a 90 day period before the SCT will step in. And even then, the parties have the right to challenge in court SCT's decision. Currently the two main railroad companies in Mexico are litigating in federal courts SCT's decision regarding certain trackage rights fees, and that litigation has dragged on for years.

Second, even if UP or another affected party were successful in obtaining a favorable ruling from the SCT, the Mexican legal system would afford TFM various opportunities to challenge the SCT resolution and to block the resolution during the pendency of such challenge. All resolutions issued by administrative agencies such as the SCT are subject to appeal and review by the Mexican courts, and such appeals are typically time-consuming, especially where untested issues of law are involved. Moreover, there are various legal vehicles that TFM could invoke to suspend the effects of the resolution while such appeals are pending. In accordance with the Mexican judicial system, decisions by the SCT could be appealed to the Federal Administrative and Tax Tribunal by TFM and in some instances its decisions could be challenged directly by "*amparo*" proceedings in Federal courts. The writ of "*amparo*" offers federal judicial protection from laws or governmental actions that are asserted to violate individual constitutional rights.

One example of the difficulty in obtaining, and then enforcing, an SCT resolution is the frustrations that Ferromex, a Mexican competitor to TFM, has experienced for six years in seeking to enforce certain provisions of the TFM Concession. As a

condition to the auction of the TFM concession, the SCT sought to ensure competition in the important industrial center of Monterrey by requiring that TFM grant Ferromex access to certain shippers in that city. The fees and conditions associated with this access, however, were not spelled out in TFM Concession. Thus, Ferromex – after failing to reach a voluntary agreement with TFM – sent a letter on July 4, 2001, requesting that the SCT require that TFM make available to Ferromex certain trackage rights and terminal services that are necessary in order to enjoy full access to shippers in Monterrey. Roughly a year later, on August 7, 2002, the SCT issued a resolution granting Ferromex's request and requiring that TFM grant access under specified terms and conditions. Then, TFM obtained a resolution from the Ninth Court of the Federal Administrative and Tax Tribunal which suspends the SCT's resolution and prevents Ferromex from exercising the rights granted to it by the SCT. To my knowledge, this suspension remains in effect. In all, there are more than 20 *amparo* proceedings currently in place between TFM and Ferromex. Experience confirms that efforts to enforce TFM's obligations under its Concession and applicable railroad law and regulations have been ineffective for many years.

II. THE REVIEW OF THE KCS-TFM TRANSACTION BY MEXICAN REGULATORS

The proposed KCS-TFM transaction requires the approval of two Mexican regulatory agencies. The first agency, CFC, approved the transaction without condition in a resolution dated May 19, 2003. KCS produced an English-language translation of the resolution to UP in discovery, which is attached as Exhibit A ("CFC Resolution"). Because the Chairman of the CFC was recused from participating in the proceeding, only four of the

five commissioners voted, and the merger was approved by a vote of 2-2.[4] UP attempted to participate in the CFC proceeding as an interested party, but the CFC rejected its submissions based on its position that third parties are not permitted to participate in CFC processes.

The CFC resolution defined the relevant geographic market as {"

"} Exh. A, KCS – C0188. It held that the merger would not affect competition because the merger would not cause the national railroad system to undergo any changes. Exh. A, KCS – C0189. It did not address any of the vertical issues raised by the transaction or any of the effects that the transaction might have in the United States on U.S.-Mexico cross-border traffic.

The other regulatory agency that needs to approve the proposed merger is the Foreign Investment Commission ("FIC"). To my knowledge, the FIC has not yet issued a decision on the transaction. In accordance with the Foreign Investment Law and the Authorizing Statute, FIC will be examining whether the transaction would contribute to increasing the competitiveness of Mexican industry and promoting regional and technological development, and protect the sovereign integrity of the Nation. The primary focus of this inquiry is on internal Mexican economic matters.

Another Mexican agency that is closely involved in evaluating the potential effects of the proposed merger is the Secretary of Communications and Transportation ("SCT"). SCT is the agency charged with regulation of the railroad industry. Although

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[4] The tie-breaking vote was cast by one of the participating Commissioners who had been given tie-breaking authority in the temporary absence of the Chairman. *See* CFC Resolution, Exh. A, KCS – C0189. It is questionable whether such tie-breaking vote temporary authority is valid.

KCS and TFM do not need formal SCT approval in order to consummate the TFM acquisition,[5] SCT, as a member of FIC, has been closely involved in helping the FIC evaluate the transaction.

One of the points that various interested parties have discussed with SCT and FIC is the desirability of enhancing the ability of the other Mexican railroad serving the U.S. border – Ferromex – to compete more effectively against TFM (and against other modes of transportation, including trucks) within Mexico, including for the portion of international movements between the U.S. border and points served by TFM in Mexico. One approach would require an elimination of restrictions imposed by TFM on Ferromex's use of trackage rights TFM's important mainline between Ramos Arizpe (near Saltillo) and Querétaro, and a reduction in the high level of fees for those rights. The fees TFM charges Ferromex are high principally because the SCT has determined that the costs upon which such fees are based should include the amortization costs of the high purchase price paid for the TFM Concession. My understanding is that KCS and TFM, in negotiations with the relevant agencies, have refused to consider any proposal that would lead to a meaningful reduction in TFM's high fees.

III. REQUIRING TFM TO NOT DISCRIMINATE WITH RESPECT TO INTERNATIONAL TRAFFIC FLOWS WOULD NOT CONFLICT WITH MEXICAN LAW OR OFFEND MEXICAN NOTIONS OF SOVEREIGNTY.

I understand that UP will be asking the STB to impose conditions on the KCS-Tex Mex acquisition that would require KCS to abide by commitments it is making regarding the Laredo Bridge, and also regarding KCS's use of its control over TFM to

[5] They are required only to file a notice with SCT of the share acquisition by KCS once it is completed.

ensure that TFM continues to work with UP on international cross-border traffic via the Laredo Gateway and continues to provide commercially reasonable rates or rate factors that allow UP-TFM services to remain competitive.

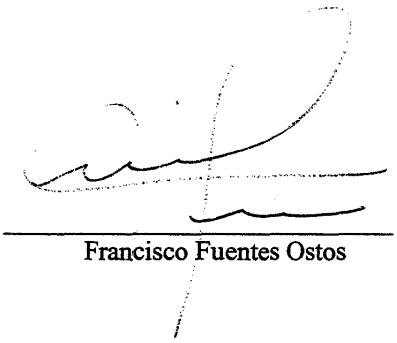
Such action by the STB would not interfere with the role, pursuant to its legal mandate, of any relevant Mexican governmental agency, or involve any conflict or interference with Mexican legal principles, including sovereignty principles. As discussed above in Section II, Mexican railroad law today requires that TFM cooperate with its U.S. connections on an impartial and non-discriminatory basis, including on the rates that it sets and the services it provides, and I understand that TFM has acted in a neutral manner. The commitments KCS has made appear designed to ensure that KCS's control of TFM does not cause an adverse change in the way TFM behaves with respect to its other connections, principally UP, on international traffic flows. Such a commitment is perfectly consistent with Mexican law and regulations.

It would be equally appropriate for the STB to play a role in holding KCS – a U.S. company – to its commitments in an effective way. The Mexican authorities would not question the Board's role in considering and protecting competition for international traffic flows that benefit U.S. customers. As I explained above, no agency of the Mexican government concerns itself with protecting rail competition in the United States that depends on effective cooperation from TFM for the portion of the movement from Laredo south. Steps by the STB that would require KCS to use its new control of TFM to ensure that TFM works with UP on traffic moving across the border at Laredo, and quotes commercially reasonable rates for UP-TFM cross-border interline movements, would not involve any inappropriate interference in internal Mexican affairs or call upon TFM to do anything

inconsistent with other Mexican legal requirements. To the contrary, such steps would be consistent with the principles of non-discrimination and fostering of competition that Mexican law requires Mexican governmental agencies to apply.

I, Francisco Fuentes Ostos, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on August 1, 2003.



Francisco Fuentes Ostos

A

Fuentes Exhibit A
Public

EXHIBIT FILED UNDER SEAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 13

COMMENTS OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY FILED IN *KANSAS CITY SOUTHERN – CONTROL – THE KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL.*, FINANCE DOCKET NO. 34342 ("KCS/TEX MEX") (FILED AUGUST 4, 2003)

208614



MAYER BROWN ROWE & MAW

August 4, 2003

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

Adrian L. Steel, Jr.
Direct Tel (202) 263-3237
Direct Fax (202) 263-5237
asteel@mayerbrownrowe.com

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

Re: Finance Docket No. 34342, *Kansas City Southern – Control – The Kansas City Southern Ry., Gateway Eastern Ry. & The Texas Mexican Ry.*

Dear Secretary Williams:

Please find enclosed for filing in the above-captioned proceeding the original and twenty-five (25) copies of Comments of The Burlington Northern and Santa Fe Railway Company (BNSF-4). Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 9 format.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files.

Sincerely yours,

Adrian L. Steel, Jr.

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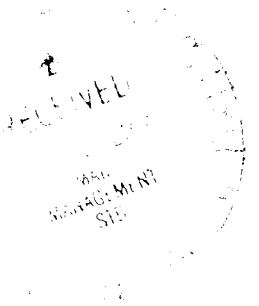
Enclosures

cc: All Parties of Record

Brussels Charlotte Chicago Cologne Frankfurt Houston London Los Angeles Manchester New York Palo Alto Paris Washington, D.C.
Independent Mexico City Correspondent: Jauregui, Navarrete, Nader y Rojas, S.C.

Mayer, Brown, Rowe & Maw LLP operates in combination with our associated English limited liability partnership in the offices listed above.

BNSF-4



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

COMMENTS OF
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

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Jeffrey R. Moreland
Richard E. Weicher
Sidney L. Strickland, Jr.
Michael E. Roper

The Burlington Northern
and Santa Fe Railway Company
2500 Lou Menk Drive
Third Floor
Fort Worth, Texas 76131-0039
(817) 352-2368

Erika Z. Jones
Robert M. Jenkins III
Adrian L. Steel, Jr.
Reginald R. Goeke

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Attorneys for The Burlington Northern and Santa Fe Railway Company

Dated: August 4, 2003

TABLE OF CONTENTS

Page

Introduction and Summary 1

Argument 7

I. It is Critical to Ensure that Traffic Flows Freely and Competitively through Laredo and Brownsville 7

A. Laredo And Brownsville Are Important Gateways For NAFTA Traffic 7

B. BNSF Is A Critical Competitor At The Laredo Gateway 9

II. Absent AN Open Gateway Condition, The Proposed Transaction May Reduce Competitive Options at Laredo 11

III. KCS' Traffic Diversions could drive shippers to use Less Efficient Alternative Routings and THEREBY Reduce Overall Rail Competition 13

IV. Imposition of an Open Gateway Condition is AN Appropriate Remedy to be imposed both at Robstown and at Brownsville and Laredo 18

A. An Open Gateway Condition Is Consistent With The Board's Decision In Ex Parte No. 582 (Sub-No. 1) As Well As KCS' Position In That Proceeding 18

B. An Open Gateway Condition Is Consistent With Conditions Imposed In Other Control Proceedings 19

C. An Open Gateway Condition Is Necessary To Preserve BNSF's Ability To Offer Effective SP Replacement Competition 21

D. An Open Gateway Condition Should Provide For A Transition Period Which Continues Existing Rates 23

E. The Board Has Jurisdiction to Impose Open Gateway Conditions At Laredo And Brownsville For Cross-Border Traffic 24

Conclusion 28

Verified Statement of Peter J. Rickershauser

Verified Statement of David Reishus

3

BNSF-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

COMMENTS OF
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Pursuant to Decision No. 2 in this proceeding, The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits its comments on the proposed Kansas City Southern ("KCS")/Texas Mexican Railway Company ("Tex Mex") control transaction.

INTRODUCTION AND SUMMARY

BNSF's interest in the KCS/Tex Mex/NAFTA Rail transaction is to ensure that rail shippers who rely on BNSF to provide them access to south Texas and Mexican markets are not competitively worse off as a result of the transaction. KCS has made a number of pledges and commitments to the Surface Transportation Board ("STB" or "Board") and others which address many of BNSF's concerns – including at the Board's July 31, 2003 public hearing, where KCS stated that it would accept as a condition to the Board's approval of the KCS/Tex Mex transaction a requirement that the Laredo and

Brownsville gateways be kept open on commercially reasonable terms.[1] As a result, BNSF supports the KCS/Tex Mex/NAFTA Rail transaction, subject to clarification of those pledges and commitments and to their inclusion as conditions in the Board's final decision. BNSF believes that the transaction could result in a stronger interline connecting carrier with which BNSF could work to enable it to provide better competition.

The proposed KCS/Tex Mex/NAFTA Rail transaction raises greater competitive issues and policy concerns than would be typical for a primarily end-to-end merger involving a Class II carrier. These concerns arise from the unique and important position that Tex Mex plays in international trade and from the anticipated second-stage acquisition of TFM, S.A. de C.V. ("TFM") by KCS, creating an international single system NAFTA Rail network.

In addition, BNSF plays a special role regarding its customers' traffic moving via Laredo and Brownsville. BNSF obtained access to those gateways in the UP/SP merger proceeding as a replacement for Southern Pacific ("SP") in order to provide a competitive counterweight to Union Pacific ("UP") for U.S.-Mexico traffic. Thus, it is

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[1] KCS also announced at the hearing that it had reached an agreement with The National Industrial Transportation League ("NIT League") which respect to issues relating to the proposed transaction but did not make details of the agreement public. Accordingly, BNSF has not had an opportunity to review and analyze the agreement, and BNSF will provide its views on the agreement in its September 2, 2003 reply comments.

important that, if the transaction is approved, BNSF's competitive capability to fill that role for its customers continue on an undiminished basis.[2]

In BNSF's view, the key issue for preserving competition for U.S.-Mexican rail traffic is the maintenance of meaningfully open gateways through Laredo and Brownsville including, in BNSF's unique case, its ability to reach Laredo via Tex Mex through Robstown. Otherwise, shippers may be forced to use less efficient and more costly routes, or switch to other transportation modes, for their Mexican traffic as their only alternative to UP. The Board recognized in its revised merger rules in Ex Parte No. 582 (Sub-No. 1)[3] that major existing gateways should be kept open in future mergers, both physically and economically.

The conditions the STB imposed on the UP/SP merger to protect shippers gave BNSF the right to connect with Tex Mex as a neutral bridge carrier, capable of interlining with both BNSF and KCS in competition with UP for traffic to and from the Laredo gateway. BNSF has gained a relatively small percentage of the traffic moving through Laredo, but it helps effectively constrain the rates through that gateway. It is significant to note that KCS reported to the Board in its control application that, small as

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[2] As KCS has stated in its pleadings to the Board and in various communications to shippers, the Board also provided Tex Mex with trackage rights over UP/SP lines to connect with KCS at Beaumont, TX in order to ensure the continuation of effective competition at Laredo. *Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp.*, 1 STB 233, 421-426 (1996) (*"Decision No. 44"*). However, as the Board noted, Tex Mex's trackage rights were to be, in Tex Mex's own view, "an addition to [the] competitive safeguards contained in the BNSF agreement, and not . . . a replacement." *Id.* at 147.

[3] *Major Rail Consolidation Procedures* (served June 11, 2001) (*"June 11 Decision"*).

BNSF's share of the Laredo international market is, BNSF nonetheless was Tex Mex's largest interline partner in terms of volume in 2002. While KCS is a vital part of the nation's rail system, it does not have the route structure or market reach to provide the competitive presence that BNSF can and does provide to and from major gateways and throughout the western United States. The diminution of Tex Mex as a neutral non-controlled bridge carrier could weaken the competitive discipline that BNSF provides to UP over the Laredo gateway. BNSF must be able to continue to be a competitive alternative for shippers to UP as a replacement for SP pursuant to the UP/SP merger conditions.

The Board's conditions were also premised on TFM's provision of rates and services over the international gateways of Laredo and Brownsville to and from points in Mexico that permit BNSF to be competitive, and the failure by TFM to do so would similarly adversely affect BNSF's ability to competitively serve shippers.

It is clear that the STB has jurisdiction over the Laredo and Brownsville gateways, within the context of this integrated transaction for control of both Tex Mex and TFM. The STB can exercise its conditioning power to address competitive issues on international traffic over an established international gateway. It does not have direct jurisdiction over TFM's operations within Mexico, but it can require the U.S. controlling company – NAFTA Rail – to ensure commercially reasonable open gateways for international traffic over Laredo and Brownsville.

In statements to the Board on several occasions, KCS has made a series of commitments and pledges and has given reassurances that it would continue to work with BNSF over these international gateways and that it would honor all existing Tex

Mex and TFM marketing and pricing agreements. KCS has also said it will keep the Laredo and Brownsville gateways open on commercially reasonable terms and that all carriers will be treated fairly at the Laredo Bridge. BNSF believes these commitments on service and commercial access need to be made more specific and imposed as conditions for approval of KCS' control of Tex Mex now pending before the Board.

Accordingly, BNSF's support of the NAFTA Rail transaction proposed by KCS and Tex Mex is premised on the Board ensuring through conditions that KCS/Tex Mex will be required to provide commercially reasonable rates and service to BNSF between Laredo and Robstown and that KCS/TFM will be required to provide rates and service for BNSF traffic moving via Laredo and Brownsville to and from Mexico which do not disadvantage shippers who would choose BNSF's offerings in comparison to other routing alternatives.[4]

BNSF does not seek the imposition of something cumbersome or particularly complex. In accord with the kind of condition the STB imposed in the CN/Wisconsin

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[4] BNSF is not alone in this regard. A number of the shippers who appeared at the Board's July 31st hearing or who have filed written submissions with the Board have noted the importance of requiring KCS to maintain open gateways at Laredo and Brownsville on commercially reasonable terms and/or imposing a condition to that end on the Board's approval of the transaction. These shippers include: AK Steel Corporation; CWS, Incorporated; Dal-Tile; E.I. du Pont de Nemours and Company; Griffin Industries, Inc.; Hub Group, Inc.; Lason Grain Company; Kimberly-Clark de Mexico, S.A. de C.V.; Pacesetter Steel Service, Inc.; Reagent Chemical & Research, Inc.; Unimin Corporation; and Weyerhaeuser Company. Indeed, one of those shippers – Hub Group, Inc. – has recently supplemented its prior April 28, 2003 letter of support to the Board to clarify that it "strongly supports conditions that will guarantee continued competitive and efficient . . . .rail service via the Laredo gateway." Letter from Thomas L. Hardin, Hub Group, Inc., to Secretary Williams, dated July 17, 2003

Central transaction[5] to implement those parties' agreement with NIT League, one tested, workable approach would be for the Applicants to be required to maintain the existing Tex Mex and TFM rates and services presently available for service in conjunction with BNSF at Laredo, Robstown/Corpus Christi and Brownsville for a temporary five-year period, subject to RCAF-U increases, and to provide commercially reasonable rates and services thereafter subject to the jurisdiction of the Board. Such an approach would provide a transitional time period for the development of effective interline routing and commercial relationships in light of the transaction. BNSF does not believe that a condition should preclude the new system from properly exploiting whatever competitive efficiencies and benefits it could bring to the shipping public as a result of its transaction. Thus, if the new system can offer lower rates and better service to rail shippers as a result of its extended system, then it should be free to do so.

Such a condition would reflect the Board's adoption of open gateway requirements in the revised merger rules. It would also be consistent with open gateway agreements in prior merger proceedings and would preserve BNSF's ability to offer effective competition to its customers as a replacement for SP pursuant to the UP/SP merger conditions. Such an approach would also be consistent with the position taken by KCS in Ex Parte No. 582 (Sub-No. 1) that all existing competitive shipper rail options should be preserved in future merger or control transactions.

A measured approach can make the benefits of the proposed NAFTA Rail transaction available to the Applicants and shippers, while preserving competitive

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[5] *Canadian National Ry. Co. – Control – Wisconsin Central Transp. Corp.*, Finance Docket No. 34000.

alternatives and shipper options, so that ultimately shippers can choose the services they desire.

ARGUMENT

To ensure that there will not be a substantial lessening of competition for traffic moving between the U.S. and Mexico via the Laredo and Brownsville gateways as a result of the proposed KCS/Tex Mex/NAFTA Rail transaction, the Board should condition its approval of the transaction on NAFTA Rail maintaining commercially open gateways at Laredo and Brownsville and maintaining existing rates, subject to RCAF-U adjustments, during a five-year transition period. As shown below and in the Verified Statements of Peter J. Rickershauser ("Rickershauser V.S.") and David Reishus ("Reishus V.S.") submitted herewith, such a condition is necessary to ensure that, in the interim and over the long term, there continues to be effective competition at those two critical international gateways. Such a condition is well within the authority of the Board and is consistent with the Board's past practices and its new rules for mergers. Moreover, because KCS has already agreed and committed to maintain open gateways on commercially reasonable terms at those gateways, such a condition would not adversely affect NAFTA Rail.

I. IT IS CRITICAL TO ENSURE THAT TRAFFIC FLOWS FREELY AND COMPETITIVELY THROUGH LAREDO AND BROWNSVILLE

A. Laredo And Brownsville Are Important Gateways For NAFTA Traffic

Laredo is the most important Mexican gateway, and maintaining an open gateway at Laredo is critical for ensuring the free flow of goods between the U.S. and Mexico. As the Board recognized in the UP/SP merger proceeding, Laredo constitutes a market of "separate and surpassing economic significance" superior to other

gateways. Decision No. 44 at 422. In fact, Laredo accounts for 75% of the value of all rail traffic between the U.S. and Mexico (Reishus V.S. at 4), with overall traffic between the U.S. and Mexico growing over 300% since 1994 (*Id.*, Figure 1).

Laredo is a critical gateway for several key commodities and products. BNSF alone shipped over 13,000 rail cars of grain, 14,000 rail cars of industrial products, 5,000 rail cars of motor vehicles and auto parts, and 3,000 rail cars of intermodal traffic through Laredo in 2002 (Rickershauser V.S., Exhibit 1), and BNSF constitutes only 8% of the total Laredo traffic (Reishus V.S. at 7). Laredo is a key gateway for at least three reasons. First, "Laredo is located on the most direct route between the major population and industrial centers of Mexico City and Monterrey and the central and eastern U.S." Reishus V.S. at 4. Second, the infrastructure that has been built up at Laredo to handle significant traffic volumes on a timely basis makes Laredo one of the most efficient rail gateways to and from Mexico. Third, Laredo is the principal juncture with TFM, which "has exclusive access on the Mexican side of the Northeastern Mexican gateways of Laredo/Nuevo Laredo and Brownsville/Matamoros and reaches the important industrial centers of Mexico City and Monterrey." *Id.*

Brownsville, though carrying less traffic than Laredo, is still a significant gateway for traffic to and from areas of northeastern Mexico it can efficiently serve, particularly for grain processors and other producers near the Mexican border. "BNSF has also increased traffic over its Brownsville route by 250% over the 1996-2002 time period, with over 10,000 cars exchanged at the Brownsville gateway in 2002." Rickershauser V.S. at 4. For example, 60-70% of BNSF's traffic to Brownsville serves a single receiver – Regasa. Rickershauser V.S. at 23. If the Brownsville gateway were to be no longer

open on commercially reasonable terms, Regasa could only receive its soybean shipments through UP, or via barge or truck. *Id.* Such a diversion would nearly eliminate BNSF as a competitor to UP for this traffic, and would likely also mean that the U.S. shippers that served Regasa via BNSF would be replaced by new shippers. *Id.*

B. BNSF Is A Critical Competitor At The Laredo Gateway

Rail traffic to the Laredo gateway is dominated by UP. UP carried 84% of the traffic at Laredo in 2001. Reishus V.S., Figure 3. UP enjoys a more direct route to Laredo; its density on its shipments to Laredo provides it a lower cost structure; and its broad coverage area permits it to serve more customers at that gateway than other carriers. Rickershauser V.S. at 15, Exhibit 2.

The Board conditioned the UP/SP merger on BNSF being granted trackage rights over UP's track to enable BNSF to reach Tex Mex and to serve as an effective competitive replacement to SP for traffic going through Laredo. To further the Board's goals, BNSF has invested heavily to compete for traffic going through Laredo. *See* Rickershauser V.S. at 4. Since the Board's decision in 1996, BNSF has invested over $20 million in marketing BNSF's service to and from Mexico. *Id.* BNSF has added 7-10 additional trains each way per week, it has developed efficient unit grain train services, and it has developed value-added services, such as its Mexi-Modal service and integrated dock-to-dock carload pricing and service. *Id.*

As a result of its efforts, BNSF provides effective competitive discipline to UP. BNSF, operating through an agreement with Tex Mex, accounts for the majority of the non-UP traffic going through Laredo, and in 2002 BNSF shipped 38,800 cars through that gateway. Rickershauser V.S., Exhibit 3. BNSF has increased its traffic through Laredo 87% since 1996, driven largely by growth in grain traffic (258% growth),

industrial traffic (154% growth), and intermodal traffic (156% growth). Rickershauser V.S. at 4-7. In fact, "[d]espite UP's dominant share of traffic over Laredo, BNSF carries over a quarter of the Laredo gateway traffic to and from the tier of grain belt states from Oklahoma to North Dakota." Reishus V.S. at 12 (footnote omitted). BNSF is able to compete for this traffic because of BNSF's broad geographic reach, its ability to offer value-added services, and its reasonably efficient routings to Laredo. Rickershauser V.S. at 8-9. By contrast, KCSR, which provides only 5% of traffic to Laredo, has neither the geographic reach nor the efficient routings that would permit it to pose a competitive threat to UP. *Id.* Because BNSF is the only carrier that can provide full replacement competition against UP at Laredo, maintaining BNSF's access to Laredo at competitively reasonable rates is critical for ensuring effective competition for shippers.

As Mr. Rickershauser states, since the Board's decision in the UP/SP merger:

> BNSF has demonstrated that it can provide effective competitive discipline to UP for traffic destined for the Laredo and Brownsville gateways. Developing that level of competition, though, has required substantial investment on the part of BNSF throughout its network to support Mexican business flows and provide competitive, marketable service offerings for shippers, and has required BNSF to leverage all of its competitive advantages, from its broad geographic reach and extensive interline connections to its dedicated drive to achieving efficiencies and reducing shipping costs. In addition, BNSF's ability to provide effective competition to UP depends on the provision of commercially reasonable rates and services by both the Tex Mex and TFM, and its ability to continue to provide shippers with that competition is dependent on the continuation of such rates and services.

Rickershauser V.S. at 9. Unless BNSF continues to receive commercially reasonable rates and service from both Tex Mex and TFM, the proposed transaction could jeopardize the progress BNSF has made in providing customers relying on it a competitive alternative to UP.

II. ABSENT AN OPEN GATEWAY CONDITION, THE PROPOSED TRANSACTION MAY REDUCE COMPETITIVE OPTIONS AT LAREDO

Absent the imposition of an open gateway condition, the new NAFTA Rail could impose competitive restraints that would reduce competitive options at Laredo and Brownsville. KCS' control over both Tex Mex and TFM would give KCS numerous opportunities to restrict competition through the Laredo gateway, and KCS' comments in this proceeding and its past conduct suggest that the new NAFTA Rail may well avail itself of its options.

First, the new NAFTA Rail will have multiple options for restricting competition through the Laredo gateway. As stated in Mr. Rickershauser's Verified Statement, KCS could discriminate against its competitors in the following ways:

- KCS could raise rates at Robstown for any traffic going over Tex Mex unless it originates from the KCS system or is routed to give KCS its longest haul.
- KCS could raise rates at Laredo for any traffic going over TFM that again does not originate from the KCS/Tex Mex system or does not give the system its longest haul.
- KCS could discriminate against competing carriers on TFM by charging higher bridge fees or by reducing the crossing access that it would charge itself.
- KCS could cause TFM and Tex Mex to discontinue providing value-added services (such as blocking traffic, providing equipment or providing intermodal service) to KCS' competitors, preventing those carriers from offering fully-competitive services.

Rickershauser V.S. at 11.

Second, based on its filings to date and from its past conduct, KCS has effectively acknowledged that it intends to raise rates on BNSF traffic over Tex Mex. In their Application to the Board, the Applicants stated that they may not renew "agreements that would not provide adequate revenues to a combined KCSR/Tex Mex

system." Application at 27, n.19. The BNSF/Tex Mex 1998 interline divisional agreement, which is up for renewal at the end of 2003, appears to be one of the contracts to which the Applicants refer. Further, as KCS stated in response to a discovery request, KCS has told BNSF that it "need[s] to improve the overall revenue/expense ratio for Tex Mex of handling BNSF traffic after expiration of current BNSF-Tex Mex agreements."[6]

KCS' diversion analysis confirms KCS' intent to divert traffic from BNSF, even if that diversion results in inefficient routings of rail traffic. The only way that KCS could achieve such inefficient diversions would be to impose restrictions on BNSF that prevent it from remaining an effective competitor for the traffic. KCS anticipates that its control over Tex Mex alone – without considering the future impact of KCS' control over TFM – will result in the diversion of 4,725 rail cars from BNSF to KCS, which represents almost 10% of BNSF's traffic through Brownsville and Laredo. Rickershauser V.S. at 16. Two-thirds of that traffic will be diverted from a BNSF interchange with Tex Mex at Robstown or Corpus Christi to an interchange with KCSR at Kansas City, and in most cases, the new diverted route is longer than the existing BNSF-Tex Mex route. KCS provides no analysis of which shippers are presumed to choose this new route or on what basis KCS assumed that the traffic would divert to KCS.

Similarly, KCS indicates that it will divert 10% of BNSF's traffic from Brownsville to Laredo, even though the vast majority of that traffic is destined to points just across

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[6] Supplement to the Kansas City Southern Railway Company's and the Texas Mexican Railway Company's Responses and Objections to Union Pacific Railroad Company's Third Set of Discovery Requests to Applicants, Supplemental Responses, served July 23, 2003, Request No. 26, at p. 2.

the border at Brownsville. Presumably, KCS intends to reroute the traffic through Laredo, south over TFM to Monterrey, and then back north to the border town of Matamoros, Mexico. It is highly unlikely that such inefficient re-routings would result from customer preference, and the only inference must be that KCS intends to impose that rerouting based on discriminatory pricing and service to BNSF.

III. KCS' TRAFFIC DIVERSIONS COULD DRIVE SHIPPERS TO USE LESS EFFICIENT ALTERNATIVE ROUTINGS AND THEREBY REDUCE OVERALL RAIL COMPETITION

Unless properly conditioned, the proposed transaction threatens to injure shippers in two ways. First, because the combined NAFTA Rail will have the ability and incentive to divert traffic to its routes in the U.S., and because of inefficiencies in many of those routes, shippers may be forced to use longer, slower, less efficient service for rail transportation through Laredo and Brownsville. Second, to the extent that NAFTA Rail succeeds in diverting traffic from BNSF and reduces BNSF's long-term competitiveness through Laredo and Brownsville, the transaction may lessen the competitive options open to many shippers who ship goods through those gateways. Such a lessening of competitive options threatens to undo the benefits that resulted from the Board's conditions imposed on the UP/SP merger.

KCS' potential traffic diversions may injure shippers by forcing them to use less efficient alternatives to reach Mexico. As discussed in the Verified Statement of Mr. Rickershauser, the KCS-Tex Mex route to Laredo is less direct than the BNSF-Tex Mex route for at least two reasons. First, "Tex Mex's trackage rights between Houston and Robstown require trains to travel 286 miles. Rather than following the coastline as BNSF's trackage rights do, Tex Mex must travel due west to Flatonia from Houston, before heading south to Robstown through Placedo." Rickershauser V.S. at 12. This

diversion is 23% longer than BNSF's route between Houston and Robstown. *Id.* Second, due to BNSF's diversity of routing options, BNSF offers a more direct route to Laredo from most major interline junction points across the U.S. In fact, KCS' routes from major cities to Laredo are anywhere from 3% to 44% longer than the comparable route for BNSF. *See* Mileage Comparison Chart attached as Exhibit 2 to Mr. Rickershauser's Verified Statement.

Of course, in the delivery of most products, "time is money, and slower service is a significant disadvantage" to shippers. *See* Letter from Louis R. Mastandrea, Unimin Corporation, to Secretary Williams, dated July 23, 2003 ("Mastandrea Letter") at 2. As shippers have made clear in their submissions to the Board, one of their "primary concerns in transporting . . . products to Mexico is transit time." Letter from Gary Kidwell, AK Steel Corporation, to Secretary Williams, dated July 25, 2003 ("Kidwell Letter") at 2.[7] The delays imposed by forced diversions to KCS' lines would likely make KCS' service uncompetitive for much traffic going to Mexico, particularly grain, motor vehicle and auto parts, and intermodal traffic, which collectively account for almost half of BNSF's traffic. Rickershauser V.S. at 5-7.

The forced diversion of traffic to KCS would further injure shippers because KCS cannot offer the range of services that BNSF can offer. While "BNSF moves over 3

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[7] Mr. Kidwell further explained: "AK Steel is concerned that once the formation of the NAFTA Railway is completed, TFM will favor traffic that originates on its affiliated companies, i.e., KCS and TexMex, over interchange traffic received from UP or The Burlington Northern & Santa Fe Railway Company ("BNSF"). If such discriminatory practices occur, there would be a detrimental impact on cycle times, which in turn would greatly impact AK Steel's ability to obtain reliable and efficient transportation service into Mexico." Kidwell Letter at 2.

million intermodal shipments per year, KCS moves comparatively few." Rickershauser V.S. at 13. KCS' smaller scale results in less equipment availability, which limits KCS' ability to offer credible competitive service to large shippers. *Id.* Further, with only 3,130 route miles of track, KCS is not able to offer the geographic scope of service that BNSF can offer given its 33,000 route miles. This further limits KCS' ability to offer credible service to shippers seeking a comprehensive, single-source provider of rail transportation.

Since the Board's decision in the UP/SP merger granting BNSF trackage rights over UP, BNSF has achieved a toehold as an effective competitor to UP for Mexico traffic. As stated earlier, becoming an effective competitor in the Texas/Mexico corridor through Laredo has required substantial investment on the part of BNSF – over $20 million in marketing alone. It has also required BNSF to aggressively work with Tex Mex and TFM to create value-added services like Mexi-Modal and to improve overall efficiency by blocking of northbound rail traffic and other efficiency improvements. This transaction could threaten to undo BNSF's hard work, reducing the competitive options to shippers.[8]

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[8] For example, NAFTA Rail's projected traffic diversion threatens to reduce by almost 20% the traffic gains made by BNSF in the six years since the Board's UP/SP decision. That reduction in traffic density "would squeeze BNSF's margins and could force BNSF over time to rationalize the frequency of the train service that it offers." Rickershauser V.S. at 14. Over the long run, faced with competitor control over both Tex Mex and TFM, potentially unable to offer value-added services or to negotiate efficiency-enhancing cooperative agreements, and faced with potentially discriminatory rate-setting for traffic to Mexico, BNSF may be forced to reduce its overall marketing expenditures and customer-driven infrastructure improvements for traffic over the Laredo and Brownsville gateways. *Id.* Such a reduction in service would clearly adversely affect shippers.

KCS will not be able to replace BNSF as the primary competitive alternative to UP. Contrary to assertions recently made by KCS, the Board envisioned BNSF serving as the principal competitive replacement to UP through Laredo. Decision No. 44 at 422. Over the past six years, BNSF *has been* the primary competitive alternative to UP for good reason. First, KCS' routes are longer even than BNSF's routes from most points. Given the difficulty BNSF has competing with UP's more direct routes, KCS would be at an even greater disadvantage. Second, KCS does not offer the same geographic scope of single-line service that BNSF or UP can offer, making KCS less attractive to shippers with multiple origination points. Rickershauser V.S. at 13-14; Reishus V.S. at 12.

Contrary to the assertions of some, other Mexican gateways do not offer a competitive alternative to Laredo and would not be able to ensure competitive discipline on UP if the transaction undermined BNSF's competitiveness at Laredo. First, none of the other gateways (Brownsville, El Paso or Eagle Pass) has the physical infrastructure that is in place at Laredo, and, as a result, dramatically increased shipper volumes moving through these international gateways would strain existing capacity, resulting in delays for existing as well as rerouted traffic. Second, El Paso and Eagle Pass are out of route for most eastern shippers who ship through Laredo, adding further inefficiency at those gateways. Third, because El Paso and Eagle Pass gateways provide interchange with Ferrocarril Mexicano, S.A. de C.V. ("FXE") rather than TFM, any shipment through those gateways for destinations served by TFM would require an extra interchange within Mexico at best, if such a routing would be feasible or available. Moreover, because "in practice, FXE cannot serve most shippers and receivers on

TFM's line," those gateways are ineffective as alternatives to Laredo. *See* Rickershauser V.S. at 18.[9] Finally, besides the fact that BNSF's only connection into Mexico at Brownsville would be over the KCS-controlled TFM, Brownsville cannot serve as a replacement to Laredo because the infrastructure of the track between Matamoros and the TFM main line cannot accommodate the traffic that moves through Laredo, and because that route is longer and slower than a comparable shipment through Laredo for most TFM points. *Id.*[10]

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[9] Mr. Rickershauser's conclusion is confirmed by Mr. Mastandrea's July 23, 2003 letter to Secretary Williams. There, he notes that a routing via FXE over Eagle Pass has several "significant disadvantages".

> First, it is more circuitous, which means that shipments will take longer and cost more. Second, shipments from the United States move much more quickly through Laredo than through Eagle Pass (or Brownsville, for that matter) because there has been much more investment at Laredo. In this business, time is money, and slower service is a significant disadvantage. Similarly, because ball clay moves in carloads instead of unit trains, the less frequent service on the Eagle Pass-FXE route is also a disadvantage. Since the Eagle Pass-FXE route is used much less intensively than the Laredo Bridge, it takes longer on the FXE routing to assemble a trainload of empty cars to return from Mexico to the United States, thus further slowing the cycle time and increasing costs.

Mastandrea Letter at 2-3.

[10] Truck and water competition also cannot serve as an effective replacement for open rail gateways. Although KCS suggests in its control application (at 27-28) that truck competition obviates the need for conditions, KCS' witness Curtis Grimm took the opposite position in his testimony on behalf of Tex Mex when Tex Mex was seeking trackage rights conditions over UP in 1996. *See* Verified Statement of Curtis M. Grimm, filed March 29, 1996, in Finance Docket No. 32760 (Sub-No. 13) (excerpted at Exhibit 2 to Reishus V.S.). There, he stressed that "[a]lthough truck and water play an important role overall in transportation of goods between U.S. and Mexico, many shippers of many commodities are dependant upon rail competition for competitive transportation (cont'd)

IV. IMPOSITION OF AN OPEN GATEWAY CONDITION IS AN APPROPRIATE REMEDY TO BE IMPOSED BOTH AT ROBSTOWN AND AT BROWNSVILLE AND LAREDO

A. An Open Gateway Condition Is Consistent With The Board's Decision In Ex Parte No. 582 (Sub-No. 1) As Well As KCS' Position In That Proceeding

In Ex Parte No. 582 (Sub-No. 1), the Board recognized that existing major gateways should be kept open in future mergers and that such gateways need to be open both physically and economically. As part of its rationale for so holding, the Board recognized that most inefficient gateways have either been closed or move only minimal traffic, and it noted the broad support expressed for preserving major existing gateways. June 11 Decision at 25-26. Accordingly, the Board stated that it would "require applicants to present an effective plan to keep open major existing gateways" and would "impose conditions on any transaction that [it approves] to ensure that result." *Id.*

Moreover, an open gateway condition is consistent with the position that KCS took in the Ex Parte No. 582 (Sub-No. 1) proceeding, where it insisted that all existing competitive shipper rail options should be preserved in future merger or control

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(... cont'd)

options." *Id.* at 128-29. The United States Department of Agriculture ("USDA") has suggested here that grain and grain products may be uniquely susceptible to truck and water competition, *see* USDA Comments filed July 25, 2003, but Dr. Grimm in 1996 pointed to the USDA's own reports to demonstrate the ineffectiveness of truck and water alternatives as substitutes for long-haul rail transportation. Reishus V.S. at 15, n.20. Indeed, if the Board had believed that truck and water competition could act as effective replacements for rail competition through Laredo and Brownsville, there would have been no need for it to condition its approval of the UP/SP transaction on access for both BNSF and KCS to Laredo and for BNSF to Brownsville.

transactions.[11] Particularly given that the Board has already acknowledged that the proposed merger between KCS and TFM would fall under the new merger rules but for the fact that TFM is across the Mexican border, application of the open gateway principle is appropriate here as well.

B. An Open Gateway Condition Is Consistent With Conditions Imposed In Other Control Proceedings

In addition to being a part of the new merger process applicable to Class I railroad mergers, the imposition of open gateway requirements has become the norm in rail control transactions to which the new regulations have not applied. In the CN/IC transaction[12] (which preceded the new rules), the Board imposed a condition requiring that the merging parties keep the Chicago gateway between CP and IC open and competitive. This condition was imposed despite the recognition of CN/IC's stated economic incentive and intent to keep that gateway open and competitive.

Similarly, in a 2001 control transaction between a Class I railroad, Canadian National, and a Class II railroad, Wisconsin Central, the Board imposed conditions to "keep all existing active gateways affected by the Transaction open on commercially reasonable terms."[13] The CN/WC transaction, like the one at issue here, was classified

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[11] *See* "Seven Modest Adjustments Toward Better Balance in Rail Mergers", KCS (Aug. 3, 2000) at 5 ("the Board's guiding principle in any future merger proceeding should be to preserve rail service options available to shippers."). *See also* KCSR ANPR Comments at 14 ("it should be the policy of this Board to preserve the few remaining competitive rail options").

[12] *Canadian National Railway Co. – Control – Illinois Central Corp.*, Finance Docket No. 33556.

[13] *Canadian National Ry. Co. – Control – Wisconsin Central Transp. Corp.*, Finance Docket No. 34000, Decision No. 10 (served September 7, 2001), at 28.

as a "minor transaction". As a mechanism to fulfill the open gateway requirement, CN/WC entered into an agreement with NIT League that required the establishment and maintenance of commercially reasonable contract through rates on all its active gateways; that restricted any increase in their portion of common carrier through rates for five years to a measure of RCAF-U; and that precluded the closure of any active interchange after the five-year period by any commercially unreasonable means.

As Dr. Reishus explains in his Verified Statement, these modern gateway commitments are easily distinguished from the anticompetitive and discredited "DT&I conditions" that the Interstate Commerce Commission routinely imposed in the past.[14] Dr. Reishus explains:

> The DT&I conditions, which rigidly froze in place rates and interchanges as part of merger approval, were imposed on an overly regulated rail industry in desperate need of network rationalization and effectively required that rates be frozen indefinitely over routes and interchanges, no matter how circuitous, insignificant, or inefficient. The DT&I conditions functioned as an anticompetitive barrier to necessary rationalization of the rail industry. By contrast, the current gateway requirements are focused on specific significant gateways, impose specific rate caps for only limited terms (five years) subject to cost-related increases, and require only that the gateway be open on commercially reasonable terms thereafter. The commitments do not preclude procompetitive rate reductions in response to changing marketplace conditions. Rather, these gateway requirements provide a competitive transition for shippers in the face of the loss of a neutral connection and provide a regulatory backstop to actions of the newly merged parties.

Reishus V.S. at 21.

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[14] *Detroit, Toledo & Ironton R.R. Co. Control*, 275 I.C.C. 455, 492-93 (1950).

C. An Open Gateway Condition Is Necessary To Preserve BNSF's Ability To Offer Effective SP Replacement Competition

At the time of the UP/SP decision, Tex Mex was an independent rail carrier, with barely enough traffic to sustain its own business. "Because of the UP/SP merger agreements and conditions, Tex Mex became a neutral, independent bridge carrier capable of interlining with both BNSF and KCSR in competition with UP for traffic to and from the Laredo gateway." Reishus V.S. at 10. There was no reason to believe that Tex Mex might have an incentive to artificially discriminate between its rail connections. Further, the Mexican railroad network was operated by the Mexican government, and, although privatization was on the horizon, "[i]t was anticipated . . . that the resulting privatized Mexican rail companies would provide neutral, competitive access to shippers in Mexico and for international traffic from the U.S." Reishus V.S. at 17. In fact, the past and current TFM management practice has been one of neutrality generally over the Laredo gateway for U.S. carriers, unless one carrier offered a specific and differentiated market product not provided by the other U.S. carriers which provided benefits to TFM and TFM customers meriting differential treatment. Examples of this neutral, pro-competitive behavior by TFM include:

- TFM has entered into partnerships with all three connecting railroads, UP, BNSF, and KCS, to offer intermodal service between the U.S., Canada and Mexico;

- TFM has collaborated with BNSF (and Tex Mex) to improve service to Mexico, for example, by increasing the efficiency of unit grain trains and by improving through train efficiency;

- TFM has built and subsequently upgraded key facilities to improve the handling of U.S.-Mexico traffic, such as the Sanchez yard at Nuevo Laredo, which benefits all U.S. railroads serving U.S. Mexico traffic.

Reishus V.S. at 18.

With KCS' control over Tex Mex and TFM, this state of neutrality could well change. Because BNSF's ability to compete with UP for Mexico traffic depends on offering its customers door-to-door transportation packages – including competitive rates, service, equipment quality and information exchange – any negative change to Tex Mex's and TFM's neutral stance condition could reduce BNSF's ability to serve as an effective competitor. It bears emphasizing that BNSF's ability to meet customer needs depends on competitive rate and service offerings from both Tex Mex and TFM. UP already has a well-established route to Laredo, with considerable mileage advantage compared to BNSF's route, so BNSF's ability to compete is driven by providing value-added solution services. If Tex Mex and/or TFM are no longer neutral, and do not cooperate in providing value-added services, BNSF's ability to meet its customers' needs and compete with UP will be substantially diminished. Rickershauser V.S. at 16.

Mr. Kidwell of AK Steel expressed this concern in his letter to Secretary Williams.

> In addition, AK Steel is concerned that the formation of the NAFTA Railway could impact on the ability of competing carriers to provide service to Mexico on commercially reasonable terms. As noted above, AK Steel currently has a variety of alternative transportation routings that it can use to transport its products to Mexico. The combination of KCS/TexMex/TFM, however, presents an incentive for TFM to favor KCS/TexMex to the detriment of other carriers, like UP and BNSF, that connect with TFM at the Laredo Bridge. In so doing, TFM can exercise bottleneck control to assure that AK Steel's only transportation options will be those involving the NAFTA Railway. Such practices would greatly limit UP's and BNSF's ability to provide competitively priced service for AK Steel's transportation needs to the Mexican gateway.

Kidwell Letter at 2. *See also* Letter from Jose Robles, Kimberly-Clarke de México, S.A. de C.V., to Secretary Williams, dated July 8, 2003 (the Board should ensure "that NAFTA Rail is prevented to discriminate [sic] against shipments delivered to Laredo by other carriers on both sides of the border"); Letter from Edwin E. Vigneaux, Reagent Chemical & Research, Inc., to Secretary Williams dated July 10, 2003, at 1 ("We believe the only way to achieve [open competition at the Laredo Gateway] is for the NAFTA carriers to keep this gateway open on commercially reasonable terms.").

KCS is not an adequate replacement for BNSF and could not replicate the competition that SP provided to UP before that merger. KCS' network size and scope do not match SP's scope before the merger, and certainly do not match the size and scope of BNSF's network or UP/SP's network after the merger. BNSF's network, on the other hand, closely matches UP's in territorial coverage and connections and is the only network even close to matching UP/SP in combined origin/destination territories. KCS' network is particularly deficient in comparison to BNSF's connectivity to railroads in the eastern and northern United States and Canada. Rickershauser V.S. at 19.

D. An Open Gateway Condition Should Provide For A Transition Period Which Continues Existing Rates

In imposing an open gateway condition on the KCS/Tex Mex transaction, the Board should provide a transition mechanism to ensure that there are no significant market dislocations during the implementation period. Such a transitional time period would permit the development of effective interline routing and commercial relationships in light of the transaction. As Dr. Reishus states in his Verified Statement:

> Application of open gateway conditions on the Laredo and Brownsville gateways that limits increases in rates over a fixed period, such as five years, is a reasonable public policy accommodation to preserve competition and shipper

> options. The interchanges . . . are obviously major, efficient interchanges that experience growing traffic levels; there is no risk that inefficient routings will be preserved in the foreseeable future. As recent merger proceedings prior to this one show, these rate and service restrictions have been offered, negotiated, or imposed by or on the merging parties in a manner that has been acceptable to the parties. These restrictions do not appear to have diminished the efficiency gains that the mergers generate nor do they appear to have deterred the merging parties from completing their transactions and capturing these gains. The Applicants have provided no evidence of any harm that would result from the preservation of existing competitive conditions for a limited period of time that would outweigh the protection that they provide to competition and shippers.

Reishus V.S. at 26-27.

E. The Board Has Jurisdiction to Impose Open Gateway Conditions At Laredo And Brownsville For Cross-Border Traffic

Although KCS agreed at the Board's July 31st hearing to the imposition of open gateway conditions at Laredo and Brownsville, it previously suggested in the Supplement to Application, filed June 23, 2003, that the Board would have no jurisdiction to impose conditions that would implicate its plan to acquire control of TFM. KCS Supplement at 3 n.2. Because open gateway conditions at Laredo and Brownsville would necessarily implicate KCS' plan to acquire control of TFM – indeed, open gateway conditions are required at Laredo and Brownsville precisely because of KCS' plan to acquire control of TFM – KCS' jurisdictional objection to such conditions may now be moot. Nevertheless, to avoid any doubt regarding the Board's authority to impose such conditions, a brief review of the legal basis for that authority is set forth below.

First, no one disputes that the Board has jurisdiction over KCS and Tex Mex or that the Board can impose conditions in the U.S. public interest on KCS' acquisition of

control of Tex Mex. *See* 49 U.S.C. § 11324(c); 49 C.F.R. § 1180.1(d). Furthermore, there is no doubt that the Board's jurisdiction extends not only to domestic rail traffic but also to traffic moving between the U.S. and a foreign country. *See* 49 U.S.C. § 10501(a)(2)(F). In fact, it was specifically because of the Board's concern that competition be maintained for cross-border traffic moving between the U.S. and Mexico through Laredo and Brownsville that the Board in the UP/SP proceeding conditioned that transaction on BNSF's obtaining access to Laredo and Brownsville to act as a competitive counterweight to UP for that traffic. KCS too owes its access to Laredo to the conditions imposed by the Board in that proceeding to maximize competition for U.S.-Mexican traffic.

Second, KCS' plans to acquire control of TFM and integrate it into NAFTA Rail are closely related to its acquisition of control of Tex Mex. This is not a situation, like KCS' acquisition of the Panama Canal Railway Company, where there is no connection between the transaction before the Board and a transaction in another country. KCS' planned TFM acquisition is part and parcel of KCS' NAFTA Rail plan. Most of the traffic that moves over Tex Mex today is bridge traffic that is terminated or originated by TFM. KCS has made clear that it expects to use its integrated NAFTA Rail system to divert traffic that currently moves via BNSF-Tex Mex-TFM or UP-TFM through Laredo and BNSF-TFM or UP-TFM through Brownsville to KCS-Tex Mex-TFM routings. Whether those diversions occur because KCS' integrated system offers better service and rates or because KCS uses its control of Tex Mex and TFM to foreclose BNSF and/or UP depends on whether the Laredo and Brownsville gateways truly remain open, both physically and economically. Arguably, how KCS uses its control of TFM is even more

important than how it uses its control of Tex Mex, because TFM is the only carrier carrying traffic to and from Mexico from both Laredo and Brownville.

The STB need not be concerned that it is being asked to "regulate" in a foreign country. The issue here is not intra-Mexican traffic. The issue here is cross-border traffic moving between the U.S. and Mexico – in which the U.S., its shippers, and its railroads have a vital interest. The Board made clear in Ex Parte No. 582 (Sub-No. 1) that the public interest is served when major gateways remain open in the wake of a merger, and this includes major international gateways. June 11 Decision at 25-26. While Mexican or Canadian law may also have a role to play in keeping those gateways open, the Board must make its own judgment about the conditions that are appropriate to protect U.S. commerce when railroads seeking approval for transactions involves cross-border traffic. Reishus V.S. at 22-25. In fact, in UP/SP, the Board emphatically rejected the suggestion from KCS that cross-border traffic with Mexico involved foreign policy considerations that were beyond the Board's jurisdiction: "We reject KCS' various challenges to our jurisdiction and to the manner in which this proceeding has been conducted. Our jurisdiction extends to rail traffic moving in foreign commerce." Decision No. 44 at 464.

More recently, in Ex Parte No. 582 (Sub-No. 1), the Board rejected arguments that it could not require the submission of information from merger applicants regarding the impact of their foreign operations on U.S. commerce. June 11 Decision at 46-47. In fact, the Board specified in its new merger rules:

> All applicants must submit "full system" competitive analyses and operating plans – incorporating any operations in Canada or Mexico – from which we can determine the competitive, service, employee, safety, and environmental

> impacts of the prospective operations within the United States . . . . [49 C.F.R. § 1180.1(k)]

Thus, there is no doubt that an applicant before the Board can be required to make known its plans for cross-border operations and that the Board can condition the proposed transaction and any affiliated transactions so as to protect U.S. interests.

Third, the Board has jurisdiction to protect its own conditions. In UP/SP, in order to protect U.S. interests in cross-border traffic, the Board imposed as a condition on the transaction that BNSF be given access to Brownville and, via Tex Mex, to Laredo. It also gave KCS access via Tex Mex to Laredo. At the time, both TFM and Tex Mex were independent carriers and could be expected to set reasonably competitive rates in connection with BNSF. There was no apparent need to impose open gateway conditions. Even so, after BNSF had negotiated an agreement with Tex Mex in 1998, it was stymied for some time in obtaining a final agreement. Because of the Board's continuing oversight of the UP/SP transaction, BNSF had an avenue for relief from the Board. If KCS obtains control of both Tex Mex and TFM, it will be in a position potentially to interfere with BNSF's ability to continue to provide efficient cross-border service via Laredo and Brownsville. BNSF would certainly hope to avoid any need to approach the Board to resolve any dispute about gateway closure which became intractable, but if a proceeding became necessary, there can be no doubt that the Board would have jurisdiction to enforce the conditions it imposed in UP/SP and require KCS to permit its controlled affiliates to continue commercially reasonable rates and practices with BNSF.

Finally, it bears emphasizing that the Board's authorization of a control transaction is permissive. If the parties seeking that authorization do not wish to comply

with the conditions that the Board sets in the public interest, they need not consummate the transaction. Thus, if KCS did not expect an open gateway condition to be imposed at Laredo or Brownsville and did not wish to comply with such a condition, it would not have to proceed with its acquisition of control of Tex Mex. In this case, of course, KCS has confirmed that it anticipated such a condition and has already agreed to its imposition. Even were it not estopped from challenging the Board's jurisdiction, however, it could not reasonably complain that it should not be required to comply with open gateway conditions as a prerequisite to the consummation of its NAFTA Rail plans.

CONCLUSION

For the reasons set forth above, BNSF respectfully submits that, should the Board find that the proposed KCS/Tex Mex control transaction is in the public interest and determine to approve the transaction, then it should condition its approval of the transaction by requiring the Applicants to maintain the existing Tex Mex and TFM rates and services presently available for service in conjunction with BNSF for a temporary five-year period, subject to RCAF-U increases, and to provide commercially reasonable rates and services thereafter subject to the jurisdiction of the Board. The imposition of such a condition to maintain open gateways at Robstown, Laredo and Brownsville on a "commercially reasonable" basis would provide shippers and connecting carriers a safety net and regulatory jurisdictional backstop if the market did not function to preserve and permit the use of efficient routings in the future if and when problems

developed. It would do so without unduly affecting the Applicants' ability to offer shippers the benefits of the proposed transaction.

Respectfully submitted,



Jeffrey R. Moreland
Richard E. Weicher
Sidney L. Strickland, Jr.
Michael E. Roper

The Burlington Northern
and Santa Fe Railway Company
2500 Lou Menk Drive
Third Floor
Fort Worth, Texas 76131-0039
(817) 352-2368

Erika Z. Jones
Robert M. Jenkins III
Adrian L. Steel, Jr.
Reginald R. Goeke

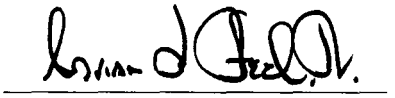
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Attorneys for The Burlington Northern and Santa Fe Railway Company

Dated: August 4, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all parties of record in Finance Docket No. 34342 by first-class mail or a more expeditious manner.



VERIFIED STATEMENT
OF
PETER J. RICKERSHAUSER

My name is Peter J. Rickershauser. I am the Vice President of Network Development for The Burlington Northern and Santa Fe Railway Company ("BNSF"). My business address is 2650 Lou Menk Drive, Fort Worth, TX 76131.

The purpose of this Verified Statement is to set forth BNSF's position on the control transaction proposed by KCS and Tex Mex. BNSF wants to support KCS in its NAFTA Rail transaction. BNSF's interest in the transaction and the overall KCS/Tex Mex/NAFTA Rail transaction is to ensure that rail shippers throughout the United States, Canada and Mexico who rely on BNSF to provide them access to south Texas and Mexico markets and customers are not competitively worse off as a result of the tandem NAFTA Rail transactions. The pledges and other commitments which KCS has made to the Board address many of BNSF's concerns, and, as a result, BNSF supports the proposed transactions subject to the acceptable clarification of KCS' pledges and to their inclusion as conditions on the Board's approval of the transaction in this proceeding.

BNSF believes that, in reviewing the transaction, the Board should address the unique aspects of the transaction by ensuring that KCS, Tex Mex, and TFM maintain open gateways through Laredo and Brownsville and by requiring specificity to KCS' pledges that "it will keep the Laredo gateway open on commercially reasonable terms," that KCS will "continue to cooperate with UP, [and] BNSF . . . on interline services," that "KCS [will] honor the terms of all marketing and pricing agreements involving Tex Mex and TFM . . . to their full term and will not seek to cancel them early," that "[a]ll carriers will be treated fairly at the Laredo bridge," and that "[t]here will not be significant changes in operations and safety will remain a top priority."

Verified Statement of Gerald Davies, Supplement To Application, filed June 23, 2003 ("Davies V.S."), at 14-17.

BNSF is in the unique position of having, unlike UP, to rely on Tex Mex interchange service over Corpus Christi and Robstown, TX to reach the Laredo gateway, thus involving two additional significant interchange points for rail customers in south Texas as well as Mexico to be considered in any discussions involving gateways. BNSF understands KCS' plans to use the NAFTA Rail system to "help secure the financial stability of Tex Mex," bring investment to the Tex Mex system, and generally improve operations and capacity across the Tex Mex network which BNSF and our customers rely on for south Texas and Laredo access. But, while the Applicants have pledged to "keep the Laredo Gateway open on commercially reasonable terms," *Id.* at 15, they have not given the type of detailed, written assurances that are needed to ensure the shipping public that the Applicants will provide commercially reasonable rates to BNSF between Laredo and Robstown, and that the new NAFTA Rail will provide competitive rates and service for BNSF traffic moving via Laredo and Brownsville to and from customers and points accessed by TFM in Mexico. Such commitments are needed in this case to ensure that shippers relying on BNSF to access markets in south Texas served by Tex Mex and Mexico served by TFM are not injured and to ensure that BNSF can continue to serve as an effective competitive replacement for SP vis-à-vis UP, as envisioned under the UP/SP merger conditions.

BACKGROUND AND QUALIFICATIONS

I joined BNSF in October 1996, as Vice President, Marketing, UP/SP Lines. Subsequently, I served as Vice President, Marketing for the UP/SP Lines and the Mexico Business Unit. In those positions, I was responsible for, among other things, coordinating the marketing and implementing of the new service opportunities that BNSF offers to shippers as a

result of the merger of UP and SP, and for coordinating the marketing and service offer for BNSF's Mexico service. Because of my experience in those positions, I am intimately familiar with the market and competitive conditions affecting rail transportation in southern Texas and Mexico.

Prior to joining BNSF, I was Vice President, Sales, with SP in Denver, Colorado, where I directed SP's field carload sales force in the United States and Canada. From 1991 to 1995, I was Managing Director, Regional Sales-Midwest, in Lisle, Illinois, for SP. Prior to that, I spent nine years in various sales and marketing management positions with Norfolk Southern Corporation, seven years in various sales management positions with Norfolk & Western Railway Company, and three years in track maintenance and transportation assignments with several predecessors of Conrail. As a result of my extensive sales, marketing, and transportation experience, I have gained detailed knowledge of the needs of customers and how railroads can meet those needs.

In my current position as Vice President of Network Development, I focus on developing BNSF's rail network to better meet the needs of BNSF's shipper customers. In this capacity, I have acquired substantial knowledge of the strengths and weaknesses of BNSF's rail network and of the networks of our connecting carriers and competitors.

I. BNSF'S COMPETITIVE SERVICE OFFERING IN SOUTHERN TEXAS AND MEXICO

Since the Board's decision in the UP/SP merger proceeding granting BNSF trackage and haulage rights to reach Mexican markets via border crossings points including those in Brownsville and Laredo, TX, effective in September, 1996, BNSF has worked aggressively to expand our Mexican commercial presence on both sides of the international border and to develop an effective competitive offering for customers' traffic bound to or from Mexico

through the Laredo and Brownsville, as well as other gateways. In the past six years, BNSF has invested over $20 million marketing BNSF's service to and from Mexico. Since 1996, BNSF has:

- Increased its annual marketing expenditures for Mexican traffic by over 1000%;
- Identified over 2,000 Mexican rail customers for which BNSF can provide connecting international rail transportation;
- Added 7-10 additional trains each way per week over the BNSF-Tex Mex line compared to what BNSF previously routed via SP-Tex Mex;
- Developed value-added services, such as Mexi-Modal (a door-to-door intermodal service including CN and CSX railroads) and Mexi-Rail (an integrated dock-to-dock carload service);
- Developed efficient unit grain train services in partnership with TFM by focusing on total cycle times for rail cars;
- Helped Mexican customers finance and build track expansions at their facilities on TFM to encourage business to shift to rail;
- Partnered with Tex Mex and TFM to improve through train efficiency by managing the "Despacho Previo" (border customs clearance) process, as well as participating in train pre-blocking to reduce handlings northbound and southbound on BNSF, Tex Mex and TFM;
- In coordination with other carriers and service providers, developed the ability to deliver "one-stop shop" products and services.

Through BNSF's aggressive marketing, its increased service, and its value-added offerings, BNSF increased its Laredo traffic by 87% from 1996 to 2002, making it, as validated by KCS in its control application (at 77), "Tex Mex's primary interchange partner, with 35,000 carloads of forwarded and 10,000 cars of received traffic in 2001." In 2002, BNSF carried almost 40,000 cars of traffic to and from the Laredo gateway. *See* Exhibit 3. BNSF has also increased traffic over its Brownsville route by 250% over the 1996-2002 time period, with over 10,000 cars exchanged at the Brownsville gateway in 2002. This competition by BNSF has

imposed a competitive discipline on UP, which is reflected by the fact that UP's average rate over Laredo did not increase at all during the period 1997 to 2001. UP Fifth Annual Oversight Report in F.D. No. 32760 (Sub-No. 21) (UP/SP 384) (July 2, 2001) ("2001 Oversight Report"), at 111.

The significance for rail freight transportation service providers to reach and maintain access to the Laredo gateway for NAFTA flows cannot be understated. For 2001, fully 75% of all rail shipments between the U.S. and Canada to and from Mexico passed through the Laredo gateway over either UP or Tex Mex. As KCS stated in its control application, "Laredo has long been the principal rail gateway between the U.S. and Mexico. This fact is due to Laredo's superior infrastructure, such as customs brokers, and its location on the shortest route between many U.S. and Mexican origins and destinations, particularly between major Mexican industrial and population centers and the Midwest and Eastern U.S." Application, filed May 13, 2003 at 84.

As detailed in Exhibit 1, BNSF's traffic through Laredo and Brownsville is primarily in four commodity categories of traffic: agricultural goods, industrial materials, motor vehicles and auto parts, and intermodal traffic. A brief description of that traffic follows.

Agricultural Products. Over a third of BNSF's Laredo traffic is grain traffic and over 80% of BNSF's Brownsville traffic consists of grain and grain products, much of which is consumed by customers in Matamoros, directly adjacent to Brownsville. Because grain is a commodity product, customers are particularly sensitive to changes in shipping costs. BNSF's customers include both grain suppliers in the U.S. that need the least-cost/highest service/most efficient route for distributing their grain, and Mexican grain purchasers that need access to a broad number of U.S. grain suppliers to ensure competitive grain delivery economics.

Competition for this business includes other railroad combinations, other commodities and geographic areas, and, to an extent, other transportation modes, including water-borne and truck. BNSF has addressed competitive issues in a number of ways, including extending our high service and efficient 110 car grain shuttle network in partnership with Tex Mex and Mexican rail carriers to a growing number of new and expanded shuttle facilities within Mexico. Because of BNSF's efficient routes, extensive interline connections, added services, and broad geographic reach in grain production areas across the western United States, BNSF has been able to increase its agricultural traffic to Mexico via Laredo by 258% since 1996.

Industrial Products. Traffic in industrial products carried to and from the Laredo gateway by BNSF has grown 154% since 1996, and this traffic now constitutes over a third of BNSF's Laredo traffic. This traffic consists of a variety of different products from scrap paper and cement to aluminum and steel products. Shippers of these goods, and other products such as chemicals, are often either small or operating at widely-dispersed locations, and buyers will often seek to single-source contract with rail carriers that can give them broad access to those shippers. BNSF's broad western U.S. geographic reach and connections to carriers servicing other areas in the eastern U.S. and Canada has allowed it to compete effectively for those customers' business and thus increase its traffic.

Motor Vehicle and Auto Parts. BNSF's motor vehicle and auto parts traffic constitutes 13% of its Laredo traffic, with over 5100 cars shipped annually. Although BNSF has been more successful in serving this traffic via its western Mexican gateways (due to the location of traditional BNSF auto partners' manufacturing locations on the rail networks within Mexico), its ability to provide competitive pricing at the Laredo gateway and its ability to provide reliable and timely service have nonetheless imposed competitive discipline on UP. For example, as a

result of BNSF's competition with UP, UP reduced its overall cost of service to DaimlerChrysler by 25-30% for traffic between the U.S. and Mexico. Consequently, while BNSF's overall share of automotive traffic to and from Mexico is small, our ability to continue to compete (and hopefully secure) more of that traffic in the future depends on the interline service offerings and cost parameters BNSF receives from NAFTA Rail to move via Tex Mex and TFM.

Intermodal. BNSF has invested heavily to attract intermodal traffic to BNSF's network. While intermodal traffic constituted only 8% of BNSF's traffic through Laredo in 2002, that traffic has increased 156% since inception in 1997, and BNSF expects the traffic to continue to grow at double digit rates over the next three years. Intermodal shippers are some of the most time-sensitive customers for BNSF because they carry both inputs to manufacturing, as well as finished goods to distributors for ultimate consumers. BNSF has grown this business in part through the development of its Mexi-Modal service, which is a unique product offering of door-to-door service between the U.S., Canada and Mexico. In addition, BNSF has worked with Tex Mex in developing joint intermodal services in conjunction with Tex Mex's new intermodal facility at Serrano Yard (Milepost 9) on Tex Mex directly east of Laredo. BNSF also worked with Tex Mex and TFM to develop coordinated in-bond U.S. and Canadian products for service to and from points within Mexico. Indeed, without accessing and exploiting BNSF's extensive intermodal network on an interline basis, Tex Mex has a geographically-constricted intermodal service offering for shippers and receivers at Laredo with which to compete with UP's nearby extensive Port Laredo facility, leaving most of the western U.S. without alternative competitive intermodal product offerings.

NAFTA Traffic. In addition to its service to U.S. shippers, BNSF also carries significant NAFTA traffic via its connections with Canadian carriers. BNSF's direct north-south routing

and extensive connections with both CP and CN make BNSF an attractive shipping partner for Canadian traffic, a significant portion of which moves to or from Mexico. For example, in 2002, BNSF carried over 6,800 rail cars from Canada to Mexico, which alone equals almost a quarter of *all* traffic carried by KCS over Tex Mex.

A major operational and marketing initiative being undertaken by BNSF and our partner connecting carriers calls for redesigning interline flows to focus interline carload traffic over fewer gateways with improved service consistency and shipment velocity. A key component of these initiatives, and part of our "Ease Of Doing Business" initiative directed at rail shippers and seeking to make rail more competitive with motor carriers for additional traffic, is pricing simplification to provide competitive through rates on a timely basis. An initial focus of this initiative with both major eastern railroads involves service improvements over the New Orleans, LA gateway, with new carload services in place with CSX and under design with NS. Given BNSF's more direct route between many major eastern gateways and Laredo in conjunction with Tex Mex (for example, as shown on Exhibit 2, the BNSF-Tex Mex route between Laredo and New Orleans is 738 miles, compared with UP's still shorter 724 mile route and with KCS' 1,043 mile route), these initiatives have the opportunity to attract more business to rail from alternative modes, provided BNSF retains the ability to handle this traffic competitively with Tex Mex and TFM for Mexican customers and markets.

Overall, during the past six years, BNSF has demonstrated that it can provide effective competitive discipline to UP for traffic destined for the Laredo and Brownsville gateways. Developing that level of competition, though, has required substantial investment on the part of BNSF throughout its network to support Mexican business flows and provide competitive, marketable service offerings for shippers, and has required BNSF to leverage all of its

competitive advantages, from its broad geographic reach and extensive interline connections to its dedicated drive to provide shippers with improved and additional transportation service options and to achieve efficiencies and reduce shipping costs. In addition, BNSF's ability to provide effective competition to UP depends on the provision of commercially reasonable rates and services by both the Tex Mex and TFM, and its ability to continue to provide shippers with that competition is dependent on the continuation of such rates and services. Thus, the transaction proposed by KCS and Tex Mex could jeopardize BNSF's progress to date and thereby reduce the competitive offerings available to shippers, unless BNSF continues to receive commercially reasonable rates and service from both the Tex Mex and TFM components of the new NAFTA Rail.

II. ABSENT EFFECTIVE OPEN GATEWAY CONDITIONS, KCS COULD FORCE SHIPPERS TO DIVERT TRAFFIC TO KCS

One of the key elements to BNSF's ability to provide competitive service has been its ability to strike reasonable and stable interline pricing and contract terms with Tex Mex and TFM that provide for competitive rates and for BNSF to work cooperatively with Tex Mex and TFM to ensure efficient service for traffic traveling over those lines. While KCS has made a number of helpful "pledges" to the Board on terms and commitments under which NAFTA Rail will work with BNSF (and UP) over the Laredo and Brownsville gateways, many of the pledges lack necessary specificity. Absent continuation of existing interline working relationships with Tex Mex and TFM, perhaps through agreement on enforceable terms of open gateway agreements and their imposition as conditions, KCS has indicated that it will impose new terms and conditions for traffic traveling over Tex Mex and TFM that may restrict BNSF's access to Mexico, and thereby may prevent BNSF from providing an effective competitive alternative to UP.

Specifically, KCS stated in its Application that NAFTA Rail may not renew some pricing and marketing agreements that do not provide "adequate" revenues for a combined KCS/Tex Mex system. Application at 26-27 n.19. The BNSF/Tex Mex 1998 Laredo-Robstown interline division agreement, which covers most commodities moving between BNSF and Tex Mex for the Laredo gateway, and which is up for renewal at the end of this year, appears to be one of the contracts to which KCS refers. Further, as KCS stated in a discovery response in this proceeding, KCS has told BNSF that it "need[s] to improve the overall revenue/expense ratio for Tex Mex of handling BNSF traffic after expiration of current BNSF-Tex Mex agreements."[1] This uncertainty is already impacting BNSF and, potentially, shippers relying on BNSF to reach south Texas and Mexico markets via Laredo and Tex Mex. For example, for customers wanting long term (beyond the end of 2003) rates in conjunction with BNSF and Tex Mex to access Laredo, BNSF cannot offer firm rates and commitments to offer customers in response to many of their inquiries. As the end of 2003 draws closer, customers' abilities to obtain the kind of commitments they need to route their freight to and from Laredo from BNSF in conjunction with Tex Mex will grow more difficult, causing them to look to other carriers, other modes or other markets to handle their Mexico transportation and distribution needs. Waiting for the rates to expire before considering renewal, extension, or renegotiation, as suggested by KCS' Gerald Davies' at the July 31, 2003 Board hearing on the proposed transaction, is not responsive to shippers' needs in this critical competitive corridor. Additionally, resolution of this issue is not of concern to UP or its customers, as UP has its own Laredo access, bypassing Tex Mex.

[1] Supplement to the Kansas City Southern Railway Company's and the Texas Mexican Railway Company's Responses and Objections to Union Pacific Railroad Company's Third Set of Discovery Requests to Applicants, Supplemental Responses, served July 23, 2003, Request No. 26, at page 2.

Moreover, in its diversion analysis, KCS has projected that it will divert 4,725 cars from BNSF to KCS, which represents almost 10% of BNSF's traffic through Brownsville and Laredo.[2] While KCS has not specifically explained how it would achieve those diversions, given its other comments, KCS could achieve that end by raising BNSF's rates over Tex Mex and TFM such that BNSF is not able to compete against KCS for shippers that are served by both railways.

Because KCS has not submitted an operating plan to the Board, its exact operating intentions are unclear. But, there are a number of steps that KCS could take to divert traffic to the KCS system:

- First, KCS could raise rates at Robstown for any traffic going over Tex Mex unless it originates from the KCS system or is routed to give KCS its longest haul. This would artificially increase other carriers' costs, giving KCS a competitive advantage. For example, as stated in KCS' control application, "the other most significant shift comes from traffic that BNSF currently interchanges with Tex Mex at Robstown/Corpus Christi being interchanged instead with KCSR in Kansas City and moving via the commonly-controlled KCSR/Tex Mex to Laredo from that point." (Application, at 122)

- Second, KCS could raise rates at Laredo for any traffic going over TFM that again does not originate from the KCS/Tex Mex system or does not give the system its longest haul.

- Third, KCS could discriminate against competing carriers on TFM by charging higher bridge fees or by reducing the crossing access that it would charge itself. While KCS' "pledges" appear to address the first issue, the second remains – and could impact BNSF-Tex Mex traffic as compared to KCS-Tex Mex traffic.

- Fourth, KCS could cause TFM and Tex Mex to discontinue providing value-added services (such as blocking traffic, providing equipment or providing intermodal service) to KCS' competitors, preventing those carriers from offering fully-competitive services.

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[2] This projection assumes a static state with respect to KCS' transaction with TFM. Thus, diversions are significantly understated since they do not take any potential anticompetitive steps on TFM into account.

KCS has not disclosed its actual pricing and service intentions for traffic going through Robstown or Laredo. While KCS has made a vague promise many times to keep the Laredo and Brownsville gateways "open on commercially reasonable terms," KCS has refused to give any specific assurances as to what that will mean, beyond a statement "This is the same commitment that was made in the CN/WC and CSX/NS/Conrail merger cases and KCS will live by those commitments." Davies V.S., at 15. Absent a firm and well-defined open gateway commitment by KCS, or the imposition of a condition by the Board, KCS will be free to divert traffic to its own system without regard to the efficiency of such diversions.

As Mr. Davies reported to the Board at the July 31, 2003 hearing, KCS has reached an agreement on the NAFTA transactions with NIT League. BNSF is anxious to review and understand the terms of that agreement, but is hopeful that it will further provide the specificity on the open gateway commitment by KCS to shippers and permit this issue to be resolved.

III. TRAFFIC DIVERSION TO KCS COULD INJURE SHIPPERS

Because of several inadequacies of the KCS/Tex Mex route compared to the BNSF/Tex Mex route, the economic diversion of traffic from BNSF to KCS would in many cases reduce the quality of service available to shippers and negatively impact competition.

First, because the KCS/Tex Mex connection between Houston and Robstown is circuitous compared to BNSF's route, a diversion of traffic to NAFTA Rail from BNSF would add to the shipping time for traffic going to Laredo. Tex Mex's trackage rights between Houston and Robstown require trains to travel 286 miles. Rather than following the coastline as BNSF's route, which includes trackage rights, does, Tex Mex must travel due west to Flatonia from Houston, before heading south to Robstown through Placedo. This diversion is 23% longer than BNSF's route between Houston and Robstown. Further, Tex Mex must go through the Houston

terminal complex, while BNSF skirts around Houston from the northwest on its own line to reach its trackage rights over UP at Algoa to reach Robstown for much of its south Texas and TFM business. In all, Tex Mex's circuity can add an often substantial number of hours of shipping time over a comparable shipment over BNSF track.[3]

In fact, as can be seen on the mileage chart attached as Exhibit 2, the combined KCS/Tex Mex route is longer than the BNSF/Tex Mex route from most major interconnection points across the U.S. to Laredo. For example, from Chicago, KCS/Tex Mex is 1779 miles, while BNSF/Tex Mex is 1660 miles with one less rail carrier in the route (and the dominant rail carrier in the lane, UP, has a route hundreds of miles shorter than BNSF's route). Further, KCS/Tex Mex is 304 miles longer than BNSF (44% longer) from Dallas-Fort Worth to Laredo. BNSF's ability to compete with UP and highway competition is due in part to the more direct north-south route that BNSF enjoys compared to KCS, and in part due to the circuitous nature of the Tex Mex route.

Second, KCS does not offer shippers the range of transportation services and products that BNSF can offer. For example, while BNSF moves over three million intermodal shipments per year, KCS moves comparatively few. This diminishes its ability to compete for double stack intermodal auto parts business due to the overall equipment, infrastructure and capacity requirements. Further, many customers prefer to obtain all rail service requirements from a single-source, even if they have multiple origination locations. BNSF operates one of the largest railroad networks in North America, with 33,000 route miles of track covering 28 states, which allows BNSF to serve as a single-source provider. KCS, by contrast, has less than 10% of

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[3] Although Tex Mex proposes to reduce this time by relaying track across an 85-mile right of way between Rosenberg and Victoria, Texas, given its projected cost of $60-120 million (depending on a number of factors relating to infrastructure to be installed on this line), the development of that track may be years away.

BNSF's trackage (3,130 track miles), and serves only 11 states. KCS' small network footprint leaves it unable to compete for business from customers seeking a single-source provider without working with partner connections. This recognition on the part of KCS led to its establishing a number of marketing "Alliances" and agreements with connecting carriers having extensive route networks, including BNSF which, as KCS reported in its control application, was inaugurated in 2002 (Application, at 56-57). However, despite KCS' statement that this marketing agreement was entered into "in part to jointly facilitate the development of NAFTA traffic" (*Id.*), traffic to and from Mexico was specifically excluded from the agreement's application at the insistence of KCS, and neither Tex Mex nor TFM are parties to the agreement as a result.

Third, as KCS has pointed out several times, Tex Mex must operate over UP's infrastructure to connect KCSR with TFM, and has over the years and in this proceeding levelled numerous complaints about the handling of Tex Mex trains and line capacity over UP. For example, as KCS pointed out in its control application, "[A]t timetable speeds (which generally have declined since the UP/SP merger), Tex Mex's Robstown-to-Victoria trip could be made in about three hours. However, due to congestion on the Brownsville Subdivision, UP dispatchers often refuse a Tex Mex train entry onto the trackage rights line unless the crew has 5 or even 6 hours of service available" (*Id.*, at 134). Elsewhere in the control application, KCS states "[T]he diversion study also assumes that Tex Mex's operations over UP's lines will be as efficient as if Tex Mex owned those lines. Currently that is not the case. The section of UP's Brownsville Subdivision utilized by Tex Mex is often near gridlock these days . . . These delays significantly increase Tex Mex's train operating costs, including crew costs" (*Id.,* at 149). In its June 23 supplemental filing, KCS further stated "NAFTA Rail's ability to compete against UP at Laredo

depends largely upon the dispatching, maintenance, and investment practices of UP. In the end, NAFTA Rail can remain competitive only if UP is held to its promises, commitments, and agreements to provide neutral treatment to Tex Mex trains, invest in its infrastructure, and maintain service levels on the tracks used by BNSF and Tex Mex to provide a competitive alternative to UP." (Supplement, at 22-23). These claims were repeated at the recent Board hearing. KCS' ability as NAFTA Rail to increase its competitiveness over Tex Mex for TFM traffic could in part depend on its ability to resolve these issues with UP.

IV. TRAFFIC DIVERSION COULD FURTHER INJURE SHIPPERS BY REDUCING BNSF'S ABILITY TO SERVE AS EFFECTIVE COMPETITOR TO UP

The Board's conditions in the UP/SP merger called for BNSF to serve as the competitive replacement for SP to ensure that there is effective competition to UP for traffic to and from southern Texas and Mexico. As discussed earlier, BNSF has invested heavily – over $20 million in marketing costs alone – to offer service that is competitive to UP. BNSF has added additional train service (7-10 additional weekly trains to and from Laredo alone), has developed value-added services such as Mexi-Modal, and has improved its overall efficiency through cooperative agreements with Tex Mex and TFM. As a result, BNSF has increased traffic through Laredo by 87% since 1996, and its competitive presence has disciplined UP, whose prices for traffic through Laredo have remained essentially flat over the same time period. *See* 2001 Oversight Report, at 111.

Despite its success to date, BNSF remains challenged in its ability to compete against UP, which enjoys a network competitive advantage due to its more direct, efficient routings, as shown in the mileage chart in Exhibit 2. As demonstrated in Exhibit 3, BNSF traffic at Laredo declined 14.6% from 2001 to 2002, and BNSF has actually lost market share over that same time period. BNSF's continued ability to serve as an effective competitor will depend on BNSF's

ability to offer long-term competitive and stable interline rates and value-added services, and to maintain sufficient density on its routes.

The competitive steps that KCS may take absent clarity on its open gateway pledge and imposition of those terms as a condition by the Board may erode or eliminate BNSF's ability to remain competitive and thereby deprive shippers of competitive alternatives. For example, decreasing BNSF's traffic density to Brownsville and Laredo by 10% (as projected in KCS' traffic diversion analysis included in its control application) would eliminate almost 20% of BNSF's growth since 1996 and half of BNSF's growth since 1997. That reduction in density would squeeze BNSF's margins and could force BNSF over time to rationalize the frequency of the train service that it offers, making itself uncompetitive for other traffic of existing and potential BNSF customers in this market.

If KCS directed Tex Mex and TFM to cease cooperation with BNSF (*i.e.*, by no longer providing blocking on north-bound traffic, or improved cycle times on unit grain trains, or by no longer providing intermodal service in Mexico), BNSF would be limited in its ability to offer some of the value-added services that have helped it attract traffic.[4] To the extent BNSF is no longer able to grow its Mexican business at historic rates, BNSF may need to reduce its marketing expenditures and reduce or even end the assistance it has provided to shippers to build out their infrastructure to provide value-added services and shift traffic to longhaul rail handling in the U.S. and Mexico. Such responses, while necessary to maintain financial feasibility of the routes, may further erode BNSF's ability to serve as an effective competitor with other carriers and modes for traffic through Laredo. While BNSF would have the option of shifting some

[4] While KCS has stated in a letter to David Meyer dated July 21, 2003, that it will use its control over TFM to ensure that TFM "cooperates" with BNSF in providing services, that commitment should be made express through a condition in this proceeding, so that later, when pinched for competitive leverage, NAFTA Rail does not reduce such services.

portion of its Mexico traffic to TFM's competitor, Ferrocarril Mexicano (FXE), this scenario could nonetheless have a significant impact for rail shippers relying on BNSF, not only within BNSF's western U.S. service territory but on connections, both Class I carriers and shortline and regional rail carriers alike, to reach south Texas and Mexican markets served by Tex Mex and TFM.

BNSF's service through other Mexican gateways is not likely to provide effective competition to UP over the Laredo gateway. For example, BNSF's other direct access to TFM, through Brownsville, could not serve as a competitive replacement to Laredo for at least three reasons. First, the Brownsville gateway does not have the physical infrastructure or support services for handling international traffic that Laredo enjoys. For example, there is no intermodal service provided by any rail carrier in the Brownsville-Matamoros area because there is no facility there. Second, TFM's route between Matamoros and TFM's main north-south line (between Nuevo Laredo and Mexico City) has the characteristics of a lighter-density route, in keeping with the traffic volumes moving over it. Unlike TFM's core, high density/high capacity route south from Laredo, the Matamoros line has not enjoyed the benefit of major capital investments, which limits its ability to carry the volume of traffic, including time-sensitive automotive, intermodal, and other commodities that currently move through Laredo. Third, TFM's line from Matamoros passes through Monterrey to reach TFM's main north-south Laredo line, whereas the Nuevo Laredo route enjoys a bypass around Monterrey, impacting transit time and potentially bringing additional volumes and congestion to Monterrey which is not present now if usage was increased.

While BNSF may divert some traffic to El Paso or Eagle Pass, those gateways would also not provide strong competition to Laredo because (1) they are out of route for most shippers who

would ship through Laredo, (2) they lack the border crossing and yard infrastructure of the Laredo gateway, and (3) FXE may not serve the BNSF shippers' customers located on TFM in Mexico. For example, the El Paso gateway is over 500 miles out of route from Chicago compared to the UP-TFM route via Laredo. While the El Paso route can compete for West Coast traffic, the majority of Mexican intermodal business flows are between the U.S. Upper Midwest region and facilities in Mexico served by TFM. Finally, many customers' traffic is not susceptible to diversion to another gateway or Mexican connecting carrier, potentially harming customers dependent on BNSF to reach customers, markets and locations on TFM.

Moreover, although the TFM and FXE lines are supposed to be open to the other in Mexico, in practice, FXE cannot serve most shippers and receivers on TFM's line, which makes FXE an ineffective alternative for originations or terminations on TFM for other than intermodal and limited transloadable carload traffic. As KCS pointed out in a footnote in its June 23 supplemental filing, even where FXE should be obtaining additional access to TFM lines and customers in common terminal areas, such as Monterrey, that access has largely not been realized due to lengthy negotiations and court actions by both TFM and FXE keeping them from being implemented. Supplement, at 18 n. 7. Moreover, even if FXE could serve TFM points, that service would require an additional interchange, which would be both more expensive and more time consuming. Thus, for shippers such as DeBruce Grain in Creston, Iowa, for example, that ship most of their grain to the San Luis Postosi grain distribution center in Mexico served exclusively by TFM, if BNSF cannot provide efficient service on TFM through Laredo, the only remaining alternative may be for DeBruce Grain to ship its grain to other markets that may provide it a lower total return, reducing market access for this customer compared to his competitors located in other areas and on other transportation providers, including UP.

KCS cannot serve as an effective competitive replacement for SP either. First, as stated above, KCS' routes to reach Tex Mex and TFM are longer even than BNSF's from most joint and interline junction points. Given the difficulty BNSF has competing with UP's more direct routes, KCS will be at an even greater competitive disadvantage. Second, KCS does not offer the same geographic scope of single-line service that BNSF or UP can offer rail customers, making KCS less attractive to shippers with multiple origination points, or who want to single-source their rail commitments. Furthermore, shippers located in the western United States, which have enjoyed the benefit of having BNSF serve as a competitive replacement to SP, would potentially face a reduced competitive landscape. A very real and ironic possibility of KCS' actions in relation to BNSF interline access to Mexican markets could be the diversion of only a small incremental amount of the traffic KCS predicts in its control application to KCS long term, but the surrender of more traffic and future growth to UP, water/barge or truck, and not to KCS/NAFTA Rail.

V. KCS' DIVERSIONS COULD INJURE SHIPPERS IN EVERY COMMODITY GROUP

As explained above, shipping time velocity and consistency along with value added services are important factors for shippers of grain, motor vehicles and auto parts, industrial products, and intermodal traffic. If, due to discriminatory rates or other actions taken by KCS, those shippers are diverted to less efficient KCS' routes, are forced to interchange with KCS in Kansas City, or are forced to pay higher rates to ship over BNSF, those shippers would suffer competitive harm, and may switch their traffic either to UP or to non-rail alternatives. Examples of some of the potential harms faced by BNSF's customers are listed below.

Grain Traffic. Because it is such a widely available commodity, grain traffic is particularly sensitive to even small changes in shipping price and delivered cost. Grain shippers

on BNSF facing modest increases in shipping prices to Mexico, relative to other shippers and other markets, are likely to shift their traffic to other markets where they will be more competitive, or lose the business altogether to other origins, which ripples back to the ultimate producers, the farmers. Further, Mexican grain distribution companies rely on BNSF to provide them with access to a broad number of potential grain providers in the U.S., which ensures efficient grain pricing in Mexico. If BNSF's shipping customers can no longer competitively supply grain over the BNSF route, those Mexican grain distribution companies will lose access to the broad set of suppliers that BNSF was able to provide them, injuring both the Mexican distributor and the U.S. producer. Because KCS' limited reach greatly restricts its ability to originate grain, KCS could not replace the competition that BNSF provided. For example:

- The primary route to Mexico for wheat originating in the Dallas-Fort Worth area is via the Laredo gateway. If KCS were to carry this traffic, the ability for grain suppliers to compete on service and cost could be reduced as the KCS route from the Fort Worth area to Laredo is 304 miles longer than the BNSF route. Even if BNSF had to exchange the traffic with KCS at Houston, the route would still be longer than a BNSF-Tex Mex route.

- Internacional at San Luis Potosi, Mexico is a grain distribution point in Mexico, between Monterrey and Mexico city, served only by TFM. Internacional depends on BNSF to provide it with broad access to grain shippers in the U.S., and ships over 3300 cars on BNSF annually. If, as a result of the NAFTA Rail transaction, BNSF's grain shippers are less competitive shipping grain via the Laredo gateway, Internacional's ability to price shop for grain would be reduced as a result of fewer competitive supply points, and the cost of grain on TFM served points would likely increase. Moreover, Internacional is one of the customers in which BNSF has invested to help upgrade its shipping facilities to receive larger unit train shipments. If BNSF were no longer able to serve customers such as Internacional, it would likely reduce such investments because they would not pay off over time. As a consequence, shippers like Internacional would not only lose access to competitively priced grains but also to financing for infrastructure improvements.

Industrial Products. Industrial products include a wide variety of products from paper and aluminum to cement and metals. The supply points of industrial products are highly

fragmented in the U.S. The Mexican receivers that BNSF serves need to source products from multiple locations and often prefer to do that using a single carrier. Because of its broad geographic network, BNSF is able to provide such services to its Mexican receiver customers. Were KCS to increase the costs of shipping over BNSF, BNSF's Mexican receivers would suffer from the loss of competitive market access, and U.S. shippers would suffer from being denied access to Mexican markets or from a lack of a competitive alternative to UP. For example:

- Pipsamex (Mexico) buys and processes scrap paper from all over the U.S. Pipsamex will, for example, put out for bid a contract for hauling up to 3000 cars of scrap paper annually, and will use the carrier that can give it the best overall rates. Because of BNSF's broad geographic network, BNSF is able to compete against UP for that traffic. If KCS diverted BNSF's traffic to Kansas City or increased BNSF's costs to serve Pipsamex, BNSF may not be able to offer competitive service. Moreover, because KCS does not have as broad a coverage area, it could not provide Pipsamex with access to as many scrap paper shippers. Pipsamex would have to source from only those suppliers on KCS' line or its connections, thereby injuring both Pipsamex and the many scrap paper suppliers who would no longer have access to Pipsamex, or it would have to shift to using UP, thereby further lessening competition for rail traffic through Laredo.

Motor Vehicle and Auto Parts. Because of the need to supply just-in-time inventory systems in Mexico and the U.S., BNSF must provide fast and predictable shipment times to auto manufacturers to compete for motor vehicle and auto parts traffic. Moreover, because motor vehicle manufacturers prefer to contract with a single-source provider that can service most or all of their plants directly or through connections, BNSF and UP are the only effective competitors for those manufacturers. If KCS were to force BNSF to interchange motor vehicle and auto parts traffic in Kansas City rather than Corpus Christi/Robstown, BNSF would lose much of its ability to provide efficient service to Mexico, and UP would be left as the only competitive rail carrier to serve those manufacturers. For example:

- Prior to 2002, Metalsa, a supplier of automobile frames based in Monterrey, Mexico, shipped its products via TFM-UP-ALS-TRRA-BNSF to Fenton, Mo. In 2002, BNSF was able to offer Metalsa a price-competitive rate with a reduced

shipping time because BNSF served the DaimlerChrysler sequencing facility to which Metalsa shipped and was therefore able to reduce the number of traffic interchanges with a route of TFM-TM-BNSF. If KCS were to force that traffic to interchange at Kansas City, Metalsa would lose the benefit of reduced shipping time and would likely also no longer receive a price-competitive rate. The KCS route would be 418 miles longer via GWWR-KCS in comparison to the BNSF route. In such a case, Metalsa would shift back to UP's service. If multiplied over several parts suppliers in Mexico which require optimum transit times, KCS' actions would leave UP virtually without a competitor for rail shipments of automotive parts.

- The DaimlerChrysler double stack auto parts bid exemplifies how BNSF imposes competitive discipline even when it does not win a contract. In 2001, DaimlerChrysler opened for competitive bidding its double-stack auto parts business to Mexico. BNSF was a finalist on the bid, as its bid was considered credible due to the broad geographic scope, efficient delivery times, equipment and infrastructure that would be needed to serve DaimlerChrysler. UP responded by not only reducing its rates on the Mexican route, but also by bundling that traffic with U.S. domestic business and reducing the price on the whole bundle. As a result, DaimlerChrysler received an effective 25-30% reduction in the cost of service to Mexico. Because KCS has neither the geographic scope, the efficient delivery times, nor the required equipment and infrastructure, KCS alone would not have been able to provide such a credible alternative to either UP or highway alternatives.

Intermodal Traffic. Intermodal traffic is one of the most time-sensitive categories of traffic. With BNSF's Mexi-Modal program, which BNSF provides in cooperation with Tex Mex, TFM, CSX and CN, BNSF is able to offer door-to-door service that can significantly reduce transit times for intermodal traffic. If KCS were to force intermodal customers to select its services over Kansas City in lieu of BNSF's more direct and extensive service offerings, or direct Tex Mex or TFM to cease cooperating with BNSF in providing those services, BNSF may be unable to provide shippers that service, and customers may opt for UP or over-the-highway options to meet their customers' transport needs instead. For example:

- Mabe, a GE Company, ships appliances from Toronto, Canada to Mexico City using the Mexi-Modal program. Mabe appliances originate on Canadian National, which interchanges the traffic to BNSF in Chicago. BNSF interchanges that traffic with Tex Mex at Robstown, which performs the necessary work (including in-bond documentation paperwork) to move the traffic through Laredo

to Mexico City on TFM. Once the load clears customs in Mexico City, the TFM Intermodal Team coordinates the final delivery (dray) to the customer's door in the Mexico City area. If BNSF were forced to interchange the traffic at Kansas City or if KCS were to direct Tex Mex or TFM to cease providing that intermodal service, BNSF would be unable to provide Mabe with this attractive service. It is highly possible that KCS would not be able to provide a competitive replacement to Mabe for this service.

Brownsville Traffic. BNSF's Brownsville gateway service primarily serves agricultural processors just across the border in Matamoros, Mexico. If KCS were to divert this traffic to the Laredo gateway, as suggested by its diversion analysis, those Brownsville customers would no longer have competitive rail service available to them. They would be forced to either use UP or to transport the products by other modes of transportation – truck or water, for example. For example:

- Regasa receives 60-70% of BNSF's traffic at Brownsville. Regasa is located in Matamoros, just across from the Brownsville rail border crossing. If KCS were to force BNSF to divert this traffic from Brownsville to Laredo, as suggested in KCS' traffic diversion analysis, the traffic would have to then travel west on Tex Mex 146 miles to Laredo, south on the TFM main line to Monterrey 165 miles, before shipping north and east 208 miles back to Matamoros creating an additional net length of haul of 383 miles. Such a lengthy diversion would probably not be supported economically, and Regasa would likely have no choice but to source its purchases from other locations (potentially outside the U.S.) or find another shipping alternative to BNSF, which would again decrease the competitive options available to shippers.

VI. AN OPEN GATEWAY CONDITION IMPOSED BY THE BOARD COULD PREVENT THESE HARMS TO SHIPPERS

The maintenance of meaningfully open gateways through Laredo and Brownsville would avoid most of the competitive harms outlined above, would not be unduly cumbersome or complex to administer, and would be consistent with the Board's guidelines and past practices. While BNSF has been encouraged that KCS has committed generally to accepting conditions to keep the Laredo and Brownsville gateways open on commercially reasonable terms and to

continuing to provide service at the same levels as the past, those commitments need to be made more specific and enforceable. Specifically, we would suggest an open gateway condition similar to the condition imposed in the CN/Wisconsin Central transaction, which KCS referred to in their June supplemental filing (Davies V.S., at 15). That open gateway commitment and condition spoke to an agreement with NIT League whereby, as applied to the NAFTA Rail transactions, the Applicants would be required to maintain BNSF's existing rates and services with Tex Mex and TFM for a five-year period, subject to RCAF-U increases, and to provide commercially reasonable rates thereafter subject to the jurisdiction of the Board.

Such conditions are not unduly burdensome and pose no threat to KCS' ability to achieve its efficiency gains from the merger. Open gateway conditions should require little ongoing monitoring by the Board, and would be far less intrusive than trackage rights or other remedies. The efficiency of open gateway conditions is apparent by the experiences of the parties following the CN/WC and the CN/IC mergers. In both cases, open gateway conditions were imposed with minimal, if any, impact on the efficiency or operational objectives of the parties.

The imposition of such a condition to maintain open gateways at Robstown, Laredo and Brownsville on a "commercially reasonable" basis would provide shippers and connecting carriers a safety net and regulatory jurisdictional backstop if the market did not function to preserve and permit the use of efficient routings in the future if and when problems developed. It would do so without unduly affecting the Applicants' ability to offer shippers the benefits of the proposed transaction.

Open gateway commitments are also consistent with the Board's guidelines and with past Board practice. In the Board's decision in Ex Parte No. 582 (Sub-No. 1), the Board provided that future major mergers would require the inclusion of open gateway commitments. Given that

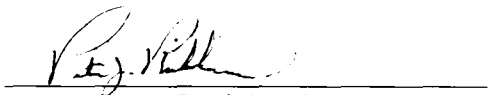
the KCS/TFM control proceeding would constitute a major merger if TFM were located in the United States, imposition of the open gateway requirement is appropriate. Further, as mentioned, the Board has imposed open gateway conditions in both the CN/WC and the CN/IC proceedings that are similar, or identical to the open gateway commitments sought here. Given the Board's own precedent, requiring an open gateway commitment at Laredo and Brownsville is a measured approach that can make the benefits of the proposed transaction available to both the shippers and the Applicants.

Finally, imposition of open gateway commitments is consistent with the positions and conduct of KCS. For example, in Ex Parte No. 582 (Sub-No. 1), KCS took the position that all existing competitive shipper rail options should be preserved in future merger or control transactions. Given that position, it would be difficult for KCS to now argue that an open gateway condition is not justified.

VERIFICATION

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

Executed on July 31, 2003.

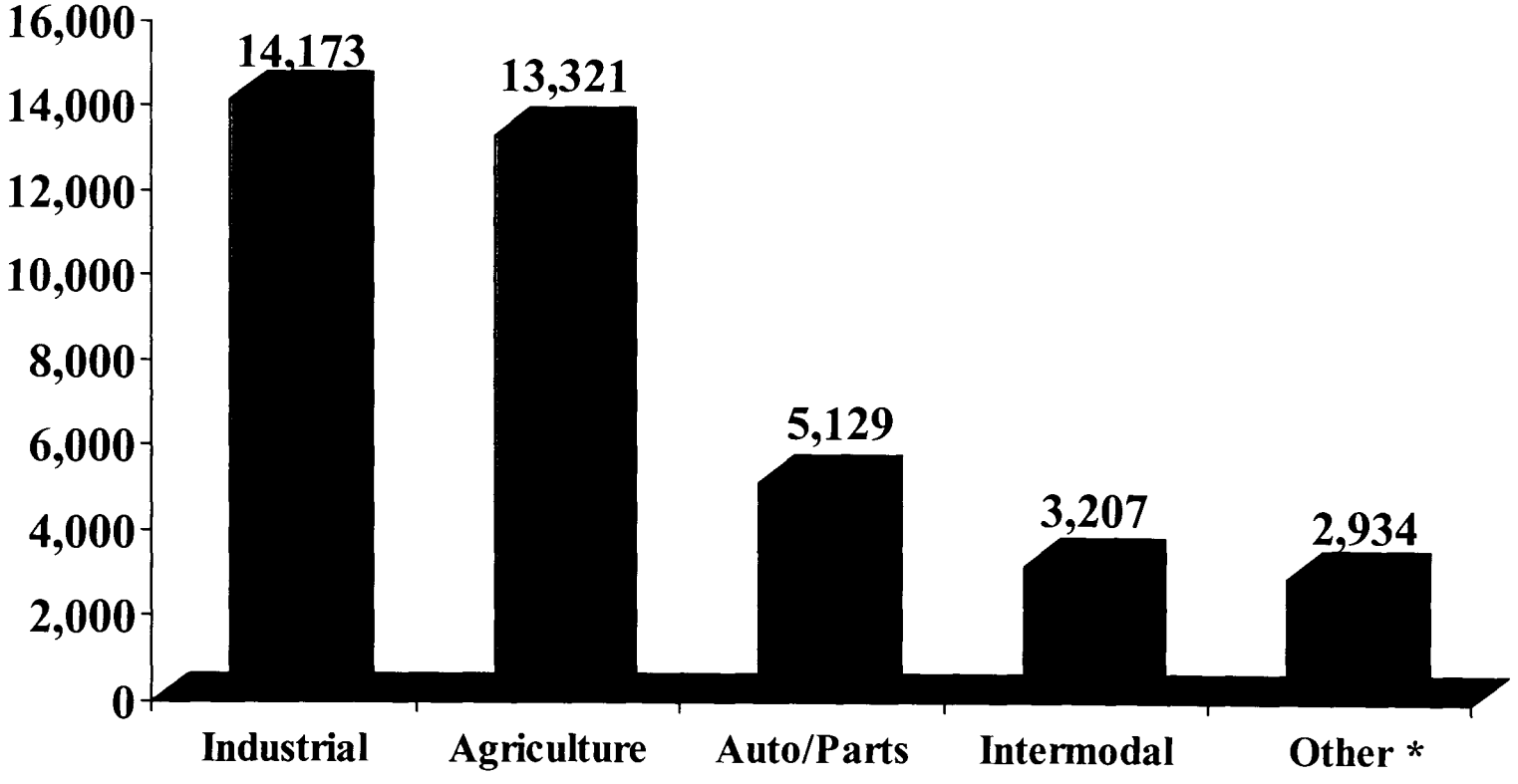


Peter J. Rickershauser

BNSF Traffic Through Laredo by Category

2002 Traffic Through Laredo

Rail Cars



* Other includes Perishable and Dry Boxcar products

Source: BNSF Traffic Data

Exhibit 1

Mileage Comparisons from Key Cities to Laredo

City	BNSF Miles	KCS Miles (% vs. BNSF)	UP Miles (% vs. BNSF)*
New Orleans	738	1,043 (+41.2%)	724 (-2.0%)
Houston	377	430 (+14.0%)	359 (-4.9%)
DFW (Alliance)	690	994 (+44.0%)	427 (-61.9%)
Chicago	1,660	*1,779 (+7.2%)	**1,354 (-18.4%)
St. Louis	1,200	1,618 (+34.8%)	1,186 (-1.2%)
Kansas City	1,230	1,289 (+4.8%)	933 (-24.1%)

* UP/KCS Haulage Springfield - Chicago

**UP mileage assumes routing over BNSF trackage rights Kansas City to Chicago.

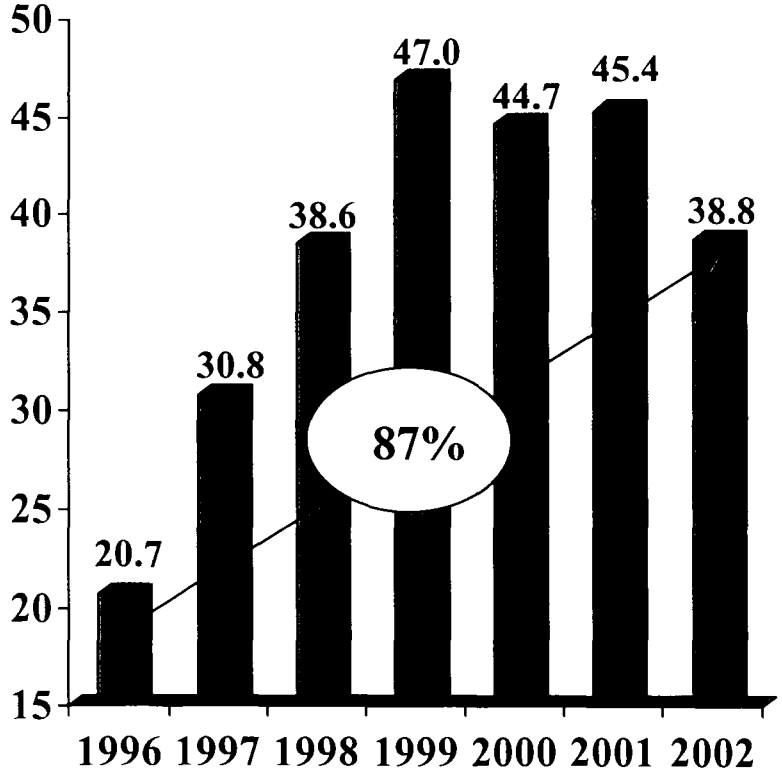
62

Source: BNSF Analysis (PC Rail 8.0)

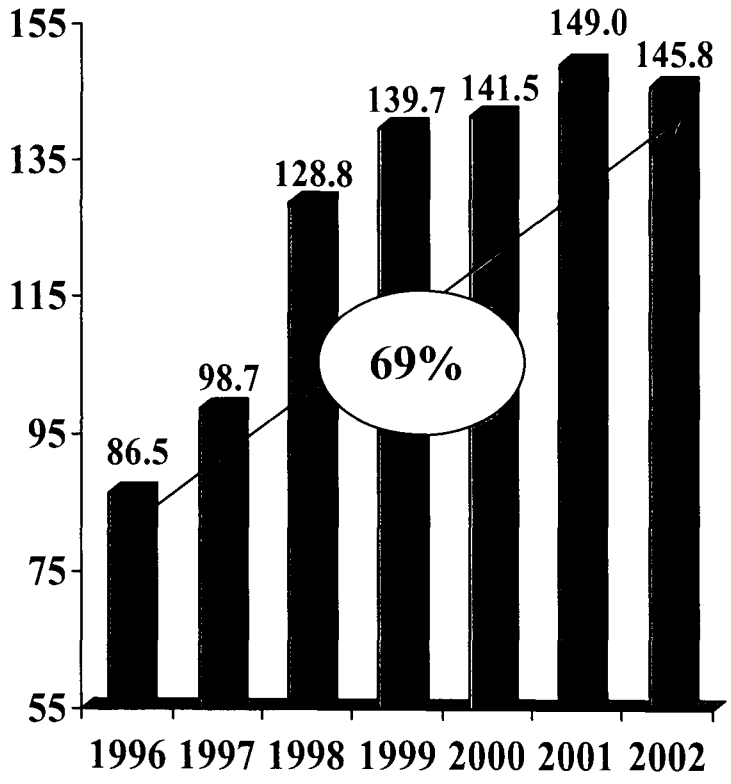
Exhibit 2

Growth in Traffic at Laredo and all Gateways

Laredo Traffic Growth, 1996-2002
Rail Cars, 000s



Mexico Traffic Growth, 1996-2002
Rail Cars, 000s



Source: BNSF Historic Traffic Data

Exhibit 3

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34342

KANSAS CITY SOUTHERN
– CONTROL –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY,
and
THE TEXAS MEXICAN RAILWAY COMPANY

VERIFIED STATEMENT OF DAVID REISHUS

I. INTRODUCTION

I.A. Qualifications and Purpose

My name is David Reishus. I am a Senior Vice President at Lexecon Inc., and prior to its acquisition by Lexecon in 1999 was President of The Economics Resource Group, Inc. I received my Ph.D. and Master's degrees in economics from Harvard University.

I have specialized in applied microeconomic analysis and have consulted for numerous private and public clients on issues involving the economics of competition, pricing, market access, mergers, and regulation. I have worked extensively in the railroad and energy sectors, and have previously filed testimony before regulatory bodies on the operation of markets and competition. I previously have submitted testimony to the Surface Transportation Board ("STB" or "Board"), including a verified stated previously submitted in this proceeding.[1] My *curriculum vita* is attached as Exhibit 1.

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[1] Before the Surface Transportation Board, Finance Docket No. 34342, Kansas City Southern -- Control -- The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, The Burlington Northern and

I have been asked by The Burlington Northern and Santa Fe Railway Company ("BNSF") to review potential competitive impacts of the proposed common control of The Texas Mexican Railway Company ("Tex Mex") and The Kansas City Southern Railway Company ("KCSR") by Kansas City Southern ("KCS") and to analyze potential remedies or conditions that could mitigate these impacts if the transaction were approved.[2]

I.B. Summary

Three-quarters of the value of U.S.-Mexico trade shipped by rail goes through the Laredo gateway. Laredo and Brownsville, which are the only rail gateways connecting with TFM, S.A. de C.V. ("TFM"), are economically significant and growing more so. BNSF was granted access to the Laredo (via connection with Tex Mex) and Brownsville gateways to replace the competition lost when the rail carriers of Union Pacific Corporation ("UP") and Southern Pacific Rail Corporation ("SP") merged. As part of the conditions imposed on the merger, BNSF received trackage rights to reach Tex Mex at Robstown and Corpus Christi to serve traffic through Laredo. Tex Mex also received trackage rights to Beaumont in order to connect with KCS.

While UP carries a large portion of the Laredo gateway traffic, due to a superior route and the extent of its network, a BNSF-Tex Mex-TFM routing competitively disciplines the rates and service that shippers obtain for traffic through Laredo. Preservation of shippers' competitive alternatives imposed in the UP/SP merger requires that BNSF have continued viable economic and

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Santa Fe Railway Company's Reply to Applicants' Petition to Establish Procedural Schedule, Verified Statement of David Reishus, June 3, 2003.

[2] Before the Surface Transportation Board, Finance Docket No. 34342, Kansas City Southern -- Control -- The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, Railroad Control Application, May 14, 2003 ("KCS Application"); Before the Surface Transportation Board, Finance Docket No. 34342, Kansas City Southern -- Control -- The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, Supplement to Application, June 23, 2003 ("Supplemental Application").

physical access to the Laredo gateway via interchanges with Tex Mex at Robstown and Corpus Christi and with TFM at Laredo.

A mechanism for ensuring the ongoing competitive discipline in the face of the proposed transactions that would place KCSR, Tex Mex, and TFM under common control is to provide that the gateways are required to remain open on commercially reasonable terms. Requiring that Tex Mex and TFM maintain the Laredo and Brownsville gateways open on a commercially reasonable basis and that a transition for some fixed period of time, such as five years, be in place to limit changes in rates and service conditions would preserve U.S. shipper interests at these U.S.-Mexico gateways.

Imposition of such an open gateway protection is a reasonable and prudent regulatory safety net against a lessening of competition, if the market does not act to provide for efficient outcomes for shippers. Experience in recent mergers demonstrates that such open gateway protections impose little risk of lost efficiencies in the merger as a result of such conditions. From a shipper's perspective, they largely provide stability and continuity over defined important interline gateways. These sorts of conditions have been offered, negotiated, or imposed with no appreciable loss of efficiency. Imposition of such conditions on the Laredo and Brownsville gateways is sound and reasonable public policy.

II. THE KCS TRANSACTION AND THE LAREDO GATEWAY

In April 2003, Kansas City Southern announced a series of agreements that would combine KCSR, Tex Mex, and TFM as wholly owned subsidiaries under the common control of KCS, to be renamed NAFTA Rail.[3] The first stage of the proposed combination involves the common control of KCSR and

[3] I will refer to KCS, KCSR, Tex Mex, and The Gateway Eastern Railway Company (a 17-mile short line wholly owned by KCSR) as the "Applicants."

Tex Mex by KCS.[4] The second stage entails exchanging cash and stock so that KCS will control and own all of TFM, which operates the rail lines from Laredo and Brownsville to Monterrey and the Mexico City area, among others.

This transaction raises greater competitive issues and public policy concerns than would be typical for a primarily end-to-end merger between a Class I carrier and a Class II carrier with 157 miles of rail line. These concerns arise, in part, from the unique and important position that Tex Mex plays in international trade and from the anticipated second-stage acquisition of TFM, the connecting Mexican carrier. In addition, continued effective competition to UP for Southeast Texas and Mexico traffic by BNSF as a replacement for SP following the UP/SP merger must be considered and preserved.

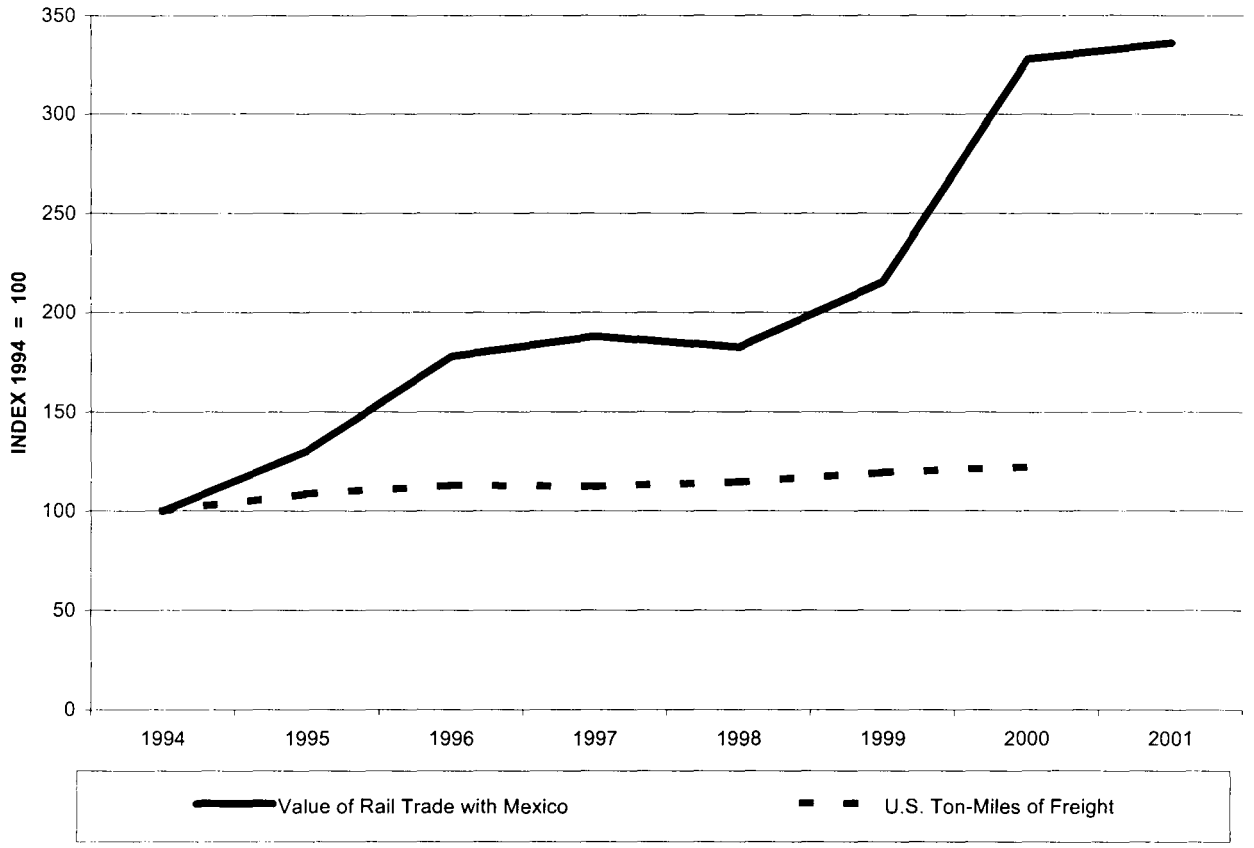
The integration of the U.S. and Mexican economies has accelerated since NAFTA went into effect in 1994. Trade between the U.S. and Mexico has grown much faster than growth in either economy. The growth in rail transportation between the two countries reflects that trend; the growth in cross-border rail traffic between the U.S. and Mexico has substantially exceeded the growth in U.S. domestic rail traffic. (See Figure 1.)

Laredo is the dominant gateway for both truck and rail between the U.S. and Mexico. As shown in Figure 2, 75% of the value of rail trade between the U.S. and Mexico passes through Laredo. This is partly a result of geographic happenstance. Laredo is located on the most direct route between the major population and industrial centers of Mexico City and Monterrey and the central and eastern U.S. (See Appendix.) As such, establishment of cross-border business services and investments in the

[4] KCS has already acquired ultimate ownership of Tex Mex (via MexRail) and is seeking approval to exercise control of Tex Mex and dissolve the voting trust into which it has been placed.

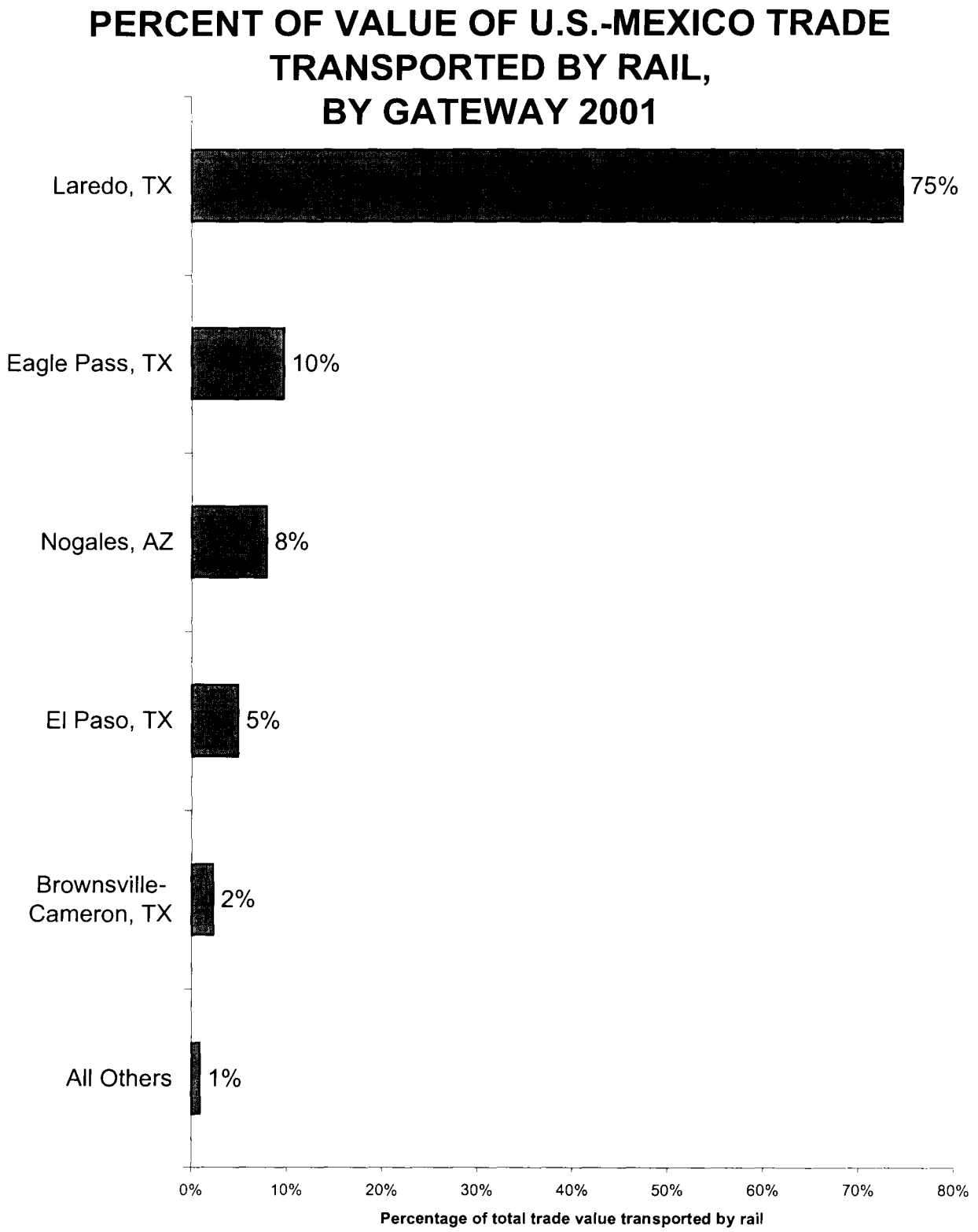
Figure 1

GROWTH IN U.S. - MEXICO RAIL TRAFFIC HAS EXEEDED THE GROWTH IN U.S. DOMESTIC RAIL TRAFFIC



Source: U.S. Department of Transportation, Bureau of Transportation Statistics.

Figure 2



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Source: U.S. Department of Transportation, Bureau of Transportation Statistics.

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corresponding physical and organizational infrastructure have been made at Laredo to enable efficient, high-volume cross-border trade and transportation.

Tex Mex's unique significance results from its being the only railroad with U.S. access to the Laredo Mexican gateway besides UP. Tex Mex functions primarily as a bridge carrier connecting the Laredo gateway with the rest of the U.S. rail system; 80% of its traffic is interline traffic to and from Laredo.[5] As shown in Figure 3, UP is the largest U.S. carrier at Laredo, accounting for almost 85% of the units passing through the Laredo gateway in 2001. The remaining traffic travels over the Tex-Mex system, with BNSF-Tex Mex routings having the next largest volume at 8% and KCSR-Tex Mex following with 5%. Thus, joint-line movements with Tex Mex and its upstream carriers are crucial competitive restraints on UP for traffic through the Laredo gateway.

TFM is the most important Mexican railroad for U.S.-Mexican trade. It has exclusive access on the Mexican side to the Northeastern Mexican gateways of Laredo/Nuevo Laredo and Brownsville/Matamoros and reaches the important industrial centers of Mexico City and Monterrey. TFM handles over three-quarters of the U.S.-Mexican rail trade. International freight accounts for 82% of TFM's revenue, most of which passes through Laredo.[6] In fact, TFM enjoys the shortest route from Midwestern and eastern points in

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[5] 2001 Waybill Sample. Most traffic to and from Mexico is waybilled separately on the U.S. and Mexican side with the U.S.-Mexican border crossing (e.g. Laredo) as the listed destination or origination for traffic that is actually flowing to and from interior points in Mexico. Therefore, it may not be possible from waybill information available to U.S. railroads to identify the destination or origination in Mexico. The amount of local rail traffic to Laredo is small or non-existent, so that all rail traffic identified from waybill information as being to or from Laredo is treated as international traffic flowing through the Laredo gateway.

[6] Grupo TMM, S.A., SEC Form 20-F, 2002, at 27. By contrast, only 30% of traffic on Ferromex, which serves the other U.S.-Mexican rail gateways, is international traffic, reflecting the relative importance of the Laredo and Brownsville gateways. http://www.gmexico.com/gm11000.html, July 29, 2003.

Figure 3

PERCENT OF TRAFFIC TO AND FROM LAREDO GATEWAY BY ROUTING, 2001

Route	Percentage
UP	84%
BNSF - Tex Mex	8%
KCSR - Tex Mex	5%
Tex Mex only	2%
UP - Tex Mex	< 1%

Source: 2001 Waybill Sample.

the U.S. to the major industrial and population areas in Mexico.[7] In terms of operating revenue, TFM is the largest railroad in Mexico, with revenues of $670 million in 2001.[8]

The proposed, two-stage control transaction among KCSR, Tex Mex, and TFM is primarily an end-to-end consolidation. End-to-end rail mergers typically result in improved single-line service for some shippers and reduced costs through the capture of economies of scale and scope. Loss of Tex Mex as a neutral, non-controlled bridge carrier, however, threatens the competitive discipline that BNSF provides to UP over the Laredo gateway. Closure of access by a KCS-controlled Tex Mex to Laredo for BNSF traffic or economically inefficient pricing and service by a KCS-controlled Tex Mex would eliminate or weaken the competitive alternative provided by a BNSF-Tex Mex routing.

The risk of reduction in competitive alternatives is enhanced by the proposed second phase of the transaction, as KCS would gain control of the only Mexican railroad serving the Laredo and Brownsville gateways. TFM, currently not controlled by any U.S. carrier, serves as a neutral Mexican carrier for all combinations of traffic crossing at Laredo and Brownsville. While a KCSR-Tex Mex combination alone could effectively foreclose BNSF-source traffic from accessing the Laredo gateway, a combined KCSR-Tex Mex-TFM could additionally foreclose both BNSF and UP through Laredo.

Control of TFM by the Applicants would give KCS complete control over all possible connections through Brownsville and Laredo. With control of TFM, the proposed NAFTA Rail could engage in economically inefficient foreclosure or discrimination against BNSF-sourced traffic at Laredo and/or Brownsville. Thus, to the extent that BNSF provides a competitive discipline

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[7] Kansas City Southern Industries, Inc., SEC Form 10-K, 2000, at 5.

[8] Association of American Railroads, *North American Freight Railroad Statistics*, May 14, 2003, at 1.

to UP at Laredo and Brownsville, this alternative could be lost or reduced if the proposed NAFTA Rail were to inefficiently favor its own traffic through its routing over the Laredo and Brownsville gateways.

III. COMPETITION AT RISK BY KCSR-TEX MEX-TFM TRANSACTION

III.A. UP/SP conditions

The existing set of rail alternatives between the U.S. and Mexico results directly from the UP/Southern Pacific ("SP") combination. Prior to the UP/SP merger, only UP and SP-Tex Mex routings reached the Laredo gateway, and only UP and SP served the Brownsville gateway. As part of a settlement agreement upon which the UP/SP merger was conditioned, BNSF assumed the competitive role of SP so that BNSF would have access to Laredo through connection with Tex Mex and direct access to Brownsville. In addition to the competitive alternative provided by the BNSF-Tex Mex combination to Laredo, the Board granted Tex Mex a connection to KCSR by which KCSR could interchange with Tex Mex to reach Laredo. Because of the UP/SP merger agreements and conditions, Tex Mex became a neutral, independent bridge carrier capable of interlining with both BNSF and KCSR in competition with UP for traffic to and from the Laredo gateway.

The BNSF settlement agreement, on which the UP/SP merger was conditioned, "anticipated that BNSF would replace SP as an independent interline partner for Tex Mex traffic bound to and from Laredo."[9] The Board

[9] Before the Surface Transportation Board, Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Decision No. 44, Decided: August 6, 1996, at 148; and Before the Surface Transportation Board, Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Decision No. 62, Decided: November 27, 1996, at 7.

also provided Tex Mex limited access to Beaumont, Texas, in order to connect with KCSR. This additional condition was imposed to enhance competition with UP over the Laredo gateway and promote continued service by Tex Mex.

The agreements and conditions imposed in the UP/SP merger have maintained the competitive alternative that would otherwise have been lost. BNSF interlined 45,395 units of traffic with Tex Mex through the Laredo gateway in 2001, compared to 25,345 cars handled by Tex Mex at the gateway from all sources between June 1995 and May 1996.[10] Tex Mex traffic through the Laredo gateway from all sources has more than doubled since the UP/SP merger.[11] BNSF interline traffic currently accounts for more than half of the traffic received by Tex Mex.[12] Concerns that BNSF could not provide Tex Mex sufficient traffic to act as a competitive counterweight to UP have proven to have been unwarranted.

As detailed in the UP/SP oversight proceedings and the Verified Statement of Peter Rickershauser, competition between UP and an independent Tex Mex/BNSF routing for traffic to the Laredo gateway has provided an effective competitive restraint on UP. It has served to suppress rail transportation rate increases from UP over the gateway and has resulted in numerous shippers switching carriers and benefiting from price and service competition between UP and BNSF-Tex Mex for traffic bound to the Laredo gateway.[13] BNSF need not carry the traffic for shippers to benefit from BNSF competition for Laredo gateway traffic; the experience of

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[10] Verified Statement Peter J. Rickershauser; Before the Surface Transportation Board, Finance Docket No. 32760 (Sub-No. 21), Union Pacific's Fifth Oversight Report, 2001, at 13 ("Fifth Oversight Report").

[11] 2001 Waybill Sample.

[12] Before the Surface Transportation Board, Finance Docket No. 34342, Application of the Kansas City Southern Railway Company, Gateway Easter Railway Company, and The Texas Mexican Railway Company, Verified Statement of Curtis M. Grimm, May 12, 2003, Table 3.

[13] Fifth Oversight Report at 10 and Confidential Appendix E.

Daimler-Chrysler described by Mr. Rickershauser is just one specific, vivid example of how shippers benefit from better service and/or lower rates.

The BNSF-Tex Mex routing provides a unique competitive constraint on UP. BNSF is the only carrier in the west capable of providing competition to UP over the range of its network; KCSR lacks the rail network to provide the competition that BNSF-Tex Mex can provide. For example, approximately a third of BNSF traffic over Laredo and 80% of Brownsville traffic consist of grain and grain by-products delivered to Mexico.[14] Despite UP's dominant share of traffic over Laredo, BNSF carries over a quarter of the Laredo gateway traffic to and from the tier of grain belt states from Oklahoma to North Dakota.[15] KCSR-Tex Mex lacks the network scope to provide an adequate replacement for the competition provided by BNSF-Tex Mex.

A review of the U.S. rail network confirms this conclusion. Figure 4 shows the relative distance from representative originations and interchange locations through the Laredo gateway. As can be seen in each case, a KCSR-Tex Mex routing would increase the length, circuity and, most likely, cost and travel time relative to a BNSF-Tex Mex routing over Laredo. Single-line service created by an end-to-end merger may create service improvements or cost reductions that may be attractive to shippers, despite a somewhat longer haul. Shippers would be harmed, however, if KCS were to force traffic onto itself by inefficiently altering rates and service on Tex Mex (or TFM) for traffic interlined from BNSF. By reducing the competitive discipline that BNSF could provide, such behavior by KCS would reduce the degree of competitive constraint on UP for traffic to Mexico.

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[14] Verified Statement of Peter J. Rickershauser.

[15] 2001 Waybill Sample.

Figure 4

DISTANCE FROM SELECTED ORIGINS TO LAREDO

City Name	BNSF-Tex Mex (miles)	KCS-Tex Mex (miles)	Additional Circuity of KCS-Tex Mex Route compared to a BNSF-Tex Mex Route (percent)
Chicago	1,660	1,779	7%
DFW (Alliance)	690	994	44%
Houston	377	430	14%
Kansas City	1,230	1,289	5%
New Orleans	738	1,043	41%
St. Louis	1,200	1,618	35%

Source: Verified Statement of Peter J. Rickershauser.

BNSF has made significant investments in expanding its U.S.-Mexico traffic including and especially through the Laredo gateway. As detailed by Mr. Rickershauser, since 1996, BNSF, among other activities, has:[16]

- Increased its annual marketing expenditures for Mexican traffic by over 1000%;
- Added 7-10 additional trains each way per week over the BNSF-Tex Mex line;
- Developed value-added services, such as the Mexi-Modal service, and integrated dock-to-dock carload pricing and service;
- Helped Mexican customers finance and build track expansions at their facilities to facilitate shift to use of rail transportation;
- Developed efficient unit grain train services in partnership with TFM by focusing on cycle times for train cars;
- Partnered with Tex Mex and TFM to improve through-train efficiency by managing the "Despacho Previo" process.

The results of these efforts have been double-digit growth in traffic to Mexico, including over the Laredo and Brownsville gateways.

BNSF-Tex Mex and KCSR-Tex Mex routings through Laredo provide the only *intramodal* competition to UP by which to discipline rates and service UP offers to shippers for traffic to and from Mexico. UP retains a very large share of the rail traffic through Laredo, and viable and active rail alternatives provide a source of competition for some commodities that cannot be matched by other modes of transportation. As previously explained to the Board, rail-on-rail competition between BNSF-Tex Mex and UP has served to reduce rates and improve service to numerous, specific customers

[16] Verified Statement of Peter J. Rickershauser.

for traffic through Laredo.[17] The competitive discipline of the BNSF alternative benefits shippers

For many types of traffic, trucks and other transportation modes could not prevent harm to shippers if BNSF-interline traffic were denied viable rates and service through the Laredo and Brownsville gateways. Trucks are not effective competitors for many types of rail traffic, especially over long distances. Over half of the value of U.S. exports carried by rail through Laredo is destined for Mexico City and the neighboring state of Mexico, a distance of approximately 800 miles from Laredo.[18] While Texas exports more than any other state through the Laredo rail gateway, nearly half of the value of goods exported to Mexico by rail through the Laredo gateway comes from the industrial states of Illinois, Indiana, Ohio, Michigan, and Pennsylvania.[19] A trip from Chicago to Mexico City is approximately 2100 miles, a distance at which railroads hold a competitive advantage over trucks for transportation of many commodities.

Similarly, transportation by ship and barge can provide competition for some shippers and bulk commodities between the U.S. and Mexico, but it cannot provide competitive discipline for all.[20] For example, while rail

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[17] Fifth Oversight Report at Confidential Appendix E.

[18] U.S. Department of Transportation, Bureau of Transportation Statistics, Transborder Surface Freight Data; http://www.tfm.com.mx/english/somos/infraestructura.html, July 30, 2003.

[19] U.S. Department of Transportation, Bureau of Transportation Statistics, Transborder Surface Freight Data.

[20] Although KCS argues here that truck alternatives obviate the need for conditions, Dr. Grimm took the position that truck and water competition were insufficient in his testimony on behalf of Tex Mex when Tex Mex was seeking trackage rights conditions over UP in 1996. *See* Verified Statement of Curtis M. Grimm, filed March 29, 1996, in Finance Docket No. 32760 (Sub-No. 13); excerpt attached as Exhibit 2. There, he stated that "[a]lthough truck and water play an important role overall in transportation of goods between U.S. and Mexico, many shippers of many commodities are dependant upon rail competition for competitive transportation options." *Ibid.* at 128-129. The United States Department of Agriculture ("USDA") has suggested that grain and grain products may be highly susceptible to intermodal competition. (USDA Comments filed July 25, 2003.) Dr. Grimm in 1996 pointed to the USDA's reports to explain his conclusion about the ineffectiveness of truck and

accounts for a minority of U.S. grain exports to Mexico, not all Mexican grain receivers are located in places for which delivery from Mexican ports represents competitive alternatives to rail shipments. Also, to the extent that U.S. exporters face higher costs of shipping to Mexico due to actions by the proposed NAFTA Rail at the Laredo and Brownsville interchanges that limit BNSF's ability to compete, these exporters will be forced to accept lower net prices for their product and possibly seek alternative outlets for their products with concomitantly lower netback prices.

The Houston/Gulf service crisis of 1997-98 was a recent, painful episode that demonstrated vividly the limits of intermodal competition and competition provided by alternative Mexican gateways. The service meltdown, among other things, backed up rail exports at Laredo and prevented timely shipments of product through that gateway. A number of shippers turned to trucks, in some cases, to prevent the shutdown of factories, but returned to rail when rail service reverted to normal. If other modes and other gateways were truly effective competition for rail, then the rail service disruption at Laredo would have had little impact on shippers. The very public harm suffered by shippers during the service crisis demonstrates the importance of rail-on-rail competition for U.S.-Mexican traffic across the Laredo gateway.[21]

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water as an alternative to long-haul rail transportation. Verified Statement of Curtis M. Grimm, March 29, 1996 at 129-130. If the Board had concluded that truck and water competition could act by themselves as a replacement for rail-on-rail competition, there would have been no need to condition the UP/SP merger on the BNSF accessing Laredo and Brownsville (as part of the UP-BNSF Agreement). Moreover, there would have been certainly have been no basis for introducing a third rail access option by connecting Tex Mex with KCS for Laredo traffic.

[21] "Ford, Chrysler Trucks Piling Up: Transport Firms' Merger, Rail Car Shortage Delay Shipping," *The Globe and Mail*, April 28, 1998; "The Western Rail Service Crisis: One Year Later," Economic Research Service/USDA, *Agricultural Outlook*, December 1998.

III.B. TFM and Mexican Railroad Privatization

At the time the UP/SP merger was proposed, the Mexican railroad system was owned by the Mexican government. In May 1995, Mexico's government enacted a new law that paved the way for privatization of Mexico's railways. Privatization involved dividing the state-owned railway company into a number of regional systems and then selling to private investors concessions to operate them. The three main railway systems were the Northeast Railway (connecting the Laredo and Brownsville gateways to Monterrey, Mexico City, and ports on the Pacific and Gulf coasts), the Pacific-North Railway (connecting the Eagle Pass, El Paso, Nogales, and Calexico gateways to Guadalajara, Mexico City, and ports on the Pacific and Gulf coasts), and the Southeast Railway (connecting Mexico City to ports on the Gulf coast).

The Mexican rail privatization imposed barriers to a majority foreign ownership of the new concessions, limiting the risk of control by a U.S. carrier.[22] It was anticipated in 1995 and 1996 that the resulting privatized Mexican rail companies would provide neutral, competitive access to shippers in Mexico and for international traffic from the U.S.[23] In December 1996, after the approval and implementation of the UP/SP merger, the Mexican government announced that TFM, a joint-venture owned 49% by KCS and 51% by Transportacion Maritima Mexicana (TMM), had won the bidding for

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[22] Mexican railroad privatization explicitly denied majority foreign ownership of any concession. The National Commission on Foreign Investment (CNIE), however, had the authority to override this provision. (*Ley Reglamentaria del Servicio Ferroviario*, Article 17.)

[23] Mexican law states that concessionaires have to provide service in an equitable way (*Ley Reglamentaria del Servicio Ferroviario,* Article 24, May 12, 1995). In addition, Mexico's railway regulations explicitly provide for non-discriminatory treatment of shippers (*Reglamento del Servicio Ferroviario,* Article 170, September 30, 1995). TFM's concession title, awarded in December 1996, further stipulates that TFM must provide terminal and interchange services to interconnecting foreign railroads on an equitable and non-discriminatory basis. It also states that in setting rates, TFM cannot engage in unwarranted price discrimination. (Supplemental Application at 30 and Appendix 1: "Memorandum Summarizing Features of Mexican Law and the TFM Concession Relevant to Issues Arising from Sections 1180.1(K) and 1180.11.") See discussion below regarding implementation.

Northeast Railway concession.[24] At the time when the Northeast Railway concession was awarded to TFM, it accounted for 40% of Mexico's rail cargo, and its network passed through Mexican states composing 69% of Mexico's population and accounting for over 70% of Mexico's gross domestic product.[25]

While U.S. rail interests have maintained minority ownerships in Mexican rail concessionaires, the Mexican railroads have not been controlled by U.S. carriers and have served as neutral interline partners with U.S. railroads over the border. As such, TFM has had the incentive to work with each of the competing U.S. rail connections in a neutral manner to grow and enhance the value of international traffic for itself. Available evidence indicates that TFM has worked with each of the interconnecting U.S. carriers to develop international business. Examples of this neutral, pro-competitive behavior by TFM include:

- TFM has entered into partnerships with all three connecting railroads, UP, BNSF, and KCS, to offer intermodal service between the U.S., Canada, and Mexico[26];

- TFM has collaborated with BNSF (and Tex Mex) to improve service to Mexico, for example, by increasing the efficiency of unit grain trains and by improving through-train efficiency[27];

- TFM has built and subsequently upgraded key facilities to improve the handling of U.S.-Mexico traffic, such as the Sanchez yard at Nuevo Laredo, which benefits all U.S. railroads serving U.S. Mexico traffic.[28]

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[24] TFM began operation in June 1997. http://www.tfm.com.mx/english/somos/somos.html, July 28, 2003.

[25] Kansas City Southern Industries, SEC Form 10-K, 1997, at 2, 58.

[26] BNSF, "BNSF Launches Mexi-Modal – A Transborder Intermodal Service," June 28, 2001; KCS, "Kansas City Southern Introduces Time-Definite Intermodal Service in Mexico," April 21, 1999; "New intermodal service agreement to link Canadian and Mexican Destinations," *World Trade,* June 1, 1999. In fact, BNSF officials have stated that "(Kansas City Southern Railway) has a relationship with (Transportacion Ferroviaria Mexicana, a Ferromex competitor) as well, but from our perspective, we're treated fair and equal by TFM and Ferromex management and feel we get a very fair opportunity doing business in Mexico." "Opening El Paso," *Traffic World,* May 20, 2002.

[27] Verified Statement of Peter J. Rickershauser.

Maintenance of the competitive replacement for SP represented by an independent BNSF-Tex Mex routing requires that TFM and Tex Mex both continue to be willing and cooperative partners with BNSF. Preservation of open gateways between Tex Mex and TFM at Laredo and Tex Mex and BNSF at Robstown and Corpus Christi, discussed below in more detail, is a necessary condition for the competitive replacement for SP to be sustained. Moreover, TFM's continued cooperation with BNSF-Tex Mex at Laredo and with BNSF at Brownsville on economically reasonable terms is necessary for BNSF to continue to be an effective competitor with UP.

IV. PRESERVATION OF OPEN GATEWAYS

The preservation of competition for U.S.-Mexican rail traffic requires the preservation of open gateways through Laredo to carriers other than those of the proposed NAFTA Rail. Competition between the UP-TFM and BNSF-Tex Mex-TFM routings requires that the gateways controlled by NAFTA Rail – the combined KCSR, Tex Mex, and TFM – be open at economically efficient rates and service conditions.

IV.A. Public Policy of Open Gateways

In its recently promulgated Major Rail Consolidation Procedures, the Board recognized that "...because most inefficient gateways now have either been closed or move only minimal traffic, major existing gateways should be kept open in future mergers."[29] The Board has acknowledged that gateways need to be open both physically and economically.[30]

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[28] "Mexico: Pesos for progress," *Railway Age,* October 1, 1999; TFM, *Report to Customers 2001*, http://www.tfm.com.mx/english/nuevo/info2.html, July 29, 2003.

[29] Surface Transportation Board, Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, June 11, 2001, at 33.

[30] *Ibid.* at 8.

While preservation of existing gateways has become part of the new merger process applicable to Class I railroad mergers, the imposition of open gateway requirements has also become the norm even in rail control transactions to which the new regulations have not applied. In the Canadian National ("CN")-Illinois Central ("IC") transaction, the Board imposed a condition requiring that the merging parties maintain the Canadian Pacific ("CP")-IC gateway in Chicago open and competitive.[31] This condition was imposed despite the recognition of CN/IC's stated economic incentive and intent to keep the gateway open and competitive.

Similarly, in a 2001 control transaction between a Class I railroad, CN, and a Class II railroad, Wisconsin Central ("WC"), the Board imposed conditions to "keep all existing active gateways affected by the Transaction open on commercially reasonable terms."[32] The CN/WC transaction, like the one at issue here, was classified as a "minor transaction."[33] As a mechanism to fulfill this requirement, CN/WC entered into an agreement with The National Industrial Transportation League that required the establishment and maintenance of commercially reasonable contract through-rates on all its active gateways, that restricted any increase in their portion of common carrier through-rates for five years to a measure of railroad cost increases, and that precluded the closure of any active interchange after the five-year period by any commercially unreasonable means.[34]

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[31] Surface Transportation Board, Finance Docket No. 33556, Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated -- Control -- Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, Decision No. 36, Decided: May 21, 1999, at 37.

[32] Surface Transportation Board, Finance Docket No. 34000, Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. -- Control -- Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., Decision No. 10, Decided: September 5, 2001, at 13.

[33] *Ibid* at 3.

[34] *Ibid* at 12-13.

These modern gateway commitments are easily distinguished from the anticompetitive and discredited "DT&I conditions" that the ICC routinely imposed in the past.[35] The DT&I conditions, which rigidly froze in place rates and interchanges as part of merger approval, were imposed on an overly regulated rail industry in desperate need of network rationalization and effectively required that rates be frozen indefinitely over routes and interchanges, no matter how circuitous, insignificant, or inefficient. The DT&I conditions functioned as an anticompetitive barrier to necessary rationalization of the rail industry. By contrast, the current gateway requirements are focused on specific significant gateways, impose specific rate caps for only limited terms (five years) subject to cost-related increases, and require only that the gateway be open on commercially reasonable terms thereafter. The commitments do not preclude procompetitive rate reductions in response to changing marketplace conditions. Rather, these gateway requirements provide a competitive transition for shippers in the face of the loss of a neutral connection and provide a regulatory backstop to actions of the newly merged parties.

IV.B. Tex Mex and the Laredo Gateway

BNSF provides competition to UP through the Laredo gateway by interlining with Tex Mex at its eastern interchanges at Robstown and Corpus Christi.[36] Tex Mex currently provides a neutral bridge movement between these eastern interchanges and Laredo, where it interlines with the currently neutral TFM at the international bridge to reach locations in Mexico. Thus,

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[35] Detroit, T. & I.R. Co. Control, 275 I.C.C. 455, 492-93 (1950). See also Rulemaking Concerning Traffic Protective Conditions In Railroad Consolidation Proceedings, 366 I.C.C. 112 (1982), rev'd on other grounds *sub nom. Detroit, Toledo & Ironton R.R. v. United States*, 725 F.2d 47 (6th Cir. 1984); and Curtis M. Grimm, Clifford Winston, and Carol A Evans, "Foreclosure of Railroad Markets: A Test of Chicago Leverage Theory," *Journal of Law & Economics*, vol. 35, 1992, at 298-299.

[36] The nature of competition at Laredo and BNSF's role in replacing lost alternatives from the merged UP/SP is discussed in more detail in the next section.

the Laredo gateway consists of multiple components. An open Laredo gateway requires that Tex Mex's eastern interchanges at Robstown and Corpus Christi remain open **and** that Tex Mex and TFM maintain the interchange at Laredo open. An open Laredo gateway requires an obligation on both Tex Mex and TFM to preserve the gateway.

Inefficient impediments to interchange at either end of Tex Mex, whether physical or economic, would reduce or eliminate the competitive discipline provided by a BNSF-Tex Mex routing. Thus, any open gateway commitment from Tex Mex must be sure to clarify that the gateways at both the western and the eastern ends of the line remain open.

IV.C. TFM

The two-stage structure of the proposed NAFTA Rail complicates the issue of preserving open gateways. A KCSR-Tex Mex combination may lack the power to bar UP from utilizing the Laredo gateway, but it could exclude or deter BNSF from competing for interline traffic through Laredo. Conditions on Tex Mex that preserve BNSF's competitive ability to reach the Laredo gateway through a BNSF-Tex Mex routing, however, are not sufficient to preserve an open Laredo gateway in light of the proposed second-stage control of TFM. Control of TFM by KCS is sufficient to foreclose BNSF and UP from both the Laredo and the Brownsville gateways, regardless of the conditions imposed on Tex Mex.

Mexican and U.S. rail systems operate under different rules and regulations. Yet, it is necessary to coordinate operations, rates, service and policy to permit an efficient North American rail transportation network. The U.S.-Mexican border acts as a "seam" in the market rules and regulatory oversight, and that "seam" represents a potential source of market inefficiency and regulatory avoidance. Uncoordinated oversight and mismatched market rules at the seams between jurisdictions are common problems in regulated network transportation industries. The opportunity to

game the disparate rules to achieve an anticompetitive outcome may be enhanced by common control of transportation facilities across the regulatory seam by a single market participant. For example, different rules in the U.S. and Mexico may permit a commonly controlled rail entity to take anticompetitive actions on one side of the border that would not be allowed on the other but which would have cross-border effects and which would not be in the interests of shippers. To the extent that regulatory consistency across the seam can be established, pro-competitive impacts of market rules and regulation can be maintained.

Mexican rail concessionaires have exclusive rights to operate over their lines.[37] However, with the objective of giving access to at least two railroads to main cities such as Mexico City, Monterrey, and Guadalajara, the concessions stipulated that the concessionaire must provide trackage rights and access to certain locations to other companies. The government's intention was for the concessionaires to negotiate among themselves the appropriate fees for the mandatory trackage rights specified in the concession titles, but in the event that they were unable to reach an agreement, the Secretariat of Communications and Transportation (SCT) could intervene and set rates.[38] In addition, Mexican law states that mandatory trackage rights should be granted under "equal conditions and in a non-discriminatory way."[39]

The degree of competition and access in the Mexican rail system, however, has not developed as it was anticipated at the time of the UP/SP merger following passage of Mexican rail privatization legislation. In practice, the issue of trackage and hauling rights has been contentious since

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[37] Concessionaires effectively have exclusive rights during the first thirty years of the concession. J. Campos, "Lessons from railway reforms in Brazil and Mexico," *Transport Policy,* 8 (2001), at 91.

[38] *Ibid.*; *Reglamento del Servicio Ferroviario*, Articles 107, 109.

[39] *Reglamento del Servicio Ferroviario*, Article 109.

the Mexican railroads were privatized. The competition envisioned in the original privatization plan has not been realized. For example, Ferromex has attempted to obtain trackage rights over TFM from Ramos Arizpe (near Monterrey) to Querétaro (near Mexico City), a key north-south route for the automotive industry.[40] Ferromex accused TFM of demanding excessive fees to access Monterrey and in 2001 asked the Federal Competition Commission (CFC) to intervene.[41] The CFC stated that in calculating trackage right fees, the concessionaire ought to act in a non-discriminatory way to avoid undue displacement of the company requesting the trackage rights. The CFC also stated that the exclusive rights granted in the concessions were not intended to result in restrictions to competition.[42]

Despite the Commission's opinion, TFM and Ferromex continued their dispute over trackage rights, and in August 2002 the SCT issued resolutions requiring that TFM grant trackage rights to Ferromex in Monterrey and that Ferromex grant TFM trackage rights in Altamira.[43] Given the inability of TFM and Ferromex to determine acceptable fees, the SCT calculated the fees to be charged by each of the companies, but those have been contested by the parties.[44] In 2002, the SCT issued draft rules governing trackage, haulage, and interconnection rights, but to this date, the terms are still being contested by the railroads, and no final resolution has been reached.[45] In the meantime, in August 2002 the CFC opened an investigation into possible

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40 "Railroad Shippers Still Caught in a Mexican Standoff," *Journal of Commerce*, March 8, 1999.

41 "Grupo Mexico Seeks Antitrust Ruling in Rail Dispute," *Dow Jones International News*, March 22, 2001.

42 Comision Federal de Competencia, *Informe de Competencia Economica 2001*, at 82.

43 "SCT issues rulings on line usage rights between Ferromex and TFM," *Corporate Mexico*, August 16, 2002.

44 Grupo TMM, S.A. de C.V., SEC Form 20-F, 2001, at 13; Grupo TMM, S.A., SEC Form 20-F, 2002, at 18-19.

45 "More LatAm Infrastructure News," *Business News Americas*, October 14, 2002.

anticompetitive, monopolistic behavior by all Mexican railroad companies.[46] This investigation is still in process.[47]

While TFM has provided a neutral connection for U.S. carriers to date, it is unclear whether and to what extent existing Mexican regulatory practice will prevent anticompetitive behavior of a KCS-controlled TFM. Preservation of effective competition for U.S.-Mexican rail traffic requires that TFM maintain the border gateways open physically and economically and that competitive protections provided to shippers on one side of the border for international traffic are not undone by actions on the other side.

IV.D. Proposed Open Gateway Conditions

The KCS Application clearly contemplates that the Robstown, Corpus Christi, and Laredo interchanges will remain economically open to all parties, as the projection of diversions contemplates that BNSF will continue to interchange a significant volume of traffic over the existing gateways. Moreover, the Applicants pledge to "keep the Laredo gateway open on commercially reasonable terms,"[48] and expect and accept that an open gateway requirement will be imposed at the gateways (Laredo and Brownsville) as a condition of the Board's approval of KCS's control of Tex Mex.[49] An open Laredo gateway requires that, first, the BNSF-Tex Mex interchange at Robstown/Corpus Christi remain open; second, the Tex Mex-TFM interchange at Laredo remain open regardless of whom Tex Mex interlines with in the U.S.; and, third, the TFM interchange with UP and Tex Mex remain open regardless of interline movements in the U.S. An open

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46 "Investiga la CFC a ferrocarriles," *Reforma*, August 15, 2002

47 The findings have not yet been made public.

48 Supplemental Application at 24.

49 Transcript of Testimony of Gerald Davies, COO of KCS, at Public Hearing on Proposed "KCS-Tex Mex"-Railroad Merger, July 31, 2003, at 44-45. He continues that "Those kinds of conditions are conditions that simply will foster the development of that marketplace."

gateway commitment at Laredo and Brownsville is a very modest intervention to preserve existing competitive options.[50]

The Applicants state they intend to "honor the terms of all marketing and pricing agreements involving Tex Mex and TFM" and will "not seek to cancel them early."[51] However, "... KCS is not willing to simply renew such an agreement under the old terms without undertaking a good faith negotiation."[52] Thus, unlike the open gateway commitments that have been made in recent mergers, KCS has indicated an unwillingness to limit rate and division increases for any period beyond the expiration of existing agreements. In the CN/WC transaction, by contrast, limitations to preserve existing competitive gateway rates and conditions were made for five years.

Application of open gateway conditions on the Laredo and Brownsville gateways that limits increases in rates over a fixed period, such as five years, is a reasonable public policy accommodation to preserve competition and shipper options. The interchanges at Laredo are obviously major, efficient interchanges that experience growing traffic levels; there is no risk that inefficient routings will be preserved in the foreseeable future. As recent merger proceedings prior to this one show, these rate and service restrictions have been offered, negotiated, or imposed by or on the merging parties in a manner that has been acceptable to the parties. These restrictions do not appear to have diminished the efficiency gains that the mergers generate nor do they appear to have deterred the merging parties from completing their transactions and capturing these gains. The Applicants have provided no evidence of any harm that would result from the preservation of existing

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[50] This is recognized by KCS. In discussing the open gateway protections, the KCS COO states, "Those kinds of conditions are conditions that simply will foster the development of that marketplace." *Ibid.* at 45.

[51] Supplemental Application at 26.

[52] *Ibid.*

competitive conditions for a limited period of time that would outweigh the protection that they provide to competition and shippers.

V. PAST AND PRESENT BEHAVIOR OF KCS WITH RESPECT TO TEX MEX-BNSF SERVICE

Past and present behavior of KCS with respect to Tex Mex-BNSF interline service raises heightened concerns about the willingness of KCS to engage in economically efficient and commercially reasonable arrangements with BNSF once it gains control of Tex Mex (and/or TFM). In early 1998, BNSF negotiated a division and marketing agreement with Tex Mex. This agreement was intended to allow BNSF to market BNSF-Tex Mex service more effectively over the Laredo gateway to enhance the competitive alternative anticipated under the UP/SP merger conditions. Only after Tex Mex and BNSF had reached agreement did KCS intervene in an attempt to block Tex-Mex from entering into this pro-competitive agreement with BNSF.[53]

KCS did not reveal to BNSF or the Board the basis on which it claimed the right to intervene until BNSF and Tex Mex had already reached agreement. This disclosure did not come until well after the Board's decision in the UP/SP merger to create a competitive alternative to UP at Laredo through BNSF-Tex Mex and KCSR-Tex Mex routings. No immediate resolution was reached. Instead, filings were made before the Board seeking clarification and relief, and only after several months of wrangling with KCS and the Board's indicated willingness to establish a rate, if necessary, were BNSF and Tex Mex able to enter into the agreements. The agreements, by which BNSF and Tex Mex could effectively set and market contract rates, were and are clearly pro-competitive. BNSF's and Tex Mex's attempts to

[53] Before the Surface Transportation Board, Finance Docket No. 32760 (Sub-Nos. 26, 30 and 32), BNSF Rebuttal Evidence and Argument in Support of Requests for Additional Remedial Conditions, Verified Statement of Harold F. Weddle, October 16, 1998 (BNSF-10), Tab 2.

complete the agreements indicate that they each thought they were in their own self-interests. Tex Mex, as the bottleneck carrier between BNSF and Laredo, presumably negotiated as successfully as possible to capture the "lump" available to itself (given that it could utilize a competing KCS route to reach U.S. locations). KCS, a minority owner in Tex Mex at that time with no regulatory right of control, exerted itself to prevent this pro-competitive arrangement for BNSF-Tex Mex service to Laredo from taking effect.

The diversion analysis submitted by the Applicants also raises questions about KCS's post-control intentions with respect to rates and service. A detailed look at the predicted diversions from BNSF to KCS, which amount to almost half (47%) of the revenue estimated to be gained by the combined KCS/Tex Mex, indicates that two-thirds of BNSF's lost revenue arises from traffic that is diverted from a BNSF interchange with Tex Mex at Robstown or Corpus Christi to an interchange with KCSR at Kansas City.

Half of the revenue the Applicants predict they will gain from BNSF arises from traffic that originates or terminates at stations closed to KCS or at interchange locations that KCS cannot reach. Again, in most cases, the new diverted route is longer than the existing BNSF-Tex Mex route. The portion of the route from Kansas City itself is longer on KCS than on BNSF to any point located on Tex Mex, including Laredo. (See Figure 4.)

Once KCS were to gain control of Tex Mex, traffic that originates on BNSF would still require one interchange with the commonly controlled KCSR-Tex Mex to reach Laredo, whether it interchanges in Kansas City or Robstown. While the diversion study is premised on continued interchange at Robstown and Corpus Christi, it is unclear what changes KCS intends that would force BNSF to interchange traffic at Kansas City rather than Robstown or Corpus Christi. The predicted diversions would be slower and longer, would have the same number of interchanges as the existing route, and would provide a shorter haul for BNSF which originates the traffic. One

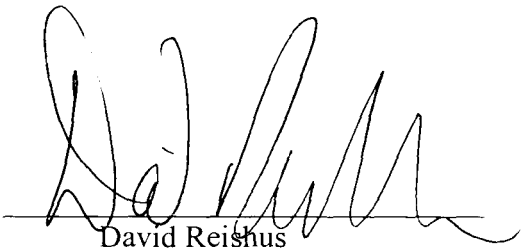
method for achieving that outcome is to raise the divisions at Corpus Christi and Robstown relative to Kansas City so that it is no longer profitable for BNSF to use its more efficient route.

Both past behavior and the projections of the Applicants indicate that modest protective gateway conditions would be prudent public policy to preserve the competitive discipline that a BNSF-Tex Mex routing provides for service to and from Southeast Texas and Mexico.

VERIFICATION

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

Executed on August 4, 2003.



David Reishus

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 14

HIGHLY CONFIDENTIAL — BNSF0000932

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HYNES V.S. EXHIBIT 26

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HYNES V.S. EXHIBIT 27

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HYNES V.S. EXHIBIT 28

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HYNES V.S. EXHIBIT 29

HIGHLY CONFIDENTIAL — UP-HC-001106

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HYNES V.S. EXHIBIT 30

HIGHLY CONFIDENTIAL — UP-HC-001387

BEFORE THE
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HYNES V.S. EXHIBIT 31

PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY V. THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, STB DOCKET NO. 42057, FINAL BRIEF OF DEFENDANT THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY (SERVED SEPT. 8, 2003)

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoe.com

208868

Anthony J. LaRocca
202.429.8119
alarocca@steptoe.com



September 8, 2003

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Secretary
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1925 K Street, N.W.
Washington, D.C. 20423

Re: ***Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, Docket No. 42057**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 15 copies of the Public Version of the Final Brief of Defendant The Burlington Northern and Santa Fe Railway Company. A copy of the filing is also included on the three (3) attached diskettes.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

Anthony J. LaRocca

Enclosures

cc: Counsel for Complainant

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PUBLIC SERVICE COMPANY OF COLORADO D/B/A/ XCEL ENERGY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Final Brief of
The Burlington Northern and Santa Fe Railway Company

Richard E. Weicher
Michael E. Roper
David M. Pryor
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
STEPTOE & JOHNSON, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6486

September 8, 2003

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	7
II.	TRAFFIC GROUPING	11
	A. Exclusion of Riverside/Highbridge Traffic	11
	B. Exclusion of Traffic for Consistency with BNSF's 2003 and 2004 Forecasts	11
	C. Exclusion of Rerouted Jeffrey Traffic	13
III.	TREATMENT OF CROSS-OVER TRAFFIC	18
IV.	SARR CAPACITY	24
	A. String Program Flaws	25
	B. Xcel's Understatement of Capacity	27
	C. BNSF's Capacity Model.	28
	D. Yard Capacity	31
V.	SARR OPERATING COSTS	32
	A. Crew	33
	B. SARR Locomotive Costs	34
	C. G&A	35
	D. MOW COSTS	37
VI.	ROAD PROPERTY COSTS	38
	A. Earthworks In Yards	38
	B. Earthworks On Line Segments	41
	C. Engineering Costs	42
	D. Material Transportation	43
VII.	DCF ISSUES	43
VIII.	VARIABLE COST CALCULATION	44
IX.	CONCLUSION	45

ABBREVIATIONS

Terms

AEP	American Electric Power
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
DARA	Density Adjusted Revenue Allocation Method
DCF	Discounted Cash Flow
Elec.	Electronic
Exh.	Exhibit
ICC	Interstate Commerce Commission
LCRA	Lower Colorado River Authority
LG&E	LG&E Energy
MMP	Modified Mileage Prorate
MOW	Maintenance of Way
Nar.	Narrative
Op.	Opening
PRB	Powder River Basin
RCAF-A	Rail Cost Adjusted Factor -- Adjusted
RCAF-U	Rail Cost Adjusted Factor -- Unadjusted
Reb.	Rebuttal
Rep.	Reply
RPI	Road Property Investment
RSAM	Revenue Shortfall Allocation Method

RTC	Railroad Traffic Controller Model
SAC	Stand-Alone Cost
SARR	Stand-Alone Railroad
STB	Surface Transportation Board
Surreb.	Surrebuttal
UP	Union Pacific Railroad Company
V.S.	Verified Statement
WP	Work Paper
WRPI	Western Railroad Properties, Inc.

Pleadings

Sum. Disp. Motion	BNSF Motion for Summary Disposition and Stay (filed Feb. 6, 2003).
Surreb. Motion	BNSF Motion for Leave to File Limited Surrebuttal Evidence (filed June 6, 2003).
Xcel Errata to Reb.	Xcel Errata to Complainant's Rebuttal Evidence (filed June 26, 2003).
Xcel Rep. to Sum. Disp. Motion	Xcel Reply to Motion for Summary Disposition and Stay (filed Feb. 26, 2003).

ICC or STB Proceedings

AEPCO	*Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. Co. and Union Pacific R.R. Co.*, STB Docket No. 42058 (STB served Aug. 20, 2002).
APL	*Arkansas Power & Light Co. v. Burlington Northern R.R. Co.*, 3 I.C.C.2d 757 (1987).
Duke	*Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, (STB served Mar. 25, 2003).
Gen. Procedures	*General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases,* Ex Parte No. 347 (Sub-No. 3) (STB served Mar. 12, 2001).

Guidelines	*Coal Rate Guidelines -- Nationwide*, 1 I.C.C.2d 520, 544 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d. Cir. 1987).
McCarty Farms	*McCarty Farms, Inc. v. Burlington Northern, Inc.*, 2 S.T.B. 460 (1997).
Nevada II	*Bituminous Coal -- Hiawatha, Utah to Moapa, Nevada Power,* 10 I.C.C.2d 259 (1994).
OPPD	*Omaha Public Power Dist. v. The Burlington Northern R.R. Co.*, 3 I.C.C.2d 853 (1987).
PPL I	*PPL Montana, LLC v. The Burlington Northern & Santa Fe Ry. Co.,* STB Docket No. 42054 (STB served Aug. 19, 2002).
PPL II	*PPL Montana, LLC v. The Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42054 (STB served Mar. 21, 2003).
TMPA	*Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42056 (STB served Mar. 24, 2003).
WPL	*Wisconsin Power & Light Co. v. Union Pacific R.R. Co.,* STB Docket No. 42051 (STB served Sept. 13, 2001).
WTU	*W. Tex. Utilities Co. v. Burlington N.R.R. Co.,* 1 S.T.B. 638 (1996).

FINAL BRIEF OF DEFENDANT BNSF

Pursuant to the Board's August 8, 2003 Order, BNSF hereby files its final brief.

I. INTRODUCTION

The circumstances leading to this rate reasonableness challenge have become common. Prior to the filing of the complaint, BNSF provided transportation of PRB coal to Xcel's Pawnee electricity generating station in unit trains under a transportation contract. Months before the contract was to expire, the parties began negotiation of a new, replacement contract. BNSF offered new contract rates significantly below the expiring contract rate.[1] Xcel rejected BNSF's offer, requested that BNSF publish a common carrier rate to establish STB jurisdiction for a rate reasonableness challenge, and then initiated this litigation.

This case, like others that have recently been brought against BNSF, is the product of an increasingly widespread view among coal shippers that the Board's regulation of rail rates has become a business opportunity for electric utilities to improve their profits, not a protection against the abuse of market power by regulated common carriers. There was no market failure in this case that justifies Xcel's complaint seeking regulatory intervention. Xcel's transportation costs for the two movements previously bundled under the expiring contract declined. BNSF Op. Nar. at II-76. Xcel had an opportunity to obtain even lower transportation rates through private, market-based negotiations. It passed up that opportunity for the prospect of a regulatory windfall.

While Xcel may have been encouraged to litigate by some Board decisions in the 1990s, it had no valid reason to expect the Board to prescribe rates here that are lower than those that

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[1] The transportation rate under the expiring contract was { }. Xcel Op. Nar. at II-B-13. BNSF offered to renew the contract at { } a rate { } below the expiring contract rate. *Id.* at II-B-14.

were available to Xcel through contract negotiations. Coal transportation rates have declined over the past two decades, but even Xcel acknowledges that the railroads are under financial pressure to increase coal rates.[2] In exercising its rate reasonableness jurisdiction, the Board cannot and does not ignore these financial concerns. Low rates on coal transportation, resulting in part from shippers' threats to seek unpredictable regulatory action, have contributed to BNSF's continuing revenue inadequacy. BNSF Op. Nar. at II-90-94. The overall R/VC ratio for BNSF's year 2000 coal movements with R/VC ratios over 180 percent was only { } percent, far lower than the revenues that the Board has determined in its RSAM calculations that BNSF needs to generate to become revenue adequate. *Id.* at II-85-86. If regulation further constrains BNSF's coal transportation rates, the prospects for achieving revenue adequacy will be greatly diminished.

Xcel argues that the Board should ignore BNSF's revenue inadequacy in assessing the rates at issue here. Xcel Rep. Nar. at I-3. The statute plainly states the contrary. It expressly instructs the Board to "recogniz[e] the policy . . . that rail carriers shall earn adequate revenues" in determining the reasonableness of rates in individual cases. 49 U.S.C. § 10701(d)(2). This statutory mandate is not satisfied simply by applying the SAC test, as opposed to some other regulatory methodology, to assess rate reasonableness. The SAC test is not a self-executing formula -- not like winding up a clock -- its application in an individual case requires dozens of methodological and evidentiary determinations by the Board. The Board's statutory obligation to take revenue adequacy into account means that the Board must assure itself that the SAC

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[2] As Xcel states on rebuttal, "Financial analysts and industry observers . . . publicly express their expectation that coal rates generally are on the rise, as the remaining large railroads come under increased investor pressure to grow revenues." Xcel Reb. Nar. at III-A-90.

analysis is being implemented in particular cases consistent with the economic principles and policies that underlie the SAC methodology.

One of the foundations of Constrained Market Pricing is that revenue inadequate railroads must be able to charge higher rates to shippers with inelastic demand. BNSF Op. Nar. at I-6-9. This differential pricing policy is reflected in the Board's RSAM calculations, which indicate that shippers with inelastic demand would have to pay rates that are significantly higher than the 180 percent R/VC jurisdictional threshold if BNSF were to have any hope of achieving revenue adequacy. Xcel is precisely the type of shipper that should be paying high rates because of its inelastic demand for coal transportation service. *Id.* at II-76-90. Xcel does not contest BNSF's evidence on this matter, arguing instead that Xcel's demand elasticity, like BNSF's revenue inadequacy, is irrelevant to the application of the SAC test. But if regulation prevents BNSF from charging a shipper like Xcel rates that significantly exceed the jurisdictional threshold, then the regulatory standard has become an obstacle to revenue adequacy, not a vehicle for achieving financial health as Congress intended.

The policies of promoting differential pricing and revenue adequacy are essential guideposts for the Board's implementation of the SAC test. When forced to resolve questions of SAC methodology in a particular case, the Board needs to consider how its methodological decisions will advance the policies that led to the adoption of the SAC test. It would be irrational to adopt a test for rate reasonableness that was designed to give railroads the opportunity to achieve revenue adequacy through differential pricing but then apply the test in a way that severely constrained railroads' ability to charge higher rates to shippers with inelastic demand.

There are two critical methodological issues in this case that the Board must resolve in light of these policies underlying the SAC test. The first involves traffic grouping. Xcel seeks to

distort the SAC results by assuming that revenues from traffic to Western Resources' Jeffery plant would be available to cover the costs of facilities that the Jeffrey traffic does not use. Xcel's proposed rerouting of the Jeffery movement is a major focus of BNSF's reply and Xcel's rebuttal evidence. As BNSF explains, revenues from the Jeffery movement should not be included in the SAC analysis because those revenues *do not* today offset the cost of facilities that are replicated by the SARR, those revenues *could not* be used by BNSF to offset the cost of those facilities due to binding contractual commitments, and they *would not* be available to offset the cost of SARR facilities in the stand-alone world because of the operating difficulties associated with the proposed revised route.

The second issue involves Xcel's treatment of cross-over traffic. Almost all of the revenue claimed by Xcel's SARR is derived from an arbitrary allocation of revenues on cross-over traffic. Cross-over traffic is subject to manipulation that can distort the results of the SAC test and lead the Board to conclude that rates are unreasonable when in fact they would be found reasonable under a properly performed SAC analysis. Xcel seeks just such an outcome here. Its revenue allocation on cross-over traffic must be rejected.

The Board should also implement the statutory revenue adequacy policy by giving teeth to the requirement that the complainant meet its burden of proof. The Board cannot accept vague or conclusory evidence in support of the complainant's case-in-chief. Therefore, when Xcel assumes operating, personnel and construction costs that are unparalleled in the real world, the Board cannot accept those assumptions based merely on Xcel's assertion that its SARR is assumed to be a least cost, efficient railroad. Xcel must be required to demonstrate with specific evidence how the SARR could achieve unprecedented cost savings. This brief addresses the principal areas of disagreement between the parties on the calculation of SAC costs. As BNSF

explains, Xcel has not carried its burden of proof on the critical cost assumptions underlying its SAC calculations.

When the SAC test is applied in a way that is consistent with the economic principles that led to its adoption and the evidence is evaluated in light of the complainant's burden of proof, the Board must conclude that the challenged rates do not exceed a reasonable maximum.

II. TRAFFIC GROUPING

While the complainant has the right to select the traffic base for its SARR network, there are limitations to this right. As the ICC explained, "[t]he proponent of a particular stand-alone model must . . . be prepared to defend, the assumptions and selections it has made." *Guidelines,* at 544. In several areas, discussed below, BNSF showed that Xcel's assumptions about the traffic and revenues that would be available to the SARR were unsupported and unjustified.

A. Exclusion of Riverside/Highbridge Traffic

Xcel improperly included in its SARR network coal movements to Xcel's own Riverside/Highbridge plants for the full 20 year DCF period. However, the evidence shows that Xcel plans to convert these plants from coal to gas when the existing coal transportation contract with BNSF expires. BNSF Rep. Nar. at III.A-35-36. In fact, in discovery, Xcel told BNSF that those plants would not be included in its SARR network and declined to produce any information about them. *Id.* at III.A-36. It would therefore be unreasonable to assume that the SARR handles any traffic to these plants beyond the amounts required by the existing transportation contract or to include any traffic to these plants after the existing contract expires.

B. Exclusion of Traffic for Consistency with BNSF's 2003 and 2004 Forecasts

For plants other than its own plants, Xcel developed its traffic volumes for the years 2003 and 2004 based upon BNSF's internal forecasts prepared in the ordinary course of business. However, as BNSF explained on reply, Xcel deviated from the BNSF forecast at times, without

justification, and overstated volumes moving to particular shippers. BNSF corrected Xcel's stand-alone traffic volumes to make them consistent with BNSF's internal forecasts that Xcel relied upon for most purposes.[3] These corrections affected the volumes of three shippers – (1) volumes to LCRA's Seymour plant { } consistent with the forecast and the expiration date of the current contract, (2) volumes to LG&E's Ghent plant { } consistent with the forecast and LG&E's obligations under its transportation contract, and (3) volumes to the AEP Rockport plant were { } BNSF Rep. Nar. at III.A-30-34.

On opening, Xcel presented no evidence or explanation supporting its deviation from BNSF's internal forecasts. Xcel merely assumed that "this traffic will continue to move over the WCC after the contracts expire." Xcel Op. Nar. at III-A-9. On rebuttal, Xcel presented for the first time evidence purporting to justify its deviation from the BNSF internal forecasts. Specifically, Xcel claims that publicly available information shows that BNSF's volume forecast relating to the Rockport, Seymour and Ghent plants was inaccurate. This "public information," presented for the first time on rebuttal, is improper. As the Board has repeatedly stated, "[r]ebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief."[4] Since Xcel's assumptions

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[3] The Board has recognized that internal forecasts are a valid basis for forecasting future volumes. *WPL* at 17-18; *WTU* at 662-63. Having chosen to rely on BNSF's forecasts, Xcel should not be able to selectively deviate from them.

[4] *Duke* at 4; *see also Gen. Procedures* at 5; *TMPA* at 138.

represented a departure from the BNSF internal forecasts that Xcel relied on, Xcel should have presented any supporting evidence on opening.[5]

C. Exclusion of Rerouted Jeffrey Traffic

A particularly significant traffic issue in this case involves the non-issue traffic moving annually to Western Resources' Jeffrey plant. As BNSF demonstrated on reply, it was improper for Xcel to include the Jeffrey traffic in the stand-alone shipper group. In the real world, the Jeffrey traffic moves on BNSF from northern PRB mines through Edgemont, SD and Alliance, NB to Northport where it is interchanged with UP. This traffic does not move over the lines replicated by the SARR. As discussed below and in detail in its reply evidence, BNSF showed that the inclusion of the Jeffrey traffic violates both prongs of the two-part test announced by the Board in *TMPA* for assessing a complainant's traffic grouping assumptions. *TMPA* at 19.

As to the first prong of that test, the SARR would not meet the transportation needs of Western Resources because the service provided by the SARR on the Jeffrey movement would be inferior to that provided by the real world BNSF. As to the second prong, the rerouting of the Jeffrey traffic from its real world route would not meet the purposes and objectives of the SAC

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[5] In any event, a review of the "new evidence" submitted by Xcel does not support Xcel's claim that BNSF's internal forecast was wrong. As to LCRA, Xcel points to the 2002 LCRA Annual Report. However, that Annual Report says nothing about LCRA's coal transportation sources in 2004 and beyond. To the contrary, it merely discussed the current contract that expires on December 31, 2004. BNSF's internal forecast is the only evidence on post-2003 traffic to the Seymour plant. As to Ghent, Xcel points to a Coal Supply Agreement, apparently obtained by Xcel in mid-May 2003, months after its opening evidence, as evidence that LG&E will ship at least 1 million tons of PRB coal in 2004 and 2005. Xcel Reb. Nar. at III-A-34; Xcel Reb. WP at 5554. However, that coal supply agreement does not obligate LG&E to purchase any PRB coal after 2003. LG&E is only obligated to take PRB coal from the supplier after 2003 *if* LG&E and the supplier are able to negotiate a price and other terms. If the parties do not reach an agreement on these terms, the Agreement is terminated. *See* Agreement, § 8.1 at Xcel Reb. WP 5564 to 5565. There is no evidence that an agreement was ever reached on post-2003 PRB coal purchases. BNSF's internal coal forecast remains the best evidence of record on Ghent traffic volumes after 2003.

test. The Board has explained that it is inconsistent with the purposes and objectives of the SAC test for a complainant to rely on non-issue traffic to contribute to the costs of facilities that the non-issue traffic does not use.[6] The Jeffrey traffic does not and would not use the facilities replicated by the SARR so the revenues from that movement should not be included in the SAC analysis.

BNSF has two routes out of the PRB. One route goes south over the Orin Line through Guernsey to Northport. The northern route exits the PRB at Donkey Creek and turns southeast through Edgemont, SD and Alliance, NB. The existence of these two routes allows BNSF efficiently to serve its PRB traffic by routing traffic originating at mines in the northern PRB over the Edgemont/Alliance line and routing the traffic originating at mines in the southern PRB over the southern route. There is no evidence in the record suggesting that BNSF's ownership and operation of these two lines is inefficient or unnecessary. Indeed, shippers, including Western Resources, clearly benefit from the existence of these multiple routes out of the PRB.

Xcel's SARR replicated only the southern BNSF route out of the PRB going through Guernsey. Xcel also assumed, consistent with BNSF's practice in the real world, that this route would handle traffic primarily originating in the southern PRB mines. Nearly 75 percent of the SARR traffic (other than Jeffrey traffic) originates at southern PRB mines, *i.e.* mines south of Cordero. Indeed, where a particular shipper served by the SARR originated coal today at mines

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[6] *AEPCO* at 2 ("a shipper should not seek to have its rate reduced by shifting any part of the costs of the lines or facilities that it needs onto traffic that does not use those lines or facilities"); *PPL II* at 7 ("revenues from non-issue traffic should not be relied upon to contribute to the costs of line segments or facilities that the non-issue traffic would not use").

in both the northern and southern portions of the PRB, Xcel generally chose to handle only that shipper's southern mine origins.[7]

Xcel departed from this approach with the Jeffrey traffic. That traffic originates at two northern mines in the PRB – Eagle Butte and Belle Ayr – and moves on BNSF today over the Edgemont/Alliance route. {

} BNSF Rep. Nar. at III.A-24, n.16.[8] Several operating conditions also dictate the routing of the Jeffrey traffic over the Edgemont/Alliance line. For example, that route is (1) shorter than the southern route from the PRB, (2) operationally more efficient for coal coming out of the northern Eagle Butte mine where the vast majority of Jeffrey traffic originates, and (3) avoids congestion on the heavily used southern line. *Id.* at III.A-23-24.

Xcel's assumption that the Jeffrey traffic would be rerouted from BNSF's Edgemont/Alliance line to the SARR's southern line is unreasonable and inconsistent with the traffic grouping principles underlying the SAC test. First, under SAC theory, the SARR steps into the shoes of the incumbent. {

} *See WTU* at 658, n.41. A shipper

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[7] For example, while { } originated coal from many northern mines in 2001 and 2002 (including Cordero, Buckskin, Caballo Rojo and Rawhide), Xcel only selected coal originating from Black Thunder, a southern mine, for inclusion in its traffic base. BNSF Rep. Ex. III.A-3.xls at WS Final Traffic 2002, rows 76-4, 78-9 and SMRT01H2 at rows 128, 177, 186, 197, 325, 337, 355, 385.

[8] Xcel points to a single Jeffrey movement out of the hundreds of Jeffrey movement records produced by BNSF in this case that moved south over the Orin Line through Guernsey. *See* Xcel Reb. Nar. at III-A-19. {

}

cannot have it both ways. It cannot assume the benefits of the incumbent's existing contracts but then avoid the substantive obligations that are part of the contract.

Second, { } it is unreasonable to assume a rerouting of the traffic because the SARR's service would be inferior to the service provided by BNSF today over the Edgemont/Alliance route. As BNSF explained on reply, the disadvantages of the southern route for Jeffrey trains are exemplified by Xcel's own evidence on cycle times. Even though Xcel's string program clearly understates cycle times, Xcel assumed that the cycle times for the Jeffrey trains on the SARR would *exceed* BNSF's cycle times by as much as 17 percent. BNSF Rep. Nar. at III.A-24-27.[9] On rebuttal, Xcel challenged BNSF's cycle times evidence as a apples-to-oranges comparison of average cycle times on the BNSF today to peak cycle times on the SARR. Xcel argued that it is not surprising that the cycle times achieved during the supposed two-week peak period on the SARR are longer than BNSF's average cycle times because one would expect cycle times during peak periods to be longer than average.

The problem with Xcel's argument is that Xcel did not, in fact, model a peak period. As BNSF showed in its Summary Disposition Motion at 10-14, Xcel's opening evidence was based on a modeled week with *below* average traffic volume. In response, Xcel claimed that it inadvertently based its opening evidence on a one-week period from the string program instead of a two-week period. Xcel Rep. to Sum. Disp. Motion, Crowley V.S., 14-15. BNSF then showed in its reply evidence that even the two-week period belatedly selected by Xcel was only an average period on the WCC and still did not qualify as a peak. BNSF Rep. Nar. at III.B-11-

[9] The differences between the cycle times are magnified when the obvious shortcomings in Xcel's string program are considered. *See* BNSF Rep. Nar. at III.B-10-20.

15. On rebuttal, Xcel claimed that it *could* have instructed the string program to model the operations of longer trains with more cars, which would increase the annualized traffic volume based on the two-week period to a level representative of a peak period. Xcel Reb. Nar. at III-B-24-25. But Xcel *did not* model the operations of these longer trains; if it had, the SARR's trains would have been heavier and slower, causing the cycle times to be even longer. [10]

Also on rebuttal, Xcel presented a new string program analysis purporting to show that SARR trains would actually achieve faster cycle times than the trains Xcel modeled on opening. The Board should not give any weight to this new string program analysis. In addition to being improper rebuttal under Board precedent, the string program results generating the supposedly faster trains stemmed in part from an error in the program codes that instructed the model to ignore grades and curves on the SARR. *See* BNSF Surreb. Motion at 15-19. Trains moving over flat, straight track will obviously achieve unrealistically fast transit times. In its response to BNSF's surrebuttal motion, Xcel admits that the new string program contained this error but suggests that yet another change in the program code could fix the error. *See* Xcel Errata to Reb. At this late stage, the Board cannot accept yet another iteration of Xcel's flawed string program or place any reliance at all on operating statistics that might be produced by it.

There are other reasons to believe that the SARR would not be able to provide service as good as the incumbent's on the Jeffrey movement. Use of the Edgemont/Alliance route for the Jeffrey traffic avoids interference with other loaded and empty trains being staged into and out of the southern PRB mines. Since as many as 25 trains a day are assumed to enter and depart the

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[10] Xcel also claims in its rebuttal that it modeled the "WCC's three busiest weeks" in its string program. Xcel Reb. Nar. at III-A-21. However, Xcel's workpapers show that the traffic volume for this three-week period, when annualized, is equal to Xcel's expected annual volume for the WCC. *See* Xcel Reb. Elec.WP "PEAKTRAINSReb.123."

simplifying assumption that allows shippers to avoid evidentiary burdens as it was in the *Nevada Power* case where the ICC first approved its use. Instead, cross-over traffic has evolved into the 800 pound gorilla of complainants' hypothetical SARRs, completely dominating complainants' traffic groups and effectively determining the outcome of the cases. In a case like this where cross-over traffic dwarfs the issue traffic, the allocation of revenue on cross-over traffic is the most critical input to the SAC analysis, yet that allocation is unavoidably arbitrary, regardless of the allocation method used.

This is a bizarre – and in BNSF's view impermissible – state of affairs. Absent the abuse of cross-over traffic, complainants would have no basis for their rate reasonableness claims.

BNSF's reply evidence explained in detail why reliance on cross-over traffic is inconsistent with SAC principles. Professor Janusz Ordover's extensive testimony on this conceptual aspect of the cross-over issue boils down to three basic propositions: (1) Cross-over traffic violates the cost-causality principle underlying the SAC test. That test is supposed to compare the total revenues generated by the traffic group with the full economic costs of all the facilities needed to serve movements in the group. The use of cross-over traffic (and the splitting of a stand-alone railroad into interline segments) severs the responsibility for cost recovery, necessitating an arbitrary allocation of revenues that, by definition, cannot be attributed to particular segments of the cross-over movement. BNSF Rep. Nar. at III.A.10-13. (2) The allocation of revenue on cross-over traffic can distort the outcome of a properly performed SAC test, resulting in a finding that challenged rates are unreasonably high when, in fact, they would be found to be reasonable under a full SAC analysis. *Id.* at III.A.15-21. The potential for distortion increases as the share of cross-over traffic in the stand-alone traffic group increases.

(3) Complaining shippers, including Xcel, have the incentive to use cross-over traffic as a vehicle for strategic revenue shifting that will produce distorted SAC results. *Id.* at III.A.13-15.

In its rebuttal evidence and argument, Xcel fails to refute any of BNSF's three conceptual propositions. It essentially ducks the first point, suggesting that BNSF's critique of cross-over traffic is an attack on the principal of traffic *grouping*. Xcel Reb. Nar. at I-10-11. But BNSF specifically endorsed the "ICC's decision to allow a shipper to group issue and non issue traffic that was to be carried end-to-end" as "fully consistent with the basic precepts of constrained market pricing." BNSF Rep. Nar. at III.A.9. It is the severing of end-to-end movements and the consequent inability to compare full revenues and full costs that violates SAC principles. Xcel did not even address the severing/arbitrary allocation issue on rebuttal. Nor did Xcel address BNSF's contention that the use of cross-over traffic can distort the outcome of a properly performed SAC analysis. It had no answer to the stick diagram (or "simplified example") set forth in BNSF's reply narrative. *Id.* at III.A-15-21. BNSF has presented unrefuted evidence of the distorting effect of cross-over traffic. Finally, Xcel did not dispute that it has the incentive to manipulate the division of revenues on cross-over traffic so as to engage in strategic revenue shifting.

Given these unrefuted conceptual problems with Xcel's reliance on cross-over traffic, the Board should dismiss Xcel's SAC evidence in its entirety since Xcel's case is built on cross-over traffic. If it does not do so, the Board must accept the evidence of record based on the method for allocating revenue on cross-over traffic that is less arbitrary and less likely to distort the outcome of the SAC analysis.

On the record presented here, the Board's choice of revenue allocation methods is between the modified mileage prorate ("MMP") espoused by Xcel and the density adjusted

revenue allocation method ("DARA") proposed by BNSF. DARA is clearly superior from the perspective of SAC principles because it addresses the ability of the SARR and the residual incumbent to cover both attributable and unattributable costs. It does so by taking account of differing levels of traffic density on the on-SARR and off-SARR portions of cross-over movements. DARA is also superior from an equitable perspective because it produces more even-handed results than MMP, which, as implemented by Xcel, allocates disproportionate revenues to short-haul movements by the SARR as originating carrier.

Xcel attempts to defend MMP not as a matter of economic logic but as a matter of Board precedent. It contends that its use of MMP is based on the Board's "well-established standard that in the absence of actual data on revenue divisions the goal of estimating the revenues that a SARR should earn from cross-over traffic is to estimate what the market-based divisions would be in the 'real world.'" Xcel Reb. Nar. at I-24. Xcel extracts this "well-established standard" from the concurring opinion of Chairman McDonald in the ICC's *Nevada Power* decision.

In fact, the current state of the law is that there is no "well-defined standard" that governs the issue of what method should be used to allocate cross-over traffic revenues in this case. Although the Board and its predecessor have accepted revenue allocations based on MMP in some prior SAC cases, the Board has twice recently addressed the issue of allocation methodology and said that "we have not adopted a single, preferred procedure for developing revenue divisions on cross-over traffic."[14]

As to the Board's supposed preference for allocating revenues by estimating market-based divisions, the state of the law is also different from what Xcel claims it to be. *Nevada*

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[14] *TMPA* at 31 n.74; *accord PPL I* at 7 n.14.

Power did not constitute an unqualified endorsement of divisions.[15] Numerous other SAC cases, including those most recently decided by the Board, indicate that considerations of cost-coverage are at least as relevant as market considerations in determining how to allocate revenues on cross-over traffic.[16] In *McCarty Farms*, the Board used MMP to allocate revenues on cross-over traffic not because it found MMP to estimate market-based divisions but because it "account[ed] for the non-mileage-based costs incurred when carriers switch freight cars."[17]

The issue regarding cost coverage on cross-over traffic is framed by the Board's recent statement in *TMPA*: "The revenue each carrier receives should cover the attributable costs of the service it provides and make some contribution to its unattributable costs." *TMPA* at 37 n.74. Determining coverage of attributable costs for the SARR and the residual incumbent is relatively straight-forward.[18] The question that is critical to the revenue allocation issue in this case is how the residual revenue available for coverage of unattributable costs should be divided between the SARR and the residual incumbent.

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[15] *Nevada Power* at 268 ("In the absence of any better evidence, we will prorate the revenues attributable to the cross-over traffic among the SARR and incumbent carriers on a mileage basis. . . . This approach is consistent with the treatment in our staff's preliminary analysis of historically interlined traffic for which actual (market-based) divisions are not available.")

[16] *OPPD* at 136, 138; *PPL I* at 10 n.20; *TMPA* at 31 n.73.

[17] *McCarty Farms* at 9. The Board stated that "[w]e find that the modified mileage proration method is superior to a straight mileage proration, because it takes into consideration differing handling costs." *Id.*

[18] BNSF calculated attributable costs for both the SARR and residual incumbent portions of cross-over movements under its DARA procedure using the most recent URCS for BNSF and employing the Board's Ex Parte No. 399 costing assumptions. BNSF Rep. Nar. at III.A-67. Xcel purported to show that its MMP revenue allocation gives the residual incumbent sufficient revenue to cover attributable costs of off-SARR portions of cross-over movements, but it did not calculate attributable costs correctly. *See* BNSF Rep. Nar. at III.A.-56-57.

Xcel makes no effort to answer this question. BNSF does answer this question, and its answer is that the carrier with relatively lower densities on its segment of a cross-over movement will need a relatively greater portion of the residual revenue on the movement to cover its unattributable costs than the carrier with relatively higher densities. This proposition flows logically from the existence of production economies that characterize the economic structure of the rail industry, and in particular from "the fact that greater use of the fixed plant result in a declining average cost."[19]

BNSF's DARA procedure involves an explicit calculation of attributable costs on both portions of cross-over movements and an allocation of residual revenue in direct proportion to length of haul and in inverse proportion to traffic density.[20] Thus, in the current case, DARA represents a refinement and an improvement over MMP because it provides a principled basis for allocating that portion of revenue on cross-over movements that is available to cover unattributable costs. DARA is designed to be even-handed.[21] In this case, it allows the SARR to benefit from economies of density by receiving additional revenue in excess of attributable costs for each unit of traffic that it carries, while at the same time recognizing that the less dense residual incumbent must also cover unattributable costs over the long term if it is to be able to interchange traffic with the SARR over the long term.

Xcel directs a variety of unfocused criticisms at DARA, the most prominent being that DARA is "contrary to the rule that that estimates of revenue divisions for cross-over traffic must be market-based. . . ." Xcel Reb. Nar. at III-A-63. As discussed above, the decisions of the

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[19] *Guidelines* at 526; *see also PPL I* at 12 n.21 (referring "to "the declining capital investment needed per unit of output as the rail system is used more intensively").

[20] The procedure for implementing DARA is described at BNSF Rep. Nar. at. III.A.-65-68.

[21] *See* BNSF Rep. Nar. at III.A-71-74 (DARA results and interpretation).

Board and its predecessor regarding cross-over traffic cannot fairly be read to establish such a categorical rule. Xcel also contends that DARA "can lead to anomalous results because it focuses on only a single cost factor – density – and ignores all others." *Id.* at 64. This is simply wrong. In its attributable cost calculation, the DARA procedure takes account of all the cost factors that comprise variable costs. And DARA, like MMP, explicitly accounts for length of haul.

The DARA revenue allocation procedure is the best one available to the Board on the record of this case.

IV. SARR CAPACITY

Xcel's failure to posit a SARR with adequate capacity is a critical flaw in its case-in-chief. Xcel's understatement of capacity resulted in a railroad that would be utterly incapable of providing service at the same level as the incumbent, a flaw that should, on its own, result in dismissal of Xcel's claims. Xcel impermissibly tried to repair the flaws in its capacity assumptions by reconfiguring the SARR on rebuttal, a misuse of rebuttal. In any event, given the deficiencies in the string program, Xcel provided no competent evidence that could be used to assess the new capacity assumptions.[22] The only reliable evidence on SARR capacity in this case is that submitted by BNSF.

[22] As a result, there is no evidence in the record as to the capacity that would be needed to handle the higher traffic volumes assumed by Xcel. The Board cannot logically accept Xcel's traffic assumptions when Xcel has failed to provide competent evidence on the capacity needed to handle that traffic.

A. String Program Flaws

Apart from some general references to the former WRPI line, Xcel's only support for its capacity assumptions is a flawed and unreliable string program analysis.[23] As BNSF explained in BNSF'S Summary Disposition Motion and reply evidence, numerous errors in the string program code as well as in Xcel's application of the string program render it useless in this case as a test for the adequacy of SARR capacity.

First, the string program analysis understates the number of trains that the SARR would need to accommodate in the peak traffic period, thus understating peak period capacity requirements.[24] Second, the string program fails to link empty trains with loaded trains departing from PRB mines, thus ignoring capacity that would be required at the mines or at staging locations in the PRB.[25] Third, the string program fails to detect overloadings of sidings and

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[23] Xcel claims that its SARR design is based on the former WRPI line. While Xcel's opening SARR had 26% doubletrack compared to 28% doubletrack for the former WRPI line in 1994, the WRPI line in 1994 also carried 30% less traffic than the SARR. BNSF Rep. Nar. at III.B-7. On rebuttal, Xcel claims that UP has expanded its traffic volume on the WRPI line since 1994, but it ignores the fact that UP has also added substantial capacity since 1994 to handle those higher traffic volumes. Xcel Reb. Nar. at III-B-11. By contrast, BNSF's real world Edgemont/Alliance line handles traffic volumes comparable to the SARR and has about 78% doubletrack, more than twice the amount assumed by Xcel, even after Xcel purported to add capacity on rebuttal. BNSF Rep. Nar. at III.B-34.

[24] Xcel's failure to model a peak period is discussed in connection with the Jeffery traffic.

[25] BNSF Sum. Disp. Motion at 15-16 and BNSF Rep. Nar. at III.B-15 to 16. Xcel's string program assumed that some trains would wait for days at mine loading locations but failed to include this time or consider whether there was adequate capacity for these trains at the mines. *Id.* Xcel claims that this problem is the inevitable result of its modeling assumptions, especially its use of actual departure time for individual trains. Xcel Reb. Nar. at III-B-30. But this concession highlights the unreliability of Xcel's string program analysis. Moreover, BNSF showed that it was possible to model a full cycle of SARR trains while they were on the SARR, thus ensuring that SARR capacity in the loading areas would be evaluated. BNSF Rep. Nar. at III.B-25.

yards, a fatal defect in a model designed to test the adequacy of capacity.[26] Fourth, the string program assumes incorrect or impossible train operations, including excessive speeds, flawed acceleration and deceleration, and erratic train movements.[27]

BNSF pointed out these flaws in Xcel's string program in its Summary Disposition Motion, and Xcel claimed, in reply to BNSF's motion, that the errors could be fixed on rebuttal. However, as to the first two categories of errors described above, Xcel did not even attempt on rebuttal to repair the string program.[28] On the question of overloaded yards and sidings, Xcel claims on rebuttal to have addressed this problem by "manually adjust[]" trains. Xcel Reb. Nar. at III-B-33. However, BNSF demonstrated in its Surrebuttal Motion that the new string program, like its many predecessors, still failed to detect overloaded sidings and yards. BNSF Surreb. Motion at 7, 19-20. On the question of erroneous train operations, Xcel claimed that these errors could be corrected by modifying the data used in the string program on SARR grades and curves. Xcel Reb. Nar. at III-B-35. Whether or not this is true, Xcel's rebuttal string program clearly did not fix the problem because the new string program ignored grade and curve

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[26] BNSF Sum. Disp. Motion at 17; BNSF Rep. Nar. at III.B-17 to 18; BNSF Surreb. Motion at 7, 19-20. These same defects in the string program submitted by complainants in TMPA led the Board to reject its use in that case. *TMPA* at 68 n.112 and 73-74. A related problem is the failure of the string program to detect T-Bone train collisions. BNSF Motion at 16-17 and BNSF Rep. Nar. at III.B-16 to 17.

[27] BNSF Sum. Disp. Motion at 17; BNSF Rep. Nar. at III.B-18 to 20.

[28] Xcel claims that it *could have* modeled a peak period simply by assuming the trains used in the string program were longer and heavier. But the short answer is that Xcel *did not* model the operations of those longer, heavier trains. BNSF Rep. Nar. at III.B-13 n.12. In addition, Xcel did not fix the string program's failure to link loaded and empty trains, which as noted above, is a shortcoming inherent in its model. Xcel Reb. Nar. at III-B-30 to 31.

data altogether.[29] Indeed, this error in the rebuttal string program, which Xcel acknowledges, alone renders it unreliable as a tool for testing capacity in this case.

The Board has seen multiple versions of the string program analysis in recent cases as complainants scramble to address program and implementation errors that are pointed out by defendants. As demonstrated in this case, every time an error in the program is supposedly fixed, other errors are introduced. The string program used here is an unwieldy and unreliable model in each of its iterations and the Board should reject all evidence based on it.

B. Xcel's Understatement of Capacity

There is no dispute that Xcel failed to design a SARR with sufficient capacity to meet the service requirements of its shippers. Xcel's own cycle times evidence showed that SARR trains consistently exceeded BNSF's existing cycle times by large margins.[30] Xcel's failure to posit a SARR that provides service at least as good as that provided by the incumbent justifies dismissal of Xcel's SAC evidence without even considering the many flaws in Xcel's string program. BNSF Rep. Nar. at I-4-9. Indeed, Xcel admitted on rebuttal that the SARR it posited on opening had "certain congestion problems." Xcel Reb. Nar. at III-B-4. It therefore reconfigured the SARR on rebuttal to doubletrack an additional 10% of the SARR. These changes to the SARR design constitute impermissible rebuttal.

The Board permits a complainant to correct inadvertent errors in its opening evidence, but it does not permit the complainant to redesign the SARR to address a design or operating flaw in the complainant's case-in-chief.[31] Xcel's claim that it was merely correcting inadvertent

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[29] BNSF Surreb. Motion at 6-7, 15-19.

[30] BNSF Rep. Nar. at III.B-8 to 9; III.C-15 to 16.

[31] *Duke* at 4.

string program flaws that BNSF pointed out in its Summary Disposition Motion is patently false. *See* Xcel Reb. Nar. at III-B-3. The revised SARR design presented by Xcel on rebuttal did not simply lengthen sidings to accommodate the multiple trains that the string program erroneously assumed would fit in a siding -- the issue addressed by BNSF in its Motion -- but instead sought to expand capacity to reduce congestion and provide faster cycle times for SARR trains.[32] In effect, Xcel posited a new SARR on rebuttal because it was clear that the SARR posited on opening was inadequate. This is impermissible rebuttal.

In any event, Xcel's rebuttal capacity assumptions cannot be accepted because they cannot be assessed on this record. The flaws in the string program analysis that Xcel used on rebuttal to assess transit times and capacity contain *new* errors. As explained in BNSF's Surrebuttal Motion, Xcel's rebuttal string program analysis mistakenly assumes that SARR trains move over a perfectly flat, straight track, allowing those trains to achieve unrealistic transit times. BNSF Surreb. Motion at 17. Xcel admits that the rebuttal string program contained this error but implausibly suggests that the error is not significant and that it can be corrected by yet another change to the underlying code. It would be improper to consider any evidence based on further iterations of the string program.

C. BNSF's Capacity Model

In contrast to Xcel's made-for-litigation string program, BNSF used the Rail Traffic Controller ("RTC") model developed by Berkeley Simulation Software to develop capacity assumptions for the SARR. The RTC model is sophisticated, reliable and easy to use, and it has become widely accepted among railroads, transit authorities and government agencies. BNSF

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[32] Indeed, Xcel admits that the changes were addressed to "congestion problems." Xcel Reb. Nar. at III-B-7.

Rep. Nar. at III.B-22. BNSF described in detail on reply the inputs to the RTC model and how that model was used to determine SARR capacity requirements.[33] Using the RTC model, Mr. Wheeler determined that the SARR required an additional 69 miles of mainline track to accommodate BNSF's revised traffic volume.[34]

On rebuttal, Xcel challenged BNSF's use of the RTC model. First, Xcel argued that it would be improper for the Board to accept evidence based on the RTC model because the program code for the model cannot be evaluated. Xcel Reb. Nar. at III-B-38-39. However, the masking of program code is a common feature of commercial computer programs designed to prevent the theft of the underlying intellectual property. The Board should accept evidence based on such programs if the programs are used in commercial applications since acceptance by the industry is sufficient evidence that the model produces reliable results.[35]

Second, Xcel argues that the Board should not accept evidence based on the RTC model because Mr. Wheeler did not respond to requests for detailed information about the specific projects on which the RTC model was used. Xcel Reb. Nar. at III-B-39 to 40. But Mr. Wheeler was not obligated to respond to burdensome and unauthorized discovery requests filed after reply evidence was submitted. Xcel's discovery argument is a red herring intended to distract the

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[33] BNSF Rep. Nar. at III.B-20-34. BNSF will provide a copy of the RTC model to the Board after final briefs are filed to allow the Board to evaluate BNSF's evidence on capacity. BNSF provided a copy of the model to Xcel after reply evidence was filed.

[34] BNSF Rep. Table III.B-5. Some of the additional capacity in Table III.B-5 is second mainline within SARR yards, and BNSF therefore counted that capacity as yard track in the comparison of track miles in Tables III.B-2 and III.B-3 of its reply evidence.

[35] A more restrictive rule would force the Board to rely on made-for-litigation models that are more easily manipulated. Indeed, it would be irrational for the Board to reject the widely used RTC model and instead rely on a string program developed for litigation purposes whose code is available for review but clearly replete with errors.

Board from the uncontested evidence that the RTC model is in fact used in commercial applications. Xcel presents no evidence whatsoever that the model is unreliable.[36]

Finally, Xcel raises a number of issues related to the implementation and use of the RTC model in this case. It is clear without extensive analysis that Xcel's criticisms are trivial and address minutia, not the overall logic or validity of Mr. Wheeler's RTC application.

In its August 8, 2003 order, the Board instructed the parties to address in their final briefs the development of off-line transit and unloading times used in their respective operating models. BNSF did not independently develop off-line or unloading times but instead accepted Xcel's assumptions as to those times. Xcel never explained its procedure for developing off-line and unloading times, which are set out in an electronic workpaper.[37] It used these off-line times in the following way. It first identified the time that each modeled train was assumed to leave the SARR loaded and then added the off-line time to determine when the train was assumed to return to the SARR empty. BNSF simply accepted Xcel's calculation of the empty return time as the beginning of the cycle of each SARR train that BNSF modeled. There was no reason to question Xcel's calculation of off-line times since those times were not relevant to the determination of SARR capacity or cycle times. Moreover, acceptance of Xcel's calculations eliminated an area of potential dispute.

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[36] Xcel did criticize the model on grounds that it supposedly does not produce data in a form that can be utilized by an analyst. Xcel Reb. Nar. at III-B-46. Xcel is wrong. The RTC Model can produce output data in spreadsheet format that can be analyzed in either Microsoft Access or Excel.

[37] Xcel Op. Elec. WP "peaktrns.xls" at column AV in the "string_Xcel.zip" file.

D. Yard Capacity

The most significant difference between the parties on the issue of yard capacity relates to the Guernsey Yard, the largest and most important SARR yard. The inadequacy of Xcel's Guernsey yard is evident by comparing it to BNSF's Alliance Yard, which handles a comparable amount and type of traffic as the SARR. BNSF's Alliance Yard has 27 tracks used to process empty trains while Xcel's Guernsey Yard has *six* tracks for empty trains. BNSF Rep. Nar. at III.B-45-46. While Xcel's assumptions inconsistent with the real world, Xcel provides no support for its Guernsey Yard configuration except vague and conclusory assertions that Xcel's experts designed the Guernsey Yard to be comparable to WRPI yards. WRPI, however, handled a substantially lower traffic volume than the SARR is assumed to handle. Moreover, there is no way to verify Xcel's assertions about WRPI because Xcel did not submit a scrap of evidence on the WRPI yard configuration to support its claims.

BNSF performed two independent and complementary analyses of the trackage required for Xcel's Guernsey Yard. First, BNSF's witnesses Messrs. Cebula and Mueller evaluated the actual operations to be carried out at Guernsey. BNSF Rep. Nar. at III.B-46-48, 51. A second analysis was performed by Mr. Wheeler using the RTC model.[38] BNSF Rep. Nar. at III-B-48-49, 51-52. Xcel basically ignored BNSF's RTC model analysis and focused its criticism on Mr. Mueller's analysis of operations needed to be performed at Guernsey.

First, Xcel complained that it was inappropriate for Mr. Mueller to rely on real world experience in assessing the time that empty trains would spend at Guernsey. But Xcel presented no evidence challenging Mr. Mueller's detailed description of the specific steps required or the

[38] Both analyses were performed based on the lower traffic volumes that BNSF assumes will be available to the SARR. Obviously, higher traffic volumes would require substantially more yard capacity.

amount of time required to perform the needed operations, and Xcel likewise presented no evidence to support the 2-hour dwell time for empty trains that Xcel asserts should be used instead.[39] Xcel Reb. Nar. at III-B-52; III-C-19-20. Second, notwithstanding its own designation of the Guernsey yard as the SARR's "principal service/staging yard," Xcel Op. Nar. at III-B-6, Xcel asserts that it was inappropriate to include staging tracks at Guernsey to coordinate access into PRB mines. Xcel Reb. Nar. at III-B-52. But it is beyond serious dispute that any railroad originating unit coal trains in the PRB would need staging facilities to ensure the efficient flow of traffic on high volume lines. BNSF Rep. Nar. at III.B-48. Finally, Xcel challenged BNSF's assumption that southbound loaded trains must enter Guernsey Yard. Xcel Reb. Nar. at III-B-53. But BNSF demonstrated that loaded trains interchanged to BNSF at Pawnee Junction must enter Guernsey Yard for a 1,000-mile inspection. BNSF Rep. Nar. at III.C-24.

V. SARR OPERATING COSTS

It is difficult to compare directly the parties' operating costs because those costs are based on SARRs with significantly different traffic volumes. However, it is clear that the parties are far apart in their calculation of operating costs since Xcel's base year operating costs are 57 percent of BNSF's projected operating costs even though Xcel's SARR supposedly handles 12 percent *more* traffic in the base year.[40] The areas where the parties differ most significantly on operating costs relate to crew, locomotive, G&A, and MOW costs.

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[39] Mr. Mueller pointed out that his assessment of time was very optimistic when compared to BNSF actuals. BNSF Rep. Nar. at III.C-19 to 24.

[40] *Compare* BNSF Rep. Ex. III-H-1 at 23; Xcel Reb. Ex. III-H-3 at 23; and BNSF Rep. Ex. III.A.8 at 1 and Xcel Reb. Ex. III-A-8 at 1.

A. Crew

Xcel failed to provide the Board with any reliable or usable crew statistics. BNSF pointed out in its Summary Disposition Motion, and Xcel in many cases conceded, the numerous mathematical errors and the failure to comply with federal hours-of-service regulations that led to Xcel's first assumption on opening of 146 T&E employees.[41] In response to BNSF's Motion, Xcel hypothesized that if the errors were corrected, the WCC could require as many as 260 crew personnel in the base year.[42] BNSF demonstrated on reply that the necessary corrections would result in a need for more than 400 crew personnel in the base year.[43] Then on rebuttal, Xcel came up with a new crew number that was lower than its earlier estimate of 260 crew personnel. Xcel's new crew number was based on a "corrected" two week "peak" period and a radically altered string program that purported to show much shorter transit times on SARR trains. As noted previously, the errors in Xcel's rebuttal string program invalidate any statistic, including crew personnel, that was based on the new string output. Moreover, despite its admission that the SARR would be required to comply with hours-of-service regulations, Xcel made no effort to determine whether additional crews would be required because some crews cannot complete their duty tour within the time allowed. Xcel blithely asserts without supporting evidence that "crews would have more than enough time to complete their shifts."[44]

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[41] *See* BNSF Sum. Disp. Motion, at 18-22; Xcel Rep. to Sum. Disp. Motion, at 5-6; Crowley V.S. at 27.

[42] Xcel Reb. Nar. at III-D-21.

[43] *See* BNSF Rep. Nar. at III.D-38, Table III.D.3-4, and III.D-40 (384 road crew plus 22 switch crew personnel).

[44] Xcel Reb. Nar. at III-D-22. This statement is untrue. Xcel's new (and invalid) string output demonstrates numerous instances where crews would exceed the permitted time.

In addition, Xcel continues to grossly understate the amount it would need to pay its crew personnel. Xcel calculated crew salaries that were below the average salaries paid to BNSF conductors and engineers reflected in Wage Form B, and it also assumed that its employees would work far more than the average BNSF employee despite the smaller annual salary. On reply, BNSF demonstrated that only a very small proportion of BNSF crew personnel works as many shifts as SARR crews would be required to, and that small subset of employees is compensated at much higher levels than the "average" BNSF employee.[45] The labor market would force any railroad to pay higher annual wages to crew expected to work the number of shifts posited by Xcel, especially for unit train coal operations that are unscheduled.[46] Xcel cannot have it both ways. It cannot calculate the number of crew personnel by assuming an extremely high number of crew starts per year and then avoid paying its crew personnel a salary that compensates for that heavy workload.

B. SARR Locomotive Costs

Differences between the parties on the number of locomotives required by the SARR are driven primarily by three factors. First, Xcel's locomotive calculations do not account for peak period requirements. BNSF Rep. Nar. at III.C-33-34. Xcel argues that the SARR does not need worry about peak traffic periods because it could simply borrow locomotives from the residual

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[45] *See* BNSF Rep. Nar. at III.D-41 to III.D-51.

[46] The low wages cited by Xcel supposedly paid by the ICE are irrelevant. There is no evidence, and no reason to believe, that ICE employees would be expected to perform the same type of work or work anywhere near the number of shifts per year that Xcel assumes for its SARR employees. *See* BNSF Rep. Nar. at III.D-46-48. Indeed, the Board can evaluate the vast differences between the SARR and the ICE by reviewing materials submitted by ICE. *See* Verified Notice of Exemption of Iowa, Chicago & E.R.R. Corp., *Iowa, Chicago & E.R.R. Corp. – Acquisition & Operation Exemption – Lines of I&M Rail Link, LLC*, STB Fin. Docket No. 34177 (filed June 7, 2002).

incumbent under a hypothetical run-through agreement. Xcel Reb. Nar. at III.C-9-10. But Xcel cannot impose on the residual incumbent the burden to incur the costs needed to maintain peak period equipment for the off-SARR *and* on-SARR portions of the movement. As the Board concluded in *TMPA*, it is "a carrier's obligation to have sufficient locomotives to serve its customers during peak periods," *TMPA* at 81, and Xcel failed to do so here.

The parties also disagree on the proper spare margin to use in developing the total locomotive fleet. BNSF showed that Xcel's reliance on a { } in an expired BNSF maintenance contract was misplaced because Xcel misconstrued the scope of that guarantee. BNSF Rep. Nar. at III.C-36. Moreover, BNSF's actual experience with the SD70MAC locomotives used to provide coal transportation service, including those covered by the maintenance agreement, was that they were in the shop and unavailable for use { } of the time. BNSF Rep. Nar. at III.C-37. Since Xcel proposes to use the same types of locomotives for the same type of service, there is no reason to expect that the SARR would experience different availability.

Third, Xcel dramatically reduced its locomotive count on rebuttal based on the output of its rebuttal string program. As discussed above, the output of that string program is flawed and cannot be used to generate reliable operating statistics.[47]

C. G&A

There is not sufficient space to address in this brief the numerous assumptions and calculations needed to produce reliable G&A estimates. However, the Board should evaluate the evidence presented by the parties in light of the real world references that BNSF submitted on

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[47] Differences between the parties on locomotive operating costs are driven by different assumptions as to rates of fuel consumption. BNSF Rep. Nar. at III.D-9.

reply. BNSF demonstrated that Xcel had posited a SARR that achieved unrealistically low staffing and salary levels that have never been achieved in the past.[48] Given the extreme discrepancies between Xcel's G&A assumptions and real world experience, it was incumbent upon Xcel to submit detailed and verifiable evidence supporting its G&A assumptions. On opening, Xcel failed to provide any support for its G&A assumptions other than the general and conclusory statements of its witnesses. On rebuttal, Xcel purported to submit evidence supporting some of its G&A assumptions. Pursuant to Board precedent described above, this evidence should be excluded as improper rebuttal. The Board should not permit complainants to avoid scrutiny of their cost assumptions by holding back evidence on those assumptions until rebuttal.[49]

A major difference between the parties on G&A costs involves insurance. Xcel assumed the SARR's insurance cost would be a percentage of the SARR operating costs equal to the ratio of BNSF's insurance costs to BNSF's operating costs. Xcel Op. Nar. at III-D-40. However, BNSF demonstrated that its low insurance costs are the result of economies of scale not available to the SARR, and it submitted the only evidence in the record as to the insurance costs that a railroad with the specific characteristics of the SARR would incur. BNSF Rep. Nar. at III.D-95.

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[48] BNSF Rep. Nar. at III.D-68-69, 79-80, 85-86, 93-95 (staffing levels); *id.* at 99-102 (executive salaries); *id.* at 74-75 (board of directors); *id.* at 87, 94 (outsourcing); *id.* at 62-63 (revenue/employee comparison to Class I railroads); *id.* at 67 (revenue/employee comparison to regional and shortline railroads).

[49] In any event, the rebuttal evidence is inadequate. For example, there are clear inconsistencies between the RailAmerica information offered in Xcel's Reb. Nar. at III-D-42 (noting 500 North American employees) and its workpapers at XCEL.REB.WP.6108 (showing 1300 employees in North America).

D. MOW COSTS

As noted previously, a complainant must design a SARR that provides service at least as good as the service provided by the incumbent. Xcel ignored this requirement in the assessment of SARR capacity and its MOW assumptions suffer from the same flaw. BNSF explained on reply that Xcel's MOW plan would result in delays and degraded service that would be unacceptable to SARR shippers. Xcel's in-house MOW staff would be insufficient to handle even routine day-to-day maintenance and it would be utterly incapable of responding to unexpected maintenance events that could shut down SARR lines. Xcel's arbitrary allocation of 10% of its contract expenditures on program maintenance to supplement the work of its meager in-house MOW staff is patently inadequate.[50] Unsupported allocations are no substitute for competent evidence on the expenditures required to maintain efficient operations of the SARR.

BNSF showed that the level of MOW spending that Xcel assumes for its high-density SARR would be inadequate even for a low density railroad. BNSF presented detailed evidence comparing the MOW staffs for two major shortline railroads, the MRL and the FEC, with Xcel's MOW staff assumptions. As BNSF explained, while both comparison lines had significantly lower traffic density, they had far larger MOW workforces than the SARR.[51] Xcel claims that a better comparison would be with the WRPI line, but it failed to present any competent or verifiable information about the MOW workforce or practices on WRPI.[52]

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[50] Xcel's 10% assumption comes out of thin air.

[51] *See* BNSF Rep. Nar. at III-D.123, III-D.159, III-D.177. The size of these railroads' operating MOW budget as a percent of total budget was also much greater than assumed by Xcel for its SARR.

[52] The only data presented by Xcel on WRPI was the vague and confusing statement, presented on rebuttal, that "WRPI, with 60 percent higher tonnages than the WCC, averages one person for every 5.8 route miles." Xcel Reb. Nar. at III-D-97. There is no context for this figure. It is

Xcel's MOW assumptions rest on little more than rhetoric about the ability of a SAC complainant to "structure a least-cost, most efficient stand-alone railroad." Xcel Reb. Nar. at III-D-88. But the complainant has the burden of proof and it must present *evidence*, not rhetoric, supporting its cost assumptions. Xcel's opening and rebuttal MOW presentations are totally devoid of substance, analysis or data. The only competent evidence in this case as to the MOW costs for the SARR is that presented by BNSF consisting of a detailed, bottom up evaluation of the specific tasks that would have to be supported by an MOW workforce and the necessary size of that workforce given the specific traffic characteristics and territory to be covered.

VI. ROAD PROPERTY COSTS

The parties differ substantially on the costs to engineer and construct the SARR. Some of the difference results from the parties' different mainline and yard capacity assumptions, discussed previously. Most of the remaining differences are associated with a small number of cost issues that are briefly discussed below.[53]

A. Earthworks In Yards

The single most important area of difference on RPI costs is earthworks, and the most important source of that difference relates to the cost of earthworks required to construct SARR

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impossible to know whether it is accurate; whether it refers to current UP practice or the old WRPI line; what personnel are included in the number; or what line segment is at issue. Unverifiable evidence such as this is incompetent and cannot be relied upon.

[53] Xcel asserts that the cost/track mile calculated by the Board in *TMPA* ($1.7 million) is a valid benchmark for assessing BNSF's RPI costs in this case ($2.7 million) and Xcel's RPI costs ($1.5 million). Xcel Reb. Nar. at III-F-1. However, a comparison of the TMPA and Xcel SARRs on a cost/track-mile basis is misleading because it does not account for the relative densities of the two railroads. Moreover, any comparison of the evidence here with findings in another case is misplaced because the Board decides SAC cases based on the evidence in the record in each case, not on an independent assessment of costs.

yards.[54] Xcel vastly understated the earthworks costs for SARR yards by assuming that all yards (except the Bill yard) would have an average of one foot of fill. Xcel's reliance on the Board's decision in *WPL* to justify this assumption is misplaced. There, the complainant located SARR yards in the same place they were located when the ICC Engineering Reports were produced. Since the Engineering Reports do not separately identify earthworks for yards and mainline, the complainant allocated the earthworks quantities for a particular valuation section between the yards in the valuation section and the corresponding mainlines assuming one foot of fill for the yards and the remainder for the mainline.[55] Having made this allocation, the Board correctly found that it would be incorrect to assume additional amounts of earthworks for the SARR yards, which would then exceed the total earthworks for the valuation section in the Engineering Reports.

In this case, Xcel chose *not* to locate SARR yards where they were when the Engineering Reports were developed and instead selected locations where earth moving requirements would be substantial. Because earthwork quantities for these new yards are not in the Engineering Report quantities, there is no linkage between yard and mainline earthwork quantities as in *WPL*, and no overstatement or double counting results from using the actual earthwork quantities for these new yards. Indeed, a one-foot-fill assumption dramatically understates the earthworks quantities that would be needed for the SARR yards (except for the yard at Sterling which existed at the time the Engineering Reports were prepared). For example, the Guernsey yard that Xcel chose for its SARR was not built until the late 1970s and its earthworks quantities are not

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[54] *See* Xcel Reb. Nar. at Tables III-F-6 and III-F-7.

[55] Since the yards were originally located on flat ground, this one foot of fill assumption was reasonable.

reflected in the Engineering Reports. BNSF Rep. Nar. at III.F-46-47. BNSF's witnesses describe the extensive rock formations that had to be excavated in order to create that yard. Xcel's assumption that this yard would require only one foot of fill is clearly wrong.[56] An accurate assessment of earthworks for that yard, as well as the other yards that were placed at locations where yards did not exist when the Engineering Reports were developed, requires an assessment of the specific terrain for the yard, and BNSF has presented the only evidence in this case on that issue.[57]

The second major issue involving earthworks in yards relates to the need to relocate the SARR's Bill yard, which Xcel improperly assumed would be constructed on top of UP's existing Bill yard. Xcel claims that the concept of entry barriers entitles it to build a yard where UP has a yard today since the SARR should not bear costs associated with its later entry into the market. Xcel misinterprets the law relating to entry barriers. As the cases cited by Xcel indicate, an entry barrier is a cost that the new entrant would have that *the incumbent* did not or would not have. Xcel Reb. Nar. at III-B-56, 57. But the existence of UP's yard would be as much an impediment to the incumbent seeking to do business in the manner proposed by Xcel as it is to the SARR.

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[56] Xcel contends that its method of separating yard quantities in the Engineering Reports from quantities attributable to the mainline overstates mainline earthworks quantities. BNSF disagrees, but that is not a relevant issue since Xcel chose its methodology for separating the respective quantities.

[57] Xcel argues that BNSF should be precluded from relying on commercial software to determine earthworks unless it agrees to produce a copy of the software. It cites the Board's treatment of the RAILS model in *TMPA* as support. But the programs used by BNSF in this case, unlike the proprietary RAILS model, are commonly used by engineering firms and are readily available for purchase. BNSF Rep. Nar. at III.F-44, 146. Xcel would apparently have the Board establish a rule precluding the use of commercial programs, most of which are licensed and cannot be freely produced, so that the parties would be forced to rely on made-for-litigation models that can be more easily manipulated.

The SARR is entitled to assume that its yards are built on top of the incumbent's yards, but it cannot ignore the existence of third party facilities.

B. Earthworks On Line Segments

A SARR must be built to standards that will ensure that it can provide service at least as good as the service provided by the incumbent. Xcel's earthworks calculations for SARR mainline segments violates this principle in two significant ways. First, Xcel assumes that mainline doubletrack segments can be built with only 15 feet between track centers. But as BNSF explained in its reply evidence, BNSF currently has 25-foot track centers on the line segments replicated by the SARR because that track spacing is necessary to maintain efficient traffic flows and to ensure the safety of MOW workers on high volume doubletrack segments. BNSF Rep. Nar. at III.F-24-25. Indeed, FRA regulations require 25-foot track centers unless train speeds are restricted or adjacent tracks are cleared of all maintenance workers and equipment.[58] BNSF has chosen not to sacrifice service quality to its shippers by having narrow track centers that would require speed restrictions and delay. The SARR likewise cannot choose to save costs on the construction of mainline segments that would result in degraded service.[59]

Xcel also failed to include the cost of access roads on certain high traffic portions of the SARR where operating and MOW crews, as well as outside vendors, need to have access to SARR lines without disrupting traffic. Once again, these are facilities that BNSF currently has,

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[58] 49 C.F.R. 214.7, 214.327(b), 214.335(c). Xcel asserts that the FRA working limits regulation allows the trains to operate at full speed, but the regulation in fact states that movements under working limits "shall be at restricted speed [20 mph] unless a *higher* speed [not necessarily full speed] has been specifically authorized." 49 CFR 214.321(d).

[59] Xcel's assumption of 15-foot track centers is also inconsistent with Xcel's operating plan and string program, neither of which contemplate the effect of maintenance delays. BNSF Rep. Nar. at III.F-26.

and they are critical to BNSF's ability to provide quality service today. The SARR cannot expect to avoid these costs and still provide the same service that BNSF provides. In fact, Xcel does not specifically dispute the need for access roads, but it claims that the earthworks quantities for constructing these roads are already included in the Engineering Reports. Xcel Reb. Nar. at III-F-21. Xcel submits absolutely no evidence to support this assumption and it is implausible on its face. Access roads are required to maintain high volume operations without restricting traffic flows. These concerns were not relevant 100 years ago since the rail lines that were the subject of the Engineering Reports were low density lines. Access roads were built as traffic volumes increased, and there is no reason to believe the Engineering Reports contain any earthworks corresponding to such roads.

C. Engineering Costs

Another major difference between the parties relates to engineering costs. Xcel based its engineering costs entirely on the engineering costs used by the Board in *PPL* and submitted no independent evidence. But reliance on the *PPL* engineering costs is inappropriate. There, the parties agreed on at least two elements of engineering costs (design and subsurface investigation) and the Board accepted *PPL*'s evidence on another cost element (inspection) because it was the only evidence in the record. The Board did not endorse a specific percentage for future cases but merely accepted the evidence before it. Here, BNSF has presented detailed evidence on each specific engineering cost tailored to the circumstances of the SARR at issue in this case. BNSF's evidence on this issue is not only the best evidence as to the engineering costs for the SARR at issue here, it is the *only* evidence.[60]

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[60] Xcel claims that any costs included in BNSF's engineering estimate associated with the compressed schedule for construction of the SARR are entry barriers that should be excluded

D. Material Transportation

Differences between the parties on material transportation costs relate primarily to three factors. First, Xcel fails to include the cost to transport subballast to the work site. Xcel claims that its subballast costs include transportation, but Xcel's subballast costs are derived from a BNSF AFE that does not include a cost for the transportation of subballast from the quarry. BNSF Rep. Nar. at III.F-95-97. Second, Xcel assumes that subballast will be available from the earthworks preparation of the yard at Guernsey but ignores the fact that the SARR construction schedule specifies that the Guernsey yard would be constructed after the mainlines. *Id.* at III.F-157-158. Third, Xcel assumes the SARR could reduce material transportation costs by using the residual BNSF to transport materials to the work site. *Id.* at III.F-110. This is a distortion of SAC principles. The SAC test allows the complainant to assume the SARR is constructed on top of the existing incumbent's lines. This fiction may be necessary to allow the complainant to choose the most efficient, least cost route, but it cannot be used to ignore real world that any railroad (including the incumbent) would have to incur to construct a new line.

VII. DCF ISSUES

There are two significant areas of dispute between the parties on the implementation of the Board's DCF model. First, BNSF includes a financing fee representing the costs that would be incurred to obtain equity for construction of the SARR. Xcel claims that the Board's cost of capital already includes any flotation costs incurred by the industry. But BNSF showed that while the Board-calculated cost of capital could in theory contain amounts for raising equity, it

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from the SAC analysis. Once again, Xcel misconstrues the concept of entry barrier. It is an entry barrier to assume a *premium* resulting from labor and equipment shortages that might be associated with an accelerated construction schedule. But BNSF simply included the costs for the additional staffing that would be required to achieve the posited construction schedule.

does not in fact contain such amounts. BNSF Rep. Nar. at III.D-185-86; III.G-1. Since any railroad seeking to raise capital for a significant construction project would incur these costs, it is not an entry barrier to assume those costs in the SAC analysis.

Second, Xcel uses the RCAF-A to index operating costs while BNSF uses the RCAF-U, consistent with the Board's decision in *TMPA*. As BNSF explained, it is inappropriate to assume that a SARR transporting a single commodity would be able to achieve the magnitude of productivity gains possible for an existing Class I railroad. BNSF Rep. Nar. at III.D-184.

VIII. VARIABLE COST CALCULATION

Most of the issues relating to the proper calculation of variable costs are thoroughly addressed in the evidence that has been submitted. It is necessary, however, to address briefly the calculation of road property costs, which account for more than 40% of the difference between the parties' variable cost evidence, because Xcel relies on a new road property analysis submitted for the first time on rebuttal.[61]

Xcel's new road property evidence purports to rely on the methodology accepted by the Board in *TMPA*. There are three problems with Xcel's reliance on *TMPA*. First, BNSF does not agree with the Board's conclusion in *TMPA* that the reconciliation of FADB and R-1 data at a *system-wide* level confirms the accuracy of the FADB data at the *segment-specific* level. BNSF Op. Nar. at II-49-50; Elliott V.S. at 23-25.[62] Second, even if it were possible to reconcile the

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[61] Xcel tries to shift the blame to BNSF for its late filed road property evidence, arguing that it should be able to submit a new analysis because BNSF did not provide workpapers to support the Elliott statement until May 6, 2003. But Xcel did not even ask for those workpapers until April 18, 2003, even though it had the Elliott statement since April 2002.

[62] Indeed, Xcel's witness here, Mr. Plaistow, has taken the position in the *AEPCO* case that BNSF's internal road property data do not permit segment-specific calculations. *See* AEPCO Op. Nar. at II-A-37 n. 31 (filed Feb. 7, 2003).

FADB and R-1 data relating to *gross* investment, BNSF showed that the depreciation data used to produce *net* investment are erroneous and overstate depreciation, particularly on high-density lines. BNSF Rep. Nar. at II-20l; Elliott V.S. at 25-29. Third, the Board in *TMPA* specifically left open the question whether a line-specific adjustment could ever be made (even if accurate data were available) without first adjusting the variability factor to account for relative density. BNSF showed that variability does in fact change with density and that the ICC previously acknowledged that relationship. BNSF Op. Nar. at II-52-54; Rep. Nar. at II-22-24; Reb. Nar. at II-36-37. Xcel argues on rebuttal that there is no need to adjust the variability factor because the 50% variability in URCS is already too high. BNSF has not had an opportunity to respond to this assertion, but the short answer is that the ICC already concluded that road property variability most likely ranged between 50% and 90%, i.e., that 50% would be a *floor* for any credible variability analysis.[63]

IX. CONCLUSION

Xcel's SAC evidence is based on fundamental conceptual flaws as well as unsupported and erroneous cost assumptions. When the SAC test is implemented using appropriate cost and revenue assumptions, it is clear that the challenged rate does not exceed a reasonable maximum rate. The Board should dismiss Xcel's complaint.

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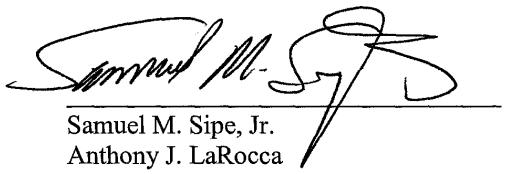
[63] ICC, Bureau of Accounts, Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs, Statement No. 7-63, at 83 (1963). This conclusion is even more applicable today given that changes in railroad accounting result in more MOW expenditures, which are highly variable with density, being treated as capitalized road property costs.

Respectfully submitted,



Richard E. Weicher
Michael E. Roper
David M. Pryor
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
STEPTOE & JOHNSON, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6486

Attorneys for The Burlington Northern And Santa Fe Railway Company

Dated: September 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2003, a true and correct copy of the Final Brief of BNSF was served by hand on:

Thomas W. Wilcox
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036

Anthony J. LaRocca



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 32

REPLY COMMENTS OF BNSF MAJOR ISSUES IN RAIL RATE CASES, EX PARTE NO. 657 (SUB-NO. 1), (FILED MAY 31, 2006)

REDACTED PUBLIC RECORD VERSION

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STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Samuel M. Sipe, Jr.
202.429.6486
ssipe@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
www.steptoe.com

June 1, 2006



Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Re: **Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1)**
Reply Comments of BNSF Railway Company

Dear Secretary Williams:

BNSF Railway Company ("BNSF") attempted to file a physical copy of the Reply Comments of BNSF Railway Company and related materials with the Board at approximately 3:00 p.m. on May 31, but was unable to complete the filing because the Board's building was closed due to a broken water main. Shortly thereafter, BNSF filed a .pdf version of its Reply Comments using the Board's electronic filing system. Copies of the Reply Comments were served on interested parties on May 31. BNSF is now submitting the paper copy of its filing, as well as CDs containing electronic versions.

Enclosed are the original and twenty copies of the Reply Comments of BNSF Railway Company submitted in response to the Board's Notice of Proposed Rulemaking dated February 27, 2006 in the above-captioned proceeding. Also enclosed are three CDs containing PDF copies of these Reply Comments and three CDs containing electronic versions of BNSF's Reply Comments in Word format.

Please date stamp the extra copy of this letter and return it with our messenger.

Sincerely,

Samuel M. Sipe, Jr.
Counsel for BNSF Railway Company

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216660

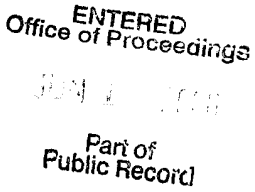


BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

REPLY COMMENTS OF
BNSF RAILWAY COMPANY



Richard E. Weicher
Michael E. Roper
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, DC 20036
(202) 429-3000

ATTORNEYS FOR
BNSF RAILWAY COMPANY

May 31, 2006

TABLE OF CONTENT

Page

I. INTRODUCTION 1

II. MAXIMUM RATE DETERMINATION 5

A. Railroad Commenters Agree That The Board's Proposals Are Flawed 5

B. The Shippers Advocate That The Board Should Abandon Percentage Reduction And Adopt No Fixed Approach As A Replacement 7

C. Alternatives To Percent Reduction Proposed By Shippers Are Flawed 9

1. AEP Texas 9

2. Arkansas Electric Cooperative 13

3. Western Fuels/Basin Electric 13

a. RAM 14

b. Reduced Mark-Up 15

III. REVENUE ALLOCATION FOR CROSS-OVER TRAFFIC 16

A. Introduction 16

B. Revenue Allocation Based On Real World Divisions Is Not Called For By The *Guidelines*, Economic Theory, Or ICC/Board Precedent 18

1. A Revenue Allocation Methodology Based On Real World Divisions Is Inconsistent With Contestable Market Theory 19

2. Neither The ICC/Board Decisions In SAC Cases Prior To 2003 Nor ICC Precedent Outside The SAC Context Require Use Of Real-World Divisions To Allocate Revenues On Cross-Over Traffic 21

3. The Board Explained In *Duke/NS* Why It Adopted A Cost-Based Approach For Allocating Revenues On Cross-Over Traffic 26

4. A Cost-Based Revenue Allocation Approach Does Not Undermine Shippers' Supposed Entitlement To The Use Of Cross-Over Traffic In A SAC Analysis 27

C. The Shippers' Claims Regarding The Purported Flaws In The ATC Methodology Proposed By The Board Also Lack Merit 29

D. If The ATC Approach Is Adopted In This Rulemaking, The Board Should Apply It In The Pending Cases 31

IV. INDEXING OPERATING EXPENSES 33

V. USE OF URCS SYSTEM-AVERAGE COSTS IN RAIL RATE CASES 40

A. The Board's Proposal Would Simplify SAC Litigation 40

B. Shippers' Objections Are Unfounded 42

C. Shippers' Proposals Would Increase Expense, Complexity And Uncertainty Of The Jurisdictional Determination 44

D. No Movement Specific Adjustments Are Appropriate Unless They Properly Account For The Relationship Between Variability And Density 46

E. Other Comments 48

VI. DCF PERIOD 49

VII. STANDARD FOR REOPENING, VACATING AND FILING A NEW CASE 52

A. The Board Correctly Interpreted The Court's Decision In *BNSF* As Mandating Similar Treatment For Railroads And Shippers Seeking *Vacatur* Of A Rate Prescription 53

B. Interim Suspension Of A Prescribed Rate Is Within The Board's Authority 54

C. The Board's Proposed Limits On The Scope Of A Reopening Are Appropriate 56

D. The Board Should Not Adopt A Rule Addressing The Extent To Which Changes In SAC Methodology Will Be Considered In Reopening Proceedings 56

VIII. OTHER ISSUES – TESTING FOR CROSS-SUBSIDY 57

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

REPLY COMMENTS OF BNSF RAILWAY COMPANY

On May 1, 2006, BNSF Railway Company ("BNSF") submitted comments addressing the rules proposed by the Board in the February 27, 2006 Notice of Proposed Rulemaking in Ex Parte No. 657 (Sub-No. 1), *Major Issues In Rail Rate Cases* ("NPRM"), regarding the application of the SAC test in rail rate cases and the procedures for reopening and vacating existing rate prescriptions. The Board also received comments from other railroads, shippers, shipper associations, and government agencies. BNSF hereby submits its reply comments addressing the opening comments of other parties in this proceeding.

I. INTRODUCTION

More than a quarter of a century after the Staggers Act, shippers and their advocates continue to deny the basic principles that govern the Board's regulation of railroad rates. There is a pervasive sense in the shippers' comments that rate prescriptions should be favored over market-based rates, that railroads should be restrained from setting rates based on market forces, and that differential pricing should be severely restricted because it is unfair to shippers with high demand for rail services. The shippers' emphasis on regulation and disregard for market-based rate setting would turn the statute on its head. In the Staggers Act, Congress sought to *remove* the burdens of regulation that had produced ruinous financial results for the Nation's railroads. Congress expressly instructed the Board to "allow, to the maximum extent possible,

competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. §10101(1). Congress also instructed the Board to assist railroads to achieve revenue adequacy. 49 U.S.C. §10704(a)(2). There is no dispute that revenue adequacy can only be achieved if railroads are permitted to engage in differential pricing.

The scheme of regulation under the current statute is to give railroads the freedom to set rates based on market forces. Rate regulation is limited to circumstances where there is an abuse of market power. It is not an abuse of market power for a railroad to set differential prices based on perceived demand for service by individual shippers. Differential pricing is critical to the financial viability of the railroad industry and it has been at the heart of regulatory policy since the Staggers Act. Nothing has changed in the railroad industry to make differential pricing any less important now. The Board and its predecessor have repeatedly stated that railroads can recover their substantial joint and common costs only by setting relatively high prices for shippers with high demand for rail service.

Some shippers and their advocates suggest that railroads no longer need to engage in differential pricing because they have already achieved revenue adequacy. *See, e.g.*, Verified Statements of Curtis M. Grimm, at 1-2 ("Grimm Op. VS") and George H. Borts, at 1-2, ("Borts Op. VS"), attached to the Joint Opening Comments of Western Coal Traffic League, Concerned Captive Coal Shippers, Western Fuels Association, Inc, Edison Electric Institute, National Rural Electric Cooperative Association & American Public Power Association (hereinafter "WCTL" or "Coal Shippers"). This claim flies in the face of the Board's own revenue adequacy findings. The Board cannot ignore its calculations showing that the Nation's largest railroads are not consistently earning their cost of capital. If railroads cannot earn their cost of capital on a sustained basis, their ability to provide the services that shippers demand is at risk. The Board's

standards for measuring revenue adequacy are not at issue in this proceeding. If shippers believe that a different revenue adequacy standard should be used, they should seek to convene a separate rulemaking proceeding to address that issue. In the meantime, the Board must be guided by its findings that no Class I railroad has become revenue adequate on a sustained basis.

It is particularly important for the Board carefully to consider the impact of regulatory policy on the adequacy of railroad revenues now, since it is widely agreed that rail capacity needs to be expanded in the face of growing demand. As the Department of Transportation noted in its comments, "[t]he single most critical problem facing railroads today, if not the entire freight transportation industry, is providing the capacity to handle growing demand for transportation." Initial Comments of the United States Department of Transportation at 2 ("DOT Op. Comments"). Railroads can meet this growing demand only if they have revenues that are adequate to fund the costly expansion of their capacity. Regulation that cuts railroad revenues by restricting differential pricing would limit the ability of railroads to make capital investments and therefore would be detrimental to the community of railroad users. The Board regulates railroads in the broad public interest, and the public's interest is in a financially healthy railroad industry that can make the investments necessary to ensure adequate transportation service.

The shippers' comments also assert that the Board has shown a pro-railroad bias in recent coal rate cases. This claim is demonstrably wrong. Where complaints have been dismissed, it has been the result of ill-conceived SAC presentations where the shippers have sought to test the outer limits of the SAC test. The recent upsurge in litigation has not been the result of any market dislocation but rather has resulted from a widespread view that the SAC standard is capable of manipulation, particularly on the issue of cross-over traffic. Rail rate increases have been modest, considering the strong increases in demand. Rail rates have increased far less than

price increases in related energy markets, such as the market for oil, natural gas and coal. *See* Verified Statement of Darius W. Gaskins, Jr. at 9 ("Gaskins Op. VS") attached to the Comments of BNSF Railway Company ("BNSF Op. Comments"). Moreover, where shippers have prevailed in the recent cases, the Board has set rates very low – at or near the jurisdictional threshold.

The commenting shippers also repeat their complaint over the Board's decision to address issues of SAC methodology in a rulemaking proceeding. The shippers' disapproval of rulemakings reflects their hostility toward the economic principles underlying the SAC test. A rulemaking proceeding allows the Board to evaluate and adopt standards based on a broad and careful examination of the economic principles that are supposed to guide the Board's regulation of railroad rates. Shippers have apparently concluded that they can achieve better results when SAC issues are addressed in individual cases, where complex and difficult issues of economic policy may take a back seat to the myriad evidentiary issues that must be decided. It is appropriate for the Board to step back and ask for interested parties' views on broader, recurring issues of SAC methodology.

As BNSF noted in its opening comments, this rulemaking proceeding does not cover all of the issues that BNSF believes should be addressed in a full review of SAC methodology. And the shippers, while opposing the rulemaking, also – inconsistently – ask the Board to expand the scope of the rulemaking to cover additional issues, including the Board's cross-subsidy test, the treatment of debt amortization and the extent to which new SAC methodologies will be considered in the reopening of an existing rate prescription. The Board's rulemaking could have been more comprehensive, but it was not. Given the scope of the Board's initial notice and the fact that the Board has not chosen to expand it, there are limits to the issues that can be addressed

in this proceeding. *See, e.g., Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Unless the scope of the rulemaking is expanded by order of the Board and an opportunity is given to all parties to comment on specific new proposals, the Board must limit the scope of this rulemaking to the issues specifically identified in the February 27, 2006 NPRM.

BNSF's reply comments follow the same format as its opening comments. BNSF addresses the opening comments of other parties on each of the Board's six proposals in sections II through VII below. BNSF responds briefly to the Coal Shippers' comments on the cross-subsidy issue in Section VIII. BNSF's reply comments are also supported by verified statements of Professors Kalt and Willig and Messrs. Klick and Baranowski, all of whom presented testimony on BNSF's behalf on opening. In addition, these reply comments are supported by a verified statement of Martin M. Baily, a Senior Fellow at the Institute for International Economics and an Academic Advisor to the Congressional Budget Office, who addresses the economic issues raised by the shippers' comments on the question of productivity that would be experienced by a SARR.

II. MAXIMUM RATE DETERMINATION

A. Railroad Commenters Agree That The Board's Proposals Are Flawed

The most extensive railroad comments on the Board's proposed MCM and MMM approaches to setting a maximum rate were from BNSF. On opening, BNSF and its expert witnesses explained at length why both approaches were fundamentally inconsistent with differential demand-based pricing and the contestable market principles embraced by the *Guidelines*.[1] BNSF showed that the effect of the Board's proposals would be to drive rates on railroads' most demand inelastic traffic down to a common level, in violation of the economic

[1] *Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520 (1985)("*Guidelines*").

principles that govern railroad rate regulation, longstanding agency and court decisions, and several explicit provisions of the governing statute. BNSF also showed that the sole rationale for proposing to depart from the percent reduction methodology was an unsupported presumption that railroads will attempt to "game" the results of a SAC analysis in setting a common carrier rate. There is no evidence that would support such a conclusive presumption, which in any event is at odds with a railroad's statutory right to set rates of its own choosing in the first instance.[2]

The joint comments of Norfolk Southern and CSX similarly note that "there is simply no evidence that the hypothetical concern addressed by the Board's proposed alternatives to the [percent reduction methodology] . . . is a real problem that requires abandonment of the fundamentally sound approach that the [percent reduction methodology] takes to allocating excess revenues across the users of a stand-alone railroad system."[3] As to the Board's proposed solution to this nonexistent problem, NS and CSX note that under both of the Board's approaches, the railroads' existing rate structure is destroyed because lower rates do not change while higher rates are forced to a common level.[4] As Norfolk Southern and CSX properly note, the principles of demand-based differential pricing and contestability dictate that any rate reduction methodology should produce lower rates for all movements in a SARR's traffic group when an overcharge has been demonstrated while preserving to the extent possible the existing rate relationships in the railroad's rate structure. UP similarly expresses concern in its comments that MCM and MMM "depart from the concept of differential pricing, which lies at the very core

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[2] *See generally* BNSF Op. Comments, at 18-45; Verified Statement of Joseph P. Kalt, at 4-34 ("Kalt Op. VS"); Verified Statement of Robert D. Willig, at 5-27 ("Willig Op. VS"); Verified Statement of John C. Klick, at 3-23 ("Klick Op. VS").

[3] Joint Comments of Norfolk Southern Railway Co. and CSX Transportation Co., at 4 ("NS/CSXT Op. Comments").

[4] *Id.*, at 6.

of the approach the agency has properly taken to rate regulation in the past."[5] UP notes, in addition, that these approaches closely resemble the "ton-mile method" and "ratio method" that the ICC rejected more than 20 years ago.[6]

B. The Shippers Advocate That The Board Should Abandon Percentage Reduction And Adopt No Fixed Approach As A Replacement

The most extensive shipper comments on the rate reduction issue are contained in the Coal Shippers Opening Comments. First, the Coal Shippers support the Board's proposal to discontinue use of the percent reduction methodology. While they refer to the Board's "gaming" rationale for seeking alternatives to the percent reduction methodology, they point to no evidence that such "gaming" has actually occurred. The Coal Shippers discuss the issue briefly in a single paragraph. Indeed, the Coal Shippers make it clear that their real purpose in seeking to eliminate the percent reduction methodology is to eliminate a railroad's ability to engage in differential pricing. This should be troubling to the Board. The Board's proposal was prompted by shippers' repeated claims about the possibility of railroad gaming, and now it is clear that the shippers have in fact been searching for a back door way of eliminating differential pricing, which is a bedrock principle in the *Guidelines*.

The Coal Shippers' tortured argument is that the SARR is, by definition, a revenue *adequate* railroad, while differential pricing is only allowed for revenue *inadequate* railroads. "By continuing to maintain a differential pricing profile attributable to a revenue inadequate incumbent for the revenue adequate SARR, the percent reduction method offends this essential principle of the Guidelines."[7] In other words, once a railroad is found to have charged a rate that

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[5] Opening Submission of Union Pacific Railroad Co, at 20 ("UP Op. Comments").

[6] The Coal Shippers' comments suggest in passing that MMM and MCM are consistent with Ramsey pricing principles, but make no effort to actually demonstrate such consistency.

[7] Coal Shippers Op. Comments, at 16.

exceeds a reasonable maximum rate, its prices must be set as though it were a revenue adequate SARR that is no longer permitted to price differentially based on shipper demand.

What this argument ignores is that the issue traffic rate is being set for a revenue inadequate railroad. The *Guidelines* unambiguously endorsed demand-based pricing as the "essential principle" governing the Board's regulation of rates for railroads that are revenue inadequate. The ICC acknowledged that a demand-based pricing structure must be preserved if a railroad is to have any chance to achieve revenue adequacy. As the ICC explained in the 1983 Guidelines, "[i]t is only through a demand-based pricing system that the nonattributable costs can be allocated in an efficient manner."[8] The ICC explicitly stated that a railroad's demand-based pricing system must be preserved in the setting of a maximum rate even if the challenged rates are found to exceed a SAC maximum rate: "In considering a rate prescription and/or reparations, we will attempt to provide an effective remedy for the complaining shipper, but in a manner that would not introduce further distortion into the carrier's pricing structure." *Guidelines* at 548. Preservation of the railroad's basic pricing structure, which is accomplished through the percent reduction methodology, was the express goal of the ICC in the *Guidelines*.

Second, the Coal Shippers state that the Board's proposed alternative methodologies are "superior to the percent reduction formula," but they urge the Board not to adopt a single, standard methodology in place of the percent reduction methodology. Instead, they assert that the Board "should consider alternative methodologies that may be developed and proposed in individual proceedings." Coal Shippers Op. Comments at 17. The two shippers with pending cases who filed comments – AEP Texas and Western Fuels/Basin Electric – each advocate that

[8] *Coal Rate Guidelines – Nationwide*, Ex Parte No. 347 (Sub-No.1), slip op. at 9 (Feb. 8, 1983).

the approaches they proposed in their individual cases should be accepted as "appropriate," but non-exclusive, methodologies.

In his attached statement, Professor Kalt explains why the open-ended, results-oriented approach advocated by the shippers is senseless from a regulatory and public policy perspective. The economic principles underlying the *Guidelines* are general and can be applied across the spectrum of cases. They provide a rational framework and add coherence and predictability to the regulatory process. Abandoning the *Guidelines* for a case-by-case approach with no governing principles would undermine the regulatory process and produce negative consequences for the economy as a whole.

The Board's proposed changes to the percent reduction methodology purport to stem from a concern over the possibility of railroad manipulation of the SAC process. But the history of recent cases demonstrates that the real manipulation problem has been created by shippers who construct grotesquely distorted SARRs with huge volumes of cross-over traffic that make minimal use of the SARR but nevertheless generate vast revenue windfalls. The Coal Shippers' proposal that the Board permit complainants to use different rate reduction methods in different cases is an obvious attempt to preserve the ability to manipulate the SAC process. It is an invitation to the Board to unleash wholesale gaming upon rate cases by permitting shippers to choose, without any governing rules, whatever approach results in the lowest rates in a particular case.

C. Alternatives To Percent Reduction Proposed By Shippers Are Flawed

1. AEP Texas

AEP Texas purports to resubmit in this proceeding for adoption "as an acceptable approach to the allocation of rate relief" the General Percent Reduction Methodology ("GPRM") that it advocated in STB Docket No. 41191 (Sub-No. 1). Opening Comments of AEP Texas

North Company, at 8 ("AEP Texas Op. Comments"). AEP Texas promotes GPRM as a modification to the percent reduction methodology that allocates rate relief in proportion to the ratio of price markups over marginal cost. *Id.* at 11. In fact, AEP Texas did not promote a single or consistent GPRM approach in Docket No. 41191. Rather, AEP Texas proposed, on opening, an approach that was described as reducing rates in proportion to mark up over marginal cost but which, as applied, actually set all rates for higher-rated traffic to the same revenue to marginal cost ratio.[9] AEP Texas defended that approach on rebuttal, but then proposed a new allocation method in its brief in violation of the Board's rules governing the scope of final briefs. For purposes of this proceeding, AEP Texas appears to be proposing that the Board adopt the GPRM approach as modified by AEP Texas in its brief. AEP Texas Op. Comments at 13-14.[10]

AEP Texas argues that GPRM is consistent with Ramsey pricing principles because it focuses on the markup over marginal cost rather than absolute rate levels. But two fatal defects render the approach unworkable. First, the markup over marginal cost under Ramsey pricing is related to demand. But GPRM considers the supposed markup over marginal costs only for the cross-over portion of a movement, not for the through movement. There is no shipper demand for a portion of a through movement. The Board's own precedent confirms that it is inappropriate to view the revenue allocated to the SARR for its portion of a movement as a rate

[9] *See* BNSF Reply Nar. at III.G-40 to 41. Such an approach would be similar to the Board's MMM proposal and would suffer from the defects of that proposal as described in the opening statements of Professors Willig and Kalt and Mr. Klick.

[10] Some confusion remains because AEP Texas attaches as an exhibit to its comments Exhibit III-H-1 from its opening evidence in Docket No. 41191. AEP Texas describes the exhibit as "[a]n example of the calculation of the resulting percent markups for each movement." AEP Texas Op. Comments at 13. In fact, the exhibit shows nothing of the kind. Instead, it is the typical DCF exhibit presented in rate cases with an extra column added to Table L to report what purports to be a GPRM SAC rate. That GPRM SAC rate was not calculated using the approach described in AEP Texas' brief, but instead was calculated using the flawed iterative approach that reduced all highly-rated traffic to a common R/VC ratio that AEP Texas appeared to have abandoned by the time it filed its final brief.

that reflects demand for through transportation, or as in any way reflective of shipper demand. In the *Bottleneck*[11] decision, the Board declined to allow shippers to force railroads to establish local rates over bottleneck portions of a through route because, in part, it recognized that a shipper's demand was for origin to destination transportation, not transportation over a specific routing or segment. Quoting *Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458, 463 (1935), the Board affirmed that "[t]he shipper's only interest is that the charge shall be reasonable as a whole." 1 S.T.B. at 1072 (internal quotation marks omitted).

Shipper demand is for a through movement, therefore Ramsey prices would make sense, if they could be calculated, only for the through movement. Mr. Klick explains in his reply verified statement that if it were not for the difficulty in calculating marginal costs – one of the reasons that the ICC concluded that true Ramsey pricing could not be implemented as a regulatory standard – a Ramsey-type rate reduction approach would have to focus on the markup over marginal costs *on the through movement.* Thus, a Ramsey-based approach would first assume that the SAC analysis using cross-over traffic identifies the dollar amount of any overcharge by the incumbent on the movements included in the SARR traffic group. As Mr. Klick explains, this assumption – that the overcharge would not be larger if the SARR were extended – is reasonable in light of the fact that the complainant chose not to build out to include a larger portion of the through movement in the SARR and in light of the incumbent's real world revenue inadequacy. The dollar overcharge thus identified in the cross-over analysis could then be eliminated by applying an equal percentage reduction to the markup over marginal cost on the

[11] *Central Power & Light Co. v. Southern Pacific Transportation Co.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

through movement, thereby preserving the relative demand-based markups (on the through movements) for the group of shippers in the SARR traffic group.

But the second problem with GPRM, relating to the calculation of marginal cost, is insurmountable. An accurate calculation of marginal costs for specific movements is an essential requirement for any Ramsey-based pricing system. GPRM is based on calculating an exceedingly crude URCS-based proxy for marginal cost. BNSF witnesses Kalt, Willig and Klick address in detail the numerous pitfalls involved in attempting to use URCS variable cost calculations as a proxy for true marginal costs.

AEP Texas acknowledges that accurate calculation of marginal costs for each member of a SARR traffic group would be "extremely burdensome." AEP Texas Op. Comments at 11. AEP Texas reasons, however, that it does not matter whether the calculation is accurate, because all that is necessary is to know the relationship between "comparable markups above similarly determined cost levels." *Id.* at 12. That argument is obviously flawed. If marginal costs do not really matter in Ramsey pricing, then why would Ramsey prices focus on the markup over marginal cost? Professor Kalt demonstrates in his reply statement the importance of an accurate calculation of marginal costs in Ramsey pricing. Moreover, as Mr. Klick points out in his reply statement, the ICC recognized that an accurate calculation of marginal costs for particular through movements would be necessary for any Ramsey-based pricing scheme, and that is one of the reasons it did not adopt pure Ramsey pricing as the model for maximum rate regulation.

As an alternative to pure Ramsey pricing, the ICC adopted an approach to maximum rate regulation that allowed railroads to set rates in the first instance based on perceived market demand, and then, if those demand-based prices were shown to generate excessive revenues for a group of shippers, to reduce those demand-based prices to eliminate the overcharge while

preserving the railroad's price structure as much as possible. *See Guidelines* at 548. The Board's percent reduction methodology reflects this regulatory approach and it should continue to be used in SAC cases.

2. Arkansas Electric Cooperative

Arkansas Electric Cooperative, through its witness Michael A. Nelson, proposes that the Board adopt a variant of MMM based on fixed-dollar allocations and train miles.[12] Under the proposed approach, the SARR's costs in excess of variable costs are allocated among shippers on a dollar-per-train-mile basis. The iterative approach proposed by the Board is followed so that no shipper is required to pay more than its existing rate. Mr. Nelson asserts that the approach is reasonable because train-miles are a more accurate measure of the rail capacity used by each shipper and because the approach would encourage shippers to use a smaller number of longer, heavier trains.

Mr. Klick points out in his reply statement that Mr. Nelson's approach suffers from the defects in MMM that were identified in BNSF's opening comments. In addition, selecting train-miles as the measure for allocating unattributable costs is no less arbitrary than ton-miles or car-miles because all of these measures are divorced from the demand elasticities of individual shippers. Ignoring demand does not comply with Ramsey principles. The proposed approach also does not preserve the incumbent's rate structure.

3. Western Fuels/Basin Electric

WFA/Basin ask the Board to adopt as appropriate rate reduction methods the two approaches submitted by them in Docket No. 42088. They label these the Reasonable Allocation Method ("RAM") and the "Reduced Mark-Up." Neither approach is valid.

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[12] Written Testimony of Michael A. Nelson on Behalf of Arkansas Electric Cooperative Corporation, at 5-8 ("AECC Op. Comments").

a. RAM

WFA/Basin's RAM approach divides a SARR's traffic group into two groups, designated captive and non-captive. All shippers receive revenues sufficient to cover their variable costs. However, responsibility for all unattributable SARR costs is assigned to the so-called captive shippers. The unattributable costs are distributed on a pro-rata ton-mile basis to the shippers labeled captive and then combined with each shipper's variable cost to identify the maximum rate level for each shipper.

WFA/Basins' RAM approach is similar to the Board's MCM approach in that demand for service by individual shippers is utterly ignored. It therefore suffers from the defects of MCM that were pointed out in BNSF's opening comments and the statements of witnesses Willig, Kalt, and Klick. For example, RAM assumes that all shippers designated as captive exhibit identical demand characteristics and that all shippers designated as non-captive exhibit identical demand characteristics. RAM assumes that all captive shippers will pay the same dollar-per-ton mile markup. But as BNSF pointed out in its opening comments, the ICC and the Board have long recognized that demand varies widely among railroad shippers, even among so-called captive shippers. In addition, the statement of Dr. Darius Gaskins submitted by BNSF on opening demonstrates that demand varies widely even among shippers that would be considered captive under RAM. For shippers designated non-captive, RAM assumes that there would be no mark-up over variable cost.

RAM violates the *Guidelines* by imposing on railroads a rate structure that disregards altogether a railroad's demand-based prices. Setting one group of rates (non-captive) equal to variable cost while forcing the other group of rates (captive) to an average rate per ton-mile is completely inconsistent with what would occur if Ramsey principles were applied to reduce rates. As BNSF and its witnesses indicated in their prior filings, if Ramsey principles were

applied, differences in demand elasticity among sole-served shippers would produce different markups, in inverse proportion to demand elasticity, if an overcharge was found. Assuming that a railroad's existing price structure is based on perceived differences in demand elasticity among shippers, application of Ramsey principles would not produce a fundamentally different rate structure, as RAM would do, if overall revenue levels had to be reduced. RAM also distorts the pricing structure because of its treatment of shippers who have more than one rail alternative. It is quite possible that many of these "non-captive" shippers would be willing and able to contribute some amount above their variable costs, but RAM assumes that they cover only their variable costs.

In the attached reply statement, Professor Kalt, who addressed the deficiencies in RAM in Docket No. 42088, further describes the deficiencies in RAM. Professor Kalt explains how RAM is inconsistent with demand-based differential pricing, Ramsey pricing, and contestable market principles.

b. Reduced Mark-Up

WFA/Basin's alternative proposal is the Reduced Mark-Up method. This approach is similar to the GPRM approach advocated by AEP Texas, except that it does not purport to calculate marginal cost. Rather, the "profit contribution" for each shipper – defined as the difference between the SARR's variable cost and revenue – is calculated and reduced in equal proportion to eliminate any excess of SAC over revenues. WFA/Basin continue to assert that RAM is their preferred approach.

The Reduced Mark-Up approach shares with GPRM the obvious defect that it is applied to a cross-over movement where revenues have been arbitrarily assigned to the SARR. The markup, or "profit contribution," that is the focus of this methodology says nothing about shipper

demand for service, because there is no shipper demand for a portion of a through movement. It is simply not possible to apply Ramsey principles to cross-over traffic.

Another major defect in Reduced Mark-Up is its focus on variable cost of the SARR. As discussed previously, variable costs calculated using URCS are not a good measure of marginal cost, which must be identified if Ramsey-based prices are to be constructed. But the Reduced Mark-Up approach distorts the marginal cost calculation even further by using the variable costs of the SARR, which are not the same as that of the incumbent. If the objective of a Ramsey-based approach is to maintain the relative markups in the traffic group based on the incumbent's perception of relative demand elasticity, then the use of a marginal cost calculation based on something other than the incumbent's marginal costs makes no sense at all. The multiple defects in Reduced Mark-Up clearly make it unusable as an approach to determining maximum reasonable rates.

III. REVENUE ALLOCATION FOR CROSS-OVER TRAFFIC

A. Introduction

On opening, BNSF and its expert witnesses supported the Board's proposal to discontinue use of the Modified Straight-Mileage Prorate ("MSP") methodology for allocating revenues on cross-over traffic. As BNSF explained, that methodology has several shortcomings, including its failure to consider the impact of density on cost, that encourage the use of highly contrived SARR configurations dominated by short-haul traffic and that create bias in the SAC results. In lieu of the MSP methodology, BNSF proposed adoption of an approach based on contestability principles to determine the SARR's revenues on cross-over traffic. This approach, which calculates revenues on cross-over traffic based on the incumbent's avoided cost for the portion of a movement handled by the SARR, was described by Professor Kalt in BNSF's opening comments. Union Pacific Railroad Company ("UP") proffered a similar approach based

on the principle of efficient component pricing ("ECP").[13] BNSF also stated that if the Board decides not to base revenues on cross-over traffic on contestable market principles, but rather to allocate through revenues based on relative on-SARR and off-SARR costs, then the Board should adopt the Average Total Cost ("ATC") approach that it proposed in its NOPR. The ATC approach is superior to MSP in that it takes account of the important relationship between density and costs and reduces incentives to game the SAC process by relying on large volumes of very short-haul cross-over traffic that benefits from the 100-mile revenue credit for originating cross-over traffic.

The shippers argue that the Board should reject the ATC approach. Most shippers contend that the Board should continue to use the MSP approach or its predecessor, the Modified Mileage Prorate ("MMP") approach to allocate revenues on cross-over traffic. The primary comments submitted by the shippers on the issue of cross-over traffic revenue allocation are the Coal Shippers Op. Comments. The Coal Shippers Comments on cross-over revenue allocation were also incorporated into the separate comments of several other shippers.[14]

The shippers' support for MSP and MMP is based upon several faulty premises, including the following: (1) the *Guidelines* as properly construed by ICC/STB precedent up to 2003 require that the methodology for allocating revenue to the SARR on cross-over traffic be a market-based approach reflecting real world divisions, and that the MSP/MMP approaches used by the Board are good proxies for real world divisions; (2) a cost-based approach to determining revenue allocations on cross-over traffic is inconsistent with the *Guidelines* and supposedly undermines shippers' entitlement to the use of cross-over traffic, and (3) the specific cost-based

[13] UP Op. Comments at 29-31 and attached Verified Statement of Kevin Neels (hereafter "Neels Op. VS") at 14-17.

[14] Additional Opening Comments of Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc., at 25 ("WFA/Basin Op. Comments"); AEP Texas Op. Comments at 3.

approach proposed by the Board, the ATC approach, has various flaws, including the flaws that led the Board to reject DARA. As explained below, none of these arguments is supported by the *Guidelines*, ICC/Board precedent or relevant economic theory. BNSF addresses each of these arguments in turn.

Another shipper, Arkansas Electric Cooperative Corporation ("AECC"), proposes an alternative methodology for determining the SARR's revenues on cross-over traffic that would provide the SARR with the full contribution over total variable costs realized by the incumbent on the entire through movement. AECC acknowledges that if its proposed methodology were adopted, rail rates would likely be set at the jurisdictional threshold in SAC cases. As explained below, the Board should reject this proposed methodology because it is inconsistent with principles of contestability.

Finally, a few shippers, WFA/Basin and AEP Texas, submitted comments addressing the issue whether the ATC approach should be applied in pending cases if adopted by the Board. WFA/Basin take the position that it would be manifestly unfair for the Board to apply the ATC approach to the pending WFA/Basin case because doing so would require the submission of a new case. In taking this position, WFA/Basin essentially concede that they used the MSP methodology to "game" the results of the SAC analysis by relying heavily on short-haul cross-over traffic to skew the SAC results in their favor. The Board should not sanction such attempts to manipulate the SAC test by giving the complainant another opportunity to present evidence when its strategy is revealed.

B. Revenue Allocation Based On Real World Divisions Is Not Called For By The *Guidelines*, Economic Theory, Or ICC/Board Precedent

The Coal Shippers argue that the principles endorsed by the *Guidelines*, as construed by ICC/STB precedent up to 2003, require that the Board adopt a market-based approach reflecting

real world divisions as the methodology for allocating revenue on cross-over traffic. *See, e.g.*, Coal Shippers Op. Comments at 26-33, 43-48. Specifically, the shippers argue that use of real-world divisions, or a proxy for real-world divisions like MSP/MMP, conforms to "certain basic principles underlying the *Guidelines*." *Id.* at 27. One such principle, according to the Coal Shippers, is that "the SARR is an independent replacement for the defendant carrier over the involved SARR route." *Id.* The Coal Shippers' theory is that since the SARR replaces the incumbent for a portion of through movements on cross-over traffic, the SARR would have to engage in bi-lateral negotiations with the incumbent to determine the SARR's share of revenue for its portion of the movement. In those negotiations, both parties would use their market power, just as real-world railroads do, to produce results most favorable to them. *Id.* at 27-28; 32-33.

As discussed below, the Coal Shippers' theory is entirely at odds with contestable market theory. Similarly, their claim that the Board impermissibly broke with precedent in rejecting the use of real-world divisions in favor of a cost-based approach is demonstrably inaccurate. *Id.* at 32-33, 38, 43.

1. A Revenue Allocation Methodology Based On Real World Divisions Is Inconsistent With Contestable Market Theory

Contrary to the shippers' claims, contestable market theory does not support a revenue allocation methodology for cross-over traffic based on real-world divisions. As Professor Borts, the Coal Shippers' expert, admits, the most basic principle of contestable markets is that the participants lack market power that is derived from the existence of entry and exit barriers.[15] It would turn contestable market theory on its head to posit SARR revenue divisions based on the outcome of negotiations between real world carriers that use their respective market power to

[15] Borts Op. VS at 3.

influence the results. Indeed, Professor Borts notes that a contestable market "is hardly a realistic description of the railroad industry" given the high entry and high exit barriers in the industry. *Id.*

There is nothing in the *Guidelines* suggesting that a SARR would act as a monopolist simply because it "replaces" the incumbent for a portion of the through movement. To the extent the SARR "replaces" the incumbent for a portion of the through movement, the SARR and the incumbent become partners in an interline movement. Revenues would be established by reference to the principle of contestability that allows either of them to enter or exit without cost and would have nothing to do with the exercise or influence of market power.[16] As Professor Kalt explained, real world market-based divisions are driven by precisely the kind of factors that make them not contestable and, therefore, they cannot be the basis of rates that a SARR would receive in a contestable market. *See* Kalt Reply VS at § IV.A.

Professor Kalt also explained on opening and reiterates in his reply verified statement that it is possible to determine the revenues that would be available to a SARR in a contestable world – *i.e.*, a world with no entry and exit barriers and no market power created by those barriers – in situations where the SARR "replaces" the incumbent for a portion of the through movement. As Professor Kalt explains, in a cross-over scenario the SARR is assumed to have superior efficiency on the portion of the movement for which it replaces the incumbent, which is why, in a contestable market, it would be able to replace the incumbent for that portion of the movement. The SARR would receive as revenues the full avoided cost of the incumbent over

[16] The Coal Shippers' argument that the SARR is entitled to exercise market power in setting revenue divisions because the incumbent exercises market power in the real world to negotiate divisions is similar to its argument that a SARR can rely on internal cross-subsidies to reduce the issue traffic rates because the incumbent relies on cross-subsidies in the real world. In both cases, the shippers' argument ignores the purpose of the SAC test, which is to simulate a competitive market where market power and cross-subsidies would not exist.

that route, thereby realizing the benefit of its superior efficiency.[17] UP's expert, Dr. Neels, presents a similar analysis and proposes a similar calculation methodology based on ECP for setting revenues on cross-over traffic.[18] If the Board uses the principles of contestability to establish revenues on cross-over traffic, it should adopt the avoidable cost theory proposed by Professor Kalt.

2. Neither The ICC/Board Decisions In SAC Cases Prior To 2003 Nor ICC Precedent Outside The SAC Context Require Use Of Real-World Divisions To Allocate Revenues On Cross-Over Traffic

The Coal Shippers Op. Comments mischaracterize precedent in arguing that ICC/Board SAC cases prior to 2003 required the use of real-world divisions to allocate revenues on cross-over traffic to the SARR. In the handful of ICC/Board decisions that addressed the issue of revenue allocation for cross-over traffic prior to 2003, the agency never definitively established that cross-over revenues should be determined on the basis of real-world divisions. The ICC/STB explained that several factors, including costs, should be considered and it repeatedly stated that it did not have a well-established method for allocating revenues on cross-over traffic. There was considerable confusion and uncertainty regarding this issue in the early cases and the ICC/STB made it clear it was searching for guiding principles to govern its selection of a cross-over traffic revenue allocation methodology. In *Duke/NS*, the Board finally settled on the principle that cross-over revenues should be based on an allocation of through revenues in

[17] BNSF Op. Comments at 50-53 and Kalt Op. VS at 37-46; Kalt Reply VS at § IV. When cross-over revenues are determined in this manner, it would be unnecessary and inappropriate to adjust these revenues in any way in the rate reduction phase of the SAC analysis, thus simplifying the SAC test. If SAC revenues were found to exceed SAC costs, only the revenues on through movements would need to be adjusted. BNSF Op. Comments at 51-52.

[18] UP Op. Comments at 29-31 and attached Neels Op. VS at 14-17.

proportion to on-SARR and off-SARR costs.[19] Since then, the Board has been searching for ways to calculate those costs as accurately as possible, and in the NPRM, it settled on ATC.

Contrary to shippers' claims, neither the *Nevada Power*[20] decision nor subsequent SAC cases decided prior to 2003 constituted an unqualified adoption of a standard for cross-over revenues that was based on real-world negotiated divisions. In the 1994 *Nevada Power* decision, which was quoted extensively by shippers, the ICC stated that "[i]n the absence of any better evidence, we will prorate the revenues attributable to the cross-over traffic among the SARR and incumbent carriers on a mileage basis, as proposed by NPC." 10 I.C.C. 2d at 268 (emphasis added). While the ICC referred to market-based divisions as a reference point in calculating cross-over revenues, it also acknowledged the cost-based nature of such divisions. Indeed, Chairman McDonald explained that "market-based divisions result from the interaction of supply considerations (*the relative costs incurred by the carriers in providing the interline movement*) and demand considerations (the relative bargaining power of the two carriers)." 10 I.C.C. 2d at 280 (emphasis added). However, the Chairman also concluded that "with our determination that the SARR is to be a replacement for segments of the incumbent lines, it appears that there are no significant differences in the relative bargaining power of the carriers." *Id.* In other words, the bargaining power factor dropped out of the supposed market-based analysis, leaving only the supply consideration, *i.e.* the relative costs of the carriers. Chairman McDonald then went on to suggest that relative density of on-SARR and off-SARR lines might need to be factored into the allocation of cross-over revenues, a clear recognition of the importance of costs.[21]

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[19] *Duke Energy Corp. v. Norfolk Southern Railroad Co.*, STB Docket No. 42069 (served Nov. 6, 2003)("*Duke/NS*").

[20] *Bituminous Coal – Hiawatha, Utah to Moapa, Nevada*, 10 I.C.C. 2d 259 (1994).

[21] *Id.* at 281 (". . . mileage-based divisions would not be appropriate approximations of market-based rates for a long-haul, high density SARR, using efficient unit trains, that interlined

Subsequent cases also emphasized the importance of relative on-SARR and off-SARR costs in allocating revenues for cross-over traffic. In *McCarty Farms*, the Board justified its use of the MMP methodology to allocate revenues on cross-over traffic not because it found MMP to estimate market-based divisions but because it "account[ed] for the non-mileage-based costs incurred when carriers switch freight cars."[22] *See also PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42054, slip op. at 10 n.20 ("*PPL I*")(served Aug. 19, 2002) "A residual carrier would agree to move the traffic so long as the revenue division would allow it to cover its attributable costs associated with handling the traffic"); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42056, at 31 n. 73 (served Mar. 24, 2003)("*TMPA*")("The revenue each carrier receives should cover the attributable costs of the service it provides and makes some contribution to its unattributable costs. As long as the traffic makes any contribution to a carrier's unattributable cost, the railroad is better off participating in the transportation than not participating in it.").

Several of the SAC cases decided subsequent to *Nevada Power* did not even address the issue of the appropriate revenue division allocation method for cross-over traffic either because the complainant did not include any cross-over traffic in the SARR traffic group, *i.e. WTU/BNSF* and *APS/ATSF*,[23] or the parties agreed to use the MMP method for allocating cross-over

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with a number of short-haul, light density branch lines that distributed traffic a few cars at a time.").

[22] *McCarty Farms Inc. v. Burlington Northern, Inc.*, 2 S.T.B. 460, 472 (1997). The Board also stated that "[w]e find that the modified mileage proration method is superior to a straight mileage proration, because it takes into consideration differing handling costs." *Id.*

[23] *West Texas Utilities Co. v. Burlington Northern Railroad Co.*, 1 S.T.B. 638 (1996); *Arizona Public Service Co. v. The Atchison, Topeka & Santa Fe Railway Co.*, 2 S.T.B. 367 (1997).

revenues without addressing underlying principles, *i.e. WPL/UP*.[24] In the other pre-2003 cases in which the ICC or Board addressed the issue of the proper revenue allocation methodology, the agency never required the adoption of a market-based approach. In *FMC Wyoming Corp. v Union Pacific* Railroad, STB Docket No. 42022, slip op. at 30-31 (served May 12, 2000), the ICC rejected UP's effort to use actual market-based divisions in favor of the shipper's proposed use of the MMP methodology. In *PPL I* and *TMPA*, the Board continued to use the MMP methodology but acknowledged that "[w]e have not adopted a single preferred procedure for developing revenue divisions on cross-over traffic."[25]

The Coal Shippers also argue that ICC/Board precedent *outside* the SAC context supports the use of a market-based approach reflecting real-world divisions in determining revenue divisions on cross-over traffic. Coal Shippers Op. Comments at 41-42. Specifically, the shippers argue that historically the ICC "routinely . . . consider[ed] evidence of negotiated divisions to determine divisions set under comparable market circumstances." *Id.* at 41. The shippers point to a solitary 1914 ICC decision to establish the existence of this alleged routine practice.[26] In the only other case cited, *Boston and Maine R.R. v. United States*, 208 F. Supp. 661 (D. Mass 1962), the ICC did not (as the shippers suggest) prescribe rate divisions by looking to negotiated divisions on comparable traffic.[27] Rather, the Commission applied a group

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[24] *Wisconsin Power & Light Co. v. Union Pacific Railroad*, STB Docket No. 42051 (served Sept. 13, 2001).

[25] *PPL I* slip op. at 7, n.14; *TMPA* slip op. at 31, n.75.

[26] *See* Coal Shippers Op. Comments at 41 citing *Rates on Lumber and Other Forest Products from Points in Arkansas* in which the Commission prescribed a common per pound rate for lumber delivered to Northern carriers at East St. Louis.

[27] The language the shippers misleadingly quote from *Boston and Maine* refers to the Commission's ability to establish divisions on a group basis. *See, e.g., The New England Divisions Cases*, 261 U.S. 184 (1923) (affirming as Constitutional the Commission's decision to

divisional scale, developed in a 1953 proceeding, that was roughly designed to allocate revenue based on the joint carriers' respective costs. *Id.* at 676-677.[28]

In fact, the shippers' argument is belied by the case law. Outside the SAC context, the ICC routinely used a cost-based rather than a market-based approach for determining revenue divisions between carriers. In *Trackage Rights - Lehigh Valley Railroad Company*, 342 I.C.C. 793 (1973), the ICC explained that:

> the cost and revenues of moving the issue traffic should be the primary criteria for determining the proper division of through revenue. Indirect as well as direct costs should be included in the cost of service because each segment of traffic should carry its share of this burden. To do otherwise would result in a disproportionate share of these costs being borne by part of the traffic.

Id. at 812.[29]

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adjust divisions applicable to individual carriers based on group cost and revenue data believed to reflect the similar operating costs and revenue needs of the individual carriers).

[28] In 1965, the Commission re-constructed the divisional scale at issue in *Boston and Maine* "directly from costs" so that it would more accurately reflect each carrier's relative cost of service. *See Chicago & North Western Railway Co. v. Atchison, Topeka, and Santa Fe Railway Co.*, 387 U.S. 326 at 359 (1967), discussing *Official Southern Divisions,* 325 I.C.C. 1, 449 (1965).

[29] This statement is consistent with the ICC's decades-long practice of using a cost-based approach to determine revenue divisions on service provided by interline carriers. *See, e.g., New England Divisions,* 66 I.C.C. 196, 198-199 (1922) ("the relative amount and cost under economical and efficient management of the service rendered is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive"); *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175 (1939) (allocating more revenue per-mile on joint rates to Southern carriers due to higher relative operating expenses); *Official Southern Divisions,* 325 I.C.C. 1, 449 (1965) (constructing detailed divisional scales based on carriers' relative costs of service); *Baltimore & Ohio Railroad Co. v. Aberdeen and Rockfish,* 393 U.S. 87, 88 (1968)("Commission found that existing divisions violated § 15 (6) because they allocated to Northern lines a lesser share of the revenues than would be warranted by their share of the expenditures made in providing joint service"); *Chicago & Northwestern,* 387 U.S. at 360 ("the Commission's action in this case was based not on revenue needs, but cost of service, and it found that the divisions which it established would produce moderate overall increases in the shares of the Midwestern group, in accord with its costs findings"); *Increases in Freight Rates and Charges of the Long Island Railroad Company*, 346 I.C.C. 305 (1973) (prescribing divisions

3. The Board Explained In *Duke/NS* Why It Adopted A Cost-Based Approach For Allocating Revenues On Cross-Over Traffic

Coal Shippers further argue that the Board's rejection in *Duke/NS* of a market-based approach in favor of a cost-based approach for allocating revenues for cross-over traffic "was made without ever explaining that it was radically departing from longstanding and contrary precedent." *See* Coal Shippers Op. Comments at 34. As explained above, the predicate for this argument – that there was a longstanding precedent inconsistent with use of a cost-based standard – is wrong. In addition, the Board's rationale for adopting a cost-based standard was adequately explained.

The Board's *Duke/NS* decision devotes several pages to its explanation of why it adopted a cost-based revenue allocation methodology. Shippers may not like that explanation, and BNSF disagrees with several points made by the Board in that discussion, but to claim that the Board failed to explain its decision is ludicrous. In that lengthy discussion, the Board "first considered the more general question posed by NS of whether divisions should be based on a market-based or a cost-based inquiry, and concluded that a market-based inquiry is not appropriate for a SAC analysis." *Duke/NS* slip op. at 17. The Board explained that the existence of market power should not factor into the allocation of revenues on cross-over movements, and therefore that "a debate over how much of the revenues from cross-over traffic the hypothetical carrier could negotiate with the residual defendant has no place in the SAC analysis." *Id.* at 19. The Board further explained that real world divisions between NS and other carriers would not "be

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allocating revenues in proportion to costs); *Expeditious Handling of Divisions of Revenue Cases*, 353 I.C.C. 349 (1981) (requiring detailed production of cost of service information in divisions cases); *Increases in Freight Rates and Charges of the Long Island Railroad Company*, 365 I.C.C. 193 (1981) (having set each carrier's revenue to cost ratio equally in 1973, the Commission refused to readjust the division when it found that Long Island's intervening cost of service increases were due to inefficient operations).

particularly instructive, as those divisions presumably reflect a wide range of commercial considerations across a broad spectrum of traffic and gateways." *Id.* at 20, n. 29.

The Board provided further explanation of why a market-based approach reflecting real world divisions was not an appropriate methodology for allocating revenues to the SARR on cross-over traffic in its recent *Otter Tail* decision.[30] Since *Duke/NS*, the Board has consistently applied a cost-based approach to revenue allocation, although it has continued to search for an appropriate methodology for assessing relative on-SARR and off-SARR costs.[31]

4. A Cost-Based Revenue Allocation Approach Does Not Undermine Shippers' Supposed Entitlement To The Use Of Cross-Over Traffic In A SAC Analysis

As a corollary to their argument that the *Guidelines* require the use of real-world divisions in establishing revenues for cross-over traffic, the Coal Shippers argue that the *Guidelines* do not permit the use of a cost-based revenue allocation procedure because such an approach undermines the right that shippers have to use cross-over traffic in SAC cases. Their argument on this issue is largely incoherent. But the underlying principles they assert and the premises to their argument are clearly wrong.

The Coal Shippers' first premise is that the *Guidelines* explicitly allow complainants in SAC cases to rely on cross-over traffic. *See* Coal Shippers Op. Comments at 25-26. The only support provided for this far-fetched claim is the Coal Shippers' assertion that the *Guidelines* "encourage shippers to augment the issue traffic with other traffic; that is to 'group' traffic in

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[30] *Otter Tail Power Company v. BNSF Railway Co.*, STB Docket No. 42071, slip op. at 13-15 (served Jan. 27, 2006)("*Otter Tail*").

[31] *See Carolina Power & Light Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42072, slip op. at 20-21 (served Dec. 23, 2003) (" *CPL/NS*"); *Duke Energy Corp. v. CSX Transportation, Inc.*, STB Docket No. 42070, slip op. at 20-21 (served Feb. 4, 2004) ("*Duke/CSX*"); *Public Service Co. of Colorado v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42057, slip op. at 17 (served June 8, 2004) ("*Xcel/BNSF*").

logical and efficiency-maximizing configurations." *Id.* at 30. Shippers are clearly entitled to group non-issue traffic with issue traffic. However, this cited passage says nothing about whether the "other traffic" can consist of partial movements rather than through movements. There is no indication that the drafters of the *Guidelines* ever contemplated the use of cross-over traffic. Indeed, the *Guidelines'* references to the incumbent's existing rates as the basis for assigning revenues to the SARR make it clear that the ICC assumed that non-issue traffic would be included in a SAC analysis on a through movement basis, since the incumbent's rates exist only for through movements. Indeed, if cross-over traffic had been contemplated in the *Guidelines*, surely the ICC would have said something on the critical issue of revenue allocation that has received so much attention in the SAC cases where cross-over traffic has been used. Cross-over traffic was a foreign concept, never addressed in the *Guidelines*.

Second, the Coal Shippers claim that the use of a cost-based revenue allocation approach in effect requires the complainant to replicate all lines used by its traffic group. *See* Coal Shippers Op. Comments at 35-37. This argument is nonsense. The Board has repeatedly made it clear that the fundamental purpose for allowing complainants to use cross-over traffic in a SAC analysis is to enable complainants to *avoid* having to posit the costs of constructing and operating all of the lines that are used to provide service to the shippers included in the SARR traffic group. *See, e.g., Xcel/BNSF*, slip op. at 14-16; *Otter Tail*, slip op. at 12-13. There is nothing about the use of a cost-based approach that precludes a complainant from using cross-over traffic.

The Coal Shippers' real complaint about a cost-based approach appears to be that it makes the use of cross-over traffic less attractive to complainants because it allocates to the SARR less revenue than their supposed market-based approaches, particularly in cases where

cross-over traffic moves only a short distance on the SARR. Shippers apparently believe that they are entitled to take advantage of economies of density without any responsibility for the costs incurred on low density lines by the incumbent to make those economies of density possible. Such a position is illogical and untenable.

It would be anathema to the statutory revenue adequacy policy for the Board to conclude that a complainant in a SAC case does not need to account in any way for the revenue needs of the incumbent's low density delivery network, without which there would be no partial movements for the SARR to handle. The Board allows a complainant to refrain from building a far-flung delivery network because of the difficulty in presenting SAC evidence relating to the entire network of lines required to provide service to the SARR shippers, not because the high costs associated with BNSF's far-flung delivery network should be borne entirely by the incumbent. *Otter Tail*, slip op. at 12-13. A cost-based revenue allocation approach, when done properly, attempts to ensure that the revenues on through movements are allocated so as to cover the costs associated with different segments of those movements by allocating revenues in proportion to the costs of the various segments. Such an approach does not ensure that there will be revenues to cover the costs of off-SARR portions of a movement, but it can limit the distortions resulting from shippers' decisions not to build low density lines.

C. The Shippers' Claims Regarding The Purported Flaws In The ATC Methodology Proposed By The Board Also Lack Merit

As noted in BNSF's opening comments, BNSF endorses the Board's proposed ATC approach in the event the Board decides not to use contestability principles in establishing revenues on cross-over traffic. It is appropriate for the Board to seek ways to simplify SAC cases, so long as the simplification methodologies do not distort the outcome of the analysis. By taking account of the relative density of on-SARR and off-SARR lines in allocating through

revenues between the SARR and the residual incumbent, the Board's ATC approach is less likely than any cost-based approach used to date in SAC cases to produce distortions. Moreover, under ATC, the results of the SAC analysis are less likely to be driven by the complainant's choice of how much of the incumbent's network should be reproduced by the SARR, thus reducing complainants' incentives to game the SAC test through heavy use of short-haul traffic. The shippers uniformly object to the adoption of the ATC approach but, as explained below, they fail to present any valid basis for rejecting the methodology.

The shippers erroneously assert that the Board should not adopt the ATC methodology because it purportedly contains the same flaws that led the Board to reject the DARA methodology proposed by various railroads. *See* Coal Shippers Op. Comments at 48-52. To the contrary, as shown by Mr. Klick, ATC does achieve a different result than DARA as densities increase and, consequently, does not have the purported flaws in DARA that were identified by the Board. *See* Klick Reply VS at § III. Coal Shippers related claim that by adopting ATC the Board is ignoring its directive from *Duke/NS* that it would need actual line-specific investment data to approximate line-specific fixed costs per mile (Coal Shippers Op. Comments at 52) is based on a misreading of the *Duke/NS* decision and, consequently, has no merit.

Shippers claim that the ATC methodology should be rejected for various other reasons, including that it purportedly creates barriers to entry. *See* Coal Shippers Op. Comments at 39-42). As explained in section IV.B of the reply verified statement of Professor Kalt, the ATC methodology does not create entry barriers. The shippers' argument is based upon an apparent misunderstanding of the economics of barriers to entry. Nor do the other criticisms of the ATC methodology made by Mr. Borts or Mr. Crowley, experts testifying on behalf of the Coal Shippers, have any validity. *See* Klick Reply VS at § III.

Mr. Nelson, an expert retained by the AECC, proposes that the Board adopt a methodology for cross-over traffic that would provide the SARR with the full amount of the contribution that exists on the through movement. Mr. Nelson erroneously asserts that this alternative methodology is consistent with contestable market principles. To the contrary, as explained by Professor Kalt at § IV, the proposed methodology is inconsistent with contestability principles.

D. If The ATC Approach Is Adopted In This Rulemaking, The Board Should Apply It In The Pending Cases

The comments submitted by AEP Texas and WFA/Basin both address the issue whether the Board should apply the ATC methodology in pending cases if the methodology is adopted in this rulemaking proceeding. However, AEP Texas and WFA/Basin take opposite positions on this issue. AEP Texas takes the position that, if adopted, the ATC approach should be mechanically applied to the current record and no new evidence should be allowed in the case. *See* AEP Texas Op. Comments at 5-7. In contrast, WFA/Basin argue that it would be "manifestly unjust" to apply the ATC approach in their pending case because applying it would "require the submission of an essentially new SAC case." *See* WFA/Basin Op. Comments at 25.

WFA/Basin's argument is not based on legal standards governing retroactivity, but on the supposed "unfairness" that would result from application of a cost-based methodology. WFA/Basin essentially admit that they designed their SARR with heavy use of short-haul cross-over traffic to take advantage of the gaming opportunities available by application of the MSP methodology and, consequently, to bias the results in WFA/Basin's favor. WFA/Basin assert that they relied on the MSP approach "as the central building block in determining the LRR's configuration" and that the ATC approach "is a significantly different divisions procedure that MSP, since it, among other things, eliminates the MSP origin and destination revenue blocks and

does not allocate the remaining revenues on a straight mileage prorate." *Id.* at 26. WFA/Basin state that if they had known that the Board would apply the ATC methodology when their evidence was being developed, they "would have most likely configured a SARR that was significantly longer and carried significantly more tons." *Id.* at 27.

WFA/Basin would not be treated unfairly if the Board were to apply a methodology other than MSP to calculate cross-over revenues. The Board had made it abundantly clear before WFA/Basin presented evidence that it would apply a cost-based methodology to allocate revenues between the SARR and the residual incumbent on cross-over traffic. The Board also made it clear that it was concerned about the impact of relative density on costs and that it was open to adopting a new methodology that correctly takes account of economies of density. *See, e.g., Duke/CSX* slip op. at 20 (while it rejected CSX' proposed methodology intended to account for economies of density, the Board noted that it "has not foreclosed an approach that would incorporate relative densities, as densities could affect the defendant carrier's relative costs of providing service over the relevant segments.").

WFA/Basin effectively admit that they were seeking to game the results of the SAC analysis by positing a SARR that relied heavily on short-haul traffic. They either knew or should have known that any cost-based approach that considered relative density of on-SARR and off-SARR lines would have produced a dramatically different allocation of revenues, but they chose to take the chance that the distortions produced by MSP would continue to be available to them. The Board should not sanction WFA/Basin's attempt to manipulate the SAC outcome by positing a short-haul SARR that was profitable only because of the distortions produced by the revenue allocation methodology that had previously been used. WFA/Basin should not get

another opportunity to present SAC evidence. If ATC is adopted, the Board should apply it in the pending cases.

IV. INDEXING OPERATING EXPENSES

The Board's NPRM seeks to resolve a conflict over whether SAC operating costs should be indexed by the RCAF-U (unadjusted for productivity) or the RCAF-A (adjusted for productivity) by proposing a mix of the two indices. The hybrid index would phase in the RCAF-A beginning with 5% in year two and increasing incrementally to 100% in year 20. The railroads universally oppose the Board's proposal. As SAC theory already assumes that the hypothetical SARR is the most efficient, most technologically advanced railroad from its inception, it is unrealistic to also assume that the SARR would achieve any productivity at all in its initial years of operation.[32] The railroads contend that the Board should establish a presumption of no productivity for the first ten years, unless there is compelling evidence of specific improvements the SARR purports to make, including the timing, costs, and anticipated benefits of implementing such improvements.[33] The railroads further contend that adopting the Board's proposed 10-year DCF period would moot the issue, as there clearly would be no need to address productivity on the SARR during that period.

Shippers also object to the Board's proposal. They advocate an aggressive phase-in of the RCAF-A beginning with 50% in year one and increasing incrementally to 100% in year ten.

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[32] UP Op. Comments at 31-35 and attached Verified Statement of Thomas C Haley ("Haley Op. VS"); BNSF Op. Comments at 55-59; Comments of Canadian Pacific Railway Company, at 3-5 ("CP Op. Comments"); NS/CSXT Op. Comments at 8-11.

[33] BNSF offered as an alternative applying RCAF-A starting in year 11 to those items of operating costs where productivity gains are most likely to occur. Verified Statement of Michael R. Baranowski, at 20-21 ("Baranowski Op. VS"), included with BNSF Op. Comments.

Coal Shippers Op. Comments at 70.[34] They argue that the SARR would achieve significant productivity *even in the first year* from technological advancements, particularly improvements brought about through advances in information technology (IT) and through "learning by doing."

The shippers' position rests heavily on "strawman" arguments that have no merit. First, the Coal Shippers assert, without any support, that the Board's proposal "does not go far enough to eliminate the illogical and unsupported disparity between the manner in which the Board indexes operating expenses and the manner in which the Board forecasts SARR revenues." Coal Shippers Op. Comments at 69. They imply that their proposed mix is the solution to a "problem" that must be fixed, but they offer no evidence that a problem actually exists or that their solution would cure it. As BNSF witness Michael R. Baranowski explains in his reply verified statement, because the three indices used in the DCF – one for revenues, one for operating costs, and one for construction costs – are designed to forecast different elements that are in no way related, there is no disparity between the ways revenues and operating costs are indexed. The revenue index reflects revenues available to a SARR that replaces the incumbent. Those revenues are compared to the operating (and other) costs of an efficient SARR to determine whether, on a present value basis, the revenues exceed costs that need to be covered. The indices are *suppose* to measure different future trends. Moreover, to the extent that productivity is reflected in the forecasts for revenues, that productivity reflects the future efforts

[34] AECC and WFA suggest alternative methodologies. AECC proposes using the anticipated productivity on heavy haul operations rather than the RCAF to phase in productivity on the SARR (AECC Op. Comments at 17-19), but its proposal is based on the same flawed assumptions implicit in Coal Shippers' witness Caves' statement supporting the Coal Shippers' methodology, which is addressed *infra*. WFA reasserts by reference the arguments and proposed index submitted in its pending rate case. AEP Texas, on the other hand, endorses the Coal Shippers' approach rather than the approach it advocated in its pending rate case. Consultants Snavely King & Moros agree with the Board's phase-in proposal, but suggest that under a 10-year DCF scenario, the percentages should be adjusted.

of the industry to achieve the efficient operations that are already captured in the base year SARR operating expenses.

The Coal Shippers' second argument is that the Board's proposal is improperly based on the assumption that most productivity comes from asset replacement. Coal Shippers Op. Comments at 73. The Coal Shippers attack this strawman by pointing to potential productivity gains unrelated to asset replacement (*e.g.*, increased train size, heavier car loadings, updated IT software, improved MOW practices, and labor productivity) which could begin "even in the first year." The shippers' argument, however, is based on a false premise. The Board has not assumed that productivity comes only from asset replacement. The Board simply gave one indisputable example relating to the SARR's assets showing why the SARR would not have the same opportunities to achieve productivity in the early years as real-world railroads. It is a quantum leap to go from that simple, obvious example to the assertion that the Board ignored all other forms of productivity.[35]

Even if the sources of productivity were related to operations rather than assets, that still would not justify productivity for a SARR in the early years of operation. As Mr. Baranowski explains in his attached reply statement, the benefits from many of the technological advances cited by the shippers have already been incorporated into the SARR from the beginning.[36] In

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[35] Based on this reading of the Board's decision, the Coal Shippers' witness William J. Brennan constructed an elaborate exercise attempting to justify the shippers' proposed 50/50 mix of RCAF-A and RCAF-U in year one. Brennan Op. VS. at 13-14. As Mr. Baranowski shows in his statement, the analysis of the percentage of Class I railroads' system-wide operating costs "associated with assets" has no rational connection with SARR operating costs, and clearly provides no basis for determining the percentage of system-wide productivity reflected in the RCAF-A that would be available to the SARR.

[36] In his opening statement, Mr. Baranowski discussed at length how many potential improvements require substantial outlays of capital beyond what would be reasonable for the SARR to incur in the early years, while others, such as one-man crews, are far too speculative to

effect, the SARR's operations already include the benefit of productivity that it will take many years for real-world railroads to achieve. It would double-count those productivity benefits to reflect future productivity improvements in SARR operations that are already vastly more efficient than real-world operations.

Mr. Baranowski explains that there are many reasons that the SARR would not be able to achieve claimed productivity gains. For example: (1) the SARR is assumed to be optimally sized from a network perspective from day one – shippers build it to the peak year traffic levels, so there cannot be any improvement through additional investment in the right of way; (2) the process used by the Board to adjust operating expenses year-to-year automatically adjusts the rolling stock and operating labor to fit the level of the traffic handled in each year; (3) the G&A expenses are bare-bones from day one, so the concept of management efficiency is moot; (4) the traffic is assumed to be handled from the beginning in the most efficient manner possible – long unit trains for coal, which is the major if not exclusive commodity on a SARR, and hook-and-haul operations for any limited volumes of intermodal or general merchandise that the SARR might carry; and (5) the SARR starts from day one with the most efficient models of rolling

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assume they would be available in the near future to either the industry or the SARR.

In his reply statement, Mr. Baranowski points out that the technologies cited, or the investments needed to support them, often have been spurned by SARR proponents. For example, while they now claim heavier-loading cars as a potential productivity improvement, they rejected the use of concrete ties and heavier rail required for such loadings, claiming they were unnecessary, either because the SARR would not have the same tonnage as the incumbent or because a least-cost railroad would not incur the added expense. *See e.g.,* Docket No. 42088, WFA/Basin Reb. Nar. at III-F-96 (September 30, 2005). Thus, they avoided the costs for such investments, yet assume productivity benefits from operational changes dependent on those investments. Similarly, they cut operating costs by assuming an exceptionally streamlined staff with unprecedented labor productivity from day one (significantly greater than any achieved by a real-world railroad), yet assume future labor productivity comparable to that of industry participants through learning by doing. *See e.g.,* Docket No. 42088, WFA/Basin Reb. Nar. at III-D-48 through 49 (September 30, 2005).

stock (cars and locomotives), which are almost exclusively under lease by the SARR at an expense that reflects the lowest dollar level the incumbent has been able to negotiate – both for the actual units and, usually, for maintenance. Because of these efficiencies, the SARR would have nothing to gain from technological advances in the early years. They already have the benefits available from existing technologies. And as to future technologies, the FRA points out in its March 2002 strategic plan that technologies currently under development may not be available for implementation for more than five years and the benefits not seen for at least ten years.[37]

In addition to productivity from technological advances, the Coal Shippers and their witnesses Dr. Caves et al (Caves) also claim early benefits through replacement of assets "when economically feasible to do so" regardless of asset lives.[38] They attempt to bolster their argument through reference to an exhibit submitted by AEP Texas in its rate case purportedly showing that the average age of Class I rail assets is seven years, and thus not that different from the SARR's assets. Mr. Baranowski explains that the asset lives calculated from the R-1, which reflect purchase accounting adjustments following recent rail mergers, bear no relationship to the actual physical age of the assets. For example, as part of the purchase accounting adjustment, the accumulated depreciation for assets is written down to zero. Under the shippers' calculations, such assets would have a useful life equal to their remaining life, and as such, would have an age of zero, even though they had been in service for many years. These

[37] *Five Year Strategic Plan for Railroad Research, Development, and Demonstrations, March 2002,* Federal Railroad Administration, at ES-8.

[38] Mr. Baranowski pointed out in his opening statement that for railroad assets the point at which it becomes economically feasible to replace the assets is highly unlikely to occur anytime within the first ten years.

adjustments for newly acquired assets made for accounting purposes do not reflect the actual age of the assets.

The Coal Shippers' third argument is that the complex interconnections between various sources of productivity gains makes it "futile" to examine specific evidence related to the specific sources of process improvements that would impact productivity on the SARR. For this reason, the Coal Shippers claim that the Board should merely assume that the SARR is just like a real-world railroad except where the SARR uses technologies that have not been used by real-world railroads. This argument, presented by Caves, should be a non-starter for use in a SAC case, where the burden of proof is on the complainant. If there is no concrete evidence supporting a productivity adjustment, then there would be no basis for the Board even to consider the question further. In any event, BNSF's expert Dr. Martin N. Baily rejects both the rationale and the assumptions underlying Caves' analysis. He points out that far from being "futile," looking at the specific sources of productivity in the railroad industry and determining whether they *would* or *would not* affect a SARR is the only valid way to address the issue, and the fact that the sources of productivity are interconnected does not preclude their being identified and their likelihood and timing evaluated. He then demonstrates that the underlying assumptions about the SARR's productivity in relation to that of the industry are wrong.

Dr. Baily explains that in assessing the potential productivity for a SARR, Caves overemphasizes the impact that IT improvements would have on the SARR. Research shows that productivity improvements are engendered from IT investments *only* when specific process improvements are *enabled* by these investments. Such process improvements are much more likely in complex networks with large volumes of heterogeneous transactions such as those of

the real-world railroads, than in the simple network of homogeneous traffic, limited activities, and a defined client base characteristic of a hypothetical SARR.

Dr. Baily likewise refutes two of Caves' other arguments that seek to put the SARR on equal footing with real-world railroads with respect to productivity. Caves argues that the SARR would achieve benefits from improving its management practices, as would any other railroad. However, research shows that the most significant gain in productivity comes from companies implementing the best practices of the leading company, and that they most often achieve that goal through opening new best-practices establishments rather than improving best practices themselves. As the SARR is already assumed to be the industry leader – the most efficient railroad that is feasible – the productivity that can be expected from the industry seeking to attain that level would not be available to the SARR. Dr. Baily further notes that Caves' and witness Brennan's reliance on "learning by doing," to the extent it might be considered relevant in a SAC analysis, actually cuts the other way. If the SARR workforce is capable of "learning by doing," then it is a workforce that would – like any other real-world workforce – have *less* efficient operations at the beginning of operations while it "learned the ropes." But the SAC test allows the SARR to achieve all the benefits available from "learning by doing" from day one.

Dr. Baily also rejects Caves' argument that the convergence of rail industry productivity and productivity in the economy as a whole leads to the conclusion that the SARR will experience the same level of productivity as real-world railroads from day one. Whether the railroad industry and the economy as a whole converge is irrelevant to the question of whether the SARR and the rail industry will have the same productivity growth in the SARR's first years of operation. As Dr. Baily explains, the substantial advantage that the SARR has over real-world

railroads leads to the opposite conclusion – that it is reasonable to assume that the SARR will achieve *no* additional productivity in the early years of its operations.

Dr. Baily emphasizes that there is no evidence linking the qualitative arguments in Caves' testimony with the quantitative solution that it supports. Rather, the evidence shows that it is unreasonable to *assume* any productivity for the SARR in the early years of its operation. Therefore, the Board should adopt a presumption of no productivity and apply the RCAF-U for the first ten years of the SARR's operations, unless productivity improvements advocated by the proponents of a SARR can be tied to a specific source of productivity increase that can be identified and evaluated on the evidence.

V. USE OF URCS SYSTEM-AVERAGE COSTS IN RAIL RATE CASES

A. The Board's Proposal Would Simplify SAC Litigation

Class I railroads generally support the Board's proposal to rely more heavily on system-average URCS costs in SAC cases.[39] The Board's proposal addresses three basic problems with the current approach to calculating variable costs for purposes of determining the jurisdictional threshold. First, as BNSF explained in its opening comments, litigation over movement-specific adjustments to URCS system-average costs is burdensome, complex and seldom justified.[40] Second, use of movement-specific adjustments raises complex and difficult issues relating to the variability percentages used in URCS. Third, the current practice promotes uncertainty as to the jurisdictional threshold and encourages unnecessary litigation, thereby undermining one of Congress's objectives in requiring the Board to establish a simple and clear variable costs standard for use in assessing the statutory jurisdictional threshold.

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[39] Of the railroad commenters, only CP, a carrier that has not litigated a SAC rate case before the Board, objected to the Board's proposal. CP Op. Comments at 5-9.

[40] BNSF Op. Comments at 61-64.

BNSF suggested modest changes to the Board's proposal that would realize the benefits of simplification that the Board is attempting to achieve through its proposal while preserving some role for movement-specific adjustments where consideration of movement-specific adjustments to URCS might actually have an impact on rates. Specifically, BNSF proposed that the Board (1) include in its calculation of URCS system-average costs the payments that railroads make to third parties for providing some portion of the transportation service; and (2) address movement-specific adjustments at the end of a SAC case if it can be shown by clear and convincing evidence that the adjustments are justified and that they would affect the level of a prescribed rate.[41] BNSF anticipates that such adjustments would include the use of additional, easily ascertainable, operating characteristic inputs such as tare weights, empty miles and number of locomotives.[42]

CSX, NS and UP also agree with the Board's objective to increase reliance on system-average costs in an effort to simplify SAC litigation and to avoid complex disputes over issues that may not need to be litigated in every case. They also propose modest changes that would promote simplification while preserving the ability to consider movement-specific adjustments in appropriate circumstances. Like BNSF, CSX, NS and UP advocate that payments made to third parties for providing a portion of the transportation service be included in the variable cost calculation.[43] They also propose that the Board take into account additional operating characteristic inputs, including some of the same operating characteristics identified by BNSF.

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[41] *Id.* at 64-67.

[42] *Id.* at 66-67.

[43] NS/CSXT Op. Comments, at 17; UP Op. Comments at 37-40. *See also* Comments of Snavely King Majors O'Connor & Lee, Inc., at 2-3.

CSX/NS make an additional proposal: that the carrier be permitted to elect at the outset of a case whether to contest quantitative market dominance. If the carrier elects not to contest market dominance, the parties would conduct discovery and present evidence regarding only the SAC portion of the case. If the Board then determines that a rate exceeds a maximum reasonableness level, a party could then elect to present variable cost evidence including movement-specific adjustments.[44]

B. Shippers' Objections Are Unfounded

The Coal Shippers flatly oppose the Board's proposal.[45] They urge the Board to continue to accept movement-specific URCS adjustments and to allow full litigation over such adjustments under the same open-ended procedures that have been followed in the past. In some respects, they ask the Board to expand the scope and expense of litigation over variable costs. Only Arkansas Electric Cooperative Corporation expressed qualified support for the Board's proposal.[46]

The Coal Shippers' primary concern appears to be that reliance on unadjusted URCS system-average costs will "raise the jurisdictional threshold rate level and rate prescription floor."[47] There are two problems with this contention. First, there is no reason to believe that the actual variable costs of unit coal train service are below BNSF's system-average variable costs. In fact, there is evidence that suggests that unit coal train variable costs may be higher than system-average variable costs. Second, the Coal Shippers completely disregard the Board's

[44] NS/CSXT Op. Comments at 15.

[45] Coal Shippers Op. Comments at 89-101.

[46] AECC Op. Comments at 20-22.

[47] Coal Shippers Op. Comments at 92.

cost/benefit analysis and its conclusion that the benefits of simplification outweigh the complexities and costs of dealing with variable cost issues from the start in all cases.

The premise of the Coal Shippers' concern that reliance on unadjusted URCS system-average costs will result in an increase in the jurisdictional threshold is their assertion that "adjustments are called for to reflect the economies and efficiencies of unit train service."[48] While there are undoubted efficiencies in unit coal train service, this does not necessarily translate into variable costs that are below a carrier's system-average costs. For example, there is credible evidence that BNSF's current unit coal train operations are more costly in some respects than other types of traffic on BNSF's system. In its opening comments, BNSF identified two examples of costs – locomotives and fuel – that are demonstrably higher for BNSF's unit coal train operations than for other services.[49]

Moreover, even if concerns about the relative efficiency of unit train operations were valid in the past, they do not carry weight today. System-average costs, at least for western railroads, are substantially more reflective of unit train costs today than they were when URCS was developed in the 1980s. Over time, unit trains have accounted for an increasing proportion of the total car miles on western railroads, rising from approximately 25 percent in the early

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[48] *Id.* at 90.

[49] BNSF Op. Comments at 60 nn. 46, 47. The Coal Shippers' argument presupposes the accuracy of the movement-specific adjustments for which complainants typically advocate, in particular the adjustments to road property costs which, in BNSF's experience, typically account for more than half of the difference between the parties' variable cost estimates. However, BNSF has demonstrated, and the Board has now acknowledged, that there is a significant problem with the road property adjustment. NPRM at 24-25. Specifically, the use of the system-average variability factor to calculate a movement-specific road property adjustment substantially understates the variable road property costs on high density lines. BNSF has also identified problems with the shippers' improper use of data that are not maintained by the railroad for the purpose of making movement-specific cost estimates, which further distorts shipper sponsored adjustments. *See e.g. AEP Texas,* BNSF Reply Evidence, II-36 to II-38 and Exhibit II.A-4 (filed May 24, 2004).

1980s to 43 percent in 2004.[50] Consequently, a significant portion of current system-average costs for the western railroads are based on unit train operations.

As to the Board's cost/benefit analysis, shippers are dismissive of the Board's concern that the limited benefits of allowing movement-specific adjustments outweigh the costs. According to the Coal Shippers, "movement specific adjustments are not the driving factor behind the expense of maximum rate cases."[51] The Coal Shippers miss the point. Regardless of whether the calculation of variable costs is the "driving factor," behind rate case complexity, it is undeniably a significant expense, particularly in light of the fact that each party to a rate case typically files three rounds of evidence on variable cost issues, more than on any other issue in a SAC case. It also should be an unnecessary expense in most cases. Indeed, shippers identify just one case out of the nine coal rate cases that the Board has decided since 2000 in which the jurisdictional threshold was implicated.[52] In light of these facts, it is difficult to comprehend the Coal Shippers' flat-out rejection of the Board's proposal to eliminate from SAC litigation an expense that yields little or no demonstrable benefit.

C. Shippers' Proposals Would Increase Expense, Complexity And Uncertainty Of The Jurisdictional Determination

Coal Shippers suggest that there are other ways besides using system-average costs to deal with the concerns that underlie the Board's proposal to do away with movement-specific adjustments, particularly the Board's concern that data are insufficient to produce reliable movement-specific adjustments. They make three proposals to address perceived problems with railroad recordkeeping: (1) Where adequate data on which to calculate a reliable movement-

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[50] *Compare* Analysis of Class I Railroads, AAR (1984) *with* Analysis of Class I Railroads, AAR (2004).

[51] Coal Shippers Op. Comments at 91.

[52] *Id.* at 97 (citing *Wisconsin Power & Light*).

specific adjustment are unavailable, the Board should give "deference" to adjustments advocated by the shipper; (2) The Board should permit discovery and use of railroad internal management costs; and (3) The Board should direct railroad defendants to perform special studies, i.e., create evidence at a shipper's request.[53] Each of the shippers' proposals defies the concerns over efficiency, simplification and certainty that the Board is trying to address in this proceeding. Each proposal is also directly at odds with Congress's effort to reduce carriers' regulatory recordkeeping burden.

The Coal Shippers' proposal that the Board show deference to shipper-sponsored movement-specific adjustments effectively asks the Board to relax its long-standing requirement that a proponent of an adjustment show that it is "demonstrably superior" to unadjusted URCS system-average variable costs.[54] Particularly since recordkeeping requirements have been relaxed as part of the deregulatory thrust of the Staggers Act, shippers' proposal opens the door to massive gaming of the URCS calculations on grounds that the railroad's data are supposedly insufficient. This proposal would also substantially increase the uncertainty surrounding the determination of the jurisdictional threshold.

As to the Coal Shippers' proposal that the Board allow discovery and use of internal management costs, the Board has already soundly and repeatedly rejected use of internal management cost data in rate cases on the grounds that "costs in Board proceedings are to be

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[53] *Id.* at 93-95.

[54] *Potomac Electric Power Co. v. CSX Trans. Inc.*, STB Docket No. 41295, slip op. at 2 n.10 (served May, 27, 1997) citing *Adoption of the Uniform Rail Costing System As a General Purpose Costing System for All Regulatory Costing Purposes*, Ex Parte No. 431 (Sub-No. 1), 5 I.C.C. 2d 894, 899 n. 12 (1989).

determined using . . . URCS," while internal management data are not based on URCS standards.[55]

The Coal Shippers' proposal that carriers should be forced to create new evidence for shippers by conducting special studies would impose new and significant burdens on the carriers. It would also create complex evidentiary issues, and undoubtedly would lead to additional discovery disputes between the parties to a rate case, imposing additional burdens on the Board and the parties.

In its separately filed comments, Arkansas Electric Cooperative Corporation, through its witness, Michael A. Nelson, proposes using SARR operations simulations "to verify or refute the accuracy of the aggregate results of the URCS analysis."[56] Apart from being vague, the problem with AECC's proposal is that the costs of providing service on a least cost, most efficient, hypothetical, stand-alone railroad bear little relationship to the incumbent's real world costs of serving the issue traffic. Accordingly, a simulation of SARR operations would be completely irrelevant to the variable cost calculations.

D. No Movement Specific Adjustments Are Appropriate Unless They Properly Account For The Relationship Between Variability And Density

The Coal Shippers address one substantive issue: the use of the same variability percentage that is used to calculate system-average road property variable costs to calculate a movement-specific adjustment to those costs. The Coal Shippers and their witness, Joseph

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[55] *See Kansas City Power & Light Co. v. Union Pacific R.R. Co.*, STB Docket No. 42095, 2-3 (served Feb. 15. 2006); *Northern States Power Co. D/B/A Xcel Energy v. Union Pacific R.R. Co.*, STB Docket No. 42059, slip op. at 8-9 (STB served May 23, 2002); *Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Ry.*, STB Docket No. 42056 (STB served Feb. 9, 2001) (*TMPA*); *Minnesota Power v. Duluth, Missabe and Iron Range Ry.*, STB Docket No. 42038 (STB served July 8, 1999); *Arizona Public Service Co. v. Atchison, T. & S.F. Ry. Co.*, 2 S.T.B. 367, 372 (1997); *Potomac Elec. Power v. CSX Trans.*, STB Docket No. 41989, *et al.* (STB served May 27, 1997).

[56] AECC Op. Comments at 21.

Plaistow, incorrectly argue that the ICC long ago settled this issue in the shippers' favor.[57] Shippers have made this argument, as well as the others set forth in Mr. Plaistow's statement, in recent rate cases. With one exception that BNSF addresses below, BNSF has explained in prior rate cases why each of Mr. Plaistow's arguments is wrong, and BNSF does not repeat those discussions here.[58] BNSF showed, and the Board acknowledged in the NPRM, that use of the wrong variability percentage causes substantial distortions. Unless and until a method is found to account for the relationship between variability and density, no movement-specific adjustment is appropriate.

Mr. Plaistow raises one new argument. Mr. Plaistow claims that "depreciation rates [that the Board] has approved for application to each Class I railroad already reflect higher costs for higher traffic densities."[59] He does not explain, however, how this fact, even if true, supports the use of the system-average variability factor regardless of density. Indeed, the very fact that depreciation rates are higher on high density lines makes it all the more important to deal with the variability percentage if a movement-specific adjustment is made. Mr. Plaistow appears to

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[57] Coal Shippers Op. Comments at 96 and Verified Statement of Joseph J. Plaistow attached thereto (Plaistow Op. VS).

[58] In *AEP Texas,* BNSF Rebuttal Evidence, at I-3 to I-33 (filed July 27, 2004), BNSF presented a comprehensive summary of its experts' evidence demonstrating that substantial distortions result from complainant's calculation of movement-specific adjustments to road property costs using the same variability factor that is used to calculate system-average road property variable costs. BNSF also explained that the Board has never addressed the issue of whether it is proper to use the system-average variability factor to make a movement-specific adjustment. BNSF also presented in Exhibit II.A-4 to that rebuttal an econometric analysis that demonstrates that there is a strong relationship between density and the variability of road property investment costs, and that the average variability of road property investments on BNSF's system is 58 percent – higher than the 50 percent variability percentage assumed by URCS. *See also OTP*, BNSF Rebuttal Evidence, at II-9 to II-20, (filed April 29, 2004) (explaining that changes in railroad accounting practices since the adoption of URCS is another factor underlying the strong relationship between variability of road property investment and density).

[59] Plaistow Op. VS at 11.

concede this point, noting that "[a]ny alteration to the variability factor applying to road property return and depreciation costs must take this depreciation rate-density relationship into account."[60] However, Mr. Plaistow never proposes how this could be done.[61]

E. Other Comments

BP Amoco objects to the Board's proposal as it applies to large rate cases but supports it as it applies to small shipper rate cases, i.e., rate cases brought under the *Simplified Guidelines*.[62] As to large rate cases, BP Amoco objects to the Board's proposal because it is "conceivable that a complainant . . . may file a complaint and allege that a rate close to or at the jurisdictional threshold should be prescribed."[63] However, the possibility that variable costs might be a factor in a case is not a legitimate basis for imposing the extensive burdens on the parties associated with litigating movement-specific adjustments. Like the Coal Shippers, BP Amoco ignores the simplification objective that underlies the Board's proposal and presents no evidence suggesting that system-average URCS costs are an unreasonable measure of variable costs for large scale unit coal movements for purposes of determining whether the Board has jurisdiction to entertain a rate complaint.

As to cases brought under the *Simplified Guidelines,* BP Amoco supports the Board's proposal and urges the Board to disallow any adjustments whatsoever to unadjusted URCS system-average variable cost estimates.[64] As BNSF stated in its opening comments, BNSF

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[60] Plaistow Op. VS at 11-12.

[61] Mr. Plaistow also completely ignores the unreliability of the depreciation data that complainants have tried to use in recent cases to make a purported movement-specific road property and depreciation costs adjustment. *See e.g. AEP Texas,* BNSF Reply Evidence, II-36 to II-38 and Exhibit II.A-4 (filed May 24, 2004).

[62] Initial Comments of BP Amoco Chemical Co. at 2-3.

[63] *Id.*

[64] *Id.*

agrees with the thrust of the Board's proposal to rely principally on a system-average calculation of URCS costs in small-shipper cases, but urges the Board to apply this approach with flexibility given the lack of significant experience in small shipper cases.[65] BP Amoco provides no valid reason for adopting an inflexible rule that adjustments to system-average costs should be disallowed in all cases.

VI. DCF PERIOD

The parties commenting on the Board's proposal to shorten the SAC analysis period from the usual 20 years to ten years expressed qualified acceptance of the proposal. BNSF and UP do not oppose the Board's proposal, even though they recognize that the truncated analysis period could negatively impact the railroads, particularly in cases where the SAC analysis shows over-recovery of SAC costs in the outer years that offset under-recovery in the earlier years. They agree with the Board that a shortened DCF analysis period reduces reliance on speculative forecasts, adequately reflects the business cycles, and that an accompanying limitation on the rate prescription would reduce the need for reopening to vacate or modify existing rate prescriptions that have become obsolete due to changed circumstances. BNSF also supports the use of a shorter DCF period because it allows the Board to avoid grappling with the difficult and speculative issue of SARR productivity, since any productivity that would be experienced by a SARR would only occur in the later years of a SARR's life. NS/CSXT agree generally that a shorter DCF period makes sense, but they propose that the Board establish only a presumptive length of analysis period, allowing the parties to present evidence for different length periods based on the specific circumstances of the case.

[65] BNSF Op. Comments at 68-69.

Commenting shippers had mixed views. Albemarle contends that the Board should not mandate a 10-year DCF period, but instead should address the issue on a case-by-case basis. Comments of Albemarle Corporation, at 8 ("Albemarle Op. Comments"). AECC contends that a 10-year DCF period would impede the SARR's ability to benefit from outer year growth (AECC Op. Comments at 24), and that the Board's proposed procedures for reopening would eliminate any need to shorten the DCF analysis period.[66] *Id.* at 22. The Coal Shippers support the shortened DCF period so long as (1) the Board modifies the DCF model to incorporate a new methodology for amortizing debt, and (2) the rate prescription is allowed to extend indefinitely until the railroad can prove on reopening that there are changed circumstances that justify termination. Coal Shippers Op. Comments at 102-103.

BNSF opposes the Coal Shippers' conditions. The proposed modification to the debt amortization schedule has no place in this proceeding. The treatment of debt amortization is unrelated to the DCF period. The length of the debt amortization period is not a function of the DCF analysis period. As discussed by Mr. Baranowski in the attached verified statement, changes can be made to the DCF period without any need to address the debt amortization period. Indeed, shippers have sought changes in the debt amortization schedule in pending cases without seeking any change in the DCF period.[67] The two issues are separate.

It would therefore be inappropriate even to consider the Coal Shippers' proposal in this proceeding. The NPRM sought comments on the proposed shortening of the DCF period and "how the electronic spreadsheets used in these cases should be modified to make this change [in

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[66] AECC's argument is rather circular as the Board proposes to shorten the DCF period and the length of the rate prescription precisely to make such reopenings unnecessary.

[67] See BNSF discussion of complainants' attempts in Docket No. 42088, BNSF Reply Nar. at III.G-19 to 20 (July 20, 2005) and in Docket No. 41191 (Sub-No. 1), BNSF Reply Nar. at III.G-23 (May 24, 2005).

the DCF period] if adopted." NPRM at 31. The Board did not seek comments on substantive changes to other economic assumptions used in the DCF analysis and it would be inappropriate to do so now. Moreover, any change to the Board's longstanding practices relating to the debt amortization period would require the evaluation of substantial evidence relating to railroad practices, interest rate assumptions, and the Board's cost of capital determinations, as explained by Mr. Baranowski. This rulemaking proceeding is not the proper forum to consider such a fact-specific inquiry.[68]

The shippers' second request that a rate prescription be allowed to extend beyond the 10-year DCF period and that the railroad be burdened with justifying its termination defeats the purpose of shortening the SAC analysis period. The Board was correct in recognizing that long-term rate prescriptions often becomes obsolete because they are based on projections and assumptions about the future that are inherently speculative. The purpose of the Board's proposal is to reduce the impact of those speculative future projections on rate prescriptions and thereby reduce the litigation burdens that result from reopening proceedings that assess the continued validity of those projections. The shippers' proposal to continue the prescription indefinitely and force the railroad to seek reopening based on changed circumstances undermines the purpose of reducing the DCF period in the first place.

Finally, all parties agree that changes to the DCF analysis period should not be applied to pending rate cases in which the evidentiary period is closed so as to avoid needless complication of those cases. Coal Shippers Op. Comments at 103.

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[68] In the pending WFA/Basin case (Docket No. 42088), the complainant also sought to have the Board change its treatment of the debt amortization period without any consideration of evidence by burying its proposal in a workpaper on opening. Docket No. 42088, BNSF Brief at 22-23 (December 6, 2005). If complainants want to have a serious discussion of this issue, they must raise it properly in their opening evidence with supporting evidence so that the railroad defendant has an opportunity to address the issue on the merits.

VII. STANDARD FOR REOPENING, VACATING AND FILING A NEW CASE

The Board's NPRM proposes to amend the rules governing the reopening of Board decisions to implement the ruling of the D.C. Circuit in *BNSF v. STB,* 403 F.3d 771 (D.C. Cir. 2005), that railroads and shippers should be treated in the same way when they seek to reopen and vacate an existing rate prescription. Any party seeking to vacate an existing rate prescription – whether a shipper or a railroad – must establish that material error, new evidence or substantially changed circumstances justify reopening and vacatur. The railroad commenters, including BNSF, support the Board's proposed rule change. One shipper urges the Board to continue to apply disparate standards to shippers and railroads, although the largest group of shipper commenters – the Coal Shippers – accepts the Board's conclusion that "a common standard will be applied to all prescription reopening/vacation petitions." Coal Shippers Op. Comments at 105.

In addition, the Board's NPRM sets out a proposed "multi-tier" procedure for addressing requests to reopen and vacate existing rate prescriptions. Under that approach, the Board will lift the prescriptive effect of the prescription upon finding that there is sufficient evidence of changed circumstances to call the validity of the existing prescription into question, and then either call for additional evidence or vacate the prescription and allow the filing of a new rate complaint. The Coal Shippers object to this proposal and instead favor a single evidentiary hearing in which the parties are allowed to present evidence beyond the scope of the original SAC assumptions, including selection of a new traffic group and revision of the SARR configuration. Coal Shippers Op. Comments at 109-14. While the hearing is pending, the rate prescription would remain in effect. Finally, the Coal Shippers argue that the Board should not allow the new standards emerging from this rule making to be used as a basis for reopening

Board decisions with respect to existing rate prescriptions. *Id.* at 115-17. BNSF addresses each these positions below.

A. The Board Correctly Interpreted The Court's Decision In *BNSF* As Mandating Similar Treatment For Railroads And Shippers Seeking *Vacatur* Of A Rate Prescription

Xcel takes issue with the Board's conclusion that any party seeking to reopen and vacate an existing rate prescription must show, to the satisfaction of the Board, that material error, new evidence or substantially changed circumstances justify reopening. Xcel argues that the court's decision in *BNSF* does not mandate identical standards for railroads and shippers, but only requires that the Board provide a well-articulated reason for treating them differently. Xcel further claims that disparate treatment of shippers and railroads could be justified by the supposedly disparate effect of vacatur on shippers and railroads. According to Xcel, "*vacatur* of a rate prescription enables the railroad to regain complete rate-setting autonomy to charge a new rate pending the new case, and imposes on the complainant the high burden of preparing and submitting a new SAC analysis." Comments of Xcel Energy, at 6 ("Xcel Op. Comments").

This argument is a rehashed version of the same argument that was presented to the D.C. Circuit in support of disparate treatment in *BNSF v. STB* and rejected by the court in that case. The D.C. Circuit noted that one of the Board's justifications for disparate treatment was that "vacation of the rate prescription affords the carrier rate-making freedom while the shipper bears a substantial burden to show a new rate is unreasonable." *BNSF* at 777. Thus, the Board's rationale in *BNSF v. STB* was essentially the same rationale that Xcel now asks that the Board resuscitate and use in support of disparate treatment of shippers and railroads. But the D.C. Circuit found that "the Board's *Decision* is arbitrary and capricious," *Id.* at 778, and specifically concluded that "the Board's justification in the *Decision* for disparate treatment is flawed." *Id.* at

777. Thus, the shippers' "better rationale" has already been considered and rejected by the court.

B. Interim Suspension Of A Prescribed Rate Is Within The Board's Authority

The Coal Shippers object to the Board's proposal for an interim suspension of a rate prescription where the party seeking vacatur has demonstrated that there are sufficient grounds for questioning the continued validity of the rate prescription. They claim that the Board lacks the authority to take such an action, arguing that a rate prescription must remain in effect until the Board eliminates it altogether after a full hearing on the merits. Coal Shippers Op. Comments at 106. While BNSF agrees that an existing rate prescription must remain in effect until the Board has made a finding that material error, new evidence or substantially changed circumstances calls the validity of the rate prescription into question, such a finding could support a prospective lifting or suspension of the rate prescription while additional evidence is considered.

The Board is authorized under 49 USC 722(b) to "change, suspend, or set aside" a prior action by the Board. The conditions under which the Board may suspend a prior action under Section 722(b) are specified in Section 722(c), which states that the "Board may, at any time on its own initiative because of material error, new evidence or substantially changed circumstances - (1) reopen a proceeding; (2) grant rehearing, reargument, or reconsideration of an action of the Board; or (3) *change* an action of the Board." (emphasis added). So long as the Board makes specific findings of material error, new evidence or substantially changed circumstances, it may "change" the rate prescription by suspending it while additional evidence is considered. There is nothing in the statute that requires the Board to conduct a full evidentiary hearing before taking action under Section 722(b).

The Coal Shippers contend that lifting the prescriptive effect of a rate prescription is indistinguishable from a *vacatur* and is therefore unlawful absent a full evidentiary hearing. Coal Shippers Op. Comments at 107. But lifting the prescriptive effect is not a final determination on the prescribed rate; it is only a temporary action pending further investigation. As such, it is a "suspension," not a "vacation" of the prescription. "Suspension" is temporary by nature. "Suspend" means "to set aside or make temporarily inoperative," to "stop temporarily," or to "hold in an undetermined or undecided state awaiting further information." *Merriam Webster's Collegiate Dictionary* 1187 (10th ed. 1993). *Vacatur*, on the other hand, implies permanence. "Vacate" means to "make legally void," or to "annul." *Id.* at 1303. The Board's objective in the proposed standard for reopening is not to void the prescription permanently when it lifts the prescriptive effect, but to put the rate prescription on temporary hold pending further investigation. As the prescription may or may not be vacated after consideration of further evidence, the shippers' contention that lifting the prescriptive effect is the equivalent of *vacatur* is incorrect.

The Coal Shippers also contend that under *Arizona Grocery*[69] it is unlawful for the Board to lift the prescriptive effect of a rate prescription prior to a full evidentiary hearing. Coal Shippers Op. Comments at 101-109. But *Arizona Grocery* does not address the scope of the Board's authority under Section 722(b). It is clearly unlawful under *Arizona Grocery* to lift or eliminate the prescriptive effect of a rate prescription at any time prior to a specific finding by the Board that changed circumstances affect the continued validity of the prescription. But *Arizona Grocery* does not preclude the suspension of a rate prescription after such a finding is

[69] *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Rwy. Co.*, 284 U.S. 370 (1932).

made to enable the Board fully to assess evidence on the question whether to modify the rate prescription, eliminate it altogether, or keep it in place.

C. The Board's Proposed Limits On The Scope Of A Reopening Are Appropriate

The Coal Shippers also complain that any limits on the scope of the reopening proceeding would unduly constrain the hearing that must be carried out before a rate prescription may be vacated. But the shippers misunderstand the question that is at issue in a reopening of an existing rate prescription. The question is not whether *any* rate prescription would be appropriate, but whether the specific rate prescription imposed on the basis of specific SAC assumptions remains valid. For example, since the original rate prescription is typically based on assumptions about future events, it is appropriate to consider whether key assumptions have turned out, over the passage of time, to be accurate. It is not appropriate to relitigate the basic assumptions about the configuration of the SARR or the composition of the SARR traffic group. New evidence relating to a SARR that is different from the SARR in the original SAC analysis would say nothing about the continued validity of the original rate prescription. It would merely indicate that different results could be obtained by changing the underlying SAC assumptions.

Shippers are not prejudiced by the proposed rule. After a rate prescription is vacated, the ratemaking initiative returns to the railroad. If the railroad then establishes a new rate that the shipper believes is unreasonable, the Board's proposed rule would allow the shipper to challenge that rate in a new SAC proceeding.

D. The Board Should Not Adopt A Rule Addressing The Extent To Which Changes In SAC Methodology Will Be Considered In Reopening Proceedings

The Coal Shippers ask the Board to declare that no changes in SAC methodology that result from this rulemaking proceeding can be the basis, standing alone, for a decision to reopen an existing rate prescription. Coal Shippers Op. Comments at 115-16. It would not be

appropriate for the Board to issue such a rule in this proceeding since the issue was not raised in the Board's NPRM. In any event, the question of whether a new standard or methodology constitutes or contributes to "substantially changed circumstances" that would justify reopening cannot be determined in the abstract. It must be decided on a case-by-case basis. The Coal Shippers' concerns over administrative finality and the importance of changes in the factual assumptions underlying the rate prescription would need to be considered in any request to reopen an existing rate prescription. But there is no reason to issue a rule that prohibits the Board from considering changes in SAC methodology in deciding whether to reopen a rate prescription.

VIII. OTHER ISSUES – TESTING FOR CROSS-SUBSIDY

The Coal Shippers argue that the Board's cross-subsidy test, as applied in *PPL* and *Otter Tail*, is inconsistent with the *Guidelines* and constrained market pricing, and must therefore be abandoned. Coal Shippers Op. Comments at 55. The Coal Shippers argue that the *Guidelines* are concerned only with the question whether a *complainant* is cross-subsidizing other traffic, not whether other traffic in a proposed SARR is cross-subsidizing the complainant. The Coal Shippers assert that it is therefore inappropriate to test whether other traffic in the SARR cross-subsidizes the issue traffic and that preventing such cross-subsidies is, in fact, inconsistent with the complainant's prerogative to group traffic in a beneficial manner. *See, e.g.,* Coal Shippers Op. Comments at 65-66. In essence, the Coal Shippers argue that a complainant is entitled to create a SARR in which the issue traffic is cross-subsidized by other shippers and the cross-subsidy that the issue traffic receives from other shippers can be used to reduce the issue traffic rate.

As a preliminary matter, it is clear that the Board's cross-subsidy rules are not part of this proceeding. The cross-subsidy rules did not form a part of the NOPR, and the Board has not

issued any subsequent order that would expand the rulemaking to include new issues. It was therefore inappropriate for the joint shippers to submit detailed comments on this issue, and the Board should disregard those comments.

Moreover, the Board's cross-subsidy rules are economically sound, grounded in rational application of the cross-subsidy principles set out in the *Guidelines*, and judicially approved. When it adopted the cross-subsidy test, the Board explained that the elimination of the effects of cross-subsidies was a "fundamental principle" of constrained market pricing. *PPL Montana, LLC v. Burlington Northern & Santa Fe Railway Co.*, STB Docket No. 42054, slip op. at 6 (served Mar. 24, 2003). Rejecting the same arguments made here, the Board reasoned that "[i]t would turn the CMP principle against cross-subsidization on its head to protect a captive shipper from subsidizing other traffic, while at the same time allowing that shipper's rates to be subsidized by other traffic." *Id.*

The Board's cross-subsidy test was affirmed by the D.C. Circuit in *PPL Montana, LLC v. Surface Transportation Board*, 437 F.3d 1240 (D.C. Cir. 2006). PPL made the same argument to the Court that the Coal Shippers make here. As the Court noted, "PPL suggested the SAC test only prevented the complaining shipper from being forced to subsidize other traffic, and that the complaining shipper was free to design a SARR in which other traffic subsidized the complaining shipper." *Id.* at 1243. But the Court agreed with the Board that "the primary purpose of the SAC test . . . is to guard against 'both cross-subsidization by and cross-subsidization of the captive issue traffic' when determining the reasonableness of the issue traffic's rates." *Id.* at 1245 (quoting the Board's August 2002 decision). As the court recognized, SAC is grounded in competitive market principles, and cross-subsidies would not exist in competitive markets. Moreover, the Court agreed with the Board's obvious conclusion

that a rate cannot be unreasonably high if it does not generate enough revenues, along with revenues from other shippers using the same facilities, to cover the costs of the facilities used by the issue traffic: "[T]he Board's decision advances the reasonable proposition that the captive issue traffic cannot be improperly subsidizing other traffic if the issue traffic cannot even cover its own attributable costs; in other words, it is difficult to steal from a penniless Peter to pay Paul." *Id.* at 1245-46.

The Board's extension of the cross-subsidy rule in *Otter Tail* to the rate reduction phase was a logical application of the same principles articulated by the Board in *PPL* and confirmed by the D.C. Circuit. As the Board explained, if it were to allow shippers to rely on cross-subsidies in the presentation of SAC evidence, a "test designed to root out costs associated with cross-subsidization would be transformed into one where captive shippers seek out cross-subsidies to pay for the facilities needed to serve them." *Otter Tail*, slip op. at 25. Shippers should not be able to use cross-subsidies to create the appearance that a challenged rate is unreasonably high, and they should not be able to use cross-subsidies to produce unwarranted rate reductions.

Professor Willig explains in his reply statement that it is entirely appropriate for the Board to apply its cross-subsidy test both initially and as a check to the level of the prescribed rate. It is undesirable for the regulatory process itself to introduce or exacerbate inefficiencies in the incumbent's rate structure. The Board's cross-subsidy test guards against such problems. Moreover, the concern that the cross-subsidy test will unnecessarily complicate SAC proceedings is based on a misperception of what the test actually requires. The cross-subsidy test does not require a complainant to posit an optimal SARR, it merely requires that the SARR posited by complainant should be free of cross-subsidy.

Mr. Klick explains in his reply statement that Professor Borts' discussion of cross-subsidy is in error because Professor Borts does not recognize how the Board's cross-subsidy test treats different kinds of costs. Contrary to Professor Borts' contention, and the example he uses, the Board's treatment of costs ensures that the test for cross-subsidy is conservative and will not show a cross-subsidy except in fairly extreme cases.

Respectfully submitted

By: _____

Richard E. Weicher
Michael E. Roper
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

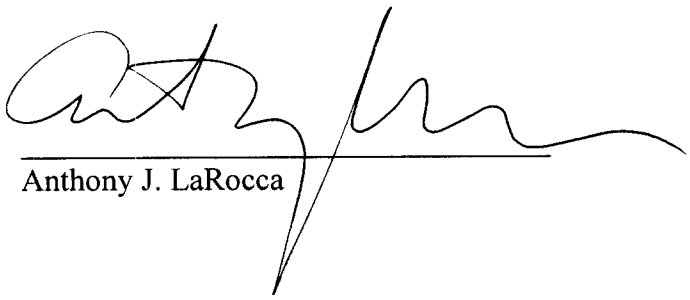
Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

ATTORNEYS FOR
BNSF RAILWAY COMPANY

May 31, 2006

CERTIFICATE OF SERVICE

I, Anthony J. LaRocca, hereby certify that on this 31st day of May, 2006, I caused a copy of BNSF Railway Company's Reply Comments to be served by first-class mail or a more expeditious method of delivery upon all persons who have filed a notice of intent to participate in STB Ex Parte No. 657 (Sub-No. 1).



Anthony J. LaRocca

Kalt

BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

Verified Reply Statement of

Joseph P. Kalt, Ph.D.

On Behalf of BNSF Railway Company

May 31, 2006

I. INTRODUCTION

A. Witness Background and Qualifications

My name is Joseph P. Kalt. I am the Ford Foundation Professor of International Political Economy at the John F. Kennedy School of Government, Harvard University. The Kennedy School is Harvard's graduate school of public policy and public administration. In addition to my work at the Kennedy School, I am also a Senior Economist at Lexecon, an economics consulting firm and a division of FTI Consulting. I hold B.A., M.A., and Ph.D. degrees in economics and am a specialist in the economics of competition, antitrust, and regulation, with particular emphasis on the energy, natural resource, and transportation sectors. Throughout my professional career I have conducted research, published, taught, and testified extensively on the economics of competition and regulation, with a particular emphasis on regulated industries. I have studied extensively the economics and regulation of the railroad industry and have presented expert testimony before the Surface Transportation Board (STB or Board) on numerous occasions, most recently in *WFA*.

I previously filed a Verified Statement in this proceeding, *EP 657: Major Issues in Rail Rate Cases* (Opening V.S.). In this Reply Verified Statement (Reply V.S.), I have been asked by BNSF Railway Company (BNSF) to comment specifically on the submissions of the Western Coal Traffic League (WCTL); AEP Texas North Company (AEPTX); Western Fuels Association, Inc., and Basin Electric Cooperative, Inc. (WFA); and Arkansas Electric Cooperative Corporation (AECC). In each case, I consider the economic and policy implications of these submissions' analyses and recommendations relative to two primary issues raised by the Board in *EP 657*: (1) the appropriate rate prescription methodology, and (2) the appropriate principles of revenue allocation for cross-over traffic under the Stand-Alone Cost (SAC) test for rate reasonableness originally set forth in the *Coal Rate Guidelines* (*Guidelines*).[1]

[1] *Coal Rate Guidelines*, Nationwide, 1 ICC 2d 520C (August 8, 1985) (hereinafter, *Guidelines*).

B. Summary of Findings

Rate Reduction Methodology: In my Opening V.S., I compared the two proposals (plus variants) for rate reduction methodology set out by the Board in *EP 657* – Maximum Contribution Methodology (MCM) and Maximum Markup Methodology (MMM) – to the Board's longstanding Percentage Reduction Method (PRM). As I explained therein, the PRM approach to rate prescription recognizes that pre-reduction pricing by the commercially rational incumbent can be presumed to reflect Ramsey principles of differential pricing under which customers with less elastic demand exhibit generally higher rates and higher percentage mark-ups over marginal cost. I noted that these basic relative rate relationships must be maintained, even if rate prescriptions are imposed, if a rate prescription methodology is to be consistent with Ramsey pricing and contestable market theory – the two principles the Interstate Commerce Commission (ICC) cited in the *Guidelines* as underpinning Constrained Market Pricing (CMP) and the SAC test.

Compared to PRM, both MCM and MMM are markedly inconsistent with the simulated competition of contestability and the Ramsey principles that are clearly articulated in the *Guidelines*. Although described as "demand-based" in the *EP 657* rulemaking decision, both MCM and MMM are, at their core, fully distributed cost methodologies that attempt to focus on equal distribution of costs among shippers without regard for the differences in value (i.e., demand elasticities) that individual shippers place on rail transportation. By embracing cost-based methodologies, MCM and MMM fly in the face of the *Guidelines*, which were highly critical of the arbitrariness of establishing rail rates based on cost allocation.[2]

Rate Reduction Methodology (Reply): In this Reply V.S., I apply the economics of Ramsey pricing principles and contestability to evaluate alternatives to the PRM methodology that have been proposed by intervening parties. WCTL, in particular, is aggressive in asserting that rate reduction should be determined in both methodology

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[2] *Guidelines* at 523, 526.

and magnitude on a case-by-case basis.[3] This is a recommendation for no generalizable methodology. But the principles of Ramsey pricing and the economics of contestability do not vary from case to case. They are generalizable frameworks; that is why the *Guidelines* could be built upon them. The Board's rate reduction methodology should be consistent across cases with the economics of contestability and Ramsey pricing principles.

AEPTX proposes, with WCTL's endorsement, that the Board adopt the General Percent Reduction Method (GPRM) proposed by AEPTX in *Docket No. 41191 (Sub-No. 1)* (AEP Texas). Relative to the Board's current PRM methodology, GPRM is decidedly inferior. GPRM's purported goal is to make the Board's rate reduction methodology consistent with Ramsey principles and to eliminate purported incentives for carriers to "game" the SAC process by establishing rates above commercially reasonable levels in the hope that SAC tests will not lower such rates to below the level carriers' desire. GPRM fails in meeting both of its stated objectives. The proposed rate reduction method requires measurement of the true marginal costs of serving all of the shippers contained in the Stand-Alone Railroad's (SARR's) proposed traffic group. GPRM's proposal to employ the Uniform Railroad Costing System (URCS) as a proxy for economic marginal cost represents a vain hope of achieving the impossible. This is not a matter of whether URCS cost proxies could be "good enough." Rather, as I discuss below, the use of URCS proxies for marginal cost would introduce distinct biases into GPRM – biases that would point in the direction of systematically lowering rail rates below Ramsey levels for services such as rail transportation of coal.

WFA proposes that the Board adopt WFA's so-called Reasonable Allocation Method (RAM) or, in the alternative, WFA's Reduced Mark-Up Method as these have been advanced by WFA in its pending rate case challenging certain rates of BNSF (i.e., Docket No. 42088 (Western Fuels). The RAM approach to rate reduction in SAC

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[3] See, e.g., Joint Opening Comments of Western Coal Traffic League, Concerned Captive Shippers, Western Fuels Association, Inc., Edison Electric Institute, National Rural Electric Cooperative Association and American Public Power Association, Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases, (hereinafter WCTL Opening) at 13; Verified Statement of Thomas D. Crowley, on behalf of Western Coal Traffic League et al, Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases (hereinafter, Crowley Opening V.S.) at 3.

analyses would be starkly inconsistent with Ramsey principles and, even on its own terms, would require wholly unrealistic assumptions regarding shippers' demands and demand elasticities. From a public policy perspective, the Percentage Reduction Method that the Board has repeatedly employed is clearly preferable to RAM. WFA's Reduced Mark-Up Method is similarly dominated from a public policy perspective by the Board's extant Percent Reduction Methodology.[4]

Revenue Allocations for Cross-Over Traffic: In my Opening V.S., I noted that the Board has recognized that its current system of cross-over allocation creates strong incentives for shippers to design grossly inefficient and biased SARRs. A complainant can selectively choose highly rated (i.e., high revenue and low cost) traffic on the SARR and use rules-based revenue divisions to "game" the process by designing a SARR to capitalize on divisions that reward small SARRs with very large amounts of revenue from highly rated cross-over traffic.[5] With the overwhelming majority of a SARR's revenues coming from cross-over traffic, the challenged traffic is required to provide proportionately less of the revenue burden needed to ensure that overall SARR revenues just cover its stand-alone costs. This increases the likelihood that the incumbent's challenged rates will be found to exceed the rates that would exist in a contestable market.

In *EP 657*, the Board suggests an alternative to its current Modified Straight-Mileage Prorate (MSP) method of allocating revenues to SARRs' cross-over traffic. Under the alternative, the Board would employ a measure of Average Total Cost (ATC) to create a proxy for what the Board refers to as a "full" SAC analysis of a full SARR that would compete to replace all of incumbent carrier's facilities and operations utilized by the SARR's traffic groups.[6] As I showed in my V.S., there is no need to turn to a

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4 Although vague, Arkansas Electric Cooperative Corporation appears to endorse the MCM or MMM methodologies. (See Written Testimony of Michael A. Nelson on behalf of Arkansas Electric Cooperative Corporation, Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases (hereinafter "AECC Opening"). I have addressed these options in detail in my V.S. in this proceeding. My analyses there apply to AECC's comments.

5 STB Docket No. 42072, Carolina Power & Light Company v. Norfolk Southern Railway Company, Decision (December 22, 2003) (hereinafter *CP&L/NS Decision*) at 31-32.

6 Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases; Docket No 41191, West Texas Utilities Company v. BNSF Railway Company; STB Docket 41191 (Sub no. 1), AEP Texas North

proxy approach in order to properly incorporate cross-over traffic. The economics of contestability readily yield cross-over allocations for SARR's actually proposed by shippers. Specifically, these economics yield cross-over revenues equal to the incumbent's avoided costs on cross-over traffic, and doing so provides shippers with proper incentives to design efficient SARRs.

Revenue Allocations for Cross-Over Traffic (Reply): Shipper intervenors in this proceeding vociferously oppose changes to the MSP approach. If the MSP approach is to be abandoned, WCTL would prefer to determine cross-over revenue allocation via empirical estimation of "real world" rate divisions. As discussed in my Opening V.S., the MSP approach is wholly inconsistent with the economics of contestability embraced by the *Guidelines*. WCTL's alternative of "actual market divisions" is similarly inconsistent with these economics. The SARRs actually proposed by shippers are properly allocated revenues in accord with incumbents' avoided fixed and variable costs when a SARR replaces the incumbent on system segments that carry the SARR's cross-over traffic. As explained in my Opening V.S., for SARRs that choose to compete for non-issue traffic as *partial* SARRs competing to attract cross-over traffic, this avoided cost standard for determining cross-over revenues follows directly from the economics of contestability. However, if the Board determines that SAC analysis should proceed as if "full" SARRs are competing to replace the incumbent in serving Complainants' traffic groups, the ATC method for allocating revenues to cross-over traffic, set out by the Board in *EP 657*, would represent a sound starting point.

Finally, the treatment of cross-over traffic in SAC analysis must be harmonized with whatever rate reduction methodology is applied when an incumbent's rates are found to generate SARR revenues which exceed the stand-alone cost of a Complainant's SARR. Specifically, whatever rate reduction approach is applied in such cases must be applied to the *through* rates associated with cross-over traffic carried by the SARR. The Ramsey pricing principles and the economics of contestable markets are unambiguous in

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Company v. BNSF Railway Company; STB Docket No. 42088, Western Fuels Association Inc., & Basin Electric Power Cooperative v. BNSF Railway Company; STB Docket No. 42095, Kansas City Power and Light Company v. Union Pacific Railroad Company, Decision (February 27, 2006) at 7 (hereinafter *EP 657: Major Issues in Rail Rate Cases*) at 17.

indicating: (1) that Ramsey prices and principles only apply to the through rates that interact with shippers' demand elasticities to determine the volume of rail service shippers purchase; and (2) that, in the simulated competition of contestable markets that is the heart of SAC analysis, a "full" SARR would put downward pressure on all of the incumbent's *through* rates.[7] For rate reduction in SAC cases to be coherently consistent with the principles of Ramsey pricing and contestable markets, this means that reduction or mark-up percentages emanating from PRM, MCM, MMM, GPRM, RAM or whatever method the Board adopts must be applied to through rates.

II. RATE PRESCRIPTION AND THE ECONOMICS OF THE COAL RATE *GUIDELINES*

A. Shipper Proposals for a "Case-by-Case" Standard

With respect to the matter of rate prescription methodologies in SAC cases, WCTL and other shippers filing comments in this proceeding advocate no outcome at all, arguing that the appropriate method for resolving rate disputes be decided on a "case-by-case" basis.[8] This approach, however, would leave rate prescription in SAC cases unguided by any overarching, generalized framework grounded in sound application of the economics the *Guidelines* rely upon for why SAC analyses should be done in the first place. Those economics – of contestability and Ramsey prices – have their roots deep in concepts of the public interest and designs of regulatory mechanisms that serve the public interest.[9]

In fact, it is telling in a context such as this when one side of the private interests at stake seeks to avoid adoption of guidelines and principles of sound policy and, instead, invokes a claimed need for case-by-case determinations on a recurring issue. Such a strategy asks for a move away from regulatory policymaking according to coherent frameworks and rules, and toward regulatory policy more susceptible to political forces and pressures. While such a move may be desirable from the perspective of a private

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[7] As discussed at length in my Opening V.S., in a contestable market, a partial SARR would realize the incumbent's avoided fixed and variable costs on partial (i.e., cross-over) traffic moves.

[8] See, e.g., Crowley Opening V.S. at 3; WCTL Opening at 13 and 22-25.

[9] Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases, Verified Statement of Joseph P. Kalt, Ph.D. on behalf of BNSF Railway Company, (hereinafter Kalt Opening V.S.), at 11-13.

party that fares better wielding political influence than wielding applicable rules and principles, considerable research tells us that, in the realm of governmental policy, stable and coherent rules of the game are critical to satisfying the public's interest in a healthy economy.[10] It is wholly appropriate that an agency such as the Surface Transportation Board undertake, as it is doing here, to build regulatory systems on firm principles that point its decisions toward service of the public interest. Adoption of such principles and procedures will provide information to future participants in rate cases; provide the basis around which parties might enter into independent agreements to resolve rate disputes; and remove the temptation that one party or the other may perceive in taking unfair advantage of a regulatory vacuum by advancing results-oriented methodologies designed to yield the best results for that party in a given case.

B. Guiding Economic Principles

For these reasons, it is appropriate and necessary to develop a framework for rate prescription that is grounded in the basic economic principles of the rail industry. As I noted in my Opening V.S., [11] the *Guidelines* appropriately employed such a framework. The policies implemented under the *Guidelines* are intended to set maximum rates for coal transportation in the face of a tension between railroads' need for differential pricing and concerns over potential railroad market dominance. The *Guidelines* approach this tension by relying upon the results of simulated competition to establish maximum rates on coal (and other traffic) over which a carrier may be found to be market dominant. This is accomplished by invoking the principles of contestable markets and Ramsey-based differential pricing.

Contestability: Under the *Guidelines*' Constrained Market Pricing, the total revenue needed by a rail system or subset of a rail system to ensure that it is able to cover its costs plus a reasonable rate of return is determined using the principles of contestability. A market is contestable when it is free of barriers to entry and exit that can otherwise impede competitors from entering the market to compete as a supplier of

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[10] A classic in this regard is by Nobel Laureate Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990).

[11] Kalt Opening V.S. at 4-13.

customers' needs. Under such conditions of free entry and exit, even if the market is served at lowest cost by a single large firm that maximizes economies of scale and scope, that single large firm will not be able to extract monopoly prices and profits. This is because if it tries to do so, it is immediately subject to entry and attack by freely entering (and freely exiting) competitors. Under contestable market conditions, surviving suppliers can realize only their costs plus a reasonable (i.e., competitive) rate of return.[12] The real world of the railroad industry obviously is not actually contestable – if it were, there would be no need at all for railroad rate regulation. SAC analysis is designed to simulate the results of contestability. The hypothetical entrant envisioned in the SAC analysis must charge rates sufficient to permit long-term viability, but can earn revenues no higher than those required for long-term viability (i.e., by covering costs plus a reasonable return to reflect the cost of capital).

Ramsey Pricing: The *Guidelines* also invoke the principles of Ramsey pricing.[13] As discussed in my Opening V.S. and the Opening V.S. of Prof. Robert Willig,[14] Ramsey pricing describes a set of rules that simultaneously address the paired challenges of (1) limiting the total revenues of a firm to no more than its total costs (including a reasonable return to cover the cost of capital), and (2) minimizing the distortions to efficiency and the associated public interest in an economy that maximizes consumers' well-being when some of this distortion is unavoidable because the existence of joint and common costs requires differential mark-ups on each movement above its attributable costs.[15] Indeed, the Ramsey pricing rules are derived mathematically in economics by maximizing the benefit to the public of a sector such as railroading. This means limiting the system to no more total revenue than needed to attract and hold investors, and differential pricing that sets rates relative to costs highest for those movements with the highest valuation of their

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12 *Guidelines* at 528, *EP 657* at 5.

13 *Guidelines* at 526-528.

14 Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases Verified Statement of Robert D. Willig, on behalf of BNSF Railway Company (hereinafter Willig Opening V.S.) at 5-11 and 13-15.

15 This minimization of the loss to consumer well-being that arises because first-best pricing at variable cost is not achievable causes Ramsey pricing to be labeled "second-best" pricing. In other words, the best we can do in the real world in which differential pricing is unavoidable.

rail service in the sense that demands are least discouraged (least elastic) in the face of higher prices. The mathematics of this exercise yields the Ramsey pricing rule:

$$[(P_1 - MC_1)/P_1] \div [(P_2 - MC_2)/P_2] = \varepsilon_2/\varepsilon_1 ;$$

for any two shippers, 1 and 2, with elasticities of demand ε_1 and ε_2.

Thus, under Ramsey pricing, prices across different shippers are set such that each movement's relative mark-up above marginal costs[16] per unit of service varies inversely with its elasticity of demand, and relative mark-ups of any two moves are inversely proportional to the ratio of those movement's relative demand elasticities. The implication is that for, say, non-captive traffic where a shipper might turn relatively easily to, for example, another railroad or another transport mode, elasticities of demand can be expected to be relatively high, and corresponding Ramsey-derived prices would be marked up relatively little (albeit, generally not by zero) compared to marginal cost. Shippers with low elasticities of demand – reflecting more limited alternatives, inelastic ultimate consumer demand, and the like – would see higher relative mark-ups of prices over marginal costs. The evident tight dependency of mark-ups on elasticities of demand is what it means for the *Guidelines* to refer to proper (Ramsey) pricing of rail service as "demand-based."[17]

C. Implications for SAC Analysis

As discussed in my Opening V.S., the basic Ramsey pricing rule with respect to price mark-ups is, to a first approximation, applicable to an unregulated, profit-maximizing firm. The difference between Ramsey pricing applied to the regulated firm and the unregulated firm is that, in the former case, the sum of all revenues –the portions covering both marginal costs and mark-ups – is set equal to cost plus a reasonable return. The unregulated firm charges higher relative mark-ups to less elastic customers in order to maximize *unconstrained* profit. In the contestable setting of SAC analysis, the SARR is attempting to do the same thing, but conditions of free entry mean that the SARR

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[16] I.e., expressing mark-up of price above marginal cost as a percent of price.

[17] *Guidelines* at 526-527.

cannot realize excess profits (i.e., revenues in excess of costs plus a competitive return to capital). The SARR is appropriately treated in the simulated competition of SAC analysis as being economically compelled to offer the shippers whose business the SARR is chasing prices which are simultaneously sufficient to allow the SARR to break even, and which generate maximum benefit for shippers being served. These are the Ramsey prices. If the SARR doesn't offer them, the SARR does not "win" in the contestable market because the conditions of free entry implicate other competitors able to offer shippers more benefit.

The observation that the incumbent railroad that has not had its rates rolled back by regulation would rationally set relative mark-ups inversely proportional to demand elasticities means that, upon coming into a contestable market against the incumbent, the "winning" SARR will put downward pressure on all rates by following the formula above, reducing mark-ups so as to preserve the Ramsey formula, but pulling down total revenues so that SARR realizes only its costs plus a competitive return. As discussed at length in my Opening V.S., the MCM and MMM methodologies proposed by the Board in *EP 657* for rate reduction in SAC cases would both fail, as a general matter, to exhibit this basic attribute of the contestability foundations of the *Guidelines*.[18] In the same spirit, let us now examine intervening shippers' additional proposals for rate reduction methodologies.

III. SHIPPER PROPOSALS RE: RATE REDUCTION METHODOLOGIES

A. AEPTX's/WCTL's GPRM Proposal

In AEP Texas, AEPTX proposed what it terms a General Percentage Reduction Method (GPRM). AEPTX, along with WCTL, now suggests to the Board that, if this rulemaking is to yield a general rule for rate reduction, that rule should be GPRM. GPRM is purported by AEPTX (and, implicitly, WCTL) as a more consistent with the

[18] Testimony submitted in this proceeding by Michael Nelson as an expert on behalf of AECC proposes an iterative allocation of a SARR's stand-alone revenue requirement. Like the MCM and MMM approaches, Mr. Nelson's proposed rate reduction methodology results in rate compression and rate equalization across select shippers. (See AECC Opening at 6.) As discussed at length in my Opening V.S., this is wholly inconsistent with Ramsey pricing and the economics of contestable markets.

Ramsey pricing rules and as overcoming the purported "gaming" of initial rates by carriers.[19] As I show here, neither of these claims withstands scrutiny.

GPRM attempts to invoke the Ramsey formula set out above. According to AEPTX's Opening submission in this rulemaking, GPRM would proceed by calculating relative mark-ups, $(P_i - MC_i)/P_i$, for all traffic for which the SARR sets itself up to compete in the contestable market. Based on the Ramsey formula set out above, "[t]he estimated mark-ups are used to infer the relative demand elasticities"[20] (i.e., $\varepsilon_2/\varepsilon_1$). This gives GPRM its target: Reduce all rates so as to leave relative mark-ups equal to original relative demand elasticities. To be meaningful, the attempt to "infer" the Ramsey value, $\varepsilon_2/\varepsilon_1$, could only be made with respect to prices and elasticities of demand for *through* moves. For purposes of the Ramsey pricing rule set out above, nether prices nor elasticities are even defined over, for example, sub-portions (e.g., cross-over portions) of a through move. For this reason, as I discuss below in the context of harmonizing cross-over revenue allocation with SAC rate reduction, any coherent rate reduction methodology must be applied to through rates under which cross-over traffic moves.

In implementing PRM, the rates paid by individual movements, P_i, would apparently be based on extant rates at the time of calculation for purposes of the SAC analysis.[21] Marginal cost, MC_i, of serving each individual movement would be estimated using Phase III URCS variable cost items, adjusted for individual movements. Each individual movement's total contribution of mark-up revenues, M_i, would then be

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19 Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases, Opening Comments of AEP Texas North Company (hereinafter AEPTX Opening) at 15-16.

20 AEPTX Opening at 12.

21 AEPTX refers to the prices to be used as starting points under GPRM as the "original rates[s]." See AEPTX Opening at 13. My analysis in the text treats these as referring to the rates in place at the time of a rate challenge (i.e., with the challenged rate being the P_i of the issue traffic). If, as applied to the challenged rate, "original rate" were to refer to the rate in place for the issue traffic *before* a rate increase occasioning the rate challenge, GPRM would be rendered logically incoherent on its own terms. GPRM relies on rates prevailing in the market to provide Ramsey-relevant information on mark-ups and (implicitly) elasticities of demand. Such an approach requires, at a minimum (i.e., ignoring, for the sake of argument, the method's infeasible reliance on true marginal costs) that the P_i of the issue and non-issue traffic be the rates that the rational, unconstrained carrier sets absent the rate challenge in light of the carrier's perceptions of elasticities of demand and marginal costs. Pre-increase rates on the issue traffic are out of step with these market-driven rates; that is why issue traffic rates get raised.

calculated as the product of (P_i - MC_i) per ton of movement i traffic times the volume, Q_i, in tons of movement i traffic. In the event a SAC analysis found that extant rates of the incumbent applied to the SARR's traffic group yielded an overage of revenues for the SARR relative to the SARR's break-even total costs, rates for issue and non-issue movements would be reduced by subtracting from each movement's total mark-up contribution a share of the overage equal to that movement's share of the total mark-up revenues of all of the issue and non-issue traffic.[22]

The foregoing formulas and calculations are offered by AEPTX as means of purportedly making SAC rate reductions "consistent with Ramsey pricing principles."[23] In fact, GPRM is subject to a number of shortcomings and irresolvable questions of calculational feasibility that render this claim unsupportable. Consider, for example, the underlying premise of GPRM – that it allocates rate reductions across all issue and non-issue traffic in a manner which preserves pre-challenge ratios of relative mark-ups (*per* the Ramsey formula above) and, hence, results in ratios of relative mark-ups at post-reduction rates that continue to equate to pre-reduction ratios of elasticities, $\varepsilon_2/\varepsilon_1$. The very premise is unsupportable: There is, in fact, no basis for asserting that the Ramsey ratio of $\varepsilon_2/\varepsilon_1$ "should" remain constant when an incumbent's extant rates are subject to substantial reduction of the type routinely requested by Complainants in SAC cases. Let us examine why.

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22 As originally proposed by AEP Texas in AEP Texas v. The Burlington Northern Santa Fe Railway Company, GPRM would employ an iterative approach similar to MMM and MCM. I have discussed the infirmities of such an approach in my Opening V.S. See, also, STB Docket No. 41191 (Sub-No. 1), AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company (May 24, 2004) (hereinafter "BNSF Reply, AEP Texas v. BNSF") at III-G-40-41. AEPTX now appears to have abandoned this approach.

23 AEPTX Opening at 10. See, also, AEPTX Opening at 9, 15, 16. AEPTX also asserts (at 15) that GPRM "eliminates the risk of gaming," referring to the Board's description of such "risk" in *EP 657*. (*EP 657: Major Issues in Rail Rate Cases* at 7-9) The Board sees these risks as arising when the challenged carrier can establish the challenged rate as the starting point for a rate reduction calculation. In so far as AEPTX intends the GPRM to employ the carrier's challenged rate (see note 21 above) in determining an applicable rate reduction, GPRM does not eliminate the asserted "risk." As I discuss in my Opening V.S., the "risk" the Board perceives is properly addressed as an evidentiary matter, rather than through manipulation of rate reduction calculations such as are contained in MCM and MMM.

GPRM's Treatment of Demand Elasticities: AEPTX's proposed GPRM methodology is built on assumptions and calculations regarding both demand elasticities and marginal costs. The *Guidelines* note with force, however, that (at 257):

> We did not consider it to be practical to impose pure Ramsey pricing as a regulatory requirement for across the board application in all cases. Ramsey pricing is based on a mathematical formula that requires both the marginal cost and the elasticity of demand to be quantified for every movement in the carrier's system. Thus, the amount of data and degree of analysis required seemed overwhelming. We concluded that while formal Ramsey pricing is useful as a theoretical guideline, it is too difficult and burdensome for universal application.

With respect to demand elasticities, the underlying premises of GPRM are that the ratio of elasticities, $\varepsilon_2/\varepsilon_1$, can be "inferred" from the original ratios of relative mark-ups; and that this inferred ratio of demand elasticities can then be employed by GPRM as the target at which SAC rate reduction should aim.[24] This approach, however, presumes constancy in relative elasticities of demand as rates are reduced via GPRM. Yet, there is no foundation for believing that, as volumes demanded by shippers change in response to a change in rates, elasticities of demand are constant.

Indeed, demands of constant elasticity have a particular, even peculiar, logarithmic mathematical form which is but one form from among an infinite possible number of forms of mathematical representations of demand. Moreover, nature – or human nature – is not so cooperative as to provide meaningful guidance as to how demand elasticities may change as prices change. Thus, for example, if a shipper's alternatives to a carrier's rail service only become attractive when rail rates are quite high, the carrier's unregulated rates might well be pushed toward those high levels – where the availability of alternatives can start to make demand for the carrier's service more elastic. Lowering rates (e.g., in the simulated competition of SAC analysis) can then move rates into ranges of less elastic demand. On the other hand, if pushing rates to higher levels doesn't call practical alternatives into play, but does squeeze out less urgent

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[24] Even on its own terms (including the implicit assumption that volumes of traffic are not affected by rates), GPRM's calculations do not (except in mathematically peculiar settings) produce relative rates and mark-ups that "hit" the presumed target of the pre-reduction $\varepsilon_2/\varepsilon_1$. The direction of bias in failing to hit this target can go in either direction for any individual shipper.

ranges of rail use, shippers may well exhibit lower elasticity of demand at higher rates, and higher elasticity of demand at lower rates. Moreover, the permutations and magnitudes of these types of problems only escalate when we wish to know how much demand elasticities change over large ranges of price movements – such as the movements that complaining shippers understandably hope for in SAC analyses.

The "anything could happen" character of this discussion of changes in demand elasticity as one moves over the range of price and volume combinations that describe shipper demands is not empty speculation or quibbling. It is why the *Guidelines* are correct in concluding that credibly quantifying and employing demand elasticities to justify rates would require an "overwhelming" "amount of data and degree of analysis."[25] This conclusion of the *Guidelines* applies with equal force to claims that GPRM is an implementation of Ramsey pricing or can be concluded to be consistent with the Ramsey pricing formula.

GPRM's Treatment of Marginal Costs: Even more profound difficulties for GPRM lie in its treatment of the other primary component of the Ramsey pricing rules – marginal cost. GPRM cannot proceed without calculation of marginal cost, since it is the ratio of percentage mark-ups, $(P_i - MC_i)/P_i$, that is used in GPRM to "infer" and set the target value of $\varepsilon_2/\varepsilon_1$ from the Ramsey pricing rule. As noted, in order to calculate marginal cost, AEPTX proposes to use Phase III URCS costing procedures, presumably employing such URCS cost components as seem to represent variable costs. AEPTX proposes to approximate marginal cost for use in the GPRM calculations with URCS proxies for "system average marginal costs," adjusted for distance.[26] In AEP Texas, the proposed adjustment for distance employed URCS Phase III costing procedures, including the *Ex Parte 270* trainload adjustments, to generate "marginal costs" for movements of 300, 600, 900, and 1200 miles. For GPRM purposes, URCS variable unit costs were modified to eliminate overhead rates, to eliminate various supervision and superintendence costs, to eliminate fixed plant depreciation and lease rentals, to eliminate

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[25] *Guidelines* at 527.

[26] AEPTX Opening at 12.

returns to fixed plant, to eliminate certain CLOR costs not associated with coal service, and to add certain replacement costs for track.[27]

GPRM's proposed calculations and use of URCS costs would be inconsistent with Ramsey pricing and the *Guidelines*. As the *Guidelines* note (at 532, n. 31):

> Ramsey pricing requires the use of *economic* costs rather than accounting costs. Although Rail Form A or URCS might be useful as a rough indicator of economic costs, we recognize that local factors and circumstances may cause the economic costs to differ greatly from accounting estimates. Such local factors might include, for example, where the movement is a backhaul or off-peak movement or whether the facilities are congested.

The emphasis on *economic* marginal costs is critical in this context. The overriding goals of Ramsey pricing are protection and promotion of the public interest. As discussed in my Opening V.S., Ramsey pricing pursues these public interest objectives by setting prices above marginal costs so as to allow the firm under analysis to cover its costs, while minimizing the distortion to the efficient use of society's resources that comes from pricing above marginal cost.[28] The true, economic marginal cost of providing a good or service (such as rail transportation) to any particular use and customer consists of the value of the resources used up or otherwise forgone by devoting resources to that use and customer, relative to other uses to which those resources might be put (including using the rail service to serve other shippers, or using the associated fuel, labor, and other inputs employed in rail service in some other sector of the economy).

As a general matter and as the *Guidelines* note, true, economic marginal cost differs from accounting costs (including URCS-based accounting costs). Nevertheless, it is tempting to think of, and proxy, marginal cost with accounting measures of unit (average) variable cost. After all, marginal cost is the change in – variation in – the total resource cost of providing a good or service as the volume of output of that service is

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[27] See STB Docket No. 42088, Western Fuels Association Inc., & Basin Electric Power Cooperative v. BNSF Railway Company, Reply Evidence of BNSF Railway Company, (hereinafter *BNSF Reply Evidence, WFA et al. v. BNSF*), at III-G-37 for further discussion.

[28] Kalt Opening V.S. at 7-9. See, also, Willig Opening V.S. at 12-15.

varied. In terms of average variable costs, however, true marginal cost can be properly conceived of as including both average variable cost *plus or minus* any output-induced changes in average variable cost.[29] Unit variable cost only equates to marginal cost under the special case where unit variable costs are the same no matter what level of output is produced. When marginal cost is, say, above average variable cost, it is pulling that average up (since marginal additions to output add variable costs at the margin which exceed average variable costs up to that point).[30]

As a general matter, accounting costs do not capture marginal cost, even if accounting techniques can measure unit variable cost. Instead, marginal cost is the province of careful and sophisticated statistical estimation techniques of the "burdensome" kind suggested in the *Guidelines*. Moreover, as a general matter, accounting measures of variable cost do not and commonly cannot recognize the kind of "local factors and circumstances" the Guidelines correctly identify as influencing economic marginal cost. Such factors include movement-specific contractual terms, movement- and/or contractually specific risks, movement-specific handling and logistics necessities, and degrees of congestion encountered in serving particular movements and/or line segments. Thus, for example, a rail carrier would be expected to incur higher marginal costs to serve customers with whom it has agreed to particular performance standards or particular handling and logistics techniques. Similarly, where non-performance or operational risks are differentially present, a carrier can be expected to take actions and incur costs that minimize those risks and add to the marginal cost of service.

Of particular relevance to today's coal transportation sector, true economic marginal costs of serving particular shippers are subject to costs attributable to system congestion. In key respects, these costs are inherently outside of the scope of accounting

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[29] Note, again, the difficulty arising from GPRM's contradictory holding of volume constant in the face of the rate reductions in generates. With volumes held constant, no changes in variable cost are induced. Yet, as explained here, marginal costs are intimately tied to how variable cost changes as volume changes.

[30] Like adding a person who is six feet tall to a group of people that otherwise average five feet six inches tall: The six footer pulls the average of the group up.

measures of cost. Congestion occasions the need for carriers to incur costs to relieve that congestion and, during periods of congestion, ration away that congestion by making decisions on where to allocate resources and whom to serve (or whom to serve first or with the highest quality). Indeed, basic economic principles recognize that under conditions of congestion, one of the components of true economic marginal cost is the cost of having to "bump" certain customers off the system (or "bump" them to the back of the queue in terms of service timing and quality).[31] This forgone service (or quality of service) is a cost of serving those who do not get "bumped" – because the forgone service reflects society's having to forgo the value of the service that is adversely affected by congestion. As the Board and the public have experienced in instances of congestion, such as the service problem following the merger of the Union Pacific and Southern Pacific rail systems, the economic values destroyed and forgone when a rail system is congested are very real costs to the economy.

Congestion arises when market supply conditions tighten relative to demand. Under such supply and demand conditions, well-functioning markets exhibit rising prices: Congestion implies higher true economic marginal costs, and prices in well-functioning, but congested, markets move up with marginal cost and bring supply and demand back into balance. Such supply and demand forces are at work in current coal transportation and, with world energy markets forecasted to remain strong,[32] can be expected to continue into the indefinite future. The Department of Energy's Energy Information Administration estimates that Powder River Basin (PRB) coal production will grow from a level of 398 million tons per year in 2004 to 615 million tons annually in 2024.[33]

As described in detail in BNSF's Opening Narrative in Western Fuels, growing

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31 See, Alfred E. Kahn, The Economics of Regulation: Principles and Institutions, MIT Press (Cambridge, MA) 1988 at 87-89.

32 See, Joseph P. Kalt, 'Economics, Law and Politics: What Will Drive Energy's Future," July 2004, in Proceedings of the 50th Annual Institute of the Rocky Mountain Mineral Law Foundation, Vol. 50, p. 1-1 (2004) December 2005 at 20-23.

33 U.S. Energy Information Administration, *Annual Energy Outlook* 2005, Supplemental Table 111 (hereinafter EIA AEO Table 111), included in BNSF's Rebuttal electronic workpapers as "EIA, Annual Energy Outlook (2005) Supplemental Table 111.pdf."

demand is creating tight rail capacity for PRB coal.[34] Market demand for PRB coal is strong and is expected to continue to grow as, for example, utilities in midwestern and eastern states increasingly have been switching to low-sulfur coal produced in the PRB. This comes in response to Clean Air Act Amendments with more stringent emissions requirements that went into effect in 2000. Much of PRB coal moves out of the Basin on track over which Union Pacific Railroad (UP) and BNSF operate jointly. In the last 20 years, coal produced in mines in the southern PRB along this track has increased by a factor of four, while track miles have increased by less than a factor of two.[35] From January 2003 to December 2004, alone, the number of coal trainsets hauling PRB coal increased *over 40%*.[36] Despite investments in tracks, terminal capacity, train sets, and locomotives, track expansion has not been able to keep pace with the very rapid growth in demand for PRB coal. As a result, capacity in the PRB has become considerably tighter in recent years and scheduling conflicts have arisen.[37] Between 2003 and the present, the coal trade press has routinely reported to the effect that "rail capacity on the Southern PRB's Joint Line, operated by both UP and Burlington Northern Santa Fe, is at or very near maximum."[38]

The tightness in PRB rail capacity for moving coal has direct implications for the rates that carriers charge to move coal through the PRB. Higher prices reflect higher marginal costs as shippers seeking PRB transportation "bump" each other off the system or to lower quality, back-of-the-queue service, and as they call more of society's

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34 For a more detailed discussion, see STB Docket No. 42088, Western Fuels Association Inc., & Basin Electric Power Cooperative v. BNSF Railway Company, Opening Evidence of BNSF Railway Company, (hereinafter *BNSF Opening Evidence, WFA et al. v. BNSF*), Narrative and Exhibits, Volume I of I at II-28 – II-30.

35 In 1984, there were 181 running track miles on the Orin line. By 2004, this had increased to 304.

36 The average trainsets increased from 270 in January 2003 to 390 in December 2004, a 44% increase. Ex Parte 657, *Rail Rate Challenges Under the Stand-Alone Cost Methodology*, Statement of John Lanigan (April 26, 2005) (hereinafter Lanigan Statement).

37 *See*, for example, Energy Information Administration, *Annual Coal Report 2001*, at 34; "Capacity Issues and Trends in the PRB," *Platts Coal Outlook*, November 17, 2003; "PRB Demand Boosts Railroad Outlooks, Pressures on Train Capacity," *Platts Coal Outlook*, February 28, 2005; and "Grand River Dam Authority," *Platts Coal Outlook*, November 8, 2004.

38 "Coal Market Reaching Fever Pitch as Prices, OTC Volumes Soar," *Platts Coal Outlook* (December 8, 2003). See also "KFx Project Raises Possibility of Arch Reviving Coal Creek Mine," *Platts Coal*

resources – from new and/or upgraded tracks needed to carry heavier trains and additional sidings to accommodate more trains, to more advanced signaling equipment, purchasing additional locomotives, etc.[39] – into PRB service. From the perspective of the public interest, it is desirable that rail rates rise in response to these kinds of upward pressure on marginal costs. It is the role of prices to bring supply and demand back into balance. They do so in two ways. First, higher prices dampen demand and allow the customers who value the transportation of PRB coal the most to use the network's constrained capacity. Second, higher prices provide railroads with the means to make additional capital investments in PRB infrastructure and thereby expand the ability of the rail network to carry additional traffic.

In short, matters such as rail congestion imply true economic marginal costs that differ materially from accounting measures of variable costs. They also imply material and substantial deviations between true economic marginal costs and the kind of proxy for "system average marginal cost" that AEPTX proposes to build from URCS costing procedures and apply under its GPRM proposal. Indeed, with true economic marginal costs driven above GPRM's measures of URCS-proxied marginal cost by, for example, congestion, contract performance clauses, and the like, any pretext that GPRM is an approximation of, or is consistent with, Ramsey pricing collapses.

Consider, for example, the simple cases of Tables 1 and 2. Table 1 employs an URCS-proxy for marginal cost. The Table shows a straightforward case in which the Complainant shipper is paying a rate of $12 per ton on 10 tons of issue traffic, while the Other Shipper (or Shippers) in the SARR's traffic group is paying a rate of $10 per ton on 10 tons of non-issue traffic movement. The respective URCS-proxied "marginal costs" of serving these issue and non-issue movements are taken to be $5/ton and $3/ton for the purposes of this illustration. The SARR's total costs are assumed to be $150. In Table 1, however, extant pre-reduction rates yield total revenues of $225. Thus, the incumbent's rates generate $75 in excess of SAC revenues. GPRM allocates this $75 reduction in

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Outlook (March 29, 2004), and "Shippers, Railroads Need Joint Solutions to Problems," *Platts Coal Outlook* (March 21, 2005).

[39] *See* June 23, 2004 letter to The Honorable Roger Nober from Matt Rose.

proportion to each shipper's contribution to total mark-up, and reduces rates for the Complainant shipper to $8.50/ton, while the Other Shipper(s)' rates are reduced to $6.50/ton. (See Table1) Assuming that traffic volume is not stimulated by the reduction in rates,[40] these rates generate total revenues of $150 – i.e., the revenues needed by the SARR to "stand alone" (i.e., break even).

Table 1

	Original Rate (P)	URCS-Proxy Marginal Cost (MC)	Original (P-MC) ÷ P	Tons (Q)	Mark-Up Contrib. (P-MC)*Q	Share of Mark-Up Contrib.	GPRM SAC Rate	GPRM (P-MC) ÷ P
Complainant	$12	$5	.58	10	$70	.5	$8.50	.41
Other Shipper	$10	$3	.70	10	$70	.5	$6.50	.54

In Table 1, marginal costs to be used by GPRM are proxied by URCS-based variable costs. What if true economic marginal costs differed from these URCS-proxies?. Table 2 addresses this question. In Table 2, Table 1 has been modified by assuming for purposes of illustration that the true economic marginal cost of serving the Complainant's movements is actually $10 per ton (as compared to the URCS-proxied "marginal cost" of $5 per ton in Table 1). For sake of illustration, the economic marginal cost and the URCS-proxied "marginal cost" of serving the Other Shipper is taken to be $3 per ton in both tables. SARR costs are assumed to continue to be $150.

Table 2

	Original Rate (P)	Economic Marginal Cost (MC)	Original (P-MC) ÷ P	Tons (Q)	Mark-Up Contrib. (P-MC)*Q	Share of Mark-Up Contrib.	GPRM SAC Rate	GPRM (P-MC) ÷ P
Complainant	$12	$10	.17	10	$20	.22	$10.44	.04
Other Shipper	$10	$3	.70	10	$70	.78	$4.56	.34

As indicated in Table 2, if GPRM were applied to true economic marginal cost, the resulting SAC rate for the Complainant's movement would be $10.44 – fully 23%

[40] Albeit, inconsistent with the very notion of elasticity of demand. As discussed above, this represents a source of deep conflict with basic economic principles inherent in the GPRM rate reduction proposal.

higher than the $8.50 rate that AEPTX's URCS-based GPRM yields in Table 1. In fact, these results and implications of the inability of GPRM to capture and employ economic marginal cost belie assertions by AEPTX to the effect that: "The use of [URCS] system average costs is sufficient" for the purpose of inferring the relative demand elasticities employed as the target in GPRM.[41] Indeed, the source of the gross error introduced by GPRM in Table 1 is the fact that the use of URCS-proxied marginal costs yields the GPRM's relative elasticity target of $\varepsilon_2/\varepsilon_1 = .58/.70 = .83$. On GPRM's own terms, the target GPRM should be aiming for is for the ratio of *post*-reduction relative mark-ups, $(P_i - MC_i)/P_i)$, to equate to $\varepsilon_2/\varepsilon_1 = .17/.70 = .24$ in Table 2. All else equal, the inability of URCS-proxied accounting costs to reflect marginal cost drivers such as congestion, when congestion is a reality of western coal transportation, imparts a systematic bias toward excessive coal rate reduction under GPRM.

By the same token, AEPTX is wrong in claiming that "there is no need to compute the actual marginal costs of a particular movement with specificity [since] the goal [of GPRM] is to measure the mark-up of the rate over a determined cost level *relative* to comparable mark-ups above similarly determined cost levels on other rates in the traffic group."[42] Clearly, Tables 1 and 2 demonstrate that it matters a great deal under GPRM whether the *levels* of economic marginal costs are measured accurately and, hence, whether pre-reduction ratios of the $(P_i - MC_i)/P_i$ are measured accurately. Moreover, there is no basis for assuming that the errors between AEPTX's URCS-proxied "system average cost" and true economic marginal cost would be proportionately the same for all shippers and all movements (such that it might be claimed that the ratios of the $(P_i - MC_i)/P_i$ are not distorted). In terms of Tables 1 and 2, for example, there is no reason to maintain that both the Complainant's movement and the Other Shipper's movement are subject to the marginal cost impacts of congestion, or the same proportionate marginal cost impacts of congestion – just as there is no foundation for asserting that a Complainant moving Powder River Basin coal is subject to the same congestion as all other shippers in a SARR's traffic group.

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41 AEPTX Opening at 12.

42 AEPTX Opening at 11-12 (emphasis in the original).

Finally, note that Tables 1 and 2 make it clear that, while AEPTX would interpret the (apparently) relatively high mark-up of the pre-reduction rate paid by the Complainant to relatively inelastic demand on the part of the Complainant, the foregoing makes it clear that what appears to be a high mark-up over URCS-proxied marginal cost can well be due to the inaccuracy of the URCS proxy. In Table 2, the mark-up of the rate paid by the Complainant relative to true economic marginal cost is, in fact, relatively low. The erroneously large rate reduction that GPRM would impose on the challenged rate (*per* Table 1) arises because GPRM cannot accurately measure economic marginal costs – as GPRM's invocation of Ramsey principles requires. More generally, claims to the effect that GPRM yields the greatest percent reduction to the shippers with the least elastic demand and that this means that GPRM "conforms to Ramsey pricing principles" are rendered empty by the inability of GPRM to measure true mark-ups of rates relative to true marginal costs.

Summary re: GPRM: The *Guidelines* sagely recognized that credible quantification of the ingredients needed for explicit implementation of Ramsey pricing rules – particularly demand elasticities and marginal costs – was a hopeless task for real world regulatory practices before the Board. The fact that GPRM falls on these same rocks simply serves to reinforce the useful insight of the *Guidelines*. The kinds of internal contradictions and contradictions of Ramsey pricing rules (and, hence, of the public interest) that systems such as GPRM (and MCM and MMM) introduce in their attempts to get more formulaic and complicated in their focus on mark-ups above costs recommend eschewing them in favor of the Board's longstanding PRM methodology of rate prescription in SAC cases.

The PRM method, too, does not purport to achieve the impossible goal of explicit Ramsey pricing. But it does invoke the basic Ramsey result, discussed above, that the introduction of contestability into rail markets would imply downward movement of all rates if an incumbent's rates generated greater than stand-alone costs for an efficient SARR; and it does so without the pretext that manipulations of accounting-measured

mark-ups are manipulations of mark-ups required by Ramsey pricing.[43] As we have seen, such manipulations can readily move us directly away from the Ramsey principles of the *Guidelines* and, in so doing, away from protection of the public interest.

B. WFA's RAM and "Reduced Mark-Up Method" Approaches to SAC Rate Reduction

In Western Fuels, WFA has proposed that the Board adopt WFA's so-called Reasonable Allocation Method (RAM) or, in the alternative, WFA's Reduced Mark-Up Method as the method of rate reduction to be applied in SAC cases. WFA reiterates these recommendations here. I have previously addressed these methodologies in the course of filings made on behalf of BNSF in Western Fuels.[44] I here briefly summarize my findings.

WFA's RAM Methodology: RAM would allocate joint and common SAC costs (that is, SAC costs above the asserted variable cost of each movement) across different groups of traffic based on methods that the WFA asserts are consistent with Ramsey pricing. Specifically, after dividing the SARR traffic's shippers into two groupings ("competitive" and "captive"), RAM *assumes* that the price elasticities of demand are identical within each group of shippers.[45] In setting the rates, the "competitive" group would pay only variable costs, making no contribution at all to joint and common costs. All of the joint and common costs would be allocated – on the basis of ton-miles – to the shippers in the "captive" group. The rates for each "captive" movement under this method would be the sum of the movement's variable costs and its allocated share of joint and common costs.[46]

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[43] In fact, as shown in BNSF's Reply Evidence in AEP Texas v. BNSF at III-G-1-13 (Declaration of Richard S. Higgins and Fred S. McChesney), GPRM's noted assumption that traffic volumes are invariant with respect to GPRM's rate reductions actually yield PRM as the GPRM result.

[44] STB Docket No. 42088, Western Fuels Association Inc., & Basin Electric Power Cooperative v. BNSF Railway Company, Reply Statement of Joseph P. Kalt, Ph.D. at 39-45 (hereinafter Kalt WFA *Reply Statement*).

[45] To the extent that any of the shippers are incorrectly classified in the captive group, this would decrease the allocation to the issue traffic by spreading joint and common costs over a larger group of shippers. The RAM method can be quite sensitive to how shippers are classified.

[46] Subject to an imposed constraint on the allocation of joint and common costs to ensure that the rate assigned to each plant does not exceed its actual rate.

The WFA's RAM recommendation suffers from the fact that ton-miles are an arbitrary mechanism for allocating joint and common costs to individual movements. Such allocation is inherently arbitrary because it does not recognize that demand elasticities vary across shippers, including across shippers that RAM might designate as "captive." RAM's ton-miles allocation of joint and common costs would preclude meaningful, Ramsey-consistent demand-based differential pricing. In fact, in part for this reason, the Board has rejected allocating costs on the basis of ton-miles in a number of prior rulings.[47] As recognized in the *Guidelines,* "non-demand-based cost apportionment methods do not necessarily reflect the carrier's ability (or inability) to impose the assigned allocations and cover its costs."[48] Allocation according to ton-miles is just such a non-demand-based method of cost apportionment.

For such an allocation to be non-arbitrary and consistent with the demand-based principles of Ramsey pricing, it would have to be the case (1) that all of the shippers in the group that RAM would label as "captive" would have the same elasticity of demand; and (2) that all of the shippers in the group labeled "competitive" would have the same, infinitely elastic demands.[49] Such requirements of RAM are not remotely plausible. Certainly, an assumption of equal elasticity for all of the shippers that RAM might label as "captive" in a particular group cannot be based on a simple-minded notion[50] that being, say, solely served by a railroad (and, hence, putatively "captive") gives all such shippers the same demand responsiveness, irrespective of such matters as: individual shippers' access to other modes of transportation; their other alternatives for sourcing the product at issue; the profit margins they might realize – or not – from shipping their

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47 ICC Docket No. 38301S, Coal Trading Corporation, et al., v. The Baltimore and Ohio Railroad Company, et al. (January 17, 1990) (hereinafter *Coal Trading*) at ¶39-40; CP*&L/NS Decision* at 33.

48 *Guidelines* at 526.

49 Infinitely elastic demand has the characteristic that even a very small increase in price causes buyers demand to evaporate, as those buyers turn to perfect substitutes (for example). Under Ramsey pricing, the only customers bearing no mark-up above marginal cost would be customers with infinitely elastic demand. Trying to recover contribution to the coverage of joint and common costs from such customers is necessarily unsuccessful, since raising price above marginal cost drives those customers completely away.

50 See, for example, STB Docket Number 42088, Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company, Opening Evidence of Western Fuels Association, (hereinafter, "WFA Opening Evidence, WFA v. BNSF") at III-H-23, III-H-25 to III-H-28.

products by rail at a given level of rail rates; the ability of shippers to pass on higher rail rates in the form of higher prices charged to the shippers' respective and different customers; and so on.

Even if RAM's designated group of "captive" shippers were to consist solely of, say, coal-fired electric generation utilities, an assumption of equality of elasticities of demand across those shippers vastly oversimplifies the complexities of electric generation. Individual utilities have their own set of reasonable alternatives available to them for meeting the demands of their customers, and the presence of these alternatives affects how elastic the demand of any particular utility is. A railroad could readily find itself facing multiple sources and degrees of "product" or "geographic" competition on the margin for one shipper, and another set of such factors in the case of the next shipper. Thus, for example, other fuels, a utility's other plants, the technical suitability of alternative coals from alternative mines, and a utility's ability to buy electricity from others on the electricity grid, all provide differential sources and degrees of alternatives to the services of a coal-shipping railroad making deliveries from an array of mines to an array of coal-burning power plants. Such sources and degrees of alternatives significantly affect a plant's elasticity of demand for a railroad's coal transportation services, and they can vary substantially from plant to plant and buyer to buyer.

The assumption of homogeneous and infinitely elastic demands among the group of shippers that RAM would label as "competitive" is similarly unsupportable. First, the case of infinitely elastic demand – and, hence, no mark-up under Ramsey pricing or rational unconstrained pricing by a railroad – is an extremity that is belied by the fact that actual railroads set actual prices differentially, with wide variations in mark-ups across a wide variety of customers (including customers that RAM would undoubtedly label as "competitive"). As noted, such differential pricing is rational for profit-seeking railroads because of cross-shipper differences in demand elasticity, ranging from the very elastic to the very inelastic.

Second, just as the converse is the case for "captive" shippers," having access to multiple railroads might, indeed, make that shipper rail-competitive, but that is not the same as making all multiple-served shippers have the same elasticity of demand. For one

shipper, having access to rail may be nice, but trucking may be the particularly preferred alternative. For another shipper, demands of its marketplace may place a premium on quality of rail service relative to price. Another shipper may need a portfolio of rail alternatives to manage risks in its business, making it less able to play one railroad off against another on the basis of price. One shipper may find it easy to pass rail rates onto downstream customers, while another finds rail rates to be the make-or-break determinant of its profitability. For one shipper, the rail freight charges it bears may be but tiny portions of its overall costs of production, making that shipper relatively price-insensitive (inelastic); another shipper may be extremely price-sensitive because rail costs make up very large portions of its overall costs of doing business in its markets. And so on.

Third, if RAM is to assert any Ramsey-like attributes, RAM's assumption that all "competitive" traffic has infinitely elastic demand must underlie RAM's allocation of *no* mark-up above variable cost to the rates for "competitive" traffic served by a SARR. Yet, if "competitive" traffic generates no revenues in excess of variable costs, it is unclear why any railroad – SARR or incumbent – would service such traffic or invest in needed replacement facilities over time to service such traffic over the long run. The assumption of infinitely elastic demand and RAM's allocation of no mark-up above variable cost are patently unrealistic.

In short, RAM's implicit assumptions (1) that the shippers it would designate as "competitive" would share the same, infinitely elastic demands, and (2) that the shippers it would label as "captive" would thereby all have the same less-than-infinite demand elasticities are untenable. RAM is, in fact, an attack on the differential pricing that the *Guidelines* recognize is necessary for both the health and survival of railroads and the protection of the public interest via Ramsey pricing principles.

WFA's "Reduced Mark-Up Method": As a "fallback" to RAM, WFA proposes an alternative method for adjusting rates. In contrast to RAM, the Reduced Mark-Up Method assumes that there is a wide spectrum of demand elasticities within a SARR's traffic group, and that each movement is capable of providing some contribution to the SARR's joint and common costs. Akin to AEPTX's GPRM methodology discussed above, WFA's Reduced Mark-up Method would utilize accounting estimates of the

variable cost of serving each SARR shipper and the incumbent's extant rates to calculate a mark-up and contribution of price above variable cost for each movement. If a SAC analysis found excess revenues relative to the SARR's stand-alone cost, each shipper's estimated dollar contribution of price above variable cost would be reduced *pro rata* until SARR revenues equal SARR costs.[51]

From the discussion of GPRM, it is clear that WFA's Reduced Mark-up Method suffers from similar incapacitating infirmities. While its precept is that preservation upon rate reduction of the relative size of mark-ups above cost would, in some sense, hearken to Ramsey principles, it does not go the step, as does GPRM, of tying this reasoning to the Ramsey pricing formula set out above. Rather than targeting relative mark-ups expressed as $(P_i - MC_i)/P_i$ (*per* the Ramsey pricing rule), the Reduced Mark-up Method expresses mark-ups as price minus variable cost (i.e., $P_i - VC_i$) and targets the maintenance of proportionate shares of such margin contribution (i.e., $P_i - VC_i) \times Q_i$). Not only does this methodology not target a Ramsey price; as we have seen, the use of accounting measures of variable costs cannot be relied upon for the task at hand as a "good enough" proxy for true economic marginal costs. Accordingly, the Reduced Mark-up Method is subject to creating direct contradictions between itself and Ramsey principles and, hence, between itself and the public interest. It does not qualify as viable method for use in SAC analyses and rate reductions.

C. The Board's Current PRM Approach Is the Feasible, Ramsey-Consistent Rate Reduction Methodology

A finding under SAC analysis that a complainant's candidate SARR would earn excess profits if it charged extant incumbent rates provides justification under CMP for lowering the challenged rate. Since the ICC's *Coal Trading* decision in 1990,[52] challenged rates that are found to be excessive under the SAC analysis have been subject to a Percent Reduction Methodology for bringing such rates into compliance with the *Guidelines*. Under PRM, the challenged rate is reduced by the percentage by which

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[51] Additional Opening Comments of Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc., Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases, (hereinafter WFA Opening) at 17.

[52] *Coal Trading* at ¶184.

calculated SARR revenues at extant rates exceed the SARR's stand-alone costs.[53] This is consistent with the economics of contestability and the economics of Ramsey pricing insofar as it recognizes that the opening up of a rail market to contestability would put downward pressure on all rates and, as a general matter, preserve the ranking of rates.

As noted above, the *Guidelines'* recognition that it is not feasible to implement or test for perfect Ramsey pricing applies to PRM.[54] Yet, upon adopting the PRM rate reduction procedure in *Coal Trading*, the ICC appropriately observed that "[t]he rate structure exhibited by the defendants over the complaint period is the necessary consequence of differential pricing and cost of service. Any revision to rates due to the imposition of rate prescriptions should, to the extent possible, retain the underlying relationships. Thus, overcharges must be distributed to the SARR traffic group in a manner which will not substantially change rate relationships and, thus, disrupt the existing pattern of differential pricing unless it is demonstrated that the pattern is seriously flawed."[55] As we have seen, the alternative methodologies that have been introduced in this proceeding – MCM, MMM, GPRM, RAM, Reduced Mark-up – attempt to justify themselves as moving rate reduction closer to Ramsey principles. In each case, however, these methodologies either directly violate Ramsey principles (e.g., as when MCM compresses challenged rates to equality with otherwise different rates on non-issue traffic[56]) or ask too much of the data (e.g., on economic marginal cost) and end up introducing stark distortions of Ramsey principles.

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53 The ambiguity in the calculation of this percentage that is introduced when candidate SARRs involve cross-over traffic is discussed at length below.

54 Owing to the informational burdens that would be engendered by attempting to figure out each shipper's or shipper type's demand elasticity and the marginal costs of serving each shipper. See *Guidelines* at 527.

55 *Coal Trading* at ¶170.

56 See Kalt Opening V.S. at 19-22.

IV. REVENUE ALLOCATION ON CROSS-OVER TRAFFIC

Current practice with respect to the allocation of revenues to cross-over traffic carried by the SARR has introduced biases and distortions to the SAC process. Under the Board's standard approach, cross-over revenues have been based on the so-called Modified Straight-Mileage Prorate methodology. Under MSP, revenue is allocated based on the mileage hauled over the SARR relative to the mileage the traffic in question travels on the residual incumbent, with an additional 100-mile block credited for originating or termination the traffic. This MSP approach lacks grounding in the economics of contestability that properly should guide our determinations as to the revenues a SARR electing to compete with the incumbent for only portions of moves carried in the real world by the incumbent would receive.[57] Moreover, the approach provides strong incentives for Complainants in SAC cases to "game" the process by designing manifestly inefficient SARRs to capitalize on divisions that reward small SARRs with very large amounts of revenue from highly rated cross-over traffic.[58] The more such traffic a Complainant can claim, the less the revenue burden to be carried in a SAC analysis by the issue traffic for which Complainants seek rate reductions.

In my Opening V.S., I examined the economics of contestability that underlie SAC analyses. I reported that those economics clearly demonstrate that a contestant SARR seeking to capture cross-over traffic in a contestable market would find itself in competition with an incumbent for provision of facilities and services to the cross-over portions of certain moves. In such a competition, the SARR would "win" by offering rates on its cross-over moves that could "beat" the incumbent's fixed and variable-type expenditures that the incumbent would avoid if it did not carry the cross-over portions at issue principles.[59]

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57 See Kalt Opening V.S. at 34-37.

58 *CP&L/NS Decision* at 31-32.

59 Kalt Opening V.S. at 37-46. I note that Mr. Nelson opines on behalf of AECC that a partial SARR should be allocated revenues on cross-over traffic such that the SARR captures the margin otherwise realized by the incumbent. (AECC Opening at 9-10.) This is inconsistent with the applicable economics of partial SARRs in contestable markets. These economics yield partial SARRs cross-over revenues no greater than the partially-replaced incumbent's avoidable costs on the partial segments that SARRs typically propose.

A. "Actual Market Divisions" v. Contestable Market Revenue Allocation for Cross-Over Traffic

Albeit indirectly, a number of shipper interests – most vociferously, WCTL – have challenged the conclusions that follow from the economics of contestable markets. Citing the decision by the Interstate Commerce Commission (ICC) in *Nevada Power*,[60] these shippers argue that revenues should be "allocated on the basis of market principles."[61] They argue further that this objective can be accomplished by use of statistical data on "actual market divisions" that arise when two (or more) carriers participate in a move.[62] These "actual market divisions" are represented as being "market-based" and, therefore, consistent with the *Guidelines* and contestable market theory.[63] This representation of proposed "actual market divisions" as consistent the *Guidelines* and contestable market theory is wrong. In fact, it turns contestability on its head.

It is clearly the shippers' view that the term "market principles" is synonymous with the use of real world, "actual market" arrangements between a defendant railroad and its real world connections. Yet, clearly, real world divisions do not plausibly reflect the "market principles" of a contestable market. Real world rail markets are not contestable. In particular, they are subject to fixed and sunk costs that, as a result of being sunk, constitute barriers to entry and exit. Moreover, real world divisions are arrived at by real world railroads, subject to the array of barriers to entry and exit that keep rail markets from being contestable. Consequently, the typical case of two railroads implicitly or explicitly negotiating over divisions on a through move fits what economics refers to as a setting of bilateral bargaining power.[64] Divisions that result in such settings are driven first and foremost by precisely the kinds of factors that make real world rail

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60 10 I.C.C.2d at 268.

61 WCTL at 26.

62 WCTL at 33.

63 WCTL further argues that, in the event the Board does not adopt shippers' "actual market divisions" approach to cross-over revenue allocation, the Board should continue use of MSP (or the original Modified Mileage Prorate, or MMP), rather than an ATC methodology. WCTL Opening at 47-49 and Crowley Opening V.S. at 8.

markets *not* contestable – i.e., which railroad has the most market power, which railroad has the most irretrievably sunk costs, which railroad has most credible threat of surmounting entry barriers and building out to replace the counterparty's facilities and operations, and the like.

In a contestable market (including the simulated contestable market of SAC analysis), on the other hand, both the prospectively entering SARR and the incumbent being challenged compete on "completely symmetric terms."[65] This symmetry means that both the SARR and the incumbent are free of barriers to entry. As a result, when the SARR "wins" the contestability contest, it replaces those services and facilities of the incumbent that it "beats": Because the incumbent faces no barriers to exit, upon losing the contest, the incumbent simply takes its assets and deploys them in some other use at full, fair market value. Furthermore, because the contestable market is free of barriers to entry and exit, the contestable market produces the results of competitive markets.[66] A competitive market drives pricing – including divisions applicable to cross-over traffic – to the level at which the efficient firm can just break even as a stand-alone enterprise.

As Prof. Willig and the other authors of the contestable market framework note, there are two ways to generate the conclusion that contestable markets will yield SAC revenue recovery: "either the absence of sunk costs or the prevention of post-entry responses by incumbents."[67] The absence of sunk costs means that, even if the contest is restricted to solely the SARR and the incumbent, competition to be the "winner" of the traffic will continue, with revenues (including divisions on cross-over traffic) being driven downward until they reach the level of stand-alone costs of efficient carriage. From the perspective of the incumbent, being symmetrically situated vis-à-vis the SARR means that the incumbent, like the SARR, is free of entry and exit barriers. In particular,

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64 Robert S. Pindyck and Daniel L. Rubinfeld, Microeconomics, Prentice Hall (Englewood Cliffs, NJ) 1995 at 352.

65 Baumol, Panzar and Willig, Contestable Markets and the Theory of Industry Structure, Harcourt Brace Jovanovich, Inc., 1982 at 349.

66 *Guidelines* at 528.

67 Baumol, Panzar and Willig, Contestable Markets and the Theory of Industry Structure, Harcourt Brace Jovanovich, Inc., 1982 at 301.

sunk costs are not a barrier to entry or exit; hence, the incumbent has every incentive to stay in the competition until revenues are driven to stand-alone competition. If and when the incumbent loses, it can take its resources and redeploy them at full market value.

Alternatively, a market is made contestable when there are no barriers to entry and exit for SARRs and the incumbent is taken to be unable to make its own price responses to the appearance of SARRs. The conditions of free entry and exit mean that any SARR that enters the contest to serve a selected traffic group cannot sustain prices and associated revenues (including the divisions on cross-over traffic) that exceed the stand-alone costs of an efficient SARR. If, for example, a first SARR to enter and price all movements at but one cent below the incumbent's extant rates (including taking cross-over revenue divisions at one cent below the divisions the incumbent grants to other carriers in "actual" market divisions), *and* if resulting revenues exceed the SARR's stand-alone costs, the conditions of free entry guarantee that some other SARR will come in and drive rates and divisions lower. Indeed, this is what the condition of free entry means. If SAC analysis were performed as if the first SARR were protected by barriers to entry and the incumbent was presumed to be unable to respond to that SARR's competition, SAC analysis would not reproduce the results of competition as envisioned by the *Guidelines* and would not satisfy the criterion set out by the authors of the contestability framework, to the effect that regulatory intervention to set rates "should be governed by the performance perfect contestability can be expected to produce."[68] Rather, the SARR would be able to reproduce the results – less one cent – of a market that is decidedly not contestable and subject to the pricing of the incumbent, with its presumed elements of market dominance and associated monopoly power on the part of the incumbent.

As the foregoing suggests, the treatment of sunk costs plays a particularly important role in the economics of contestability. Specifically, sunk costs are a barrier to entry. As such, they can destroy contestability if an incumbent can employ sunk costs to its advantage. It might do so in the face of threatened entry by a SARR, for example, by

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[68] Baumol, Panzar and Willig, Contestable Markets and the Theory of Industry Structure, Harcourt Brace Jovanovich, Inc., 1982 at 479.

responding to the threat with retaliatory pricing in which the incumbent moves its prices below its own stand-alone costs – since it would be rational for an incumbent with sunk costs to protect itself by ignoring those sunk costs when pricing to deter a new entrant, if necessary. Under such circumstances, the SARR, needing to cover its variable and not-yet-sunk fixed costs, could be precluded from entering, leaving the market uncontested and uncontestable. As the ICC observed in Nevada Power:

> Because of the prevalence of "sunk costs" in railroading, however, post-entry competition between a SARR and an incumbent will not mirror contestable outcomes. That is because an incumbent could remain in the market even if it were to offer rates that do not cover costs that are already sunk.[69]

Interestingly, in subtle but important ways, WCTL shippers in this proceeding do not accept the conclusion that the contestable market framework yields the results of a competitive marketplace. In support of its contention that cross-over revenue allocations should be made based on "actual market divisions," WCTL's version of SAC analysis allows the SARR is protected by barriers to entry by other SARRs,[70] and is competing against an incumbent who cannot respond in any fashion. In the view of WCTL (at 45 and citing to the Opening V.S. of Grimm): "If a new SARR is viewed as a competitor to the existing SARR, and the entrant can take away the existing SARR's revenues before the existing SARR can recoup its costs, then the latter will shun the market. Stated another way, the "no retaliation" applies equally to any market participant, whether it is the incumbent or a prospective new SARR." Given this premise, the SARR in a SAC analysis can actually earn excess revenues (i.e., excess profits). According to WCTL (at 47):

> If the SARR can provide rail service at a profit relative to the incumbent's exiting price for the same service by operating more efficiently, the SARR will enter the market, and set its rate a level below the incumbent's price. How low the SARR sets its rate is dependent upon its overall costs, but in a contestable market, how high the SARR sets its rate is a function of the incumbent's existing price. The SARR's overall costs act as a floor for the SARR's pricing structure, not a cap

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69 10 I.C.C.2d at 266-267.

70 WCTL Opening at 45.

From the perspective of basic economic principles, WCTL's reasoning is incredible. Under its version of contestability, contestability does not yield what the *Guidelines* seek in SAC analysis: "The stand-alone cost, as we define it here, approximates the full economic costs, including a normal profit, that need to be met for an efficient producer to provide service to the shipper(s) identified. This cost calculation provides a simulated competitive price standard against which actual rates can be compared."[71] And contrary to the *Guidelines*' observation that "contestable markets have competitive characteristics which preclude monopoly pricing,"[72] WCTL's novel version of such markets does not result in the *sine qua non* of competitive markets recognized by the *Guidelines* – i.e., profits in excess of costs, with costs including a reasonable return.[73] Instead, in WCTL's version of "contestability," the SARR can realize excess profits since it need only price at a level below the incumbent's prices; its costs are only a "floor." Indeed, under WCTL's conception, the SARR does not engage in the simulated competition of SAC analysis. Rather, the Complainant's proposed SARR is a monopolist: subject to no threat of entry by other possible SARRs; subject to no threat of even non-retaliatory, competitive responses by incumbents; and subject only to a cap at the existing rates and revenues of the incumbent.

The value to shippers of this is obvious: If the SARR's costs are only a revenue "floor" and the Complainant's SARR can earn revenues in the WCTL version of the contestable market at the level of the incumbent's revenues (less one cent, in order to "beat" the otherwise unresponsive incumbent) irrespective of the SARR's costs, any and all excess of revenues on non-issue traffic relative to competitive market outcomes will leave less revenue for the issue traffic to bear in order for total revenues to add up to total costs. Indeed, WCTL's "SARR costs are only a floor" can readily imply that, since non-issue revenues are capped at the incumbent's existing revenues on such traffic (less one cent), such traffic can generate sufficient revenues in WCTL's version of SAC analysis to render it unnecessary to collect any revenue from the issue traffic.

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71 *Guidelines* at 529.

72 *Guidelines* at 528.

73 *Guidelines* at 529.

While this is a wonderful result from the short-term, narrow self-interest perspective of complaining shippers, it is a ludicrous result economically and from the perspective of the public interest. Indeed, the fact that contestability implies rates to SARRs which, in the aggregate, just cover the SARR's stand-alone costs is the reason SAC analysis employs rate reduction methods (by precedent, PRM) that apply to all of the SARR's traffic. That is, the very idea of some form of SARR traffic-wide rate reduction methodology is an invocation of the principle that serves as the basis of the *Guidelines* – i.e., that contestable markets put downward pressure on issue and non-issue traffic rates until rates available in the contestable market are no greater than needed to allow the SARR to stand alone (i.e., cover its total costs).

Of course, carriers might prefer WCTL's framework: Taken to its logical conclusion, WCTL's notions that a Complainant SARR would be protected from competitive response by the incumbent *and* from entry by other SARRs. As a result, the Complainant SARR could price up to the level of the existing rates and rate divisions of the incumbent; the Complainant SARR would have no reason to set rates on issue traffic at more than one cent below the challenged rates of the incumbent carrier. Such are the implications of WCTL's unique version of contestability under SAC analysis.

The chains of reasoning by which WCTL reaches its conclusions regarding contestability are remarkably convoluted and (apparently) reflect a notable lack of basic economic understanding. Consider, for example, WCTL's assertion that the Complainant's SARR can price up to the level of the incumbent's existing rates and revenue divisions. According to WCTL, any price response by the incumbent to the appearance of a SARR is impermissible "retaliation"[74] and constitutes a barrier to entry by the SARR.[75] Yet, it is clear from our discussion of sunk costs above that price responses by incumbents that represent "retaliatory" pricing and barriers to entry are price responses by incumbents which push incumbent prices below recovery of the incumbent's full, SAC costs. In the presence of sunk costs, this prospect arises because

[74] WCTL Opening at 45.

[75] WCTL Opening at 41.

incumbents could rationally ignore those costs and reduce prices all the way to variable costs if necessary to discourage entry by a SARR that has not yet sunk its costs.[76]

> [W]here truly sunk costs constitute a high proportion of the incumbent's expenses, entrants should expect incumbents to respond to entry with sharp price reductions, even if they will preclude recovery of investment. Responsive pricing patterns, and rational threats of such behavior, may then effectively prevent replacement of the incumbent.[77]

On the other hand, pricing by an incumbent down to the level of its full costs is not a retaliatory response or barrier to SARR entry; it is a competitive response in a contestable market.

WCTL's reasoning regarding why, in its view, contestable market theory requires that the Complainant's SARR be protected from competition by possible subsequent SARR's is similarly confused. As noted, in WCTL's view, such protection is necessary because without it, "the entrant [SARR] can take away the existing SARR's revenues before the existing SARR can recoup its costs, [and] the latter will shun the market."[78] But the very premise of SAC analysis is that the Complainant's SARR is efficient, or should only "win" in the contestable market if it is efficient. This means that a subsequently entering SARR, by assumption, is not more efficient than the Complainant's "existing SARR" and cannot afford to, and would not rationally, price below the prices and rate divisions the Complainant SARR needs to "recoup" its efficient costs. Moreover, because under contestability, the Complainant SARR is free of barriers to entry and exit, and sunk costs are a barrier to both, the Complainant SARR doesn't need time to "recoup" its costs. If another SARR were to come along and displace it (which could only happen under contestability if this subsequent SARR were more efficient than the Complainant's SARR), the Complainant SARR in SAC analysis can

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[76] William J. Baumol and Robert D. Willig "Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly," The Quarterly Journal of Economics, August 1981.

[77] Baumol, Panzar and Willig, Contestable Markets and the Theory of Industry Structure, Harcourt Brace Jovanovich, Inc., 1982 at 429.

[78] WCTL Opening at 45.

freely exit and redeploy its assets and resources to other uses that also yield it a competitive, reasonable rate of return (i.e., its cost of capital).[79]

WCTL is struggling mightily to justify Complainants' SARRs capturing prices on and rate divisions on non-issue traffic that do not reflect competitive market outcomes, but instead reflect "actual market" outcomes and the ready prospect of excess profits for Complainant SARRs. In the process, however, WCTL has created the antithesis of contestability in the markets where the SARR and the incumbent meet under SAC analysis. Notwithstanding the confused and flatly wrong economics employed by WCTL, the bottom line is that allocation of cross-over traffic revenues to the SARR must be based on the way market principles would be applied *in a contestable market*. In my Opening V.S. in this proceeding, I demonstrated that if the SAC proponent chooses to compete in the contestable market with a SARR that depends heavily on cross-over traffic, then application of market principles, *as they would be applied in a contestable market*, would generate cross-over revenue allocations equal to the fixed and variable costs that the incumbent avoids by having the SARR replace it for the SARR's portion of cross-over movements. Applying this principle of "contestability pricing" is not only consistent with the economics of contestability as invoked by the *Guidelines*, it also would give Complainant shippers the incentive to design truly efficient systems that can legitimately "beat" incumbents.

B. "Full" SAC Analysis and ATC-Based Cross-Over Revenue Allocation

In *EP 657*, the Board suggests that rather than incenting Complainants to propose efficient SARRs, efficient SARRs may be so large as to create an undue burden on rate cases and may require the introduction of "simplified" short-cuts to approximate the "full" SARRs that may be maximally efficient and, hence, competitive.[80] Thus, the Board proposes an alternative to its current MSP method of allocating revenues to SARRs' cross-over traffic. Under the alternative, the Board would employ a measure of Average Total Cost (ATC) to create a proxy for what the Board refers to as a "full" SAC

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[79] In fact, this ability to redeploy assets without suffering any losses from not having enough time to "recoup" costs is what freedom of exit technically means in economics.

[80] *EP 657: Major Issues in Rail Rate Cases*, at 17.

analysis of a full SARR that would compete to replace all of incumbent carrier's facilities and operations utilized by the SARR's traffic groups.[81]

The Board reasons, in essence, that if a full SARR were to be designed to replace the entirety of the incumbent's facilities from which the SARR's traffic group benefits, the resulting SARR would be far more extensive than the actual SARRs Complainants have come to routinely propose. Such full SARRs would not rely on cross-over traffic; they would propose the facilities to serve such traffic as through traffic. As such, full SARRs would have to cover the total costs of associated facilities, suggesting the use of ATC in allocating revenues to actual proposed SARRs' cross-over traffic. As I showed in my Opening V.S., however, there is no need to turn to such a proxy approach in order to properly incorporate cross-over traffic. The economics of contestability readily yield cross-over allocations for SARRs actually proposed by shippers. Specifically, these economics yield cross-over revenues equal to the incumbent's avoided costs on cross-over traffic, and doing so provides shippers with proper incentives to design efficient SARRs.

It is telling that WCTL, representing shipper interests, adamantly opposes the Board's introduction of the notion of a "full" SAC analysis for a "full" SARR.[82] Clearly, garnering "actual market divisions" on non-issue cross-over traffic, with those divisions' values set in decidedly *not* contestable settings, is preferable to shippers interested in depressing rates on issue traffic. In fact, WCTL asserts that the use of ATC to determine SARR cross-over revenues is tantamount to imposing "construction" and "productive technique" barriers to entry on SARRs by implicitly imagining SARRs "building" "full" systems when they might prefer to build "partial" SARRs.[83] In keeping with its treatment of contestability, however, WCTL has erred in its apparent understanding of the economics of barriers to entry.

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81 *EP 657: Major Issues in Rail Rate Cases* at 17.

82 WCTL Opening at 25, 35-36, 39, 42; Crowley Opening V.S. at 7.

83 WCTL Opening at 39-42.

In the context at hand, a barrier to entry by a SARR would have to consist of a cost borne (albeit, hypothetically in SAC analysis) by a SARR that is not borne by an incumbent and that imparts a competitive advantage to the incumbent in the sense of allowing an otherwise symmetrically situated incumbent to be able to survive as a stand-alone enterprise at lower total revenues than an efficient SARR. Such is not the case with the Board's concept of a "full" SARR.

First, consider the implication that Complainants might have to incur additional litigation costs (e.g., in the form of additional need for analysis and consultants) if Complainants were unable to rely on cross-over traffic and were, instead, required to actually propose "full" SARRs that could replace the entirety of an incumbent's system that serves the SARR's selected traffic group. Such a cost to Complainants *as litigants*, however, would not be a barrier to entry for Complainants' SARRs *as railroads* as these SARRs enter the hypothetical "contests" created by SAC analysis. Not only is the Board's proposed ATC approach to "full" SAC analysis a short-cut to considering "full" SARRs in SAC cases; it is a short-cut intended to avoid the imposition of additional litigation costs on Complainants and carriers. Moreover, such costs are ignored in the simulated market competition of SAC analysis. SARRs *as railroads* (rather than litigants) compete in SAC analyses free of such costs.

Second, implicitly imagining (through the Board's proposed ATC short-cut) "full" SARRs as the competitors in SAC analyses would imply more expensive SARRs than Complainants have been routinely proposing. But such increased expense is not a "construction," "productive technique," or any other kind of barrier to entry. Rather, the "full" SARR would be presumed to be able to freely redeploy fixed assets and realize full market value on those assets if exit proved necessary. The absence of barriers to exit in the contestable setting guarantees this. Furthermore, the costs of "building" "full" facilities would be assumed in "full" SAC analysis to be borne symmetrically by the incumbent.[84] That is, the costs of "full" facilities would not provide incumbents with any

[84] This also follows from the contestability precept of no barriers to exit. In the absence to barriers to exit, the going-forward costs of even an already-built incumbent system include the opportunity costs of not redeploying the incumbent's assets at full market value to other uses. Accordingly, the rational

competitive advantage that otherwise might serve as a barrier to entry. Indeed, Complainants routinely assert that their SARRs – whether large or small – are more efficient than the incumbent's relevant systems. Thus, SAC analysis of either "full" or partial SARRs essentially entails the arguable assumption that SARRs start out in the SAC "contest" on no worse than equal footing with incumbents.

The Board's proposal in *EP 657* is to allocate cross-over traffic revenues to a SARR in the proportion that the average total cost of the proposed SARR's partial move (adjusted as appropriate for mileage and density) bears to the average total cost of the movement on- and off-SARR.[85] As noted above and in my Opening V.S., while the proposal would constitute a short-cut and an approximation, it properly recognizes the principle that, if a "full" SARR were in the "contest" of the simulated competition of SAC analysis, its willingness and ability to stand alone as a successful competitor for the full movement of the traffic would depend on its ability to realize revenues sufficient to cover the total costs of "full" operations.

At the same time, because the proposed ATC approach would be a short-cut and an approximation, it is appropriate to heed Prof. Willig's admonition in his Opening V.S.: If an approximation is to be used to estimate revenues to be allocated to cross-over traffic, both shippers and carriers *must* be afforded the opportunity in SAC cases to demonstrate that the ATC approximation is biased.[86] Without such an opportunity, the ATC short-cut could readily result in short-cuts to conclusions that are inconsistent with the concepts of contestability and stand-alone survival that undergird Constrained Market Pricing in the *Guidelines*.

C. Harmonizing Cross-Over Revenue Allocation and Rate Reduction Methodologies

Finally, it is important that an adoption of the Board's proposed ATC approach to allocation of cross-over traffic revenues be coherently integrated with the accompanying

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incumbent has to treat its already-built system as not sunk and, hence, price and compete on a symmetrical basis with SARRs.

85 *EP 657: Major Issues in Rail Rate Cases* at 19.

86 Willig Opening V.S. at 30.

rate reduction methodology. In particular, as indicated above, the introduction of "full" SAC analysis via the proposed ATC approach to cross-over revenues would entail the concept of "full" SARRs competing with incumbents for through moves of what would otherwise be cross-over traffic. This implies a shift in focus from the question of rate divisions in contestable markets to price competition on through moves in such markets. This leads us back to Ramsey pricing principles.

Specifically, competition in contestable markets between partial SARRs and incumbents for the carriage of cross-over, as opposed to through, traffic leads to the result reported in my Opening V.S. Namely, such competition would yield the partial SARR divisions of cross-over revenues no greater than the incumbent's avoidable costs of serving the partial move of cross-over traffic. Competition for cross-over portions of through traffic between a partial SARR and an incumbent is not competition over the through rates that are relevant to customer's demand choices and to which Ramsey principles apply.[87] Rather, such partial competition is competition for an incumbent's "make or buy" choice with respect to the partial segment serving what the SARR proposes should be cross-over movements. The incumbent "buys" from the SARR when the SARR accepts rate divisions that are more attractive than the avoidable costs the incumbent would incur to handle the cross-over portions of moves.

On the other hand, competition by "full" SARRs for the full movement of what otherwise would be interchanged as the cross-over traffic of a partial SARR represents competition over the rates paid for through movements by customers. These rates are the rates to which Ramsey principles apply. As such, simulated competition from full SARRs in the contestable market of SAC analysis would be expected to put downward pressure on the through moves sought by a "full" SARR. Thus, to be coherent, rate reduction in SAC analyses that allocate revenues to cross-over traffic via the short-cut of an ATC methodology would apply the rate reduction percentages (e.g., under PRM) to the through revenues associated with cross-over traffic. It is these revenues that "full" SARRs would put under competitive pressure in "full" SAC analyses.

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[87] See note 20 above.

I declare under penalty of perjury that the foregoing is true and correct.

Joseph P. Kalt

Executed on May 31, 2006.

Willig

REPLY VERIFIED STATEMENT

OF

ROBERT D. WILLIG

I. INTRODUCTION

My name is Robert D. Willig. I filed an Opening Verified Statement in this proceeding on May 1, 2006, and a copy of my CV was attached as Exhibit No.__(RDW-1) to that statement.

In this Reply Verified Statement, I have been asked by BNSF Railway Company ("BNSF") to address three issues raised by testimony that accompanies the *Pro-Shipper Opening Comments*, filed on May 1, 2006.[1] First, I have been asked to address the shippers' discussions of the cross-subsidy tests that the Surface Transportation Board ("STB" or "Board") applied in the recent *PPL* and *Otter Tail* proceedings – which are set forth in the verified statements filed by Curtis M. Grimm and George H. Borts. Second, I address certain issues raised by two rate reduction proposals made in filings by Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. ("WFA"), and one proposal in the Opening Comments of AEP Texas North Company ("AEP Texas"). The first of these issues relates to the view, implicit in both proposals, that one can infer Ramsey price-to-marginal cost relationships for movements in the stand-alone traffic group from rate-to-URCS variable cost relationships. The second issue I address relates to how the use of cross-over traffic affects the way in which rate reductions are actually calculated.

As background for my discussion, it is useful to put the Constrained Market Pricing ("CMP") and the stand-alone cost ("SAC") test into their larger regulatory context. As I noted in

[1] *See Joint Opening Comments of Western Coal Traffic League, Concerned Captive Shippers, Western Fuels Association, Inc., Edison Electric Institute, National Rural Electric Cooperative Association, and American Public Power Association.*

my Opening Verified Statement, where there is effective competition for rail services, there is no need for regulatory intervention, since the effects of competition would lead to prices that maximize the utilization of railroad facilities, while ensuring that shippers need not pay the forward-looking costs of facilities and services from which they derive no benefit. In short, effective competition for rail services will lead to prices that are economically and socially efficient. Furthermore, I noted that when a railroad is revenue inadequate, it has every incentive to price its services in accordance with Ramsey Pricing principles, because doing so will maximize the contribution all services, combined, can make to the coverage of fixed, joint and common costs.

Guidelines recognized, however, that certain *real world* rail markets may not be competitive or contestable, due to the existence of significant barriers to competitive entry into and exit from those markets. When a shipper contends that its rate is unreasonably high, it is in essence asserting that real world entry/exit barriers have rendered the market for its services not effectively competitive, creating an opportunity for the incumbent railroad to charge rates that exceed levels that would exist if the market were contestable, even though consistent with the shippers' real world market demands. The regulatory process embodied in CMP, and the SAC test on which it relies, is therefore designed to assist the Board in determining the economically appropriate level of unattributable costs that should be charged to the shippers that use the railroad (or a delineated subset of the railroad), along with the distribution of those unattributble costs in a manner consistent with Ramsey Pricing principles. *Guidelines* describes this process this way:

> Although we have described the constraints in CMP separately, they are necessarily interrelated. They represent different means of approaching the same basic issue, i.e., the extent

> of unattributable costs to be covered through differential pricing and the portion that can be charged to the shipper involved.
>
> The revenue adequacy constraint is a limit on the total revenues a carrier can collect. The adjustments to eliminate plant and operational inefficiencies reduce the costs which may be covered by differential pricing. The adjustments to account for revenues lost through inefficient pricing practices also reduce the allowable differential pricing. Through these steps, the total amount of permissible differential pricing is determined. The pricing efficiency constraint directs that the resulting pool of unattributable costs be allocated among the carrier's shippers in accordance with Ramsey principles (i.e., on the basis of relative demand elasticities), recognizing that contract solutions may be superior to Ramsey prescriptions.
>
> Alternatively, the pool of unattributable costs to which the shipper must contribute may be determined through a stand-alone cost analysis. This permits the shipper to avoid contributing to the costs of facilities and services from which it does not benefit. Again, the pricing efficiency constraint directs that the unattributable costs of the SAC system be allocated among the users of the SAC system on the basis of the demand elasticities.
>
> Thus, the various constraints contained in CMP may be used individually or in combination to analyze whether the rate at issue is unreasonably high, i.e., set at a level greater than necessary to collect the portion of unattributable costs that can properly be charged to that shipper. If we determine that a rate has been set at an unreasonably high level, we will take whatever action is appropriate, based upon the nature and extent of the violation shown, to afford relief to the complaining shipper and to promote proper pricing by the carrier. In considering a rate prescription and/or reparations, we will attempt to provide an effective remedy for the complaining shipper, but in a manner that would not introduce further distortions into the carrier's pricing structure. *Guidelines* at 1 I.C.C.2d 547-548, (footnotes deleted).

Thus, Guidelines views CMP and SAC as appropriate tools for adjusting railroad rates in those limited circumstances in which market forces are deemed inadequate, not as *carte* blanche for wholesale revision of the incumbent's rate structure. At the end of the day, in other words, application of CMP and the SAC test – where appropriate – should result in a real world rate structure for the real world incumbent that is closer to what would be observed if the market for

all rail services were contestable. Any regulatory action that would distort the incumbent's rate structure by rendering it *less* consistent with what would be observed if real world markets were actually competitive or contestable would be inconsistent with *Guidelines*.

With this background in mind, I now turn my attention to each of the three issues I have been asked to address.

II. TEST FOR CROSS-SUBSIDY

The Board's cross-subsidy test, initially applied in *PPL*, and discussed more fully in *Otter Tail*, comes into play when the proponent of a given stand-alone railroad ("SARR") seeks to make it appear that the issue traffic rates are too high by designing a system that is composed of two essentially separate parts that do not extensively overlap – a lighter-density segment (or group of segments) that is utilized by the issue traffic and certain other non-issue traffic, and a heavier-density segment (or group of segments) that is used relatively little or not at all by the issue traffic (and, therefore, is used exclusively, or primarily, by non-issue traffic).[2] In *PPL*, the Board found that if the attributable forward-looking costs of the lighter-density segment used by the issue traffic are higher than the revenues that would be generated by this traffic, then the proponent of the particular SARR configuration is deemed to have failed in its effort to

[2] As explained in the Reply Verified Statement of John C. Klick, the Board addresses the potential complexity introduced when traffic that predominantly uses the lighter-density segment also makes minor use of the heavier-density segment by excluding – from the attributable costs of the lighter-density segment – *all* of the construction costs associated with the overlapping portion of the SARR network, and *all* of the operating costs associated with non-issue traffic that does not utilize the lighter-density segment, and including all of the revenues generated by the traffic that uses the lighter-density segment. In terms of the schematic set forth at page 11 of the Grimm V.S., the Board would include in the attributable forward-looking costs of the Shipper 1 and Shipper 2 traffic *only* the construction and operating costs for the B-to-A segment (used by both Shipper 1 and Shipper 2), and only the Shipper 2 operating costs for the C-to-B segment (used by both Shipper 2 and Shipper 3) – and it would compare these attributable costs to all of the revenues generated by Shippers 1 and 2. If the revenues from Shippers 1 and 2 are not sufficient to offset these forward-looking costs, a railroad operating in the contestable market envisioned by the SAC test would exit the market because the costs it would save would be greater than the revenues it would lose.

demonstrate that the issue traffic rates are unreasonably high. In upholding the Board's decision in *PPL*, the United States Court of Appeals for the District of Columbia Circuit found in part:

> *Guidelines* explains the SAC test is a means of assuring that a "captive shipper should not bear the costs of any facilities or services from which it derives no benefit." 1 I.C.C.2d at 523. The Board reasonably extrapolated from this that a basic principle of *Guidelines*, and the primary purpose of the SAC test, is to guard against "both cross-subsidization by and cross-subsidization of the captive issue traffic" when determining the reasonableness of the issue traffic's rates. *Decision I*, 2002 WL 1905118 at *5. As previously described, the SAC test, rooted in the concept of contestable markets, "is used to compute the rate a competitor in the market-place would need to charge in serving a captive shipper or a group of shippers who benefit from sharing joint and common costs." *Guidelines*, 1 I.C.C.2d at 528. In a contestable market, a competitor would always enter the market to compete for, and charge a lower price for, any traffic that is subsidizing other traffic on the line. Therefore, just as a "captive shipper should not bear the costs of any facilities or services from which it derives no benefit," *id.* at 523, it was not unreasonable for the Board to require the captive shipper in this case to hypothesize its SARR in accordance with the same standard—i.e., the viability of the western segment (including the issue traffic) could not depend on a cross-subsidy. Faced with PPL's SARR, the Board's decision advances the reasonable proposition that the captive issue traffic cannot be improperly subsidizing other traffic if the issue traffic cannot even cover its own attributable costs; in other words, it is difficult to steal from a penniless Peter to pay Paul.[3]

The Board's February 27, 2006 decision in the instant proceeding did not seek comment on the cross-subsidy issue, which is not surprising, given the D.C. Circuit's endorsement of the logic of the Board's cross-subsidy test. Nevertheless, both Grimm and Borts seek to inject the issue into this proceeding, and BNSF has asked that I therefore briefly address some of the obvious errors in their analyses in this Reply Verified Statement.

Dr. Grimm makes three arguments in opposition to the Board's test. First, he argues that the cross-subsidy test originally envisioned in the *Guidelines* was meant to ensure that the issue

[3] *See* D.C. Circuit No. 04-1369 at 9.

(and other "grouped) traffic was not cross-subsidizing other traffic that does not use the issue traffic facilities, *not* the other way around. Grimm Opening V.S. at 4-5. Second, he argues that contestability theory "posits" that "if *any* SARR can be constructed which generates excess profits, the challenged rates are too high," even if that SARR incorporates a cross-subsidy of the issue traffic by non-issue traffic that does not share facilities with the issue traffic. Grimm Opening V.S. at 6-8.[4] Here, Dr. Grimm raises a "doomsday scenario," interpreting the "sustainability" argument made by the Board in defending its cross-subsidy test as potentially leading "toward a requirement that the complainant devise a SARR which represents the lowest cost, optimum system for any member of the SARR group located anywhere along the SARR route." Finally, Dr. Grimm suggests that the Board's cross-subsidy test must be flawed because BNSF has not yet abandoned the "west line" used by the PPL issue traffic, even though it has "for the past 25-30 years had the ability to abandon unprofitable line segments." Grimm Opening V.S. at 8-9.

What the cross-subsidy test tells us is that if the shipper has indeed posited a SARR that reflects the contribution available from the defendant's traffic selected for inclusion in the traffic group, the real world rates on the lighter-density portion of the network are not yielding revenues that would be generated in a hypothetical contestable market, that is, revenues sufficient to cover the collective attributable cost of handling the traffic over the light density lines in the long term.[5] The implication of this conclusion is that the only appropriate adjustment to the rates on the lighter-density segment, including the issue traffic rates, would be to increase the rates to

[4] This point is the essence of Dr. Borts's criticism of the Board's cross-subsidy test as well. I understand that Dr. Borts has mischaracterized the nature of the Board's cross-subsidy test, which is addressed in Mr. Klick's Reply V.S.

[5] The inclusion of allocated revenues from cross-over traffic movements makes it impossible to know for certain that the revenues generated by the SARR accurately reflect the contribution of the defendant's real world traffic.

levels at which they would cover their traffic's collective attributable costs, assuming that shipper demand for the services involved were sufficient to permit such an increase.[6] The result sought by the complaining shipper, i.e. a *reduction* in the issue traffic rates because contribution can be claimed from other traffic that does not share the lighter-density lines, would yield precisely the opposite result from the rate increase that would occur in a contestable market and would introduce inefficiency into the defendant's real world pricing structure. Because proper rate regulation should always serve to increase the economic efficiency of the incumbent's rate structure, not to introduce new or exacerbate existing departures from contestable-market behavior, the cross-subsidy test is clearly appropriate. This is the essence of the D.C. Circuit's observation, in the above quote, that "the Board's decision advances the reasonable proposition that the captive issue traffic cannot be improperly subsidizing other traffic if the issue traffic cannot even cover its own attributable costs; in other words, it is difficult to steal from a penniless Peter to pay Paul."[7]

The test promulgated in *PPL* relied upon a finding that an internal cross-subsidy existed at the *current* level of revenues allocated to the SARR. In *Otter Tail*, the Board took the next logical step -- concluding that even if no cross-subsidy exists at the current level of revenues allocated to the SARR, rate reductions that are indicated by a finding that current revenue levels exceed SAC could not be significant enough, on the light-density portion of the SARR, to create

[6] If demand is not sufficient to permit rates that recover long-run collective attributable costs, the real world defendant whose costs in the lighter-density lines are sunk, will nonetheless appropriately continue to handle the traffic as long as it recovers collective short-term attributable costs.

[7] Note that while Dr. Grimm suggests that in a "more typical context" cross-subsidy analyses are performed with respect to "estimates of incremental, marginal, or variable costs," which he describes as "more tractable," his discussion at pages 9 and 10 makes clear that he agrees with the commonly-held view of economists that the proper way to assess whether cross subsidy exists is to determine whether the portion of the rail system under study is "a viable component of a presumptively efficient, de novo railroad system," *i.e.*, that the right way to assess whether a cross-subsidy exists *in the real world* is to compare revenues to the forward-looking costs of efficiently constructing and operating the portion of the rail system under study – precisely what the Board's cross-subsidy test does.

a cross-subsidy – *after* the rate reduction – where one does not exist today. The conclusion that the cross-subsidy test properly acts as a constraint on the size of the rate reduction that can be imposed on traffic that moves over the light-density segment also is logical. If one is going to establish reasonable rates by asking what rates would exist on the issue and non-issue traffic in a contestable market, it makes no sense to assume rate levels on the light-density portion of a network that could exist only if a cross-subsidy from the heavier-density portion of the network were available. Over the long run, this approach would merely and unnecessarily replace one distortion (*i.e.*, rates above a reasonable level) with another (*i.e.*, a cross-subsidy of the lighter-density segment by the heavier-density segment). The right approach is the one advocated by the Board, *i.e.*, to reduce rates on the lighter-density segment only until they just cover the forward-looking attributable costs of that segment.

One other brief comment is in order. One can certainly conceive of a process that would result in identifying an "optimal" stand-alone configuration for each combination of traffic movements over an incumbent railroad's system, but nothing in the Board's adoption of the cross-subsidy test forces shippers to take on this burden. All that is required is that the complainant posit a SARR that does not depend upon a cross-subsidy to make the facilities used by the issue traffic look more profitable than they are. To paraphrase Dr. Grimm, identification of *any* low-cost, hypothetical SARR serving the issue traffic and a logical shipper group that is earning excess profits system-wide based upon existing SARR rate levels, *without simultaneously cross-subsidizing the issue traffic rate*, would establish that the complaining shipper's rates are excessive. Just as clearly, as discussed above, it would not be good regulatory policy intentionally to increase the level of distortion in the incumbent's rate structure by means

of an issue traffic rate reduction in excess of one that would exist in a competitive or contestable market.

Dr. Grimm suggests that BNSF's continued operation – over an extended period of time – of the light-density line at issue in *PPL* indicates that the line *does*, in fact, cover its forward-looking costs. As an initial matter, this is tantamount to claiming that the Board significantly overstated the attributable forward-looking costs that it calculated for the "west leg" of the *PPL* SARR. The time is long past for making this claim, but I note that the Board's decision is explicit that it calculated these costs in a manner that would tend to *understate* these costs, not overstate them.[8] In addition, the fact that the stand-alone rail systems relied upon by shippers in *PPL* and *Otter Tail* make such extensive use of cross-over traffic renders it difficult to draw *any* conclusion about the real world incumbent's rail lines.

More fundamentally, the fact that BNSF has continued to operate this line for years is not inconsistent with the Board's conclusion that revenues fail to cover forward-looking attributable cost. Many significant railroad assets, such as grading, tunnels and bridges, have useful lives much longer than the 25 years that have passed since the Staggers Rail Act of 1980 made abandonment of unprofitable rights-of-way by carriers more feasible. As the I.C.C. recognized repeatedly in *Guidelines*, it is economically rational and socially efficient for a railroad to operate segments of railroad that do not cover their long-run incremental costs as long as they are covering the costs that they incur in the short run. *See*, for example, *Guidelines* at 1 I.C.C.2d at 537-538.

[8] *PPL Montana, LLC, v. BNSF*, STB Docket No. 42054, slip op. at 10 (served August 20,2002)

III. ADDITIONAL RATE PRESCRIPTION METHODOLOGIES PROPOSED BY SHIPPERS

In addition to commenting on the Board's rate prescription proposals, Western Fuels Association, Inc. and Basin Electric Power Cooperative ("WFA") proposed two alternatives to the Percent Reduction Methodology, *i.e.*, a "Reasonable Allocation Methodology," or "RAM," and a "Reduced Mark-Up Method." Further, AEP Texas North Company ("AEP Texas") proposed what it calls a "Generalized Percent Reduction Method," or "GPRM." I understand that other BNSF witnesses are addressing these proposals in detail. I limit my focus to implications that exist in both of these filings that the marginal costs relied upon in calculations for both the Reduced Mark-Up method and GPRM are somehow consistent with marginal costs as that term is construed in Ramsey Pricing theory, and that reliance on either of these two methods to establish reduced rates on the issue traffic would therefore somehow be "consistent with" Ramsey pricing.

As WFA explains in its pleading, under the Reduced Mark-Up method, "contribution" on each stand-alone movement is calculated as the difference between "the revenues paid by each [SARR] shipper and the variable costs the [SARR] incurs to provide that shipper with service." While it is not explained in detail in the May 1, 2006 filing, I understand that the following are features of the Reduced Mark-Up method:

1. "variable costs" are based on an effort to put the operating and capital costs of the SARR into an URCS variable cost format,[9] and

2. the term "revenues paid by each [SARR] shipper," when applied to cross-over traffic movements, is in fact a reference to the portion of the BNSF's actual

[9] As an economic matter, it is the marginal costs of the incumbent, not the SARR, that should be used in any rate reduction methodology based on "Ramsey Pricing" principles. Afterall, the aim of the application of regulation to reduce rates is to improve the economic performance of the actual prices with respect to the real world railroads and their actual demands. This is the function of the principles of Ramsey Pricing, and avoidance of cross-subsidy as well. As such, it is the real world marginal costs of the real railroad incumbents that should inform the setting of rates.

> revenues that is allocated to the SARR for providing only a portion of the service provided by BNSF on each movement, *i.e.*, it is based on a formulaic allocation of through revenues.

AEP Texas ties GPRM more directly to the concept of Ramsey pricing (*see* the equation set forth on page 11 of its Opening Comments), and specifically states in its discussion of marginal costs:

> As a practical matter, coal rate proceedings do not readily permit the specific calculation of marginal service costs for each member of the SARR traffic group. Such a showing would be extremely burdensome. This limitation should not affect the use of GPRM, however, as there is no need to compute the actual marginal costs of a particular movement with specificity. Instead, the goal is to measure the markup of the rate over a determined cost level *relative* to the comparable markups above similarly determined cost levels on other rates in the traffic group. As long as the rates are measured against a consistent cost standard, the relative markups can be determined in order to allocate the excess SARR revenues over SAC. AEP Texas Rebuttal at III-G-46 to 47. The average marginal costs for a movement can be determined using publicly available Phase III URCS data for the defendant railroad in the base year of the SAC analysis. AEP Texas Opening at III-G-32 to 33. . . . The calculation of system average marginal costs in this manner has come under attack as not determining shipper-specific marginal costs with certainty. BNSF Reply at III-G-36 to 40. However the Board and ICC each have recognized that complex precision must be tempered with practicality when determining a workable regulatory formula. The marginal cost calculations in this instance are used to estimate the percentage markup for each movement. The estimated markups are used to infer the relative demand elasticities. The use of system average costs is sufficient for such a purpose. AEP Texas Rebuttal at III-G-46 to 47. AEP Texas Opening Comments at 11-12.

Again, although it is not clear from this description, I understand that certain categories of expense have been eliminated from BNSF's URCS to create what AEP Texas calls "marginal costs," and that the revenues and revenue markups calculated for cross-over movements reflect only the portion of the BNSF's actual revenues that is allocated to the SARR, *i.e.*, GPRM also relies upon a formulaic allocation of BNSF's total revenues to the SARR's portion of each cross-

over traffic movement. These features of the reduced mark-up method and the GPRM have implications for several aspects of the rate prescription issue that the Board has raised in this proceeding.

First and foremost, it is something akin to an economic "twilight zone" for shippers to be talking about Ramsey pricing while at the same time relying so extensively on cross-over traffic movements that ignore the revenues and "marginal costs" for the *full service* that is provided on each cross-over traffic movement by BNSF today. Relative elasticities of demand for individual shippers are reflected only in the end-to-end rates they pay, and it is an indefensible leap of faith to *assume*, as WFA and AEP Texas do, that the revenues allocated to the SARR for its portion of each cross-over traffic movement – using MSP, ATC or some other cost-based approximation – could somehow reflect each movement's elasticity of demand.

While I understand the Board's desire to simplify the SAC process through the cross-over traffic convention, there is a real danger in individual rate proceedings that formulaic approximations can bias the results that would be obtained under a "full SAC" analysis that would explicitly reflect each shipper's demand-based rates. The way to address this problem in the rate reduction context was suggested by BNSF in recent rate proceedings, and is alluded to in the Opening V.S. submitted by John Klick in this proceeding, *i.e.*, to apply the rate reduction procedure in a manner that ensures that whatever excess of revenues over SAC results from applying the SAC test is eliminated by reducing the *full* rates on the stand-alone traffic movements, or the *full* contribution generated by this traffic. While this approach does not entirely address the implications of focusing only on the SARR's allocated revenues and "marginal costs," it is a significant step in the right direction.[10]

[10] As I read Mr. Klick's statement, evidence submitted in the *Laramie River* proceeding demonstrates that this approach would *overstate* the reduction required because, as the system is

Second, one cannot expect that URCS-based variable costs – whether for the incumbent railroad or the SARR, un-diluted, or with the sorts of modifications made by AEP Texas – would reflect the marginal costs that are consistent with Ramsey pricing principles. This is so because system-average costs, based on embedded book values, do not accurately reflect marginal costs for individual movements.

In *Guidelines*, the ICC found that:

> Rail Form A and the Uniform Railroad Costing System (URCS) are both cost accounting systems which transform reported railroad expense and activity data into estimates of the intermediate- to long-run variable cost of providing rail service. URCS offers a number of refinements to Rail Form A designed to increase both its flexibility and accuracy. Adoption of URCS is being considered in Ex Parte No. 431.
>
> However, both these systems yield cost estimates which are based largely on system-wide averages. Ramsey pricing requires the use of economic costs rather than accounting costs. Although Rail Form A or URCS might be useful as a rough indicator of economic costs, we recognize that local factors and circumstances may cause the economic costs to differ greatly from accounting estimates. Such local factors might include, for example, whether the movement is a backhaul or off-peak movement or whether the facilities involved are congested. Parties presenting cost estimates should be prepared to show that they have taken account of relevant local factors.[11]

These observations apply with full force to the supposed development of marginal costs reflected in the WFA and AEP Texas proposals. As Mr. Klick explains in more detail, for example, AEP Texas started with standard URCS variable unit costs, and modified those costs to eliminate

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expanded to look more and more like a "full SAC" analysis, the excess of revenues over SAC declines (not surprising, given the revenue inadequate status of the major railroads). By assuming that the "overage" that is calculated for the "short SARR" (relying on cross-over traffic) would be the same if a "full SAC" were conducted – which is functionally what Mr. Klick's proposal assumes, this method overstates the average reduction required from each member of the stand-alone traffic group, including the issue traffic, *whatever* method is used to develop the rate prescription.

[11] *Guidelines*, 1 I.C.C.2d at 532 n.31.

general overhead and supervisory expenses, depreciation and "return" on fixed assets, added the current year's capital investment in track assets, and eliminated certain carload billing expenses that were deemed inapplicable to coal unit train service. I understand that these modified "system-average marginal costs" were used to generate a series of "cost factors" that AEP Texas alleges can be used to "approximate" movement costs for other lengths of haul (and differences in other shipment characteristics, such as termination vs. interchange and car ownership).

The outcome of such an approach would seem to be an implicit assumption that all movements with identical operating parameters (*e.g.*, the same length of haul, same class of traffic and same car ownership characteristics) would exhibit the same marginal cost. Such an assumption is inconsistent with a basic premise of Ramsey pricing, which requires that the marginal costs used for each individual movement must reflect all of the relevant forward-looking economic costs associated with that particular movement.

If a movement uses a portion of the railroad that is particularly congested, its marginal costs must reflect the costs of this congestion (*i.e.*, either the slower transit times and higher probability of crews outlawing on congested routes, or the investment costs that will be required to eliminate this congestion). On the other hand, if the movement uses a portion of the railroad where there is considerable available capacity, the costs of such capacity would not be part of the marginal costs used in a proper implementation of Ramsey pricing.

Similarly, properly-developed marginal costs would reflect differences in the "risk-profile" of individual movements. Movements under contract are more certain than movements under common carrier rates; movements from or to solely-served locations are more certain than movements between competitively-served locations. As a result, investments in locomotives, freight cars and rights-of-way to handle some movements carry less risk than similar investments

associated with other traffic. Furthermore, while contracts tend to improve certainty, the obligations associated with individual contracts differ, and these differences can impose costs that vary significantly for movements of the same length of haul. Some contracts impose service standards on railroads, while others do not; some impose obligations on railroads to provide railroad-owned equipment or to move additional trainsets of coal at the shipper's request, while others do not. These sorts of requirements affect a railroad's marginal cost of handling these movements, but are not reflected in the URCS-based marginal costs developed for BNSF by AEP Texas.

AEP Texas attempts to down play this long-held view that URCS is not a suitable surrogate for the marginal costs required to implement Ramsey Pricing by arguing that it is only the *relative* costs that are important, not the absolute level of marginal costs. This statement is wrong for two reasons. First, as I have already noted, is the fact that URCS system-average costs are not sensitive to a host of factors that can radically change relative costs, such as diverse contract terms and extent to which certain movements do or do not move over capacity-constrained facilities. As a result, it is a false hope that they get the "relative costs" right. However, even if the *relative* costs were accurate, the absolute level of cost does matter for Ramsey Pricing calculations. If costs are overstated on average, even if the relative level of costs for each movement were accurate, this would lead to a different pattern of rate reductions across the movements in the stand-alone traffic group than if the lower, more accurate marginal costs were employed.[12]

[12] A simple way to illustrate this is to assume that all marginal costs were overstated – by the same amount across the board to maintain the proper *relative* cost levels touted by AEP Texas – and that this overstatement was sufficient to generate costs for certain movements that equaled or exceeded their existing rate levels. Under such circumstances, if a reduction in the amount of unattributable cost that needs to be recovered is indicated by a SAC test, these movements would incur none of this reduction, which would not be the case if the proper marginal costs had been employed.

Reliance on the sort of "system-average" approach to developing marginal costs that is advocated by WFA and AEP Texas also obviously distorts the rate/marginal cost relationships that it relies upon to infer relative demand elasticities. For example, all other things being equal, one would expect BNSF to charge a higher rate per ton for a movement on which it has agreed to a service performance standard (with penalties when it fails to perform) than on one where it has no such obligation. The higher rate reflects the higher risk and, therefore, higher marginal cost to BNSF of handling this movement. Yet the "system-average" approach would calculate identical marginal costs for both movements and infer that the movement that involved the service performance standard is more demand inelastic than the movement that does not because the contribution ratio is higher. Similarly, when a movement makes substantial use of congested BNSF facilities, one would expect BNSF to assess a higher rate per ton – all other things being equal – to offset the costs associated with the congestion (or, alternatively, the costs of eliminating this congestion). Once again, the "system-average" approach to calculating marginal costs would pick up the higher rate per ton, but fail to account for the higher costs, and lead it to conclude, generally, that movements over congested facilities are more demand inelastic than they are.

This discussion highlights a second, critically important flaw introduced by using URCS system average costs as the basis for calculating marginal costs for use in rate reduction methodologies that are allegedly based on Ramsey Pricing principles. I understand that significant network congestion is a real world factor on each of the major railroads that filed opening comments in this proceeding – particularly on lines used by traffic that has been part of stand-alone traffic groups in prior rate cases – yet stand-alone railroads are presumably constructed with sufficient network capacity to handle the traffic included in the stand-alone

traffic group during peak time periods. It obviously makes no economic sense in the real world to *reduce* rates for traffic that makes extensive use of rail facilities that are congested, because this will only encourage more demand for facilities whose capacity is already over-subscribed. But it is certainly possible that a properly-conducted SAC test of these same movements could demonstrate that revenues exceed the long-run forward-looking costs developed to construct and operate the SARR. In these circumstances, how should the Board reconcile the real world "state of play" with the results of a SAC analysis that relies upon a hypothetical efficient service provider?

The answer to this apparent conundrum lies in the principle set forth at the outset of this statement, *i.e.*, that the SAC test is merely a starting point for determining how to modify real world rates to eliminate distortions caused by barriers to entry and exit, and to be more economically and socially efficient in the long-run (it is obviously not efficient to encourage expanded use of facilities that are operating at or above capacity). Traffic that utilizes congested facilities experience very high marginal costs – costs that include a *pro rata* share of the full, forward-looking costs of expanding the network capacity to eliminate the congestion that these movements help to cause. In Ramsey Pricing terms, these very high marginal costs result in relatively small (or even negative) margins on the traffic moving over congested facilities, which in turn suggests that while facilities used by the issue traffic remain congested, minimal or no rate reductions would be warranted, *even if revenues seem to exceed SAC.*[13]

[13] As SAC is routinely calculated, depreciation is annuitized to reflect level conditions of deployment and utilization of capital facilities. However, where traffic is growing fast, or is subject to significant variations over time, facilities will sometimes be congested and sometimes be slack. Optimally, under the dynamics of Ramsey Pricing principles, depreciation should be relatively high when congestion makes contemporaneous marginal costs high, and depreciation should be relatively low when capital facilities are uncongested or even temporarily underutilized, and short-run marginal costs are correspondingly low. With such time-varying depreciation, revenues need not necessarily exceed SAC during times of congestion when optimal prices are high, because depreciation should be high as well.

In short, as the ICC recognized long ago, URCS-based system average variable costs – or variants on these costs – are not sufficiently movement-specific and network-specific to generate rate-to-cost ratios from which one can infer relative demand elasticities – and if marginal costs are not calculated in a manner that properly reflects what the I.C.C. termed "local factors" such as congestion and/or specific contract terms, economically and socially inefficient rate reductions could result.

Under such a dynamic pattern however, prices should fall to reflect the easing of congestion, as depreciation is backed down as well. Here, over time, the overall depreciation should average out (in appropriate discounted values) to the annuitized level, and revenues should be compared to SAC over the full cycle of congestion, capacity enlargement and congestion alleviation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 2006

Robert D. Willig

Klick

STB Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

REPLY VERIFIED STATEMENT

OF

JOHN C. KLICK

May 31, 2006

I. INTRODUCTION

My name is John C. Klick. I am a Senior Managing Director in FTI Consulting Inc.'s economic practice. My office is located at 1201 I Street, NW, Suite 400, Washington, D.C., 20005. A statement of my qualifications is attached as Exhibit No. __ JCK-1 to the Opening Verified Statement I filed in this proceeding on May 1, 2006.

I have been asked by BNSF Railway Company ("BNSF") to address certain issues raised in the WCTL Comments,[1] the *Additional Opening Comments of Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.* ("WFA"), *Opening Comments of AEP Texas North Company* ("AEP Texas"), and *Comments of Arkansas Electric Cooperative Corporation* ("AECC"). The specific areas I have been asked to address are summarized below:

Rate Reduction

- The reduced mark-up methodology proposed by WFA, and the Generalized Percent Reduction Methodology ("GPRM") proposed by AEP Texas
- The train-mile allocation approach proposed by AECC witness Nelson

Revenue Allocation

- Criticisms of the Average Total Cost ("ATC") proposal, and the market based approach to revenue allocation, made in WCTL Comments

Cross-Subsidy

- Discussion of the cross-subsidy issue set forth in the Borts and Grimm Verified Statements attached to the WCTL Comments

[1] *Joint Opening Comments of Western Coal Traffic League, Concerned Captive Coal Shippers, Western Fuels Association, Inc., Edison Electric Institute, National Rural Electric Cooperative Association, and American Public Power Association* ("WCTL Comments").

II. RATE REDUCTION ISSUES

A. AEP Texas's Generalized Percentage Reduction Method Does Not Implement Ramsey Principles

In its Opening Comments, AEP Texas North Company (AEP Texas) identifies significant flaws in both MCM and MMM, and proposes that the Board adopt instead the Generalized Percentage Reduction Method ("GPRM") that it first proposed in STB Docket No. 41191 (Sub-No.1).[2] AEP Texas states that GPRM "modifies the Board's [percentage reduction] methodology to be consistent with Ramsey pricing principles," and contends that it "allocates rate relief based on the maintenance of the ratios of price markups over marginal cost." AEP Texas's suggestion that its rate reduction approach is consistent with the principles of Ramsey pricing is wrong for several reasons.

As several witnesses for BNSF noted on Opening, in formulating the *Guidelines*[3] the ICC was guided by the economic principles underlying Ramsey pricing. The ICC found it to be impractical to impose pure Ramsey pricing as the mechanism for determining rate reasonableness, because doing so "requires both the marginal cost and the elasticity of demand to be quantified for every movement in the carrier's system. Thus, the amount of data and degree of analysis required seemed overwhelming."[4] The ICC determined to rely upon "formal" Ramsey pricing only as a theoretical *guideline*, and adopted Constrained Market Pricing ("CMP") and the stand-alone cost ("SAC") test as practical alternatives for assessing rate reasonableness that it anticipated would promote Ramsey prices in the freight rail industry.[5]

In advocating GPRM, AEP Texas effectively claims to have found a shortcut that eliminates all of the difficulties and burdens of calculating true Ramsey prices that the ICC

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[2] AEP Texas Opening Comments, referencing STB Docket No. 41191 (Sub-No. 1) ("*AEP Texas*") at AEP Texas Opening Nar. at III-G-25 to 32; and AEP Texas Rebuttal Nar. at III-G-35 to 40.
[3] ICC Docket No. 347 (Sub-No. 1), *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d at 520.
[4] *Guidelines* at 527.
[5] *Id.* at 534.

identified during the *Guidelines* proceeding.[6] As a logical matter, if calculation of Ramsey prices is not practical because it is too complex, the likelihood that Ramsey prices could be closely approximated using GPRM is highly implausible.[7] Although GPRM does exhibit some superficial consistency with Ramsey pricing principles, it suffers from two fundamental problems – neither the revenues nor the marginal costs used in the GPRM rate reduction calculations are meaningful for calculating demand elasticity.

1. AEP Texas's Opening Comments Do Not Clearly Identify Which Version of GPRM It is Proposing in this Proceeding

In Docket No. 41191 (Sub-No.1) – in response to criticisms of its Opening evidence made by BNSF – AEP Texas changed the way it performed its GPRM calculations when it filed its brief in that proceeding. The confusion in this proceeding arises because AEP Texas's Opening Comments do not acknowledge the change that was made in its Docket No. 41191 (Sub-No. 1) pleadings, and it includes documents from the rate case that both precede and succeed the change made on brief as attachments to its GPRM discussion in this proceeding.

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[6] Specifically, AEP Texas states:

> As a practical matter, coal rate proceedings do not readily permit the specific calculation of marginal service costs for each member of the SARR traffic group. Such a showing would be extremely burdensome. This limitation should not affect the use of GPRM, however, as there is no need to compute the actual marginal costs of a particular movement with specificity. Instead, the goal is to measure the markups above similarly determined cost levels on other rates in the traffic group. As long as the rates are measured against a consistent cost standard, the relative markups can be determined in order to allocate the excess SARR revenues over SAC. AEP Texas Rebuttal at III-G-46 to 47. The average marginal costs for a movement can be determined using publicly available Phase III URCS data for the defendant railroad in the base year of the SAC analysis. AEP Texas Opening at III-G-32 to 33. The SARR revenue per ton attributable to each member of the traffic group then can be compared to the appropriate marginal cost figure, based upon distance, to arrive at the relative markups. *Id.* at 32 to 33. AEP Texas Opening Comments at 11-12.

[7] If it were appropriate to determine the Ramsey optimal prices for the subset of the defendant's system represented by the stand-alone shipper group, the way to determine them would be to calculate the revenue need for the stand-alone railroad (configured to handle the historical and projected volumes of the shipper group) and then set the rates for the shippers in the group based on their demand elasticity and marginal cost. The ICC's discussion of difficulties in implementing pure Ramsey pricing suggests that these calculations cannot be feasibly made, and if this is so it is not likely that one could "back into" reliable Ramsey prices for the subset of the defendant's system in the manner proposed by AEP Texas.

At page III-G-30 of its Opening Narrative in Docket No. 41191 (sub-No. 1), AEP Texas states:

> Following Ramsey principles, a rate reduction or rate relief allocation methodology should attempt to maintain price mark up ratios across the market in question. Herein, AEP Texas proposes and applies an alternative formula -- called the "generalized percentage reduction" rule -- that allocates relief *based on the maintenance of the ratios of price markups over marginal cost.*[8]

A very similar claim is made for GPRM in this proceeding.[9] Note, too, that these claims support BNSF's view – expressed in its Opening Comments by Professors Willig and Kalt, that any acceptable rate reduction methodology must (1) reduce rates for *all* members of the stand-alone traffic group, and (2) maintain the existing rate/cost relationships that are established by the incumbent railroad based on its assessment of market demand.

In Docket No. 41191 (Sub-No. 1), however, examination of the workpapers in which AEP Texas had actually implemented its GPRM calculations revealed that AEP Texas had not in fact maintained the ratios of price markups over marginal cost.[10] Instead, the way AEP Texas computed the rate reduction for the movements in its stand-alone traffic group, including the issue traffic, was to employ the following iterative process for each quarter of the DCF period:

1. Rank order the SARR traffic movements in each quarter by revenue-to-"marginal cost" ratios, highest to lowest.[11]

2. Determine the amount by which TNR revenues in the quarter must be reduced to ensure that overall stand-alone revenues are equal to overall stand-alone costs across the DCF period.

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[8] AEP Opening Nar. at III-G-30, emphasis supplied.

[9] "The goal of GPRM is to allocate excess revenues over SAC in a manner which simultaneously provides reductions to all shippers in a group whose contributions exceed marginal costs, and closely maintains the relative relationship of each shipper's respective demand elasticity to every other shipper's." AEP Texas Opening Comments at 13.

[10] AEP Texas's application of the "generalized percentage reduction" rule to the TNR is reflected in AEP Texas's Opening electronic workpapers "2000-Q2 AARM.xls" through "2020-AARM.xls," and "Alternative Rate Reduction Rev Ton and Mile Inputs1.xls," "Final SAC Netting and Index.xls," and "AARM Template.xls."

[11] Marginal costs are those developed by the process that I critiqued earlier in this verified statement.

3. Begin the iterative process by reducing revenues for the movement with the highest revenue-to-"marginal cost" ratio until its revenue-to-"marginal cost" ratio just equals the revenue-to-"marginal cost" ratio for the movement rank ordered just below (*i.e.*, the movement with the second highest revenue-to-"marginal cost" ratio).

4. Check to see whether the resulting revenue reduction is sufficient to completely eliminate the quarter's excess revenues, as identified in step 2. If yes, go to step 7; if not, proceed to step 5.

5. Sequentially reduce the revenues for the movements with the highest *two* revenue-to-"marginal cost" ratios until their revenue-to-"marginal cost" ratios just equal the revenue-to-"marginal cost" ratio of the movement rank ordered 3.

6. Repeat steps 4 and 5, sequentially reducing the revenue-to-"marginal cost" ratios for each move above the iteration cut-off point down to the revenue-to-"marginal cost" ratio of the rank ordered move just below the iteration cut-off point until the cumulative revenue reductions are sufficient to eliminate the quarter's excess revenues, as identified in step 2.

7. The prescribed rate for the issue traffic is the revenue per ton shown for the issue traffic movement at the end of the *prior* iteration.

This approach does not come close to "maintaining the ratios of price markups over marginal costs," as AEP Texas claimed it intended. Instead, all of the movements above the iteration cut-off point end up exhibiting *identical* ratios of revenue to "marginal costs," while *none* of the movements below the iteration cut-off point experience any rate reduction at all. Thus, the prescribed rates that AEP Texas calculated in its opening evidence in Docket No. 41191 (sub-No. 1) were characterized by flaws similar to those BNSF identified for MCM and MMM in its Opening Comments in this proceeding, and thus bore no resemblance at all to an outcome consistent with Ramsey pricing principles.

On brief in the Docket No. 41191 (Sub-No. 1) proceeding, AEP Texas modified the way it applied GPRM to be more Ramsey-like, *i.e.*, it modified GPRM to develop rate reductions for each movement in the stand-alone traffic group as described at pages 13 and 14 in its Opening Comments. If revenues exceed SAC, the *corrected* GPRM approach does in fact reduce revenue

levels for each and every movement in the stand-alone traffic group (assuming revenues generated by a movement exceed its "marginal costs"), and does leave each movement's revenue-to-"marginal cost" rank-ordering unchanged.

The witnesses that developed GPRM for AEP Texas in Docket No. 41191 (Sub-No. 1) – Douglas Caves, Kelly Eakin and Mark Meitzen – showed in Exhibit III-G-11 to the opening evidence in the rate proceeding that GPRM was intended to reduce rates for all traffic movements in the stand-alone traffic group, and maintain the relative revenue-to-"marginal cost" rank order of each movement (*see* pages 4 through 5 of Exhibit III-G-11, attached as Exhibit A to the AEP Texas Opening Comments). This, coupled with the fact that on brief AEP Texas conformed *application* of GPRM in the way it was described by its witnesses, strongly supports the criticisms of MCM and MMM made by BNSF in its Opening Comments in this proceeding.

Nevertheless, because it relies upon marginal cost calculations that are fatally flawed, even the corrected GPRM approach is inferior to the Board's traditional percentage reduction method ("PRM"), which does not require marginal cost calculations, but does reduce each issue traffic rate, and does maintain each movement's revenue-to-"marginal cost" rank order.

2. AEP Texas's Calculations Do Not Use Prices that Reflect Demand for Through Service

The contribution margins that Ramsey pricing calculations would rely upon, if they could be done properly, are presumably an indicator of how valuable rail service is to each individual customer of the incumbent. However, when the vast majority of movements in a stand-alone traffic group are cross-over movements – as has been the case in virtually all of the recent SAC proceedings before the Board – the revenues that GPRM uses to develop its markup ratios do not reflect the prices set in the real world for the end-to-end transportation service provided by the incumbent for each cross-over movement, but are allocations of end-to-end revenues derived

using MSP, ATC or some other formulaic methodology. Thus, the revenues used by AEP Texas in its GPRM are not prices for through service and, as a result, cannot possibly reflect the value of rail service to each shipper, because there is no shipper demand for only a portion of an end-to-end movement, and no way of determining the shipper's willingness to pay for transportation to an imaginary interchange point. Thus, any "Ramsey-based" rate reduction would have to be calculated in light of the rate for the *through* movement.

As I suggested in my Opening V.S., this can be done without altering the fundamental nature of SAC presentations. The first step is to assume that the dollar amount of the overcharge developed from a SAC study, using cross-over traffic, would be no larger if a "full SAC" study were conducted.[12] This overage can then be eliminated by applying an equal percentage reduction to the mark-ups over marginal costs developed for the *through* movements of each movement in the stand-alone traffic group, including each cross-over traffic movement (information that is easily developed from data routinely available in SAC cases). This approach preserves the relative demand-based markups across all *through* movements, consistent with Ramsey pricing principles.

3. AEP Texas Has Not Determined Marginal Costs in the Manner Necessary for Proper Calculation of Ramsey Prices

AEP Texas's proxy for demand elasticities requires a calculation of marginal costs. In Docket No. 41191 (sub-No. 1), AEP Texas's witness Whitehurst calculated marginal costs based on BNSF URCS costs. As the ICC recognized long ago, and as Professors Willig and Kalt

[12]This is a reasonable assumption, because if building a full SAC would substantially increase the amount by which revenue exceeds SAC, complainants have every incentive to do so. In fact however – consistent with this logic and with the overall revenue inadequacy of railroads – the "serial build out" analysis conducted by BNSF in *Laramie River* demonstrates that a "full SAC" analysis is most likely to exhibit a lower excess of revenue over SAC. Reply Evidence and Argument of BNSF Railway Company, STB Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company* ("*Laramie River*"), Narrative, Volume I of II, at III.A-14.

explain in their Reply Verified Statements, use of URCS (or modifications of URCS) for this purpose does not yield proper Ramsey prices. In *Guidelines*, the ICC stated that both Rail Form A and URCS costs:

> yield cost estimates which are based largely on system-wide averages. Ramsey pricing requires the use of economic costs rather than accounting costs. Although Rail Form A or URCS might be useful as a rough indicator of economic costs, we recognize that local factors and circumstances may cause the economic costs to differ greatly from accounting estimates. Such local factors might include, for example, where the movement is a backhaul or off-peak movement or whether the facilities involved are congested.[13]

The ICC's observations apply with equal force to AEP Texas's supposed development of "marginal costs" for use in GPRM.

In its Opening Exhibit III-G-12, from Docket No. 41191 (sub-No. 1), AEP Texas explained how W. W. Whitehurst & Associates, Inc. supposedly calculated "marginal costs for standard BNSF system-average unit coal train movements based on the Board's URCS costs for the year 2001" for the purpose of applying the GPRM. As described therein, AEP Texas started with standard URCS variable unit costs, and modified those costs by:

- eliminating the URCS general overhead rates;
- eliminating supervision and superintendence for maintenance-of-way ("MOW"), maintenance of equipment ("MOE") and transportation;
- eliminating fixed plant depreciation and lease rentals ("DLR") and fixed plant ("ROI");
- adding current year replacement costs for track structure to maintenance-of-way operating expenses (i.e., the URCS gross ton-mile Table D1 unit costs); and
- eliminating certain CLOR costs that are not associated with coal unit train service.

[13] *Guidelines*, 1 I.C.C.2d at 532 n.31.

These modified "system-average marginal costs" were then applied, using the URCS Phase III costing procedures, employing the Ex Parte No. 270 trainload adjustments, to generate costs for movements of 300, 600, 900 and 1200 miles. These costs, in turn, were used to develop a series of "cost factors" that AEP Texas alleges can be used to "approximate" movement costs for other lengths of haul (and differences in other shipment characteristics, such as termination vs. interchange and car ownership). This approach to developing marginal costs is inappropriate for the purpose of developing Ramsey prices for two primary reasons.

First, the basic assumption of AEP Texas's approach – *i.e.*, that all movements with the same length of haul, same class of traffic and same car ownership characteristics will exhibit the same marginal cost – is not sufficiently movement-specific to yield meaningful Ramsey prices. As explained in the Reply Verified Statements of Professors Kalt and Willig, economic theory requires that the marginal costs used in applying Ramsey prices use costs calculations that reflect, with precision, the specific characteristics of each movement. If a movement uses a portion of the railroad that is particularly congested, its marginal costs must reflect the costs of this congestion (*i.e.*, either the slower transit times and higher probability of crews outlawing on congested routes, and/or the investment costs that will be required to eliminate this congestion). On the other hand, if the movement uses a portion of the railroad where there is excess capacity, such costs would not be part of the marginal costs required to properly implement Ramsey pricing. Similarly, properly-developed marginal costs should reflect differences in the "risk-profile" of individual movements. Movements under contract are more certain than movements under common carrier rates; movements from or to solely-served locations are more certain than movements between competitively-served locations. As a result, investments in locomotives,

freight cars and rights-of-way to handle some movements carry less risk than similar investments associated with other traffic.

More mundane examples exist of the sorts of movement-specific detail that should be reflected in Ramsey prices. In Docket No. 41191 (Sub-No. 1), AEP Texas's application of GPRM assumed that all movements would load to 111 tons per car, move in trains of 110 cars, and require a system-average consist of system-average locomotives to move a system-average number of miles per day. The reality is, however, that these characteristics for individual coal unit train movements exhibit considerable variation.

Contract obligations differ from movement to movement and can impose significantly different costs on BNSF for otherwise similar movements. Some contracts impose service standards on BNSF, while others do not; some impose obligations on BNSF to provide railroad-owned equipment or to move additional trainsets of coal at the shipper's request, while others do not. These sorts of requirements affect BNSF's marginal cost of handling these movements, but are not reflected in the URCS-based marginal costs developed by AEP Texas.

AEP Texas's "system-average" approach to developing marginal costs for GPRM therefore distorts the rate/marginal cost relationships from which GPRM infers relative demand elasticities.[14] For example, all other things being equal, one would expect BNSF to charge a higher rate per ton for a movement where it has agreed to a service performance standard (with penalties when it fails to perform) than where it has no such obligation. The higher rate reflects the higher risk and, therefore, higher marginal cost to BNSF of handling this movement. Yet AEP Texas would calculate identical marginal costs for each movement and infer that the

[14] *See* AEP Texas Opening Comments at 12: "The marginal cost calculations in this instance are used to estimate the percentage markup for each movement. The estimated markups are used to infer the relative demand elasticities."

movement that involved the service performance standard is more demand inelastic than the movement that does not because the contribution ratio is higher.

Similarly, when a movement makes substantial use of congested BNSF facilities, one would expect BNSF to assess a higher rate per ton – all other things being equal – to offset the increase in marginal costs that is associated with operating a railroad at or above capacity. GPRM would pick up the higher rate per ton, but fail to account for the higher marginal costs, leading to the result that movements over congested facilities generally are more demand inelastic and subject to relatively high rate reductions in the event revenues are found to exceed SAC.

The second flaw implicit in the GPRM approach to developing marginal costs is somewhat theoretical, since it is overshadowed by the lack of precision inherent in GPRM's use of system-average URCS costs as the basis for its estimates of marginal costs. It is important, however, because AEP Texas's reliance on this view implies that precision in calculating marginal costs is not so critical (and, implicitly, suggests that the ICC had it wrong long ago when it concluded that Ramsey prices could not feasibly be calculated). This flaw is AEP Texas's contention, highlighted in the quotation cited above in footnote 6, that the absolute level of marginal cost for each individual movement does not need to be calculated accurately as long as the relative marginal costs for the movements in the stand-alone traffic group is approximated accurately. As Professor Willig explains, this assertion is simply wrong. Even if AEP Texas could demonstrate that the URCS-based procedure it uses to calculate marginal costs accurately reflected relative differences in "true" marginal cost – a demonstration that cannot in fact be made, since the URCS-based procedure cannot take differences in utilization of congested and un-congested facilities, differences in third party payments, differences in contract terms, and

other operational differences into account – departures from "true" marginal cost distort the allegedly "Ramsey-based" rate reductions from those that would be calculated if "true" marginal costs were used.

In summary, even if one could infer relative demand elasticities from existing revenue/marginal cost relationships (and, because of the extensive use of cross-over traffic and the consequent revenue allocation, one cannot), the system-average approach to calculating marginal costs employed by AEP Texas would render the numbers unreliable for purposes of a Ramsey-based analysis. For all of these reasons, the rate/marginal cost relationships relied upon by AEP Texas cannot accurately reflect "true" relative demand elasticities and, therefore, cannot produce "Ramsey-like" reductions in rates when revenues are found to exceed SAC for a given SARR.

B. WFA's Reduced Mark-Up Method Suffers from the Same Core Deficiencies as GPRM, and Exhibits an Additional Inconsistency with Proper Use of Ramsey pricing Principles to Calculate Rate Reductions When SAC Exceeds Stand-Alone Revenues

WFA also has a rate case pending at the STB in Docket No. 42088. In *Laramie River*, WFA proposed two alternatives to PRM to be applied if revenues were found to exceed SAC, the "Reasonable Allocation Method," or "RAM" (which is addressed in Professor Kalt's Reply V.S.) and the "Reduced Mark-Up Method."

The Reduced Mark-Up Method is similar to corrected GPRM. It relies upon URCS-based costs as "estimates" of marginal cost, and it reflects only the portion of the incumbent's end-to-end revenues that are allocated to the SARR. In this respect, it also suffers from the two fatal flaws of corrected GPRM. Like corrected GPRM, the Reduced Mark-Up Method generates rate reductions for all members of the stand-alone traffic group that exhibit contribution above

marginal costs, and as a result it preserves each movement's revenue-to-"marginal cost" rank order. Thus, it too highlights the shortcomings of MMM and MCM, and is also inferior to PRM.

In developing its URCS-based estimates of "marginal cost," however, the Reduced Mark-Up Method does not rely upon BNSF's URCS costs as a starting point, as does GPRM. Instead, it tries to "force" the costs developed for the SARR into an URCS format, and then uses these "unit costs" to develop its marginal cost estimates. As Professors Kalt and Willig explain, it is the marginal costs of the incumbent railroad that would be appropriate for any "Ramsey-based" rate reduction procedure (of course, as noted above, URCS-based estimates of "marginal costs" are not sufficiently precise for this purpose), not the marginal costs of the hypothetical competitor.

C. The Ton-Mile Alternative to MMM Proposed by Mr. Nelson Also Suffers from the Flaws Identified in BNSF's Opening Evidence

In the *Decision*, the Board suggested an alternative to the Maximum Mark-Up Methodology ("MMM") procedure that would apply a "fixed dollar" markup above variable costs, for each movement, to account for the excess of SAC over total variable costs for all movements in the stand-alone traffic group. *Decision* at 15-16. As I noted in my Opening V.S. in this proceeding, it is unclear whether the Board is proposing a fixed dollar mark-up per ton, per ton-mile, or per car-mile. Klick Opening V.S. at 9, fn 10.

In an Opening V.S. filed on behalf of Arkansas Electric Cooperative Corporation ("AECC"), Michael A. Nelson suggests yet another version of this "alternative formulation" of MMM that would use train-miles, as opposed to ton-miles or car-miles, to attribute the excess of SAC over total variable costs. Specifically, Mr. Nelson suggests a rate prescription procedure that would (1) first ensure that each movement covers its on-SARR variable costs, and then (2)

attribute the difference between SAC and the sum of all on-SARR variable costs (*i.e.*, the "contribution") to each individual movement on the basis of train-miles.

As an initial matter, whether the alternative formulation of MMM relies upon ton-miles, car-miles or train-miles, the fact remains that this particular methodology is fatally flawed for the same reasons I discussed in my Opening V.S. Klick V.S. at 9-23. Mr. Nelson' version of MMM also would create rate compression in railroad rate structures by ensuring that the highest-contribution movements in the stand-alone traffic group will all have their margins above variable cost driven to an identical amount per train-mile, and that the lowest-contribution movements will experience no rate reduction at all. This destroys the existing railroad pricing structure (contrary to the intent of *Guidelines*) and is inconsistent with the outcomes that would result from proper application of the principles of Ramsey pricing and contestability. Significantly, Mr. Nelson makes no effort to explain how his suggested approach might be deemed consistent with the economic principles of demand-based Ramsey pricing and contestable market theory that underpin the *Guidelines*.

Mr. Nelson is critical of "ton- and car-based measures" for allocating the excess of SAC over variable cost because, in his view, they are too "heterogeneous" to be reliable. Nelson Opening V.S. at 5. Instead, he asks the Board to "address this heterogeneity" by taking into account his view that "achievable capacity throughput for any given rail line is primarily governed by train movements rather than by more specific measures of commodity volume (i.e., cars or tonnage)." This effort to convince the Board that train-miles are more suitable than are ton-miles or car-miles, for allocation of SAC "contribution" to individual movements, serves to underscore that *all* rate prescription proposals that ignore individual shipper demand are

inherently arbitrary and, thus, inconsistent with the basic economic precepts relied upon by the ICC in *Guidelines*.

As experience with the RTC model in various rate proceedings has demonstrated, train-miles are not the homogeneous building block of railroad operations that Mr. Nelson suggests. High-speed train-miles associated with Intermodal trains are not the equivalent of train-miles generated by long, heavy unit coal trains, or unit grain trains, or general merchandise trains; and train-miles on congested main lines are not the equivalent of train-miles generated on underutilized branch lines. Furthermore, a *mix* of different train types can require more capacity than the same number of trains that are all essentially identical. And main line capacity requirements can be significantly affected by circumstances hundreds of miles away, as evidenced by the siding track capacity required on BNSF and UP mainlines and yards to stage unit coal trains into the capacity constrained PRB.

At bottom, Mr. Nelson's recommended approach suffers from *both* of the primary flaws that characterize all of the alternatives to PRM that have been proposed in this proceeding, *i.e.*, it (1) ignores the outcomes that Ramsey pricing principles would dictate – by creating rate compression at the highest-contribution end of the spectrum of stand-alone traffic and generating no rate reduction at all at the lowest-contribution end of the spectrum – and (2) relies upon URCS-based variable costs (or variations thereof) as a surrogate for the movement-specific marginal cost determination required for proper application of Ramsey pricing principles.

III. REVENUE ALLOCATION ISSUES

Shippers universally attack the Average Total Cost ("ATC") procedure that the Board proposed in its *Decision*. Instead, they argue that divisions should be "market based," and recommend as an alternative to "market based" divisions, continued use of MSP in allocating the

incumbent's end-to-end revenues to the SARR for its portion of each cross-over movement.[15] Most shippers also attack the Board's view that the outcome of a "full SAC" is the proper standard for evaluating bias – effectively confirming the railroads' long-held view that their use of cross-over traffic to-date has permitted them to achieve a better result than they could have obtained had they built all of the railroad required to replicate the incumbent's service for the movements in the stand-alone traffic group.[16] Professor Kalt addresses most of these arguments, but BNSF has asked that I address a couple of specific points.

As a threshold matter, it is important to recognize that real world divisions are not relevant to a SAC analysis. As Professor Kalt explains in his Reply V.S., the relevant "market-based" inquiry is what market behavior *in a contestable market* would dictate. Because real world railroad operations are by definition not contestable, real world divisions cannot be relevant to how revenues on cross-over traffic would be allocated in the contestable market environment that the Board seeks to replicate by applying the SAC test.

Evidence filed by the complainant in the *Otter Tail* proceeding makes it obvious why shippers seek to utilize real world divisions data, even though it is so clearly irrelevant to the SAC inquiry – it provides such fertile ground for manipulation of the SAC test.[17] WCTL's witness Crowley acknowledges as much in his Opening V.S. when he states:

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[15] Some shipper witnesses do embrace "full SAC" as the proper standard. AECC's witness Nelson does so by effectively embracing the "willing" *and* "able" standard articulated by Professor Willig's Opening V.S. He is critical of all of the methods for revenue allocation that are under discussion in this proceeding because "none of the methods limit the off-SARR allocation of revenues to the level that ensures the revenue adequacy of off-SARR segments." Nelson Opening V.S. at 10. Of course, Mr. Nelson's concern is that railroads may be earning unreasonably high profits on cross-over traffic that might be allocated to the off-SARR portions of cross-over movements – a circumstance that is unlikely given railroad revenue inadequacy. I note that if this were the case, however, shippers can (and would) "take credit "for these high earnings, regardless of what revenue allocation procedure is adopted, by presenting a "full SAC" study – so no particular change is required in current SAC procedures to prevent Mr. Nelson's concern from being realized. As Professor Kalt explains, Mr. Nelson's proposed solution, in contrast, is inconsistent with contestable market principles.

[16] *See* Nelson Opening V.S. at 9-10.

[17] STB Docket No. 42071, *Otter Tail Power Company v. BNSF* Railway Company ("*Otter Tail*"). In that proceeding, the complaining shipper employed data produced by BNSF on unit train coal divisions to conduct

> Obviously, no complainant wants to have to redo an entire stand-alone case because the STB changed the method for calculating divisions on cross-over traffic but that is exactly what could happen. Stated differently, as the ATC divisions approach produces different revenues than does the MSP approach promulgated by the STB in recent proceedings, the traffic group selected using MSP will not necessarily maximize profitable traffic when using the ATC approach. The ATC approach will force a complainant to evaluate and include longer haul traffic in the stand-alone group. Therefore the complainant in proceedings where the traffic group was selected using the MSP approach will be forced to reevaluate the selection of the traffic group if the ATC approach is adopted. Crowley Opening V.S. at 10.

The sentiment so candidly expressed by Mr. Crowley explains why shippers oppose so vehemently the Board's view, which is clearly correct, that use of cross-over traffic should not create a SAC result that is radically different from the outcome that would be achieved if a "full SAC" study were conducted; and it explains why they argue so strenuously for real-world "market-based" divisions for cross-over traffic – which clearly are irrelevant to the contestable market environment that informs the SAC test – instead of addressing substantively the evidence that Professor Kalt has presented on what *contestable market behavior* would establish as the appropriate allocation of cross-over traffic revenue to the SARR. Finally, it underscores the importance of Professor Willig's view that if the Board is going to use an approximation such as MSP or ATC to establish cross-over traffic revenues attributable to the SARR in the first

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regression analyses (using revenue divisions as the dependent variable, and shipment distance as the independent variable). These regression results were then used to estimate the SARR revenue allocation for the cross-over movements. Otter Tail used this regression approach to argue that its SARR was entitled to a significant division of revenues even when it performed minimal or *no* line haul service. Had the Board accepted this approach, it would have created even more incentive for shippers to reduce, as much as possible, the on-SARR distances traveled by cross-over traffic.

In response, to Otter Tail's evidence, BNSF argued that real world divisions were irrelevant to the SAC test, *and* demonstrated that Otter Tail's analysis was rife with statistical errors, the most significant of which was a "relevant range" problem created by the fact that the shortest real world length of haul for which real world divisions were available was substantially longer than the on-SARR lengths of haul for the vast majority of the cross-over traffic movements, rendering the real world divisions of no statistical value in analyzing the cross-over traffic movements. In addition, BNSF identified a host of other statistical problems with the conclusions drawn by Otter Tail that rendered its analysis unusable. In its decision, the Board rejected the market-based approach in favor of a cost-based approach. *Otter Tail* decision at 13-15.

instance, it is critical that the parties be provided an opportunity to demonstrate potential bias, vis a vis a "full SAC" presentation.

A second attack shippers have launched against ATC is to suggest that there is no mathematical difference in the way DARA and ATC work. Borts Opening V.S. at 19. As a result, they argue, the Board's prior rejection of DARA because "the DARA formula did not actually factor in economies of density" should apply with equal force to ATC.[18] There are two responses to this criticism. First, as the table below demonstrates, ATC does in fact treat economies of density differently than does DARA as densities increase.

[18] As the Board states in *Otter Tail*, DARA was rejected because "as the relative economies of density changed (reflected in changes in average total costs) DARA would not adjust the portion of the revenues allocated to each segment, and thus would not achieve its stated objective . . . The defining feature of industries with strong economies of density is decreasing average total cost with output." *Otter Tail* decision at 16, citing *Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & S.F. Ry.*, STB Docket No. 42057 ("*Xcel*"), slip op. at 11 (STB served Jan. 19, 2005.

Table 1 Demonstration that ATC and DARA Perform Differently As Densities Increase				
	ATC		DARA	
	SARR	Residual Incumbent	SARR	Residual Incumbent
Mileage	500	500	500	500
Variable Cost Per Ton	$5.00	$5.00	$5.00	$5.00
Fixed Costs Per Mile	$160,000	$160,000	$160,000	$160,000
End-to-End Rate	$20.00	$20.00	$20.00	$20.00
First Hypothetical				
Density (Millions of Tons)	50	25	50	25
Fixed Costs Per Ton-Mile	$.0032	$.0064	xxx	xxx
Fixed Costs Per Ton	$1.60	$3.20	xxx	xxx
Variable Costs Per Ton	$5.00	$5.00	$5.00	$5.00
Total Cost Per Ton	$6.60	$8.20	xxx	xxx
DARA Allocation of Contribution	xxx	xxx	$3.33	$6.67
DARA Total Revenue Allocation	xxx	xxx	$8.33	$11.67
Division of End-to-End Rate	44.6%	55.4%	41.7%	58.3%
Second Hypothetical				
Density (Millions of Tons)	100	50	100	50
Fixed Costs Per Ton-Mile	$.0016	$.0032	xxx	xxx
Fixed Costs Per Ton	$0.80	$1.60	xxx	xxx
Variable Costs Per Ton	$5.00	$5.00	$5.00	$5.00
Total Cost Per Ton	$5.80	$6.60	xxx	xxx
DARA Allocation of Contribution	xxx	xxx	$3.33	$6.67
DARA Total Revenue Allocation	xxx	xxx	$8.33	$11.67
Division of End-to-End Rate	46.8%	53.2%	41.7%	58.3%

Table 1 compares results for ATC and DARA under two hypothetical examples in which, in each case, densities on the SARR are twice as high as densities off the SARR. In the second hypothetical, however, densities on- and off-SARR are twice as high as they are in the first hypothetical. Table 1 demonstrates that as overall densities increase – even though the relationship *between* on-SARR and off-SARR densities remains in proportion – the ATC-based divisions get systematically closer to the 50/50 split that would exist if there were no economies

of density, as is assumed for example by MSP.[19] In contrast, DARA would generate the same division *regardless* of densities, as long as the relationship between on-SARR and off-SARR densities remains in proportion. In short, while both ATC and DARA take economies of density into account – which is clearly a failing of MSP – Table 1 demonstrates that under ATC those effects decline as overall densities increase. This is fully consistent with the Board's view that at higher densities, economies of density become less pronounced. In contrast, the DARA result is unaffected by increases in overall line density, as the Board noted in *Otter Tail* and *Xcel*.

Professor Borts's criticisms also exhibit a fundamental misunderstanding of URCS. For example, he states that:

> It is reasonable to allocate the variable cost of a particular movement on a route mile basis, because variable costs do increase with the length of haul among other indicia of rail output. But there is no rationale for allocating fixed costs on the same basis. For if fixed costs did vary with length of haul they would not be measure as fixed. Borts Opening V.S. at 19.

As the Board recognizes, URCS employs measures of both output and capacity as independent variables in its regressions. When URCS uses the term "variable," it is describing costs that change over the medium to long run as changes in *output* occur, given a specified level of railroad capacity. Thus, the "percent variable," in URCS parlance, is calculated as the ratio of total variable expenses (output coefficient multiplied by total units of output) divided by the total variable costs *plus* total "fixed costs" (in which "fixed costs" are calculated by multiplying the capacity coefficient by total units of capacity). Because URCS itself calculates a cost per unit of capacity (*e.g.*, each mile of road), it is obvious that total capacity costs will increase as the size of

[19] At page 9 of his Opening V.S., Mr. Crowley states ". . . ATC also fails because the STB's proposal intends to rely on system average variable costs as determined by the URCS Phase III calculation and an allocation of fixed costs based on route miles. The application of these system factors to movement-specific rates will in no way recognize the economies of scale, scope and density which the STB is seeking." I do not understand the point Mr. Crowley seeks to make here, but Table 1 clearly demonstrates that his conclusion is wrong – ATC obviously does reflect economies of density.

the railroad increases, but that does not change the fact that these costs are a fixed cost for a given plant size across *all* levels of output.

Both WCTL witnesses Borts and Crowley also criticize ATC as a form of fully-allocated pricing. Borts, for example, states that:

> There is no theoretical justification for allocating fixed costs. Indeed, if such a justification did exist we wouldn't need a SAC approach to the determination of freight rates on captive movements. We would just allocate all of the fixed costs of the railroad's traffic on a route mileage basis." *Id.* at 19-20.

Clearly, fully-allocated costs are not an appropriate basis for setting prices, for all of the reasons articulated in *Guidelines*. But here, we are seeking to allocate the incumbent's end-to-end revenues on cross-over traffic to the SARR – for providing only a portion of the incumbent's end-to-end service – in a manner that "reflects, to the extent practicable, the defendant carrier's relative average costs of providing service over the two segments" *Decision* at 18. Clearly, significant differences in the utilization of fixed plant facilities on-SARR as compared to off-SARR affect the relative average costs – and ATC incorporates those differences. If a "full SAC" analysis were undertaken, different levels of fixed plant utilization experienced in providing end-to-end service would automatically be incorporated into the analysis; the Board has designed its ATC revenue allocation mechanism to reflect this reality in the context of a "partial SAC" analysis that relies heavily on cross-over traffic. *Otter Tail* decision at 14.

In summary, the Board is right in finding that economies of density need to be taken into account in developing a cost-based alternative of cross-over traffic revenues to the SARR, and it is obvious that MSP does not do so. *Decision* at 18. The Board is also correct in observing that the outcome of a "full SAC" is conceptually the right standard for evaluating whether a given cross-over revenue allocation mechanism constitutes a reasonable "approximation." ATC is

clearly superior to other cost-based mechanisms that have been suggested in this proceeding, because it takes economies of density into account (as is implicitly the case in a "full SAC" analysis).[20]

IV. BORTS'S CRITIQUE OF THE *PPL* CROSS-SUBSIDY ANALYSIS REFLECTS A SERIOUS MISUNDERSTANDING OF THE BOARD'S PROCEDURES

In his Reply V.S., Professor Willig addresses the conceptual issues raised by the views expressed by WCTL's witnesses Grimm and Borts in arguing that the Board should cease applying the cross-subsidy test proposed by the Board in *PPL*[21] and *Otter Tail*. BNSF has asked me to focus on the schematic displayed at page 12 of the Borts Opening V.S., and the conclusions that Dr. Borts draws from that schematic at pages 12 through 15. For the Board's convenience, I reproduce the schematic below:

Shippers 1 and 2		**Cordero**		**Rochelle**		**Shipper 3**
A←	**$70**	**→B←**	**$30**	**→C←**	**$10**	**→D**

As a threshold matter, the Borts schematic is misleading in two respects. First, it suggests that the "BC Segment" over which there is some "overlap" between the traffic that utilizes the lighter-density route required by the issue traffic (Shippers 1 and 2 in the Borts example) and the traffic that uses the heavier-density segment (Shipper 3) is relatively long. Second, the schematic in the *Otter Tail* decision is a hypothetical illustration of how a "second-

[20] Because a "full SAC" analysis would rely upon efficient, forward-looking costs for various assets and operations required to handle the cross-over traffic end-to-end, while ATC relies upon URCS (which reflects an embedded investment base for the incumbent's assets), there are differences between ATC and a "full SAC" analysis that could render ATC inconsistent with the outcome of a "full SAC" analysis. For this reason, the recommendation made by Professor Willig in his Opening V.S. that ATC be used as an approximation for the purposes of allocating cross-over revenues to the SARR, and that parties be provided with an opportunity to demonstrate in the context of a specific case that it creates a biased result, is sound regulatory policy.

[21] STB Docket No. 42054, *PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company.*

order" cross-subsidy test would be conducted, not an illustration of the way the Board actually applied the cross-subsidy test in either *Otter Tail* or *PPL*.

Borts implies that the existence of a BC segment, in which there is an overlap between the traffic that uses the lighter-density AB segment and the traffic that uses the heavier-density CD segment, is a significant problem for the Board's cross-subsidy approach because neither of the two groups of traffic is "solely responsible for the . . . cost of the BC segment." Specifically., Borts states:

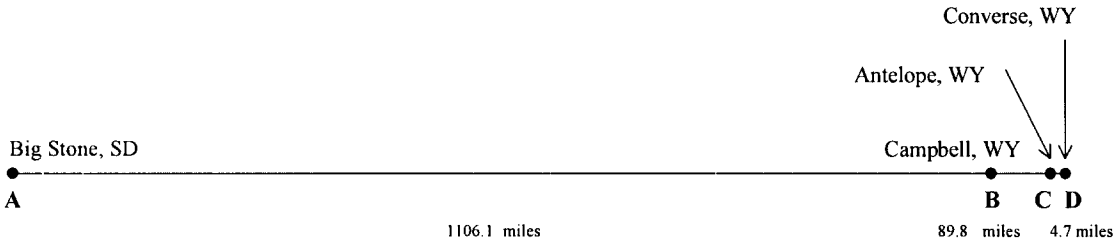
> Under a correct application of the PPL test, Shippers 1 and 2 must cover the $70 cost of the AB segment, but they alone are not responsible for the $30 cost of the BC segment. That cost will be shared with Shipper 3. There is no reason why Shipper 3 should be permitted to use the SARR's BC segment for nothing. The only truly attributable costs are those that would disappear if the shipper's traffic disappeared. If Shippers 1 and 2 disappeared, Shipper 3 would still have to cover the cost of the BC segment. Borts Opening V.S. at13.

This statement is clearly correct – and the Board's cross-subsidy test does nothing that is inconsistent with it. What Borts either fails to recognize, or chooses to ignore, is that the Board's application of the cross-subsidy test explicitly addresses this problem by distinguishing between "right-of-way" costs and "operating" costs, and properly considering whether or not these should be included in the attributable costs of the lighter-density segment.

In applying the cross-subsidy test, the Board includes *all* of the revenues generated by Shippers 1 and 2, but explicitly *excludes* all of the right-of-way costs of the BC segment from the attributable costs it calculates for Shippers 1 and 2. It also explicitly *excludes* all of the operating costs incurred on the BC segment by Shipper 3. As a result, the only BC segment costs that the Board's cross-subsidy test includes in the attributable costs calculated for Shippers 1 and 2 would be the operating costs incurred by Shipper 2 (since Shipper 1 does not traverse the BC

segment) – which (to use Borts's formulation) clearly would disappear if Shipper 2 disappeared.[22]

I noted above that the Borts schematic is misleading, because it does not reflect the fact that in the STB's real world applications of the cross-subsidy test, the equivalents of the BC segment have been relatively small in comparison to the real world equivalent of the AB segment. To be more realistic, I produce below a schematic of the actual *Otter Tail* cross-subsidy analysis.



In *Otter Tail*, the equivalent of the BC segment – where there is some overlap between the traffic using the lighter-density segment and the traffic using the heavier-density segment – is only 90 miles long, or 7.5 percent of the total SARR route mileage. The AB segment is over 1,100 miles long.

While the validity of the Board's approach is not a function of the relative lengths of these segments, the likelihood that a cross-subsidy will be found to exist increases when the BC segment is relatively short. Note that if the BC segment were relatively long in relation to the AB and CD Segments – implying that Shippers 1, 2 and 3 shared a significant portion of total SARR facilities – the Board's approach of including the full Shipper 1 and 2 revenues, but

[22] It is on this point that the Borts example goes awry. He asserts that the "cost" of the BC segment is $30, without distinguishing between right-of-way and operating costs. Because the Board's process would include only Shipper 2's *operating* costs in the attributable costs of Shippers 1 and 2, the $30 is clearly attributable to Shipper 2. But Borts treats the $30 as though it were entirely right-of-way cost that would remain to be covered by Shipper 3, even if Shipper 2 disappeared – which is clearly not consistent with the way the Board applies the test.

excluding all of the right-of-way costs for the BC segment, would make it more difficult to show the existence of a cross-subsidy of Shippers 1 and 2, because most of the construction costs of the SARR would be eliminated from the attributable costs of Shippers 1 and 2.

Because the Board's cross-subsidy test assumes that Shippers 1 and 2 (the potentially subsidized traffic) incur *none* of the right-of-way costs of the BC segment, the only BC segment costs that the Board attributes to Shippers 1 and 2 are the operating costs for Shippers 1 and 2, which clearly are attributable to this traffic; and by assuming that Shipper 3 will cover no more than the full right-of-way costs of the BC segment plus its own operating costs, the Board's cross-subsidy test prevents Shipper 3 from paying for any facilities or services that it does not use. In short, the Board's continued application of the cross-subsidy test is appropriate and, as Professor Willig explains, fully consistent with the principles set forth in *Guidelines*.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 30, 2006

John C. Klick

Baranowski

REPLY VERIFIED STATEMENT

OF

MICHAEL R. BARANOWSKI

I. INTRODUCTION

My name is Michael R. Baranowski. I am the same Michael R. Baranowski who filed a verified statement in this proceeding on behalf of BNSF on May 1, 2006. A statement of my qualifications is attached as Exhibit No. __ MRB-1 to that statement.

In my opening statement, I addressed two of the issues for which the Board sought comments in its February 27, 2006 Decision in Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* ("X-657 Decision") -- the Board's proposal to reflect productivity in indexing operating costs and its proposal to shorten the DCF period to ten years. Specifically, I (1) explained why it was unrealistic to assume that the SARR would achieve any productivity in the first ten years of its operations, (2) examined the extent to which future productivity improvements should be reflected in forecasts of stand-alone operating expenses beyond year 10 of a SARR's life; and (3) offered a proposal to reflect future productivity gains that is consistent with the manner in which SARR operating expenses are determined beginning in year 11 of the DCF period. I also addressed the advisability of shortening the DCF period used in SAC studies from 20 to 10 years and explained the relatively minor changes that would be required to the Board's DCF process to implement such a proposal.

BNSF has now asked me to address certain of the opening comments made by parties relating to these two topics. In Section II of my testimony, I address shippers'

comments related to adjustments to SARR operating expenses to reflect the benefits of future productivity, and in particular, I address the following points:

- I discuss the fallacy of shippers' claims that forecasts of future productivity need to be reflected in SARR operating expenses to avoid a disparity between the treatment of SARR operating costs and revenues.
- I explain that the vast majority of the potential productivity improvements identified by shippers (1) are already captured in the SARR operating expenses, (2) are unavailable to a SARR entrant, or (3) would not be realized within the first ten years of SARR operations.
- I explain why shippers' assertion that Class I railroad assets average only seven years in age is wrong.
- I explain why shippers' proposals for determining SARR productivity, which align future SARR productivity with the productivity that will be experienced by the railroad industry as a whole, overstate SARR productivity.

In Section III of my testimony, I address the shippers' unfounded assertion that a change in the DCF period from 20 to 10 years necessitates a change to the SARR debt amortization period.

II. EVALUATION OF THE PARTIES' PRODUCTIVITY COMMENTS

In the Joint Opening Comments of Western Coal Traffic League, et al. ("WCTL" or "Coal Shippers"), WCTL, not surprisingly, lauds the Board's efforts to introduce a productivity adjustment that begins with the second year of SARR operations, but argues that the Board has not gone far enough to eliminate what it describes as the "illogical and unsupported disparity between the manner in which the Board indexes operating expenses and the manner in which the Board forecasts SARR revenues".[1] WCTL further

[1] Joint Opening Comments of Western Coal Traffic League, Concerned Captive Coal Shippers, Western Fuels Association, Inc., Edison Electric Institute, National Rural Electric Cooperative Association and American Public Power Association, May 1, 2006 at 69.

complains that the Board has erred by assuming that a SARR will not enjoy the benefits of any productivity enhancements in its first year of operations and that it is wrong to assume that a SARR's ability to benefit from productivity enhancements in a manner that is comparable to the rail industry as a whole will only be achieved after the twentieth year of SARR operations. WCTL at 69. In place of the Board's proposal, WCTL opines that the Board should adopt an index that is weighted 50 percent RCAF unadjusted for productivity ("RCAF-U") and 50 percent RCAF adjusted for productivity ("RCAF-A") for the first year of SARR operations and transition to 100 percent of the RCAF-A by the tenth year of operations. *Id.* at 70. This proposal is more aggressive in shippers' favor than any of the shipper productivity alternatives currently before the Board.

While WCTL devotes substantial verbiage to potential sources of future productivity, nowhere in its submission does it (1) acknowledge the substantial productivity already reflected in the SARR base year operating expenses, (2) recognize the difference between the limited SARR customer base and the myriad of customers served and commodities moved by the railroad industry as a whole, or (3) explain how anticipated industry-wide productivity is in any way relevant to a SARR. In the remainder of this section, I explain why the shippers' logic is misguided and why its alternative proposal overstates grossly the level of productivity a SARR could achieve – particularly in the early years of its existence.

1. There Is No Disparity Between the Manner In Which the Board Indexes Operating Expenses and the Manner In Which It Forecasts SARR Revenues

The shippers' alleged need for a productivity adjustment to SARR operating expenses, although hotly contested, is a relatively recent argument that was borne from an assertion by complainants in large coal rate proceedings of a conceptual inconsistency

between the index used to adjust revenues for the SARR and the index used to adjust operating expenses. In this proceeding, Dr. Brennan, in testimony sponsored by the Western Coal Traffic League of Concerned Captive Shippers ("WCTL"), echoes that unfounded logic and asserts that the forecast used to project SARR revenues into the future "implicitly" includes a productivity component while the RCAF used for projecting operating expenses does not.[2] From this he concludes that if the forecast of rates being used in the DCF analysis includes productivity, then consistency requires that a productivity adjustment must also be included in the operating expense forecast in the SAC calculations in the DCF analysis.

Dr. Brennan's assessment is wide of the mark for two key reasons. First, any perceived link between the index used to predict SARR revenues and the index used to inflate stand-alone operating expenses is merely a made-for-litigation figment of shippers' imagination. The Board's SAC test is comprised of three independent analyses that are brought together in the discounted cash flow model. Based on the traffic and network configuration posited by a shipper in a SAC rate proceeding, the Board seeks to determine the following:

- The tonnages that need to be moved and the associated revenues that will be available to the SARR entrant over the DCF period.
- The operating expenses that will be incurred in moving the posited traffic over the DCF period.
- The network configuration and cost of building the facilities needed to move the projected traffic volumes, which is converted to an annual capital recovery requirement.

[2] Comments of William J. Brennan, Ph.D. (Brennan) at 5, footnote 5. "This position is also consistent with the Board's preference that forecasts, to the maximum extent possible, come from the same source. To the extent that future revenue streams implicitly include a productivity adjustment, so too should the expense stream."

The DCF model combines the annual operating expense with the annual capital recovery and compares the sum to the annual revenue forecast for each year of the DCF period. Forecasts for each component are derived independently and are not linked in any way. For example, the revenue forecast looks at the forecasted trend in rates that will be charged by the incumbent railroads. These rates will reflect market conditions (including competition), costs, capacity and other relevant factors considered by the incumbent railroads in pricing their services and have nothing whatsoever to do with the projected cost structure of a SARR. Similarly, the forecast applied to SARR operating expenses is focused on the specific inflation anticipated for each of the SARR operating expense categories and is unrelated to cost trends for the incumbent railroad. Because the inflation indexes are designed to forecast different elements that are in no way related, Dr. Brennan is wrong in asserting they should be linked.

Second, Dr. Brennan's argument disregards the significant level of productivity beyond that of the incumbent that is already captured in the base year SARR operating expenses. Because the SARR is more efficient than the residual incumbent, it has already captured all of the productivity that it will take the incumbent years to achieve and to pass along to its shippers. As such, to the extent there is any productivity reflected in the index used to forecast future revenues, that productivity reflects the efforts of the incumbent railroads to catch up to the productivity levels enjoyed by a SARR from the first day of its operation. In other words, the SARR receives as a revenue windfall the difference between the productivity reflected in its base year operations and the productivity that the incumbent railroads have yet to achieve and pass along to their customers through reduced rates.

2. WCTL's Argument that the SARR Will Begin to Achieve Additional Productivity at the Outset of Operations is Wrong

WCTL identifies three principal reasons why it believes the Board is wrong to assume that a SARR would not enjoy productivity benefits at the outset of its operations. First, WCTL argues that there are significant sources of productivity that are not asset related and which could be implemented in the first year of operations. Second, the shippers contend that a SARR would upgrade assets when it would improve efficiency and lower costs, which, the shippers allege, could occur immediately after operations start. And, third, they allege that the SARR would be better situated than the industry as a whole to improve its operation beginning as early as the first year. WCTL at 73-74. None of WCTL's assertions ring true when evaluated in the context of the way in which SARR operating expenses are developed and the substantial productivity above that of the incumbent that a SARR enjoys.

a. Productivity Benefits Unrelated to Asset Replacement

In its opening comments, WCTL attempts to separate potential SARR productivity between that associated with the replacement of assets and productivity derived from non-asset related sources. It argues that there are a number of areas in which productivity gains that are unrelated to asset replacement will be available to the SARR even in its first year of operations and lists seven categories of potential improvement. *Id.* at 74-82. As explained below, all of the potential productivity sources identified by WCTL are either unavailable to a SARR or the full benefits of such productivity are already enjoyed by the SARR. I address each category individually.

1. More Efficient Train Sizes. WCTL asserts that, like incumbent railroads, a SARR will increase its train sizes "when it is economically and technically feasible to do so." It offers no timetable, nor is there any suggestion that such a change would or could occur in the first year of SARR operations. WCTL argues that trains are

sized as the incumbents operate them today, but that the history of unit coal train operations in the west has shown a pattern of increasing train sizes. In fact, train sizes have increased historically, but this trend has leveled off in recent years, suggesting that further increases, particularly in the short term, are unlikely. More importantly, however, a SARR is typically designed at inception to accommodate efficiently the train sizes assumed in the operating plan. In this regard, mine leads, storage tracks, yards, passing sidings, interchange tracks and other SARR facilities are sized for the planned train lengths. Further, the facilities of the residual incumbent and those of the originating mine and terminating shipper are also appropriately sized. As such, any change in SARR train size would likely require additional investment to cover the substantial reconfiguration of on-SARR and off-SARR facilities. To date, no party has included in the SAC costs any provision for such incremental investment, and without those investments, the productivity benefits of longer trains could not accrue to a SARR. Indeed, if the proponents of a SARR consider longer trains a substantial benefit, they have the opportunity in developing the peak year operating plan to incorporate the efficiencies of longer trains, provided, however, that they also include the costs of all incremental investment required to effect such a change, both on and off the SARR.

2. More Efficient Train Operating Systems. In this category, WCTL lists ongoing industry research and development initiatives such as new management systems that will dynamically track locomotive performance and alert users to pending maintenance problems, leading to a decrease in costly unplanned locomotive maintenance. While such an initiative will likely benefit existing railroads, it will have absolutely no benefit to a SARR for two reasons. First, the cost of these and other types of cutting edge systems are typically rejected by complainants in SAC cases as unnecessary. Since they find them unnecessary for cost purposes, complainants should not be allowed to assume future benefits from such investments. Second, SARR operating expenses, to date, have not included any additional costs for unscheduled locomotive maintenance. In the SARR world, locomotive maintenance costs are predictable and scheduled. Thus, complainants are not entitled to the benefits of improvements that would lower costs that were never even included in the SAC operating costs.

   WCTL also cites developments in positive train control and GPS tracking systems as ways to improve system usage and run more trains over particular routes. Here again, these developments will certainly help existing, capacity constrained railroads improve efficiency, but the SARR track configuration is designed to accommodate peak period demand. As such, the SARR has no need for, and thus cannot benefit from, techniques designed to increase capacity.

3. More Efficient Maintenance Procedures. WCTL describes several initiatives under development at the AAR that may improve future maintenance practices and reduce costs. Each of the items identified – Rail Profile Maintenance Software to identify areas of high stress, performance-based track geometry

inspection procedures, and rail flaw and broken rail inspection systems – if implemented, appear to trade increased maintenance of way operating expenditures in the form of preventative maintenance in the short term for lower capital expenditures down the road. Because these additional preventative maintenance expenditures are not included in SARR maintenance of way expenses, the SARR is ineligible for these benefits. In addition, unlike real-world railroads, a SARR typically does not incur any research and development expenditures for these new technologies, and, as it is not a member of the AAR and does not explicitly pay AAR dues, would not be in a position to claim the same benefits as dues-paying, cost-sharing members.

4. Increased Labor Productivity. WCTL, with support from witness Caves et al, argues that productivity improvements will be derived from enterprising workers who will somehow find ways to increase system productivity. But, according to complainants in recent cases, the staff of the SARR is already more efficient than real-world railroads. Indeed, WFA, in its recent rebuttal, claimed that any "peer group" comparisons "lead down a false path because the LRR has no peer group to which it can be compared. Unlike any real-world railroads . . . , the LRR is a single-commodity railroad that operates only unit coal trains in high-volume service . . ."[3] Although the SARR is apparently "peerless" when it comes to G&A staffing costs, exhibiting employee productivity far beyond that ever achieved by any Class I railroad, shippers nonetheless assume that the SARR would share again in the productivity that will render incumbent railroads more efficient, effectively double counting productivity.

   WCTL also argues that there will be substantial over capacity in the early years of SARR operations which will lead to increases in system velocity and, according to WCTL, reduce system unit costs. Notably, WCTL does not identify the costs that would be saved. In reality, from a cost perspective increased velocity on the coal-only SARR will result in increases to SARR fuel consumption and, because heavy unit coal trains moving at higher speeds will inflict exponentially more damage on the track structure, substantially increased maintenance costs. As such, higher train speeds will translate into higher, not lower, costs.

5. Traffic-Based Efficiencies. Here WCTL argues that because the costs for train operating personnel and locomotive related costs move up in lock-step with SARR tonnage increases, complainants are missing out on the traffic based productivity improvements that typically occur when changes in outputs increase faster than changes in inputs. In fact, just the opposite occurs in the Board's SAC process. The operating plan for a SARR is developed based on peak year traffic levels, thus capturing all traffic-based efficiencies. Peak year operating statistics are then ratcheted down to base year levels on a pro-rata basis with tonnage. As a result, the SARR enjoys, in the base year, all of the traffic based efficiencies that would not otherwise be achieved until the peak year volumes are met.

[3] Docket No. 42088, WFA/Basin Reb. Nar. at III-D-48.

6. Information Technology ("IT") System Improvements. WCTL claims that IT systems will generate productivity as older systems are replaced with even more efficient systems, as these systems become available. Unfortunately, WCTL misses the mark. Over the years, improvements in IT have resulted in the substitution of technology for human capital. A SARR, however, is staffed with the bare minimum of personnel (and is more likely understaffed), so there is little opportunity for traditional benefits attributable to IT improvements. In addition, IT comprises a very small portion of annual stand-alone costs – typically around one percent. As such, any cost savings or productivity driven by the substitution of more efficient systems is likely to be minute. Finally, it is extremely unlikely that a SARR would begin replacing its IT systems beginning in the first year of operations.

7. Track-Related Efficiencies. WTCL cites a number of studies the AAR is performing to reduce stress on, and increase the operating life of, track and roadbed structure. The initiatives raised by WCTL, like those associated with improved maintenance practices discussed above, would require more in the way of up-front SARR construction cost that is typically spurned by SAC complainants. If a SARR does not invest in the cutting-edge technology required to improve efficiency, it cannot turn around and claim the associated productivity benefits.

b. The Asset Replacement Criteria Set Forth By Shippers Cannot Be Met By A SARR, Particularly in the Early Years of Operation

In its comments, WCTL maintains that a SARR will replace its assets at any time necessary to improve its efficiency, assuming that a net cost savings can be realized. Witness Caves et al expand this argument, stating, "[g]enerally, a firm will invest in new assets if the expected total cost of producing with the new assets is less than the variable costs of producing with existing assets, regardless of the remaining life of the existing assets."[4] While conceptually accurate, from a practical perspective, there are no SARR assets that could satisfy this test, particularly in the early years of SARR operations. If more efficient assets existed, they would be part of the SARR investment cost. If they do

[4] Joint Verified Statement of Douglas W. Caves, Ph.D., B. Kelley Eakin, Ph.D., Mark E. Meitzen, Ph.D., and Philip E. Schoech, Ph.D. (Caves) at 9.

not yet exist, because of the long lead times for research and development of new railroad products, it is extremely unlikely that these new products could be invented and deployed in time to achieve any productivity in the first 10 years of SARR operations.

c. Because It Has Achieved Productivity Greater Than The Railroad Industry as a Whole, A SARR Is Poorly Situated For Additional Productivity Gains

WCTL argues that productivity improvements could occur as early as the first year of SARR operations due to over-capacity in its network produced by sizing the infrastructure to accommodate their peak year traffic. It claims that as a result the SARR would have the flexibility to improve its operations relative to real-world carriers. As I explained previously, the operating plan for a SARR is developed based on peak year traffic levels, thus capturing all traffic based efficiencies. Those efficiencies are carried back to the base year. Excess capacity in the early years of SARR operations will not produce cost saving efficiencies. Because under SAC theory, the SARR's traffic base is defined, and the labor and equipment scaled in each year to match the actual traffic load for that year, there would be no way that it could productively use its overcapacity. A SARR cannot fill the excess capacity with additional traffic, it cannot further reduce staffing or equipment in any year, and it certainly cannot downsize its plant to remove extra capacity as it will need that capacity in the peak year.

3. Shipper Claims That The Average Age of Class I Railroad Assets in Service as of 2002 Was Seven Years is Wrong

In an effort to dispute the Board's conclusion that a SARR will not reach comparability with the railroad industry in terms of productivity until year 20, WCTL asserts that the SARR is much more closely aligned with the railroad industry than the Board allows. To support that argument, it includes an analysis that AEP Texas

submitted in its rate case purportedly showing that, based on R-1 data, the average age of Class I railroad assets in service as of 2002 was only seven years. Caves at 8-9.

The shippers' reliance on R-1 annual report data to develop the average age of existing railroad assets is critically flawed, and produces an average age that is well below the actual physical life of the assets. Shippers calculate the average age of assets from the R-1 by dividing the accumulated depreciation balance for each roadway account by the annual depreciation recorded for each account. In a simplistic world, such a calculation might yield a reasonable estimate of the average asset age. However, railroads are more complex. Changes in annual depreciation rates produced by increased traffic volumes can distort the analysis. In addition, as shippers' experts should be aware, the accounting for recent railroad mergers and changes in the treatment of removal costs have further distorted the relationship between accumulated and annual depreciation charges, rendering efforts to calculate the average age of assets in place from these data sources futile. For example, as part of the purchase accounting adjustment for mergers, the accumulated depreciation for assets acquired is written down to zero. Under the shippers' calculations, such assets would have a useful life equal to their remaining life and would, as such, have an age of zero, even though the assets have been in service for many years.

4. Shippers' Proposal to Align SARR Productivity With The Productivity Anticipated For the Railroad Industry as a Whole Overstates Dramatically The Productivity That Could Be Achieved By a SARR

In their discussion of potential productivity for the SARR, shippers assert that a SARR is very similar to the real world railroad and, as such, should be expected to enjoy the future productivity benefits predicted for the industry. On this basis, WCTL proposes

that the Board should adopt an index that is weighted 50 percent RCAF-U and 50 percent RCAF-A for the first year of SARR operations and transition to 100 percent of the RCAF-A by the tenth year of operations. As I explained in detail in the prior sections of my Verified Statement, because of the manner in which SARR operating expenses are developed, a SARR is vastly more productive than the railroad industry as a whole. There is thus no basis to assume that a SARR would achieve any additional productivity in the early years of its operation, and likely will not achieve any measurable productivity until after year 10 as new technologies emerge and the SARR begins the process of replacing certain of its assets.

In fact, shippers' claims are belied by their prior submissions. In its recent rebuttal evidence, WFA / Basin noted that, "...no currently operating real-world railroad is comparable to a SARR that handles a single commodity exclusively in unit train service."[5] Single commodity unit train service is the most efficient type of movement made by real world railroads. As such, a SARR that handles only unit train operations has already achieved a level of productivity that real world railroads could only dream of.

WCTL offers another alternative for why it believes it is appropriate to begin with an inflation index that is weighted 50 percent RCAF-A. WCTL witness Brennan asserts that the Board has inappropriately used 100% RCAF-U in year one to index operating expenses and that this, "denies a SARR the benefit of *any* productivity improvements in labor, existing capital or purchased services."[6]

Dr. Brennan begins his analysis on the unfounded presumption that the Board concludes that a SARR will not achieve any additional productivity gains in its first year

[5] Docket No. 42088, WFA/Basin Reb. Nar. at I-31.

[6] Brennan at 11.

of operation simply because a SARR cannot be expected to further increase the productivity attributable to its new capital assets. From this erroneous start,[7] he leaps to the bizarre conclusion that SARR operating expenses can somehow be separated between those associated with the railroad's capital base (including fuel consumption) and those that are not, and that the SARR is eligible to share in productivity benefits for those operating expenses he deems to be not associated with the railroad's capital base. He then embarks on an exercise, using R-1 data, to calculate the percentage of *incumbent railroad* operating expenses associated with capital expenditures and materials and supplies. From this he concludes that more than half of railroad operating expenses are not related to capital assets and could be expected to capture normal productivity gains, rendering shippers' proposal to begin with a 50/50 split of RCAF-U, RCAF-A conservative.

As I describe in more detail, Dr. Brennan's "analysis" suffers innumerable flaws which render his conclusion meaningless. Listed below are just a few of the fatal flaws:

- The gist of Dr. Brennan's analysis is that all Class I railroad operating expenses relating to labor, general expenses and purchased services can benefit from improvements in efficiency. While this certainly may be true for real-world Class I carriers because of the myriad of services they provide, the same does not hold true for a SARR, regardless of the expense category, because as discussed above a SARR already captures all available productivity.

- All of the SARR operating expenses are associated either directly or indirectly with the SARR assets, so any attempt to segregate them is meaningless. For example, Dr. Brennan's approach, if translated to a SARR, would suggest that all train and enginemen labor is unrelated to a SARR's assets. Yet, SARR train and

[7] The Board did not assume, as WCTL claims, that all productivity gains come from asset replacement, but simply noted the SARR would not have equal opportunities for productivity gains as real-world railroads, and it gave as an example the fact that the SARR, with its new assets, would have less opportunity to achieve productivity gains from asset replacement than would real-world railroad with a mix of old and new assets.

enginemen productivity are tied directly to the SARR's locomotive assets and track facilities.

- The cost structures of the incumbent railroads are vastly different from those of a SARR. A Class I railroad's system-wide operating expenses will include, among other things, costs for significantly more complex yard operations, switching operations, varied types of transactions and services for multiple heterogeneous customers, and significantly greater marketing costs than those associated with operating the relatively simple SARR network. As there is no rational nexus between the system-wide operating costs of a Class I railroad and those of the much simpler SARR, there is certainly no logical ground for assuming that the percentage of operating expenses associated with assets (as Dr. Brennan calculates them) will be the same on a Class I railroad and on the SARR.

As such, Dr. Brennan's analysis does not in any way support the shippers' assertion that a 50/50 split of RCAF-U and RCAF-A is the appropriate starting point for indexing SARR operating expenses.

III. CHANGING THE DCF PERIOD DOES NOT REQUIRE A CHANGE IN THE PERIOD OVER WHICH DEBT IS AMORTIZED

In his opening Verified Statement, WCTL witness Thomas D. Crowley discusses what he describes as a problem with the Board's proposal to shorten the DCF period from 20 to 10 years. According to Mr. Crowley, the period over which the stand-alone debt is amortized is the same as the DCF period and, if the Board shortens the DCF period, it must also shorten the amortization period for the SARR debt. As an alternative, Mr. Crowley proposes an approach that has been rejected numerous times by this Board and its predecessor the ICC, which is to amortize the SARR debt over the life of the SARR assets. Crowley at 13-14.

There are a number of problems with Mr. Crowley's proposal. The first is that his starting premise – that the debt amortization period is the same as the DCF period – is wrong. As I explained in my opening comments, the DCF period is simply the time period over which the Board compares stand-alone costs to stand-alone revenues in

determining whether or not a challenged rate is reasonable. Other inputs to the DCF, such as the assumed asset lives, the replacement of assets as they are anticipated to wear out, the calculation of Federal and state income taxes, and the amortization of the debt are not tied to the DCF period and, as such, any consideration of substantive changes to such inputs, including the amortization period, are beyond the scope of this proceeding. Moreover, it is clear that this issue is not one "necessitated" by the change in the DCF period, as WCTL asks the Board to make this change in the amortization period *regardless of whether it uses a 10 or 20 year DCF period.* WCTL at 103. Rather, Mr. Crowley's proposal is a rehash of shippers' continued attempts to have the Board change the economically sound and long-accepted practice of amortizing debt over a 20 year period.

The second problem with Mr. Crowley's argument against the current practice is that the 20 year debt amortization period, although coincidentally the same as the 20 year DCF period, was actually the result of a compromise by the ICC as articulated by the ICC Bureau of Economics staff in a September 9, 1991 memo from Howard K. Face, Director, Office of Economics to David M. Konschnik, Director, Office of Proceedings in ICC Docket Nos. 37063 and 38025S *Dayton Power and Light v. Louisville and Nashville Railroad Company.* In that memo, the staff explained that Complainants Dayton Power and Light had argued to lock in the SARR cost of debt at the weighted average of the cost of debt during the SARR construction period, weighted by the amount of investment assumed to occur in each year. In that proceeding, complainants also advocated that the debt be amortized over the expected life of the SARR assets. In addressing the issue, the staff accepted the Complainants' argument that the cost of debt be locked in at the

average of the cost of debt during the construction period, but rejected the argument that the debt be amortized over the life of the asset and instead chose a 20 year debt amortization period. The staff explained that locking in debt would be consistent with an assumption of a 20 year bond with a fixed interest coupon and that Complainants' proposal to amortize debt over the asset life failed to consider the increased risk and higher yield that would be required if the maturity of the debt instruments were extended from 20 years to the average life of the assets. As the staff explains, it is well established that the longer term a bond or debenture has, the higher the risk premium, and, thus, the yield.

Ironically, the same is true of Mr. Crowley's current proposal. Amortization over the life of the assets would result in long term debt with terms exceeding 50 years, which would clearly elicit concerns over the costs associated with greater risk that were addressed by the ICC in *Dayton Power & Light.* In addition, any change to the Board's longstanding practices relating to the debt amortization period would require the evaluation of substantial evidence relating to railroad debt financing practices, the appropriate interest rate assumption, and the relevance of the Board's cost of capital determinations in SAC proceedings.

Third, Mr. Crowley appears to have inadvertently misspoken in his Verified Statement. At page 20 of his statement, Mr. Crowley states that "In order for the STB's proposed 10-year model to produce the same answer as the current 20-year model produces, the STB has to amortize the Table E debt over the life of the asset and not over the life of the model. With this one adjustment, the two models will produce the same answer(assuming all other inputs are the same)." In fact, the only way for the 10-year

model to produce the same answer as the 20-year model produces (for the first 10 years) is for the debt to continue to be amortized over 20 years. The proposed changes to the DCF model set forth in my opening statement will accomplish this, without any need to change the amortization period.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 30, 2006

Michael R. Baranowski

Michael R. Baranowski

Baily

REPLY VERIFIED STATEMENT

OF

MARTIN N. BAILY

I. INTRODUCTION

My name is Martin N. Baily. I am a Senior Fellow at the Institute for International Economics, a position I have held since March, 2001. In addition, I am a Senior Advisor to the McKinsey Global Institute, the economics think-tank of McKinsey & Company, and I am an Academic Advisor to the Congressional Budget Office. Between October, 1994 and August, 1996, I was a member of the President's Council of Economic Advisors; from August 1999 to January 2001, I was Chairman of the Council of Economic Advisors and a member of the President's Cabinet.

My main field of expertise is productivity. I have conducted academic research projects over the course of over 25 years in this field, looking at the sources of productivity growth in the overall economy, in individual industries, and in individual manufacturing establishments. I co-authored *Innovation and the Productivity Crisis,* published by The Brookings Institution in 1988 and I have written numerous journal articles in the field, before and since—see for example articles in the *Review of Economics and Statistics 2001, Brookings Papers on Economic Activity various issues, Journal of Economic Perspectives 2001, 2002, International Productivity Monitor 2006,* in the attached curriculum vitae.

As well as this academic work, I have also been an advisor to a series of studies of U.S. and overseas productivity performance that examine the behavior of individual companies and industries. Most recently, I presented the results of a study of productivity growth in the U.S.

auto industry at the Chicago Federal Reserve's auto conference in Detroit, in April 2006.[1] The focus of my current work is on the revival of U.S. productivity growth, and the effect of the strong dollar on the U.S. economy. In the early 1990s, I participated in two commercial arbitrations in which I studied the causes of improved productivity on the Burlington Northern Railroad Company. My CV is attached as Exhibit__(MNB__1).[2]

I have been asked by BNSF Railway Company ("BNSF") to address the testimony of Caves, et al.[3] Where relevant to the issues I address in *Caves*, I also discuss the comments of William J. Brennan.[4]

Caves concludes

> that "the Coal Shipper's proposal to attribute 50% of RCAF-A productivity gains to the SARR in the first year of the DCF period (i.e., 50% RCAF-A and 50% RCAF-U) and increase this incrementally to 100% of RCAF-A productivity gains after the tenth year is a reasonable proposal. It is based on the structure of the Board's proposal. However, in contrast to the Board's proposal, the Coal Shipper's proposal more accurately reflects the productivity gains the SARR is likely to enjoy immediately as well as the path of the SARR's gains over time." *Caves* at 3.

A close reading of *Caves* reveals that this conclusion does not actually follow from the discussion of productivity contained in the statement. More fundamentally, for the reasons I describe in detail below, I believe these witnesses have substantially overstated the importance of future improvements in productivity in assessing operating costs for a stand-alone railroad

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[1] Available at their website, www.chicagofed.org

[2] This statement reflects my own views as an independent expert. The views do not necessarily represent those of the Institute for International Economics, McKinsey & Company or the Congressional Budget Office and should not be attributed to these organizations.

[3] *See Joint Verified Statement of Douglas W. Caves, P.hD, B. Kelly Eakin, Ph.D., Mark E. Meitzen, Ph.D, and Philip E. Schoech, Ph.D.*, attached to the *Joint Opening Comments of Western Coal Traffic League, Concerned Captive Coal Shippers, Western Fuels Association, Inc., Edison Electric Institute, National Rural electric Cooperative Association, and American Public Power Association* in Ex Parte No. 657 (sub-No. 1), dated May 1, 2006 ("*Caves*").

[4] *See Comments of William J. Brennan, Ph.D.*, attached to the *Joint Opening Comments of Western Coal Traffic League, Concerned Captive Coal Shippers, Western Fuels Association, Inc., Edison Electric Institute, National Rural electric Cooperative Association, and American Public Power Association* in Ex Parte No. 657 (sub-No. 1), dated May 1, 2006 ("*Brennan*").

("SARR") over a multi-year discounted cash flow ("DCF") period. An efficient firm entering the market with new assets, the technology tailored to its operational requirements, and an operating plan reflecting the industry's best practices would begin to experience productivity improvements at some point in the future. But, given its starting point, it is unlikely that that the SARR would experience *any* productivity improvement in the early years of its existence. I understand that the Board is considering the possibility of reducing the DCF period used in its SAC analysis from 20 years to 10. In either case, it would be appropriate to assume that the SARR experiences no productivity improvement during its first 10 years *unless* such improvements can be tied to a specific source of productivity increase that can be identified and evaluated on the evidence.

Caves makes three principal points in an effort to support its conclusions. First it implies that it is futile to try to identify *specific* sources of process improvements that would improve productivity on the SARR (*Caves* at 6-7). Instead, *Caves* suggests that it would be "a more useful exercise" to (1) identify how the SARR differs from the railroad industry generally, (2) examine "qualitatively" whether these differences result from technology that is available to the SARR but not to the industry as a whole, and (3) quantify how much of future productivity gain in industry productivity improvement would be driven by adopting this new technology. *Caves* asserts that all other productivity improvement would be enjoyed by *both* the SARR and the industry. Note that this paradigm *assumes*, without any evidence, (1) that there would be no circumstance in which the SARR would benefit *less* from technological improvements than the real-world industry participants, and (2) that productivity improvements that are not technologically driven would apply equally to both the SARR and the real-world industry participants. As I explain below, both of these implicit assumptions are incorrect.

Second, *Caves* argues that the SARR will have the same access as do real-world railroads to the same pool of human capital and, therefore, can expect to experience the same levels of productivity gain from "the latest innovation and management techniques," which they recognize will lead to productivity improvements in "operations, management practices [and] learning by doing." *Caves* at 8-11.

Third, *Caves* presents evidence to the effect that railroad productivity – which had significantly exceeded economy-wide productivity throughout the 1982 to 2000 time period – seems to be "trending" toward levels that are comparable to those experienced overall in the U.S. economy. *Caves* suggests that this means the railroads have "largely exhausted the productivity gains resulting from deregulation," and asserts as a result that "current railroad productivity is more reflective of economy-wide productivity than of gains from past deregulation." From this line of argument, *Caves* leaps to conclude that "near-future productivity gains by an efficient SARR would also be more reflective of the economy productivity and therefore not much different from gains experienced by an incumbent railroad, or the industry overall." *Caves* at 13-14.

I address each of these three arguments below and show that they do not support the position that a SARR would experience productivity improvement in the early years of its life. Furthermore, it is worth emphasizing that apart from my disagreement with the arguments made by *Caves*, those arguments do not support a conclusion that applying a 50/50 mix of RCAF-A and RCAF-U in Year 1 of a SARR's life, and increasing this mix steadily, year-by-year, to 100% of the RCAF-A by Year 10 of a SARR's life, is appropriate. There is no evidence linking the qualitative comments in *Caves* to the quantitative solution that it advocates.

As a threshold matter, I disagree with the implication in *Caves* that these issues are not amenable to analysis based on evidence. It is important to look at specific sources of potential productivity improvement and to determine whether they would or would not affect a SARR – there is no other valid approach to addressing the issue. It is true, as *Caves* suggests, that these sources of productivity may well be interconnected, but the sources can often be identified and their likelihood and timing evaluated. It is incumbent on those who argue that the SARR would achieve productivity growth in the future to identify the specific sources of productivity improvement, *especially in the early years of a SARR's existence*. In this regard, there is a considerable body of research that bears on these issues (which *Caves* ignores) that demonstrates how unlikely it is that the SARR would achieve significant productivity gains in the early years of its life.

As noted above, *Caves* emphasizes the productivity that would be brought about by advances in information technology ("IT"), citing Board cases that it characterizes as concluding that "there should be no difference between the SARR and incumbent railroads." *Caves* at 106. But this emphasis on the impact of IT on future SARR productivity is overstated. As many companies have found in recent years, merely investing in IT does not guarantee productivity improvements. For example, the U.S. banking industry found that its practice, in the 1990s, of installing high-powered terminals on the desks of bank tellers did nothing to improve the productivity of those tellers.[5] A seminal study on the subject demonstrates that productivity improvements are engendered from IT investments *only* when companies specifically identify process improvements that are *enabled* by these investments.[6]

[5] McKinsey Global Institute, *US Productivity Growth,* McKinsey & Company, Washington DC, 2001.
[6] McKinsey Global Institute, *How It Enables Productivity Growth,* McKinsey & Company, San Francisco, 2002.

In the railroad industry, such process (*i.e.*, best practice) improvements are most likely in complex networks – in which large volumes of heterogeneous transactions must be managed. But it is my understanding that recent SARRs have been relatively simple networks with a defined customer base. The traffic is largely homogeneous – large volume movements of coal to utility plant customers that are handled in continuously cycling unit trains – and much of the complexity of switching, staging and other "hub" operations is left to the incumbent railroad through the use of "cross-over" traffic.[7] In a relatively simple network such as this, the effect of IT investments on productivity improvement is likely to be negligible, even over the longer run. In contrast, if properly implemented, the effect of IT investments on the much more complex networks represented by real-world railroads can be significant, even in the relatively short run where the mix of assets may not be optimal given the mix of traffic.[8]

Of course, technological developments will undoubtedly occur in the future, and the productivity-enhancing benefits of some of those developments will be available to the SARR. But here, too, the evidence strongly suggests that it will take years for new technological developments to have an effect on a SARR that is hypothesized as entering the market *de novo today.*[9] In an example directly on point, the Federal Railroad Administration ("FRA") has noted

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[7] See, for example, *Opening Evidence of Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.* Narrative Volume 1 of 2 (Public Version) at III-D-49 and III-D-50 ("The LRR's IT staff is smaller than the IT staffs of most railroads because the LRR is unique. It handles only trainload movements, which reduces the complexity of computer and communications systems required to support its operations. The computer system requirements of a Class I railroad are very complex due to the large number of customers served, large number of different commodities handled, large number of different origin and destination pairs, different types of railcars required extensive yard operations, and service commitments to most customers on an individual car basis. The LRR has only one local customer, five interchange points, service measurements entirely by train rather than by individual railcars, and trainload billing with the RMI Revenue system used to allocate revenues."). I also understand that where shippers have hypothesized SARRs that handle multiple commodities, the SARR is assured to receive high-speed trains from the incumbent, moves the train directly across the SARR network and hands the train back to the incumbent for subsequent loading. *See*, for example, *Complainant Arizona Electric Power Cooperative, Inc.'s Rebuttal Evidence*, STB Docket No. 42058, Narrative (Public Version) at III-A-20 through III-A-23.

[8] *See* Opening V.S. of Thomas C. Haley, attached to Union Pacific's Opening Comments.

[9] I understand that SARR's do not normally spend money on research and development, nor do they pay the dues required to belong to industry trade associations that are engaged in research and development efforts on behalf of

that only a portion of the technological improvements under consideration will ever be implemented, and that it will take even longer for improvements that are implemented to show up as efficiency gains in the rail industry's operations.[10] The FRA estimates that, overall, it will take 10 years for technology innovations under active consideration today to begin to generate operational efficiencies.[11]

Research has demonstrated that the most significant source of productivity is from existing firms' efforts to implement the best practices of leading firms in their industries. In the automobile industry, for example, the most important source of productivity improvement over the 15-year period from 1987 to 2002 was the adoption of "lean manufacturing" techniques by the "Big Three" U.S. auto makers – a production process developed over many years by Toyota and introduced into the US industry in the early 1980s.[12] Academic research, using U.S. Census data, confirms this for a study of productivity in retailing, which found that *virtually all* of the productivity growth in that industry arose from opening best-practices establishments and closing older ones, rather than from any improvement in best practices themselves.[13]

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their members. As a result, the SARR's postulated by shippers are likely to be late adopters of improved technology. *See* Reply V.S. of Mike Baranowski.

[10] In addressing its on-going R.D&D projects (including efforts with Distributed Power and Positive Train Control) FRA states:

> At best, implementation of the results of only a small portion of the projects described herein will have begun five years from now. Effects of the projects...will begin to show up in railroad safety and efficiency statistics in earnest *ten years from now*. (emphasis added).

[11] Many service companies introduced customer relations software believing it would payoff in productivity and profitability. Only now are they seeing positive results, approximately ten years after early introduction.

[12] James P. Womack, Daniel T. Jones and Daniel Roos, *The Machine that Changed the World: The Story of Lean Production,* New York, Rawson Associates, 1990. McKinsey Global Institute, *Increasing Global Competition and Labor Productivity: Lessons from the US Automotive Industry*, McKinsey & Company, San Francisco, November 2005. General Motors and Toyota formed a joint venture called NUMMI to produce small cars in a former GM plant in Fremont CA. The planning for this venture started in 1982. Ford formed a partnership with Mazda in 1979, when it started to learn about lean manufacturing.

[13] Lucia Foster, John C. Haltiwanger and C.J. Krizan, "The Link Between Aggregate and Micro Productivity Growth: Evidence from Retail Trade," *Working Paper, No. 9120,* National Bureau of Economic Research, Cambridge, MA, August 2002.

The implications of this research for the question at hand are obvious. By definition, the SARR embodies – at its inception – a new state-of-the-art physical plant, current technologies, and a best practice operating plan that are collectively tailored to the traffic that is hypothesized to move over the hypothetical railroad. As a result, productivity improvements that can be expected in the rest of the industry – as it seeks to achieve this level of efficiency today – will not be available to the SARR; and efficiency improvements from changes in technology and/or best practices will take years to emerge before they will "move the dial" on the level of SARR productivity.

Caves makes a passing reference to "learning by doing," and this seems to be the central point of *Brennan.* But a detailed study by the staff of the Bureau of Labor Statistics of railroad productivity growth did not mention learning by doing as a source of growth in the industry in the years between 1958 and 1989.[14] This accords with my own experience studying a variety of industries in different countries, where learning by doing has not been found to be an important source of sustained productivity improvement. Furthermore, to the extent learning by doing might be considered relevant in a SAC analysis, it would seem to cut in a direction inconsistent with that advocated by the shippers. As I understand it, the SARR is hypothesized by shippers to operate efficiently from day one, using the current technology. In practice, of course, any start-up railroad – even if it were employing entirely experienced railroad personnel – would experience a significant "ramp up" period before it would be operating optimally. Thus, if one wants to hypothesize a workforce that is capable of achieving productivity improvements from "learning by doing," one must also accept that such a workforce would have *less* efficient operations in the short term while the SARR personnel "learn the ropes." But the SAC test

[14] John Duke, Diane Litz and Lisa Usher "Multifactor Productivity in Railroad Transportation, *Monthly Labor Review,* August 1992.

allows the complainant to assume the most efficient workforce from the first day of SARR operations. The SARR has already "learned by doing," and the benefits are already reflected in the efficient operations of the SARR from the start. It would double count the productivity that would be available from any "learning by doing" to give additional productivity benefits to a SARR through a productivity adjustment to operating cost inflation.

Finally, the discussion in *Caves* to the effect that the level of railroad productivity improvement seems to be converging on the level of productivity improvement in the U.S. economy as a whole – and the conclusion that, therefore, it would be appropriate to assume this level of productivity improvement for the SARR from day one – seems entirely irrelevant to the question of SARR productivity improvement. Even if the level of productivity in the U.S. rail industry seems recently to have converged on the level of productivity improvement economy wide, there is no reason to expect that these two measures would continue to track in the future. But more fundamentally, given the special circumstances that are embodied in the SARR concept – state-of-the-art assets and a best-practices operating plan tailored to a relatively simple network operation – there is simply no reason to expect that the SARR would experience productivity improvements similar to other, real-world railroads or to the economy as a whole in the first 10 years of its life.

Instead, given that the SARR is assumed to already have the most appropriate technologies operated and managed by best-practice personnel, it is reasonable to assume that there would be no additional productivity improvement in the first 10 years of its life. Those who disagree with this view should bear the burden of identifying the operating changes the SARR would make in its early years, changes that would be considered economically rational.

The quantitative impact on productivity of any such process improvements should also be demonstrated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 26, 2006

Martin N. Baily

Exhibit_(MNB)_1

Martin Neil Baily

Résumé, May 2006

Institute for International Economics
1750 Massachusetts Avenue NW, Washington DC 20036-1207
(202) 328-9000.

At McKinsey & Company 202-662-4332 (asst. 202-662-1121)

Date of Birth: January 13, 1945 Citizenship: U.S. Citizen

Married, four children E-mail: mbaily@iie.com and martin_baily@mckinsey.com

Education:

Cambridge University; majored in economics with a minor in natural sciences. Received first class honors. B.A. 1966 M.A. 1970

Simon Fraser University in Canada; majored in economics and econometrics. M.A. 1968.

Massachusetts Institute of Technology, Ph.D. in economics, 1972.

Principal Positions:

Senior Fellow, Institute for International Economics March 2001-present.

Senior Advisor, McKinsey Global Institute, McKinsey & Company, January 2002-present.

Board of Directors, The Phoenix Companies, Hartford CT, April 2005-present

Academic Advisor, Congressional Budget Office, Spring 2006 to the present.

Associate Editor, *Journal of Economic Perspectives,* December 2005 to the present.

Chairman, President's Council of Economic Advisers, member of President Clinton's Cabinet, August 1999-January 2001.

Principal, McKinsey & Company, Inc., September 1996-August 1999.

External Senior Fellow at the Brookings Institution, 1996-1999.

Member, President's Council of Economic Advisers, October 1994-August 1996.

Professor of Economics at the University of Maryland, 1989 to 1996.

Senior Fellow at the Brookings Institution in Washington, D.C. 1979-89.

Research Associate or Affiliate of the National Bureau of Economic Research, 1978-1998.

Co-Editor of the *Brookings Papers on Economic Activity, Microeconomics*, 1989 to 1999.

Lecturer, University of Nairobi, 1972; Assistant Professor MIT, 1972-73; Assistant and Associate Professor, Yale University, 1973-79; Visiting Professor, Universidad de los Andes, Colombia, 1975.

Other Positions:

Vice-Chairman, panel of the National Research Council/National Academy of Sciences convened to assess the contribution of information technology to performance in service activities, 1991-1993.

Member of a panel convened by the Office of Technology Assessment to evaluate pharmaceutical prices, 1991.

Member of the Brookings Panel on Macroeconomics and Senior Adviser to this panel since 1976.

Research Support:

Research has been funded by The National Science Foundation, The Sloan Foundation and The Ford Foundation, as well as numerous corporate supporters.

Consulting Activities:

Prepared economic analysis for numerous companies, including studies of the tax treatment of R&D for the Council on Research and Technology, a consortium of corporations and universities. Testified as an expert witness in D.C. Superior Court and in arbitration hearings. Worked with McKinsey client teams to provide economic counseling to CEOs and senior management.

Summary of Research Interests:

Developed a theory of implicit labor contracts, an analysis of why wage inflation responds so sluggishly to excess supply in the labor market. Evaluated the impact of unemployment insurance, policies to reduce structural unemployment and the role of monetary and fiscal policy in the stability of the U.S. economy. Since 1979 worked on productivity and innovation in the US and other countries. The impact of labor quality, energy and capital, measurement problems, innovation, the electronics revolution and management quality on U.S. economic performance have been assessed. Completed several studies of individual manufacturing plants. Participated as co-author and member of the leadership team of McKinsey Global Institute studies of service

sector and manufacturing productivity and the employment performance and in a series of country studies. Participated in studies of the globalization of the capital market and of health care. Current work assesses the revival of US productivity growth, and the impact of the strong dollar on the US economy. Completed a book on European reform in September 2004.

Listing of Publications and Papers:

"An Econometric Model of the World Copper Industry," *Bell Journal of Economics*, Fall 1972 (junior author).

"Research and Development Costs and Returns," *Journal of Political Economy*, Jan/Feb 1972.

"Wages and Employment Under Uncertain Demand," *Review of Economic Studies*, January 1974.

"Dynamic Monopsony and Structural Change," *American Economic Review*, June 1975.

"Unemployment and Unemployment Insurance," *Discussion Paper No. 29*, Yale University, December 1974.

"On the Theory of Layoffs and Unemployment," *Econometrica*, July 1977.

"Contract Theory and the Moderation of Inflation by Recession and Controls," *Brookings Papers on Economic Activity, 3:1976.*

"Unemployment Insurance as Insurance for Workers," *Industrial and Labor Relations Review*, July 1977.

"Inflation-Unemployment Consequences of Job Creation Policies," in J. Palmer, ed., *Creating Jobs: Public Employment Programs and Wage Subsidies*, The Brookings Institution, 1978 (with James Tobin).

"The Macroeconomic Impact of Selective Public Employment and Wage Subsidies," *Brookings Papers on Economic Activity, 2:1977* (with James Tobin).

"Stabilization Policy and Private Economic Behavior," *Brookings Papers on Economic Activity, 1:1978.*

"Public Service Employment as Macroeconomic Policy" in *Job Creation Through Public Service Employment*, National Commission for Manpower Policy, March 1978
(with Robert M. Solow).

"Some Issues in Wage and Price Adjustment and Macroeconomic Fluctuations," presented to the NBER Conference on Macroeconomic Fluctuation, Stanford, January 1978.

"Some Aspects of Optimal Unemployment Insurance," *Journal of Public Economics*, December 1978.

"Output and Labor Input in the Short-Run," paper presented to the NBER Economic Fluctuations meeting, July 1979.

Inflation and Social Security Financing, study prepared for the National Commission on Social Security, June 1980.

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"Productivity and the Services of Capital and Labor," *Brookings Papers on Economic Activity, 1:1981.*

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"Innovation and Productivity in U.S. Industry," *Brookings Papers on Economic Activity, 2:1985.*

"Innovation and U.S. Competitiveness," *Brookings Review*, Fall 1985.

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"Productivity and the Electronics Revolution," *Bell Atlantic Quarterly*, Summer 1986.

"What Has Happened to Productivity Growth?" *Science*, November 1986.

"Aging and Ability to Work," in Gary Burtless, ed., *Work, Health, and Income Among the Elderly*, Brookings, 1987.

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Innovation and the Productivity Crisis, The Brookings Institution, 1988 (with A.K. Chakrabarti).

"The Productivity Slowdown, Measurement Errors, and the Explosion of Computer Power," *Brookings Papers on Economic Activity, 2:1988* (with Robert J. Gordon).

"Productivity and American Management," in *American Living Standards: Threats and Challenges*, Brookings Institution, 1988 (with Margaret Blair).

"The Slowdown and Recovery of Productivity Growth in U.S. Manufacturing," paper presented at the Meetings of the American Economics Association, December, 1990 (with Charles Hulten).

"The Productivity of Capital in a Period of Slower Growth," *Brookings Papers on Economic Activity, Micro, 1990*, pp.369-406 (with Charles L. Schultze).

"Great Expectations: PCs and Productivity," in Charles Dunlop and Rob Kling *Computerization and Controversy*, Academic Press, San Diego CA, 1991; second edition 1995.

"Measurement Issues and the Productivity Slowdown in Five Major Industrial Countries," in *Technology and Productivity* ed. G. Bell, Organisation for Economic Cooperation and Development, Paris 1991 (with Robert J. Gordon).

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"Productivity Dynamics in Manufacturing Plants," *Brookings Papers on Economic Activity. Micro: 1992* (with Charles Hulten and David Campbell); reprinted in *Innovation, Evolution of Industry and Economic Growth*, edited by D. Audretsch and S. Klepper; for the *Critical Writings in Economics* series.

Service Sector Productivity, McKinsey Global Institute, Washington, D.C. 1992, Co-author.

"Made in the USA: Productivity and Competitiveness in U.S. Manufacturing," *The Brookings Review*, Winter 1993.

Growth with Equity, The Brookings Institution, 1993, (with Gary Burtless and Robert Litan).

Manufacturing Productivity, McKinsey Global Institute, Washington D.C., 1993 Co-author.

"Competition, Regulation, and Efficiency in Service Industries," *Brookings Papers on Economic Activity: Micro 2:1993*

Employment Performance, McKinsey Global Institute, Washington D.C. 1994, Co-author.

Macroeconomics, Financial Markets and the International Sector, second edition, Richard D. Irwin, 1994, (with Philip Friedman).

"Information Technology: Increasing Productivity in Services," *Academy of Management Executive*, August 1994; (with James Brian Quinn). Selected as the best publication of 1994 on information systems in the journals of the Academy of Management.

"Downsizing and Productivity Growth: Myth or Reality," in David G. Mayes ed. *Sources of Productivity Growth in the 1980s*, Cambridge University Press, 1995, (with Eric Bartelsman and John Haltiwanger); reprinted in *Small Business Economics*.

"Efficiency in Manufacturing and the Nature of Competition," *Brookings Papers on Economic Activity, Microeconomics, 1995*, (with Hans Gersbach).

Economic Report of the President, February 1995, and February 1996, Co-author.

"Trends in Productivity Growth," in *Technology and Growth, Conference Series No. 40,* Federal Reserve Bank of Boston, June 1996.

Removing Barriers to Growth and Employment in France and Germany, McKinsey Global Institute, (Co-author) March 1997.

"Health Care Productivity" *Brookings Papers on Economic Activity, Micro*; with Alan Garber, 1997.

Boosting Dutch Economic Performance, McKinsey Global Institute, Washington, DC, September 1997, Co-author.

Productivity: The Key to an Accelerated Development Path for Brazil, McKinsey Global Institute, Washington, DC, March 1998, Co-author.

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"Extending the East Asian Miracle: Microeconomic Evidence From Korea," *Brookings Papers on Economic Activity, Micro 1998*; with Eric Zitzewitz.

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"Service Sector Productivity Comparisons: Lessons for Measurement," in *New Developments in Productivity Analysis,* edited by Charles Hulten, and Michael Harper, NBER Conference volume, University of Chicago Press, 2001, with Eric Zitzewitz.

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"Macroeconomic Implications of the New Economy," presented at the 2001 symposium Jackson Hole. In *Economic Policy for the Information Economy,* Federal Reserve Bank of Kansas City, 2002.

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"The Year in Review: A Turning Point?" in Peter K. Cornelius, *The Global Competitiveness Report 2002-2003,* World Economic Forum and Oxford University Press, New York and Oxford, 2003.

"Persistent Dollar Swings and the US Economy," in C. Fred Bergsten and John Williamson, *Dollar Overvaluation and the World Economy,* Institute for International Economics, 2003.

"Information Technology and Productivity: Recent Findings," presentation at the American Economics Association, January 2003.

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"Promoting European Growth," The Robert Schuman Lecture, The Lisbon Council, Brussels, October 2003.

"The Year in Review" in *The Global Competitiveness Report 2003-2004,* World Economic Forum and Oxford University Press, New York and Oxford.

"Recent Productivity Growth: The Role of IT and Other Sources of Innovation," Keynote address at the San Francisco Federal Reserve Bank conference on productivity and innovation, November 2003. *Bulletin of the San Francisco Federal Reserve Bank*, 2004.

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"The Impact of Trade on US Job Loss, 2000-03," in *Dollar Adjustment: How Far? Against What?* C. Fred Bergsten and John Williamson eds, Institute for International Economics, November 2004; with Robert Z. Lawrence.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 33

HIGHLY CONFIDENTIAL — BNSF0002691

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 34

COMPETITION IN THE RAILROAD INDUSTRY, EX PARTE NO. 705, JOINT COMMENTS OF ALLIANCE FOR RAIL COMPETITION, ET AL. (FILED APR. 12, 2011)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

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JOINT COMMENTS

of

ALLIANCE FOR RAIL COMPETITION, THE AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, THE CHLORINE INSTITUTE, COLORADO WHEAT ADMINISTRATIVE COMMITTEE, CONSUMERS UNITED FOR RAIL EQUITY, EDISON ELECTRIC INSTITUTE, GLASS PRODUCERS TRANSPORTATION COUNCIL, IDAHO BARLEY COMMISSION, IDAHO WHEAT COMMISSION, KANSAS WHEAT COMMISSION, LARGE PUBLIC POWER COUNCIL, MONTANA FARMERS UNION, MONTANA WHEAT & BARLEY COMMITTEE, NATIONAL GRAIN AND FEED ASSOCIATION, THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, NEBRASKA WHEAT BOARD, OKLAHOMA WHEAT COMMISSION, PORTLAND CEMENT ASSOCIATION, SOUTH DAKOTA WHEAT COMMISSION, TEXAS WHEAT PRODUCERS BOARD, THE FERTILIZER INSTITUTE, U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, AND WASHINGTON GRAIN COMMISSION

Thomas Schick
Senior Director
American Chemistry Council
1300 Wilson Blvd.
Arlington, VA 22209

Scott Stone
Patton, Boggs and Blow
2550 M Street, NW
Washington, DC 20037
Attorney for the American Chemistry Council

Karyn A. Booth
Jeffrey O. Moreno
Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036
Attorneys for The Fertilizer Institute and The National Industrial Transportation League

Paul Donovan
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
Attorney for The Chlorine Institute

Dated: April 12, 2011

In this section, the Interested Parties discuss these areas of law and respond to the questions asked by the Board, including pre-Staggers Act practice, the effect of Staggers, and the issue of whether there are statutory or other legal constraints on the Board's ability to change its policy. These areas of law will be dealt with under the following three headings: (a) Reciprocal Switching Agreements under 49 U.S.C. § 11102(c); (b) Terminal Facilities Access under 49 U.S.C. § 11102(a); and (c) Bottleneck Rates. The Interested Parties believe that, in each case, the Board has wide discretion under the statute to change its policies, and that there are no statutory or other legal constraints that would prevent the Board from changing its current rules and policies.

Of course, even new more pro-competitive policies cannot prevent all abuses of market power because some shippers are too far from a competing railroad to benefit from competitive remedies, and because railroads that could compete do not always do so effectively. For such shippers, the Board must continue, and strengthen, its regulation of unreasonable rail rates and practices.

A. THE BOARD HAS BROAD DISCRETION TO REVISE ITS POLICIES TO ENCOURAGE THE USE OF RECIPROCAL SWITCHING

Current § 11102(c) on reciprocal switching, which was added by section 223 of the Staggers Act,[36] provides that the Board "may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." The language and legislative history of this section indicate that Congress, through this provision, substantially *broadened* the agency's power to establish reciprocal switching arrangements in order to

[36] Section 223 of the Staggers Act added this section as 49 U.S.C. §11103(c). ICC Termination Act of 1995 revised the number to 49 U.S.C. § 11102(c). Unless the context otherwise requires, the statutory provision in 49 U.S.C. added by Section 223 of the Staggers Act will be referred to by its current numbering as 49 U.S.C. § 11102(c).

encourage the development of such arrangements. Ironically, the agency's current rules and precedent, far from advancing that policy and encouraging reciprocal switching, have instead erected insuperable barriers to the use of section 11102(c). Indeed, the Board's policies and precedent are so unfavorable to shippers, that not a single shipper has even *filed* a request for reciprocal switching under the statute since the Board's last pronouncement regarding the standards that it will apply to establish reciprocal switching agreements under section 11102(c), fifteen years ago.

Fortunately, however, the Board is free to change its current policy and practice, since the statutory wording, legislative history and precedent involving § 11102(c) all indicate that the Board has very substantial discretion to determine the conditions under which reciprocal switching may be established. General court precedent also gives agencies, including the Board, substantial discretion to interpret their statute in light of changed conditions and new policies. Moreover, Congress' passage of the ICC Termination Act of 1995 ("ICCTA") does not constrain the agency's discretion. Although the Board need not rely on changes in the transportation market in order to initiate a revision of its policies and precedent in the area of reciprocal switching, in addition to the matters discussed in Sections II and III of these Joint Comments, there have in fact been changed circumstances related specifically to reciprocal switching that warrant a revision to the Board's rules and precedent. Finally, the Interested Parties strongly believe that the broad "practicable and in the public interest" standard cannot and should not be constrained by the "where . . . necessary to provide competitive rail service" standard. In other words, the two standards are independent, alternative tests.

1. The statutory language and legislative history of § 11102(c) indicate that Congress intended the agency to broaden the use of reciprocal switching and that congress gave the agency wide discretion to do so

Prior to the Staggers Act of 1980, the authority of the Interstate Commerce Commission ("ICC") to impose reciprocal switching arrangements upon carriers or to decide the terms and conditions of reciprocal switching arrangements was not clear.[37] In adding a provision on reciprocal switching to the legislation that eventually became the Staggers Act, Congress indicated that reciprocal switching was to be a *pro-competitive* benefit for shippers. The Staggers Act Senate Report noted, for example, that "[i]n areas where reciprocal switching is feasible, it provides an avenue of relief for shippers served by only one railroad where service is inadequate."[38] This same language was repeated by the Staggers Act Conference Committee Report.[39]

The Congress, in clarifying the agency's authority to prescribe reciprocal switching, fully expected the agency to utilize its new power in a pro-competitive manner. The Staggers Act House Report, for example, noted that "[t]he Committee *intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.*"[40] Accordingly, the Conference Committee accepted the slightly broader version of the provision adopted by the House in incorporating section 223 in the bill that eventually became the Staggers Act. Indeed, the Staggers Act Conference Committee Report *specifically* noted that the reciprocal switching agreement provision in the Act, among others, was "included to foster greater competition."[41]

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[37] *See*, S. Rep. No. 96-470, at 42 (1979); H.R. Rep. No. 96-1035, at 67 (1980).
[38] S. Rep. No. 96-470, at 42 (1979).
[39] H.R. Rep. No. 96-1430, at 116 (1980) (Conf. Rep.).
[40] H.R. Rep. No. 96-1035, at 67 (1980) (emphasis added).
[41] H.R. Rep. No. 96-1430, at 80 (1980) (Conf. Rep.). *See also, Central States Enters., Inc. v. ICC*, 780 F.2d 664, 679 (7th Cir. 1985) ("The purpose of the Staggers Act was to encourage, under the appropriate circumstances, but not require, the Commission to approve railroad switching agreements.").

On its face, the wording of the statutory provision gives the agency wide discretion to determine how to provide for broadened reciprocal switching. The language of the provision indicates that the Board "may" require carriers to enter into reciprocal switching arrangements under two standards: (a) where the agency "finds" such agreements to be "practicable and in the public interest"; or (b) where the agency finds that such agreements are "necessary to provide competitive rail service." All of this wording underscores the Board's discretion: the use of the discretionary term "may"; the broad requirement for "findings" determined solely by the Board; the use of the broad "public interest" standard as one alternative to establishing reciprocal switching; and an alternative standard in which the Board could find simply that it is "necessary" to provide competitive rail service.

Congress used the word "may" in this statute to indicate the Board has broad discretion to require reciprocal switching agreements. Courts have noted that the words of section 11102(c) give the agency wide discretion. In *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) ("*Midtec Court Review Decision*"), the court noted the "permissive" language of the reciprocal switching provision as embodied in the use of the word "may," and indicated that the statute "was cast in discretionary terms."[42] More generally, the United States Supreme Court has noted that the use of the term "may" "usually implies some degree of discretion."[43]

Here, the legislative intent behind § 11103(c)(2) and the statutory landscape support the implication that the Board has discretion. First, Congress intended to broaden the Board's regulatory power with § 11102(c)(2), clarifying the Commission's authority to order reciprocal switching[44] and expanding the Commission's ability to "permit and *encourage* reciprocal

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[42] *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1499 (D.C. Cir. 1988).
[43] *United States v. Rodgers*, 461 U.S. 677, 706 (1983).
[44] *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 113 (D.C. Cir. 1987) [hereinafter *BG&E*].

switching as a way to encourage greater competition."[45] Second, the broader purpose of the statutes governing rail transportation — to achieve the goals of the national rail transportation policy[46] — suggests that Board has discretion because it requires the Board to weigh multiple, competing factors when regulating the railroad industry.

Similarly, the "public interest" standard of § 11102(c)(2) invites the Board to use its discretion. Congress did not define "public interest," leaving the definition to the Board. In situations like this — where a statute is silent or ambiguous — the Board has broad discretion to resolve the ambiguity.[47] The only limit on this discretion is that it must "represent[] a reasonable accomodation of the conflicting policies that were committed to the agency's care by the statute."[48] Thus, the D.C. Circuit has upheld Commission determinations of public interest under § 11102(c)(2) that were reasonable in light of the national rail transportation policy.[49] Accordingly, the Board's discretion is reviewed under the broad standard of reasonableness.

Likewise, the same broad standard confines the Board's discretion to determine what is "necessary to provide competitive rail service." Congress directed the Board to determine necessity but did not provide clear guidance. To resolve the ambiguity, the Board may construe the provision in any manner that is reasonable.[50]

The wording of §11102(c) gives no indication beyond the broad "public interest/practicable" and "necessary to provide competitive rail service" standards as to how the reciprocal switching provision is to be construed, nor does the legislative history of §11102(c) give any firm direction. The matter is up to the agency's discretion, within the confines,

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[45] Staggers Act House Report, at 67 (1980) (emphasis added).
[46] 49 U.S.C. § 10101 (establishing the policy of the U.S. in regulating the railroad industry).
[47] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).
[48] *Id.*
[49] *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1501 (D.C. Cir. 1988); *BG&E*, 817 F.2d at 115.
[50] *Chevron*, 467 U.S. at 844.

however, of the pro-competitive purpose of the provision. The Staggers Act Senate Report simply noted that the "practicable and in the public interest" standard was the "same standard the Commission has applied for many years in considering whether to order the joint use of terminal facilities" under current 49 U.S.C. § 11102(a) (then 49 U.S.C. § 11103(a)). As discussed further in Section IV.B. of these Joint Comments, a review of the precedent under the joint use of terminal provisions reveals that the agency's standard had for many years been a broad one.

2. In its decision in *D & H Railway Company*[51] just after the Staggers Act, the Board established reciprocal switching under a broad reading of the statutory provisions, indicating that the Board's current restrictive rules and precedent can be changed

Just six months after the passage of the Staggers Act, the Delaware and Hudson Railway Company ("D&H") filed a petition under the newly-enacted reciprocal switching provisions of 49 U.S.C. 11103(c), seeking the imposition of a reciprocal switching agreement between the D&H and Consolidated Rail Corporation ("Conrail") covering rail service within the city of Philadelphia.[52] In its decision, the ICC noted that relief could be granted under either the "practicable/public interest" test or the "necessary to provide competitive rail service" test.[53]

In determining what is "practicable and in the public interest," the Board noted the broad standard that it had relied on in *Jamestown, N.Y. C. of C. v. Jamestown, W & N. R. R. Co.*, 195 I.C.C.289, 292 (1933) ("*Jamestown*"), and affirmed a finding by the Commission's Review Board that there are four broad criteria for determining whether the proposed switching service is "practicable and in the public interest": (1) the interchange and switching must be feasible; (2) the terminal facilities must be able to accommodate the traffic of both competing carriers; (3) the presence of reciprocal switching must not unduly hamper the ability of either carrier to serve its

[51] *Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement*, 367 I.C.C. 718 (1981)
[52] *Id.*
[53] *Id.* at 720.

shippers; and (4) the benefits to shippers from improved service or reduced rates must outweigh detriments, if any, to either carrier. In *D&H*, the agency found that each of these four tests were met.[54] Significantly, the carrier did not dispute the propriety of the agency's criteria, only the application of the criteria. In determining the "public interest," the agency noted that "[a]dditional rail competition is a clear public benefit from the proposed operation, one which is endorsed by rail transportation policy announced in the Staggers Act."[55]

In finding that the petition met the second alternative test of "necessary to provide competitive rail service," the agency considered only intramodal rail competition in making that determination. In doing so, it rejected Conrail's arguments that the Review Board erred in failing to consider other types of competition in determining whether reciprocal switching was "necessary to provide competitive rail service." Conrail argued that the Review Board's standard would lead to the "unreasonable result that a competing carrier will be able to impose a reciprocal switching agreement on serving carriers in every instance where a particular shipper or group of shippers has access to only one carrier."[56] In rejecting the railroad's argument, the ICC declared:

> We affirm the review board's interpretation of the intramodal analysis under the "necessary competitive rail service" test. The clear language and legislative history of section 11103(c) show that it was Congress' intent that we focus on rail-to-rail competition in determining whether reciprocal switching agreements are necessary to provide competitive rail service. As noted by the [review] board in the prior decision, 366 I.C.C. at p. 854, the Senate Report (S. Rept. 96-470, 96th Cong. 1st sess. (1979) accompanying section 203(b) of Senate Bill S. 1946, the forerunner of what ultimately added section 11103(c), states that:
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> > The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal

[54] *Id.* at 721-725.
[55] *Id.* at 723 (citing the Staggers Act policy to encourage competition).
[56] *Id.* at 727.

> competition and section 203 deals with intramodal competition among railroads.
>
> The [review] board's decision is consistent with the legislative history of section 11103(c).[57]

The ICC further noted that "[t]he reciprocal switching section is concerned with *increasing rail competition by authorizing an increase in the absolute number of rail carriers serving a particular market.* The legislative mandate of section 11103(c) thus requires a narrower (intramodal) focus in determining whether reciprocal switching is necessary to provide 'competitive rail service.'"[58] The agency concluded its analysis in the *D&H* decision by noting that "rail carriers have been given a great deal of flexibility to adjust their rates under the Staggers Act" and the agency was "convinced that Congress' aim in creating section 11103(c) of the Staggers Act was to *provide a competitive counterbalance* to this broadened rate freedom."[59] It buttressed this conviction by quoting the Conference Committee Report on the Staggers Act that "[a] number of provisions are included [in the Staggers Act] *to foster greater competition* by simplifying coordination, minor merger procedures, entry and *reciprocal switching agreements.*"[60]

Thus, three things are abundantly clear in examining the very first decision rendered by the ICC construing its new authority to order reciprocal switching under current § 11102(c): (1) the agency read the language and statutory history of the provision as requiring the agency to *encourage and facilitate* intramodal rail competition through the increased use of reciprocal switching; (2) the agency believed that an extremely broad test – one that would permit

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[57] *Id.*
[58] *Id.* at 728 (emphasis added).
[59] *Id.* at 729 (emphasis added).
[60] *Id.* (first emphasis added and second emphasis in original) (citing H.R. Rept. 96-1430, at 80 (1980)). D&H subsequently sued Conrail under the antitrust laws for monopolization. *See Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990) (reversing a trial court's grant of summary judgment in favor of Conrail).

reciprocal switching to be established in *every* case where a shipper was served by a single rail carrier – was consistent with the words and purpose of the statute; and, (3) the agency has broad authority and discretion to interpret § 11102(c). Thus, the *D&H* decision make abundantly clear that the Board has the authority *now* to change its current rules and precedent — rules and precedent that make it virtually impossible for any shipper to obtain reciprocal switching under the statute. It is to that subject that we now turn.

3. Board precedent construing its Ex Parte No. 445 competitive access rules with respect to reciprocal switching have effectively eliminated the possibility of establishing reciprocal switching under section 11102(c), a result inconsistent with the purpose of section 11102(c)

In the Staggers Act, shippers understood that regulation of railroads was to be curtailed, and instead, to the maximum extent possible, competition was to ensure that rail rates were reasonable. As discussed above, as a partial counterweight to the reduction in the regulatory regime, Congress decided that there should be a broadening of competitive access remedies by inserting new authority for the agency to establish reciprocal switching.

The Board's competitive access rules were promulgated in 1985.[61] Under the Board's rules in Ex Parte No. 445, the Board will establish a reciprocal switching arrangement only where necessary to remedy or prevent acts that are "contrary to the competition policies" of the statute or "otherwise anticompetitive."[62] One year later, the agency issued the first decision construing those rules in response to a request for reciprocal switching, in the case of *Midtec Paper Corp. v. Chicago & North Western Transportation Company*, 3 I.C.C.2d 171 (1986) [herinafter *Midtec*], *aff'd, Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) (herinafter *Midtec Court Review Decision*). Between 1986 and 1996 the agency issued four

[61] See Ex Parte No. 445, *Intramodal Rail Competition*, 1 I.C.C.2d 822, *aff'd sub nom Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 114 (D.C. Cir. 1987).
[62] *See* 49 C.F.R. §1144.5(a)(1)(i).

decisions construing the agency's competitive access rules in response to requests for reciprocal switching or terminal trackage rights: (1) *Midtec*, including the *Midtec Court Review Decision*; (2) *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Railway*, 5 I.C.C.2d 331 (1989); (3) *Shenango, Inc. v. Pittsburgh, C & Y Railway*, 5 I.C.C.2d 995 (1989), *aff'd sub nom. Shenango, Inc. v. ICC*, 904 F.2d 696 (3d Cir. 1990); and, (4) *Golden Cat Division of Ralston Purina Co. v. St. Louis Southwestern Railway*, ICC Docket No. 41550 (served Apr. 25, 1996) ("*Golden Cat*"). In each of these decisions, the agency refused to establish reciprocal switching or terminal trackage rights. More importantly, the precedents set by these decisions have for all practical purposes *eliminated* the availability of relief. Following is a brief review of only some of the statements and principles that have been stated in these decisions, that can be argued to govern reciprocal switching cases.

- The agency's competitive access rules are only intended to correct competitive abuse, only to prevent anticompetitive acts, and not to introduce additional competitive carrier service.[63] Relief is available only where there has been a demonstration of actual or threatened harm.[64]

- Whether or not "abuse" has occurred involves an antitrust-type inquiry.[65] The agency's competitive access rules narrow the agency's discretion under the statute to grant competitive remedies.[66]

- Under the statute, the agency must consider intramodal, intermodal and geographic competition.[67]

- Where the claim is that the carrier's rates are too high, a finding of market dominance is required, and there needs to be an inquiry into rate unreasonableness.[68] However, a finding of market dominance is not sufficient to justify a grant of competitive access.[69]

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[63] *Midtec*, 3 I.C.C.2d at 173-74; *see also, BG&E*, 817 F.2d at 114.
[64] *Vista Chemical*, 5 I.C.C.2d at 342.
[65] *Midtec*, 3 I.C.C.2d at 173-174.
[66] *Vista Chemical*, 5 I.C.C.2d at 335; see also, *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1500 (D.C. Cir. 1988).
[67] *Vista Chemical*, 5 I.C.C.2d at 336; *see also, Midtec Court Review Decision*, 857 F.2d at 1505, 1513.
[68] *Vista Chemical*, 5 I.C.C.2d at 336; see also, *Midtec Court Review Decision*, 857 F.2d at 1507.
[69] *Shenango, Inc. v. Pittsburgh, C & Y Railway*, 5 I.C.C.2d 995, 1001 (1989).

- A complete analysis of rates and costs is required to determine the relative efficiency of a carrier's route.[70]

- Even the charging of rates above Stand-Alone Cost is not a sufficient basis for the grant of competitive trackage rights.[71]

- The determination of whether a "terminal area" exists (a prerequisite to the grant of reciprocal switching or trackage rights) requires a full inquiry into the nature and use of the facility, including switching or classification activities, the activities of other shippers, and other facts.[72]

- To obtain competitive access on the basis of poor service, the fact that the carrier's service is not to the shipper's satisfaction is not enough; service failures have to be severe. The shipper must also demonstrate that the accessing carrier would not interfere with the landlord carrier's ability to handle its own business.[73]

The fact of the matter is that the above precedents currently present insuperable obstacles to a grant of competitive access relief through reciprocal switching. It can be argued that a shipper seeking such relief has to present evidence on: (1) likely or actual antitrust-type competitive abuse, such as market foreclosure, price squeezes, refusal to deal, or monopolization or predation; (2) market dominance, including intermodal, intramodal and geographic competition; (3) rate unreasonableness, including an inquiry into the carrier's costs and SAC; (4) the nature of the carrier's operations in the area to establish that there is a terminal area; and/or (5) severe service failures coupled with a showing that the operations of the carrier against whom relief is sought will not be impaired. Just the discovery requirements to adduce evidence to prove these elements are daunting. And because there has never been a successful case, no shipper can be sure of what, if any, evidence would ever satisfy the standards. In the face of all of this, shippers have been effectively deterred from even attempting to invoke the statutory

[70] *Vista Chemical*, 5 I.C.C.2d at 341.
[71] *Id.*
[72] *Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.*, ICC Docket No. 41550, slip op. at 7-8 (served Apr. 25, 1996).
[73] *Id.* at 9.

remedies. In the past fifteen years, there has not been even a single shipper application for reciprocal switching under § 11102(c).[74]

Although the ICC may have believed at the time that it published the Ex Parte No. 445 (Sub-No. 1) rules that it was simply "narrowing" the availability of relief under 49 U.S.C. § 11102(c), a review of all of the precedent reveals that the agency has, by erecting numerous legal and evidentiary barriers, in fact *foreclosed* any relief whatsoever. This result is fundamentally inconsistent with the purpose of the Congress in promulgating its new reciprocal switching remedy for shippers, and is fundamentally unfair. The Board can and should use the wide discretion given it to change its current rules on reciprocal switching.

4. Court review of the Board's decisions in Ex Parte No.445 and *Midtec* indicate that the Board has wide discretion in the area of reciprocal switching

The Interstate Commerce Commission's decisions in Ex Parte No. 445, *Intramodal Rail Competition,* and in *Midtec* were both appealed to the courts, the former in *BG&E* and the latter in the *Midtec Court Review Decision.* In both cases, the court affirmed the agency's decision. However, in both cases the court made clear that it was affirming the agency's decision *not* because the agency's interpretation was the only one permissible under the statute, but rather because the statute gave the agency discretion, and the agency's exercise of that discretion in the case at hand was properly explained. Thus, the court reviews of the agency's decisions make clear that the agency retains wide discretion under the statute, and that the agency's current policies are not the only ones possible.

In *BG&E*, the petitioner challenged as inconsistent with the statute the agency's decision to establish reciprocal switching arrangements *only* to remedy or prevent "anticompetitive" acts,

[74] Over ten years ago, the U.S. Court of Appeals for the Eighth Circuit noted that "invoking [the competitive access] rules has proved difficult for shippers . . . ." *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1108 (8th Cir. 1999).

as the ICC's Ex Parte No. 445 rules prescribed. The court noted that while BG&E's position might be a reasonable interpretation of the statute (a question the court did not decide), it was not the *only* reasonable interpretation because "the statutory directives under which the ICC operates do not all point in the same direction . . . Our task thus is only to determine whether the ICC has arrived at a reasonable accommodation of the conflicting policies set out in its governing statute . . . ."[75] In coming to that conclusion, the court noted "the Staggers Act's strong emphasis on preserving and enhancing competition . . . ." *Id.* Thus, the court was clear that, while the agency's interpretation of the statute set forth in its Ex Parte No. 445 rules was permissible, the agency might also come to some other permissible interpretation.

The same was true in the *Midtec Court Review Decision.* In that decision, the court noted the "permissive" language and "discretionary terms" of the statute. The court also noted that it would review the agency's "exercise of discretion" by examining whether it had provided a "reasoned analysis that is not manifestly contrary to the purposes of the legislation it administers."[76] The court found only that the agency's interpretation of the statute was a "reasonable accommodation" of the fifteen different and not-entirely-consistent goals of the national rail transportation policy set out in the Staggers Act, and saw "no basis in the text of the statute or in its legislative history for concluding that the Commission acted unreasonably. . . ."[77] Thus, it is abundantly clear that the court in the *Midtec Court Review Decision*, like the court in *BG&E*, recognized that §11102(c) did not mandate one result, but rather gave the agency wide discretion to interpret the provision in light of current circumstances and the need to weigh and balance the policies of the Act at a particular time. Thus, it is also abundantly clear from these court decisions specifically reviewing the agency's authority under §11102(c) that any future

[75] *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 115 (D.C. Cir. 1987).
[76] *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1500 (D.C. Cir. 1988)
[77] *Id.* at 1501.

court, in reviewing any future change to the agency's rules and precedent on reciprocal switching, would review any such action under the same broad parameters.

5. In Ex Parte No. 575, the Board recognized that it had discretion to change its rules

As the Board's Notice indicates, Ex Parte No. 705 is not the first time that the Board has reviewed these issues. Specifically, the Board took extensive testimony and oral comments thirteen years ago, in Ex Parte No. 575, *Review of Rail Access in Competition Issues,* 3 S.T.B. 92 (1998) ("*Ex Parte No. 575 Decision*"). At the end of the proceeding, the Board noted that

> [T]he railroads have not satisfactorily addressed the shippers' basic complaints: that the rail industry has changed dramatically since 1980 as a result of significant railroad consolidations, system rationalizations, and greater carrier pricing flexibility and routing discretion. Although these changes have contributed to the efficiencies, cost savings, and improved earnings necessary to sustain the industry, cumulative the result has been a significantly more consolidated industry in which competitive options for rail-dependent shippers have not been expanded. This increasing consolidation within the industry, combined with the difficulties that many shippers perceive in obtaining relief through the regulatory system, leave too many shippers feeling that they have no leverage and no avenue of relief.[78]

Although ultimately the Board did not take action on the competitive access issues outlined in Ex Parte No. 575 (alternative through routes and bottlenecks, reciprocal switching, and terminal trackage rights),[79] the Board's observations about the negative effects of consolidation and constraints on competition are, for all of the reasons already mentioned, of more pressing concern today than they were thirteen years ago.

The Board's decision in Ex Parte No. 575 made clear that the Board believed that it had discretion to change its rules. The Board, for example, gave *no* indication that it believed that it was constrained by the statute from changing its policies in the three competitive access areas

[78] *Ex Parte No. 575 Decision*, 3 S.T.B. at 95.
[79] *See Ex Parte No. 575 Decision*, 3 S.T.B. at 97

that it discussed. On the contrary, the Board indicated that, "[t]o ensure that our procedures are effective in addressing needed service improvements, we will expeditiously begin a rulemaking proceeding to consider revisions to the competitive access regulations to address quality of service issues."[80] In addition, the Board indicated that "[g]iven the changes that have taken place in the rail industry since 1980, we will also consider whether to revise the competitive access rules with respect to competitive issues not related to quality of service."[81] The Board directed the railroads to arrange meetings with a broad range of shipper interests to explore the issue and see if the parties can mutually identify appropriate modifications to the non-service related component of the Board's competitive access standards that would "facilitate greater access where needed." The Board gave *no* indication that the statute would constrain changes in Board rules or policies or that the "meetings" would thus be restricted to statutory changes — indeed, the direct implication was that the Board would itself directly consider any changes recommended. Though nothing came of these discussions and the Board declined to go forward,[82] it was clear that the Board believed in 1998 that it had discretion to change its rules and policies.

6. Changed circumstance particularly warrant a revision to the Board's rules and precedent on reciprocal switching

As noted above, thirteen years ago, in Ex Parte No. 575, the Board declared that the railroads "have not satisfactorily addressed the shippers' basic complaints: that the rail industry has changed dramatically since 1980 as a result of significant railroad consolidations, system

[80] *Id.* at 98.
[81] *Id.*
[82] In a December 1998 letter to Congress, the STB reviewed its efforts in Ex Parte No. 575 and indicated that it would not reopen its competitive access rules because it believed that such a policy shift should be initiated by Congress rather than the agency. However, the agency's decision not to reopen was clearly made not because it believed that it did not have the statutory power to do so, but for reasons of comity and national policy.

rationalizations, and greater carrier pricing and routing discretion."[83] In the thirteen years since the Board's decision in 1998, there have been further changes in the industry, many of which have been discussed in Section II and III of these comments and which the Board has already noted in its Notice initiating this proceeding.[84] In addition, a few other changed circumstances should be discussed, pertaining specifically to reciprocal switching. Together with the changes already mentioned, such circumstances clearly warrant a revision to the Board's rules on reciprocal switching.

a. Capacity constraints in the rail industry particularly justify a reexamination of the Board's rules on reciprocal switching

There have been increasing concerns that the U.S. rail system is becoming or will soon become increasingly congested and may find it increasingly difficult to handle substantially increased volumes of traffic in the future, at least assuming that traffic rebounds from recession-induced volume reductions. According to the Department of Transportation, between 2010 and 2035, the U.S. transportation system will experience a 22 percent increase in the total tonnage that it moves, a result of population growth.[85] There is no question that traffic density on the U.S. rail system has increased very substantially since passage of the Staggers Act. According to the AAR, revenue ton-miles per owned mile of track has more than tripled since 1980, from 3.40 million ton-miles per owned mile of track to 11.06 million ton-miles per owned mile of track in

[83] *Ex Parte No. 575 Decision*, 3 S.T.B. at 95.
[84] *Competition in the Railroad Industry*, STB Ex Parte No. 705 at 3 (served Jan. 11., 2011).
[85] FRA, Dep't of Transp., *National Rail Plan* 6 (2010). It should be noted, however, that the Board-requested "Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment – Final Report," by Laurits R. Christensen Associates, Inc., March 2009 ["Christensen Capacity Report"], cautions that such long-term forecasts "should not be viewed as having a high degree of precision." *Id.*, at ES-4. Moreover, the Christensen Capacity Report cautions that DOT forecasts very high demand growth compared to current production forecasts from the Department of Energy and the Department of Agriculture for coal, petroleum products and grains, which are key components of the railroads' traffic mix. *See*, Christensen Capacity Report, at 5-1.

2008.[86] A recent study by RAND Supply Chain Policy Center ("Rand Study"), noted that "[r]ail traffic density may continue to increase, allowing for further productivity improvements, but recent indications that rates are rising suggest that it is possible that, at least in the near future, rail volumes may be approaching capacity."[87] The RAND Study also noted that current research from the finance industry suggests that rail rates have begun to increase by as much as 30 percent for some customers,[88] and indicated that several recent studies "strongly support the hypothesis that railroad prices are increasing rapidly."[89] As previously noted, DOT itself has indicated that between 2001 and 2008, rail rates increased over 25% in inflation-adjusted terms.[90] The RAND Study suggested that rail traffic density may now have increased to a level that could indicate that the rail industry, which is "clearly a natural monopoly," is facing capacity constraints.[91] The RAND Study also indicated that publicly available data suggests that decade-long improvements in rail speed and reliability "may be slowing or reversing,"[92] and that one study has noted that rail productivity metrics indicate that the rate of productivity increases in the rail industry began to decline in 2004.[93]

To the extent that the rail system is experiencing or will soon experience certain capacity constraints, particularly those constraints resulting from operations at specific choke points in the rail system, the increased use of reciprocal switching could provide additional efficiencies. Under the current system, if a shipper is served by a single rail carrier, even if another rail carrier is close by with an equally or even more-efficient routing from origin to destination, the shipper

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[86] Ass'n of Am. R.Rs., *Railroad Facts* 42 (2010). In 2009, revenue ton-miles per owned mile of track declined for the first time in 30 years because of the traffic reductions caused by the 2008-2009 recession.
[87] Brian A. Weatherford et al., *The State of U.S. Railroads – A Review of Capacity and Performance Data* 4 (2008) [herinafter *RAND Study*].
[88] *Id.*
[89] *Id.* at 37.
[90] FRA, *supra* note 85, at 15.
[91] *Rand Study*, *supra* note 87, at 23.
[92] *Id.* at xi.
[93] *Id.* at 38.

is effectively unable to access the other rail carrier because of the extremely high barriers erected as a result of the agency's precedent. However, under a broader reciprocal switching regime, the shipper would be able to access a choice of carriers. If the incumbent's route were the more efficient of the two overall, competition would presumably permit the incumbent to retain the traffic, to the benefit of overall system efficiency and productivity. But in a broader reciprocal switching regime, if the competitive rail carrier's route were the more efficient, competition (assuming a competitive reciprocal switching charge) would permit the shipper to access the more efficient route. Under such a regime, system capacity would be maximized.

b. The Christensen Report confirms that a broadening of reciprocal switching would not harm the railroads' financial health

In its Notice in this proceeding, the Board took note that it had recently commissioned Christensen Associates, Inc. to perform an independent study to examine competitive access issues ("Christensen Competition Report").[94] The Christensen Competition Report noted that, for open-access policies to produce an overall gain in economic welfare, "the effects of lower prices to shippers, increased output, and/or increased service quality due to competitive pressures must outweigh any increase in railroad costs. Furthermore, . . . the economic assessment of the likely effects of these proposals must include the impacts on railroad profitability and investment incentives."[95] The Christensen Competition Report went on to present a summary of the likely economic effects of various competitive access proposals, including reciprocal switching.[96] The Christensen Competition Report noted:

> Of the various open-access policies proposed in recent legislation, those policies that propose incremental changes – *e.g., reciprocal*

[94] See, Lauritis R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition* (2009), http://www.lrca.com/projects/railroadstudy/ [hereinafter *Christensen Competition Report*].
[95] 3 *Id.* at 22-12.
[96] *Id.* at 22-13.

> *switching and terminal agreements – will be the least costly in terms of loss of economic efficiency and, in our opinion, the most likely to produce competitive responses by railroads.* The losses of economies of density and vertical integration, and the likely negative impact on incumbent investment incentives, are among the economic efficiency costs that must be weighed against any potential gains. Of course, to the extent that competitive responses result and traffic increases, static efficiency losses may be overcome – e.g., there would be a likely gain in economies of density if volumes increase.
>
> . . . .
>
> *[I]ncremental policies such as reciprocal switching . . . are most likely to produce an outcome of increased railroad competition as length-of-haul economies are least affected by end-point open access.*[97]

Table 22-1 summarized the Christensen Competition Report's conclusions by indicating that, reciprocal switching would likely result in "potential gains" with respect to economies of density; would produce only "small losses" or "small effects" with respect to length of haul economies, investment incentives, railroad profitability, and coordination costs; would "most likely" result in competitive responses by carriers; and would "most likely" produce shipper gains. The Report's overall conclusions on reciprocal switching were significant: "[w]e believe that incremental policies such as reciprocal switching and terminal agreements *have a lower potential of leading to adverse changes to industry structure, costs, and operations, and additionally have greater likelihoods of resolving shipper concerns via competitive market responses.*"[98]

7. Under general court precedent, the Board has the broad discretion and wide legal authority to revise its rules on reciprocal switching

As the Board well knows, the law does not require regulations and precedent to remain set in concrete forever. Administrative agencies are permitted to change their policies and reverse prior conclusions as long as the statute permits such discretion and as long as the

[97] *Id.* (emphasis added).
[98] *Id.* at 22-14 (emphasis added).

agencies explain themselves adequately.[99] Indeed, an agency's view of what is in the public interest may change, with or without a change in circumstances.[100] But the agency must supply a reasoned analysis to support its change. *Id.*

As noted by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863 (1984), an agency interpretation "is not instantly carved in stone." The Board may change its policies, to the extent that the Interstate Commerce Act permits, so long as it acknowledges its prior policy and provides a reasoned basis for the changed policy.[101] Thus, if the STB concludes that circumstances now require a different accommodation of the conflicting goals of the National Transportation Policy, that new interpretation will also enjoy the deference of the courts under the *Chevron* doctrine, as long as the new interpretation is also a reasonable reading of the statute and the agency adequately explains the reason for its change.

The fact that the Congress passed ICCTA in 1995 does not change this conclusion. ICCTA was intended not to make substantive changes to the Interstate Commerce Act (with a few explicit exceptions). The Board should not be dissuaded from amending its policies because of changed circumstances or because it believes that a different policy response is required. Indeed, the Board has changed pre-ICCTA policies after ICCTA, despite the passage of the Act. For example, when the Board concluded in 1999 that it should alter its "market dominance" rules to exclude "product and geographic competition" in most circumstances, it did so despite the fact that its prior decision including product and geographic competition long pre-dated ICCTA, and

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[99] *Motor Vehicle Mfr's Ass'n v. State Farm*, 463 U.S. 29, 42, 57 (1983).

[100] *Id.* at 58; *see also, BNSF Railway v. STB*, 526 F.3d 770, 779-80 (D.C. Cir. 2008) (holding that the STB may change how it implements it statutory duties with or without a change in circumstances).

[101] See, *e.g.*, *FCC v. Fox*, 129 S. Ct. 1800, 1811 (2009) (holding that to change its position, an agency must show that: (1) the new policy is permissible under the statute; (2) good reasons exist for the policy; and (3) the agency believes the new policy is better); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

its new policy post-dated ICCTA.[102] This decision was affirmed by the D.C. Circuit, which analyzed the decision under the familiar deferential standard of *Chevron*.[103] The same principle applies here: regardless of the passage of ICCTA, the Board has wide discretion to interpret the standards under which it will establish reciprocal switching under 49 U.S.C. § 11102(c).

8. It would be unlawful and contrary to Congressional intent to constrain the "practicable and in the public interest" standard by the "necessary to provide competitive rail service" standard

In its Notice directed to 49 U.S.C. § 11102(c), the Board asked the parties in particular to address "whether the broad 'practicable and in the public interest' standard in the statute should be constrained by the provision permitting relief "where . . . necessary to provide competitive rail service." The Interested Parties believe that the statute is clear, that these are alternative and independent tests, and that it would be unlawful to constrain the former by the latter.

At the outset, it should be noted that it is not at all clear that the "necessary" test is narrower than the "practicable/public interest" test. Indeed, it could be argued that the latter is broader (i.e., more permissive) than the former. But without getting into a metaphysical discussion as to which test is "broader," it is very clear from both the wording of the statute and the Board's own precedent that these are *alternative* and *independent* tests. The statutory wording is clearly in the alternative: "[t]he Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, *or* where such agreements are necessary to provide competitive rail service."[104] If Congress had

[102] *See Mkt. Dominance Determinations – Prod. & Geographic Competition*, 3 S.T.B. 937 (1998).
[103] *Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108 (D.C. Cir. 2002).
[104] 49 U.S.C. § 11102(c) (emphasis added).

intended the former to be constrained by the latter, it would have chosen statutory language to indicate such an intent.[105]

Moreover, the legislative history also makes clear that these are alternative and independent tests. As noted in Section IV.A.1 and 2, above, the Staggers Act Senate Report noted that the "practicable and in the public interest" standard was the "same standard the Commission [had] applied for many years in considering whether to order the joint use of terminal facilities" under current 49 U.S.C. § 11102(a) (then 49 U.S.C. § 11103(a)). The addition of the "necessary" standard was new, and was clearly intended to provide an alternative to the traditional "practicable/public interest" test that had previously been applied by the agency in the terminal trackage rights context. For the Board to condition the one by the other would therefore violate both the statutory wording and the Congressional intent.

B. THE BOARD HAS WIDE DISCRETION TO ESTABLISH TERMINAL TRACKAGE RIGHTS UNDER SECTION 11102(a)

For many of the same reasons discussed at length in the previous section — the use of the word "may," the need for the Board to issue findings determined solely by it; the use of the broad "practical/public interest" standard, and the general broad standard used by the courts in reviewing agency actions — the Board has wide discretion to establish terminal trackage rights under 49 U.S.C. § 11102(a). Admittedly, the statutory provision granting the Board the authority to order terminal trackage rights is more demanding than the statutory provision authorizing the Board to order reciprocal switching. Under the terminal trackage rights provision of § 11102(a), the agency is required to find not only that the trackage rights are "practicable and in the public

[105] For example, the statute could have used the word "and" in place of the "or"; or could have been worded to permit the Board to require rail carriers to enter into reciprocal switching agreements where it finds such agreements to be practicable and in the public interest, but *provided that* the Board finds that such agreements were necessary to provide competitive rail service. But wording such as "provided," "unless," "on the condition that," etc., were *not* chosen, indicating clearly that Congress intended the tests to be alternative and independent.

interest," but that the trackage rights would not "substantially impair[] the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business." This reflects the more invasive nature of trackage rights compared to reciprocal switching.

Nevertheless, a review of precedent under the joint use of terminal provisions confirms that the agency's standard had for many years been a broad one, giving the agency wide discretion. For example, in *Jamestown*, the agency exercised its authority to order joint use of terminal facilities when it found that such use would be in the public interest, would be practicable, and would not substantially impair the carrier owning or entitled to enjoyment of the facilities to handle its own business. [106] In cases before the Staggers Act, the Commission identified the components of the public interest standard for ordering the joint use of terminal facilities. When making a public interest determination, the agency considered the interest of the shippers involved, carriers, and the general public.[107] Two prerequisites existed to finding public interest. First, there needed to be an actual necessity or compelling reason for the joint terminal use.[108] Mere desirability or convenience was insufficient.[109] Second, existing service needed to be inadequate.[110] In addition, the Commission identified a number of factors that would inform a public interest determination, such as: (1) the financial consequence to the carriers involved;[111] (2) the disparity between the traffic gained by the carrier gaining the use and the traffic lost by the carrier providing the use; and (3) the inconveniences that may result to the shipping and traveling public in general.[112] However, these factors were themselves extremely general, and

[106] *Jamestown, N.Y. C. of C. v. Jamestown, W & N. R. R. Co.*, 195 I.C.C. 289, 292 (1933).
[107] *Id.*
[108] *Id.*
[109] *Mfrs. Assoc. of York, PA. v. Pa. R.R.*, 73 I.C.C. 40, 50. (1922).
[110] *Id.* at 49.
[111] *Hastings Commercial Club v. Chicago, Milwaukee & St. Paul Rwy.*, 107 I.C.C. 208, 216 (1926)
[112] *Id.*

gave the agency wide discretion in interpreting them. It is clear, then, the agency exercised considerable discretion in making a public interest determination under 49 U.S.C. § 11102(a).

C. THE BOARD HAS BROAD DISCRETION TO CHANGE ITS POLICIES WITH RESPECT TO BOTTLENECK RATES

For the same reasons that adopting revised policies on reciprocal switching and use of terminal facilities is well within the Board's statutory authority, the Board also has broad discretion to revise its outdated bottleneck rate policy. Indeed, ICCTA entitles a shipper to a common carrier rate upon reasonable request. But, in the so-called "Bottleneck Decisions," the Board permitted a railroad to refuse to quote a bottleneck segment rate, even if a bottleneck rate would facilitate rail-to-rail competition for most of the distance between the origin and destination.[113]

The Board's "Bottleneck Decisions" facilitate conscious parallelism and should be reversed by the Board to allow for additional rail–to-rail competition. A shipper seeking a bottleneck rate from an origin to a destination served by the same carrier will almost always be rebuffed or have the quoted rate limited to a local movement with no combination rate beyond allowed. The purpose of such a refusal is obvious; the carrier forecloses the possible competition offered by a connecting carrier at the interchange point. Today, where there are so few competitive choices, the ability of a railroad to refuse to quote a bottleneck rate to an interchange point makes rail-to-rail competition virtually impossible. The current bottleneck doctrine is an anachronism that would not be tolerated in any other industry. (See Section VII, below, for a discussion of how reasonable access is maintained in telecommunications deregulation.)

It is clearly reasonable, in general, for a shipper to request a common carrier bottleneck rate to a point of interchange that would lead to a routing that, because of the non-bottleneck

[113] *Cent. Power & Light Co. v. S. Pac. R.R.*, 1 S.T.B. 1059 (1996), *clarified by Cent. Power & Light Co. v. S. Pac. R.R.*, 2 S.T.B. 235 (1997), *aff'd in part, MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

carrier, is more efficient or otherwise more commercially advantageous to the shipper.[114] It defies common sense, and the pro-competitive purposes of the Staggers Act, to say that a carrier's common carrier obligation does not apply when it would require the carrier to compete with another carrier.[115]

The Supreme Court's decision in *Great Northern Railway v. Sullivan*, 294 U.S. 458 (1935), is not an obstacle to overturning the Board's "Bottleneck Decisions" for three reasons. First, *Great Northern* did not involve a request for a "bottleneck rate," but rather an effort at challenging the "divisions" between two railroads participating in the same joint rate. Second, the Staggers Act was enacted long after *Great Northern* was decided, and adopted a "pro-competitive" rail transportation policy. The "bottleneck" rule prevents, rather than promotes, rail-to-rail competition, and so is inconsistent with the Staggers Act. Third, the Eighth Circuit's decision affirming the Board's "Bottleneck Decisions" held that the existing statute was ambiguous, and deferred to the STB's reasonable interpretation of the statute. The Court's language implied that it would have affirmed a contrary reading, *i.e.*, that the existing statute requires railroads to quote "bottleneck rates."[116]

The lack of a "bottleneck" rate deprives shippers of the ability to benefit from competition where it already exists, and it also deprives them in many cases of the most efficient routes. Instead, shippers are forced to rely heavily upon regulation to ensure reasonable rates for the entire movement from origin to destination, including the competitive segments, or to forego any regulatory constraint at all due to the cost and complexity of bringing such extensive rate

[114] Exceptional situations, in which there is a dispute whether the shipper's chosen point of interchange is feasible or otherwise reasonable, can be dealt with on a case-by-case basis.

[115] 49 U.S.C. § 10705(a)(2), the "long-haul, short-haul" provision, which the Board cited in its "bottleneck rate" decision, is not to the contrary. It clearly provides the Board with discretion to require railroads to participate in through rates (or, as the railroads are fond of putting, to "short-haul themselves."). *See supra* note 45.

[116] *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1107 (8th Cir.) ("Regardless of how we would resolve the tension in the Act if we were to independently rule on the utilities' claims, we cannot say that the Board's interpretation was incorrect."), *cert. denied*, 528 U.S. 950 (1999).

cases. Shippers should be entitled to competition, because that was the promise of the Staggers Act. And shippers should certainly be entitled to efficient transportation; that has been the law since 1887.[117]

It follows that the Board should overturn its "bottleneck" rate rule, and may do so as a reasonable interpretation of the existing statute, based on the Eighth Circuit's determination that the statute is ambiguous and because the Board is entitled to deference in construing such provisions.[118]

V. CHANGES TO THE BOARD'S COMPETITION RULES AND PRECEDENT WOULD ASSIST THE U.S. ECONOMY

The Board should consider of the utmost importance the question whether railroad rates and other charges have been increased to such an extent that they are now clearly harming the U.S. economy, in any number of ways. Set out below are examples of the widespread harm to the U.S. economy that high rail rates and poor railroad service cause.

Competition with Foreign Interests. U.S. railroads do not compete with railroads in China, India, Europe, or any other part of the world economy — but most of their customers, especially grain, chemical, clay, and other manufacturing interests, compete with grain, chemical, clay and manufacturing interests in those countries. Therefore, almost every time a rail customer is charged an excessive rate, it hurts American industry's ability to compete with China and other foreign countries and the industries in those countries. Even where rail customers, such as electricity generators, do not compete with foreign entities,[119] American

[117] *E.g., Consolidated Rail Corp. v. United States,* 646 F.2d 642 (D.C. Cir.), *cert. denied,* 454 U.S. 1047 (1981); *Akron, Canton & Youngstown R.R. v. ICC,* 611 F.2d 1162 (6th Cir. 1979), *cert. denied,* 449 U.S. 830 (1980).
[118] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).
[119] There is a limited amount of electricity that moves across the U.S.-Canadian border, depending on availability and price. Similarly, there is a limited amount of competition between U.S. and Canadian railroads. Neither circumstance is significant enough to affect the overall picture in most markets, given that rail lines and electricity transmission lines are typically not located in ways that promote competition between the United States and Canada.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

HYNES V.S. EXHIBIT 35

CONFIDENTIAL - BRIEF FOR RESPONDENT NITL IN SUPPORT OF PETITIONER FILED WITH THE UNITED STATES SUPREME COURT IN WESTERN COAL TRAFFIC LEAGUE V. SURFACE TRANSPORTATION BOARD, ET AL. (NO. 99-135) ON AUGUST 9, 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 37

EX PARTE NO. 711 (SUB-NO. 1), U.S. WHEAT ASSOCIATES TESTIMONY (FILED FEB. 14, 2022)

REDACTED PUBLIC RECORD VERSION

ENTERED
Office of Proceedings
February 14, 2022
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

U.S. WHEAT ASSOCIATES TESTIMONY

U.S. Wheat Associates ("USWA") respectfully submits its testimony in the above-captioned proceeding in accordance with the Surface Transportation Board ("STB" or "Board") Notice of Public Hearing ("Notice") served on December 28, 2021. The Board provided the opportunity for interested parties to provide testimony to update the record in this proceeding regarding its proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish reciprocal switching arrangements under certain circumstances. USWA thanks the Board for this opportunity to voice its strong support for these proposed new rules for reciprocal switching made even more necessary now by the changes in the rail industry since early 2017.

USWA INTEREST IN THE PROPOSED RULES

USWA is the export market development organization for the U.S. wheat industry. USWA promotes the reliability, quality, and value of all six U.S. wheat classes to wheat buyers, millers, bakers, food processors, and government officials in more than 100 countries around the

world. Its mission is to "develop, maintain, and expand international markets to enhance wheat's profitability for U.S. wheat producers and its value for their customers." Funding is made possible through checkoff dollars, goods and services from 17 state wheat commissions, and cost-share grants from the U.S. Department of Agriculture's Foreign Agricultural Service.

USWA created an internal Transportation Working Group ("TWG") in 2018 after the realization that increasing rail rates were having a large impact on the wheat industry's export competitiveness. TWG is a working group with USWA that examines rail and other transportation issues on behalf of these member Commissions. Wheat is heavily reliant first on exports, exporting on average half of all US production, and second on rail transportation to move this commodity across the U.S. to feed the world. Rail rates have a disparate impact on wheat shippers vis a vis other bulk US commodities due to the large percentage of production that is exported and the major growing regions that are not generally adjacent to the Mississippi waterways. Distances from the central and northern plains wheat producing areas are far too great to truck wheat to export facilities, making railroads a crucial and irreplaceable link in the wheat export logistics chain.

The results of this increased dependance on rail for the movement of wheat exports have been clear. Over the last decade, rail rates have increased exponentially, and wheat continues to be charged higher rates than other commodities with similar handling characteristics – even for identical hauls. In work conducted by the TWG in 2020, quotes for rail service were collected from grain shippers for major US grain crops. These price indications were for the same origin/destination pairings and for the same dates of service. They documented a premium of between 22% and 39% for wheat movements compared to corn in four major regions. These

results were corroborated by a June 2017 study by the U.S. Department of Agriculture's Agricultural Marketing Service which was able to find no underlying cause driving the increases in wheat rates. These premiums relative to these other commodities clearly demonstrate the current market power of the Class I railroads and the lack of any serious competition afforded to wheat shippers.

That unchecked market power has had serious implications for U.S. wheat's competitive position vis a vis other major world exporters, such as Canada. The Canadian comparison is particularly telling as the two spring wheat and durum growing regions are similarly positioned in the interior of each country, with nearly identical distances to traverse to export facilities in each country, with differing government rail policies (including more favorable terms for reciprocal switching) being one of the only large differences in market position. However, despite the similarities, work collected by one of USWA's member states showed similar origin to export point rail moves in Canada were 30% below the US moves at the time.

As has been demonstrated, wheat rail shippers have been adversely impacted by the lack of any options to obtain competitive rail access. Under the current process for the reciprocal switching remedy, wheat shippers do not bring forward cases and are often forced to modify operations to their detriment because no other viable options are present. This results in negative impacts throughout the supply chain ultimately impacting not only wheat shippers, but their customers and consumers. With extensive coverage by multiple Class I railroads of the largest wheat growing areas in the U.S. and a limited number of export facilities capable of handling bulk grain exports, the US wheat industry is particularly well-positioned to benefit from policies better enabling competitive switching.

USWA appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve the reciprocal switching remedy in line with the intent of Congress. USWA urges the Board to breathe life into this remedy that has been essentially dormant for decades and to provide a method to counter the Class I railroads' unabated market power over wheat shippers.

BACKGROUND OF THE PROCEEDING AND THE PUBLIC HEARING

The Board opened this proceeding by issuing a Notice of Proposed Rulemaking ("2016 NPRM") on reciprocal switching on July 27, 2016. *Reciprocal Switching ("NPRM"),* STB Ex Parte 711 (Sub-No. 1) (STB served July 27, 2016). Parties filed opening comments and reply comments on the 2016 NPRM in late 2016 and early 2017. Following these comments, the proceeding did not move forward except for ex parte meetings and has remained essentially dormant since that time.

The 2016 NPRM grew out of the Ex Parte No. 711 proceeding, which was initiated by a July 7, 2011 petition for rulemaking by the National Industrial Transportation League. Petition for Rulemaking of the National Industrial Transportation League, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte 711 (filed July 7, 2011). That proceeding involved comments filed in 2013 and a public hearing in March 2014.

On December 28, 2021, the Board issued the Notice stating its intent to "hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed" through the 2016 NPRM. *Reciprocal Switching*, STB Ex Parte 711 (Sub-No. 1), slip op. at 1 (STB served Dec. 28, 2021). The Board's stated intent for holding a public hearing and inviting comments is "[t]o allow interested persons to submit testimony to update the record," and "[t]o

ensure a full and updated record in this proceeding." *Id.* at 2, 6. Thus, the Notice specifically invites comments addressing certain topics, including:

- "[A]dditional or modified views on the effects and/or need for the proposed regulations" in light of "significant operational changes in and affecting the freight rail industry" in the time "[s]ince the issuance of the NPRM";
- "[N]ew developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter's views since the previous round of comments"; and
- "[T]opics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding."

Id. at 6.

LAW AND LEGISLATIVE HISTORY REGARDING RECIPROCAL SWITCHING

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. The Board may require the establishment of a switching arrangement when it finds that the arrangement either (1) is practicable and in the public interest, or (2) is necessary to provide competitive rail service. 49 U.S.C. § 11102(c)(1). Section 11102(c)(1) authorizes the Board to establish the conditions of and compensation for switching service if the affected carriers cannot reach agreement on those matters within a reasonable period. The Board's implementation of § 11102 is guided by the rail transportation policy set forth in 49 U.S.C. § 10101. *See NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 16.

The Board's current regulations governing reciprocal switching were promulgated in 1985 by the Board's predecessor, the Interstate Commerce Commission ("ICC"), *see Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom. Balt. Gas & Elec. v. United States,* 817 F.2d 108 (D.C. Cir. 1987), and are codified at 49 C.F.R. § 1144. The regulations provide that reciprocal switching would only be prescribed if the agency determines that it "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. [§] 10101 or is otherwise anticompetitive," and "otherwise satisfies the criteria of . . . [§] 11102(c)." 49 C.F.R. § 1144.2(a)(1). The Board's regulations also provide relevant factors that the agency shall consider in determining whether to prescribe competitive access, along with a "standing" requirement. 49 C.F.R. § 1144.2(a)(1)-(2). The regulations do not address how the Board should establish compensation for Board-ordered switching when the carriers cannot reach agreement within a reasonable period.

In *Midtec Paper Corp. v. Chicago & North Western Transportation Co. ("Midtec"),* 3 I.C.C.2d 171 (1986), the first case where the ICC applied 49 C.F.R. § 1144.2, the ICC explained that the key issue under its then-new regulations was whether the incumbent railroad "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Id*. at 181. The ICC further explained that it would find anticompetitive behavior only when an incumbent carrier had "used its market power to extract unreasonable terms on through movements" or "because of its monopoly position . . . shown a disregard for the shipper's needs by rendering inadequate service." *Id.* The agency's competitive access regulations have not changed substantively since 1985 and few requests for reciprocal switching have been filed since then. In other words, *Midtec* caused the use of the reciprocal switching remedy to go dormant because rail shippers did not believe this standard could be met.

Under the Board's proposed regulations, there would be no need to show anticompetitive conduct, as had been required in the ICC's *Midtec* decision. Rather, under the Board's proposed regulations, the Board would require the establishment of a switching arrangement when the switching arrangement either was practicable and in the public interest or was necessary to provide competitive rail service. *NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 16. This approach would simply apply the language in the statute as written by Congress.

In assessing whether a switching arrangement would be practicable and in the public interest under the proposed regulations, the Board would consider whether the benefits of a proposed arrangement would outweigh its potential detriments. In making that determination, the Board would consider all relevant factors, such as (1) whether the arrangement would further the rail transportation policies in 49 U.S.C. § 10101; (2) the efficiency of the proposed route; (3) whether the arrangement would allow access to new markets; (4) the impacts, if any, of the arrangement on capital investment, quality of service, and employees; (5) the amount of traffic that would be moved under the arrangement; and (6) the impact, if any, of the arrangement on the rail transportation network. *NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 18.

In assessing whether a reciprocal switching arrangement would be necessary to provide competitive rail service, the Board would consider whether intermodal and intramodal competition were effective with respect to the movements for which the switching arrangement was sought. The Board would evaluate the effectiveness of competition using quantitative and qualitative factors that the Board has developed in the context of assessing market dominance in rate challenges, but it would not consider product competition or geographic competition. *Id.* at 27.

The Board's proposed regulations also state that reciprocal switching would not be ordered, even if one or both of the foregoing standards were met, if the switching was not feasible, would be unsafe, or would unduly hamper a carrier's ability to serve its customers. As additional limitations, the Board would require the establishment of a switching arrangement only when (1) the shipper or receiver was served by a single Class I carrier; and (2) there was or could be, within a reasonable distance of the shipper or receiver's facilities, a working interchange between the incumbent carrier and another Class I rail carrier. *Id.* at 19-21.

The 2016 NPRM sought comments on two alternatives regarding the compensation the Board could impose for switching service if the carriers could not agree within a reasonable time. Under the first alternative, compensation would be based on factors such as: (1) the geography where the proposed switch would occur; (2) the distance between the shipper/receiver and the proposed interchange; (3) the cost of the service; (4) the capacity of the interchange facility; and (5) other case-specific factors. The 2016 NPRM asked for comment on whether the agency should also consider what have been referred to as the incumbent carrier's lost contribution or opportunity costs. Under the second alternative, compensation would be based on the cost of providing the service plus a fair and reasonable return on the capital that was used to provide the service, analogous to the rental income that applies when the Board orders a carrier to provide trackage rights to another carrier (the Board's "SSW methodology"). *Id.* at 25-26; *see, e.g., New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC*, FD 35842 (STB served Oct. 31, 2017); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 4 I.C.C.2d 668 (1987); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.— Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984).

The rail transportation policy established by the Staggers Rail Act of 1980 ("Staggers") places great importance on the promotion of competition in the rail industry: "[i]n regulating the rail industry, it is the policy of the United States government…to allow, to the **maximum extent possible, competition and demand for services to establish reasonable rates for transportation by rail**." 49 U.S.C. § 10101 (1) (emphasis added). Congress emphasized the importance of competition in four additional sections setting out the policy underlying Staggers. *Id.* at (4), (5), (6), and (12). These provisions leave little doubt that Staggers intended to introduce competition as an alternative to regulation of rates and service. These proposed rules follow this rail transportation policy by making competitive access available to rail shippers who have had no real ability to obtain this remedy since *Midtec.*

The new proposed rules in the 2016 NPRM are exactly what Congress intended when it enacted the reciprocal switching remedy in Staggers. Not only do these proposed rules conform with their statutory basis, but they also use the exact language of the statute as noted. Consequently, the proposal would replace the Board's outdated regulations with ones that more closely adhere to Congress' deregulatory vision for the freight rail industry. The legislative history regarding this competitive access remedy makes that extremely clear.

Title II of Staggers is the section which includes the reciprocal switching provision and "is related to the key areas of the Interstate Commerce Act which involve railroad rates and inter-carrier practices. In general, the title assures railroads substantially more rate freedom than [was] afforded them under existing law" at that time. H.R. Rept. 96-1430, 96th Cong. 2d sess. 80 (1980). To balance this new-found ratemaking freedom, "[a] number of provisions are included

to foster greater competition by simplifying coordination, minor mergers procedures, entry and reciprocal switching agreements." *Id.*

The Conference Committee Report on Staggers ("Committee Report") provided in relevant part as follows:

> Consistent with the new rail transportation policy of this Act, the conferees intend that competition be recognized as the best control on the ability of railroads to raise rates. The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The conferees believe that **by allowing the forces of the marketplace to regulate railroad rates wherever possible** the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

Id. at 89 (emphasis added). Undoubtedly, Congress intended competition to be the most effective and desirable way to protect shippers.

With respect to the way Congress intended for competition to be used remedially, the Committee Report stated:

> The Senate authorized the Commission to require railroads to enter into reciprocal switching where it finds such agreements to be practicable and in the public interest. In many parts of the country, reciprocal switching agreements are in effect where carriers pick up and deliver traffic for other railroads. In areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where

> only one railroad provides service and it is inadequate. The standard "practicable and in the public interest" is the same standard the Commission has applied in considering whether to order joint use of terminal facilities.

Id. at 116. *See also* S. Rept. 96-470, Cong. 1st sess. 41-42 (1979) (same).

Similarly, the discussion of reciprocal switching in the Report of the House Committee on Interstate and Foreign Commerce stated:

> This section empowers the Commission to approve reciprocal switching agreements and joint service agreements upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, it provides competition to the benefit of shippers served. While the Commission now has the power to order the joint use of terminal facilities, its power to order reciprocal switching is less clear. In particular, reciprocal switching has been limited to situations where competition between rail carriers is not threatened. **The Committee intends for the Commission to permit and encourage greater competition.** Likewise joint service agreements should be encouraged in order to improve shipper service and efficiency.
>
> The standard the Commission should use in approving agreements under this section should be where the requested action is "practicable and in the public interest."

H. Rept. 96-1035, 96th Cong. 2nd sess. 67 (1980) (emphasis added).

The Senate Committee on Commerce, Science and Transportation Report emphasized the importance of enhanced competition:

> The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition, and section 203 [the Senate reciprocal switching provision] deals with intramodal competition among railroads… As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. **Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices.**

S. Rept. 96-470, at 41 (1979) (emphasis added). *See also* 126 Cong. Rec. H10079-87, 99 (daily ed. Sept. 30, 1980) (statement of Rep. Eckhardt) ("inclusion of provisions relating to entry and reciprocal switching which provide increased rail-to-rail competition"); 126 Cong. Rec. H5899-5914, 549 (daily ed. June 30,1980) (statement of Rep. Madigan) (reciprocal switching "will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad's operating territory, thereby providing many shippers with competition in rail service that they presently do not enjoy."). The point of this legislation is "to encourage intramodal competition." S. Rept. 96-470, at 38.

The STB in the 2106 NPRM followed this broad two-part model set forth in the statute in creating the proposed rules for reciprocal switching. Instead of the narrow standard in place today, the Board followed the statutory language, the transportation policy, and the legislative

intent by proposing to introduce greater competition into rail markets. The legislative language and history in Staggers urged the ICC to do exactly what the STB has done here.

NEW REASONS WHY THE PROPOSED RULES ARE NEEDED

1. The Historic Rail Industry Change to PSR since 2017 Makes these Proposed Rules Even More Necessary Now to Provide Shippers with a Remedy to Protect Them from this Dysfunctional Operating Model.

The developments regarding Precision Scheduled Railroading ("PSR") since the Board last sought comments in this proceeding clearly provide more justification than ever for the approval of these proposed rules on reciprocal switching. Implementation of PSR by nearly all the Class I railroads[1] (except for BNSF Railway) shortly after this last round of comments has made the need for this competitive access remedy even more compelling now than in early 2017. This widespread implementation and now use of PSR as the railroad operating model has caused a sea change in the way the rail network works and has resulted in generally poorer service and higher rates for rail shippers over the last 5 years.

The railroads claim "Precision" in PSR "refers to highly precise planning, examining, and fine-tuning of all processes related to the movement of rail cars, combined with disciplined, synchronized execution of the processes."[2] There are several elements to many of the PSR operating strategies claimed to be followed by the Class I railroads in the US. The first element is to "restructure local service" by "better utilize[ing] crews and locomotives, while asking more of

[1] Canadian Pacific Railway and Canadian National Railway Company had already implemented PSR before 2017.

[2] [2] "*The Operational Nuts and Bolts of Precision Scheduled Railroading",* Carl Van Dyke, FHWA Webinar PowerPoint, at 6, March 2020, https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/march_2020/talkingfreight3_18_20cvd.pdf

customers and local crews." *Id.* at 8. The second element is to "increase car velocity" by "reduc[ing] switching, while using block swaps more and providing multiple outlets for traffic - focus on plan adherence and elimination of blocking (switching), connection, and train make-up errors." *Id.* The third element is to "minimize train miles and road locomotive and crew needs" by "run[ning] fewer, longer, more generic trains on a balanced network and filling out the trains to their maximum capacity, while focusing on crew and locomotive cycling." *Id.* The fourth element is to "change customer services" by "eliminat[ing] 'boutique' operating plan elements (blocks and trains) and standardizing product offerings." *Id.* In its purest form, this operating strategy should "bring[] together many core principles that should arguably be widely supported by both railroads and customers, driving to better asset velocity, overall efficiency, shipment speed, and reliability." *Id.* at 7.

Unfortunately, PSR has not been used in its purest form as the railroads have professed and has been widely opposed by rail shippers due to its adverse effects on their service and costs. As stated by Chair of the House Committee on Transportation and Infrastructure Peter DeFazio: "In recent years, numerous stakeholders have raised concerns about the railroad management strategy known as precision scheduled railroading (PSR). Using variations of this strategy, it appears that Class I railroads have streamlined operations and otherwise cut costs in pursuit of lower operating ratios for short-term revenue gains. Stakeholders are concerned that the rise of the PSR model has come at the expense of long-term capital investments, reduced rail infrastructure, affected service for some shippers, and caused dramatic workforce cuts and safety

concerns."[3] Chair DeFazio was so concerned by this problematic use of PSR that a study by the U.S. General Accountability Office ("GAO") was passed by the House in his surface transportation reauthorization bill, the INVEST in America Act, to help find ways to address the impacts this railroad management strategy has had on workers, freight shippers, passenger railroads, and rail safety.

The facts clearly demonstrate that Chair DeFazio's impression of PSR is the accurate one. First and foremost, rail service has plummeted since this historical change in how railroads operate. In March 2017, CSX Transportation, Inc. ("CSXT") implemented PSR as its rail operating plan. This implementation led to countless service issues across its network almost immediately. Part of CSXT's PSR plan involved cutting a large number of jobs across its system. By July, the Board had taken a number of actions in response to the service problems resulting from CSXT's ongoing implementation of this new operating plan. The Board began closely monitoring CSXT's performance, including requesting that CSXT's senior management participate in weekly calls with the Board's Rail Customer and Public Assistance staff and that CSXT submit weekly specific service performance data to facilitate these calls.

On October 11, 2017, service on CSXT had become so unreliable that the Board ordered executive-level officials from CSXT to appear at a listening session at the STB to discuss their ongoing and future efforts to improve service and to provide an estimated timeline for recovery of normal service levels. The Board also asked impacted shippers to appear at the public listening session to discuss their service concerns and comment on the railroad's service recovery efforts.

[3] May 12, 2021 Letter from Chair DeFazio to U.S. Government Accountability Office, https://transportation.house.gov/news/press-releases/chairs-defazio-and-payne-jr-request-gao-study-on-the-impacts-of-precision-scheduled-railroading-on-workers-safety-and-shippers

On March 18, 2018, STB Chairman Ann Begeman individually wrote the Class I railroads about service issues across the US rail system. She stated that the Board had been closely monitoring freight rail service across the US and had become increasingly concerned about its overall state based on the weekly data collected under 49 C.F.R. pt. 1250. The data was indicating that service was deteriorating based on decreasing system average train speeds and increasing terminal dwell time. Other key metrics were also trending in a negative direction. The STB began holding weekly calls with the railroads and asked them to provide certain information with respect to their rail service.

Despite these monumental service issues on CSXT, most of the other Class I railroads, who were not already operating under PSR, also adopted this rail operating plan, including Norfolk Southern Railway ("NSR") in July 2019, Kansas City Southern Railway in January 2019, and Union Pacific Railroad ("UP") in October 2018. These changes led to further disruptions across the US rail network. Massive job cuts, like on CSXT, occurred on NS and UP as part of this plan, leading many to believe that any uptick in the need for rail service would leave them woefully unprepared. This eventually proved to be the case.

On August 24, 2020, the STB Chairman, as well as the Federal Railroad Administration Administrator, wrote the Class I railroads about both of their rail service concerns. These leaders of the rail regulatory agencies explained that they had been made aware of service issues, including missed industrial switches and excessively late or annulled trains due to crew availability issues. They noted that with both increasing intermodal and carload volumes and a projected robust harvest fast approaching, railroad employee availability, together with sufficient equipment resourcing, was essential for safe, fluid rail service in support of the nation's economic recovery from COVID-19. Given the challenges related to changing demand patterns

and operating conditions, they stated that increased communication and transparency with rail shippers had become especially important to ensure they have the information needed to plan their businesses and meet their own customers' needs. They emphasized that it was their expectation that there would be heightened emphasis on improving employee availability, equipment resources, and robust communication to quickly resolve service issues as they arose and to prevent them from becoming widespread. The Class I railroads did not heed this warning as service issues became more rampant.

On May 27, 2021, the new Chairman of the STB, Martin Oberman, also felt compelled to write to the Class I railroads again about rail service issues. He explained that the Board had received concerning reports from a meaningful number of rail customers of subpar performance, including missed switches, railcars delayed at intermediate yards or interchanges, extended out-of-route movements, and prolonged dwell at origin for some unit train traffic. Additionally, he noted that the STB had been made aware of instances of significant congestion at various intermodal facilities, which has resulted in delayed train arrivals and disruptions to container availability. He recognized that these rail service challenges, at least to some extent, had been related to workforce reductions resulting from COVID-19 cases, quarantines, and furloughs based on the temporary decline in demand and the resultant adjustments made by railroads in nearly every facet of their businesses. **But he also expressed his concern about the extent to which these service issues may be related to or exacerbated by a broader trend of rail labor reductions that have been occurring over the past several years. He stated that a lack of personnel, including reserve personnel, has made it more difficult to scale-up operations to respond to increases in demand and to maintain reliable service in the face of unanticipated external events that disrupt ordinary operations or business expectations.** He said labor

shortages could also delay or prolong the recovery period when such network disruptions inevitably occur.

As stated in previous STB letters, he said it is vital that freight railroads continue frequent, proactive communication with the Board and customers on their ability to meet demands for service as the economy recovers from the pandemic. He requested an updated and detailed description of the railroads' preparedness to meet anticipated future demand, including (1) the availability of train crew, yard, and maintenance employees (active, reserve, and furloughed workers) and their plans and time frames for employees to return to work and any re-training, if necessary, and (2) the availability of equipment resources (active and short-term / long-term stored locomotives and rail cars). **As part of this update, he specifically requested that the railroads also address whether they have any long-term plans, including their hiring plans for 2021 and 2022, to reverse any of the diminishing workforce levels which have resulted from their strategies in recent years.** He also asked them to identify any regions of their networks where they were experiencing or anticipating workforce challenges, and their plans to overcome these challenges.

Shortly thereafter, on July 22, 2021, STB Chairman Oberman again wrote the Class I railroads about significant disruptions within the international intermodal supply chain that involve the freight rail network. He stated that he was particularly concerned about significant increases in container congestion at key U.S. terminals, and substantial charges being levied by the railroads for container storage at these terminals. Specifically, in recent months, he asserted that the Board had received numerous reports related to the length of time that containers were being held in rail yards, and the sizeable storage fees some customers had been required to pay in order to obtain release of containers bearing their shipments. He said that he was particularly

troubled about reports that Class I railroads were continuing to impose these charges even in circumstances when the receivers, as a practical matter, had no means to facilitate the release of their containers. Under these circumstances, he noted that demurrage fails to provide any constructive incentives, and perversely results in massive charges that can exceed the commercial value of the shipment. In order to better understand the magnitude of the current container congestion and the framework for the associated demurrage fees, he asked for information from each of the Class I railroads regarding policies and practices with respect to the assessment of demurrage fees on intermodal containers.

On October 18, 2021, Chairman Oberman focused on service issues on CSXT which again caused great concern to the Board, thereby precipitating a letter to the carrier seeking rail service performance information. He stated his reason for this information request was that over the past several months, the Board had continued to receive a steady stream of complaints about the adequacy of rail service provided by CSXT. In both private meetings and public settings, he said CSXT customers have relayed examples of substandard performance, including missed switches, extended transit times for both manifest and bulk shipments, unfilled car orders, and the inability to contact customer service and operating personnel. He stated that customers have also reported that service problems are sometimes resolved, only to recur weeks or months later. Taken together, he noted these complaints were of grave concern as it appeared that CSXT resources were surged to assist one customer, only to have problems arise with another. And, as a result of these problems, he explained that customers incurred premium freight costs, idled production, lost sales and damaged commercial relationships, typically without meaningful recourse from CSXT. In addition to anecdotal incidents, he noted CSXT's rail service performance data reported under STB Docket No. EP 724 tended to support that CSXT's

network was underperforming compared to the benchmarks set in 2019. **He also noted that CSXT has approximately 1,000 fewer "transportation" employees for August 2021 compared to August 2019 (6,577 versus 7,543), as reported on STB Form C.**

This was followed with a similar letter to NS on November 23, 2021, emphasizing the railroad's deteriorating key operating metrics reported pursuant to EP 724. **He compared these numbers with the fact that NSR's number of "transportation" employees had continued to decline over the prior three months (8,281, 8,269, and 8,207, respectively), as reported on STB Form C.** Coinciding with the marked deterioration in NSR's performance metrics, he said the Board had received an increasing number of complaints from NSR's customers about poor performance, including missed switches, cars stranded at intermediate yards, longer transit times, operating plan changes without notice, and a lack of communication from customer service**. For these reasons, he requested that NSR provide the Board with a review of the current state of its network, and assessment of what factors are affecting NSR's ability to achieve past levels of fluidity and consistent service, and in particular the impact on customer service of previous headcount reductions for train, yard, and maintenance employees. He noted it would be most helpful if NSR could provide this review as a follow up to its June 18, 2021, letter, in which a "program of targeted hiring" to meet workforce needs, referenced measures to attract and retain operating employees was outlined. In light of the declining employee headcount since June as shown by the data supplied to the STB, he asserted this program does not appear to have succeeded in obtaining a workforce level sufficient to avoid the service challenges described above.**

As some of these STB communications seem to express, this massive decline in rail service since 2017 can clearly be tied to the use of PSR across the US rail network and the

resulting job cuts that made the railroads incapable of providing adequate service and handling upticks in the need for service. CSX had 23,988 total employees and 9262 train and engine service employees in February 2017. CSX had 17,250 total employees and 6795 train and engine service employees in December 2021. UP had 44,652 total employees and 18,612 train and engine service employees in October 2018. UP had 32,494 total employees and 14,079 train and engine service employees in December 2021. NS had 24,594 total employees and 10,243 train and engine service employees in July 2019. NS had 18,011 total employees and 7521 train and engine service employees in December 2021. (These numbers were obtained from the STB Form C information on the STB website.) Job cuts of this magnitude can only result in one outcome which is poor service as the above-recounted facts clearly demonstrate.

Moreover, the operating ratios for these railroads continue to decline. UP has gone from an operating ratio of 63.7% in 2016 to 57.2 in 2021. CSX has gone from 69.2% in 2016 to 56.3% in 2021. NS has gone from 69.6% in 2016 to 60.1% in 2021.

While service has declined, rail rates have continued to rise. In a recent report published by the Rail Customer Coalition[4], evidence of skyrocketing rates and less competitive traffic is clear. The report finds:

- From 2004 to 2019, **real rates (adjusted for inflation) for all rail shippers increased 43%.**
- During the same period, real **railroad costs rose only 8%.**
- Rates for the largest U.S. railroads have jumped **more than twice as fast as inflation and rates for long-haul trucking**.

[4] Escalation Consultants, "*Economic Analysis: Consolidation and Increasing Freight Rail Rates*," June 2021. https://www.freightrailreform.com/new-report-finds-rail-customers-paying-a-steep-price-for-consolidation-and-dwindling-competition/

- **For major commodity groups, revenue from potentially non-competitive rates increased 230%**, while revenue from competitive rates increased only 24%.
- **In 2019, half of railroad revenue was generated from potentially non-competitive rates**, up from 27% in 2004.
- For significantly impacted sectors and commodities, the share of total rail revenue derived from non-competitive rates increased as follows**:**

Agriculture

Commodity	2004	2019
Food Products	15%	39%
Farm Products	34%	56%

Building & Construction

Commodity	2004	2019
Wood Products	8%	31%

Metal Products	17%	45%
Stone & Glass Products	36%	64%

Transportation & Infrastructure

Commodity	2004	2019
Transportation Equipment	13%	33%

- In a troubling indicator of the railroads' ever-growing market dominance and pricing power, **the average revenue-to-variable-cost (RVC) ratio increased from 135% to 167% for shipments of these commodities.**

Id.

Obviously, the implementation of PSR by the railroads since 2016 has made the need for these proposed rules more evident. In fact, before BNSF Executive Chairman Matt Rose retired, he predicted that "PSR, reducing service, and demarketing some types of traffic in pursuit of higher profits" would result in increased scrutiny by the STB. He stated that railroads "have this common carrier obligation to provide freight service to all customers in all markets. And what we're doing in PSR is redefining what we're willing to accept in the freight railroad industry on certain lanes. And I really do believe we're going to get in a lot of trouble by doing that." He

added that "[w]hen you start redefining markets, I think the federal policy makers will look at this, and quite frankly, they will not be happy with us."[5]

As Chairman Oberman recently noted, "railroads' emphasis has not been on growth. Rather, the emphasis has been on cutting in pursuit of the almighty [operating ratio] down to below 60%." He added that '[i]t is clear that as a whole, railroads have foregone many kinds of carloads that they could carry profitably, only not at O.R.s as low as 55%, and instead have focused on only the most profitable traffic. No one is asking the railroads to focus on traffic that would only be carried at a loss. But surely it is not asking too much for railroads to actively seek profitable traffic, even if not as profitable as others."[6]

In other words, PSR railroads have resorted to only choosing rail traffic which fits within the PSR model to continue to drive down operating ratios. This practice leaves certain rail shippers out in the cold even though rail is their best transportation option. This practice is even more disruptive today when truck capacity due to a shortage of drivers is extremely limited. As a result, some rail shippers have nowhere to turn.

The effects of this new rail operating strategy have devastated the rail workforce and resulted in correspondingly poor rail service and sometimes no service at all. While the railroads will assumedly argue that the pandemic is the cause of their service issues over the last two years, this claim is obviously only a part of the story. USWA does not dispute that the pandemic has had a historic impact on the world's supply chain. However, the railroads by slashing jobs have

[5] Trains, *Analysis: Former BNSF Executive Matt Rose's Warning Comes True,* July 22, 2021. https://www.trains.com/trn/news-reviews/news-wire/former-bnsf-executive-matt-roses-2019-warning-comes-true/

[6] Trains, *Top Regulator Urges Railroads to Focus on Growth,* September 9, 2021. https://www.trains.com/trn/news-reviews/news-wire/top-regulator-urges-railroads-to-focus-on-growth/

directly caused the situation to be much worse by making them incapable of adjusting to upticks in the need for rail service. As a result, many rail shippers, especially captive ones, have suffered from plant shutdowns and slowdowns and other adverse impacts that have damaged their businesses despite paying higher and higher rates. These shippers have little recourse except through informal channels to hold these railroads accountable for the harms they suffer at the hands of the railroads. If the new proposed rules are adopted by the Board, some rail shippers would finally have a path to remedy some of these problems. In sum, there never has been a time since the enactment of Staggers where Congress's intent to introduce competition through reciprocal switching was more needed.

2. Increased Use of Reciprocal Switching Arrangements Will Lead to Increased Revenues for the Class I Railroads.

Railroads claim that reciprocal switching will not allow them to properly invest in their infrastructure and would deter them from investing where reciprocal switching allowed another carrier access to its captive customers. However, with the proposed rules, new rail shippers and an overall increase in contribution to overhead could be attracted with the prospect of competitive linehaul service and stable switching service. In other words, railroads could be the financial beneficiaries from reciprocal switching because it may make rail more attractive to shippers who can get better rates and service due to the new competition.

As discussed in the previous section, railroads have slashed jobs and expenses under the guise of PSR. Continuing down this path will eventually lead to the complete destruction of rail service in the US. In other words, cutting expenses can only go so far. At some point, railroads will have to begin to look to other ways to impress Wall Street besides cost cutting because there will be nothing left to cut. The only other way to do this would be to increase revenues. Despite

the railroads total opposition to any change to the reciprocal switching remedy as proposed in this proceeding, this view is shortsighted when one considers the benefits of reciprocal switching to an industry that has recently lost one of its main sources of revenue in coal.

Railroads like to emphasize how capital intensive its industry is and how much money it invests in its infrastructure. This claim is certainly a main talking point by the railroads and undisputedly warrants careful examination because proper investment in the rail network is essential to provide this crucial service to the nation. However, concerning the general state of capital investment by Class I railroads, capital investment claimed by the seven Class I railroads during the decade 2010-to-2019 is approximately $152.1 billion, $26.6 billion of which represents the portion of those capital expenditures that was discretionary and spent in order to increase the railroad's rate of return, where the $125.5 billion difference is comprised of non-discretionary items that would not increase the railroad's rate of return and would not be classified as capital expenditures in other industries[7]:

- $85.4 billion spent on track and bridges, primarily replacements in kind;
- $30.9 billion spent on locomotives and freight cars, again almost entirely replacements in kind, where locomotives were not new Tier 4 environmentally compliant, but re-built lower Tier motive power and where locomotive work, as measured by gross ton-miles of freight moved, was flat[8] during the decade, and where replaced cars did not keep up with retired cars—railroad-controlled car fleets decreasing 24% from 2010 to 2019[9]; and

[7] Comments of Rail Cents Enterprises, Inc., EP 711 (Sub-No. 1), at 6 (filed February 1, 2022).
[8] Freight ton-miles moved by the seven Class I's was basically flat from 2010 (2.21 trillion) to 2019 (2.29 trillion).
[9] Freight cars owned and leased by Class I's decreased 24% from 461,849 in 2010 to 351,032 in 2019.

- $9.2 billion spent on Positive Train Control, a safety technology mandated by Congress in 2008,

Id.

While these numbers touted by the railroads appear impressive on their face, they are not as substantial as claimed. The question then becomes what are the railroads doing with all the monies that they are earning from these massive cuts in expenses. Distributions to shareholders by the seven Class I railroads during the same decade, 2010-to-2019, was approximately $164.2 billion. That is, the Class I's returned over six times[10] as much money to shareholders during the decade before the Covid-19 crises as they spent on projects to increase their rates of return. *Id.* "Implication: senior management at the Class I's has had great difficulty in finding investments with returns in excess of their cost of capital, hinting that a new strategy based on carload traffic growth could open up new vistas of franchise growth." *Id.* Reciprocal switching could make this strategy more obtainable by introducing competition, thereby creating better service and lower rates.

Railroads have been accused of demarketing certain types of traffic as discussed in the previous section, since the advent of the PSR revolution, that do not fit within this model. Many shippers have sought new rail service or sought to continue rail service only to have the railroads express little interest in their business. Railroads can easily deter shippers from using rail by quoting extremely high rates or offering limited service. While railroads know that rates are required to be reasonable by statute, they also know that the STB rate case process provides little hope to the shippers who would like to challenge these rates as the Board has admitted in recent

[10] $164.2 billion divided by $26.6 billion is 6.2, which changes very little (to 6.1) if all numbers for the decade are converted into constant dollars in order to erase the effects of inflation.

proceedings. Therefore, if rail traffic does not fit within the PSR model, railroads can easily sidestep their common carrier obligation by offering these unreasonable take it or leave it rates to shippers.

However, at some point, railroads will have to change their shortsighted path in order to make Wall Street happy by increasing revenues as this present strategy is unsustainable in the long run. An increase in reciprocal switching could help to make this inevitable path more of a reality. For example, railroads may only provide a shipper facility with three days of switching service per week. However, the shipper may want to increase the number of days of service to move more of its product by rail. If an interchange with another railroad is within a reasonable distance, that competing railroad could fill in that void and provide service on those additional days. The result would be more rail business. Moreover, by offering more competitive rates, railroads could obtain more business that presently moves by other modes of transportation.

With the recent loss of revenue from the large decrease in coal traffic, Class I railroads will have to turn to new markets to increase revenue. That market could easily be carload traffic. As a result, while this proposed change to the reciprocal switching rules may be strongly opposed by the rail industry now, it may eventually lead to increases in business brought on my better rates and improved service, thereby making this a win-win situation for all involved.

3. During this Historic Disruption of the Global and U.S. Supply Chains Brought on by the Pandemic, the Need for More Efficient and Flexible Rail Service Has Never Been More Evident which these Proposed Rules Will Allow to Happen.

As the Board is aware, the global supply chain has been completely disrupted by the pandemic that has changed the world as we know it over the last two years. This supply chain crisis has wreaked havoc across all forms of transportation including maritime, trucking, and rail. The unpredictability of the demand for goods and the workforce supply, among other things, has

brought on events in the supply chain never seen in the past. Unfortunately, there is no certain time when this disruptive situation will end.

Obviously, railroads are crucial to the supply chain in the U.S. and North America. An efficient rail system is extremely important now to help solve these supply chain issues. However, with the pandemic and corresponding difficulties in keeping the workforce fully staffed brought on by devastating illness and quarantine requirements across the U.S., the railroads have had an extremely difficult time providing adequate service to rail shippers in dire need of their services during these unprecedented times. These workforce difficulties were compounded by the large job cuts described above that made the railroads woefully unprepared for these challenges brought on by the pandemic. Moreover, the railroads seemed reluctant to bring back workers as the numbers quoted by Chairman Oberman in his letters to CSX and NS last year demonstrate.

Reciprocal switching could certainly be a cure for some of these troubles when a railroad is understaffed and cannot adequately provide service to its customers. First, when an incumbent railroad serving a captive shipper is not prepared for a surge in business due to job cuts, a competing railroad with a nearby interchange may have the resources to provide this service. The proposed new rules could allow the captive shipper to obtain this service through a reciprocal switching arrangement. At present, it is highly unlikely that the incumbent would allow the competing railroad access to its captive customer. As a result, the captive customer would have no other choice but to rely on the unprepared railroad and receive inadequate service.

Second, in some instances, the incumbent railroad may not have access to the most efficient rail route for its captive customer. Therefore, when rail service crises occur, the captive shipper would be required to rely on the incumbent carrier's less efficient route even though a

competing railroad with a nearby interchange can provide better service. The inefficiency of this result would only be compounded if the incumbent railroad was suffering from service issues across its network brought on by its unpreparedness for a surge in business.

While railroads do at times have a difficult balancing act when trying to determine the resources they need to be prepared for changes in business, examples of major rail service problems have been common over the last decade despite the financial health of the industry. In 2013 and 2014, the rail network struggled mightily with the upsurge in business in North Dakota brought on by fracking and crude by rail. *See United States Rail Service Issues, et al,* EP 724 (STB served Aug. 18, 2014). These issues became even worse with poor weather in Chicago and a strong harvest that had to compete for service with the crude oil traffic. *Id.* As noted, CSX had severe service problems as it implemented PSR on its network in 2017 which continue to this day. *See Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues, et al,* EP 742 (STB served Aug. 24, 2017). The implementation of the proposed rules might not have been able to eliminate all these issues over the years, but it certainly could have helped in certain situations by allowing rail customers to use a better prepared or suited railroad that might not have been available because of the lack of this competitive access remedy.

Generally, the implementation of these proposed rules will make the rail network more efficient by allowing captive shippers within a reasonable distance of a competing railroad to obtain better routes or better service as discussed above. It also would create competition which would require railroads to provide better service to rail shippers or risk losing business. There never has been a time since the passage of Staggers that this remedy has been more needed. The railroads have decided to implement PSR and make cuts to their workforces and other needs that have generally left them unprepared to provide adequate rail service. The railroads have not been

responsive to the Board's inquiries and warnings about their hiring issues. As a result, rail shippers have suffered from poor service resulting in plant shutdowns and slowdowns on an unprecedented basis. This use of reciprocal switching on an increased basis will make the rail system more efficient and hopefully compel the railroads to provide better service and to be more prepared by introducing more competition into the rail industry.

CONCLUSION

Based on the foregoing discussion, USWA strongly urges the Board to adopt the proposed rules for reciprocal switching. The case for the implementation of these rules has never been stronger than now.

Respectfully submitted,

/s/ Daniel R. Elliott
Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for U.S. Wheat Associates

/s/ Dalton Henry
Dalton Henry
Vice President - Policy
U.S. Wheat Associates
3103 10th Street, North
Suite 300
Arlington, VA
(202) 463-0999

Dated: February 14, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 38

EX PARTE NO. 711 (SUB-NO. 1), INDUSTRIAL MINERALS ASSOCIATION-NORTH AMERICA TESTIMONY (FILED FEB. 14, 2022)

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Office of Proceedings
February 14, 2022
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

INDUSTRIAL MINERALS ASSOCIATION–NORTH AMERICA TESTIMONY

The Industrial Minerals Association–North America ("IMA") respectfully submits its testimony in the above-captioned proceeding in accordance with the Surface Transportation Board ("STB" or "Board") Notice of Public Hearing ("Notice") served on December 28, 2021. The Board provided the opportunity for interested parties to provide testimony to update the record in this proceeding regarding its proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish reciprocal switching arrangements under certain circumstances. IMA thanks the Board for this opportunity to voice its strong support for these proposed new rules for reciprocal switching made even more necessary now by the changes in the rail industry since early 2017.

IMA INTEREST IN THE PROPOSED RULES

IMA is a trade association that represents companies that mine, process, and sell industrial minerals throughout North America. IMA represents a diverse set of member companies engaged in mining and processing of ball clay, barite, bentonite, borates, calcium carbonate,

diatomite, feldspar, industrial sand, kaolin, lithium, mica, perlite, potash, quartz, salt, soda ash, sodium bicarbonate, talc, and wollastonite, and other minerals across North America. The industrial minerals produced by IMA member companies are the raw material feedstock that are incorporated into a broad range of products, including among other things, container, food products, flat and specialty glasses, paint and coatings, ceramics, and a broad range of building products. Additionally, industrial minerals are used to make foundry molds and cores, which are in turn used to make metal shapes used to manufacture automobiles, SUVs and trucks, rail cars and almost all other items that have metal castings. The demand for many of these minerals from manufacturers is global, and the continued pressure member companies are feeling from the railroads in the form of unreliable service and higher rates is making it more difficult to compete in that global market. This poor service by the railroads is having a negative overall impact on the U.S. economy, and issues could get worse if they are not held accountable.

Industrial minerals are low margin, high volume products. Member companies are heavily dependent upon a reliable and cost-effective transportation network, especially rail, and are major shippers with the major rails. To help highlight that, in 2014, the nonmetallic minerals except fuels category, made up $1.5 Billion in total freight rail premiums.

IMA member companies have been adversely impacted by the lack of any options to obtain competitive rail access. Under the current process for the reciprocal switching remedy, IMA members do not bring forward reciprocal switching cases and are often forced to modify operations to their detriment because no other viable options are present. This results in negative impacts throughout the supply chain ultimately impacting not only IMA member companies, but their customers and consumers.

IMA appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve the reciprocal switching remedy in line with the intent of Congress. IMA urges the Board to breathe life into this remedy that has been essentially dormant for decades and to provide a method to counter the Class I railroads' unabated market power over its member companies.

BACKGROUND OF THE PROCEEDING AND THE PUBLIC HEARING

The Board opened this proceeding by issuing a Notice of Proposed Rulemaking ("2016 NPRM") on reciprocal switching on July 27, 2016. *Reciprocal Switching ("NPRM"),* STB Ex Parte 711 (Sub-No. 1) (STB served July 27, 2016). Parties filed opening comments and reply comments on the 2016 NPRM in late 2016 and early 2017. Following these comments, the proceeding did not move forward except for ex parte meetings and has remained essentially dormant since that time.

The 2016 NPRM grew out of the Ex Parte No. 711 proceeding, which was initiated by a July 7, 2011 petition for rulemaking by the National Industrial Transportation League. Petition for Rulemaking of the National Industrial Transportation League, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules,* STB Ex Parte 711 (served July 7, 2011). That proceeding involved comments filed in 2013 and a public hearing in March 2014.

On December 28, 2021, the Board issued the Notice stating its intent to "hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed" through the 2016 NPRM. *Reciprocal Switching*, STB Ex Parte 711 (Sub-No. 1), slip op. at 1 (STB served Dec. 28, 2021). The Board's stated intent for holding a public hearing and inviting comments is "[t]o allow interested persons to submit testimony to update the record," and "[t]o

ensure a full and updated record in this proceeding." *Id.* at 2, 6. Thus, the Notice specifically invites comments addressing certain topics, including:

- "[A]dditional or modified views on the effects and/or need for the proposed regulations" in light of "significant operational changes in and affecting the freight rail industry" in the time "[s]ince the issuance of the NPRM";
- "[N]ew developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter's views since the previous round of comments"; and
- "[T]opics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding."

Id. at 6.

LAW AND LEGISLATIVE HISTORY REGARDING RECIPROCAL SWITCHING

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. The Board may require the establishment of a switching arrangement when it finds that the arrangement either (1) is practicable and in the public interest, or (2) is necessary to provide competitive rail service. 49 U.S.C. § 11102(c)(1). Section 11102(c)(1) authorizes the Board to establish the conditions of and compensation for switching service if the affected carriers cannot reach agreement on those matters within a reasonable period. The Board's implementation of § 11102 is guided by the rail transportation policy set forth in 49 U.S.C. § 10101. *See NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 16.

The Board's current regulations governing reciprocal switching were promulgated in 1985 by the Board's predecessor, the Interstate Commerce Commission ("ICC"), *see Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom. Balt. Gas & Elec. v. United States,* 817 F.2d 108 (D.C. Cir. 1987), and are codified at 49 C.F.R. § 1144. The regulations provide that reciprocal switching would only be prescribed if the agency determines that it "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. [§] 10101 or is otherwise anticompetitive," and "otherwise satisfies the criteria of . . . [§] 11102(c)." 49 C.F.R. § 1144.2(a)(1). The Board's regulations also provide relevant factors that the agency shall consider in determining whether to prescribe competitive access, along with a "standing" requirement. 49 C.F.R. § 1144.2(a)(1)-(2). The regulations do not address how the Board should establish compensation for Board-ordered switching when the carriers cannot reach agreement within a reasonable period.

In *Midtec Paper Corp. v. Chicago & North Western Transportation Co. ("Midtec"),* 3 I.C.C.2d 171 (1986), the first case where the ICC applied 49 C.F.R. § 1144.2, the ICC explained that the key issue under its then-new regulations was whether the incumbent railroad "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Id*. at 181. The ICC further explained that it would find anticompetitive behavior only when an incumbent carrier had "used its market power to extract unreasonable terms on through movements" or "because of its monopoly position . . . shown a disregard for the shipper's needs by rendering inadequate service." *Id.* The agency's competitive access regulations have not changed substantively since 1985 and few requests for reciprocal switching have been filed since then. In other words, *Midtec* caused the use of the reciprocal switching remedy to go dormant because rail shippers did not believe this standard could be met.

Under the Board's proposed regulations, there would be no need to show anticompetitive conduct, as had been required in the ICC's *Midtec* decision. Rather, under the Board's proposed regulations, the Board would require the establishment of a switching arrangement when the switching arrangement either was practicable and in the public interest or was necessary to provide competitive rail service. *NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 16. This approach would simply apply the language in the statute as written by Congress.

In assessing whether a switching arrangement would be practicable and in the public interest under the proposed regulations, the Board would consider whether the benefits of a proposed arrangement would outweigh its potential detriments. In making that determination, the Board would consider all relevant factors, such as (1) whether the arrangement would further the rail transportation policies in 49 U.S.C. § 10101; (2) the efficiency of the proposed route; (3) whether the arrangement would allow access to new markets; (4) the impacts, if any, of the arrangement on capital investment, quality of service, and employees; (5) the amount of traffic that would be moved under the arrangement; and (6) the impact, if any, of the arrangement on the rail transportation network. *NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 18.

In assessing whether a reciprocal switching arrangement would be necessary to provide competitive rail service, the Board would consider whether intermodal and intramodal competition were effective with respect to the movements for which the switching arrangement was sought. The Board would evaluate the effectiveness of competition using quantitative and qualitative factors that the Board has developed in the context of assessing market dominance in rate challenges, but it would not consider product competition or geographic competition. *Id.* at 27.

The Board's proposed regulations also state that reciprocal switching would not be ordered, even if one or both of the foregoing standards were met, if the switching was not feasible, would be unsafe, or would unduly hamper a carrier's ability to serve its customers. As additional limitations, the Board would require the establishment of a switching arrangement only when (1) the shipper or receiver was served by a single Class I carrier; and (2) there was or could be, within a reasonable distance of the shipper or receiver's facilities, a working interchange between the incumbent carrier and another Class I rail carrier. *Id.* at 19-21.

The 2016 NPRM sought comments on two alternatives regarding the compensation the Board could impose for switching service if the carriers could not agree within a reasonable time. Under the first alternative, compensation would be based on factors such as: (1) the geography where the proposed switch would occur; (2) the distance between the shipper/receiver and the proposed interchange; (3) the cost of the service; (4) the capacity of the interchange facility; and (5) other case-specific factors. The 2016 NPRM asked for comment on whether the agency should also consider what have been referred to as the incumbent carrier's lost contribution or opportunity costs. Under the second alternative, compensation would be based on the cost of providing the service plus a fair and reasonable return on the capital that was used to provide the service, analogous to the rental income that applies when the Board orders a carrier to provide trackage rights to another carrier (the Board's "SSW methodology"). *Id.* at 25-26; *see, e.g., New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC*, FD 35842 (STB served Oct. 31, 2017); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 4 I.C.C.2d 668 (1987); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.— Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984).

The rail transportation policy established by the Staggers Rail Act of 1980 ("Staggers") places great importance on the promotion of competition in the rail industry: "[i]n regulating the rail industry, it is the policy of the United States government…to allow, to the **maximum extent possible**, competition and demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101 (1) (emphasis added). Congress emphasized the importance of competition in four additional sections setting out the policy underlying Staggers. *Id.* at (4), (5), (6), and (12). These provisions leave little doubt that Staggers intended to introduce competition as an alternative to regulation of rates and service. These proposed rules follow this rail transportation policy by making competitive access available to rail shippers who have had no real ability to obtain this remedy since *Midtec.*

The new proposed rules in the 2016 NPRM are exactly what Congress intended when it enacted the reciprocal switching remedy in Staggers. Not only do these proposed rules conform with their statutory basis, but they also use the exact language of the statute as noted. Consequently, the proposal would replace the Board's outdated regulations with ones that more closely adhere to Congress' deregulatory vision for the freight rail industry. The legislative history regarding this competitive access remedy makes that extremely clear.

Title II of Staggers is the section which includes the reciprocal switching provision and "is related to the key areas of the Interstate Commerce Act which involve railroad rates and inter-carrier practices. In general, the title assures railroads substantially more rate freedom than [was] afforded them under existing law" at that time. H.R. Rept. 96-1430, 96th Cong. 2d sess. 80 (1980). To balance this new-found ratemaking freedom, "[a] number of provisions are included

to foster greater competition by simplifying coordination, minor mergers procedures, entry and reciprocal switching agreements." *Id.*

The Conference Committee Report on Staggers ("Committee Report") provided in relevant part as follows:

> Consistent with the new rail transportation policy of this Act, the conferees intend that competition be recognized as the best control on the ability of railroads to raise rates. The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The conferees believe that **by allowing the forces of the marketplace to regulate railroad rates wherever possible** the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

Id. at 89 (emphasis added). Undoubtedly, Congress intended competition to be the most effective and desirable way to protect shippers.

With respect to the way Congress intended for competition to be used remedially, the Committee Report stated:

> The Senate authorized the Commission to require railroads to enter into reciprocal switching where it finds such agreements to be practicable and in the public interest. In many parts of the country, reciprocal switching agreements are in effect where carriers pick up and deliver traffic for other railroads. In areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where

> only one railroad provides service and it is inadequate. The standard "practicable and in the public interest" is the same standard the Commission has applied in considering whether to order joint use of terminal facilities.

Id. at 116. *See also* S. Rept. 96-470, Cong. 1st sess. 41-42 (1979) (same).

Similarly, the discussion of reciprocal switching in the Report of the House Committee on Interstate and Foreign Commerce stated:

> This section empowers the Commission to approve reciprocal switching agreements and joint service agreements upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, it provides competition to the benefit of shippers served. While the Commission now has the power to order the joint use of terminal facilities, its power to order reciprocal switching is less clear. In particular,reciprocal switching has been limited to situations where competition between rail carriers is not threatened. **The Committee intends for the Commission to permit and encourage greater competition.** Likewise joint service agreements should be encouraged in order to improve shipper service and efficiency.
>
> The standard the Commission should use in approving agreements under this section should be where the requested action is "practicable and in the public interest."

H. Rept. 96-1035, 96th Cong. 2nd sess. 67 (1980) (emphasis added).

The Senate Committee on Commerce, Science and Transportation Report emphasized the importance of enhanced competition:

> The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition, and section 203 [the Senate reciprocal switching provision] deals with intramodal competition among railroads… As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. **Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices.**

S. Rept. 96-470, at 41 (1979) (emphasis added). *See also* 126 Cong. Rec. H10079-87, 99 (daily ed. Sept. 30, 1980) (statement of Rep. Eckhardt) ("inclusion of provisions relating to entry and reciprocal switching which provide increased rail-to-rail competition"); 126 Cong. Rec. H5899-5914, 549 (daily ed. June 30,1980) (statement of Rep. Madigan) (reciprocal switching "will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad's operating territory, thereby providing many shippers with competition in rail service that they presently do not enjoy."). The point of this legislation is "to encourage intramodal competition." S. Rept. 96-470, at 38.

The STB in the 2106 NPRM followed this broad two-part model set forth in the statute in creating the proposed rules for reciprocal switching. Instead of the narrow standard in place today, the Board followed the statutory language, the transportation policy, and the legislative

intent by proposing to introduce greater competition into rail markets. The legislative language and history in Staggers urged the ICC to do exactly what the STB has done here.

NEW REASONS WHY THE PROPOSED RULES ARE NEEDED

1. The Historic Rail Industry Change to PSR since 2017 Makes these Proposed Rules Even More Necessary Now to Provide Shippers with a Remedy to Protect Them from this Dysfunctional Operating Model.

The developments regarding Precision Scheduled Railroading ("PSR") since the Board last sought comments in this proceeding clearly provide more justification than ever for the approval of these proposed rules on reciprocal switching. Implementation of PSR by nearly all the Class I railroads[1] (except for BNSF Railway) shortly after this last round of comments has made the need for this competitive access remedy even more compelling now than in early 2017. This widespread implementation and now use of PSR as the railroad operating model has caused a sea change in the way the rail network works and has resulted in generally poorer service and higher rates for rail shippers over the last 5 years.

The railroads claim "Precision" in PSR "refers to highly precise planning, examining, and fine-tuning of all processes related to the movement of rail cars, combined with disciplined, synchronized execution of the processes."[2] There are several elements to many of the PSR operating strategies claimed to be followed by the Class I railroads in the US. The first element is to "restructure local service" by "better utilize[ing] crews and locomotives, while asking more of

[1] Canadian Pacific Railway and Canadian National Railway Company had already implemented PSR before 2017.

[2] [2] "*The Operational Nuts and Bolts of Precision Scheduled Railroading",* Carl Van Dyke, FHWA Webinar PowerPoint, at 6, March 2020, https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/march_2020/talkingfreight3_18_20cvd.pdf

customers and local crews." *Id.* at 8. The second element is to "increase car velocity" by "reduc[ing] switching, while using block swaps more and providing multiple outlets for traffic - focus on plan adherence and elimination of blocking (switching), connection, and train make-up errors." *Id.* The third element is to "minimize train miles and road locomotive and crew needs" by "run[ning] fewer, longer, more generic trains on a balanced network and filling out the trains to their maximum capacity, while focusing on crew and locomotive cycling." *Id.* The fourth element is to "change customer services" by "eliminat[ing] 'boutique' operating plan elements (blocks and trains) and standardizing product offerings." *Id.* In its purest form, this operating strategy should "bring[] together many core principles that should arguably be widely supported by both railroads and customers, driving to better asset velocity, overall efficiency, shipment speed, and reliability." *Id.* at 7.

Unfortunately, PSR has not been used in its purest form as the railroads have professed and has been widely opposed by rail shippers due to its adverse effects on their service and costs. As stated by Chair of the House Committee on Transportation and Infrastructure Peter DeFazio: "In recent years, numerous stakeholders have raised concerns about the railroad management strategy known as precision scheduled railroading (PSR). Using variations of this strategy, it appears that Class I railroads have streamlined operations and otherwise cut costs in pursuit of lower operating ratios for short-term revenue gains. Stakeholders are concerned that the rise of the PSR model has come at the expense of long-term capital investments, reduced rail infrastructure, affected service for some shippers, and caused dramatic workforce cuts and safety

concerns."[3] Chair DeFazio was so concerned by this problematic use of PSR that a study by General Accountability Office ("GAO") was passed by the House in his surface transportation reauthorization bill, the INVEST in America Act, to help find ways to address the impacts this railroad management strategy has had on workers, freight shippers, passenger railroads, and rail safety.

The facts clearly demonstrate that Chair DeFazio's impression of PSR is the accurate one. First and foremost, rail service has plummeted since this historical change in how railroads operate. In March 2017, CSX Transportation, Inc. ("CSXT") implemented PSR as its rail operating plan. This implementation led to countless service issues across its network almost immediately. Part of CSXT's PSR plan involved cutting a large number of jobs across its system. By July, the Board had taken a number of actions in response to the service problems resulting from CSXT's ongoing implementation of this new operating plan. The Board began closely monitoring CSXT's performance, including requesting that CSXT's senior management participate in weekly calls with the Board's Rail Customer and Public Assistance staff and that CSXT submit weekly specific service performance data to facilitate these calls.

On October 11, 2017, service on CSXT had become so unreliable that the Board ordered executive-level officials from CSXT to appear at a listening session at the STB to discuss their ongoing and future efforts to improve service and to provide an estimated timeline for recovery of normal service levels. The Board also asked impacted shippers to appear at the public

[3] May 12, 2021 Letter from Chair DeFazio to U.S. Government Accountability Office, https://transportation.house.gov/news/press-releases/chairs-defazio-and-payne-jr-request-gao-study-on-the-impacts-of-precision-scheduled-railroading-on-workers-safety-and-shippers

listening session to discuss their service concerns and comment on the railroad's service recovery efforts.

On March 18, 2018, STB Chairman Ann Begeman individually wrote the Class I railroads about service issues across the US rail system. She stated that the Board had been closely monitoring freight rail service across the US and had become increasingly concerned about its overall state based on the weekly data collected under 49 C.F.R. pt. 1250. The data was indicating that service was deteriorating based on decreasing system average train speeds and increasing terminal dwell time. Other key metrics were also trending in a negative direction. The STB began holding weekly calls with the railroads and asked them to provide certain information with respect to their rail service.

Despite these monumental service issues on CSXT, most of the other Class I railroads, who were not already operating under PSR, also adopted this rail operating plan, including Norfolk Southern Railway ("NSR") in July 2019, Kansas City Southern Railway in January 2019, and Union Pacific Railroad ("UP") in October 2018. These changes led to further disruptions across the US rail network. Massive job cuts, like on CSXT, occurred on NS and UP as part of this plan, leading many to believe that any uptick in the need for rail service would leave them woefully unprepared. This eventually proved to be the case.

On August 24, 2020, the STB Chairman, as well as the Federal Railroad Administration Administrator, wrote the Class I railroads about both of their rail service concerns. These leaders of the rail regulatory agencies explained that they had been made aware of service issues, including missed industrial switches and excessively late or annulled trains due to crew availability issues. They noted that with both increasing intermodal and carload volumes and a projected robust harvest fast approaching, railroad employee availability, together with sufficient

equipment resourcing, was essential for safe, fluid rail service in support of the nation's economic recovery from COVID-19. Given the challenges related to changing demand patterns and operating conditions, they stated that increased communication and transparency with rail shippers had become especially important to ensure they have the information needed to plan their businesses and meet their own customers' needs. They emphasized that it was their expectation that there would be heightened emphasis on improving employee availability, equipment resources, and robust communication to quickly resolve service issues as they arose and to prevent them from becoming widespread. The Class I railroads did not heed this warning as service issues became more rampant.

On May 27, 2021, the new Chairman of the STB, Martin Oberman, also felt compelled to write to the Class I railroads again about rail service issues. He explained that the Board had received concerning reports from a meaningful number of rail customers of subpar performance, including missed switches, railcars delayed at intermediate yards or interchanges, extended out-of-route movements, and prolonged dwell at origin for some unit train traffic. Additionally, he noted that the STB had been made aware of instances of significant congestion at various intermodal facilities, which has resulted in delayed train arrivals and disruptions to container availability. He recognized that these rail service challenges, at least to some extent, had been related to workforce reductions resulting from COVID-19 cases, quarantines, and furloughs based on the temporary decline in demand and the resultant adjustments made by railroads in nearly every facet of their businesses. **But he also expressed his concern about the extent to which these service issues may be related to or exacerbated by a broader trend of rail labor reductions that have been occurring over the past several years. He stated that a lack of personnel, including reserve personnel, has made it more difficult to scale-up operations to**

respond to increases in demand and to maintain reliable service in the face of unanticipated external events that disrupt ordinary operations or business expectations. He said labor shortages could also delay or prolong the recovery period when such network disruptions inevitably occur.

As stated in previous STB letters, he said it is vital that freight railroads continue frequent, proactive communication with the Board and customers on their ability to meet demands for service as the economy recovers from the pandemic. He requested an updated and detailed description of the railroads' preparedness to meet anticipated future demand, including (1) the availability of train crew, yard, and maintenance employees (active, reserve, and furloughed workers) and their plans and time frames for employees to return to work and any re-training, if necessary, and (2) the availability of equipment resources (active and short-term / long-term stored locomotives and rail cars). **As part of this update, he specifically requested that the railroads also address whether they have any long-term plans, including their hiring plans for 2021 and 2022, to reverse any of the diminishing workforce levels which have resulted from their strategies in recent years.** He also asked them to identify any regions of their networks where they were experiencing or anticipating workforce challenges, and their plans to overcome these challenges.

Shortly thereafter, on July 22, 2021, STB Chairman Oberman again wrote the Class I railroads about significant disruptions within the international intermodal supply chain that involve the freight rail network. He stated that he was particularly concerned about significant increases in container congestion at key U.S. terminals, and substantial charges being levied by the railroads for container storage at these terminals. Specifically, in recent months, he asserted that the Board had received numerous reports related to the length of time that containers were

being held in rail yards, and the sizeable storage fees some customers had been required to pay in order to obtain release of containers bearing their shipments. He said that he was particularly troubled about reports that Class I railroads were continuing to impose these charges even in circumstances when the receivers, as a practical matter, had no means to facilitate the release of their containers. Under these circumstances, he noted that demurrage fails to provide any constructive incentives, and perversely results in massive charges that can exceed the commercial value of the shipment. In order to better understand the magnitude of the current container congestion and the framework for the associated demurrage fees, he asked for information from each of the Class I railroads regarding policies and practices with respect to the assessment of demurrage fees on intermodal containers.

On October 18, 2021, Chairman Oberman focused on service issues on CSXT which again caused great concern to the Board, thereby precipitating a letter to the carrier seeking rail service performance information. He stated his reason for this information request was that over the past several months, the Board had continued to receive a steady stream of complaints about the adequacy of rail service provided by CSXT. In both private meetings and public settings, he said CSXT customers have relayed examples of substandard performance, including missed switches, extended transit times for both manifest and bulk shipments, unfilled car orders, and the inability to contact customer service and operating personnel. He stated that customers have also reported that service problems are sometimes resolved, only to recur weeks or months later. Taken together, he noted these complaints were of grave concern as it appeared that CSXT resources were surged to assist one customer, only to have problems arise with another. And, as a result of these problems, he explained that customers incurred premium freight costs, idled production, lost sales and damaged commercial relationships, typically without meaningful

recourse from CSXT. In addition to anecdotal incidents, he noted CSXT's rail service performance data reported under STB Docket No. EP 724 tended to support that CSXT's network was underperforming compared to the benchmarks set in 2019. **He also noted that CSXT has approximately 1,000 fewer "transportation" employees for August 2021 compared to August 2019 (6,577 versus 7,543), as reported on STB Form C.**

This was followed with a similar letter to NS on November 23, 2021, emphasizing the railroad's deteriorating key operating metrics reported pursuant to EP 724. **He compared these numbers with the fact that NSR's number of "transportation" employees had continued to decline over the prior three months (8,281, 8,269, and 8,207, respectively), as reported on STB Form C.** Coinciding with the marked deterioration in NSR's performance metrics, he said the Board had received an increasing number of complaints from NSR's customers about poor performance, including missed switches, cars stranded at intermediate yards, longer transit times, operating plan changes without notice, and a lack of communication from customer service**. For these reasons, he requested that NSR provide the Board with a review of the current state of its network, and assessment of what factors are affecting NSR's ability to achieve past levels of fluidity and consistent service, and in particular the impact on customer service of previous headcount reductions for train, yard, and maintenance employees. He noted it would be most helpful if NSR could provide this review as a follow up to its June 18, 2021, letter, in which a "program of targeted hiring" to meet workforce needs, referenced measures to attract and retain operating employees was outlined. In light of the declining employee headcount since June as shown by the data supplied to the STB, he asserted this program does not appear to have succeeded in obtaining a workforce level sufficient to avoid the service challenges described above.**

As some of these STB communications seem to express, this massive decline in rail service since 2017 can clearly be tied to the use of PSR across the US rail network and the resulting job cuts that made the railroads incapable of providing adequate service and handling upticks in the need for service. CSX had 23,988 total employees and 9262 train and engine service employees in February 2017. CSX had 17,250 total employees and 6795 train and engine service employees in December 2021. UP had 44,652 total employees and 18,612 train and engine service employees in October 2018. UP had 32,494 total employees and 14,079 train and engine service employees in December 2021. NS had 24,594 total employees and 10,243 train and engine service employees in July 2019. NS had 18,011 total employees and 7521 train and engine service employees in December 2021. (These numbers were obtained from the STB Form C information on the STB website.) Job cuts of this magnitude can only result in one outcome which is poor service as the above-recounted facts clearly demonstrate.

Moreover, the operating ratios for these railroads continue to decline. UP has gone from an operating ratio of 63.7% in 2016 to 57.2 in 2021. CSX has gone from 69.2% in 2016 to 56.3% in 2021. NS has gone from 69.6% in 2016 to 60.1% in 2021.

While service has declined, rail rates have continued to rise. In a recent report published by the Rail Customer Coalition[4], evidence of skyrocketing rates and less competitive traffic is clear. The report finds:

- From 2004 to 2019, **real rates (adjusted for inflation) for all rail shippers increased 43%.**

[4] Escalation Consultants, "*Economic Analysis: Consolidation and Increasing Freight Rail Rates*," June 2021. https://www.freightrailreform.com/new-report-finds-rail-customers-paying-a-steep-price-for-consolidation-and-dwindling-competition/

- During the same period, real **railroad costs rose only 8%.**
- Rates for the largest U.S. railroads have jumped **more than twice as fast as inflation and rates for long-haul trucking**.
- **For major commodity groups, revenue from potentially non-competitive rates increased 230%**, while revenue from competitive rates increased only 24%.
- **In 2019, half of railroad revenue was generated from potentially non-competitive rates**, up from 27% in 2004.
- For significantly impacted sectors and commodities, the share of total rail revenue derived from non-competitive rates increased as follows**:**

Agriculture

Commodity	2004	2019
Food Products	15%	39%
Farm Products	34%	56%

Building & Construction

Commodity	2004	2019

Wood Products	8%	31%
Metal Products	17%	45%
Stone & Glass Products	36%	64%

Transportation & Infrastructure

Commodity	2004	2019
Transportation Equipment	13%	33%

- In a troubling indicator of the railroads' ever-growing market dominance and pricing power, **the average revenue-to-variable-cost (RVC) ratio increased from 135% to 167% for shipments of these commodities.**

Id.

Obviously, the implementation of PSR by the railroads since 2016 has made the need for these proposed rules more evident. In fact, before BNSF Executive Chairman Matt Rose retired, he predicted that "PSR, reducing service, and demarketing some types of traffic in pursuit of higher profits" would result in increased scrutiny by the STB. He stated that railroads "have this common carrier obligation to provide freight service to all customers in all markets. And what we're doing in PSR is redefining what we're willing to accept in the freight railroad industry on

certain lanes. And I really do believe we're going to get in a lot of trouble by doing that." He added that "[w]hen you start redefining markets, I think the federal policy makers will look at this, and quite frankly, they will not be happy with us."[5]

As Chairman Oberman recently noted, "railroads' emphasis has not been on growth. Rather, the emphasis has been on cutting in pursuit of the almighty [operating ratio] down to below 60%." He added that '[i]t is clear that as a whole, railroads have foregone many kinds of carloads that they could carry profitably, only not at O.R.s as low as 55%, and instead have focused on only the most profitable traffic. No one is asking the railroads to focus on traffic that would only be carried at a loss. But surely it is not asking too much for railroads to actively seek profitable traffic, even if not as profitable as others."[6]

In other words, PSR railroads have resorted to only choosing rail traffic which fits within the PSR model to continue to drive down operating ratios. This practice leaves certain rail shippers out in the cold even though rail is their best transportation option. This practice is even more disruptive today when truck capacity due to a shortage of drivers is extremely limited. As a result, some rail shippers have nowhere to turn.

The effects of this new rail operating strategy have devastated the rail workforce and resulted in correspondingly poor rail service and sometimes no service at all. While the railroads will assumedly argue that the pandemic is the cause of their service issues over the last two years, this claim is obviously only a part of the story. IMA does not dispute that the pandemic has had a

[5] Trains, *Analysis: Former BNSF Executive Matt Rose's Warning Comes True,* July 22, 2021. https://www.trains.com/trn/news-reviews/news-wire/former-bnsf-executive-matt-roses-2019-warning-comes-true/

[6] Trains, *Top Regulator Urges Railroads to Focus on Growth,* September 9, 2021. https://www.trains.com/trn/news-reviews/news-wire/top-regulator-urges-railroads-to-focus-on-growth/

historic impact on the world's supply chain. However, the railroads by slashing jobs have directly caused the situation to be much worse by making them incapable of adjusting to upticks in the need for rail service. As a result, many rail shippers, especially captive ones, have suffered from plant shutdowns and slowdowns and other adverse impacts that have damaged their businesses despite paying higher and higher rates. These shippers have little recourse except through informal channels to hold these railroads accountable for the harms they suffer at the hands of the railroads. If the new proposed rules are adopted by the Board, some rail shippers would finally have a path to remedy some of these problems. In sum, there never has been a time since the enactment of Staggers where Congress's intent to introduce competition through reciprocal switching was more needed.

2. Increased Use of Reciprocal Switching Arrangements Will Lead to Increased Revenues for the Class I Railroads.

Railroads claim that reciprocal switching will not allow them to properly invest in their infrastructure and would deter them from investing where reciprocal switching allowed another carrier access to its captive customers. An alternative speculation is that new rail shippers and an overall increase in contribution to overhead could be attracted with the prospect of competitive linehaul service and stable switching service, both of which are promulgated by reciprocal switching. In other words, railroads could be the financial beneficiaries from reciprocal switching because it may make rail more attractive to shippers who can get better rates and service due to the new competition.

As discussed in the previous section, railroads have slashed jobs and expenses under the guise of PSR. Continuing down this path will eventually lead to the complete destruction of rail service in the US. In other words, cutting expenses can only go so far. At some point, railroads

will have to begin to look to other ways to impress Wall Street besides cost cutting because there will be nothing left to cut. The only other way to do this would be to increase revenues. Despite the railroads total opposition to any change to the reciprocal switching remedy as proposed in this proceeding, this view is shortsighted when one considers the benefits of reciprocal switching to an industry that has recently lost one of its main sources of revenue in coal.

Railroads like to emphasize how capital intensive its industry is and how much money it invests in its infrastructure. This claim is certainly a main talking point by the railroads and undisputedly warrants careful examination because proper investment in the rail network is essential to provide this crucial service to the nation. However, concerning the general state of capital investment by Class I railroads, capital investment claimed by the seven Class I railroads during the decade 2010-to-2019 is approximately $152.1 billion, $26.6 billion of which represents the portion of those capital expenditures that was discretionary and spent in order to increase the railroad's rate of return, where the $125.5 billion difference is comprised of non-discretionary items that would not increase the railroad's rate of return and would not be classified as capital expenditures in other industries[7]:

- $85.4 billion spent on track and bridges, primarily replacements in kind;
- $30.9 billion spent on locomotives and freight cars, again almost entirely replacements in kind, where locomotives were not new Tier 4 environmentally compliant, but re-built lower Tier motive power and where locomotive work, as measured by gross ton-miles of

[7] Comments of Rail Cents Enterprises, Inc., EP 711 (Sub-No. 1), at 6 (filed February 1, 2022).

freight moved, was flat[8] during the decade, and where replaced cars did not keep up with retired cars—railroad-controlled car fleets decreasing 24% from 2010 to 2019[9]; and

- $9.2 billion spent on Positive Train Control, a safety technology mandated by Congress in 2008,

Id.

While these numbers touted by the railroads appear impressive on their face, they are not as substantial as claimed. The question then becomes what are the railroads doing with all the monies that they are earning from these massive cuts in expenses. Distributions to shareholders by the seven Class I railroads during the same decade, 2010-to-2019, was approximately $164.2 billion. That is, the Class I's returned over six times[10] as much money to shareholders during the decade before the Covid-19 crises as they spent on projects to increase their rates of return. *Id.* "Implication: senior management at the Class I's has had great difficulty in finding investments with returns in excess of their cost of capital, hinting that a new strategy based on carload traffic growth could open up new vistas of franchise growth." *Id.* Reciprocal switching could make this strategy more obtainable by introducing competition, thereby creating better service and lower rates.

Railroads have been accused of demarketing certain types of traffic as discussed in the previous section, since the advent of the PSR revolution, that do not fit within this model. Many shippers have sought new rail service or sought to continue rail service only to have the railroads

[8] Freight ton-miles moved by the seven Class I's was basically flat from 2010 (2.21 trillion) to 2019 (2.29 trillion).
[9] Freight cars owned and leased by Class I's decreased 24% from 461,849 in 2010 to 351,032 in 2019.
[10] $164.2 billion divided by $26.6 billion is 6.2, which changes very little (to 6.1) if all numbers for the decade are converted into constant dollars in order to erase the effects of inflation.

express little interest in their business. Railroads can easily deter shippers from using rail by quoting extremely high rates or offering limited service. While railroads know that rates are required to be reasonable by statute, they also know that the STB rate case process provides little hope to the shippers who would like to challenge these rates as the Board has admitted in recent proceedings. Therefore, if rail traffic does not fit within the PSR model, railroads can easily sidestep their common carrier obligation by offering these unreasonable take it or leave it rates to shippers.

However, at some point, railroads will have to change their shortsighted path in order to make Wall Street happy by increasing revenues as this present strategy is unsustainable in the long run. An increase in reciprocal switching could help to make this inevitable path more of a reality. For example, railroads may only provide a shipper facility with three days of switching service per week. However, the shipper may want to increase the number of days of service to move more of its product by rail. If an interchange with another railroad is within a reasonable distance, that competing railroad could fill in that void and provide service on those additional days. The result would be more rail business. Moreover, by offering more competitive rates, railroads could obtain more business that presently moves by other modes of transportation.

With the recent loss of revenue from the large decrease in coal traffic, Class I railroads will have to turn to new markets to increase revenue. That market could easily be carload traffic. As a result, while this proposed change to the reciprocal switching rules may be strongly opposed by the rail industry now, it may eventually lead to increases in business brought on my better rates and improved service, thereby making this a win-win situation for all involved.

3. During this Historic Disruption of the Global and U.S. Supply Chains Brought on by the Pandemic, the Need for More Efficient and Flexible Rail Service Has Never Been More Evident which these Proposed Rules Will Allow to Happen.

As the Board is aware, the global supply chain has been completely disrupted by the pandemic that has changed the world as we know it over the last two years. This supply chain crisis has wreaked havoc across all forms of transportation including maritime, trucking, and rail. The unpredictability of the demand for goods and the workforce supply, among other things, has brought on events in the supply chain never seen in the past. Unfortunately, there is no certain time when this disruptive situation will end.

Obviously, railroads are crucial to the supply chain in the U.S. and North America. An efficient rail system is extremely important now to help solve these supply chain issues. However, with the pandemic and corresponding difficulties in keeping the workforce fully staffed brought on by devastating illness and quarantine requirements across the U.S., the railroads have had an extremely difficult time providing adequate service to rail shippers in dire need of their services during these unprecedented times. These workforce difficulties were compounded by the large job cuts described above that made the railroads woefully unprepared for these challenges brought on by the pandemic. Moreover, the railroads seemed reluctant to bring back workers as the numbers quoted by Chairman Oberman in his letters to CSX and NS last year demonstrate.

Reciprocal switching could certainly be a cure for some of these troubles when a railroad is understaffed and cannot adequately provide service to its customers. First, when an incumbent railroad serving a captive shipper is not prepared for a surge in business due to job cuts, a competing railroad with a nearby interchange may have the resources to provide this service. The proposed new rules could allow the captive shipper to obtain this service through a reciprocal switching arrangement. At present, it is highly unlikely that the incumbent would allow the

competing railroad access to its captive customer. As a result, the captive customer would have no other choice but to rely on the unprepared railroad and receive inadequate service.

Second, in some instances, the incumbent railroad may not have access to the most efficient rail route for its captive customer. Therefore, when rail service crises occur, the captive shipper would be required to rely on the incumbent carrier's less efficient route even though a competing railroad with a nearby interchange can provide better service. The inefficiency of this result would only be compounded if the incumbent railroad was suffering from service issues across its network brought on by its unpreparedness for a surge in business.

While railroads do at times have a difficult balancing act when trying to determine the resources they need to be prepared for changes in business, examples of major rail service problems have been common over the last decade despite the financial health of the industry. In 2013 and 2014, the rail network struggled mightily with the upsurge in business in North Dakota brought on by fracking and crude by rail. *See United States Rail Service Issues, et al,* EP 724 (STB served Aug. 18, 2014). These issues became even worse with poor weather in Chicago and a strong harvest that had to compete for service with the crude oil traffic. *Id.* As noted, CSX had severe service problems as it implemented PSR on its network in 2017 which continue to this day. *See Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues, et al,* EP 742 (STB served Aug. 24, 2017). The implementation of the proposed rules might not have been able to eliminate all these issues over the years, but it certainly could have helped in certain situations by allowing rail customers to use a better prepared or suited railroad that might not have been available because of the lack of this competitive access remedy.

Generally, the implementation of these proposed rules will make the rail network more efficient by allowing captive shippers within a reasonable distance of a competing railroad to

obtain better routes or better service as discussed above. It also would create competition which would require railroads to provide better service to rail shippers or risk losing business. There never has been a time since the passage of Staggers that this remedy has been more needed. The railroads have decided to implement PSR and make cuts to their workforces and other needs that have generally left them unprepared to provide adequate rail service. The railroads have not been responsive to the Board's inquiries and warnings about their hiring issues. As a result, rail shippers have suffered from poor service resulting in plant shutdowns and slowdowns on an unprecedented basis. This use of reciprocal switching on an increased basis will make the rail system more efficient and hopefully compel the railroads to provide better service and to be more prepared by introducing more competition into the rail industry.

IMA TESTIMONY ABOUT INTERCHANGE DISTANCE

One of the requirements in the proposed rules is that "[t]he party seeking such switching shows that there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching." IMA is concerned about how the term "reasonable distance" will be interpreted in future decisions at the Board. IMA urges the Board to liberally interpret this language, or many IMA member companies may not have access to this crucial reciprocal switching remedy.

Many IMA member companies are located in remote, rural areas where only one Class I railroad is in the immediate area. These member companies are captive to this railroad and have no other options to move their bulk product to their customers or ports. These member companies are large rail shippers and spend over $1 billion in rail service each year. However, if the Board limits a "reasonable distance" to 30 miles in these remote areas, many of the IMA

member companies will not be able to use the proposed rules because of their long distance to an interchange with another Class I railroad. Many member companies find themselves in this position because the nature of their business makes it more likely that they will be located in these more remote areas. This is also the case for many rail shippers in other industries like agriculture and coal. Therefore, this is an extremely important issue for many rail shippers who are captive in remote locations.

Moreover, IMA member companies that are captive to a Class I railroad in these remote areas presently feel helpless to push for reasonable rates and service. First, as the Board has noted, the competitive access remedies have proven to be unworkable for captive shippers over the past several decades since the *Midtec* decision. In essence, these remedies, including reciprocal switching, cannot be used successfully by IMA member companies. Second, the stand alone cost test rate case process for large rate cases has proven to be broken to a large extent. The process has been shown to be overly expensive, incredibly complex, unpredictable, and unusable depending on the circumstances. Finally, most IMA member companies have little flexibility regarding the locations of their facilities. They must be located where they are because that is where the industrial minerals are located. As a result, these member companies cannot choose to place their facilities at locations that are served by more than one railroad.

The Board has acknowledged the ineffectiveness of these remedies and has begun to take action for which the IMA commends the Board and urges it to move swiftly in this proceeding. Also, the Board reviewed the broken rate case process in its rate case report and has moved forward with the Final Offer Rate Review process for small rate cases. While IMA is very supportive of these actions, its member companies could still find themselves in the same position after all is said and done. FORR does little to help these large rail shippers with its 2

years / $4 million cap. As mentioned, many IMA member companies are large rail shippers who would need an improved large rate case process for an effective remedy for unreasonable rates. Moreover, if the term "reasonable distance" is strictly interpreted to only apply to interchanges within a 30-mile radius, many of these member companies would not be able to use this remedy. As a result, they would find themselves in the same position that they are in right now which is without any accessible remedy before the Board when they are captive. This result seems inherently wrong and counter to the intentions of Congress.

Therefore, IMA respectfully asks the Board to apply the term "reasonable distance" with the location in mind. If the facility is in a remote location, the Board should permit this distance to be at least 300 miles to make it usable by these captive rail shippers. Longer distance interchange points are not unheard of in rail regulation. In Canada, the 2018 amendments to the Canada Transportation Act provide for Long Haul Interswitching, which provides for reciprocal switching in circumstances where the nearest interchange is much farther than 300 miles.

If the Board does not interpret "reasonable distance" this way, the result would eliminate the benefits of the proposed rules to a large sector of captive rail shippers. Moreover, it is clearly in the public interest because these rail shippers presently feel as if they have no access to the Board when they are captive, and a shorter distance limitation would make them feel as if nothing has changed.

CONCLUSION

Based on the foregoing discussion, IMA strongly urges the Board to adopt the proposed rules for reciprocal switching with this one recommendation regarding "reasonable distance" in mind. The case for the implementation of these rules has never been stronger than now.

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for Industrial Minerals Association-North America

/s/ Chris Greissing

Chris Greissing
President
Industrial Minerals Association-North America
1200 18th Street, Suite 1150
Washington, DC 20036
(202) 457-0200

Dated: February 14, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 39

EX PARTE NO. 711 (SUB-NO. 1), COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION (FILED FEB. 14, 2022)

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LAW OFFICE OF THOMAS W. WILCOX, LLC
1629 K. STREET, NW SUITE 300
WASHINGTON, DC 20006

(202) 508-1065 (O)
(202) 365-8409 (C)
TOM@TWILCOXLAW.COM
WWW.TWILCOXLAW.COM

February 14, 2022

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. EP 711 (Sub - No. 1) – *Reciprocal Switching*

Dear Ms. Brown:

Pursuant to the decision served in the captioned proceeding on December 28, 2021, the National Grain and Feed Association ("NGFA") hereby submits its written comments on the topics discussed in the decision. The NGFA also submits the written testimony of Mr. Max Fisher, its Chief Economist. Mr. Fisher will be in attendance for NGFA at the hearing scheduled on March 15-16, accompanied by its undersigned counsel. The NGFA has requested 10 minutes be allotted for its remarks.

Please do not hesitate to call me if you have any questions.

Sincerely,

Thomas W. Wilcox

Thomas W. Wilcox

Transportation Counsel for The National Grain and Feed Association

NGFA COMMENTS

National Grain and Feed Association
www.ngfa.org

1400 Crystal Drive, Suite 260
Arlington, VA 22202
P: (202) 289-0873

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub- No.1)

RECIPROCAL SWITCHING

COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

The National Grain and Feed Association ("NGFA") is very appreciative of the opportunity to supplement its prior comments in this proceeding,[1] and the NGFA commends the Surface Transportation Board ("Board" or "STB") for resuming its consideration of revising the current rules and regulations implementing 49 U.S.C. §11102(c)(1) to facilitate reciprocal switching for the purposes of potentially increasing rail-to-rail competition for the benefit of agricultural shippers and for society at large. Many of the NGFA's members are captive to one railroad for service. While the alternative of truck transportation for most agricultural commodities

[1] On October 26, 2016 the NGFA submitted Opening Comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in this Docket on July 26, 2016. On January 13, 2017, the NGFA submitted Reply Comments on the NPRM. The NGFA also participated in a joint filing in this and other dockets submitted on July 29, 2021 by a group of agricultural trade associations called the Agricultural Working Group in response to the July 9, 2021 Executive Order issued by President Biden which in part encouraged the Board to adopt initiatives such as reciprocal switching to encourage competition in the railroad industry. NGFA incorporates those prior filings by reference in these comments.

theoretically exists nearly everywhere, it is not an effective competitor to long haul shipments that predominate rail transportation. Thus, a revision of the rules governing Board-directed reciprocal switching arrangements to more closely adhere to the statutory language is not only long overdue, it would potentially provide relief for NGFA's members that is not currently available under existing rules and agency precedent.

I. Identity and Interests of NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, and processing industry. The NGFA also consists of 27 affiliated State and Regional Grain and Feed Associations and is co-located and has a strategic alliance with the North American Export Grain Association, and a strategic alliance with the Pet Food Institute.

II. Comments in Response to the December 27, 2021 Decision

A. New Developments in the Agricultural Industry Relevant to a Final Decision

Since 2017, when the written comment period on the NPRM closed, the amount of grain transported by rail has been relatively steady and the long running trend of shuttering smaller train loading facilities and building larger facilities has continued. This combination of steady grain volumes and fewer, but larger facilities, is in part the outcome of the Class I railroads' changes to their operating plans caused by adopting the principles of so-called "precision scheduled

railroading." This change in the agricultural commodity transportation market has created an even greater need for reciprocal switching and makes the industry more conducive to trying to create rail competition through reciprocal switching.

Meanwhile, the need for increased rail-on-rail competition remains. The number and makeup of grain handling facilities is evolving, but the ability remains low to locate or move facilities to more favorable locations to try and obtain rail-to-rail competition. For example, grain origin facilities must stay reasonably close to farms to keep truck freight costs manageable for the first movement from field to storage. This means grain handlers often must build in areas that are captive to a single railroad.

In summary, agriculture's suitability for reciprocal switching has improved and its need for rail-to-rail competition remains.

B. Comments on Topics Discussed in *Ex Parte* Meetings

The NGFA does not have any comments on topics that were discussed in *ex parte* meetings with the Board members and staff on reciprocal switching issues.

C. Other Matters Relevant to This Proceeding

The NGFA continues to maintain that final revised rules governing the Board's establishment of reciprocal switching arrangements should have several primary objectives. The first objective is to reaffirm the Board's conclusion in the NPRM that the "anticompetitive act" standard applied in the Interstate Commerce Commission's rules in *Intramodal Rail Competition*[2] and in *Midtec Paper Corp. v. Chicago & North Western Transportation Co*[3] should be reversed for the reasons discussed in the NPRM.[4]

[2] 1 I.C.C.2d 822 (1985), *aff'd sub nom Balt. Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).
[3] 3 I.C.C.2d 171 (1986).
[4] NPRM at 8-10.

Second, the final revised rules should be as streamlined as possible so decisions on whether a reciprocal switch arrangement should be established can be made without lengthy and costly administrative proceedings, while still fulfilling the statutory directives of §11102(c)(1) and principles of due process. The NGFA has previously commented that the final rules should be more explicit about the procedures for resolving reciprocal switching disputes. The NGFA also believes that the Board should reconsider its prior rejection of the concepts of rebuttable presumptions that was a key component of the original proposal of the National Industrial Transportation League in 2011. For example, the Board could establish a presumption that carriers should establish a reciprocal switching arrangement for shippers located within a defined distance of an established interchange, thus placing the onus on the incumbent rail carrier to demonstrate that a reciprocal switching arrangement was neither in the public interest nor necessary to provide competitive rail service. In such cases, evidence could include the extent to which the incumbent's investment in power, crews and track can create capacity that would overcome alleged switching challenges.

Third, the NGFA continues to urge the Board to be adaptable in determining qualifications for determining whether there "can be" a working interchange from which reciprocal switching can occur.[5] The final rules should take into account that new interchanges can be established, and former interchanges rehabilitated and restored to service. The NGFA also recommends that the Board accompany the final rules with a public process whereby existing and potential new interchanges eligible for reciprocal switching arrangements would be identified starting from an appropriate baseline date preceding the effective date of the final rules.

Fourth, the NPRM chose to leave the determination of whether there is a working

[5] The NGFA has previously commented it does not object to the NPRM's proposed identification of existing interchanges.

interchange "within a reasonable distance of the facilities of the party seeking switching" to be made on a case-by-case basis.[6] The NGFA recently surveyed its membership and now more than one-half of its members' rail origin and destination facilities that are located on a Class I railway are located within 100 miles of a second Class I railway. Consequently, a determination in the final rules that 100 miles is "within a reasonable distance" could potentially lead to increased rail-to-rail competition for a significant portion of grain shippers, and the NGFA reiterates its support for such a determination.

Grain shippers and receivers that are beyond a "reasonable distance" from an interchange would be relegated to trying to control their rail transportation costs through efforts to have the Board determine the maximum reasonable rate the railroad could charge under the law. For this reason, the NGFA is very pleased that the Board is simultaneously working to promulgate revisions to its rate reasonableness procedures and standards that are applicable to disputes that involve relatively small damage amounts.

Finally, the NGFA continues to encourage the Board to be vigilant in fashioning workable and effective rules governing the compensation to be paid incumbent carriers in Board-directed reciprocal switching arrangements. As the NGFA has explained in its prior comments in this proceeding, the Board's rules should apply to both cases where (1) the Board directs a reciprocal switch arrangement and the carriers cannot reach agreement on the conditions and compensation applicable to the agreement; and (2) the Board directs an arrangement and the carriers do reach agreement but the shipper(s) benefitting from the arrangement believe the agreed upon amount is unreasonably high. The NGFA continues to be concerned that in today's concentrated railroad industry the possibility exists that such fees and terms almost certainly will be set at levels that

[6] Proposed Section 1145.2(a)(1)(ii).

maintain the *status quo* at a particular location instead of creating effective competition. In such cases, which the NGFA believes will be common despite the pro-competitive intent of §11102(c), shippers must have a clearly defined and efficient means to challenge the agreed-upon reciprocal switching fee at this Board. The most efficient and reasonable approach to address this issue would be for the final rules to establish that the standards for determining whether compensation agreed to by railroads under §11102(c) is appropriate shall be the same as the standards to be applied when they *cannot* agree.

NGFA continues to be in favor of an "access pricing" methodology (compensation determined on a case-by-case basis reviewing a specific set of factors - i.e., geography, distance, cost of service, capacity of interchange facility, etc.) – as proposed in the NRPM. By developing and then consistently applying an appropriate "access pricing" methodology, the Board would place all incumbent rail carriers on a level playing field to compete for business through reciprocal switching arrangements.

III. Conclusion

The NGFA encourages the Board to maximize this opportunity to facilitate rail-to-rail competition and allow both origin and destination rail customers to attempt to obtain alternative rail service via reciprocal switching arrangements. In a highly consolidated and largely captive industry, this may be the best opportunity to create some semblance of effective rail-to-rail competition. The NGFA accordingly urges the Board to act with all deliberate speed to promulgate final regulations in this proceeding.

Respectfully submitted,

Sincerely,



Michael C. Seyfert
President and Chief Executive Officer
National Grain and Feed Association
1400 Crystal Drive, Suite 260
Arlington, VA 22202
mseyfert@ngfa.org
202-289-0873



Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW Suite 300
Washington, DC 20006
tom@twilcoxlaw.com
202-508-1065

Transportation Counsel for the
National Grain and Feed Association

February 14, 2022

NGFA TESTIMONY

National Grain and Feed Association
www.ngfa.org

1400 Crystal Drive, Suite 260
Arlington, VA 22202
P: (202) 289-0873

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub- No.1)

RECIPROCAL SWITCHING

TESTIMONY OF THE NATIONAL GRAIN AND FEED ASSOCIATION

Good morning, my name is Max Fisher, and I am the Chief Economist for the National Grain and Feed Association. The NGFA consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities.

I would like to begin by commending the Board for resuming its work in this proceeding for the purpose of increasing rail-to-rail competition through reciprocal switching arrangements. Many of NGFA's members are captive to one railroad and have little bargaining power in the absence of rail-to-rail competition.

Since 2017, when NGFA submitted its last set of comments on the NRPM, the amount of grain transported by rail has been relatively steady, and the long running trend of shuttering smaller train loading facilities and building larger facilities has continued. This combination of steady grain volumes and fewer, but larger facilities is in part the outcome of the Class I railroads' changes

to their operating plans caused by adopting the principles of so-called "precision scheduled railroading."

Meanwhile, the need for increased rail-to-rail competition remains. The number and makeup of grain handling facilities is evolving, but the ability remains low to locate facilities in places where more than one railroad can provide service. For example, grain origin facilities must stay reasonably close to farms to keep truck freight costs manageable for the first movement from field to storage. This means grain handlers often must build in areas that are captive to a single railroad.

To summarize these trends, agriculture's suitability for alternative rail service through reciprocal switching has improved and its need for rail-to-rail competition remains.

With respect to the 2016 NPRM, the NGFA maintains that several primary objectives should be reflected in the final rules the Board issues. The first objective is to reaffirm the Board's conclusion in the proposed rule that the "anticompetitive act" standard applied by the Interstate Commerce Commission in the MidTec case and other decisions should be reversed.

Second, the procedures contained in the final rules should be as streamlined as possible so decisions on the establishment of reciprocal switching arrangements can be made without lengthy and costly administrative proceedings.

Third, the NGFA continues to urge the Board to be adaptable and take into account that interchanges conducive to reciprocal switching can be established or reconstructed. The NGFA also recommends that the Board accompany the final rules with a public process whereby existing and potential new interchanges eligible for reciprocal switching arrangements would be identified.

Fourth, the NGFA recently surveyed its membership and now more than one-half of its members' rail origin and destination facilities are located on a Class I railway that is within 100

miles of a second Class I railway. Consequently, a determination in the final rules that 100 miles is "within a reasonable distance" of an interchange could potentially lead to increased rail-to-rail competition for a significant portion of grain shippers.

In any case, the NGFA is very pleased that the Board is simultaneously working to promulgate revisions to its rate reasonableness procedures for shippers and receivers that would be too far from an interchange to participate in reciprocal switching.

Finally, the NGFA encourages the Board to fashion workable and effective rules governing the compensation to be paid incumbent carriers in Board-directed reciprocal switching arrangements. These rules should apply to cases where the Board directs a reciprocal switch arrangement but the carriers cannot reach agreement on the conditions and compensation; and also cases where the Board directs an arrangement and the carriers do reach agreement but the shipper(s) benefitting from the arrangement believe the agreed upon amount is unreasonably high.

The NGFA is remains in favor of the "access pricing" methodology in the proposed rule. By developing and consistently applying an appropriate "access pricing" methodology, the Board should be able to place rail carriers on a relatively level playing field to compete for business through reciprocal switching arrangements.

In conclusion, the NGFA encourages the Board to maximize this opportunity to facilitate rail-to-rail competition and allow both origin and destination rail customers to attempt to obtain alternative rail service via reciprocal switching arrangements. In a highly consolidated and largely captive industry, this may be the best opportunity to create some semblance of rail-to-rail competition. The NGFA accordingly urges the Board to act with all deliberate speed to promulgate final regulations in this proceeding.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 40

EX PARTE NO. 711 (SUB-NO. 1), PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION TESTIMONY (FILED FEB. 14, 2022)

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BEFORE THE

SURFACE TRANSPORTATION BOARD

Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION TESTIMONY

Private Railcar Food and Beverage Association ("PRFBA") respectfully submits its testimony in the above-captioned proceeding in accordance with the Surface Transportation Board ("STB" or "Board") Notice of Public Hearing ("Notice") served on December 28, 2021. The Board provided the opportunity for interested parties to provide testimony to update the record in this proceeding regarding its proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish reciprocal switching arrangements under certain circumstances. PRFBA thanks the Board for this opportunity to voice its strong support for these proposed new rules for reciprocal switching made even more necessary now by the changes in the rail industry since early 2017.

PRFBA INTEREST IN THE PROPOSED RULES

PRFBA is comprised of 18 global food and beverage companies and manufacturers headquartered in North America. These members include PepsiCo, Inc., Molson Coors Beverage

Company, KraftHeinz Food Company, General Mills, Inc. ("GMI"), McCain Foods USA, Inc, Sysco Corporation, Bonduelle America, Boardman Foods, Inc., G3 Enterprises, Inc., JD Irving/Cavendish Farms, The Martin-Brower Corporation, Lamb Weston Holdings, Inc., Univar Solutions, Darigold, Inc., Kellogg Company, Land O' Lakes, Inc., National Sugar Marketing, LLC, and Laprino Foods. They are major rail shippers that rely on the railroads to produce and distribute their food and beverage products that are vital to the health and welfare of our nation. These companies are responsible for feeding the citizens of this nation. Without adequate rail service, their food and beverages will not be on store shelves in the US.

PRFBA members meet regularly to discuss opportunities and solutions to their "similar" challenges with railcar service. The membership collaborates with other trade associations with regard to industry changes and proposed legislation and regulations that directly impact the association's food and beverage transportation needs. PRFBA meets with the Class I North American railroads where group discussions are held on rail service issues unique to its membership. PRFBA provides its members with a forum to work together to harness the railroad service challenges ultimately providing a better industry foundation for private railcar food and beverage shippers in North America.

PRFBA members continue to be adversely impacted by the lack of any options to obtain competitive rail access. Under the current process for the reciprocal switching remedy, PRFBA members do not bring forward reciprocal switching cases and are often forced to modify operations to their detriment because no other viable options are present. This results in negative impacts throughout the supply chain ultimately impacting not only PRFBA members, but their customers and then their consumers.

PRFBA appreciates that the STB has an important oversight role in looking at the impact of freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve the reciprocal switching remedy in line with the intent of Congress. PRFBA urges the Board to breathe life into this remedy that has been essentially dormant for decades and to provide a method to counter the Class I railroads' unabated market power over its members.

BACKGROUND OF THE PROCEEDING AND THE PUBLIC HEARING

The Board opened this proceeding by issuing a Notice of Proposed Rulemaking ("2016 NPRM") on reciprocal switching on July 27, 2016. *Reciprocal Switching ("NPRM"),* STB Ex Parte 711 (Sub-No. 1) (STB served July 27, 2016). Parties filed opening comments and reply comments on the 2016 NPRM in late 2016 and early 2017. Following these comments, the proceeding did not move forward except for ex parte meetings and has remained essentially dormant since that time.

The 2016 NPRM grew out of the Ex Parte No. 711 proceeding, which was initiated by a July 7, 2011 petition for rulemaking by the National Industrial Transportation League. Petition for Rulemaking of the National Industrial Transportation League, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte 711 (served July 7, 2011). That proceeding involved comments filed in 2013 and a public hearing in March 2014.

On December 28, 2021, the Board issued the Notice stating its intent to "hold a public hearing on March 15 and 16, 2022, concerning the reciprocal switching regulations it proposed" through the 2016 NPRM. *Reciprocal Switching*, STB Ex Parte 711 (Sub-No. 1), slip op. at 1 (STB served Dec. 28, 2021). The Board's stated intent for holding a public hearing and inviting comments is "[t]o allow interested persons to submit testimony to update the record," and "[t]o

ensure a full and updated record in this proceeding." *Id.* at 2, 6. Thus, the Notice specifically invites comments addressing certain topics, including:

- "[A]dditional or modified views on the effects and/or need for the proposed regulations" in light of "significant operational changes in and affecting the freight rail industry" in the time "[s]ince the issuance of the NPRM";
- "[N]ew developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter's views since the previous round of comments"; and
- "[T]opics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding."

Id. at 6.

LAW AND LEGISLATIVE HISTORY REGARDING RECIPROCAL SWITCHING

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. The Board may require the establishment of a switching arrangement when it finds that the arrangement either (1) is practicable and in the public interest, or (2) is necessary to provide competitive rail service. 49 U.S.C. § 11102(c)(1). Section 11102(c)(1) authorizes the Board to establish the conditions of and compensation for switching service if the affected carriers cannot reach agreement on those matters within a reasonable period. The Board's implementation of § 11102 is guided by the rail transportation policy set forth in 49 U.S.C. § 10101. *See NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 16.

The Board's current regulations governing reciprocal switching were promulgated in 1985 by the Board's predecessor, the Interstate Commerce Commission ("ICC"), *see Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom. Balt. Gas & Elec. v. United States,* 817 F.2d 108 (D.C. Cir. 1987), and are codified at 49 C.F.R. § 1144. The regulations provide that reciprocal switching would only be prescribed if the agency determines that it "is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. [§] 10101 or is otherwise anticompetitive," and "otherwise satisfies the criteria of . . . [§] 11102(c)." 49 C.F.R. § 1144.2(a)(1). The Board's regulations also provide relevant factors that the agency shall consider in determining whether to prescribe competitive access, along with a "standing" requirement. 49 C.F.R. § 1144.2(a)(1)-(2). The regulations do not address how the Board should establish compensation for Board-ordered switching when the carriers cannot reach agreement within a reasonable period.

In *Midtec Paper Corp. v. Chicago & North Western Transportation Co. ("Midtec"),* 3 I.C.C.2d 171 (1986), the first case where the ICC applied 49 C.F.R. § 1144.2, the ICC explained that the key issue under its then-new regulations was whether the incumbent railroad "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Id*. at 181. The ICC further explained that it would find anticompetitive behavior only when an incumbent carrier had "used its market power to extract unreasonable terms on through movements" or "because of its monopoly position . . . shown a disregard for the shipper's needs by rendering inadequate service." *Id.* The agency's competitive access regulations have not changed substantively since 1985 and few requests for reciprocal switching have been filed since then. In other words, *Midtec* caused the use of the reciprocal switching remedy to go dormant because rail shippers did not believe this standard could be met.

Under the Board's proposed regulations, there would be no need to show anticompetitive conduct, as had been required in the ICC's *Midtec* decision. Rather, under the Board's proposed regulations, the Board would require the establishment of a switching arrangement when the switching arrangement either was practicable and in the public interest or was necessary to provide competitive rail service. *NPRM,* EP 711 (Sub-No. 1) et al., slip op. at 16. This approach would simply apply the language in the statute as written by Congress.

In assessing whether a switching arrangement would be practicable and in the public interest under the proposed regulations, the Board would consider whether the benefits of a proposed arrangement would outweigh its potential detriments. In making that determination, the Board would consider all relevant factors, such as (1) whether the arrangement would further the rail transportation policies in 49 U.S.C. § 10101; (2) the efficiency of the proposed route; (3) whether the arrangement would allow access to new markets; (4) the impacts, if any, of the arrangement on capital investment, quality of service, and employees; (5) the amount of traffic that would be moved under the arrangement; and (6) the impact, if any, of the arrangement on the rail transportation network. *NPRM*, EP 711 (Sub-No. 1) et al., slip op. at 18.

In assessing whether a reciprocal switching arrangement would be necessary to provide competitive rail service, the Board would consider whether intermodal and intramodal competition were effective with respect to the movements for which the switching arrangement was sought. The Board would evaluate the effectiveness of competition using quantitative and qualitative factors that the Board has developed in the context of assessing market dominance in rate challenges, but it would not consider product competition or geographic competition. *Id.* at 27.

The Board's proposed regulations also state that reciprocal switching would not be ordered, even if one or both of the foregoing standards were met, if the switching was not feasible, would be unsafe, or would unduly hamper a carrier's ability to serve its customers. As additional limitations, the Board would require the establishment of a switching arrangement only when (1) the shipper or receiver was served by a single Class I carrier; and (2) there was or could be, within a reasonable distance of the shipper or receiver's facilities, a working interchange between the incumbent carrier and another Class I rail carrier. *Id.* at 19-21.

The 2016 NPRM sought comments on two alternatives regarding the compensation the Board could impose for switching service if the carriers could not agree within a reasonable time. Under the first alternative, compensation would be based on factors such as: (1) the geography where the proposed switch would occur; (2) the distance between the shipper/receiver and the proposed interchange; (3) the cost of the service; (4) the capacity of the interchange facility; and (5) other case-specific factors. The 2016 NPRM asked for comment on whether the agency should also consider what have been referred to as the incumbent carrier's lost contribution or opportunity costs. Under the second alternative, compensation would be based on the cost of providing the service plus a fair and reasonable return on the capital that was used to provide the service, analogous to the rental income that applies when the Board orders a carrier to provide trackage rights to another carrier (the Board's "SSW methodology"). *Id.* at 25-26; *see, e.g., New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC*, FD 35842 (STB served Oct. 31, 2017); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis,* 4 I.C.C.2d 668 (1987); *St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.— Kan. City to St. Louis,* 1 I.C.C.2d 776 (1984).

The rail transportation policy established by the Staggers Rail Act of 1980 ("Staggers") places great importance on the promotion of competition in the rail industry: "[i]n regulating the rail industry, it is the policy of the United States government…to allow, to the **maximum extent possible**, competition and demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101 (1) (emphasis added). Congress emphasized the importance of competition in four additional sections setting out the policy underlying Staggers. *Id.* at (4), (5), (6), and (12). These provisions leave little doubt that Staggers intended to introduce competition as an alternative to regulation of rates and service. These proposed rules follow this rail transportation policy by making competitive access available to rail shippers who have had no real ability to obtain this remedy since *Midtec.*

The new proposed rules in the 2016 NPRM are exactly what Congress intended when it enacted the reciprocal switching remedy in Staggers. Not only do these proposed rules conform with their statutory basis, but they also use the exact language of the statute as noted. Consequently, the proposal would replace the Board's outdated regulations with ones that more closely adhere to Congress' deregulatory vision for the freight rail industry. The legislative history regarding this competitive access remedy makes that extremely clear.

Title II of Staggers is the section which includes the reciprocal switching provision and "is related to the key areas of the Interstate Commerce Act which involve railroad rates and inter-carrier practices. In general, the title assures railroads substantially more rate freedom than [was] afforded them under existing law" at that time. H.R. Rept. 96-1430, 96th Cong. 2d sess. 80 (1980). To balance this new-found ratemaking freedom, "[a] number of provisions are included

to foster greater competition by simplifying coordination, minor mergers procedures, entry and reciprocal switching agreements." *Id.*

The Conference Committee Report on Staggers ("Committee Report") provided in relevant part as follows:

> Consistent with the new rail transportation policy of this Act, the conferees intend that competition be recognized as the best control on the ability of railroads to raise rates. The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The conferees believe that **by allowing the forces of the marketplace to regulate railroad rates wherever possible** the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers, and rail employees.

Id. at 89 (emphasis added). Undoubtedly, Congress intended competition to be the most effective and desirable way to protect shippers.

With respect to the way Congress intended for competition to be used remedially, the Committee Report stated:

> The Senate authorized the Commission to require railroads to enter into reciprocal switching where it finds such agreements to be practicable and in the public interest. In many parts of the country, reciprocal switching agreements are in effect where carriers pick up and deliver traffic for other railroads. In areas where reciprocal switching is feasible, it provides an avenue of relief for shippers where

> only one railroad provides service and it is inadequate. The standard "practicable and in the public interest" is the same standard the Commission has applied in considering whether to order joint use of terminal facilities.

Id. at 116. *See also* S. Rept. 96-470, Cong. 1st sess. 41-42 (1979) (same).

Similarly, the discussion of reciprocal switching in the Report of the House Committee on Interstate and Foreign Commerce stated:

> This section empowers the Commission to approve reciprocal switching agreements and joint service agreements upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, it provides competition to the benefit of shippers served. While the Commission now has the power to order the joint use of terminal facilities, its power to order reciprocal switching is less clear. In particular,reciprocal switching has been limited to situations where competition between rail carriers is not threatened. **The Committee intends for the Commission to permit and encourage greater competition.** Likewise joint service agreements should be encouraged in order to improve shipper service and efficiency.
>
> The standard the Commission should use in approving agreements under this section should be where the requested action is "practicable and in the public interest."

H. Rept. 96-1035, 96th Cong. 2nd sess. 67 (1980) (emphasis added).

The Senate Committee on Commerce, Science and Transportation Report emphasized the importance of enhanced competition:

> The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition, and section 203 [the Senate reciprocal switching provision] deals with intramodal competition among railroads… As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. **Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices.**

S. Rept. 96-470, at 41 (1979) (emphasis added). *See also* 126 Cong. Rec. H10079-87, 99 (daily ed. Sept. 30, 1980) (statement of Rep. Eckhardt) ("inclusion of provisions relating to entry and reciprocal switching which provide increased rail-to-rail competition"); 126 Cong. Rec. H5899-5914, 549 (daily ed. June 30,1980) (statement of Rep. Madigan) (reciprocal switching "will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad's operating territory, thereby providing many shippers with competition in rail service that they presently do not enjoy."). The point of this legislation is "to encourage intramodal competition." S. Rept. 96-470, at 38.

The STB in the 2106 NPRM followed this broad two-part model set forth in the statute in creating the proposed rules for reciprocal switching. Instead of the narrow standard in place today, the Board followed the statutory language, the transportation policy, and the legislative

intent by proposing to introduce greater competition into rail markets. The legislative language and history in Staggers urged the ICC to do exactly what the STB has done here.

NEW REASONS WHY THE PROPOSED RULES ARE NEEDED

1. The Historic Rail Industry Change to PSR since 2017 Makes these Proposed Rules Even More Necessary Now to Provide Shippers with a Remedy to Protect Them from this Dysfunctional Operating Model.

The developments regarding Precision Scheduled Railroading ("PSR") since the Board last sought comments in this proceeding clearly provide more justification than ever for the approval of these proposed rules on reciprocal switching. Implementation of PSR by nearly all the Class I railroads[1] (except for BNSF Railway) shortly after this last round of comments has made the need for this competitive access remedy even more compelling now than in early 2017. This widespread implementation and now use of PSR as the railroad operating model has caused a sea change in the way the rail network works and has resulted in generally poorer service and higher rates for rail shippers over the last 5 years.

The railroads claim "Precision" in PSR "refers to highly precise planning, examining, and fine-tuning of all processes related to the movement of rail cars, combined with disciplined, synchronized execution of the processes."[2] There are several elements to many of the PSR operating strategies claimed to be followed by the Class I railroads in the US. The first element is to "restructure local service" by "better utiliz[ing] crews and locomotives, while asking more of

[1] Canadian Pacific Railway and Canadian National Railway Company had already implemented PSR before 2017.

[2] "*The Operational Nuts and Bolts of Precision Scheduled Railroading",* Carl Van Dyke, FHWA Webinar PowerPoint, at 6, March 2020, https://www.fhwa.dot.gov/Planning/freight_planning/talking_freight/march_2020/talkingfreight3_18_20cvd.pdf

customers and local crews." *Id.* at 8. The second element is to "increase car velocity" by "reduc[ing] switching, while using block swaps more and providing multiple outlets for traffic - focus on plan adherence and elimination of blocking (switching), connection, and train make-up errors." *Id.* The third element is to "minimize train miles and road locomotive and crew needs" by "run[ning] fewer, longer, more generic trains on a balanced network and filling out the trains to their maximum capacity, while focusing on crew and locomotive cycling." *Id.* The fourth element is to "change customer services" by "eliminat[ing] 'boutique' operating plan elements (blocks and trains) and standardizing product offerings." *Id.* In its purest form, this operating strategy should "bring[] together many core principles that should arguably be widely supported by both railroads and customers, driving to better asset velocity, overall efficiency, shipment speed, and reliability." *Id.* at 7.

Unfortunately, PSR has not been used in its purest form as the railroads have professed and has been widely opposed by rail shippers due to its adverse effects on their service and costs. As stated by Chair of the House Committee on Transportation and Infrastructure Peter DeFazio: "In recent years, numerous stakeholders have raised concerns about the railroad management strategy known as precision scheduled railroading (PSR). Using variations of this strategy, it appears that Class I railroads have streamlined operations and otherwise cut costs in pursuit of lower operating ratios for short-term revenue gains. Stakeholders are concerned that the rise of the PSR model has come at the expense of long-term capital investments, reduced rail infrastructure, affected service for some shippers, and caused dramatic workforce cuts and safety

concerns."[3] Chair DeFazio was so concerned by this problematic use of PSR that a study by the General Accountability Office ("GAO") was passed by the House in his surface transportation reauthorization bill, the INVEST in America Act, to help find ways to address the impacts this railroad management strategy has had on workers, freight shippers, passenger railroads, and rail safety. Since the House passage of the INVEST Act, and upon the direct request of Chairman DeFazio and Chairman of the House Railroads, Pipelines, and Hazardous Materials Subcommittee Chairman Donald Payne, the GAO began conducting this study late last year.

The facts clearly demonstrate that Chair DeFazio's impression of PSR is the accurate one. First and foremost, rail service has plummeted since this historical change in how railroads operate. In March 2017, CSX Transportation, Inc. ("CSXT") implemented PSR as its rail operating plan. This implementation led to countless service issues across its network almost immediately. Part of CSXT's PSR plan involved cutting a large number of jobs across its system. By July, the Board had taken a number of actions in response to the service problems resulting from CSXT's ongoing implementation of this new operating plan. The Board began closely monitoring CSXT's performance, including requesting that CSXT's senior management participate in weekly calls with the Board's Rail Customer and Public Assistance staff and that CSXT submit weekly specific service performance data to facilitate these calls.

On October 11, 2017, service on CSXT had become so unreliable that the Board ordered executive-level officials from CSXT to appear at a listening session at the STB to discuss their ongoing and future efforts to improve service and to provide an estimated timeline for recovery

[3] May 12, 2021 Letter from Chair DeFazio to U.S. Government Accountability Office, https://transportation.house.gov/news/press-releases/chairs-defazio-and-payne-jr-request-gao-study-on-the-impacts-of-precision-scheduled-railroading-on-workers-safety-and-shippers

of normal service levels. The Board also asked impacted shippers to appear at the public listening session to discuss their service concerns and comment on the railroad's service recovery efforts.

On March 18, 2018, STB Chairman Ann Begeman individually wrote the Class I railroads about service issues across the US rail system. She stated that the Board had been closely monitoring freight rail service across the US and had become increasingly concerned about its overall state based on the weekly data collected under 49 C.F.R. pt. 1250. The data was indicating that service was deteriorating based on decreasing system average train speeds and increasing terminal dwell time. Other key metrics were also trending in a negative direction. The STB began holding weekly calls with the railroads and asked them to provide certain information with respect to their rail service.

Despite these monumental service issues on CSXT, most of the other Class I railroads, who were not already operating under PSR, also adopted this rail operating plan, including Norfolk Southern Railway ("NSR") in July 2019, Kansas City Southern Railway in January 2019, and Union Pacific Railroad ("UP") in October 2018. These changes led to further disruptions across the US rail network. Massive job cuts, like on CSXT, occurred on NS and UP as part of this plan, leading many to believe that any uptick in the need for rail service would leave them woefully unprepared. This eventually proved to be the case.

On August 24, 2020, the STB Chairman, as well as the Federal Railroad Administration Administrator, wrote the Class I railroads about both of their rail service concerns. These leaders of the rail regulatory agencies explained that they had been made aware of service issues, including missed industrial switches and excessively late or annulled trains due to crew availability issues. They noted that with both increasing intermodal and carload volumes and a

projected robust harvest fast approaching, railroad employee availability, together with sufficient equipment resourcing, was essential for safe, fluid rail service in support of the nation's economic recovery from COVID-19. Given the challenges related to changing demand patterns and operating conditions, they stated that increased communication and transparency with rail shippers had become especially important to ensure they have the information needed to plan their businesses and meet their own customers' needs. They emphasized that it was their expectation that there would be heightened emphasis on improving employee availability, equipment resources, and robust communication to quickly resolve service issues as they arose and to prevent them from becoming widespread. The Class I railroads did not heed this warning as service issues became more rampant.

On May 27, 2021, the new Chairman of the STB, Martin Oberman, also felt compelled to write to the Class I railroads again about rail service issues. He explained that the Board had received concerning reports from a meaningful number of rail customers of subpar performance, including missed switches, railcars delayed at intermediate yards or interchanges, extended out-of-route movements, and prolonged dwell at origin for some unit train traffic. Additionally, he noted that the STB had been made aware of instances of significant congestion at various intermodal facilities, which has resulted in delayed train arrivals and disruptions to container availability. He recognized that these rail service challenges, at least to some extent, had been related to workforce reductions resulting from COVID-19 cases, quarantines, and furloughs based on the temporary decline in demand and the resultant adjustments made by railroads in nearly every facet of their businesses. **But he also expressed his concern about the extent to which these service issues may be related to or exacerbated by a broader trend of rail labor reductions that have been occurring over the past several years. He stated that a lack of**

personnel, including reserve personnel, has made it more difficult to scale-up operations to respond to increases in demand and to maintain reliable service in the face of unanticipated external events that disrupt ordinary operations or business expectations. He said labor shortages could also delay or prolong the recovery period when such network disruptions inevitably occur.

As stated in previous STB letters, he said it is vital that freight railroads continue frequent, proactive communication with the Board and customers on their ability to meet demands for service as the economy recovers from the pandemic. He requested an updated and detailed description of the railroads' preparedness to meet anticipated future demand, including (1) the availability of train crew, yard, and maintenance employees (active, reserve, and furloughed workers) and their plans and time frames for employees to return to work and any re-training, if necessary, and (2) the availability of equipment resources (active and short-term / long-term stored locomotives and rail cars). **As part of this update, he specifically requested that the railroads also address whether they have any long-term plans, including their hiring plans for 2021 and 2022, to reverse any of the diminishing workforce levels which have resulted from their strategies in recent years.** He also asked them to identify any regions of their networks where they were experiencing or anticipating workforce challenges, and their plans to overcome these challenges.

Shortly thereafter, on July 22, 2021, STB Chairman Oberman again wrote the Class I railroads about significant disruptions within the international intermodal supply chain that involve the freight rail network. He stated that he was particularly concerned about significant increases in container congestion at key U.S. terminals, and substantial charges being levied by the railroads for container storage at these terminals. Specifically, in recent months, he asserted

that the Board had received numerous reports related to the length of time that containers were being held in rail yards, and the sizeable storage fees some customers had been required to pay in order to obtain release of containers bearing their shipments. He said that he was particularly troubled about reports that Class I railroads were continuing to impose these charges even in circumstances when the receivers, as a practical matter, had no means to facilitate the release of their containers. Under these circumstances, he noted that demurrage fails to provide any constructive incentives, and perversely results in massive charges that can exceed the commercial value of the shipment. In order to better understand the magnitude of the current container congestion and the framework for the associated demurrage fees, he asked for information from each of the Class I railroads regarding policies and practices with respect to the assessment of demurrage fees on intermodal containers.

On October 18, 2021, Chairman Oberman focused on service issues on CSXT which again caused great concern to the Board, thereby precipitating a letter to the carrier seeking rail service performance information. He stated his reason for this information request was that over the past several months, the Board had continued to receive a steady stream of complaints about the adequacy of rail service provided by CSXT. In both private meetings and public settings, he said CSXT customers have relayed examples of substandard performance, including missed switches, extended transit times for both manifest and bulk shipments, unfilled car orders, and the inability to contact customer service and operating personnel. He stated that customers have also reported that service problems are sometimes resolved, only to recur weeks or months later. Taken together, he noted these complaints were of grave concern as it appeared that CSXT resources were surged to assist one customer, only to have problems arise with another. And, as a result of these problems, he explained that customers incurred premium freight costs, idled

production, lost sales and damaged commercial relationships, typically without meaningful recourse from CSXT. In addition to anecdotal incidents, he noted CSXT's rail service performance data reported under STB Docket No. EP 724 tended to support that CSXT's network was underperforming compared to the benchmarks set in 2019. **He also noted that CSXT has approximately 1,000 fewer "transportation" employees for August 2021 compared to August 2019 (6,577 versus 7,543), as reported on STB Form C.**

This was followed with a similar letter to NS on November 23, 2021, emphasizing the railroad's deteriorating key operating metrics reported pursuant to EP 724. **He compared these numbers with the fact that NSR's number of "transportation" employees had continued to decline over the prior three months (8,281, 8,269, and 8,207, respectively), as reported on STB Form C.** Coinciding with the marked deterioration in NSR's performance metrics, he said the Board had received an increasing number of complaints from NSR's customers about poor performance, including missed switches, cars stranded at intermediate yards, longer transit times, operating plan changes without notice, and a lack of communication from customer service**. For these reasons, he requested that NSR provide the Board with a review of the current state of its network, and assessment of what factors are affecting NSR's ability to achieve past levels of fluidity and consistent service, and in particular the impact on customer service of previous headcount reductions for train, yard, and maintenance employees. He noted it would be most helpful if NSR could provide this review as a follow up to its June 18, 2021, letter, in which a "program of targeted hiring" to meet workforce needs, referenced measures to attract and retain operating employees was outlined. In light of the declining employee headcount since June as shown by the data supplied to the STB, he asserted this**

program does not appear to have succeeded in obtaining a workforce level sufficient to avoid the service challenges described above.

As some of these STB communications seem to express, this massive decline in rail service since 2017 can clearly be tied to the use of PSR across the US rail network and the resulting job cuts that made the railroads incapable of providing adequate service and handling upticks in the need for service. CSX had 23,988 total employees and 9262 train and engine service employees in February 2017. CSX had 17,250 total employees and 6795 train and engine service employees in December 2021. UP had 44,652 total employees and 18,612 train and engine service employees in October 2018. UP had 32,494 total employees and 14,079 train and engine service employees in December 2021. NS had 24,594 total employees and 10,243 train and engine service employees in July 2019. NS had 18,011 total employees and 7521 train and engine service employees in December 2021. (These numbers were obtained from the STB Form C information on the STB website.) Job cuts of this magnitude can only result in one outcome which is poor service as the above-recounted facts clearly demonstrate.

Moreover, the operating ratios for these railroads continue to decline. UP has gone from an operating ratio of 63.7% in 2016 to 57.2 in 2021. CSX has gone from 69.2% in 2016 to 56.3% in 2021. NS has gone from 69.6% in 2016 to 60.1% in 2021.

While service has declined, rail rates have continued to rise. In a recent report published by the Rail Customer Coalition[4], evidence of skyrocketing rates and less competitive traffic is clear. The report finds:

[4] Escalation Consultants, "*Economic Analysis: Consolidation and Increasing Freight Rail Rates*," June 2021. https://www.freightrailreform.com/new-report-finds-rail-customers-paying-a-steep-price-for-consolidation-and-dwindling-competition/

- From 2004 to 2019, **real rates (adjusted for inflation) for all rail shippers increased 43%.**
- During the same period, real **railroad costs rose only 8%.**
- Rates for the largest U.S. railroads have jumped **more than twice as fast as inflation and rates for long-haul trucking**.
- **For major commodity groups, revenue from potentially non-competitive rates increased 230%**, while revenue from competitive rates increased only 24%.
- **In 2019, half of railroad revenue was generated from potentially non-competitive rates**, up from 27% in 2004.
- For significantly impacted sectors and commodities, the share of total rail revenue derived from non-competitive rates increased as follows**:**

Agriculture

Commodity	2004	2019
Food Products	15%	39%
Farm Products	34%	56%

Building & Construction

Commodity	2004	2019
Wood Products	8%	31%
Metal Products	17%	45%
Stone & Glass Products	36%	64%

Transportation & Infrastructure

Commodity	2004	2019
Transportation Equipment	13%	33%

- In a troubling indicator of the railroads' ever-growing market dominance and pricing power, **the average revenue-to-variable-cost (RVC) ratio increased from 135% to 167% for shipments of these commodities.**

Id.

Obviously, the implementation of PSR by the railroads since 2016 has made the need for these proposed rules more evident. In fact, before BNSF Executive Chairman Matt Rose retired, he predicted that "PSR, reducing service, and demarketing some types of traffic in pursuit of

higher profits" would result in increased scrutiny by the STB. He stated that railroads "have this common carrier obligation to provide freight service to all customers in all markets. And what we're doing in PSR is redefining what we're willing to accept in the freight railroad industry on certain lanes. And I really do believe we're going to get in a lot of trouble by doing that." He added that "[w]hen you start redefining markets, I think the federal policy makers will look at this, and quite frankly, they will not be happy with us."[5]

As Chairman Oberman recently noted, "railroads' emphasis has not been on growth. Rather, the emphasis has been on cutting in pursuit of the almighty [operating ratio] down to below 60%." He added that '[i]t is clear that as a whole, railroads have foregone many kinds of carloads that they could carry profitably, only not at O.R.s as low as 55%, and instead have focused on only the most profitable traffic. No one is asking the railroads to focus on traffic that would only be carried at a loss. But surely it is not asking too much for railroads to actively seek profitable traffic, even if not as profitable as others."[6]

In other words, PSR railroads have resorted to only choosing rail traffic which fits within the PSR model to continue to drive down operating ratios. This practice leaves certain rail shippers out in the cold even though rail is their best transportation option. This practice is even more disruptive today when truck capacity due to a shortage of drivers is extremely limited. As a result, some rail shippers have nowhere to turn.

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[5] Trains, *Analysis: Former BNSF Executive Matt Rose's Warning Comes True,* July 22, 2021. https://www.trains.com/trn/news-reviews/news-wire/former-bnsf-executive-matt-roses-2019-warning-comes-true/

[6] Trains, *Top Regulator Urges Railroads to Focus on Growth,* September 9, 2021. https://www.trains.com/trn/news-reviews/news-wire/top-regulator-urges-railroads-to-focus-on-growth/

The effects of this new rail operating strategy have devastated the rail workforce and resulted in correspondingly poor rail service and sometimes no service at all. While the railroads will assumedly argue that the pandemic is the cause of their service issues over the last two years, this claim is obviously only a part of the story. PRFBA does not dispute that the pandemic has had a historic impact on the world's supply chain. However, the railroads by slashing jobs have directly caused the situation to be much worse by making them incapable of adjusting to upticks in the need for rail service. As a result, many rail shippers, especially captive ones, have suffered from plant shutdowns and slowdowns and other adverse impacts that have damaged their businesses despite paying higher and higher rates. These shippers have little recourse except through informal channels to hold these railroads accountable for the harms they suffer at the hands of the railroads. If the new proposed rules are adopted by the Board, some rail shippers would finally have a path to remedy some of these problems. In sum, there never has been a time since the enactment of Staggers where Congress's intent to introduce competition through reciprocal switching was more needed.

2. Increased Use of Reciprocal Switching Arrangements Will Lead to Increased Revenues for the Class I Railroads.

Railroads claim that reciprocal switching will not allow them to properly invest in their infrastructure and would deter them from investing where reciprocal switching allowed another carrier access to its captive customers. An alternative speculation is that new rail shippers and an overall increase in contribution to overhead could be attracted with the prospect of competitive linehaul service and stable switching service, both of which are promulgated by reciprocal switching. In other words, railroads could be the financial beneficiaries from reciprocal

switching because it may make rail more attractive to shippers who can get better rates and service due to the new competition.

As discussed in the previous section, railroads have slashed jobs and expenses under the guise of PSR. Continuing down this path will eventually lead to the complete destruction of rail service in the US. In other words, cutting expenses can only go so far. At some point, railroads will have to begin to look to other ways to impress Wall Street besides cost cutting because there will be nothing left to cut. The only other way to do this would be to increase revenues. Despite the railroads total opposition to any change to the reciprocal switching remedy as proposed in this proceeding, this view is shortsighted when one considers the benefits of reciprocal switching to an industry that has recently lost one of its main sources of revenue in coal.

Railroads like to emphasize how capital intensive its industry is and how much money it invests in its infrastructure. This claim is certainly a main talking point by the railroads and undisputedly warrants careful examination because proper investment in the rail network is essential to provide this crucial service to the nation. However, concerning the general state of capital investment by Class I railroads, capital investment claimed by the seven Class I railroads during the decade 2010-to-2019 is approximately $152.1 billion, $26.6 billion of which represents the portion of those capital expenditures that was discretionary and spent in order to increase the railroad's rate of return, where the $125.5 billion difference is comprised of non-discretionary items that would not increase the railroad's rate of return and would not be classified as capital expenditures in other industries[7]:

- $85.4 billion spent on track and bridges, primarily replacements in kind;

[7] Comments of Rail Cents Enterprises, Inc., EP 711 (Sub-No. 1), at 6 (filed February 1, 2022).

- $30.9 billion spent on locomotives and freight cars, again almost entirely replacements in kind, where locomotives were not new Tier 4 environmentally compliant, but re-built lower Tier motive power and where locomotive work, as measured by gross ton-miles of freight moved, was flat[8] during the decade, and where replaced cars did not keep up with retired cars—railroad-controlled car fleets decreasing 24% from 2010 to 2019[9]; and
- $9.2 billion spent on Positive Train Control, a safety technology mandated by Congress in 2008,

Id.

While these numbers touted by the railroads appear impressive on their face, they are not as substantial as claimed. The question then becomes what are the railroads doing with all the monies that they are earning from these massive cuts in expenses. Distributions to shareholders by the seven Class I railroads during the same decade, 2010-to-2019, was approximately $164.2 billion. That is, the Class I's returned over six times[10] as much money to shareholders during the decade before the Covid-19 crises as they spent on projects to increase their rates of return. *Id.* "Implication: senior management at the Class I's has had great difficulty in finding investments with returns in excess of their cost of capital, hinting that a new strategy based on carload traffic growth could open up new vistas of franchise growth." *Id.* Reciprocal switching could make this strategy more obtainable by introducing competition, thereby creating better service and lower rates.

[8] Freight ton-miles moved by the seven Class I's was basically flat from 2010 (2.21 trillion) to 2019 (2.29 trillion).
[9] Freight cars owned and leased by Class I's decreased 24% from 461,849 in 2010 to 351,032 in 2019.
[10] $164.2 billion divided by $26.6 billion is 6.2, which changes very little (to 6.1) if all numbers for the decade are converted into constant dollars in order to erase the effects of inflation.

Railroads have been accused of demarketing certain types of traffic as discussed in the previous section, since the advent of the PSR revolution, that do not fit within this model. Many shippers have sought new rail service or sought to continue rail service only to have the railroads express little interest in their business. Railroads can easily deter shippers from using rail by quoting extremely high rates or offering limited service. While railroads know that rates are required to be reasonable by statute, they also know that the STB rate case process provides little hope to the shippers who would like to challenge these rates as the Board has admitted in recent proceedings. Therefore, if rail traffic does not fit within the PSR model, railroads can easily sidestep their common carrier obligation by offering these unreasonable take it or leave it rates to shippers.

However, at some point, railroads will have to change their shortsighted path in order to make Wall Street happy by increasing revenues as this present strategy is unsustainable in the long run. An increase in reciprocal switching could help to make this inevitable path more of a reality. For example, railroads may only provide a shipper facility with three days of switching service per week. However, the shipper may want to increase the number of days of service to move more of its product by rail. If an interchange with another railroad is within a reasonable distance, that competing railroad could fill in that void and provide service on those additional days. The result would be more rail business. Moreover, by offering more competitive rates, railroads could obtain more business that presently moves by other modes of transportation.

With the recent loss of revenue from the large decrease in coal traffic, Class I railroads will have to turn to new markets to increase revenue. That market could easily be carload traffic. As a result, while this proposed change to the reciprocal switching rules may be strongly opposed by

the rail industry now, it may eventually lead to increases in business brought on my better rates and improved service, thereby making this a win-win situation for all involved.

3. During this Historic Disruption of the Global and U.S. Supply Chains Brought on by the Pandemic, the Need for More Efficient and Flexible Rail Service Has Never Been More Evident which these Proposed Rules Will Allow to Happen.

As the Board is aware, the global supply chain has been completely disrupted by the pandemic that has changed the world as we know it over the last two years. This supply chain crisis has wreaked havoc across all forms of transportation including maritime, trucking, and rail. The unpredictability of the demand for goods and the workforce supply, among other things, has brought on events in the supply chain never seen in the past. Unfortunately, there is no certain time when this disruptive situation will end.

Obviously, railroads are crucial to the supply chain in the U.S. and North America. An efficient rail system is extremely important now to help solve these supply chain issues. However, with the pandemic and corresponding difficulties in keeping the workforce fully staffed brought on by devastating illness and quarantine requirements across the U.S., the railroads have had an extremely difficult time providing adequate service to rail shippers in dire need of their services during these unprecedented times. These workforce difficulties were compounded by the large job cuts described above that made the railroads woefully unprepared for these challenges brought on by the pandemic. Moreover, the railroads seemed reluctant to bring back workers as the numbers quoted by Chairman Oberman in his letters to CSX and NS last year demonstrate.

Reciprocal switching could certainly be a cure for some of these troubles when a railroad is understaffed and cannot adequately provide service to its customers. First, when an incumbent railroad serving a captive shipper is not prepared for a surge in business due to job cuts, a

competing railroad with a nearby interchange may have the resources to provide this service. The proposed new rules could allow the captive shipper to obtain this service through a reciprocal switching arrangement. At present, it is highly unlikely that the incumbent would allow the competing railroad access to its captive customer. As a result, the captive customer would have no other choice but to rely on the unprepared railroad and receive inadequate service.

Second, in some instances, the incumbent railroad may not have access to the most efficient rail route for its captive customer. Therefore, when rail service crises occur, the captive shipper would be required to rely on the incumbent carrier's less efficient route even though a competing railroad with a nearby interchange can provide better service. The inefficiency of this result would only be compounded if the incumbent railroad was suffering from service issues across its network brought on by its unpreparedness for a surge in business.

While railroads do at times have a difficult balancing act when trying to determine the resources they need to be prepared for changes in business, examples of major rail service problems have been common over the last decade despite the financial health of the industry. In 2013 and 2014, the rail network struggled mightily with the upsurge in business in North Dakota brought on by fracking and crude by rail. *See United States Rail Service Issues, et al,* EP 724 (STB served Aug. 18, 2014). These issues became even worse with poor weather in Chicago and a strong harvest that had to compete for service with the crude oil traffic. *Id.* As noted, CSX had severe service problems as it implemented PSR on its network in 2017 which continue to this day. *See Public Listening Session Regarding CSX Transportation, Inc.'s Rail Service Issues, et al,* EP 742 (STB served Aug. 24, 2017). The implementation of the proposed rules might not have been able to eliminate all these issues over the years, but it certainly could have helped in

certain situations by allowing rail customers to use a better prepared or suited railroad that might not have been available because of the lack of this competitive access remedy.

Generally, the implementation of these proposed rules will make the rail network more efficient by allowing captive shippers within a reasonable distance of a competing railroad to obtain better routes or better service as discussed above. It also would create competition which would require railroads to provide better service to rail shippers or risk losing business. There never has been a time since the passage of Staggers that this remedy has been more needed. The railroads have decided to implement PSR and make cuts to their workforces and other needs that have generally left them unprepared to provide adequate rail service. The railroads have not been responsive to the Board's inquiries and warnings about their hiring issues. As a result, rail shippers have suffered from poor service resulting in plant shutdowns and slowdowns on an unprecedented basis. This use of reciprocal switching on an increased basis will make the rail system more efficient and hopefully compel the railroads to provide better service and to be more prepared by introducing more competition into the rail industry.

PRFBA TESTIMONY PROVIDING SPECIFIC EXAMPLES OF RECENT INCREASE IN NEED FOR THE PROPOSED RULES

As noted, PRFBA members are major food and beverage companies that rely on rail service to feed the world. Without adequate rail service, these companies will not be able to get their products to their customers. Since 2017 with the advent of PSR across the US rail system, PRFBA members have noticed a greater need and reason for the proposed rules on reciprocal switching because their rail service has become much more unreliable, and the railroads seem less responsive to their needs. Members have suffered from plant shutdowns, more inefficient routes, and outrageous price increases unrelated to the actual cost of shipping the goods.

For example, KraftHeinz has a facility in North Florida that is single served by a Class I railroad with another Class I railroad nearby. The railroad was unable to serve this facility adequately causing it to shut down production on at least one occasion which prevented KraftHeinz from meeting its production-scheduled demands. If reciprocal switching had been a possibility, it likely would have been able to prevent its plant from being shut down by using the other nearby Class I railroad.

Moreover, another member was recently given a proposal by its Class I railroad to increase one of its rates. This increase would have resulted in a revenue to variable cost of over 600% for this captive route. When asked what the reason for the rate increase was, the railroad told this member that it was because a competing railroad had won the member's rail business for certain unrelated competitive traffic in a bidding contest for the work with this railroad. As a result, the railroad said it was raising this member's rate in response.

Also, this same member is captive at another one of its production facilities and was looking to grow its rail shipments. At one time in the discussions with its railroad, two railroads came together for a competitive rate compared to truck (before the current market conditions). Then, the discussion shifted to the railroad that serves the origin taking the loads the entire movement. This increased the rate, mileage, and transit time. If reciprocal switching would have been an option, this member would have gotten a lower rate and better transit times. This member also had an opportunity on this given lane to share a carpool with another shipper who had empty cars going back that this member could have filled, but this shipper wanted to keep its cars on another rail line that did not switch this member's facility. Thus, this member had to source more railcars which increased costs and stunted rail growth despite a plan for rail expansion.

In other words, the examples of where the proposed rules for member companies would help to eliminate adverse service situations, make routes more efficient, and deter unreasonable rate increases are many. Unfortunately, this need for the proposed rules has become more and more vital to PRFBA members' use of rail since 2017 because of the adoption of PSR by more railroads. Without these proposed rules, members will continue to suffer from unreliable service and other difficulties that captive rail shippers must endure at present. Without this change, PRFBA members will move away from rail more and more.

CONCLUSION

Based on the foregoing discussion, PRFBA strongly urges the Board to adopt the proposed rules for reciprocal switching. The case for the implementation of these rules has never been stronger than now.

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for Private Railcar Food and Beverage Association

/s/ Herman Haksteen

Herman Haksteen
President
Private Railcar Food and Beverage Association
11620 Red Run Boulevard
Reisterstown, MD 21136

Dated: February 14, 2022

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 41

NATIONAL GRAIN AND FEED ASSOCIATION COMMENT, EP 761 AND 722 (STB FEB. 13, 2020)

National Grain and Feed Association
www.ngfa.org

1400 Crystal Drive, Suite 260
Arlington, VA 22202
P: (202) 289-0873

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Docket EP 761

HEARING ON REVENUE ADEQUACY

STB Docket EP 722

RAILROAD REVENUE ADEQUACY

SUPPLEMENTAL SUBMISSION OF THE NATIONAL GRAIN AND FEED ASSOCIATION

On December 12-13, 2019, the Surface Transportation Board ("Board," "STB" or "Agency) conducted a public hearing in these proceedings. Representatives of the National Grain and Feed Association ("NGFA") appeared and provided testimony on December 13, 2019. On December 16, 2019, the Board served a Decision that held the hearing record open until February 13, 2020 to allow hearing participants to supplement their oral testimony. Pursuant to that Decision, the NGFA hereby supplements its oral testimony to address certain issues and questions that arose during the hearing.

A. The Legal Viability of the Revenue-Adequacy Constraint

The Notice of Hearing issued on September 12, 2019 stated that the hearing's purpose was to receive public input on several recommendations made by the Rail Rate Reform Task Force ("RRTF") on how to incorporate a railroad's revenue-adequate status into maximum reasonable rate determinations. Devising ways to take a railroads' revenue-adequate status into account when determining maximum reasonable rates is not new. Such efforts have been part of the statutory directives to the Interstate Commerce Commission ("ICC") and the Board's charge for more than 40 years. *See, e.g., Standards and Procedures for the Establishment of Adequate Railroad Revenues*, 358 I.C.C. 844 (1978)("*Standards*"). In *Standards*, the ICC adopted standards and procedures for implementing Section 15a(4) of the Interstate Commerce Act, the predecessor to 49 U.S.C. §10704. In contemplating the overall purpose of the annual revenue-adequacy determination it was directed to make for Class I railroads, the ICC concluded that while this statute focused attention on the criteria for determining revenue adequacy, "it is evident that more than a mere determination is contemplated." *Id*. at 847. Moreover,

> it is clear that Congress did not intend for our mandate to be simply one of promoting railroad revenues. *Consideration of shipper and public interests requires that revenue adequacy be taken not only as a goal but also a limitation*. *In other words, to the extent possible, we are to assist railroads in attaining revenue adequacy, and to protect the public from having to provide revenues that exceed an adequate level*. *Id.* at 848 (emphasis added).

On the question of how to factor a railroad's revenue adequacy into an individual rate proceeding, railroad parties participating in *Standards* recognized that Section 15a(4) created some type of cap on railroad revenues. The ICC summarized its contention to be "that a specific increase proposed by an individual railroad should be approved so long as that railroad's overall revenue does not exceed an adequate level." *Id*. at 853. The ICC

concluded in *Standards* that "revenue adequacy should be a consideration in individual rate proceedings," *id*. and "[a] proponent carrier's revenue adequacy status can and should influence the determination as to how high its rate for a particular service may be reasonably set." *Id*. at 854. Thus, the ICC clearly concluded that a railroad's revenue-adequate status limited the extent to which it could increase its rates. This statutory interpretation in *Standards* was not judicially challenged by any Class I railroad.

The ICC carried over its interpretation of Section 15a(4) when its language was folded into the Staggers Rail Act of 1980 (Staggers Act) and became 49 U.S.C. §10704(a). First, the ICC modified its formula for determining revenue adequacy in *Standards* without modifying or retracting any of its statements regarding how a railroad's revenue-adequate status would constrain its ability to raise its rates. *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981). Soon thereafter, the ICC promulgated *Coal Rate Guidelines Nationwide*, 1 I.C.C. 520 (1985), in which the ICC reaffirmed its interpretation of the statutory language, stating:

> Our revenue adequacy standard represents a reasonable level of profitability for a healthy carrier. It fairly rewards the rail company's investors and assures shippers that the carrier will be able to meet their service needs for the long term. Carriers do not need greater revenues than this standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues. Therefore, the logical first constraint on a carrier's pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this "revenue adequacy" level. In other words, captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs. *Id*. at 535-36.

The ICC further clarified that "A railroad seeking to earn revenues that would provide it, over the long term, a return on investment above the cost of capital would have to demonstrate with particularity: (1) a need for the higher revenues; (2) the harm it would suffer if it could not collect them; and (3) why the captive shippers should provide them." *Id*. at footnote 36. Elsewhere in

Coal Rate Guidelines, the ICC stated, "the revenue adequacy constraint is a limit on the total revenues a carrier can collect." *Id*. at 547.

The revenue-adequacy constraint in *Coal Rate Guidelines* was affirmed explicitly by the U.S. Court of Appeals for the Third Circuit in 1987. *Consolidated Rail Corp. v. U.S.*, 812 F.2d 1444 (3rd Cir. 1987). In that case, in which both railroads and shippers participated, the court held that the four constraints in the Final Guidelines were consistent with the 4R Act and the Staggers Act. As to the revenue-adequacy constraint specifically, the court stated that *"[b]y imposing revenue adequacy as a ceiling*, the ICC intends to ensure that a captive shipper will 'not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting the current and future service needs." *Id*. at 1450 (emphasis supplied), *Citing* 1 ICC 2d 520, 535-46. The court also said that the revenue-adequacy constraint and the other three constraints in *Coal Rate Guidelines* are "designed to protect captive shippers from paying rates that are unnecessary to achieve revenue adequacy and which reflect inefficiencies." *Id*. at 1444. The revenue-adequacy constraint, although seldom used, subsequently has been part of the Board's rate reasonableness rules and policies for more than 35 years.

Notwithstanding this long, clear line of agency and court precedent (and the lack of any railroad formally challenging the legality of the agency's statutory interpretation) the Association of American Railroads (AAR) inexplicably alleged during the hearing proceeding that the revenue-adequacy constraint somehow "came out of the blue and was untethered from the statute, prior precedent, sound economic concepts or support of commentators…." Comments of the AAR at 33. This collateral attack on the legality of the revenue-adequacy constraint in this proceeding is utterly meritless.

B. Economic Profit Under §10704

One issue that arose during the hearing proceeding involved the question of how to define the term "economic profit" in 49 U.S.C. §10704(a)(2), which states in relevant part that railroads are entitled to earn a "reasonable and economic profit or return (or both) on capital employed in the business." Economic profit typically is defined as the profitability measurement that calculates the amount that revenues exceed the opportunity costs a company experiences from using resources to make and sell these products. Opportunity cost is the cost of an opportunity foregone, *i.e.*, given up so as to pursue another one. Consequently, economic profit is excess money a company earned from one course of action over another had it chosen differently. When the opportunity costs exceed the revenues received, then the outcome is economic loss. Economic profit is different than "accounting profit," which simply measures the difference between revenues and costs of production, without taking into account opportunity costs. Notwithstanding the foregoing, the AAR in this proceeding asserts "Economic profit equals ROI minus COC." AAR Comments at 17, note 17.

There appears to be a dearth of legislative history explaining the meaning of "economic profit" in §10704(a)(2). Nevertheless, the railroads' view of the provision immediately after passage of the Staggers Act is instructive. For example, in 1987 an amendment was proposed by shipper interests to delete the term "economic profit" from §10704. In Congressional testimony opposing the amendment, the then-President of the AAR stated:

> The statutory requirement that an adequate revenue for railroads include "a reasonable and economic profit or return (or both) on capital employed in the business" originated with the 4-R Act. The legislative history of that Act sheds no clear light on Congressional intent in employing the term. Economists use the term "economic profit" to refer to profits in excess of costs including returns to shareholders. The Congress would not intend that railroads generally be allowed excessive profits. It would be fair to infer, however, an intention to allow railroads like all other competitive industries to earn above normal profits (returns) in some

> years to compensate for years in which inadequate profits (returns) were realized. Such averaging would be necessary if the railroads were to earn adequate returns over the long run. The deletion of the phrase "economic profit" could be construed as an intentional action to prohibit such averaging.
>
> The word "economic" modified the word "return" as well as the word "profit." An "economic return" means, to an economist, a return equal to the cost of capital – and that is the standard the ICC has adopted.
>
> Upon deleting the words "and economic profit" the law would provide only for "a reasonable return." This change gives effect to the other amendments in this section of the bill (discussed below) which, in the aggregate, would preclude the railroads from every (sic) earning the cost of capital and which would, therefore, be a prescription for disinvestment in the railroad industry.

Rail Industry/Staggers Act Oversight: Hearings before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation, June 9, 1987, at 521, Statement of William H. Dempsey, President, Association of American Railroads.

The AAR's statement that "[e]conomists use the term 'economic profit' to refer to profits in excess of costs including returns to shareholders," is confirmation that in 1987, the AAR believed that economic profit included all profits in excess of costs, which included returns to shareholders and, it logically follows profits that are used to buy back shares of the company's stock. Moreover, the "profit-averaging" concept advanced by AAR may have had some facial appeal in the years immediately following passage of the Staggers Act when some railroads still were struggling financially. However, it has absolutely no application to the modern railroad industry, when comparable years of "inadequate profits" do not occur. Finally, the AAR's testimony confirmed that the AAR at that time interpreted "economic return" to mean a return equal to the railroad's cost of capital.

C. The Board Should Encourage Actual Competition to Establish Market-Based Rates – Role of Reciprocal Switching and Bottleneck Rules

1. The best way to account for railroad revenue adequacy in rate-setting is to create actual rail-to-rail competition

It is beyond dispute that the Staggers Act was enacted in large part to allow and encourage competition between railroads to establish rates and terms for service. This plainly is evident within the National Rail Transportation Policy, which unequivocally states that "In regulating the railroad industry, it is the policy of the United States Government…(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. §10101(1). *See also* §10101(4) (policy is to "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense"); §10101(5)("to ensure effective competition and coordination between rail carriers and other modes). Competition between railroads has been encouraged in areas such as rail construction under §10901, where the ICC and the STB have adopted longstanding policies that liberally approve rail buildouts and associated rail crossings to establish competition at captive shipper locations.[1]

In their written submissions and testimony in this proceeding, the Class I railroads assert that they exist in a market where their rates purportedly are set through vigorous competition. However, the carriers' claims of competition are not based on any evidence of actual head-to-head competition with other railroads. Instead "competition" is defined artificially by carriers in terms of whether the rates they charge are less than the 180 percent jurisdictional threshold under 49 U.S.C. §10707. For example, less than one-third of BNSF's traffic exceeds 180 percent of

[1] See e.g. Docket No. FD 36186, *Texas Railway Exchange – Construction and Operation Exemption – Galveston County, Tex* (served January 17, 2020); STB Finance Docket No. 34210, *Sunflower Rail Company – Construction and Operation Exemption – Finney County, KS* (served March 28, 2003)

variable costs. So, BNSF asserts, *ipso facto*, that the remainder of its rates are established via market-based competition.

The carriers' reliance on the jurisdictional threshold as a surrogate for the real competition envisioned by the framers of the Staggers Act is inaccurate, misleading and obscures the fact that there is very little actual, effective competition in the railroad industry any longer. The reality of the situation today is that carriers typically increase rates to the maximum extent they can. In other cases, carriers "demarket" rail movements they no longer wish to transport by either assessing exorbitant rates that make the movements economically uncompetitive, or imposing restrictive service terms and conditions that make rail unattractive to shippers or receivers (e.g., unilaterally shifting previous unit-train traffic to more costly and less-timely manifest service). These trends have become more prevalent under the so-called "precision scheduled railroad" operating model implemented by most Class I carriers.

Whenever the policy discussion turns to fulfilling the Staggers Act's policy and goal of allowing, "*to the maximum extent possible*, competition and the demand for services to establish reasonable rates for transportation," the railroads vehemently resist any attempts by the Board to increase the opportunities for Class I railroads to compete with one another and to gain market share. As noted by Vice Chairman Oberman in the hearing proceeding, "But it seems to be difficult for us – for the railroads to come in here and say 'let competition set the rates, but where there is a chance to have more competition, don't make us do it.' And I share (Board Chairman Ann Begeman's) sentiment, we've seen at least two concrete situations that I'm aware of where railroads, there's some evidence that they have a chance for competition and they are consciously avoiding it." Tr. At 343.

Typically heard Class I railroad laments of the horrors of actually competing for business with one another like other industries do on a daily basis are that if a railroad actually had to reduce its rates because of competition, this would (1) retard future investment in their system; and (2) create network "inefficiencies," which usually boils down to the inconvenience of altering operating plans to keep or seek new business. These laments are obviously time-worn by now[2], but they were repeated in this hearing proceeding. *See* Tr. At 310 (where a witness for Norfolk Southern Railway asserted that creating competition through either bottleneck rule changes or reciprocal switching would "introduce a level of inefficiency and risk into the system that's not present now. And both provide a disincentive to investment, a likelihood of causing congestion or other operational disruption."). The NGFA finds the Board's frustration with such positions both totally justified and encouraging, such as the comment of Chairman Begeman to a railroad representative at Tr. At 339 ("But I'm not hearing anything about the fact that you also could be receiving, you know, service, or you know, customers from the other bottleneck carriers that might want to be in the same situation where someone wants to go to you and leave them…it seems like it would be an opportunity should the carrier want to take it and, as Frank just said, and actually do some competition."), to which the response was, "the concern we have [presumably with actually competing] is that what may be good for one particular shipper is bad for the network.") *Id*. at 341. *See also id*. at 345, where the railroad representative stated that when faced with the choice of lowering a rate to keep traffic "I don't want to – if we lowered the rate because I want to avoid it, that means there's less chance of investment there, less new capacity, less solution for

[2] Such assertions have become a familiar refrain from the Class I railroads. Attached hereto are NGFA's reply comments in Docket No. EP 711 (Sub – No. 1), *Reciprocal Switching*, filed January 13, 2017, which responds to nearly identical arguments made by railroad parties in that proceeding

operational issues." The NGFA concurs with Vice Chairman Oberman's response, which was, "[y]ou are arguing for monopolistic pricing, so you could have more money. I mean you're either going to have competition set the rates or you're not." *Id.* at 346.

One of the salutary purposes of the public hearing was to explore whether the RRTF's proposals to suspend or overrule the "Bottleneck Rules" for Long-Term Revenue Adequate Railroads potentially would create opportunities for Class I railroads to compete for new business and market share. Also revisited as part of that general discussion were the policy implications and issues surrounding an effort by the Board to revise the rules and policies implementing 49 U.S.C. §11102(c), which state in part "The Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, *or where such agreements are necessary to provide competitive rail service*." (emphasis supplied). Right on cue, the Class I railroads uniformly criticized the Board for even considering taking steps that would increase competition in the railroad industry and in part provide them with increased business opportunities and traffic volumes.

The notion that facilitating actual competition between railroads would be harmful and bad policy is not only contrary to the express language of the statute and its legislative history, it is patently absurd, particularly in today's duopolistic rail industry. The NGFA again strongly urges the Board to reject the Class I railroad's overwrought claims that requiring them to actually compete with each other in accordance with the clear intent of Congress in the Staggers Act would harm them and their systems. Hereafter, the NGFA provides additional comments on the bottleneck proposals and the reciprocal switching discussion.

2. **The Board has the authority to implement the RRTF proposal on bottleneck rules**.

The NGFA reiterates its support for the RRTF's proposal that so-called "bottleneck rule" protections should be suspended or overruled for railroads determined to be long-term revenue adequate. In doing so, the NGFA presumes the RRFT means that a bottleneck railroad that serves the same origin or destination as an alternative railroad would be required to provide a rate for transportation over its bottleneck segment without (1) the shipper having to make a case for "competitive access" under 49 CFR Part 1144 and applicable precedent, and (2) without having to first enter into a contract for the non-bottleneck portions of the overall movement. The latter point is helpful to agricultural shippers because many do not ship by contract. NGFA does not interpret the RRTF's recommendation to mean that shippers could pick and choose interchanges and routings as the AAR and other parties asserted during the hearing. The NGFA believes that the Board should remain the ultimate authority for such determinations under 49 U.S.C. §10742 and other applicable statutes.

The NGFA agrees there is no policy basis for erecting the barrier of the competitive-access rules to protect a long-term-revenue-adequate railroad's desire for long-haul revenues, and the Board clearly has discretionary authority to implement that recommendation. Carriers do not have a statutory absolute right to either the long haul or a short haul. Specifically, 49 U.S.C. §10705(a) provides that the STB must "give reasonable preference, subject to this subsection" to the carrier originating the traffic when prescribing a joint through route. In addition, the Board's obligations to uphold a railroad's routing preferences are qualified further by 49 U.S.C. §10705(a)(2)(A) – (C). Subparagraph (C) provides that the Board does not have to defer to a railroad's preference for its long haul if the Board "decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation." This provision gives the Board broad

discretion to allow competition between Class I railroads when a bottleneck railroad has been determined to be long-term revenue adequate. Indeed, 49 U.S.C. 10101(1) commands the Board to allow such competition "to the maximum extent possible." *See also* STB Docket NOR 42131, *Canexus Chemicals v. BNSF* (served February 8, 2012)(where the STB found in part that BNSF's preference for a particular route and interchange point with the Union Pacific Railway was unreasonable under §10705(a) and contrary to the public interest).

The Board also clearly has the discretionary administrative authority to amend its competitive access rules under 49 CFR Part 1144 and decide to terminate their application to bottleneck rate situations involving long-term-revenue-adequate railroads. The authority to change the competitive access rules administratively was briefed extensively by the NGFA and other parties in their submissions in Docket No. EP 711 (Sub-No.1), *Reciprocal Switching*, where the Board in 2017 proposed to overturn 30-year-old agency precedent and regulations implementing 49 U.S.C. §11102(c), which have stifled shippers' ability to obtain competitive rates through reciprocal switching from interchange points served by railroads other than their incumbent carrier.

Finally, the NGFA repeats below the three additional elements it believes would be appropriate for suspending the bottleneck rules as applied to shipments of agricultural products.

- First, in cases where the bottleneck railroad and alternative railroads regularly have utilized an interchange, there should be a rebuttable presumption that the interchange is physically and operationally feasible and safe. The railroad – not the shipper – should bear the burden to rebut this presumption.

- Second, suspending the bottleneck rules should not lead to a conclusion that "effective competition" is present for the non-bottleneck segments of through movements. Whether the bottleneck rate results in the competition the RRTF envisions actually occurs – or occurs at all – should be determined on a case-by-case basis pursuant to the Board's rules governing determinations of market dominance.

- Third, as noted previously by NGFA, to the extent a long-term-revenue-adequate railroad responds to a request for a rate over a bottleneck segment by establishing a charge to switch the trains of the alternative railroad, there should be clear standards that prevent such charges from becoming an economic barrier to using an alternative railroad. NGFA previously has suggested a rebuttable-presumption, cost-based approach that the railroad must justify if the switch charge is challenged.

Distilled to its essence, the railroads' collective objection to the RRTF's bottleneck recommendation is that they do not want to be put in a position of competing with another railroad to keep business they currently have from a captive rail shipper to which they can charge monopoly rates. This is flatly contrary to the statutory charge to the Board to allow rail-to-rail competition "*to the maximum extent possible*." The RRTF's proposals, on the other hand, are entirely consistent with the statutory directive.

3. The Board also has the authority to liberalize the reciprocal switching rules, which also may prove to be a very effective way to foster rail-to-rail competition

The railroads' reaction to the RRTF's bottleneck rule proposals is consistent with the theme the Class I railroads advanced in Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, in which they objected strongly to the Board's proposal to reverse the onerous standards for permitting reciprocal switching pursuant to 49 U.S.C. §11102(c), an action that would have benefitted all Class I railroads by increasing their opportunities to compete for market share.

Amending the reciprocal switching rules remains a potentially effective way to increase competition in the railroad industry. As discussed in this hearing proceeding, there is an interplay between requiring a bottleneck railroad to short-haul itself under §10705 and §11102(c) because under §10705, the Board may require a bottleneck railroad to short-haul itself and permit competition with a non-bottleneck railroad by requiring the bottleneck railroad to provide

reciprocal switching pursuant to §11102(c). Thus, a reciprocal switching order under §11102 is an express exception to the statutory provisions that favor the railroads' preference for their long haul. The NGFA believes that amending the reciprocal switching rules to place more appropriate emphasis on implementing the congressional intent of directing railroads to enter into reciprocal switching agreements "where such agreements are necessary to provide competitive rail service" is warranted.

D. The NGFA Supports Rate Rules that Compare Rates if Properly Formulated and Procedurally Efficient

The NGFA continues to believe the Board's Three-Benchmark methodology could be improved to make it a more accessible, workable and cost-effective process for challenging unreasonable rail rates. For this reason, in its Opening and Reply Comments in the Final Offer Rate Review (FORR) proposed rule (EP 755), NGFA respectfully recommended that the Board not close the docket in *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2), and instead continue work toward issuing final rules that modify its initial proposal in response to the comments received from NGFA and other stakeholders, as well as the recommendations of its RRTF. In particular, the NGFA supported the following recommendations made by the RRTF to improve the "smallest rate cases" methodology proposal in EP 665 (Sub-No. 2):

1. Allow the traffic comparison group to include similar traffic with R/VC ratios below 180 percent, so long as they exceed the carrier's RSAM figure;

2. Set the revenue need adjustment factor at 1 when the carrier is "long-term revenue adequate," as defined by the Board;

3. Eliminate the so-called "common-carrier adjustment," which was used in a single case with virtually no evidentiary support;

4. Eliminate the "revenue-per-ton-mile screen;"

5. Eliminate the "other-relevant-factors" component, which has been shown to be subject to abuse and litigation gamesmanship by defendant railroads;

6. Eliminate the confidence interval; and

7. Adopt more streamlined procedural rules and timelines.

As noted in its previous filings on the FORR rulemaking, the NGFA does not agree with the RRTF's recommendation to establish a $500,000 cap for relief for cases utilizing the three-benchmark methodology. This is far too low for reasons the NGFA has explained in its prior comments to that docket.

However, the NGFA continues to believe that rate review methodologies that utilize a rate-comparison approach, such as the Board's "smallest rate cases" proposal and the current Three-Benchmark Methodology (as modified by recommendations from the RRTF, NGFA and other stakeholders), can be useful and improve the process, and we encourage the Board to continue its efforts in this regard. NGFA's support for the comparison-traffic-based approach also is one reason it conditionally supported the Board's proposal to amend its Waybill Sample regulations to simplify and increase the sampling rates required to be reported by Class I railroads of non-intermodal carload shipments. The RRTF correctly has pointed out that this additional data would provide a greater number of potentially comparable movements and relevant comparability factors from which shippers could create comparison group proposals, thereby rectifying the paucity of data that currently too often exists.

E. The NGFA Continues to Believe Rate Disputes Could be Resolved Through its Arbitration Process

The NGFA continues to believe rate-related disputes between its member companies and rail carriers could be resolved successfully through the NGFA's Rail Arbitration System, which

has been in place since 1998 and has operated extremely well. In fact, there is nothing now preventing a shipper and railroad from arbitrating a rate dispute through NGFA, even though such arbitration currently is ***not*** compulsory under NGFA's Rail Arbitration Rules.

However, doing so requires a willing partner. Thus far, Class I carriers have rejected repeated approaches from NGFA to create a framework for compulsory arbitration of rate-related disputes. To its credit, the BNSF Railway approached NGFA on two occasions for exploratory discussions – first with NGFA's Executive Committee on January 12, 2015, and followed by an initial working discussion on October 27, 2016 between two BNSF executives with a delegation representing NGFA's Rail Shipper/Receiver Committee to explore potential approaches. However, no follow-up discussions have been conducted with BNSF after it indicated that agreement by one or more additional Class I carriers would be a prerequisite for its participation. Despite several approaches by NGFA to other Class I railroads since 2016, none has expressed a willingness to even explore such discussions, which NGFA attributes in large part to the current lack of an accessible, timely, workable and cost-effective rate-challenge process at the Board. Further, no Class I railroad yet has agreed to arbitrate a rate complaint involving an individual shipper through NGFA's system.

NGFA believes fervently in alternative-dispute resolution, including its own, which provide impartial, transparent, cost-effective and timely resolution of disputes, with decisions rendered by disinterested experts knowledgeable about the type of dispute involved in the case. Cases filed under NGFA's Rail Arbitration System are adjudicated by a panel of three arbitrators comprised of both rail carriers and rail users, with written decisions published and made available publicly, in which the arbitrators' names are listed to further enhance transparency and accountability.

NGFA believes strongly that having a streamlined, workable, timely and cost-effective rate-challenge process available through the Board – such as the proposed FORR and an updated and improved Three-Benchmark methodology along the lines NGFA has suggested – would be an important development to "incentivize" thus far recalcitrant Class I carriers to consider alternative dispute resolution as a means of resolving shipper-railroad disputes involving freight rail rates and other matters, including demurrage and accessorial practices that rail customers may believe are commercially unfair, commercially unachievable and non-reciprocal.

Conclusion

The NGFA appreciates the Board's willingness to provide an opportunity for stakeholders to provide supplemental comments following the public hearing, and thanks the Board in advance for its consideration of its comments.

Respectfully submitted,





Randall C. Gordon

President and Chief Executive Officer
National Grain and Feed Association
1400 Crystal Drive, Suite 260
Arlington, VA 22202
rgordon@ngfa.org
202-289-0873

Thomas W. Wilcox

GKG Law, P.C.
1055 Thomas Jefferson St. Suite 500
Washington, D.C.20007
twilcox@gkglaw.com
202-342-5248

Transportation Counsel for the National Grain and Feed Association

February 13, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 42

WRITTEN STATEMENT OF THE FERTILIZER INSTITUTE FILED IN STB DOCKET NO. EP 738 FILED ON JULY 24, 2017

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Surface Transportation Board

Docket No. EP 738
Regulatory Reform Task Force
July 25, 2017

Written Statement of The Fertilizer Institute

The Fertilizer Institute ("TFI") submits these comments for the record of the July 25, 2017 Regulatory Reform Task Force ("RRTF") Listening Session announced in a decision served in this docket on June 20, 2017.

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI's members play a key role in producing and distributing vital crop nutrients, such as nitrogen, phosphorus and potassium, which facilitate the production of healthy and abundant supplies of food, fiber and fuel. Fertilizers make it possible for farmers to grow enough food to feed the world's more than 7 billion people. TFI members rely heavily upon rail transportation to produce fertilizers and transport them to farms. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, and economic information and public communication programs.

TFI supports the RRTF mission to identify rules and practices that are burdensome, unnecessary, or outdated, and to recommend how they should be addressed. Through these comments, TFI brings to the RRTF's attention certain existing regulations that are outdated, unnecessary and burdensome, resulting in collateral burdens and consequences in other regulatory areas also within the Board's jurisdiction. Those rules pertain to reciprocal switching and rate regulation.

In EP 711, *Reciprocal Switching*, the Board is considering repealing and replacing its existing regulations for prescribing reciprocal switching. Those rules, currently codified at 49 C.F.R. Part 1144, were originally adopted in Ex Parte No. 445 (Sub-No. 1), *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), which was prior to most of the rail mergers that have consolidated the rail industry into eastern and western duopolies. Moreover, the Board has applied those rules to set an unattainable bar for obtaining reciprocal switching by requiring a showing that is equivalent to establishing a violation of the antitrust laws. *E.g., Midtec Paper Corp. v. Chicago and N.W. Transp. Co.*, 3 I.C.C. 2d 171 (1986). This unattainable bar allows rail carriers with relatively short distance origin or destination bottlenecks to foreclose existing competitive options over non-bottleneck portions of their routes. Due to industry consolidation, the distances over which such competition is foreclosed has grown vastly longer than they were in 1985.

Setting a reasonable and attainable standard for reciprocal switching by replacing the current rules, as proposed in EP 711, will have significant deregulatory effects. Currently, captive rail shippers with rate and/or service problems must rely upon Board regulation to address those problems. Such regulation involves the Board in prescribing rates and directing alternative rail service. These regulatory remedies themselves are expensive and difficult to

pursue in a timely and cost-effective manner, which effectively leaves most captive shippers without any remedies at all. Reciprocal switching would alleviate the need for regulation of rates and service at all by allowing competition in the marketplace to resolve those issues where such competition already exists but is foreclosed by the incumbent rail carrier's short distance bottleneck.

Even in situations where the need for regulation is not completely eliminated, reciprocal switching still can significantly reduce the scope of such regulation. For example, in the absence of reciprocal switching, a bottleneck origin rail carrier is entitled to its long haul. If the actual bottleneck distance is just 30 miles out of a 500 mile movement on that rail carrier, and competition exists for the remaining 470 miles, the Board still must regulate the rate over the entire 500 mile route to protect the captive shipper from market power. In contrast, reciprocal switching at the origin would reduce the need for rate regulation to just the 30 mile bottleneck segment, allowing competition to determine a rate for the other 470 miles.

Although reducing the burdens of the current reciprocal switching rules would have a substantial deregulatory effect, such action will not completely eliminate the need for regulation. The Board's existing standards for ensuring reasonable rail rates are particularly cumbersome, time-consuming and expensive. The heart of the problem is the Board's use of stand-alone costs ("SAC") to measure rate reasonableness, which requires a shipper to design, construct, and operate a hypothetical alternative to the incumbent's rail service. The SAC process was created 30 years ago for unit train coal traffic and a very different rail industry and marketplace. Moreover, the Board has required shippers to present SAC evidence for the incumbent's entire route instead of just the truly captive bottleneck segments, which often are much shorter. As a consequence of this burdensome process, many captive shippers are without a truly effective means to redress unreasonable rates.

TFI, therefore, urges the RRTF to consider how replacing the outdated and burdensome reciprocal switching rules with new rules that reflect today's rail markets can have a positive deregulatory impact simply by allowing competition to function where it already exists. In addition, TFI supports efforts to develop alternatives to SAC that better reflect today's rail markets and are less arcane, costly and lengthy.

Respectfully submitted,



Justin Louchheim
Director, Government Affairs
The Fertilizer Institute

425 Third Street, S.W., Suite 950
Washington, DC 20024
202-515-2718
jlouchheim@tfi.org

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 43

WRITTEN COMMENTS OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE FILED IN STB DOCKET NO. EP 761 AND STB DOCKET NO. EP 722 ON NOVEMBER 26, 2019.

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Hearing on Revenue Adequacy

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Railroad Revenue Adequacy

WRITTEN COMMENTS OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Karyn A. Booth
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

Counsel for
The National Industrial Transportation League

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BEFORE THE

SURFACE TRANSPORTATION BOARD

STB Docket No. EP 761
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STB Docket No. EP 722
Railroad Revenue Adequacy

WRITTEN SUBMISSION OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("NITL" or "League") hereby submits its written submission on the revenue adequacy issues raised in the Notice of Public Hearing ("Notice") served by the Surface Transportation Board ("STB" or "Board") on September 12, 2019 in the above-noted proceedings.

The League represents a broad cross-section of American business, united in their need for reliable, efficient and competitive transportation services. Our rail members ship chemicals, petroleum, agricultural products, paper and forest products, and many other commodities using all modes of transportation, including rail. Our members have developed complex supply chains to support their operations. Efficient and competitive rail service, and fair rules and practices related to such service, are critical to maintaining the supply of goods required to meet the demand of American businesses and consumers and to compete effectively with producers around the world.

The Notice indicates that the Board will hold a public hearing on December 12, 2019 on revenue adequacy issues that were raised in the report issued by the Board's Rate Review Task Force ("RRTF"). The RRTF was established in January 2018 to recommend improvements to the existing rate review processes and to propose new rate review methodologies that would be more attuned to the realities of the current transportation world.[1] The RRTF's Report, issued to the Board on April 25, 2019, dealt with a variety of railroad rate review matters. Among them were matters dealing with railroad revenue adequacy, including proposals dealing with the definition of long-term railroad revenue adequacy; a proposed possible rate increase constraint; a proposed change to the Board's bottleneck rules; and a proposed change to the Board's Simplified Stand-Alone Cost Rules for revenue adequate carriers.[2]

In its September 12 Notice, the Board invited interested persons to provide input on the RRTF's recommendations regarding revenue adequacy. Based on the current financial strength of the freight rail industry, including the large number of Class I railroads who recently and currently have been determined by the Board to be revenue adequate, it is entirely appropriate for the Board to evaluate possible new rate review procedures that would apply to revenue adequate carriers. The League thanks the Board for issuing its Notice of Public Hearing and provides its written submission on each of the RRTF's revenue adequacy proposals below.

A. Definition of Long-Term Revenue Adequacy

In its Report, the RRTF noted that the Board has been directed by statute to assist rail carriers in achieving revenue adequacy, and is required to determine which rail carriers are earning adequate revenues.[3] The Report further noted that the Board's annual revenue adequacy

[1] RRTF Report, p. 1.

[2] RRTF Report, pp. 32-41.

[3] RRTF Report, p. 32.

determination is simply a one-year snapshot, and was never intended to identify whether rate relief was available under the long-term revenue adequacy constraint announced in *Coal Rate Guidelines.*[4] In that decision, the agency noted that revenue adequacy is a "long term" concept, not a single-year snapshot.

With this background, the RRTF indicated that the Board has never announced a working definition of what it means to be long-term revenue adequate, and stated that "the time is ripe for the Board to pronounce a working definition of long-term revenue adequacy. . . ."[5] The RRTF recommended that the Board measure long-term revenue adequacy "over the length of an entire business cycle," in order to include the negative effects of a recession. The Task Force's specific recommendation was to look at the "**shortest period of time, not less than five years, that includes both a year in which a recession began and a year that follows a year in which a recession began."**[6] The RRTF Report then set forth the long-term revenue adequacy status of each of the nation's Class I carriers for each relevant period per year from 2002 through 2017. The data set forth in the RRTF Report thus covered two recessionary periods in 2001 and 2008-2009.

The League believes that the long-term revenue adequacy standard recommended in the RRTF Report is extremely conservative, tending to emphasize the effects of recessions on the finances of the nation's rail carriers. The RRTF indeed concedes this point, noting that its recommendation "emphasize[s] the significance of recessions. . . ."[7] The RRTF methodology does this by requiring both the year in which a recession began and a year following a year in

[4] *Coal Rate Guideline, Nationwide*, 1 I.C.C.2d 520, 536 (1985), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

[5] RRTF Report, p. 33.

[6] *Id.* (emphasis in original).

[7] *Id.*, p. 35.

which a recession began to be included in the analysis (which second year could itself be part of the recessionary period, as it was in 2007-2008), and by focusing on the "shortest" period of time, not less than five years, in which those events occur. Use of the "shortest" period of time again emphasizes the effects of a recession on the finances of the nation's rail carriers by limiting the years considered. The RRTF indicates that these features will add a "confidence factor" that railroads will achieve and maintain long-term revenue adequacy by emphasizing the effect of recessions on the nation's rail carriers.[8] Therefore, if a rail carrier achieves long-term revenue adequacy under the RRTF's proposed definition, the Board can be certain that a rail carrier is financially sound over the long-term.

Particularly given the conservative nature of the recommended definition of long-term revenue adequacy, the figures in the RRTF Report for the long-term revenue adequacy status of each of the nation's Class I rail carriers are significant; indeed, eye-opening. Though the average cost of capital in each of these periods from 1998 to 2017 has remained fairly stable,[9] the average return on investment of all of the nation's Class I rail has climbed significantly over this period. UP's average long-term return over this nineteen-year period has more than doubled, from 6.56% to 13.01%. NS' and BNSF's average long-term return have increased by about 40% over this period. Even carriers that have not achieved long-term revenue adequacy under the RRTF's definition have seen a major increase in their returns: CP's average long-term return has doubled, and CSX's average long-term return has nearly doubled. Accordingly, the long-term revenue adequacy data included in the RRTF report fully supports the use of a variety of rate and market constraints on such carriers.

[8] *Id.*

[9] The average cost of capital in each revenue adequacy test period has ranged from a low of 10.23% (from 1999-2003) to a high of 11.22 % (in 2007-2013).

In addition, it is significant that, once a carrier has achieved long-term revenue adequacy even under the conservative definition proposed by the RRTF, the carrier remains long-term revenue adequate over time. Thus, NS achieved long-term revenue adequacy in 2006, and has remained long-term revenue adequate every single test period since then, through 2017, the most recent year for which data is available. UP and BNSF achieved long-term revenue adequacy in 2012 and 2013 respectively, and they also have maintained that status for every period since then.

The data in the RRTF Report thus indicates two things of major significance. First, the rail industry that the Board oversees in 2019 is night-and-day different from the rail industry that the Congress and the agency faced in 1980 at the time of the Staggers Act and even the industry existing at the time of the ICC Termination Act of 1995. Specifically, the freight rail industry has experienced a financial renaissance since that time and is currently very financially strong. Thus, it is entirely appropriate for the Board to develop new rate review rules that reflect the existing financial state of the Class I railroads, including the achievement by the vast majority of revenue adequacy. Second, the financial trends in the industry and the tendency for carriers to remain long-term revenue adequate after they have achieved that status, strongly indicates that the Board can place constraints on long-term revenue adequate carriers without fearing that the financial status of these carriers will be compromised.

B. Rate Increase Constraint

In its Report, the RRTF described a possible rate increase constraint (RIC) applicable to carriers that are long-term revenue adequate. The proposed constraint identifies the point at which the existing application of differential pricing is enough: carriers at or above that point would be forbidden from increasing non-contract, non-exempt rates by more than the rate of inflation. If a rate is below the threshold, a carrier could raise that rate to the threshold, but not

beyond. The RIC threshold would be determined by calculating an average annual real surplus beyond long-term revenue adequacy and that surplus would be allocated to various commodities. At that point, an increase in differential pricing beyond the RIC threshold would be subject to challenge. A shipper would have to file a complaint, prove that the railroad is market-dominant with respect to the challenged movement(s) and show that the issue movement is non-exempt and non-contract.[10] The rate increase constraint proposed by the RRTF would provide benefits to shippers and would not be unfair to carriers. Certainly, if a carrier is long-term revenue adequate and is market dominant as to a particular movement, there is no reason why that carrier should be permitted to increase such captive rates any further. Indeed, the Rate Increase Constraints identified in the RRTF Report are still financially profitable to carriers, sometimes in the extreme. Specifically, the RRTF Report indicates that, depending upon the commodity, the RIC would apply beginning at no less than a revenue to variable cost ratio of 180% for certain commodities, and for some commodities on certain railroads a constraint would not apply until the revenue to variable cost ratio for a movement would exceed over 600%.[11]

Although existing rates could not be reduced under this constraint, at least further rate increases would be limited solely to increases in a railroad's cost of service. Under the proposal, it would be relatively simple for a shipper to determine whether its rate was below, at, or above the RIC level, by simply calculating an R/VC for the movement. And, while a shipper would have to file a complaint, the litigation would basically be limited to a determination of market dominance. Thus, while the proposed RIC would not have huge benefits to shippers, since it would only limit future rate increases, shippers would benefit from not have huge litigation or

[10] RRTF Report, pp. 36-37.

[11] RRTF Report, p. 38 (R/VC Constraint for chlorine for NS would be 639%).

other costs either. The League believes that the adoption of the proposal by the Board is legally supportable and would offer benefits to some companies in the shipper community.

C. Bottleneck Changes

The third topic for comment set forth in the Board's Ex Parte 761 Notice of Public Hearing was the RRTF's recommendation for suspension of the Board's Bottleneck protections as applied to long-term revenue adequate carriers.[12] In its Report, the RRTF first noted the agency's decisions in its "Bottleneck" cases[13] which restrict bottleneck relief only to situations where a shipper has made a full-blown competitive access case (which relief has rarely been granted) or where the shipper has obtained a rail contract for the non-bottleneck segment in cases where the origin carrier does not also serve the destination.[14] The RRTF indicated that a change in the Board's policy for long-term revenue adequate carriers could be an "effective" competitive remedy, since it would make it easier to require such carriers to perform a short-haul in order to promote competition for a portion of the movement.[15] In discussing its recommendation, the RRTF analyzed the statutory and legal basis for the Board's Bottleneck decisions, and the legal basis for making a change to that policy for long-term revenue adequate carriers. The League has examined the RRFT's legal analysis and agrees that the Board would be well within its discretion to make such a change. First, the statute on its face provides the Board with a legal basis for limiting a carrier's general routing prerogatives and its long-haul in particular. Specifically, 49 U.S.C. §10705(a)(2)(C) states that "[t]he Board may require a rail carrier to

[12] Ex Parte 761 Notice, p. 3; RRTF Report, pp. 39-41.

[13] *Central Power & Light Co. v. S. Pac. Transportation Co.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

[14] RRTF Report, p. 40.

[15] *Id.*

include in a through route substantially less than the entire length of its railroad when…the Board decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation…." Elimination of the Board's Bottleneck restrictions in the case of long-term revenue adequate carriers would permit shippers to access rail-to-rail competition for at least a portion of the through route, thus obtaining more "economic" transportation. Shippers would not pursue the alternative routing using a bottleneck rate if the more competitive transportation did not also provide "adequate" service. Thus, removal of Bottleneck restrictions for long-term revenue adequate carriers would meet the express terms of Section 10705(a)(2)(C), by resulting in "adequate" and "economic" rail transportation.

Moreover, the elimination of Bottleneck restrictions for long-term revenue adequate carriers would be consistent with the purpose of the statute and the changes in circumstances underlying the Board's 1990s Bottleneck decisions. In reviewing the agency's Bottleneck Decisions, the Eighth Circuit noted that the Board had "grappled with the tension between two competing policies expressed in the Interstate Commerce Act," namely, the carriers' broad discretion in setting rates and routes, and regulation of a railroad's monopoly power.[16] The court also noted that:

> the Act protects both shippers and carriers. It guarantees that shippers will receive service at reasonable rates, and it allows carriers to provide service in a manner that achieves revenue adequacy.[17]

The court then noted that "in the present case, the Board determined that exploiting bottlenecks by refusing to provide separately challengeable bottleneck rates also assists carriers in achieving revenue adequacy."[18]

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[16] *MidAmerican,* 169 F.3d at 1104.

[17] *Id.* at 1106.

[18] *Id.* at 1107.

But the force of this key rationale underlying the Board's Bottleneck decisions and the Eighth Circuit's review of them disappears in the case of long-term revenue adequate carriers. Indeed, in that case, there is no "tension" between the carriers' need for revenue adequacy and the shippers' need for service at competitive rates because the carrier has already achieved revenue adequacy over at least a five-year period (and in the present cases, much more). Thus, the Board is well within its discretion in opening up bottleneck relief for such carriers.

The League strongly supports the RRTF's recommendation for a change in the Board's Bottleneck rules in the case of long-term revenue adequate carriers. In the current situation, the change would allow a shipper to obtain competition over a non-bottleneck segment and would also allow a shipper to challenge a bottleneck rate, at least for three of the nation's seven Class I railroads. Based on present circumstances, this would introduce greater rail competition at least for these three carriers. Of course, if the bottleneck carrier offers an excessive rate over the bottleneck segment, the shipper would still have to challenge that rate before the Board and be able to show that the bottleneck rate is unreasonable. The potential need to litigate the reasonableness of the bottleneck rate is a difficult task that by itself would limit the practical application of the new rule. Yet, by permitting competition over the non-bottleneck segment and by permitting a shipper to bring a reasonableness complaint against a bottleneck rate, fairer and more competitive rates are likely to result, either through negotiation with the bottleneck carrier or through rate reasonableness litigation before the Board.

In supporting the adoption of the RRTF bottleneck recommendation by the Board, the League recognizes that there is a significant limitation to that recommendation: namely, bottleneck relief would apply only to long-term revenue adequate carriers. Currently only three of the nation's seven Class I carriers would qualify as long-term revenue adequate. This leaves

shippers served by nearly sixty percent of the nation's carriers without this competitive access relief. Accordingly, even if the Board were to open up bottleneck rates as recommended by the RRTF, there is still a need for the Board to adopt its proposed competitive switching rules which would apply to all Class I railroads.

On July 27, 2016, the Board granted in part a petition by the League to adopt revised reciprocal switching regulations that had been proposed by the League. The Board proposed its own regulations that would allow a party to seek a reciprocal switching prescription that is either practicable and in the public interest or necessary to provide competitive rail service. See, Ex Parte 711 (Sub-No. 1), *Reciprocal Switching*, decision served July 27, 2016. Interested parties filed comments on the Board's proposal on October 26, 2016 and Reply Comments on January 13, 2017. No action has been taken in Ex Parte 711 (Sub-No 1) since then, although the Board has authorized ex parte meetings with Board members and has yet to set a date to close the record in that docket.

The League strongly urges the Board to take action as recommended by the League in its opening and reply comments submitted in EP 711, in order to provide at least some measure of competitive relief to all of the nation's shippers, whether or not they are served by long-term revenue adequate carriers. The League sees no reason for continued inaction in the reciprocal switching proceeding which has been the subject of extensive briefing and expert testimony, has been pending for more than three years, and was constituted from earlier proceedings that began in 2011.[19] Between 2002 and 2017, the average rate of return for each revenue adequacy test

[19] The Board first initiated a hearing on the state of competition in the railroad industry, and possible policy changes, in June 2011 in its Ex Parte 705 proceeding. The League actively participated in the hearing and subsequently filed its Petition for Rulemaking to Adopt Revised Reciprocal Switching Rules soon after that hearing on July 7, 2011.

period for all of the nation's Class I rail carriers has increased from 6.87% to 10.24%.[20] No Class I rail carrier had an average return on investment in the most recent revenue adequacy test period of less than 8.28%.[21] Clearly, the railroad industry as a whole is financially viable and stable. Accordingly, increasing competitive access through broadened reciprocal switching rules for all Class I carriers is in the public interest.

D. Simplified Stand-Alone Cost (Simplified-SAC) Changes

The final RRTF revenue adequacy recommendation involved a proposed change to Simplified–SAC for long-term revenue adequate carriers. Specifically, the RRTF recommended that the Board reinstate the simplification of Road Property Investment from Simplified-SAC for such carriers, to make the Simplified-SAC process quicker and easier. The RRTF also recommended that Simplified-SAC be eliminated for non-long-term-revenue inadequate carriers, since the process has never been used.

The League believes that the Board should not pursue this recommendation. As pointed out by the RRTF, the Simplified-SAC process has never been used, and the League believes that the proposed change will not cure the problems with Simplified-SAC. The time of the Board

[20] RRTF Report, p. 35: 2002 (Revenue Adequacy Test Period 1998-2002): BNSF= 8.30%, CN=8.46%, CP=4.92%, CSX=5.06%, KCS=7.06%, NS=7.72%, UP=6.56%. Average of all equals 6.87%. 2017 (Revenue Adequacy Test Period 2007-2017): BNSF=11.44%, CN=9.49%, CP=8.86%, CSX=9.46%, KCS=8.28%, NS =11.12%, UP=13.01%. Average of all equals 10.24%.

[21] KCS' return on investment in 2017 (2007-2017 test period) was 8.28%. *See* footnote 5.

and its staff can be better spent on other recommendations by the RRTF, and in other proceedings.

Respectfully Submitted

/s/ Karyn A. Booth
Karyn A. Booth
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 263-4108

Counsel for
The National Industrial Transportation League

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HYNES V.S. EXHIBIT 44

COMMENTS OF THE INDUSTRIAL MINERALS ASSOCIATION FILED IN STB DOCKET NO. EP 761 AND STB DOCKET NO. EP 722 ON NOVEMBER 25, 2019.

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SURFACE TRANSPORTATION BOARD

Docket No. EP 761

HEARING ON REVENUE ADEQUACY

Docket No. EP 722

RAILROAD REVENUE ADEQUACY

INDUSTRIAL MINERALS ASSOCIATION- NORTH AMERICA COMMENTS

Industrial Minerals Association ("IMA-NA") respectfully submits its comments for the Hearing on Revenue Adequacy. On September 12, 2019, the Surface Transportation Board ("STB" or "Board") issued a Notice of Public Hearing ("Notice") for December 12, 2019 on revenue adequacy issues raised in the report issued by the Board's Rate Reform Task Force ("RRTF"). IMA-NA sincerely thanks the Board for having this hearing on a matter that is extremely important to us. Presently, IMA-NA feels its members have no recourse when a rate is unreasonable and commends the Board for attempting to find better ways to challenge a rate in this proceeding and in the Final Offer Rate Review and Market Dominance Streamlined Approach proceedings.

In January 2018, the Board established the RRTF with the objectives of developing recommendations to reform and streamline the Board's rate review process for large cases and determining how to best provide a rate review process for smaller cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (RRTF Report). The

RRTF Report recommended, among other things, that the Board consider policy changes regarding revenue adequacy. RRTF Report 12-13, 32-42.

In the Notice, the Board asked interested persons to provide input on the RRTF's recommendations regarding railroad revenue adequacy. The Board specifically asked participants to address the following RRTF recommendations in their written testimony at the hearing:

- Definition of long-term revenue adequacy: The RRTF recommended determining long-term revenue adequacy by looking at the annual determinations over "the shortest period of time, not less than five years, that includes both a year in which a recession began and a year that follows a year in which a recession began." RRTF Report 13, 33.

- Rate increase constraint: The RRTF recommended considering a rate increase constraint for long-term revenue-adequate carriers, which would identify a point beyond which further application of differential pricing would be unwarranted. See RRTF Report 13, 36-39.

- Bottleneck changes: The RRTF recommended considering suspension of the Board's Bottleneck protections as applied to long-term revenue-adequate carriers. See RRTF Report 13, 39-41.

- Simplified Stand-Alone Cost (Simplified-SAC) changes: For purposes of considering whether a long-term revenue-adequate carrier's rate is reasonable under Simplified-SAC, the RRTF recommended reinstating the simplification of the Road Property Investment analysis. See RRTF Report 13, 41-42, & app. B.

IMA-NA will address each of these points in the order presented by the Board.

IDENTITY AND INTEREST

The IMA-NA is a trade association that represents companies that mine, process and sell industrial minerals throughout North America. IMA-NA represents a wide variety of minerals in North America, including: ball clay, barite bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, soda ash, talc, wollastonite and other minerals. The industrial minerals produced by IMA-NA member companies are the raw material feedstock that are incorporated into a broad range of products, including among other things, containers, flat and specialty glasses, paint and coatings, ceramics, and a broad range of building products. Additionally, industrial minerals are used to make foundry molds and cores, which are in turn

utilized to make metal shapes for the manufacturing of automobiles, SUVs and trucks, rail cars and almost all other items that have metal castings. The demand for many of these minerals from manufacturers is global, and the continued pressure its member companies are feeling from the railroads in the form of constant rate increases is making it more difficult to compete in that global market.

In this global market, IMA-NA has seen with certain minerals that it is now cheaper for its members' global competitors to ship via vessel from Europe and elsewhere to portions of the United States than it is for IMA-NA members to ship via rail in the United States with the skyrocketing rail rates. These unchecked rates imposed by the railroads are having a negative overall impact on the U.S. economy, and matters could get even worse if they are not held accountable.

Industrial minerals are low margin, high volume products. IMA-NA member companies are heavily dependent upon a reliable and cost-effective transportation network, especially rail, and are major shippers with the Class I rails. To help highlight that, in 2014, the nonmetallic minerals, except fuels category, made up $1.5 billion in total freight rail premiums.

As a result, IMA-NA has a very strong interest in having the Board provide a revenue adequacy constraint process and in the market dominance streamlined process in EP 756 and in final offer rate review process in EP 755. IMA-NA commends the Board for taking an interest in promoting policies that remove barriers to accessing regulatory protection remedies and is extremely pleased that the Board is having this discussion about the revenue adequacy constraint.

DEFINITION OF LONG-TERM REVENUE ADEQUACY

The first recommendation the Board asks IMA-NA to address is the definition of long-term revenue adequacy. As noted, the RRTF recommended determining long-term revenue adequacy by looking at the annual determinations over "the shortest period of time, not less than five years, that includes both a year in which a recession began and a year that follows a year in which a recession began." RRTF Report 13, 33. Generally, IMA-NA is supportive of this approach but suggests broadening it to ensure it captures all revenue adequate carriers that are financially healthy by adding the right to submit additional probative evidence on revenue

adequacy and an STB-determined range around the cost of capital calculation that would take into account the inexact nature of the process.

Under 49 U.S.C. § 10701(d)(2), when determining whether a rate is reasonable, the Board is directed to give due consideration to three factors, recognizing the policy that "rail carriers shall earn adequate revenues." The Board is required to "annually determine which rail carriers are earning adequate revenues." 49 U.S.C. § 10704(a)(3); see, e.g., R.R. Revenue Adequacy—2017 Determination, EP 552 (Sub-No. 22) (STB served Dec. 21, 2018). This annual determination is distinct from long-term revenue adequacy, which "calls for a company, *over time*, to average return on investment equal to its cost of capital." Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 536 (1985).

Each year, the Board determines the railroad industry's cost of capital and then uses this figure in a variety of regulatory proceedings, including the annual determination of railroad revenue adequacy. The Board calculates the cost of capital as the weighted average of the cost of debt and the cost of equity. See Methodology to be Employed in Determining the R.R. Indus.'s Cost of Capital, EP 664, slip op. at 3 (STB served Jan. 17, 2008). While the cost of debt is observable and readily available, **the cost of equity (the expected return that equity investors require) can only be estimated.** Id. Thus, "estimating the cost of equity requires relying on appropriate finance models." Pet. of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the R.R. Indus.'s Cost of Equity Capital, EP 664 (Sub-No. 2), slip op. at 2 (STB served Oct. 31, 2016).

As the Board has stated previously, **there is no single simple or correct way to estimate the cost of equity for the railroad industry**, and many model options are available. Use of a Multi-Stage Discounted Cash Flow Model, EP 664 (Sub-No. 1), slip op. at 15; see also Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 2, 20 (STB served Oct. 31, 2016). The Board has acknowledged that "by using multiple models that are based on different perspectives and rely on different inputs, the Board benefits because anomalies affecting one model are less likely to affect the other." Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 3 (STB served Apr. 28, 2017). The Board has previously determined that a

methodology that uses multiple models is more robust than a methodology that utilizes only one model, not because one model is "conceptually or pragmatically superior to the other," but rather because each has different strengths and weaknesses. Pet. of the W. Coal Traffic League, EP 664 (Sub-No. 2), slip op. at 11 (STB served Oct. 31, 2016). Since 2009, the Board has found that the simple average of the Capital Asset Pricing Model ("CAPM") and the Morningstar/Ibbotson Multi-Stage Discounted Cash Flow Model ("MSDCF") has produced a reasonable estimate of the cost of equity used to gauge the financial health of the railroad industry.

This annual cost of capital determination has been the subject of much controversy and debate over the years, including various challenges and changes to the process. In fact, the Board presently has a proceeding pending before it in EP 664 (Sub-No. 4), Revisions to the Board's Methodology for Determining the Railroad Industry's Cost of Capital, regarding a proposal to incorporate an additional model, called the "Step MSDCF" to complement its use of the CAPM and Morningstar/Ibbotson MSDCF approaches. IMA-NA is supportive of the proposed rule in this proceeding but urges the Board to have some additional flexibility in its approach when determining long-term revenue adequacy instead of closely following these annual determinations that the Board concedes are not exact because the cost of equity determination is merely an estimate.

In making a decision on long-term revenue adequacy, the Board should consider that most economists and financial analysts presently do not consider any Class I railroad to be revenue inadequate. In a congressionally mandated report, a distinguished committee of economists put together by the Transportation Research Board declared their belief that the rail industry is now revenue adequate. Nat'l Acads. Of Sciences, Eng'g, and Med., Modernizing Freight Rail Regulation (2015) ("TRB Committee Report"). It even recommended that the STB discontinue issuing annual reports on the revenue adequacy of individual railroads and replace them with periodic studies of economic and competitive conditions in the rail industry. Id. Moreover, the U.S. Senate Commerce Committee issued a report, The Current Financial State of the Class I Freight Rail Industry, in 2010, that found the railroad industry to be revenue adequate and extremely financially healthy.

In fact, CSX in May of this year had its stock price top 80, increasing from a price of 14 in December of 2007. Moreover, CSX's operating ratio in 2018 reached an all-time low of 58.7%. However, the Board recently in a revenue adequacy constraint rate case found CSX not to be revenue adequate despite this obvious good health. Consumers Energy Company v. CSX Transportation, Inc., NOR 42142, slip op. at 21 (STB served Jan. 11, 2018 and updated Mar. 14, 2018). While CSX was close to being revenue adequate in the Board's annual determinations during the present business cycle, it never achieved that standard which resulted in this confusing finding of revenue inadequacy despite the railroad's skyrocketing stock price and record low operating ratio.

Now, as noted, the Board proposes to define long-term revenue adequacy by looking at these annual determinations over "the shortest period of time, not less than five years, that includes both a year in which a recession began and a year that follows a year in which a recession began." RRTF Report 13, 33. While this approach is compelling in its straightforwardness and simplicity, CSX still would not have been found to be revenue adequate if the Board had used this approach in Consumers. Obviously, this result seems irrational and needs to be fixed in some fashion.

Consequently, IMA-NA urges the Board to use its proposed test, but it should add in two additional parts. First, IMA-NA suggests that the Board also permit additional probative evidence of revenue adequacy or inadequacy to be submitted by the parties in these cases. This suggestion follows the existing precedent in these types of proceedings regarding revenue adequacy which permits this type of evidence. See Consumers, slip op. at 5-6. However, the Board should reevaluate how it could possibly find a company like CSX to be revenue inadequate despite receiving ample additional evidence of its extremely good financial health. Otherwise, the revenue adequacy constraint may lie fallow like the Stand-Alone Cost constraint presently does.

One way to ensure that railroads are considered to be revenue adequate when they are earning a return just below the cost of capital standard is to create a range around this number of two percentage points. Therefore, if the Board determined the cost of capital to be 12% over a business cycle, a railroad that earned 10.5% would still be considered long-term revenue

adequate. This approach is justifiable because the cost of capital determination is merely an estimate. This proposed range would have resulted in the correct finding in Consumers and would fix a clear flaw in the process.

IMA-NA again commends the Board for having this discussion about a standard for when a railroad is considered to be long-term revenue adequate. However, it urges the Board to consider all probative and competent evidence when reaching this result and to provide some flexibility in making this determination by establishing some type of cost of capital range when deciding whether a railroad earned its cost of capital over a business cycle.

RATE INCREASE CONSTRAINT

As noted, the RRTF recommended considering a rate increase constraint for long-term revenue-adequate carriers, which would identify a point beyond which further application of differential pricing would be unwarranted. See RRTF Report 13, 36-39. The RRTF reasoned that "the purpose of this proposal is 'to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.'" RRTF Report 36 (quoting 49 U.S.C. § 10101(6)); see also Coal Rate Guidelines, 1 I.C.C.2d at 535-36 ("the logical first constraint on a carrier's pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this 'revenue adequacy' level. In other words, captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs.") IMA-NA again thanks the Board for this opportunity to discuss this recommendation which provides a form of relief for rail shippers when long-term revenue adequacy is found.

The RRTF explained that this constraint is an identification of the point at which the existing application of differential pricing is enough. However, in applying this constraint, the Board would not rebate any money to shippers and would not reduce the rates shippers are currently paying beyond the level identified. Moreover, carriers could continue to charge their existing rates to their existing customers; the constraint would impose no change on their existing rate structure. For shippers whose rates exceed the rate increase constraint, carriers

would be forbidden from raising non-contract, non-exempt rates by more than the rate of inflation (as measured by RCAF-U). Long-term revenue adequate carriers would be free to raise non-contract, non-exempt rates below the threshold, but only up to the threshold, not beyond it. No constraint would be enforced as to commodities or services that are exempt or pursuant to a contract as described in 49 U.S.C. § 10709(a). The threshold level would vary based on the category of transportation and would rise and fall each year as the carrier's revenue above the long-term revenue adequacy threshold rises or falls. RRTF Report 36-37.

In other words, the Board would prospectively constrain long-term revenue adequate railroads from raising rates but would not provide a shipper any relief from an existing unreasonable rate prospectively or retrospectively. While this constraint would be an extremely useful tool for shippers to help them control the unreasonable rate increases which seem to have become a matter of course in the rail industry, it would not solve the existing or past problem of an unreasonable rate. As a result, IMA-NA urges the Board to adopt this constraint and also to make competitive access more available to shippers as discussed in the following section.

BOTTLENECK CHANGES

As noted, the RRTF recommended considering suspension of the Board's Bottleneck protections as applied to long-term revenue-adequate carriers. See RRTF Report 13, 39-41. IMA-NA applauds this proposal and only asks the Board to take one further step by also making reciprocal switching available to shippers by using a more lenient standard as applied to long-term revenue adequate carriers.1

As background, "competitive access" refers to inter-railroad cooperative arrangements under which railroads participate in "through routes" with other railroads, offer shippers "joint rates" on such routes, use other railroads' terminal trackage facilities, and "switch" cars in the service of other railroads to and from track sidings where shippers are located. A through route is an arrangement under which a shipment is transported to its ultimate destination by two or more railroads in succession.

1 IMA-NA continues to support the Board's reciprocal switching proposal in Reciprocal Switching, EP 711 (Sub-No. 1). However, it makes this suggestion for reciprocal switching here based on its uncertainty about how that matter will proceed.

After the enactment of the Staggers Rail Act of 1980, the Interstate Commerce Commission ("ICC") adopted regulations regarding competitive access substantially similar to a proposal submitted by joint agreement between certain shippers and railroads. Intramodal Rail Competition, EP 445 (Sub-No. 1) (served Oct. 31, 1985). These regulations set out the standards the ICC and now the Board would thereafter use in determining whether to prescribe through routes and joint rates, and establish switching arrangements: the ICC will step in only where necessary to remedy or prevent acts that are "contrary to the competition policies of 49 U.S.C. [Sec.] 10101a or [are] otherwise anticompetitive." 49 C.F.R. Sec. 1144.5(a)(1)(i) (1986). Since the enactment of this regulatory standard, shippers have rarely utilized this remedy because it was believed to be unattainable by most and has proven to be so.

As mentioned above, one means of competitive access that is available to a shipper and is at issue in this recommendation is a through route under 49 U.S.C. § 10705, which is subject to the Bottleneck protections. This remedy can be used when a rail bottleneck arises. The RRTF explained that a rail bottleneck arises when more than one railroad may be involved in providing service from an origin to a destination, but only one—the bottleneck carrier—can serve either the origin or the destination. In the late 1990s, the Board handled the three Bottleneck cases, see Cent. Power & Light Co. v. S. Pac. Transp. Co., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999). in which a utility company sought to require the bottleneck carrier to establish a "local rate" for the segment of the through movement that was served by that carrier so that the utility could combine that local rate with a rate for the remainder of the movement by another carrier. The idea was that, rather than having to challenge the full origin-to-destination rate in its entirety, as generally required by Great Northern Railway v. Sullivan, 294 U.S. 458, 463 (1935), the utility could create competition for the bulk of the movement and separately challenge the reasonableness of the local (bottleneck) rate, presumably resulting in lower charges overall.

In its decisions, the Board found that a shipper cannot force a bottleneck carrier to use a routing over the line of the non-bottleneck carrier without making a full-blown "competitive access" case subject to the strict regulatory test established in Intramodal Rail Competition, even if such a routing could result in lower rates. Otherwise, the Board found that a shipper could direct a bottleneck carrier that could provide origin-to-destination rail service to "shorthaul"

itself by routing traffic over the lines of the non-bottleneck carrier if it obtained a rail contract under 49 U.S.C. § 10709 for the non-bottleneck segment. The Board's decisions were affirmed in MidAmerican.

Concluding that they reflected a "permissible" reading of the statute, the MidAmerican court found that the Board's Bottleneck decisions "grappled with the tension between two competing policies expressed in the Interstate Commerce Act": carrier discretion in setting rates and routing traffic (49 U.S.C. § 10701(c)) so that railroads could "achieve revenue adequacy by competing on a free-market basis," on the one hand; and the requirement that market-dominant carriers charge only reasonable rates (49 U.S.C. § 10701(d)), on the other. 169 F.3d at 1104-05. The reviewing court's decision was based in part on the Board's conclusion that permitting the maximum differential pricing at bottlenecks would "assist[] carriers in achieving revenue adequacy." Id. at 1107. Indeed, the MidAmerican court found that permitting the maximum differential pricing at bottlenecks would assist carriers in "achiev[ing] revenue adequacy by competing on a free-market basis." See 169 F.3d at 1105-07.

The RRTF stated that this rationale in the Bottleneck cases loses its force for carriers that have already achieved long-term revenue adequacy and for a part of an industry that is viewed as quite profitable. RRTF Report 41. The RRTF explained that given the significant improvement in the rail industry's finances, a change making it easier to require revenue-adequate carriers to short-haul to promote competition for a portion of a movement might well be another permissible reading of the statute. RRTF Report 40.

IMA-NA believes this recommendation to make a through route more available when a carrier is found to be long-term revenue adequate is indisputably within the Board's statutory power as explained in the RRTF Report. 40-41. Also, because the rail industry is clearly revenue adequate, the suspension of the Bottleneck decisions (that have essentially stopped the through route remedy to this point) makes complete sense. The vibrant and healthy rail industry today and the ailing and stagnant rail industry in the 80s are completely different animals. Therefore, due to this change in the state of the industry, the Board should implement this new standard making through routes more available by suspending the Bottleneck protections under these circumstances.

However, the Board should not stop there. Changing the standard for bottleneck situations alone would be a great first step; however, this remedy would not be as useful for some shippers as it would be for others. As the Board noted, if a shipper obtained this access, it would still have to bring a rate case to obtain relief on the shorter captive portion of the route against the incumbent carrier. Of course, the hope would be that the shipper would now have more negotiating power due to the availability of this remedy, but as the Board knows and is the point of the RRTF Report, bringing a rate case is not a simple matter and might render this proposal less effective. As a result, IMA-NA also believes the Board should reverse its decisions to use the existing competitive access standard discussed above to obtain the reciprocal switching remedy, thereby giving shippers another option when a railroad is found to be long-term revenue adequate.

Under reciprocal switching, or as it is sometimes called, "competitive switching," an incumbent carrier transports a shipper's traffic to an interchange point, where it switches the cars over to the competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing or taking the cars from the shipper's facility to the interchange point, or vice versa, which is incorporated into the competing carrier's total rate to the shipper. Reciprocal switching thus enables a competing carrier to offer its own single-line rate to compete with the incumbent carrier's single-line rate, even if the competing carrier's lines do not physically reach a shipper's facility.

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. The statutory provision governing the Board's authority to order reciprocal switching arrangements was first enacted by Congress in the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895. That provision now states as follows:

> The Board may require rail carriers to enter into reciprocal switching agreements <u>where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.</u> The rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement, but, if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation.

49 U.S.C. § 11102(c)(1) (emphasis added) (previously codified at 49 U.S.C. § 11103(c) (1980)).

In 1986, the ICC decided its first reciprocal switching case under the strict competitive access regulations discussed above. In Midtec Paper Corp. v. Chicago & North Western Transportation Co., 3 I.C.C.2d 171 (1986), the ICC denied a shipper's petition for competitive access either via terminal trackage rights or reciprocal switching. In so doing, the ICC elaborated on the rules it adopted in Intramodal Rail Competition and their relation to the statute:

> (W)e think it correct to view the Staggers (Act) changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.

Id. at 174. Thus, although "(u)nder (§ 11102(c)), awarding reciprocal switching is discretionary," the ICC explained that the key issue under its then-new regulations was whether the incumbent railroad "has engaged or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." Id. at 181.

Since adoption of the agency's stringent competitive access regulations in 1985 discussed above, the regulations have not changed substantively. Few requests for reciprocal switching have been filed with the agency since then, and in none of those cases has the Board granted a request for reciprocal switching. See, e.g., Midtec Paper Corp, 3 I.C.C.2d 171; Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry., 5 I.C.C.2d 331 (1989). Therefore, like with the Bottleneck cases, this competitive access remedy has been rendered somewhat useless to captive shippers since Intramodal Rail Competition and Midtec Paper Corp.

As noted, the health of the rail industry has improved substantially since these competitive access policies were imposed in 1985. In the 80s, the rail industry was barely alive due to decades of inefficiencies and bankruptcies. In the TRB Committee Report, it was noted that "[t]he U.S. freight rail industry has undergone a remarkable transformation since the enactment of the Staggers Rail Act of 1980," and exclaimed that "the industry has evolved and the railroads' financial viability has drastically improved." 1-2. Therefore, for the same reasons the RRTF suggested suspending the Bottleneck decisions when a carrier is found to be long-term

revenue adequate, the Board should also apply that rationale to reciprocal switching. The Board should suspend the use of a single anticompetitive standard for reciprocal switching cases when a railroad is found to be long-term revenue adequate and a less stringent standard like the one proposed in EP 711 (Sub-No. 1) or used in Canada should be applied.

Moreover, reciprocal switching is commonly viewed as the least intrusive of the competitive access remedies available to the Board. The less intrusive nature of this remedy, the great improvement to the health of the rail industry since the 80s, and the complexities of a bottleneck case make the addition of this remedy a perfect fit for the Board's intent to make the regulatory process more effective for captive shippers who now have no options available.

IMA-NA assumes the Class I railroads will argue that making these competitive access remedies available upon a finding of long-term revenue adequacy will be a financial and operational disaster for them. However, one must merely look to our north in Canada to see that the use of these remedies will have very little effect on the financial and operational health of large railroads. In Canada, "competitive line haul rates" and "interswitching" have proven to be successful policies for the protection of shippers and have had no adverse effect financially, operationally, or otherwise on the rail industry. In fact, the Canadian rail industry has long been a favorite of financial analysts with operating ratios in 2018 below 60%, generally better than their U.S. counterparts, except ironically for CSX.

Consequently, IMA-NA asks the Board to add this additional competitive access change to the Bottleneck cases recommendation in the event of long-term revenue adequacy by a railroad. This addition would make the Board's recommendation more effective and would provide captive shippers with the protection they need from rail market dominance. When the ICC imposed the stringent competitive harm standard for these access remedies, it did so to protect an industry that was reeling from bankruptcies and inefficient operations. Now, the rail industry has strongly recovered and these policies of the past are no longer necessary. In fact, the pendulum has completely swung to the other side with shippers having nearly no access to rate relief or competitive access remedies that Congress intended to be used for their protection. As a result, these changes making bottleneck relief and reciprocal switching more available are

crucial to a regulatory scheme that seemingly has lost its way during the rail renaissance over the past few decades.

SIMPLIFIED STAND-ALONE COST CHANGES

As noted, the Board also asked for testimony on the RRTF recommendation reinstating the simplification of the Road Property Investment Analysis for purposes of considering whether a long-term revenue adequate carrier's rate is reasonable under Simplified-SAC. While IMA-NA is more interested in having these other recommendations discussed above being imposed, it fully supports this proposed change to Simplified-SAC which could possibly result in this process being used in the future. As mentioned in the RRTF Report, Simplified-SAC has never been litigated to a final decision. Therefore, any mechanism that might breathe some life into this process would be welcomed.

CONCLUSION

IMA-NA once again thanks the Board for taking this important step to define when a railroad is considered to be long-term revenue adequate and to determine what regulatory action should then occur. As discussed herein, IMA-NA supports the recommendations by RRTF listed in the Notice but also seeks a slight broadening of the proposed long-term revenue adequacy standard and the addition of reciprocal switching to the Bottleneck protections change. With the imposition of these recommendations for a revenue adequacy constraint and the rules proposed in Final Offer Rate Review and Market Dominance Streamlined Approach, IMA-NA believes the Board will be able to regulate the railroad industry in the manner Congress intended. As a result, IMA-NA asks the Board to take these needed steps and bring back some balance to a regulatory scheme that has been less effective than necessary to protect railroad shippers.

Respectfully submitted,

/s/ Daniel R. Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue
Suite 7000
Washington, DC 20006
(703) 863-9670

Attorney for Industrial Minerals Association-NA

November 26, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 45

CONFIDENTIAL - TERMS FOR TEXAS MEXICAN RAILWAY COMPANY TRACKAGE RIGHTS BETWEEN HOUSTON BELT & TERMINAL RAILWAY COMPANY AND THE TEXAS MEXICAN RAILWAY COMPANY, SIGNED BY HB&T ON JANUARY 10, 1997 AND BY TEX MEX ON JANUARY 28, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____

FINANCE DOCKET NO. 36500

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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

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HYNES V.S. EXHIBIT 46

HIGHLY CONFIDENTIAL – STB-FD36500-UP-HC000092

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 47

HIGHLY CONFIDENTIAL – STB-FD36500-UP-HC000521

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 48

SUMMARY OF CP DELAY EVENTS 2016-2021

REDACTED PUBLIC RECORD VERSION

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
1/11/2016	2221		Spaulding	DELAY	22	Dispatcher failed to move Metra train around CP grinding equipment	10	8201	1. Metra 2221 was delayed 22 minutes following CP Rail Grinding equipment which was operating on Track and Time. Primary delay occurred at Spaulding. Opportunity to have 2221 run on #2 MT from Roselle West to Spaulding around rail grinder was not taken. Lengthy delay carried over to delays to Peak Period trains 2244 (9 minutes) and 2243 both of which turn from 2221.
1/11/2016	2244	PEAK		DELAY	9	Cascading delay	10	8201	CASCADE
1/11/2016	2243	PEAK		DELAY		Cascading delay	10	8201	CASCADE
1/11/2016	2248		Bensenville	DELAY	14	Two freights dispatched out of yard at once, forcing one into peak period	10	8201	1. CP 473 was allowed to depart Bensenville behind 2221 at the same time that CP 472 (8500 feet) on short time was ['allowed to leave Genoa as the evening Metra rush approached. This created a "hostage railroading" situation whereby it became necessary to run 472 in the midst of the rush in order to get 473 out of the way. 472 wound up stopping on the plant at B17 from 1830 to 1850 delaying Metra 2248 who caught up with 472 at Wooddale. 2248 was 14 minutes late arriving Chicago which turned into similar delays to "flips" 2249, 2254, and 2255.
1/11/2016	2249		Bensenville	DELAY		Cascading delay	10	8201	CASCADE
1/11/2016	2254		Bensenville	DELAY		Cascading delay	10	8201	CASCADE
1/11/2016	2255		Bensenville	DELAY		Cascading delay	10	8201	CASCADE
1/15/2016	2250		B17	DELAY	20	Waiting for inbound freight	2	8450	Inbound train #2250, scheduled to arrive Chicago Union Station at 8:29 PM, is 15 to 20 minutes behind schedule dfreight train interference. 680-704 was released into Bensenville yard but did not have a route when they arrived which resulted in the train trailing out of the yard onto the main track.
1/15/2016	2251			DELAY		Cascading delay	2	8450	
1/15/2016	2256			DELAY		Cascading delay	2	8450	
2/9/2016	2256		B12	DELAY	25	Dispatched freight train slow to enter yard	34	7904	Please see delay to Metra 2256 (MWDW) last night - 25 minutes freight interference. What were the circumstances? Was running 2256 on #2 Mail and loading/unloading at crosswalks an option? It looks like 287-09 departed Gale wood at 2231 which should have been sufficient time to get the train in the clear at Bensenville. Appears the train was stopped in the plant at B12 attempting to line frozen switches into the yard. I don't believe running 2256 on Main 2 would have been an option for loading/ unloading due to 287-09 blocking the crosswalks. We had CCF do a replay. 287 came #2 main from Galewood and crossed to 3-lead so that #2 main, as you point out, was not an option. Please re-emphasize with all of the dispatchers that when trains are released to go into the yard, either at B 17 or B12, that there is a commitment from the yard that the route will be lined (or if not, what switches the freight crew will need to line before they can be clear) and a conversation with the crew that they will in fact be able to clear given the information received from the yard.
2/16/2016	2256		Spaulding	DELAY	20	Following freight train	21	8013	Metra 2256 delayed 20 MINUTES last night behind CP 472 working at Spaulding. 2256 then followed 472 to Tower B17 arriving Chicago minutes late. I thought we had agreed that trains working at Spaulding would Only occupy the block between TowelSffitilding allowing Metra traffic to run around on #1 Main between B35 and Spaulding. In this case, 472 could also have been held to follow 2256 from Almoi hold the main as 2256 is the last Metra inbound of the night. Please advise why neither ofthese provisions were chosen.
2/16/2016	2256		B17	DELAY		Freight train dispatched ahead of Metra train	21	8013	Yesterday afternoon, CP-473 departed Tower B17 1513 hrs, right ahead of Metra 2221 who is due there at 1503, but was running late due to picking up passengers from our stalled 2219 from an earlier Engine failure. 473 actually had a 10 minute lead on 2221 who went by B17 at 1523. Normally this would have worked out okay, however 473 was told to stop around Schaumburg when it was discovered that there was an additional car in the train without paperwork. When stopped, 473 was actually almost 10 miles out of Bensenville. Having gone that far already, we asked that 473 be allowed to continue West to clear Metra territory at Randall Road and resolve the paperwork issue up there. Train was, nevertheless, held until a radio waybill could be composed and issued, necessitating having 2221 stop at Roselle West while the Operator at B17 timed out the signal, then running on #2 Main to Tower B35. This situation would have resulted in a substantial Metra delay except for the fact that Metra 2242 had been annulled due to the earlier engine failure on 2219.
2/16/2016	2221		B17	DELAY		Cascading delay	21	8013	CASCADE
2/17/2016	2255		Bensenville	ALT TRACK		Dispatcher dispatched freight train ahead of Metra train	21	8013	Yesterday evening, there was a lengthy CP-484 that had run East via A5 stopped on #1 MT at Galewood East awaiting release from Bensenville Yard. Metra 2255 was lined up to run #3 MT from Tower 66 to Galewood East around 484. This would have been fine since 2255 has no scheduled passenger stops between 66 and Galewood East. 2255 also has a scheduled meet with inbound 2256 in the Mont Clare-Elmwood Park area, half-way between Galewood East and Tower B12. Had 2255 crossed back over to #1 MT at Galewood East ahead of 484, 2255 would have been on the correct track for his station work, and 2256 would have been able to proceed East on his correct #3 MT from B12 without any delay. Apparently, while 2255 was approaching B6, the Elgin Dispatcher received the release from Bensenville for 484. Rather than wait the additional 5 minutes (10 tops) for 2255 to come around, 484 was lined up to immediately proceed West on #1 MT from Galewood East. Doing this necessitated running 2255 West all the way to B12 on #3 Main which created two problems: 1) 2256 would have to wait at 612 @ 20 minutes for 2255 to clear (This is the same train, and for the most part the same passengers, that had to endure a 20 minute delay the previous evening for the 472 incident above). 2) 484 running West on #1 MT was now operating on the normal loading side for 2255, separating any boarding passengers from crossing to #3 Main where 2255 was running. Nothing was gained for 484 by doing this, since when 484 got to B12, they still had to wait for 2255 (as well as the badly delayed 2256) to clear the interlocking. In addition, with 484 stopped on #1 MT at B12, both River Grove Depot, as well as the heavily trafficked Thatcher Avenue, were blocked by 484. At least one individual wound up crawling underneath 484 in order to get to the opposite platform to board 2255 at River Grove. This may have been before 484 stopped.
2/17/2016	2256		Bensenville	DELAY	20	Cascading delay	21	8013	CASCADE
3/8/2016	2251		B17	DELAY		Dispatcher error	11	8169	Train #2 2 5 1, Scheduled to Arrive Big Timber Rd at 10:01 PM - Stopped. Train #2 2 5 1, scheduled to arrive Big Timber Rd at 10:01 PM, is stopped near Bensenville due to switch problems. duration ofthis delay is unknown. Metra will update this site as information becomes available. Had to hand line route at B17. Spoke with Delia at B17. She said she had indications on the switches but could not display a signal. Even though she had indications on the switches, she told the crew to "check their route". Crew took that as instructions to hand line. Niki, please remind operators that when they have proper switch indications for the needed route, they should not tell crews to check their route.

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DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
3/10/2016	2244	PEAK	Spaulding	DELAY	24	Dispatched too many freights at once near peak period	12	8168	This evening, during the 45 minute scheduled gap between Metra #2242 (Spaulding 1535) and #2244 (Spaulding 1620) CP G-35 was allowed to triple up a train from the CN interchange at Spaulding out on to Metra #2 MT while holding the interlocking at Spaulding. #2244 wound up sitting at Spaulding while G35 completed their triple, then followed G35 to Bensenville. Having already delayed 2244 @ 10 minutes, we were assured that G35 would have a "straight shot" into Bensenville yard, but in spite of this, G35 stopped 3 times going into the yard before the rear of the 7700 foot train cleared B17 interlocking. #2244 was delayed over 30 minutes in the process, and arrived CUS at 1801, 24 minutes behind schedule. While delays of this magnitude to our service are never acceptable, this was particularly bad because: ·2244 with a scheduled arrival at CUS at 1737 was operating in the peak of our evening rush hour, and is considered a "peak period" train. ·2244's late operation necessitated numerous modifications to our normal rush hour operation including altering crew and equipment turns so that #2243, our 1746 departure from Chicago who normally turns from #2244, and is one of our most heavily patronized trains, could still depart on time. Track utilization changes between Tower B6 and Tower B12 also had to be arranged in order to accommodate the late running 2244. The practice of having G35 come out at Spaulding and triple up on the main line during the narrow windows between scheduled Metra trains is one that was quite common at one time, and was a chronic cause of Metra delays. It has come to our attention that this practice has occurred several time of late, and while up until tonight, no major delays have occurred because of it, the risks are there every time this plan is implemented. We have discussed this practice in the past and came up with the following possible solutions to avoid delays to our service: 1.Schedule G35 to do Spaulding work so as to come out on #2 MT AFTER #2256, our last inbound train to Chicago, passes Spaulding at 2223 hrs. Virtually unlimited time on the main is then available. 2.If necessary to make these moves while Metra trains are still running, have G35 assemble their train COMPLETELY WEST of the Spaulding interlocking on #2 MT so that EWD Metra trains can run on #1 MT from Tower B35 to Spaulding and cross back over to #2 MT AT SPAULDING. Our schedules will support this operation without causing delays to our service, but EWD Metr, trains must cross back at SPAULDING, not Roselle West. I know it's a bit awkward assembling West of Spaulding due to road crossings, but it can and has been done. 3.Do not try and triple up between trains while holding the plant. It is in many ways just as quick -- and much simpler -- to take one or two cuts into Bensenville, then return with light power for the remaining cut(s). All of these ideas have been discussed in the past, and to my knowledge, had been adhered to until just recently. I would appreciate your cooperation in insuring that the Spaulding operation does not again become a source of delays to our service and customers. As always, thanks for your help and assistance. If there are any questions, or if I can assist in any way, please let me know.
4/7/2016			Fox Lake	CALLBOX		Call box not working	30	7667	The box with the direct line to the C&M Dispatcher at Fox Lake has been out for a week now. It has been extremely difficult logistically to get movement authorities to our trains so that they can leave Fox Lake. WE have had late trains on occasion because of this. Can we please put our heads together and come up with a solution? If we can't get AT&T interested in fixing the problem, we will need to look for a different carrier. This has got to be fixed.
4/11/2016			Fox Lake	CALLBOX		Call box not working	30	7667	Fox Lake box is still out. Now Grayslake is out again as well. We have had 3 Metra delays today due to this situation. We need to come up with a solution now.
4/11/2016			Grayslake	CALLBOX		Call box not working	30	7667	Fox Lake box is still out. Now Grayslake is out again as well. We have had 3 Metra delays today due to this situation. We need to come up with a solution now.
5/13/2016	2254		TOW	DELAY	12	Waiting for freight to clear	9	8255	Metra 2254 shows delay of12 minutes at TOW waiting for freight train to clear. Please advise circumstances.
7/26/2016	2231	PEAK	Itsaca and Wooddale	DELAY	11	Dispatching error compounding one blocked mainline, causing slowdown	16	8135	On Monday, July 25, 2016 while travelling EWD on #2 MT following Metra 2244 at approximately 1700 hrs., CP 472-24 with 87-42-12700, 8350 feet experienced an emergency brake application between Itasca and Wooddale. After Conductor walked almost the entire length of the train, it was reported that there was a knuckle and/or drawbar failure about 5 cars from the rear of the train. CP dispatched personnel stationed at Bensenville Yard from both their transportation and mechanical departments to assist the crew, and a Metra Signal Maintainer, who was in the area, also helped in expediting the clearing of #2 Main once the problems were identified. Arrangements were made to have CP-472 take the head portion of the train (up to the break) into Bensenville yard, and a crew that went on duty at Bensenville at 1800 hrs was promptly positioned with light power in order to retrieve the rear 5 cars once the head end cleared Tower B17. We are grateful for the prompt response to the situation by all involved, and appreciate the effort put forth to clear up our Main Tracks to salvage as much of the evening rush hour as possible. Unfortunately, because this train was operating during Metra's Peak Period, the logistics of single-tracking around the stalled train (8 miles from Tower B17 to Roselle West with 5 intermediate passenger stations and a dense WWD peak period schedule) had a devastating effect on our Operation, both during the peak period itself, and, because of crew and equipment turns, afterward. In review, it appears that the delays to 2233 through 2239 (as well as to subsequent trains since 2246 waited at Roselle West for 2239 to clear and 2243 waited at B17 for 2246 to clear) might have been significantly reduced, since, per Rule 6.23, once 2231 passed by the disabled train at restricted speed and determined that #1 Main was, in fact, not obstructed, the following trains should have been allowed to proceed through the area at track speed rather than at restricted speed as the trains in question were instructed.
7/26/2016	2233	PEAK		DELAY	15	Cascading delay	16	8135	CASCADE
7/26/2016	2235	PEAK		DELAY	14	Cascading delay	16	8135	CASCADE
7/26/2016	2237	PEAK		DELAY	10	Cascading delay	16	8135	CASCADE
7/26/2016	2239			DELAY	5	Cascading delay	16	8135	CASCADE
7/26/2016	2241			TERMINATED		Cascading delay	16	8135	CASCADE
7/26/2016	2243			DELAY	26	Cascading delay	16	8135	CASCADE
7/26/2016	2245			ANNULLED		Cascading delay	16	8135	CASCADE
7/26/2016	2247			DELAY	16	Cascading delay	16	8135	CASCADE
7/26/2016	2251			DELAY	11	Cascading delay	16	8135	CASCADE
7/26/2016	2253			DELAY	26	Cascading delay	16	8135	CASCADE

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
7/26/2016	2246			DELAY	46	Cascading delay	16	8135	CASCADE
7/26/2016	2248			DELAY	38	Cascading delay	16	8135	CASCADE
7/26/2016	2252			DELAY	33	Cascading delay	16	8135	CASCADE
7/28/2016	2256		B35	DELAY	7	Dispatching Metra train on the wrong track for passengers to alight	28	7686	Metra 2256 last night delayed 7 minutes due to using #1 MT Tower B35 to Roselle West around G35 and waiting on passengers on wrong side to cross overlincluding substantial delay at Bartlett due to split platforms and lengthy walk involved to get to the #1 platform. #2253 delayed 14 minutes at Roselle West waiting for 2256 to clear #1 main. In discussions sometime ago, it was agreed to call G35 to follow Metra 2253 out of B17 at 2212 and then crossover to #2 MT at Roselle West behind #2256 who is the last Metra inbound of the night so as to preclude the possibility of G35 disrupting Metra schedules. Can we please look into resuming this practice?
7/28/2016	2256		B35	ALT TRACK		Dispatching Metra train on the wrong track for passengers to alight	28	7686	
7/28/2016	2253		Roselle West	DELAY	14	Cascading delay	28	7686	CASCADE
7/28/2016	2160		Fox Lake	CALLBOX		Call box not working	29	7685	2160 left Fox Lake 5 minutes late again. Conductor wrote, "late departure of 2160 due to CP Dispatcher not answering call box at Fox Lake". LMM working again last night. This is 3rd time with same problem recently.
8/1/2016	2227	PEAK		DELAY	11	Equipment error compounded by close to peak	15	8135	The scenario encountered on Monday, July 25, 2016 (described below) repeated itself almost identically on Friday, July 29, 2016. 472-29 was operating in the same slot as the train on Monday, following 2244 and ahead of 2246 out of Elgin. This time the train had 99-39-11000, 9396 feet long. In essentially the same location as Monday, this train also got a broken knuckle and drawbar, this time about 84 cars back. We were able to alleviate some of the delays encountered on Monday by operating only the first train by, 2227, at restricted speed and allowing the balance to go by at track speed. Nevertheless, the delays were devastating to our rush hour service, as well as to our customers, many of whom were personally assured following Monday's meltdown that we at Metra had taken appropriate steps with our counterparts at CP Rail to insure that this would not happen again. The situation was further hampered on Friday due to the broken drawbar becoming wedged underneath the car behind (and had we been made aware of this, we would have dispatched appropriate engineering or mechanical personnel from Metra to assist), which ultimately resulted in our single tracking around 472's rear end until almost 2200 hrs, over 5 hours after the initial break.
8/1/2016	2241			TERMINATED		Cascading delay	15	8135	CASCADE
8/1/2016	2243			DELAY	10	Cascading delay	15	8135	CASCADE
8/1/2016	2246			DELAY	35	Cascading delay	15	8135	CASCADE
8/1/2016	2248			DELAY	70	Cascading delay	15	8135	CASCADE
8/1/2016	2250			DELAY	13	Cascading delay	15	8135	CASCADE
8/1/2016	2251			DELAY	17	Cascading delay	15	8135	CASCADE
8/1/2016	2253			DELAY	23	Cascading delay	15	8135	CASCADE
8/1/2016	2252			DELAY	22	Cascading delay	15	8135	CASCADE
8/1/2016	2254			DELAY	39	Cascading delay	15	8135	CASCADE
8/1/2016	2255			DELAY	24	Cascading delay	15	8135	CASCADE
8/24/2016	2200		Spaulding	DELAY	10	Waiting for freight to clear plant	1	8564	This week, on Wednesday Augf24th, Metra 2200 delayed 10 minutes at Spaulding, arrived Chicago 8 minutes late waiting for G35 to clear plant shoving over to #1 main. This morning, Friday August 26th, 2200 again delayed at Spaulding for G35, this time 2200 arrived Chicago 7 minutes late. I understand that this morning, 2200 also stopped to pick up G35s Conductor and give ride back to head end. Late arrival of 2200 at Chicago also causes 2201 to leave late. Please follow up with G35 crew so that they understand to arrange their work at Spaulding so that it does not interfere with scheduled Metra traffic.
8/26/2016	2200		Spaulding	DELAY	7	Waiting for freight to clear plant	1	8564	
8/26/2016	2201			DELAY		Cascading delay	1	8564	
11/17/2016	2254		Bensenville	DELAY	18	Freight train slow to enter yard	25	7745	2254 delayed 18 minutes following freight 472 enroute, and additionally at B17Fivith 472 not yarding promptly and hanging out on plant. Please advise why 472 was released so closely ahead of 2254 and then not yard ed promptly. Delay to 2254 will carry over to 2255 as well. I spoke to B17 and she stated 472 was pulling into Bensenville at 2155 and cleared it at 2202. Train was stopped in the plant with 6 cars hanging out while lining switches in yard. B17 was told that train would have route lined into yard. Metra 2254 then did not go by B17 until 2208, 6 minutes after 472 was clear of the plant for a total delay of 18 minutes. With 2254 due B17 at 2150, clearly 472 should not have run ahead of them in the,first place.
11/17/2016	2255		Bensenville	DELAY		Cascading delay	25	7745	CASCADE
12/31/2016	_600		Rondout	DELAY		Significant delay at Rondout due to freight stopped in plant - equipment problem	5	8433	_600 received significant delay at Rondout due to freight stopped in plant. Please provide any details/specifics you can. 280-01 experienced undesired emergency brake application at Rondout. Inspection found a separated air hose between their 93' and 94th car that was secured. 280 stopped in plant at 0543 —0615
1/3/2017	2200		B17	DELAY	9	Metra train delayed at Tower B17 waiting for 198 to clear plant pulling into yard	60	9857	Metra 2200 arrived Chicago 9 minutes late at 0539. Was delayed at Tower B17rwaiting for 198 to clear plant pulling into yard, then lost additional time running on #1 Main Track Tower B12 to Galewood East due to NS 17V using #3 Main and waiting for passengers crossing from #3 Main platforms to #1 Main. Delay to 2200 will also affect 2201 and possibly 2222.
1/3/2017	2200		B12	ALT TRACK		lost additional time waiting for passengers crossing from #3 Main platforms to #1 Main	60	9857	Metra 2200 arrived Chicago 9 minutes late at 0539. Was delayed at Tower B17rwaiting for 198 to clear plant pulling into yard, then lost additional time running on #1 Main Track Tower B12 to Galewood East due to NS 17V using #3 Main and waiting for passengers crossing from #3 Main platforms to #1 Main. Delay to 2200 will also affect 2201 and possibly 2222.
1/3/2017	2201			DELAY		Cascading delay	60	9857	CASCADE

METRA_D036500_00195403

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
1/16/2017	2249		B17	DELAY	13	Waiting for freight train to clear in yard	36	8529	Metra 2249 delayed 13 minutes at B17 last night waiting for freight train to clear in yard. This also resulted in delays to flips 2254 and 2255. Please advise circumstances. fhe train involved was 484-15. They were 9378' and had 1 switch to get coming into the yard. Unfortunately, 484-15 expired on hours of service at 2245 and Bensenville was waiting on the power to operate a different train and the crew to tie up to be rested to run 199 on time today. In an effort to meet the needs of the operation, the decision was made to run 484 in the 1950-2015 window as the windows are all between 25-30 minutes prior to 2320 and the crew would have been expired Hours of Service if we waited for the larger window after 2320. They did not believe that it would delay 2249 and certainly didn't believe it would delay them to the extent it did
1/16/2017	2254		B17	DELAY		Cascading delay	36	8529	CASCADE
1/16/2017	2255		B17	DELAY		Cascading delay	36	8529	CASCADE
2/1/2017	2200		Bensenville	DELAY	12	Metra train delayed due to freight train stopped going in Bensenville Yard with rear end still in plant	53	7837	Metra 2200 delayed approximately 12 minutes at B17 this morning behind G35 who stopped going in Bensenville Yard with rear end still in plant. 2200 arrived Chicago 8 minutes late resulting in late departure on 2201. Please advise reason for G35 blocking plant. Was Bensenville committed to moving G35 before they were released from Spaulding?
2/1/2017	2201			DELAY		Cascading delay	53	7837	CASCADE
3/1/2017	2217		1317	DELAY	28	CP 586 released to come in the yard with CP 143 blocking the lead that 586 needed to use in order to clear the plant. CP 586 stopped with rear end blocking B17 plant.	52	7845	Metra 2217 arrived Tower 1317 1310 departed 1338 28 minutes delay; Metra 2236 arrived B17 1302 departed 134038 minutes delay. CP 586 was apparently released to come in the yard with CP 143 blocking the lead that 586 needed to use in order to clear the plant. CP 586 stopped with rear end blocking B17 plant. Please advise any additional circumstances surrounding these extensive delays, and any measures taken to prevent a recurrence.
3/1/2017	2236		B17	DELAY	38	CP 586 released to come in the yard with CP 143 blocking the lead that 586 needed to use in order to clear the plant. CP 586 stopped with rear end blocking B17 plant.	52	7845	Metra 2217 arrived Tower 1317 1310 departed 1338 28 minutes delay; Metra 2236 arrived B17 1302 departed 134038 minutes delay. CP 586 was apparently released to come in the yard with CP 143 blocking the lead that 586 needed to use in order to clear the plant. CP 586 stopped with rear end blocking B17 plant. Please
4/12/2017	2244	PEAK	B12	ALT TRACK		Freight train CP-241 in Emergency between B12 and Galewood East on Track 3, requiring Metra to use alternate track	59	9799	Freight train CP-241 in Emergency between B12 and Galewood East on Track 3. Will update when on the Move. 2244 will need to run on #2 MT B12 to Gatewood East and will have to load and unload passengers on crosswalks. 241 has Elmwood Park depot blocked so passengers will not be able to get to train. This is interfering with Metra's peak period trains in violation of the operating agreement.
4/14/2017	2252		1317	DELAY	18	Metra train delayed by train failing to clear yard	47	8054	Re lerence MWDW delays on attached report. Metra 2252 Friday April 14 2017 delayed 18 minutes at Tower 1317 behind CP-658 hanging plant. Delay carried over to 2253 who was 12 minutes late turning o112252. Was yard committed to handling 658 when they were release advise any other details available in regards to this delay and causes.
4/14/2017	2253		1317	DELAY	12	Cascading delay	47	8054	CASCADE
4/28/2017	2200		B17	DELAY	15	Freight train stopped several times while pulling into the yard with rear end blocking Metra Main Line at Tower B17	48	8043	Metra 2200 delayed about 15 minutes this morning behind CP-472 who apparently stopped several times while pulling into the yard with rear end blocking Metra Main Line at Tower B17.
4/28/2017	2200		B12	ALT TRACK		Metra train forced to use alternate track at station due to CP-143 on #3 MT with rear end blocking B12.	48	8043	After that, 2200 delayed additionally using #1 MT Tower B12 to Galewood waiting for passengers to walk across from the normal #3 Main platform. This was due to CP-143 on #3 MT with rear end blocking B12. Please advise why these trains were released without a clear route into the yard so as to clear Main Tracks in sufficient time to avoid delay to Metra scheduled operations. Delay to 2200 will carry over to flips 2201 and 2222.
4/28/2017	2201			DELAY		Cascading delay	48	8043	CASCADE
4/28/2017	2222			DELAY		Cascading delay	48	8043	CASCADE
6/26/2017	2158		Rondout	DELAY	4	Metra train held at Rondout @ 4 minutes to follow CP-384-251	45	8178	Metra 2158 last night delayed @ 12 minutes. They were held at Rondout @ 4 minutes to follow CP-384-251, then lost @ another 7 minutes following 384-251 to Tower A20. This also caused delays to 2151 who meets 2158 at Rondout, and 2155 who turns at Chicago from 2158. I interviewed the student that was in the office and was advised that they were intending to stack the route for Metra 2158 and inadvertently stacked the route for 384. They noticed just as the signal came in for 384. They thought that knocking the signal down and waiting for it to run time would take longer and result in a larger delay to Metra 2158 than just running the train. I will address with the dispatcher as well and have already addressed with the student. As part of the education process, student should be advised that in this case, if the mistake was noticed right away, it would have been considerably faster to contact 384 for permission to take the signal down, run time, and then line up 2158. Thanks for the follow up.
6/26/2017	2158		A20	DELAY	7	Metra train then lost @ another 7 minutes following 384-251 to Tower A20	45	8178	
6/26/2017	2151		Rondout	DELAY		Cascading delay	45	8178	CASCADE
6/26/2017	2155		CUS	DELAY		Cascading delay	45	8178	CASCADE

METRA_D036500_00195404

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
7/10/2017	2208	PEAK	B12	ALT TRACK		NS 17V was dispatched from Cicero West to Tower B12 Westward on #3 MT behind #2202 and ahead of #2208	56	7608	During this morning's AM peak period operation, NS 17V was dispatched from Cicero West to Tower B12 Westward on #3 MT behind #2202 and ahead of #2208. #2208 is supposed to operate on #3 MT because it has scheduled stops at Elmwood Park, Mont Clare, Mars and Galewood where there are no passenger loading platforms on #2 MT, and there is opposing traffic scheduled on #1 MT. 17V was unable to clear Tower B12 prior to Metra 2208's arrival, so it became necessary to run #2208 on #2 MT from Tower B12 to Galewood East. This entailed loading and unloading passengers at crosswalks and/or road crossings at the four stations listed. While this is never a good operating practice, loading and unloading passengers in this manner was that much more problematic this morning because all of this was taking place during a heavy rainstorm, and passengers were unable to remain under platform shelters and still board the train. #2208 arrived Chicago at 7:26 AM, 6 minutes late. Moving NS-17V in this manner interfered with Metra's operation of peak period train 2208 in contradiction to terms set forth in the Metra-CP Operating agreement.
7/10/2017	2208	PEAK		DELAY	6	Alternative track use caused delays	56	7608	
7/10/2017	2208	PEAK	B12	ALT TRACK		NS 17-V dispatched to run West on #3 MT forcing Metra trains to use alternate track at stations	56	7608	Reference e-mail sent last Monday, July 10, 2017 (below) relative to Metra peak-period train #2208 scheduled to make local stops at Elmwood Park, Mont Clare, Mars, and Galewood being routed down #2 MT where there are no passenger platforms instead of running on #3 MT as they are supposed to due to NS 17-V operating WWD on #3 MT. This same scenario was repeated this morning, MONDAY JULY 17, 2017 except this morning BOTH #2208 and #2212 who both make those same 4 local stops were run on #2 MT so that NS 17-V could run West on #3 MT. In this case, not only did passengers have to load and unload on crosswalks and road crossings instead of using boarding platforms, but also had to dodge 17-V who on #3 MT would have been between the loading platforms and the Metra train(s).
7/10/2017	2212	PEAK	B12	ALT TRACK		NS 17-V dispatched to run West on #3 MT forcing Metra trains to use alternate track at stations	56	7608	
9/13/2017			B12	DELAY		Dispatcher dispatched NS crew that was not lined up correctly during peak period	40	8483	NS 17v received the lineup at B12 at 53-5lined 2main-3main— 3 lead. It accepted the signal at 5:39:57. If you listen to the attached recordings, the crew appears not to kril their territory. When the B12 Dispatcher asks why theytopped, they stated they wererit lined the correct way. I reviewed the replay and they were indeed properly lin NS2204 had to be rerouted to track 1 @b17 causing' alellay. NS 17V finally cleared B12 @628a. NS crews on 17v are notoriously slow. Today they stopped at B12 even though properly lined for 3-lead resulting in a substantial delay to Metra 2204 who had to meet 2201 at B17 in order to run around 17v. Is there any way to work with NS crews so they don't tie up the railroad so long? Otherwise we should not chance running them during rush hours.
11/3/2017	2256		Spaulding	DELAY	15	Waiting for freight train to clear plant	51	7985	Metra 2256 delayed at Spaulding 15 minutes for G-65 to clear plant. Please advise circumstances for this.lengthy delay.
12/6/2017	2256		Bensenville	DELAY	14	Waiting for freight train coming from Bryn Mawr and pulling Bensenville Yard	38	8498	Metra 2256 Wednesday December 6. 2017 held at 1317 14 minutes for inbound lie ight train coming olicut-oliti•om Bryn Mawr and pulling Bensenville Yard. Please advise circumstances.
12/26/2017	2204	PEAK	Big Timber Road	DELAY	25	Equipment problem compounded by planned crewing at Randall Road just before peak period	41	8355	Compounded by ongoing signal problems at Tower B35 caused by a relay house fire over the past weekend, a CP-473 was allowed to leave Bensenville at 0330 heading West on the Elgin Sub. The train was being operated by a Chicago Terminal crew who was not qualified to run past Randall Road (MP 40.26), the intention being that a crew cabbing from Nahant or Savanna would meet the train at Randall Road and take over. Bear in mind that Metra's first EWD train of the morning rush hour departs Elgin at 0417 which means that an 0330 departure from Bensenville is doable, but iffy, under the best of circumstances. It was a known fact that due to the relay house fire, CP 473 would need to stop at both Spaulding and Tower B35 to get verbal authority past stop signals and would then be proceeding at restricted speed. The temperatures on this date and time were below zero which means that freight operations can typically be problematic and/or slower, and that Metra customers waiting for their trains are standing out in the cold at several locations. The fact that 473 was going to be re-crewed was not communicated, and when 473 stopped with the head end at Randall Road for the re-crew, the rear end of the train was blocking our Big Timber Road depot, as well as the crossovers at the Almora Control Point. The equipment for Metra 2204 (due out of Big Timber 0527) was allowed to follow 473 out of Elgin, but could not get to the depot to pick up passengers. 2206's eqpt went up #2 MT from Elgin depot to Big Timber but passengers at that depot were blocked by 473 could not get to the train. We wound up running 2206's equipment as 2204 25 minutes late, and 2204's equipment as 2206 (34 minutes late). Both trains originated at Elgin Depot. The first train capable of picking up passengers at Big Timber Road was 2210 due out of Big Timber 0612. The late departures wound up creating a domino effect on our operations causing 18 delays and 2 annulments. All of these trains are considered to be "Peak Period trains" which, according to the Metra-CP operating agreement, are not be interfered with.
12/26/2017	2206	PEAK	Big Timber Road	ALT TRACK		Stopped freight train required boarding on alternative tracks	41	8355	
12/26/2017	2206	PEAK	Big Timber Road	DELAY	34	Cascading delay	41	8355	
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017		PEAK	Big Timber Road	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017	2230		B35	DELAY	40	CP-472 was dispatched in a narrow window between scheduled Metra trains and wound up getting a broken drawbar just short of Tower B35	41	8355	Later that morning, CP-472 was dispatched in a narrow window between scheduled Metra trains and wound up getting a broken drawbar just short of Tower B35. Metra 2230 was directly behind 472 when this occurred, had to back up to Almora to use the other main around 472 resulting in a 40 minute delay to 2230 as well as a 17 minute delay to following 2232.
12/26/2017	2232		B35	DELAY	17	Cascading delay	41	8355	CASCADE
12/26/2017	2250		B17	DELAY	12	Freight train allowed to depart directly ahead of Metra 2250	41	8355	In the evening, a CP 650 which came off the C&M Sub at Tower B17, and was destined to the BRC at Cicero West, was allowed to depart directly ahead of Metra 2250 causing a 12 minute delay to 2250 as well as to 2250's "flips" 2251, 2256 and 2257.
12/26/2017	2251		B17	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017	2256		B17	DELAY		Cascading delay	41	8355	CASCADE
12/26/2017	2257		B17	DELAY		Cascading delay	41	8355	CASCADE
12/27/2017	2248		Bensenville	DELAY	15	Waiting for a CP-241 heading into Bensenville yard at Tower B12 to clear the main	41	8355	Metra 2248 delayed 15 minutes at Tower B12 waiting for a CP-241 heading into Bensenville yard at Tower B12 to clear the main so that 2248 could proceed. This resulted in delays to 2248's "flips 2249, 2254, and 2255.
12/27/2017	2249		Bensenville	DELAY		Cascading delay	41	8355	CASCADE
12/27/2017	2254		Bensenville	DELAY		Cascading delay	41	8355	CASCADE
12/27/2017	2255		Bensenville	DELAY		Cascading delay	41	8355	CASCADE
12/28/2017	2244	PEAK	B12	ALT TRACK		Freight train released at peak of rush hour in tight window between Metra trains	41	8355	During the heart of the evening rush hour, a 67X was released at Cicero West to run to Tower B12 on #3 MT and into the yard via 6-lead, directly behind 2242 who cleared Cicero West at 1639. This left less than 20 minutes for 67X to clear B12 before Metra 2244 was due at 1657. 67X did not clear B12 until 1720 necessitating running 2244 down #2 MT where there are no station platforms at 4 stops (Elmwood Park, Mont Clare, Mars, and Galewood). Passenger loading and unloading then needed to take place using a single coach vestibule spotted at crosswalks or road crossings, a time consuming process. 2244 arrived Chicago 12 minutes late resulting in Peak Period train 2243 departing Chicago 7 minutes late. Minor delays were also experienced by Peak Period trains 2231, 2233, NCS 111 and NCS 113 which all had to operate on #1 MT due to 2244 occupying #2 MT, instead of the established operation which has some WWD rush hour trains running on #1 MT and some on #2 MT. While in most cases, CP Dispatchers have been cooperative and work with us to insure that our scheduled operation is protected, the succession of delays experienced this week has not only been a cause for increased customer complaints, but a cause for concern among those of us involved in Metra's Operations. Moving forward, we ask that Dispatchers use extra discretion in moving freight traffic close to scheduled Metra operations, and avoid close moves when possible. It is strongly suggested that prior to releasing trains for Bensenville yard, Dispatchers ascertain from Bensenville Yardmasters the total number of hand throw switches the crew will need to line prior to clearing at B12 or B17, and then pass along this information to the crew onboard the freight train, asking if they will be able to clear in sufficient time to avoid a delay to the next scheduled Metra train. We know that winter weather presents challenges to all of us, and hope that we will be able to work together to protect our respective operations. As always, your assistance is greatly appreciated. If I can be of any help, please let me know.
12/28/2017	2244	PEAK	Galewood	DELAY	12	Freight train released at peak of rush hour in tight window between Metra trains	41	8355	
12/28/2017	2234	PEAK	CUS	DELAY	7	Cascading delay	41	8355	CASCADE
12/28/2017	2231	PEAK		DELAY		Cascading delay	41	8355	CASCADE
12/28/2017	2233	PEAK		DELAY		Cascading delay	41	8355	CASCADE
3/3/2018	2604		Rondout	DELAY	15	Metra train was intentionally held 9 minutes to follow CP train whose crew was short on time, then followed the CP train	73	8395	Saturday, March 3rd, Metra 2604 was intentionally held 9 minutes at Rondout to follow a CP-470 whose crew was on short time. 2604 then followed 470 to Tower A20 resulting in a total delay of 15 minutes.
3/10/2018	2250		Spaulding	DELAY	20	Following CP freight form Spaulding to Tower 1317	73	8395	Metra 2250 delayed 20 minutes following CP Freight from Spaulding to Tower 1317. This also caused delays to 2251 and 2256. Please ad circumstances as to why this excessive delay took place.

METRA_D036500_00195406

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
3/10/2018	2251			DELAY		Cascading delay	73	8395	
3/10/2018	2256			DELAY		Cascading delay	73	8395	
3/13/2018	2254		B17	DELAY		CP 280 train left on Metra #2 MT for a re-crew, occupying for over 5 hours, activated automatic warning device at crossings	73	8395	Last night (Tue Mar 13-Wed Mar 14) a CP 280 train departed Tower B17 @ 2100 and was left on Metra #2 MT, presumably for a re-crew. Train did not clear B12 until 0228 this morning, thus occupying #2 MT for over 5 hours. Also, it appears that 280's inbound crew may have pulled down too close to Scott Street, since we wound up with Automatic Warning Device activations at Scott St., Rose St. Calwagner and Ruby Streets. Metra 2254 was delayed copying mandatory directives for the crossings and lost time running around 280 on #1 MT and complying with the crossing restrictions; 2255 was delayed further when Police left lighted fusees at the crossings.
3/13/2018	2255		B17	DELAY		Cascading delay	73	8395	
3/14/2018	2202		Bensenville	DELAY	20	CP-G52 with 7400 feet was dispatched from Bensenville Yard ahead of Metra train	73	8395	This morning, (Wed. Mar 14) a CP-G52 was dispatched from Bensenville Yard on #3 MT ahead of Metra 2202. G52 with 7400 feet had to line switches at both ends of the Galewood receiving yard before being able to clear #3 Main. Metra 2202 wound up sitting behind 2202 for close to 20 minutes waiting for G52 to pull in the clear.
3/24/2018	2256		B12	DELAY	18	Freight interference	83	8223	2256 showing 18 minute delay at Tower BI2 for freight interference. Please advise circumstances. It was a 6300' 17V that came out of 4L to MT2 after 2254 cleared. That route fired offat 2210 and 17V knocked it down at 2214. 17V cool west on MT3 because G47 was on that track. BI2 dispatcher lined up 17V at B12 MT2 to 6L at 2210. I7V knocked down BI2 at 2230 an(clear the interlocking until 2316.
4/25/2018	2251		Galewood East	DELAY	15	traffic holding on line to be used by Metra train	74	8381	Metra 2251 last night delayed 15 minutes at Galewood East waiting for 2252 who was using 41 MT Tower BI2 to Galewood East due to traffic holding on both #2 and #3 MT.
4/25/2018	2251		B17	DELAY		Following slow freight train from 1317 to B12	74	8381	Then 2254 delayed II minutes following EWD freight from 1317 to B12. Please advise why freight tri moved in a way that did not keep routes available Ibr these scheduled Metra trains.
6/8/2018	2227		Bensenville	DELAY		Slow crew going into Bensenville	78	8291	2227 10" due to NS 17V going into Bensenville yard at B12 from #2 MT to 4 —lead. Yardmaster told Elgin Dispatcher that route for 17V was lined, but crew (who dragged their feet all the way from the BRC) still had to stop and get one switch. Had to turn 2225-7412 on #1 MT at Franklin Park and 17V was still not clear when 7412 came back. 7412 and 2227 waited on #1 MT looking at each other until 17V finally cleared and 7412 could cross over.
6/8/2018	2245		B12	DELAY		Dispatcher dispatched freight ahead of Metra train	78	8291	2245 7" CP-287 off BRC to go to B17 and Bryn Mawr to C&M came off #3 MT at Cicero East and ran #3 MT to B12 with 2245 running on #1 MT. Elgin Dispatcher had B12 run 287 right in front of 2245 to B17 instead of crossing 287 over behind 2245.
7/24/2018	2200		Spaulding	ALT TRACK		Metra dispatched on alternative track, forcing passengers to cross track	78	8219	Please refer to passenger complaint received today regarding operation of Metra 2200 on #1 MT between Tower B35 and Roselle West yesterday due to CP G35 working at Spaulding with Control point blocked. Also see our response below the complaint. As we have discussed before, operation of Metra trains on other than their regular tracks can create unique challenges for our customers, as well as a potential for more serious issues should someone arriving at the last minute somehow misjudge the speed of the approaching train and dash across the tracks in their zeal to not miss their train. This is particularly important in the case of Bartlett where the #2 MT platform and the #1 MT platform are a good city block away from each other. We understand that track work, signal problems, and some unforeseen occurrences necessitate operating on the opposite main, but we again request this only be done where it cannot otherwise be avoided. As to G35 switching at Spaulding, if they keep their train on #2 MT West of the Spaulding control point with the East Electric Lock switch lined for #2 MT except when needed for an immediate movement, there should be no problem bringing EWD Metra trains on #1 MT from B35 to Spaulding and then crossing back over to #2 MT before reaching the first passenger station at Bartlett. Please share this with Elgin Dispatchers and B17 Operators. Thanks for your assistance.
8/17/2018	2250		B17	DELAY	17	Dispatcher error squeezing freight trains in front of Metra, compounding signal problem and slow train crews.	70	8443	Metra 2250 delayed 17 minutes at Tower 1317 waiting for inbound freight from C&M Sub to clear plant going in yard. Delays to 2250 carrie flips 2251 and 2256. Please advise why freight was released to come into yard with insufficient time to clear.
8/17/2018	2251			DELAY		Cascading delay	70	8443	
8/17/2018	2256			DELAY		Cascading delay	70	8443	
8/23/2018	2231		B17	DELAY	15	CP 198 12k foot train slow entering Bensenville; dispatched with impossible timing and without yard switches lined up	79	8269	This evening, Metra 2231 was held at Tower B17 approximately 15 minutes for CP 198 at 12,000 feet to enter Bensenville Yard from the Cut-off. The delay to 2231 carried over to 2233, and 2235 who all arrived their destinations 13 minutes late, and 2237 who arrived 8 minutes late. 2231 and 2237 carry an average of 1100 Metra customers each, and 2233 approximately 700. At 12,000 feet, it would have been next to impossible for 198 to clear in the 25 minute window between 2227 and 2231 without causing delay, even if all the yard switches had been lined for 198, which they were not. Moving 198 in this manner not only inconvenienced thousands of our customers, but also represented a gross disregard for the terms ofthe Me CP Operating Agreement which specifically prohibits interference with Meitaak Period trains. Please review the handling ofthis situation this evening and advise what steps will be taken to prevent a recurrence
8/23/2018	2233			DELAY		Cascading delay	79	8269	
8/23/2018	2235			DELAY		Cascading delay	79	8269	
8/23/2018	2237			DELAY		Cascading delay	79	8269	
8/25/2018	2708		Galewood East	DELAY	16	Crew swap on mainline	92	18484	1. crew swap was set up at Galewood involving two CP trains, one of which was on #2 MT and one on #3 MT (I believe one may have been G52). This impacted Metra 2708 who was delayed 16 minutes in the process (see attached GPS report).
8/25/2018	2716		B17	DELAY		CP train parked on mainline #2 for 7 hours	92	18484	1. A CP-470 train (Loco BNSF 4930) went by Tower B17 at 1425 hrs on #2 MT and was parked West of Scott Street. For whatever reason this train remained Parked on Metres #2 MT for almost 7 HOURS. It did not get by BI2 until 2127. The single track situation ultimately affected Metra 2716 who was running out of slot due to an earlier pedestrian strike. And, yes, the pedestrian strike was unforeseen (although it did occur and was cleaned up long before 470 went down #2 Main), but the point is this is precisely why the Metra mains need to be fluid. We should not be forced into a single track operation when unforeseen occurrences take place.

METRA_PUBLIC_0001956.07

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
9/5/2018	2158		Rondout	DELAY		Intentionally held to allow for freight with short crew time to proceed ahead, then forced to follow freight	75	8356	On Wednesday, September 5, 2018, Metra Train #2158 due Rondout 2031 stopped at Rondout per GPS data at 2040 hrs. and was held! 812 empty coal train who had to operate via Tower A5 and then make a main line crew change on the Elgin Sub. My understanding is tht Dispatcher was directed by the Chief Dispatcher to intentionally hold the scheduled Metra train in order to follow 812 due to the crew on 8 on "short time". Doing this resulted in not only the initial delay to 2158 at Rondout, but additional delay as 2158 following 812 enroute on signals. Bear in mind that 812 had to negotiate the UP controlled crossing at Mayfair as well as the 10 MPH move around the wye at Toy directly ahead of2158. To help mitigate the delay, Dispatcher arrange for 2158 to run on #1 MT from Mayfair to Tower A5, however this help as 2158 still had to wait at each station while passengers who were blocked by 812 made it across to the opposite platform. 2158 ar Chicago at 2146, 12 minutes late causing their "flip" 2155 to depart Chicago 12 minutes late and arrive Fox Lake 9 minutes late. Both tra considered to be "reportable" delays. A fact also to be considered is that with 812's remaining time short enough to have prompted a mop% any of the many unforeseen variables that frequently cause freight trains to stop even briefly would have resulted in 812 being stranded o trackage for an extended period of time while a qualified re lie fcrew was located or called and transported.
9/5/2018	2158			ALT TRACK		Dispatcher used alternative mainline to accommodate delay	75	8356	
9/5/2018	2155		CUS	DELAY		Cascading delay	75	8356	
10/18/2018	2207	PEAK	B12	DELAY	22	Dispatcher dispatched train to cross that wasn't ready	68	8479	Delays were due to a CP-Q165 which had apparently been called out to move from IHB Norpaul Yard to Schiller Park yard crossing the Elgin Sub at Tower B12 in the process. CP Elgin Dispatcher instructed Metra Operator Tower B12 to line 0165 across, however 0165 was apparently not actually ready to move when the line-up was put in. Then, when it became apparent that Q-165 was not moving, many attempts were made to contact the crew on 0165 on several radio channels in order to get their authority to drop the signal. Q-165 could not be contacted for an extended period of time.
10/18/2018	2226	PEAK	B12	DELAY	17	Dispatcher dispatched train to cross that wasn't ready	68	8479	
10/18/2018	2230		Big Timber Road	DELAY		Cascading delay	68	8479	
10/29/2018	2251		Galewood East	DELAY	18	Delay caused by reduction of mainlines due to CP train pulling into Bensenville	81	8244	Metra 2251 on Mon Oct 29' was delayed 18 minutesat Galewood East due to being held for inbound 2252 who had to run East on #1 MT due to CP-198 (11,300 feet) pulling into yard at Tower B12 from #2 MT, thus leaving only #1 MT open to run trains. As
10/29/2018	2256		Big Timber Road	DELAY	12	Cascading delay	81	8244	
11/12/2018	2248	MD-W	Spaulding	DELAY	13	Following freight train from Spaulding to B17	90	18289	#2248 delayed 13 minutes following freight from Spaulding to Tower B17
11/12/2018	2256	MD-W	Galewood East	DELAY		Delay caused by 2-287 doubling out of Galewood Yard	90	18289	#2256 at Galewood East for a 2-287 doubling out of Galewood Yard
11/12/2018	2255	MD-W	B17	DELAY		Metra train blocked at B17 for inbound freight pulling in yard from cut-off.	90	18289	2255 blocked at Tower B17 for inbound freight pulling in yard from Cut-Off.
11/20/2018	2255		B17	DELAY	13	Slow freight train clearing yard	66	8558	Metra 2255 last night arrived Big Timber Road 17 minutes late last night. They were held 13 minutes at Tower B17 waiting fora lengthy 198 to clear the plant. 198 was moved between 2256 and 2255, a window that is clearly not big enough for a train ofthat size.
11/20/2018	2255		Spaulding	DELAY	8	Dispatcher held Metra train to cross freight train	66	8558	To make matters worse, B17 then ran a CN freight across Spaulding ahead of them delaying 2255 for an additional 8 minutes.
12/5/2018	2256		B17	DELAY	25	slow entry into yard	67	8515	Metra 2256 Wednesday Dec 5 2018 waited 25 minutes at Tower BI7 while a lengthy (14,000 plus feet) CP-198 was brought into Bensen' from the Cut Oft While we can certainly appreciate the challenges ofrunning trains ofextreme lengths, we ask that if this must be done. i done at the expense of Melfffficheduled operations and our customers. We are hearing that part of the issue in tarring 198 last night was t another yard movement was blocking their route in the yard? Moving forward. when trains ofthis length are run, we ask that trains be sta arrive B17 when there are windows large enough to move them, and that entire route in yardbe pre-lined before train is released at Towei
4/4/2019	2201			DELAY	22	9900 foot freight dispatched from Norpaul to Schiller Park across B12 directly ahead of Metra trains	156	13276	This morning, a 9900 foot Q-165 was dispatched from Norpaul to Schiller Park across Tower B12 directly ahead of Metra 2201 and 2204. 2201 was already stopped at B12 before Q165 even showed up. 2201 delayed 23 minutes and 2204 delayed 14 minutes. 2204 is a Peak Period train. 2201 is not but turns for 2222 atBig Timber who is Peak Period and will be late. Late 2204 will ultimately affect Peak Period train 2220 out of Roselle. 2201 delayed 22 minutes, arrived Big Timber 17 mins late.
4/4/2019	2204	PEAK	B12	DELAY	14	9900 foot freight dispatched from Norpaul to Schiller Park across B12 directly ahead of Metra trains	156	13276	2204 delayed 14 minutes arrived CUS 12 mins late.
4/4/2019	2220	PEAK	B12	DELAY	7	Cascading delay	156	13276	2220 departed Roselle 7 minutes late, will arrive CUS 5 to 6 minutes late.
5/1/2019	2221		Big Timber Road	ALT TRACK		Re-crewing at Randall Road blocked acced to Big Timber Road depo and #1 main because of train length, forcing Metra trains to board/deboard on tracks with no depot	160	16673	Reference delays to Metra Milwaukee District West Line trains on attached sheet: On Wednesday, May 1, 2019, a lengthy CP-473 was dispatched from Bensenville with the intent of re-crewing the train at Randall Road. CP-473 stopped on #1 MT and due to train length completely blocked access to Metra's Big Timber Road depot and #1 main platform. metra 2221¬2244 were sent up #2 MT to make their turn, however there is nothing at Big Timber on the #2 main side of the platform. Passengers were completely cut off from depot, parking lot, etc. passengers off 2221 had no place to go and passengers for 2244 could not get to train. Because of this, 2244 was held 17 minutes waiting for CP-473 to clear. In order to make flip at CUS to 2243, 2244 was expressed from River Grove to Chicago. 7452 was held on #1 MT at B12 to follow 2244 and handle shorts. Peak period train 2231 had to wait st B12 for #1 MT clear. This also affected Metra Peak Period trains 2233, 2235, and 2237

METRA_D036500_00195408

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
5/1/2019	2244		Big Timber Road	ALT TRACK	17	Re-crewing at Randall Road blocked acced to Big Timber Road depo and #1 main because of train length, forcing Metra trains to board/deboard on tracks with no depot	160	16673	
5/1/2019	7452			DELAY		Cascading delay	160	16673	
5/1/2019	2231	PEAK		DELAY		Cascading delay	160	16673	
5/1/2019	2233	PEAK		DELAY		Cascading delay	160	16673	
5/1/2019	2235	PEAK		DELAY		Cascading delay	160	16673	
5/1/2019	2237	PEAK		DELAY		Cascading delay	160	16673	
5/30/2019	2200		Bartlett	ALT TRACK	6	Metra dispatched on wrong track	141	7692	The Delay Report shows #2200 6 down due to passengers on the wrong side Bartlett to Schaumburg, freight train . Announcements were made, not sure why Customers were on the wrong side. I called Track #19 to see if Blake had any insight as to why this train was late yesterday and today and he said he would look into it and call me back.
6/7/2019	2141		Rondout	DELAY	5	Metra train held for Amtrak, although Metra train is scheduled to go first	162	19346	Please see delay to Metra 2141 at Rondout on attached Milwaukee North delay report. 2141 was held approximately 5 minutes for Amtrak 340 to go first. Regarding this please note that: 1. 2141 is scheduled to go through Rondout ahead of 340. 2. 340, as scheduled, catches up to and follows Metra 2152 in route to Chicago. Running 2141 first will not in any way affect 340's arrival into Chicago.
6/11/2019	2250		Spaulding	DELAY	15	Freight train put ahead of Metra train	93	8563	Train #2250, scheduled to arrive Chicago Union Station at 8:29 PM, is operating 15 to 20 minutes behind schedule due to freight train interference. CP G35 was the reason. He had an hour window to get them out and heading east from Spaulding, their longest window but their move took too long. G35 departed there in advance of MW2250's arrival but they caught up to them before getting to Roselle. He was finally able to get MW2250 over 2-1 at Roselle of course by then the damage was done.
7/13/2019	2708		Cicero West	DELAY	15	Freight train set out in front of Metra train with reduced lines due to maintenance work	154	13273	Be advised that the above listed train wi ll take a significant delay at CI' Cicero West for a meet with M W2708. We have MT2 out of service for MOW and a CP 281 on MT3. MW 2707 will probably take a 15+ minute delay. With tracks out of service. it is expected that freight trains will he dispatched judiciously and only where there is an opportunity for them to run without intentionally delaying scheduled Metra trains. I have asked repeatedly to have 281 sent via UP during track work and these requests have been ignored. If you insist on running 281 via A5 during track work. our expectations are that train will only be moved when there is a window that does not impact our operation - not simply on a basis as to when the train happens to be ready to go.
7/19/2019	2117		Fox Lake	DELAY	56	Blocked by CP freight train with broken knuckle	142	7652	2117 Expressed from Deerfield to Round Lake, arrived Fox Lake at 15:08 3:08 56 min late, 58 min A¬20 blocked by CP freight with a broken knuckle and 2 main out of service due to scheduled track (it is summer time) work.
7/19/2019	2136			DELAY		Cascading delay	142	7652	2136 arrived CUS at 14:40 2:40 18 min late, 10 min Grayslake waiting on a late 2115, 10 picking up and delivering CP (knucklehead) Conductor with a replacement Knuckle.
7/19/2019	2138		A20	DELAY	69	CP freight blocking 1 main between A20 and Deerfield	142	7652	2138 arrived CUS at 16:31 4:31 69 min, 1 hour 9 min late, CP freight blocking 1 main between A-20 and Deerfield, had to make a see-saw move to west of Rondout to clear a path for a late 2117, 335 and 2119 and Amtrak (buffoonery) 7.
7/19/2019	2121		Rondout	DELAY	9	Following CP freight train (with knuckle fixed)	142	7652	2121 arrived Fox Lake at 16:26 4:26 13 min late, 8 min following CP (with a new knuckle) freight to Rondout, 9 min waiting on a Late 2140 to clear Rondout.
7/19/2019	2142			DELAY	10	Cascading delay	142	7652	2142 arrived CUS at 17:20 5:20 10 min late, 10 min waiting on 2121.
7/19/2019	2144			DELAY	15	Cascading delay	142	7652	2144 arrived CUS at 18:43 6:43 15 min late, 18 min Deerfield waiting on 2142.
7/19/2019	2131	PEAK	A20	DELAY	12	Following CP freight train	142	7652	2131 arrived Fox Lake at 18:30 6:30 12 min late, following CP (Classic Clownery) 281 from A-20 to Deerfield during rush hour.
7/19/2019	2146		A20	DELAY	7	Waiting on Cp 281 at A20	142	7652	2146 arrived CUS at 18:02 6:02 7 min late, 5 min Libertyville meeting 2125, 6 min approach (281 hanging out at A-20) signals.
7/28/2019	2714		B17	DELAY	20	Yard move closely ahead of Metra scheduled train	125	7818	This afternoon, an on-time Milwaukee West Line train (MW2714) was excessively delayed by a yarding Canadian Pacific train (286-27) at Tower B17 a short while ago. The 6600' freight train was asked to hand line a yard switch and make a 10 minute window to clear the mains at Tower B-17. The B-17 Operator further asked 2714 what their status was and they indicated that they were on-time, and in the vicinity of Itasca. The freight train was lined up, nonetheless. As clarification regarding the 20 minute delay to Metra 2714 at Tower B17, on Sunday July 28, 2019, was moving the yard that closely ahead of2714 a conscious decision tsnp@ft, or were there other extenuating factors?
7/29/2019	2215		Galewood	DELAY	17	Waited for freight train to clear track	95	8446	2215 held at Galewood East 17 mins for EWD freight to clear #2 MT
7/29/2019	2215		Galewood	ALT TRACK		Metra train crossed over to use alternative mainline track, due to other mainline unavailable due to freight pulling out ot Galewood	95	8446	[2215] then crossover and use #2 MT to B12, loading and unloading passengers on crosswalks. #1 MT was 005 for Sayre Ave resurfacing and #3 MT was unavailable due to WWD freight pulling out of Galewood yard on to #3 MT.
7/29/2019	2223		B12	DELAY	20	Held up due to constrained mainline availability because of re-crewing on mainline	95	8446	2223 held 20 minutes at Tower B12 to meet 2242 running East on #1 MT from B17 around a CP 650 re-crewing on #2 MT at Mannheim. Lost time on 2242 on this move also impacted 2231 waiting for #3 MT to clear up. 2231 (a Peak Period Train) was 6 minutes late at Big Timber Road.
7/29/2019	2231			DELAY	6	Cascading delay	95	8446	
7/29/2019	2228		B17	DELAY	13	Waiting for freight train to clear into Bensenville	139	7704	2228 13 minutes at Tower B17 waiting for freight train to clear into Bensenville yard.
7/29/2019	2232		B17	DELAY	8	Waiting for outbound freight coming out of Bensenville	139	7704	2232 8 minutes at Tower B17 waiting for outbound freight coming out of Bensenville yard.

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
7/29/2019	2612		A20	DELAY	49	Dispatching decisions to prioritize CP in context of single tracking due to track work	148	7617	Around 12:35PM, they sent an eastbound train (CP 286-20) on #1 main around the out of service block o. Main #2 between Rondout and Deerfield. Waiting at the other end of the single track to head west, beginnin, at Deerfield towards Tower A20, were three westbound freight trains, CP 581-377, CP 281-21 and CP199-21. Before 199-21 could even clear the Shermer Cut-Offat Tower A20 and onto Main 1, they had MN2607 waiting on them at the signal at Tower A20. Delays compounded and the decision was made to see-saw MN2612 at Rondout while waiting on freight traffic, in an effort to keep MN2607 moving west. Ultimately, this led to the following 4 delays
7/29/2019	2607		A20	DELAY	30	Dispatching decisions to prioritize CP in context of single tracking due to track work	148	7617	
7/29/2019	2611		A20	DELAY	40	Dispatching decisions to prioritize CP in context of single tracking due to track work	148	7617	
7/29/2019	2612		A20	DELAY		Cascading delay	148	7617	
7/29/2019	2616		A20	DELAY	11	Dispatching decisions to prioritize CP in context of single tracking due to track work	148	7617	
7/30/2019	NCS 112		B12	DELAY	10	Metra train to follow CP train to Galewood East	95	8446	Metra NCS 112 held 10 minutes at Tower B12 to follow CP-281 to Galewood East.
7/30/2019	NCS 112		B12	DELAY	10	Held up to follow CP-281 to Galewood East	140	7703	Metra NCS 112 held 10 minutes at Tower B12 to follow CP-281 to Galewood East.
7/30/2019	2217		B17	DELAY	8	Held up waiting for CP-286 to clear going into Bensenville	140	7703	2217 8 minutes at Tower B17 waiting for CP-286 to clear going into Bensenville Yard
7/30/2019	2236		B17	DELAY	8	Held up waiting for CP-286 to clear going into Bensenville	140	7703	2236 initially 8 minutes at Tower B17 waiting for CP-286 to clear.
7/30/2019	2236		B12	DELAY	17	Held at B12 on account of PC-287 taking headroom at Galewood East	140	7703	Than additional 17 minutes at Tower B12 account CP- 287 taking headroom at Galewood East toward #3 MT.
7/30/2019	2236		Galewood East	ALT TRACK		Passengers blocked at station by freight train	140	7703	2236 had to wait for NC-105 to clear B12, then run #2 MT to Galewood loading and unloading passengers on crosswalks. Passengers at Galewood completely blocked by 287.
8/2/2019	2230		B12	DELAY		Metra train running 8 minutes late not given dispatch priority over freight train	131	7782	Metra 2230 was running approximately 8 minutes late due to heavy passenger loading brought about by the Lollapalooza fest in Chicago. 2230 was already lined up at Tower B12 for their normal route from #2 Main Track to #3 Main Track. qAs 2230 was approaching Mannheim, CP-281 had pulled down on 3-lead in preparation for departure and announced to the Elgin Dispatcher that they were ready to go. Elgin Dispatcher then directed the B12 Operator to take the signal away from 2230 and begin running time on the signal. 2230 was then to wait for outbound 2211 to clear B12 and 2230 then
8/2/2019	2230		B12	ALT TRACK		Delayed Metra train forced to use alternative tracks resulting in passengers having to cross tracks	131	7782	Also, bear in mind that passengers waiting for 2230 at Elmwood Park, Mont Clare, and Galewood would be standing on the platform adjacent to #3 Main, and would then either wind up being blocked by 281, or more likely would dash across in front of 281 in order to get to the #1 main platform and not miss their train. The safety implications of this scenario are staggering, not to mention the blatant disregard for Metra's Operation on our own tracks.
8/6/2019	2202		B17	DELAY	17	Freight train yarding blocked by another locomotive	97	8416	Arrived CUS r 06:30."-5reight interference Wood Dale East:21E40p signal 13-17 (686-770) freight train yarding blocked by another locomotive. rear-end was hanging out [CP 686 hanging out on #2 MT at Tower 1317 blocking 2202]; > This was due to a CP-686 that was run from Randall to Bensenville Yard ahead o 1 2202. Upon arrival at Bensenville Yard. 686 was bloc engine on the lead with train hanging out on #2 MT. Delay to 2202 will also affect 2203 as well as Peak Period Train 2226. Delays to 7201 2203 are likely potentially resulting in delays to Peak Period Trains 2220 and 2222.
8/6/2019	2203	PEAK		DELAY	20	Cascading delay	97	8416	> 2203 (-20) Arrived Elgin @ 07:58. 44:11e parted CUS late due to late arrival/turn of 2202. previous deliTIFIS IS A PEAK PERIOD TRAIN.
8/6/2019	2220	PEAK		DELAY	9	Cascading delay	97	8416	> 2220 (-9) Arrived CUS 08:32. Departed Roselle late due to late arrival/turn o f 7201. following tanelyTEL1831S A PEAK PERIOD TRAr
8/6/2019	2224	PEAK		DELAY	7	Cascading delay	97	8416	> 2224 (-7) Arrived CUS @ 08:56.'1Departed Franklin Park late due to following 2220 and 2-2711IS IS A PEAK PERIOD TRAIN.
8/6/2019	2226	PEAK		DELAY	14	Cascading delay	97	8416	> 2226 (-14) Arrived CUS @ 09:14. -'1 Departed Elgin late due to late arrival/turn of2203;S4lop signal- THIS IS A PEAK PERIOD TRAIN.
8/6/2019	2232			DELAY	32	Freight interference - wrong lineup into the yard	97	8416	2232 (-32) Arrived CUS rii) 12:15. -3Stop signal 13-12 freight interference (G57) wrong lineup into the yard. back up move
8/7/2019	2230		B17	DELAY	23	Dispatching an 11k foot train closely ahead of scheduled Metra train, not being able to clear main trais and lack of coordination with other freight dispatcher	97	8416	
8/9/2019	2200		B17	DELAY	27	Metra train held because freight train cleared to enter Bensenville but no actual clear route into the yard	101	8413	Metal 2200 This morning. Friday August 9. 2019 was stopped at Tower B17 approximately 25 minutes due to a CP-386 off the North Line started in to Bensenville Yard @ 0400 hrs but actually had no clear route into the yard because of an earlier locomotive derailment in the was known at the time 386 was released but train was released anyway. The delay to 2200 will carry over to 2201 (Peak Period Train) as 2222 (Also Peak Period Train) who both utilize 2200s crew and equipment. 2200 arrived Chicago 27 minutes late:
8/9/2019	2201	PEAK		DELAY		Cascading delay	101	8413	
8/9/2019	2222	PEAK		DELAY		Cascading delay	101	8413	
9/18/2019	2253		B17	DELAY	20	Metra train held waiting for CP-382 from Bryn Mawr pulling into the yard	113	8156	ast night, Metra 2253 was held @ 20 minutes at Tower B17 waiting fora CP-382 from Bryn Mawr pulling in to the yard. Please advise what prompted this delay to occur. Our yardmaster also left a notation to the effect that there may have been a miscalculation as to 382's actual length that may have been a contributing factor. I would appreciate it if you could look into this situation and let us know if there is any truth to this. Thanks for your assistance.

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
9/23/2019	Multiple		B17	DELAY		Single tracking around CP trains for 3+ hours	96	8434	#1 MT at Tower B17 while 3 inbound trains on both tracks came off the cut off. Metra single tracking went on for 3 hours or more.
9/24/2019	2217		B17	DELAY	13	Metra waited for locomotive swap on mainline	96	8434	Today, 2-287-24 stopped at B17 @ 1100 hrs with a 581 train pulling up shortly behind them. 2-287 sat while a locomotive swap took place. Getting the fresh power back to the train resulted in a 12 to 13 minute delay to Metra 2217 who was running around both freights on #2 MT but had to wait at Tower B17 due to being blocked by the light power going back on 2-287's train.
9/24/2019	2236		B17	DELAY	13	Cascading delay	96	8434	
9/25/2019	2214	PEAK	B17	DELAY	7	Stopped at B17 because of long train dispatched between two Metra trains during peak periods	110	8328	Mawr behind Metra 2212 and 7201 and ahead of Metra 2214. The window between trains was insufficient to accommodate a train of this length and as a result the following delays were incurred by Metra Peak Period Trains: 2214 stopped at Tower B17 7 minutes arrived Chicago 7:59 AM, 2 minutes late.
9/25/2019	2216	PEAK		DELAY	9	Cascading delay	110	8328	2216 stopped behind 2214, then running on restricting signal due to 2214 ahead, passed Tower B17 9 minutes late, arrived Chicago 8 minutes late (reportable).
9/25/2019	2218	PEAK		DELAY	9	Cascading delay	110	8328	2218 following 2216 passed Tower B17 8 minutes late, arrived Chicago 9 minutes late (reportable). This resulted in a 5 minute late departure from Chicago on 2209 who uses Engineer and equipment from 2218.
9/25/2019	2209	PEAK		DELAY	5	Cascading delay	110	8328	
9/25/2019	North Central 108			DELAY	7	Cascading delay	110	8328	North Central 108 followed Metra 2216 from Tower B12, arrived Chicago 7 minutes late (reportable).
9/30/2019	2208	PEAK		DELAY	7	Following CP train	111	8221	2208 delayed 7 minutes following CP G54. 2208 is contractually a Peak Period train.
9/30/2019	2156		Rondout	DELAY	31	Metra train running late but able to make destination with 5 minute delay delayed 31 minutes due to dispatching freight train ahead of it	111	8221	2156 was running 12 minutes late on turn from 2141, but schedule for this trgitecbaserS, time built into schedule which would have allowed for arrival at Chicago within 5 minute tolerance. Instead CP ran a lengthy 198 directly ahead of2 156 out of Rondout to operate via Tower known 10 MPH restriction around wye at A5, 198 caused an additional 20 minutes delay to 2156 resulting in 31 minute late arrival at Chic 2156. This also delayed Amtrak 342 behind 2156.
10/1/2019	2200		B35	DELAY	18	Metra train 16 minutes at Tower B35 to let CP train go through first	111	8221	Metra 2200 held 16 minutes at Tower B35 to let a CP-474 go through first. 2200 arrived Chicago 18 minutes late resulting in late departure 2201. This will also affect peak period train 2222 who turns from 2201.
10/1/2019	2201			DELAY		Cascading delay	111	8221	
10/1/2019	2222			DELAY		Cascading delay	111	8221	
10/4/2019	2154		A20	DELAY	18	Dispatching handoff between CP and UP caused Metra delay	111	8221	I know you gave me some Omaha contacts at one pointliinitalving trouble locating them. The issue we have tonight is that CP had a 286 e 680-315 which they claim were both presented to Desk P-342 who agreed to handle them. Apparently 286 was stopped at Shermer brie0• up, however as 680 was going by A20. 3 minutes from Shermer. P342 lined up for a UP Southbound and a UP Northbound. Since 680 dic between Shermer and A20. Metra 2154 took an 18 minute delay waiting until CP 680 was finally lined up and pulled up to clear A20. Amti wound up stopping behind 2154 until they could move, and Techny Road crossing was blocked for the duration.
10/12/2019	2603		Morton Grove	DELAY	15	Metra train held at Morton Grove to allow 281 to cross over in front	153	10967	Reference Milwaukee North Line Delay sheet on attached delay report. On Sat Oct 12 CP-281 ran #2 MT A6 to Morton Grove with2603 on #1 MT. 2603 was held at Morton Grove to allow281 to cross over in front resulting in 15 minute delay to 2603. Please advise why this was done as opposed to having 281 fol1ow2603. Also please look into delay to 2607 running around freight between Tower A6 and Mayfair
10/18/2019	2208	PEAK	B12	DELAY	12	Light engines requiring axle block held up Metra train	130	7784	FYI, this morning, Light Engines ran from Tower 1317 to Cicero East to access BRC during height of morning rush. Since light engines required an axle block, Metra 2208 had to be held approximately 12 minutes at Tower B12 until Light power ahead on #3 MT cleared the Control Point at Galewood West. 2208 arrived CUS 8 minutes late.
10/23/2019	2215		Bensenville	DELAY		Two main lines used by CP for crew change and setting out cars, resulting in single tracking for Metra train	124	7827	CP G57 (outbound 287-23) has been occupying Metra #2 MT between Tower B12 and Tower B17 since 0915 this morning. My understanding is that arrangements were made to have this train hold #2 MT while setting out cars in Bensenville Yard. Metra Operations have been single tracking around this train on #1 MT going on 3 hours. To make matters worse, we now have a CP-581 stopped on #1 MT at Mannheim changing crews, essentially taking away both of the Metra owned Main Tracks for yard activities. It was agreed some time ago that the Metra Main tracks were to be used for moving trains. Crew changes were acceptable if relief crews were in place and trains were staged so as not to delay Metra's operations. Yard activities, such as picking up and setting out cars and locomotives were to take place in the yard or on the Cut-off between Tower B17 and Bryn Mawr. With both Metra Mains occupied both Metra 2215 who followed 581 to B17, as well as Metra 2234 who was waiting at Tower B17 for 2215, incurred minor delays. Moving forward, we respectfully request that CP resume the use of Metra's two Main tracks between Tower B12 and Tower B17 for moving traffic as was agreed to.
10/23/2019	2234		Bensenville	DELAY		Two main lines used by CP for crew change and setting out cars, resulting in single tracking for Metra train	124	7827	CP G57 (outbound 287-23) has been occupying Metra #2 MT between Tower B12 and Tower B17 since 0915 this morning. My understanding is that arrangements were made to have this train hold #2 MT while setting out cars in Bensenville Yard. Metra Operations have been single tracking around this train on #1 MT going on 3 hours. To make matters worse, we now have a CP-581 stopped on #1 MT at Mannheim changing crews, essentially taking away both of the Metra owned Main Tracks for yard activities. It was agreed some time ago that the Metra Main tracks were to be used for moving trains. Crew changes were acceptable if relief crews were in place and trains were staged so as not to delay Metra's operations. Yard activities, such as picking up and setting out cars and locomotives were to take place in the yard or on the Cut-off between Tower B17 and Bryn Mawr. With both Metra Mains occupied both Metra 2215 who followed 581 to B17, as well as Metra 2234 who was waiting at Tower B17 for 2215, incurred minor delays. Moving forward, we respectfully request that CP resume the use of Metra's two Main tracks between Tower B12 and Tower B17 for moving traffic as was agreed to.

METRA_D036500_00195871

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
11/12/2019	2125		Greyslake Crossing	DELAY		Dispatching coordination issue	120	7846	Last night we experienced delays on both 2125 and 2129 at the Grayslake crossing for cross traffic. Today 2117 also delayed. We have asked CP if they would be agreeable to allowing CN RTCs access to their overview screens which are available on the internet by using Internet Explorer (only) as a browser. CP indicated that they would be willing to do this. Since implementation of CTC on the Fox Lake Sub earlier this year, we now have control points at Liberty (4 miles East of CN Crossing) as well as at Grayslake East and Grayslake West just West of the crossing. If Desk 15 had access to the CP C&M Dispatcher overview they would be able to see the trains on the Fox Lake Sub approaching and should be better able to judge whether cross traffic could clear in time or not.
11/12/2019	2129		Greyslake Crossing	DELAY		Dispatching coordination issue	120	7846	Last night we experienced delays on both 2125 and 2129 at the Grayslake crossing for cross traffic. Today 2117 also delayed. We have asked CP if they would be agreeable to allowing CN RTCs access to their overview screens which are available on the internet by using Internet Explorer (only) as a browser. CP indicated that they would be willing to do this. Since implementation of CTC on the Fox Lake Sub earlier this year, we now have control points at Liberty (4 miles East of CN Crossing) as well as at Grayslake East and Grayslake West just West of the crossing. If Desk 15 had access to the CP C&M Dispatcher overview they would be able to see the trains on the Fox Lake Sub approaching and should be better able to judge whether cross traffic could clear in time or not.
11/12/2019	2200		Roselle West	ALT TRACK		9k CP-472 experience broken knuckle, crew decided to leave on main line, requiring Metra trains to load from opposite platforms in 9 degree weather	147	7634	Metra 2200 and 2202 used #1 MT from Tower B35 to Tower B17 loading passengers on the opposite platform at 8 stations (Bartlett through Bensenville) requiring that passengers stand out in cold (temperature was @ 9 degrees). CP-472 began moving toward Bensenville @ 0530 and Metra 2204 was allowed to run their normal #2 MT to Roselle West, and was then lined up to run #1 MT to Tower B17 in case CP-472 didn't yard right away. This turned out to be the case, and with CP-472 going into the outbound lead, it was not possible to cross 2204 back to #2 MT at Tower B17. That meant that 2204 had to stay on #1 MT to Tower B12 with 2201 holding at Tower B12 for them to clear. This delayed 2201 (peak period train) 17 minutes. 2204 (also peak period train) arrived CUS 6 minutes late.
11/12/2019	2202		Roselle West	ALT TRACK		9k CP-472 experience broken knuckle, crew decided to leave on main line, requiring Metra trains to load from opposite platforms in 9 degree weather	147	7634	
11/12/2019	2201	PEAK	Bensenville	DELAY	17	Fixed CP train allowed to run number #2 MT toward Bensenville holding up Metra trains	147	7634	CP-472 began moving toward Bensenville @ 0530 and Metra 2204 was allowed to run their normal #2 MT to Roselle West, and was then lined up to run #1 MT to Tower B17 in case CP-472 didn't yard right away. This turned out to be the case, and with CP-472 going into the outbound lead, it was not possible to cross 2204 back to #2 MT at Tower B17. That meant that 2204 had to stay on #1 MT to Tower B12 with 2201 holding at Tower B12 for them to clear. This delayed 2201 (peak period train) 17 minutes. 2204 (also peak period train) arrived CUS 6 minutes late.
11/12/2019	2204	PEAK	Bensenville	DELAY	6	Fixed CP train allowed to run number #2 MT toward Bensenville holding up Metra trains	147	7634	CP-472 began moving toward Bensenville @ 0530 and Metra 2204 was allowed to run their normal #2 MT to Roselle West, and was then lined up to run #1 MT to Tower B17 in case CP-472 didn't yard right away. This turned out to be the case, and with CP-472 going into the outbound lead, it was not possible to cross 2204 back to #2 MT at Tower B17. That meant that 2204 had to stay on #1 MT to Tower B12 with 2201 holding at Tower B12 for them to clear. This delayed 2201 (peak period train) 17 minutes. 2204 (also peak period train) arrived CUS 6 minutes late.
11/12/2019	2213		B12	DELAY	25	Two CP trains simultaneously allowed to go to Mannheim for crew change, leaving Metra trains constricted at B12/B17	147	7634	About 1030 hrs, CP-287 on #1 MT and CP-582 on #2 MT were both allowed to simultaneously go to Mannheim for a crew change. Metra 2213 arrived Tower B12 and Metra 2232 arrived Tower B17 with no place to go. CP-582 started to move about that time, so 2232 followed 582 and 2213 crossed over at B12 after 2232 cleared. 2213 was 25 minutes late arriving Big Timber Road. Before CP-287 moved and cleared up #1 MT between B12 and B17, ANOTHER eastbound, CP-380 was brought down to Mannheim for a crew change. The above scene almost repeated itself with 2215 and 2234, however 287 did begin moving toward the C&M just as 2215 got to B12, so 2215 followed 287 and proceeded once 287 cleared B17 going on to the Cut off, and then 2234 crossed over at B17 and proceed East on #1 MT.
11/13/2019	2117		Greyslake Crossing	DELAY		Dispatching coordination issue	120	7846	Last night we experienced delays on both 2125 and 2129 at the Grayslake crossing for cross traffic. Today 2117 also delayed. We have asked CP if they would be agreeable to allowing CN RTCs access to their overview screens which are available on the internet by using Internet Explorer (only) as a browser. CP indicated that they would be willing to do this. Since implementation of CTC on the Fox Lake Sub earlier this year, we now have control points at Liberty (4 miles East of CN Crossing) as well as at Grayslake East and Grayslake West just West of the crossing. If Desk 15 had access to the CP C&M Dispatcher overview they would be able to see the trains on the Fox Lake Sub approaching and should be better able to judge whether cross traffic could clear in time or not.
11/16/2019	2711		B17	DELAY		Metra train held at B17 waiting for CP train to clear going into Bensenville Yard	120	7846	Metra 2711 date delayed 18 minutes at Tower B17 waiting for CP 286-15 to clear going into Bensenville Yard. This will also cause delay 2718 who turns from 2711 at Elgin. There was a window ofapproxinnately I hour 30 minutes behind 2711 . Please advise why this excess was necessary.
11/16/2019	2718			DELAY		Cascading delay	120	7846	
11/23/2019	2710		B17	DELAY	8	CP freight clearing in yard	152	7870	Saturday Nov 23, 2019 Metra 2710 delayed 8 minutes at TowerB17 for CP freight clearing in yard
11/24/2019	2714		B17	DELAY	12	CP freight clearing in yard	152	7870	Sunday Nov 24. 2019 Metra 2714 delayed12 minutes at Tower B17 also for freight yarding. Before releasing trains for yard can we provide advance information to crews regarding switches that will need to be lined, etc.. then receive assurance from crew that they will be able to clear in the allotted time? Your assistance would be greatly appreciated.
11/25/2019	2134		Rondout	DELAY	9	Metra train delayed following freight train from Rondout to Tower A20	115	8145	MON 11-25-19 -- Metre 2134 delayed 9 minutes following freight train from Rondout to Tower A20.
11/26/2019	2228		Roselle West	DELAY	20	Equipment issue on freight train operating closely ahead of 2228 created mainline restriction and backup	115	8145	TUES 11-26-19 — CP 472 was run out of Almora directly ahead of Metre 2228, then had knuckle/drawbar failure just East of Roselle West. Due to operating so closely ahead of 2228, 2209 was already lined West at B17 on #1 MT so 2228 was held 20 minutes at Roselle West to meet #2209 and use #1 MT. Under normal circumstances, preferred move would have been to hold 2209 and run 2228 had there been sufficient warning. 2211 was also held 18 minutes at B17 to meet 2230.
11/26/2019	2211			DELAY	15	Cascading delay	115	8145	2211 was also held 18 minutes at B17 to meet 2230.
11/26/2019	2219		B12	DELAY	15	CP 650 allowed to occupy #2 MT between Tower 617 and B12 to make crew change	115	8145	TUES 11-26-19 -- CP 650 was allowed to occupy #2 MT between Tower 617 and Tower B12 in order to make a crew change at Mannheim during time period where 2219 and 2238 are scheduled to meet between 612 and B17. Crew change could easily have been made at Tower B17 or Galewood, or 650 should have been held to follow 2238. 2219 was delayed 15 minutes.

METRA_D036500_00195472

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
11/27/2019	2132		A20	DELAY	9	Waited for CP-199 to clear Tower A20	115	8145	WED 11-27-19 -- 2132 was 9 minutes late — Waited for CP-199 to clear Tower A20 and waited for CP-281 to clear Tower A6.
11/27/2019	2132		A6	DELAY		Waited for CP-281 to clear Tower A6	115	8145	WED 11-27-19 -- 2132 was 9 minutes late — Waited for CP-199 to clear Tower A20 and waited for CP-281 to clear Tower A6.
11/27/2019	2134		A20	DELAY	6	Following freight from Rondout to Tower A20	115	8145	WED 11-27-19 -- 2134 was 6 minutes late due to following freight from Rondout to Tower A20.
11/27/2019	2242		B12	DELAY	11	Freight occupying #3 MT	115	8145	WED 11-27-19 -- 2242 was 11 minutes late due to freight train at Tower B12 occupying #3 MT
11/27/2019	2242		B12	ALT TRACK		Freight occupying #3 MT	115	8145	2242 had to operate on #2 MT from B12 to Galewood East necessitating loading and unloading passengers through one coach on crosswalks.
11/29/2019	2132		A6	DELAY	18	CP 281 lost air as locomotives entered Tower A6 control point	115	8145	FRI 11-29-19 -- CP 281 lost air as locos were entering Tower A6 control point. This resulted in delays to 2132 (18 minutes) 2115 (39 minutes) and 2215 (10 minutes).
11/29/2019	2115		A6	DELAY	39	CP 281 lost air as locomotives entered Tower A6 control point	115	8145	FRI 11-29-19 -- CP 281 lost air as locos were entering Tower A6 control point. This resulted in delays to 2132 (18 minutes) 2115 (39 minutes) and 2215 (10 minutes).
11/29/2019	2215		A6	DELAY	10	CP 281 lost air as locomotives entered Tower A6 control point	115	8145	FRI 11-29-19 -- CP 281 lost air as locos were entering Tower A6 control point. This resulted in delays to 2132 (18 minutes) 2115 (39 minutes) and 2215 (10 minutes).
12/1/2019	2608		Rondout	DELAY	8	CP 286 dispatched ahead of Metra train on its schedule	115	8145	CP 286 was run out of Rondout directly ahead of 2608 — essentially on 2608's schedule. 2608 arrived Chicago 8 minutes late.
12/2/2019	2226		B17	DELAY	12	CP train brought out of B12 toward #2 MT at tail end of morning rush and lost air	115	8145	CP 2/287 was brought out of B12 toward #2 MT at tail end of morning rush. 2/287 lost air in plant causing 2226 to hold at B17 for 2207. 2226 arrived Chicago 12 minutes late.
12/23/2019	2253		B17	DELAY		Crew change on mainline turned into fuel level check, which delayed their pull towards Byrn Mawr	109	8350	MW2253 Followed a recrewed CP581 on main 1 at BI7. Freight Crew took it upon themselves to check the fuel levels of their road power, which delayed their pull towards Bryn Mawr, when it was not requested or required of the crew by anyone. MW2253 was 2mins late by A5, 7mins late by B-12 (no delays A5-B12) and lost the balance of their time waiting for CP 581 to clear Elgin Sub 1 main to the C&M at B-17.
1/31/2020	2242		B17	DELAY	12	C198 11,800 stopped at B17 and started off CP-2 with no chance of clearing ahead of Metra train	176	7979	An 11,800 foot CP-198 was stopped at B17. Train was started off CP-2 for New Arrival Track @ 1548 with no chance of clearing B17 plant ahead of 2242 due B17 1604 and 2223 due B17 1607. 2242 was held 12 minutes, 2223 8 minutes for 198 to clear into yard.
1/31/2020	2223		B17	DELAY	8	C198 11,800 stopped at B17 and started off CP-2 with no chance of clearing ahead of Metra train	176	7979	An 11,800 foot CP-198 was stopped at B17. Train was started off CP-2 for New Arrival Track @ 1548 with no chance of clearing B17 plant ahead of 2242 due B17 1604 and 2223 due B17 1607. 2242 was held 12 minutes, 2223 8 minutes for 198 to clear into yard.
2/1/2020	2706		Bensenville	DELAY	12	Delayed for CP 286 yarding at Bensenville	176	KKR#1598189	
2/1/2020	2717		B17	DELAY	35	Single tracking around CP681 in emergency	176	KKR#1598189	Metra 2717 was stopped at B17 35 minutes to meet 2720 due to CP681 who was dispatched directly ahead of 2717 having locomotive issues at Medinah
2/2/2020	2213			DELAY	18	Departed CUS 7 min late due to mechanical issues 10" CP 581 & CP2-287 stopped on 1 MT between B12 & B17 waiting for train to clear into yard.	176	KKR#1598189	
6/11/2020	2219		B17	SIGNAL VIOLATION	68	Signal violation by CP Frt Crew	184	KKR#1598189	
6/11/2020	2240		B17	SIGNAL VIOLATION	20	Signal violation by CP Frt Crew	185	KKR#1598189	
6/11/2020	2221		B17	DELAY	20	Following delayed 2219 (see above delay)	185	KKR#1598189	
6/11/2020	2242		B17	DELAY	20	Late turn from delayed 2219 (see above delay)	184	KKR#1598189	
6/15/2020	2121		A20	DELAY	20	Waiting for CP287 to come off the cut off and run ahead.	188	KKR#1598189	
7/31/2020	2248		B17	DELAY	18	CP Freight interference at B17	163	KKR#1598189	
8/3/2020	2248		B17	DELAY	13	Freight train interference	163	KKR#1598189	
8/4/2020	2157		Rondout	DELAY	12	Freight train interference	163	KKR#1598189	
8/4/2020	108	PEAK	B12	DELAY	7	108 7 minutes Tower B12 for Q165 going into Schiller Park (108 is Peak Period train)	163	8357	108 7 minutes Tower B12 for Q165 going into Schiller Park (108 is Peak Period train)
8/4/2020	2217		B12	DELAY	18	2217 held for 18 minutes for CP286 going in yard	163		

METRA_D036500_00195673

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
8/4/2020	2216	PEAK	B12	DELAY	7	2216 7 minutes Tower B12 for Q165 going into Schiller Park (2216 is Peak Period Train) (See above delay)	163	8357	2216 7 minutes Tower B12 for Q165 going into Schiller Park (2216 is Peak Period Train)
8/4/2020	2236		B17	DELAY	23	Held at B17 for 2217 acct single tracking around freight (See above delay)	163	KKR#15 98189	
8/15/2020	2721		B12	DELAY	8	Held at B12 for 2722 acct single tracking around freight	165	KKR#15 98189	
8/15/2020	2714		B17	DELAY	30	Freight train interference	165	KKR#15 98189	
8/17/2020	2202	AM	B17	DELAY	8	Freight train interference	165	KKR#15 98189	
8/24/2020	2244	PM	B17	DELAY	17	CP freight yarding at Bensenville	173	KKR#15 98189	
8/24/2020	2227	PM	B17	DELAY	22	CP freight yarding at Bensenville	173	KKR#15 98189	
8/31/2020	2213		B17	DELAY	20	CP-65K changing power on #1 MT at Tower B17	191		
9/3/2020	2128		Fox Lake	DELAY		Dispatch/PTC	198		
9/9/2020	2121		A20	DELAY	15	Dispatching decision	183		
9/18/2020	2216	AM		DELAY	15	Freight train interference	186	KKR#15 98189	
10/1/2020	2230		B17	DELAY	10	8 min CP frt at B17; 6 min CP frt at B12	169	KKR#15 98189	
10/1/2020	2236		B17	DELAY	30	CP freight train interference	169	KKR#15 98189	
10/29/2020	2242		B17	DELAY	20	CP freight train interference	163	KKR#15 98189	
10/29/2020	2223		B17	DELAY	17	A 9500 foot 286 was released to come into the yard directly ahead of Metra train	163	8359	I understand that we just had this conversation yesterday, and procedures take time to be placed in operation. I do need to mention, however, that just now, a 9500 foot 286 was released to come into the yard directly ahead of Metra #2223 (due B17 1606) and Metra 2242 (due B17 1605). Both trains wound up being delayed 17 minutes. I sincerely hope that you will be able to move forward toward putting the procedures we discussed into operation. If I can assist in any way, please let me know. Thanks again for your help.
11/5/2020	2223		B17	DELAY	17	CP Freight train interference	181		
11/5/2020	2242	PM	B17	DELAY	20	CP Freight train interference	181	KKR#15 98189	
12/15/2020	2232		B17	DELAY	6	Held at B17 for 2213 single tracking around G57-287 on Trk 2	168	KKR#15 98189	
12/15/2020	2236		B17	DELAY	35	IM-1 taking headroom on 2 west of B17 to shove into yard	168	KKR#15 98189	
12/21/2020	2216	AM	Elgin	DELAY	19	Departed late due to CP-686 interference	167	KKR#15 98189	
12/21/2020	2222	AM	Elgin	DELAY	13	Late departure held for late 2216 (see above delay)	177	KKR#15 98189	
12/24/2020	2206	AM	B12	DELAY	15	Q165 (8300 ft)	177	KKR#15 98189	
12/24/2020	2208	AM	B12	DELAY	10	Following delayed 2206 (see above delay)	177	KKR#15 98189	
12/26/2020	2702		B1	DELAY	13	Dispatcher decision	177	KKR#15 98189	
12/26/2020	2707		Galewood East	DELAY	10	No. 2707 delayed 10 minutes at Galewood East account freight CP281 (CP6231, 115 cars, 8,627ft)	178		No. 2707 delayed 10 minutes at Galewood East account freight CP281 (CP6231, 115 cars, 8,627ft)
12/30/2020	2240		B17	DELAY	15	CP-472 slow and then blocked B17	197		
1/8/2021	2216	AM	Elgin	DELAY	16	Held for CP 472-07	229	KKR#15 98189	
1/8/2021	2222	AM	Elgin	DELAY	13	Late out of yard due to late departing 2216 (see above)	229	KKR#15 98189	
1/14/2021	2225	PM	B17	DELAY	14	CP 470 had to line 3 switches in the yard	216	KKR#15 98189	
1/28/2021	2237	PM	B17	DELAY	82	CP286 (11,000 ft) and CP473 (12,000 ft)	204	KKR#15 98189	
1/28/2021	2246	PM	B17	DELAY	35	CP286 (11,000 ft) and CP473 (12,000 ft)	204	KKR#15 98189	

METRA_D036500_00195674

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
2/17/2021	2216	AM	B17	DELAY	14	Freight train clearing	211	KKR#1598189	
2/3/2021	2227	PM	B12	DELAY	14	Held for 2244 acct single tracking around Frt on trk 2	241	KKR#1598189	
2/11/2021	2216		B12	DELAY	16	Blocked at Tower B12 by CP Q165 running from Norpaul to Schiller Park	228		
2/12/2021	2222		B17	DELAY	9	Blocked at Tower B17 by CP 198 pulling in yard	228		
2/17/2021	2216	PEAK	B17	DELAY	16	Stopped at B17 for CP-288	211		Stopped at B17 for CP-288
3/9/2021	2232		B17			Crew change on mainline	222		
3/15/2021	2225		B17	DELAY	9	CP Freight Train Interference	214	KKR#1598189	Metra Peak Period Train 2225 held at Tower B17 12 minutes for 11,000 foot CP 286 to clear in yard.
4/12/2021	2244	PM	Galewood	DELAY	20	Following CP Freight Train	227	KKR#1598189	
4/12/2021	2252		Galewood	DELAY	16	CP Freight Train Interference	227	KKR#1598189	
4/16/2021	2244	PM	B17	DELAY	11	CP Freight Train Interference	244	KKR#1598189	
4/16/2021	2227	PM	B17	DELAY	13	CP Freight Train Interference	244	KKR#1598189	
4/19/2021	2128		B17	DELAY		Single tracking created conflied between 2128 and 2109	213		Yesterday, MONDAY APRIL 19, 2021 we had first a CP 686 and then a CP 380 making extended (not one crew off one crew on) crew changes at Mannheim using #2 MT between Tower B17 and Franklin Park West. #2 MT was occupied from @ 0845 until 1215. This created a conflict between Metra trains 2128-2109 as well as between Metra trains 2113-2132 who are scheduled to meet in this location.
4/19/2021	2132		B17	DELAY		Single tracking created conflied between 2132-2113	213		
4/20/2021	2132		B17	DELAY		Single tracking created conflied between 2132-2113	213		Today, TUESDAY APRIL 20, 2021 we had first a CP-287 and then a CP 67X both occupying #1 MT. 67X not only blocked #1 MT, but also blocked Franklin Park depot as well as all of the road crossings in Franklin Park for over 30 minutes. Again, conflicts were created between scheduled Metra trains 2132-2113 as well as between 2136-2117.
5/5/2021	2225	PM	Almora	DELAY	26	CP Freight blocking route at Almora	220	KKR#1598189	
5/5/2021	2227	PM	Almora	DELAY	6	CP Freight blocking route at Almora	220	KKR#1598189	
7/2/2021	2236		B17	DELAY		Stopped freight train on maintline forcing single tracking	208		
7/19/2021	2202		B17	DELAY	13	Freight train interference	207	KKR#1598189	
8/1/2021	2627		Rondout	DELAY	17	Delayed at Rondout for CP Freight	210	KKR#1598189	
8/2/2021	2124	PEAK	A20	DELAY	16	Metra train held for freight CP-341 from UP	210		
8/3/2021	2203	AM	A5	DELAY	6	CP Freight Train Interference	205	KKR#1598189	
8/3/2021	2212	AM	Rondout	DELAY	6	Following delayed 2210	205	KKR#1598189	
8/3/2021	2213	PEAK	B17	DELAY	10	CP-286 slow going into yard	210		
8/3/2021	2232	PEAK	B17	DELAY	10	CP-286 slow going into yard	210		
8/6/2021	2222	AM	B17	DELAY	12	CP199 (11500ft)	237	KKR#1598189	
8/9/2021	2213		B17	DELAY	15	Train not ready when brought down main by dispatcher	219		
8/10/2021	2213		B17	DELAY		Train not ready when brought down main by dispatcher	219		
8/20/2021	2213		B17	DELAY	12	Dispatcher put freight on line ahead of Metra trains	221		
8/20/2021	2232		B12	DELAY	14	Dispatcher put freight on line ahead of Metra trains	221		
8/25/2021	2222		B17	DELAY	10	Metra train waited for CP-199 to pull out of yard	224		
9/8/2021	2222	PEAK	B17	DELAY	7	Dispatcher squeezed freight train in	215		Metra #2222 7 minutes. 2222 is a PEAK PERIOD TRAIN which is supposed to run as a non-stop express from Roselle to Western Avenue. On paper, there is a 19 minute gap between #2216 and #2222 and Dispatchers/Yardmasters are constantly trying to squeeze trains out of Bensenville Yard in this narrow window. Doing this inevitably results in a delay to #2222 whose operation as a Peak Period Train should not be interfered with. If instead of trying to squeeze trains in this narrow window, waiting until #2226 clears B17 at 0809 results in a window of almost an hour. Pushing the trains out earlier not only delays 2222, but generally winds up with the freight train waiting for a window at Deval on the UP anyway.

METRA_D036500_00195875

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
9/8/2021	2213	PEAK	B17	DELAY	15	Dispatcher squeezed freight train in	215		
9/13/2021	2209		B17	DELAY	12	CP Freight Train stopped on mainline	209		
9/13/2021	2240		B17	DELAY	12	CP Freight Train stopped on mainline	209	KKR#15 98189	
9/13/2021	2213		B17	DELAY	9	CP Freight Train stopped on mainline	209	KKR#15 98189	
9/23/2021	2128		Deerfield	DELAY	9	Held up by prioritized freight train	233		
9/23/2021	2128		Deerfield	ALT TRACK	9	Required to switch tracks, passenger had to cross tracks to board	233		Passengers at Deerfield, Lake Cook Road, Northbrook, North Glenview, Glenview, Golf, and Morton Grove all had to cross tracks to board. The ones at the first 3 stations also had to dodge the freight train in order to get over there.
9/23/2021	2232		B17	DELAY	7	Crew change called with far less time than the window allowed between Metra trains	233		Metra #2213 delayed 15 minutes at Franklin Park West meeting #2232 account CP G57/287 holding #1 MT at Tower B17 to set out cars. We have been told repeatedly that when G57/287 needs to pick up or set out locomotives or cars, the work would be done in Bensenville yard instead of tying up one of the two Main Tracks. Why was this not done today?
9/25/2021	2717		B17	DELAY	11	CP198-21 yarding at Bensenville	231	KKR#15 98189	
9/25/2021	2720		B17	DELAY	12	Following CP686-757 Elgin to 12	231	KKR#15 98189	
9/26/2021	2714		B17	DELAY	16	CP Frt yarding at B17	231	KKR#15 98189	
9/30/2021	2236		B17	DELAY	14	CP286 (12,245 ft)	225	KKR#15 98189	
9/30/2021	2217		B17	DELAY	12	CP286 (12,245 ft)	225	KKR#15 98189	
10/1/2021	2202	AM	B12	ALT TRACK	3	2202 routed trk 1 instead of trk 3 acct NS17V 8500ft on trk 3	238	KKR#15 98189	
10/1/2021	2204	AM	B12	DELAY	25	CP Q165 off IHB for Schiller Park	238	KKR#15 98189	
10/1/2021	2206	AM	B12	DELAY	10	Following delayed NCS100 (see below delay)	238	KKR#15 98189	
10/1/2021	2208	AM	B12	ALT TRACK	3	2208 routed trk 2 instead of trk 3 acct CP141 9893 ft on trk 3	238	KKR#15 98189	
10/1/2021	2230		B17	DELAY	10	CP199 (11,000 ft)	239	KKR#15 98189	
10/1/2021	2232		B12	ALT TRACK	5	2232 routed trk 1 instead of trk 3 acct CP281 13,995 ft on trk3	239	KKR#15 98189	
10/1/2021	100	AM	B12	DELAY	10	Followed delayed MW2204 acct CP Q165 on track 2	239	KKR#15 98189	
10/5/2021	2232		B12	ALT TRACK		2232 routed trk 1 instead of trk 3 acct CP281 13,000 ft on trk 3	205	KKR#15 98189	
10/12/2021	2217		B17	DELAY	7	Delayed running on restricting signals due to CP 287 ahead and waiting for 287s rear end to clear Tower B17	245		
10/12/2021	2236		B17	DELAY	13	Waiting for 2217, then crossing over to run around 650-772	245		
10/13/2021	2228		B17	DELAY	17	Held behind CP 472 for crew change	243		
10/13/2021	2213		Franklin Park West	DELAY	15	Held due to CP 287 being held on Metra #1 MT, making space for additional inbound CP trains	245		
10/31/2021	2724		Galewood East	DELAY	15	Mw2724 stopped 15 m because (288 Cp8915 6805) on 2MT going to Belt 2 and behind him on 3MT going to Belt 2 was the (140 CP8576 12,277) which was blocking Galewood East preventing the MW2724 to crossover to 2MT.	284	KKR#16 30670	Mw2724 stopped 15 m because (288 Cp8915 6805) on 2MT going to Belt 2 and behind him on 3MT going to Belt 2 was the (140 CP8576 12,277) which was blocking Galewood East preventing the MW2724 to crossover to 2MT.
11/2/2021	NCS 108	PEAK	B12 DELAY	DELAY	18	CP dispatched 10k foot train from IHB Norpaul to Schiller Park during peak period	248		

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
11/2/2021	NCS 101	PEAK	B12	DELAY	17	CP dispatched 10k foot train from IHB Norpaul to Schiller Park during peak period	248		
11/2/2021	2216		B12	DELAY	5	CP dispatched 10k foot train from IHB Norpaul to Schiller Park during peak period	248		
11/2/2021	2117		Deerfield	DELAY	30	Freight CP-287 dispatched ahead of Metra trains without sufficient window	249		
11/2/2021	2136		Deerfield	DELAY	32	Freight CP-287 dispatched ahead of Metra trains without sufficient window	249		
11/5/2021	2225		B17	DELAY	9	Stopped at Tower B17 for 9 minutes waiting for CP-470 to clear into yard	251		
11/10/2021	2226		River Grove	ALT TRACK		MW2226 had to re-route 1MT River Grove to Galewood due to (17V NS7539 59 X 119 11590) on 3MT.	283	KKR#16 30669	MW2226 had to re-route 1MT River Grove to Galewood due to (17V NS7539 59 X 119 11590) on 3MT.
11/12/2021	2213		Franklin Park West	DELAY	16	MW2213 was held 16m at Franklin Park West for MW2232 due to (K446 CSXT3240 2 X 96 5985') on 2MT.	280	KKR#16 30666	MW2213 was held 16m at Franklin Park West for MW2232 due to (K446 CSXT3240 2 X 96 5985') on 2MT.
11/12/2021	2210		B12	DELAY	8	MW2210 delayed at B17 due to cross traffic (470 CP8912) 8m late by B12.	281	KKR#16 30667	MW2210 delayed at B17 due to cross traffic (470 CP8912) 8m late by B12.
11/14/2021	2720		B17	DELAY	28	2720 was delayed 28 min at b17 freight interference. Train causing delay 198-10 CP 897. Over 10,000 feet. B-17 was told by a "senior director" to run it no matter what	291		2720 was delayed 28 min at b17 freight interference. Train causing delay 198-10 CP 897. Over 10,000 feet. B-17 was told by a "senior director" to run it no matter what
11/15/2021	2230		Galewood	ALT TRACK		MW2230 had to re-route down 1MT at B12 to Galewood due to (281 CP8957 49 X 145 12708') on 3MT.	278	KKR#16 30664	MW2230 had to re-route down 1MT at B12 to Galewood due to (281 CP8957 49 X 145 12708') on 3MT.
11/15/2021	2206			ALT TRACK		MW2206 and MW2208 had to re-route down 2MT due to (651 CP8022 35 X 147 11248) on 3MT.	279	KKR#16 30665	MW2206 and MW2208 had to re-route down 2MT due to (651 CP8022 35 X 147 11248) on 3MT.
11/15/2021	2208			ALT TRACK		MW2206 and MW2208 had to re-route down 2MT due to (651 CP8022 35 X 147 11248) on 3MT.	279	KKR#16 30665	MW2206 and MW2208 had to re-route down 2MT due to (651 CP8022 35 X 147 11248) on 3MT.
11/16/2021	2217		B12	ALT TRACK		MW2217 will run 3MT Cicero West to B12 due to (287 CP8931 85 X 86 10160) recrewing on 1MT.	277	KKR#16 30663	MW2217 will run 3MT Cicero West to B12 due to (287 CP8931 85 X 86 10160) recrewing on 1MT.
11/22/2021	2222	PEAK	B17	DELAY	13	CP 680 moving off cut off from Bryn Mawr toward yard	295		
12/2/2021	2202			ALT TRACK		MW2202 and MW2204 had to reroute down 1MT due to (288 NS1171 90X12 6103) was on 2MT. Also (141 CP8794 78X46 8320) was 3MT.	276	KKR#16 30662	MW2202 and MW2204 had to reroute down 1MT due to (288 NS1171 90X12 6103) was on 2MT. Also (141 CP8794 78X46 8320) was 3MT.
12/2/2021	2204			ALT TRACK		MW2202 and MW2204 had to reroute down 1MT due to (288 NS1171 90X12 6103) was on 2MT. Also (141 CP8794 78X46 8320) was 3MT.	276	KKR#16 30662	MW2202 and MW2204 had to reroute down 1MT due to (288 NS1171 90X12 6103) was on 2MT. Also (141 CP8794 78X46 8320) was 3MT.
12/3/2021	2226		B12	ALT TRACK		MW2226 had to re-route 2MT to 1MT at B12 due to (17V NS7675 23 X 105 8458) on 3MT.	275	KKR#16 30661	MW2226 had to re-route 2MT to 1MT at B12 due to (17V NS7675 23 X 105 8458) on 3MT.
12/6/2021	2232		B12	DELAY	6	MW2232 was 7m late by B12 due to (281 KCS5010 79 X 61 11,054') departing 5L to 2MT.	274	KKR#16 30660	MW2232 was 7m late by B12 due to (281 KCS5010 79 X 61 11,054') departing 5L to 2MT.

METRA_D036500_00195617

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
12/7/2021	2228		B12	ALT TRACK		MW2228 had to re-route 2MT to 1MT at B12 due to (17V NS9972 29 X 131 10,300') on 3MT.	272	KKR#16 30658	MW2228 had to re-route 2MT to 1MT at B12 due to (17V NS9972 29 X 131 10,300') on 3MT.
12/7/2021	2204		B12	DELAY	11	MW2204 was 11 minutes late by B12 due to 472 going into the yard at B17.	273	KKR#16 30659	MW2204 was 11 minutes late by B12 due to 472 going into the yard at B17.
12/9/2021	2110	AM	Morton Grove	DELAY	24	Dispatcher exacerbated delays by refusing to upgrade signal fault	252	KKR#16 24262	Please be advised that this morning's inbound commuter Peak Period was severely disrupted due to a track circuit that went out on #2 Main Track in the Morton Grove to Mayfair block that appeared behind #2110. In addition to causing red signals between Morton Grove and Forest Glen, the circuit caused crossing gates to stay down at Devon Avenue and Caldwell Avenue. Because call to report gates down came from a private citizen, Dispatcher issued an Item '1'. With crews having to go out and flag 2 busy crossings, the delays were extensive:.... Particularly troublesome was that after the signal maintainer arrived on the scene and confirmed that the problem was in fact gates stuck down (false activation) and not some other random problem, he attempted to get the Item '1' upgraded to an Item '2'. Doing this would have eliminated a need for a crew member to walk ahead and flag 2 crossings, probably saving 10 to 15 minutes per train. The train Dispatcher refused to upgrade to an Item '1' claiming that, "the system would not allow it".
12/9/2021	2116	AM	Morton Grove	DELAY	14	Dispatcher exacerbated delays by refusing to upgrade signal fault	252	KKR#16 24262	(see above)
12/9/2021	2118	AM	Morton Grove	DELAY	12	Dispatcher exacerbated delays by refusing to upgrade signal fault	252	KKR#16 24262	(see above)
12/9/2021	2120	AM	Morton Grove	DELAY	11	Dispatcher exacerbated delays by refusing to upgrade signal fault	252	KKR#16 24262	(see above)
12/9/2021	2124	AM	Morton Grove	DELAY	10	Dispatcher exacerbated delays by refusing to upgrade signal fault	252	KKR#16 24262	(see above)
12/9/2021	2126	AM	Morton Grove	DELAY	12	Dispatcher exacerbated delays by refusing to upgrade signal fault	252	KKR#16 24262	(see above)
12/9/2021	2118	AM	Morton Grove	HOTLINE		Hotline disabled, unable to reach dispatcher	252	KKR#16 24261	In the midst of the signal problems this morning, I attempted to contact C&M in order to get Metra 2118 and 2124 crossed over to #1 MT at Morton Grove East after #2105 cleared in order to take advantage of the clear signals on #1 MT. I let the Hot line ring for at least 20 minutes while I was also on hold on the other line in the queue, and the Hot Line was never answered.
12/9/2021	2124	AM	Morton Grove	HOTLINE		Hotline disabled, unable to reach dispatcher	253	KKR#16 24261	In the midst of the signal problems this morning, I attempted to contact C&M in order to get Metra 2118 and 2124 crossed over to #1 MT at Morton Grove East after #2105 cleared in order to take advantage of the clear signals on #1 MT. I let the Hot line ring for at least 20 minutes while I was also on hold on the other line in the queue, and the Hot Line was never answered.
12/10/2021	2221		B17	DELAY	20	Dispatcher overruled Bensenville superintendent to line up 12k foot 286 freight train, causing delays	256	KKR#16 24192	
12/10/2021	2240		B17	DELAY	20	Dispatcher overruled Bensenville superintendent to line up 12k foot 286 freight train, causing delays	256	KKR#16 24192	
12/12/2021	2704		Galewood	DELAY	5	MW2704 was stopped 5m @ Galewood waiting on freight 17V-11 to clear. The 17V-11 was 28x128, 7594 tons, and a length of 9633 ft.	286	KKR#16 30671	As info, MW2704 was stopped 5m @ Galewood waiting on freight 17V-11 to clear. The 17V-11 was 28x128, 7594 tons, and a length of 9633 ft. It was coming out of 4L @ Galewood for tk 2 heading towards B12.
12/13/2021	2202		B12	ALT TRACK		MW2202 had to re-route 1MT at B12 to Cicero West due to (17V NS9542 18 X 73 5910) on 3MT.	271	KKR#16 30656	MW2202 had to re-route 1MT at B12 to Cicero West due to (17V NS9542 18 X 73 5910) on 3MT.
12/16/2021	2230		B12	ALT TRACK		MW2230 had to re-route 1MT at B12 to Galewood due to (17V NS9690 39X123 10239) on 3MT.	270	KKR#16 30642	MW2230 had to re-route 1MT at B12 to Galewood due to (17V NS9690 39X123 10239) on 3MT.
12/17/2021	2249		B12	DELAY	17	Dispatcher dispatched freight train after asking crew if it could clear in 20 minutes, crew said yes	287	KKR#16 30673	MW2249 delayed 17m at B12 for Freight headend move from CN3 to Track 2 east. CP Dispatcher asked if they can clear in 20m which crew on Freight IM-2, CP 8648 stated Yes. Freight took signal at 746pm and Cleared at 825pm. MW2249 by B12 at 827pm. 17m Late.
12/17/2021	2232		B12	ALT TRACK		MW2232 had to re-route 1MT B12 to B6 due to (281 BN7947 55X163 13973') on 3MT.	269	KKR#16 30641	MW2232 had to re-route 1MT B12 to B6 due to (281 BN7947 55X163 13973') on 3MT.
12/20/2021	2213		Franklin Pk	DELAY	17	Metra train held due to CP G57-287 holding at B17 for slow crew change	318	KKR#16 26477	Metra 2213 MON DEC 20, 2021 held at Franklin Park West 17 minutes to meet inbound Metra 2232 due to CP G57-287 holding #1 MT at Tower B17 for crew change. For the record, G57-287 was brought up to B17 @ 20 minutes ahead of 2213, but outbound crew is not called until 1140! There is no discernable reason that G57-287 could not have been held to follow 2213 out of Galewood to avoid the extensive delay to the scheduled Metra train.

METRA_D036500_00195478

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
12/20/2021	2226		Galewood East	ALT TRACK		MW2226 had to re-route 1MT at Galewood East to B6 due to MW2202 stopped om 3MT.	320	KKR#16 30639	MW2226 had to re-route 1MT at Galewood East to B6 due to MW2202 stopped om 3MT.
12/20/2021	2212		Galewood East	ALT TRACK		MW2212 had to re-route 1MT at Galewood East to B6.	268	KKR#16 30640	MW2212 had to re-route 1MT at Galewood East to B6.
12/21/2021	2226		B12	ALT TRACK		Metra train forced on other than normal track due to freight on Metra's main track	267	KKR#16 30637	MW2226 had to re-route 1MT B12 to Galewood East due to (17V NS1103 7 X 158 10,100') on 3MT.
12/22/2021	2230		B12	DELAY	7	MW2230 7m late by B12 4m stopped at B12 due to (281 BNSF 6674 20 X 77 5834') crossing over 3MT to 2MT at B12.	322	KKR#16 30653	MW2230 7m late by B12 4m stopped at B12 due to (281 BNSF 6674 20 X 77 5834') crossing over 3MT to 2MT at B12.
12/27/2021	2208		B12	ALT TRACK		Metra train forced on other than normal track due to freight on Metra's main track	266	KKR#16 30636	MW2208 had to re-route down 2MT B12 to Galewood East due to (17V NS8057 21 X 99 7601") on 3MT.
12/28/2021	2232		B12	ALT TRACK		Metra train forced on other than normal track due to freight on Metra's main track	265	KKR#16 30635	MW2232 had to re-route 1MT B12 to Galewood East due to (281 CP 8769 56 X 127 12,900') on 3MT.
12/29/2021	2232		B17	DELAY	8	Metra 2232 held 8 minutes at Tower B17 to meet Metra 2213, due to CP 67X on #2 MT at Tower B17 changing crews.	260	KKR#16 30538	Metra 2232 held 8 minutes at Tower B17 to meet Metra 2213, due to CP 67X on #2 MT at Tower B17 changing crews.
12/29/2021	2221		Franklin Pk	DELAY	8	Metra 2221 held 8 minutes at Franklin Park West to meet Metra 2236 due to CP-681 on #1 MT at Tower B17 changing crews.	260	KKR#16 30538	Metra 2221 held 8 minutes at Franklin Park West to meet Metra 2236 due to CP-681 on #1 MT at Tower B17 changing crews.
12/29/2021	NCS101		B12	DELAY	27	CP intentionally pushed CP 165 12,198ft from IHB to Schiller Park across Tower B12 during morning peak	262	KKR#16 30595	On Wednesday, December 29, 2021, CP intentionally pushed a CP I65 train, 12,198 from the IHB into Schiller Park across Tower B12 during the morning Metra Peak Period. The following Metra Peak Period trains were delayed significantly
12/29/2021	NCS108		B12	DELAY	20	CP intentionally pushed CP 165 12,198ft from IHB to Schiller Park across Tower B12 during morning peak	262	KKR#16 30595	On Wednesday, December 29, 2021, CP intentionally pushed a CP I65 train, 12,198 from the IHB into Schiller Park across Tower B12 during the morning Metra Peak Period. The following Metra Peak Period trains were delayed significantly
12/29/2021	2216		B12	DELAY	15	CP intentionally pushed CP 165 12,198ft from IHB to Schiller Park across Tower B12 during morning peak	262	KKR#16 30595	On Wednesday, December 29, 2021, CP intentionally pushed a CP I65 train, 12,198 from the IHB into Schiller Park across Tower B12 during the morning Metra Peak Period. The following Metra Peak Period trains were delayed significantly
12/29/2021	2228		B12	ALT TRACK		Metra train forced on other than normal track due to freight on Metra's main track	264	KKR#16 30634	MW2228 had to re-route 1MT B12 to Galewood East due to (17V NS4532 17 X 109 7956') on 3MT.
12/31/2021	2700		Galewood East	ALT TRACK		MW2700 had to re-route 1MT B12 to Galewood East due to (G52 CP8030 86 X 3 6504') on 3MT.	288	KKR#16 31015	MW2700 had to re-route 1MT B12 to Galewood East due to (G52 CP8030 86 X 3 6504') on 3MT.
12/31/2021	2710		Galewood East	ALT TRACK		MW2710 had to re-route 1MT B12 to Galewood East due to (17V CSXT5472 46 X 87 8686') on 3MT.	288	KKR#16 31015	MW2710 had to re-route 1MT B12 to Galewood East due to (17V CSXT5472 46 X 87 8686') on 3MT.
1/6/2022	2227		B17	DELAY	16	Held for CP286 moving from CP2 to the outbound	291	KKR#16 34124	2227 (Peak Period Train) Delayed 16 mins at B17 for CP286-05 with 11k' of train moving from CP2 to the Outbound. Allegedly this decision to move was made by a Bensenville trainmaster on protest of the CP Elgin Dispatcher.
1/6/2022	2229		B17	DELAY		Cascading delay (see above delay)	291	KKR#16 34124	
1/6/2022	2233		B17	DELAY		Cascading delay (see above delay)	291	KKR#16 34124	
1/6/2022	2244			DELAY		Cascading Delay (see above delay)	291	KKR#16 34124	
1/7/2022	2204	AM	B12	DELAY	12	Held for CP I65 coming from IHB to Schiller park yard	291	KKR#16 34124	2204 and NCS-100 (both peak period trains) were stopped at Tower B12 waiting for CP freight I65 (8643 feet) coming from the IHB to Schiller Park Yard.
1/8/2022	NCS100	AM	B12	DELAY	4	Following delayed 2204 (see above delay)	291	KKR#16 34124	
1/8/2022	2717		B17	DELAY	15	Metra 2717 stopped 15 minutes at Tower B17 waiting for CP-286 to clear plant going into Bensenville Yard	293		

METRA_PUBLIC_0019578

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
1/10/2022	2717		B17	DELAY	15	Held for CP-286 to clear	293	KKR#16 34658	Metra 2717 stopped 15 minutes at Tower B17 waiting for CP-286 to clear plant going into Bensenville Yard.
1/10/2022	2212	AM	B12	DELAY	12	CP G52 Freight Train Interference	293	KKR#16 34574	Metra Peak Period Trains delayed this morning, MON JAN 10, 2022 due to CP G52 (8043) being dispatched out #3 MT ahead of Metra #2212 in the heart of the Metra Peak period. G52 was initially held for release by BRC due to communications misunderstanding and train stopped with the Control Point at Galwood East being blocked.
1/10/2022	NCS108	AM	B12	DELAY	8	Following Delayed 2212 (see above delay)	293	KKR#16 34574	
1/10/2022	2216	AM	B12	DELAY		Following Delayed 2212 (see above delay)	293	KKR#16 34574	
1/10/2022	2217		B17	DELAY	10	CP 287 Crew Change for two hours	293	KKR#16 34658	CP-287 on Metra #1 Main Track at Tower B17 for @ 2 hours plus making crew change and ???? 2217 delayed 10 minutes at Franklin Park West waiting for 2236, then crossed to #2 MT to run around 287.
1/13/2022	2217		B17	ALT TRACK		2217 had to reroute to 2MT due to CP 287 delay (see above delay)	295	KKR#16 34658	
1/13/2022	2210	AM	B17	DELAY	10	Held for CP 686 being pushed off cut-off	323	KKR#16 35911	Metra Peak Period Trains delayed this morning, THU JAN 10, 2022 due to CP 686 being pushed off Cut-off between Bryn Mawr and Tower B17 into Bensenville Yard during the heart of the Metra peak period
1/13/2022	2203	AM	B17	DELAY	7	Cascading delay	323	KKR#16 35911	waiting at Tower B17 for 686 to clear the Control Point
1/13/2022	NCS110	AM	B12	DELAY	4	Cascading delay	323	KKR#16 35911	waiting at Tower B12 to follow the late 2210.
1/13/2022	2232		Galewood East	DELAY	13	Metra 2232 waited at Galewood East. 2232 delayed 13 minutes at Galewood East waiting for 287's light engine to clear #3 MT	304	KKR#16 37372	Metra 2232 waited at Galewood East. 2232 delayed 13 minutes at Galewood East waiting for 287's light engine to clear #3 MT. CP brought 198 with 10,800 feet via Tower A5 and held train on #2 MT between Tower B6 and Galewood East until yard could handle.
1/17/2022	2223	PM	B17	DELAY	11	Metra 2223 held for CP473	306	KKR#16 37373	2223 was actually HELD 5 minutes at Tower B17 to allow CP-473 to pull out of the yard first. 2223 then proceeded to follow 473 all the way to Big Timber Road.
1/18/2022	2117		A20	DELAY		CP 287 was dispatched out of Tower A20 today essentially on 2117's time.	308		The bigger issue is that the practice of running a freight train directly ahead of, and on the schedule of, a scheduled passenger train opens the possibility for passengers waiting for 2117, who typically stay inside the depo buildings (which are on the #2 Main Track Platform) until the last minute, particularly in cold weather, to run across the crosswalk to catch their train. Seeing the headlight approaching, passengers will typically assume that this is their train slowing down to a stop, giving them ample time to get across. Instead it is a freight train traveling at track speed which opens the possibility for a potential tragedy."
1/18/2022	2240		B17	DELAY	10	Delayed by CP583 for crew change.	311	KKR#16 37380	Metra 2240 today, TUES JAN 18, 2022 delayed 10 minutes at Tower B17, held to meet Metra 2221 who was using #2 MT between Franklin Park West and Tower B17 around CP-583 who was holding #1 MT at Tower B17 for crew change.
1/26/2022	2202	AM	B17	DELAY	31	waiting for a 13,799 foot CP-198 to clear	325	KKR#16 40010	2202 stopped at Tower B17 31 minutes waiting for a 13,799 foot CP-198 to clear the Control Point pulling into Bensenville Yard. 2202 arrived CUS 6:43 AM, 30 minutes late.
1/26/2022	2203	AM	Big Timber	DELAY	28	Cascading delay (see above delay)	325	KKR#16 40010	2203 (Peak Period Train) departed CUS 6:49 AM 28 minutes late, late turn off inbound 2202. 2203 arrived Big Timber Road 8:21 AM, 32 minutes late.
1/26/2022	2228	AM	Big Timber	DELAY	14	Cascading delay (see above delay)	325	KKR#16 40010	2228 departed Big Timber Road 8:36 AM, **14 minutes late**, due to late turn off inbound 2203.
1/26/2022	NCS101		B12	DELAY	5	Delayed by CP transfer	325	KKR#16 40010	NC-101 (Peak Period Train) was blocked 5 minutes at Tower B12 waiting for CP IM-1 transfer job to pull out of Schiller Park Yard and clear the Junction 16 Control Point.
1/26/2022	NCS112		B12	DELAY	5	Blocked by CP freight	325	KKR#16 40010	NC-112 was blocked at Tower B12 5 minutes by CP I65-26 pulling into Schiller Park Yard.
1/27/2022	2202		B17	DELAY	12	delayed due to CP Freight activity at Tower B17	326	KKR#16 40364	This morning, THURSDAY JAN 27, 2022 the same trains that received the most significant delay yesterday – 2202 and their flip, 2203 – were again delayed due to CP Freight activity at Tower B17. Today it was following CP-472 from Elgin to Tower B17. CP-472 stopped several times pulling into Bensenville yard to line switches with 2202 waiting behind them. 2202 was 12 minutes late going by B17
1/27/2022	2203		B17	DELAY	7	Cascading delay (see above delay)	326	KKR#16 40364	
1/27/2022	2246	PM	Galewood East	DELAY	13	Delayed by CP freight	328	KKR#16 40631	2246 had to run #1 MT from Tower B12 to Galewood East (instead of normal #3 MT). Had to wait for passengers on wrong side at Elmwood Park, Mont Clare, and Galewood to cross to board train, then waited for #2239 to clear #2 MT at Galewood East in order to cross back.
1/28/2022	2219		B17	DELAY		CP freight stopped blocking passenger boarding and detraining	312	KKR#16 40908	CP 581-12 came off BRC and was brought up to Mannheim for crew change. CP 581-12 cleared Tower B12 at 1345 and stopped with rear of train blocking Franklin Park depot as well as road crossings at Rose Street, Calwagner Street, Ruby Street, and Scott Street, essentially the entire town of Franklin Park. Train is just starting to move at 1453. Franklin Park depot and the 4 road crossings will have been blocked 1 hour 10 minutes by the time the train clears. Metra #2219 ran #2 MT Tower B12 to Tower B17. Passengers waiting for #2219 at Franklin Park were unable to board; Passengers detraining from #2219 at Franklin Park were unable to access the North side of town including the depot. Metra #2240 will be delayed at Tower B17 waiting for #2221 to clear #2 MT operating around 581-312.
1/28/2022	2240		B17	DELAY		Cascading delay (see above delay)	312	KKR#16 40908	
1/28/2022	2221		B17	DELAY		Cascading delay (see above delay)	312	KKR#16 40908	
1/31/2022	2221		B17	DELAY	15	Delayed by CP crew change	313	KKR#16 41489	CP-581 was on #1 MT East of Tower B17 waiting on crew change. 2240 was holding at Tower B17 waiting for 2221 to run around CP-581. 2221 was then blocked at Tower B17 @ 15 minutes waiting for CP 2-288 to pull into yard. When 2-288 finally cleared, 2221 went 2-1, then 2240 left.

METRA_D036500_00195420

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
1/31/2022	2240		B17	DELAY	20	Cascading delay (see above delay)	313	KKR#16 41489	
2/2/2022	2232		B12	ALT TRACK		Ran on #1 MT instead of their normal #3 MT from Tower B12 to Galewood East due to freight train NS-17V running Westward on #3 MT.	314	KKR#16 42205	passengers waiting for #2232 at River Grove, Elmwood Park, Mont Clare, and Galewood had to utilize crosswalks to walk across 3 main tracks to get from the normal inbound platform where they were waiting, to the opposite side to board their train, essentially at the same time that the freight was coming West.
2/2/2022	2132		A20	DELAY	6	CP freight block	314	KKR#16 42205	CP-281 was running West on #2 Main Track all the way to Tower A20 alongside Amtrak 333 who was on #1 MT. For the record, Amtrak 333 is due at Tower A20 Westward at 1132 hrs and Metra 2132 is due at Tower A20 Eastward at 1136 hrs. We're not sure why 281 was brought up to Tower A20 to crossover in the 4 minutes between Amtrak 333 and Metra 2132, but 281 could certainly have crossed over behind 333 at either Morton Grove or Mayfair and avoided the problem. Instead, Metra 2132 wound up waiting 6 minutes for Amtrak 333 to clear A20, then was crossed over to #1 MT to run from Tower A20 to Morton Grove. This meant that passengers at North Glenview, Glenview, Golf, and Morton Grove waiting for #2132 in the inclement weather had to utilize crosswalks to get to the other side.
2/3/2022	2242		B17	DELAY	8	Metra 2242 waited at Tower B17 8 minutes for CP-473 to clear the Control Point, arrived Chicago 4:54 PM, 5 minutes late	316		
2/3/2022	2223		B17	DELAY	7	Metra 2223 waited at Tower B17 7 minutes for CP-473 to clear the Control point, then followed directly behind 473 all the way to Almora.	316		
2/22/2022	2228		B17	DELAY	7	Crew change on mainline required Metra train to use alternative mainline	317	KKR#16 49336	Metra 2228 held 7 minutes at Tower B17 waiting for Metra 2209 to clear #2 MT. Metra 2209 had to run #2 MT from Franklin Park West to Tower B17 due
2/22/2022	2228		B17	ALT TRACK		Crew change on mainline required Metra train to use alternative mainline	317	KKR#16 49336	Metra 2228 held 7 minutes at Tower B17 waiting for Metra 2209 to clear #2 MT. Metra 2209 had to run #2 MT from Franklin Park West to Tower B17 due
2/22/2022	2236		B17	DELAY	30	Metra train held because freight crew time expired	317	KKR#16 49336	to CP 681 stopped on #1 MT changing crews.
2/22/2022	2236		B17	ALT TRACK		Dispatcher dispatched Metra train on the "wrong" side of the trains to get around stopped freight train	317	KKR#16 49336	2236 – CP-650 coming off Chicago Sub at Randall Road had a crew that expired on Hours of Service @ 1300. 650 was pushed ahead of 2236 out of Almora about 7 to 10 minutes ahead of 2236's scheduled departure. 650 was unable to make Tower B17 prior to 1300, so train stopped around Itasca to wait for a recrew. 2236 had been lined in behind 650. Operator B17 had to get 2236 stopped and run time at Roselle West. For some reason Operator B17 also took down 2236's signal at Bartlett East and held them there while time ran at Roselle West. 2236 was eventually released at Bartlett East and ran #1 MT from Roselle West to Tower B17. Passengers were then on the wrong side at Roselle, Medinah, Itasca, Wooddale and Bensenville. Metra 2217 was held at Tower B17 until 2236 cleared #1 MT. This resulted in a 30 minute delay to #2236 and a 22 minute delay to 2217. In this situation, it appears that running 650 behind 2236 with a relief crew meeting them enroute, would have been the better plan.
2/22/2022	2217		B17	DELAY		Cascading delay	317	KKR#16 49336	See above
2/22/2022	2229		B17	DELAY	10	Metra 2219 delayed 10 minutes at Tower B17 waiting for the rear end of CP 286 to clear the Control point going into the Yard	317	KKR#16 49336	Metra 2219 delayed 10 minutes at Tower B17 waiting for the rear end of CP 286 to clear the Control point going into the Yard
2/24/2022	2204	PEAK	B12	DELAY	12	Thursday February 24, 2022, Metra Peak Period Train #2204 was delayed 12 minutes at Tower B12, blocked by CP-I65 moving from IHB into Schiller Park across Metra's 3 Main tracks.	329	KKR#16 50133	Thursday February 24, 2022, Metra Peak Period Train #2204 was delayed 12 minutes at Tower B12, blocked by CP-I65 moving from IHB into Schiller Park across Metra's 3 Main tracks.
2/24/2022	2156		A20	DELAY	19	ALSO, THU FEB 24, 2022: Metra 2156 was held @ 4 minutes at Rondout to follow CP 288. 2156 then lost an additional 15 minutes following 288 all the way to Tower A20 and waiting while 288 went up the cut-off to get on the UP	329	KKR#16 50133	ALSO, THU FEB 24, 2022: Metra 2156 was held @ 4 minutes at Rondout to follow CP 288. 2156 then lost an additional 15 minutes following 288 all the way to Tower A20 and waiting while 288 went up the cut-off to get on the UP
2/28/2022	2225		B17	DELAY	24	Metra train held at B17 for freight train (CP 473) holding outside of Bensenville, then followed CP 473 in route all the way to Big Timber Road	330	KKR#16 50990	On Monday, February 28th , 2022, Metra Peak Period Train 2225 was held at Tower B17 19 minutes (by Franklin Park West 16:37:31, Tower B17 17:01:04) waiting for CP 473 who was allowed to double up in Bensenville Yard while occupying both Metra Main Tracks at Tower B17. Metra 2225 then followed CP 473 in route all the way to Big Timber Road. Metra 2225 arrived Big Timber Road 17:55:01, 24 minutes late.

METRA_D365001_00195421

Summary of CP Delay Events 2016 - 2021

DATE	TRAIN	PEAK	LOCATION	TYPE	MIN	DESCRIPTION	Exhibit A-2 PAGE #	DOC ID	BACKGROUND
2/28/2022	2227		B17	DELAY	20	Cascading delay	330	KKR#1650990	While Metra 2225 was stopped at Tower B17 waiting for CP 473, Metra Peak Period Train 2227 caught up to 2225 and was stopped behind him. 2227 followed 2225 to Big Timber Road arriving at 18:13:10, 20 minutes late.
3/6/2022	2707		B17	DELAY	45	MW2707 was delayed about 45mins this morning waiting for a CP 199 train to triple up and depart Bensenville at Tower B17	331	KKR#1653047	MW2707 was delayed about 45mins this morning waiting for a CP 199 train to triple up and depart Bensenville at Tower B17. Train was CP 8768 with 77 cars and 12,442' long. B17 operator says several scenarios for the move were discussed between her and the Elgin Dispatcher to eliminate any delays to Metra service but were eventually over ruled by higher decision makers at CP
3/6/2022	2704		B17	DELAY	14	MW2704 was delayed 14 mins at Tower B-17 for CP 198 with 72 cars and 12,922' long moving CP2 to the New Arrival track into Bensenville Yard	331	KKR#1653047	Earlier, MW2704 was delayed 14 mins at Tower B-17 for CP 198 with 72 cars and 12,922' long moving CP2 to the New Arrival track into Bensenville Yard. Train took longer than usual to yard because of an IM1 job in the way once they got into the yard, which prevented them from clearing the mains.
3/14/2022	2226	PEAK	B12	ALT TRACK		Metra 2226 was routed on #1 MT from Tower B12 to Galewood East due to CP 651 operating on #3 MT between BRC Connection Cicero West and Tower B12. As a result, passengers waiting on the #3 Main Track platforms had to cross at the last minute to opposite side to board. Resulted in passenger complaint.	332	KKR#1655606	Metra 2226 was routed on #1 MT from Tower B12 to Galewood East due to CP 651 operating on #3 MT between BRC Connection Cicero West and Tower B12. As a result, passengers waiting on the #3 Main Track platforms had to cross at the last minute to opposite side to board. Resulted in passenger complaint.

METRA_D036500_00195422

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 49

METRA'S DECEMBER 2021 ON-TIME PERFORMANCE REPORT

On-Time Performance

December 2021

Metra

Prepared by the Division of Strategic Planning & Performance

On-Time Performance
December 2021

This report presents an analysis of December 2021 train delays as reported for Metra's eleven rail lines. On-time is defined, for this analysis, as those regularly scheduled trains arriving at their last station stop less than six minutes behind schedule. Trains that are six minutes or more behind schedule, including annulled trains (trains that do not complete their scheduled runs), are regarded as late. "Extra" trains (trains added to handle special events but not shown in the regularly published timetables) are excluded from on-time performance calculations unless shown in special-event schedules that include all intermediate station stop times and are distributed publicly via Metra's website or on paper flyers. Cancelled (not annulled) trains and non-revenue trains are also excluded from on-time performance calculations.

On-Time Performance Tables

Table 1 shows the total number of scheduled and delayed trains for each line by service period for the current month and year-to-date.

Table 2 lists on-time percentages by line for each month and year since 2016.

Table 3 lists each weekday train that was less than 85% on-time for the current month, in order of line, train, and dates delayed. The codes in the *Delay Code* column of Table 3 are defined and shown sorted by cause category and carrier designation in Table 4. Effective January 1, 2020, and November 1, 2021, Metra is using an updated set of delay codes and delay cause categories. Changes to the delay cause categories used for Tables 5 through 7 have been applied retroactively to prior year data; totals by cause category for prior years may not match what was previously reported.

Table 5 shows the number of delays by cause and line for the current month, including a 5-year average. The table highlights the top two delay causes for each line.

Table 6 shows the number of delays by cause and line for year-to-date, including a 5-year average. The table highlights the top two delay causes for each line.

Table 7 shows the number of delays by cause and month for the current year and prior year. The table highlights the top two delay causes for each month.

For Tables 5 through 7, delays by cause are separated into *Metra/PSA* and *Foreign* designations, where applicable. *Metra/PSA* refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation. *Foreign* refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. *Foreign* also includes delays attributable to BNSF and Union Pacific freight operations. See Table 4 for a detailed breakdown of delay codes by cause category and carrier designation.

Table 8 shows the number of delays by duration and service period for each line.

Table 9 shows the annual number of train delays and annual on-time performance by line for the past five years. Table 9 is only included in the December monthly report.

Table 10 shows the annual number of train delays by cause and line for the past five years. Table 10 is only included in the December monthly report.

Reporting Calculations for Temporary Schedules and Special Events

Planned construction projects or special events can adversely affect on-time performance. Metra occasionally publishes full temporary schedules, which supersede the standard published schedules, to inform riders of possible delays or modifications to regular service. Metra also may publish informational notices to accompany temporary schedules. On-time performance is calculated using the temporary schedules and any accompanying notices.

Alternate Service Schedules due to the Coronavirus (COVID-19) Pandemic

On Monday, March 23, 2020, Metra began operating alternate weekday schedules on all lines, except the Heritage Corridor (HC), to adjust for the reduced number of riders due to school closures, work-from-home mandates and other consequences of the coronavirus pandemic. Through the month of April Metra continued to operate regularly scheduled weekday service on the HC Line as well as normal weekend service. On May 4 Metra reduced weekday service on the HC, North Central Service (NCS) and SouthWest Service (SWS) lines, and on May 9 reduced Saturday service to Sunday service levels on all lines except the Metra Electric (ME), thus eliminating all SWS Saturday service. Metra increased weekday service on the ME on May 18 as required for implementation of the Positive Train Control (PTC) safety system on that line. Metra increased weekday service on the RI on June 15 and on the HC, NCS and SWS on June 29. As of July 4, Metra decreased Saturday service on the ME to match Sunday service, thus eliminating Saturday service on the ME Blue Island Branch. Beginning August 3, Metra added two weekday BNSF trains and four weekday RI trains. Metra added four weekday UP-N trains and six weekday UP-NW trains on November 2.

On January 11, 2021, Metra added two weekday MD-N trains and four weekday MD-W trains, and on February 1 added 10 weekday RI trains. Metra added four weekday BNSF and MD-N trains and two NCS trains on April 12. Metra added four weekday ME trains on May 10, four Saturday ME trains on May 15 and four Sunday ME trains on May 16. On May 29 Metra restored Saturday service on the BNSF, MD-N, MD-W, RI, UP-N, UP-NW, and UP-W lines, resulting in an increase of 46 Saturday revenue trains systemwide.

In July, Metra launched pilot schedules on the BNSF, ME and UP-N (July 12), and the RI (July 19) that added off-peak options to meet post-COVID needs for riders. Metra also implemented minor weekday peak-period service increases on all other lines and restored ME Saturday service effective July 12. These changes resulted in an increase of 148 weekday trains and 38 Saturday trains systemwide in July. Schedule adjustments on September 13 resulted two fewer weekday trains on both the UP-N and UP-W. A schedule adjustment on November 15 resulted in eight fewer weekday BNSF trains. There were no schedule adjustments in December.

Under these pilot and alternate schedules Metra operated 558 regularly scheduled revenue trains each weekday in December, which is a 19 percent reduction from Metra's pre-pandemic weekday service of 692 scheduled revenue trains. Metra operated 269 regularly scheduled revenue trains each Saturday in December, which is a one percent reduction from the 273 Saturday trains Metra operated pre-pandemic. Metra operated 185 regularly scheduled revenue trains each Sunday in December, which is a two percent increase from the 181 Sunday revenue trains Metra operated pre-pandemic. As a result of the changes under these alternative and pilot schedules, Metra operated about 16 percent fewer total revenue trains in December 2021 than in December 2019, but about 36 percent more total revenue trains than in December 2020.

Metra has developed a set of service restoration principles to guide schedule design as service is added back. These principles will help Metra meet the needs of riders as travel demand approaches a new normal. Metra will continue to monitor ridership and will add service back incrementally throughout the system to stay ahead of the ridership growth curve and ensure that adequate service is in place to provide social distancing and encourage ridership.

Table 1.a: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
December 2021

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	861	1	99.9%	945	11	98.8%	1,806	12	99.3%	150	5	96.7%	100	3	97.0%	2,056	20	99.0%
ME-ML	483	10	97.9%	882	16	98.2%	1,365	26	98.1%	210	4	98.1%	121	1	99.2%	1,696	31	98.2%
ME-BI	147	6	95.9%	231	4	98.3%	378	10	97.4%	40	0	100.0%		--		418	10	97.6%
ME-SC	231	10	95.7%	651	18	97.2%	882	28	96.8%	160	4	97.5%	100	0	100.0%	1,142	32	97.2%
Subtotal	861	26	97.0%	1,764	38	97.8%	2,625	64	97.6%	410	8	98.0%	221	1	99.5%	3,256	73	97.8%
HC	105	11	89.5%	21	3	85.7%	126	14	88.9%		--			--		126	14	88.9%
MD-N	378	24	93.7%	420	14	96.7%	798	38	95.2%	100	12	88.0%	90	9	90.0%	988	59	94.0%
MD-W	399	26	93.5%	441	22	95.0%	840	48	94.3%	120	18	85.0%	90	10	88.9%	1,050	76	92.8%
Subtotal	777	50	93.6%	861	36	95.8%	1,638	86	94.7%	220	30	86.4%	180	19	89.4%	2,038	135	93.4%
NCS	168	12	92.9%	84	6	92.9%	252	18	92.9%		--			--		252	18	92.9%
RI	651	9	98.6%	1,029	30	97.1%	1,680	39	97.7%	165	2	98.8%	140	9	93.6%	1,985	50	97.5%
SWS	189	18	90.5%	63	12	81.0%	252	30	88.1%		--			--		252	30	88.1%
UP-N	462	21	95.5%	1,092	56	94.9%	1,554	77	95.0%	130	1	99.2%	90	3	96.7%	1,774	81	95.4%
UP-NW	441	30	93.2%	504	24	95.2%	945	54	94.3%	170	4	97.6%	105	4	96.2%	1,220	62	94.9%
UP-W	336	27	92.0%	504	57	88.7%	840	84	90.0%	100	6	94.0%	90	12	86.7%	1,030	102	90.1%
Subtotal	1,239	78	93.7%	2,100	137	93.5%	3,339	215	93.6%	400	11	97.3%	285	19	93.3%	4,024	245	93.9%
System	4,851	205	95.8%	6,867	273	96.0%	11,718	478	95.9%	1,345	56	95.8%	926	51	94.5%	13,989	585	95.8%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.
Delays data for most recent month is final (01/14/2022) version from TOPS.

Table 1.b: Scheduled Trains, Delayed Trains, and On-Time Performance by Service Period and Line
January - December 2021

	Weekdays									Weekends						Total		
	Peak*			Off-Peak**			Total			Saturdays			Sundays & Holidays					
	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time	Trains Scheduled	Trains Late	Percent On-Time
BNSF	8,724	238	97.3%	8,379	251	97.0%	17,103	489	97.1%	1,377	53	96.2%	1,169	24	97.9%	19,649	566	97.1%
ME-ML	5,486	84	98.5%	9,690	168	98.3%	15,176	252	98.3%	1,646	47	97.1%	1,320	25	98.1%	18,142	324	98.2%
ME-BI	1,778	50	97.2%	2,837	67	97.6%	4,615	117	97.5%	220	5	97.7%	20	2	90.0%	4,855	124	97.4%
ME-SC	2,794	89	96.8%	7,342	99	98.7%	10,136	188	98.1%	1,358	49	96.4%	1,158	21	98.2%	12,652	258	98.0%
Subtotal	10,058	223	97.8%	19,869	334	98.3%	29,927	557	98.1%	3,224	101	96.9%	2,498	48	98.1%	35,649	706	98.0%
HC	1,137	153	86.5%	121	13	89.3%	1,258	166	86.8%	20	6	70.0%		--		1,278	172	86.5%
MD-N	4,165	302	92.7%	4,675	302	93.5%	8,840	604	93.2%	1,021	87	91.5%	1,049	69	93.4%	10,910	760	93.0%
MD-W	4,412	305	93.1%	5,200	230	95.6%	9,612	535	94.4%	1,148	90	92.2%	1,046	77	92.6%	11,806	702	94.1%
Subtotal	8,577	607	92.9%	9,875	532	94.6%	18,452	1,139	93.8%	2,169	177	91.8%	2,095	146	93.0%	22,716	1,462	93.6%
NCS	1,626	139	91.5%	484	63	87.0%	2,110	202	90.4%		--			--		2,110	202	90.4%
RI	6,256	243	96.1%	10,278	485	95.3%	16,534	728	95.6%	1,653	65	96.1%	1,633	57	96.5%	19,820	850	95.7%
SWS	2,020	133	93.4%	762	116	84.8%	2,782	249	91.0%		--			--		2,782	249	91.0%
UP-N	4,258	166	96.1%	10,093	403	96.0%	14,351	569	96.0%	1,225	44	96.4%	1,060	47	95.6%	16,636	660	96.0%
UP-NW	5,068	263	94.8%	6,100	249	95.9%	11,168	512	95.4%	1,530	101	93.4%	1,222	55	95.5%	13,920	668	95.2%
UP-W	3,532	326	90.8%	5,924	583	90.2%	9,456	909	90.4%	1,022	83	91.9%	1,050	103	90.2%	11,528	1,095	90.5%
Subtotal	12,858	755	94.1%	22,117	1,235	94.4%	34,975	1,990	94.3%	3,777	228	94.0%	3,332	205	93.8%	42,084	2,423	94.2%
System	51,256	2,491	95.1%	71,885	3,029	95.8%	123,141	5,520	95.5%	12,220	630	94.8%	10,727	480	95.5%	146,088	6,630	95.5%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.
Delays data for most recent month is final (01/14/2022) version from TOPS.

Table 2: On-Time Performance by Line

Line	Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-Dec	Annual
BNSF	2016	93.2	93.8	95.9	96.8	94.0	93.5	93.8	91.4	91.3	95.2	95.4	93.1	94.0%	94.0%
	2017	95.9	95.6	96.2	96.3	95.4	93.7	96.2	94.4	92.7	93.8	91.8	92.1	94.5%	94.5%
	2018	89.6	91.6	92.7	94.2	90.5	92.2	91.6	92.7	92.0	92.4	92.5	95.1	92.2%	92.2%
	2019	92.7	88.8	97.8	95.1	94.9	94.6	93.0	96.3	96.7	96.3	95.9	97.7	95.0%	95.0%
	2020	97.3	96.6	97.5	99.5	97.2	97.4	97.7	98.1	98.6	98.8	98.2	99.5	97.9%	97.9%
	2021	99.0	90.8	99.4	98.5	98.1	98.5	97.3	96.5	94.2	96.6	98.1	99.0	97.1%	97.1%
	2016-2020 average	93.8	93.3	96.0	96.0	94.1	93.9	94.1	94.2	93.8	94.9	94.4	95.1	94.5%	94.5%
ME	2016	98.0	98.6	98.8	98.9	98.9	96.5	97.9	98.5	97.1	98.6	97.7	97.7	98.1%	98.1%
	2017	95.6	98.9	98.3	98.9	98.7	97.1	98.7	98.5	98.2	98.3	97.8	98.4	98.1%	98.1%
	2018	97.7	97.2	99.1	99.0	99.2	97.7	98.2	98.6	98.6	98.2	97.7	95.9	98.1%	98.1%
	2019	96.4	90.7	99.6	99.7	98.6	99.5	97.1	98.6	98.9	99.3	98.7	98.5	98.0%	98.0%
	2020	97.5	97.3	98.2	99.3	95.7	98.1	97.1	96.7	99.0	97.8	97.4	99.1	97.7%	97.7%
	2021	99.3	96.2	98.9	98.7	98.6	98.5	96.9	98.2	97.9	98.0	97.4	97.8	98.0%	98.0%
	2016-2020 average	97.0	96.7	98.8	99.1	98.4	97.7	97.8	98.3	98.3	98.5	97.9	97.9	98.0%	98.0%
HC	2016	90.0	92.9	97.4	97.3	95.2	94.8	87.9	94.4	94.6	98.0	94.6	91.8	94.2%	94.2%
	2017	93.9	94.3	96.9	96.4	94.2	89.0	90.7	97.5	95.7	90.3	88.4	90.7	93.2%	93.2%
	2018	86.4	90.7	90.9	95.2	73.4	87.1	93.9	93.2	96.2	88.8	87.8	90.7	89.4%	89.4%
	2019	81.8	82.1	87.1	87.7	85.1	92.1	89.6	89.0	82.9	90.7	90.7	95.9	87.9%	87.9%
	2020	90.9	91.4	89.0	95.5	91.1	78.9	86.4	81.0	86.9	85.2	88.8	97.7	89.6%	89.6%
	2021	90.0	75.0	88.0	95.5	76.3	87.5	87.7	85.6	82.8	87.0	91.3	88.9	86.5%	86.5%
	2016-2020 average	88.5	90.2	92.3	94.3	87.2	90.0	90.0	92.1	91.6	91.0	90.2	93.1	90.9%	90.9%
MD-N	2016	95.3	94.2	95.7	96.8	92.5	92.9	95.0	93.1	93.8	97.5	95.1	93.8	94.6%	94.6%
	2017	95.3	95.6	96.5	96.1	95.9	93.4	88.4	93.1	90.4	93.9	94.8	92.4	93.8%	93.8%
	2018	91.8	89.2	95.2	91.6	92.4	93.6	94.8	94.8	92.4	92.0	90.3	94.3	92.7%	92.7%
	2019	88.4	85.2	94.2	94.3	94.3	92.3	89.4	91.8	95.3	93.2	88.9	95.1	91.9%	91.9%
	2020	93.3	95.7	97.6	97.0	95.3	96.7	96.9	97.4	95.7	96.3	94.5	95.0	95.8%	95.8%
	2021	91.8	86.7	96.4	95.1	93.9	89.3	91.1	95.7	94.7	91.6	94.7	94.0	93.0%	93.0%
	2016-2020 average	92.8	92.1	95.8	95.0	94.0	93.4	92.5	93.7	93.3	94.4	92.5	94.0	93.6%	93.6%
MD-W	2016	94.0	95.3	94.4	96.0	94.9	93.6	92.1	95.2	97.4	97.0	95.6	93.3	94.9%	94.9%
	2017	96.9	95.2	95.2	95.6	97.5	95.8	96.3	96.3	95.5	96.7	96.9	88.2	95.5%	95.5%
	2018	94.7	91.3	96.3	97.7	95.8	96.5	97.4	96.6	96.4	95.7	93.2	96.6	95.7%	95.7%
	2019	92.3	91.9	96.4	95.7	95.5	97.0	96.7	96.0	96.2	95.5	91.0	96.1	95.1%	95.1%
	2020	95.8	91.7	96.4	96.9	96.4	96.3	94.7	92.1	96.3	93.9	94.1	92.4	94.7%	94.7%
	2021	93.0	85.8	96.1	95.3	93.5	93.8	94.3	95.7	96.3	95.8	95.0	92.8	94.1%	94.1%
	2016-2020 average	94.8	93.1	95.7	96.4	96.0	95.8	95.5	95.6	96.4	95.9	94.2	93.4	95.2%	95.2%
NCS	2016	92.3	95.5	91.7	93.3	94.4	96.3	95.0	96.4	96.1	95.5	95.2	92.6	94.5%	94.5%
	2017	92.6	91.6	95.1	95.2	95.5	95.7	94.8	98.0	92.7	91.9	92.6	92.0	94.0%	94.0%
	2018	93.2	86.4	95.9	95.5	90.0	92.9	98.8	93.3	93.2	96.1	90.0	88.5	92.9%	92.9%
	2019	87.6	91.8	95.0	95.2	95.0	97.3	95.2	95.0	95.8	95.2	91.3	96.7	94.3%	94.3%
	2020	92.7	82.0	95.5	94.8	100.0	84.2	90.9	86.9	96.4	92.0	97.5	95.5	91.7%	91.7%
	2021	88.8	68.8	92.4	90.7	90.8	93.9	81.0	89.8	92.5	95.2	94.4	92.9	90.4%	90.4%
	2016-2020 average	91.7	89.6	94.5	94.8	93.9	95.3	95.7	95.4	94.6	94.5	92.6	92.7	93.7%	93.7%

Table 2 (continued): On-Time Performance by Line

Line	Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan-Dec	Annual
RI	2016	92.6	96.2	95.8	96.5	97.9	96.2	93.5	96.3	96.0	98.2	97.9	95.3	96.1%	96.1%
	2017	95.2	97.1	97.8	98.0	94.6	96.0	95.3	95.2	95.7	95.9	94.0	92.8	95.7%	95.7%
	2018	92.2	90.2	95.7	96.8	94.8	95.0	96.7	94.9	95.6	97.2	93.3	95.4	94.8%	94.8%
	2019	89.8	87.1	96.7	95.7	88.9	94.0	88.2	92.6	90.1	94.9	91.4	94.1	92.0%	92.0%
	2020	92.0	92.6	97.4	99.1	96.4	93.7	97.9	95.5	96.0	97.5	95.2	98.4	95.8%	95.8%
	2021	97.7	91.9	96.2	97.7	97.6	93.5	92.8	96.1	95.6	96.1	95.5	97.5	95.7%	95.7%
	2016-2020 average	92.4	92.7	96.7	97.1	94.4	95.1	94.0	94.9	94.6	96.7	94.4	95.0	94.8%	94.8%
SWS	2016	95.6	97.2	97.8	95.6	91.9	95.3	94.1	93.3	91.6	97.4	96.6	96.2	95.2%	95.2%
	2017	96.2	94.1	96.4	97.3	92.8	97.1	97.1	94.3	96.3	93.7	90.1	93.8	94.9%	94.9%
	2018	93.9	90.5	92.0	95.4	92.4	87.1	91.9	92.7	94.8	93.6	93.1	95.2	92.7%	92.7%
	2019	90.4	91.0	93.8	94.4	95.3	91.7	92.0	94.9	92.0	92.1	94.1	94.2	93.0%	93.0%
	2020	95.6	94.1	97.6	98.1	100.0	88.8	89.1	80.5	86.7	91.8	94.0	96.4	94.0%	94.0%
	2021	96.5	85.0	94.8	90.9	92.5	90.0	93.3	91.7	93.3	88.5	88.5	88.1	91.0%	91.0%
	2016-2020 average	94.3	93.4	95.5	96.0	93.4	92.8	93.4	92.9	93.1	94.0	93.5	95.0	94.0%	94.0%
UP-N	2016	96.9	98.6	97.1	98.3	98.3	98.2	97.0	96.0	98.1	99.1	98.0	98.1	97.8%	97.8%
	2017	95.6	99.0	98.3	97.0	97.3	97.3	95.6	97.7	96.9	98.1	96.9	96.0	97.2%	97.2%
	2018	97.6	94.2	97.1	97.4	97.6	97.2	97.7	96.6	97.4	96.8	94.2	94.8	96.6%	96.6%
	2019	90.7	89.1	96.9	97.6	97.6	95.3	94.6	94.7	97.2	95.4	94.4	99.3	95.3%	95.3%
	2020	98.5	98.6	98.4	98.2	97.7	98.4	98.6	97.2	97.4	97.0	97.4	98.9	98.1%	98.1%
	2021	98.4	93.6	96.9	98.7	97.3	97.6	95.1	92.7	95.9	97.1	96.2	95.4	96.0%	96.0%
	2016-2020 average	95.9	96.0	97.5	97.7	97.7	97.2	96.5	96.4	97.4	97.3	96.1	97.3	96.9%	96.9%
UP-NW	2016	97.0	98.1	97.8	98.1	96.0	96.6	94.9	96.8	96.9	96.5	93.2	93.4	96.3%	96.3%
	2017	96.2	97.4	98.1	93.7	97.2	93.3	92.2	94.6	93.8	94.8	95.6	94.6	95.1%	95.1%
	2018	95.7	90.7	95.8	98.0	95.6	91.3	95.5	95.8	94.7	97.8	92.4	94.9	94.9%	94.9%
	2019	90.3	89.9	94.8	93.4	95.7	94.7	90.7	93.4	96.7	92.1	88.6	95.4	93.0%	93.0%
	2020	96.3	96.1	98.0	98.7	96.5	96.1	96.6	95.7	97.2	96.3	94.0	98.9	96.7%	96.7%
	2021	97.7	89.6	98.2	96.9	97.8	96.1	95.1	91.3	95.7	93.6	95.5	94.9	95.2%	95.2%
	2016-2020 average	95.1	94.5	96.9	96.2	96.2	94.2	93.7	95.2	95.8	95.4	92.6	95.3	95.1%	95.1%
UP-W	2016	97.8	93.4	97.2	96.7	90.1	94.4	96.6	96.0	96.2	95.6	94.0	92.9	95.1%	95.1%
	2017	95.0	96.5	96.1	92.9	93.8	92.4	94.8	94.3	94.7	92.9	94.8	90.7	94.1%	94.1%
	2018	92.3	89.0	94.4	92.8	88.9	93.9	91.6	89.9	92.9	92.2	91.2	88.5	91.5%	91.5%
	2019	90.4	77.0	90.7	94.0	92.9	95.9	91.1	95.3	95.0	95.3	92.3	95.9	92.3%	92.3%
	2020	94.9	98.2	97.8	99.1	94.8	96.3	92.2	93.1	93.8	92.0	90.1	93.3	94.9%	94.9%
	2021	93.6	82.5	95.8	97.3	91.7	89.3	87.6	86.2	90.6	93.3	88.5	90.1	90.5%	90.5%
	2016-2020 average	94.0	90.9	95.2	94.8	91.9	94.4	93.3	93.7	94.6	93.7	92.7	92.2	93.5%	93.5%
System excluding South Shore	2016	95.8	96.4	96.8	97.4	95.8	95.5	95.4	95.7	95.7	97.4	96.2	95.2	96.1%	96.1%
	2017	95.6	96.9	97.2	96.6	96.5	95.3	95.5	96.0	95.2	95.7	95.2	93.9	95.8%	95.8%
	2018	94.2	92.3	95.9	96.3	94.5	94.6	95.6	95.3	95.4	95.5	93.6	94.6	94.8%	94.8%
	2019	91.8	88.2	96.3	96.1	95.3	95.8	93.2	95.3	95.9	95.7	93.6	96.7	94.6%	94.6%
	2020	95.9	95.6	97.6	98.5	96.2	96.6	96.3	95.4	96.9	96.4	95.6	97.5	96.5%	96.5%
	2021	96.9	90.6	97.4	97.4	96.4	95.3	94.3	94.7	95.3	95.8	95.6	95.8	95.5%	95.5%
	2016-2020 average	94.7	94.0	96.8	96.9	95.6	95.4	95.1	95.6	95.7	96.1	94.8	95.4	95.5%	95.5%

Delays data for most recent month is final (01/14/2022) version from TOPS.

'2016-2020 average' calculated by summing the delays over the five years, summing the trains run over the five years, and calculating their ratio.

Table 3: Weekday Trains less than 85% On-Time
December 2021

Line	Train	Date	Minutes Late	Delay Code	Delay Explanation
HC	916	Fri, Dec 03	7	CD	8M CP CANAL FREIGHT MPRAS UP9045 W/203 CARS 13,062 FT STOPPED COULD NOT REACH AN EMPLOYEE IN CHARGE
	76% OT	Thu, Dec 16	19	DD	CN stopped at Rockwell, 17MIN AT ROCKWELL HELD OUT FOR AMTRAK 301
		Fri, Dec 17	10	RF	6" Stopped at Cermak 22nd St. (CN DS ERROR) 2" Freeport Bulletin #5154 speed restriction. 3" Amtrak Polk St Red signal
		Wed, Dec 22	9	DD	9M STOPPED AT CERMAK AMTRAK 301 GOES FIRST
		Thu, Dec 30	14	D	(GENERAL FREIGHT INTERFERENCE) - 7MIN DELAY FOR FREIGHT TRAIN MCHL30 UP7918 10000FT
MD-W	2202	Wed, Dec 01	10	E	-10" Departed Elgin Courtyard late due to mechanical problems engine #97 (Auxiliary Gen Field Switch)
	81% OT	Thu, Dec 02	12	D	(-12)" Freight train interference B-17 (CP472); -3" X/O 1MT B-17 to B-6, passengers on wrong side
		Mon, Dec 06	10	D	Departed Elgin 2" late due to crew management issues. CP 472 RAN AHEAD OF 2202
		Mon, Dec 20	0	XE	Annulled @ Grand/Cicero due to mechanical problems engine #404. Passengers transferred to 2204 (will replace terminal board) CA TERMINAL BOARD
MD-W	2203	Wed, Dec 01	14	E1	-14" PTC issues @ Racine Ave, re-initialize
	76% OT	Thu, Dec 02	15	D1	(-15)" -10" Departed CUS late due to late arrival/turn of 2202; -5" Stop signal Roselle West, verbal permission by, restricted speed
		Tue, Dec 07	12	R1	-12" Stopped at Elgin West waiting on late 2226
		Tue, Dec 14	9	J	-9" Police activity east of Elgin
		Mon, Dec 20	49	E1	(-49)" -33" Departed CUS late due to late arrival/turn of 2204. Used 2204's crew /equipment to protect 2203 instead of normal 2202); -12" Crew swap @ Grand/Cicero between Assignments #202/203
MD-W	2212	Wed, Dec 08	9	R1	(-9) -7" Following train ahead (2210); -2" Stop signal A-2 new engineer
	76% OT	Thu, Dec 09	7	U1	(-7)" -7" Following train ahead (2210 WHICH HAD 3 ADAs)
		Thu, Dec 16	10	D1	7" Following tardy 2210; -2" Stop signal A-2
		Mon, Dec 20	8	E1	(-8)" X/O 2MT to 1MT Galewood
		Tue, Dec 28	6	U1	-6 min following 2210.
NCS	108	Thu, Dec 09	9	D	(-9)" Stop signal Deval; Stop signal Galewood; Stop signal A-2
	81% OT	Mon, Dec 13	9	D	-9" -5 min stopped at B-12 G52 on 3 main and then had to follow 2216; -5 min stopped at B-6; -4 min approach signal A-5 to A-2.
		Tue, Dec 21	11	N1	11" Signal problems CP Morgan (AT&T outage)
		Wed, Dec 29	18	D	-20 min waiting for I65-28 (12,000 ft. freight train) to clear B-12.
SWS	803	Thu, Dec 02	20	D	4M BELT WAITING FOR SWS803|12M ASHBURN LANDERS TAKING HEADROOM BH45 UP6029 8000FT|9M CHICAGO RIDGE IO15 CSXT3038 71 CARS 12,000FT WAITING FO
	67% OT	Tue, Dec 07	8	D	(GENERAL FREIGHT INTERFERENCE) - 803 DELAYED 8 MINS AT FOREST HILL
		Fri, Dec 10	0	R1	FLIP FROM 802. 802 WAS 75" LATE GETTING IN annulled due to possible signal violation on 802
		Mon, Dec 13	10	ZR1	(PTC HUMAN ERROR, METRA TRANSPO) - 10 MINUTES AT THE BELT WAITING FOR 806 TO CLEAR
		Wed, Dec 15	12	D	(GENERAL FREIGHT INTERFERENCE) - 16M DELAY NS518 FREIGHT 25Z NS9882 49X24 CARS 11918 FT TAKING HEAD ROOM|5M FORST H ILL WAITING FOR SWS808
		Mon, Dec 27	7	D	(GENERAL FREIGHT INTERFERENCE) - 7MIN DELAY AT THE BRC FOR FREIGHT TRAIN G52-27 NS 4006 8000FT GOING ACROSS.
		Thu, Dec 30	8	GF	(GATE XING / SIG / SWITCH FOREIGN) - 6MIN FOR ITEM 1 GRADE CROSSINGS AT LAWNDALE AVE AND 83RD PLACE
SWS	812	Thu, Dec 02	23	D1	(GENERAL FREIGHT INTERFERENCE) - 25M LATE DEPARTING 179TH ACCOUNT LATE TURN FROM SWS803
	81% OT	Fri, Dec 10	88	GF1	(GATE XING / SIG / SWITCH FOREIGN) - 1HR 15M LATE DEPARTING ACCOUNT TURN FROM SWS806 12M AT NS518 WAITING FOR AMTRAK 49 TO CLEAR.
		Mon, Dec 13	26	ZR1	(PTC HUMAN ERROR, METRA TRANSPO) - LEFT 25 MINUTES DOWN DUE TO LATE TURN FROM 803(RELATED TO 806)AND PTC ISSUES
		Thu, Dec 30	6	GF1	(GATE XING / SIG / SWITCH FOREIGN) - LATE TURN FROM SW803
SWS	815	Wed, Dec 01	7	KW	8M OAK LAWN THRU RIDGELAND AV. DUE TO MULTIPLE WHEEL SLIPS ENGAGING PTC. ALSO GRADE CROSSING MALFUNCTION AT RIDGELAND AV.
	81% OT	Mon, Dec 13	11	R	7M CUS, RED SIGNAL. HELD BY TRAIN DIRECTOR. (extra board engineer could have proceeded past signal)
		Wed, Dec 15	6	D	(GENERAL FREIGHT INTERFERENCE) - 7M STOPPED AT BELT JUNCTION DUE TO FREIGHT CROSS TRAFFIC Q367 CSXT3442 120CARS 8K FT. PER BRC FREIGHT CREW
		Tue, Dec 28	10	GX	(METRA/PSA BROKEN GATE CROSSING) - 8M PULASKI AV., BROKEN GATE HAD TO BE REMOVED BY CONDUCTOR, ITEM 1.
UP-W	20	Tue, Dec 07	11	I	-11" Bell stuck at Geneva (4"); slow loading passenger at Glen Ellyn and slow loading ADA lift at Oak Park
	76% OT	Wed, Dec 08	10	I	-10" Heavy passenger loading
		Mon, Dec 13	10	I	-10" Slow passenger loading @ Geneva, Whitfield, Wheaton, Glen Ellyn, Lombard, Elmhurst, and Oak Park (running opposite main)
		Tue, Dec 14	10	U	2 ADA lifts and slow passenger loading @ Geneva, Wheaton
		Wed, Dec 29	10	D	Stopped at Peck waited for UP68008 to clear. No signal at Washington St. waited for iG1LA-29
UP-W	25	Wed, Dec 08	17	D	-27" Freight train interference
	81% OT	Mon, Dec 13	20	D	-20" Delayed waited for ZG2LT-13 to clear @ Kress then followed the ZG2LT-13
		Tue, Dec 14	15	D	-15" Delayed @ University waited for the LG2IT to clear also delayed following the freight
		Wed, Dec 22	6	D	Freight train interference (zg2lt on one & LG2G2 on two)
UP-W	27	Tue, Dec 14	24	D1	-24" Delayed @ Park waited for a late M42 to clear on trk #3
	76% OT	Wed, Dec 15	16	DE	-18" freight train interference; MNSNP 14 went into emergency in front of M27 (KNUCKLE)
		Mon, Dec 20	11	D	-11" Delayed following the MNSNP that had cross traffic @ the CN Washington St. interlocking
		Tue, Dec 28	13	D	Held @ Park waited for M42 to clear on trk 3 due to the ZG2LT on trk 1 and the MCBCH on trk 2 Freight Priority
		Thu, Dec 30	16	D	Following ZG2LT-30 from College Ave to Elmhurst

Table 3 (continued): Weekday Trains less than 85% On-Time
December 2021

Line	Train	Date	Minutes Late	Delay Code	Delay Explanation
UP-W	29	Tue, Dec 14	13	D1	-13" Delayed @ Park waited for a late M44 to clear on trk #3
	76% OT	Wed, Dec 15	29	D1	-29" Held @ Park for M44
		Thu, Dec 16	10	CC	Held at Berckley for M44
		Tue, Dec 21	9	D	HELD @ PARK WAITED FOR M44 TO CLEAR ON TRK 3 DUE TO MCHBO ON TRK 1 AND THE MNPCH ON TRK 2
		Tue, Dec 28	7	D	Held @ Park waited for M44 to clear on trk 3 due to the CNRSH9 crossing over from 2-1 and CWSWT9 on trk 1 Freight Priority
UP-W	36	Thu, Dec 02	37	D1	-37" M32 ahead at Elmhurst then make all stops from Elmhurst account M32 expressed from Elmhurst to Chicago
	81% OT	Fri, Dec 03	14	D	-14" Stopped @ Elmhurst waited for the LG2G2-02 to clear into Proviso on trk 1
		Mon, Dec 13	29	U	-7" ADA lift @ College Ave
		Mon, Dec 20	14	ZT	-14" Delayed due to PTC on the METX 8419 disengaged had to cut out and run in on ATC
UP-W	44	Wed, Dec 08	25	D1	-34" Late arrival of M25 & slow loading
	71% OT	Mon, Dec 13	24	D1	-24" Late turn from M25 also delayed @ River Forest due to passenger medical emergency
		Tue, Dec 14	9	D1	-9" Late turn from M25
		Wed, Dec 15	23	D	-17" Waited on ZG2LT to pass
		Fri, Dec 17	6	U	Slow loading ADA lift also slow passenger loading
		Wed, Dec 22	12	D1	Freight train interference (flip from 25)
UP-W	46	Mon, Dec 06	8	D1	-18" Late turn from M27 also slow passenger loading
	52% OT	Wed, Dec 08	15	D	-25" Freight train interference
		Mon, Dec 13	10	D	-10" Departed Elburn late waited for the ZLTG2 to clear then delayed following the ZLTG2
		Tue, Dec 14	22	D1	-22" Late turn from M27
		Wed, Dec 15	25	DE1	-25" Late arrival of M27. Stopped @ Turner due to high railers on MT #1 & Freight train on MT #2, west bound on MT #3 crossing over
		Fri, Dec 17	7	D	Delayed following MNSPP from Geneva - University
		Mon, Dec 20	9	D1	-9" Late turn from M27
		Tue, Dec 21	15	D	HELD @ TURNER WAITED FOR M29 TO CLEAR THEN RAN TRK 2 TURNER-PARK HAD THE MCHBO AND THE IG1LA ON TRK 1 ALSO HAD SLOW PASSENGER LOADING @ VILLA PARK
		Tue, Dec 28	14	D1	Due to 27's flip
		Thu, Dec 30	13	D1	Late turn from M27
UP-W	57	Wed, Dec 01	9	UF	-09" Delayed @ Oak Park on acct. of trouble with deploying the ADA lift (had to manually operate) - REPLACED BROKEN RIGHT SIDE LIFT ROLL STOP PIN AND ADJUSTED STOW HEIGHT
	81% OT	Mon, Dec 06	20	D1	-20" Wait for M58 to Clear Grace account MNPPR Disabled on track #1
		Tue, Dec 07	13	D1	-13" Delayed following M55; 1 ADA lift; heavy passenger unloading
		Thu, Dec 16	13	E	Late departure from CPT on acct. of swapped equipment at departure time, due to original equipment METX143 had head end power issues and smoke in the engine & XH @ MP10.2 -TURBO GEAR TRAIN DAMAGE

Data is final (01/14/2022) version from TOPS.

Table 4: Delay Codes by Cause Category & Carrier

METRA/PSA	
Delay Code	Category Definition
	Passenger Train Interference
A	Passenger Train/Interline Interference
AA	Rule 9.9 Delayed in Block / Rule 6.30 [obsolete Jan. 2020]
AD	Non-Revenue Passenger Train Interference [obsolete Jan. 2020]
	Accident
M	Right of Way Accident / Misc.
YC	Derailment - Engineering
YE	Derailment - Mechanical
YM	Derailment - Accident
	Passenger Related
I	Passenger Handling, Running Time
IB	Passenger Handling, Bicycle
J	Passenger Problems / Removal
JM	Passenger Medical Emergency
U	Accessibility Related (ADA)
	Obstruction/Debris
K	Obstruction On Tracks
KD	Train Struck Debris
L	Unauthorized People On Tracks / Near Miss
KP	Suspicious Package(s) / Person(s) / Activity
	Signal/Switch Failure
CM	Switch Malfunction (Track Dept.)
G	Metra / PSA Signal / Switch Malfunction (Signal Dept.)
GM	Metra / PSA Gate Crossing Malfunction
GT	Metra / PSA Telecom / CAD failure
GX	Metra / PSA Broken Gate Crossing
VG	Signal / Switch / Gate Crossing Failure, Nothing Found
	Track Work
C	Unscheduled Track Work
CC	Scheduled Track Work
CF	Engineering Equipment Malfunction
CG	Scheduled Signal Work
CH	Contractor Failure
	Catenary Failure
CO	Scheduled Wire Work
O	AC/DC System Failure
	Non-Locomotive Equipment Issue
F	Cab Car / Trailer / MU Malfunction
UF	ADA Lift Failure
VF	Cab Car Problem Reported, Nothing Found
	Locomotive Issue
E	Locomotive Malfunction
VE	Locomotive Problem Reported, Nothing Found

METRA/PSA (continued)	
Delay Code	Category Definition
	Human Error
B	Human Error, Eng. Dept.
H	Human Error, Mechanical Department
Q	Late Issuance of Track Warrant
R	Human Error, Transportation
RD	Metra Dispatcher Error (dispatching Metra trains)
RL	Human Error, Job Action / Employee No Show (CMS Error)
RN	Human Error, Job Action / Employee No Show (Non-CMS)
RO	Human Error, Metra Tower Operator
YB	Derailment - Human Error, Engineering
YH	Derailment - Human Error, Mechanical
YR	Derailment - Human Error, Transportation
	Weather
AW	Pass. Train Interference, Weather [obsolete Jan. 2020]
CW	M of W Work, Weather
EW	Locomotive Malfunction, Weather
FW	Cab Car / TRL / MU Malfunction, Weather
GW	Signal / Switch Malfunction Weather (Signal Dept.)
IW	Passenger Handling, Weather
KW	Obstruction On Tracks, Weather
MW	Right of Way Accident / Misc., Weather [obsolete Jan. 2020]
NW	Utility Failure, Weather
OW	AC/DC System Failure, Weather
RW	Train Crew Issues, Weather
UW	Accessibility, Weather
YW	Derailment Accident, Weather
ZW	PTC Weather
	Other
N	Utility Failure
S	Operational (Efficiency) Testing
T	Property Vandalism
W	Gas Leak (non-loco fuel)
	PTC Related
ZB	PTC Human Error, Engineering Dept.
ZC	PTC Construction / Maintenance
ZE	PTC Malfunction Locomotive Hardware
ZF	PTC Malfunction Coach Hardware
ZG	PTC Wayside
ZH	PTC Human Error, Mechanical
ZP	PTC Dispatcher
ZR	PTC Human Error, Metra Transportation
ZT	PTC Back Office/Software
ZV	Metra / PSA PTC On-Board Software

Foreign Carrier	
Delay Code	Category Definition
	Passenger Train Interference
AM	Amtrak Caused Delay
AS	NICTD Train Interference
	Freight Interference - Peak & Off-Peak
D	General Freight Interference
DD	Freight Dispatcher Error (dispatching freight trains)
DE	Freight Mechanical Malfunction
DR	Freight-Human Error
	Accident
DM	Freight-Accident / Incident
YF	Derailment - Accident, Foreign Line
	Passenger Related
JA	Amtrak Passenger Problems / Removal
	Signal/Switch Failure
GA	Signal / Switch Failure Amtrak (Signal Dept.)
GF	Gate Crossing / Signal / Switch Foreign Line
	Track Work
CA	Amtrak Engineering
CD	Track Work by Freight Carrier
	Non-Locomotive Equipment Issue
FS	NICTD MU Malfunction
	Locomotive Issue
EA	Amtrak Locomotive/Car Malfunction
	Human Error
BA	Amtrak Engineering Human Error
HS	Human Error, NICTD Mechanical Dept. [obsolete Jan. 2020]
RA	Human Error, Amtrak Transportation
RF	Foreign/PSA Dispatcher Error (dispatching Metra trains)
RS	Human Error, NICTD Transportation
	Weather
DW	Freight Train Interference, Weather
	PTC Related
ZA	PTC Amtrak Train (On-Board)
ZD	PTC Foreign Line Transportation
ZN	PTC Foreign Line Engineering
ZS	PTC NICTD MU Train (On-Board)

Effective November 1, 2021

'Metra/PSA' refers to delays that either directly affect or are directly attributable to Metra or its Purchase of Service Agreement partners (BNSF and Union Pacific) on Metra or PSA-controlled rail lines or trains in commuter operation.
'Foreign' refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations.

The delay codes listed above are used for primary delayed trains; primary annulled trains (trains that fail to reach their scheduled destination station) use a primary delay code preceded by an "X" (e.g., XE, XGA, etc.);
All secondary trains, including annulled, use primary delay code followed by a "1" (e.g., E1, GA1, etc.); secondary annulled trains do not use a delay code preceded by an "X".

Table 5.a: Train Delays by Cause and Line

December 2021

Top 2 causes for each line and the system are shaded

Cause Category	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	SYSTEM
Freight Interference - Total	**7**	**-**	**-**	**-**	**7**	**5**	**19**	**6**	**1**	**7**	**2**	**3**	**65**	**122**
Freight Interference - Peak	-	-	-	-	6	1	6	4	-	2	1	3	18	41
Primary	-	-	-	-	*6*	*1*	*5*	*4*	-	*1*	*1*	*3*	*11*	*32*
Secondary	-	-	-	-	-	-	*1*	-	-	*1*	-	-	*7*	*9*
Freight Interference - Off-Peak	7	-	-	-	1	4	13	2	1	5	1	-	47	81
Primary	*6*	-	-	-	*1*	*3*	*11*	*2*	*1*	*5*	-	-	*29*	*58*
Secondary	*1*	-	-	-	-	*1*	*2*	-	-	-	*1*	-	*18*	*23*
Signal/Switch Failure - Total	**2**	**4**	**3**	**19**	**1**	**18**	**15**	**4**	**11**	**8**	**10**	**12**	**1**	**108**
Signal/Switch Failure - Metra/PSA	1	4	3	19	-	18	14	3	11	2	10	12	1	98
Primary	*1*	*4*	*2*	*15*	-	*11*	*9*	*2*	*9*	*2*	*10*	*11*	*1*	*77*
Secondary	-	-	*1*	*4*	-	*7*	*5*	*1*	*2*	-	-	*1*	-	*21*
Signal/Switch Failure - Foreign	1	-	-	-	1	-	1	1	-	6	-	-	-	10
Primary	*1*	-	-	-	*1*	-	*1*	*1*	-	*4*	-	-	-	*8*
Secondary	-	-	-	-	-	-	-	-	-	*2*	-	-	-	*2*
Mechanical Failure - Total	**3**	**3**	**-**	**-**	**-**	**10**	**13**	**2**	**9**	**-**	**21**	**3**	**9**	**73**
Mechanical Failure - Metra/PSA	3	-	-	-	-	10	13	2	9	-	21	3	9	70
Non-Locomotive Equipment Issue - Metra/PSA	1	-	-	-	-	2	6	-	2	-	6	-	1	18
Primary	*1*	-	-	-	-	-	*3*	-	*2*	-	*3*	-	*1*	*10*
Secondary	-	-	-	-	-	*2*	*3*	-	-	-	*3*	-	-	*8*
Locomotive Issue - Metra/PSA	2	-	-	-	-	8	7	2	7	-	15	3	8	52
Primary	-	-	-	-	-	*3*	*2*	-	*3*	-	*4*	*2*	*4*	*18*
Secondary	*2*	-	-	-	-	*5*	*5*	*2*	*4*	-	*11*	*1*	*4*	*34*
Mechanical Failure - Foreign	-	3	-	-	-	-	-	-	-	-	-	-	-	3
Passenger Train Interference - Total	**1**	**-**	**-**	**-**	**-**	**3**	**1**	**-**	**-**	**1**	**-**	**-**	**-**	**6**
Passenger Train Interference - Metra/PSA	-	-	-	-	-	2	-	-	-	-	-	-	-	2
Passenger Train Interference - Foreign	1	-	-	-	-	1	1	-	-	1	-	-	-	4
Accident - Total	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**15**	**2**	**17**
Accident - Metra/PSA	-	-	-	-	-	-	-	-	-	-	-	15	-	15
Accident - Foreign	-	-	-	-	-	-	-	-	-	-	-	-	2	2
Track Work - Total	**4**	**-**	**-**	**-**	**1**	**-**	**-**	**-**	**5**	**-**	**12**	**2**	**1**	**25**
Track Work - Metra/PSA	4	-	-	-	-	-	-	-	4	-	12	2	1	23
Track Work - Foreign	-	-	-	-	1	-	-	-	1	-	-	-	-	2
Human Error - Total	**-**	**1**	**3**	**4**	**1**	**7**	**6**	**-**	**1**	**2**	**1**	**6**	**5**	**37**
Human Error - Metra/PSA	-	1	3	4	-	3	5	-	1	2	1	6	3	29
Human Error - Foreign	-	-	-	-	1	4	1	-	-	-	-	-	2	8
PTC Related - Total	**-**	**1**	**-**	**1**	**3**	**3**	**11**	**4**	**6**	**5**	**3**	**7**	**4**	**48**
PTC Related - Metra/PSA	-	-	-	1	2	3	11	2	6	4	3	7	4	43
PTC Related - Foreign	-	1	-	-	1	-	-	2	-	1	-	-	-	5
Weather - Total	**1**	**13**	**1**	**3**	**-**	**2**	**-**	**1**	**3**	**1**	**23**	**6**	**-**	**54**
Weather - Metra/PSA	1	13	1	3	-	2	-	1	3	1	23	6	-	54
Weather - Foreign	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Passenger Related - Total	**2**	**6**	**-**	**2**	**1**	**2**	**9**	**-**	**2**	**-**	**4**	**2**	**14**	**44**
Obstruction/Debris - Total	**-**	**1**	**1**	**3**	**-**	**9**	**1**	**-**	**12**	**2**	**5**	**6**	**1**	**41**
Catenary Failure - Total	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
Other - Total	**-**	**2**	**2**	**-**	**-**	**-**	**1**	**1**	**-**	**4**	**-**	**-**	**-**	**10**
Total Trains Delayed	**20**	**31**	**10**	**32**	**14**	**59**	**76**	**18**	**50**	**30**	**81**	**62**	**102**	**585**
Total Metra/PSA Delays	11	27	10	32	3	49	54	9	48	15	79	59	33	429
Total Foreign Carrier Delays	9	4	0	0	11	10	22	9	2	15	2	3	69	156

Data for current month is final (01/14/2022) version of TOPS

'Metra/PSA' refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation.

'Foreign' refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations.

Table 5.b: Train Delays by Cause and Line

Average December Over Previous Five Years: 2016-2020

Top 2 causes for each line and the system are shaded

Cause Category	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	SYSTEM
Freight Interference - Total	**7**	**-**	**-**	**-**	**5**	**9**	**9**	**7**	**6**	**13**	**1**	**5**	**26**	**88**
Freight Interference - Peak	2	-	-	-	4	2	3	2	1	4	-	3	9	29
Primary	*1*	-	-	-	*4*	*1*	*2*	*1*	*1*	*3*	-	*2*	*3*	*17*
Secondary	*0*	-	-	-	*0*	*1*	*1*	*1*	*1*	*1*	-	*1*	*6*	*12*
Freight Interference - Off-Peak	5	-	-	-	1	7	6	5	5	10	1	2	17	59
Primary	*4*	-	-	-	*1*	*5*	*5*	*4*	*3*	*7*	*1*	*2*	*12*	*44*
Secondary	*1*	-	-	-	*0*	*2*	*1*	*1*	*1*	*3*	-	*0*	*5*	*15*
Signal/Switch Failure - Total	**22**	**9**	**3**	**4**	**1**	**14**	**27**	**5**	**11**	**5**	**2**	**3**	**10**	**112**
Signal/Switch Failure - Metra/PSA	17	9	3	4	-	10	26	2	10	2	2	2	9	95
Primary	*11*	*5*	*1*	*2*	-	*7*	*18*	*1*	*8*	*2*	*1*	*2*	*5*	*64*
Secondary	*6*	*4*	*2*	*2*	-	*2*	*8*	*0*	*2*	*0*	*1*	*1*	*4*	*31*
Signal/Switch Failure - Foreign	5	-	-	-	1	4	0	3	1	2	-	0	1	17
Primary	*3*	-	-	-	*1*	*1*	*0*	*1*	*0*	*2*	-	*0*	*1*	*10*
Secondary	*1*	-	-	-	-	*3*	*0*	*2*	*1*	*0*	-	-	*0*	*7*
Mechanical Failure - Total	**22**	**3**	**1**	**-**	**0**	**10**	**9**	**2**	**15**	**1**	**11**	**6**	**10**	**90**
Mechanical Failure - Metra/PSA	22	0	-	-	0	8	9	2	15	1	11	6	10	85
Non-Locomotive Equipment Issue - Metra/PSA	8	0	-	-	-	1	2	0	5	1	2	3	4	25
Primary	*3*	*0*	-	-	-	*0*	*1*	*0*	*2*	*0*	*1*	*2*	*2*	*12*
Secondary	*5*	-	-	-	-	*0*	*1*	-	*3*	*0*	*1*	*1*	*2*	*13*
Locomotive Issue - Metra/PSA	14	-	-	-	0	8	6	2	11	1	9	4	6	60
Primary	*5*	-	-	-	*0*	*2*	*3*	*1*	*4*	*0*	*3*	*2*	*2*	*23*
Secondary	*9*	-	-	-	-	*5*	*4*	*1*	*6*	*0*	*6*	*1*	*4*	*37*
Mechanical Failure - Foreign	-	3	1	-	-	2	-	-	-	-	-	-	-	5
Passenger Train Interference - Total	**1**	**4**	**1**	**1**	**0**	**4**	**0**	**1**	**0**	**1**	**-**	**-**	**0**	**14**
Passenger Train Interference - Metra/PSA	-	-	-	-	-	2	0	0	0	0	-	-	0	4
Passenger Train Interference - Foreign	1	4	1	1	0	2	0	0	-	1	-	-	-	11
Accident - Total	**4**	**6**	**1**	**1**	**-**	**1**	**1**	**-**	**2**	**0**	**1**	**8**	**4**	**29**
Accident - Metra/PSA	3	6	1	1	-	1	1	-	1	0	1	8	4	28
Accident - Foreign	0	-	-	-	-	-	-	-	1	-	-	-	1	2
Track Work - Total	**8**	**4**	**1**	**2**	**0**	**6**	**5**	**2**	**1**	**0**	**3**	**3**	**3**	**39**
Track Work - Metra/PSA	8	4	1	2	0	6	5	2	1	0	3	3	3	39
Track Work - Foreign	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Human Error - Total	**14**	**2**	**0**	**1**	**2**	**9**	**7**	**2**	**4**	**3**	**3**	**5**	**6**	**58**
Human Error - Metra/PSA	9	2	0	1	1	6	6	1	4	2	3	4	6	46
Human Error - Foreign	5	-	-	-	1	4	1	1	0	1	-	0	0	12
PTC Related - Total	**1**	**0**	**-**	**1**	**0**	**2**	**4**	**0**	**5**	**0**	**3**	**6**	**10**	**32**
PTC Related - Metra/PSA	1	0	-	1	-	2	4	-	5	-	3	6	10	32
PTC Related - Foreign	-	-	-	-	0	-	-	0	-	0	-	-	-	1
Weather - Total	**11**	**3**	**2**	**1**	**0**	**9**	**9**	**1**	**19**	**1**	**9**	**11**	**7**	**84**
Weather - Metra/PSA	11	3	2	1	0	9	9	1	19	1	9	11	7	84
Weather - Foreign	-	-	-	-	0	-	-	-	0	-	-	-	-	0
Passenger Related - Total	**4**	**4**	**1**	**1**	**-**	**10**	**12**	**2**	**11**	**1**	**6**	**16**	**19**	**85**
Obstruction/Debris - Total	**4**	**3**	**1**	**3**	**-**	**5**	**3**	**5**	**8**	**2**	**3**	**6**	**5**	**47**
Catenary Failure - Total	**-**	**9**	**3**	**3**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**15**
Other - Total	**-**	**-**	**-**	**-**	**-**	**0**	**0**	**-**	**1**	**-**	**-**	**0**	**2**	**4**
Total Trains Delayed	**97**	**48**	**13**	**18**	**9**	**79**	**86**	**27**	**82**	**28**	**41**	**69**	**102**	**699**
Total Metra/PSA Delays	80	41	11	17	2	59	76	15	74	10	40	64	74	563
Total Foreign Carrier Delays	17	7	2	1	7	20	10	12	8	18	1	5	28	136

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Effective January 2020, Metra has updated the delay cause categories in this table; totals by cause category for prior years may not match what was previously reported.

Table 5.c: Train Delays by Cause and Line

December 2021 Compared to Average December Over Previous Five Years: 2016-2020

Cause Category	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	SYSTEM
Freight Interference - Total	**0**	**-**	**-**	**-**	**2**	**(4)**	**10**	**(1)**	**(5)**	**(6)**	**1**	**(2)**	**39**	**34**
Freight Interference - Peak	(2)	-	-	-	2	(1)	3	2	(1)	(2)	1	0	9	12
Primary	*(1)*	-	-	-	*2*	*0*	*3*	*3*	*(1)*	*(2)*	*1*	*1*	*8*	*15*
Secondary	*(0)*	-	-	-	*(0)*	*(1)*	*0*	*(1)*	*(1)*	-	-	*(1)*	*1*	*(3)*
Freight Interference - Off-Peak	2	-	-	-	-	(3)	7	(3)	(4)	(5)	0	(2)	30	22
Primary	*2*	-	-	-	*0*	*(2)*	*6*	*(2)*	*(2)*	*(2)*	*(1)*	*(2)*	*17*	*14*
Secondary	*0*	-	-	-	*(0)*	*(1)*	*1*	*(1)*	*(1)*	*(3)*	*1*	*(0)*	*13*	*8*
Signal/Switch Failure - Total	**(20)**	**(5)**	**0**	**15**	**0**	**4**	**(12)**	**(1)**	**0**	**3**	**8**	**9**	**(9)**	**(4)**
Signal/Switch Failure - Metra/PSA	(16)	(5)	0	15	-	8	(12)	1	1	(0)	8	10	(8)	3
Primary	*(10)*	*(1)*	*1*	*13*	-	*4*	*(9)*	*1*	*1*	-	*9*	*9*	*(4)*	*13*
Secondary	*(6)*	*(4)*	*(1)*	*2*	-	*5*	*(3)*	*1*	*0*	*(0)*	*(1)*	*0*	*(4)*	*(10)*
Signal/Switch Failure - Foreign	(4)	-	-	-	0	(4)	1	(2)	(1)	4	-	(0)	(1)	(7)
Primary	*(2)*	-	-	-	*0*	*(1)*	*1*	*(0)*	*(0)*	*2*	-	*(0)*	*(1)*	*(2)*
Secondary	*(1)*	-	-	-	-	*(3)*	*(0)*	*(2)*	*(1)*	*2*	-	-	*(0)*	*(5)*
Mechanical Failure - Total	**(19)**	**(0)**	**(1)**	**-**	**(0)**	**0**	**4**	**0**	**(6)**	**(1)**	**10**	**(3)**	**(1)**	**(17)**
Mechanical Failure - Metra/PSA	(19)	(0)	-	-	(0)	2	4	0	(6)	(1)	10	(3)	(1)	(15)
Non-Locomotive Equipment Issue - Metra/PSA	(7)	(0)	-	-	-	1	4	(0)	(3)	(1)	4	(3)	(3)	(7)
Primary	*(2)*	*(0)*	-	-	-	*(0)*	*2*	*(0)*	*0*	*(0)*	*2*	*(2)*	*(1)*	*(2)*
Secondary	*(5)*	-	-	-	-	*2*	*2*	-	*(3)*	*(0)*	*2*	*(1)*	*(2)*	*(5)*
Locomotive Issue - Metra/PSA	(12)	-	-	-	(0)	0	1	0	(4)	(1)	6	(1)	2	(8)
Primary	*(5)*	-	-	-	*(0)*	*1*	*(1)*	*(1)*	*(1)*	*(0)*	*1*	*(0)*	*2*	*(5)*
Secondary	*(7)*	-	-	-	-	*(0)*	*1*	*1*	*(2)*	*(0)*	*5*	*(0)*	*0*	*(3)*
Mechanical Failure - Foreign	-	0	(1)	-	-	(2)	-	-	-	-	-	-	-	(2)
Passenger Train Interference - Total	**0**	**(4)**	**(1)**	**(1)**	**(0)**	**(1)**	**1**	**(1)**	**(0)**	**(0)**	**-**	**-**	**(0)**	**(8)**
Passenger Train Interference - Metra/PSA	-	-	-	-	-	(0)	(0)	(0)	(0)	(0)	-	-	(0)	(2)
Passenger Train Interference - Foreign	0	(4)	(1)	(1)	(0)	(1)	1	(0)	-	(0)	-	-	-	(7)
Accident - Total	**(4)**	**(6)**	**(1)**	**(1)**	**-**	**(1)**	**(1)**	**-**	**(2)**	**(0)**	**(1)**	**7**	**(2)**	**(12)**
Accident - Metra/PSA	(3)	(6)	(1)	(1)	-	(1)	(1)	-	(1)	(0)	(1)	7	(4)	(13)
Accident - Foreign	(0)	-	-	-	-	-	-	-	(1)	-	-	-	1	0
Track Work - Total	**(4)**	**(4)**	**(1)**	**(2)**	**1**	**(6)**	**(5)**	**(2)**	**4**	**(0)**	**9**	**(1)**	**(2)**	**(14)**
Track Work - Metra/PSA	(4)	(4)	(1)	(2)	(0)	(6)	(5)	(2)	3	(0)	9	(1)	(2)	(16)
Track Work - Foreign	-	-	-	-	1	-	-	-	1	-	-	-	-	2
Human Error - Total	**(14)**	**(1)**	**3**	**3**	**(1)**	**(2)**	**(1)**	**(2)**	**(3)**	**(1)**	**(2)**	**1**	**(1)**	**(21)**
Human Error - Metra/PSA	(9)	(1)	3	3	(1)	(3)	(1)	(1)	(3)	(0)	(2)	2	(3)	(17)
Human Error - Foreign	(5)	-	-	-	0	0	0	(1)	(0)	(1)	-	(0)	2	(4)
PTC Related - Total	**(1)**	**1**	**-**	**0**	**3**	**1**	**7**	**4**	**1**	**5**	**(0)**	**1**	**(6)**	**16**
PTC Related - Metra/PSA	(1)	(0)	-	0	2	1	7	2	1	4	(0)	1	(6)	11
PTC Related - Foreign	-	1	-	-	1	-	-	2	-	1	-	-	-	4
Weather - Total	**(10)**	**10**	**(1)**	**2**	**(0)**	**(7)**	**(9)**	**(0)**	**(16)**	**0**	**14**	**(5)**	**(7)**	**(30)**
Weather - Metra/PSA	(10)	10	(1)	2	(0)	(7)	(9)	(0)	(16)	0	14	(5)	(7)	(30)
Weather - Foreign	-	-	-	-	(0)	-	-	-	(0)	-	-	-	-	(0)
Passenger Related - Total	**(2)**	**2**	**(1)**	**1**	**1**	**(8)**	**(3)**	**(2)**	**(9)**	**(1)**	**(2)**	**(14)**	**(5)**	**(41)**
Obstruction/Debris - Total	**(4)**	**(2)**	**0**	**(0)**	**-**	**4**	**(2)**	**(5)**	**4**	**(0)**	**2**	**(0)**	**(4)**	**(6)**
Catenary Failure - Total	**-**	**(9)**	**(3)**	**(3)**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**(15)**
Other - Total	**-**	**2**	**2**	**-**	**-**	**(0)**	**1**	**1**	**(1)**	**4**	**-**	**(0)**	**(2)**	**6**
Total Trains Delayed	**(77)**	**(17)**	**(3)**	**14**	**5**	**(20)**	**(10)**	**(9)**	**(32)**	**2**	**40**	**(7)**	**0**	**(114)**
Total Metra/PSA Delays	-69	-14	-1	15	1	-10	-22	-6	-26	5	39	-5	-41	-134
Total Foreign Carrier Delays	-8	-3	-2	-1	4	-10	12	-3	-6	-3	1	-2	41	20

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Effective January 2020, Metra has updated the delay cause categories in this table; totals by cause category for prior years may not match what was previously reported.

Table 6.a: Train Delays by Cause and Line - YTD

January - December 2021

Top 2 causes for each line and the system are shaded

Cause Category	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	SYSTEM
Freight Interference - Total	**95**	**-**	**-**	**-**	**66**	**58**	**154**	**36**	**29**	**64**	**19**	**56**	**447**	**1,024**
Freight Interference - Peak	27	-	-	-	54	18	60	28	7	37	9	33	133	406
Primary	*21*	*-*	*-*	*-*	*53*	*16*	*49*	*24*	*5*	*27*	*7*	*29*	*93*	*324*
Secondary	*6*	*-*	*-*	*-*	*1*	*2*	*11*	*4*	*2*	*10*	*2*	*4*	*40*	*82*
Freight Interference - Off-Peak	68	-	-	-	12	40	94	8	22	27	10	23	314	618
Primary	*63*	*-*	*-*	*-*	*9*	*36*	*85*	*5*	*21*	*23*	*6*	*20*	*222*	*490*
Secondary	*5*	*-*	*-*	*-*	*3*	*4*	*9*	*3*	*1*	*4*	*4*	*3*	*92*	*128*
Signal/Switch Failure - Total	**40**	**56**	**20**	**55**	**31**	**182**	**94**	**37**	**168**	**61**	**26**	**49**	**66**	**885**
Signal/Switch Failure - Metra/PSA	21	56	20	55	-	158	87	21	164	25	26	33	53	719
Primary	*17*	*41*	*16*	*36*	*-*	*118*	*71*	*20*	*144*	*16*	*22*	*27*	*41*	*569*
Secondary	*4*	*15*	*4*	*19*	*-*	*40*	*16*	*1*	*20*	*9*	*4*	*6*	*12*	*150*
Signal/Switch Failure - Foreign	19	-	-	-	31	24	7	16	4	36	-	16	13	166
Primary	*18*	*-*	*-*	*-*	*31*	*18*	*6*	*13*	*4*	*30*	*-*	*14*	*13*	*147*
Secondary	*1*	*-*	*-*	*-*	*-*	*6*	*1*	*3*	*-*	*6*	*-*	*2*	*-*	*19*
Mechanical Failure - Total	**52**	**6**	**1**	**6**	**5**	**93**	**73**	**28**	**82**	**4**	**84**	**30**	**67**	**531**
Mechanical Failure - Metra/PSA	51	3	1	6	5	93	73	28	82	4	84	30	67	527
Non-Locomotive Equipment Issue - Metra/PSA	19	3	1	6	2	12	21	5	18	-	21	10	35	153
Primary	*14*	*2*	*1*	*2*	*2*	*7*	*14*	*2*	*16*	*-*	*15*	*8*	*17*	*100*
Secondary	*5*	*1*	*-*	*4*	*-*	*5*	*7*	*3*	*2*	*-*	*6*	*2*	*18*	*53*
Locomotive Issue - Metra/PSA	32	-	-	-	3	81	52	23	64	4	63	20	32	374
Primary	*19*	*-*	*-*	*-*	*2*	*31*	*23*	*10*	*36*	*3*	*22*	*13*	*17*	*176*
Secondary	*13*	*-*	*-*	*-*	*1*	*50*	*29*	*13*	*28*	*1*	*41*	*7*	*15*	*198*
Mechanical Failure - Foreign	1	3	-	-	-	-	-	-	-	-	-	-	-	4
Passenger Train Interference - Total	**8**	**2**	**-**	**20**	**5**	**31**	**6**	**14**	**7**	**4**	**5**	**3**	**-**	**105**
Passenger Train Interference - Metra/PSA	-	2	-	19	-	21	5	14	6	-	5	3	-	75
Passenger Train Interference - Foreign	8	-	-	1	5	10	1	-	1	4	-	-	-	30
Accident - Total	**97**	**11**	**7**	**-**	**2**	**11**	**15**	**4**	**46**	**4**	**21**	**96**	**29**	**343**
Accident - Metra/PSA	70	11	7	-	-	10	9	4	46	4	20	95	8	284
Accident - Foreign	27	-	-	-	2	1	6	-	-	-	1	1	21	59
Track Work - Total	**65**	**43**	**2**	**36**	**8**	**39**	**39**	**4**	**81**	**16**	**124**	**58**	**52**	**567**
Track Work - Metra/PSA	64	42	2	36	1	33	36	4	79	9	124	54	52	536
Track Work - Foreign	1	1	-	-	7	6	3	-	2	7	-	4	-	31
Human Error - Total	**55**	**20**	**17**	**31**	**16**	**74**	**59**	**32**	**77**	**16**	**72**	**66**	**61**	**596**
Human Error - Metra/PSA	28	20	17	31	8	24	48	17	77	11	49	39	38	407
Human Error - Foreign	27	-	-	-	8	50	11	15	-	5	23	27	23	189
PTC Related - Total	**6**	**14**	**5**	**17**	**25**	**80**	**54**	**26**	**47**	**50**	**44**	**41**	**90**	**499**
PTC Related - Metra/PSA	6	11	5	15	8	70	49	13	45	21	44	41	83	411
PTC Related - Foreign	-	3	-	2	17	10	5	13	2	29	-	-	7	88
Weather - Total	**60**	**58**	**22**	**16**	**9**	**119**	**79**	**12**	**108**	**10**	**130**	**146**	**73**	**842**
Weather - Metra/PSA	46	58	22	16	7	116	76	12	108	8	119	142	67	797
Weather - Foreign	14	-	-	-	2	3	3	-	-	2	11	4	6	45
Passenger Related - Total	**29**	**58**	**17**	**16**	**2**	**40**	**71**	**1**	**88**	**-**	**66**	**53**	**123**	**564**
Obstruction/Debris - Total	**32**	**35**	**20**	**39**	**1**	**32**	**48**	**7**	**114**	**10**	**66**	**70**	**82**	**556**
Catenary Failure - Total	**-**	**18**	**11**	**21**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**50**
Other - Total	**27**	**3**	**2**	**1**	**2**	**1**	**10**	**1**	**3**	**10**	**3**	**-**	**5**	**68**
Total Trains Delayed	**566**	**324**	**124**	**258**	**172**	**760**	**702**	**202**	**850**	**249**	**660**	**668**	**1,095**	**6,630**
Total Metra/PSA Delays	374	317	124	255	34	598	512	122	812	102	606	560	578	4,994
Total Foreign Carrier Delays	192	7	0	3	138	162	190	80	38	147	54	108	517	1,636

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Table 6.b: Train Delays by Cause and Line - YTD

January - December Average Over Previous Five Years: 2016-2020

Top 2 causes for each line and the system are shaded

Cause Category	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	SYSTEM
Freight Interference - Total	**135**	**-**	**0**	**-**	**56**	**115**	**112**	**69**	**58**	**134**	**13**	**61**	**243**	**996**
Freight Interference - Peak	49	-	0	-	49	22	30	24	13	48	4	34	87	359
Primary	*28*	*-*	*-*	*-*	*41*	*14*	*21*	*18*	*8*	*37*	*2*	*18*	*40*	*227*
Secondary	*21*	*-*	*0*	*-*	*8*	*8*	*9*	*6*	*5*	*11*	*2*	*16*	*47*	*132*
Freight Interference - Off-Peak	86	-	-	-	7	94	82	45	46	86	9	27	156	637
Primary	*70*	*-*	*-*	*-*	*6*	*61*	*59*	*40*	*35*	*61*	*5*	*20*	*114*	*472*
Secondary	*17*	*-*	*-*	*-*	*1*	*32*	*23*	*5*	*11*	*25*	*3*	*7*	*42*	*165*
Signal/Switch Failure - Total	**229**	**83**	**36**	**36**	**29**	**205**	**143**	**73**	**136**	**101**	**27**	**76**	**105**	**1,277**
Signal/Switch Failure - Metra/PSA	141	83	36	36	3	161	121	33	133	39	27	57	91	961
Primary	*98*	*56*	*26*	*27*	*3*	*99*	*91*	*26*	*100*	*28*	*17*	*31*	*44*	*645*
Secondary	*43*	*27*	*10*	*9*	*0*	*61*	*31*	*7*	*33*	*11*	*10*	*26*	*47*	*315*
Signal/Switch Failure - Foreign	88	-	-	-	25	44	21	40	3	61	0	19	14	317
Primary	*68*	*-*	*-*	*-*	*21*	*23*	*15*	*30*	*2*	*41*	*-*	*12*	*10*	*221*
Secondary	*20*	*-*	*-*	*-*	*4*	*22*	*7*	*10*	*1*	*20*	*0*	*7*	*4*	*96*
Mechanical Failure - Total	**204**	**21**	**6**	**4**	**6**	**150**	**100**	**34**	**195**	**35**	**104**	**106**	**123**	**1,088**
Mechanical Failure - Metra/PSA	202	13	4	3	6	139	100	33	195	35	104	106	123	1,062
Non-Locomotive Equipment Issue - Metra/PSA	69	13	4	3	1	20	12	5	28	13	33	34	52	287
Primary	*29*	*5*	*2*	*1*	*1*	*11*	*8*	*3*	*13*	*8*	*19*	*19*	*26*	*144*
Secondary	*40*	*8*	*2*	*2*	*0*	*9*	*4*	*2*	*15*	*5*	*14*	*15*	*27*	*143*
Locomotive Issue - Metra/PSA	133	0	-	-	5	119	88	28	167	22	71	72	71	775
Primary	*41*	*-*	*-*	*-*	*4*	*37*	*35*	*10*	*54*	*10*	*23*	*24*	*25*	*263*
Secondary	*92*	*0*	*-*	*-*	*1*	*82*	*53*	*18*	*113*	*11*	*48*	*48*	*46*	*512*
Mechanical Failure - Foreign	2	8	2	2	0	11	1	1	-	-	-	-	-	25
Passenger Train Interference - Total	**22**	**10**	**3**	**4**	**9**	**35**	**5**	**10**	**5**	**29**	**-**	**3**	**3**	**140**
Passenger Train Interference - Metra/PSA	2	4	1	1	0	25	3	9	4	1	-	3	3	54
Passenger Train Interference - Foreign	21	6	2	4	9	10	2	1	1	28	-	-	1	85
Accident - Total	**83**	**37**	**7**	**12**	**3**	**42**	**44**	**12**	**32**	**17**	**42**	**93**	**57**	**481**
Accident - Metra/PSA	72	24	5	12	1	33	39	10	28	11	40	85	37	395
Accident - Foreign	11	13	2	-	2	9	6	3	5	7	1	8	19	86
Track Work - Total	**163**	**79**	**14**	**39**	**11**	**100**	**43**	**12**	**113**	**18**	**64**	**64**	**77**	**797**
Track Work - Metra/PSA	153	79	14	39	10	98	41	11	113	12	64	63	77	776
Track Work - Foreign	10	-	-	-	1	2	2	0	0	5	-	0	-	21
Human Error - Total	**178**	**35**	**14**	**17**	**19**	**117**	**67**	**27**	**85**	**39**	**58**	**66**	**76**	**798**
Human Error - Metra/PSA	103	34	14	17	4	71	48	13	83	18	51	50	59	564
Human Error - Foreign	76	1	-	1	15	46	19	14	2	21	7	16	17	234
PTC Related - Total	**34**	**10**	**3**	**6**	**6**	**11**	**15**	**6**	**47**	**8**	**39**	**36**	**57**	**278**
PTC Related - Metra/PSA	32	10	3	6	2	11	15	3	46	4	39	35	55	262
PTC Related - Foreign	2	-	-	-	4	0	-	2	1	4	-	1	1	16
Weather - Total	**130**	**85**	**30**	**40**	**4**	**88**	**75**	**19**	**135**	**11**	**89**	**121**	**57**	**884**
Weather - Metra/PSA	130	85	30	40	4	88	75	19	134	10	89	121	57	881
Weather - Foreign	0	-	-	-	0	0	-	-	1	1	-	0	0	3
Passenger Related - Total	**92**	**82**	**13**	**15**	**1**	**124**	**107**	**12**	**128**	**6**	**108**	**150**	**157**	**994**
Obstruction/Debris - Total	**90**	**44**	**12**	**38**	**5**	**50**	**47**	**22**	**91**	**31**	**35**	**88**	**94**	**648**
Catenary Failure - Total	**-**	**33**	**8**	**14**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**55**
Other - Total	**3**	**1**	**2**	**4**	**0**	**6**	**8**	**1**	**7**	**2**	**4**	**7**	**6**	**50**
Total Trains Delayed	**1,365**	**521**	**149**	**231**	**150**	**1,043**	**765**	**296**	**1,032**	**430**	**583**	**869**	**1,053**	**8,486**
Total Metra/PSA Delays	1,016	492	143	225	37	806	601	166	962	168	562	764	758	6,701
Total Foreign Carrier Delays	349	28	6	6	114	238	163	129	70	262	21	104	295	1,785

Data for current month is final (01/15/2021) version of TOPS

'Metra/PSA' refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation.

'Foreign' refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations.

Effective January 2020, Metra has updated the delay cause categories in this table; totals by cause category for prior years may not match what was previously reported.

Table 6.c: Train Delays by Cause and Line - YTD

January - December 2021 Compared to Average January - December Average Over Previous Five Years: 2016-2020

Cause Category	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	SYSTEM
Freight Interference - Total	**(40)**	**-**	**(0)**	**-**	**10**	**(57)**	**42**	**(33)**	**(29)**	**(70)**	**6**	**(5)**	**204**	**28**
Freight Interference - Peak	(22)	-	(0)	-	5	(4)	30	4	(6)	(11)	5	(1)	46	47
Primary	*(7)*	*-*	*-*	*-*	*12*	*2*	*28*	*6*	*(3)*	*(10)*	*5*	*11*	*53*	*97*
Secondary	*(15)*	*-*	*(0)*	*-*	*(7)*	*(6)*	*2*	*(2)*	*(3)*	*(1)*	*-*	*(12)*	*(7)*	*(50)*
Freight Interference - Off-Peak	(18)	-	-	-	5	(54)	12	(37)	(24)	(59)	1	(4)	158	(19)
Primary	*(7)*	*-*	*-*	*-*	*3*	*(25)*	*26*	*(35)*	*(14)*	*(38)*	*1*	*0*	*108*	*18*
Secondary	*(12)*	*-*	*-*	*-*	*2*	*(28)*	*(14)*	*(2)*	*(10)*	*(21)*	*1*	*(4)*	*50*	*(37)*
Signal/Switch Failure - Total	**(189)**	**(27)**	**(16)**	**19**	**2**	**(23)**	**(49)**	**(36)**	**32**	**(40)**	**(1)**	**(27)**	**(39)**	**(392)**
Signal/Switch Failure - Metra/PSA	(120)	(27)	(16)	19	(3)	(3)	(34)	(12)	31	(14)	(1)	(24)	(38)	(242)
Primary	*(81)*	*(15)*	*(10)*	*9*	*(3)*	*19*	*(20)*	*(6)*	*44*	*(12)*	*5*	*(4)*	*(3)*	*(76)*
Secondary	*(39)*	*(12)*	*(6)*	*10*	*(0)*	*(21)*	*(15)*	*(6)*	*(13)*	*(2)*	*(6)*	*(20)*	*(35)*	*(165)*
Signal/Switch Failure - Foreign	(69)	-	-	-	6	(20)	(14)	(24)	1	(25)	(0)	(3)	(1)	(151)
Primary	*(50)*	*-*	*-*	*-*	*10*	*(5)*	*(9)*	*(17)*	*2*	*(11)*	*-*	*2*	*3*	*(74)*
Secondary	*(19)*	*-*	*-*	*-*	*(4)*	*(16)*	*(6)*	*(7)*	*(1)*	*(14)*	*(0)*	*(5)*	*(4)*	*(77)*
Mechanical Failure - Total	**(152)**	**(15)**	**(5)**	**2**	**(1)**	**(57)**	**(27)**	**(6)**	**(113)**	**(31)**	**(20)**	**(76)**	**(56)**	**(557)**
Mechanical Failure - Metra/PSA	(151)	(10)	(3)	3	(1)	(46)	(27)	(5)	(113)	(31)	(20)	(76)	(56)	(535)
Non-Locomotive Equipment Issue - Metra/PSA	(50)	(10)	(3)	3	1	(8)	9	(0)	(10)	(13)	(12)	(24)	(17)	(134)
Primary	*(15)*	*(3)*	*(1)*	*1*	*1*	*(4)*	*6*	*(1)*	*3*	*(8)*	*(4)*	*(11)*	*(9)*	*(44)*
Secondary	*(35)*	*(7)*	*(2)*	*2*	*(0)*	*(4)*	*3*	*1*	*(13)*	*(5)*	*(8)*	*(13)*	*(9)*	*(90)*
Locomotive Issue - Metra/PSA	(101)	(0)	-	-	(2)	(38)	(36)	(5)	(103)	(18)	(8)	(52)	(39)	(401)
Primary	*(22)*	*-*	*-*	*-*	*(2)*	*(6)*	*(12)*	*0*	*(18)*	*(7)*	*(1)*	*(11)*	*(8)*	*(87)*
Secondary	*(79)*	*(0)*	*-*	*-*	*(0)*	*(32)*	*(24)*	*(5)*	*(85)*	*(10)*	*(7)*	*(41)*	*(31)*	*(314)*
Mechanical Failure - Foreign	(1)	(5)	(2)	(2)	(0)	(11)	(1)	(1)	-	-	-	-	-	(21)
Passenger Train Interference - Total	**(14)**	**(8)**	**(3)**	**16**	**(4)**	**(4)**	**1**	**4**	**2**	**(25)**	**5**	**0**	**(3)**	**(35)**
Passenger Train Interference - Metra/PSA	(2)	(2)	(1)	18	(0)	(4)	2	5	2	(1)	5	0	(3)	21
Passenger Train Interference - Foreign	(13)	(6)	(2)	(3)	(4)	(0)	(1)	(1)	(0)	(24)	-	-	(1)	(55)
Accident - Total	**14**	**(26)**	**-**	**(12)**	**(1)**	**(31)**	**(29)**	**(8)**	**14**	**(13)**	**(21)**	**3**	**(28)**	**(138)**
Accident - Metra/PSA	(2)	(13)	2	(12)	(1)	(23)	(30)	(6)	18	(7)	(20)	10	(29)	(111)
Accident - Foreign	16	(13)	(2)	-	(0)	(8)	0	(3)	(5)	(7)	(0)	(7)	2	(27)
Track Work - Total	**(98)**	**(36)**	**(12)**	**(3)**	**(3)**	**(61)**	**(4)**	**(8)**	**(32)**	**(2)**	**60**	**(6)**	**(25)**	**(230)**
Track Work - Metra/PSA	(89)	(37)	(12)	(3)	(9)	(65)	(5)	(7)	(34)	(3)	60	(9)	(25)	(240)
Track Work - Foreign	(9)	1	-	-	6	4	1	(0)	2	2	-	4	-	10
Human Error - Total	**(123)**	**(15)**	**3**	**14**	**(3)**	**(43)**	**(8)**	**5**	**(8)**	**(23)**	**14**	**0**	**(15)**	**(202)**
Human Error - Metra/PSA	(75)	(14)	3	14	4	(47)	0	4	(6)	(7)	(2)	(11)	(21)	(157)
Human Error - Foreign	(49)	(1)	-	(1)	(7)	4	(8)	1	(2)	(16)	16	11	6	(45)
PTC Related - Total	**(28)**	**4**	**2**	**11**	**19**	**69**	**39**	**20**	**-**	**42**	**5**	**5**	**33**	**221**
PTC Related - Metra/PSA	(26)	1	2	9	6	59	34	10	(1)	17	5	6	28	149
PTC Related - Foreign	(2)	3	-	2	13	10	5	11	1	25	-	(1)	6	72
Weather - Total	**(70)**	**(27)**	**(8)**	**(24)**	**5**	**31**	**4**	**(7)**	**(27)**	**(1)**	**41**	**25**	**16**	**(42)**
Weather - Metra/PSA	(84)	(27)	(8)	(24)	3	28	1	(7)	(26)	(2)	30	21	10	(84)
Weather - Foreign	14	-	-	-	2	3	3	-	(1)	1	11	4	6	42
Passenger Related - Total	**(63)**	**(24)**	**4**	**1**	**1**	**(84)**	**(36)**	**(11)**	**(40)**	**(6)**	**(42)**	**(97)**	**(34)**	**(430)**
Obstruction/Debris - Total	**(58)**	**(9)**	**8**	**1**	**(4)**	**(18)**	**1**	**(15)**	**23**	**(21)**	**31**	**(18)**	**(12)**	**(92)**
Catenary Failure - Total	**-**	**(15)**	**3**	**7**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**(5)**
Other - Total	**24**	**2**	**0**	**(3)**	**2**	**(5)**	**2**	**(0)**	**(4)**	**8**	**(1)**	**(7)**	**(1)**	**18**
Total Trains Delayed	**(799)**	**(197)**	**(25)**	**27**	**22**	**(283)**	**(63)**	**(94)**	**(182)**	**(181)**	**77**	**(201)**	**42**	**(1,856)**
Total Metra/PSA Delays	-642	-175	-19	30	-3	-208	-89	-44	-150	-66	44	-204	-180	-1,707
Total Foreign Carrier Delays	-157	-21	-6	-3	24	-76	27	-49	-32	-115	33	4	222	-149

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'Foreign' refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations.

Effective January 2020, Metra has updated the delay cause categories in this table; totals by cause category for prior years may not match what was previously reported.

Table 7.a: Train Delays by Cause and Month

2021

Top 2 causes for each month and year-to-date are shaded

Cause Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan - Dec	
Freight Interference - Total	**65**	**109**	**39**	**44**	**60**	**79**	**120**	**139**	**100**	**68**	**79**	**122**	**1,024**	**15.4%**
Freight Interference - Peak	31	52	21	17	23	26	42	55	29	35	34	41	406	6.1%
Primary	*26*	*43*	*17*	*16*	*21*	*22*	*31*	*38*	*22*	*28*	*28*	*32*	*324*	*4.9%*
Secondary	*5*	*9*	*4*	*1*	*2*	*4*	*11*	*17*	*7*	*7*	*6*	*9*	*82*	*1.2%*
Freight Interference - Off-Peak	34	57	18	27	37	53	78	84	71	33	45	81	618	9.3%
Primary	*24*	*47*	*16*	*26*	*32*	*44*	*54*	*64*	*61*	*28*	*36*	*58*	*490*	*7.4%*
Secondary	*10*	*10*	*2*	*1*	*5*	*9*	*24*	*20*	*10*	*5*	*9*	*23*	*128*	*1.9%*
Signal/Switch Failure - Total	**46**	**93**	**43**	**37**	**50**	**84**	**117**	**59**	**67**	**106**	**75**	**108**	**885**	**13.3%**
Signal/Switch Failure - Metra/PSA	37	65	37	28	30	60	108	49	53	92	62	98	719	10.8%
Primary	*32*	*51*	*29*	*26*	*27*	*51*	*80*	*39*	*41*	*73*	*43*	*77*	*569*	*8.6%*
Secondary	*5*	*14*	*8*	*2*	*3*	*9*	*28*	*10*	*12*	*19*	*19*	*21*	*150*	*2.3%*
Signal/Switch Failure - Foreign	9	28	6	9	20	24	9	10	14	14	13	10	166	2.5%
Primary	*8*	*25*	*6*	*7*	*18*	*23*	*8*	*9*	*10*	*13*	*12*	*8*	*147*	*2.2%*
Secondary	*1*	*3*	*-*	*2*	*2*	*1*	*1*	*1*	*4*	*1*	*1*	*2*	*19*	*0.3%*
Mechanical Failure - Total	**25**	**43**	**23**	**37**	**32**	**43**	**75**	**51**	**53**	**40**	**36**	**73**	**531**	**8.0%**
Mechanical Failure - Metra/PSA	25	43	23	37	32	43	75	51	52	40	36	70	527	7.9%
Non-Locomotive Equipment Issue - Metra/PSA	4	14	9	3	10	20	17	7	20	9	22	18	153	2.3%
Primary	*3*	*8*	*6*	*3*	*7*	*13*	*10*	*6*	*13*	*8*	*13*	*10*	*100*	*1.5%*
Secondary	*1*	*6*	*3*	*-*	*3*	*7*	*7*	*1*	*7*	*1*	*9*	*8*	*53*	*0.8%*
Locomotive Issue - Metra/PSA	21	29	14	34	22	23	58	44	32	31	14	52	374	5.6%
Primary	*11*	*19*	*11*	*14*	*10*	*14*	*28*	*14*	*17*	*14*	*6*	*18*	*176*	*2.7%*
Secondary	*10*	*10*	*3*	*20*	*12*	*9*	*30*	*30*	*15*	*17*	*8*	*34*	*198*	*3.0%*
Mechanical Failure - Foreign	-	-	-	-	-	-	-	-	1	-	-	3	4	0.1%
Passenger Train Interference - Total	**2**	**9**	**3**	**1**	**1**	**5**	**16**	**18**	**18**	**13**	**13**	**6**	**105**	**1.6%**
Passenger Train Interference - Metra/PSA	2	7	3	1	-	4	9	16	13	10	8	2	75	1.1%
Passenger Train Interference - Foreign	-	2	-	-	1	1	7	2	5	3	5	4	30	0.5%
Accident - Total	**30**	**35**	**24**	**40**	**17**	**36**	**5**	**66**	**50**	**15**	**8**	**17**	**343**	**5.2%**
Accident - Metra/PSA	23	21	24	39	14	23	5	61	36	15	8	15	284	4.3%
Accident - Foreign	7	14	-	1	3	13	-	5	14	-	-	2	59	0.9%
Track Work - Total	**1**	**18**	**40**	**17**	**28**	**38**	**76**	**77**	**93**	**63**	**91**	**25**	**567**	**8.6%**
Track Work - Metra/PSA	1	18	38	16	27	37	73	71	86	62	84	23	536	8.1%
Track Work - Foreign	-	-	2	1	1	1	3	6	7	1	7	2	31	0.5%
Human Error - Total	**25**	**62**	**27**	**23**	**47**	**29**	**108**	**83**	**59**	**46**	**50**	**37**	**596**	**9.0%**
Human Error - Metra/PSA	19	52	19	16	34	20	71	53	37	17	40	29	407	6.1%
Human Error - Foreign	6	10	8	7	13	9	37	30	22	29	10	8	189	2.9%
PTC Related - Total	**33**	**32**	**35**	**26**	**37**	**60**	**50**	**41**	**51**	**37**	**49**	**48**	**499**	**7.5%**
PTC Related - Metra/PSA	28	26	29	16	31	54	39	33	48	29	35	43	411	6.2%
PTC Related - Foreign	5	6	6	10	6	6	11	8	3	8	14	5	88	1.3%
Weather - Total	**23**	**430**	**5**	**1**	**12**	**31**	**27**	**106**	**10**	**58**	**85**	**54**	**842**	**12.7%**
Weather - Metra/PSA	23	397	5	1	12	31	27	95	10	57	85	54	797	12.0%
Weather - Foreign	-	33	-	-	-	-	-	11	-	1	-	-	45	0.7%
Passenger Related - Total	**20**	**37**	**23**	**18**	**27**	**67**	**89**	**76**	**63**	**50**	**50**	**44**	**564**	**8.5%**
Obstruction/Debris - Total	**36**	**36**	**21**	**26**	**50**	**45**	**72**	**34**	**68**	**75**	**52**	**41**	**556**	**8.4%**
Catenary Failure - Total	**-**	**-**	**-**	**2**	**11**	**-**	**2**	**14**	**14**	**-**	**7**	**-**	**50**	**0.8%**
Other - Total	**-**	**-**	**1**	**4**	**4**	**1**	**2**	**7**	**2**	**30**	**7**	**10**	**68**	**1.0%**
Total Trains Delayed	**306**	**904**	**284**	**276**	**376**	**518**	**759**	**771**	**648**	**601**	**602**	**585**	**6,630**	**100.0%**
Total Metra/PSA Delays	214	702	223	204	272	385	572	560	482	477	474	429	4,994	75.3%
Total Foreign Carrier Delays	92	202	61	72	104	133	187	211	166	124	128	156	1,636	24.7%

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'Foreign' refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations.

Table 7.b: Train Delays by Cause and Month

2020

Top 2 causes for each month and year-to-date are shaded

Cause Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan - Dec	
Freight Interference - Total	**55**	**52**	**58**	**18**	**12**	**37**	**63**	**68**	**46**	**44**	**51**	**51**	**555**	**11.8%**
Freight Interference - Peak	19	13	20	6	3	12	24	33	20	19	18	21	208	4.4%
Primary	*13*	*10*	*13*	*6*	*3*	*12*	*22*	*27*	*19*	*18*	*18*	*14*	*175*	*3.7%*
Secondary	*6*	*3*	*7*	*-*	*-*	*-*	*2*	*6*	*1*	*1*	*-*	*7*	*33*	*0.7%*
Freight Interference - Off-Peak	36	39	38	12	9	25	39	35	26	25	33	30	347	7.4%
Primary	*26*	*31*	*26*	*11*	*8*	*18*	*30*	*28*	*24*	*23*	*28*	*28*	*281*	*6.0%*
Secondary	*10*	*8*	*12*	*1*	*1*	*7*	*9*	*7*	*2*	*2*	*5*	*2*	*66*	*1.4%*
Signal/Switch Failure - Total	**87**	**146**	**47**	**22**	**31**	**44**	**56**	**32**	**37**	**36**	**50**	**24**	**612**	**13.0%**
Signal/Switch Failure - Metra/PSA	70	77	36	20	24	35	51	29	30	31	48	21	472	10.0%
Primary	*52*	*46*	*28*	*18*	*20*	*29*	*39*	*28*	*23*	*23*	*41*	*16*	*363*	*7.7%*
Secondary	*18*	*31*	*8*	*2*	*4*	*6*	*12*	*1*	*7*	*8*	*7*	*5*	*109*	*2.3%*
Signal/Switch Failure - Foreign	17	69	11	2	7	9	5	3	7	5	2	3	140	3.0%
Primary	*15*	*61*	*10*	*2*	*6*	*9*	*4*	*3*	*6*	*4*	*2*	*2*	*124*	*2.6%*
Secondary	*2*	*8*	*1*	*-*	*1*	*-*	*1*	*-*	*1*	*1*	*-*	*1*	*16*	*0.3%*
Mechanical Failure - Total	**99**	**106**	**37**	**15**	**13**	**12**	**23**	**21**	**32**	**32**	**10**	**26**	**426**	**9.1%**
Mechanical Failure - Metra/PSA	93	92	37	15	13	11	23	21	32	32	10	26	405	8.6%
Non-Locomotive Equipment Issue - Metra/PSA	29	45	11	6	4	3	11	4	10	17	4	3	147	3.1%
Primary	*12*	*16*	*5*	*4*	*3*	*3*	*10*	*4*	*9*	*13*	*4*	*3*	*86*	*1.8%*
Secondary	*17*	*29*	*6*	*2*	*1*	*-*	*1*	*-*	*1*	*4*	*-*	*-*	*61*	*1.3%*
Locomotive Issue - Metra/PSA	64	47	26	9	9	8	12	17	22	15	6	23	258	5.5%
Primary	*16*	*18*	*15*	*5*	*7*	*6*	*10*	*10*	*8*	*14*	*2*	*11*	*122*	*2.6%*
Secondary	*48*	*29*	*11*	*4*	*2*	*2*	*2*	*7*	*14*	*1*	*4*	*12*	*136*	*2.9%*
Mechanical Failure - Foreign	6	14	-	-	-	1	-	-	-	-	-	-	21	0.4%
Passenger Train Interference - Total	**5**	**7**	**2**	**2**	**-**	**3**	**3**	**9**	**1**	**2**	**3**	**2**	**39**	**0.8%**
Passenger Train Interference - Metra/PSA	3	2	2	2	-	2	3	8	1	-	2	2	27	0.6%
Passenger Train Interference - Foreign	2	5	-	-	-	1	-	1	-	2	1	-	12	0.3%
Accident - Total	**57**	**18**	**20**	**4**	**5**	**5**	**25**	**19**	**10**	**15**	**30**	**21**	**229**	**4.9%**
Accident - Metra/PSA	57	17	13	4	1	1	18	19	10	10	27	21	198	4.2%
Accident - Foreign	-	1	7	-	4	4	7	-	-	5	3	-	31	0.7%
Track Work - Total	**41**	**46**	**38**	**18**	**41**	**59**	**40**	**30**	**28**	**28**	**40**	**7**	**416**	**8.8%**
Track Work - Metra/PSA	40	43	34	13	40	56	40	25	25	27	40	7	390	8.3%
Track Work - Foreign	1	3	4	5	1	3	-	5	3	1	-	-	26	0.6%
Human Error - Total	**103**	**99**	**42**	**14**	**17**	**18**	**36**	**36**	**28**	**36**	**29**	**23**	**481**	**10.2%**
Human Error - Metra/PSA	97	80	39	10	17	14	24	28	17	25	24	21	396	8.4%
Human Error - Foreign	6	19	3	4	-	4	12	8	11	11	5	2	85	1.8%
PTC Related - Total	**43**	**36**	**21**	**28**	**29**	**20**	**33**	**27**	**48**	**37**	**35**	**43**	**400**	**8.5%**
PTC Related - Metra/PSA	39	32	14	19	29	16	26	24	47	35	29	39	349	7.4%
PTC Related - Foreign	4	4	7	9	-	4	7	3	1	2	6	4	51	1.1%
Weather - Total	**33**	**89**	**4**	**7**	**24**	**11**	**26**	**148**	**10**	**80**	**93**	**16**	**541**	**11.5%**
Weather - Metra/PSA	32	89	4	7	23	10	26	148	10	80	93	16	538	11.4%
Weather - Foreign	1	-	-	-	1	1	-	-	-	-	-	-	3	0.1%
Passenger Related - Total	**57**	**55**	**37**	**5**	**12**	**47**	**24**	**27**	**24**	**26**	**12**	**18**	**344**	**7.3%**
Obstruction/Debris - Total	**97**	**39**	**25**	**18**	**165**	**21**	**27**	**31**	**31**	**22**	**75**	**18**	**569**	**12.1%**
Catenary Failure - Total	**21**	**-**	**25**	**-**	**-**	**-**	**1**	**-**	**-**	**-**	**-**	**-**	**47**	**1.0%**
Other - Total	**11**	**8**	**3**	**3**	**1**	**-**	**5**	**2**	**3**	**6**	**1**	**3**	**46**	**1.0%**
Total Trains Delayed	**709**	**701**	**359**	**154**	**350**	**277**	**362**	**450**	**298**	**364**	**429**	**252**	**4,705**	**100.0%**
Total Metra/PSA Delays	617	534	269	116	325	213	268	362	230	294	361	192	3,781	80.4%
Total Foreign Carrier Delays	92	167	90	38	25	64	94	88	68	70	68	60	924	19.6%

Data for current month is final (01/15/2021) version of TOPS

'Metra/PSA' refers to delays that may be directly or indirectly attributed to Metra or Metra Purchase of Service Agreement partners (BNSF and UP) in commuter rail operation.

'Foreign' refers to delays that may be directly or indirectly attributed to other carriers, including freight carriers, Amtrak, and NICTD, that affect Metra trains. 'Foreign' also includes delays attributable to BNSF and Union Pacific freight operations.

Effective January 2020, Metra has updated the delay cause categories in this table; totals by cause category for prior years may not match what was previously reported.

REDACTED PUBLIC RECORD VERSION

Table 8: Train Delays by Duration

December 2021

Minutes	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	System
Weekday Peak *														
6-10	1	3	4	4	7	12	20	10	2	7	4	7	10	91
11-15	0	6	1	3	1	9	3	1	4	5	4	8	7	52
16-20	0	0	0	1	2	0	2	1	2	1	3	4	2	18
21+	0	0	1	1	1	3	0	0	1	4	6	10	8	35
Annulled	0	1	0	1	0	0	1	0	0	1	4	1	0	9
Sub-Total	1	10	6	10	11	24	26	12	9	18	21	30	27	205
Weekday Off-Peak **														
6-10	4	8	4	6	1	7	12	4	9	8	12	10	18	103
11-15	5	1	0	2	1	6	6	0	9	2	9	5	14	60
16-20	1	2	0	0	0	1	2	2	3	1	7	1	11	31
21+	1	3	0	6	1	0	2	0	8	0	15	8	12	56
Annulled	0	2	0	4	0	0	0	0	1	1	13	0	2	23
Sub-Total	11	16	4	18	3	14	22	6	30	12	56	24	57	273
Saturday														
6-10	4	4	0	0	0	4	7	0	2	0	0	3	4	28
11-15	1	0	0	2	0	3	7	0	0	0	1	0	1	15
16-20	0	0	0	1	0	3	1	0	0	0	0	0	1	6
21+	0	0	0	1	0	2	3	0	0	0	0	1	0	7
Annulled	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sub-Total	5	4	0	4	0	12	18	0	2	0	1	4	6	56
Sunday-Holiday														
6-10	2	0	0	0	0	3	6	0	6	0	1	1	6	25
11-15	1	1	0	0	0	1	1	0	2	0	0	1	1	8
16-20	0	0	0	0	0	0	1	0	1	0	1	0	1	4
21+	0	0	0	0	0	5	2	0	0	0	1	0	4	12
Annulled	0	0	0	0	0	0	0	0	0	0	0	2	0	2
Sub-Total	3	1	0	0	0	9	10	0	9	0	3	4	12	51
December 2021 Total														
6-10	11	15	8	10	8	26	45	14	19	15	17	21	38	247
11-15	7	8	1	7	2	19	17	1	15	7	14	14	23	135
16-20	1	2	0	2	2	4	6	3	6	2	11	5	15	59
21+	1	3	1	8	2	10	7	0	9	4	22	19	24	110
Annulled	0	3	0	5	0	0	1	0	1	2	17	3	2	34
TOTAL	20	31	10	32	14	59	76	18	50	30	81	62	102	585
2021 Year-to-Date														
6-10	192	156	54	122	75	356	342	98	482	101	192	198	381	2,749
11-15	113	77	19	43	39	198	168	37	155	52	115	116	265	1,397
16-20	57	28	15	21	18	80	80	21	74	27	72	85	151	729
21+	130	44	23	45	37	106	99	39	117	61	198	220	268	1,387
Annulled	74	19	13	27	3	20	13	7	22	8	83	49	30	368
TOTAL	566	324	124	258	172	760	702	202	850	249	660	668	1,095	6,630

Share of Delays by Duration

Minutes	BNSF	ME-ML	ME-BI	ME-SC	HC	MD-N	MD-W	NCS	RI	SWS	UP-N	UP-NW	UP-W	System
December 2021 Total														
6-10	55.0%	48.4%	80.0%	31.3%	57.1%	44.1%	59.2%	77.8%	38.0%	50.0%	21.0%	33.9%	37.3%	42.2%
11-15	35.0%	25.8%	10.0%	21.9%	14.3%	32.2%	22.4%	5.6%	30.0%	23.3%	17.3%	22.6%	22.5%	23.1%
16-20	5.0%	6.5%	0.0%	6.3%	14.3%	6.8%	7.9%	16.7%	12.0%	6.7%	13.6%	8.1%	14.7%	10.1%
21+	5.0%	9.7%	10.0%	25.0%	14.3%	16.9%	9.2%	0.0%	18.0%	13.3%	27.2%	30.6%	23.5%	18.8%
Annulled	0.0%	9.7%	0.0%	15.6%	0.0%	0.0%	1.3%	0.0%	2.0%	6.7%	21.0%	4.8%	2.0%	5.8%
TOTAL	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
2021 Year-to-Date Delays By Duration														
6-10	33.9%	48.1%	43.5%	47.3%	43.6%	46.8%	48.7%	48.5%	56.7%	40.6%	29.1%	29.6%	34.8%	41.5%
11-15	20.0%	23.8%	15.3%	16.7%	22.7%	26.1%	23.9%	18.3%	18.2%	20.9%	17.4%	17.4%	24.2%	21.1%
16-20	10.1%	8.6%	12.1%	8.1%	10.5%	10.5%	11.4%	10.4%	8.7%	10.8%	10.9%	12.7%	13.8%	11.0%
21+	23.0%	13.6%	18.5%	17.4%	21.5%	13.9%	14.1%	19.3%	13.8%	24.5%	30.0%	32.9%	24.5%	20.9%
Annulled	13.1%	5.9%	10.5%	10.5%	1.7%	2.6%	1.9%	3.5%	2.6%	3.2%	12.6%	7.3%	2.7%	5.6%
TOTAL	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

*Includes peak direction trains operating during weekday peak periods. **Includes all other weekday trains.

Data for most recent month is final (01/14/2022) version from TOPS.

Table 9: Annual Train Delays and On-Time Performance

2016 - 2021

	Delays									On-Time Performance						
	2016	2017	2018	2019	2020	2016 - 2020 Avg	2021	2020 vs. 2021 change		2016	2017	2018	2019	2020	2016 - 2020 Avg	2021
BNSF	1,607	1,450	2,072	1,352	344	1,365	566	222	64.5%	94.0%	94.5%	92.2%	95.0%	97.9%	94.5%	97.1%
ME-ML	598	493	497	546	470	521	324	-146	-31.1%	97.5%	97.9%	98.0%	97.8%	97.3%	97.7%	98.2%
ME-BI	142	179	175	152	96	149	124	28	29.2%	98.7%	98.2%	97.6%	97.9%	98.1%	98.2%	97.4%
ME-SC	258	275	206	192	222	231	258	36	16.2%	98.5%	98.3%	98.5%	98.6%	98.2%	98.4%	98.0%
HC	101	121	189	216	125	150	172	47	37.6%	94.2%	93.2%	89.4%	87.9%	89.6%	90.9%	86.5%
MD-N	951	1,089	1,265	1,448	463	1,043	760	297	64.1%	94.6%	93.8%	92.7%	91.9%	95.8%	93.6%	93.0%
MD-W	875	761	733	841	614	765	702	88	14.3%	94.9%	95.5%	95.7%	95.1%	94.7%	95.2%	94.1%
NCS	307	333	367	292	179	296	202	23	12.8%	94.5%	94.0%	92.9%	94.3%	91.7%	93.7%	90.4%
RI	847	946	1,053	1,668	647	1,032	850	203	31.4%	96.1%	95.7%	94.8%	92.0%	95.8%	94.8%	95.7%
SWS	380	403	580	555	231	430	249	18	7.8%	95.2%	94.9%	92.7%	93.0%	94.0%	94.0%	91.0%
UP-N	446	572	691	955	252	583	660	408	161.9%	97.8%	97.2%	96.6%	95.3%	98.1%	96.9%	96.0%
UP-NW	695	905	951	1,346	447	869	668	221	49.4%	96.3%	95.1%	94.9%	93.0%	96.7%	95.1%	95.2%
UP-W	846	1,014	1,462	1,328	615	1,053	1,095	480	78.0%	95.1%	94.1%	91.5%	92.3%	94.9%	93.5%	90.5%
System	**8,053**	**8,541**	**10,241**	**10,891**	**4,705**	**8,486**	**6,630**	**1,925**	**40.9%**	**96.1%**	**95.8%**	**94.8%**	**94.6%**	**96.5%**	**95.5%**	**95.5%**

Delays data for most recent month is final (01/14/2022) version from TOPS.

Table 10: Annual System Causes of Train Delays
2016 to 2021

	2016		2017		2018		2019		2020		2016-2020 Avg		2021	
Cause Category	**Delays**	**%**	**Delays**	**%**	**Delays**	**%**	**Delays**	**%**	**Delays**	**%**	**Delays**	**%**	**Delays**	**%**
Freight Interference - Total	**842**	**10.5%**	**1,000**	**11.7%**	**1,514**	**14.8%**	**1,070**	**9.8%**	**555**	**11.8%**	**996**	**11.7%**	**1,024**	**15.4%**
Freight Interference - Peak	309	3.8%	357	4.2%	556	5.4%	366	3.4%	208	4.4%	359	4.2%	406	6.1%
Primary	*202*	*2.5%*	*228*	*2.7%*	*299*	*2.9%*	*232*	*2.1%*	*175*	*3.7%*	*227*	*2.7%*	*324*	*4.9%*
Secondary	*107*	*1.3%*	*129*	*1.5%*	*257*	*2.5%*	*134*	*1.2%*	*33*	*0.7%*	*132*	*1.6%*	*82*	*1.2%*
Freight Interference - Off-Peak	533	6.6%	643	7.5%	958	9.4%	704	6.5%	347	7.4%	637	7.5%	618	9.3%
Primary	*423*	*5.3%*	*476*	*5.6%*	*696*	*6.8%*	*485*	*4.5%*	*281*	*6.0%*	*472*	*5.6%*	*490*	*7.4%*
Secondary	*110*	*1.4%*	*167*	*2.0%*	*262*	*2.6%*	*219*	*2.0%*	*66*	*1.4%*	*165*	*1.9%*	*128*	*1.9%*
Signal/Switch Failure - Total	**1,390**	**17.3%**	**1,221**	**14.3%**	**1,565**	**15.3%**	**1,598**	**14.7%**	**612**	**13.0%**	**1,277**	**15.1%**	**885**	**13.3%**
Signal/Switch Failure - Metra/PSA	900	11.2%	996	11.7%	1,228	12.0%	1,207	11.1%	472	10.0%	961	11.3%	719	10.8%
Primary	*543*	*6.7%*	*639*	*7.5%*	*857*	*8.4%*	*825*	*7.6%*	*363*	*7.7%*	*645*	*7.6%*	*569*	*8.6%*
Secondary	*357*	*4.4%*	*357*	*4.2%*	*371*	*3.6%*	*382*	*3.5%*	*109*	*2.3%*	*315*	*3.7%*	*150*	*2.3%*
Signal/Switch Failure - Foreign	490	6.1%	225	2.6%	337	3.3%	391	3.6%	140	3.0%	317	3.7%	166	2.5%
Primary	*354*	*4.4%*	*140*	*1.6%*	*214*	*2.1%*	*273*	*2.5%*	*124*	*2.6%*	*221*	*2.6%*	*147*	*2.2%*
Secondary	*136*	*1.7%*	*85*	*1.0%*	*123*	*1.2%*	*118*	*1.1%*	*16*	*0.3%*	*96*	*1.1%*	*19*	*0.3%*
Mechanical Failure - Total	**1,188**	**14.8%**	**1,169**	**13.7%**	**1,403**	**13.7%**	**1,252**	**11.5%**	**426**	**9.1%**	**1,088**	**12.8%**	**531**	**8.0%**
Mechanical Failure - Metra/PSA	1,179	14.6%	1,147	13.4%	1,363	13.3%	1,217	11.2%	405	8.6%	1,062	12.5%	527	7.9%
Non-Locomotive Equipment Issue - Metra/PSA	276	3.4%	268	3.1%	388	3.8%	357	3.3%	147	3.1%	287	3.4%	153	2.3%
Primary	*148*	*1.8%*	*142*	*1.7%*	*178*	*1.7%*	*166*	*1.5%*	*86*	*1.8%*	*144*	*1.7%*	*100*	*1.5%*
Secondary	*128*	*1.6%*	*126*	*1.5%*	*210*	*2.1%*	*191*	*1.8%*	*61*	*1.3%*	*143*	*1.7%*	*53*	*0.8%*
Locomotive Issue - Metra/PSA	903	11.2%	879	10.3%	975	9.5%	860	7.9%	258	5.5%	775	9.1%	374	5.6%
Primary	*304*	*3.8%*	*308*	*3.6%*	*295*	*2.9%*	*285*	*2.6%*	*122*	*2.6%*	*263*	*3.1%*	*176*	*2.7%*
Secondary	*599*	*7.4%*	*571*	*6.7%*	*680*	*6.6%*	*575*	*5.3%*	*136*	*2.9%*	*512*	*6.0%*	*198*	*3.0%*
Mechanical Failure - Foreign	9	0.1%	22	0.3%	40	0.4%	35	0.3%	21	0.4%	25	0.3%	4	0.1%
Passenger Train Interference - Total	**154**	**1.9%**	**133**	**1.6%**	**222**	**2.2%**	**150**	**1.4%**	**39**	**0.8%**	**140**	**1.6%**	**105**	**1.6%**
Passenger Train Interference - Metra/PSA	49	0.6%	76	0.9%	78	0.8%	41	0.4%	27	0.6%	54	0.6%	75	1.1%
Passenger Train Interference - Foreign	105	1.3%	57	0.7%	144	1.4%	109	1.0%	12	0.3%	85	1.0%	30	0.5%
Accident - Total	**544**	**6.8%**	**634**	**7.4%**	**407**	**4.0%**	**591**	**5.4%**	**229**	**4.9%**	**481**	**5.7%**	**343**	**5.2%**
Accident - Metra/PSA	505	6.3%	512	6.0%	371	3.6%	391	3.6%	198	4.2%	395	4.7%	284	4.3%
Accident - Foreign	39	0.5%	122	1.4%	36	0.4%	200	1.8%	31	0.7%	86	1.0%	59	0.9%
Track Work - Total	**996**	**12.4%**	**945**	**11.1%**	**775**	**7.6%**	**851**	**7.8%**	**416**	**8.8%**	**797**	**9.4%**	**567**	**8.6%**
Track Work - Metra/PSA	955	11.9%	931	10.9%	770	7.5%	834	7.7%	390	8.3%	776	9.1%	536	8.1%
Track Work - Foreign	41	0.5%	14	0.2%	5	0.0%	17	0.2%	26	0.6%	21	0.2%	31	0.5%
Human Error - Total	**637**	**7.9%**	**900**	**10.5%**	**904**	**8.8%**	**1,068**	**9.8%**	**481**	**10.2%**	**798**	**9.4%**	**596**	**9.0%**
Human Error - Metra/PSA	502	6.2%	604	7.1%	635	6.2%	684	6.3%	396	8.4%	564	6.6%	407	6.1%
Human Error - Foreign	135	1.7%	296	3.5%	269	2.6%	384	3.5%	85	1.8%	234	2.8%	189	2.9%
PTC Related - Total	**6**	**0.1%**	**30**	**0.4%**	**289**	**2.8%**	**665**	**6.1%**	**400**	**8.5%**	**278**	**3.3%**	**499**	**7.5%**
PTC Related - Metra/PSA	6	0.1%	24	0.3%	289	2.8%	643	5.9%	349	7.4%	262	3.1%	411	6.2%
PTC Related - Foreign	-	0.0%	6	0.1%	-	0.0%	22	0.2%	51	1.1%	16	0.2%	88	1.3%
Weather - Total	**554**	**6.9%**	**597**	**7.0%**	**1,054**	**10.3%**	**1,676**	**15.4%**	**541**	**11.5%**	**884**	**10.4%**	**842**	**12.7%**
Weather - Metra/PSA	553	6.9%	595	7.0%	1,050	10.3%	1,670	15.3%	538	11.4%	881	10.4%	797	12.0%
Weather - Foreign	1	0.0%	2	0.0%	4	0.0%	6	0.1%	3	0.1%	3	0.0%	45	0.7%
Passenger Related - Total	**1,051**	**13.1%**	**1,147**	**13.4%**	**1,307**	**12.8%**	**1,122**	**10.3%**	**344**	**7.3%**	**994**	**11.7%**	**564**	**8.5%**
Obstruction/Debris - Total	**526**	**6.5%**	**654**	**7.7%**	**699**	**6.8%**	**791**	**7.3%**	**569**	**12.1%**	**648**	**7.6%**	**556**	**8.4%**
Catenary Failure - Total	**100**	**1.2%**	**33**	**0.4%**	**77**	**0.8%**	**20**	**0.2%**	**47**	**1.0%**	**55**	**0.7%**	**50**	**0.8%**
Other - Total	**65**	**0.8%**	**78**	**0.9%**	**25**	**0.2%**	**37**	**0.3%**	**46**	**1.0%**	**50**	**0.6%**	**68**	**1.0%**
Total Trains Delayed	**8,053**	**100.0%**	**8,541**	**100.0%**	**10,241**	**100.0%**	**10,891**	**100.0%**	**4,705**	**100.0%**	**8,486**	**100.0%**	**6,630**	**100.0%**
Total Metra/PSA Delays	6,388	79.3%	6,791	79.5%	7,892	77.1%	8,652	79.4%	3,781	80.4%	6,701	79.0%	4,994	75.3%
Total Foreign Carrier Delays	1,665	20.7%	1,750	20.5%	2,349	22.9%	2,239	20.6%	924	19.6%	1,785	21.0%	1,636	24.7%

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Effective January 2020, Metra has updated the delay cause categories in this table; totals by cause category for prior years may not match what was previously reported.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

HYNES V.S. EXHIBIT 50

METRA'S JANUARY 2019 RIDERSHIP TRENDS REPORT

RIDERSHIP TRENDS

January 2019

Metra

Prepared by the Division of Strategic Capital Planning
March 2019

Table of Contents

Executive Summary....1
Ridership....3
Estimated Passenger Trips by Line....3
Estimated Passenger Trips by Fare Zone Pair....4
Estimated Passenger Trips by Ticket Type....5
Passenger Loads....6
RTA Ride Free Permit Free Trips....6
Accessible Trips....7
Bicycle Trips....7
Ridership Influences....8
Employment....8
Gas Prices....9
Road Construction....10
Service Changes....10
Special Events and Promotions....10
Weather....10
Passenger Revenue and Ticket Sales....11
Passenger Revenue....11
Ticket Sales....14
Link-Up and PlusBus Sales....18
Reduced Fare Sales....19

Executive Summary

Estimated passenger trips decreased 12.2 percent in January 2019 compared to January 2018. January 2019 had the same number of Saturdays, Sundays, and holidays compared to January 2019. The following factors influenced ridership in January 2019:

- The Partial Federal Government Shutdown from December 22 to January 25
- The Polar Vortex extreme winter weather event on January 30 and 31, causing total passenger loads for the workweek beginning January 28 to be about 50 percent lower than previous weeks
- The lack of 10-Ride Ticket stockpiling in 2019 compared to 2018, due to there being no fare increase in 2019

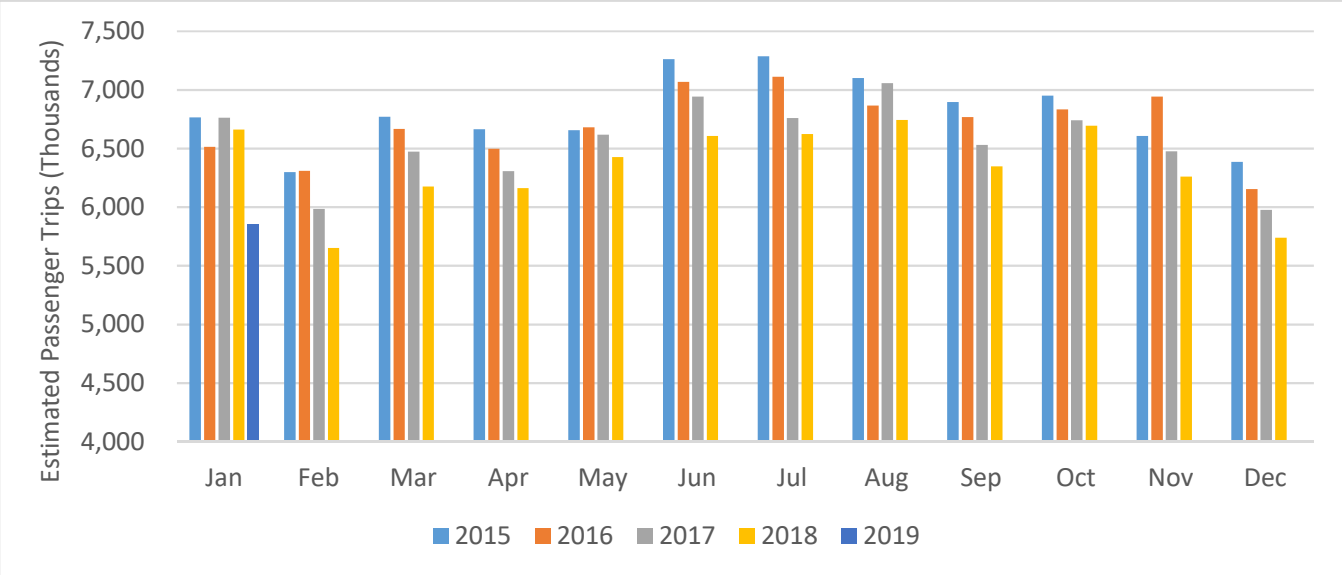
Estimated passenger trips have decreased 4.1 percent in the last 12 months compared to the previous 12 months.

Table 1: Estimated Passenger Trips by Month [1]

Month	Estimated Passenger Trips (Thousands)					Change	
	2015	2016	2017	2018	2019	2015-2019	2018-2019
Jan	6,764	6,513	6,762	6,661	5,850	-13.5%	-12.2%
Feb	6,297	6,310	5,985	5,651			
Mar	6,770	6,666	6,474	6,176			
Apr	6,663	6,497	6,305	6,162			
May	6,656	6,681	6,618	6,426			
Jun	7,260	7,066	6,941	6,607			
Jul	7,286	7,110	6,759	6,623			
Aug	7,100	6,866	7,055	6,742			
Sep	6,896	6,766	6,530	6,347			
Oct	6,949	6,832	6,740	6,694			
Nov	6,606	6,943	6,475	6,261			
Dec	6,385	6,153	5,976	5,739			
Last 3 Months	**20,248**	**19,503**	**19,858**	**19,111**	**17,850**	**-11.8%**	**-6.6%**
Last 12 Months	**83,697**	**81,379**	**80,651**	**78,519**	**75,278**	**-10.1%**	**-4.1%**

[1] Values are rounded to the thousand. Change is calculated based on the unrounded values.

Figure 1: Estimated Passenger Trips by Month



For the 2018 budget year, Metra estimated total annual passenger trips to be 75.6 million. To track how well ridership is comparing to this budgeted amount, monthly estimates have been calculated by distributing the budgeted trips throughout the year based on the distribution in previous years. Unanticipated differences in holiday and special event travel are common explanations for variations between the monthly budget distribution and actual ridership. These effects are less pronounced at the quarterly and annual level. Table 2 shows the estimated monthly passenger trips compared to this distribution.

Table 2: Estimated vs. Budget Passenger Trips [1]

Month	Estimated Passenger Trips (Thousands)		Variance
	Budget (2019)	Actual (2019)	
Jan	6,400	5,850	-8.6%
Feb	5,700		
Mar	5,950		
1st Quarter	**18,050**		
Apr	6,450		
May	6,400		
Jun	6,360		
2nd Quarter	**19,210**		
Jul	6,830		
Aug	6,490		
Sep	6,530		
3rd Quarter	**19,850**		
Oct	6,500		
Nov	5,970		
Dec	5,990		
4th Quarter	**18,460**		
Total	**75,570**		

[1] Values are rounded to the thousand. Variance is calculated based on the unrounded values.

Ridership

Estimated ridership figures are based on the number of ticket sales multiplied by a standard ridership factor unique to each ticket type, in addition to the number of RTA Ride Free Permit passenger trips reported by conductors.

Estimated Passenger Trips by Line

Table 3 shows estimated passenger trips by line for the current month, the last three months, and the last 12 months. Estimated passenger trips decreased by 6.6 percent in the last three months compared to the previous year, and decreased 4.1 percent in the last 12 months compared to the previous year.

Table 3: Estimated Passenger Trips by Line

Line	January			Last 3 Months			Last 12 Months		
	2018	2019	Change	2018	2019	Change	2018	2019	Change
BNSF	1,386,291	1,223,615	-11.7%	3,946,537	3,686,523	-6.6%	16,238,763	15,659,976	-3.6%
HC	63,219	57,180	-9.6%	177,609	171,246	-3.6%	725,752	722,428	-0.5%
MD-N	593,526	513,273	-13.5%	1,680,003	1,570,296	-6.5%	6,829,059	6,529,806	-4.4%
MD-W	525,766	462,209	-12.1%	1,523,534	1,425,266	-6.5%	6,339,002	6,080,439	-4.1%
ME	665,078	581,285	-12.6%	1,943,521	1,800,124	-7.4%	8,087,524	7,632,328	-5.6%
NCS	149,916	127,162	-15.2%	418,366	380,615	-9.0%	1,687,098	1,618,230	-4.1%
RI	657,100	589,100	-10.3%	1,925,298	1,793,218	-6.9%	7,903,327	7,510,330	-5.0%
SWS	213,163	193,331	-9.3%	610,914	579,685	-5.1%	2,454,995	2,401,089	-2.2%
UP-N	780,979	662,002	-15.2%	2,182,477	2,010,027	-7.9%	9,021,363	8,570,799	-5.0%
UP-NW	921,503	820,610	-10.9%	2,670,207	2,524,254	-5.5%	10,907,566	10,496,787	-3.8%
UP-W	704,013	620,447	-11.9%	2,033,015	1,909,231	-6.1%	8,324,978	8,055,778	-3.2%
Total	**6,660,551**	**5,850,211**	**-12.2%**	**19,111,481**	**17,850,483**	**-6.6%**	**78,519,424**	**75,277,989**	**-4.1%**

Estimated Passenger Trips by Fare Zone Pair

Table 4 shows estimated passenger trips by fare zone pair for the current month, the last three months, and the last 12 months.

- The long-term decline in No Zone Pair passenger trips is expected to continue as data collection improvements and the shift to the Ventra App cause fewer trips to be reported without a zone pair.
- In July 2018, year-long testing of the zone consolidation policy began. All tickets for Zones K through M were capped to the price of Zone J tickets. This caused an increase in passenger trips for Zone A-J, and a decrease for passenger trips for Zones A-K and A-M. There are no stations in Zone L.

Table 4: Estimated Passenger Trips by Fare Zone Pair [1]

Zone Pair	January (Thousands)			Last 3 Months (Thousands)			Last 12 Months (Thousands)		
	2018	2019	Change	2018	2019	Change	2018	2019	Change
A-A	22	19	-15.3%	57	54	-5.6%	239	234	-1.9%
A-B	509	443	-12.9%	1,397	1,310	-6.2%	5,657	5,459	-3.5%
A-C	937	834	-11.0%	2,628	2,500	-4.9%	10,584	10,377	-2.0%
A-D	1,133	994	-12.3%	3,192	2,972	-6.9%	12,995	12,533	-3.6%
A-E	1,437	1,297	-9.7%	4,032	3,861	-4.2%	16,453	16,012	-2.7%
A-F	865	746	-13.8%	2,424	2,250	-7.2%	9,880	9,674	-2.1%
A-G	524	464	-11.4%	1,471	1,385	-5.8%	6,023	5,856	-2.8%
A-H	420	363	-13.7%	1,195	1,111	-7.0%	4,909	4,733	-3.6%
A-I	143	124	-13.1%	409	382	-6.7%	1,655	1,618	-2.3%
A-J	25	51	105.8%	72	161	123.4%	293	484	65.1%
A-K	28	-	-100%	82	-	-100%	331	148	-55.2%
A-M	7	-	-100%	21	-	-100%	89	37	-58.3%
A-J, K, & M	*60*	*51*	-14.0%	*174*	*161*	*-7.8%*	*713*	*670*	*-6.1%*
Intermediate	206	174	-15.8%	580	526	-9.3%	2,435	2,279	-6.4%
No Zone Pair	405	342	-15.6%	1,552	1,338	-13.8%	6,977	5,833	-16.4%
Total	**6,661**	**5,850**	**-12.2%**	**19,111**	**17,850**	**-6.6%**	**78,519**	**75,278**	**-4.1%**

[1] Values are rounded to the thousand. Change is calculated based on the unrounded values.

Estimated Passenger Trips by Ticket Type

Table 5 shows estimated passenger trips by ticket type for the current month, the last three months, and the last 12 months. Special event tickets and other data irregularities can affect month-to-month comparisons of passenger trips by ticket type:

- Stockpiling of 10-Ride Tickets occurred in advance of the 2018 fare increase. As a result, 10-Ride Ticket passenger trips are overstated in January 2018 compared to January 2019.

Table 5: Estimated Passenger Trips by Ticket Type [1]

Ticket Type	January (Thousands)					Last 3 Months (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Monthly Pass	3,666	3,557	-3.0%	54.9%	60.8%	10,826	10,509	-2.9%	56.7%	59.0%
10-Ride Ticket	2,118	1,460	-31.1%	31.7%	24.9%	5,174	4,315	-16.6%	27.1%	24.2%
One-Way Ticket	625	623	-0.3%	9.4%	10.6%	2,066	2,146	3.9%	10.8%	12.0%
Weekend Pass	195	151	-22.6%	2.9%	2.6%	802	648	-19.2%	4.2%	3.6%
Special Passes	0	-	0%	0.0%	0.0%	0	-	0%	0.0%	0.0%
RTA Ride Free Permit	69	63	-8.4%	1.0%	1.1%	211	200	-5.6%	1.1%	1.1%
Total [2]	**6,673**	**5,853**	**-12.3%**			**19,079**	**17,817**	**-6.6%**		

Ticket Type	Last 12 Months (Thousands)				
	2018	2019	Change	Share 2018	Share 2019
Monthly Pass	45,820	44,286	-3.3%	58.3%	58.8%
10-Ride Ticket	18,915	17,780	-6.0%	24.1%	23.6%
One-Way Ticket	9,198	9,510	3.4%	11.7%	12.6%
Weekend Pass	3,524	2,757	-21.8%	4.5%	3.7%
Special Passes	129	90	-29.9%	0.2%	0.1%
RTA Ride Free Permit	942	876	-7.0%	1.2%	1.2%
Total [2]	**78,528**	**75,299**	**-4.1%**		

[1] Values are rounded to the thousand. Change and share are calculated based on the unrounded values.
[2] Passenger trip totals differ from those presented in other tables in this report, due to adjustments made for group sales, marketing sales, and refunds.

Passenger Loads

Table 6 shows the average daily passenger loads by service period for the current month, the last three months, and the last 12 months, derived from conductor counts. Average peak-peak direction passenger loads decreased by 10.1 percent in the current month, and average total weekday passenger loads decreased by 10.3 percent in the same period.

Table 6: Average Daily Passenger Loads [1]

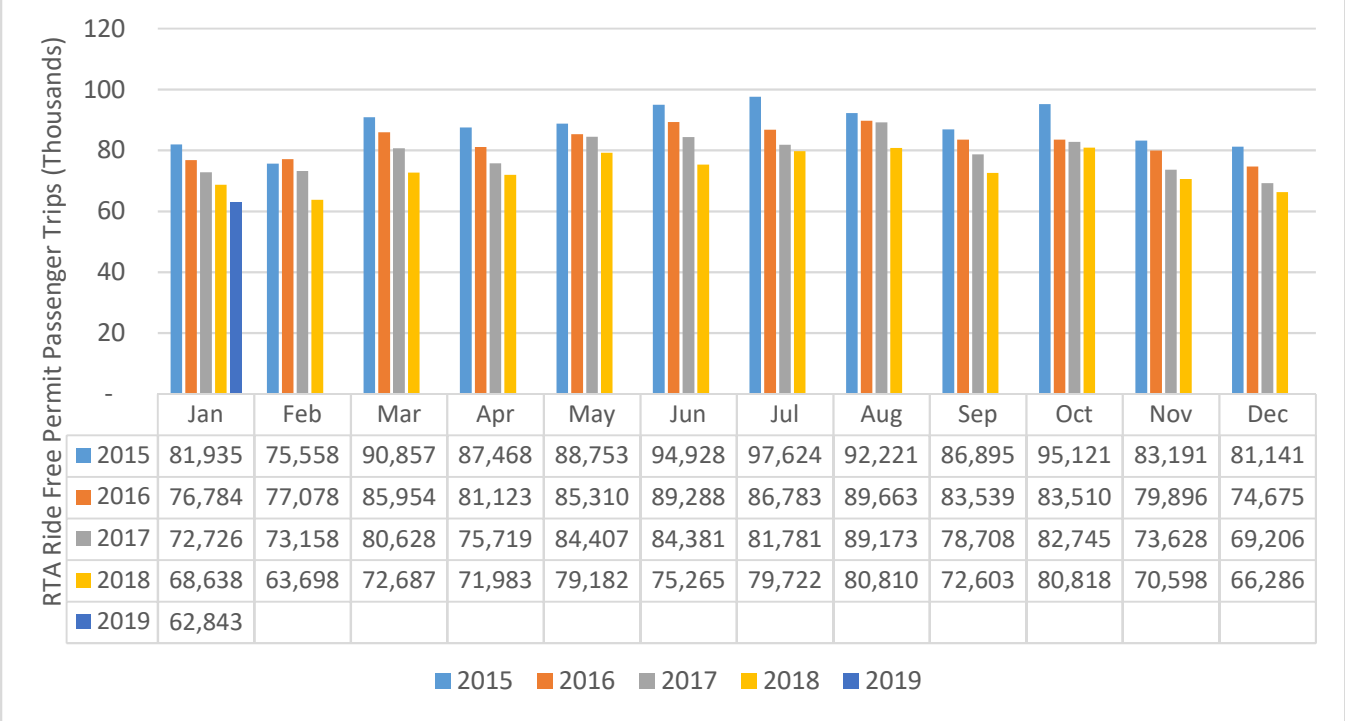
Service Period	January (Thousands)			Last 3 Months (Thousands)			Last 12 Months (Thousands)		
	2018	2019	Change	2018	2019	Change	2018	2019	Change
Peak - Peak Direction	213	191	-10.1%	205	192	-6.2%	215	209	-2.8%
Peak - Reverse Direction	19	16	-14.4%	19	17	-9.1%	20	19	-4.0%
Midday	28	25	-9.5%	32	30	-6.3%	32	31	-4.5%
Evening	14	12	-10.1%	15	14	-5.7%	16	16	-3.1%
Weekday	**273**	**245**	**-10.3%**	**271**	**253**	**-6.4%**	**284**	**275**	**-3.1%**
Saturday	49	44	-10.0%	58	56	-4.2%	65	59	-9.2%
Sunday	27	29	5.1%	33	34	4.1%	41	38	-5.8%

[1] Values are rounded to the thousand. Change is calculated based on the unrounded values.

RTA Ride Free Permit Free Trips

Figure 2 shows the number of RTA Ride Free Permit passenger trips for the last five years. Trips are included in ridership estimates because Metra is eligible for reimbursement for the number provided.

Figure 2: RTA Ride Free Permit Passenger Trips

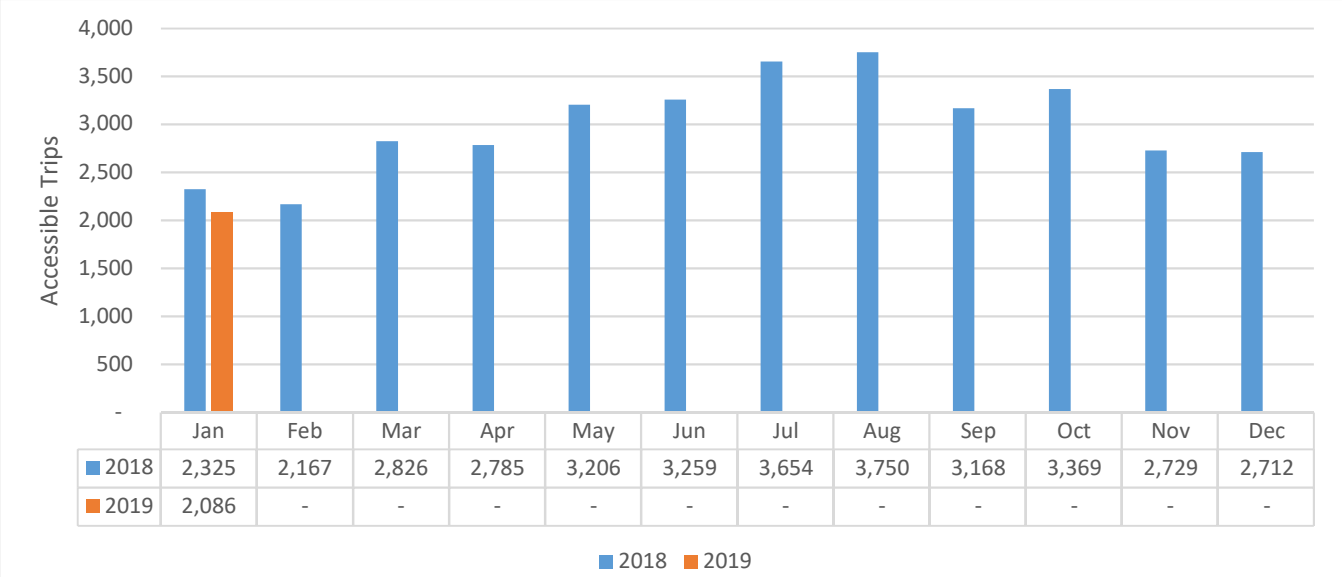


	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2015	81,935	75,558	90,857	87,468	88,753	94,928	97,624	92,221	86,895	95,121	83,191	81,141
2016	76,784	77,078	85,954	81,123	85,310	89,288	86,783	89,663	83,539	83,510	79,896	74,675
2017	72,726	73,158	80,628	75,719	84,407	84,381	81,781	89,173	78,708	82,745	73,628	69,206
2018	68,638	63,698	72,687	71,983	79,182	75,265	79,722	80,810	72,603	80,818	70,598	66,286
2019	62,843											

Accessible Trips

Figure 3 shows the number of trips provided using accessible equipment. Accessible equipment consists of bridge plates on the Metra Electric and wheelchair lifts on all other lines.

Figure 3: Accessible Trips

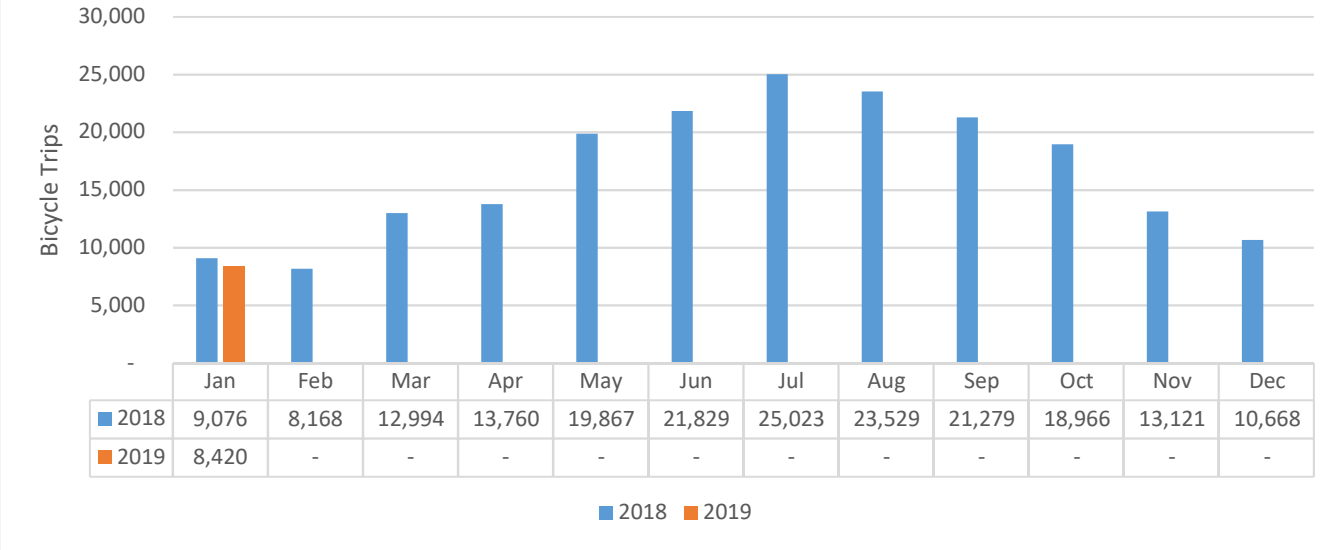


	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2018	2,325	2,167	2,826	2,785	3,206	3,259	3,654	3,750	3,168	3,369	2,729	2,712
2019	2,086	-	-	-	-	-	-	-	-	-	-	-

Bicycle Trips

Figure 4 shows the number of trips provided where the passenger transported a bicycle.

Figure 4: Bicycle Trips



	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2018	9,076	8,168	12,994	13,760	19,867	21,829	25,023	23,529	21,279	18,966	13,121	10,668
2019	8,420	-	-	-	-	-	-	-	-	-	-	-

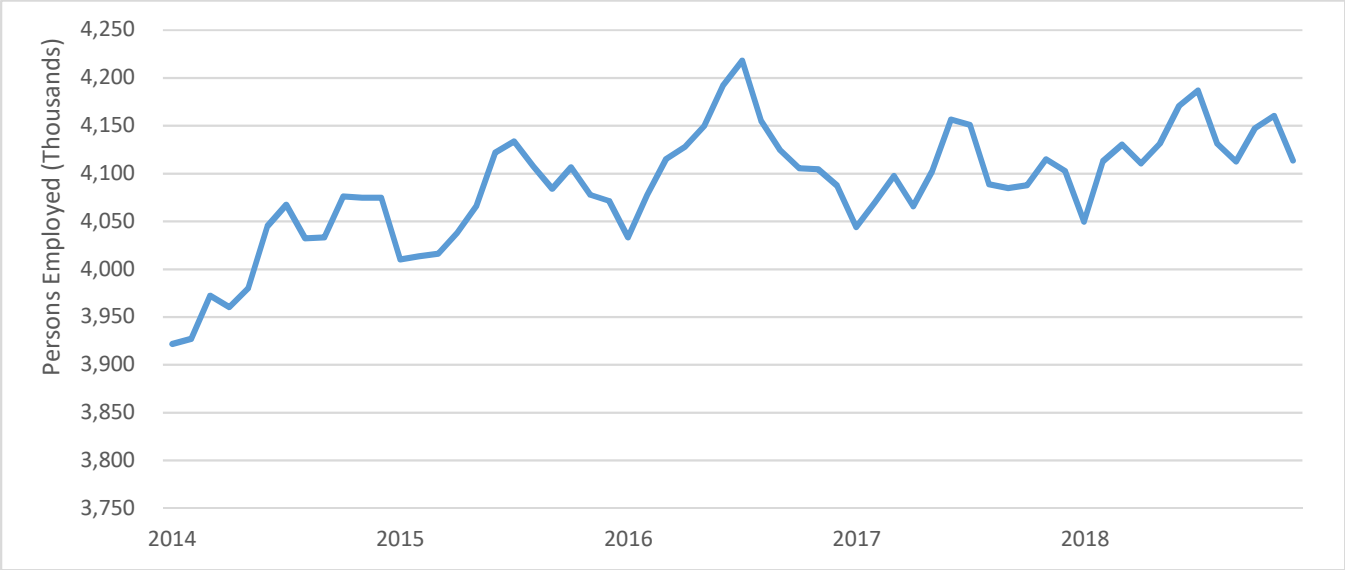
Ridership Influences

Many different factors (such as the employment, gas prices, road construction, service changes, and special events) can influence ridership trends.

Employment

Figure 5 shows the number of persons employed in the six-county Chicago Region. The number of persons employed increased 0.3 percent in December 2018 compared to December 2017. Employment data for January 2019 will be released in March 2019.

Figure 5: Persons Employed in the Chicago Region [1]



Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-to-date Average
2014	3,922	3,927	3,972	3,960	3,980	4,045	4,068	4,032	4,033	4,076	4,075	4,075	4,014
2015	4,010	4,014	4,016	4,038	4,066	4,122	4,134	4,108	4,084	4,107	4,078	4,072	4,071
2016	4,033	4,078	4,115	4,128	4,150	4,192	4,218	4,155	4,125	4,106	4,105	4,087	4,124
2017	4,044	4,070	4,098	4,066	4,102	4,156	4,151	4,089	4,085	4,088	4,115	4,102	4,097
2018	4,050	4,113	4,130	4,111	4,131	4,171	4,187	4,131	4,113	4,147	4,161	4,113	4,130
Change 2017-2018	**0.1%**	**1.1%**	**0.8%**	**1.1%**	**0.7%**	**0.4%**	**0.9%**	**1.0%**	**0.7%**	**1.5%**	**1.1%**	**0.3%**	**0.8%**

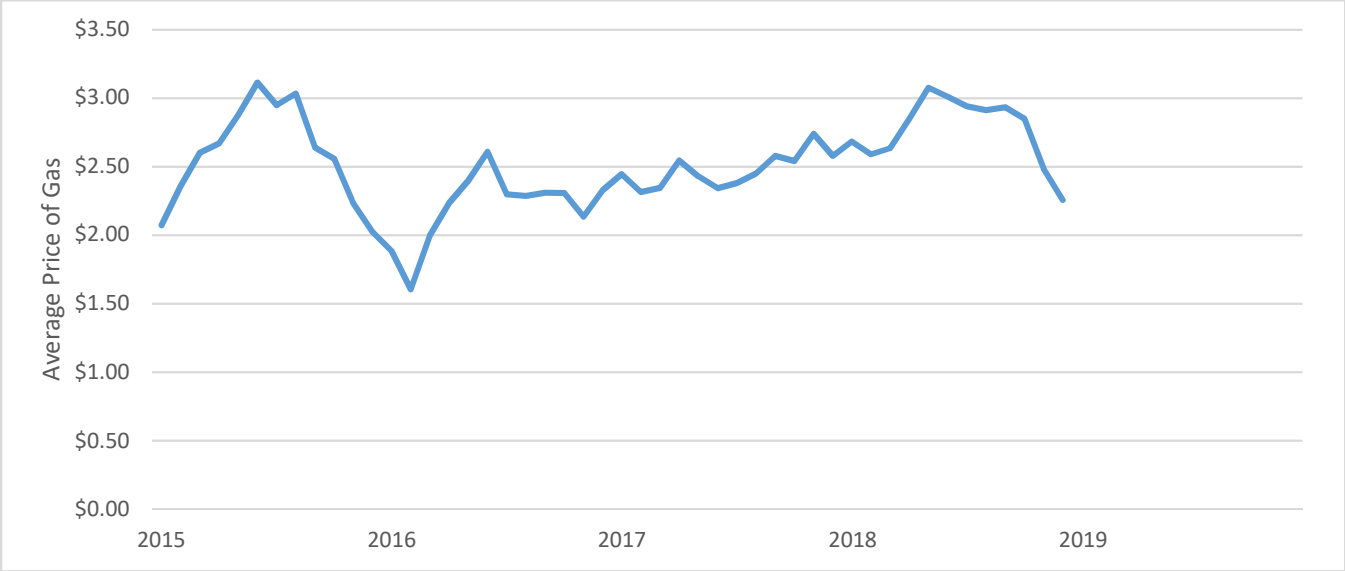
[1] Values are rounded to the thousand. Change is calculated based on the unrounded values.

Source: Illinois Department of Employment Security

Gas Prices

Figure 6 shows the average price of unleaded regular gas for the Chicago-Naperville-Elgin area. The average price of a gallon of regular unleaded gas was $2.16 in January 2019, a $0.52 decrease compared to January 2018.

Figure 6: Chicago Region Average Gas Prices



Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year-to-date Average
2015	$3.45	$3.52	$3.83	$3.95	$3.86	$3.99	$3.71	$3.57	$3.61	$3.30	$3.00	$2.57	$3.45
2016	$1.89	$1.61	$2.00	$2.24	$2.40	$2.61	$2.30	$2.29	$2.31	$2.31	$2.14	$2.33	$1.89
2017	$2.45	$2.32	$2.35	$2.55	$2.43	$2.34	$2.38	$2.45	$2.58	$2.54	$2.74	$2.58	$2.45
2018	$2.69	$2.59	$2.64	$2.85	$3.08	$3.01	$2.94	$2.92	$2.94	$2.85	$2.49	$2.26	$2.69
2019	$2.16												$2.16
Change 2018-2019	**-$0.52**												**-$0.52**

Source: Bureau of Labor Statistics

Road Construction

No new roadway construction projects of regional significance began in January. The following projects are either under construction or were recently completed:

- Jane Byrne Interchange Reconfiguration – In 2015, work began on a major reconfiguration of the Jane Byrne Interchange. Work is expected to continue through 2022.

Service Changes

On January 28, a new schedule was implemented on the Rock Island Line. The new schedule includes changes necessary for the new Positive Train Control (PTC) safety system, as well as some service enhancements such as new express trains.

Special Events and Promotions

Metra offered $10 unlimited ride passes valid on New Year's Eve and New Year's Day, Dec 31 and Jan 1.

Family Fares were in effect on January 1.

Weather

The Chicago region experienced a Polar Vortex extreme winter weather event on January 30 and 31. Metra operated on a modified schedule on January 30 and 31 due to the extreme cold. Total passenger loads data shows that ridership was depressed for the entire workweek beginning January 28, about 50 percent lower compared to the weeks of January 7-11 and January 14-18.

Metra Electric Line service was suspended on January 30 and 31 due to the extreme cold and a Canadian National freight train derailment.

Passenger Revenue and Ticket Sales

Changes in fares, ticket policies, and ticket sales channels can affect passenger revenue and ticket sales trends:

- The Ventra App was introduced in November 2015, causing a long-term shift from ticket agent and conductor sales to sales through the app.
- In June 2018, Metra stopped selling Monthly Passes and 10-Ride Tickets from vending machines at 15 non-downtown stations on the Metra Electric Line.
- In June 2018, Metra ended its Ticket-by-Internet program.
- In July 2018, yearlong testing of the zone consolidation policy began. All tickets from Zone A to Zones K through M were capped at the price of Zone J tickets.
- In July 2018, select stations with perceived inconsistencies in distance from downtown were reassigned to closer zones. Ashland, Racine, West Pullman, Stewart Ridge and State Street stations moved from Zone D to C. On the Metra Electric mainline, the 83rd Street and 87th Street stations were moved from Zone C to B. On the Rock Island Beverly Branch, the 123rd Street Station was moved from Zone D to C.
- In December 2018, an update to the Ventra app ended the option for purchasing mobile tickets without creating a Ventra account.

Special event tickets and other data irregularities can affect month-to-month comparisons of passenger revenue and ticket sales figures:

- Stockpiling of 10-Ride Tickets occurred in advance of the 2017 and 2018 fare increases. As a result, 10-Ride Ticket passenger revenue and ticket sales were overstated in January 2018 and understated in subsequent months.

Passenger Revenue

Table 7 shows passenger revenue by line for the current month, the last three months, and the last 12 months.

Table 7: Passenger Revenue by Line [1]

Line	January (Thousands)			Last 3 Months (Thousands)			Last 12 Months (Thousands)		
	2018	2019	Change	2018	2019	Change	2018	2019	Change
BNSF	$6,621	$6,162	-6.9%	$18,652	$18,592	-0.3%	$76,124	$78,923	3.7%
HC	$317	$300	-5.5%	$883	$899	1.9%	$3,597	$3,791	5.4%
MD-N	$2,855	$2,614	-8.4%	$7,969	$7,987	0.2%	$32,239	$33,346	3.4%
MD-W	$2,536	$2,333	-8.0%	$7,208	$7,175	-0.5%	$29,778	$30,675	3.0%
ME	$2,814	$2,615	-7.1%	$8,169	$8,082	-1.1%	$33,881	$34,341	1.4%
NCS	$828	$726	-12.4%	$2,281	$2,170	-4.9%	$9,131	$9,247	1.3%
RI	$2,944	$2,783	-5.5%	$8,528	$8,462	-0.8%	$34,886	$35,491	1.7%
SWS	$953	$913	-4.2%	$2,702	$2,722	0.7%	$10,822	$11,274	4.2%
UP-N	$3,278	$2,978	-9.2%	$9,098	$9,051	-0.5%	$37,579	$38,656	2.9%
UP-NW	$4,526	$4,219	-6.8%	$12,966	$13,009	0.3%	$52,534	$54,276	3.3%
UP-W	$3,317	$3,093	-6.7%	$9,465	$9,545	0.8%	$38,661	$40,378	4.4%
Total	**$30,989**	**$28,735**	**-7.3%**	**$87,921**	**$87,695**	**-0.3%**	**$359,232**	**$370,399**	**3.1%**

[1] Values are rounded to the thousand. Change is calculated based on the unrounded values.

Table 8 shows passenger revenue by ticket type for the current month, the last three months, and the last 12 months.

Table 8: Passenger Revenue by Ticket Type [1]

Ticket Type	January (Thousands)					Last 3 Months (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Monthly Pass	$15,191	$15,536	2.3%	48.9%	54.0%	$44,793	$45,841	2.3%	51.0%	52.3%
10-Ride Ticket	$11,438	$8,700	-23.9%	36.8%	30.3%	$27,964	$25,710	-8.1%	31.8%	29.3%
One-Way Ticket	$3,791	$3,914	3.2%	12.2%	13.6%	$12,582	$13,533	7.6%	14.3%	15.4%
Weekend Pass	$624	$603	-3.4%	2.0%	2.1%	$2,566	$2,591	1.0%	2.9%	3.0%
Special Passes	$0	-		0.0%	0.0%	$0	-		0.0%	0.0%
Total [2]	**$31,044**	**$28,752**	**-7.4%**			**$87,905**	**$87,675**	**-0.3%**		

Ticket Type	Last 12 Months (Thousands)				
	2018	2019	Change	Share 2018	Share 2019
Monthly Pass	$189,777	$193,622	2.0%	52.8%	52.2%
10-Ride Ticket	$102,236	$105,815	3.5%	28.4%	28.5%
One-Way Ticket	$55,598	$59,740	7.5%	15.5%	16.1%
Weekend Pass	$11,330	$11,025	-2.7%	3.2%	3.0%
Special Passes	$471	$469	-0.5%	0.1%	0.1%
Total [2]	**$359,411**	**$370,671**	**3.1%**		

[1] Values are rounded to the thousand. Change and share are calculated based on the unrounded values.
[2] Passenger revenue totals differ from those presented in other tables in this report, due to adjustments made for group sales, marketing sales, and refunds.

Table 9 shows passenger revenue by ticket type and sales channel for the current month 2018 and 2019.

Table 9: Passenger Revenue by Ticket Type and Sales Channel (Current Month) [1]

Sales Channel	Monthly Pass (Thousands)					10-Ride Ticket (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Commuter Benefit	$4,991	$4,980	-0.2%	32.9%	32.1%	$659	$632	-4.1%	5.8%	7.3%
Conductor	-	-		0.0%	0.0%	-	-		0.0%	0.0%
Internet	$484	-	-100%	3.2%	0.0%	$110	-	-100%	1.0%	0.0%
Ticket Agent	$4,663	$4,868	4.4%	30.7%	31.3%	$3,809	$2,241	-41.2%	33.3%	25.8%
Vending Machine	$572	$497	-13.1%	3.8%	3.2%	$386	$346	-10.3%	3.4%	4.0%
Ventra App	$4,481	$5,190	15.8%	29.5%	33.4%	$6,475	$5,481	-15.3%	56.6%	63.0%
Total	**$15,191**	**$15,536**	**2.3%**			**$11,438**	**$8,700**	**-23.9%**		

Sales Channel	One-Way Ticket (Thousands)					Weekend, Special, Ravinia Passes (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Commuter Benefit	-	-		0.0%	0.0%	-	-		0.0%	0.0%
Conductor	$864	$761	-11.9%	22.8%	19.5%	$353	$341	-3.4%	56.5%	56.5%
Internet	-	-		0.0%	0.0%	-	-		0.0%	0.0%
Ticket Agent	$1,110	$997	-10.2%	29.3%	25.5%	$72	$53	-26.7%	11.5%	8.7%
Vending Machine	$122	$118	-3.7%	3.2%	3.0%	$15	$15	-3.2%	2.4%	2.4%
Ventra App	$1,695	$2,038	20.2%	44.7%	52.1%	$184	$195	5.6%	29.5%	32.3%
Total	**$3,791**	**$3,914**	**3.2%**			**$624**	**$603**	**-3.4%**		

Sales Channel	All Ticket Types (Thousands)				
	2018	2019	Change	Share 2018	Share 2019
Commuter Benefit	$5,650	$5,612	-0.7%	18.2%	19.5%
Conductor	$1,216	$1,102	-9.4%	3.9%	3.8%
Internet	$594	-	-100%	1.9%	0.0%
Ticket Agent	$9,654	$8,159	-15.5%	31.1%	28.4%
Vending Machine	$1,095	$975	-10.9%	3.5%	3.4%
Ventra App	$12,835	$12,904	0.5%	41.3%	44.9%
Total [2]	**$31,044**	**$28,752**	**-7.4%**		

[1] Values are rounded to the thousand. Change and share are calculated based on the unrounded values.

[2] Passenger revenue totals differ from those presented in other tables in this report, due to adjustments made for group sales, marketing sales, and refunds

Ticket Sales

Table 10 shows ticket sales by ticket type for the current month, the last three months, and the last 12 months. Monthly Pass sales decreased by 3.0 percent in the current month compared to the previous year, and 10-Ride Ticket sales decreased by 31.1 percent in the same period.

Table 10: Ticket Sales by Ticket Type [1]

Ticket Type	January (Thousands)					Last 3 Months (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Monthly Pass	85	83	-3.0%	8.5%	9.1%	252	244	-2.9%	8.0%	7.9%
10-Ride Ticket	212	146	-31.1%	21.2%	16.0%	517	431	-16.6%	16.4%	14.0%
One-Way Ticket	625	623	-0.3%	62.5%	68.3%	2,066	2,146	3.9%	65.5%	69.6%
Weekend Pass	78	60	-22.6%	7.8%	6.6%	321	259	-19.2%	10.2%	8.4%
Special Passes	0	-	-100%	0.0%	0.0%	0	-	-100%	0.0%	0.0%
Total	**1,000**	**912**	**-8.8%**			**3,156**	**3,081**	**-2.4%**		

Ticket Type	Last 12 Months (Thousands)				
	2018	2019	Change	Share 2018	Share 2019
Monthly Pass	1,066	1,030	-3.3%	7.8%	7.7%
10-Ride Ticket	1,892	1,778	-6.0%	13.9%	13.2%
One-Way Ticket	9,198	9,510	3.4%	67.5%	70.7%
Weekend Pass	1,410	1,103	-21.8%	10.4%	8.2%
Special Passes	53	40	-25.6%	0.4%	0.3%
Total	**13,618**	**13,460**	**-1.2%**		

[1] Values are rounded to the thousand. Change and share are calculated based on the unrounded values.

Tables 11 details ticket sales by line and ticket type.

Table 11: Ticket Sales by Ticket Type and Line (Current Month)

Monthly Pass				10-Ride Ticket			
Line	**2018**	**2019**	**Change**	**Line**	**2018**	**2019**	**Change**
BNSF	19,141	18,356	-4.1%	BNSF	42,974	30,551	-28.9%
HC	1,017	974	-4.2%	HC	1,645	1,219	-25.9%
MD-N	6,633	6,539	-1.4%	MD-N	22,178	15,194	-31.5%
MD-W	6,825	6,628	-2.9%	MD-W	14,881	9,886	-33.6%
ME	8,287	8,061	-2.7%	ME	18,738	12,346	-34.1%
NCS	1,992	1,886	-5.3%	NCS	5,034	3,241	-35.6%
RI	9,697	9,537	-1.6%	RI	16,522	11,076	-33.0%
SWS	3,291	3,141	-4.6%	SWS	5,563	4,215	-24.2%
UP-N	7,915	7,671	-3.1%	UP-N	32,114	21,915	-31.8%
UP-NW	11,586	11,355	-2.0%	UP-NW	29,519	20,302	-31.2%
UP-W	8,880	8,575	-3.4%	UP-W	22,638	16,026	-29.2%
Total	**85,264**	**82,723**	**-3.0%**	**Total**	**211,806**	**145,971**	**-31.1%**
One-Way Ticket (Mobile & Station)				**One-Way Ticket (Conductor)**			
Line	**2018**	**2019**	**Change**	**Line**	**2018**	**2019**	**Change**
BNSF	81,191	82,928	2.1%	BNSF	15,521	12,575	-19.0%
HC	2,623	2,693	2.7%	HC	336	334	-0.6%
MD-N	42,369	45,876	8.3%	MD-N	15,155	12,867	-15.1%
MD-W	41,558	42,139	1.4%	MD-W	15,784	13,018	-17.5%
ME	68,324	69,671	2.0%	ME	22,298	18,027	-19.2%
NCS	8,277	8,902	7.6%	NCS	5,091	4,102	-19.4%
RI	43,855	43,359	-1.1%	RI	12,457	10,182	-18.3%
SWS	11,254	11,746	4.4%	SWS	3,295	2,769	-16.0%
UP-N	55,859	61,320	9.8%	UP-N	27,699	24,421	-11.8%
UP-NW	65,069	70,143	7.8%	UP-NW	20,904	20,157	-3.6%
UP-W	50,313	52,484	4.3%	UP-W	15,311	13,078	-14.6%
Total	**470,692**	**491,261**	**4.4%**	**Total**	**153,851**	**131,530**	**-14.5%**
Weekend, Special, Ravinia Passes (Mobile & Station)				**Weekend, Special, Ravinia Passes (Conductor)**			
Line	**2018**	**2019**	**Change**	**Line**	**2018**	**2019**	**Change**
BNSF	6,896	5,385	-21.9%	BNSF	5,444	4,204	-22.8%
HC	-	-		HC	-	-	
MD-N	4,256	2,844	-33.2%	MD-N	5,829	4,176	-28.4%
MD-W	3,041	2,612	-14.1%	MD-W	4,741	3,921	-17.3%
ME	3,445	2,676	-22.3%	ME	2,236	1,611	-28.0%
NCS	-	-		NCS	-	-	
RI	1,906	1,566	-17.8%	RI	3,395	2,372	-30.1%
SWS	97	76	-21.6%	SWS	159	153	-3.8%
UP-N	3,817	2,763	-27.6%	UP-N	6,527	4,062	-37.8%
UP-NW	6,051	4,707	-22.2%	UP-NW	9,359	8,293	-11.4%
UP-W	4,449	3,604	-19.0%	UP-W	6,394	5,356	-16.2%
Total	**33,958**	**26,233**	**-22.7%**	**Total**	**44,084**	**34,148**	**-22.5%**

Tables 12 shows ticket sales by ticket type, sales channel, and tender type for the current month 2018 and 2019. Tables 14 shows total ticket sales by sales channel and tender type for the current month 2018 and 2019.

Table 12: Ticket Sales by Ticket Type, Sales Channel, and Tender Type (Current Month) [1]

Sales Channel	Monthly Pass (Thousands)					10-Ride Ticket (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Commuter Benefit	27	26	-5.5%	32.2%	31.4%	11	10	-12.1%	5.3%	6.8%
Conductor	-	-				-	-			
Internet	3	-	-100%	3.2%		2	-	-100%	0.9%	
Ticket Agent	27	26	-0.9%	31.2%	31.9%	73	39	-46.4%	34.5%	26.8%
Cash & Other	4	4	-5.4%			11	6	-47.1%		
Credit Card	22	22	-0.1%			62	33	-46.3%		
Vending Machine	3	3	-17.0%	3.8%	3.3%	7	6	-19.8%	3.4%	3.9%
Ventra App	25	28	9.8%	29.5%	33.4%	118	91	-23.0%	55.9%	62.5%
Credit Card	23	25	9.4%			111	86	-22.1%		
Mixed & Other	1	1	-2.8%			2	1	-56.0%		
Ventra	1	1	39.6%			6	4	-30.2%		
Total	**85**	**83**	**-3.0%**			**212**	**146**	**-31.1%**		

Sales Channel	One-Way Ticket (Thousands)					Weekend, Special, Ravinia Passes (Thousands)				
	2018	2019	Change	Share 2018	Share 2019	2018	2019	Change	Share 2018	Share 2019
Commuter Benefit	-	-				-	-			
Conductor	154	132	-14.5%	24.6%	21.1%	44	34	-22.4%	56.5%	56.0%
Internet	-	-				-	-			
Ticket Agent	177	153	-13.2%	28.3%	24.6%	9	5	-41.4%	11.5%	8.7%
Cash & Other	105	87	-16.7%			5	3	-44.8%		
Credit Card	72	66	-8.0%			4	3	-37.4%		
Vending Machine	20	18	-8.2%	3.2%	2.9%	2	1	-22.5%	2.4%	2.4%
Ventra App	274	320	16.6%	43.9%	51.3%	23	20	-13.1%	29.6%	32.9%
Credit Card	243	290	19.6%			21	19	-10.2%		
Mixed & Other	3	2	-34.8%			0	0	-49.5%		
Ventra	29	28	-4.1%			2	1	-41.0%		
Total	**625**	**623**	**-0.3%**			**78**	**61**	**-21.9%**		

[1] Values are rounded to the thousand. Change and share are calculated based on the unrounded values.

Table 14: Total Ticket Sales by Sales Channel and Tender Type (Current Month) [1]

Sales Channel	All Ticket Types (Thousands)				
	2018	2019	Change	Share 2018	Share 2019
Commuter Benefit	39	36	-7.4%	3.9%	3.9%
Conductor	198	166	-16.3%	19.8%	18.2%
Internet	5	-	-100%	0.5%	
Ticket Agent	285	224	-21.4%	28.6%	24.6%
Cash & Other	125	100	-20.1%		
Credit Card	161	125	-22.5%		
Vending Machine	32	28	-12.5%	3.2%	3.1%
Ventra App	441	458	4.0%	44.1%	50.2%
Credit Card	398	421	5.8%		
Mixed & Other	6	4	-35.7%		
Ventra	37	34	-9.0%		
Total	**1,000**	**912**	**-8.7%**		

[1] Values are rounded to the thousand. Change and share are calculated based on the unrounded values.

Link-Up and PlusBus Sales

Sales of CTA Link-Up passes decreased by 8.2 percent in the current month compared to the previous year, and sales of Pace PlusBus passes decreased by 10.2 percent in the same period. Table 16 shows Link-Up and PlusBus sales by month for 2018 and 2019.

Table 16: Link-Up and PlusBus Sales

Month	2018		2019		Change		Mobile Share (2019)	
	Link-Up	PlusBus	Link-Up	PlusBus	Link-Up	PlusBus	Link-Up	PlusBus
Jan	3,090	1,177	2,836	1,057	-8.2%	-10.2%	27.5%	23.4%
Feb	3,120	1,155	-	-	-	-	-	-
Mar	3,109	1,188	-	-	-	-	-	-
Apr	3,051	1,148	-	-	-	-	-	-
May	2,964	1,107	-	-	-	-	-	-
Jun	2,908	1,068	-	-	-	-	-	-
Jul	2,812	1,038	-	-	-	-	-	-
Aug	2,820	1,060	-	-	-	-	-	-
Sep	2,798	1,063	-	-	-	-	-	-
Oct	2,899	1,111	-	-	-	-	-	-
Nov	2,925	1,070	-	-	-	-	-	-
Dec	2,699	922	-	-	-	-	-	-
Last 3 Months	**8,988**	**3,472**	**8,460**	**3,049**	**-5.9%**	**-12.2%**	**28.1%**	**23.5%**
Last 12 Months	**36,710**	**14,354**	**34,941**	**12,987**	**-4.8%**	**-9.5%**	**25.3%**	**21.0%**

Reduced Fare Sales

Seniors, some Medicare recipients, some persons with disabilities, primary and secondary school students, children, and military personnel are eligible for reduced fares on Metra. Table 17 shows the number of reduced fare tickets sold by month for 2018 and 2019.

Table 17: Reduced Fare Ticket Sales

Month	2018				2019			
	Monthly Pass	10-Ride Ticket	One-Way Ticket		Monthly Pass	10-Ride Ticket	One-Way Ticket	
			Mobile & Station	Conductor			Mobile & Station	Conductor
Jan	2,771	18,132	40,528	20,183	2,752	11,168	42,613	19,183
Feb	2,897	9,165	36,638	18,463	-	-	-	-
Mar	3,007	11,429	64,010	24,568	-	-	-	-
Apr	3,006	12,195	43,755	22,532	-	-	-	-
May	3,039	13,026	55,248	27,998	-	-	-	-
Jun	2,875	12,742	73,733	34,342	-	-	-	-
Jul	2,841	12,374	88,996	34,797	-	-	-	-
Aug	2,703	12,919	82,500	32,105	-	-	-	-
Sep	3,154	12,430	49,190	24,220	-	-	-	-
Oct	3,318	14,436	52,359	25,649	-	-	-	-
Nov	3,122	12,216	53,685	22,797	-	-	-	-
Dec	2,675	11,029	57,839	24,766	-	-	-	-
Last 3 Months	**8,555**	**44,591**	**146,136**	**69,374**	**8,549**	**34,413**	**154,137**	**66,746**
Last 12 Months	**36,131**	**159,168**	**691,140**	**337,027**	**35,389**	**145,129**	**700,566**	**311,420**

Month	Change			
	Monthly Pass	10-Ride Ticket	One-Way Ticket	
			Mobile & Station	Conductor
Jan	-0.7%	-38.4%	5.1%	-5.0%
Feb	-	-	-	-
Mar	-	-	-	-
Apr	-	-	-	-
May	-	-	-	-
Jun	-	-	-	-
Jul	-	-	-	-
Aug	-	-	-	-
Sep	-	-	-	-
Oct	-	-	-	-
Nov	-	-	-	-
Dec	-	-	-	-
Last 3 Months	**-0.1%**	**-22.8%**	**5.5%**	**-3.8%**
Last 12 Months	**-2.1%**	**-8.8%**	**1.4%**	**-7.6%**

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

HYNES V.S. EXHIBIT 51

METRA'S COMMENTS FILED IN *CANADIAN PACIFIC RY., ET AL. – CONTROL – DAKOTA, MINNESOTA & EASTERN R.R., ET AL.*, FINANCE DOCKET NO. 35081, ON MARCH 4, 2008

(EXCERPTS)

FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW
WASHINGTON HARBOUR
3000 K STREET, N W., SUITE 500
WASHINGTON, D C 20007 5143
202 672 5300 TEL
202 672 5399 FAX
www foley com

WRITER'S DIRECT LINE
202 672 5367
rvomeigen@foley com EMAIL

CLIENT/MATTER NUMBER
424177 0146

March 4, 2008

BY E-FILING AND BY HAND

Ms. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Suite 101
Washington, D.C. 20423-0001

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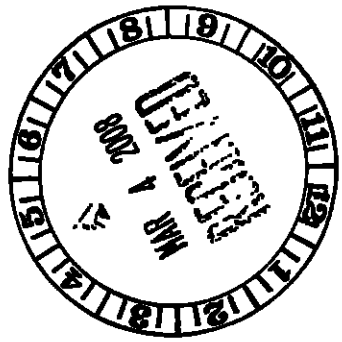


Subject: Finance Docket No. 35081 – *Canadian Pacific Railway Company, et al. – Control – Dakota Minnesota & Eastern Railroad Corporation, et al.*

Dear Acting Secretary Quinlan:

Enclosed for filing in the above proceeding are an original and ten copies of the Public Version of Metra's Comments in Opposition to Proposed Transaction and Request for Conditions, and ten copies of the Highly Confidential Version of Metra Comments to be filed under seal pursuant to the terms of the Protective Order issued by the Board in this proceeding. Also enclosed is a disc containing an electronic copy of the Public Version of Metra's Comments.

Please acknowledge receipt of the above identified filings by date stamping the extra copies provided and return same to our messenger for our files.

Sincerely yours,

Robert P. vom Eigen

RVE: dmo
Encls:

cc. Michael C Noland (w/Highly Confidential and Public Versions of Metra's Comments)
Parties of Record (w/ Public Version of Metra's Comments)
Counsel for Applicants (w/Three Copies of Highly Confidential Version of Metra's Comments)

While Metra owns the North and West Lines, the 1985 Trackage Agreement between CP and the Milwaukee Trustee, as supplemented and amended from time to time ("Metra/CP Trackage Agreement"), grants CP the right to dispatch these lines subject to the requirement to provide priority to Metra's schedules and operations, and to insure that there be no material interference with that service. CP dispatches these lines from the Soo Line building in Minneapolis, MN.

The on-time performance average on the two CP dispatched Metra routes over the period of 2007 has been worse than Metra's system-wide average, and worse than each of the four lines Metra dispatches. The North Line has the third worst on-time performance record over that period of any of Metra's lines. The average number of "delayed" trains, defined as trains 6 or more minutes late, on the North Line are the second highest on the Metra system.

Average On-time Percentage 2002-2007[6]

Metra System-Wide	- 96 5%
Metra Electric – ML	- 97.9%
Metra Electric – BI	- 98.7%
Metra Electric – SC	- 96.4%
CP – North Line	- 94.3%
CP – West Line	- 95.7%

Metra dispatches lines under its control through its Consolidated Control Facility ("CCF") located at 1501 South Canal Street in Chicago. Constructed in the early 1990's, this facility was intended to house personnel from Metra to dispatch lines over which Metra trains operate and for tower operators from those lines. At the CCF, Metra currently dispatches the two lines of the Rock Island District, the three lines of the Electric, and the North end of Metra's Southwest Service (between 21st Street and 74th Street). The CCF also houses the operator of

[6] These data are derived from the Table, attached hereto, as Exhibit B to these Comments, captioned "Annual Train Delays and On-Time Performance."

and North Lines, and that the agreements governing operations over these lines need to be amended to deal with these challenges.

Immediately upon receiving CP's Application Metra sought to negotiate amendments with CP to modify the Metra/CP Trackage Agreement and the ICE Chicago Trackage Rights Agreement to incorporate provisions to protect Metra service over the North Line that were satisfactory to DM&E and CP in 2003 for the West Line. After an initial meeting, CP refused to negotiate such amendments, thereby requiring this request for conditions to protect Metra's rail service. In the days prior to this filing, negotiations have resumed, but no resolution has been reached as of this filing.

Conditions Necessary to Protect Metra Service.

The existing agreements governing operations over the North and West Lines are not capable of addressing the risks to Metra service raised by CP's acquisition of DM&E. Recognizing that the STB cannot negotiate effective arrangements between Metra and CP, Metra requests that the following conditions be imposed on the approval of CP's application to control DM&E/IC&E:

(1) CP shall transfer to Metra the right to control and dispatch train operations over the North and West Lines out of Metra's Consolidated Control Center in Chicago;

(2) CP shall not commence operation of any PRB coal trains over the West or North Lines until Metra has completed construction of necessary capacity improvements as determined in accordance with the provisions equivalent to those contained in the CP/Metra Trackage Rights Agreement and the ICE Chicago Trackage Rights Agreement which are necessary to preserve Metra's service capabilities over the North and West Lines;

(3) The expense of such capacity improvements shall be borne solely by CP, to the extent they are required solely for the movement of such coal trains or other CP/DM&E/IC&E trains.

(4) CP shall pay Metra (i) the Excess Train Charge or Coal Train Charge, as specified in §3.1 and §3.2 of the ICE Chicago Trackage Rights Agreement, adjusted

III. Transfer of Dispatching Control is the Only Way that Metra Can Enforce Provisions to Protect its Service.

Only through dispatching the West and North lines can Metra know what trains are being admitted to the lines on a real time basis. Metra cannot count upon magazine articles to disclose movements that CP fails to disclose The existing agreements have audit provisions to permit verification of periodic data provided by CP. However, that is a post-facto remedy that will not permit a pro-active monitoring of changes in traffic patterns that will permit Metra to anticipate looming challenges to the capacity of these lines and to prevent deterioration of the quality of its commuter rail services on a daily basis.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 52

METRA'S OBJECTIONS AND RESPONSES TO APPLICANTS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSION (APR. 11, 2022)

(EXCERPTS)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

OBJECTIONS AND RESPONES BY COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY D/B/A METRA TO INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSION FORM APPLICANTS CANADIAN PACIFIC RAILWAY LIMITED*, ET AL.*

The Commuter Rail Division of the Regional Transportation Authority d/b/a Metra ("Metra"), by and through counsel, hereby responds and objects as follows to the First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission served March 25, 2022 ("Discovery Requests"), submitted by Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, "Canadian Pacific" or "CP") and Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, "KCS"; together with CP, the "Applicants").

RESPONSES TO INTERROGATORIES

Interrogatory No. 1:

Describe Metra's dispatching practices for any line for which it dispatches both commuter and freight trains, including but not limited to (i) whether Metra's dispatchers on such lines are available 24 hours a day to dispatch freight trains overnight, (ii) how many freight trains a day Metra dispatches on such lines, (iii) Metra's dispatchers' interaction process with other Class I railroads that have dispatching authority over adjacent or nearby subdivisions, and (v) which subdivisions Metra's dispatchers monitor and factor into their dispatching decisions.

Response to Interrogatory No. 1:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that is not in Metra's possession or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that its dispatchers currently dispatch both passenger and freight trains on the Metra's Rock Island Line and portions of the Southwest Service Line. In addition, Metra's dispatchers working under the supervision of CP's dispatching control station dispatch freight train traffic operating on Metra's MD-W and MD-N on CN's Waukesha Subdivision where it crosses MD-W. Metra's dispatchers on these lines are available 24 hours a day to dispatch freight trains overnight.

On Metra's Rock Island Line, Metra dispatches approximately four daily freight trains—two CSX trains and two Iowa Interstate trains. Metra's dispatching of this line also requires it to

handle approximately 8-10 daily freight train crossings at the Canadian National Railway's Leighton Subdivision crossing east of Joliet.

On Metra's Southwest Service Line, Metra dispatches one Norfolk Southern train along the entire length of the line, as well as approximately 8 daily Norfolk Southern freight trains on this line between a connection at 59th Street and a connection with the BRC at 74th Street, and between 4 and 8 daily trains on another segment between Chicago Ridge and Landers. Metra's dispatchers are also involved in handling approximately 20 daily trains on 5 crossings along the segment between 59th Street and 74th Street.

On Metra's MD-N Line at Control Tower A5, Metra's dispatchers control dispatching under supervision and authority of CP's dispatching center and dispatch all freight and passenger traffic crossing that tower for both CP's C&M and Elgin Subdivisions. On Metra's MD-W Line at Control Tower B12, Metra's dispatchers control dispatching under supervision and authority of CP's dispatching center and dispatch all freight and passenger traffic crossing that tower for CP's Elgin Subdivision as well as the Galewood East and Cicero West (connection with Belt Railway Company of Chicago ("BRC")) Control Points. Under CP dispatcher authority, they also control movements in and out of the east end of Bensenville Yard through the Control Point Franklin Park West, as well as movements to and from the Indiana Harbor Belt Railway at the Control Point Edgington.

Interrogatory No. 2:

Identify which railroad's freight trains are purportedly obstructing Metra's trains in the social media posts in Figure 4 of Metra's Comments and Request for Conditions filed on March

15, 2022, and the direction of travel and track on which the depicted Metra and freight trains were operating. Produce all Documents in support of that identification.

Response to Interrogatory No. 2:

Metra specifically objects to this request on the basis that it requests information that is not in Metra's possession or would require Metra to conduct unduly burdensome additional research.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra does not possess this information.

Interrogatory No. 3:

Describe in detail each instance in which Greg Godfrey and his staff allegedly "witnessed CP dispatchers who [were] able to prioritize or avoid delay to Metra being directly told by senior management to move CP trains, regardless of the impact on the network" and that "sometimes Metra train dispatchers are even forced and required by CP to follow these instructions to display signals for freight trains ahead of Metra trains" as asserted on page six of the Verified Statement of Greg Godfrey (Exhibit E to Metra's Comments and Request for Conditions filed on March 15, 2022) and, for each such instance, identify (i) the date and time it occurred and (ii) the Metra employees, the CP dispatchers and the CP senior management personnel who were allegedly involved.

Response to Interrogatory No. 3:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it

requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that it has already produced this information. These instances are discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See*, *e.g.*, METR-7, Ex. B-2 at 204, 252-53, 256, 291, 331.

Interrogatory No. 4:

Identify the "daily operations decisions" that CP dispatchers make which "clearly favor their freight operations, both in and outside of the peak-periods" as asserted on page 10 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022), including but not limited to specific examples and the dates and times of those actions.

Response to Interrogatory No. 4:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating it has already provided this information to Applicants. This is discussed in the documents already provided to Applicants attached to Metra's Comments. *See*, *e.g.*, METR-7, Ex. B at 11-12; *id*. Ex. B-2 at 1-333. Further information regarding specific

examples with dates and times is also provided in the additional documentation produced in response to Applicants' Request for Production No. 4, below.

Interrogatory No. 5.:

Explain in detail how CP "could schedule night service to avoid interference with Metra's trains" as asserted on page 10 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022), including but not limited to how such a practice would work under current operating procedures.

Response to Interrogatory No. 5:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that, as discussed in Metra's Comments, Metra operates dozens of passenger trains on MD-W and MD-N. None of Metra's inbound trains operate scheduled service for over seven hours between 9:45 pm and 4:52 am during the week, and none of its outbound trains operate scheduled service for over six hours between 12:05 am and 6:21 am during the week. *See* https://schedules.metrarail.com/pdf/alternative/MD-W.pdf and https://schedules.metrarail.com/pdf/alternative/MD-N.pdf. These windows, which are similar during the weekend, constitute a significant proportion of time available for freight movements that are not appropriate for passenger service. Typically, the only CP freight train that operates

during this night-time window on the C&M Sub is a 471 (now relabeled 255) train. On the Elgin Subdivision, sporadic movements between Bensenville Yard and the BRC connection at Cicero West could easily be augmented with additional freight traffic. The rest of CP's freight trains regularly operate during the times when Metra trains also operate.

Interrogatory No. 6:

Describe in detail each instance in which CP dispatchers have allegedly "ignored or disabled the hot line, leaving [Mr. Oppenheim] and [his] staff without expeditious recourse when CP dispatching decisions are either the cause of CP-related issues on Metra's lines or CP-related issues could be resolved or mitigated through dispatching" as asserted on page 17 of the Verified Statement of Richard P. Oppenheim (Exhibit B to Metra's Comments and Request for Conditions filed on March 15, 2022) and, for each such instance, identify (i) the date and time it occurred and (ii) the Metra employees and CP employees who were allegedly involved.

Response to Interrogatory No. 6:

Metra specifically objects to this request on the basis that it is unduly burdensome and not proportional to the scope of the issues raised in this proceeding, and to the extent that it requests information that Metra has already provided to Applicants, that is not in Metra's possession, or would be unduly burdensome for Metra to produce.

Subject to and without waiving the above General Objections and specific objections raised, Metra responds by stating that Metra has already provided this information to Applicants. This is discussed in detail in the documents already provided to Applicants attached to Metra's Comments. *See, e.g.*, METR-7, Ex. B-2 at 29, 252-54.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 53

HIGHLY CONFIDENTIAL – CN0000187-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 54

HIGHLY CONFIDENTIAL – CN0000049-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 55

HIGHLY CONFIDENTIAL – CN0000037-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 56

CN MOTION TO WITHDRAW, FINANCE DOCKET NO. 36514 (CN-28)

September 16, 2021

303004

ENTERED
Office of Proceedings
September 16, 2021
Part of
Public Record

By E-Filing

The Honorable Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423

Re: Finance Docket No. 36514, *Canadian National Railway Company, et al.—Control—Kansas City Southern, et al.*

Dear Ms. Brown,

Canadian National Railway Company and its rail operating subsidiaries (collectively, "CN") respectfully submit this letter to inform the Board that the May 21, 2021 Agreement and Plan of Merger between CN and Kansas City Southern ("KCS") has been terminated by KCS. As a result, CN is withdrawing the Notice of Intent to File an Application that it submitted in this docket on April 20, 2021 (CN-1).

CN appreciates the broad array of stakeholders who wrote more than 1,750 letters of support for a CN-KCS combination. Many of those stakeholders supported a CN-KCS combination because of the unprecedented commitments that CN offered in order to provide shippers with improved route choices, concrete open gateway commitments, and enhanced competitive opportunities. CN firmly believes that no Class I merger with KCS should be approved without similar commitments to enhance competition and protect the public interest.

KCS has entered a new merger agreement with Canadian Pacific Railway Company ("CP") at a higher purchase price than the prior CP-KCS

merger agreement, which KCS terminated on May 21, 2021. Yesterday CP and KCS filed a notice of their intent to file an application for approval of this new proposed transaction. CN will participate actively in that proceeding to ensure that all regulatory rules are applied fairly and that any Board proceeding in connection with the CP-KCS combination ensures that it will be pro-competitive and in the public interest.

Respectfully submitted,

/s/ Raymond A. Atkins

Raymond A. Atkins
Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
ratkins@sidley.com

Counsel for Canadian National Railway Company, Grand Trunk Corporation, and CN's Rail Operating Subsidiaries

cc: Parties of Record in FD 36514

272055212v.1

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 57

HIGHLY CONFIDENTIAL – CN0000071-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 58

HIGHLY CONFIDENTIAL – CN0000137-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 59

HIGHLY CONFIDENTIAL – CN0000147-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 60

HIGHLY CONFIDENTIAL – CN0000185-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 61

HIGHLY CONFIDENTIAL – CN0000167-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 62

HIGHLY CONFIDENTIAL – CN0001142-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 63

HIGHLY CONFIDENTIAL – CN0000783-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 64

HIGHLY CONFIDENTIAL – CN0000708-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 65

HIGHLY CONFIDENTIAL – CN0000415-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 66

HIGHLY CONFIDENTIAL – CN0001255-HC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 67

CN INVESTOR DECK (APRIL 2021)

Superior Proposal to Combine With Kansas City Southern

INVESTOR PRESENTATION
April 2021









Forward-Looking Statements

Certain statements included in this presentation constitute "forward-looking statements" within the meaning of the United States Private Securities Litigation Reform Act of 1995 and under Canadian securities laws, including statements based on management's assessment and assumptions and publicly available information with respect to KCS, regarding the proposed transaction between CN and KCS, the expected benefits and synergies of the proposed transaction, future opportunities for the combined company and future shareholder returns. By their nature, forward-looking statements involve risks, uncertainties and assumptions. The Company cautions that its assumptions may not materialize and that current economic conditions render such assumptions, although reasonable at the time they were made, subject to greater uncertainty. Forward-looking statements may be identified by the use of terminology such as "believes," "expects," "anticipates," "assumes," "outlook," "plans," "targets," or other similar words.

Forward-looking statements are not guarantees of future performance and involve risks, uncertainties and other factors which may cause actual results, performance or achievements of CN, or the combined company, to be materially different from the outlook or any future results, performance or achievements implied by such statements. Accordingly, readers are advised not to place undue reliance on forward-looking statements. Important risk factors that could affect the forward-looking statements in this presentation include, but are not limited to: the outcome of any possible transaction between CN and KCS, including the possibility that a transaction will not be agreed to or that the terms of any definitive agreement will be materially different from those described; uncertainties as to whether KCS will cooperate with CN regarding the proposed transaction; the parties' ability to consummate the proposed transaction; the conditions to the completion of the proposed transaction; that the regulatory approvals required for the proposed transaction may not be obtained on the terms expected or on the anticipated schedule or at all; CN's indebtedness, including the substantial indebtedness CN expects to incur and assume in connection with the proposed transaction and the need to generate sufficient cash flows to service and repay such debt; CN's ability to meet expectations regarding the timing, completion and accounting and tax treatments of the proposed transaction; the possibility that CN may be unable to achieve expected synergies and operating efficiencies within the expected time-frames or at all and to successfully integrate KCS's operations with those of CN; that such integration may be more difficult, time-consuming or costly than expected; that operating costs, customer loss and business disruption (including, without limitation, difficulties in maintaining relationships with employees, customers or suppliers) may be greater than expected following the proposed transaction or the public announcement of the proposed transaction; the retention of certain key employees of KCS may be difficult; the duration and effects of the COVID-19 pandemic, general economic and business conditions, particularly in the context of the COVID-19 pandemic; industry competition; inflation, currency and interest rate fluctuations; changes in fuel prices; legislative and/or regulatory developments; compliance with environmental laws and regulations; actions by regulators; the adverse impact of any termination or revocation by the Mexican government of Kansas City Southern de México, S.A. de C.V.'s Concession; increases in maintenance and operating costs; security threats; reliance on technology and related cybersecurity risk; trade restrictions or other changes to international trade arrangements; transportation of hazardous materials; various events which could disrupt operations, including illegal blockades of rail networks, and natural events such as severe weather, droughts, fires, floods and earthquakes; climate change; labor negotiations and disruptions; environmental claims; uncertainties of investigations, proceedings or other types of claims and litigation; risks and liabilities arising from derailments; timing and completion of capital programs; and other risks detailed from time to time in reports filed by CN with securities regulators in Canada and the United States. Reference should also be made to Management's Discussion and Analysis in CN's annual and interim reports, Annual Information Form and Form 40-F, filed with Canadian and U.S. securities regulators and available on CN's website, for a description of major risk factors relating to CN.

Forward-looking statements reflect information as of the date on which they are made. The Company assumes no obligation to update or revise forward-looking statements to reflect future events, changes in circumstances, or changes in beliefs, unless required by applicable securities laws. In the event CN does update any forward-looking statement, no inference should be made that CN will make additional updates with respect to that statement, related matters, or any other forward-looking statement.

Additional Information

No Offer or Solicitation

This presentation does not constitute an offer to sell or the solicitation of an offer to buy any securities or a solicitation of any vote or approval, nor shall there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction. No offer of securities shall be made except by means of a prospectus meeting the requirements of Section 10 of the Securities Act of 1933, as amended.

Additional Information and Where to Find It

This presentation relates to a proposal which CN has made for an acquisition of Kansas City Southern. In furtherance of this proposal and subject to future developments, CN (and, if a negotiated transaction is agreed, KCS) may file one or more registration statements, proxy statements, tender offer statements or other documents with the U.S. Securities and Exchange Commission ("SEC") or applicable securities regulators in Canada. This presentation is not a substitute for any proxy statement, registration statement, tender offer statement, prospectus or other document CN and/or KCS may file with the SEC or applicable securities regulators in Canada in connection with the proposed transactions.

INVESTORS AND SECURITY HOLDERS ARE URGED TO READ THE PROXY STATEMENT(S), REGISTRATION STATEMENT(S), TENDER OFFER STATEMENT, PROSPECTUS AND ANY OTHER RELEVANT DOCUMENTS FILED WITH THE SEC OR APPLICABLE SECURITIES REGULATORS IN CANADA CAREFULLY IN THEIR ENTIRETY IF AND WHEN THEY BECOME AVAILABLE BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT CN, KCS AND THE PROPOSED TRANSACTIONS. Any definitive proxy statement(s), registration statement or prospectus(es) and other documents filed by CN and KCS (if and when available) will be mailed to stockholders of CN and/or KCS, as applicable. Investors and security holders will be able to obtain copies of these documents (if and when available) and other documents filed with the SEC and applicable securities regulators in Canada by CN free of charge through at www.sec.gov and www.sedar.com. Copies of the documents filed by CN (if and when available) will also be made available free of charge by accessing CN's website at www.cn.ca.

Participants

This presentation is neither a solicitation of a proxy nor a substitute for any proxy statement or other filings that may be made with the SEC and applicable securities regulators in Canada. Nonetheless, CN and its directors and executive officers and other members of management and employees may be deemed to be participants in the solicitation of proxies in respect of the proposed transactions. Information about CN's executive officers and directors is available in its 2021 Management Information Circular, dated March 9, 2021, as well as its 2020 Annual Report on Form 40-F filed with the SEC on February 1, 2021, in each case available on its website at www.cn.ca/investors/ and at www.sec.gov and www.sedar.com. Additional information regarding the interests of such potential participants will be included in one or more registration statements, proxy statements, tender offer statements or other documents filed with the SEC and applicable securities regulators in Canada if and when they become available. These documents (if and when available) may be obtained free of charge from the SEC's website at www.sec.gov and www.sedar.com, as applicable.

Non-GAAP Measures

CN reports its financial results in accordance with United States generally accepted accounting principles (GAAP). CN also uses non-GAAP measures in this presentation that do not have any standardized meaning prescribed by GAAP, including constant currency, free cash flow, and adjusted debt-to-adjusted EBITDA multiple. These non-GAAP measures may not be comparable to similar measures presented by other companies. For further details of these non-GAAP measures, including a reconciliation to the most directly comparable GAAP financial measures, refer to the Company's website, Fourth Quarter and Full Year Results at www.cn.ca/financial-results. This presentation also includes certain forward looking non GAAP measures (Adjusted Diluted EPS, Adjusted EBITDA and a leverage ratio being Adjusted Debt to Adjusted EBITDA). It is not practicable to reconcile, without unreasonable efforts, these forward looking measures to the most comparable GAAP measures (diluted EPS, Net income, and long term debt to net income ratio, respectively), due to unknown variables and uncertainty related to future results. Please see note on Forward Looking Statements above for further discussion.

All amounts in this presentation are expressed in United States dollars, unless otherwise noted. All references to the "Company" are to CN.

Highly Experienced Leadership Team

JJ Ruest

President & Chief Executive Officer



- 25 years with CN
- Served as CMO for 8 years

Rob Reilly

Executive VP & Chief Operating Officer



- 32 years of rail industry experience
- Deep understanding of intermodal business at major ports & terminals

Ghislain Houle

Executive VP & Chief Financial Officer



- 23 years with CN
- Qualified conductor and engineer

Sean Finn

Executive VP Corporate Services & Chief Legal Officer



- 27 years with CN
- 21 years in current role

Dominique Malenfant

Executive VP & Chief Information and Technology Officer



- 31 years of transportation experience
- Extensive leadership experience and deep knowledge of rail technologies

Dorothea Klein

Senior VP & Chief Human Resources Officer



- 31 years of experience
- Strong background in HR, finance, M&A and workforce transformation

Excellence in operations, safety, technology, regulatory, and M&A

For more information on CN's company officers, please visit www.cn.ca/company-officers.

CN's Superior Proposal to Combine With KCS

Higher Premium, More Upfront Cash	✓ Proposal of $325 per share; 21% premium to the CP proposal (1) ✓ $200 in cash and 1.059 CN shares for each KCS share ✓ KCS shareholders will participate in the upside and value creation
Best in Class Combined Network, More Synergies	✓ Combined revenue of $13.6B and Adj. EBITDA of $6.8B (pre-synergies) (2)(3) ✓ Establishes the premier Canada-U.S.-Mexico railway network ✓ Significant synergies mainly driven by ESG-positive conversion of truck to rail ✓ Bringing together two exceptional, talented, high performing teams
Lower Execution Risk	✓ Fully committed financing ✓ Plain vanilla voting trust structure ✓ No CN shareholder approval requirement ✓ Continue operating under the KCS name in the U.S. and Mexico

Better bid. Better partner. Better railway. Best solution.

(1) Based on CN and CP closing NYSE share prices of US$118.13 and US$365.37, as of April 19, 2021
(2) Based on revenue for the years ended December 31, 2020, from KCS public disclosure. CAD figures converted to USD at FX rate of 0.799 as of April 19, 2021.
(3) Please see the heading Non-GAAP Measures in this presentation

CN-KCS is Unique, Highly Strategic, and Value Accretive

CN + Kansas City Southern Lines

- **Premier Canada-U.S.-Mexico railway network**
- **Unparalleled stakeholder benefits: Safer, Faster, Cleaner, Stronger**
- **Accelerate ESG-driven growth and enhanced choice for the customer**
- **EBITDA synergies approaching $1B** – preliminary estimate (1)
- **Strong balance sheet with rapid deleveraging profile**
- **Expected to be highly value accretive to all shareholders** (2)

Creating The North American railway for the 21st century

(1) Management preliminary estimates based on public information

(2) The combination is expected to be accretive to CN's Adjusted Diluted EPS, excluding incremental transaction-related amortization, in the first full year following CN's acquisition of control of KCS, and is expected to generate double-digit accretion upon the full realization of synergies thereafter. Please see the heading Non-GAAP Measures in this presentation.

CN's Foundation of Excellence and Core Strengths

- ✓ **Precision Scheduled Railroading pioneer;** first to champion and integrate PSR across our full network
- ✓ **The first and leading North American railway,** with a deep and rich history of operating in the U.S.
- ✓ **ESG leadership**; the only Class I in Dow Jones Sustainability World Index
- ✓ **Culture of safety, efficiency, integrity, and diversity;** combined with leadership in advanced technology
- ✓ **Strong balance sheet** and disciplined capital allocation
- ✓ **Long-standing acquisition track record**; strategic, accretive, and successful integrations



Longstanding Track Record of Successful Acquisitions & Integrations

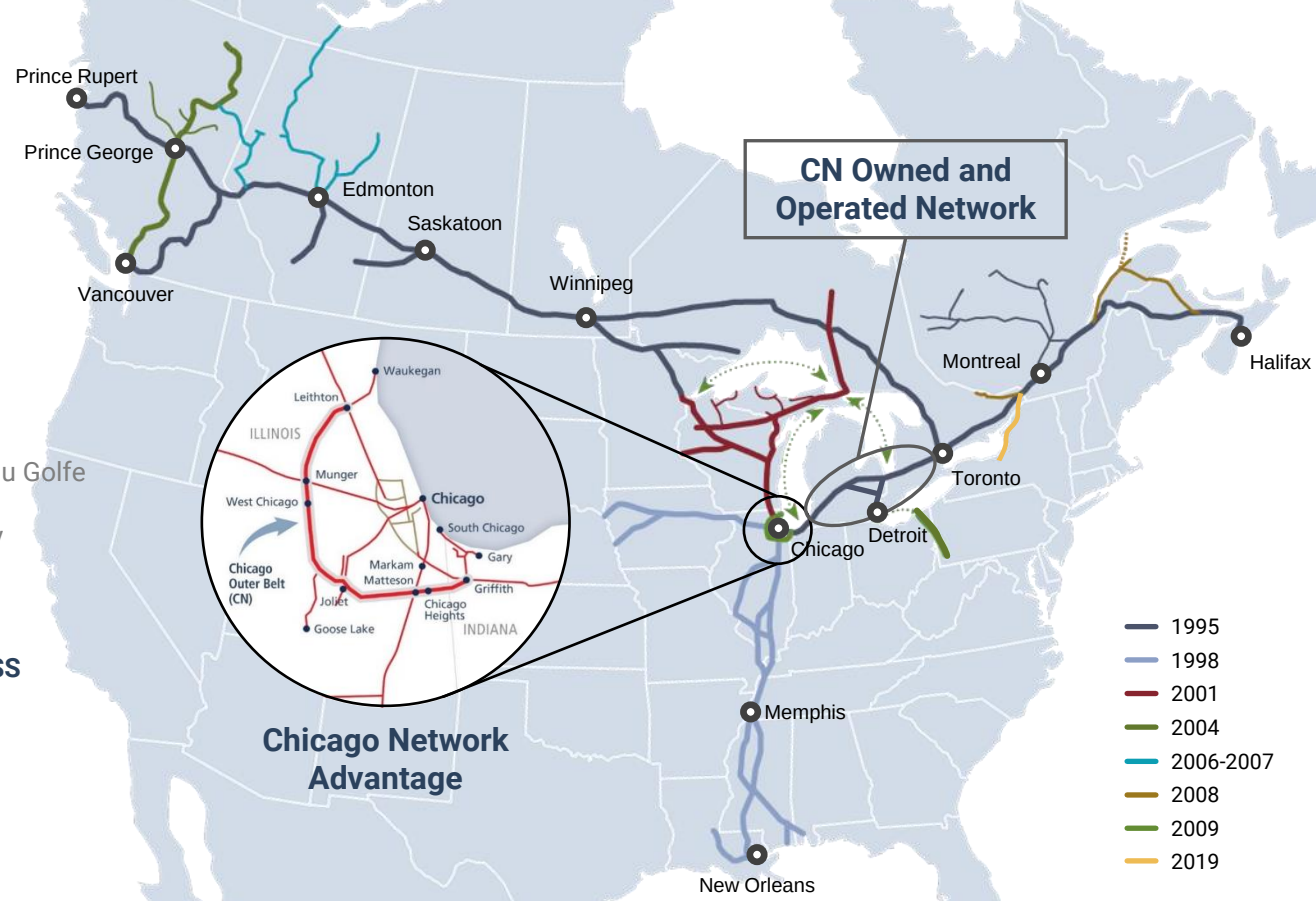
2019-2020
FURTHER EXPANDING OUR REACH
Massena rail line (pending closing)
TransX
H&R

2009
STRUCTURAL ADVANTAGE IN CHICAGO
Elgin, Joliet and Eastern Railway

2006–2008
SOLIDIFYING OUR REACH
Savage Alberta Railway
Mackenzie Northern Railway
Lakeland & Waterways Railway
Central Western Railway
Athabasca Northern Railway
Chemin de fer de la Matapédia et du Golfe
Ottawa Central Railway
New Brunswick East Coast Railway
Compagnie de Gestion de Matane

1998–2004
BUILDING A THREE COAST ACCESS
Illinois Central Railway
Wisconsin Central Railway
B.C. Railway
Great Lakes Transportation

1995
SOLID CANADIAN FOOTPRINT
CN Network at privatization

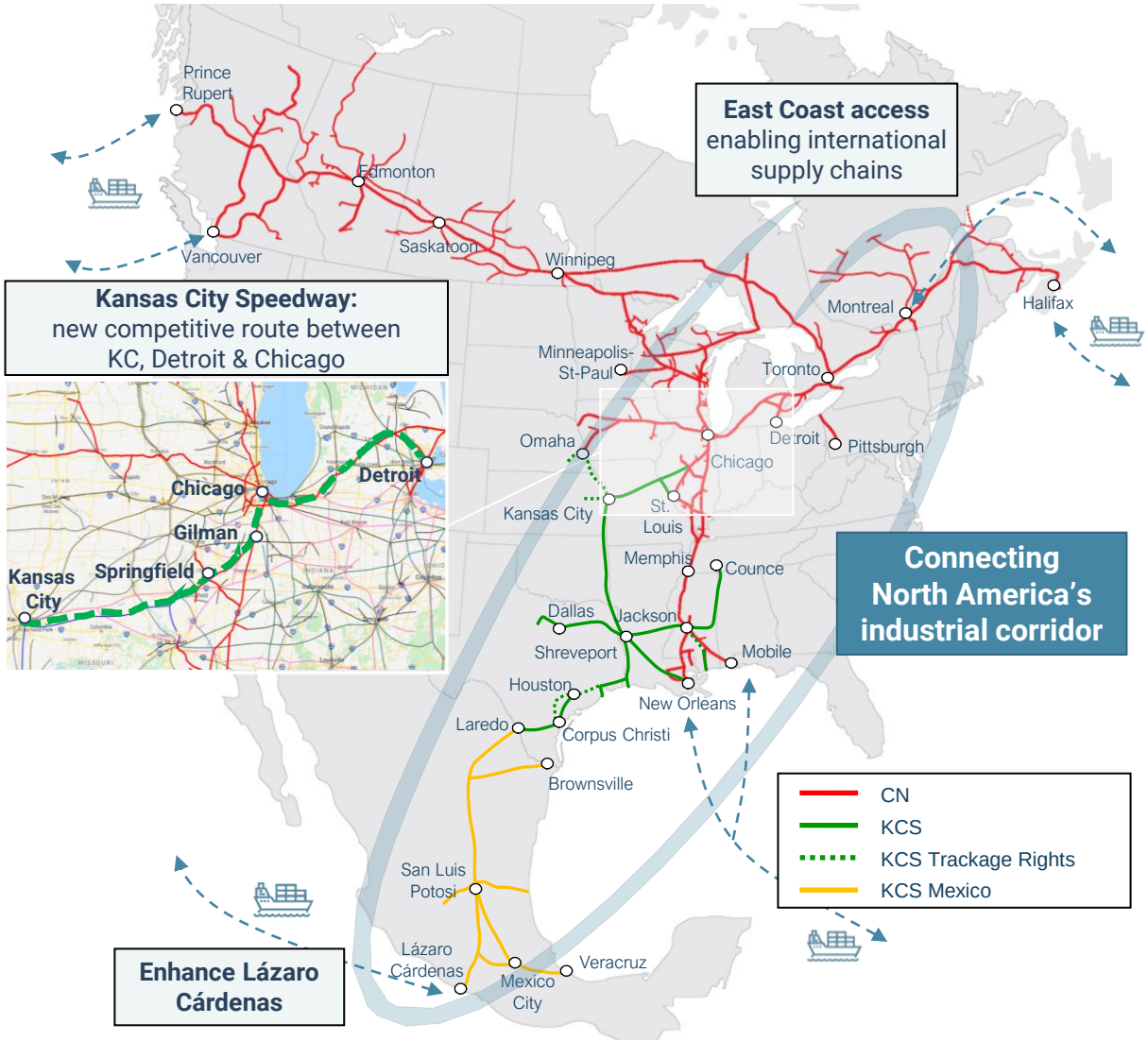


Unmatched North American rail network with a deep and rich history of operating in the U.S.

CN-KCS Will Create the End-to-End USMCA Rail Network

Unique Benefits of Combined Network (1)

- ✓ **Secure North American supply chain**
- ✓ **Deliver goods faster at lower cost**
- ✓ **Enhanced choice for customers**
- ✓ **ESG-positive truck to rail conversion**
- ✓ **Single owner-operated rail network**
  - New single line service from Laredo to Michigan & Ontario
  - KC to East Coast with no interchange
  - Leverage Prince Rupert expertise in Mexico's ports

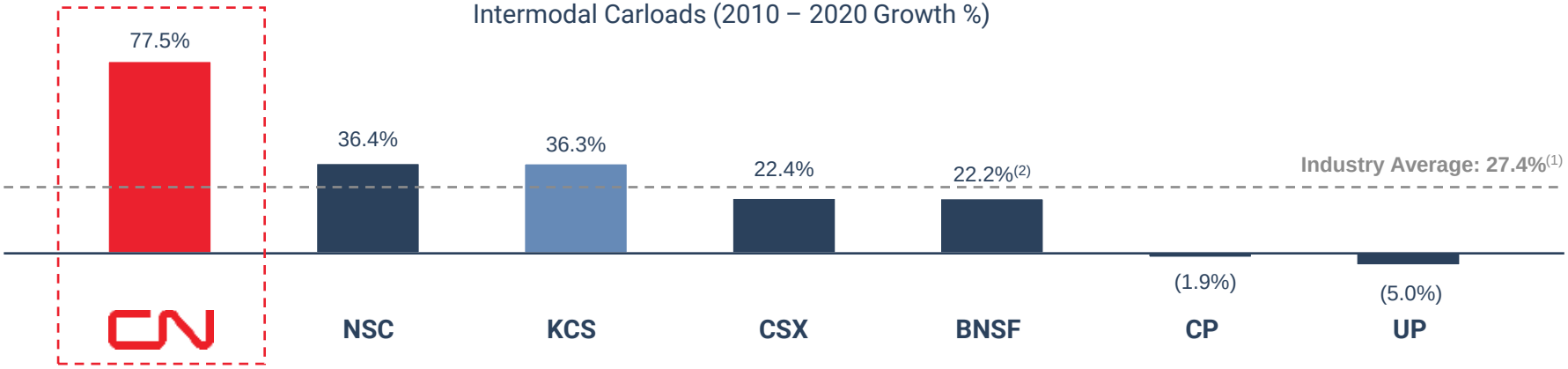


Facilitating trade and powering economic prosperity across North America

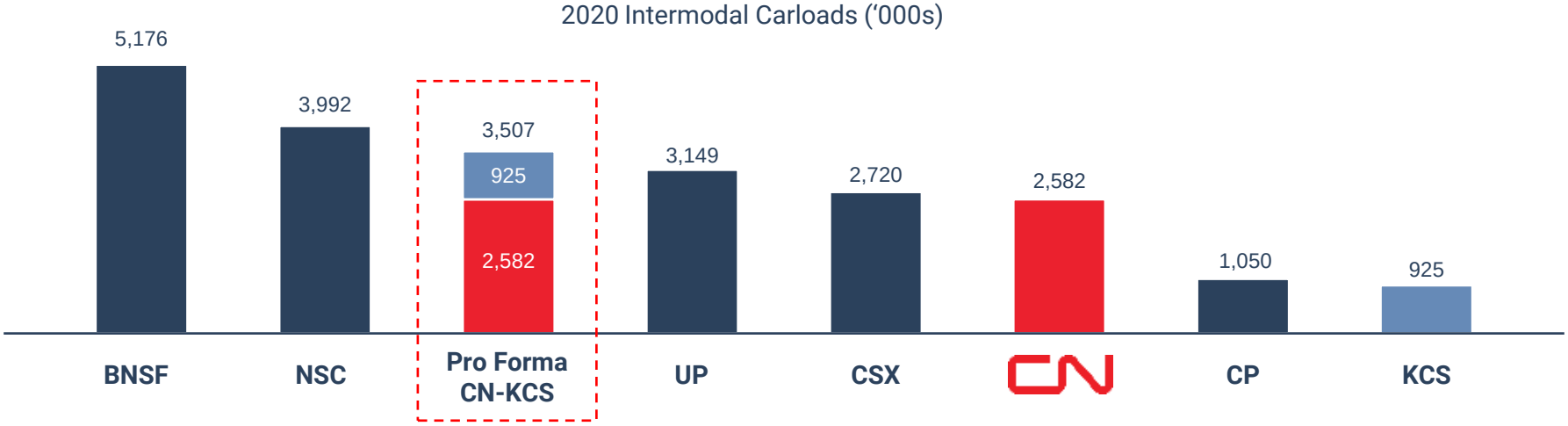
(1) Less than 1% of KCS route miles overlap with CN network

Combination Will Accelerate CN's Powerful Intermodal Growth

CN is the Fastest Growing Intermodal Network in North America



Combination Will Create One of the Largest Intermodal Networks in North America

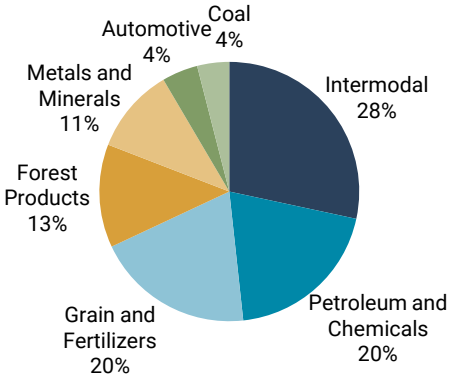


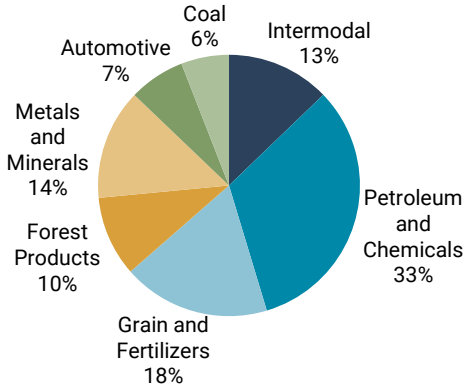
Note: Based on equity research, company websites and public filings
(1) 2010 – 2020 percent growth weighted average using 2020 intermodal carload volumes
(2) BNSF 2010 intermodal carload volume based on equity research

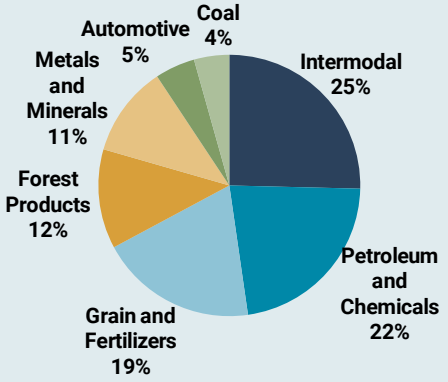
Enhanced Scale and Highly Diversified Customer Base

	CN	Kansas City Southern Lines (2)	Combined (3)
Revenue	$11.0B	+ $2.6B	$13.6B

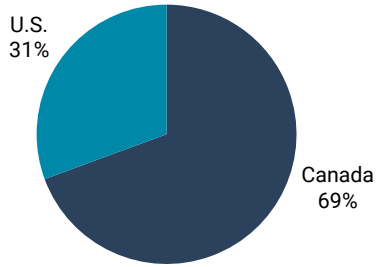
Business Mix (1)

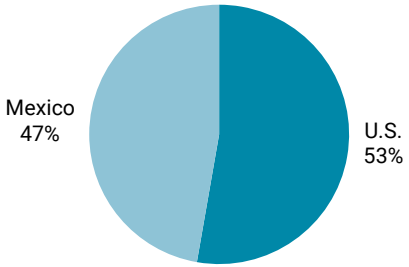


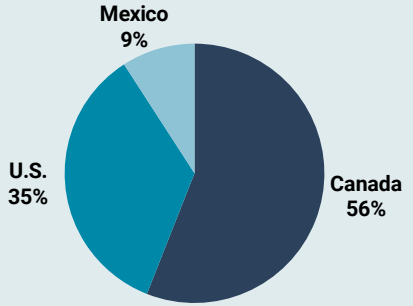




Geography (1)







Diversified by commodity & geography with minimal reliance on thermal coal and crude

Note: Based on 2020 figures. Figures in CAD converted to USD based on April 19, 2021 exchange rate of 0.799

(1) Business mix percentage based on 2020 freight revenue; Geography based on 2020 total revenue

(2) KCS information based on public filings

(3) Pro forma revenue excludes expected synergies

Expected EBITDA Synergies Approaching $1B (1)

Conservative & preliminary estimates

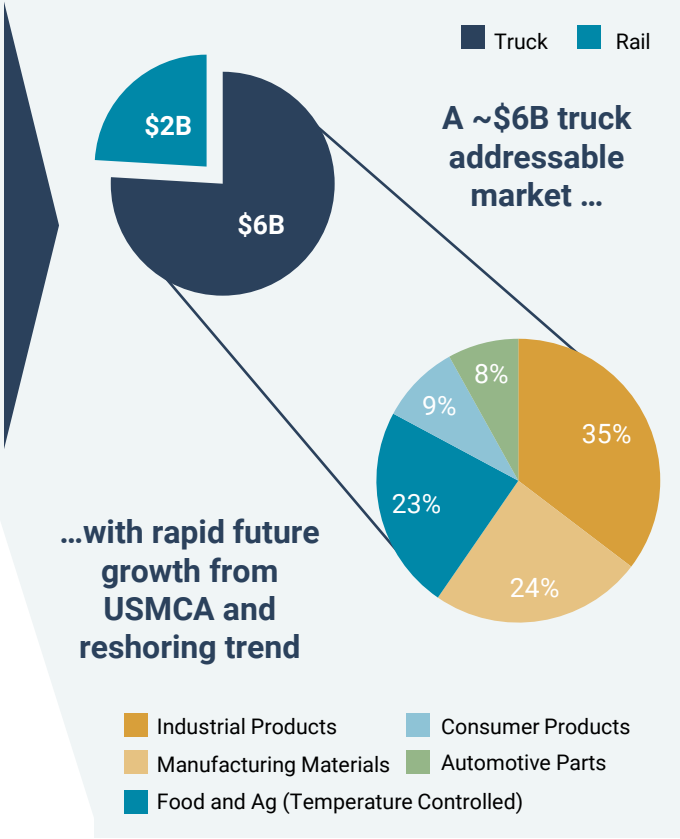
New Revenue Opportunity

- ✓ ~$8B additional addressable market opportunity
- ✓ ~75% of new TAM opportunity from ESG-positive conversion of trucks to more fuel-efficient rail
- ✓ Service enhanced USMCA trade flows
- ✓ Minimal reliance on thermal coal and crude
- ✓ Growth to support job creation
- ✓ Stronger teams with one goal of customer success

Cost Efficiencies

- ✓ Fuel efficiency and lower costs
- ✓ Broader technology deployment
- ✓ Potential for purchasing economies of scale
- ✓ Core of cost savings will not be people-driven

Intermodal Opportunity Breakdown



Expected to achieve ~$1B annualized EBITDA synergies within three years of integration (1)

(1) Management preliminary estimates based on public information

ESG Leader in North American Transportation

CN's Focus Today

Environmental Protection

- Consuming 15% less locomotive fuel per Gross Ton Mile vs. average of its Class I railway peers
- Committing to reduce GHG emission intensity by 29% by 2030 (1)
- First North American railroad to formally support TCFD framework (2)

Active Social Responsibility

- Life Critical Rules reinforce CN's culture of safety-first
- Very strong community and stakeholder engagement culture
- Signatory to Catalyst Accord 2022 to accelerate gender diversity initiatives

Best-in-Class Governance

- Executive compensation aligned with ESG performance
- Best in class corporate governance and CN Board to achieve gender parity of independent directors at AGM

Recognition

MEMBER OF Dow Jones Sustainability Indices In Collaboration with RobecoSAM

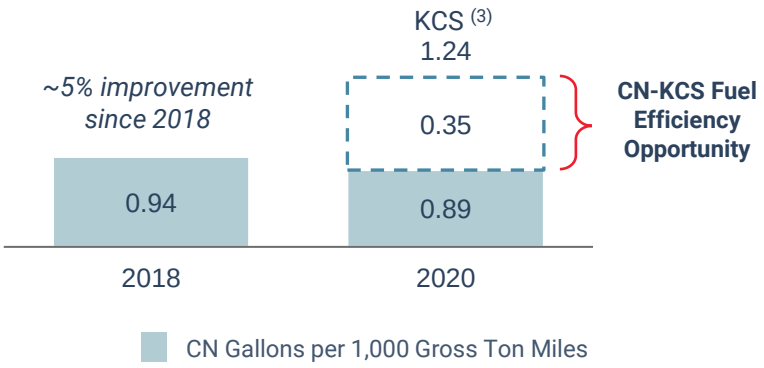
CDP A LIST 2020 CLIMATE

2021 GLOBAL100 *Corporate Knights*

Rail is Significantly More Efficient Than Truck

75%	GHG reduction moving freight by rail vs. truck
4-5x	More fuel efficient than truck
300+ Trucks	Replaced by a single freight train

Best-in-Class Fuel Efficiency Across a Larger Network



(1) tCO_2e/million revenue tonne kilometers, based on 2015 levels
(2) Task Force on Climate-related Financial Disclosure
(3) KCS information based on public filings

CN's Advanced Technology Applied to a Larger Rail Network

Autonomous Track Inspection Program *(FRA approved)* (1)

- Equipped with latest sensors and AI technology
- More accurate preventative maintenance
- Up to 20x more inspections, while unlocking capacity



Digitalized and Automated Train Inspection

- More frequent and better quality inspections
- Coupling high-resolution imaging hardware with powerful machine learning software



Connecting the Supply Chain

- APIs for customers to "track and trace" shipments in real-time (2)
- Reducing end-to-end cycle times



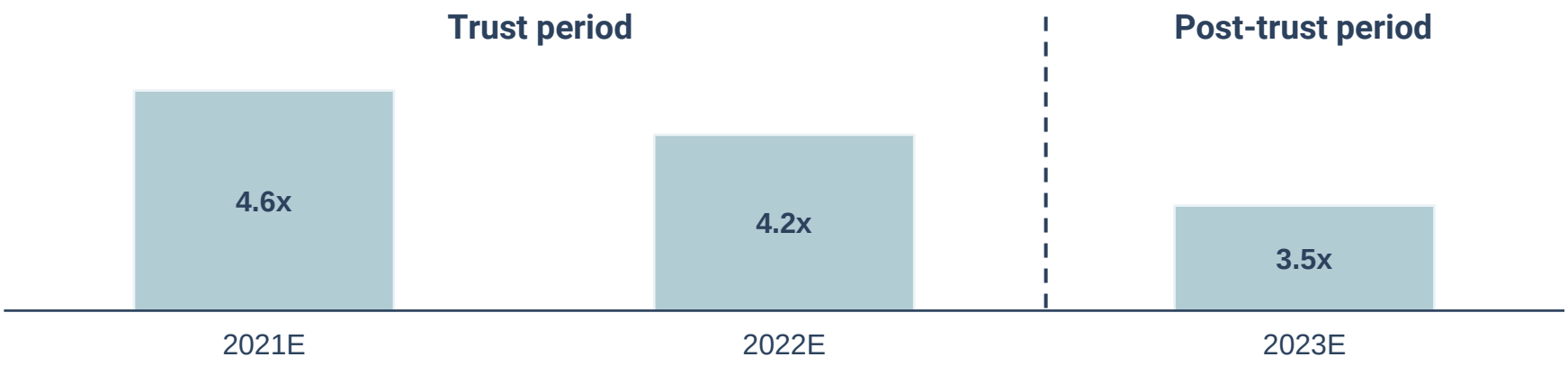
CN's technology will improve safety across KCS' ~7,100 route miles

(1) Federal Railroad Administration
(2) Application Programming Interface

Strong Free Cash Flow Supports Rapid Deleveraging

- Committed to maintaining a strong balance sheet and investment grade rating
- Pause share repurchases and re-evaluate as leverage reaches 2.5x - 3.0x (1)
- No change to current dividend policy

Pro Forma Leverage Targets (1)



Committed to a strong balance sheet and expect to maintain investment grade rating

(1) Represents adjusted debt-to-adjusted EBITDA multiple, assuming closing into trust at end of 2021. Please see the heading Non-GAAP Measures in this presentation.

Recap: Combination Will Create the Premier Railway for the 21st Century

Better Bid

Higher premium, more upfront cash, and lower execution risk

Better Partner

More (ESG-driven) synergies



Better Railway

Safer, Faster, Cleaner, Stronger

The Best Solution

Better together – for the benefit of customers, communities and shareholders





A Superior Combination





Appendix: Voting Trust Structure

Plain vanilla structure identical to the CP proposal

Process Overview

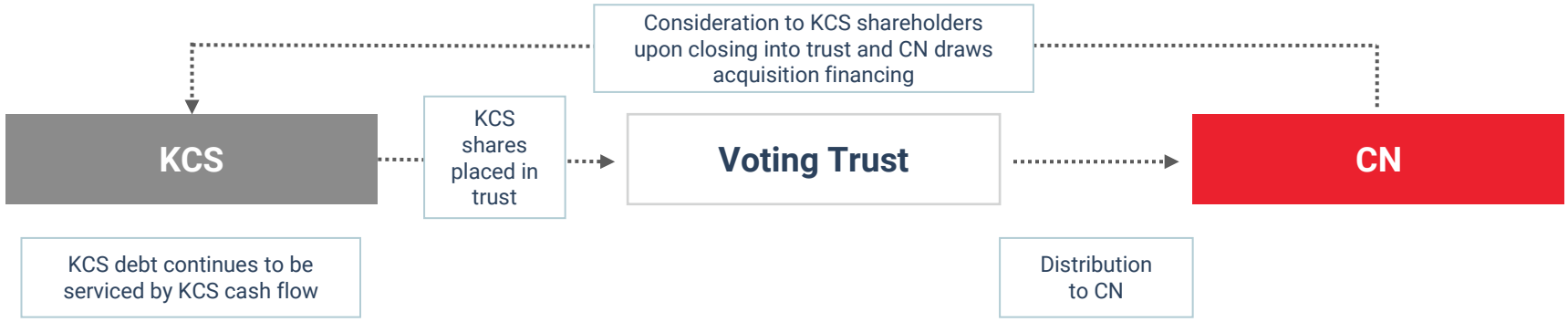
Step 1

- Independent voting trust acquires shares of KCS
- KCS shareholder approval and customary closing conditions required for CN to acquire KCS shares, at which point CN would place shares into voting trust and provide consideration to KCS shareholders
- Structure separates KCS from CN control until STB authorization
- Existing management and Board of Directors steward KCS while in trust
- **Target close in 2H/2021**

Step 2

- Upon receiving control approval from the STB, the two companies would be integrated
- Begin realizing synergies
- **Target date for acquisition of control in 2H/2022**

Trust Structure



Appendix: Key Terms of the Proposed CN Transaction

Offer Price and Consideration	• CN is proposing to combine with KCS at a price of $325 per share • KCS shareholders to receive $200 in cash and 1.059 CN shares for each KCS share • Represents a premium of 21% to the implied value of the CP proposal (1) • Implies a total enterprise value of $33.7B • At closing, KCS common shareholders would own ~12% of the combined company
Financing	• Fully committed financing by J.P. Morgan and RBC Capital Markets of $19.3B • Committed to a strong balance sheet and expect to maintain investment grade rating
Governance and Related Matters	• Continue operating in the U.S. and Mexico under the Kansas City Southern name and brand • Kansas City will be headquarters of combined CN-KCS U.S. operations • Four KCS directors will join CN's board • CN's U.S. operating and maintenance facilities to remain
Approvals & Expected Closing	• CN is seeking to enter into merger agreement with KCS as soon as possible • Targeting closing into voting trust in 2H/2021, subject to receipt of approvals by KCS shareholders, U.S. Surface Transportation Board (STB) approval of the contemplated voting trust structure and Mexican regulatory approvals • STB control approval and acquisition of control targeted in 2H/2022 • No CN shareholder approval required

(1) Based on CN and CP closing NYSE share prices of US$118.13 and US$365.37, as of April 19, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 68

CN AND KCS JOINT MOTION FOR APPROVAL OF VOTING TRUST AGREEMENT, FINANCE DOCKET NO. 36514 (CN-18 KCS-1) (EXCERPTS)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36514

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES
—CONTROL—
KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

VERIFIED STATEMENT OF JEAN-JACQUES RUEST

My name is Jean-Jacques Ruest. I am the President and Chief Executive Officer of Canadian National Railway Company ("CN"). I became President and CEO of CN in 2018. Previously, I was Executive Vice-President and Chief Marketing Officer. I joined CN in 1996 at the time it was privatized. Prior to this, I worked for 16 years at a major international chemical company. I earned a Masters in Business Administration in Marketing from Université de Montréal and a Bachelor of Science degree in applied chemistry from Université de Sherbrooke. I also completed the executive program of the University of Michigan Business School, and CN's Railroad MBA program.

The purpose of this Verified Statement is to explain some of the public interest benefits that we expect to see from a combination of CN and Kansas City Southern ("KCS"), which will benefit rail customers, port operators, employees, stakeholders, and the communities along our rail lines. These benefits are within reach now that KCS has agreed to combine with CN. We are excited about the possibilities of this transformative opportunity to create the North American railway for the 21st century—a single-line north-south rail network in the United States, Canada, and Mexico. This transaction will have

substantial benefits for our customers, who will be able to better compete in new markets thanks to longer single-line service, faster transit times, more effective equipment utilization, and fluid commercial interchanges. It will have substantial environmental benefits, since a key purpose of the transaction is to create more effective rail competition for north-south traffic flows, thus taking trucks off of congested highways and reducing greenhouse gas emissions. And CN will bring its commitment to capital investment to the KCS network, benefiting all customers who rely on that network.

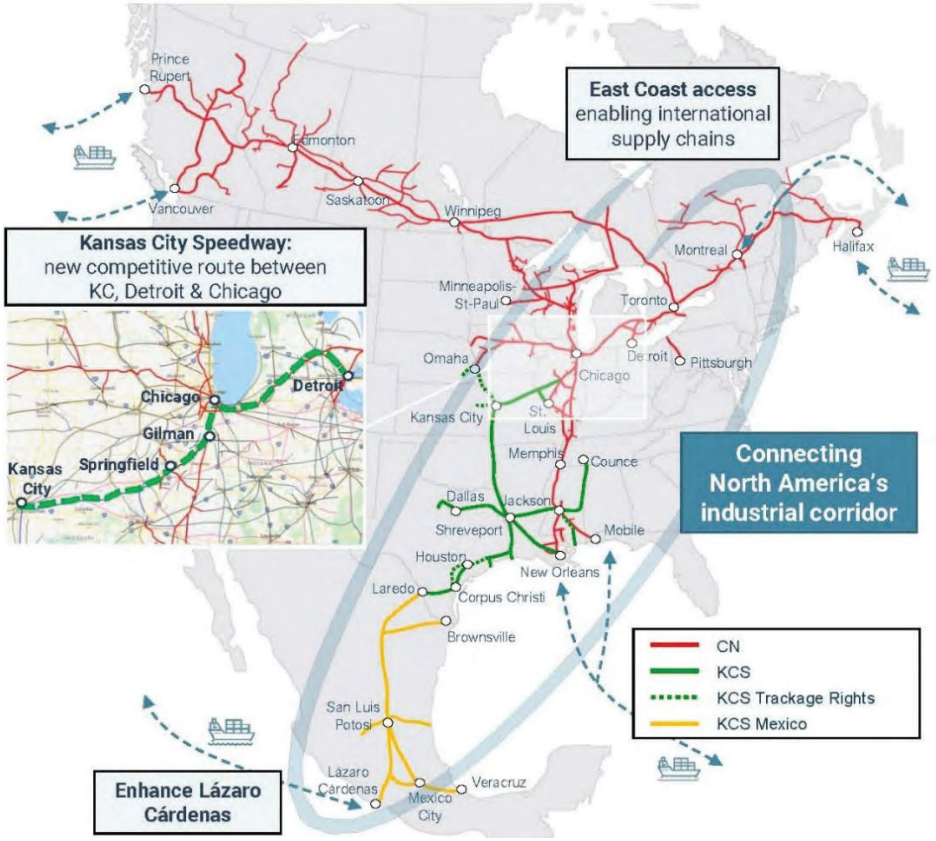
Moreover, CN is committed to assuring the Surface Transportation Board ("STB") that our combined network is a pure "end-to-end" vertical combination. Some have noted that there is a small area—reflecting less than 1% of our combined network—where CN and KCS are the only two railroads to serve a small number of rail customers. With KCS agreeing to partner with us, CN has concluded that the cleanest and most pro-competitive solution is to divest the KCS line between New Orleans and Baton Rouge, the only area where the CN-KCS combination would reduce a small number of customers from two railroads to a single rail option. CN-KCS will retain local and overhead trackage rights to provide single-line service to customers on the KCS line. We will work to secure a suitable independent carrier to acquire the line, and seek STB approval for that divestiture in our Application.

With this commitment, CN-KCS will be a true "end-to-end" combination with zero competitive overlap and tremendous public benefits. But these public benefits can only be realized if the STB approves CN's proposed voting trust. We do not ask for approval lightly, and we appreciate that the STB will a permit voting trust where the public benefits outweigh the potential public harms. In the case of CN's voting trust, they clearly do. Furthermore, the use of the voting trust here is crucial to place the CN-KCS transaction on a level playing field for KCS shareholders in this unusual setting, particularly given the

Board's prior decision to approve the use of a voting trust by the other railroad that has sought to combine with KCS. Once the Board has assured itself that there is no public harm associated with the use of the voting trust in this circumstance and of the enormous potential public benefit from a CN-KCS combination, I would urge the STB to approve our plain vanilla voting trust arrangement.

I. CN-KCS Will Be a True "End-To-End" Combination, Given CN's Commitment to Divest the KCS Line Between Baton Rouge and New Orleans.

From the outset, our proposed combination with KCS offers the promise of tremendous public benefits by connecting the continent, promoting growth, and competing more aggressively with the trucking industry for long-haul movements. Rail customers will benefit from more seamless single-line service, but so will local communities, employees, and the environment from converting truck traffic from busy interstates and highways to rail. A combined CN-KCS route would also be shorter, faster, and more direct than rail or truck competitors, resulting in improved efficiency, enhanced competition and greater options for customers. The map on the next page illustrates the vertical, "end-to-end" nature of the combined networks.



Nevertheless, some seek to overplay the competitive significance of the short New Orleans-Baton Rouge segment where CN and KCS have overlapping parallel lines. We have been very transparent from when CN first announced our bid to acquire KCS that CN would propose solutions for the very limited number of customers that are served only by CN and KCS (so-called 2-to-1 customers) between Baton Rouge and New Orleans, where the overlap in parallel lines amounts to less than 1% of the total combined network. In particular, CN previously committed to the STB that if KCS chooses to partner with CN, CN would propose effective, pro-competitive solutions to ensure that no customer will become sole served as a result of the transaction.

With the authorization of the CN Board of Directors, and with their shared commitment, I want to personally commit to the STB that, in connection with any approval for the combination, CN will divest the KCS line between Baton Rouge and New Orleans.

With KCS having now chosen to partner with CN, we have determined that divestiture is the most pro-competitive and clean solution. We will work to secure an independent third-party to acquire the overlapping KCS rail line, and to step into the shoes of KCS for any related haulage agreement. CN-KCS will retain local and overhead trackage rights to provide single-line service to customers on the KCS line. Once an agreement for the divestiture is in place, approval will be sought from the STB as part of our Application.

With this commitment, CN-KCS will be a true "end-to-end" combination. There will be zero overlapping lines, just gateways like St. Louis where the two railroads connect. This will prevent any potential 2-to-1 customer from losing rail competition, and will also address 3-to-2 customers on the New Orleans-to-Baton-Rouge line. I appreciate that the STB will remain vigilant and closely scrutinize this "end-to-end" combination to protect open gateways and require bottleneck commitments. These are steps CN has already committed to take. Now, given our commitment to remedy the small area of overlapping lines in the CN and KCS networks by divesting KCS's line between Baton Rouge and New Orleans, we hope the conversation can refocus on the tremendous value from a true "end-to-end" North American railway, which will offer more choice for rail customers, port operators, employees, shareholders, stakeholders, and communities.

II. CN-KCS Single-Line Rail Service Will Create New Opportunities for Rail Customers.

The expanded reach of the CN-KCS rail network translates into new single-line routes for rail customers that are more competitive with truck, barge, and other rail routes. The combination will allow CN customers to have single-line reach to markets served by KCS, including Kansas City and Dallas. Conversely, customers on KCS will gain single-line reach to U.S. markets served by CN, including Chicago, Detroit, and Memphis. The increased connectivity between the U.S., Canada, and Mexico would result in increased

economic growth, trade and jobs for all three countries, reinforcing the benefits of the renegotiated North American trade agreement.

Single-line service provides real benefits to CN and KCS customers. On average, eliminating interchanges between rail carriers can reduce an estimated 24 to 48 hours per interchange. Reducing transit times has a direct benefit to rail customers of more reliable and timely service, with shorter equipment cycle times. In turn, those shorter cycle times mean that a smaller railcar fleet is needed to move the same amount of product, whether the cars are railroad-owned or private.

The Attachment to my Verified Statement illustrates some examples of the particular benefits that we see for rail customers from a combined CN-KCS network. These benefits have been developed based on our best current estimate of transit times, traffic flows, and market dynamics, informed by public information and our due diligence with KCS. The Attachment illustrates supply chain benefits for six major market segments: (1) grain and grain by-products; (2) intermodal; (3) imports, exporters, and ocean carriers who rely on ports; (4) autos and auto parts; (5) lumber and panel customers; and (6) plastic resins, liquefied petroleum gases, and refined petroleum products.

A. Grain and Grain By-products

The CN-KCS combination will create new options for grain producers and processors. Generally, CN's network has more grain origins, such as in Illinois, Iowa, and Wisconsin. KCS's network has more grain destinations, including in the southern United States and Mexico. This creates multiple opportunities. For example, customers on KCS's lines will have new single-line service to barge loading locations along the upper Mississippi River system.[1] Customers on CN's lines will have new single-line service to

[1] *See* Attachment at Slide 1.

ship grain to feedmill markets on KCS's lines in the United States and Mexico.[2] Grain exporters will benefit from diversified rail and barge options to sell grain to overseas markets, in containers or in bulk.[3] The same is true for customers moving feed mill ingredients. A CN-KCS combination will improve customers' market reach by increasing the number of origin facilities and destination facilities for corn, soybean meal, and distillers dried grains.[4] Moreover, customers sourcing ethanol, distillers dried grains, and corn oil will have improved options. Customers served by CN in Iowa, Illinois, and Wisconsin will be able to ship ethanol in single-line rail service to new domestic markets in the United States, Gulf Coast export in Texas, and markets in Mexico.[5]

B. Intermodal

The CN-KCS combination will continue CN's efforts over the last ten years to grow its own intermodal network. From 2010 to 2020, CN developed the fastest growing intermodal network in North America. CN is committed to continued development of its intermodal network, and we see significant opportunities for a CN-KCS combination to increase north-south intermodal traffic and intermodal port activities. For example, currently trucks are the primary transportation option for temperature-protected food products (such as produce, fruits, processed foods, beef, pork, and poultry) moving from the U.S. Midwest to and from Mexico.[6] CN is a leader in the industry in its temperature-controlled domestic and overseas intermodal service, and a CN-KCS combination would provide single-line rail service to compete with trucks.

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[2] *See id.*

[3] *See id.* at Slide 2.

[4] *See id.* at Slide 3.

[5] *See id.* at Slide 4.

[6] *See id.* at Slide 5.

Slides 6 and 7 illustrate more ways that the CN-KCS combination would take more trucks off the road by offering a new single-line rail service to connect major markets in Texas and Mexico with the US Midwest and Canada's largest consumer markets.

C. Exporters, Importers, and Ocean Carriers

Through the proposed CN-KCS combination, rail customers will gain seamless reach to multiple new international container terminals, driving growth in international trade.

Slide 8 shows how the CN-KCS combination will create new options and improve transit times by connecting importers and exporters to the CN-served and KCS-served ports on the Pacific Ocean, Atlantic Ocean, and Gulf of Mexico. Adding more port gateways and destinations that can be reached in single-line rail service can help attract larger and more frequent ocean vessel service in North American trade lanes. Ports with available capacity provide opportunities for importers to avoid congestion that may arise in larger ports.

Slide 9 illustrates how retail customers in Kansas City and St. Louis seeking to import goods will gain single-line rail service from port terminals served by CN or by KCS, which connect with vessel services from ports around the world. This network of ports also facilitates export opportunities from Kansas City and St. Louis. Slide 10 shows how the CN-KCS combination would also connect retail importers to ports in Mexico that have capacity, are not congested, and have lower rail dwell time. Slide 11 shows how this improved ability to reach additional markets benefits terminals and their customers.

D. Automotive Supply Chain

Slide 12 illustrates the substantial benefits to the automotive supply chain from a new CN-KCS single-line rail option to connect Ontario and Michigan with Texas and Mexico. This is beneficial for all participants of the automotive supply chain, including for raw materials (like steel and aluminum), inbound parts, vehicles, and after market parts.

Slide 13 shows how electric car manufacturers in the central United States and Mexico will have better access to sustainably sourced aluminum through single-line rail service. Slide 14 illustrates the benefits of the CN-KCS combination for the automotive manufactured parts supply chain. The new single-line service would connect automotive original equipment manufacturers (OEMs) and their suppliers in Texas and Kansas City and Mexico with markets in Michigan and Southern Ontario served by CN. Reduced transit time would improve speed to market and enable customers to reduce inventory carrying costs and the total costs of the automotive supply chains.

E. Lumber and Panels

Slide 15 shows how the CN-KCS combination will connect lumber origins in Canada to destination housing, building, and home repair and renovation markets in Texas with single-line rail service. Improving the cycle time of railcars will increase fleet utilization without requiring additional investment in cars. Moving loaded cars in larger origin to destination car blocks and unit trains will create additional rail capacity to support the housing supply chain.

F. Plastics, Liquefied Petroleum Gases, and Refined Petroleum Products

Plastic resin customers currently served by CN or KCS similarly will benefit from single-line rail service to North American end markets in Mexico, Canada, and the US upper Midwest. As Slide 16 illustrates, these customers will gain access to numerous storage in transit sites, including in Chicago and Memphis, that are located on CN's network in close proximity to the end-markets for consumers of such goods. This enables faster and more flexible order fulfillment. Customers served by KCS will also have access to CN's resin overseas container packaging options adjacent to the Ports of Mobile and Prince Rupert to reach global markets.

Slide 17 shows how customers shipping liquefied petroleum gases (*e.g.*, propane and butane) will also benefit from the CN-KCS combination. Customers, farmers, and residents in the U.S. Midwest that use propane for home heating and crop drying will have CN-KCS as another option to source propane. Producers in Sarnia, Ontario and in Western Canada will be able to ship single-line moves in unit trains to supply the growing markets in Mexico. A reduction in transit time will result in fleet savings for customers, which will need fewer private cars to ship the same amount of product.

Slide 18 shows how customers shipping refined petroleum products (*e.g.*, gasoline and diesel) will benefit from the CN-KCS combination. Customers in Western Canada and the United States Midwest and Gulf Coast will be able to reach the growing markets in Mexico in single-line rail service. Customers can realize economies of scale by shipping in larger destination car block sizes or unit trains. Improved transit times can reduce car cycle times and result in savings for customers.

In short, we expect that the benefits of a CN-KCS combination would be widely shared among rail customers, who would benefit from expanded market reach and more competitive single-line rail service, as well as other participants in the supply chain, including end users and consumers.

III. CN-KCS Will Grow by Competing to Take Trucks Off the Highways, Leading to Environmental Benefits for Communities.

The environmental benefits of a CN-KCS combination would also be significant and widely shared. One of our visions for the CN-KCS combination is to convert to intermodal rail service truck loads that are currently moving over highways between Mexico/Texas and Michigan/Southern Ontario. Our routing for this traffic growth would take trucks off the highways and utilize double-stack containers on trains that would travel north to Matteson, Illinois (which is south of Chicago) and turn east toward Indiana. If successful, the CN-

KCS combined network will drive reduction in the carbon footprint of the thousands of trucks that head up and down I-35, I-55, and I-94 between Mexico, Texas, and the Midwest. Each CN-KCS daily double stack intermodal train from San Luis Potosi to Detroit would take over 300 long-haul trucks off of the road, avoiding approximately 260K tons of carbon dioxide emissions per year.



Because CN is able to remove more than 300 trucks from the road with every additional freight train, transportation by rail is four to five times more fuel efficient than transportation by long-haul trucking. This means greenhouse gases are reduced by 75% by moving goods by rail versus truck. For example, if the combined CN-KCS are able to move four trains worth of cargo per day between Mexico City and Detroit by rail instead of that cargo moving by truck, this would translate into 1,200 fewer trucks on the highway per day. This will mean fewer trucks on highways and roads and cleaner air.

IV. CN Is Committed to Investing in the KCS Network.

CN has a strong record of investing in its network to provide safe service and is dedicated to apply that same approach to the combined CN-KCS network. CN made its highest capital investments on record in 2018–2020. These investments were focused on adding capacity to accommodate growth and resiliency, deploying technology to improve safety and productivity, and investing in railcars and locomotives to serve our customers. CN invested $2.9 CAD billion (about 20% of revenue) in capital investments in 2020. Over the last three years, CN will have made a $10.3 CAD billion capital investment (about 20% of revenue per year). CN does not intend to reduce its capital expenditure plans during the pendency of the voting trust, nor would we reduce CN's capital expenditure plans even if we were required to divest KCS out of trust.

If a CN-KCS combination were approved, CN would apply its capital investment philosophy to the KCS network. We would anticipate making infrastructure investments in key areas across the new network, including Illinois, Missouri, Michigan, Louisiana, and Texas. This includes investments in the route between Kansas City, Missouri and Springfield, Illinois. This will help create a new direct single-line competitive route between Kansas City and both Detroit, Michigan and the Port of Montréal, as well as create a more direct route to the barge loading market in St. Louis. These investments mean a better, more reliable rail network for automotive, grain, and port-related container business customers.

Moreover, the CN-KCS combination will also bring significant service and efficiency improvements by leveraging the networks, resources, best practices, and technology of the combined companies. Together CN and KCS will:

- Enhance fuel efficiency by leveraging CN's best practices, new technologies (*e.g.*, Horse Power Tonnage Analyzer), efficient routings that reduce mileage and grade, and idling time policies.
- Create better overall locomotive and car fleet utilization and cycle times by applying best practices to managing the combined fleets, reduced transit times by utilizing CN's Chicago by-pass and leveraging newer, highly reliable locomotives with lower maintenance costs.
- Reduce customer logistics costs and carbon emissions costs by diverting truck traffic onto new CN-KCS premium intermodal services in key traffic lanes enabled by the combination.
- Leveraging CN's Automated Track Inspection Program ("ATIP") that promotes safe operating conditions and lowers long-term maintenance costs.

V. A Voting Trust Is Necessary to Realize These Significant Public Benefits From the Proposed CN-KCS Combination.

In closing, I reiterate that CN did not make its request to use a voting trust lightly, but rather out of necessity given the unique circumstances established by KCS's initial merger agreement with Canadian Pacific Railway ("CP"). The KCS-CP merger agreement required use of a voting trust as a structural feature of the combination. A voting trust gives certainty to KCS and its shareholders that the transaction will be able to close in 2021, without the delay of completing the full STB regulatory process, which will extend through 2022.

In order for KCS to be able to terminate its agreement with CP and accept CN's superior proposal, CN was required to provide KCS shareholders the same amount of certainty of closing into a voting trust and assurance of a closing in 2021. This is especially true since the KCS-CP voting trust had been approved by the STB. Like that approved

voting trust, the CN-KCS voting trust gives certainty of closing to KCS shareholders and ensures that KCS is independently managed by its management and the trustee, while the STB fully reviews and considers the CN-KCS combination.

Approval of the CN-KCS voting trust proposal under these unique circumstances is appropriate to maintain a level playing field for KCS and its shareholders. If the CN-KCS voting trust proposal is not approved by the STB, KCS would be deprived of its choice of CN as the winning bidder. Our merger agreement—like that previously proposed by CP—is conditioned on the use of this plain vanilla voting trust process. If the STB denies our request, having approved the voting trust of the inferior bidder, our merger agreement will terminate. KCS could be forced to accept the less valuable competing bid and deprive its shareholders and customers of the benefits that would flow from a CN-KCS transaction. With the utmost respect, it should be the decision of KCS—its management, Board of Directors, and, ultimately, its shareholders—to select which railroad is a better partner for the future, and to then have that transaction subject to the ultimate approval of the STB in accordance with the current rules. I am confident we will address any concerns and obtain that ultimate approval for our pro-competitive CN-KCS combination.

Conclusion

The CN-KCS combination will enable the creation of the North American railway for the 21st Century, with benefits of more choice for rail customers, port operators, employees, stakeholders, and the communities. These benefits can only be realized if the STB approves the CN-KCS voting trust to give KCS and its shareholders the certainty of closing in 2021.

VERIFICATION

I, Jean-Jacques Ruest, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 25th day of May, 2021.



Jean-Jacques Ruest
President and Chief Executive Officer of
Canadian National Railway Company

Attachment

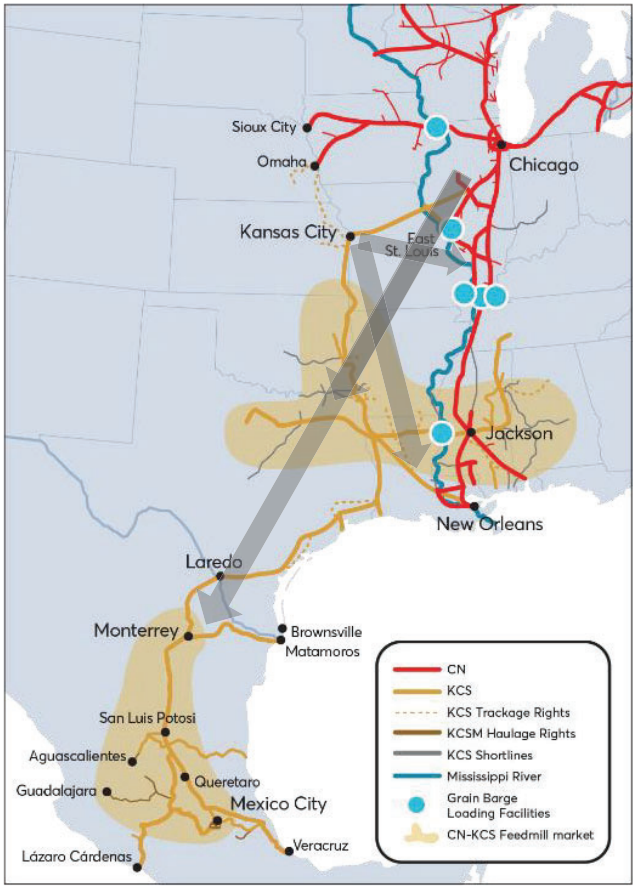
Verified Statement
of Jean-Jacques Ruest

STB Finance Docket No. 36514

Connected Continent

New Destination Markets for Grain

- KCS-served customers will **gain direct access to barge loading locations** along the river system along with grain export terminals in the Center Gulf.
- CN-served customers will have a more competitive single-owner, single-operator network to ship grain to the Mexico markets (anticipated **cost savings** of improved fleet utilization from the combination) and reach export facilities in the Texas Gulf.
- The number of feed mills, ethanol plants, and soybean processing plants that customers will be able to reach directly will increase considerably – **more markets** to market grain and/or feed ingredients to.
- **Increased optionality** and arbitrage opportunity for customers allows their commercial risk to be spread across a larger combined network.
- **Increased market liquidity** and a more dynamic rail freight market with more players in the market as part of a combined CN-KCS.

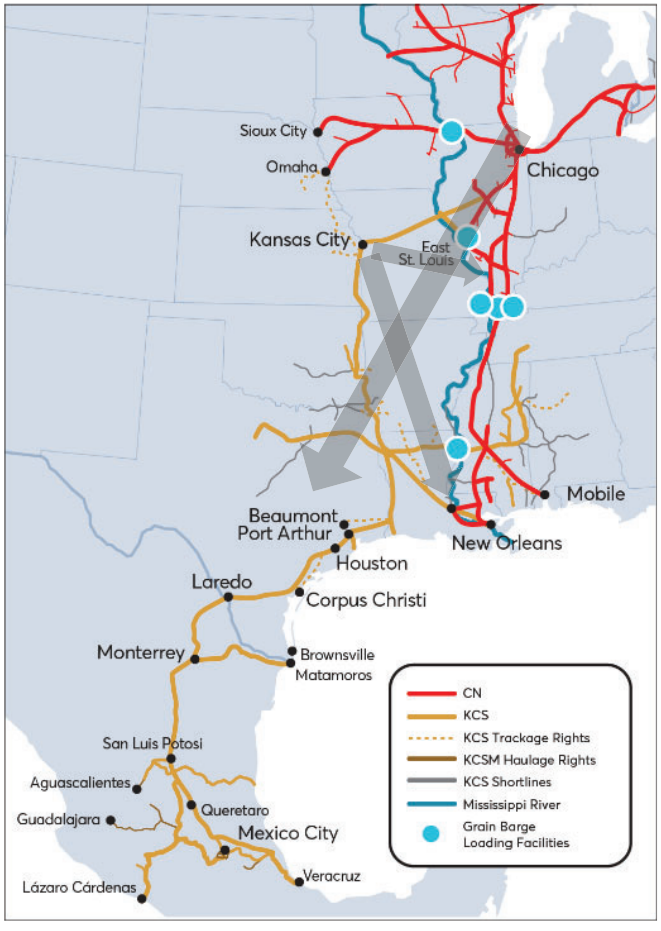


Optionality and arbitrage opportunity creates customer value, bigger network reduces commercial risk.

Connected Continent

Increased Barge/Rail Optionality for Grain Exporters

- The combination of CN-KCS will **diversify grain origination options** over a larger geography for customers selling grain into overseas markets
- **New direct access** for customers in MO, KS **to grain export terminals** in the New Orleans/Mobile area, plus multiple additional barge loading points
- **New direct access to Texas Gulf export destinations** for customers in IA, IL, WI along with reach to the Mexico market
- **Multiple efficient routing options** to the St. Louis and other barge loading locations will encourage CN-KCS direct origination as well as origination from offline origins, making the origination map bigger

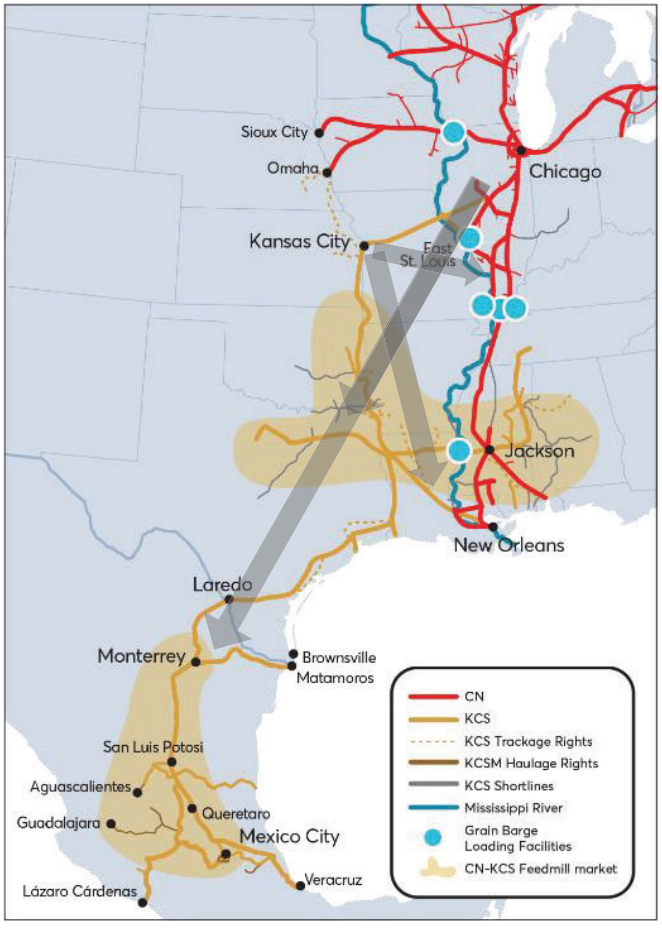


Significantly enhanced optionality to move grain to export position by barge and rail.

Connected Continent

Grain Feed Mill Market Reach

- **Increased direct single carrier product origination network** for corn, soybean meal and distillers dried grains (DDGS).
- Feed mills will be able to **spread out their product origination risk** across a much broader geography
- Direct single operator network will deliver more competitive origination options **improving supply chain costs.**
- **Increasing direct origination options** means more sellers offering product for purchase and more destinations for customers to sell to.
- Combined CN-KCS will eliminate interchange delays, **improving estimated transit time by >10% for moves over Jackson** and improving equipment utilization

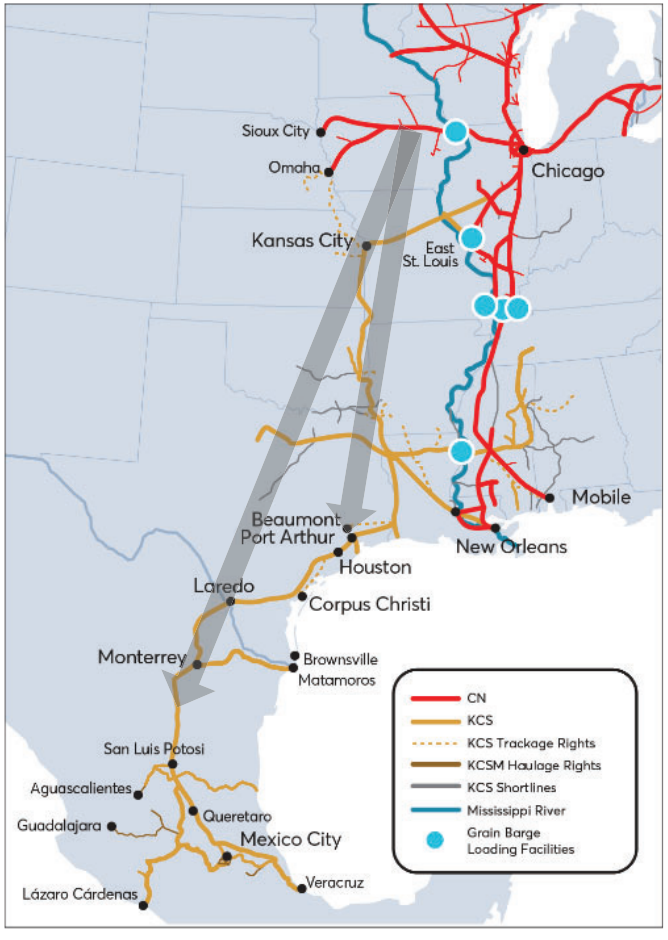


Combined CN-KCS network increases options for feed mill ingredient origination.

Connected Continent

Midwest Ethanol Plant Reach

- **Increased market optionality** for ethanol, distillers dried grains and corn oil
- Customers in IA, IL, WI will be able to **reach Gulf Coast export** infrastructure and additional domestic destination markets for ethanol along with the emerging Mexico ethanol market
- Customers will be able to **tap into a wider array of feed markets** in Mexico and the US
- Replace multi-carrier routings with single operator network, improving market competitiveness, **improving cycle times**
- Combined CN-KCS creates opportunities to **enhance destination markets** for distillers' corn oil, whether domestic consumption or overseas export

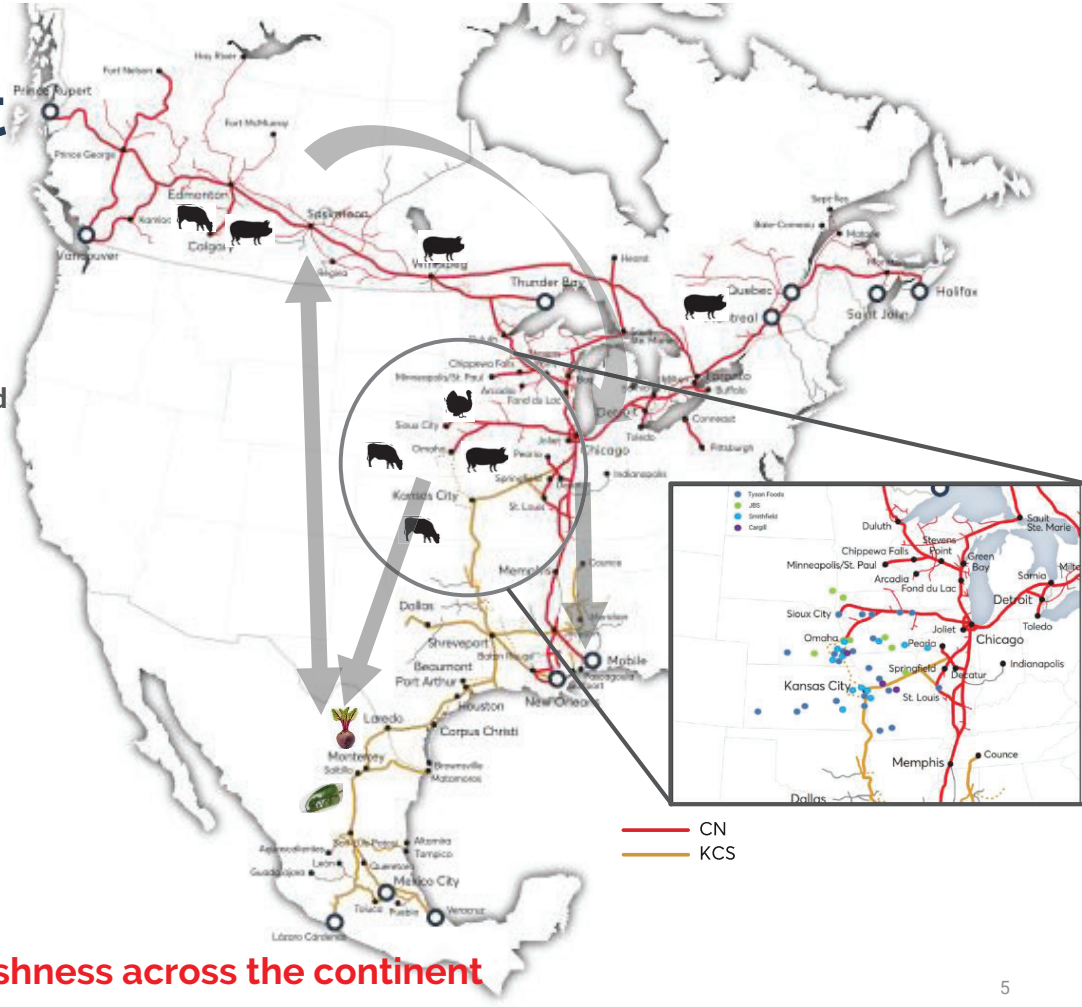


Improved market optionality for Midwest ethanol plants.

Connected Continent

Temperature Protected Supply Chain

- **Directly connecting** by rail major markets in **Mexico**, **Texas**, the **US Midwest** and **Canada** using **single-owner, single-operator** rail service **improves speed** to store shelf
- Rail **industry leading, innovative, temperature controlled** domestic and overseas intermodal service with **integrated food safety** compliant processes and **state of the art equipment** – **2,115 CN owned** temperature controlled domestic container fleet, **105 genset/powerpacks** (power up to 17 containers) and **148 nosemount gensets**
- **Facilitating** Intermodal movement of **produce, fruits, processed foods, proteins (beef, pork and poultry)** into and out of **Mexico** – (**Currently** all **trucked** to **US Midwest** & **Canada** at **10-20% higher costs** to consumers, and **on average 75% more GHG emissions**)



Feeding freshness across the continent

Connected Continent

Benefitting IMCs, 3PL & 4PL Logistics Providers that move the Consumer Economy

Directly connecting major markets in **Mexico** and **Texas** with the **US Midwest** and **Canada's** largest consumer markets using **single-owner, single-operator** rail service.

- **Direct service** between major markets avoiding street connections in Chicago increases customer owned **equipment utilization,** which provides **more capacity** to meet consumer demand **efficiently.**
- Each CN-KCS **daily Intermodal train** takes **300+ long-haul trucks off of the road avoiding an estimated 260K tons of GHG emissions** per year.
- Significant **reduction in trucking connection** between railroads in the **Chicago** market can remove greater than **100K+ annual truck movements** from the Chicago streets **freeing up** greatly needed **chassis.**



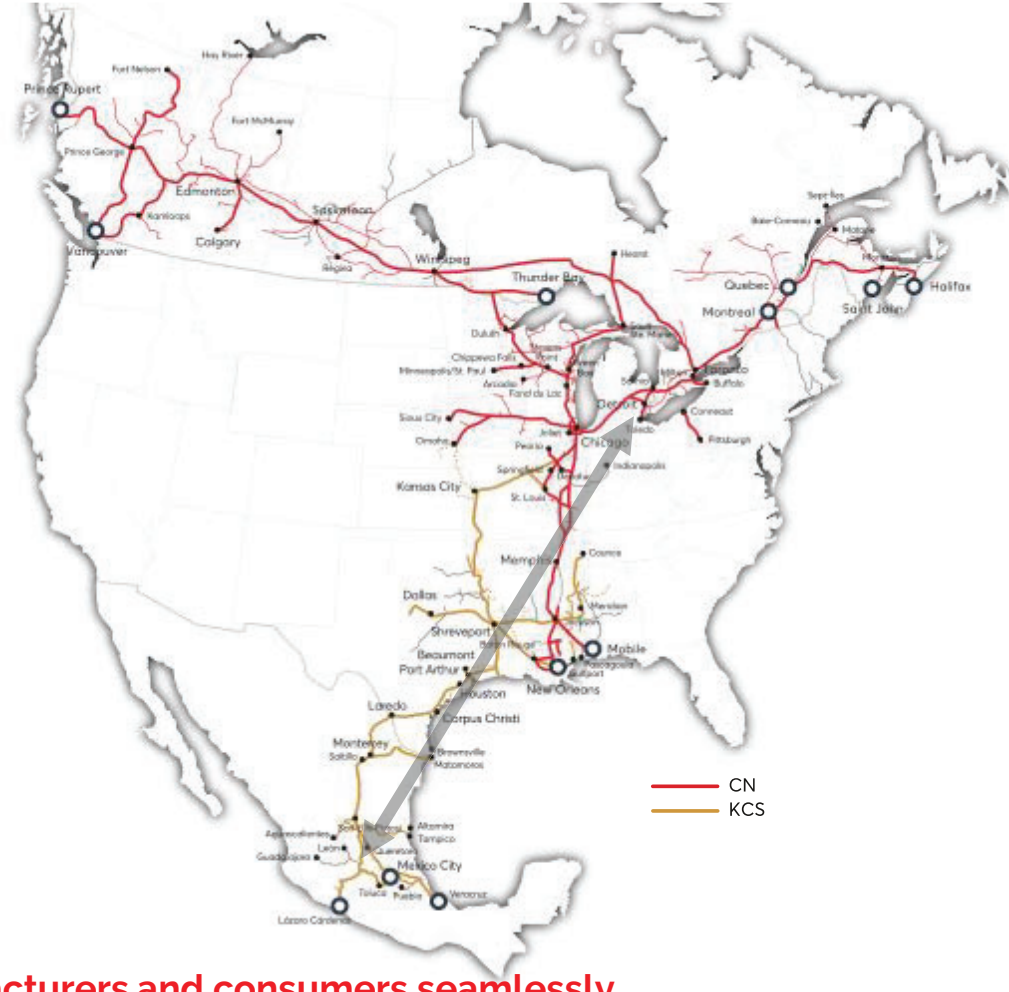
Lower cost, improved speed, more capacity

Connected Continent

Home Appliances & Electronics

Mexico is a **world leading manufacturer** of **Home Appliances**, including leading brands. **CN-KCS connects** these **manufactures with suppliers** and sister manufacturers in the **Midwest** and **Canada**, as well as end consumers in the **United States, Mexico** and **Canada.**

- **Direct service** between key suppliers and **Ohio Valley plants** increases **speed to market**, **reduces inventory carrying costs** and **minimizes potential plant shortages.**
- **Shorter route** than alternative routings into Midwest and Canada, **improves speed to market** and **reduces costs.**
- Each CN-KCS **daily Mexico Intermodal train** takes 300+ longhaul trucks off of the road **avoiding an estimated 260K tons of GHG emissions** per year.
- **Seamless single-line service** ensures service **reliability.**



Directly connecting manufacturers and consumers seamlessly

Connected Continent

Single-Line Service to 3 coasts for Importers and Exporters and Ocean carriers

- The CN-KCS Combination will create a **safer, faster single-line, single-owner service link** for Gateways on all 3 Coasts.
- The East Coast Ports of **Halifax, Saint John, Montréal, and Quebec** and the West Coast **Ports of Vancouver** and **Prince Rupert** will be able to **connect** to **new origin/destinations options**. The same is true for **Gulf Coast Ports** of **New Orleans, Gulfport, and Mobile**, as well as ports in **Mexico**.
- Adding **connected single-line destinations** assist Ports in **attracting larger Ocean Carrier vessels** who continue to upsize vessels on the North American Trade lanes. Spreading cargo to **uncongested Ports** allows **all importers** to have **options** when dealing with congestion that may arise at larger ports.
- The ability to handle **big ships connected** to the **unit trains** creates the **lowest total transportation cost**. As **CN** is a true **supply chain collaborator**, we look forward to working with our **Port partners** to compete for **Imports** and **Exports** against other **Port/Rail supply chain combinations** to the **KCS** and **CN Midwest markets**

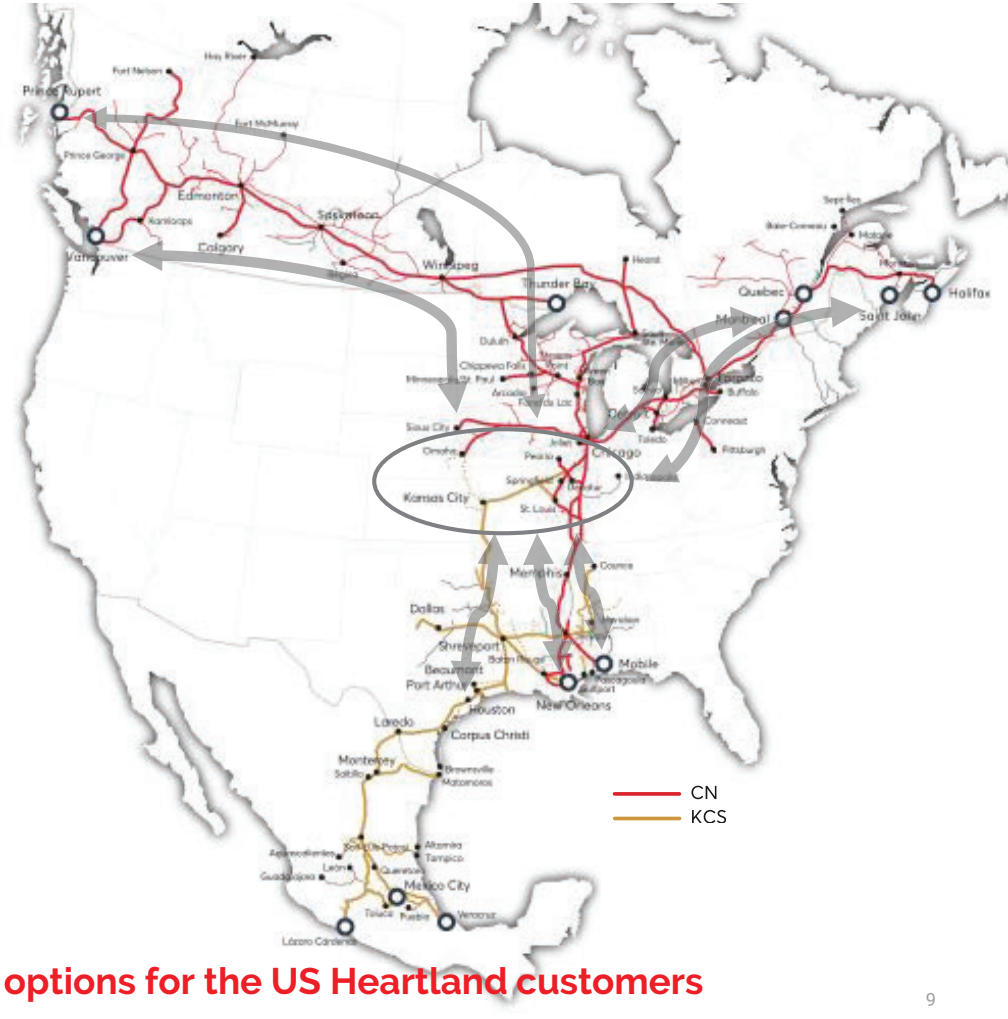


15 Port Terminals – 10 US Midwest Inland Terminals – 3 Countries – 1 Railroad

Connected Continent

Kansas City and St. Louis gain access to new gateways

- The **Kansas City** and **St. Louis** markets totaled approximately **250K+ containers** of imports with a large portion attributed to **machinery, auto parts** and **aeronautics**
- **CN-KCS** will now **directly** and **efficiently connect** the markets of **Kansas City and St. Louis** to the **15 port terminals** on its **3 coast network** which handle **54 vessel services to ports around the world**
- These **newly accessed terminals** will create **new, efficient, lower cost gateways** for **the importers and exporters avoiding** the costly **congestion** of the **U.S. West Coast Ports**
- CN-KCS's network provides **optionality** and proven **market expansion opportunities**
- The **export opportunities** from these markets include **Agri, DDG's, Beef, Pork and Poultry -** All of these products are highly sought after **export goods** shipped through the **CN-KCS served gateways**

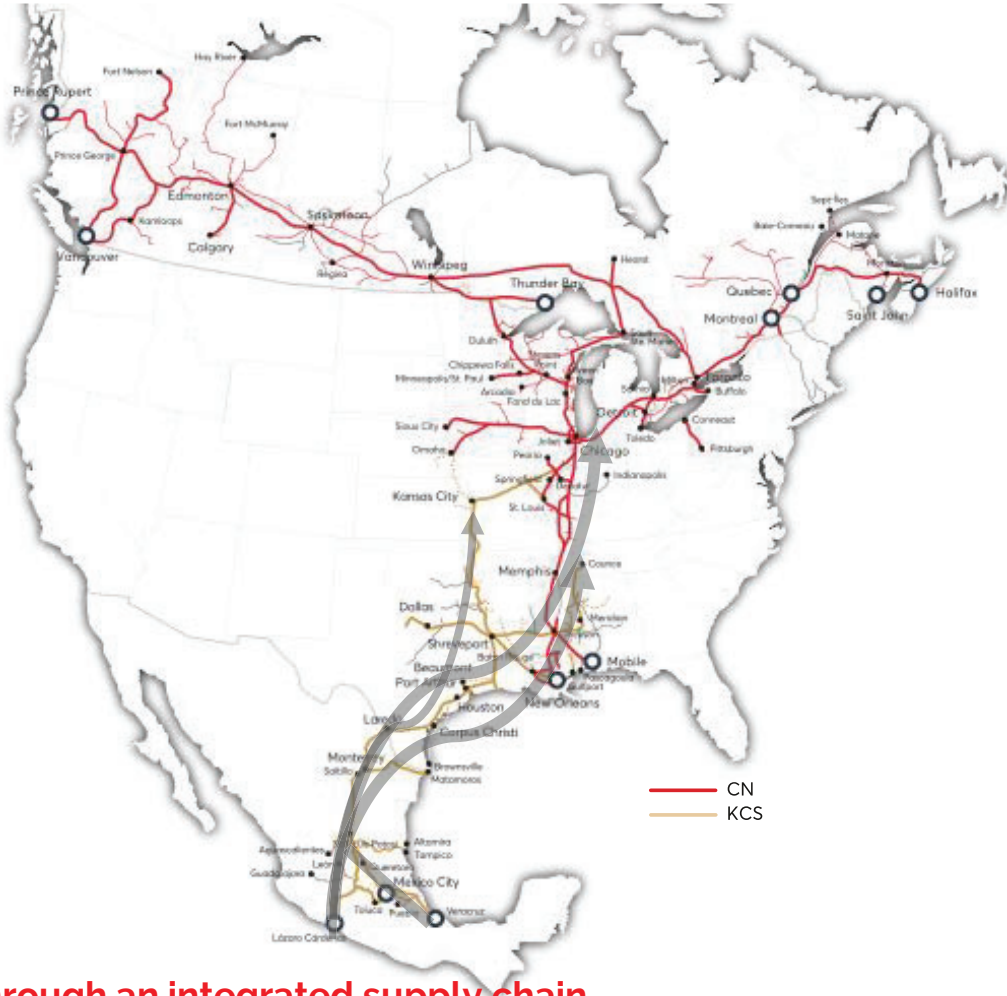


New single line service gateway options for the US Heartland customers

Connected Continent

Utilizing existing Mexico Port Capacity

- **Connecting retail importers** to key **US Midwest** markets through the underutilized **Ports of Lázaro Cárdenas and Veracruz (operating at 40%-60% capacity, low rail dwell time and congestion free)**
- Providing direct, single line **competitive options** into the US Midwest (KC, Memphis, Chicago) by applying proven, round trip economics for Ocean Carriers and their import export customers
- **US Retail importers** add optionality, with **single line rail and a proven, supply chain minded operator, skilled at providing customers with access** to profitable markets (CN has grown its Intermodal business **77%** since 2010)

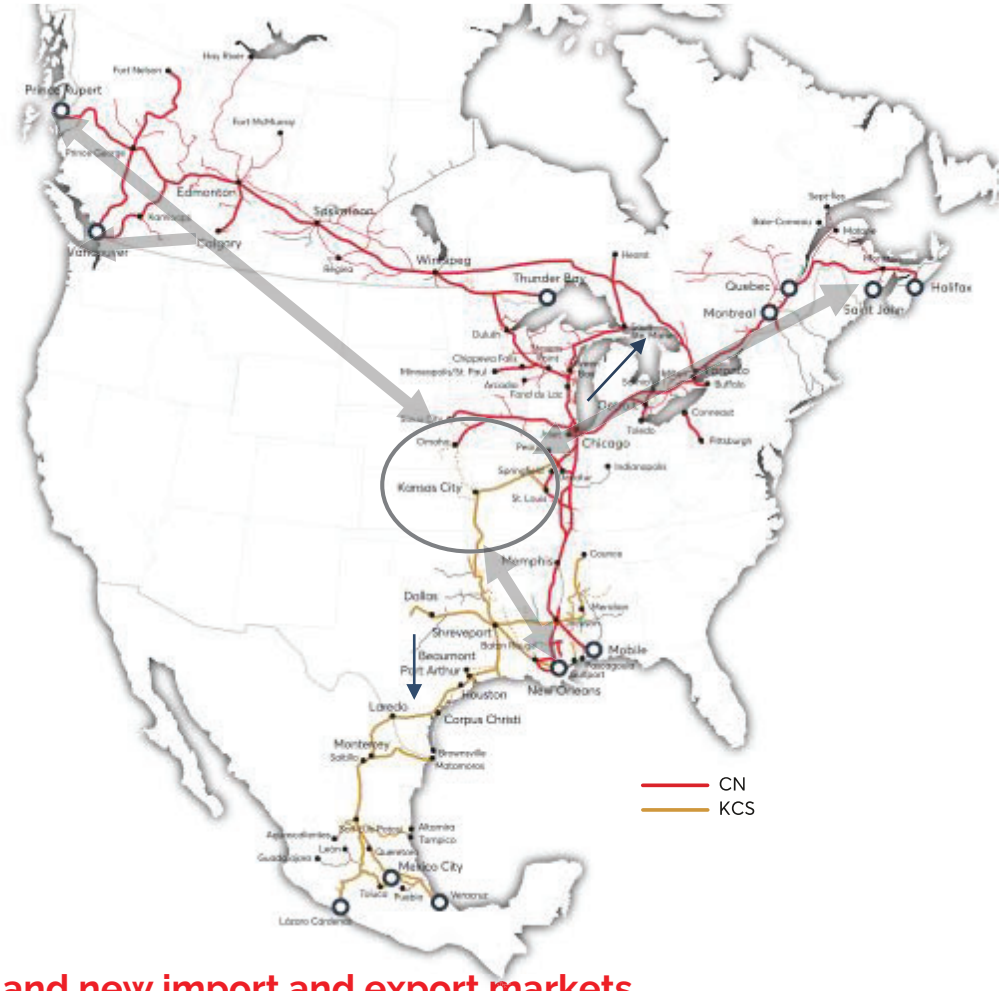


Extending market reach through an integrated supply chain

Connected Continent

Improved Gateway and Market Access for Large Beneficial Cargo Owners in KCS Geography

- CN provides **NEW optionality** and **multi-port connectivity f**or business. Whether importing or exporting **to Northern Asia, Southeast Asia, Europe or South America,** CN's **tri-coast reach** creates new alternatives for **Kansas City and St. Louis shippers**
- CN has a history of **logistics enablement**, we have developed terminals in **Arcadia and Chippewa Falls, WI, Joliet, IL** and **Indianapolis, IN** – all with our customers and their customers in mind.
- All creating more **reliable, lower cost, sustainable options** and **directly linking** some of the **nation's largest retailers** with the **world**



More access to fluid gateways and new import and export markets

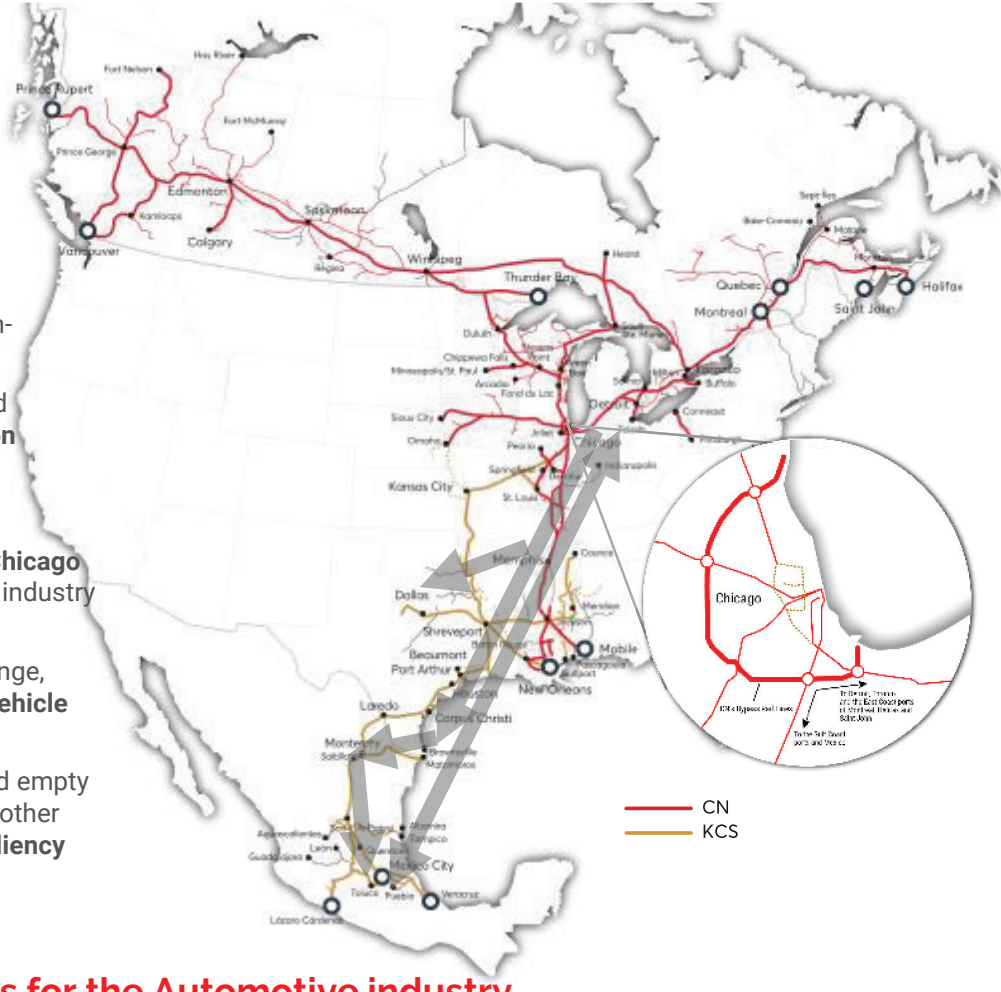
Connected Continent

CN-KCS Automotive Alley

Raw Materials — **Inbound Parts** — **Vehicles** — **After Market Parts**

Only single-line, single-owner direct service linking Ontario-Michigan-Texas-Mexico

- **Single-owner, single-operator** rail service for complete end to end **finished vehicle supply chain (semi-finished materials, production parts,** to **finished vehicles** for final delivery)
- Automotive Alley will provide **non-stop direct service**
- **Estimated 25K-30K annual finished vehicle railcars will bypass Chicago interchange, saving a**n estimate average **24-36 hours**, **improving** industry **multilevel fleet cycles** and **increasing capacity**
- **Automotive customers** will benefit from Chicago bypass interchange, including **reduced dwell in yards, faster transit times, improved vehicle quality** and **reduction in potential theft**
- **80% of Mexico vehicle** production is exported to US & Canada and empty railcar supply can be a challenge at times. CN-KCS will provide another railcar **supply option** to position empty railcars into Mexico **= resiliency**

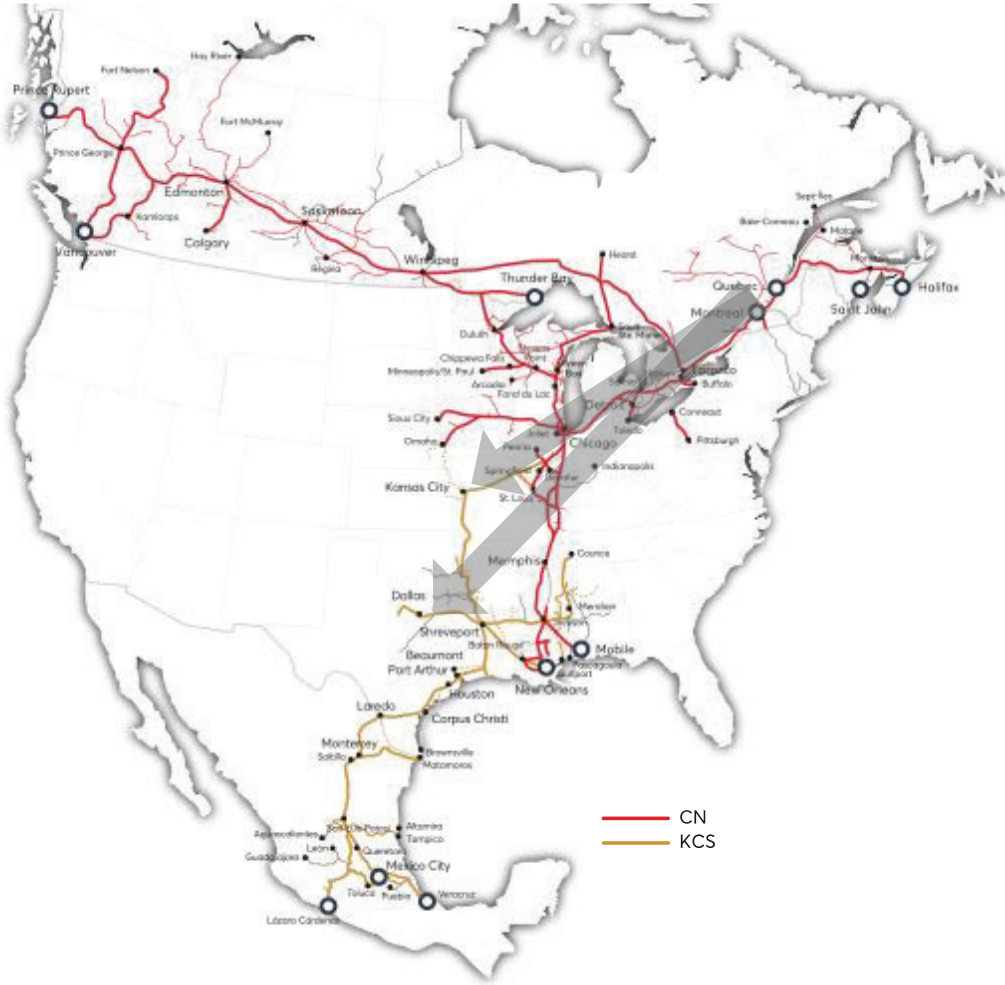


Improved economics for the Automotive industry

Connected Continent

Growing Markets with our Aluminum Customers

- CN-KCS combination provides electric car manufacturers in the Central US and Mexico with access to sustainably sourced aluminum through a single line-haul.
- In a market that is expected to grow by 20% over the next 8 years, improving cycles up to an estimated 15% will **increase their fleet utilization** supporting carload growth without additional investment.
- The CN-KCS combination will **save customers money** with better network efficiencies while expanding their market reach.
- New capacity through faster transit times
- New markets through single line-haul



Safer. Faster. More Resilient. More choices.

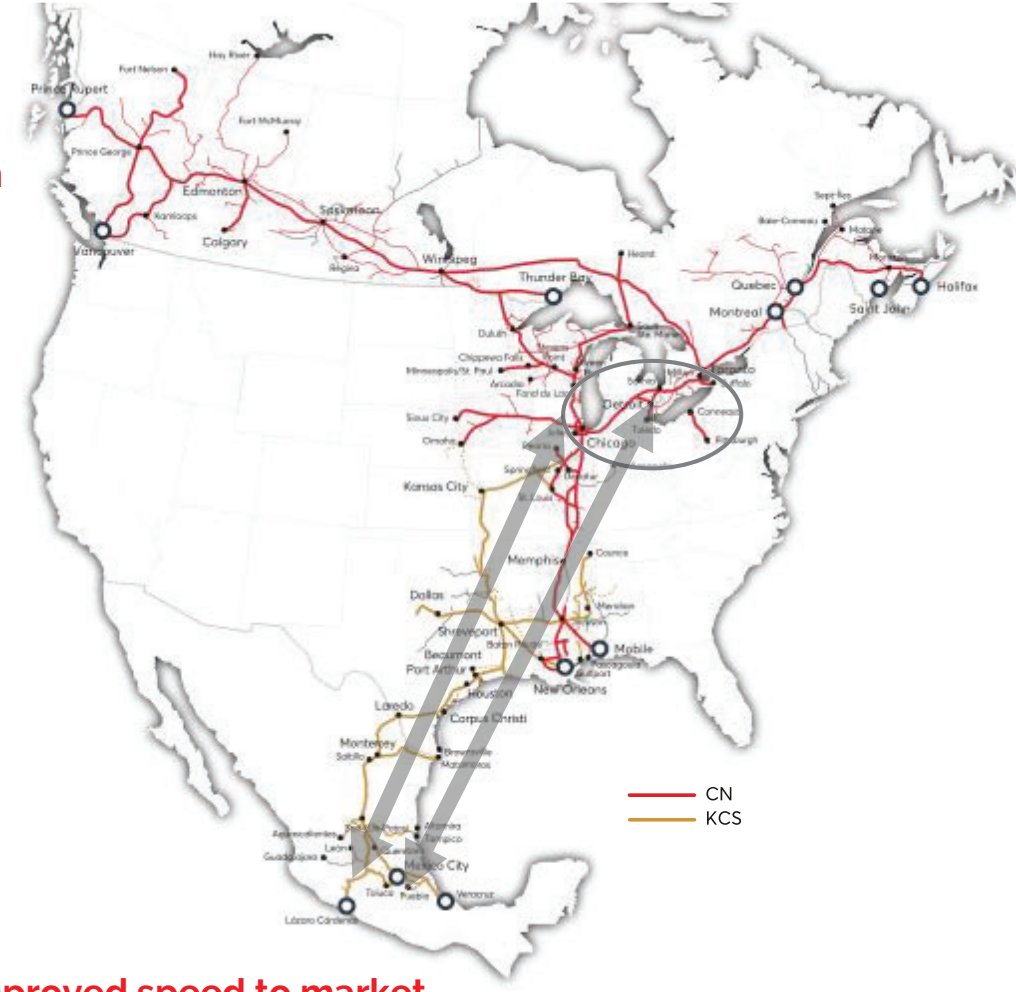
Connected Continent

Automotive Manufacturer Parts Supply Chain

Connecting Automotive OEMs and their suppliers in **Mexico, Texas and Kansas City** with the **US Midwest** and **Canada** using **single-owner, single-operator** rail service.

- **Direct, destination scheduled rail service** between major markets while avoiding interchanges in Chicago **increases speed** to market and **reduces inventory carrying costs, part shortages, and total costs of automotive supply chains.**

- Each CN-KCS **daily Mexico Intermodal train will** take **300+ long-haul trucks off of the road avoiding an estimated 260K tons of GHG emissions** per year.
- Significant **reduction in truck drayage** between railroads in the **Chicago market** will **remove** greater than **100K+ annual truck movements** from the Chicago streets.

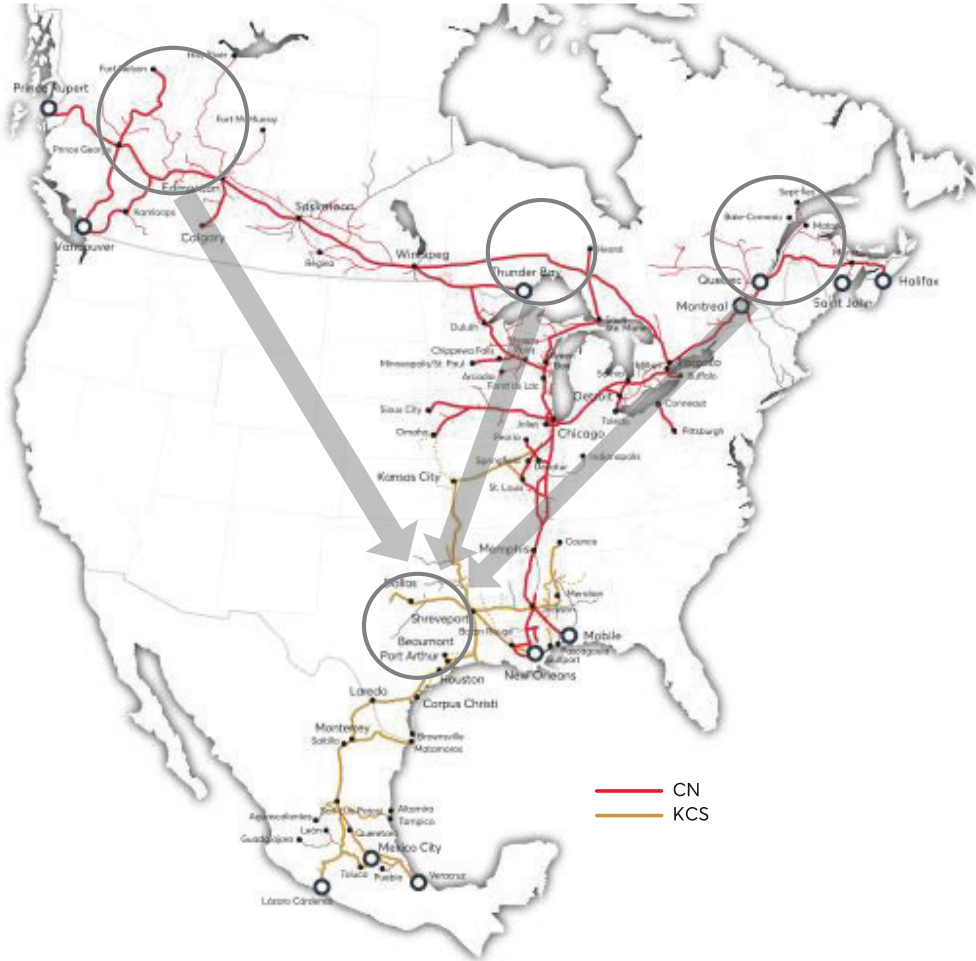


Lower cost, improved speed to market

Connected Continent

Lumber & Panels / Housing

- The CN-KCS combination creates a robust network that optimizes single line access, **maximizes car utilization and competitive pricing** or customers by introducing **new single-line access into Texas while maintaining all current route options.**
- An estimated up to 6 day roundtrip cycle improvement will increase fleet utilization supporting carload growth without additional investment. From both Western and Eastern Canada, **cycles could be reduced in a range between 10%-15%, creating cheaper options** into this growing housing market that currently requires over 1 billion board feet of Canadian lumber annually.
- The ability to directionally **handle loads into large car blocks and unit trains will create capacity**, enhance connectivity, provide incremental efficiencies and **generate cost savings** that will support the Home Building and Repair & Renovation industries for years to come.

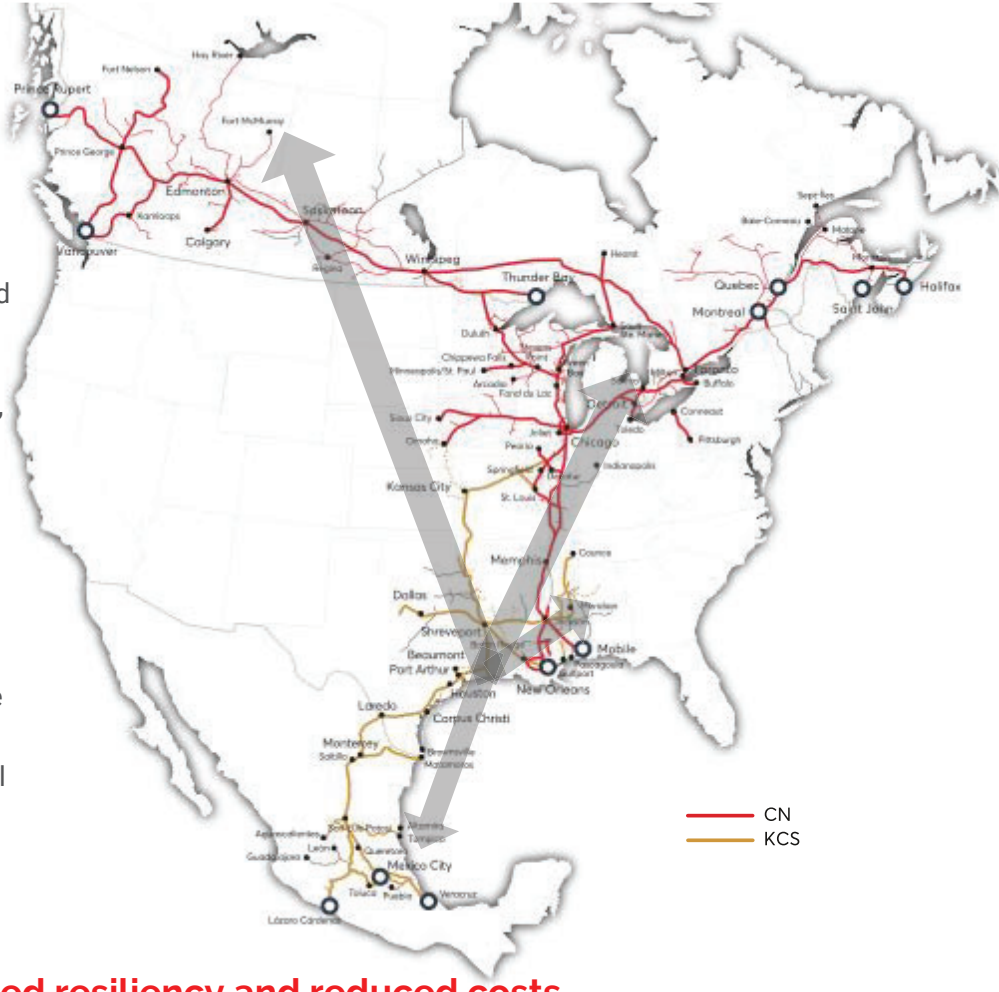


Better access into the growing Texas market.

Connected Continent

Plastic Resins

- **Single-Line Routing Efficiency** - New direct options for **Texas and Louisiana plastics** customers to reach North American end markets in Mexico, Canada and the US upper Midwest.
- Customers will experience **improved gateway optionality** and access to numerous **storage in transit sites** (Chicago, Toronto, Montreal, Memphis, others) strategically located along the CN network in **close proximity to end consuming markets** ultimately providing **faster and more flexible order fulfillment.**
- Customers can expect estimated savings of up to **6 to 8 days** on round trip transit and estimated savings of up to **$120 to $160 USD** on per trip fleet costs.
- Additional Arbitrage/Liquidity opportunities - **Single-line** access to CN's unique **resin packaging** options adjacent to the ports of **Prince Rupert, BC and Mobile, AL.**
- Providing **supply chain optionality and capacity** to reach global markets.

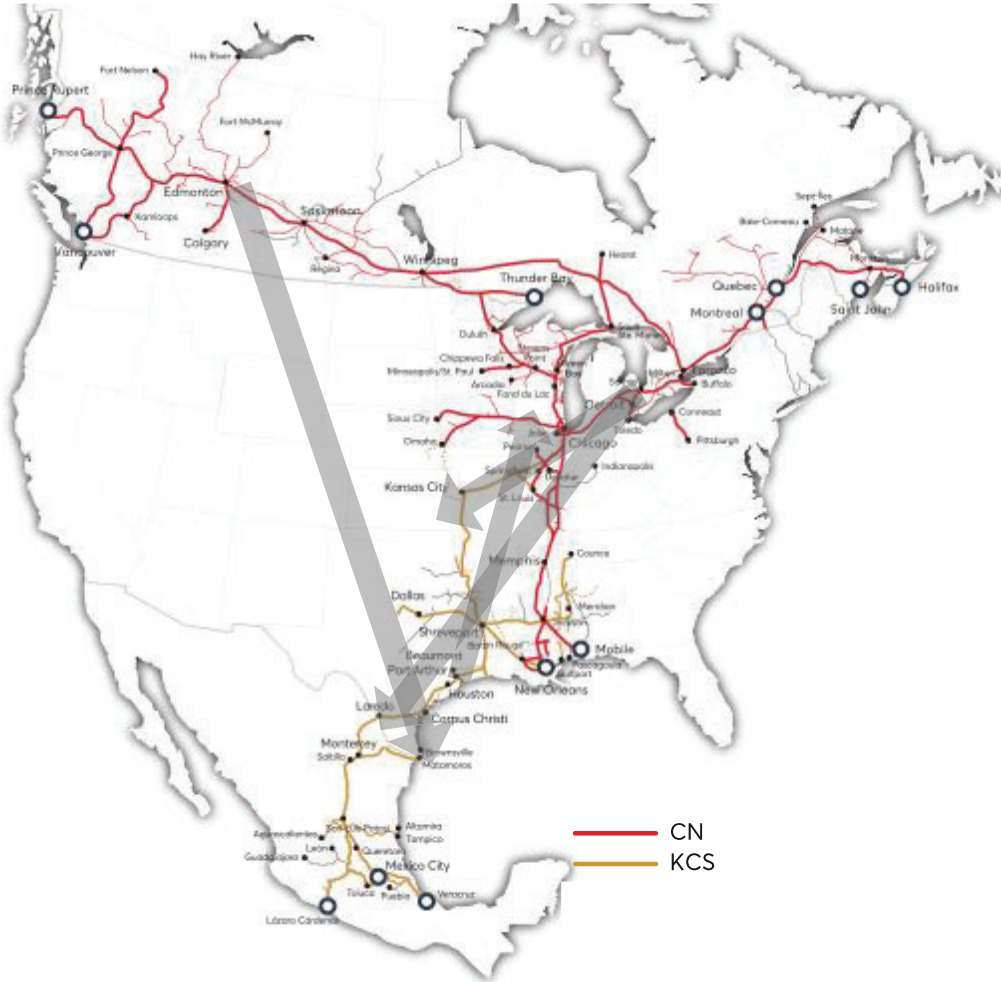


Quicker to market, increased resiliency and reduced costs.

Connected Continent

Liquefied Petroleum Gases (LPG: Propane, Butane)

- The CN-KCS Network will provide LPG Customers in the US Midwest, Mexico, and Canada **reduced complexity** and **lower cost** supply chain options, **reduced transit times**, and **increased reliability** of supply.
- A new direct unit train service will allow customers to **save** and **react to arbitrage pricing** between Conway, KS, Mont Belvieu, TX and low cost Sarnia, ON and Western Canada production to service the expanding 2 billion gallon Mexican market.
- Reducing complexity to a **single carrier** a CN-KCS service improvement can save customers up to **4 days** in transit providing **fleet savings** in the range of **$120 per trip**.
- The US Midwest is **reliant on propane** for **home heating and crop drying.** Increased CN-KCS routing options and single carrier service will **increase security of supply and reliability** for customers, farmers, and residents.

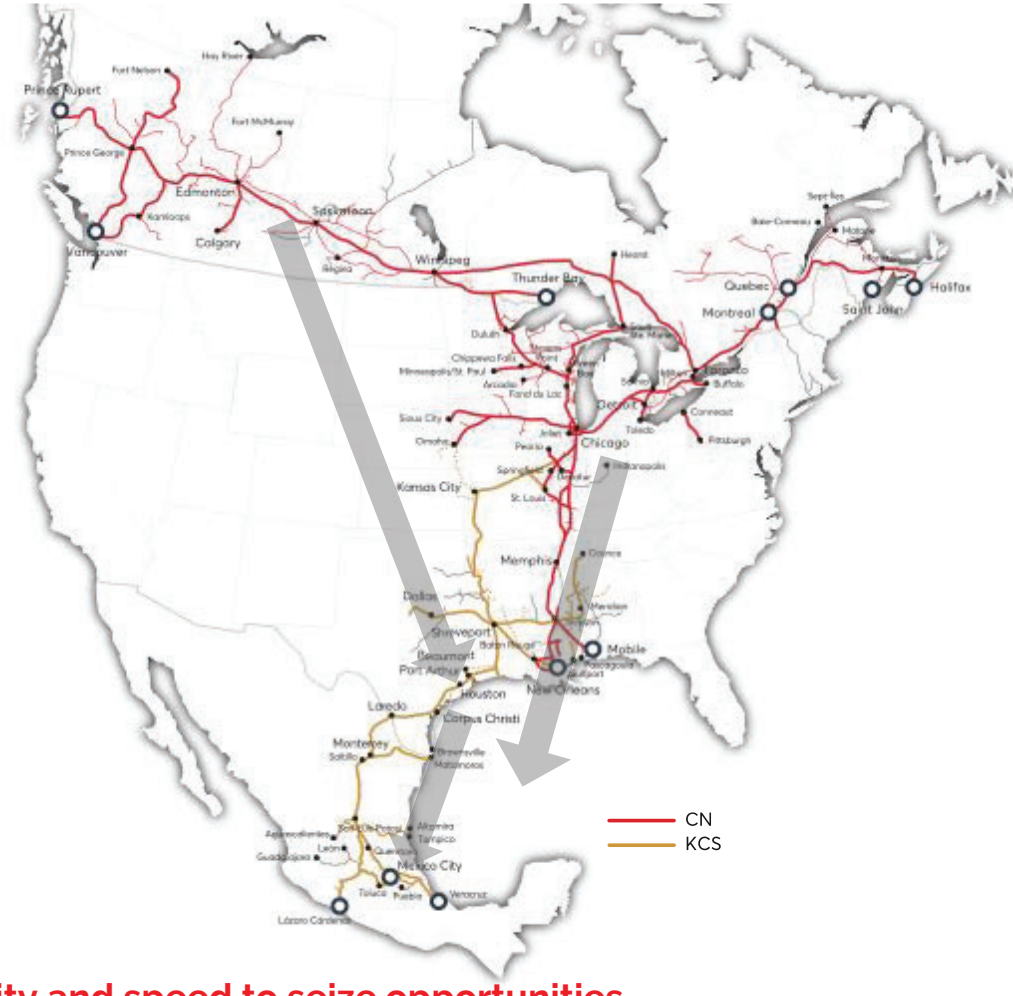


More Service, More Options, More Resilient, Lower Cost

Connected Continent

Refined Petroleum Products (Gasoline & Diesel)

- **Liquidity and arbitrage opportunities** - New direct options **allowing customers in the US Gulf Coast, US Midwest and Western Canada** to access the **1.9M BPD Mexican markets** with best possible capacity and arbitrage opportunity.
- **Unique Access and Optionality** – single line access from **all major North American production areas (US Gulf Coast, US Midwest and Western Canada**) means customers can quickly **pivot between supply origins** and realize supply chain efficiencies.
- **Economies of scale and supply chain savings** Unit train, large car block sizes allowing customers to achieve economies of scale enhanced by **optionality of routing options** resulting in estimated **savings of up to 10 days on round trip cycles and $300 USD per round trip.**



Increased optionality, liquidity and speed to seize opportunities.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY SOUTHERN, *ET AL.*

HYNES V.S. EXHIBIT 69

RUEST VERIFIED STATEMENT, CN AND KCS'S REPLY TO COMMENTS ON PROPOSED VOTING TRUST AGREEMENT, FINANCE DOCKET NO. 36514 (CN-26 KCS-9)

(EXCERPTS)

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36514

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND CN'S RAIL OPERATING SUBSIDIARIES
—CONTROL—
KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

VERIFIED STATEMENT OF JEAN-JACQUES RUEST

My name is Jean-Jacques Ruest. I am the President and Chief Executive Officer ("CEO") of Canadian National Railway Company (CN). I have described my background with CN in my prior verified statement on May 26, where I set forth the unique public benefits that can only be realized if the STB approves the use of a voting trust for the CN-KCS combination.

CN appreciates the importance of the public comment exercise to help the STB vet our position that use of a voting trust should be approved. And we are committed to addressing the legitimate concerns of every stakeholder in the application process. I have reviewed the comments submitted by the various interested parties, particularly the heated claims by Canadian Pacific. Many of their concerns are addressed by others. Our CFO Ghislain Houle together with Professor Mark Zmijewski of the University of Chicago Booth School of Business should dispel any concerns about our financial soundness or ability to divest the KCS network if required by the STB. Mr. William Rennicke—a widely regarded industry expert—dismisses the wild accusation by CP that our merger is anticompetitive. Indeed, Mr. Rennicke has never seen a merger of Class I railroads result in so few competitive issues. James Cairns should assure our customers that CN is wholly committed

to the STB's current merger rules and will "enhance competition" with new single line service, new competition against trucks and our larger Class I brethren, expanded choices and a firm promise to keep gateways open on commercially reasonable terms, and enhanced pricing transparency with Rule 11 rates.

I would like to personally clarify some confusing, misleading or irrelevant themes that have surfaced, and offer **four new commitments** to assure the STB that approval of this voting trust is clearly in the public interest.

1. The STB should reject CP's desire to transform a privilege into a weapon – to use an STB-approved voting trust to create an asymmetric structural and competitive bidding advantage, when they could not compete on the merits with a weaker balance sheet and lower value creation. CP's 500+ page submission is a transparent attempt to reserve the use of a voting trust for itself in an effort to force KCS to consider CP's inferior bid that KCS has already terminated.

2. CP's allegation that CN is pursuing this unique opportunity for the purpose of thwarting CP is preposterous. The sole reason CN is pursuing a combination with KCS is to enable the creation of the true North American Railway for the 21st Century, and its superior offer reflects the value that it expects to realize from this powerful idea. We are excited about the opportunity to create the North American Railway for the 21st Century—and offer our customers single-line service over the combined CN-KCS network in the United States, Canada, and Mexico. We believe that by doing so we will help to realize the potential of the US-Mexico-Canada Trade Agreement (USMCA). The outpouring of support from over 1700 stakeholders is the highest testament to the tremendous opportunity presented by our proposal. They can imagine the value and potential, even if CP can only view the world as revolving only around CP.

3. A union committee that represents KCS employees as well as some CP union stakeholders have asked about our future plans for the KCS line between Kansas City and Shreveport.[1] That line is one of the crown jewels of KCS, and serves important markets CN cannot serve today. KCS explains the critical strategic importance of that line between Kansas City and Shreveport. See KCS' Reply Verified Statement of Michael J. Naatz. I wholeheartedly agree. The KCSR line between Kansas City and Shreveport presents many opportunities to compete with the north-south routes of other Class I railroads serving the same markets as well as truck traffic along Interstates 35 and 55. This is a unique growth opportunity for CN-KCS. Today, CN does not have single-line service to Kansas City. In addition to new options for direct moves on the CN-KCS network, KCSR's line between Kansas City and Shreveport is important to interchange cars with other carriers. Moreover, we want to expand the Kansas City gateway, not contract it. For example, CN wants to invest in the route between Kansas City, Missouri and Springfield, Illinois to create a new high-quality line that will create faster, safer and more economical rail option. This will create a new competitive option for customers between Kansas City and both Detroit, Michigan and the Port of Montréal who currently rely on trucks. This "Kansas City Speedway" will be the connection between the KCS and CN networks to offer a new competitive alternative to compete with trucks for traffic moving from Mexico, through the U.S. heartland to Canada. Indeed, CN has committed that it will maintain the U.S. headquarters of the combined network in Kansas City, Missouri. But to assure KCS employees on that line, and the customers it serves, **I can commit that CN has no plans**

[1] Letter from General Chairperson, S.A. Habjan, SMART-TD General Committee GCA-457, at 1–2 (filed June 28, 2021) (indicating there would be "no need" for the KCS line running south from Kansas City); Letter from General Chairman – Leader, SMART-TD GO-256, at 2 (filed June 28, 2021) (representing yardmasters on CP).

to downgrade or divest that line and will continue to invest at a similar level or higher as KCS in the mainline between Kansas City and Shreveport in the years after the CN-KCS combination is consummated.

4. The American Chemistry Council and the Fertilizer Institute question whether, in the event our application is denied, that CN might attempt to sell KCS' network in pieces or sell KCS to an unsuitable owner. This would be inappropriate. KCS is worth more than the sum of its parts, and the STB has made clear it would maintain oversight over any divestiture. Value for a potential divestiture of KCS would be maximized by selling KCS as integrated franchise or holding an initial public offering for KCS as a whole. I have explained that it would be unlikely that CN would be required to divest KCS out of the voting trust because CN is committed to finding workable solutions to legitimate concerns regarding the CN-KCS combination, as demonstrated by our commitment to sell the KCS line between Baton Rouge and New Orleans. I am confident CN will address any such concerns and obtain ultimate approval for our pro-competitive CN-KCS combination. Nevertheless, if CN is required to divest KCS out of trust, **CN commits that it would divest KCS in a way that maintains KCS as an intact entity, and to obtain the best potential value for KCS.**

5. CP also raises an odd claim that CN will for some reason stop competing with KCS for traffic between Baton Rouge and New Orleans during the voting trust period. I find this idea baffling. The entire point of the voting trust is to preserve the competitive status quo because KCS continues to operate independently. Voting trusts have been used in prior mergers with far more extensive competitive overlaps with no evidence of any such misconduct. Many customers with facilities on the CN line from Baton Rouge to New Orleans have long-term contracts. CP's claim also ignores the highly competitive markets we help those customers reach. And CN and KCS have committed to divest the KCS line to

enhance those customers' competitive options. This means that if approved, those customers will be served by both the combined CN-KCS and a new competing railroad. There is simply no factual basis to assume CN would deliberately drive customers away during the voting trust process. But it is important to me that all 2-to-1 customers in Louisiana have confidence that they will suffer no harm after the merger, or during the period of the voting trust. To assure those customers, {{

}}

6. Finally, Amtrak urges the STB to deny this voting trust because it has concerns about its ability to restore intercity passenger rail service between Baton Rouge and New Orleans. CN appreciates the interest from Amtrak and some other stakeholders regarding potential for future passenger service on the KCS line between Baton Rouge and New Orleans that CN has committed to divest. CN looks forward to continuing to engage with these stakeholders. Our primary objective must be to protect the competitive options and service for freight customers on that line, and to preserve sufficient capacity to meet their current and future needs. But we welcome discussions with Amtrak regarding its desire to use as yet unobtained funding to restore intercity passenger rail service, while other stakeholders may propose different concerns. While the precise circumstances regarding the sale of the KCS line between Baton Rouge and New Orleans are premature

at this stage, the future use of that line will be addressed in detail in the ultimate merger proceeding. To assure Amtrak that its concerns will be considered, **I can commit that potential purchasers of the divested line will be asked to explain their willingness to work with potential future passenger and commuter service operators**.

In sum, CN did not propose to use a voting trust lightly. We know it is a privilege, not a right, and to be carefully permitted. However, use of the voting trust in this instance is necessary to place a CN-KCS transaction on a level playing field given the particular circumstances in this case: specifically, the unusual setting of a competitive bidding process with a merger agreement that required CN to utilize a voting trust and the Board's prior decision to approve the CP-KCS voting trust demanded that our offer—which was ultimately accepted by KCS—use an identical voting trust.

Approval of the proposed CN-KCS voting trust will not prejudge the merits of the Application. It will simply move this proceeding to the next stage, where the STB will fully vet the public benefits that will flow from this exciting merger. CN will demonstrate the overwhelming benefits of the CN-KCS combination to enable the creation of the North American Railway for the 21st Century. But those benefits can only be realized if the STB approves the voting trust for the CN-KCS combination. The "plain vanilla" voting trust prevents premature control of KCS and maintains KCS's independence while it is in trust during the STB's review of the combination under the STB's current rules that require enhanced competition. CN therefore respectfully requests the STB's approval for the CN-KCS voting trust.

VERIFICATION

I, Jean-Jacques Ruest, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 6th day of July, 2021.

Jean-Jacques Ruest
President and Chief Executive Officer of
Canadian National Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 70

HIGHLY CONFIDENTIAL – NS00000001

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 71

HIGHLY CONFIDENTIAL – NS00000991

(EXCERPT)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 72

HIGHLY CONFIDENTIAL – NS00000018

(EXCERPT)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 73

HIGHLY CONFIDENTIAL – NS00000954

(EXCERPT)

BEFORE THE
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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 74

HIGHLY CONFIDENTIAL – NS00002011

(EXCERPT)

BEFORE THE
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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 75

HIGHLY CONFIDENTIAL – NS00002982

(EXCERPT)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 76

"NEW NORFOLK SOUTHERN OPERATING PLAN TO BLEND TRAFFIC AND BUILD LONGER TRAINS," TRAINS (FEB. 12, 2019), AVAILABLE AT HTTPS://WWW.TRAINS.COM/TRN/NEWS-REVIEWS/NEWS-WIRE/12-NEW-NORFOLK-SOUTHERN-OPERATING-PLAN-TO-BLEND-TRAFFIC-AND-BUILD-LONGER-TRAINS/

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New Norfolk Southern operating plan to blend traffic and build longer trains NEWSWIRE

By Bill Stephens | February 12, 2019

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Norfolk Southern CEO Jim Squires
Norfolk Southern

ATLANTA — Expect to see big changes on Norfolk Southern as the railroad launches its new Precision Scheduled Railroading operating plan, TOP21, over the summer.

The most visible differences will include longer trains with distributed power, the increased use of general purpose trains that combine different types of traffic, and locals that operate daily. Harder to see, but no less important, will be blocking changes that allow cars to bypass intermediate terminals.

"The goal of TOP21 is to make the entire network more efficient," CEO Jim Squires said during the railroad's investor day presentations on Monday.

Increased reliability also is a goal.

"Our new mantra is don't promise anything you can't deliver and then deliver what you promise," Squires says.

Service will become more reliable, NS says, because the new operating plan is simpler to execute, day in and day out. It also will enable NS to bounce back more quickly from disruptions, such as the extreme cold and snowstorms that gripped its Northern Region last month, Chief Operating Officer Mike Wheeler says.

NS will blend different traffic types into general purpose trains. So that 60-mph intermodal traffic isn't slowed when traffic is combined, NS has raised merchandise speeds to match on much of the railroad, up from 50 mph.

"We used to talk about as many as four separate networks. An intermodal network, an automotive network, carload, and unit train," says John Friedmann, vice president of network planning and optimization. "And while it made certain intuitive sense to think of this this way, broken down along commodity lines, it really ignored the shared nature of our locomotive and our crew resources, as well as the limited nature of our line capacity."

NS has begun combining traffic on some trains already.

Train 23G, an international intermodal train linking Louisville, Ky., and Norfolk, Va., pauses in Knoxville, Tenn., to pick up 15 or so loads of export coal also bound for the port.

Handling coal on an intermodal train means three things: The coal doesn't sit in Knoxville until enough volume builds to run a unit train. The coal, and hoppers, move faster, reducing cycle time. And NS can drop train starts by shifting the bulk traffic into intermodal trains, which saves locomotives, fuel, and crews while opening up capacity on the main line.

In Winston-Salem, N.C., northbound carload traffic is taking a faster, shorter route by hitching a ride on an automotive train. Carload traffic gathered at Winston-Salem used to first run south to the hump yard at Linwood, N.C., where it would be classified and put on a northbound merchandise train.

The new arrangement saves about 100 miles, reduces car handling, and frees up capacity at Linwood.

"This is the kind of different thinking that we are infusing into our operating plan," Friedmann says.

NS also will run the same number of trains in each direction every day to keep crews and power in balance.

The new plan also reduces NS's dependence on major terminals by pre-blocking cars at local terminals and then relying on block-swapping en route.

NS is increasing local service frequency to daily across much of the system.

"What this does is it helps keep the system in motion at all times," Friedmann says.

NS will measure the effectiveness of its operating changes using five key metrics.

Goals for 2021 built around the metrics include increasing train and engine crew productivity 34 percent measured by gross ton-miles per worker; increasing average train weight by 12 percent; boosting locomotive productivity 30 percent on a ton-mile basis; and reducing the number of cars online by 12 percent.

NS also created a service delivery index, which compares the railroad's performance to 2018. The goal of the opaque metric, which measures compliance with customer commitments, is a 40-percent improvement by 2021.

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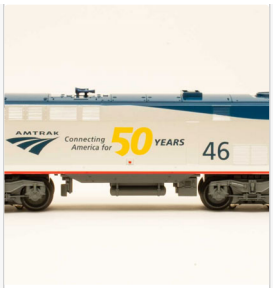

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HYNES V.S. EXHIBIT 77

HIGHLY CONFIDENTIAL – BNSF0003265

BEFORE THE
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CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 78

HIGHLY CONFIDENTIAL – NS 00004912

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 79

NOTICE OF EXEMPTION IN THE MERIDIAN SPEEDWAY TRANSACTION, FILED IN FINANCE DOCKET NO. 34822 ON JANUARY 17, 2006



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34822

KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, AND MERIDIAN SPEEDWAY, LLC -- EXEMPTION FOR TRANSACTIONS WITHIN A CORPORATE FAMILY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 C.F.R. §1180.2(d)(3)

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Robert B. Terry
Thomas J. Healey
KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1370
Fax: (816) 983-1227

William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20037
Tel: (202) 663-7823
Fax: (202) 663-7849

Attorneys For Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway, LLC

January 17, 2006

FILED
JAN 17 2006
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34822

KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, AND MERIDIAN SPEEDWAY, LLC -- EXEMPTION FOR TRANSACTIONS WITHIN A CORPORATE FAMILY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 C.F.R. §1180.2(d)(3)

Kansas City Southern ("KCS"), The Kansas City Southern Railway Company ("KCSR"), and the newly-formed Meridian Speedway, LLC ("MSLLC") (collectively, "Parties") hereby submit this notice, pursuant to 49 C.F.R. §1180.2(d)(3), for an exemption from the prior approval and authorization requirements of the Surface Transportation Board ("STB" or "Board") of a transaction within a corporate family. The transaction involved in this Notice of Exemption is MSLLC's acquisition of KCSR's rail line between Meridian, MS and Shreveport, LA ("the Line"), KCS's continuance in control of MSLLC when it becomes a carrier (upon acquiring the Line), and the subsequent grant back of operating rights by MSLLC to KCSR to allow KCSR to operate as MSLLC's contract operator in fulfilling MSLLC's contractual and common carrier obligations. In support of this Notice of Exemption and in compliance with 49 C.F.R. §1180.4(g), the Parties state the following:

49 C.F.R. §1180.6(a)(1)(i)--Description of Transaction and Parties Thereto:

a. Description of Transaction.

Kansas City Southern is a publicly traded, non-carrier holding company, with both rail and non-rail assets. KCS currently controls three common carriers subject to the jurisdiction of the STB: The Kansas City Southern Railway Company, Texas Mexican Railway Company, and

Gateway Eastern Railway Company.[1] KCSR is a Class I common carrier railroad that owns and operates approximately 3,100 miles of rail line in ten states. GWER is a Class III common carrier railroad that owns and operates approximately 17 miles of rail lines between East Alton, Illinois and East St. Louis, Illinois, and owns the rail and related materials on many of KCSR's branch lines. Tex Mex is a Class II common carrier railroad that owns and operates over 157 miles of rail line between Laredo and Corpus Christi, TX. Tex Mex also operates via trackage rights over approximately 379 miles of rail lines owned by Union Pacific Railroad Company ("UP") and Houston Belt & Terminal Railway Company between Robstown, TX and Beaumont, TX, via Houston.

MSLLC is a newly-created, wholly-owned subsidiary of KCS. MSLLC will become a common carrier railroad subject to the Board's jurisdiction upon consummation of the transaction.

One of the rail lines currently owned and operated by KCSR is known as the Meridian Speedway. The Speedway is an east/west rail line located between Meridian, MS, and Dallas, TX, which passes through Shreveport, LA. The lines of other railroads that connect with the Speedway include the UP at Shreveport, LA; the BNSF Railway Company ("BNSF") near Dallas, TX; the Canadian National Railway Company ("CN") at Jackson, MS; and the Norfolk Southern Railway Company ("NSR") and the Meridian & Bigbee Railroad Company at Meridian, MS.

The primary commodities transported over the Speedway by KCSR in both overhead and local service include consumer goods, forest products, automobiles, and chemicals. The Speedway

[1] KCS's control of KCSR and its then existing rail carrier subsidiaries was found not to require ICC approval in Kansas City Southern Industries, Inc.—Control—Kansas City Southern Railway Company, 317 I.C.C. 1 (1962). KCS received authority to commonly control KCSR and GWER in Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company—Control—Gateway Western Railway Company and Gateway Eastern Railway Company, Finance Docket No. 33311 (STB served May 1, 1997). KCS received authority to commonly control KCSR, GWER, and Tex Mex in Kansas City Southern—Control—The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, Finance Docket No. 34342 (STB served Nov. 29, 2004).

also serves as a mid-continent link for shuttling intermodal containers between West Coast ports and points in the Southeast.

Transcontinental intermodal service is currently provided across the Speedway pursuant to a haulage agreement between NSR and KCSR, which the parties entered in 2000 (the "Existing NSR Haulage Agreement"). Containers in the account of NSR are moved by KCSR between Meridian, MS and Dallas, TX. These containers are transported between Dallas and the West Coast by BNSF, and between Meridian, MS and points east by NSR. For such east/west intermodal traffic, the Speedway acts as an alternative route to those more commonly used by other railroads via other gateways, including Memphis, New Orleans and Birmingham. KCSR does not provide haulage service for intermodal traffic over the Speedway to any other railroad and NS is the sole provider of such transcontinental container traffic over the Line.[2]

As with other haulage arrangements, containers handled by KCSR for NSR remain in NSR's account between Dallas and Meridian and never enter KCSR's account. KCSR's sole role is that of a haulage carrier, providing the track, crews, dispatching, and other operating facilities required to transport the containers over the Speedway. NSR is solely responsible for, and exercises control over, the pricing and marketing of that traffic.

Notwithstanding significant capital enhancements over the past five years, the Line has become capacity constrained as traffic between the Southwest and the Southeast has grown. This capacity crunch and other constraints currently limit the ability of KCSR and NSR to attract more traffic to their services using the Speedway.

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[2] KCSR participates today as a line-haul carrier in a small volume of intermodal trailer traffic that originates on BNSF in California. These trailers, which total approximately 2,600 units per year, or 50 units per week, are transferred over the road to KCSR at Dallas, are rebilled, and then subsequently moved in KCSR's account between Dallas and Meridian in different trains than those in which NSR haulage traffic moves. At Meridian, they are delivered to NSR for subsequent

Last year, NSR approached KCSR about extending the Existing NSR Haulage Agreement. During those discussions, it became clear that substantial capital investments would be required to provide the train speeds and line capacity the parties believed was needed to handle future traffic growth on the Line. However, KCSR does not have sufficient resources to support the sustained capital spending program necessary to accommodate both NSR's and KCSR's projected traffic needs. Moreover, while NSR was willing to participate in the necessary investment, it did not want to do so unless it could be assured that other carriers would not use the capacity NS's investment would help to create. The parties reached a series of agreements that addressed these concerns.

On December 2, 2005, KCS and NSR announced agreement on a series of transactions. The first step involved the creation of a new, wholly-owned KCS subsidiary, MSLLC. Upon regulatory approval, KCSR will contribute to MSLLC the Line (consisting of 320-miles between Meridian, MS, M.P. 0.0., and Shreveport, LA, M.P. V-169.85).[3] Concurrent with MSLLC's acquisition of the Line, NSR will acquire a 30% equity interest and certain minority voting and ownership rights in MSLLC; however, KCS will remain in control of MSLLC. In exchange for its equity interest and voting and ownership rights, NSR will contribute $300 million in cash, at least $260 million of which will be used to fund capital improvements over the next four years to

---

movement by NSR to destination. This trailer traffic will continue to move in the same manner following consummation of the proposed transaction.

[3] KCSR currently operates via trackage rights over approximately four-tenths of a mile section of track in Jackson, Mississippi that is controlled by Canadian National Railway (as successor to Illinois Central Gulf Railroad Company ("IC")) pursuant to a trackage rights agreement dated March 26, 1986, between Midsouth Rail Corporation and IC ("Jackson Trackage Rights Agreement"). KCSR also currently operates over a railroad bridge over the Mississippi River at Vicksburg, MS pursuant to a lease agreement between the Vicksburg Bridge and Terminal Company and The Yazoo and Mississippi Valley Railroad Company dated February 11, 1928, as amended and/or replaced from time to time ("Vicksburg Bridge Lease"). The transaction contemplates having both the Jackson Trackage Rights Agreement and the Vicksburg Bridge Lease being assigned to MSLLC.

increase the capacity of the Line.[4] NSR will be the sole provider of service for transcontinental intermodal traffic over the Line. Specifically, NSR will be the sole provider, via haulage and trackage rights over the Line, of service for transcontinental intermodal container traffic moving on the Line that does not originate or terminate on KCS's current system and that both (a) originates or terminates in the United States at or east of Meridian and enters or exits the Line at Meridian, and (b) originates or terminates in the United States west of Fort Worth, Texas, and enters or exits the Line at Shreveport.

Through its acquisition of the Line, MSLLC will become a common carrier subject to the Board's jurisdiction. However, MSLLC will not operate the Line. Instead, MSLLC will contract with KCSR for KCSR to be the operator of the Line. Under this agreement, KCSR will provide all necessary operating and administrative functions on MSLLC's behalf, including fulfilling any obligations MSLLC may have under its contracts. MSLLC will also grant certain local and overhead trackage rights to KCSR for KCSR to continue to operate over the Line much as it does today.[5] MSLLC will also grant certain trackage and haulage rights to NSR.[6] As the contract operator for MSLLC, KCSR will perform the haulage services contemplated by MSLLC's agreement with NSR, while simultaneously operating over the Line for its own account pursuant to local and overhead trackage rights granted by MSLLC to KCSR.

Pursuant to 49 C.F.R. §1180.2(d)(3), KCS, KCSR, and MSLLC invoke the Board's class exemption from the prior approval requirements of 49 U.S.C. § 11323 for transactions within a

[4] These capital improvements will include signal systems, extended sidings, stretches of double track, upgrading track speeds, and other capacity enhancements.

[5] MSLLC's grant of local and overhead trackage rights to KCSR is the subject of a concurrently filed Notice of Exemption filed pursuant to 49 CFR 1180.2(d)(7) in Finance Docket No. 34823.

[6] MSLLC's grant of certain haulage and trackage rights to NSR is the subject of a concurrent Notice of Exemption filed by NSR pursuant to 49 CFR 1180.2(d)(7) in Finance Docket No. 34821.

corporate family for the transfer of the Line to MSLLC, the assignment of the Jackson Trackage Rights Agreement and the Vicksburg Bridge Lease to MSLLC, KCS's continuance in control of MSLLC when it becomes a carrier, and the grant back of operating rights to KCSR to enable KCSR to act as MSLLC's contract operator and to provide certain rail services for its own account.

b. Names, Addresses, and Phone Numbers of Involved Parties.

KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1370
Fax: (816) 983-1227

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1370
Fax: (816) 983-1227

MERIDIAN SPEEDWAY, LLC
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1370
Fax: (816) 983-1227

c. Names of Counsel to Whom Questions Can Be Addressed.

Correspondence with respect to this Verified Notice of Exemption should be addressed to:

Robert B. Terry
Thomas J. Healey
KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1370
Fax: (816) 983-1227

William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20037
Tel: (202) 663-7823
Fax: (202) 663-7849

49 C.F.R. §1180.6 (a) (1) (ii) --Consummation Schedule.

The Parties propose to transfer the Line to MSLLC, and to commence operations under the agreements discussed above, immediately upon the later of (1) completion of the seven day period following the filing of this Notice of Exemption and the concurrently filed Notices of Exemptions filed in F.D. Nos. 34821 and 34823, or (2) completion of the environmental or historical documentation process as required under 49 C.F.R. § 1105.

49 C.F.R. §1180.6 (a) (1) (iii) -- Purpose of the Transaction.

The purpose of this transaction is innovatively to expand capacity on the Line for the benefit of customers and the national transportation network. The Line is an important east-west route that is in need of considerable investment in roadbed, signal systems, yards and sidings in order to provide sufficient capacity for KCSR's and NSR's existing and future traffic needs.

Although KCSR has completed certain infrastructure improvements, it has been unable to expand the capacity of the Line at a pace commensurate with the growing demand for rail transportation between the Southwest, including the West Coast ports, and the Southeast. The proposed transaction, and the trackage rights contemplated by the Notices of Exemption filed by KCSR and NSR in Finance Docket Nos. 34823 and 34821, address that investment need by injecting at least $260 million, or an average of almost $800,000 per route mile, into the Line over about four years. The capacity improvements made possible by the transaction will benefit all traffic on the Line. KCSR's local and overhead traffic should benefit from the added capacity that will give more customers the opportunity to move more freight. With this investment, the Line should be more competitive for intermodal traffic with other rail routes, including routes via the New Orleans, Memphis, and Birmingham gateways, and other modes of transportation. Additionally, the investment in Centralized Traffic Control on more than 260 miles of the Line will add an extra element of safety to rail operations over the Line.

Once implemented, this transaction will perpetuate the haulage arrangements that NSR and KCSR have had over the Line while significantly expanding capacity for all traffic. It will make permanent another routing option for NSR's customers for certain intermodal traffic and will preserve jobs while enhancing job opportunities.

49 C.F.R. §1180.6 (a) (5) -- List of States in Which the Parties' Property is Located.

The states in which KCSR's rail lines are located are Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, Louisiana, Mississippi, Tennessee, and Alabama. KCSR also conducts rail business, through haulage rights, in the states of Nebraska and Iowa. The Line to be transferred to MSLLC and to be operated by KCSR on behalf of MSLLC is located in Mississippi and Louisiana.

49 C.F.R. §1180.6 (a) (6) -- Map Exhibit.

A map showing the location of the Line being transferred to MSLLC, its relationship to KCSR and other Class I carriers and short line connections, and the principal geographic points in the region traversed is attached as Exhibit 1.

49 C.F.R. §1180.6 (a) (7) (ii) -- Agreement Exhibit.

Not every agreement that the parties have entered into in connection with the transaction is relevant to the matters involved in this Notice of Exemption. Nonetheless, the Parties attach, as Exhibit 2, copies of the various agreements governing the transaction among KCS, KCSR, MSLLC, and NSR. Those agreements consist of a Transaction Agreement, minus non-relevant exhibits, but inclusive of the relevant rail operating agreements. The relevant rail operating agreements attached, which themselves are considered exhibits to the Transaction Agreement, consist of the Meridian Speedway LLC Agreement, KCSR – MSLLC Joint Use Agreement, NSR – MSLLC Joint Use Agreement, MSLCC – KCSR Operating Agreement, Western Haulage Agreement, Master Interchange Agreement, Unified Assignment and Assumption Agreement, Omnibus Bill of Sale, Vicksburg Assignment and Assumption Agreement, Jackson Assignment and Assumption Agreement, Unified Liability Agreement, Dallas Terminal Marketing Agreement, and Jackson Haulage Agreement. Certain confidential business terms have been redacted from the copies of the agreements submitted with the public version of this Notice.

Concurrent with the submission of those agreements, KCS is also filing a Motion for Protective Order whereby it requests that the Board adopt certain well-established procedures and processes governing the submission and exchange of confidential documents and information in this proceeding. KCS is also submitting, under seal, and subject to the Protective Order, unredacted Highly Confidential versions of the agreements that were submitted in the public version of this Notice.

49 C.F.R. §1180.4 (g) (1) (i) -- Level of Labor Protection.

Because KCSR will operate the Line on behalf of MSLLC (including providing haulage services to NSR for certain intermodal traffic), and will continue to operate over the Line for its own account pursuant to the local and overhead trackage rights granted to KCSR by MSLLC in Finance Docket No. 34823, the transaction contemplated by this Notice will not result in any adverse impacts on labor. Indeed, as the capacity of the Line increases and traffic levels correspondingly increase, the Parties anticipate that the transaction will generate additional opportunities for rail employment. Nonetheless, 49 U.S.C. §11326 requires imposition of labor protection for transactions approved or exempted pursuant to 49 U.S.C. § 11323. Under the statute and case precedent, the appropriate labor protection for this transaction is contained in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

49 C.F.R. §1105.6 through 1105.8--Environmental Report.

Because the transaction contemplated by this Notice does not contemplate any formal consolidation of the railroads' operations, and does not include any line abandonments or curtailment of service to customers, it should strengthen the transportation marketplace and have de minimis impacts on the environment and the communities which the Line transits. Nonetheless, recognizing that the investments contemplated by the transaction will create enhanced capacity

which in turn should lead to additional volumes of rail traffic on the Line, NSR and KCSR have consulted with the Board's Section of Environmental Analysis ("SEA") regarding retention of a third party contractor to discharge the Board's duties under the National Environmental Policy Act and the Board's implementing regulations under this Notice and the corresponding Notices filed in F.D. Nos. 34821 and 34823. As a result, no environmental or historic report need be filed with this Notice. See 49 CFR § 1105.10(d).

Respectfully submitted this 17th day of January, 2006.

Robert B. Terry
Thomas J. Healey
KANSAS CITY SOUTHERN
427 West 12th Street
Kansas City, MO 64105
Tel: (816) 983-1370
Fax: (816) 983-1227

William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20037
Tel: (202) 663-7823
Fax: (202) 663-7849

Attorneys For Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway, LLC

VERIFICATION

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Michael R. Haverty, being duly sworn, depose and state that I am the Chairman, President, and Chief Executive Officer of Kansas City Southern, and the Chairman of The Kansas City Southern Railway Company, that I am authorized to make this verification, that I have read the foregoing "Verified Notice of Exemption Pursuant to 49 C.F.R. §1180.2 (d)(3)", and know the facts asserted therein are true and accurate as stated to the best of my knowledge, information, and belief.

Michael R. Haverty

SUBSCRIBED AND SWORN TO before me this 13 day of January, 2006, in the County of Jackson, State of Missouri.

My Commission Expires:

BARBARA L. BLEVINS
MY COMMISSION EXPIRES
October 4, 2007
NOTARY SEAL
Jackson County
NOTARY PUBLIC, STATE OF MISSOURI

Barbara L. Blevins
Notary Public

BEFORE THE
SURFACE TRANSPORTATION BOARD

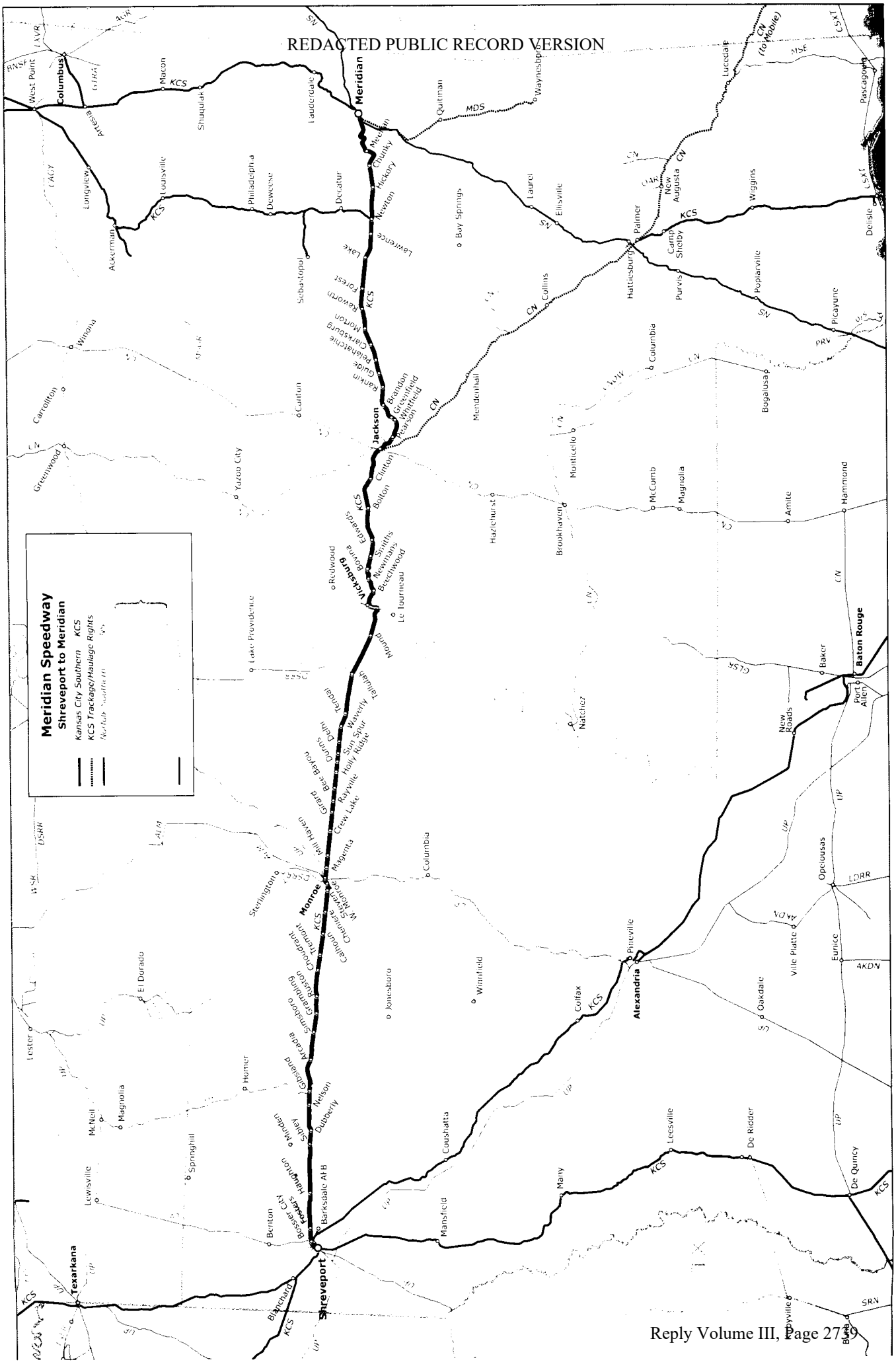
FINANCE DOCKET NO. 34822

KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, AND MERIDIAN SPEEDWAY, LLC -- EXEMPTION FOR TRANSACTIONS WITHIN A CORPORATE FAMILY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 C.F.R. §1180.2(d)(3)

---

49 C.F.R. §1180.6 (a) (6) -- Map Exhibit 1


Meridian Speedway
Shreveport to Meridian
Kansas City Southern KCS
KCS Trackage/Haulage Rights
Norfolk Southern NS
Meridian
Shreveport
Vicksburg
Jackson
Monroe
Alexandria
Baton Rouge
Columbus
Texarkana
Pineville
Natchez
Hattiesburg
Laurel
Ellisville
Picayune
Bogalusa
Amite
Hammond
Brookhaven
McComb
Magnolia
Monticello
Hazlehurst
Yazoo City
Greenwood
Carrollton
Winona
Canton
Kosciusko
Forest
Newton
Decatur
Philadelphia
Meridian
Quitman
Waynesboro
Lauderdale
Shuqualak
Macon
Columbus
West Point
Ackerman
Louisville
Longview
Sebastopol
Bay Springs
Lucedale
Pascagoula
Wiggins
Delisle
Purvis
Poplarville
Camp Shelby
New Augusta
Palmer
Collins
Mendenhall
Columbia
Clinton
Bolton
Edwards
Bovina
Redwood
Vicksburg
Le Tourneau
Beechwood
Newmans
Smiths
Lake Providence
Tallulah
Mound
Waverly
Sun Sitar
Holly Ridge
Durrs
Tendal
Delta
Bee Bayou
Grand
Rayville
Crew Lake
Mill Haven
Magenta
Sterlington
Columbia
Winnfield
Jonesboro
El Dorado
Lester
Homer
Springhill
Lewisville
McNeil
Magnolia
Benton
Bossier City
Haughton
Shady
Dubberly
Nelson
Gibsland
Arcadia
Simsboro
Grambling
Ruston
Choudrant
Tremont
Calhoun
Monroe
West Monroe
Start
Barksdale AFB
Blanchard
Mansfield
Coushatta
Many
Leesville
De Ridder
De Quincy
Oakdale
Colfax
Eunice
Ville Platte
Opelousas
Port Allen
New Roads
Baker
Baton Rouge
Plaquemine
Lake Charles
Sulphur
Vinton
Orange
Beaumont
Port Arthur
Houston
Alvin
Algoa
Galveston
Texas City
Dayton
Liberty
Cleveland
Conroe
Willis
Montgomery
Navasota
Hearne
Bryan
College Station
Caldwell
Giddings
Lexington
Elgin
Austin
Taylor
Round Rock
Georgetown
Hutto
Granger
Thrall
Coupland
Taylor
Austin
Elgin
Giddings
Lexington
Caldwell
Bryan
College Station
Hearne
Navasota
Montgomery
Willis
Conroe
Cleveland
Dayton
Liberty
Baytown
Pasadena
Houston
Algoa
Alvin
Galveston
Texas City
Port Arthur
Beaumont
Orange
Vinton
Sulphur
Lake Charles
Plaquemine
Baton Rouge
Port Allen
New Roads
Baker
Natchez
Vidalia
Lake Providence
Tallulah
Mound
Waverly
Sun Sitar
Holly Ridge
Durrs
Tendal
Delta
Bee Bayou
Grand
Rayville
Crew Lake
Mill Haven
Magenta
Sterlington
Columbia
Winnfield
Jonesboro
El Dorado
Lester
Homer
Springhill
Lewisville
McNeil
Magnolia
Benton
Bossier City
Haughton
Shady
Dubberly
Nelson
Gibsland
Arcadia
Simsboro
Grambling
Ruston
Choudrant
Tremont
Calhoun
Monroe
West Monroe
Start
Barksdale AFB
Blanchard
Mansfield
Coushatta
Many
Leesville
De Ridder
De Quincy
Oakdale
Colfax
Eunice
Ville Platte
Opelousas

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34822

KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, AND MERIDIAN SPEEDWAY, LLC -- EXEMPTION FOR TRANSACTIONS WITHIN A CORPORATE FAMILY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 C.F.R. §1180.2(d)(3)

---

49 C.F.R. §1180.6 (a) (7) (ii) -- Agreements Exhibit 2

PUBLIC VERSIONS

PUBLIC TRANSPORTATION AGREEMENT

EXECUTION COPY

TRANSACTION AGREEMENT

BY AND AMONG

KANSAS CITY SOUTHERN,

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

NORFOLK SOUTHERN CORPORATION,

AND

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

DATED AS OF

DECEMBER 1, 2005

TABLE OF CONTENTS

Page

1. Definitions 2
   - 1.1 Certain Definitions 2
   - 1.2 Construction of Certain Terms and Phrases 12

2. Purchase and Sale of Membership Interest. 12
   - 2.1 Purchase and Sale of Membership Interest. 12
   - 2.2 Use of Proceeds 13

3. Contribution of Assets and Assumption of Liabilities 13
   - 3.1 Contribution of Assets. 13
   - 3.2 Transfer of Liabilities. 15

4. Partner Financing 15

5. Intentionally Omitted 16

6. The Closing. 16
   - 6.1 The Closing 16

7. Deliveries at the Closing. 16
   - 7.1 Deliveries at the Closing 16
   - 7.2 Further Assurances 17

8. Representations and Warranties of KCS and KCSR 17
   - 8.1 Organization, Standing and Power 17
   - 8.2 Authority; Enforceability; Noncontravention 17
   - 8.3 Assets 18
   - 8.4 Material Contracts 18
   - 8.5 Absence of Certain Changes and Events 20
   - 8.6 Litigation and Proceedings 20
   - 8.7 Environmental Matters 21
   - 8.8 Compliance With Laws and Other Matters 21
   - 8.9 Labor Relations 22
   - 8.10 Taxes 23
   - 8.11 Insurance 23
   - 8.12 Books and Records 24
   - 8.13 Transactions with Affiliates 24
   - 8.14 Real Property. 24
   - 8.15 Brokers 26

9. Representations and Warranties of NS 26
   - 9.1 Organization, Standing and Power 26

9.2 Authority; Enforceability; Noncontravention. 26
9.3 Brokers 27
9.4 Sufficient Funds 27

10. Covenants 27
10.1 Operation of the Line by KCS and KCSR 27
10.2 Inspection of Records; Environmental Audits. 28
10.3 Alternative Proposals 29
10.4 Confer with NS 30
10.5 Commercially Reasonable Efforts 30
10.6 Real Estate Matters. 31
10.7 Publicity 31
10.8 Standstill 31
10.9 Encumbrance and Transfer of Assets; Indentures. 32
10.10 Option to Acquire the Line. 32
10.11 Determination and Payment of Real Property Taxes 35
10.12 NS Automotive Traffic 36
10.13 Vicksburg Bridge Lease Dispute 36

11. Conditions to the Closing 36
11.1 Mutual Conditions 36
11.2 Additional Conditions of NS 36
11.3 Additional Conditions of KCS 37

12. Survival of Representations and Warranties; Indemnity. 38
12.1 Survival of Representations and Warranties 38
12.2 Indemnification by KCS. 39
12.3 Indemnification by NS. 40
12.4 Notification of Claims 40
12.5 Matters Involving Third Parties. 41
12.6 Taxes 42
12.7 Other Limits on Indemnification 42

13. Termination 43
13.1 Termination by Mutual Consent 43
13.2 Termination by Final Order 43
13.3 Termination by NS 43
13.4 Termination by KCS 44
13.5 Effect of Termination 45

14. Miscellaneous. 45
14.1 Notices 45
14.2 Entire Agreement 46
14.3 Assignment 46
14.4 Extension, Waiver and Amendment 46
14.5 Governing Law; Submission to Jurisdiction 46
14.6 Specific Performance; Injunctive Relief 47

14.7 Severability 47
14.8 Captions 47
14.9 Counterparts 47
14.10 Costs and Attorneys' Fees 47
14.11 Judicial Interpretation 47
14.12 No Third Party Beneficiaries 48
14.13 Dispute Resolution 48

TRANSACTION AGREEMENT

THIS TRANSACTION AGREEMENT (this "Agreement") is made and entered into as of December 1, 2005, by and among KANSAS CITY SOUTHERN, a Delaware corporation ("KCS"), THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation and Subsidiary of KCS ("KCSR"), NORFOLK SOUTHERN CORPORATION, a Virginia corporation ("NS"), and THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, an Alabama corporation and Subsidiary of NS ("AGS"), with reference to the following facts:

A. KCS, through KCSR, currently owns or operates certain properties, trackage rights, signals, equipment, and other rights, Permits, claims, contracts and assets related thereto, in each case, as set forth on Annex A hereto (collectively, the "Assets"), constituting the rail line between Meridian, Mississippi and Shreveport, Louisiana identified on Annex B (the "Line").

B. KCS and NS have determined that it is advisable to form a joint venture which will own such Assets, and, at the Closing, KCS and NS, through AGS, will form a limited liability company (the "Company") for the purpose of effecting the joint venture contemplated hereby and enter into a Limited Liability Company Agreement substantially in the form attached hereto as Exhibit A (the "Company Agreement") setting forth their rights and obligations as members of the Company.

C. On the terms and subject to the conditions contained herein, KCS desires to, and desires to cause KCSR to, contribute the Assets to the Company in exchange for a 70% membership interest in the Company, (as contemplated by the Company Agreement), and NS desires to cause AGS to contribute the amounts contemplated by Schedule 2.1(a) to the Company in exchange for a 30% membership interest in the Company.

D. In connection with the transactions contemplated by this Agreement and the Company Agreement, at the Closing, the parties will enter into, or will cause the Company or their respective Affiliates to enter into, as applicable: (i) an Operating Agreement substantially in the form attached hereto as Exhibit B (the "Operating Agreement"), (ii) an NSR Joint Use Agreement substantially in the form attached hereto as Exhibit C (the "NSR Joint Use Agreement"), (iii) a KCSR Joint Use Agreement substantially in the form attached hereto as Exhibit D (the "KCSR Joint Use Agreement"), (iv) a Western Haulage Agreement substantially in the form attached hereto as Exhibit E, (v) a KCSR Master Interchange Agreement substantially in the form attached hereto as Exhibit F, (vi) a Unified Assignment and Assumption

Agreement substantially in the form attached hereto as Exhibit G, (vii) the Vicksburg Assignment Agreement (as defined in Section 3.1(b)), (viii) the Jackson Assignment Agreement (as defined in Section 3.1(c)), (ix) one or more Notes (as defined in Section 4), (x) the Omnibus Bill of Sale attached hereto as Exhibit H, (xi) the Unified Liability Agreement attached hereto as Exhibit I, (xii) the Dallas Terminal Marketing Agreement attached hereto as Exhibit J, (xiii) the NSR – KCSR Haulage Agreement (as defined in Section 3.1(c)) and (xiv) the Access Agreement (as defined in Section 10.2(c)) (collectively, the "Ancillary Agreements").

NOW, THEREFORE, with reference to the foregoing facts and in consideration of the mutual agreements and understandings set forth herein, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Definitions.

1.1 Certain Definitions. All terms defined in this Agreement shall have the defined meanings when used in this Agreement or in any agreement, note, certificate, report or other document made or delivered pursuant to this Agreement, unless otherwise defined or the context otherwise requires. The following terms shall have the following meanings:

"AAA" shall have the meaning given to that term in Section 14.13.

"Access Agreement" shall have the meaning given to that term in Section 10.2(c).

"Action" means any litigation, action, suit, proceeding, investigation, arbitration, claim or other dispute by or before any court or other Governmental Authority, or any other alternative dispute resolution proceedings, such as arbitration or mediation.

"Affiliate" shall mean, with respect to any specified Person, (i) any other Person who, directly or indirectly, controls, is under common control with, or is controlled by, such specified Person, (ii) any other Person who is a director, officer, manager, member, partner or trustee of the specified Person or a Person described in clause (i) of this definition or any spouse of the specified Person or any such other Person or (iii) any Person of which the specified Person and/or any one or more of the Persons specified in clause (i) or (ii) of this definition, individually or in the aggregate, beneficially own 10% or more of any class of voting securities.

"Aggregate NS Consideration" shall have the meaning given to that term in Schedule 2.1(a).

"Agreement" shall have the meaning given to that term in the Recitals.

"AGS" shall have the meaning given to that term in the Recitals.

"Alternative Proposal" shall have the meaning given to that term in Section 10.3.

"Ancillary Agreements" shall have the meaning given to that term in the Recitals.

"Anniversary Date" shall have the meaning given to that term in Section 2.1(b).

"Appraiser" shall have the meaning given to that term in Section 10.10(d).

"Appraisal Report" shall have the meaning given to that term in Section 10.10(e).

"Assets" shall have the meaning given to that term in the Recitals.

"Assumed Liabilities" shall have the meaning given to that term in Section 3.2(a).

"Business Combination" shall have the meaning given to that term in Section 10.8.

"Business Day" shall mean any day other than a Saturday or Sunday or any day banks in the State of New York are authorized or required to be closed.

"Canadian National" shall mean the Canadian National Railway Company.

"Capital Contribution Amount" shall mean, on any given date, the total of the KCSR Borrowing Capacity and the Company Capital Amount.

"Capital Proceeds" shall have the meaning given to that term in Section 2.2.

"Charter Documents" shall mean the certificate of incorporation or articles of incorporation and the by-laws, with respect to a corporation; the partnership agreement, with respect to a general partnership; or the certificate of formation and operating or company agreement, with respect to a limited liability company.

"Cleanup" shall mean all actions, including investigations, required by Law to: (1) cleanup, remove, treat or remediate Hazardous Materials in the environment; (2) prevent the Release of Hazardous Materials so that they do not migrate, endanger or threaten to endanger public health or welfare or the environment; (3) perform pre-remedial studies and investigations and post-remedial monitoring and care; or (4) respond to any government requests for information or documents in any way relating to cleanup, removal, treatment or remediation or potential cleanup, removal, treatment or remediation of Hazardous Materials in the environment.

"**Closing**" shall mean the closing of the purchase and sale of the NS Interest on the Closing Date as contemplated by Section 2.1(a) and the contribution of the Assets in exchange for the KCS Interest.

"**Closing Date**" shall have the meaning given to that term in Section 6.1.

"**Company**" shall have the meaning given to that term in the Recitals.

"**Company Agreement**" shall have the meaning given to that term in the Recitals.

"**Company Capital Amount**" shall mean, as of any determination date, the total amount that the Company will be able to expend for capital improvements on the Line within one-hundred eighty (180) days of such date in accordance with Section 4.06(iii) of the Indentures which improvements were not the subject of any prior calculation of the Company Capital Amount.

"**Company Indemnified Parties**" shall have the meaning given to that term in Section 12.2(a).

"**Company Line Assets**" shall have the meaning given to that term in Section 10.10(a)(ii).

"**Confidentiality Agreement**" shall have the meaning given to that term in Section 10.2(a).

"**Contract**" shall mean any note, bond, debenture, mortgage, license, agreement, commitment, contract, obligation, promise or understanding.

"**Conveying Party**" shall have the meaning given to that them in Section 3.1(c).

"**Damages**" shall have the meaning given to that term in Section 12.2(a).

"**Delaware Courts**" shall have the meaning given to that term in Section 14.5(b).

"**Dispute**" shall have the meaning given to that term in Section 14.13.

"**Dispute Notice**" shall have the meaning given to that term in Section 14.13.

"**Disclosure Schedule**" shall have the meaning given to that term in Article 8.

"**Environmental Claim**" means any fine, claim, action, lien, cause of action, investigation or notice by any Person alleging potential liability (including potential liability for Cleanup costs, governmental response costs, natural resources

damages, property damages, personal injuries, or penalties) arising out of, based on or resulting from (a) the presence, Release or threatened Release of any Hazardous Materials, or (b) circumstances forming the basis of any violation of any Environmental Law.

"Environmental Laws" means all Laws relating to pollution or protection of human health or the environment, including all Laws relating to Releases or threatened Releases of Hazardous Materials or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, Release, disposal, transport or handling of Hazardous Materials, all Laws relating to record keeping, notification, disclosure and reporting requirements respecting Hazardous Materials and all Laws relating to endangered or threatened species of fish, wildlife and plants and natural resources.

"Environmental Reports" shall have the meaning given to that term in Section 8.7(d).

"Excess Capital" shall have the meaning given to that term in Section 2.2.

"Excess Proceeds" shall have the meaning given to that term in Section 2.2.

"Excluded Assets" shall have the meaning given to that term in Section 8.3.

"Governmental Authority" shall mean any nation or government, any state or other political subdivision thereof, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government or any mediation body or arbitral tribunal, including the STB.

"Hazardous Materials" shall mean all substances defined as Hazardous Substances, Oils, Pollutants or Contaminants in the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.5, or defined as such by, or regulated as such under, any Environmental Law.

"Indebtedness" means, with respect to any Person, (i) any liability, contingent or otherwise, (a) for borrowed money, capitalized lease obligations, purchase money obligations or other obligations relating to the deferred purchase price of assets or property or (b) evidenced by a note, bond, debenture, letter of credit or similar instrument given in connection with the acquisition, other than in the ordinary course of business consistent with past practice, of any property, assets, securities or otherwise, including indebtedness created or arising under conditional sale or other title retention agreements (even though the rights and remedies of the seller or lender under the agreements in the event of default are limited to repossession or sale of the property), (ii) any liability of others described in the preceding clause (i) which such Person has guaranteed or which otherwise is its legal liability, (iii) all indebtedness referred to above secured by (or for which the holder of the indebtedness has an existing right, contingent or otherwise, to be secured by), any Lien upon the property of such Person, whether or not the obligations secured thereby have been assumed, and (iv) any amendment, renewal, extension or

refunding of any liability referred to in clauses (i), (ii) and (iii) above; provided, however, that Indebtedness does not include any trade payables of any Person incurred in the ordinary course of business consistent with past practice. The amount of Indebtedness of any Person at any date shall be the outstanding balance at the date of all unconditional obligations as described above and the maximum amount of any contingent obligations at the date.

"Indemnified Party" shall have the meaning given to that term in Section 12.4.

"Indemnifying Party" shall have the meaning given to that term in Section 12.4.

"Indentures" shall mean, collectively, the Indenture, dated as of September 27, 2000, among KCSR, KCS, certain Subsidiaries of KCS and The Bank of New York, as trustee, governing the terms of KCS' 9½% Senior Notes due 2008 and the Indenture, dated as of June 12, 2002, among KCSR, KCS, certain Subsidiaries of KCS and U.S. Bank National Association, as trustee, governing the terms of KCS' 7½% Senior Notes due 2009, as they may be amended from time to time.

"Issuance Date" shall have the meaning given to that term in Schedule 2.1(a).

"Jackson Assignment Agreement" shall have the meaning given to that term in Section 3.1(c).

"Jackson Flyover" shall mean a bridge to carry the Company's tracks over the real property and tracks of Canadian National Railway Company (or its Subsidiaries) located at Jackson, Mississippi which establishes a continuous line of rail between Meridian, Mississippi and Shreveport, Louisiana.

"KCS" shall have the meaning given to that term in the Recitals.

"KCSR Borrowing Capacity" shall mean, as of any determination date, the total amount of previously unborrowed funds that KCSR (or any other Subsidiary of KCS which is on such date a party to the Company Agreement) is permitted to borrow from the Company pursuant to a Note on such date without violating in any respect the KCS Credit Agreement, the Indentures or any other Contract evidencing more than $100,000 of Indebtedness to which it is a party on such date; it being understood that, in no event shall the KCSR Borrowing Capacity, together with all funds previously borrowed pursuant to any Note (including any Note evidencing the borrowing of the Excess Proceeds contemplated by Section 4), exceed $300,000,000.

"KCS Credit Agreement" shall mean the Credit Agreement dated as of March 30, 2004 among KCSR, KCS, certain subsidiaries of KCS and Lenders (as defined therein), as amended through the date hereof.

"KCS Credit Agreement Amendment No. 2" shall mean Amendment No. 2 to the Credit Agreement, dated as of September 30, 2005, among KCSR, KCS, the subsidiary guarantors listed on the signature page thereto, the Lender Parties (as defined therein) thereto and The Bank of Nova Scotia.

"KCS Interest" shall have the meaning given to that term in Section 3.1.

"KCSR Joint Use Agreement" shall have the meaning given to that term in the Recitals.

"KCS Line Assets" shall have the meaning given to that term in Section 10.10(a).

"KCS Membership Interests" shall have the meaning given to that term in Section 10.10(a)(i).

"KCSR" shall have the meaning given to that term in the Recitals.

"Knowledge" with respect to KCS shall mean the actual knowledge, after due inquiry into the matter in question, of any of the Persons listed on Schedule 1.1(a) hereto.

"Law" shall mean any U.S. federal, state or local or foreign statute, law, rule, regulation, ordinance, order, code, policy or rule of common law, now or hereafter in effect and, in each case, as amended, any binding judicial or administrative interpretation thereof by a Governmental Authority or otherwise, including any judicial or administrative order, consent, decree or judgment; provided that, each reference to "Law" in Sections 8 and 9 of this Agreement shall mean only a Law in effect as of the date of this Agreement.

"Lease" shall have the meaning given to that term in Section 8.4(b)(viii).

"Leased Personal Property" shall mean all personal property leased by KCS and its Affiliates which is included in the Assets.

"Leased Property" shall have the meaning given to that term in Section 8.14(b).

"Lien" shall mean any mortgage, deed of trust, pledge, security interest, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or other), or preference, purchase option, right of first offer, right of first refusal, priority or other security agreement (including any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, and the filing of any financing statement under the Uniform Commercial Code or comparable Law of any jurisdiction to evidence any of the foregoing).

"Line" shall have the meaning given to that term in the Recitals.

"Line Assets" shall have the meaning given to that term in Section 10.10(a).

"Line FMV" shall have the meaning given to that term in Section 10.10(d)(i).

"Line Option" shall have the meaning given to that term in Section 10.10(a).

"Line Option Exercise Notice" shall have the meaning given to that term in Section 10.10(g).

"Line Option Notice" shall have the meaning given to that term in Section 10.10(a).

"Line Option Valuation Notice" shall have the meaning given to that term in Section 10.10(d).

"Material Adverse Effect" shall mean, with respect to any party, any change, circumstance, event or effect which, individually or when considered in conjunction with other changes, circumstances or effects, has had or would reasonably be likely to have a material adverse effect on (a) with respect to a Material Adverse Effect on KCS and KCSR, the Assets, taken as a whole, or the financial condition or results of operations of the business of the Company to be conducted with the Assets after the Closing, taken as a whole, or (b) any party, the ability of such party to consummate the transactions contemplated by this Agreement, the Ancillary Agreements or the Company Agreement or to perform its obligations hereunder or thereunder; provided, that none of the following shall be deemed to constitute, and none of the following shall be taken into account in determining whether there has been, a Material Adverse Effect: (x) any adverse change, event, development, or effect arising from or relating to (1) general business or economic conditions, including conditions related to the prospective business of the party and including changes in energy prices or availability, except to the extent that such conditions disproportionately affect such party's business relative to the effect of such factors on other Persons operating in such party's industry, (2) national or international political or social conditions, including the engagement by the United States in hostilities, whether or not pursuant to the declaration of a national emergency or war, or the occurrence of any military or terrorist attack upon the United States, or any of its territories, possessions, or diplomatic or consular offices or upon any military installation, equipment or personnel of the United States, except to the extent that such conditions disproportionately affect such party's business relative to the effect of such factors on other Persons operating in such party's industry, (3) financial, banking, or securities markets (including any disruption thereof and any decline in the price of any security or any market index), (4) changes in United States generally accepted accounting principles, (5) changes in Law or (6) the taking of any action contemplated by this Agreement and the other agreements contemplated hereby, (y) any of the events, occurrences, or circumstances set forth in Schedule 1.1(b) and (z) any change, occurrence, event or effect, which shall have been cured without a Material Adverse Effect (excluding this clause (z)),

on the Assets, before the earlier of the Closing Date or the date on which this Agreement is terminated pursuant to Section 13.

"Material Contracts" shall have the meaning given to that term in Section 8.4(b).

"Membership Interest FMV" shall have the meaning given to that term in Section 10.10(d)(ii).

"MSR Jackson Trackage Rights" shall mean that certain trackage rights agreement, as supplemented and amended from time to time, dated March 26, 1986, between Midsouth Rail Corporation and Illinois Central Gulf Railroad Corporation, and the underlying right of movement, pursuant to which KCSR (as successor to Midsouth Rail Corporation) operates over an approximately four-tenths (0.4) of a mile section of track in Jackson, Mississippi that is controlled by Canadian National (as successor to Illinois Central Gulf Railroad Corporation).

"Notes" shall have the meaning given to that term in Section 4.

"Notices" shall have the meaning given to that term in Section 14.1.

"NS" shall have the meaning given to that term in the Recitals.

"NS Closing Cash Purchase Price" shall mean the NS Consideration payable by NS on the Closing Date as determined in accordance with Schedule 2.1(a).

"NS Consideration" shall have the meaning given to that term in Schedule 2.1(a).

"NS Indemnified Parties" shall have the meaning given to that term in Section 12.2(a).

"NS Interest" shall have the meaning given to that term in Section 2.1(a).

"NSR" shall mean Norfolk Southern Railway Company, a Virginia corporation and Subsidiary of NS.

"NSR Joint Use Agreement" shall have the meaning given to that term in the Recitals.

"Officer's Certificate" shall have the meaning given to that term in Section 2.1(b).

"Operating Agreement" shall have the meaning given to that term in the Recitals.

"Owned Property" shall have the meaning given to that term in Section 8.14(a).

"Partner Financing" shall have the meaning given to that term in Article 4.

"Permitted Liens" shall mean collectively, (i) Liens for Taxes not yet due and payable or which are being contested in good faith by appropriate proceedings and for which adequate reserves have been made; (ii) such imperfections of title, easements and other similar encumbrances, if any, as do not, individually or in the aggregate, interfere in any material respect with the use of any Owned Property as such Owned Property is used on the date of this Agreement; (iii) mechanics', materialmen's, workmen's, repairmen's, warehousemen's, carrier's and other similar Liens arising in the ordinary course of business consistent with past practice, all of which shall be released at or prior to the Closing; (iv) Liens arising under the Indentures; or (v) those Liens set forth on Schedule 1.1(c) hereto.

"Permits" shall have the meaning given to that term in Section 8.8(b).

"Person" shall mean an individual or a partnership, corporation, trust, association, limited liability company, Governmental Authority or other entity.

"Preferred Return" shall have the meaning given to that term in the Company Agreement.

"Preferred Return Amount" shall have the meaning given to that term in the Company Agreement.

"Property" shall have the meaning given to that term in Section 8.14(c).

"Release" means any release, spill, emission, discharge, leaking, pumping, injection, deposit, disposal, or leaching into the environment (including ambient air, surface water, groundwater and surface or subsurface strata) or into or out of any property, including the movement of Hazardous Materials through or in the air, soil, surface water, groundwater or property.

"Required Governmental Consents" shall have the meaning given to that term in Section 10.5.

"Restricted Subsidiary" shall have the meaning given to that term in the Indentures.

"Retained Interests" shall have the meaning given to that term in Section 3.1(d).

"Rules" shall have the meaning given to that term in Section 14.13.

"Standstill Period" shall have the meaning given to that term in Section 10.8.

"**STB**" shall mean the Surface Transportation Board or any successor entity thereto.

"**Subsidiary**" of any Person shall mean any entity of which such Person owns, directly or indirectly, securities or other ownership interests having the power to elect a majority of the board of directors or other persons performing similar functions, or otherwise having the power to direct, manage or control the conduct of business of such entity.

"**Tax Return**" shall mean any report, return, document, declaration or other information or filing (including any amendment thereto) with respect to Taxes required by Law to be supplied to any Governmental Authority (foreign or domestic) or to be collected or maintained, including information returns, any documents accompanying payments of estimated Taxes, or requests for the extension of time in which to file any such report, return, document, declaration or other information or filing.

"**Taxes**" shall mean all federal, state, local, foreign and other taxes, customs, duties, fees, levies, assessments or charges of any kind whatsoever, including all net income, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, withholding, payroll, employment, excise, estimated, severance, stamp, occupation, real or personal property, business, documentary, registration, filing, recordation, unemployment, worker's compensation, commercial rent, premium, windfall profits, deemed profits, lease, capital, production, corporation, value added, bulk sale or other taxes, customs, duties, fees, levies, assessments or charges of any kind whatsoever, together with any interest and any penalties, additions to tax or additional amounts imposed by any Governmental Authority (domestic or foreign) regardless of whether disputed or whether related to the filing of a Tax Return (or the failure to file a Tax Return).

"**Terminal**" shall have the meaning given to that term in Section 8.14(a).

"**Third Party Claim**" shall have the meaning given to that term in Section 12.5(a).

"**Third Party Leases**" shall have the meaning given to that term in Section 8.4(b)(ix).

"**Title Company**" shall have the meaning given to that term in Section 10.6(b).

"**Transfer**" shall mean sell, assign, transfer, pledge, grant a security interest in, or otherwise dispose of, with or without consideration, and "Transferred" shall have a correlative meaning.

"**Vicksburg Assignment Agreement**" shall have the meaning given to that term in Section 3.1(b).

"Vicksburg Bridge Lease" shall mean that certain lease, as supplemented, amended and/or replaced from time to time, dated February 11, 1928 between Vicksburg Bridge and Terminal Company and The Yazoo and Mississippi Valley Railroad Company, pursuant to which KCSR leases that certain railroad bridge over the Mississippi River at Vicksburg, MS.

1.2 Construction of Certain Terms and Phrases. Unless the context otherwise requires, (a) words of any gender include each other gender; (b) words using the singular or plural number also include the plural or singular number, respectively; (c) the terms "hereof," "herein," "hereby" and derivative or similar words refer to this entire Agreement; (d) the terms "Article" or "Section" refers to the specified Article or Section of this Agreement; (e) the terms "and" and "or" include the term "and/or" when the context is appropriate; (f) the terms "include" or "including" also include the words "without limitation" when the context is appropriate; and (g) the phrases "ordinary course of business" and "ordinary course of business consistent with past practice" refer to the business and practice of the Person specified or, in the case of the operation of the Line, the business and practice of KCS, KCSR and their respective Subsidiaries with respect to the Assets. Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified. All accounting terms used herein and not expressly defined herein shall have the meanings given to them under generally accepted accounting principles, as in effect in the United States of America. Whenever this Agreement refers to an Exhibit or Schedule attached hereto, the Exhibit or Schedule shall be deemed to be incorporated by reference.

2. Purchase and Sale of Membership Interest.

2.1 Purchase and Sale of Membership Interest.

(a) KCS shall prepare and deliver to NS at least ten (10) Business Days prior to the Closing Date a certificate duly executed by the chief financial officer of KCS certifying as of such date the Capital Contribution Amount (each such certificate, an "Officer's Certificate"). Subject to the terms and conditions of this Agreement, at the Closing, KCS and NS shall cause the Company to issue and sell to AGS, and NS shall cause AGS to purchase from the Company, up to a 30% membership interest in the Company (as adjusted pursuant to Section 2.1(b), the "NS Interest") in exchange for cash consideration, in each case, as determined in accordance with Schedule 2.1(a).

(b) Within ten (10) Business Days prior to each six-month anniversary of the Closing Date (each, an "Anniversary Date") until the NS Interest represents a 30% membership interest in the Company, KCS shall prepare and deliver to NS an Officer's Certificate. Subject to the terms and conditions of this Agreement, on each Anniversary Date, KCS and NS shall cause the Company to issue and sell to AGS, and NS shall cause AGS to purchase from the Company, in exchange for cash consideration determined in accordance with Schedule 2.1(a), an additional membership interest in the Company such that, upon the issuance thereof, AGS and KCS will hold the

respective percentage membership interests in the Company, in each case, determined in accordance with Schedule 2.1(a).

2.2 Use of Proceeds. KCS and NS shall cause the Company to use $260,000,000 of the proceeds from the sale of the NS Interest plus any interest earned thereon from time to time (the "Capital Proceeds") for the capital expenditures anticipated to be made in accordance with the Company Agreement and the Budgets (including any Rollover Budgets) and Business Plans (as each such term is defined in the Company Agreement) for the Company contemplated thereby. KCS and NS shall cause at Closing up to $40,000,000 of the proceeds from the sale of the NS Interest to be paid to reimburse KCS for capital expenditures made by KCS on the Line within the two-year period ending on the Closing Date (none of which shall have been made in anticipation of this Agreement) as presented on a schedule delivered to NS prior to the Closing Date, which schedule shall be final and binding on NS if it accurately sets forth expenditures made in accordance with the principles expressed in this sentence (the difference between $40,000,000 and such reimbursement shall be the "Excess Proceeds"), and (b) the Excess Proceeds and any portion of the Capital Proceeds not allocated at such time for capital expenditures in accordance with the then current Budget or any Rollover Budget, as the case may be, and Business Plan (in the aggregate, the "Excess Capital") to be made available by the Company to provide the Partner Financing pursuant to Article 4 below. KCS and NS shall cause the Company to pay KCS a Preferred Return Amount on and, at KCS' election, a Preferred Return of, the Excess Proceeds, as contemplated in the Company Agreement.

3. Contribution of Assets and Assumption of Liabilities.

3.1 Contribution of Assets.

(a) Subject to the terms and conditions of this Agreement, at the Closing, KCS and KCSR shall, and shall cause their respective Subsidiaries, as applicable, to, transfer, convey, assign and deliver to the Company, all of their respective right, title and interest in the Assets, free and clear of all Liens other than Permitted Liens, and in exchange for the Assets, KCS and NS shall cause the Company to issue to KCS a 71.4286% membership interest in the Company (as adjusted pursuant to Section 2.1(b) and together with the Preferred Return, the "KCS Interest"). The parties acknowledge that KCS' initial capital account in the Company will be as set forth in Exhibit 2.2 to the Company Agreement and that the Company shall be a Restricted Subsidiary prior to the transfer of the Assets to the Company and shall remain a Restricted Subsidiary so long as the Indentures remain in effect.

(b) Prior to the Closing, KCSR shall use its commercially reasonable efforts to obtain the consent of the Warren County Bridge Commission to an assignment of the Vicksburg Bridge Lease to the Company. Should KCSR obtain said consent prior to the Closing, at the Closing, KCSR shall assign the Vicksburg Bridge Lease to the Company pursuant to an assignment agreement substantially in the form attached hereto as Exhibit K (the "Vicksburg Assignment Agreement"). Should KCSR fail to obtain said consent prior to the Closing, at the Closing, KCSR shall sublease, at the

same rate as paid by KCSR , the Vicksburg Bridge Lease to the Company pursuant to a customary sublease agreement, and thereafter shall continue to use its commercially reasonable efforts to obtain the consent of the Warren County Bridge Commission to an assignment of the Vicksburg Bridge Lease to the Company and, upon receipt of such consent, shall assign the Vicksburg Bridge Lease to the Company pursuant to an assignment agreement substantially in the form of the Vicksburg Assignment Agreement. Notwithstanding anything herein to the contrary, for purposes of this Agreement, the Vicksburg Assignment Agreement shall only be considered an Ancillary Agreement if the consent of the Warren County Bridge Commission to an assignment of the Vicksburg Bridge Lease to the Company is obtained by KCSR prior to Closing. Any material amendment, and any termination or renewal, of the Vicksburg Bridge Lease prior to any assignment pursuant to the Vicksburg Assignment Agreement shall be made only with the written consent of NS, provided that the consent of NS shall not be required for KCS to resolve the current dispute with the Warren County Bridge Commission regarding the Vicksburg Bridge Lease described in Section 8.4(a)(i) of the Disclosure Schedule if such resolution does not prevent or materially impair the assignment to the Company of such lease as contemplated by this Section 3.1(b) or materially, adversely affect the access to or enjoyment of the Vicksburg Bridge as contemplated by the NSR Joint Use Agreement.

(c) Prior to the Closing, KCSR shall use its commercially reasonable efforts to obtain the consent of Canadian National to an assignment of the MSR Jackson Trackage Rights to the Company. KCS and NS shall seek an order of the STB permitting said assignment, should such consent be obtained, or overriding any provision of said MSR Jackson Trackage Rights preventing such assignment without the consent of Canadian National, should such consent not be obtained. Any assignment by KCSR of the MSR Jackson Trackage Rights to the Company shall be pursuant to an assignment agreement substantially in the form attached hereto as Exhibit L (the "Jackson Assignment Agreement"). Following the Closing Date and until the earlier of assignment to the Company of the MSR Jackson Trackage Rights or commencement of railroad operations over the Jackson Flyover, as provided in Section 5.13 of the Company Agreement, KCSR shall provide the Company and NSR with haulage rights over the portion of the Line subject to the MSR Jackson Trackage Rights pursuant to an NSR – KCSR Haulage Agreement substantially in the form attached as Exhibit M hereto (the "NSR – KCSR Haulage Agreement").

(d) Schedule 3.1(d) sets forth certain interests of KCS and its Subsidiaries (the "Retained Interests") in the Assets to be conveyed to the Company pursuant to Section 3.1(a) which interests shall be retained following the Closing by the party conveying the relevant Assets to the Company (the "Conveying Party"). The Retained Interests may be exercised only at the sole risk and expense of the Conveying Party, in a manner that shall not unreasonably interfere with the operation of the Assets as contemplated by the Operating Agreement, the NSR Joint Use Agreement and the KCSR Joint Use Agreement, and shall be subject to execution of a reasonable access agreement between the relevant Conveying Party and the Company. KCS shall cause any Conveying Party seeking to exercise Retained Interests to provide reasonable advance notice to the Company before said party may enter any relevant Assets consisting of Property for purposes of exercising a Retained Interest, and said party's actions on such

Property shall at all times be subject to the reasonable direction and control of the operating officer in charge of the Property and to applicable provisions of the Company's safety and operating rules.

(e) The parties hereto acknowledge that some of the Owned Properties include adjoining land, buildings, structures and other improvements that are not included in the Assets and that, accordingly, must be subdivided into separate lots. Accordingly, as to each such Owned Property, KCS shall promptly, and at KCS' sole expense, take all steps necessary (including, without limitation, recording all required deeds, performing all required surveys and obtaining all necessary planning and zoning approvals) to subdivide and obtain a separate tax lot/parcel for the portion of each such Owned Property that is included in the Assets, distinct from any adjoining land, buildings, structures or other improvements that are not included in the Assets.

3.2 Transfer of Liabilities.

(a) Subject to the terms and conditions of this Agreement, at the Closing, KCS and NS shall cause the Company to assume the liabilities and obligations of KCS, KCSR and their respective Affiliates relating to the operation of the Assets set forth on Schedule 3.2 hereto (the "Assumed Liabilities"). Except as and to the extent otherwise expressly provided in this Agreement, the Company has not agreed to pay, shall not be required to assume and shall not have any obligation in respect of, any liability or obligation, direct or indirect, absolute or contingent, of KCS, KCSR, NS or any other Person, the assumption of which by the Company is not expressly provided for in this Agreement.

(b) Notwithstanding anything in Section 3.2(a) to the contrary, any assignment agreement or sublease entered into pursuant to Section 3.1(b) shall provide that all liabilities and obligations under the Vicksburg Bridge Lease relating to or arising from events or omissions occurring prior to the Closing shall be the liabilities and obligations of KCSR, and any liabilities and obligations under the Vicksburg Bridge Lease relating to or arising from events or omissions occurring after the Closing shall be the liabilities and obligations of the Company, except to the extent that any such liabilities or obligations arise from the exercise by the Conveying Parties of the Retained Interests.

4. Partner Financing. Promptly following the Closing, KCS and NS shall cause the Company to loan to KCS an amount not to exceed the Excess Proceeds and thereafter to KCS and NS from time to time upon such party's request up to an amount equal to the Excess Capital less the aggregate amount of any outstanding loans made pursuant to this Section 4 (such loans, the "Partner Financing") to be evidenced by one or more notes substantially in the form attached hereto as Exhibit N (collectively, the "Notes"). All such Partner Financing shall first be made available to KCS and, if KCS elects not to borrow such amounts, subsequently to NS and shall in each case be structured so as to not violate, in the reasonable opinion of counsel to KCS, any provision of the Indentures.

5. Intentionally Omitted

6. The Closing.

6.1 The Closing. The Closing shall take place at the offices of Sonnenschein Nath & Rosenthal LLP, 1221 Avenue of the Americas, 25th Floor, New York, New York 10020 at 10:00 A.M., local time on a date to be agreed to by NS and KCS, which date shall be no later than three Business Days following the date on which all of the conditions set forth in Article 11 shall have been satisfied or waived (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the fulfillment or waiver of those conditions), or at such other time and place as KCS and NS mutually agree upon in writing. The date of the Closing is referred to in this Agreement as the "Closing Date."

7. Deliveries at the Closing.

7.1 Deliveries at the Closing. At the Closing:

(a) NS shall, or shall cause AGS and its other Subsidiaries to, deliver (i) the NS Closing Cash Purchase Price by wire transfer of immediately available funds to the account(s) designated by KCS and NS on behalf of the Company in writing at least one Business Day prior to the Closing Date; (ii) duly executed counterpart originals of each Ancillary Agreement to which NS, AGS or any of their respective Subsidiaries is a party to KCS or the Company, as applicable; (iii) a duly executed counterpart original of the Company Agreement to KCS; (iv) the certificate required to be delivered to KCS pursuant to Section 11.3(c) of this Agreement; (v) the opinions required pursuant to Section 11.3(e) of the Agreement to KCS; and (vi) such documents and instruments as KCS may reasonably request to evidence the satisfaction of all conditions precedent set forth in Article 11 of this Agreement or which are required to be delivered by NS at or prior to the Closing Date pursuant to this Agreement.

(b) KCS and KCSR shall, or shall cause their respective Subsidiaries to, deliver: (i) a duly executed counterpart original of the Company Agreement to NS; (ii) duly executed counterpart originals of each Ancillary Agreement to which KCS, KCSR or their respective Subsidiaries is a party to NS or the Company, as applicable; (iii) the certificate required to be delivered to NS pursuant to Section 11.2(c) of this Agreement; (iv) the consents required, if any, pursuant to Section 11.2(d) of this Agreement to NS; (v) quitclaim deeds with respect to each of the Owned Properties to the Company; (vi) the consent to assignment or sublease, as the case may be, provided for in Section 3.1(b) of this Agreement to the Company; (vii) all such other deeds, endorsements, assignments and other instruments as are necessary to transfer to the Company KCS' and its Subsidiaries' interest in the Assets in accordance with the terms hereof; (viii) the opinions required pursuant to Section 11.2(f) of the Agreement to NS; and (ix) such documents and instruments to NS as NS may reasonably request to evidence the satisfaction of all conditions precedent set forth in Article 11 of this Agreement or which are required to be delivered by KCS at or prior to the Closing Date pursuant to this Agreement.

(c) KCS and NS shall cause the Company to deliver (i) duly executed counterpart originals of each Ancillary Agreement to which the Company is a party to NS or KCS, as applicable and (ii) certificates representing the NS Initial Interest and the KCS Interest to AGS and KCS, respectively.

7.2 Further Assurances. At and following the Closing, each party to this Agreement shall deliver or cause to be delivered, as appropriate, such further certificates, consents and other documents as may be necessary to carry out the terms of this Agreement.

8. Representations and Warranties of KCS and KCSR. Except as set forth in the disclosure schedule (the "Disclosure Schedule") prepared by KCS and delivered to NS concurrently with the execution of this Agreement (in each case making reference to the particular subsection of this Agreement to which the relevant disclosure or exception is being made), KCS and KCSR jointly represent and warrant to NS as of the date hereof and, to the extent provided in Section 11.2(a), as of the Closing, as follows:

8.1 Organization, Standing and Power. Each of KCS and KCSR is a corporation duly organized, validly existing and in good standing under the Laws of the jurisdiction of its incorporation and has all requisite power and authority to own, lease and operate its properties and assets and to carry on its business as now being conducted. Each of KCS and KCSR is duly qualified or licensed as a foreign entity and is in good standing in each jurisdiction where the nature of its properties owned or held under lease or the nature of the business conducted by it make such qualification necessary, except for any failure to be so qualified, licensed and in good standing as would not, individually or in the aggregate, have a Material Adverse Effect on KCS or KCSR.

8.2 Authority; Enforceability; Noncontravention.

(a) Each of KCS, KCSR and their respective Subsidiaries, as the case may be, has full power and authority to enter into, execute and deliver this Agreement, each of the Ancillary Agreements and the Company Agreement to which it is a party and perform its obligations hereunder and thereunder. This Agreement has been, and each of the Ancillary Agreements and the Company Agreement will be, duly authorized by all necessary action of each of KCS, KCSR and their respective Subsidiaries, as the case may be. This Agreement has been, and each of the Ancillary Agreements and the Company Agreement will be, duly executed and delivered by each of KCS, KCSR and their respective Subsidiaries, as the case may be, and, assuming their due execution and delivery by the other party or parties hereto or thereto, constitutes or will constitute a valid and legally binding obligation of each of KCS, KCSR and their respective Subsidiaries, as the case may be, respectively, enforceable against them in accordance with its terms, subject to the effect of bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and other similar Laws relating to or affecting creditors' rights generally, and to the availability of equitable remedies.

(b) The execution and delivery of this Agreement, each of the Ancillary Agreements and the Company Agreement by each of KCS, KCSR and their respective Subsidiaries, as the case may be, does not and will not, and compliance by KCS and KCSR, as applicable, with the provisions of this Agreement, each of the Ancillary Agreements and the Company Agreement will not, (i) conflict with or result in a breach or default under the Charter Documents of KCS, KCSR or their respective Subsidiaries; (ii) constitute or result in a material breach or violation of, or a material default under, or the acceleration of (with or without the giving of notice, the lapse of time or both) any obligation pursuant to, any provision of any Material Contract to which KCS, KCSR or their respective Subsidiaries is a party or otherwise bound, or to which any property or asset of KCS, KCSR or their respective Subsidiaries is subject; (iii) subject to the filings with Governmental Authorities and other matters referred to in Section 8.2(c) below, violate any Law applicable to KCS, KCSR or their respective Subsidiaries; (iv) result in the creation or imposition of any material Lien on the Assets; or (v) constitute or result in any material change in the rights or obligations of any party under any of the Material Contracts.

(c) Except (i) for the applicable requirements of the STB and (ii) as set forth on Section 8.2(c) of the Disclosure Schedule, there are no approvals, authorizations, consents, orders or other actions of, or filings with, any Person, including any Governmental Authority, that are required to be obtained or made by KCS, KCSR, or their respective Subsidiaries or the Company in connection with the execution of, and the consummation of the transactions contemplated under, this Agreement, the Ancillary Agreements or the Company Agreement, except in each case as will not, individually or in the aggregate, impair in any material respect the performance by KCS, KCSR or their respective Subsidiaries of their respective obligations hereunder.

8.3 Assets. The Assets constitute all properties, assets and rights (real, personal and mixed, tangible and intangible) currently utilized in the operation of the Line, other than operating equipment such as locomotives, rail cars and maintenance vehicles, and other than maintenance of way machinery and tools (the "Excluded Assets") and, except for the Excluded Assets, the Assets are sufficient to operate the Line (i) in substantially the same manner as operated by KCS and its Affiliates prior to the Closing and (ii) as contemplated by the NSR Joint Use Agreement, the KCSR Joint Use Agreement, and the Operating Agreement. KCS or one of its wholly owned Subsidiaries has, and upon consummation of the transactions contemplated hereby the Company will acquire, good and marketable title to all of the non-real estate owned Assets free and clear of all Liens except for Permitted Liens.

8.4 Material Contracts.

(a) (i) True and correct copies of each Material Contract, including all amendments and modifications thereof and waivers thereunder, have been made available to NS and its counsel; (ii) except as set forth in Section 8.4(a)(ii) of the Disclosure Schedule, each Material Contract is in full force and effect, and is the valid and binding obligation of KCS, KCSR or their respective Subsidiaries and, to the Knowledge of KCS, each other party to the Material Contract, and upon consummation

of the transactions contemplated hereby each Material Contract will remain in full force and effect, and will be the valid and binding obligation of the Company and, to the Knowledge of KCS, each other party to the Material Contract; (iii) except as set forth in Section 8.4(a)(iii) of the Disclosure Schedule, KCS, KCSR or their respective Subsidiaries has performed all of its respective material obligations required to be performed by it to date under each Material Contract, and is not in material breach of or material default under any Material Contract, and no event has occurred or circumstance exists which, with notice or lapse of time or both, would constitute a material breach of or material default by KCS, KCSR or their respective Subsidiaries under any Material Contract; (iv) except as set forth in Section 8.4(a)(iv) of the Disclosure Schedule, to the Knowledge of KCS, each party to each Material Contract other than KCS, KCSR or their respective Subsidiaries has performed all of the material obligations required to be performed by it to date under the Material Contract, and is not in material breach of or in material default under the Material Contract, and no event has occurred or circumstance exists which, with notice or lapse of time or both, would constitute a material breach of or material default by such other party under any Material Contract; and (v) no Material Contract will be affected adversely in any material way by the execution, delivery or performance of this Agreement, the Ancillary Agreements or the Company Agreement, each in accordance with its terms, and no Material Contract contains any change in control provision, restriction on assignment or other terms that will become applicable or inapplicable as a result of the consummation of the transactions contemplated by this Agreement, the Ancillary Agreements or the Company Agreement.

(b) For purposes of this Agreement, "Material Contracts" shall mean the following Contracts of KCS, KCSR or their respective Subsidiaries, each of which contracts is listed in Section 8.4(b) of the Disclosure Schedule, (X) relating to or affecting in any material way the Assets or the Assumed Liabilities or (Y) to be assigned to the Company pursuant to the terms hereof which are in effect on the date hereof:

(i) Each Contract which is to be performed in whole or in part at or after the date of this Agreement and which (1) cannot be canceled upon 60 days' notice without payment or penalty and involves aggregate annual payments of more than $100,000; (2) involves material nonmonetary obligations to be performed later than one year from the date hereof; (3) otherwise materially affects the Assets or the operation of the Line; or (4) was not entered into in the ordinary course of business consistent with past practice;

(ii) Each Contract providing for the indemnification of any third party;

(iii) Each Contract providing for any future payments that are conditioned, in whole or in part, on any Transfer or assignment of any of the Assets;

(iv) Each Contract for the Transfer of any of the Assets or for the grant of any preferential right to purchase any of the Assets or which requires the consent of any third party to the Transfer of any of the Assets;

(v) Each Contract evidencing more than $100,000 of Indebtedness of KCS or its Subsidiaries (including the Indentures);

(vi) Each Contract involving aggregate consideration in excess of $100,000 (1) under which the benefits cannot be retained or there will be a default as a result of the consummation of the transactions contemplated by this Agreement without the written consent or approval of other parties or (2) which would require the making of any material payment, other than payments as contemplated by this Agreement, to any employee of KCS or to any other Person as a result of the consummation of the transactions contemplated herein;

(vii) Each Contract pursuant to which any material Leased Personal Property is used or leased in the operation of the Line;

(viii) Each lease, sublease or other occupancy agreement pursuant to which KCS or any of its Subsidiaries leases, subleases or otherwise occupies any real property included or related to the Line (such leases, subleases and other occupancy agreements, together with any amendments, modifications and other supplements thereto, each a "Lease" and collectively, the "Leases");

(ix) Each lease, sublease or other occupancy agreement pursuant to which KCS or any of its Subsidiaries leases or subleases any Property to a third party or one of its Affiliates (each such lease, sublease and other occupancy agreement, together with any amendments, modifications and other supplements thereto, a "Third Party Lease" and collectively, the "Third Party Leases");

(x) Each Contract involving a guarantee of any Indebtedness or imposing a Lien on any of the Assets which serve as collateral for Indebtedness; and

(xi) Each Contract granting haulage, trackage or other access or operating rights with respect to the Line.

8.5 Absence of Certain Changes and Events. Except as set forth in Section 8.5 of the Disclosure Schedule, since December 31, 2004 and prior to the date hereof, except for this Agreement and changes contemplated by this Agreement, (i) neither KCS nor any of its Subsidiaries has taken any action which would be in violation of Section 10.1 had such action been taken after the date hereof and (ii) there has not been any change or development or combination of changes or developments which, individually or in the aggregate, has resulted in, or is reasonably likely to result in, a Material Adverse Effect on KCS or KCSR.

8.6 Litigation and Proceedings. Except as set forth in Section 8.6 of the Disclosure Schedule, there is no pending or, to the Knowledge of KCS, threatened Action to which KCS, KCSR or any of their respective Subsidiaries is a party involving the Assets or the operation of the Line in any material way, and neither KCS nor any of its Subsidiaries is subject to any material judgment, order, writ, injunction, decree or regulatory directive or agreement with respect to the Assets or the operation of the Line.

None of the Assets is subject to any judgment, order or decree entered in any Action which would be reasonably likely to have a Material Adverse Effect on KCS or KCSR.

8.7 Environmental Matters.

(a) KCS, KCSR and their respective Subsidiaries, with respect to the Properties and the operation of the Line, are in compliance in all material respects with all applicable Environmental Laws (which compliance includes, but is not limited to, the possession by KCS, KCSR and their respective Subsidiaries of all material permits and other governmental authorizations required under applicable Environmental Laws, and compliance with the terms and conditions thereof). None of KCS, KCSR or any of their respective Subsidiaries has received in writing any notice, action, inquiry, investigation or claim alleging that KCS, KCSR or any of their respective Subsidiaries, with respect to the Properties or the operation of the Line, are not in such compliance.

(b) There is no Environmental Claim relating to the Properties or the operation of the Line pending or, to the Knowledge of KCS, threatened against KCS, KCSR or any of their respective Subsidiaries or, to the Knowledge of KCS, against any Person whose liability for any such Environmental Claim KCS, KCSR or any of their respective Subsidiaries has retained or assumed either contractually or by operation of Law which would, individually or in the aggregate, be material.

(c) To the Knowledge of KCS, no event has occurred and no condition exists including, without limitation, the Release, threatened Release or presence of any Hazardous Material, which could reasonably be expected to form the basis of any Environmental Claim relating to the Properties or the operation of the Line which would, individually or in the aggregate, be material.

(d) KCS has delivered or otherwise made available for inspection to NS true and correct copies and results of any reports, studies, analyses, tests or other monitoring reports or related substantive correspondence with any Governmental Authority possessed or initiated by or on behalf of KCS, KCSR or any of their respective Subsidiaries pertaining to Hazardous Materials in, on, beneath or adjacent to the Properties, or regarding KCS' and its Subsidiaries' compliance with applicable Environmental Laws with respect to the Properties and the operation of the Line (any of the foregoing, "Environmental Reports").

8.8 Compliance With Laws and Other Matters. KCS, KCSR and each of their respective Subsidiaries:

(a) is, and since January 1, 2003 has been, in compliance in all material respects, in the operation of the Line, with all applicable Laws (it being understood that, solely for purposes of this Section 8.8, the term "Laws" shall not include any Environmental Laws) and the regulations, ordinances, rules, judgments, orders or decrees of any Governmental Authority applicable thereto or to the employees involved in the operation of the Line;

(b) has, and upon the consummation of the transactions contemplated hereby the Company will have, all material permits, licenses, franchises, certificates of authority, orders, and approvals of, and has made all material filings, applications, and registrations with, Governmental Authorities that are required in order to permit it to operate the Line (the "Permits"); and since January 1, 2003 has been, in compliance in all material respects with the terms of the Permits; and all the Permits are, and will be, in full force and effect and a complete and accurate list of the Permits is set forth in Section 8.8(b) of the Disclosure Schedule;

(c) has, since January 1, 2003, received no notification or communication from any Governmental Authority (i) asserting that it is not in compliance with any Laws (or indicating, in the absence of any such assertion, a possible investigation or inquiry with respect to any of the foregoing) with respect to the operation of the Line or (ii) threatening to suspend, materially modify or revoke any Permit; and

(d) is not a party to or subject to any material order, decree, agreement, memorandum of understanding or similar arrangement with, or a commitment letter, supervisory letter or similar submission to, any Governmental Authority with respect to the Assets or the operation of the Line, and none of KCS, KCSR or any of their respective Subsidiaries has been advised by any such Governmental Authority that such Governmental Authority is contemplating issuing or requesting (or is considering the appropriateness of issuing or requesting) any such material order, decree, agreement, memorandum of understanding, commitment letter, supervisory letter or similar submission.

8.9 Labor Relations. Except as set forth in Section 8.9 of the Disclosure Schedule:

(a) There is no strike, lockout, slowdown or stoppage pending or, to the Knowledge of KCS, threatened against or directly affecting the operation of the Line.

(b) Neither KCS nor any of its Subsidiaries is delinquent in payments in any material respect: (i) to any of its employees involved in the operation of the Line for any wages, salaries, commissions, bonuses or other direct compensation for any services performed by them, (ii) to any of its employees involved in the operation of the Line for amounts required to be reimbursed to such employees or (iii) to any benefit plans with respect to amounts owed on behalf of any of its employees involved in the operation of the Line.

(c) There is no unfair labor practice, charge or complaint against KCS, KCSR or their respective Subsidiaries with respect to the operation of the Line, pending or, to the knowledge of KCS, threatened, before any Governmental Authority; and there is no grievance that would be reasonably likely to have a Material Adverse Effect on KCS or KCSR nor any arbitration proceeding arising out of or under any collective bargaining agreement pending against KCS, KCSR or their respective Subsidiaries with respect to the operation of the Line.

(d) Each of KCS and any of its Subsidiaries who are or have been (i) required to comply with Executive Order 11246 or any other requirements applicable to a "contractor" or "subcontractor" (as defined by Executive Order 11246) or (ii) required to maintain an affirmative action plan have complied with such requirements in all material respects.

8.10 Taxes. (a) All Tax Returns required to be filed by KCS, KCSR or any of their respective Subsidiaries with respect to the Assets and the operation of the Line have been filed on a timely basis and all such returns are true, complete, and correct in all material respects, (b) all Taxes (whether or not shown on any Tax Return) that are due or claimed to be due from KCS, KCSR or any of their respective Subsidiaries with respect to the Assets and the operation of the Line have been paid, (c) no notice has been received of any deficiencies for Taxes claimed, proposed or assessed by any Government Authority with respect to the Assets or the operation of the Line for which KCS, KCSR or any of their respective Subsidiaries may be liable, (d) there are no pending, current or proposed audits, examinations, suits, proceedings, investigations, claims or administrative proceedings for or relating to any liability in respect of any Taxes with respect to the Assets or the operation of the Line for which KCS, KCSR or any of their respective Subsidiaries may be liable, (e) each of KCS, KCSR and their respective Subsidiaries has withheld and paid to the relevant Governmental Authority all Taxes required to have been withheld and paid in accordance with applicable Law with respect to the Assets and the operation of the Line, including in connection with any amounts paid or owing to any employee, independent contractor, creditor, equity holder or other Person, (f) there is, to the Knowledge of KCS, no outstanding material claim by any Governmental Authority in a jurisdiction where KCS, KCSR or any of their respective Subsidiaries does not file Tax Returns that KCS, KCSR or any of such Subsidiaries may be subject to Tax in such jurisdiction with respect to the Assets or and the operation of the Line, (g) there are no Liens on any of the Assets that arose in connection with any failure (or alleged failure) to pay any Tax, and (h) none of KCS, KCSR or any of their respective Subsidiaries with respect to the Assets or the operation of the Line will be required to include any item of income in, or exclude any item of deduction from, income for any Tax period (or portion thereof) ending after the Closing Date as a result of any (1) change in method of accounting for a Tax period ending on or prior to the Closing Date, (2) agreement with a Governmental Authority executed on or prior to the Closing Date, (3) deferred gains, (4) installment sale or open transaction disposition made on or prior to the Closing Date, or (5) prepaid amount received on or prior to the Closing Date, in each case under this Section 8.10(h), to the extent that the Tax liability of the Company or any Member (as defined in the Company Agreement) could be materially affected.

8.11 Insurance. The Assets are insured with reputable insurers and Section 8.11 of the Disclosure Schedule contains a true and correct list of such insurance policies maintained by KCS, copies of which have been made available to NS. With respect to all insurance policies that are individually or in the aggregate material to the Assets and the operation of the Line: (i) such policies are in full force and effect on the date hereof and KCS, KCSR and their respective Subsidiaries shall use their commercially reasonable efforts to continue such policies in full force and effect through the Closing Date, (ii) all premiums currently payable or previously due and payable with

respect to all periods up to and including the Closing Date have been paid to the extent such premiums are due and payable on or prior to the date hereof and, with respect to premiums not due or payable at or prior to the date hereof, all premiums due and payable prior to the Closing Date, will have been paid prior to the Closing Date and (iii) no notice of cancellation or termination has been received with respect to any such policy.

8.12 Books and Records. The books and records of KCS, KCSR and their respective Subsidiaries relating to the Assets and the operation of the Line have been fully, properly and accurately maintained in all material respects.

8.13 Transactions with Affiliates. With respect to the Assets and the operation of the Line, there are no outstanding amounts payable to or receivable from, or advances by KCS, KCSR or any of their respective Subsidiaries to, and none of KCS, KCSR or any of their respective Subsidiaries is otherwise a creditor or debtor to, any member or stockholder, director, employee or Affiliate of KCS, KCSR or any of their respective Subsidiaries. With respect to the Assets and the operation of the Line, neither KCS, KCSR nor any Subsidiary of KCS nor KCSR is a party to any transaction or agreement with any Affiliate, member or stockholder, director or executive officer of KCS, KCSR or any of their respective Subsidiaries or any material transaction or agreement with any employee other than executive officers.

8.14 Real Property.

(a) Section 8.14(a) of the Disclosure Schedule sets forth a true, correct and complete list of each parcel of real property owned by KCS, KCSR or their respective Subsidiaries included in the Assets (each such parcel and, for solely the purposes of this Section 8.14, the Dallas Intermodal Terminal described on Annex C hereto (the "Terminal"), individually, an "Owned Property" and collectively, the "Owned Properties") showing the common address, or other means of identification, and record title holder thereof and, to the Knowledge of KCS, all Liens thereon. Each of KCS, KCSR and their respective Subsidiaries, as applicable, owns, and upon the consummation of the transactions contemplated hereby will transfer to the Company all of their respective rights, titles and interests in and to the Owned Properties and to all buildings, structures and other improvements thereon, free and clear of all Liens, except for Permitted Liens, and subject to the Retained Interests, sufficient for the operation of the Line in the ordinary course of business (i) in substantially the same manner as operated by KCS and its Affiliates prior to the Closing and (ii) as contemplated by the NSR Joint Use Agreement, the KCSR Joint Use Agreement, and the Operating Agreement.

(b) Section 8.14(b) of the Disclosure Schedule sets forth the common address of each parcel of real property leased or subleased by KCS, KCSR or their applicable Subsidiary pursuant to each Lease (each a "Leased Property" and collectively, the "Leased Properties"). True, correct and complete copies of all work letters, side agreements, consents, subordination agreements, guarantees and other similar arrangements or agreements with respect to each Lease and to which KCS or any of its Subsidiaries is a party (or that are otherwise in the possession of KCS, KCSR or their respective Subsidiaries) has heretofore been made available to NS and its counsel. KCS

(either directly or through KCSR or another Subsidiary) holds, and after the consummation of the transactions contemplated hereby the Company will hold, a valid and existing leasehold or subleasehold interest, as applicable, in each Leased Property pursuant to the applicable Lease, free and clear of all Liens, other than Permitted Liens, and subject to the Retained Interests. There are no oral agreements in effect as to any Lease to which KCS or any of its Subsidiaries is a party. The terms of the Leases have not been modified in any respect, except to the extent that such modifications are set forth in the documents previously delivered or made available to NS and its counsel, and none of KCS, KCSR or any of their respective Subsidiaries is in negotiations with any landlord to cancel or terminate any Lease prior to the stated maturity date of such Lease. Except for Permitted Liens, none of KCS, KCSR or their applicable Subsidiaries has assigned, transferred, conveyed, mortgaged, deeded in trust or encumbered its leasehold interest in any Lease. Neither KCS nor any Subsidiary has received a notice of default or termination with respect to any Lease. No material damage or destruction (i.e., damage or destruction that would permit either party to the applicable Lease to terminate such Lease or cause the abatement of rent thereunder) has occurred with respect to any of the Leased Properties which has not been repaired prior to the date hereof.

(c) The Owned Properties and the Leased Properties (each a "Property" and collectively, the "Properties") constitute all of the real estate, other than rail yards and similar facilities, within which KCS and its Subsidiaries operate the Line. The Properties are in compliance with all requirements of applicable Law in all material respects, and none of KCS, KCSR or any of their respective Subsidiaries has received notice of, and KCS has no Knowledge of, any condemnation, eminent domain, zoning, land use proceedings or other claims, causes of action, lawsuits or legal proceedings pending, threatened or contemplated regarding the ownership, use or possession of the Properties or any part thereof or of any sale or other disposition of the Owned Properties or any part thereof in lieu of condemnation, except for those matters that are set forth in Section 8.14(c) of the Disclosure Schedule.

(d) Section 8.14(d) of the Disclosure Schedule sets forth the common address of, or other means of identifying, each parcel of real property leased or subleased by KCS, KCSR or their applicable Subsidiary pursuant to each Third Party Lease and the property (or portion thereof) subject to such Third Party Lease. True, correct and complete copies of all work letters, side agreements, consents, subordination agreements, guarantees and other similar arrangements or agreements with respect to the Third Party Leases and to which KCS, KCSR or any of their respective Subsidiaries is a party (or that are otherwise in the possession of KCS, KCSR or any of their respective Subsidiaries) has heretofore been made available to NS. There are no oral agreements in effect as to any Third Party Lease to which KCS or any Subsidiary of KCS is a party. The terms of the Third Party Leases have not been modified in any respect, except to the extent that such modifications are set forth in the documents previously delivered or made available to NS and its counsel, and neither KCS, KCSR or any of their respective Subsidiaries is in negotiations with any tenant or subtenant to cancel or terminate any Third Party Lease prior to the stated maturity date of such Third Party Lease.

8.15 Brokers. Neither KCS nor any of its Affiliates has retained or otherwise engaged or employed, or paid or agreed to pay any fee or commission, to any agent, broker, finder or other Person, for or on account of acting as a finder or broker in connection with this Agreement, the Ancillary Agreements or the Company Agreement or the transactions contemplated hereby and thereby.

9. Representations and Warranties of NS. NS hereby represents and warrants as of the date hereof and, to the extent provided in Section 11.3(a), as of the Closing, as follows:

9.1 Organization, Standing and Power. NS is a corporation duly organized, validly existing and in good standing under the Laws of the jurisdiction of its incorporation and has all requisite power and authority to own, lease and operate its properties and assets and to carry on its business as now being conducted.

9.2 Authority; Enforceability; Noncontravention.

(a) Each of NS, AGS and their respective Subsidiaries, as the case may be, has full power and authority to enter into, execute and deliver this Agreement, each of the Ancillary Agreements and the Company Agreement to which it is a party and perform its obligations hereunder and thereunder. This Agreement has been, and each of the Ancillary Agreements and the Company Agreement will be, duly authorized by all necessary action of each of NS, AGS and their respective Subsidiaries, as the case may be. This Agreement has been and each of the Ancillary Agreements and the Company Agreement will be, duly executed and delivered by each of NS, NSR and AGS, as the case may be, and, assuming it is duly executed and delivered by KCS and the Company, as applicable, constitutes or will constitute a valid and legally binding obligation of each of NS, AGS and their respective Subsidiaries, as the case may be, enforceable against them in accordance with its terms, subject to the effect of bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and other similar Laws relating to or affecting creditors' rights generally, and to the availability of equitable remedies.

(b) The execution and delivery by each of NS, NSR and AGS, as the case may be, of this Agreement, each of the Ancillary Agreements and the Company Agreement do not and will not, and compliance by each of NS, NSR or AGS, as the case may be, with the provisions of this Agreement, each of the Ancillary Agreements and the Company Agreement will not, (i) conflict with or result in a breach or default under the Charter Documents of NS, NSR or AGS or any of the terms, conditions or provisions of any Contract to which NS is a party or otherwise bound, or to which any property or asset of NS, NSR or AGS is subject; (ii) subject to the filings with Governmental Authorities and other matters referred to in Section 9.2(c) below, violate any Law applicable to NS, NSR or AGS; or (iii) result in the creation or imposition of any Lien on any asset of NS, NSR or AGS, except in each case as will not, individually or in the aggregate, impair in any material respect NS' performance of its obligations hereunder.

(c) Except (i) for the applicable requirements of the STB and (ii) as set forth on Schedule 9.2(c), there are no approvals, authorizations, consents, orders or other actions of, or filings with, any Person that are required to be obtained or made by NS, NSR, AGS or the Company in connection with the execution of, and the consummation of the transactions contemplated under, this Agreement, the Ancillary Agreements or the Company Agreement, except for any matters as will not, individually or in the aggregate, impair in any material respect NS' performance of its obligations hereunder.

9.3 Brokers. Neither NS nor any of its Affiliates has retained or otherwise engaged or employed, or paid or agreed to pay any fee or commission, to any agent, broker, finder or other Person, for or on account of acting as a finder or broker in connection with this Agreement, the Ancillary Agreements or the Company Agreement or the transactions contemplated hereby and thereby.

9.4 Sufficient Funds. NS has, and will have as of the Closing, sufficient funds available to pay the NS Closing Cash Purchase Price.

10. Covenants.

10.1 Operation of the Line by KCS and KCSR. Between the date of this Agreement and the earlier of the Closing or termination pursuant to Section 13, except (a) as contemplated by this Agreement, (b) as may be required by applicable Law, (c) as set forth in Schedule 10.1 or (d) with the prior written consent of NS, KCS and KCSR will, and will cause their respective Subsidiaries to (X) operate the Line according to the ordinary course of business consistent with past practice, (Y) use all commercially reasonable efforts to preserve intact the Assets and maintain the rights, franchises and existing relations with suppliers and employees relating thereto and (Z) without limiting the generality of the clauses (X) and (Y) above:

(i) not transfer any of the Assets or any interest of KCS, KCSR or any of their respective Subsidiaries therein other than in the ordinary course of business consistent with past practice or to KCS or any Restricted Subsidiary;

(ii) not change the general nature of operation of the Assets or conduct any new line of business with the rail operating Assets not consistent with past practice;

(iii) not mortgage, encumber or pledge any of the Assets or permit or allow any of the Assets to be subjected to any Lien other than Permitted Liens;

(iv) not terminate prior to the scheduled expiration of, make any material modifications to, transfer or materially amend any Material Contract;

(v) not dispose of any books, records and accounts relating to the Assets, and to maintain such books records or accounts in the usual, regular and ordinary manner, on a basis consistent with prior periods;

(vi) not enter into any lease for real property with respect to any portion of the Assets;

(vii) not enter into any Contract of any kind or nature with any Affiliate (other than KCS or any Restricted Subsidiary), or make any payment or other asset Transfer to or for the benefit of any Affiliate (other than KCS or any Restricted Subsidiary), in each case, relating to the Assets or the operation of the Line;

(viii) not permit any waste of any of the Assets;

(ix) not pay, discharge or satisfy any material claim, liability or obligation (absolute, accrued, contingent or otherwise) related to the Assets other than in the ordinary course of business consistent with past practice;

(x) not cancel or compromise any material debt or material claim or waive or release any material rights relating to the Assets or the operation of the Line;

(xi) not grant any haulage, trackage or other access or operating rights with respect to the Line, except as required by Law;

(xii) not take any action that would cause a breach of any representation or warranty set forth in Article 8 hereof; or

(xiii) not authorize or enter into any agreement to otherwise take any of the foregoing actions.

10.2 Inspection of Records; Environmental Audits.

(a) Between the date of this Agreement and the Closing, KCS and KCSR shall, and shall cause their respective Subsidiaries to, allow, to the extent not prohibited by applicable Law, the officers, attorneys, accountants and other duly authorized representatives of NS reasonable access during regular business hours to the records and files, correspondence, audits, properties and personnel, as well as to all information, in each case, relating to the Assets. Any information regarding the Assets so obtained, and any information obtained by either party pursuant to the provisions of this Agreement, the Company Agreement and the Ancillary Agreements, shall be subject to the Agreement Regarding Confidentiality and Related Matters between KCS and NS, dated as of April 11, 2005, as extended to date (the "Confidentiality Agreement"), and such information shall be held by the recipient in accordance with the terms of the Confidentiality Agreement; it being understood that, for purposes of this provision, the term of the Confidentiality Agreement shall be deemed to have been extended for a period of one (1) year immediately following the Closing Date. No investigation by NS or its representatives shall affect the representations and warranties of KCS and KCSR set forth herein or preclude reliance thereon.

(b) Between the date of this Agreement and the Closing, KCS shall continue to make available for inspection by NS true, correct and complete copies

of the Environmental Reports, and shall promptly deliver to NS true, correct and complete copies of any Environmental Reports that are prepared after the date hereof or that have not been previously disclosed to NS.

(c) If reasonably necessary (as determined solely by NS), NS and/or its appointed agents shall be entitled to perform at the expense of NS Phase I and Phase II environmental audits of the Properties in a manner which shall not unreasonably interfere with the operation of the Line in the ordinary course of business consistent with past practice. With respect to any Property for which NS determines a Phase I and/or Phase II audit is warranted, KCS, KCSR and their respective Subsidiaries shall provide NS and its appointed agents reasonable access to any such Property to conduct the Phase I and/or Phase II audit. Additionally, KCS, KCSR and their respective Subsidiaries shall fully cooperate with all reasonable requests made by NS and its appointed agents in connection with the Phase I and Phase II audits in accordance with the terms of the access agreement set forth in Exhibit O (the "Access Agreement") and shall cooperate in good faith with reasonable requests made by NS and its appointed agents in connection with the Phase I and Phase II audits.

10.3 Alternative Proposals. During the period from the date of this Agreement and extending through the earlier of the termination of this Agreement in accordance with its terms or the Closing, KCS agrees that (a) it shall not, and shall use its commercially reasonable efforts to direct and cause its officers, directors, employees, agents and representatives (including any investment banker, attorney or accountant), as applicable, not to, directly or indirectly, (i) initiate, solicit or encourage, directly or indirectly, or accept the submission of any proposal or offer by any third party with respect to any joint venture, merger, acquisition, sale, consolidation or similar transaction involving the Line or any haulage, trackage or marketing arrangement involving the Line, in each case, other than the transactions contemplated by this Agreement (any such proposal or offer being hereinafter referred to as an "Alternative Proposal") or initiate or participate in any negotiations or discussions concerning an Alternative Proposal, (ii) enter into any agreement, agreement in principle, letter of intent or similar arrangement (whether or not legally binding) with any third party relating to an Alternative Proposal or (iii) provide any confidential information or data to any third party relating to an Alternative Proposal, and (b) it shall notify NS promptly if any Alternative Proposal is received by it or any negotiations or discussions relating to a potential Alternative Proposal are sought to be initiated or continued with KCS, including the material terms of such Alternative Proposal and the identity of the Person making such Alternative Proposal or seeking such negotiations or discussions; provided, that nothing in this Section 10.3 shall prevent KCS from taking any action with respect to any proposal or offer not initiated, solicited or encouraged in violation of this Section 10.3 or participating in negotiations or discussions with respect to such a proposal or offer if it is advised by outside legal counsel that it is required to take such action to satisfy the fiduciary duties of the Board of Directors of KCS under Delaware law; provided, however, that KCS shall not be permitted to terminate this Agreement other than as provided in Article 13 hereof.

10.4 Confer with NS. Prior to the Closing, to the extent practicable and not prohibited by applicable Law, KCS shall confer with NS on all operational matters that might reasonably be expected to materially affect the Assets or, after the Closing Date, the operation of the Line, including, but not limited to material transactions and material expenditures.

10.5 Commercially Reasonable Efforts. Between the date of this Agreement and the Closing, each of the parties to this Agreement will use its commercially reasonable efforts to cause the conditions to the obligations of the other parties set forth in Article 11 of this Agreement, as the case may be, to be satisfied; provided, that, except as agreed in writing by the parties hereto, in no event shall any of the parties hereto be obligated to accept, or cause the Company to accept, in connection with obtaining any Required Governmental Consents required by Section 11.1(c) or any consent, approval or agreement required by Section 11.2(d), any condition or requirement that is not acceptable to such party in its reasonable judgment. In addition, the parties hereto shall (i) cooperate and use their commercially reasonable efforts to obtain all consents, approvals, authorizations and agreements (or exemptions therefrom) of all Governmental Authorities necessary to authorize, approve or permit the consummation of the transactions contemplated by this Agreement, the Company Agreement and the Ancillary Agreements (the "Required Governmental Consents") at the earliest possible time hereafter, (ii) as promptly as practicable hereafter, file or submit, or cause to be filed or submitted, to all Governmental Authorities all notices, applications, documents and other materials necessary in connection with obtaining the Required Governmental Consents and (iii) use their respective commercially reasonable efforts to respond as promptly as practicable to all inquiries received from all Governmental Authorities for additional information or documentation in connection with obtaining such Required Governmental Consents. Each of the parties hereto shall promptly advise each other party hereto upon receiving any communication (written or oral) from any Governmental Authority whose consent, approval or authorization is required, or to whom notice must be submitted, for consummation of the transactions contemplated by this Agreement, the Company Agreement and the Ancillary Agreements which constitutes a reasonable likelihood that any requisite regulatory consent, approval or authorization will not be obtained or that receipt of any such consent, approval or authorization will be materially delayed. Each of the parties hereto shall furnish to the other party hereto such necessary information and reasonable assistance as the other may reasonably request in connection with its preparation of any filings or submissions to any Governmental Authority necessary to obtain any of the Required Governmental Consents. Each of the parties hereto shall provide the other party hereto with draft copies and as-filed copies of all filings and submissions with Governmental Authorities in respect of the Required Governmental Consents and shall provide the other with a reasonable opportunity to comment upon all such draft copies. Each of the parties hereto and its respective representatives shall promptly inform the other party hereto regarding the substance of all communications and contacts received from any Governmental Authority with respect to this Agreement, the Company Agreement, the Ancillary Agreements or the transactions contemplated hereby and thereby, and neither of the parties hereto shall initiate any contact or communications with any Governmental Authority regarding this Agreement, the Ancillary Agreements or the transactions contemplated hereby and thereby without

giving reasonable prior notice to the other party hereto and offering the other party hereto the opportunity to have a representative of such party participate in the contact or communication. For the avoidance of doubt, either party hereto shall be free to discuss regulatory matters with any Governmental Authority without the participation of the other party hereto to the extent such discussions do not directly relate to the transaction contemplated by this Agreement, the Company Agreement and the Ancillary Agreements.

10.6 Real Estate Matters.

(a) KCS and KCSR shall use their commercially reasonable efforts to obtain an estoppel certificate from each landlord under the Leases certifying that each lease is in full force and effect and that there are no defaults thereunder or any conditions that with the passage of time would constitute a default thereunder, or an estoppel certificate in the form so provided for under any such Lease or Third Party Lease. In the event that KCS is unable to deliver an estoppel certificate for any of the Leases or Third Party Leases to NS at the Closing, KCS shall indemnify NS against any loss, cost, liability or expense which NS may incur as a result of the failure of KCS to deliver such estoppel certificate.

(b) KCS and KCSR shall cause (i) title to the Owned Properties, at Closing, to be free and clear of all Liens and without exceptions, disclaimers of liability or objections except for Permitted Liens and any matters which the Title Company has committed to insure over or omit, and (ii) the First American Title Insurance Company of New York or another reputable title insurance company selected by NS (the "Title Company") to insure the Owned Properties under the terms described above.

(c) Between the date of this Agreement and the Closing, KCS shall disclose to NS any newly identified Liens on the Owned Properties that have not been previously disclosed to NS.

10.7 Publicity. The initial public disclosure relating hereto, if any, will be a joint press release and thereafter, except as otherwise required by Law, the applicable rules of the stock exchanges on which KCS' and NS' shares are listed or any other self-regulatory organization, the parties shall coordinate with each other, including the provision of drafts and the opportunity to comment thereon, prior to issuing any press releases or otherwise making public statements with respect to the transactions contemplated hereby.

10.8 Standstill. For a ten (10) year period commencing on the date hereof (such period, the "Standstill Period"), neither KCS nor NS shall, jointly with any third Person, directly or indirectly, (i) purchase or offer or agree to purchase any material assets or any voting securities of the other party (other than purchases of up to 1% of the other party's common stock) other than in the ordinary course of business consistent with past practice or (ii) propose any merger or other business combination involving the other party (any such purchase, offer to purchase or proposal, a "Business Combination"), except, in each case, if specifically invited in writing to do so by the other party. In

addition, during the Standstill Period, neither KCS nor NS nor any of their respective Subsidiaries shall, jointly with any third Person, without the prior written consent of the other party: (i) make, or in any way participate, directly or indirectly, in any solicitation of proxies to vote or seek to advise or influence any Person with respect to the voting of any voting securities of the other party; (ii) form, join, or in any way participate in a "group" within the meaning of Section 13(d)(3) of the Securities Exchange Act of 1934 with respect to any voting securities of the other party; or (iii) otherwise act, alone or in concert with others, to seek to control the management, Board of Directors, or policies of the other party. Notwithstanding the foregoing, the provisions of this Section 10.8 shall not apply to either party if during such Standstill Period (i) the other party publicly proposes to enter into a Business Combination with another Person, (ii) either NS or KCS (or their respective Affiliates) ceases to be a member of the Company or (iii) this Agreement is terminated pursuant to Article 13 hereof.

10.9 Encumbrance and Transfer of Assets; Indentures.

(a) From and after the date hereof, KCS shall not, and shall cause its Subsidiaries not to, without the prior written consent of NS: (i) enter into, amend or extend any Contract (including the Indentures or the notes governed thereby) in any manner which would encumber any of the assets or properties of the Company or prohibit, limit or defer in any way any of NS' management rights set forth in the Company Agreement (including any rights in respect of Major Decisions (as such term is defined in the Company Agreement) that become or may become with the passage of time effective and/or that are modified after the Closing Date); or (ii) with respect to any assets transferred from the Company to KCS or its Restricted Subsidiaries as permitted by the Company Agreement, except as contemplated by Section 10.10, enter into any Contract with respect to or consummate any (x) acquisition, divestiture, spin-off, merger, consolidation, business combination or similar transaction in which such assets would cease to be held by KCS or a Restricted Subsidiary or their respective successors, (y) sale, transfer, lease, sublease, license or other disposition of such assets (except by a Restricted Subsidiary to another Restricted Subsidiary or KCS) or (z) formation of or other participation in, any joint venture or partnership with respect to such assets.

(b) From and after the date hereof, KCS shall, and from and after the Closing Date NS shall, cause the Company to comply with the provisions of the Indentures and shall not, and shall cause the Company not to, incur any additional Indebtedness other than as and to the extent permitted by the Company Agreement and the Indentures and, in any event, subject to Section 10.9(a).

10.10 Option to Acquire the Line.

(a) In the event of a Permitted Asset Transfer (as such term is defined in the Company Agreement) to which NS has not previously consented in writing, KCS shall, at least twenty (20) Business Days before such transfer, provide Notice thereof (each such Notice, a "Line Option Notice") to NS in accordance with the provisions of Section 14.1 and NS shall have the option (the "Line Option") to acquire, or cause one or more of its Subsidiaries to acquire, in accordance with the procedures set

forth in this Section 10.10, (1) from the relevant transferee or transferees, all right, title and interest in the Line, as it then exists, but subject to Permitted Liens, that is owned by such transferee(s) together with, at the option of NS in its sole discretion, all right, title and interest of such transferee(s) or KCS and its Subsidiaries (other than the Company) in and to the rail yards at or near Monroe, Louisiana, Bossier City, Louisiana and Pearson, Mississippi (the Line and such rail yards collectively, the "Line Assets") that are owned by such transferee or KCS or any of its Subsidiaries (other than the Company) at the time of such Permitted Asset Transfer (the "KCS Line Assets") and (2) either:

(i) from KCS and its Subsidiaries, the Membership Interests of the KCS Member (as such terms are defined in the Company Agreement) (the "KCS Membership Interests"); or

(ii) from the Company, the remaining Line Assets (if any) owned by the Company following such Permitted Asset Transfer (the "Company Line Assets").

(b) Notwithstanding anything to the contrary herein, in the case of a Permitted Asset Transfer involving one or more assets of the Company that are not material, individually or in the aggregate, to the operation of the Line, the Line Option will not be available to NS if, within twenty (20) days after such transfer, the asset(s) subject to such Permitted Asset Transfer are transferred back to the Company on terms which have the same effect as if such Permitted Asset Transfer had not occurred.

(c) From and after the date of a Line Option Notice, KCS shall allow, to the extent not prohibited by applicable Law, the officers, attorneys, accountants and other duly authorized representatives of NS access during regular business hours to any books, records, files, correspondence, audits, properties, personnel and other information of KCS or its Subsidiaries relating to the Line Assets owned by KCS or its Subsidiaries (other than the Company) that is reasonably requested by NS or its representatives.

(d) At any time during the thirty (30) day period commencing on receipt of a Line Option Notice, NS may give Notice to KCS in accordance with the provisions of Section 14.1 (each such Notice, a "Line Option Valuation Notice") of its desire to commence the valuation of the Line Assets and the KCS Membership Interests in accordance with the procedures set forth in this Section 10.10(d). Upon the delivery of a Line Option Valuation Notice, NS and KCS shall each select and engage a reputable, independent M.A.I. designated appraiser with at least ten (10) years of experience in valuing real property and rail improvements for rail line and yard property or, at their respective option, an independent investment banking firm of national reputation and such appraisers or investment banking firms shall be instructed to meet within thirty (30) days following their selection and at such meeting to mutually agree upon the selection of an appraiser, appropriately qualified in their judgment (the "Appraiser") to determine:

(i) the fair market value of the Line Assets on a stand-alone rail operation basis (the "Line FMV"), as well as the portion of the Line FMV

attributable to the KCS Line Assets, in the aggregate, and the Company Line Assets, in the aggregate; and

(ii) the fair market value of the KCS Membership Interests (with the Line FMV determined as provided in Section 10.10(d)(i)) (the "Membership Interest FMV").

For purposes of this Section 10.10(d), "fair market value" shall mean, with respect to any asset or property, the price that could be negotiated in an arm's-length, free market transaction, for cash, between a willing seller and a willing and able buyer, neither of whom is under undue pressure or compulsion to complete the transaction.

(e) Within ninety (90) days of the date of its appointment, the Appraiser shall provide to both NS and KCS a report (the "Appraisal Report"), which report shall include the Appraiser's determination of the Line FMV, as well as the portion of the Line FMV attributable to the KCS Line Assets, in the aggregate, and the Company Line Assets, in the aggregate, and the Appraiser's determination of the Membership Interest FMV.

(f) Each of NS and KCS shall, and shall cause the Company and their respective Subsidiaries to, cooperate with the Appraiser and promptly provide all documents and other information and access during regular business hours to the Line Assets reasonably requested by the Appraiser in connection with its appraisal. The determination of the Line FMV and the Membership Interest FMV set forth in the Appraisal Report shall be final and binding on NS and KCS for purposes of this Section 10.10. KCS and NS shall bear equally all expenses of the Appraiser.

(g) Within sixty (60) days after the determination of the Line FMV and the Membership Interest FMV, either by mutual agreement of the parties (without any obligation to negotiate toward or reach such agreement) or by the issuance of the Appraisal Report, NS shall give Notice to KCS of whether it wishes to exercise the Line Option (the "Line Option Exercise Notice") at the Line FMV or the portion thereof attributable to the KCS Line Assets and Membership Interest FMV, as the case may be, as finally determined pursuant to subsections (e) and (f) above, which Notice shall indicate whether NS wishes to acquire the KCS Membership Interests pursuant to Section 10.10(a)(i) or the Company Line Assets pursuant to Section 10.10(a)(ii). In the event that NS has elected to acquire the KCS Membership Interests pursuant to the Line Option, the transfer of such interests shall be governed by the procedure set forth in Article 10 of the Company Agreement. If NS delivers a Line Option Exercise Notice to KCS, NS (or its designated Subsidiar(ies)), KCS and its Subsidiaries shall effect the transfer of the KCS Line Assets, and (in the case that NS has elected to acquire the Company Line Assets pursuant to the Line Option) cause the Company to effect the transfer of the Company Line Assets, to NS (or its designated Subsidiar(ies)) pursuant to customary documentation reasonably acceptable to the parties, including any agreements, documents and other instruments necessary or reasonably requested by NS (or its designated Subsidiar(ies)) to effect such transfer. Such documentation shall call for KCS and its Subsidiaries and, if NS elects to acquire the Company Line Assets pursuant to

Section 10.10(a)(ii), the Company to provide representations, warranties, covenants and indemnities with respect to the KCS Line Assets and Company Line Assets, respectively, with terms at least as favorable to NS and its Subsidiaries as are set forth in this Agreement with respect to the Line and the Assets. Notwithstanding anything to the contrary contained herein, the completion of the sale of the KCS Line Assets and/or Company Line Assets, as the case may be, pursuant to the Line Option and in accordance with the terms of such documentation shall each occur, and the NS Member shall pay the portion of the Line FMV attributable to the assets so acquired to the transferring party, on a date to be mutually agreed by KCS and NS, but in no event later than the later of (i) ninety (90) days after the delivery date of the Line Option Exercise Notice and (ii) five Business Days after the date on which the last of any required regulatory approvals in connection with such transaction is received. The KCS Line Assets and, if applicable, Company Line Assets, shall be conveyed to NS (or its designated Subsidiar(ies)) subject only to Permitted Liens and KCS shall be responsible for the payment of all transfer, filing and recording taxes in connection with the exercise of the Line Option with respect to such assets and the conveyance of the KCS Line Assets and, if applicable, Company Line Assets. All payments of the Line FMV attributable to the assets acquired shall be made by wire transfer of immediately available funds to an account or accounts specified by the intended recipients.

(h) In the event that NS elects not to exercise the Line Option, it shall be entitled to exercise the contingent trackage rights described in Section 3 of the NSR Joint Use Agreement. For the avoidance of doubt, nothing in this Section 10.10 nor any decision of NS not to exercise the Line Option shall in any way limit the rights of NS and its Affiliates under the NSR Joint Use Agreement, the Western Haulage Agreement, the Contingent Haulage Agreement or any other Ancillary Agreement.

(i) Notwithstanding anything in this Section 10.10 to the contrary, the Line Option shall be exercised, and title to the Line Assets shall vest, if at all, on or prior to the date on which the last of the living descendents of Joseph P. Kennedy shall die, plus twenty one (21) years.

(j) In the event that no Appraiser is appointed pursuant to and in compliance with Section 10.10(d) an Appraiser will be appointed by arbitration in accordance with Section 14.13.

10.11 Determination and Payment of Real Property Taxes. KCSR is contributing the Assets to the Company through one deed that excludes certain property. Because the Assets will be included in KCSR's Form R1 that is filed annually with the STB, Mississippi, Louisiana, and their local governments will assess property tax against KCSR (not the Company) that includes the Assets. Therefore, in connection with each annual property tax assessment, KCSR and NS will determine jointly and in good faith a reasonable and fair allocation of KCSR's property tax liability that is attributable to the Assets and that should be paid by the Company, and KCSR and NS will certify in writing that the determined amount is reasonable and fair. Thereafter, KCSR will bill the Company for, and the Company shall promptly pay to KCSR, the jointly determined share of the property tax.

10.12 NS Automotive Traffic. From and after the date hereof, NS and KCS shall negotiate in good faith the terms of an agreement with respect to NS' rights to move automotive traffic over the Line or to interchange such traffic.

10.13 Vicksburg Bridge Lease Dispute. KCS shall use its commercially reasonable efforts to resolve the Vicksburg Bridge Lease dispute referred to in, and in the manner contemplated by, Section 3.1(b).

11. Conditions to the Closing.

11.1 Mutual Conditions. The respective obligations of the parties to complete the purchase/sale of the NS Interest on the Closing Date as contemplated by Section 2.1(a), the contribution of the Assets in exchange for the KCS Interest and to take the other actions required to be taken by each of the parties at the Closing is subject to the satisfaction, at or prior to the Closing, of each of the following conditions (any of which may be waived jointly by NS and KCS in writing, in whole or in part):

(a) Company Agreement. KCS and NS or their respective Affiliates shall have entered into the Company Agreement.

(b) Ancillary Agreements. KCS, KCSR, NS, the Company and their respective Affiliates, as applicable, shall have entered into each of Ancillary Agreements.

(c) Regulatory Approvals. All Required Governmental Consents (including from the STB) shall have been obtained and shall be in full force and effect, and not subject to conditions that any party deems unacceptable in its reasonable judgment, and shall not be subject to a pending petition for review before a U.S. Court of Appeals.

(d) No Order or Action. No Law shall have been enacted, entered, promulgated or enforced by any Governmental Authority which prohibits, restricts or makes illegal the consummation of the Closing or any of the material transactions contemplated thereby, or by the Company Agreement or any of the Ancillary Agreements, and no Action shall be pending or threatened that questions the validity of this Agreement, the Company Agreement or any of the Ancillary Agreements or declares or proposes to declare the same unlawful or seeks to enjoin the consummation of any of the material transactions contemplated hereby or thereby.

11.2 Additional Conditions of NS. The obligation of NS to complete the purchase of the NS Interest on the Closing Date as contemplated by Section 2.1(a), and to take the other actions required to be taken by NS at the Closing is subject to the satisfaction, at or prior to the Closing, of each of the following additional conditions (any of which may be waived by NS in writing, in whole or in part):

(a) Representations and Warranties. The representations and warranties contained in Article 8 hereof and in all certificates delivered by KCS and KCSR to NS pursuant hereto or in connection with the transactions contemplated hereby

shall be true and accurate in all respects (in the case of representations and warranties qualified by "materiality," "in all material respects," "Material Adverse Effect" or similar terms or phrases, and in the case of the representations and warranties set forth in Sections 8.1 and 8.2) or in all material respects (in the case of all other representations and warranties) as of the date of this Agreement and as of the Closing as though made at and as of the Closing (except for changes contemplated by this Agreement and except for representations and warranties that by their terms speak specifically as of the date of this Agreement or some other date, in which case as of such date).

(b) Performance. KCS and KCSR shall have performed all obligations and complied with in all material respects all covenants required by this Agreement to be performed or complied with by KCS or KCSR on or prior to the Closing Date.

(c) Certificate. KCS shall have delivered to NS a certificate, dated the Closing Date, signed on behalf of KCS by an officer of KCS, certifying that the conditions specified in Sections 11.2(a) and (b) of this Agreement have been satisfied.

(d) Consents. At the Closing, KCS shall have delivered to NS all consents, approvals and agreements of any third Persons required by the terms of any Material Contract in order that the rights of KCS or any of its Subsidiaries or the prospective rights of the Company under such Material Contract, in each case, as they relate to the Assets or the Assumed Liabilities, will not be impaired by the consummation of the transactions contemplated by this Agreement, the Company Agreement and the Ancillary Agreements, and such consents, approvals and agreements shall be in full force and effect.

(e) No Material Adverse Effect. There shall have been no Material Adverse Effect on KCS or KCSR.

(f) Opinions of Counsel. NS shall have received an opinion of Sonnenschein Nath & Rosenthal LLP, dated as of the Closing Date, substantially in the form attached as Exhibit P hereto, and an opinion of the Senior Vice President and General Counsel of KCS, dated as of the Closing Date, substantially in the form attached as Exhibit Q hereto.

(g) Bank Approval of Transaction Agreements. KCS shall have delivered to NS written confirmation by the Required Lenders (as such term is defined in KCS Credit Agreement Amendment No. 2) that the form and substance of this Agreement and the Ancillary Agreements are satisfactory to the Required Lenders as contemplated by Section 1(a)(xiv) of KCS Credit Agreement Amendment No. 2.

11.3 Additional Conditions of KCS. The obligation of KCS and KCSR to complete the contribution of the Assets in exchange for the KCS Interest, and to take the other actions required to be taken by KCS and KCSR at the Closing is subject to the satisfaction, at or prior to the Closing, of each of the following additional conditions (any of which may be waived by KCS in writing, in whole or in part):

(a) Representations and Warranties. The representations and warranties contained in Article 9 hereof and in all certificates delivered by NS to KCS pursuant hereto or in connection with the transactions contemplated hereby shall be true and accurate in all respects (in the case of representations and warranties qualified by "materiality," "in all material respects," "material adverse effect" or similar terms or phrases, and in the case of the representations and warranties set forth in Sections 9.1 and 9.2) or in all material respects (in the case of all other representations and warranties) as of the date of this Agreement and as of the Closing as though made at and as of the Closing (except for changes contemplated by this Agreement and except for representations and warranties that by their terms speak specifically as of the date of this Agreement or some other date, in which case as of such date).

(b) Performance. NS shall have performed all obligations and complied with in all material respects all covenants required by this Agreement to be performed or complied with by NS on or prior to the Closing Date.

(c) Certificate. NS shall have delivered to KCS a certificate, dated the Closing Date, signed on behalf of KCS by an officer of NS, certifying that the conditions specified in Sections 11.3(a) and (b) of this Agreement have been satisfied.

(d) No Material Adverse Effect. There shall have been no Material Adverse Effect on NS or AGS.

(e) Opinions of Counsel. KCS shall have received an opinion of Skadden, Arps, Slate, Meagher & Flom LLP, dated as of the Closing Date, substantially in the form attached as Exhibit R hereto an opinion of the Vice President and Corporate Counsel of NS, dated as of the Closing Date, substantially in the form of Exhibit S hereto and an opinion of Cabannis, Johnston, Gardner, Dumas & O'Neal LLP, dated as of the Closing Date, substantially in the form of Exhibit T hereto.

12. Survival of Representations and Warranties; Indemnity.

12.1 Survival of Representations and Warranties. All representations and warranties made in this Agreement or made in any document delivered pursuant to this Agreement by or on behalf of any party shall survive the execution and delivery of this Agreement and the Closing, regardless of notice of or any investigation or right of investigation made after the date of this Agreement by or on behalf of any party, and shall terminate and expire one (1) year following the Closing Date, except that the representations and warranties made in Section 8.2(b)(ii) as they relate to the Indentures shall terminate and expire on the earlier of the date that is four (4) years following the Closing Date and the Maturity Date (as such term is defined in the Company Agreement) and the representations and warranties made in Sections 8.7, 8.10 and 8.14 shall terminate and expire sixty (60) days after the termination of the applicable statute of limitations, in each case, after which date they shall be of no further force or effect (except for bona fide claims of which a party has provided written notice in good faith to the other parties prior to the relevant expiration date).

12.2 Indemnification by KCS.

(a) KCS and KCSR shall indemnify, save and hold harmless (i) NS and its Affiliates, and each of their respective officers, directors, employees and agents, and each of their respective successors and assigns (collectively, the "NS Indemnified Parties"), from and against any and all costs, losses, claims, liabilities, damages, fines, penalties, expenses and Cleanup costs (including any interest which may be imposed in connection therewith and court costs and reasonable fees and disbursements of counsel) ("Damages," which shall not include any claim of diminution of value of a Member's interest in the Company unless the Company shall have incurred actual loss) incurred in connection with, arising out of, resulting from or incident to: (A) any breach of the representations or warranties of KCS and KCSR in this Agreement, except for Section 8.7, (in each case, solely for the purpose of calculating the amount of Damages, without regard to any qualification or limitation with respect to "materiality," whether by reference to "material," "in all material respects" or "Material Adverse Effect"), or (B) any breach or default in any covenants or agreements made by KCS in this Agreement; and (ii) the Company and its Affiliates, and each of their respective officers, directors, employees and agents (other than KCS or its Subsidiaries) and each of their respective successors and assigns (collectively, the "Company Indemnified Parties") and any NS Indemnified Parties from and against any and all Damages incurred in connection with, arising out of, resulting from or incident to any obligation or liability, other than the Assumed Liabilities, incurred in connection with, arising out of, resulting from or incident to any act or omission by KCS or KCSR, any of its Affiliates prior to the Closing relating to the Assets, whether fixed or contingent, recorded or unrecorded, known or unknown.

(b) KCS and KCSR shall defend, indemnify and hold harmless any NS Indemnified Parties and any Company Indemnified Parties for, from, and against all Damages asserted against, resulting to, imposed on, or incurred by NS or the Company in connection with: (i) any misrepresentation or breach of any environmental representation or warranty set forth in Section 8.7 of this Agreement; (ii) (A) the Release or threatened Release of any Hazardous Materials prior to the Closing Date on, from or under the Properties or in connection with the operation of the Assets or (B) the Release of any Hazardous Materials on, from or under any other property where, prior to the Closing Date, Hazardous Materials are or were Released, discharged or disposed of which, on or prior to the Closing date, have impacted the Property or the Assets or (C) the Release or threatened Release of any Hazardous Materials on, from or under any other property where, prior to the Closing Date, Hazardous Materials are or were Released, threatened to be Released, discharged or disposed of in connection with disposal activities related to the Properties or the Assets, whether or not, in any case covered by this clause (ii), such Release, threatened Release, discharge or disposal was in compliance with Environmental Law; (iii) the violation prior to the Closing of any Environmental Law in effect prior to the Closing by KCS or KCSR, any of their Subsidiaries or any other Person in connection with the Properties or the Assets; and (iv) any Environmental Claim relating to the Properties or the Assets against any Person whose liability for such Environmental Claim KCS, KCSR or any of their respective Subsidiaries has retained or assumed either contractually or by operation of Law.

(c) KCS and KCSR shall have no obligation to indemnify the NS Indemnified Parties under Section 12.2(a)(i)(A) until the NS Indemnified Parties have suffered Damages in excess of $2,000,000 in the aggregate, and then KCS and KCSR will be obligated to indemnify the NS Indemnified Parties for Damages only in excess of such amount, but KCS and KCSR shall not be liable for indemnification under Section 12.2(a)(i)(A) for Damages in excess of $300,000,000 in the aggregate; provided, that such $2,000,000 threshold shall not apply to any Damages arising from any breach of any representation or warranty in Section 8.10. If KCS and KCSR are obligated to indemnify the NS Indemnified Parties, then KCS and KCSR may, at their election, (i) pay such indemnification directly to the NS Indemnified Parties or the Company Indemnified Parties, as the case may be, (ii) pay any Damages arising from any liability or any Third Party Claim directly to the applicable third party (to the extent that such Damages are owed to such third party), or (iii) contribute amounts to the Company and cause the Company to pay any Damages arising from any liability or any Third Party Claim directly to the applicable third party (to the extent that such Damages are owed to such third party); provided, that the foregoing shall not limit in any way the obligation of KCS and KCSR to satisfy all such indemnification obligations.

(d) Except for fraud, injunctive and provisional relief and remedies that cannot be waived as a matter of Law, if the Closing occurs, this Section 12.2 shall be the exclusive remedy for any breach of any of KCS' or KCSR's representations and warranties or any breach of KCS' or KCSR's covenants contained in this Agreement.

12.3 Indemnification by NS.

(a) NS shall indemnify, save and hold harmless KCS and its Affiliates, and each of their respective officers, directors, employees and agents and each of their respective successors and assigns, from and against any and all Damages incurred in connection with, arising out of, resulting from or incident to: (i) any breach of or any inaccuracy in any of, the representations or warranties of NS in this Agreement (in each case, solely for the purpose of calculating the amount of Damages, without regard to any qualification or limitation with respect to "materiality," whether by reference to "material," "in all material respects" or "Material Adverse Effect"); or (ii) any breach or default in covenants or agreements made by NS in this Agreement.

(b) Except for fraud, injunctive and provisional relief and remedies that cannot be waived as a matter of Law, if the Closing occurs, this Section 12.3 shall be the exclusive remedy for any breach of any of NS' representations and warranties or any breach of NS' covenants contained in this Agreement.

12.4 Notification of Claims. A party entitled to indemnification under Sections 12.2 or 12.3 (an "Indemnified Party") shall notify the other party (the "Indemnifying Party") within a reasonable period of time after becoming aware of any Damages which the Indemnified Party shall have determined has given or could give rise to a claim for indemnification under Sections 12.2 or 12.3 hereof. Such notice shall include an estimate of the Damages that the Indemnified Party has determined may be

incurred to the extent then known or reasonably determinable. The failure to so notify the Indemnifying Party will not relieve the Indemnifying Party of any liability that it may have to any Indemnified Party, except to the extent of any prejudice to the Indemnifying Party resulting from such delay. As soon as practicable after the date of such notice, the Indemnified Party shall provide to the Indemnifying Party all information and documentation necessary to support and verify the Damages so claimed and the Indemnifying Party and its agents shall be given access to all books and records in the possession or control of the Indemnified Party which the Indemnifying Party reasonably determines to be related to such claim.

12.5 Matters Involving Third Parties.

(a) If any third party shall commence an Action against any Indemnified Party with respect to any matter (a "Third Party Claim") which may give rise to a claim for indemnification under Sections 12.2 or 12.3, or if an Indemnified Party otherwise becomes aware that a Third Party Claim may be asserted against the Indemnified Party, the Indemnified Party shall notify the Indemnifying Party in writing as soon as practicable. The failure to so notify the Indemnifying Party will not relieve the Indemnifying Party of any liability that it may have to any Indemnified Party, except to the extent of any prejudice to the Indemnifying Party resulting from such delay. If the Indemnifying Party notifies the Indemnified Party that it does not dispute the claim, or fails to notify the Indemnified Party within 30 days after delivery of such notice by the Indemnified Party whether the Indemnifying Party disputes the claim, all Damages incurred in connection with, arising out of, resulting from or incident to such Third Party Claim will be conclusively deemed a liability of the Indemnifying Party and the Indemnifying Party shall pay the amount of such Damages to the Indemnified Party promptly upon the final determination thereof.

(b) If the Indemnifying Party does not respond to the notice or elects not to assume the defense of such claim or demand, in each case within the period allowed after delivery of the notice, the Indemnified Party shall have the right to defend such claim or demand by appropriate proceedings or to settle or pay any such claim or demand for such an amount as the Indemnified Party shall deem appropriate, in either case at the sole cost and expense of the Indemnifying Party, provided that the Indemnified Party shall not settle any such claim without the prior written consent of the Indemnifying Party, which consent will not be unreasonably withheld, conditioned or delayed. In the event that the Indemnifying Party does not assume the defense of such claim or demand, the Indemnifying Party shall have the right to participate in such defense (including with counsel of its choice), at its own expense, and the Indemnified Party shall reasonably cooperate with the Indemnifying Party in connection with such participation.

(c) If the Indemnifying Party notifies the Indemnified Party that it desires to defend against such claim or demand, then the Indemnifying Party shall be entitled to participate in or, at the Indemnifying Party's option, assume at its own cost and expense the defense of any such claim or demand with counsel of its own choosing (which shall be reasonably acceptable to the Indemnified Party), provided, that, if the

Indemnifying Party assumes the defense of such claim or demand it shall reimburse the Indemnified Party for out of pocket expenses incurred by the Indemnified Party (such as travel costs, but not internal time charges) and the Indemnified Party (i) shall reasonably cooperate with the Indemnifying Party; and (ii) may elect to participate in any such defense at its sole cost and expense, but the control of such defense and its settlement or resolution shall rest with the Indemnifying Party. In the event there is a significant conflict of interest between the Indemnified Party and the Indemnifying Party in the conduct of the defense of such claim or demand, the reasonable fees and disbursements of one counsel of the Indemnified Party shall be at the expense of the Indemnifying Party. The Indemnifying Party shall not compromise or settle any such claim or demand without the prior written consent of the Indemnified Party (which consent shall not be unreasonably withheld, conditioned or delayed), unless such settlement or compromise does not subject the Indemnified Party to any monetary liability, will not impose on the Indemnified Party any obligation, admission, restriction or further Damages and includes a complete, unconditional release of the Indemnified Party from all liability with respect to such claim or demand.

(d) In all cases the Indemnified Party and the Indemnifying Party shall keep each other reasonably informed as to all matters concerning any Third Party Claim and shall promptly notify the other party in writing of any and all significant developments relating thereto.

12.6 Taxes. If any indemnity payment pursuant to this Article 12 is determined to be taxable to any Indemnified Party by any Governmental Authority, the indemnity payment shall be increased by such amount as is necessary so that, after taking into account the Tax liability imposed upon such Indemnified Party upon receipt of such indemnity payment, the Indemnified Party receives an amount equal to the amount it would have received had such indemnity payment not been subject to Tax (after taking into account, in accordance with Section 12.7(a), any Tax benefits and/or insurance coverage that may be available to the Indemnified Party).

12.7 Other Limits on Indemnification.

(a) The amount of any Damages sustained by a Indemnified Party shall be reduced (i) by any amount received by such Indemnified Party with respect thereto under any insurance coverage relating thereto (other than insurance coverage provided by an Affiliate (other than Company) of such indemnitee) or from any other party alleged to be responsible therefor and (ii) by the amount of any Tax benefit actually realized with respect to the Damages. An Indemnified Party shall use its commercially reasonable efforts to collect any amounts available under such insurance coverage and from such other party alleged to have responsibility and to realize any Tax benefit with respect to the Damages. If an Indemnified Party realizes a Tax benefit or receives an amount under insurance coverage or from such other party with respect to Damages sustained at any time subsequent to any indemnification provided pursuant to this Article 12, then such Indemnified Party shall promptly reimburse the applicable Indemnifying Party for any payment made by such Indemnifying Party in connection with providing such indemnification up to such amount realized or received by the Indemnified Party.

Nothing in this Section 12.7(a) shall limit in any way the ability of KCS, NS or the Company to (i) take (or refrain from taking, as the case may be) any reasonable position for Tax purposes that KCS, NS or the Company determines to take (or refrain from taking) in its sole discretion or (ii) refrain from pursuing any third party insurance recovery that KCS, NS or the Company, as the case may be, determines would be commercially inadvisable to pursue.

(b) Each Indemnified Party shall use its commercially reasonable efforts to mitigate any claim or liability that an Indemnified Party asserts or may assert under this Article 12. In the event that an Indemnified Party shall fail to make such commercially reasonable efforts to mitigate any such claim or liability, then notwithstanding anything contained in this Agreement to the contrary, the Indemnifying Party shall not be required to indemnify any Indemnified Party for that portion of any Damages that would reasonably be expected to have been avoided if the Indemnified Party had made such efforts.

13. Termination.

13.1 Termination by Mutual Consent. This Agreement may be terminated at any time prior to the Closing by the mutual agreement, in writing, of each of KCS and NS.

13.2 Termination by Final Order. This Agreement may be terminated by KCS or NS upon written notice to the other party that any final, non-appealable Law shall have been enacted, entered, promulgated or enforced by any Governmental Authority of competent jurisdiction which prohibits, restricts or makes illegal the consummation of the Closing or any of the material transactions contemplated thereby, or by the Company Agreement or any of the Ancillary Agreements; provided, that the right to terminate this Agreement under this Section 13.2 shall not be available to any party whose breach of any provision or whose failure to perform any obligation under this Agreement (or the breach or failure of any Affiliate thereof) has been the cause of such Law.

13.3 Termination by NS. NS may (but shall not be obligated to) terminate this Agreement prior to the Closing by giving written notice to KCS if:

(a) there has been a material violation or breach by KCS or KCSR of any of their agreements or covenants contained in this Agreement or there has been a material violation or breach by KCS or KCSR of any of their representations or warranties contained in this Agreement such that it is reasonably likely that either of the conditions set forth in Section 11.2(a) or 11.2(b) cannot be satisfied, and such violation or breach shall not have been cured or corrected within twenty days after receipt of notice thereof;

(b) the Closing does not occur on or prior to September 1, 2006, or such later date as may be agreed to in writing by the parties; provided, that, notwithstanding the satisfaction of the other conditions set forth in Sections 11.1 and 11.2

(other than any conditions which, by their terms, may only be satisfied on the Closing Date) if any of the Required Governmental Consents required by Section 11.1(c) have not been obtained by such date, such date shall be extended in additional one-month increments without any further action by the parties through February 1, 2007; and, provided, further, that the non-occurrence of the Closing is not due to a breach by NS of any condition or covenant hereunder;

(c) there has been imposed by a Governmental Authority a condition to any Required Governmental Consent, which condition is not acceptable to NS in NS' reasonable judgment; or

(d) there has been a Material Adverse Effect on KCS or KCSR which shall not have been cured or corrected within twenty days after receipt of notice thereof; provided that such Material Adverse Effect is not due to a breach by NS of any condition or covenant hereunder.

13.4 Termination by KCS. KCS may (but shall not be obligated to) terminate this Agreement prior to the Closing by giving written notice to NS if:

(a) there has been a material violation or breach by NS of any of its respective agreements or covenants contained in this Agreement or there has been a material violation or breach by NS of any of its representations or warranties contained in this Agreement such that it is reasonably likely that either of the conditions set forth in Section 11.3(a) and (b) cannot be satisfied, and such violation or breach shall not have been cured or corrected within twenty days after receipt of notice thereof;

(b) the Closing does not occur on or prior to September 1, 2006, or such later date as may be agreed to in writing by the parties; provided, that, notwithstanding the satisfaction of the other conditions set forth in Sections 11.1 and 11.3 (other than any conditions which, by their terms, may only be satisfied on the Closing Date) if any of the Required Governmental Consents required by Section 11.1(c) have not been obtained by such date, such date shall be extended in additional one-month increments without any further action by the parties through February 1, 2007; and, provided, further, that the non-occurrence of the Closing is not due to a breach by KCS or KCSR of any condition or covenant hereunder;

(c) there has been imposed by a Governmental Authority a condition to any Required Governmental Consent, which condition is not acceptable to KCS in KCS' reasonable judgment; or

(d) there has been a Material Adverse Effect on NS or AGS which shall not have been cured or corrected within twenty days after receipt of notice thereof; provided that such Material Adverse Effect is not due to a breach by KCS or KCSR of any condition or covenant hereunder.

13.5 Effect of Termination. In the event of the termination of this Agreement as permitted by this Article 13, no party shall have any obligation under, or liability to any other in respect to, this Agreement, except with respect to, any willful breach of this Agreement that gives rise to such termination and except for the provisions of the Confidentiality Agreement and the confidentiality obligations contained in Section 10.2(a), this Section 13.5 and Article 14 hereof, which shall survive the termination of this Agreement.

14. Miscellaneous.

14.1 Notices. All notices, requests, demands and other communications (collectively, "Notices") given pursuant to this Agreement shall be in writing, and shall be delivered by personal service, courier, overnight delivery service, facsimile transmission (which must be confirmed) or by United States registered or certified mail, postage prepaid, return receipt requested, to the following addresses:

(i) if to NS, to:

Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Facsimile No.: (757) 533-4872
Attn: James A. Squires, Esq.

with a copy to:

Skadden, Arps, Slate, Meagher & Flom LLP
4 Times Square
New York, New York 10036-6522
Facsimile No.: (212) 735-2000
Attn: Eric J. Friedman, Esq.

(ii) if to KCS or KCSR, to:

Kansas City Southern
427 West 12th Street
Kansas City, Missouri 64105
Facsimile No.: (816) 983-1227
Attn: Robert B. Terry, Esq.

with a copy to:

Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111

Facsimile No.: (816) 531-7545
Attn: John F. Marvin, Esq.

Any Notice, other than a Notice sent by registered or certified mail, shall be effective when received; a Notice sent by registered or certified mail, postage prepaid return receipt requested, shall be effective on the earlier of when received or the third day following deposit in the United States mails. Any party may from time to time change its address for further Notices hereunder by giving notice to the other parties in the manner prescribed in this Section.

14.2 Entire Agreement. This Agreement, the Company Agreement, the Ancillary Agreements and the Confidentiality Agreement, in each case including any attached exhibits and schedules, contain the sole and entire agreement and understanding of the parties with respect to the entire subject matter of this Agreement, and any and all prior discussions, negotiations, commitments and understandings, whether oral or otherwise, related to the subject matter of this Agreement are hereby merged herein. Nothing in this Agreement, express or implied, is intended to confer upon any Person other than the parties hereto any rights or remedies under or by way of this Agreement.

14.3 Assignment. No party may assign its rights or obligations under this Agreement, and any attempted or purported assignment or any delegation of any party's duties or obligations arising under this Agreement to any third party or entity shall be deemed to be null and void, and shall constitute a material breach by such party of its duties and obligations under this Agreement; provided that NS may assign its rights to any wholly-owned Subsidiary of NS.

14.4 Extension, Waiver and Amendment. At any time prior to the Closing, the parties hereto may (a) extend the time for the performance of any of the obligations or other acts of any other party hereto, (b) waive any inaccuracies in the representations and warranties of any other party hereto contained herein or in any document delivered pursuant hereto, and (c) waive compliance by any other party hereto with any of the agreements or conditions contained herein. Any agreement on the part of a party hereto to any such extension or waiver shall be valid if set forth in writing in an instrument signed by or on behalf of such party. The waiver by any party hereto of a breach of this Agreement shall not operate or be construed as a waiver of any subsequent breach. This Agreement may be amended only by a written agreement executed by all of the parties to this Agreement.

14.5 Governing Law; Submission to Jurisdiction.

(a) THE LAWS OF THE STATE OF DELAWARE SHALL GOVERN THE VALIDITY OF THIS AGREEMENT, THE CONSTRUCTION OF ITS TERMS AND THE INTERPRETATION OF THE RIGHTS AND DUTIES ARISING HEREUNDER.

(b) Subject to Section 14.13, each of the parties hereto (i) consents to submit itself to the exclusive jurisdiction of any Federal or state court located in the State of Delaware (the "Delaware Courts") in any action to enforce or in aid of the agreement to arbitrate in Section 14.13 herein or for provisional relief to maintain the status quo or prevent irreparable harm pending the appointment of the arbitrators, and to the non-exclusive jurisdiction of the Delaware Courts for enforcement of any award issued hereunder (ii) will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court, and (iii) waives any objection based on forum non conveniens or any other objection to venue thereof.

14.6 Specific Performance; Injunctive Relief. Each of the parties hereto acknowledges, understands and agrees that any breach or threatened breach by such party or such party's Affiliates of the covenants contained herein will cause irreparable injury to the other party and that money damages will not provide an adequate remedy therefor. Accordingly, in the event of any such breach or threatened breach, a non-breaching party shall have the right and remedy (in addition to any other rights or remedies available at Law or in equity, including, money damages), subject to the provisions of Section 14.13, to have the provisions of this Agreement specifically enforced by, and to seek injunctive relief and other equitable remedies in, any court having competent jurisdiction. Each party further agrees to waive any requirement for the securing or posting of any bond or other security in connection with seeking such remedies.

14.7 Severability. Whenever possible each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable Law, but if any provision of this Agreement shall be or become prohibited or invalid under applicable Law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Agreement.

14.8 Captions. The various captions of this Agreement are for reference only and shall not be considered or referred to in resolving questions of interpretation of this Agreement.

14.9 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

14.10 Costs and Attorneys' Fees. Whether or not the transactions contemplated hereby are consummated, each of the parties shall bear and pay all costs and expenses incurred by it or on its behalf in connection with the transactions contemplated hereunder, including fees and expenses of its own financial or other consultants, investment bankers, accountants and counsel.

14.11 Judicial Interpretation. Should any provision of this Agreement require judicial interpretation, it is agreed that a court or other tribunal, as described in Section 14.13, interpreting or construing the same shall not apply a presumption that the terms hereof shall be more strictly construed against any Person by reason of the rule of

construction that a document is to be construed more strictly against the Person who itself or through its agent prepared the same, it being agreed that all parties have participated in the preparation of this Agreement.

14.12 No Third Party Beneficiaries. Except as expressly provided in this Agreement, this Agreement shall not benefit or create any right or cause of action in or on behalf of any Person other than the parties hereto; provided, however, that this Agreement will be binding upon, inure to the benefit of, and be enforceable by, the parties and their respective successors and permitted assigns.

14.13 Dispute Resolution. Each of the parties hereto stipulates and agrees that any dispute controversy or claim, arising out of or relating to this Agreement or the breach, termination or validity thereof ("Dispute") that is not resolved by negotiations between senior officers of the parties within twenty (20) days after receipt by a party of written notice ("Dispute Notice") of such Dispute, will be submitted to mediation in accordance with the Commercial Mediation Procedures of the American Arbitration Association ("AAA"). If such dispute is not resolved within twenty (20) days after appointment of a mediator, or within sixty (60) days of receipt of Dispute Notice (whichever comes sooner), each of the parties hereto agrees that, at the demand of any party, such Dispute will be submitted to mandatory and binding arbitration before the AAA, in New York, New York by three arbitrators, under the Commercial Arbitration Rules and the Large Complex Case Procedures of the AAA then in effect (the "Rules"), under the following terms and conditions:

(a) Selection of Arbitrators. A panel of three independent arbitrators shall be appointed by the AAA using the listing, ranking and striking procedure in the Rules. Any arbitrator appointed by the AAA shall be a retired judge or a practicing attorney with no less than fifteen years of experience with large commercial cases and an experienced arbitrator.

(b) Conduct of Arbitration. The arbitration shall be held and the award shall be issued in New York, New York. In addition to Damages, the arbitral tribunal may award any remedy provided for under applicable Law and the terms of this Agreement, including, without limitation, specific performance or other forms of injunctive relief. The arbitrators shall apply the Law of the State of Delaware to the substance of the Dispute and will have no power or authority, under the rules of the AAA or otherwise, to amend or disregard any provision of this Agreement.

(c) Replacement of Arbitrator(s). Should any of the arbitrator(s) refuse or be unable to proceed with arbitration proceedings, replacement arbitrator(s) will be selected using the same method of selection as the original arbitrator(s).

(d) Findings and Conclusions. The arbitrators will, after reaching judgment and award, prepare and distribute to the parties a written award including the findings of fact and conclusions of Law relevant to such award and containing an opinion setting forth the reasons for the giving or denial of any award.

(e) Time is of the Essence. The arbitrators are hereby instructed that time is of the essence in the arbitration proceeding, and that the arbitrators will have the right and authority to issue monetary sanctions against any party if, upon a showing that such party is unreasonably delaying the proceeding.

(f) Temporary Equitable Relief. By agreeing to arbitration, the parties do not intend to deprive any Delaware Court of its jurisdiction to issue a pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings and the enforcement of any award. Without prejudice to such provisional remedies as may be available under the jurisdiction of a Delaware Court, the arbitral tribunal shall have full authority to grant provisional remedies and to direct the parties to request that any court modify or vacate any temporary or preliminary relief issued by such court, and to award Damages for the failure of any party to respect the arbitral tribunal's orders to that effect.

(g) Consolidation. The parties hereto are committed to the prompt and efficient resolution of disputes. Accordingly, if one or more disputes arises under this Agreement, the Company Agreement or any of the Ancillary Agreements such disputes may be brought in a single arbitration. If more than one arbitration is brought with respect to disputes under this Agreement, the Company Agreement or any of the Ancillary Agreements, then any party hereto may request that any arbitration or any new dispute arising under this Agreement, the Company Agreement or any of the Ancillary Agreements be consolidated into any prior arbitration. The new dispute or arbitration shall be so consolidated, provided that the arbitral tribunal for the prior (or first filed) arbitration determines that (i) the new dispute or arbitration presents significant issues of Law or fact common with those in the pending arbitration; (ii) no party would be unduly prejudiced and (iii) consolidation under such circumstances would not result in undue delay for the prior arbitration. Any order of consolidation issued by such arbitral tribunal shall be final and binding upon the parties. Unless the parties otherwise agree, the arbitral tribunal appointed first in time shall serve as the arbitral tribunal for the consolidated arbitration. The parties waive any right they have to appeal or to seek interpretation, revision or annulment of such order of consolidation under the Rules or in any court. The parties hereto agree that upon such an order of consolidation, they will promptly dismiss any arbitration brought under this Agreement, the subject of which has been consolidated into another arbitral proceeding.

(h) Discovery. Recognizing the express desire of the parties for an expeditious means of dispute resolution, the arbitrators will allow for limited discovery as may be reasonable under the circumstances.

(i) Costs and Attorneys' Fees. Notwithstanding any rule of the AAA to the contrary, the arbitrators rendering judgment under this Section 14.13 will have the power to award the costs of the arbitration, including reasonable attorneys' fees and expenses to the prevailing party or parties in the arbitration. In any action to enforce this agreement to arbitrate or any arbitral award rendered hereunder, the court may award costs and attorneys' fees against the party resisting enforcement.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

KANSAS CITY SOUTHERN

By: _____
Michael R. Haverty
Title: Chairman, President and Chief Executive Officer

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By: _____
Michael R. Haverty
Title: Chairman of the Board

NORFOLK SOUTHERN CORPORATION

By: _____
Name:
Title:

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

By: _____
Name:
Title:

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

KANSAS CITY SOUTHERN

By:_____
Name: Michael R. Haverty
Title: Chairman, President and Chief Executive Officer

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____
Name: Michael R. Haverty
Title: Chairman of the Board

NORFOLK SOUTHERN CORPORATION

By: C. W. Moorman
Name: C. W. Moorman
Title: President and Chief Executive Officer

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

By: James A. Squires
Name: James A. Squires
Title: Vice President

Schedule 2.1(a)

1. Calculation of NS Interest. On the Closing Date and each Anniversary Date (each, an "Issuance Date"), KCS and NS shall cause the Company to issue and sell to AGS, and NS shall cause AGS to purchase from the Company, in exchange for cash consideration in an amount equal to the Capital Contribution Amount calculated in respect of such Issuance Date (in each case, the "NS Consideration" and, together with any NS Consideration previously paid to the Company in accordance with Sections 2.1(a) and 2.1(b), the "Aggregate NS Consideration") set forth in the applicable Officer's Certificate, a membership interest in the Company such that, upon the issuance thereof, the NS Interest will be a percentage equal to the quotient, rounded to four decimal places, of (a) the Aggregate NS Consideration, divided by (b) $1,000,000,000; it being understood that the Aggregate NS Consideration shall in no event exceed $300,000,000.

2. Calculation of KCS Interest. On each Issuance Date, KCS' percentage interest in the Company will be adjusted to be equal to (1) 100% less (2) the NS Interest.

3. Adjustment of Capital Accounts. The Capital Accounts (as such term is defined in the Company Agreement) of the NS Member (as such term is defined in the Company Agreement) will be established (in the case of the Closing Date) or adjusted on a dollar-for-dollar basis in accordance with Section 2.2 of the Company Agreement to reflect each payment of NS Consideration pursuant to Section 1 of this Schedule 2.1(a).

AMENDMENT NO. 1 TO TRANSACTION AGREEMENT

THIS AMENDMENT NO. 1 TO TRANSACTION AGREEMENT (this "Amendment"), is made and entered into as of January 17, 2006, by and among KANSAS CITY SOUTHERN, a Delaware corporation ("KCS"), THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation ("KCSR"), NORFOLK SOUTHERN CORPORATION, a Virginia corporation ("NS"), and THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, an Alabama corporation and Subsidiary of NS ("AGS"), with reference to the following facts:

A. KCS, KCSR, NS and AGS are parties to that certain Transaction Agreement entered into as of December 1, 2005 (the "Transaction Agreement"), pursuant to the terms of which the parties thereto have agreed to form a joint venture for purposes of owning and operating certain Assets.

B. The Transaction Agreement and the related Company Agreement to be entered into at Closing contemplated that KCS will make certain capital improvements to the Line after the Closing and NS has agreed to contribute certain amounts to the Company, among other things, to pay for such improvements.

C. KCS has determined those capital improvements to the Line set forth on Exhibit D of the Company Agreement will be undertaken in advance of the Closing as part of its 2006 infrastructure program and irrespective of the transaction among the parties to the Transaction Agreement. The parties have determined that it is in the best interest of all parties for KCS to begin making such capital improvements to the Line prior to the Closing. Further, the parties have determined that, should all Required Governmental Consents be obtained, including the approval of the United States Surface Transportation Board, these capital projects should be eligible to be reimbursed from the proceeds of the transactions contemplated by the Transaction Agreement. In order to do so, the Transaction Agreement and the form of Company Agreement attached as Exhibit A hereto must each be amended such that KCS will be reimbursed by the Company following Closing for making such capital improvements to the Line prior to Closing.

NOW, THEREFORE, with reference to the foregoing facts and in consideration of the mutual agreements and understanding set forth herein, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Defined Terms.

Capitalized terms used herein but not otherwise defined herein shall have the meaning assigned to such terms in the Transaction Agreement.

2. Amendments.

2.1 Section 1 of the Transaction Agreement is hereby amended by inserting the following new definitions therein in the appropriate alphabetical order:

"**Budget**" shall have the meaning given to that term in the Company Agreement.

"**Business Plan**" shall have the meaning given to that term in the Company Agreement.

"**Fiscal Year**" shall have the meaning given to that term in the Company Agreement.

"**Pre-Closing Capital Expenditures**" shall have the meaning given to that term in the Company Agreement.

2.2 Section 2.2 of the Transaction Agreement is hereby amended by deleting the first and second sentences thereof and inserting in lieu thereof the following two new sentences:

"KCS and NS shall cause the Company to use $260,000,000 (less any Pre-Closing Capital Expenditures for which the Company reimburses KCS pursuant to clause (b) of the following sentence) of the proceeds from the sale of the NS Interest plus any interest earned thereon from time to time (the "Capital Proceeds") for the capital expenditures anticipated to be made in accordance with the Company Agreement and the Budgets (including any Rollover Budgets) and Business Plans (as each such term is defined in the Company Agreement) for the Company contemplated thereby. KCS and NS shall cause at Closing (a) up to $40,000,000 of the proceeds from the sale of the NS Interest to be paid to reimburse KCS for capital expenditures other than Pre-Closing Capital Expenditures made by KCS on the Line within the two-year period ending on the Closing Date (none of which shall have been made in anticipation of this Agreement) as presented on a schedule delivered to NS prior to the Closing Date, which schedule shall be final and binding on NS if it accurately sets forth expenditures made in accordance with the principles expressed in this sentence (the different between $40,000,000 and such reimbursement shall be the "Excess Proceeds"), (b) up to $20,000,000 of the proceeds from the sale of the NS Interest equal to the Pre-Closing Capital Expenditures to be paid to reimburse KCS for Pre-Closing Capital Expenditures made by KCS prior to the Closing Date in respect of the Proposed Capital Projects listed in Exhibit D to the Company Agreement as set forth in the Company Agreement, the Budget for the first Fiscal Year and the Business Plan for the first Fiscal Year, which amount shall be presented on a schedule delivered to NS prior to the Closing Date, which schedule shall be final and binding on NS if it accurately sets forth expenditures made in accordance with the principles set forth in this sentence, and (c) the Excess Proceeds and any portion of the Capital Proceeds not allocated at such time for capital expenditures in accordance with the then current Budget or any Rollover Budget, as the case may be, and Business Plan (in the aggregate, the "Excess Capital") to be made available by the Company to provide the Partner Financing pursuant to Article 4 below.

2.3 Section 3.1(a) of the Transaction Agreement is hereby amended by deleting the first sentence thereof and inserting in lieu thereof the following new first sentence:

"Subject to the terms and conditions of this Agreement, at the Closing, KCS and KCSR shall , and shall cause their respective Subsidiaries, as applicable, to, transfer, convey, assign and delivery to the Company, all of their respective right, title and interest in the

Assets, free and clear of all Liens other than Permitted Liens, and in exchange for the Assets, KCS and NS shall cause the Company to issue to KCS a membership interest in the Company determined in accordance with Section 2.1(a) (as adjusted pursuant to Section 2.1(b) and together with the Preferred Return, the "KCS Interest").

2.4 Exhibit A to the Transaction Agreement is hereby amended by amending and restating such Exhibit in its entirety to read as set forth on Exhibit A attached hereto.

2.5 Section 8.1 of the Transaction Agreement is hereby amended by inserting the following new third sentence:

"Since the date of its formation, the Company has been a wholly-owned subsidiary of KCS and has not (i) engaged in any business, (ii) conducted any operations, (iii) incurred any liabilities or (iv) entered into any agreements or arrangements, other than, in each case, in connection with the letter agreement by and between KCS and NS dated January 17, 2006, this Agreement and the transactions contemplated by this Agreement."

3. Limitation of Amendments.

The amendments set forth in Section 2 above are effective for the purposes set forth herein and will be limited precisely as written and will not be deemed to (a) be a consent to any amendment, waiver or modification of any other term or condition of the Transaction Agreement, (b) otherwise prejudice any right or remedy that any party to the Transaction Agreement may now have or may have in the future under or on in connection with the Transaction Agreement, or (c) be a consent to any future amendment, waiver or modification of any other term or condition of the Transaction Agreement.

4. Entire Agreement.

This Amendment, together with the Transaction Agreement, the Company Agreement, the Ancillary Agreements and the Confidentiality Agreement, in each case including any attached exhibits and schedules, contain the sole and entire agreement and understanding of the parties with respect to the entire subject matter contained herein and therein, and any and all prior discussions, negotiations, commitments and understandings, whether oral or otherwise, related to the subject matter contained herein and therein are hereby merged herein and therein. Nothing in this amendment, express or implied, is intended to confer upon any Person other than the parties hereto any rights or remedies under or by way of this Amendment.

5. Assignment.

No party may assign its rights or obligations under this Amendment, and any attempted or purported assignment or any delegation of any party's duties or obligations arising under this Amendment to any third party or entity shall be deemed to be null and void, and shall constitute a material breach by such party of its duties and obligations under this Amendment; provided that NS may assign its rights to any wholly-owned Subsidiary of NS.

6. Governing Law.

THE LAWS OF THE STATE OF DELAWARE SHALL GOVERN THE VALIDITY OF THIS AMENDMENT, THE CONSTRUCTION OF ITS TERMS AND THE INTERPRETATION OF THE RIGHTS AND DUTIES ARISING HEREUNDER.

7. Severability.

Whenever possible each provision of this Amendment shall be interpreted in such manner as to be effective and valid under applicable Law, but if any provision of this Amendment shall be or become prohibited or invalid under applicable Law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Amendment.

8. Captions.

The various captions of this Amendment are for reference only and shall not be considered or referred to in resolving questions of interpretation of this Amendment.

9. Counterparts.

This Amendment may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

10. Judicial Interpretation.

Should any provision of this Amendment require judicial interpretation, it is agreed that a court or other tribunal, as described in Section 14.13 of the Transaction Agreement, interpreting or construing the same shall not apply a presumption that the terms hereof shall be more strictly construed against any Person by reason of the rule of construction that a document is to be construed more strictly against the Person who itself or through its agent prepared the same, it being agreed that all parties have participated in the preparation of this Amendment.

11. Dispute Resolution.

Each of the parties hereto stipulates and agrees that the dispute resolution procedures set forth in Section 14.13 of the Transaction Agreement shall apply to any dispute, controversy or claim arising out of or relating to this Amendment or the breach, termination or validity thereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Amendment No. 1 to Transaction Agreement as of the date first above written.

KANSAS CITY SOUTHERN

By:_____
Name: Michael R. Haverty
Title: Chairman, President and Chief Executive Officer

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____
Name: Michael R. Haverty
Title: Chairman of the Board

NORFOLK SOUTHERN CORPORATION

By:_____
Name: Kathryn B. McQuade
Title: Executive Vice President Planning and Chief Information Officer

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

By:_____
Name: James A. Squires
Title: Vice President

EXHIBIT A

COMPANY AGREEMENT

[See Attached]

IN WITNESS WHEREOF, the parties have executed this Amendment No. 1 to Transaction Agreement as of the date first above written.

KANSAS CITY SOUTHERN

By: _____
Name: Michael R. Haverty
Title: Chairman, President and Chief Executive Officer

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By: _____
Name: Michael R. Haverty
Title: Chairman of the Board

NORFOLK SOUTHERN CORPORATION

By: _____
Name: C. W. Moorman
Title: President and Chief Executive Officer

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

By: _____
Name: James A. Squires
Title: Vice President

IN WITNESS WHEREOF, the parties have executed this Amendment No. 1 to Transaction Agreement as of the date first above written.

KANSAS CITY SOUTHERN

By:_____
Name: Michael R. Haverty
Title: Chairman, President and Chief Executive Officer

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____
Name: Michael R. Haverty
Title: Chairman of the Board

NORFOLK SOUTHERN CORPORATION

By:_____
Name: Kathryn B. McQuade
Title: Executive Vice President Planning and Chief Information Officer

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

By:_____
Name: James A. Squires
Title: Vice President

A

REDACTED

EXHIBIT A

LIMITED LIABILITY COMPANY AGREEMENT OF MERIDIAN SPEEDWAY, LLC

BY AND BETWEEN

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

AND

KANSAS CITY SOUTHERN

AS OF

[ ], 2006

REDACTED

TABLE OF CONTENTS

PAGE

SECTION 1 THE COMPANY 17

1.1 Formation and Continuation 17
1.2 Name 17
1.3 Purpose; Powers. 17
1.4 Principal Place of Business, Chief Executive Office and Registered Office 18
1.5 Term 18
1.6 Filings; Agent for Service of Process. 18
1.7 Title to Property 19
1.8 Payments of Individual Obligations 19

SECTION 2 MEMBERS' CAPITAL CONTRIBUTIONS 19

2.1 Initial Capital Contributions. 19
2.2 Initial Capital Accounts 20
2.3 Additional NS Member Contributions 20
2.4 Withdrawal and Return of Capital 20

SECTION 3 ALLOCATIONS 21

3.1 Profits 21
3.2 Losses 21
3.3 Special Allocations 21
3.4 Loss Limitation 24
3.5 Other Allocation Rules. 24
3.6 Tax Allocations; Code Section 704(c). 25
3.7 Revaluation of Capital Accounts 25

SECTION 4 DISTRIBUTIONS 25

4.1 Distributions 25
4.2 Priority Distributions 25
4.3 Amounts Withheld 26
4.4 Limitations on Distributions 26
4.5 Distributions and Allocations in Respect of a Transferred Membership Interest 26
4.6 Special Distributions. 27
4.7 Deemed Distributions 27

SECTION 5 MANAGEMENT 27

5.1 Manner of Operations 27
5.2 Management Committee. 27
5.3 Committees of the Management Committee. 28

REDACTED

5.4 Meetings of Management Committee. 29
5.5 Action by Unanimous Written Consent 30
5.6 Major Decisions 30
5.7 Budget and Business Plan; Investment Policies. 31
5.8 Officers 31
5.9 Exculpation and Indemnification. 31
5.10 Fiduciary Duty; Exculpation. 33
5.11 Interparty Matters 33
5.12 Capacity Improvement Projects. 33
5.13 Construction of the Jackson Flyover 34

SECTION 6 ROLE OF MEMBERS 34

6.1 Rights or Powers 34
6.2 Voting Rights 34
6.3 Meetings of the Members. 35
6.4 Required Member Consents 36
6.5 Member Compensation 36
6.6 Members' Liability 36
6.7 Partition 36
6.8 Transactions Between a Member and the Company 37
6.9 Other Instruments 37
6.10 Advise of Changes 37

SECTION 7 ACCOUNTING BOOKS AND RECORDS 37

7.1 Accounting Books and Records. 37
7.2 Reports. 38
7.3 Tax Matters. 39

SECTION 8 AMENDMENTS 41

8.1 Amendments 41

SECTION 9 TRANSFERS AND CALL RIGHT 41

9.1 Restrictions on Transfers 42
9.2 Permitted Transfers 42
9.3 Conditions to Permitted Transfers 42
9.4 Prohibited Transfers 43
9.5 Rights of Unadmitted Assignees 43
9.6 Admission of New and Substituted Members 43
9.7 Representations Regarding Transfers; Legend 44
9.8 Line Option Call Right 45

SECTION 10 EVENTS OF DEFAULT 46

10.1 Events of Default 46

REDACTED

10.2 Remedies Upon an Event of Default 46

SECTION 11 DISSOLUTION AND WINDING UP 48

11.1 Dissolution Events 48
11.2 Winding Up 48
11.3 Compliance With Certain Requirements of Regulations; Deficit Capital Accounts 49
11.4 Distributions in Kind 49
11.5 Rights of Members 49
11.6 Notice of Dissolution/Termination. 49
11.7 Allocations During Period of Liquidation 50
11.8 Character of Liquidating Distributions 50
11.9 The Liquidator. 50

SECTION 12 MISCELLANEOUS 50

12.1 Notices 50
12.2 Certificates. 51
12.3 Binding Effect 53
12.4 Time 53
12.5 Headings 53
12.6 Prior Agreements 53
12.7 Severability 53
12.8 Incorporation by Reference 53
12.9 Variation of Terms 54
12.10 Counterpart Execution 54
12.11 Third Party Beneficiaries 54
12.12 GOVERNING LAW 54
12.13 Submission to Jurisdiction 54
12.14 Dispute Resolution 54
12.15 Confidentiality 56

REDACTED

LIMITED LIABILITY COMPANY AGREEMENT
OF
MERIDIAN SPEEDWAY, LLC

This Limited Liability Company Agreement (this "Agreement") of Meridian Speedway, LLC, a Delaware limited liability company (the "Company"), is entered into pursuant to and in accordance with the Delaware Limited Liability Company Act (the "Act") and shall be effective as of [ ], 2006, by and between The Alabama Great Southern Railroad Company, an Alabama corporation and a wholly-owned subsidiary of NSR (as defined herein) (such corporation or any Permitted Transferee thereof, the "NS Member"), and Kansas City Southern, a Delaware corporation ("KCS" and, together with any Permitted Transferee thereof, the "KCS Member"), as the Members pursuant to the provisions of the Act.

WHEREAS, KCS, The Kansas City Southern Railway Company, a Missouri corporation and a wholly-owned subsidiary of KCS ("KCSR"), the NS Member and Norfolk Southern Corporation, a Virginia corporation and the ultimate parent of the NS Member (the "NS Parent") have entered into a Transaction Agreement (the "Transaction Agreement"), dated as of December 1, 2005, which provides, among other things for the KCS Member to contribute the railroad line between Meridian, Mississippi and Shreveport, Louisiana (the "Line") and certain other related assets (together with the Line, the "Assets"), in each case described in Schedule 1.1 to the Transaction Agreement, to the Company and for the NS Parent to cause the NS Member to make capital contributions to the Company as determined in accordance with Schedule 2.1(a) to the Transaction Agreement, in each case, in accordance with the provisions thereof;

WHEREAS, by executing this Agreement and the related Certificate of Formation and filing the Certificate of Formation with the Secretary of State of the State of Delaware, the parties hereto are hereby and thereby forming the Company; and

WHEREAS, the parties hereto desire to enter into this Agreement to set forth their rights and obligations as members of the Company.

NOW, THEREFORE, in consideration of the foregoing facts and the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties hereto hereby agree as follows:

DEFINITIONS

Capitalized words and phrases used in this Agreement have the following meanings:

"AAA" means the American Arbitration Association.

"Acceptance Agreement" shall have the meaning set forth in Section 10.2(d).

"Acceptance Period" shall have the meaning set forth in Section 10.2(c).

REDACTED

"Accumulated Preference" means, with respect to a Member with a Preferred Return, such Member's Preferred Return Amount accrued in the aggregate.

"Act" shall have the meaning set forth in the preamble.

"Adjusted Capital Account Deficit" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

(a) Credit to such Capital Account any amounts which such Member is deemed to be obligated to restore pursuant to the penultimate sentences in Sections 1.704-2(g)(1) and 1.704-2(i)(5) of the Regulations; and

(b) Debit to such Capital Account the items described in Sections 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) and 1.704-1(b)(2)(ii)(d)(6) of the Regulations.

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Section 1.704-1(b)(2)(ii)(d) of the Regulations and shall be interpreted consistently therewith.

"Affiliate" means, with respect to any specified Person, (i) any other Person who, directly or indirectly, controls, is under common control with, or is controlled by, such specified Person, (ii) any other Person who is a director, officer, manager, member, partner or trustee of the specified Person or a Person described in clause (i) of this definition or any spouse of the specified Person or any such other Person, (iii) any relative of the specified Person or any other Person described in clause (ii) of this definition, or (iv) any Person of which the specified Person and/or any one or more of the Persons specified in clause (i), (ii) or (iii) of this definition, individually or in the aggregate, beneficially own 10% or more of any class of Voting Securities.

"Agreement" shall have the meaning set forth in the Preamble. Words such as "herein," "hereinafter," "hereof," "hereto" and "hereunder" refer to this Agreement as a whole, unless the context otherwise requires.

"Assets" shall have the meaning set forth in the Preamble.

"Auditors" means the independent registered public accounting firm from time to time engaged by the Company to audit its financial statements and results of operations. The Auditors shall initially be KPMG, until changed either (i) by mutual agreement of the parties or (ii) upon receipt by the Company of a written request of the NS Member for the replacement of the initial Auditors. Successor Auditors shall be appointed by the Management Committee in accordance with Section 5.6.

"Bankruptcy" means, with respect to any Person, a Voluntary Bankruptcy or an Involuntary Bankruptcy (as each such term is defined herein).

"Budget" shall have the meaning set forth in Section 5.7(a).

REDACTED

"Business" means the business conducted by the Company, including owning, managing and maintaining the Assets, and making certain capital improvements to the same, and performing certain haulage and other freight railroad transportation services, generally as a private carrier.

"business condition" of any Person means the financial condition, results of operations, business or properties of such Person.

"Business Day" means a day of the year on which banks are not required or authorized to close in New York City.

"Business Plan" shall have the meaning set forth in Section 5.7(a).

"Capacity Improvement Project" means a construction project effectuated as described in Section 5.12.

"Capital Account" means, with respect to any Member, the Capital Account maintained for such Member in accordance with the following provisions:

(a) To each Member's Capital Account there shall be credited (1) such Member's Capital Contributions, (2) such Member's distributive share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Section 3.3 and (3) the amount of any Company liabilities assumed by such Member or which are secured by any Property distributed to such Member. The principal amount of a promissory note which is not readily traded on an established securities market and which is contributed to the Company by the maker of the note (or a Member related to the maker of the note within the meaning of Regulations Section 1.704-1(b)(2)(ii)(c)) shall not be included in the Capital Account of any Member until the Company makes a taxable disposition of the note or until (and to the extent) principal payments are made on the note, all in accordance with Regulations Section 1.704-1(b)(2)(iv)(d)(2).

(b) To each Member's Capital Account there shall be debited (1) the amount of money and the Gross Asset Value of any Property distributed to such Member pursuant to any provision of this Agreement, (2) such Member's distributive share of Losses and any items in the nature of expenses, deductions or losses which are specially allocated pursuant to Section 3.3 and (3) the amount of any liabilities of such Member assumed by the Company or which are secured by any Property contributed by such Member to the Company.

(c) In the event a Membership Interest is Transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the Transferred Membership Interest.

(d) In determining the amount of any liability for purposes of subparagraphs (a) and (b) above, there shall be taken into account Code Section 752(c) and any other applicable provisions of the Code and Regulations.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations Section 1.704-

REDACTED

1(b), and shall be interpreted and applied in a manner consistent with such Regulations. In the event the Management Committee shall determine that it is prudent to modify the manner in which the Capital Accounts or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities which are secured by contributed or distributed property or which are assumed by the Company or any Members), are computed in order to comply with such Regulations, the Management Committee may make such modification, provided that it is not likely to have a material effect on the amounts distributed to any Person pursuant to Section 11 upon the dissolution of the Company. The Management Committee also shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Regulations Section 1.704-1(b)(2)(iv)(q) and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations Section 1.704-1(b).

"Capital Contribution" means, with respect to any Member, the amount of money and the initial Gross Asset Value of any Property (other than money) contributed to the Company with respect to the Membership Interest in the Company held or purchased by such Member.

"Capital Improvement Agreement" means any agreement entered into between the Company and the KCS Member whereby the KCS Member or its subsidiaries will effect the Capital Projects on behalf of the Company.

"Capital Project Process" shall have the meaning set forth in Section 5.3(b).

"Capital Project" means those capital expenditures relating to the Line as set forth in the Budgets (including any Rollover Budgets) approved in accordance with this Agreement or Business Plan.

"Capital Recovery Book Items" means (i) Depreciation attributable to the Assets and attributable to the first $260,000,000 of Capital Projects to the extent such $260,000,000 is not allowed as a deductible expense for federal income-tax purposes, and (ii) expenses attributable to the first $260,000,000 of Capital Projects allowed as a deductible expense for federal income-tax purposes. Notwithstanding the foregoing, the $260,000,000 amount shall be adjusted downward for any Pre-Closing Capital Expenditures for which the KCS Member is reimbursed by the Company pursuant to Section 2.4(b) and for which the KCS Member, not the Company, is allowed to claim a deduction on its federal income tax return(s).

"Capital Recovery Tax Deductions" means expenses, depreciation, amortization, and other cost recovery deductions attributable solely to Capital Projects and Assets that are allowed as a deduction for federal income-tax purposes.

"Certificate of Formation" means the Certificate of Formation filed with the Secretary of State of the State of Delaware pursuant to the Act to form the Company, as originally executed and amended, modified, supplemented or restated from time to time, as the context requires.

"Claims" shall have the meaning set forth in Section 5.9(a).

REDACTED

"**Closing Date**" shall be the date the initial Capital Contributions are made under Section 2.1(a).

"**CN Jackson Trackage Rights**" means the trackage rights granted with respect to the approximately four-tenths of a mile section of track in Jackson, Mississippi pursuant to the trackage rights agreement between Midsouth Rail Corporation and Illinois Central Gulf Railroad Company, dated March 26, 1986, as supplemented and amended through the date of the Transaction Agreement.

"**Code**" means the United States Internal Revenue Code of 1986, as amended from time to time.

"**Committee Representative**" at any time means each of the individuals then appointed by the Members to and serving as a member of the Management Committee, or their alternates, as provided in Section 5.

"**Company**" means the limited liability company formed pursuant to this Agreement and the Certificate of Formation and the limited liability company continuing the business of this Company in the event of dissolution of the Company as herein provided.

"**Company Minimum Gain**" has the same meaning as the term. "partnership minimum gain," in Regulations Section 1.704-2(b)(2) and 1.704-2(d).

"**Dallas Intermodal Terminal Traffic**" means all domestic intermodal containers or trailers with an origin and destination in the United States. with a lift or drop at the KCS Member's Dallas intermodal Terminal. that moves over the Line and over KCSR's tracks between Shreveport and the KCS Member's Dallas Intermodal Terminal. and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas / Ft. Worth, TX. Standard Metropolitan Statistical Area (SMSA) as published by the Office of Management and Budget (OMB).

"**Dallas Terminal Marketing Agreement**" means the Marketing Agreement, dated the date hereof, by and among KCSR and NSR.

"**Damages**" shall have the meaning set forth in Section 10.2(b).

"**Default Sale Notice**" shall have the meaning set forth in Section 10.2(c).

"**Delaware Courts**" shall have the meaning set forth in Section 12.13.

"**Deemed Distribution Amount**" shall have the meaning set forth in Section 4.7.

"**Depreciation**" means, for each Fiscal Year. an amount equal to the depreciation, amortization or other cost recovery deduction allowable with respect to an asset for such Fiscal Year. except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year. Depreciation shall be an amount which bears the same ratio to such beginning Gross Asset Value as the federal income tax deprecation, amortization or other cost recovery deduction for such Fiscal Year bears to such

REDACTED

beginning adjusted tax basis; provided, however, that if the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Management Committee.

"Dispute" shall have the meaning set forth in Section 12.14.

"Dissolution Event" shall have the meaning set forth in Section 11.1.

"Exchange Act" means the Securities Exchange Act of 1934.

"Excess Proceeds" shall have the meaning given to that term in the Transaction Agreement.

"Fair Value" means the fair market value as determined by unanimous mutual agreement reached by the Members, or in the event the Members are unable to agree, as determined by an independent investment banking firm or firms or, in the case of any asset or other item not customarily valued by an investment banking firm, a qualified independent appraiser of the type customarily engaged in the valuation thereof (a "Qualified Appraiser"), in accordance with the following procedure. In the case of any event which gives rise to a requirement to determine "Fair Value" hereunder, the Management Committee shall be responsible for initiating the process by which Fair Value shall be determined as promptly as practicable, but in any event within twenty (20) days following such event and if the procedures contemplated herein in connection with determining Fair Value have not been complied with fully, then any such determination of Fair Value for any purpose hereunder shall be deemed to be preliminary and subject to adjustment pending full compliance with such procedures. Upon the occurrence of an event requiring the determination of Fair Value, the Management Committee shall give each Member notice of such event, and the Members shall engage in direct good faith discussions to arrive at a mutually agreeable determination of Fair Value. In the event the Members are unable to arrive at a mutually agreeable determination within thirty (30) days of the notice, an independent investment banking firm of national standing or Qualified Appraiser of national standing, as the case may be, selected by unanimous agreement of the Members shall make such determination and render such opinion. The determination so made shall be conclusive and binding on the Members. The fees and expenses of the investment banking firm or Qualified Appraiser retained for such purpose shall be paid by the Company.

"Fiscal Quarter" means any of the following:

(a) the period commencing on the date hereof and ending on the earliest to follow the Closing Date of March 31, June 30 and September 30 of the year in which the Closing Date occurs,

(b) any subsequent three (3) month period commencing on each of January 1, April 1, July 1 and October 1 and ending on the last date before the next such date, and

(c) the period commencing on the immediately preceding January 1, April 1, July 1, or October 1, as the case may be, and ending on the date on which all Property is distributed to the Members pursuant to Section 11.

REDACTED

"Fiscal Year" means any of the following:

(a) the period commencing on the date hereof and ending on December 31 of the year in which the Closing Date occurs,

(b) any subsequent twelve (12) month period commencing on January 1, and

(c) the period commencing on the immediately preceding January 1, and ending on the date on which all Property is distributed to the Members pursuant to Section 11.

"Freight Rail Common Carrier" shall mean KCSR, NSR, or such other freight rail common carrier that the Company, in accordance with the Agreement, admits to the entirety or any portion of the Line by way of haulage or trackage rights.

"GAAP" means generally accepted accounting principles as in effect in the United States of America, consistently applied.

"Gross Asset Value" means with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

(a) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value (taking Code Section 7701(g) into account) of such asset on the date of contribution as determined by the Management Committee.

(b) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values (taking Code Section 7701(g) into account), as determined by the Management Committee as of the following times: (A) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a de minimis Capital Contribution; (B) the distribution by the Company to a Member of more than a de minimis amount of Company property as consideration for an interest in the Company; and (C) the liquidation of the Company within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g), provided that an adjustment described in clauses (A) and (B) of this paragraph shall be made only if the Management Committee reasonably determines that such adjustment is necessary to reflect the relative economic interests of the Members in the Company.

(c) The Gross Asset Value of any Company asset distributed to any Member shall be adjusted to equal the gross fair market value (taking Code Section 7701(g) into account) of such asset on the date of distribution as determined by the Management Committee.

(d) The Gross Asset Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted tax basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Regulations Section 1.704-1(b)-(2)(iv)(m) and subparagraph (f) of the definition of "Profits" and "Losses"; provided, however, that Gross Asset Values shall not be adjusted pursuant to this subparagraph (d) to the extent that an adjustment pursuant to subparagraph (c) is required in connection with a transaction that would otherwise result in an adjustment pursuant to this subparagraph (d).

REDACTED

If the Gross Asset Value of an asset has been determined or adjusted pursuant to subparagraph (a), (b) or (c), such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset, for purposes of computing Profits and Losses.

"Indemnified Parties" shall have the meaning set forth in Section 10.2(f).

"Indemnified Persons" shall have the meaning set forth in Section 5.9.

"Indentures" means, collectively, the Indenture, dated as of September 27, 2000, among KCSR, KCS, certain subsidiaries of KCS and The Bank of New York, as trustee, governing the terms of KCS' 9½% Senior Notes due 2008 and the Indenture, dated as of June 12, 2002, among KCSR, KCS, certain subsidiaries of KCS and U.S. Bank National Association, as trustee, governing the terms of KCS' 7½% Senior Notes due 2009, as they may be amended from time to time.

"Investment Policies" shall have the meaning set forth in Section 5.7(b).

"Involuntary Bankruptcy" means, with respect to any Person, without the consent or acquiescence of such Person, the entering of an order for relief or approving a petition for relief or reorganization or any other petition seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or other similar relief under any present or future bankruptcy, insolvency or similar statute, law or regulation, or the filing of any such petition against such Person which petition shall not be dismissed within ninety (90) days, or without the consent or acquiescence of such Person, the entering of any order appointing a trustee, custodian, receiver or liquidator of such Person or of all or any substantial part of the Property of such Person which order shall not be dismissed within ninety (90) days.

"Issuance Items" shall have the meaning set forth in Section 3.3(j).

"Items" shall have the meaning set forth in Section 3.4.

"Jackson Assignment Agreement" means the Jackson Assignment Agreement, dated the date hereof, by and between KCSR and the Company.

"Jackson Flyover" shall have the meaning set forth in the Transaction Agreement.

"JV Transaction Agreements" means, collectively, (i) the Transaction Agreement, (ii) the Operating Agreement, (iii) the NSR Joint Use Agreement, (iv) the Western Haulage Agreement (v) the KCSR Joint Use Agreement, (vi) the KCSR Master Interchange Agreement, (vii) the Unified Assignment and Assumption Agreement, (viii) the Omnibus Bill of Sale, (ix) the Unified Liability Agreement, (x) the Dallas Terminal Marketing Agreement, (xi) one or more Notes, (xii) the Jackson Assignment Agreement, (xiii) the Vicksburg Assignment Agreement, (xiv) the Access Agreement and (xv) the NSR-KCSR Haulage Agreement.

"KCS" shall have the meaning set forth in the Preamble.

REDACTED

"KCS Member" shall have the meaning set forth in the Preamble.

"KCSR" shall have the meaning set forth in the Preamble.

"KCSR Joint Use Agreement" shall mean the The Kansas City Southern Railway Company -- Meridian Speedway, LLC Joint Use Agreement, dated as of the date hereof, by and among NSR, KCSR and the Company.

"KCSR Master Interchange Agreement" means the Master Interchange Agreement, dated the date hereof, by and between KCSR and the Company.

"Line" shall have the meaning set forth in the Preamble.

"Line Option Call Agreement" shall have the meaning set forth in Section 9.8(b).

"Line Option Call Closing" shall have the meaning set forth in Section 9.8(b).

"Line Option Call Closing Date" shall have the meaning set forth in Section 9.8(b).

"Line Option Call Right" shall have the meaning set forth in Section 9.8.

"Liquidation Period" shall have the meaning set forth in Section 11.7.

"Liquidator" shall have the meaning set forth in Section 11.9(a).

"Local Train Starts" shall have the meaning set forth in Section 5.12(a).

"Losses" shall have the meaning set forth in the definition of "Profits."

"Major Decisions" means taking any of the following actions, notwithstanding any other provisions of the Transaction Agreement or this Agreement:

(i) Repealing, modifying or amending this Agreement or any of the JV Transaction Agreements to which the Company is a party, or waiving compliance with any provision of this Agreement or any of the JV Transaction Agreements to which the Company is a party;

(ii) Repealing, modifying or amending the Investment Policies;

(iii) Entering into any agreement with respect to or consummating any (A) acquisition, divestiture, spin-off, merger, consolidation, business combination or similar transaction involving equity interests or assets of the Company, (B) sale, transfer, lease, sublease, license or other disposition of any property or asset to a third party other than in the ordinary course of business, or (C) formation of, investment of the funds or assets of the Company in or other participation in any joint venture or partnership; provided, that, prior to the Maturity Date, the foregoing shall not apply to any Permitted Asset Transfer;

REDACTED

(iv) Entering into any transactions with any Member or any Affiliate of any Member (including any Capital Improvement Agreements), other than the distributions contemplated in Section 2.4(b) or Section 4 or pursuant to the JV Transaction Agreements; provided, that, prior to the Maturity Date, the foregoing shall not apply to any Permitted Asset Transfer or any Permitted Indebtedness;

(v) Approving the Budget or the Business Plan or any changes in, amendments to or deviations from, the Budget (including any Rollover Budget) or the Business Plan; provided, however, that no Committee Representative designated by the NS Member shall unreasonably withhold such Committee Representative's approval of any changes in, amendments to or deviations from, the Budget (including any Rollover Budget) or the Business Plan proposed by the KCS Member in respect of any agreed Capital Project in light of then-current business conditions and traffic patterns relating to the Line and in the event the Management Committee cannot agree on (A) a Capital Project, the Management Committee shall accept the recommendation of the Capital Project Committee, made in accordance with the Capital Project Process, with respect to such Capital Project or (B) the Budget, the prior year's budget shall roll forward as provided in Section 5.7(a);

(vi) Appointing, setting the rate of compensation of, approving bonuses for, or terminating any employees or Officers of the Company, if any;

(vii) Approving any change in the number of members of the Management Committee;

(viii) After the Maturity Date, declaring, making or paying any dividend or any other distribution (whether in cash, securities or other property) on any equity interests of the Company, other than the distributions contemplated in Section 4;

(ix) Incurring any indebtedness, guarantee or lien or making any loans (including any Notes), advances or capital contributions to, or investments in, any Person, except (A) as provided in the Budget or Rollover Budget and (B) purchase money financing of assets used in the conduct of the business of the Company; provided, that, prior to the Maturity Date, the foregoing shall not apply to any Permitted Indebtedness;

(x) Creating any employee equity option, structured equity, employee stock option plan or other similar plan, making any grants under any such plan or materially modifying any employee benefit plan;

(xi) Requiring any Capital Contribution beyond those contributions specified in this Agreement, the JV Transaction Agreements and any Budget (including any Rollover Budget) adopted pursuant to the terms of this Agreement;

(xii) Initiating or consenting to the filing of any petition to place the Company in insolvency, bankruptcy or similar proceedings;

REDACTED

(xiii) Admitting new Members to the Company (other than to effect a Permitted Transfer);

(xiv) Approving any changes in the Percentage Interests of the Members other than to effect a Permitted Transfer, to approve the redemption of the Preferred Return or as contemplated by Section 2.3(a);

(xv) Commencing, settling or disposing of any litigation against the Company or any of its assets or properties, except any settlement or disposition not exceeding [ ];

(xvi) Entering into any agreement, license, program or arrangement pursuant to which the Company is obligated to make or receive payments or forgive debt, or amending, terminating or failing to renew any such contract other than those specified in the Budget (including any Rollover Budget);

(xvii) Approving the formation and composition of any committees of the Management Committee and the formation and composition of the boards or equivalent governing bodies of any subsidiary of the Company;

(xviii) Making any material change in the Company's accounting practices or policies (other than as required by GAAP) or any change in the Auditors;

(xix) Taking any of the actions set forth in clauses (i) through (xviii) above with respect to any entity of which the Company owns, directly or indirectly, securities or other ownership interests having the power to elect a majority of the board of directors or other persons performing similar functions, or otherwise having the power to direct, manage or control the conduct of business of such entity or otherwise owning at least ten percent (10%) of the outstanding ownership interests of such entity;

(xx) Making operating expenses or capital expenditures beyond those contained in the Budget (including any Rollover Budget);

(xxi) Entering into an agreement, program or other arrangement pursuant to which the Company grants or provides to any Person any operating, haulage, trackage or any other rights (A) to move NS Traffic or Dallas Intermodal Terminal Traffic or (B) that allow a third party access over the Line, other than rights pursuant to agreements that meet the standards set forth in Exhibit A attached hereto;

(xxii) Accepting an active common carrier obligation or moving rail traffic in its own name and on its own behalf; or

(xxiii) Permitting any Freight Rail Common Carrier to perform haulage for any rail carrier, whether such Freight Rail Common Carrier is operating over the Line in haulage or on trackage rights.

REDACTED

"Management Committee" shall have the meaning set forth in Section 5.2(a).

"Maturity Date" means the earlier to occur of (i) the retirement of the KCS Member's 9½% Senior Notes due 2009 and (ii) the date on which Section 4.05 (or any equivalent provision of the Indentures) of both of the Indentures is no longer applicable to the Company.

"Members" means the Persons (i) who are referred to as such in the opening paragraph of this Agreement or who have become a new or substituted Member by acquisition of a Membership Interest pursuant to the terms of this Agreement and (ii) who have not ceased to be a Member.

"Member Nonrecourse Debt" has the same meaning as the term "partner nonrecourse debt" in Section 1.704-2(b)(4) of the Regulations.

"Member Nonrecourse Debt Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Section 1.704-2(i)(3) of the Regulations.

"Member Nonrecourse Deductions" has the same meaning as the term "partner nonrecourse deductions" in Sections 1.704-2(i)(1) and 1.704-2(i)(2) of the Regulations.

"Membership Interest" means an ownership interest in the Company or any portion of or interest in such interest, including any and all benefits to which the holder of such interest may be entitled as provided in this Agreement, together with all obligations of such Person to comply with the terms and provisions of this Agreement.

"Net Cash Flow" means for any period the gross cash proceeds of the Company for such period (excluding Capital Contributions) less the portion thereof used to pay or establish reserves for all Company expenses, debt payments, capital improvements, replacements, and contingencies, all as determined by the Management Committee. "Net Cash Flow" shall not be reduced by depreciation, amortization, cost recovery deductions, or similar allowances, but shall be increased by any reductions of reserves previously established pursuant to the first sentence of this definition.

"New Overhead Train Starts" shall have the meaning set forth in Section 5.12(a).

"Nonrecourse Deductions" shall have the meaning set forth in Section 1.704-2(b)(1) of the Regulations.

"Nonrecourse Liability" shall have the meaning set forth in Section 1.704-2(b)(3) of the Regulations.

"Non-Sponsoring Member" shall have the meaning set forth in Section 5.12(d).

REDACTED

"Note" means any note evidencing indebtedness of the KCS Member or the NS Member to the Company entered into in accordance with Section 4 of the Transaction Agreement.

"Notice" shall have the meaning set forth in Section 12.14.

"NS Member" shall have the meaning set forth in the Preamble.

"NS Parent" shall have the meaning set forth in the Preamble.

"NS Traffic" means all intermodal traffic moving on the Line that (a) originates or terminates in the United States at or east of Meridian, Mississippi and enters or exits the Line at Meridian, Mississippi, (b) originates or terminates in the United States west of Fort Worth, Texas (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Line at Shreveport, Louisiana and (c) does not consist of traffic originating or terminating at any station on the KCSR system (including any station where KCSR or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement.

"NSR" means Norfolk Southern Railway Company, a Virginia corporation and an operating subsidiary of the NS Parent.

"NSR Joint Use Agreement" shall mean the Norfolk Southern Railway Company – Meridian Speedway, LLC Joint Use Agreement, dated as of the date hereof, by and between NSR, KCSR and the Company.

"NSR-KCSR Haulage Agreement" shall mean the Haulage Agreement, dated as of the date hereof, by and between NSR and KCSR.

"Officers" means Persons designated as officers of the Company by the Management Committee for so long as any such Person remains an Officer in accordance with the terms of this Agreement.

"Operating Agreement" shall mean the Operating Agreement, dated as of the date hereof, by and between KCSR and the Company.

"Omnibus Bill of Sale" means the Bill of Sale, dated the date hereof, by KCS and KCSR.

"Percentage Interest" means, with respect to any Member as of any date, the Percentage Interest opposite the name of each Member set forth on Exhibit C to this Agreement, which shall be maintained by the Company and updated from time to time as appropriate after the date hereof, including on the contribution by the NS Member of the amount described in Section 2.1(b) of the Transaction Agreement.

"Permitted Asset Transfer" means any non-cash transfer of the property or assets of the Company to the KCS Member or any Restricted Subsidiary (as such term is defined in the Indentures) thereof.

REDACTED

"Permitted Indebtedness" means any loans or advances by the Company to the KCS Member or any Restricted Subsidiary (as such term is defined in the Indentures) thereof.

"Permitted Transfer" shall have the meaning set forth in Section 9.2.

"Permitted Transferees" means a transferee pursuant to a Permitted Transfer.

"Person" means an individual or a partnership, corporation, trust, association, limited liability company or other entity.

"Pre-Closing Capital Expenditures" means those expenditures for Proposed Capital Projects listed in Exhibit D and made by the KCS Member prior to the Closing Date in accordance with Section 2.4(b).

"Preferred Return" means, with respect to the initial Capital Contribution made by the KCS Member, a preferential interest in the Company granted to such Member commencing on the date of this Agreement, having an initial agreed value equal to the amount of Excess Proceeds and entitling such member to certain rights as provided under the Agreement. The initial agreed value and commencement date of any other Preferred Return granted to a Member shall be as unanimously agreed by the Members at or prior to the time such Member shall make a Capital Contribution in exchange for such Preferred Return. A Member's Preferred Return shall be considered outstanding so long as such Member's Preferred Return Amount is greater than zero.

"Preferred Return Amount" means, with respect to the Preferred Return in connection with the Initial Capital Contribution made by the KCS Member, an amount computed at an interest rate equal to the sum of the 10-year U.S. Treasury Bond rate plus 50 basis points, compounded annually, and determined as of the date of the initial Capital Contribution made by the KCS Member (in all other cases determined as of the date the Company grants a Preferred Return to a Member) multiplied by the Preferred Return.

"Profits" and **"Losses"** means, for each Fiscal Year, an amount equal to the Company's taxable income or loss for such Fiscal Year, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss, deduction or credit required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments (without duplication):

(a) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be added to such taxable income or loss;

(b) Any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Regulations Section 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be subtracted from such taxable income or loss;

(c) In the event the Gross Asset Value of any Company asset is adjusted pursuant to subparagraphs (b) or (c) of the definition of Gross Asset Value, the amount of such

REDACTED

adjustment shall be treated as an item of gain (if the adjustment increases the Gross Asset Value of the asset) or loss (if the adjustment decreases the Gross Asset Value of the asset) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses;

(d) Gain or loss resulting from any disposition of Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the Property disposed of, notwithstanding that the adjusted tax basis of such Property differs from its Gross Asset Value;

(e) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year, computed in accordance with the definition of Depreciation;

(f) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) is required, pursuant to Regulations Section 1.704-(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Member's interest in the Company, the amount of such adjustments shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) from the disposition of such asset and shall be taken into account for purposes of computing Profits and Losses; and

(g) Notwithstanding any other provision of this definition, any items which are specially allocated pursuant to Section 3.3 shall not be taken into account in computing Profits or Losses.

The amounts of the items of Company income, gain, loss, deduction or credit available to be specially allocated pursuant to Section 3.3 shall be determined by applying the rules analogous to those set forth in subparagraphs (a) through (g) above.

"Property" means all real and personal property acquired by the Company, including cash, and any improvements thereto, and shall include both tangible and intangible property.

"Proposed Capital Projects" means those capital expenditures anticipated to be constructed over the four (4) year period commencing on the date hereof, as identified more specifically in Exhibit B.

"Regulations" means the Treasury Regulations, including temporary and proposed Regulations, promulgated under the Code, as such regulations are amended from time to time.

"Review Information" shall have the meaning set forth in Section 7.2(c)(i).

"Review Period" shall have the meaning set forth in Section 7.2(c)(i).

"Rollover Budget" shall have the meaning set forth in Section 5.7(a).

REDACTED

"Rules" shall have the meaning set forth in Section 12.14.

"Securities Act" means the Securities Act of 1933.

"Sponsoring Member" shall have the meaning set forth in Section 5.12(a).

"Tax Matters Partner" shall have the meaning set forth in Section 7.3(d).

"Transaction Agreement" shall have the meaning set forth in the preamble.

"Transfer" means, as a noun, any voluntary or involuntary transfer, distribution, sale, pledge, assignment or hypothecation or other disposition and, as a verb, voluntarily or involuntarily to transfer, sell, pledge, assign or hypothecate or otherwise dispose of.

"Unified Assignment and Assumption Agreement" means the Assignment and Assumption Agreement, dated the date hereof, by and between KCS, KCSR and the Company.

"Unified Liability Agreement" means the Unified Liability Agreement, dated the date hereof, by and among NSR, KCSR and the Company.

"Vicksburg Assignment Agreement" means the Vicksburg Assignment Agreement, dated the date hereof, by and between KCSR and the Company.

"Voluntary Bankruptcy" means, with respect to any Person, any of the following:

(a) the inability of such Person generally to pay its debts as such debts become due, or an admission in writing by such Person of its inability to pay its debts generally or a general assignment by such Person for the benefit of creditors.

(b) the filing of any petition or answer by such Person seeking to adjudicate itself as bankruptcy or insolvent, or seeking for itself any liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of such Person or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking, consenting to, or acquiescing in the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for such Person or for any substantial part of its Property, or

(c) corporate action taken by such Person to authorize any of the actions set forth above.

"Voting Securities" shall mean any securities of any Person which vote generally in the election of directors.

"Western Haulage Agreement" means the Western Haulage Agreement, dated as of the date hereof, by and between NSR and KCSR.

"Wholly-Owned Affiliate" of any Person means an Affiliate of such Person:

REDACTED

(a) one hundred percent (100%) of the voting stock or beneficial ownership of which is owned by such Person, or by any Person who, directly or indirectly, owns one hundred percent (100%) of the voting stock or beneficial ownership of such Person,

(b) an Affiliate of such Person who, directly or indirectly, owns one hundred percent (100%) of the voting stock or beneficial ownership of such Person, and

(c) any Wholly-Owned Affiliate of any Affiliate described in clause (a) or clause (b).

SECTION 1
THE COMPANY

1.1 Formation and Continuation. The Members hereby agree to organize the Company as a limited liability company under and pursuant to the provisions of the Act and upon the terms and conditions set forth in this Agreement. The rights and liabilities of the Members shall be as provided under the Act, the Certificate of Formation and this Agreement.

1.2 Name. The name of the Company shall be Meridian Speedway, LLC and all business of the Company shall be conducted in such name or, in the discretion of the Management Committee, under any other name.

1.3 Purpose; Powers.

(a) Generally.

(i) The purpose of the Company is to engage in the Business and in any other lawful activity for which a limited liability company may be organized under the Act.

(ii) The Company has the power to do any and all acts necessary, appropriate, proper, advisable, incidental or convenient to or in furtherance of the purposes of the Company set forth in Section 1.3(a) and has, without limitation, any and all powers that may be exercised on behalf of the Company by the Management Committee pursuant to Section 5.

(b) Carrier Status.

(i) Notwithstanding the generality of Section 1.3(a), the Members intend that the Company shall be a rail carrier as that term is defined in 49 U.S.C. § 1010(5) that performs transportation services over the Line as agent for and for the account of a Freight Rail Common Carrier.

(ii) Any rail transportation services shall at all times remain in the waybill, car hire and revenue accounts of a Freight Rail Common Carrier.

(iii) The Company shall not participate or appear in any rates, routes or divisions relating to any freight traffic whatsoever to, from and over the Line,

REDACTED

and shall not be entitled to or responsible for any freight charges relating to such freight traffic. The Company shall not quote or establish any rate or service terms applicable to freight transportation services to, from or over the Line, enter into any transportation contracts with any persons, provide for freight transportation services to, from or over the Line, or undertake to perform any for-hire transportation services directly, in its own name or for its own account, for any person other than as provided for in the KCSR Joint Use Agreement and the NSR Joint Use Agreement.

1.4 Principal Place of Business, Chief Executive Office and Registered Office. The principal place of business and chief executive office of the Company shall be located at 427 West 12th Street, Kansas City, Missouri 64105 or in such other place as the Management Committee may determine from time to time. The registered office of the Company in the State of Delaware initially is located at c/o The Corporation Trust Company, 1209 Orange Street, Wilmington, New Castle County, Delaware 19801.

1.5 Term. The term of the Company commenced on the date the Certificate of Formation was filed in the office of the Secretary of State of the State of Delaware in accordance with the Act and shall continue until the winding up and liquidation of the Company and its business is completed following a Dissolution Event, as provided in Section 11.

1.6 Filings; Agent for Service of Process.

(a) The Members shall promptly after the execution of this Agreement cause the Certificate of Formation to be filed in the Office of the Secretary of State of the State of Delaware in accordance with the provisions of the Act. The Management Committee shall take, or cause to be taken, any and all actions reasonably necessary to perfect and maintain the status of the Company as a limited liability company under the laws of the State of Delaware, including the preparation and filing of such amendments to the Certificate of Formation and such other assumed name certificates, documents, instruments and publications as may be required by law, including, without limitation, action to reflect:

(i) A change in the Company name,

(ii) A correction of false or erroneous statements in the Certificate of Formation or the desire of the Members to make a change in any statement therein in order that it shall accurately represent the agreement among the Members, or

(iii) A change in the time for dissolution of the Company if approved by the Members as evidenced by an amendment to this Agreement (approved as provided herein).

(b) The Members and the Management Committee shall execute and cause to be filed original or amended certificates and shall take any and all other actions as may be reasonably necessary to perfect and maintain the status of the Company as a limited liability company or similar type of entity under the laws of any other jurisdictions in which the Company engages in business.

REDACTED

(c) The registered agent for service of process on the Company in the State of Delaware shall be The Corporation Trust Company or any successor as appointed by the Members in accordance with the Act.

(d) Upon the dissolution and completion of the winding up and liquidation of the Company in accordance with Section 11, the Management Committee (and, if necessary and requested by the Management Committee, the Members) shall promptly execute and cause to be filed certificates of cancellation, statements of intent to dissolve and articles of dissolution in accordance with the Act and the laws of any other jurisdictions in which the Management Committee deems such filing necessary or advisable.

1.7 Title to Property. All Property owned by the Company shall be owned by the Company as an entity and no Member shall have any ownership interest in such Property in its individual name, and each Member's Membership Interests in the Company shall be personal property for all purposes. At all times after the date hereof, the Company shall hold title to all of its Property in the name of the Company and not in the name of any Member.

1.8 Payments of Individual Obligations. The Company's credit and assets shall be used solely for the benefit of the Company and no asset of the Company shall be Transferred or encumbered for, or in payment of, any individual obligation of any Member.

SECTION 2
MEMBERS' CAPITAL CONTRIBUTIONS

2.1 Initial Capital Contributions.

(a) Pursuant to the Transaction Agreement and simultaneously with the execution of this Agreement, (a) the NS Member has made the initial Capital Contribution described in Section 2.1(a) of the Transaction Agreement and (b) the KCS Member has made an initial Capital Contribution of the Assets as described in Section 3.1(a) of the Transaction Agreement.

(b) Pursuant to the Transaction Agreement and simultaneously with the execution of this Agreement, the KCS Member has also contributed or caused to be contributed to the Company, and the Company has assumed, the Assumed Liabilities (as such term is defined in the Transaction Agreement).

2.2 Initial Capital Accounts. The Company shall establish an individual Capital Account for each Member. The Company shall determine and maintain each Capital Account in accordance with Regulations Section 1.704-1(b)(2)(iv). The Capital Accounts of the Members as of the date hereof are as reflected in Exhibit 2.2.

2.3 Additional NS Member Contributions. The NS Member shall make the additional capital contributions to the Company described in Section 2.1 of the Transaction Agreement.

REDACTED

2.4 Withdrawal and Return of Capital. (a) Except as otherwise provided in this Section 2.4, Section 4 or Section 11, no Member shall withdraw any of its capital without the consent of the other Members, except upon the dissolution or liquidation of the Company to the extent provided in this Agreement. Under circumstances requiring or permitting a return of any Capital Contribution, no Member shall have the right to receive property other than cash except as may be specifically provided herein.

(b) On the Closing Date, the Company shall reimburse the KCS Member for (i) capital expenditures other than Pre-Closing Capital Expenditures, in an amount up to $40,000,000 in the aggregate, that the KCS Member made to the Assets within the two-year period ending on the Closing Date in accordance with Section 2.2 of the Transaction Agreement and (ii) Pre-Closing Capital Expenditures in respect of Proposed Capital Projects listed in Exhibit D hereto in an amount up to $20,000,000 in the aggregate made by the KCS Member prior to the Closing Date as set forth in this Agreement, the Budget for the first Fiscal Year, the Business Plan for the first Fiscal Year, and Section 2.2 of the Transaction Agreement.

(c) Within 30 days of the receipt of a written notice from a Member holding a Preferred Return that has been outstanding for at least 84 months but not more than 96 months (as of the date of such distribution), which notice expressly invokes the Member's option pursuant to this Section 2.4(c), the Company shall make a distribution to such Member in an amount equal to (i) such Member's Preferred Return Amount as of the date of the distribution; plus (ii) the amount by which such Member's Accumulated Preference as of the date of the distribution exceeds any amount distributed to such Member pursuant to Section 4.2(a) of this Agreement prior to the date of the distribution. At the Company's discretion, such distribution may be in cash or property in kind. If made, such distribution shall be treated as a preferred return pursuant to Section 1.707-4 of the Regulations. Upon receipt of the full amount of the distribution under this Section 2.4(c), the Member shall have no further rights to receive any distribution under Section 4.2(a).

SECTION 3
ALLOCATIONS

3.1 Profits. After giving effect to the special allocations set forth in Section 3.3, Profits for any Fiscal Year shall be allocated to the Members as follows:

(a) First, Profits shall be allocated to each Member in an amount necessary to offset any previous allocations of Loss to such Member pursuant to Section 3.4.

(b) Second, Profits less any amounts allocated under Section 3.1(a) shall be allocated to the Members in proportion to their respective Percentage Interests.

3.2 Losses. After giving effect to the special allocations set forth in Section 3.3 and subject to Section 3.4, Losses for any Fiscal Year shall be allocated to the Members in proportion to their Percentage Interests.

3.3 Special Allocations. The following special allocations shall be made in the following order:

REDACTED

(a) Minimum Gain Chargeback. Except as otherwise provided in Regulations Section 1.704-2(f), notwithstanding any other provision of this Section 3, if there is a net decrease in Company Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Members share of the net decrease in Company Minimum Gain, determined in accordance with Regulations Section 1.704-2(g). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Regulations Sections 1.704-2(f)(6) and 1.704-2(j)(2). This Section 3.3(a) is intended to comply with the minimum gain chargeback requirement in Regulations Section 1.704-2(f) and shall be interpreted consistently therewith.

(b) Member Minimum Gain Chargeback. Except as otherwise provided in Regulations Section 1.704-2(i)(4), notwithstanding any other provision of this Section 3, if there is a net decrease in Member Nonrecourse Debt Minimum Gain attributable to a Member Nonrecourse Debt during any Fiscal Year, each Member who has a share of the Member Nonrecourse Debt Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Section 1.704-2(i)(5) of the Regulations, shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Member Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(4). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Regulations Sections 1.704-2(i)(4) and 1.704-2(j)(2). This Section 3.3(b) is intended to comply with the minimum gain chargeback requirement in Regulations Section 1.704-2(i)(4) and shall be interpreted consistently therewith.

(c) Qualified Income Offset. In the event any Member unexpectedly receives any adjustments, allocations, or distributions described in Regulations Sections 1.704-1(b)(2)(ii)*(d)(4)*, 1.704-1(b)(2)(ii)*(d)(5)*, or 1.704-1(b)(2)(ii)*(d)(6)*, items of Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of the Member as quickly as possible, provided that an allocation pursuant to this Section 3.3(c) shall be made only if and to the extent that the Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Section 3 have been tentatively made as if this Section 3.3(c) were not in the Agreement.

(d) Gross Income Allocation. In the event any Member has a deficit Capital Account at the end of any Fiscal Year which is in excess of the sum of the amount such Member is deemed obligated to restore pursuant to the penultimate sentences of Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 3.3(d) shall be made only if and to the extent that such Member would have a deficit Capital Account in excess of such sum after all other allocations provided for in this Section 3 have been made as if Section 3.3(c) and this Section 3.3(d) were not in the Agreement.

REDACTED

(e) Nonrecourse Deductions. Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Members in proportion to their respective Percentage Interests.

(f) Member Nonrecourse Deductions. Any Member Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Regulations Section 1.704-2(i)(1).

(g) Preferred Return Allocation. Gross income shall be allocated to any Member with a Preferred Return in an amount equal to (i) the cumulative amount of Net Cash Flow distributed to such Member under Section 4.2(a); plus (ii) any amounts distributed to such Member under Section 2.4(c) that are attributable to the amount by which such Member's Accumulated Preference exceeded the amounts distributed under Section 4.2(a); minus (iii) the cumulative amount of gross income previously allocated to such Member under this Section 3.3(g).

(h) Net Cash Flow Allocation. Gross income shall be allocated to each Member in an amount equal to (i) the cumulative amount of Net Cash Flow distributed to such Member under Section 4.2(b); minus (ii) the cumulative amount of gross income previously allocated to such Member under this Section 3.3(h).

(i) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any Company asset, pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to Regulations Sections 1.704-1(b)(2)(iv)(*m*)(2) or 1.704-1(b)(2)(iv)(*m*)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their Percentage Interests in the event Regulations Section 1.704-1(b)(2)(iv)(*m*)(2) applies, or to the Member to whom such distribution was made in the event Regulations Section 1.704-1(b)(2)(iv)(*m*)(4) applies.

(j) Allocations Relating to Taxable Issuance of a Membership Interest. Any income, gain, loss or deduction realized as a direct or indirect result of the issuance of a Membership Interest by the Company to a Member (the "Issuance Items") shall be allocated among the Members so that, to the extent possible, the net amount of such Issuance Items, together with all other allocations under this Agreement to each Member shall be equal to the net amount that would have been allocated to each such Member if the Issuance Items had not been realized.

(k) Guaranteed Payments. To the extent any compensation paid to any Member by the Company, including any fees payable by the Company to any Member, is determined by the Internal Revenue Service not to be a guaranteed payment under Code Section 707(c) or is not paid to the Member other than in its capacity as a partner (Member) within the meaning of Code Section 707(a), the Member shall be specially allocated gross income of the Company in an amount equal to the amount of that compensation.

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(c) Solely for purposes of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Regulations Section 1.752-3(a)(3), the Members' interests in Company Profits are in proportion to their Percentage Interests.

(d) To the extent permitted by Regulations Section 1.704-2(h)(3), the Management Committee shall endeavor to treat distributions of Net Cash Flow as having been made from the proceeds of a Nonrecourse Liability or a Member Nonrecourse Debt only to the extent that such distributions would cause or increase an Adjusted Capital Account Deficit for any Member.

3.6 Tax Allocations; Code Section 704(c).

In accordance with Code Section 704(c) and the Regulations thereunder, income, gain, loss, deduction and credit with respect to any Property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such Property to the Company for federal income tax purposes and its initial Gross Asset Value (computed in accordance with the definition of Gross Asset Value) using the traditional method set forth in Regulations Section 1.704-3(b).

In the event the Gross Asset Value of any Company asset is adjusted pursuant to subparagraph (b) of the definition of Gross Asset Value, subsequent allocations of income, gain, loss, deduction and credit with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Regulations thereunder.

Any elections or other decisions relating to such allocations shall be made by the Management Committee in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 3.6 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items, or distributions pursuant to any provisions of this Agreement.

3.7 Revaluation of Capital Accounts. Capital Accounts shall not be revalued in connection with the Capital Contributions described in Section 2.3.

SECTION 4
DISTRIBUTIONS

4.1 Distributions. Except as otherwise provided in this Section 4 or Section 11, and after distribution of the cumulative amounts contemplated by Section 4.2 of this Agreement, remaining Net Cash Flow, if any, shall be distributed upon the approval of the Management Committee. Any distribution of Net Cash Flow (or otherwise) by the Company not otherwise governed by Section 4.2, Section 4.5, Section 4.6, Section 4.7 or Section 11.2(c) shall be distributed pro rata to the Members in accordance with each Member's Percentage Interest.

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4.2 Priority Distributions. Notwithstanding anything to the contrary in Section 4.1, for each Fiscal Year of the Company, Net Cash Flow shall be distributed on at least an annual basis as follows:

(a) First, to any Member holding a Preferred Return in an amount equal to the Member's Accumulated Preference, less any amount previously distributed to such Member pursuant to this Section 4.2(a). Such distribution shall be treated as a preferred return pursuant to Section 1.707-4 of the Regulations.

(b) Second, any remaining Net Cash Flow shall be distributed pro rata to the Members in accordance with each Member's Percentage Interest.

4.3 Amounts Withheld. All amounts withheld pursuant to the Code or any provision of any state, local or foreign tax law with respect to any payment, distribution or allocation to the Company or the Members shall be treated as amounts paid or distributed, as the case may be, to the Members with respect to which such amount was withheld pursuant to this Section 4.3 for all purposes under this Agreement. The Company is authorized to withhold from payments and distributions, or with respect to allocations to the Members, and to pay over to any federal, state and local government or any foreign government, any amounts required to be so withheld pursuant to the Code or any provisions of any other federal, state or local law or any foreign law, and shall allocate any such amounts to the Members with respect to which such amount was withheld. The withholdings by the Company referred to in this Section 4.3 shall be made at the appropriate applicable statutory rate under the applicable tax as determined by the Management Committee.

4.4 Limitations on Distributions. The Company shall make no distributions to the Members except (i) as provided by and in accordance with this Section 4 and Section 11 or as agreed to by all of the Members and (ii) in conformance with the Act.

4.5 Distributions and Allocations in Respect of a Transferred Membership Interest. If any Membership Interest is Transferred during any Fiscal Year in compliance with the provisions of Section 9 or Section 10 or additional Members are admitted to the Company after the date hereof on different dates during any Fiscal Year, Profits, Losses, each item thereof, and all other items attributable to the Transferred Membership Interest or the newly issued Membership Interest, as the case may be, for such Fiscal Year shall be divided and allocated among the Members by taking into account their varying Percentage Interests during the Fiscal Year in accordance with Code Section 706(d), using the interim-closing-of-the-books method unless the Members agree otherwise in writing. In the case of a Transferred Interest, all distributions on or before the date of such Transfer shall be made to the transferor, and all distributions thereafter shall be made to the transferee. Solely for purposes of making such allocations and distributions, the Company shall recognize such Transfer not later than the end of the calendar month during which it is given notice of such Transfer, provided that, if the Company is given notice of a Transfer at least ten (10) Business Days prior to the Transfer, the Company shall recognize such Transfer as of the date of such Transfer, and provided further that if the Company does not receive a notice stating the date such Membership Interest (or portion thereof) was Transferred and such other information as the Management Committee may reasonably require within thirty (30) days after the end of the Fiscal Year during which the

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Transfer occurs, then all such items shall be allocated, and all distributions shall be made, to the Person who, according to the books and records of the Company, was the owner of the Membership Interest on the last day of such Fiscal Year.

4.6 Special Distributions.

(a) Notwithstanding anything to the contrary in this Agreement, the Company may make the payments to the KCS Member specified in Section 4(e)(ii) of the Operating Agreement.

(b) Immediately prior to the consummation of any transaction which results in the NS Member owning all of the Membership Interests in the Company, the Company will make a distribution to the KCS Member or its Permitted Transferees of all previously undistributed Net Cash Flow due to the KCS Member and such Permitted Transferees (based upon their respective Percentage Interests). Immediately prior to the consummation of any transaction which results in the KCS Member or its Permitted Transferees owning all of the Membership Interests in the Company, the Company will make a distribution to the NS Member or its Permitted Transferees of all previously undistributed Net Cash Flow due to the NS Member and such Permitted Transferees (based upon their respective Percentage Interests).

4.7 Deemed Distributions. In the event of a Permitted Asset Transfer in which the Company receives consideration with a value less than the Fair Value of the asset(s) subject to such Permitted Asset Transfer, the excess of the Fair Value of such asset(s) over the consideration received therefor (such excess, the "Deemed Distribution Amount") shall be deemed to be a distribution to the KCS Member, and the NS Member shall be entitled to, in its sole discretion: (a) an immediate cash payment from the KCS Member equal to the NS Member's pro rata share of the Deemed Distribution Amount based on its Percentage Interest or (b) an immediate cash payment from the Company equal to the product of (i) such Deemed Distribution Amount and (ii) a fraction, the numerator of which is the NS Member's Percentage Interest and the denominator of which is the KCS Member's Percentage Interest.

SECTION 5
MANAGEMENT

5.1 Manner of Operations. The Members each agree to act in good faith to operate the Company in a manner reasonably designed to maximize the long-term value of the Company as a whole.

5.2 Management Committee.

(a) Management by the Management Committee. Subject to the provisions of this Agreement, the business, property and affairs of the Company shall be managed, and all powers of the Company shall be exercised, by or under the direction of a management committee (the "Management Committee"). Without limiting the generality of the foregoing, but subject to the express limitations set forth elsewhere in this Agreement, the Management Committee shall have all necessary powers to manage and carry out the purpose, business, property and affairs of the Company.

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(b) Composition of Management Committee. The Management Committee shall consist of six committee representatives, four of whom shall be designated by the KCS Member and two of whom shall be designated by the NS Member, and any alternate selected by a Member, to serve in the absence or unavailability of one or more committee representatives (each, including alternates, a "Committee Representative"). Each Committee Representative shall serve at the pleasure of the Member or Members who designated such Committee Representative. The initial Committee Representatives are identified in Exhibit 5.2(b) attached hereto. Any Committee Representative may resign upon written notice to the Member who designated such Committee Representative and to the Company. The resignation of any such Committee Representative shall take effect upon receipt of such notice, or at such later time as shall be specified in such notice. A Committee Representative may be removed at any time with or without cause by the Member who originally designated such Committee Representative. Except as governed by Article 10 for an Event of Default by a Member, any vacancy occurring for any reason in the number of Committee Representatives shall be filled by the Member who originally designated the Committee Representative whose position has become vacant. The Chairman of the Management Committee shall be appointed by the KCS Member.

(c) Independent Activities. Except as otherwise restricted by the provisions of this Agreement or any other agreement between the Company and the Person acting as Committee Representative, each Committee Representative in his capacity as a Committee Representative shall be required to devote such time to the affairs of the Company as may be necessary to serve the Company in such capacity and shall be free to serve any other Person or enterprise in any capacity that such Committee Representative may deem appropriate in his discretion.

5.3 Committees of the Management Committee.

(a) Creation of Committees. Subject to Section 5.6, the Management Committee shall have the power and right (but not the obligation) to create and disband committees and to determine the duties, responsibilities, activities and composition thereof. Except as otherwise provided herein, the KCS Member and the NS Member shall each be entitled to representation on any such committee, such representation to be proportionate to their respective Percentage Interests in the Company.

(b) Capital Project Committee. The Members hereby agree that there shall be created a Capital Project Committee consisting of three Committee Representatives, two of whom shall be designated by the KCS Member and one of whom shall be designated by the NS Member. The Capital Project Committee shall establish a process (the "Capital Project Process") utilizing capacity modeling and field input to determine capacity needs and capital expenditures with respect to Capital Projects. The Capital Project Committee shall be responsible for (i) determining the optimum use of capital expenditures provided for in the Company's Budget (including any Rollover Budget) or Business Plan in accordance with the Capital Project Process and (ii) negotiating and entering into any Capital Improvement Agreements and overseeing the performance of the KCS Member thereunder, provided, however, that such Capital Improvement Agreements shall provide for construction of such Capital Projects at cost. The initial designees to the Capital Project Committee shall be those persons identified in Exhibit 5.3(b)(i) hereto. Except as provided in Section 5.12, the Capital Project

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Committee shall follow any protocols approved by the Management Committee in accordance with Section 5.6 to guide capital expenditures decisions. The initial capital expenditure protocols for capital expenditures other than the Proposed Capital Projects are attached hereto as Exhibit 5.3(b)(ii).

(c) Joint Operating Committee. The Members hereby agree that there shall be created a Joint Operating Committee (the "Joint Operating Committee") consisting of the Chief Operations Officer, Chief Marketing Officer and Chief Engineering Officer, or their respective designees, of KCS and NS. The Joint Operating Committee shall make decisions by the unanimous vote of its members. The Joint Operating Committee shall have responsibility for (i) monitoring such matters as operations, performance and scheduling, (ii) managing maintenance and other operating matters arising upon the carrying out of the Operating Agreement and the KCSR Joint Use Agreement and the NSR Joint Use Agreement and (iii) seeking the resolution of disputes with respect to such matters. Meetings of the Joint Operating Committee may be convened by any member thereof. The Joint Operating Committee may meet by telephone or in any manner or place as shall be agreeable to its members. If the Joint Operating Committee is unable to reach a unanimous vote on any matter, it shall refer that matter to the Management Committee, provided, however, that any Member may require such matter to be referred to arbitration in accordance with Section 12.14, if such matter involves a breach or an alleged breach of this Agreement or of any of the JV Transaction Agreements.

5.4. Meetings of Management Committee.

(a) Notices. Meetings of the Management Committee shall be held at least once each calendar quarter and may be called by any Committee Representative. All meetings shall be held upon fifteen (15) Business Days' notice by mail or four (4) Business Days' notice delivered personally or by telephone, e-mail or facsimile stating the business to be transacted at such meeting; provided, that at least thirty (30) Business Days' notice shall be provided for any meeting in which approval of any action of the type set forth in clauses (xxi), (xxii) and/or (xxiii) of the definition of Major Decision is sought. Notice of a meeting need not be given to any Committee Representative who signs a waiver of notice or a consent to holding the meeting (which waiver or consent need not specify the purpose of the meeting) or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior to its commencement, the lack of notice to such Committee Representative. All such waivers, consents and approvals shall be filed with the Company records or made a part of the minutes of the meeting. The Committee Representatives present may adjourn any meeting to another time and place. If any meeting of the Management Committee is adjourned, no less than four (4) Business Days' notice (delivered personally or by telephone, e-mail or facsimile) shall be given to each Committee Representative who is not present at the time of such adjournment prior to such meeting being reconvened. Meetings of the Management Committee shall be held at the offices of the Company unless another location shall have been designated in the notice of the meeting or at such place as may be approved by the Management Committee. Members of the Management Committee may participate in a meeting through use of conference telephone or similar communications equipment, so long as all Committee Representatives participating in such meeting can hear one another. Participation in a meeting in such manner constitutes presence in person at such meeting. No business other than that stated in the notice shall be transacted at any meeting without the unanimous consent of all

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of the Committee Representatives. Any Committee Representative may authorize in writing any Person to act for it by proxy on all matters on which a Committee Representative is entitled to act, including waiving notice of, or voting or participating at, any meeting.

(b) Quorum. The presence in person of a majority of the Committee Representatives (at least one of whom shall be a Committee Representative appointed by the NS Member if a Major Decision is to be made) shall constitute a quorum for the transaction of business at a meeting of the Management Committee duly called in accordance with Section 5.4(a).

(c) Vote. Each Committee Representative shall have one vote to cast in person or by proxy.

(d) Action of the Committee. Except to the extent that this Agreement expressly requires otherwise (including as provided in Section 5.6), every action or resolution done or made by the majority approval of the Management Committee at a duly noticed meeting at which a quorum is present is the action of the Management Committee.

5.5 Action by Unanimous Written Consent. Any action required or permitted to be taken by the Management Committee other than approval of any action of the type set forth in clause (xx) of the definition of Major Decision may be taken by the Committee Representatives without a meeting without prior notice and without a vote, but only if a consent or consents in writing shall be signed by all of the Committee Representatives.

5.6 Major Decisions. Notwithstanding anything to the contrary contained in this Agreement, until such time as the NS Member no longer owns any Membership Interests, neither the Management Committee nor any committee thereof shall authorize or effect any action that constitutes a Major Decision unless such action has received the approval of at least one of the Committee Representatives appointed by NS.

5.7 Budget and Business Plan; Investment Policies.

(a) Attached as Exhibit 5.7(a) to this Agreement is the budget for the first Fiscal Year (the "Budget") and the business plan for the first Fiscal Year (the "Business Plan"). On or prior to the date which is sixty days before the end of each Fiscal Year, commencing with the Fiscal Year ending December 31, 2006, the Management Committee shall prepare a Budget and Business Plan for the following Fiscal Year. The Budget and Business Plan for the next succeeding Fiscal Year shall upon approval of the Management Committee in accordance with Section 5.6 become the Budget and Business Plan for such Fiscal Year. If the Management Committee does not approve a Budget or Business Plan for any Fiscal Year prior to the commencement of such year, then the Budget or Business Plan for that Fiscal Year shall be the Budget or Business Plan from the prior Fiscal Year (excluding the prior Fiscal Year's extraordinary and nonrecurring items, but including any contractually obligated or legally required commitments or expenditures for the current year), as the case may be, adjusted, in the case of the Budget based on the "AAR Railroad Cost Indexes – Table A – Annual indexes of charge-out prices and wage rates (1977 = 100) – East – Materials prices, wage rates and supplements combined (excluding fuel)," together with any adjustment of contractual

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commitments in accordance with their terms (a "Rollover Budget"). Notwithstanding anything to the contrary set forth herein, the Budget (including any Rollover Budget) and Business Plan for any Fiscal Year shall take into account the capital expenditures for such Fiscal Year set forth in Schedule 2.2 to the Transaction Agreement.

(b) Attached as Exhibit 5.7(b) to this Agreement are the investment policies (the "Investment Policies") pursuant to which the initial Capital Contribution of the NS Member described in Section 2.1(a) and any additional cash Capital Contributions to the Company shall be invested by the Company.

5.8 Officers. Subject to Section 5.6, the Management Committee shall have the authority to appoint and terminate Officers of the Company and retain and terminate employees, agents and consultants of the Company and to delegate such duties to any such Officers, employees, agents and consultants as the Management Committee deems appropriate, including the power, acting individually or jointly, to represent and bind the Company in all matters, in accordance with the scope of their respective duties. The setting and modifications of compensation levels (including bonuses and benefits, if any) for any such Officers, employees, agents or consultants shall be set by the approval of the Management Committee in accordance with Section 5.6.

5.9 Exculpation and Indemnification.

(a) Indemnified Persons. The Committee Representatives, the Officers (if any) and each Member and its Affiliates, and the partners, members, shareholders, officers, directors, advisory directors, managers, employees and control persons (as such term is defined in the Securities Act) of each Member and its Affiliates (collectively, the "Indemnified Persons") shall not be liable, directly or indirectly, to the Company, any other Member or any other Person who has an interest in the Company for any act or omission (in relation to the Company or this Agreement) taken or omitted by such Indemnified Person in good faith in their capacity as such, provided that such act or omission did not constitute gross negligence, fraud or willful violation of the law, this Agreement or the fiduciary duties set forth in Section 5.10(a). To the fullest extent permitted by applicable law, the Company shall indemnify and hold harmless each Indemnified Person and may indemnify any other Person subject to approval and designation of such person for such indemnification by approval of the Management Committee against all claims, damages, losses, liabilities and expenses of whatever nature (including reasonable attorneys' fees and disbursements) ("Claims") relating to activities undertaken in connection with the Company in their capacity as such, including, but not limited to, amounts paid in satisfaction of judgments, in compromise or as fines and penalties, and counsel fees and expenses reasonably incurred in connection with the investigation, defense or disposition of any action, suit or other proceeding, whether civil or criminal, before any court or administrative body in which such Indemnified Person may be or may have been involved as a party or otherwise, or with which such Indemnified Person may be or may have been threatened, while acting as such Indemnified Person; provided that no indemnity shall be payable hereunder against any liability incurred by such Indemnified Person by reason of gross negligence, fraud, a willful violation of the law or a breach of this Agreement or the fiduciary duties set forth in Section 5.10(a). No Indemnified Person shall settle or compromise any Claim without the

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written consent, which consent shall not be unreasonably withheld, of the Management Committee, subject to Section 5.6.

(b) Advance of Expenses. Expenses incurred by an Indemnified Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder may be advanced (and must be advanced to Members, the Committee Representatives and Officers, if any, of the Company) by the Company prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Person to repay such amount if it shall ultimately be determined that the Indemnified Person is not entitled to be indemnified by the Company.

(c) Non-Exclusivity. The right of any Indemnified Person to the indemnification provided herein shall be cumulative of and in addition to any and all rights to which such Indemnified Person may otherwise be entitled by contract or as a matter of law or equity and shall extend to such Indemnified Person's successors, assigns and legal representatives.

(d) Satisfaction from Company Assets. All judgments against the Company or an Indemnified Person, in respect of which such Indemnified Person is entitled to indemnification, shall only be satisfied from Company assets and no other Person shall have any liability with respect thereto.

(e) Expenses. The Company is authorized to pay expenses, fees, withholding taxes and other costs reasonably incurred by the Company, including, without limitation, expenses incurred in connection with acquisitions or investments and expenses incurred under this Section 5.9.

5.10 Fiduciary Duty; Exculpation.

(a) Notwithstanding any other provisions of this Agreement, whether express or implied, or applicable law, the Members agree that, to the fullest extent permitted by Section 18-1101(c) of the Act, no Member shall owe any duties at law or in equity (including fiduciary duties) to the Company or any other Member; provided, that an Indemnified Person who is a Committee Representative and who shall also be an employee of a Member shall have a fiduciary duty to such Member and not to the Company; provided further, however, that, with respect to the approval of any Permitted Asset Transfer or any Permitted Indebtedness, each Committee Representative shall owe the same duties to the Company and the Members as a director of a Delaware corporation would owe to such corporation and its shareholders with respect to such matters. Notwithstanding the foregoing, nothing in this Section 5.10 shall eliminate any implied covenant of good faith and fair dealing between any Member and the Company or the other Members.

(b) The provisions of this Agreement, to the extent that they restrict the duties and liabilities of an Indemnified Person otherwise existing at law or in equity, are agreed by the Members hereunder to replace such other duties and liabilities of such Indemnified Person.

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5.11 Interparty Matters. Notwithstanding anything to the contrary contained in this Agreement, in the event of any disagreement, dispute or controversy between any Member or any of its Affiliates (other than the Company), on the one hand, and the Company, on the other hand, arising out of or relating to this Agreement or any of the JV Transaction Agreements to which the Company is a party or is subject or the breach, termination or validity thereof, the Company Representatives designated by the other Member shall control (on behalf of the Company) the conduct or settlement of any such disagreement, dispute or controversy or any proceedings relating thereto.

5.12 Capacity Improvement Projects.

(a) Notwithstanding anything to the contrary herein, each Member (the "Sponsoring Member") may require the Company to perform all acts necessary in order to effectuate the construction of a Capacity Improvement Project. In order to initiate such construction, the Sponsoring Member may require the Company to perform a capacity model to determine the expected addition to capacity that would result from the construction of the specified Capacity Improvement Project, such capacity to be measured in the number of potential additional new overhead train movements permitted by such specified Capacity Improvement Project ("New Overhead Train Starts") and/or additional local train movements ("Local Train Starts").

(b) If the Capacity Improvement Project will result in only additional capacity through Local Train Starts, only the KCS Member may cause the Company to construct such Capacity Improvement Project, and such Capacity Improvement Project shall be constructed solely through a capital contribution of the KCS Member.

(c) If the Capacity Improvement Project will result in additional capacity through New Overhead Train Starts, then the Member that is not the Sponsoring Member ("Non-Sponsoring Member") shall have the right to require the Company to allocate to such Non-Sponsoring Member up to its share of the New Overhead Train Starts (up to two-thirds to KCSR through the KCSR Joint Use Agreement, if KCSR is the Non-Sponsoring Member or up to one-third to NSR through the NSR Joint Use Agreement, if NSR is the Non-Sponsoring Member),provided, however, that the Sponsoring Member shall always be entitled to at least one New Overhead Train Start. If the Non-Sponsoring Member elects to receive an allocation of New Overhead Train Starts as provided herein, the Capacity Improvement Project shall be constructed through a capital contribution of both Members in proportion to the number of New Overhead Train Starts allocated to each Member. Otherwise, the Capacity Improvement Project shall be constructed solely through a capital contribution of the Sponsoring Member. If either Member declines all or part of its allocation from one or more Capacity Improvement Projects, it may make up the resulting deficit in New Overhead Train Starts in any subsequent Capacity Improvement Project or Projects.

5.13 Construction of the Jackson Flyover

(a) Notwithstanding anything (except Section 5.13(b)) to the contrary, either Member may require the Company to perform all acts necessary (including requiring Capital Contributions in cash from each Member in proportion to its Percentage Interest) in order

to effectuate the construction of the Jackson Flyover. The Company shall thereafter progress the engineering, permitting (to the extent required) and construction of the Jackson Flyover with all deliberate speed.

(b) Section 5.13(a) shall be disregarded if, within thirty (30) days of the formation of the Company, the Company receives assignment of the CN Jackson Trackage Rights.

SECTION 6
ROLE OF MEMBERS

6.1 Rights or Powers. The Members in their capacity as Members shall not have any right or power to take part in the management or control of the Company or its business and affairs or to act for or bind the Company in any way. Notwithstanding the foregoing, the Members have all the rights and powers specifically set forth in this Agreement and, to the extent not inconsistent with this Agreement, in the Act. A Member shall cease to be a Member at the time such Member ceases to own any Membership Interests.

6.2 Voting Rights. No Member has any voting right except with respect to those matters specifically reserved for a Member vote which are set forth in this Agreement and as required in the Act.

6.3 Meetings of the Members.

(a) Meetings of the Members may be called upon the written request of any Member. The call shall state the location of the meeting and the nature of the business to be transacted. Notice of any such meeting, including any meeting that has been adjourned, shall be given to each Member not less than fifteen (15) Business Days (or four (4) Business Days if delivered personally or by telephone, email or facsimile) nor more than forty-five (45) days prior to the date of such meeting. Members may vote in person, by proxy or by telephone at such meeting and may waive advance notice of such meeting. Whenever the vote or consent of Members is permitted or required under the Agreement, such vote or consent may be given at a meeting of the Members or may be given in accordance with the procedure prescribed in Section 6.3(f). No business other than that stated in the notice shall be transacted at any meeting without the unanimous consent of all of the Members entitled to vote thereat.

(b) For the purpose of determining the Members entitled to vote on, or to vote at, any meeting of the Members or any adjournment thereof, the Management Committee or the Member requesting such meeting may fix, in advance, a date as the record date for any such determination. Such date shall not be more than thirty (30) days nor less than ten (10) days before any such meeting.

(c) Each Member may authorize any Person or Persons to act for it by proxy on all matters in which a Member is entitled to participate, including waiving notice of any meeting, or voting or participating at a meeting. Every proxy must be signed by the Member or its attorney-in-fact. No proxy shall be valid after the expiration of eleven (11) months from the

date thereof unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the Member executing it.

(d) Each meeting of Members shall be conducted by an individual Person selected by the Members holding a majority Percentage Interest. Except as otherwise required by law, the presence in person or by proxy of Members holding percentage interests of more than seventy-five percent (75%) shall constitute a quorum for the transaction of business at a meeting of the Members duly called in accordance with Section 6.3(a). In case a quorum shall not be present at any meeting, Members holding a majority of the Membership Interests held by Members represented thereat, in person or by proxy, shall have the power to adjourn the meeting from time to time until the requisite number of Members shall be present; provided, that, if any meeting of the Members is adjourned, no less than four (4) Business Days' notice (delivered personally or by telephone, e-mail or facsimile) shall be given to each Member who is not present at the time of such adjournment prior to such meeting being reconvened After two adjournments for lack of quorum, if notice has been given to each Member in accordance with the preceding sentence, then the quorum requirement set forth in this Section 6.3(d) for any such adjourned meeting at which no Major Decision (or any other decision that requires the unanimous agreement of the Members, as provided herein) is proposed to be made shall be reduced from seventy-five percent to fifty-one percent. At any such adjourned meeting at which the requisite number of Members shall be represented, any business may be transacted that might have been transacted at the meeting as originally noticed.

(e) At a meeting, any proposal shall be approved if it receives the affirmative vote of a majority of the Percentage Interests unless such a proposal would involve a Major Decision, in which event approval requires an affirmative vote of each of the Members.

(f) Notwithstanding this Section 6.3, any action required or permitted to be taken at any meeting of the Members may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by each Member.

6.4 Required Member Consents. Notwithstanding any other provision of this Agreement no action may be taken by the Company (whether by the Management Committee, or otherwise) in connection with any of the following matters without the written consent of all of the Members:

(a) Any act in contravention of this Agreement; or

(b) Any transaction to liquidate or dissolve the Company.

6.5 Member Compensation. No Member shall receive any interest, salary or drawing with respect to its Capital Contributions or its Capital Account or for services rendered on behalf of the Company, or otherwise, in its capacity as a Member, except as otherwise provided in this Agreement, any of the JV Transaction Agreements or in another agreement among the Company and a Member that received approval by the Management Committee in accordance with Section 5.6.

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6.6 Members' Liability. No Member shall be liable under a judgment, decree or order of a court, or in any other manner for the debts or any other obligations or liabilities of the Company. A Member shall be liable only to make its Capital Contributions and shall not be required to restore a deficit balance in its Capital Account or to lend any funds to the Company or, after its Capital Contributions have been made, to make any additional contributions, assessments or payments to the Company, provided that a Member may be required to repay distributions made to it as provided in Section 4 or the Act. A Committee Representative shall not have any personal liability for the repayment of any Capital Contributions of any Member.

6.7 Partition. While the Company remains in effect or is continued, each Member agrees and waives its rights to have any Company Property partitioned, or to file a complaint or to institute any suit, action or proceeding at law or in equity to have any Company Property partitioned, and each Member, on behalf of itself, its successors and its assigns hereby waives any such right.

6.8 Transactions Between a Member and the Company. Except as otherwise provided by applicable law and the provisions of this Agreement, subject to the Management Committee's approval in accordance with Section 5.6, any Member may, but is not required to, enter into, directly or indirectly, any transaction, agreement, joint enterprise or arrangement, guarantee, loan, advance or investment with the Company provided the same is on an arms length basis and at fair market value. No Member may, without the approval of the other Member, enter into, directly or indirectly, any transaction, agreement, joint enterprise or arrangement, guarantee, loan, advance or investment with the Company other than on an arms length basis and at fair market value. The existence of these relationships and acting in such capacities will not result in the Member being deemed to be participating in the control of the business of the Company or otherwise affect the limited liability of the Member.

6.9 Other Instruments. Each Member hereby agrees to execute and deliver to the Company within five days after receipt of a written request therefor, such other and further documents and instruments, statements of interest and holdings, designations, powers of attorney and other instruments and to take such other action as the Management Committee deems necessary, useful or appropriate to comply with any laws, rules or relations as may be necessary to enable the Company to fulfill its responsibilities under this Agreement.

6.10 Advise of Changes. Each Member hereby agrees to notify the other Members as soon as practicable of any event, circumstance or fact of which it has knowledge which has had, or is reasonably likely to have, a material adverse effect on such Member's ability to fulfill its obligations under this Agreement.

SECTION 7
ACCOUNTING BOOKS AND RECORDS

7.1 Accounting Books and Records.

(a) The Company shall keep on site at its principal place of business each of the following:

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(i) Separate books of account for the Company which shall show a true and accurate record of all costs and expenses incurred, all charges made, all credits made and received, and all income derived in connection with the conduct of the Company and the operation of the Business in accordance with this Agreement,

(ii) A current list of the full name and last known business, residence or mailing address of each Member and Committee Representative, both past and present,

(iii) A copy of the Certificate of Formation and all amendments thereto, together with executed copies of any powers of attorney pursuant to which any amendment has been executed,

(iv) Copies of the Company's federal, state, and local income tax returns and reports, if any, until one year after the period of limitations for auditing the return by the federal government or by any applicable state or local government expires,

(v) Copies of this Agreement,

(vi) Copies of any writings permitted or required under the Act regarding the obligation of a Member to perform any enforceable promise to contribute cash or property or to perform services as consideration for such Member's Capital Contribution, and

(vii) Any written consents obtained from Members pursuant to the Act regarding action taken by Members without a meeting.

(b) The Company shall use the accrual method of accounting in preparation of its financial reports and for tax purposes and shall keep its books and records accordingly. Any Member or its designated representative has the right to access and audit, inspect and copy the contents of such books or records and shall also have access during normal business hours to such additional financial information, documents, books and records as may be reasonably requested (including in order to comply with any reporting requirements of such Member under applicable laws or stock exchange regulations). The rights granted to a Member pursuant to this Section 7.1 are expressly subject to compliance by such Member with the safety, security and confidentiality procedures and guidelines of the Company, as such procedures and guidelines may be established from time to time.

(c) The accounting period of the Company shall be the Fiscal Year.

7.2 Reports.

(a) In General. Pursuant to the Operating Agreement, KCSR (or, following the termination thereof, such other Person as may be engaged by the Management Committee in accordance with Section 5.6) shall be responsible for causing the preparation of financial reports of the Company and the coordination of financial matters of the Company with the Company's accountants.

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(b) Periodic and Other Reports. The Company shall cause to be delivered to each Member the financial statements listed in clauses (i) and (ii) below, prepared, in each case (other than with respect to Member's Capital Accounts, which shall be prepared in accordance with this Agreement) in accordance with GAAP consistently applied (and, if required by any Member or its Controlled Affiliates for purposes of reporting under the Exchange Act Regulation S-X), including any reports as may be required in accordance with the Company's or any of its Members' status as a rail carrier, and such other reports, representations and certifications as any Member may reasonably request from time to time, provided that, if the Management Committee so determines within 30 days thereof, such other reports shall be provided at such requesting Member's sole cost and expense. The monthly and quarterly financial statements referred to in clause (ii) below may be subject to normal year-end audit adjustments.

(i) As soon as practicable following the end of each Fiscal Year (and in any event not later than 45 days after the end of such Fiscal Year) the Company shall cause to be delivered to each Member, a balance sheet of the Company as of the end of such Fiscal Year and the related statements of operations, Members' Capital Accounts and changes therein, and cash flows for such Fiscal Year, together with appropriate notes to such financial statements and supporting schedules, all of which shall be audited and certified by the Auditors, and in each case, to the extent the Company was in existence, setting forth in comparative form the corresponding figures for the immediately preceding Fiscal Year end (in the case of the balance sheet) and the two immediately preceding Fiscal Years (in the case of the statements), and

(ii) As soon as practicable following the end of each of the first three Fiscal Quarters of each Fiscal Year (and in any event not later than 30 days after the end of each such Fiscal Quarter), the Company shall cause to be delivered to each Member, a balance sheet of the Company as of the end of such Fiscal Quarter and the related statements of operations and cash flows for such Fiscal Quarter and for the Fiscal Year to date, in each case, to the extent the Company was in existence, setting forth in comparative form the corresponding figures for the prior Fiscal Year's Fiscal Quarter and the interim period corresponding to the Fiscal Quarter and the interim period just completed.

The periodic statements described in clause (ii) above shall be accompanied by a written certification of the Chief Financial Officer of KCSR or such other individual performing a similar function (or any Person designated by the Management Committee in accordance with Section 5.6) that such statements have been prepared in accordance with GAAP consistently applied or this Agreement, as the case may be. The Company and the Management Committee shall also distribute to all Members, at the same time such reports are circulated, delivered or distributed internally, each and every internal management report prepared by, for or circulated among senior management of the Company relating to the business or financial performance of the Company.

7.3 Tax Matters.

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(a) Partnership Status. It is the intent of the Members that the Company be classified as a partnership for U.S. federal, state and local income tax purposes. The Members hereby agree not to elect to be excluded from the application of Subchapter K of Chapter 1 of Subtitle A of the Code or any similar state statute.

(b) Company Tax Returns. The Tax Matters Partner (as defined in Section 7.3(d)) shall prepare (or cause to be prepared) the U.S. federal income tax returns and information returns for the Company and all other tax returns of the Company in a manner consistent with this Agreement. The federal income tax return shall contain an election under Section 6231(a)(1)(B)(ii) of the Code and the regulations thereunder to treat the Company as a partnership to which the provisions of Sections 6221 through 6234 of the Code, inclusive, apply. The Tax Matters Partner shall cause the Company's accountants to prepare and review the necessary federal and state income tax returns and information returns for the Company. Each Member shall provide such information, if any, as may be needed by the Company for purposes of preparing such tax and information returns, provided that such information is readily available from regularly maintained accounting records. Prior to April 1st of each year, or sooner as applicable, the Tax Matters Partner shall deliver to the other Member for its review a copy of the Company's federal and state income tax returns and information returns in the form proposed to be filed for each Fiscal Year, and shall reasonably consider and take into account all reasonable comments to such proposed tax returns and information returns provided by the other Member at least ten (10) days prior to the filing date for such returns. After taking into account any such comments, the Tax Matters Partner shall cause the Company to timely file such tax returns. Within two (2) Business Days after filing such federal and state income tax returns and information returns, the Tax Matters Partner shall cause the Company to deliver to each Member a copy of the Company's federal and state income tax returns and information returns as filed for each Fiscal Year, together with any additional tax-related information in the possession of the Company that such Member may reasonably and timely request in order to properly prepare its own income tax returns.

(c) Tax Information. Necessary tax information shall be delivered to each Member as soon as practicable after the end of each Fiscal Year of the Company but not later than five months after the end of each Fiscal Year.

(d) Tax Audits.

(i) The KCS Member is hereby designated as the "tax matters partner," as that term is defined in Section 6231(a)(7) of the Code (the "Tax Matters Partner") of the Company, with all of the rights, duties and powers provided for in Sections 6221 through 6234 of the Code, inclusive. The Tax Matters Partner is hereby directed and authorized to take whatever steps the Tax Matters Partner, in its sole discretion, deems necessary or desirable to perfect such designation, including, without limitation, filing any forms or documents with the IRS and taking such other action as from time to time is required under the Treasury Regulations.

(ii) The Tax Matters Partner, in consultation with the other Member, shall direct the defense of any claims made by the IRS (or by any other taxing authority) to the extent that such claims relate to the adjustment of Company items at the

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Company level and, in connection therewith, shall cause the Company to retain and to pay the fees and expenses of counsel and other advisors chosen by the Tax Matters Partner with the consent of the other Member. The Tax Matters Partner shall promptly deliver to each other Member a copy of all notices, communications, reports and writings received from the IRS relating to or potentially resulting in an adjustment of Company items, shall promptly advise the other Member of the substance of any conversations with the IRS in connection therewith, and shall keep the other Member advised of all developments with respect to any proposed adjustments which come to its attention. In addition, the Tax Matters Partner shall (A) provide in a timely manner the other Member with a draft copy of any correspondence or filing to be submitted by the Company in connection with any administrative or judicial proceedings relating to the determination of Company items at the Company level reasonably in advance of such submission, (B) incorporate all reasonable changes or comments to such correspondence or filing requested by the other Member and (C) provide the other Member with a final copy of correspondence or filing. The Tax Matters Partner will provide the other Member with notice reasonably in advance of any meetings or conferences with respect to any administrative or judicial proceedings relating to the determination of Company items at the Company level (including any meetings or conferences with counsel or advisors to the Company with respect to such proceedings), and the other Member shall have the right to participate, at its sole cost and expense, in any such meetings or conferences.

(iii) Notwithstanding anything in this Section 7.3, the Tax Matters Partner shall not (A) extend the period of limitations for any tax year for Federal, state, and local income tax purposes, (B) enter into any settlement agreement that is binding upon the Members with respect to the determination of Company items at the Company level, (C) file a petition under Section 6226(a) of the Code for the readjustment of Company items, or (D) appeal any judicial decision with respect to any Company item, without the prior consent of the other Member which consent shall not be unreasonably withheld, conditioned or delayed.

SECTION 8
AMENDMENTS

8.1 Amendments. Amendments to this Agreement may be proposed by any Committee Representative or any Member. Following such proposal, the Management Committee shall submit to the Members a verbatim statement of any proposed amendment, and the Management Committee shall include in any such submission a recommendation as to the proposed amendment. The Management Committee shall seek the written consent of the Members pursuant to Section 6.3(f) on the proposed amendment or shall call a meeting to vote thereon and to transact any other business that it may deem appropriate. A proposed amendment shall be adopted and be effective as an amendment hereto only if it receives the affirmative vote of each of the Members.

SECTION 9
TRANSFERS AND CALL RIGHT

REDACTED

9.1 Restrictions on Transfers. Except as provided in Section 9.2 of this Agreement, no Member shall Transfer all or any portion of its Membership Interest.

9.2 Permitted Transfers. Subject to the conditions and restrictions set forth in Section 9.3, a Member may at any time Transfer all or any portion of its Membership Interest to (a) any Person that (i) is the surviving Person as a result of any merger or consolidation of either the NS Parent or KCS with or into any such Person or (ii) acquires all or substantially all of the assets of the NS Parent or KCS, (b) any other Member, (c) any Wholly-Owned Affiliate of either the NS Parent or KCS, (d) any administrator, trustee or other Person to whom such Membership Interest of any Member is transferred involuntarily by operation of law, or (e) subject to the prior written consent of all other Members, any Person (any such Transfer being referred to in this Agreement as a "Permitted Transfer").

9.3 Conditions to Permitted Transfers. A Transfer of a Membership Interest shall not be treated as a Permitted Transfer under Section 9.2 unless and until the following conditions are satisfied:

(a) Except in the case of a Transfer involuntarily by operation of law, the transferor and transferee shall execute and deliver to the Company such documents and instruments of conveyance as may be reasonably necessary or appropriate in the opinion of counsel to the Company to effect such Transfer. In the case of a Transfer of a Membership Interest involuntarily by operation of law, the Transfer shall be confirmed by presentation to the Company of legal evidence of such Transfer, in form and substance satisfactory to counsel to the Company. In all cases, the transferor and or transferee shall reimburse the Company for all costs and expenses that the Company reasonably incurs in connection with such Transfer.

(b) The transferor and transferee shall furnish the Company with the transferee's taxpayer identification number and any other information reasonably necessary to permit the Company to file all required federal and state tax returns and other legally required information statements or returns. Without limiting the generality of the foregoing, the Company shall not be required to make any distribution otherwise provided for in this Agreement with respect to any transferred Membership Interest until it has received such information.

(c) Except in the case of a Transfer of a Membership Interest involuntarily by operation of law, either (i) such Membership Interest shall be registered under the Securities Act and any applicable state securities laws or (ii) the transferor shall provide (unless waived by the Management Committee) an opinion of counsel which opinion and counsel shall be reasonably satisfactory to the Management Committee to the effect that such Transfer is exempt from all applicable registration requirements and that such Transfer will not violate any applicable laws regulating the Transfer of securities.

(d) Prior to any such transfer, the Transferee shall deliver to each Member a written commitment from such Transferee to be bound by this Agreement and complies with the applicable provisions of Section 9.6.

REDACTED

(e) The Transferee receives the prior written consent of each other Member if the transfer would cause the Company to terminate under Section 708(b)(1)(B) of the Code and the Regulations thereunder solely as a result of such Transfer.

9.4 Prohibited Transfers. Any purported Transfer of a Membership Interest that is not permitted by the terms of this Agreement shall be null and void and of no force or effect whatever; provided that, if the Company is required as a matter of law to recognize a Transfer that is not a Transfer permitted by the terms of this Agreement (unless the Management Committee, in its sole discretion and by unanimous action or consent, elects to recognize a Transfer that is not a Transfer permitted by the terms of this Agreement), the Membership Interest Transferred shall be strictly limited to the transferor's rights to allocations and distributions as provided by this Agreement with respect to the transferred Membership Interest, which allocations and distributions may be applied (without limiting any other legal or equitable rights of the Company) to satisfy any debts, obligations, or liabilities for damages that the transferor or transferee of such Membership Interest may have to the Company.

In the case of a Transfer or attempted Transfer of a Membership Interest that is not a Transfer permitted by the terms of this Agreement, the parties engaging or attempting to engage in such Transfer shall be liable to indemnify, and hold harmless the Company and the other Members from all cost, liability, and damage that any of such indemnified Person may incur (including, without limitation, incremental tax liabilities, attorneys' fees, fees of experts and accountants, and expenses) as a result of such Transfer or attempted Transfer and efforts to enforce the indemnity granted hereby.

9.5 Rights of Unadmitted Assignees. A Person who acquires a Membership Interest, but who is not admitted as a substituted Member pursuant to Section 9.6 shall be entitled only to allocations and distributions with respect to such Membership Interest in accordance with this Agreement, and shall have no right to any information or accounting of the affairs of the Company, shall not be entitled to inspect the books or records of the Company, and shall not have any of the rights of a Member under the Act or this Agreement but shall succeed to all of the obligations of the Member who purported to transfer a Membership Interest in violation hereof including without limitation the obligation of the transferee under this Section 9 with respect to any subsequent transfers.

9.6 Admission of New and Substituted Members. Subject to the other provisions of this Article 9, a transferee or acquiree of a Membership Interest shall be admitted to the Company as a new or substituted Member upon satisfaction of the conditions set forth in this Section 9.6:

(a) The Membership Interest with respect to which the transferee is being admitted was acquired by means of a Transfer permitted by the terms of this Agreement.

(b) The transferee of the Membership Interest (other than, with respect to clauses (i) and (ii) below, a transferee that was a Member or a Wholly-Owned Affiliate of a Member prior to the Transfer) shall, by written instrument in form and substance reasonably satisfactory to the Management Committee (and, in the case of clause (iii) below, the transferor Member), (i) make customary representations and warranties to each non-transferring Member as

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to its due organization, authority to become a party to this Agreement, litigation and required consents, (ii) accept and adopt the terms and provisions of this Agreement, including this Section 9 and Section 10, and (iii) assume the obligations of the transferor Member under this Agreement with respect to the transferred Membership Interest. Upon unanimous agreement of all Members, a transferor Member transferring all but not less than all of its Membership Interest to any Permitted Transferee shall be released from all such assumed obligations except (x) those obligations or liabilities of the transferor Member arising out of a breach of this Agreement, and (y) in the case of a Transfer to any Person other than a Member or any of its Affiliates, those obligations or liabilities of the transferor Member based on events occurring, arising or maturing prior to the date of Transfer.

(c) A new Member acquiring a Membership Interest from the Company shall by written instrument in form and substance reasonably satisfactory to the Management Committee (i) make representations and warranties to the Members equivalent to those set forth in Section 9.6(b)(i) and (ii) accept and adopt the terms and provisions of this Agreement.

(d) The transferee or acquiree pays or reimburses the Company for all reasonable legal, filing, and publication costs that the Company incurs in connection with the admission of the transferee or acquiree as a Member with respect to the Transferred Membership Interest.

(e) Except in the case of a Transfer involuntarily by operation of law, if required by the Management Committee, the transferee (other than a transferee that was a Member or a Wholly-Owned Affiliate of a Member prior to the Transfer) shall deliver to the Company evidence of the authority of such Person to become a Member and to be bound by all of the terms and conditions of this Agreement, and the transferee and transferor shall each execute and deliver such other instruments as the Management Committee reasonably deems necessary or appropriate to effect, and as a condition to, such Transfer, including amendments to the Certificate or any other instrument filed with the State of Delaware or any other state or governmental authority. In the event of an involuntary Transfer by operation of law the transferee shall succeed to all of the obligations of the transferring Member under this Agreement but shall not have any rights (including rights with respect to Management Committee membership or under Section 9) other than with respect to allocations or distributions under this Agreement.

9.7 Representations Regarding Transfers; Legend. Each Member hereby represents and warrants to the Company and the Members that such Member's acquisition of a Membership Interest hereunder is made as principal for such Member's own account and not for resale or distribution of such Membership Interest. Each Member further hereby agrees that the following legends may be placed upon any counterpart of this Agreement, the Certificate of Formation, or any other document or instrument evidencing ownership of a Membership Interest:

> The Membership Interest represented by this document has not been registered under any securities laws and the transferability of such Membership Interest is restricted. Such Membership Interest may not be sold, assigned, or transferred, nor will any assignee, vendee, transferee, or endorsee thereof be recognized as

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having acquired any such Membership Interest by the issuer for any purposes, unless (1) a registration statement under the United States Securities Act of 1933, as amended, with respect to such Membership Interest shall then be in effect and such transfer has been qualified under all applicable state securities laws or (2) the availability of an exemption from such registration and qualification shall be established to the satisfaction of counsel to the Company; and

The Membership Interest represented by this document is subject to, and is transferable only upon compliance with, the provisions of a limited liability company agreement, dated as of [ ], 2006. A copy of the above-referenced agreement is on file at the principal office of the Company.

9.8 Line Option Call Right. Upon NS' delivery, in accordance with Section 10.10(g) of the Transaction Agreement, of a Line Option Exercise Notice (as such term is defined in the Transaction Agreement) stating its election to acquire the KCS Membership Interests (as such term is defined in the Transaction Agreement) pursuant to Section 10.10(a)(i) thereof, the NS Member shall have the right to acquire or cause the Company to acquire the KCS Member's Membership Interests (the "Line Option Call Right") as follows:

(a) Purchase Price. If the NS Member delivers such a Line Option Exercise Notice, then the NS Member agrees to buy (or cause one or more of its Subsidiar(ies) to buy) and the KCS Member agrees to sell the KCS Member's Membership Interests, for the Membership Interest FMV (as such term is defined in the Transaction Agreement).

(b) Permitted Transfer; Closing. Promptly following the exercise of the Line Option Call Right, the Members shall take all actions reasonable and necessary to effect a Permitted Transfer of all of the Membership Interests of the KCS Member to the NS Member pursuant to this Section 9.8, including entering into of a transaction agreement with respect to such Permitted Transfer (the "Line Option Call Agreement") reflecting the key terms set forth in this Section 9.8 and otherwise containing representations, warranties, covenants and indemnities with respect to the Membership Interests of the KCS Member with terms at least as favorable to NS and its Subsidiaries as are set forth in the Transaction Agreement with respect to the Line and the Assets. Notwithstanding anything to the contrary contained herein, the completion of such sale pursuant to the Line Option Call Right and in accordance with the terms of the Line Option Call Agreement (the "Line Option Call Closing") shall occur, and the NS Member shall pay the Membership Interest FMV to the KCS Member, on a date (the "Line Option Call Closing Date") to be mutually agreed between the KCS Member and the NS Member, but in no event later than the later of (i) ninety (90) days after the delivery date of the Line Option Call Notice and (ii) five Business Days after the date on which the last of any required regulatory approvals in connection with such transaction is received. All payments of the Membership Interest FMV shall be made by wire transfer of immediately available funds to an account or accounts specified by the intended recipients. Upon the request of the NS Member, at the Line Option Call Closing, the KCS Member shall cause their respective representatives on the Management Committee to resign therefrom. The KCS Membership Interests shall be conveyed to the NS Member (or its designated Subsidiar(ies)) subject only to Permitted Liens (as defined in the Transaction Agreement) and the KCS Member shall be responsible for the payment of all transfer, filing and

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recording taxes in connection with the exercise of the Line Option with respect to the KCS Membership Interests and the conveyance of such interests.

SECTION 10
EVENTS OF DEFAULT

10.1 Events of Default. The following acts shall constitute an Event of Default hereunder:

(a) A Transfer by any Member that is not a Permitted Transfer;

(b) Failure of any Member to materially comply with any material covenant or agreement hereunder in accordance with its terms within thirty (30) days after receipt of notice thereof; or

(c) The Bankruptcy of any Member.

10.2 Remedies Upon an Event of Default. If an Event of Default has occurred and is continuing:

(a) The non-defaulting Members may seek specific performance of any covenant or agreement contained herein, or seek to enjoin the breach of any covenant or agreement. It is acknowledged that in such event it would be impossible to measure in money the damages that would be suffered if the parties hereto fail to comply with any of the obligations imposed herein on them and that, in the event of any such failure, an aggrieved party hereto will be irreparably damaged and will not have an adequate remedy at law. In addition to being entitled to exercise all rights granted by law, any such party shall therefore, be entitled to equitable relief from any court having jurisdiction over such dispute, and if any action should be brought in equity to enforce any of the provisions of this Agreement, none of the parties shall raise the defense that there is an inadequate remedy at law; and

(b) Each non-defaulting Member shall be entitled to recover from the defaulting Member in an appropriate proceeding any and all claims, damages, losses, liabilities and expenses of whatever nature (including reasonable attorneys' fees and disbursements) (collectively, "Damages") suffered or incurred by the Company or the non-defaulting Members as a result of such Event of Default. No punitive damages shall be awarded as a result of an Event of Default hereunder.

(c) If the Event of Default arises from the Bankruptcy of a Member, no less than five Business Days after the commencement of a Bankruptcy proceeding, whether Voluntary or Involuntary, such Member shall provide notice of its offer to sell to all non-defaulting Members (the "Default Sale Notice") all but not less than all of the Membership Interest of the Company held by such defaulting Member. Each non-defaulting Member shall have the option within forty-five days of receiving the Default Sale Notice (the "Acceptance Period") to purchase all, but not less than all, of its pro rata share (based on the number of Membership Interest held by such non-defaulting Member as compared to the total number of Membership Interest held by all non-defaulting Members) of the Membership Interest offered.

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The price of the Membership Interest offered by the defaulting Member shall be the Fair Value of such Membership Interest less any Damages incurred by the non-defaulting Member that are recoverable pursuant to Section 10.2(b). If such offer to purchase is accepted, and at least two Members remain, such Bankruptcy shall not be a Dissolution Event.

(d) Each non-defaulting Member shall if it so desires, exercise its rights under Section 10.2(c) by delivering to the defaulting Member written notice of election (the "Acceptance Agreement") prior to 5:00 p.m., Eastern standard time, on or before the last day of the Acceptance Period. By delivering the Acceptance Agreement, the non-defaulting Member agrees to purchase, and the defaulting Member agrees to sell, that portion of the defaulting Member's Membership Interest which corresponds to the non-defaulting Member's pro rata share. The Acceptance Agreement shall identify the committed source of financing for such purchase or provide evidence that the non-defaulting Member is able to effect the purchase.

The completion of the sale pursuant to Section 10.2(c) shall occur on a date to be mutually agreed between the defaulting Member and the non-defaulting Member, but in no event later than five Business Days after the latter of (i) the delivery date of the Acceptance Agreement or (ii) the date on which the last of any required regulatory approvals in connection with such transaction is received. All payments of the purchase price for a transaction pursuant to Section 10.2(c) shall be made by wire transfer of immediately available funds to an account or accounts designated by the defaulting Member for such purpose.

(e) If the Event of Default arises from a Transfer that is not a Permitted Transfer, the transferring Member shall take or cause to be taken all action necessary to reverse such Transfer.

(f) In addition to the foregoing remedies, each defaulting Member hereby agrees to indemnify, defend and hold harmless each non-defaulting Member, its Affiliates and their respective partners, officers, directors, agents, representatives, employees and trustees ("Indemnified Parties") from and against all Damages arising out of or related to such Event of Default.

SECTION 11
DISSOLUTION AND WINDING UP

11.1 Dissolution Events. The Company shall dissolve and shall commence winding up and liquidating upon the first to occur of any of the following (each a "Dissolution Event"):

(i) The unanimous vote of the Members to dissolve, wind up, and liquidate the Company; or

(ii) A judicial dissolution under Section 18-802 of the Act.

The Members hereby agree that, notwithstanding any provision of the Act, the Company shall not dissolve prior to the occurrence of a Dissolution Event.

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11.2 Winding Up. Upon the occurrence of a Dissolution Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Members, and no Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's business and affairs, provided that all covenants contained in this Agreement and obligations provided for in this Agreement shall continue to be fully binding upon the Members until such time as the Property has been distributed pursuant to this Section 11.2 and the Certificate of Formation has been canceled pursuant to the Act. The Liquidator shall be responsible for overseeing the winding up and dissolution of the Company, which winding up and dissolution shall be completed within ninety days of the occurrence of the Dissolution Event. The Liquidator shall take full account of the Company's liabilities and Property and shall cause the Property or the proceeds from the sale thereof, to the extent sufficient therefor, to be applied and distributed, to the maximum extent permitted by law, in the following order:

(a) First, to creditors (including Members and Committee Representatives who are creditors, to the extent otherwise permitted by law) in satisfaction of all of the Company's debts and other liabilities (whether by payment or the making of reasonable provision for payment thereof), other than liabilities for which reasonable provision for payment has been made;

(b) Second, except as provided in this Agreement, to Members and former Members of the Company in satisfaction of liabilities for distribution under the Act;

(c) The balance, if any, to the Members in accordance with their positive Capital Account balances (after taking into account all adjustments thereto for contributions, distributions and allocations for the year of dissolution and all prior periods) to the extent thereof and then to the Members pro rata in accordance with their Percentage Interests.

Members or Committee Representatives may receive reasonable compensation for any services performed pursuant to this Section 11.

11.3 Compliance With Certain Requirements of Regulations; Deficit Capital Accounts. In the event the Company is "liquidated" within the meaning of Regulations Section 1.704-1(b)(2)(ii)(*g*), and any Member has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all Fiscal Years, including the Fiscal Year during which such liquidation occurs), such Member shall have no obligation to make any contribution to the capital of the Company with respect to such deficit, and such deficit shall not be considered a debt owed to the company or to any other Person for any purpose whatsoever. In the discretion of the Liquidator, a pro rata portion of the distributions that would otherwise be made to the Members pursuant to this Section 11 may be:

(a) Distributed to a trust established for the benefit of the Members for the purposes of liquidating Company assets, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the Liquidator, in the same proportions as the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to Section 11.2; or

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(b) Withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to reflect the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

11.4 Distributions in Kind. Any non-cash asset distributed to one or more Members shall first be valued at its Fair Value to determine Profit and Loss that would have resulted if such asset were sold for such value. Such Profit or Loss shall then be allocated to reflect such allocation.

11.5 Rights of Members. In the event of any distribution of Property in accordance with Section 11 hereof, no Member shall have any right or power to demand or receive Property other than cash from the Company. If the assets of the Company remaining after payment or discharge of the debts or liabilities of the Company are insufficient to return such Capital Contributions, the Members shall have no recourse against the Company or any other Member or Committee Representative.

11.6 Notice of Dissolution/Termination.

(a) In the event a Dissolution Event occurs, the Management Committee shall promptly, but in no event later than seven (7) days thereafter, provide written notice thereof to each of the Members.

(b) Upon completion of the distribution of the Company's Property as provided in this Section 11, the Company shall be terminated, and the Liquidator shall cause the filing of the Certificate of Cancellation pursuant to the Act and shall take all such other actions as may be necessary to terminate the Company.

11.7 Allocations During Period of Liquidation. During the period commencing on the first day of the Fiscal Year during which a Dissolution Event occurs and ending on the date on which all of the assets of the Company have been distributed to the Members pursuant to Section 11.2 (the "Liquidation Period"), the Members shall continue to share Profits, Losses, gain, loss and other items of Company income, gain, loss or deduction in the manner provided in Section 3.

11.8 Character of Liquidating Distributions. All payments made in liquidation of the interest of a Member in the Company shall be made in exchange for the interest of such Member in Property pursuant to Section 736(b)(1) of the Code, including the interest of such Member in Company goodwill.

11.9 The Liquidator.

(a) Definition. The "Liquidator" shall mean a Person appointed by the unanimous vote of the Members to oversee the liquidation of the Company.

REDACTED

(b) Fees. The Company is authorized to pay a reasonable fee to the Liquidator for its services performed pursuant to this Section 11 and to reimburse the Liquidator for its reasonable costs and expenses incurred in performing those services.

(c) Indemnification. The Company shall indemnify, save harmless, and pay all judgments and claims against such Liquidator or any officers, directors, agents or employees of the Liquidator relating to any liability or damage incurred by reason of any act performed or omitted to be performed by the Liquidator, or any officers, directors, agents or employees of the Liquidator in connection with the liquidation of the Company, including reasonable attorneys' fees incurred by the Liquidator, officer, director, agent or employee in connection with the defense of any action based on any such act or omission, which attorneys' fees may be paid as incurred, except to the extent such liability or damage is caused by the fraud, intentional misconduct of, or a knowing violation of the laws by the Liquidator which was material to the cause of action.

SECTION 12
MISCELLANEOUS

12.1 Notices. Any notice, payment, demand, or communication required or permitted to be given by any provision of this Agreement shall be in writing and shall be deemed to have been delivered, given, and received for all purposes (i) if delivered personally to the Person or to an officer of the Person to whom the same is directed or (ii) when the same is actually received, if sent either by express delivery service or registered or certified mail, postage and charges prepaid and return receipt requested, or by facsimile, if such facsimile is followed by a hard copy of the facsimile communication sent promptly thereafter by registered or certified mail, postage and charges prepaid, addressed as follows or to such other address as such Person may from time to time specify, by notice to the Members and Committee Representatives:

If to the Company:	Meridian Speedway, LLC 427 West 12th Street Kansas City, Missouri 64105 Facsimile: (816) 983-1227
With a copy to the NS Member and the KCS Member	
If to NS Member:	The Alabama Great Southern Railroad Company c/o Norfolk Southern Corporation Three Commercial Place Norfolk, Virginia 23510 Attention: James A. Squires, Esq. Facsimile: (757) 533-4872
With a copy to:	Skadden, Arps, Slate, Meagher & Flom LLP

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4 Times Square
New York, New York 10036-6522
Attention: Eric J. Friedman, Esq.
Facsimile: (212) 735-2000

If to the KCS Member:

Kansas City Southern
427 West 12th Street
Kansas City, Missouri 64105
Attention: Robert B. Terry, Esq.
Facsimile: (816) 983-1227

With a copy to:

Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Attention: John F. Marvin, Esq.
Facsimile: (816) 531-7545

12.2 Certificates.

(a) Right of the Management Committee to Issue Certificates. If at any time the Management Committee determines that it is in the best interests of the Company to issue certificates attesting to the ownership of Membership Interest in the Company by its Members, the provisions of this Section shall thereafter apply (and prior to such determination by the Management Committee, if any, this Section shall have no force or effect).

(b) Form of Certificates. Certificates attesting to the ownership of interests in the Company shall be in such form as shall be approved unanimously by the Management Committee and shall state that the Company is a limited liability company formed under the laws of the State of Delaware, the name of the Member to whom such certificate is issued and that the certificates represent limited liability company interests within the meaning of the Act. Each such certificate shall be signed by one Committee Representative appointed by the KCS Member and one Committee Member appointed by the NS Member and shall include the legends referred to in Section 9.7.

(c) Register. The transfer register or transfer books and blank share certificates shall be kept by the Secretary of the Company or by any transfer agent or registrar designated by the Management Committee for that purpose.

(d) Issuance. The certificates of the Company shall be numbered and registered in the share register or transfer books of the Company as they are issued.

(e) Transfer. Subject to all provisions hereof relating to Transfers of Membership Interest, if the Company shall issue certificates in accordance with the provisions of this Section, Transfers of Membership Interests shall be made on the register or transfer books of the Company upon surrender of the certificate therefor, endorsed by the Person named in the certificate or by an attorney lawfully constituted in writing.

REDACTED

(f) Record Holder. Except to the extent that the Company shall have received written notice of an assignment of a Membership Interest in the Company, the Company shall be entitled to treat the Person in whose name any certificates issued by the Company stand on the books of the Company as the absolute owner thereof, and shall not be bound to recognize any equitable or other claim to, or interest in, such Membership Interest on the part of any other Person.

(g) Lost Destroyed or Mutilated Certificates. The holder of any certificates issued by the Company shall promptly notify the Company of any loss, destruction or mutilation of such certificates, and the Management Committee may cause a new certificate or certificates to be issued to such holder, in case of mutilation of the certificate upon the surrender of the mutilated certificate or, in case of loss or destruction of the certificate, upon satisfactory proof of such loss or destruction and, if the Management Committee shall so determine, the granting of an indemnity and/or the deposit of a bond in such form and in such sum, and with such surety or sureties, as the Management Committee may direct.

12.3 Binding Effect. Except as otherwise provided in this Agreement every covenant, term and provision of this Agreement shall be binding upon and inure to the benefit of the Members and their respective successors, transferees and assigns.

12.4 Time. In computing any period of time pursuant to this Agreement, the day of the act, event or default from which the designated period of time begins to run shall not be included, but the time shall begin to run on the next succeeding day. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday.

12.5 Headings. Section and other headings contained in this Agreement are for reference purposes only and are not intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any provision hereof.

12.6 Prior Agreements. This Agreement, the JV Transaction Agreements and the Certificate of Formation supersede all prior agreements among the parties hereto, written or oral, with respect to the operation of the Company or the transactions referred to herein and specifically any and all term sheets prepared in respect of such transactions.

12.7 Severability. Except as otherwise provided in the succeeding sentence, every provision of this Agreement is intended to be severable, and, if any term or provision of this Agreement is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity or legality of the remainder of this Agreement. The preceding sentence of this Section 12.7 shall be of no force or effect if the consequence of enforcing the remainder of this Agreement without such illegal or invalid term or provision would be to cause any Member to lose the material benefit of its economic bargain.

12.8 Incorporation by Reference. Every exhibit and other appendix attached to this Agreement and referred to herein is incorporated in this Agreement by reference unless this Agreement expressly otherwise provides.

REDACTED

12.9 Variation of Terms. All terms and any variations thereof shall be deemed to refer to masculine, feminine, or neuter, similar or plural, as the identity of the Person or Persons may require.

12.10 Counterpart Execution. This Agreement may be executed in any number of counterparts with the same effect as if all of the Members had signed the same document. All counterparts shall be construed together and shall constitute one agreement.

12.11 Third Party Beneficiaries. Except for Indemnified Persons, this Agreement shall not benefit or create any right or cause of action in or on behalf of any Person other than the parties hereto.

12.12 GOVERNING LAW. THE LAWS OF THE STATE OF DELAWARE SHALL GOVERN THE VALIDITY OF THIS AGREEMENT, THE CONSTRUCTION OF ITS TERMS AND THE INTERPRETATION OF THE RIGHTS AND DUTIES ARISING HEREUNDER.

12.13 Submission to Jurisdiction. Subject to Section 12.14 herein, each of the parties hereto hereby (i) consents to submit itself to the exclusive jurisdiction of any Federal or state court located in the State of Delaware (the "Delaware Courts") in any action to enforce or in aid of the agreement to arbitrate in Section 12.14 herein or for provisional relief to maintain the status quo or prevent irreparable harm pending the appointment of the arbitrators, and to the non-exclusive jurisdiction of the Delaware Courts for enforcement of any award issued hereunder (ii) agrees that it will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court, and (iii) waives any objection based on forum non conveniens or any other objection to venue thereof.

12.14 Dispute Resolution. Except as provided in Section 10.2, each of the parties hereto stipulates and agrees that any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof ("Dispute") that is not resolved by negotiations between senior officers of the parties within sixty (60) days after receipt by a party of written notice ("Notice") of such Dispute, will be submitted to mediation in accordance with the Commercial Mediation Procedures of the AAA. If such dispute is not resolved within twenty (20) days after appointment of a mediator, or within sixty (60) days of receipt of Notice (whichever comes sooner), each of the parties hereto agrees that, at the demand of any party, such Dispute will be submitted to mandatory and binding arbitration, in New York, New York by three arbitrators, under the Commercial Arbitration Rules and the Large Complex Case Procedures of the AAA then in effect (the "Rules"), under the following terms and conditions:

(a) Selection of Arbitrator. A panel of three independent arbitrators shall be appointed by the AAA using the listing, ranking and striking procedure in the Rules. Any arbitrator appointed by the AAA shall be a retired judge or a practicing attorney with no less than fifteen years of experience with large commercial cases and an experienced arbitrator.

(b) Conduct of Arbitration. The arbitration shall be held and the award shall be issued in New York, New York. In addition to Damages, the arbitral tribunal may

REDACTED

award any remedy provided for under applicable law and the terms of this Agreement, including, without limitation, specific performance or other forms of injunctive relief. The arbitrators shall apply the law of the State of Delaware to the substance of the Dispute and will have no power or authority, under the rules of the AAA or otherwise, to amend or disregard any provision of this Agreement.

(c) Replacement of Arbitrator(s). Should any of the arbitrator(s) refuse or be unable to proceed with arbitration proceedings, replacement arbitrator(s) will be selected using the same method of selection as the original arbitrator(s).

(d) Findings and Conclusions. The arbitrators will, after reaching judgment and award, prepare and distribute to the parties a written award including the findings of fact and conclusions of law relevant to such award and containing an opinion setting forth the reasons for the giving or denial of any award.

(e) Time is of the Essence. The arbitrators are hereby instructed that time is of the essence in the arbitration proceeding, and that the arbitrators will have the right and authority to issue monetary sanctions against any party if, upon a showing that such party is unreasonably delaying the proceeding.

(f) Temporary Equitable Relief. By agreeing to arbitration, the parties do not intend to deprive any Delaware Court of its jurisdiction to issue a pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings and the enforcement of any award. Without prejudice to such provisional remedies as may be available under the jurisdiction of a Delaware Court, the arbitral tribunal shall have full authority to grant provisional remedies and to direct the parties to request that any court modify or vacate any temporary or preliminary relief issued by such court, and to award Damages for the failure of any party to respect the arbitral tribunal's orders to that effect.

(g) Consolidation. The Parties are committed to the prompt and efficient resolution of disputes. Accordingly, if one or more disputes arises under this Agreement and/or any JV Transaction Agreement, such disputes may be brought in a single arbitration. If more than one arbitration is brought with respect to disputes under this Agreement and/or any JV Transaction Agreement, then any Party may request that any arbitration or any new dispute arising under this Agreement or the JV Agreement be consolidated into any prior arbitration. The new dispute or arbitration shall be so consolidated, provided that the arbitral tribunal for the prior (or first filed) arbitration determines that (i) the new dispute or arbitration presents significant issues of law or fact common with those in the pending arbitration; (ii) no Party would be unduly prejudiced and (iii) consolidation under such circumstances would not result in undue delay for the prior arbitration. Any order of consolidation issued by such arbitral tribunal shall be final and binding upon the parties. Unless the parties otherwise agree, the arbitral tribunal appointed first in time shall serve as the arbitral tribunal for the consolidated arbitration. The Parties waive any right they have to appeal or to seek interpretation, revision or annulment of such order of consolidation under the Rules or in any court. The Parties agree that upon such an order of consolidation, they will promptly dismiss any arbitration brought under this Agreement, the subject of which has been consolidated into another arbitral proceeding.

REDACTED

(h) Discovery. Recognizing the express desire of the parties for an expeditious means of dispute resolution, the arbitrators will allow for limited discovery as may be reasonable under the circumstances.

(i) Costs and Attorneys' Fees. Notwithstanding any rule of the AAA to the contrary, the arbitrators rendering judgment under this Section 12.14 will have the power to award the costs of the arbitration, including reasonable attorneys' fees and expenses to the prevailing party or parties in the arbitration. In any action to enforce this agreement to arbitrate or any arbitral award rendered hereunder, the court may award costs and attorneys' fees against the party resisting enforcement.

12.15 Confidentiality. Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or in connection with an audit by the Internal Revenue Service or other tax authority, or as may be necessary or appropriate for a Member hereto to enforce its rights under this Agreement, during the term of this Agreement (including any extensions thereof), and for a period of three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Member to any person other than members, officers, employees, independent auditors, and attorneys, without the prior written approval of the other Member.

[Remainder of page intentionally left blank.]

REDACTED

IN WITNESS WHEREOF, the parties have executed and entered into this Agreement as of the day first above set forth.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,
an Alabama corporation

By: _____
Name:
Title:

KANSAS CITY SOUTHERN,
a Delaware corporation

By: _____
Name:
Title:

REDACTED

Exhibit B

Proposed Capital Projects

[See attached.]

REDACTED

Exhibit C

Percentage Interests of the Members

Member	Percentage Interest
KCS Member	[ ]*
NS Member	[ ]*

* To be determined in accordance with Sections 1 and 2 of Schedule 2.1(a) to the Transaction Agreement.

REDACTED

Exhibit D

PRE-CLOSING CAPITAL EXPENDITURES

PROJECT DESCRIPTION	EST. PRE-CLOSING COSTS
CTC (East Bovay, LA to East Bosier, LA): Engineering, material and begins the grading for Signal Houses and signal mast	$ 4,000,000
Jackson, MS High Oak Yard By Pass Track: Engineering, permitting, Property and track material purchase and begins the grading and drainage	$ 2,000,000
Simsboro Drill Track: Engineering, permitting, Property and track material purchase and begins the grading and drainage	$ 2,000,000
Monroe, LA Ouachita River Swing Bridge: Preliminary engineering including geotechnical, permitting, environmental and bridge concept plans and estimates	$ 500,000
Meehan Siding: Engineering, permitting, Property and track material purchase and begins the grading and drainage	$ 1,500,000
Stevens Siding: Engineering, permitting, Property and track material purchase and begins the grading and drainage	$ 1,500,000
Raworth Siding: Engineering, permitting, Property and track material purchase and begins the grading and drainage	$ 1,500,000
Bridge Rehabilitation / Replacement: Engineering, permitting, Property and material purchase and begins some construction	$ 2,000,000
Rail Replacement (30miles in 2006): Purchase of material, transportation, welding, and begin installation	$ 4,000,000
Tie Replacement (38 miles in 2006): Purchase of material, transportation, and unloading.	$ 1,000,000
TOTAL:	**$20,000,000**

REDACTED

Exhibit 2.2

Capital Accounts of the Members

Member	Capital Account
	[
KCS Member	
	]
NS Member	$[ ]**

* [ ]

** [ ]

REDACTED

Exhibit 5.2(b)

Initial Committee Representative

NS Member Designees:
C. Wick Moorman
Kathryn B. McQuade

KCS Member Designees:
Larry Lawrence
Robert Terry
Jerry Havein
Mike Chapman

REDACTED

Exhibit 5.3(b)(i)

Initial Members of Capital Project Committee

NS Member Designee:
David A. Brown

KCS Member Designees:
Jerry Havein
Mike Chapman

REDACTED

Exhibit 5.3(b)(ii)

Capital Expenditure Protocols

Normalized capital maintenance includes anything used to keep the existing track structure going as a result of normal wear and tear. It may also include some betterment if the asset being replaced is obsolete and technology has improved it.

> **Recovery Method** — The Company shall maintain depreciation as a cash reserve, available for borrowing by KCS or NS.
>
> **Allocation Method** — For the first two years, capital maintenance shall be allocated to the Members on the basis of gross ton miles operated pursuant to the NSR Joint Use Agreement and the KCS Joint Use Agreement. After the first two years, the Company shall allocate normalized capital maintenance to the Members on the basis of resistance miles, an Eyeris tool that takes into account miles, grade, curve, weight, and speed to better depict the wear and tear on the track.
>
> **Deficits** — If the Recovery Method does not reserve sufficient funds for normalized capital maintenance, then the Company shall initiate a capital call on the basis of resistance miles at the time normalized capital maintenance actually is performed without sufficient funds in reserve.

Capacity projects shall include new assets that do not replace existing assets, such a new siding, a turnout, or a new technology that is not a replacement.

> **Recovery and Allocation Method** — Except as provided in Sections 5.12 and 5.13, capacity expansion projects will be funded by a joint capital call unless a Member objects that the capacity expansion is for the sole benefit of the traffic of the other partner. If such an objection occurs, the Members agree to defer to a dispute resolution involving system modeling, such as RTC. If material benefits are found to accrue to the service and transit time of only one partner, that partner shall bare the sole cost.

The Vicksburg Bridge is in a separate category because of its magnitude. If the bridge must be rebuilt, the Members shall bear the cost according to their percentage interest.

REDACTED

Exhibit 5.7(a)

Approved Budget and Business Plan

[See attached.]

REDACTED

Exhibit 5.7(b)

Approved Investment Policies

The Vice President and Treasurer of Meridian Speedway, LLC (the "Company"), or his or her delegate, is authorized to purchase and sell from time to time on behalf of the Company the classes of United States dollar securities, described herein, subject to the specified limitations and ratings, and subject to any limitations that may be fixed from time to time by the Management Committee of the Company.

Securities in the short-term portfolio will consist of those maturing not later than one year from date of purchase. Securities in the intermediate-term portfolio will consist of those maturing from one to five years from date of purchase.

I. SHORT-TERM PORTFOLIO

Investments and Credit Quality (See Item 11 this section)

1. U.S. Treasury obligations
2. Federal Agency obligations
3. Bank obligations (Domestic and Eurodollar)
   - U.S. and foreign banks: Time deposits, money market demand accounts, certificates of deposit, bankers' acceptances, letter of credit-backed paper, and commercial paper issued by domestic bank holding companies and foreign bank owned funding subsidiaries.
   - Minimum equity of $500 million for U.S. banks; $1 billion for foreign banks.
   - Thompson Financial Services rating of B/C (domestic banks) or II/III (foreign banks).
   - Moody's Aa long-term deposit rating, or Moody's Aa or S&P AA or Fitch long-term debt ratings. A1/P1 ratings on short-term deposits and commercial paper. In the absence of long-term ratings, Thompson Financial Services' ratings are acceptable.
4. Commercial Paper (U. S. and non-U.S.) Asset-backed and non asset-backed
   - Long-term debt ratings of Aa/AA, short-term ratings of A1/P1. If an issuer does not have a long-term debt rating, S&P common stock rating of A or better may be substituted for this debt requirement. In the case of asset-backed paper, the issuer may be backed by a letter of credit from a financial institution with a long-term debt rating of AA or better.
5. Repurchase Agreements
   - Overnight or term repos up to 30-day maturity.
   - Collateral coverage of not less than 102% (based upon current market value plus accrued interest), using Government, federal agencies and obligations of banks which otherwise meet the criteria of this policy.

6. Overnight Institutional Money Market Funds
   a. Minimum equity of $1 billion.

REDACTED

b. Money market mutual funds organized under the laws of the United States or any state thereof which have daily pricing and daily redemption features and invest at least ninety percent (90%) of their assets in the investments described in the investment policy.

7. Tax-exempt and taxable municipal securities –

a. General obligation notes; state and municipal authorities, school districts and other revenue notes and bonds; variable rate demand/Put notes and bonds; and Daily, Weekly, Monthly Floaters.

- Long-term debt ratings of Aa by Standard & Poor's, Moody's or Fitch
- Short-term debt ratings of MIG-1/VMIG-1 or SP-1/A-1.
- Long-term ratings of Aa and AA on issues insured by Municipal
- Bond Insurance Association (MBIA); Financial Guaranty Insurance Company (FGIC), and Bond Investors Guaranty Insurance Company (BIG).
- In the case of variable rate/Put bonds, underlying issuer must be
- rated A by at least one of the rating agencies. If the underlying issuer's rating is no higher than A, then the issue must be supported by an irrevocable letter of credit issued by a bank qualifying under
- the above credit quality standards.

b. Tax-exempt commercial paper

- Long-term debt ratings of Aa or AA . or backed by a letter of credit from a financial institution rated AA. commercial paper ratings of A1 or P1.

8. Variable Rate Preferred Stock

- Issuer's equity must meet minimum standards outlined above.
- Long-term debt ratings of Aa/AA.

9. Corporate Obligations

- Floating and fixed rates credit rating by at least one rating agency of AA.

10. Broker LLC private investment funds rated AAA.

11. Credit Quality Exception-

- Long-term rating requirements as stated above are Aa by Moody's and/or AA by Standard and Poor's. This requirement is modified to the extent that up to 25% of total securities in short and intermediate-term portfolios may carry a rating of A by Moody's and/or A by Standard and Poor's or Fitch.

II. INTERMEDIATE-TERM PORTFOLIO

- Credit requirements for these issues must adhere to the same standards as short-term issues. If the total of the short-term and intermediate-term portfolios exceeds $100 million, then no more than 50% of the total investments may be placed in the intermediate-term portfolio.

REDACTED

INVESTMENTS

1. All instruments included in the short-term portfolio.
2. Corporate Notes and Bonds, both Fixed and Floating rates.
3. Corporate Notes and Bonds with Put Features.
   - Puts must be at par and unconditional, date thereof to be considered final maturity date.
4. Eurodollar and Yankee Notes and Bonds.
5. Term Certificates of Deposit issued by U.S. and foreign banks.
6. Floating Rate Instruments –
   a. Domestic and Eurodollar certificates of deposit and notes.
   b. Variable Coupon Renewable Notes.
7. Asset-backed securities, defined as:
   a. Government National Mortgage Association (GNMA) Pass-Through Certificates.
   b. Federal National Mortgage Association (FNMA) Mortgage-Backed Securities.
   c. Federal Home Loan Mortgage Corporation (FHLMC) Participation Certificates.
   d. Collateralized Mortgage Obligations (CMOs) issued by Federal Home Loan Mortgage Corporation and Wall Street dealer-sponsored special purpose corporations.
   e. Auto Loan or Credit Card-backed Notes issued by various finance companies.

III. PORTFOLIO LIMITS

1. U. S. Treasury obligations – no limits.
2. Federal Agency obligations – not more than 50% of the total portfolio.
3. Bank obligations
   a. Any single issuer is limited to 10% of total portfolio.
   b. Total bank related obligations may not exceed 50% of total portfolio.
   c. Foreign bank obligations may not exceed 25% of the total portfolio.
4. Commercial Paper
   a. Any single issuer is limited to 10% of the total portfolio.
   b. Not more than 50% of the total portfolio may be invested in commercial paper.
   c. Not more than 25% of the total portfolio may be invested in foreign commercial paper (excluding foreign bank related commercial paper).
5. Repurchase Agreements
   a. No limits on total repurchase agreements.
   b. Any approved dealer is limited to 10% of total portfolio.
6. Tax-exempt and taxable securities
   a. Any single issuer is limited to 10% of total portfolio.
   b. Total tax-exempt obligations shall not exceed 2%.
7. Variable Rate Preferred Stock

REDACTED

a. Any single issuer is limited to 5% of the total portfolio, with a maximum of 5% of any single issue.
b. Total Variable Rate Preferred Stock may not exceed 10% of the total portfolio.

8. Corporate obligations (other than bank obligations)
   a. Any single issue is limited to 10% of total portfolio.
   b. Corporate obligations may not exceed 50% of total portfolio.
9. Miscellaneous
   a. Obligations of any one industry shall not exceed 25% of the total Portfolio, with the exception of 50% limitation for bank related obligations.
   b. Not more than 5% of the total portfolio may be invested in any category or obligation of any issuer not covered by the limitations or credit standards established above, provided the investment within this limitation are consistent with the objectives of the portfolio.
   c. The total of all securities issued by foreign governments and agencies, foreign supra-national corporations, U.S. subsidiaries of foreign corporations, and foreign banks (including U. S. subsidiaries) shall not exceed 50% of the total portfolio with no more than 10% of the total portfolio invested in any one country.
   d. The total limitations on Federal Agency, Commercial Paper, bank obligations and corporate obligations will not apply when the total of the short-term and intermediate portfolios $200 million or less.
   e. Any single issuer cannot exceed the lesser of $50 million or 10% of the portfolio.

B

REDACTED

EXHIBIT B
to Transaction Agreement

MERIDIAN SPEEDWAY LLC – KANSAS CITY SOUTHERN OPERATING AGREEMENT

THIS AGREEMENT (the "Operating Agreement" or "Agreement") is entered into as of this ____ day of _____, 200__, by and between MERIDIAN SPEEDWAY LLC , a Delaware limited liability company ("MSLLC"), on the one hand, and on the other hand, KANSAS CITY SOUTHERN ("KCS") and THE KANSAS CITY SOUTHERN RAILWAY COMPANY ("KCSR"). MSLLC and KCSR are referred to individually herein as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, KCS, KCSR, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, provided for the creation of MSLLC, the transfer from KCSR to MSLLC of the Subject Trackage, as hereinafter defined, the construction, at MSLLC's cost, of certain infrastructure improvement projects and the performance of an intensive capital maintenance program, and the grant by MSLLC to Norfolk Southern Railway Company ("NSR") and KCSR of certain rights over the entirety of the Subject Trackage; and

WHEREAS, pursuant to the Transaction Agreement, MSLLC has agreed to grant NSR certain trackage and haulage rights for NSR to transport NS Traffic over the Subject Trackage consistent with the NSR Joint Use Agreement; and

WHEREAS, pursuant to the Transaction Agreement, MSLLC has agreed to grant KCSR local and overhead trackage rights as necessary for KCSR to continue to conduct railroad operations over the Subject Trackage and to fulfill its common carrier obligations with respect to all traffic except for the right to transport NS Traffic and Third Party Traffic over the Subject Trackage consistent with the KCSR Joint Use Agreement; and

WHEREAS, the Transaction Agreement anticipates that, pursuant to an Operating Agreement, MSLLC will hire KCSR for the duration of the joint venture to perform as the designated operator ("Designated Operator") for all railroad and other operations of MSLLC, including MSLLC railway operations required pursuant to the KCSR Joint Use Agreement and the NSR Joint Use Agreement, as well as, to perform all general and administrative services required by MSLLC; and

WHEREAS, the Parties desire to set forth the terms and conditions upon which KCSR shall provide services to MSLLC as MSLLC's Designated Operator;

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS

(a) Interpretation Generally.

REDACTED

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(ii) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(iii) The division of this Agreement into sections and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to sections or subsections are to articles, sections or subsections of this Agreement.

(iv) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by such Party and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such Party.

(b) Capitalized Terms.

All capitalized terms shall have the defined meaning set forth below:

"Accounting Conversion Date" shall have the meaning given that term in Section 7(a).

"Agreement" shall have the meaning given that term in the introductory paragraph.

"Ancillary Agreements" shall mean agreements assigned pursuant to the Unified Assignment and Assumption Agreement.

"BNSF" shall have the meaning given that term in the Recitals.

"Claim" or **"Claims"** shall mean any and all claims, demands, losses (including the loss of use), costs (including investigation, remedial and clean-up costs), expenses (including attorneys', consultants' or experts' fees and expenses), judgments, awards, penalties, governmental action (including fines and liens), causes of action, liens, suits or liability of every kind and nature suffered, including for exemplary, special or consequential damages.

"Designated Engineer" shall mean Chief Engineer or designee of NSR or KCSR.

"Designated Operator" shall have the meaning given that term in the Recitals.

"Effective Date" shall have the meaning given that term in Section 10(a).

REDACTED

"**Foreign Railroad**" shall mean a railroad that is not a party to this Agreement.

"**FRA**" shall mean the Federal Railroad Administration.

"**Freight Railroad Services**" shall have the meaning given that term in Section 5.

"**General and Administrative Services**" shall have the meaning given that term in Section 6.

"**Governmental Action**" shall mean any applicable law, rule, regulation or ordinance promulgated by any Governmental Entity having jurisdiction.

"**Governmental Entity**" shall mean any federal, state, local or foreign court, administrative agency or commission or other governmental or regulatory authority or commission or any arbitration tribunal.

"**Infrastructure Improvement Services**" shall have the meaning given that term in Section 4.

"**Infrastructure Improvement Project**" shall have the meaning given that term in Section 4(a)(i).

"**Infrastructure Improvement Project Cost**" shall have the meaning given that term in Section 4(a)(i).

"**Jackson Trackage Rights Section**" shall mean the approximately four-tenths of a mile section of track in Jackson, Mississippi that is controlled by Canadian National (as successor to Illinois Central Gulf Railroad Company pursuant to that certain trackage rights agreement (the "MSR Trackage Rights Agreement"), as supplemented and amended from time to time, dated March 26, 1986, between Midsouth Rail Corporation and Illinois Central Gulf Railroad Company.

"**Joint Operating Committee**" shall have the meaning given that term in the Meridian Speedway LLC Agreement.

"**JOC**" shall mean the Joint Operating Committee.

"**KCSR**" shall have the meaning given that term in the introductory paragraph.

"**KCSR Key Contact**" shall have the meaning given that term in Section 2(j).

"**KCSR Joint Use Agreement**" shall have the meaning given that term in the Recitals.

"**Lien**" shall have the meaning given that term in Section 10(b)(i).

"**LLC Agreement**" shall mean the Limited Liability Company Agreement of MSLLC.

"**Maintenance Services**" shall have the meaning given that term in Section 3.

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"Master KCS-MSLLC Interchange Agreement" shall have the meaning given that term in the Recitals.

"Material Change" shall have the meaning given that term in Section 4(b)(iii).

"MSLLC" shall have the meaning given that term in the introductory paragraph.

"MSR Trackage Rights Agreement" shall have the meaning given that term in the Recitals.

"Monthly Statement" shall have the meaning given that term in Section 10(n)(ii).

"NSC" shall have the meaning given that term in the Recitals.

"NSR" shall have the meaning given that term in the Recitals.

"NSR Joint Use Agreement" shall have the meaning given that term in the Recitals.

"NSR Revenues" shall have the meaning given that term in Section 7(a).

"Operating Agreement" shall have the meaning given that term in the introductory paragraph.

"Parties" shall have the meaning given that term in the introductory paragraph.

"Party" shall have the meaning given that term in the introductory paragraph.

"Plans" shall have the meaning given that term in Section 4(b)(i).

"Revised Infrastructure Improvement Project Cost Estimate" shall have the meaning given that term in Section 4(d)(i).

"**Services**" shall have the meaning given that term in Section 2(a).

"**Subject Trackage**" shall have the meaning given that term in Section 1(c).

"**Third Party Traffic**" shall mean freight rail service provided for a Foreign Railroad under a haulage or trackage rights agreement between MSLLC and the Foreign Railroad.

"Transaction Agreement" shall have the meaning given that term in the Recitals.

"USOA" shall mean the uniform system of accounts prescribed for Class 1 railroads by the STB or any successor federal agency that succeeds to the functions of the STB in prescribing uniform systems of accounts for rail carriers, provided, that if there shall be no STB and no such federal agency, USOA shall mean such system of accounts as is generally maintained by rail carriers consistent with GAAP as applied in the rail industry.

"Work" shall mean all tasks, duties, obligations, services, requirements and activities of whatever kind or nature, express or implied, direct or incidental, to be performed, and all items

tangible and intangible, to be provided by KCSR at the direction of MSLLC, respecting the Infrastructure Improvements pursuant to this Agreement, including but not limited to preliminary engineering design and review, construction, construction monitoring and inspection, and the furnishing of materials, supplies and equipment associated with the Infrastructure Improvement Projects.

(c) Subject Trackage and the Jackson Trackage Rights Section.

A reference to the Subject Trackage shall be:

(i) A reference to the railroad line generally running between Shreveport, LA and Meridian, MS, depicted in Appendix A – Railroad Premises Description, together with the adjacent property of every kind and description, real, personal and mixed, including the right-of-way, roadbed, tracks, track materials, poles, wire lines, signals, and other related facilities, as more fully described in Appendix A– Railroad Premises Description, and generally consisting of all the property conveyed to MSLLC from KCSR pursuant to the Transaction Agreement, excluding the Jackson Trackage Rights Section, and including any newly constructed track if constructed by MSLLC and the Jackson Flyover, if constructed; and

(ii) The Jackson Trackage Rights Section, which consists of that trackage covered by the MSR Trackage Rights Agreement, provided such MSR Trackage Rights Agreement is assigned to MSLLC.

SECTION 2. KCSR AS DESIGNATED OPERATOR

(a) MSLLC hereby retains and engages KCSR, and KCSR agrees to become and act as the Designated Operator for the Subject Trackage to provide all services as necessary or appropriate to conduct the business of MSLLC, which services shall include Maintenance Services, Infrastructure Improvement Services, Freight Railroad Services, and General and Administrative Services, on behalf of MSLLC (collectively, "Services").

(b) It is the intention of the Parties that KCSR be compensated for its fully allocated costs in providing the Services as provided in Section 7. Damages allocated to KCSR due to application of the Uniform Liability Agreement shall not be counted as costs of provision of the Services.

(c) KCSR shall not have any liability to MSLLC or NSR based on KCSR's obligations or performance as the Designated Operator for Claims covered by the Unified Liability Agreement other than as set forth therein. With respect to FELA claims, trespasser claims, employment claims, and claims arising from train operations (including derailments, crossing accidents and collisions), KCSR's liability shall be solely as provided in the Unified Liability Agreement and nothing in this Agreement shall be a basis for any KCSR liability with respect to such claims. With respect to other third party claims, KCSR shall indemnify MSLLC and NSR for any liability caused by KCSR's breach of this Agreement. KCSR shall have no liability under this Agreement other than as set forth specifically in this paragraph (and except for the injunctive remedies provided for in Section 9(a) hereof).

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(d) It is the intention of the Parties that Section 2(a) be read expansively, including the notion that MSLLC hires KCSR to maintain and operate the Subject Trackage as if the Subject Trackage were a continual integral part of KCSR's freight rail system, except to the extent set forth herein and except to the extent that the Services shall be performed on behalf of MSLLC rather than KCSR. In this regard, KCSR shall:

(i) act in accordance with its then-current collective bargaining agreements as if the Subject Trackage was an integral part of the KCSR railroad network;

(ii) observe and comply with any and all requirements of the constituted public authorities and with all applicable federal, state and local statutes, ordinances, regulations and standards applicable to MSLLC, KCSR or KCSR's operation of the Subject Trackage on behalf of MSLLC; and

(iii) obtain all applicable approvals, authorizations, franchises, licenses, and permits of any Governmental Entity as may be required.

As the Designated Operator, KCSR may execute agreements or other documents on behalf of MSLLC pursuant to appropriate authorization from MSLLC.

(g) KCSR's Relationship to Transported Traffic.

(i) KCSR shall not, pursuant to this Agreement, have any right (although it may have that right independent of this Agreement) to establish rates, charges, service terms, routes or divisions, or to collect freight revenues, relating to freight traffic transported over all or any portion of the Subject Trackage.

(ii) KCSR shall not, pursuant to this Agreement (although it may have that right independent of this Agreement), participate or appear in, or quote or establish, any rates, routes or divisions, or enter into any transportation contracts (other than this Agreement), relating to any freight traffic whatsoever that is transported over all or any portion of the Subject Trackage.

(iii) KCSR shall not, pursuant to this Agreement (although it may have that right independent of this Agreement), have any right to require shippers or carriers to provide to KCSR the nature, level or existence of any rates or charges levied against, charged to or otherwise applicable to shippers for traffic that moves over all or any portion of the Subject Trackage.

(iv) KCSR shall not, by reason of this Agreement (although it may have that responsibility independent of this Agreement), have any responsibility for railcar ownership costs, including per-diem charges and mileage allowances, for car hire, demurrage or detention charges for traffic that moves over all or any portion of the Subject Trackage.

(h) KCSR shall not, by reason of this Agreement, have any right to permit any rail carrier access to operate over or use the Subject Trackage via trackage rights, haulage rights or any other means.

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(i) Access to the Railroad Premises and Provision of Equipment.

MSLLC hereby provides KCSR with access to and use of the Subject Trackage, under the terms and conditions of this Agreement, for the purposes of providing the Services. MSLLC, its members, or their respective designated representatives, shall have the right to enter upon the Subject Trackage upon reasonable notice at any time for the purpose of inspecting and examining the property, the facilities, and the performance of the obligations of KCSR hereunder.

(j) Appointment of a KCSR Key Contact

KCSR promptly shall appoint and maintain a single point of contact ("KCSR Key Contact") to provide MSLLC and its members a single person at KCSR with whom MSLLC and its members may communicate regarding the management, supervision, maintenance, and use of the Subject Trackage. The KCSR Key Contact shall be a member of the Joint Operating Committee ("JOC"), as defined in the LLC Agreement. KCSR shall promptly notify MSLLC and its members of the name and contact information of the KCSR Key Contact, and any replacement thereof.

SECTION 3. MAINTENANCE SERVICES

Maintenance Services shall include the management, administration, supervision, and performance of all Maintenance Services concerning the Subject Trackage, including but not limited to, routine maintenance and inspection, additional non-routine maintenance, and grade crossing facility maintenance.

(a) Routine Maintenance and Inspection.

KCSR shall perform the inspection and routine, non-catastrophic, and non-capital maintenance and repair of the Subject Trackage right-of-way, track, communications, and signals fixtures and appurtenances.

(b) Additional Non-Routine Maintenance and Repair.

KCSR shall perform any non-routine maintenance, repair, upgrade, or additional maintenance and repair item that is required in order to keep the Subject Trackage in the operating condition specified by Section 3(e) of this Agreement.

(c) Grade Crossing Facility Maintenance and Repair.

KCSR shall undertake and perform any grade crossing facility maintenance, repair and inspection obligation of MSLLC arising from the creation or maintenance of any public highway-railroad grade crossing or private grade crossing, including any present or future obligations that may arise as a result of the receipt of funding or other support from a Governmental Entity for the grade crossing warning devices or other highway-railroad grade crossing facility. KCSR shall undertake and perform the obligations of MSLLC pursuant to any

agreements covering the maintenance or operation of any public highway-railroad grade crossing of such facilities which are on or adjacent to the Subject Trackage.

(d) Ownership Of Materials

Any rails, ties and other items of track, signaling equipment or other materials that KCSR installs into the Subject Trackage in furtherance hereof shall become the property of MSLLC. Any rails, ties and other items of track, signaling equipment or other materials that KCSR removes from the Subject Trackage in furtherance hereof shall become the property of KCSR, and MSLLC shall be credited for its value regardless of whether such removed property is sold or thereafter retained by KCSR for material and supplies.

(e) Minimum Standards

In performing the Maintenance Services, KCSR shall keep and maintain the Subject Trackage, including any buildings or other structures used by or leased or occupied by KCSR thereon, in good operating condition and repair in a manner consistent with sound, accepted engineering principles and maintain the main line of the Subject Trackage to a minimum of FRA Class 3 standards, capable of handling cars of 286,000 lbs.

SECTION 4. INFRASTRUCTURE IMPROVEMENT SERVICES

(a) Requirement to Construct Specified Infrastructure Improvements.

(i) Existing Infrastructure Improvement Projects.

Subject to and in accordance with the terms and conditions of this Agreement, KCSR shall perform, at the direction of MSLLC, the Work in connection with the infrastructure improvement projects as shown on Appendix B – Infrastructure Improvement Projects. Each separate project shall be hereinafter referred to as an "Infrastructure Improvement Project," and the cost of construction of the Infrastructure Improvement Project shall be hereinafter referred to as an "Infrastructure Improvement Project Cost."

(ii) New Infrastructure Improvement Projects.

During the term of this Agreement, KCSR shall perform such additional Infrastructure Improvement Projects as MSLLC may from time to time require, provided, however, that no additional Infrastructure Improvement Projects shall be constructed unless approved by MSLLC's members in accordance with the LLC Agreement.

(b) Project Plans and Specifications.

(i) Preparation and Approval.

KCSR shall prepare, and/or shall cause to be prepared, all plans, specifications and drawings necessary or appropriate to the Work to be performed by KCSR hereunder. Those plans, specifications, and drawings prepared by or on behalf of KCSR shall be

subject to the review and approval of the JOC. If the JOC cannot reach agreement on whether or not the plans should be approved, the Management Committee shall be charged with the decision to approve the plans. Approved plans, specifications and drawings, whether in original or amended form, are referred to as the "Plans." Approved Plans shall become the property of MSLLC.

(ii) Activities Not Specified by Plans.

KCSR, in its performance and/or direction of the Work, shall provide all services that are reasonably necessary or appropriate, whether or not specified in the Plans, to preserve and maintain MSLLC's property and operations in compliance with all applicable laws, ordinances, rules and regulations of Governmental Entities and MSLLC's contractual obligations, including, but not limited to, existing or proposed third party agreements and collective bargaining agreements. Further, KCSR shall furnish, and/or shall cause to be furnished, any material necessary to the provision of such services, and shall perform, and/or shall cause to be performed, any such activities as fully as if they were particularly delineated or described by the Plans.

(iii) Material Changes.

In the event that KCSR determines that the Work or materials to be provided by KCSR pursuant to this Agreement will require a material deviation from the Plans or determines that an unanticipated condition(s) will result in an increase of the costs of any particular Infrastructure Improvement Project in excess of ten percent (10%) of the costs for said particular Infrastructure Improvement Project or the total estimated costs, as the case may be (in any case, a "Material Change"), KCSR shall promptly notify the JOC and act in accordance with its direction.

(iv) Effect of Approval of Plans.

By its review and approval of Plans by the JOC or the Management Committee, KCSR, MSLLC, and NSR signify that such Plans and improvements constructed in accordance with the Plans satisfy their approval.

(v) Compliance with Plans.

KCSR shall construct the Infrastructure Improvement Projects in accordance with the Plans, as may be modified from time to time.

(c) Conduct of Work.

(i) Right(s) of Entry.

MSLLC grants to KCSR and NSR, and to the extent necessary KCSR grants to MSLLC and NSR, a non-exclusive right and permission to enter upon MSLLC's and KCSR's respective property to the extent reasonable and necessary for the performance, supervision and oversight of the Work, along such routes and upon such terms as may be

defined and imposed by MSLLC, and upon such temporary construction easements as may be designated on the Plans.

(ii) Property Acquisition.

If any additional real property interests are needed in order to construct an Infrastructure Improvement Project, MSLLC shall be solely responsible for acquiring such real property interests at MSLLC's sole expense. The acquisition of sufficient interest to the real property as may be needed for performance of an Infrastructure Improvement Project will be a precondition to KCSR's responsibility to construct such Infrastructure Improvement Project.

(iii) Construction Schedule.

Upon approval of Plans, KCSR shall develop a construction schedule satisfactory to the JOC or the Management Committee. KCSR shall use commercially reasonable efforts to attempt completion of the Infrastructure Improvement Project within the construction schedule. Consistent with this Agreement, KCSR shall manage and execute the Work to cause the least practicable amount of interference with the operation, management, maintenance, business, or traffic over the Subject Trackage.

(iv) Provision of Labor, Materials And Equipment

KCSR shall furnish, and/or shall cause to be furnished, all labor, materials, supplies, tools, and equipment needed for the Infrastructure Improvement Projects.

(v) Workmanship and Material Standards.

All materials of every description furnished by KCSR under this Agreement and all workmanship shall be of a grade specified in Plans, and such material shall be of an acceptable quality for the purpose intended.

(vii) Safety and Operating Rules.

KCSR shall use the utmost diligence in the prosecution of the Work pertaining to the Infrastructure Improvement Projects to effectively guard against all accidents on or damages to the Subject Trackage in its performance of the Work.

(d) Cost of the Construction of the Infrastructure Improvement Projects.

(i) KCSR and NSR have estimated the cost of construction of the Infrastructure Improvements Projects as shown by the cost statement attached as Appendix C – Infrastructure Improvement Project Cost Estimate. The Designated Engineers for each party will meet at least once each quarter to discuss the progress of the Work and to review the actual Infrastructure Improvement Project Costs incurred up to that point. In the event that KCSR anticipates that actual Infrastructure Improvement Project Costs may exceed such estimate by ten percent (10%) or more, (including, but not limited to, Material Changes), KCSR shall provide MSLLC and NSR with a proposed

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Revised Infrastructure Improvement Project Cost estimate for MSLLC's and NSR's review. If the Designated Engineers mutually determine that a new estimate is required, KCSR shall prepare same and submit it to the JOC for approval. Upon the JOC's approval, or the approval of the Management Committee if the JOC cannot reach agreement, of the proposed revised estimate, such revised estimate shall replace Appendix C of this Agreement ("Infrastructure Improvement Project Cost Estimate"). The Revised Infrastructure Improvement Project Cost Estimate will then govern the Infrastructure Improvement Project Costs for the Work.

(ii) MSLLC shall bear the Infrastructure Improvement Project Costs.

(e) Invoices.

(i) From time to time, KCSR shall submit statements to MSLLC, with a copy to NSR, for Infrastructure Improvement Project Costs incurred at the direction of MSLLC. MSLLC shall remit payment of the invoiced sum to KCSR within thirty (30) days following receipt of such invoice.

(ii) Following the completion of each Infrastructure Improvement Project, KCSR shall submit to MSLLC, with a copy to NSR, a final invoice for that Infrastructure Improvement Project that shall reconcile the total Infrastructure Improvement Project Cost, less the total payments received by KCSR for such Infrastructure Improvement Project, less the total outside or third-party funding received for the Infrastructure Improvement Project (if any). Within thirty (30) days of delivery of such invoice, MSLLC shall then pay the balance of unpaid Infrastructure Improvement Project Costs to KCSR.

(iii) Invoices submitted by KCSR pursuant to this Section 4 shall have sufficient detail (including identification of any applicable Infrastructure Improvement Project component) that will reasonably enable MSLLC and NSR to verify the invoices and statements and to audit work performed. No payments shall be withheld on account of a billing dispute. Disputes shall be resolved in accordance with the provisions of Section 11(e) of this Agreement. KCSR shall maintain records pertaining to Infrastructure Improvement Project Costs and shall allow the other parties reasonable access to such records for the purpose of verifying Infrastructure Improvement Project Costs.

(f) Payment on Invoices.

All invoices from KCSR to MSLLC pursuant to this Section 4 shall be delivered to MSLLC and NSR in accordance with Section 11(f) of this Agreement. All payments shall be made by electronic funds transfer or by a check.

(g) Completion of Project.

Each Infrastructure Improvement Project shall be deemed completed upon the final inspection and acceptance of all Work by each of the Designated Engineers or their respective representatives, and shall be confirmed by a certification letter executed by the respective

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Designated Engineers designating the date of completion of said Infrastructure Improvement Project.

(h) Permits.

KCSR shall prepare, prosecute and procure in MSLLC's name and account all permits and/or approvals required by any Governmental Entity for the Work and/or completion of the Infrastructure Improvement Projects.

(i) Dispute Resolution.

In the event of a dispute between them as to any matter arising under Section 4 of this Agreement that solely concerns design and construction of the Infrastructure Improvement Projects, the Designated Engineers shall attempt to resolve such dispute. If they are unable to do so, the Designated Engineers shall submit the matter to the JOC. If the JOC is unable to resolve the dispute, the Management Committee shall resolve the dispute in accordance with the LLC Agreement.

(j) Ownership of Infrastructure Improvements.

KCSR's construction of any and all Infrastructure Improvement Projects shall be performed on behalf of MSLLC, and ownership of said Infrastructure Improvements Projects shall, as between KCSR and MSLLC, lie with MSLLC. Upon completion of an Infrastructure Improvement Project, said Infrastructure Improvement Project shall become a part of the Subject Trackage covered by this Agreement.

SECTION 5 – FREIGHT RAILROAD SERVICES

Freight Railroad Services shall include the management, administration, supervision, and performance of all railroad services over the Subject Trackage on behalf of MSLLC, including but not limited to the following:

(a) provision of haulage services and access for trackage rights pursuant to the NSR Joint Use Agreement and the KCSR Joint Use Agreement;

(b) in accordance with the NSR Joint Use Agreement and the KCSR Joint Use Agreement, provide schedules and timetables for regularly scheduled trains operating over the Subject Trackage, as well as any proposed modifications thereto, to each of MSLLC, NSR and KCSR, and to such other carriers or persons as MSLLC may specifically direct;

(c) provision of train and crew dispatching, scheduling and traffic movement control, switching and yard services, for all trains over the Subject Trackage, as directed by MSLLC;

(d) weighing railcars when requested, required, or needed;

(e) provision of fuel, sand, and service for locomotives when required, requested, or needed;

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(f) provision of such labor and materials as may be required to perform, and performance of light repairs on bad ordered railcars as may be necessary to make such railcars legal and safe for movement, or, for any such bad ordered railcars that cannot reasonably be made legal and safe for movement, arrangement for the appropriate removal of the affected railcar in accordance with MSLLC's instructions;

(g) provision of special services from time to time as is requested by MSLLC with respect to trains, locomotives and railcars;

(h) provision of rerailing, wrecking service or wrecking train service as may be required, including the repair and restoration of roadbed, track, structures and the environment, as promptly as possible;

(i) preparation of an Operating Plan and operating protocols, which shall be subject to the review and approval of JOC or the Management Committee;

(j) preparation and submission to the JOC and the Management Committee of a program maintenance plan.

SECTION 6. GENERAL AND ADMINISTRATIVE SERVICES

(a) General and Administrative Services shall include the management, administration, supervision and performance of all general and administrative services necessary or appropriate to conduct the business of MSLLC, including, but not limited to:

(i) accounting, treasury, and tax services;

(ii) legal services, pursuant to the direction of MSLLC;

(iii) claims handling;

(iv) information technology services;

(v) ancillary agreement management;

(vi) human resources and labor relations services.

(b) Ancillary Agreement Management

(i) KCSR shall manage, on behalf of MSLLC, any Ancillary Agreements that are assigned to MSLLC pursuant to the Omnibus Assignment and Assumption Agreement. Such management shall include the collection and payment of rents and fees, the providing and receipt of notices and other communications as required or advisable, and the performance and receipt of the performance of such other acts as may be required or advisable under such Ancillary Agreements, all in accordance with the terms and conditions thereof and KCSR's existing practices.

(ii) Within a reasonable period of time prior to the date such action is

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required, KCSR shall present to MSLLC any Ancillary Agreement subject to renewal or termination, together with KCSR's recommendation concerning renewal or termination. Upon approval of the JOC or the Management Committee, KCSR shall review and execute all documents reasonably required for such renewal or termination.

(iii) KCSR shall account to MSLLC for any amounts received and any amounts paid by KCSR pursuant to such agreement.

(iv) KCSR shall negotiate agreements similar to the Ancillary Agreements upon direction of, and for the execution of, MSLLC. MSLLC shall be a party to all the same. KCSR shall report periodically to MSLLC the nature of said proposed new ancillary agreements, as well as the status of any negotiations thereof. KCSR shall provide any negotiated new MSLLC ancillary agreement to the JOC for review and execution.

(v) Once a new ancillary agreement has been assigned to MSLLC, that agreement shall become an ancillary agreement to be managed by KCSR pursuant to this Section.

(c) Books of Record and Account And Access To Same.

KCSR shall keep proper books of record and account in which full and correct entries shall be made of all costs, expenses, and revenues performed as part of its Services. Such books of record and account shall be in accordance with then-current generally accepted accounting principles and the USOA and shall be readily identifiable by distinct accounting codes. KCSR shall give to each of MSLLC and NSR access, during normal business hours, to inspect and make copies of any and all books of record and accounts relating to this Agreement, all of which shall be maintained by KCSR at its headquarters in Kansas City, MO, or such other location as KCSR shall specify to MSLLC and NSR from time to time.

SECTION 7. COMPENSATION

(a) Until [

], MSLLC shall pay to KCSR an Operating Fee [

].

(b) Subsequent to [ ], MSLLC shall pay to KCSR an Operating Fee equal to[

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]·

SECTION 8. TERM AND TERMINATION

(a) Effective Date.

This Agreement shall become effective following the latest date of: (i) the date first written above; (ii) receipt of any required regulatory approvals or exemptions; and (iii) the expiration of any time periods required by the issuance of labor notices by KCSR and/or MSLLC, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(b) Term.

This Agreement shall commence on the Effective Date, and, except as provided for in Section 8(c), shall continue for the duration of the joint venture or until terminated hereunder.

(c) Termination.

(i) This Agreement shall be terminated, without penalty or payment to either Party, should MSLLC no longer own or control the Subject Trackage.

(ii) This Agreement shall be terminated, without penalty or payment to either Party, should KCSR discontinue railroad operations pursuant to the KCSR Joint Use Agreement over all or substantially all of the Subject Trackage.

(iii) This Agreement may be terminated, without penalty or payment to either Party, by mutual agreement of the Parties.

SECTION 9. REMEDIES AND INSURANCE

(a) Breach of this Agreement.

Each Party acknowledges and agrees that the other Party would be irreparably damaged in the event any of the provisions of this Agreement were not performed by it in accordance with their specific terms or were otherwise breached. It is accordingly agreed that, except as provided in Section 2(c), each Party shall be entitled to an injunction or injunctions to prevent further breaches of such provisions and to specifically enforce such provisions as the exclusive remedy for breaches of this Agreement.

(b) Service Standard Failure Indemnification.

KCSR shall indemnify MSLLC for any Service Standard Failure payment requirement in accordance with the NSR Joint Use Agreement. No costs associated with the indemnification provided by KCSR pursuant to this Section 9(b) shall be considered to be a cost of providing services for the purpose of determining compensation payable to KCSR under this Agreement.

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(c) Insurance.

KCSR shall ensure that the Subject Trackage and all services provided by KCSR pursuant to this Agreement are at all times covered by insurance to the same degree and in the same manner as maintained from time to time by KCSR and its affiliates for comparable property and operations. In addition, KCSR shall cause MSLLC and NSR to be named as additional named insureds under any and all such policies.

SECTION 10. CONDEMNATION AND LIENS

(a) Condemnation.

If any or all of the Subject Trackage is condemned or taken by any competent authority, the award for payment of damages resulting therefrom, or any amount paid in settlement thereof, shall be paid to and retained by, in its entirety, MSLLC and no other Party shall have a claim to such proceeds. If the entire Subject Trackage is so taken, or such substantial portion thereof as shall materially impair or interfere with KCSR's ability to perform the Services, this Agreement shall terminate as of the date of such taking, without penalty to either Party, otherwise this Agreement shall continue in full force and effect as to the remainder thereof.

(b) Liens.

(i) KCSR shall not create, permit to be created, or permit to remain undischarged, any contingent or actual lien or other encumbrance of any kind (each a "Lien") as to the Subject Trackage that: (A) arise out of the obligations it has undertaken pursuant to this Agreement; (B) involve materials and/or supplies furnished and/or delivered by KCSR; or (C) arise out of any mortgage, conditional sale, security agreement or chattel mortgage not related to the Transaction Agreement.

(ii) KCSR shall provide notice to MSLLC and NSR of any Lien against the Subject Trackage or any part thereof. KCSR shall, within ten (10) days after demand from MSLLC or NSR, cause the same to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction or otherwise at MSLLC's expense. If KCSR fails to cause such Lien to be discharged within the aforesaid time, then MSLLC or NSR may arrange to discharge such Lien by the lienor and pay the amount of the judgment in favor of the lienor with interest, costs and allowances.

SECTION 11. PROVISIONS OF GENERAL APPLICATION

(a) Mileage and Car Hire.

As between KCSR and MSLLC, nothing in this Agreement shall modify any existing mileage and car hire charges allocations or any mileage and car hire charges obligations pursuant to the NSR Joint Use Agreement or the KCSR Joint Use Agreement .

(b) Force Majeure.

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The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

(c) Successors and Assigns.

(i) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns. Third party beneficiary status shall inure to the benefit of NSR and each of its successors and permitted assigns.

(ii) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

(iii) In the event of a sale of substantially all of the assets or business of KCSR, or the merger or consolidation of KCSR into or with a firm or corporation not controlled by KCS, KCSR may, without the prior consent of MSLLC, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of KCSR, or merging or consolidating with KCSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of KCSR under this Agreement that existed prior to such assignment.

(iv) In the event of a sale of substantially all of the assets or business of MSLLC, or the merger or consolidation of MSLLC, MSLLC may, without the prior consent of KCSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of MSLLC, or merging or consolidating with MSLLC; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of MSLLC under this Agreement that existed prior to such assignment.

(d) Invalid or Unenforceable Provisions.

If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

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(e) Arbitration.

(i) Except as otherwise provided for in this Agreement, any dispute arising between the Parties with respect to an alleged breach of this Agreement shall be referred to the JOC for resolution and if the JOC is unable to resolve the dispute, it shall be referred to the Management Committee, provided however, that any Member (as defined in the LLC Agreement) may submit the dispute for binding arbitration by a panel of three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall render a written decision on the controversy. The written decision of the arbitrators, reached upon a majority vote, shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs, and expenses of the three arbitrators, if any, shall be borne by KCSR and MSLLC, with each paying 50 percent of such compensation, costs, and expenses. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws, or to render any award for damages other than is provided for in Section 2(c). Pending the written decision of the arbitrators, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration.

(ii) As a Third Party Beneficiary, NSR may initiate and prosecute arbitration pursuant to this Section 11(e) on behalf of MSLLC. Provided that MSLLC does not enter into the arbitration in its own stead, MSLLC shall cooperate with NSR in the preparation for, and the initiation and prosecution of, such arbitration, at NSR's expense.

(f) Notice.

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

(ii) If to MSLLC:

REDACTED

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

(iii) If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

Any of MSLLC, KCSR or NSR may provide changes in the above addresses to the others by personal service or certified mail.

(g) Confidentiality.

(i) Except as provided by law or by rule, order, or regulation of any Governmental Entity or the New York Stock Exchange, or in connection with an audit by the Internal Revenue Service or other tax authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Term of this Agreement, and for a period of three (3) years after termination of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by

REDACTED

either Party to any person other than members, officers, employees, independent auditors and attorneys, without the prior written approval of the other Party.

(ii) Notwithstanding the foregoing Section 10(g)(i), the Parties acknowledge and agree that in any STB proceeding, the Parties may be required to submit this Agreement into the record. The Parties will propose to request a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with the highly confidential provisions redacted) may be entered into the public STB record and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

(h) Third Party Beneficiaries.

This Operating Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party, except NSR.

(i) Entire Understanding.

This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(j) Waiver.

No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties. No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(k) Drafters.

This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(l) Choice of Law.

This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(m) Execution in Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

REDACTED

(n) Invoices and Payment of Bills.

(i) Except with regard to invoices and payments of bills covered by Section 4(e), this Section 10(n) shall govern the invoicing and payment of bills for matters arising pursuant to this Agreement.

(ii) On or before the 15th day of each calendar month during the term of this Agreement, KCSR shall prepare and deliver to MSLLC and NSR a statement setting forth the charges to be invoiced in accordance with agreement and the basis for the charges, (the Monthly Statement"). KCSR shall deliver the Monthly Statement to MSLLC and to NSR's designee in electronic format. MSLLC shall make payment to KCSR within thirty (30) days after the date of such Monthly Statement, with confirmation of such payment provided to NSR.

(iii) Any dispute regarding the amount of a Monthly Statement shall be reconciled between the Parties (including NSR) using the JOC or the Management Committee, and any adjustment resulting from such reconciliation shall be reflected in a subsequent Monthly Statement. If MSLLC or NSR disputes any portion of a Monthly Statement, MSLLC shall nevertheless pay such Monthly Statement in full, subject to adjustment upon resolution of the dispute; provided, however, that (A) no exception to any charge in a Monthly Statement shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Monthly Statement, and (B) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement.

(iv) All invoices submitted by KCSR under this Agreement shall be consistent with the books and records maintained by KCSR pursuant to Section 7(a) hereof.

SECTION 12. AUDIT

KCSR, MSLLC, and NSR shall each have the right to audit the records of the other Parties pertaining to the subject matter of this Agreement, with each Party bearing its own expense, and any invoice issued by KCSR pursuant to this Agreement, provided such audit is initiated at any time within three (3) years of the date of the relevant invoice. All such audits shall be conducted at reasonable intervals, locations, and times. All such audits shall be prosecuted with reasonable due diligence. Each agrees that all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to an arbitrator in connection with an arbitration conducted pursuant this Agreement or as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 12 with respect to which KCSR, MSLLC, and NSR are in concurrence shall be reflected in a subsequent invoice.

SECTION 13. STATUS OF KCSR

REDACTED

(a) In the performance of the services described herein, KCSR shall be an independent contractor of MSLLC. KCSR shall have managerial control with respect to the provision of the Services provided hereunder. All personnel of KCSR shall be subject to the direction, supervision and control of KCSR and not MSLLC or NSR. Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between KCSR and MSLLC.

(b) For the Services provided by KCSR pursuant to this Agreement, KCSR may engage the services of subcontractors or agents to the extent consistent with KCSR's collective bargaining agreements.

REDACTED

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:	THE KANSAS CITY SOUTHERN RAILWAY COMPANY
_____ As to KCSR	By: _____
WITNESS:	KANSAS CITY SOUTHERN
_____ As to KCS	By: _____
WITNESS:	MERIDIAN SPEEDWAY LLC
_____ As to MSLLC	By: _____

Acknowledgement:

NORFOLK SOUTHERN
RAILWAY COMPANY

Per: _____

REDACTED

INDEX TO APPENDICES

APPENDIX A	RAILROAD PREMISES DESCRIPTION
APPENDIX B	INFRASTRUCTURE IMPROVEMENT PROJECTS
APPENDIX C	INFRASTRUCTURE IMPROVEMENT PROJECT COST ESTIMATES

C

REDACTED

EXHIBIT C
to Transaction Agreement

NORFOLK SOUTHERN RAILWAY COMPANY – MERIDIAN SPEEDWAY LLC JOINT USE AGREEMENT

THIS AGREEMENT (the "NSR Joint Use Agreement" or "Agreement") is entered into as of this ____ day of _____, 200__, by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSR"), KANSAS CITY SOUTHERN ("KCS") AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ("KCSR"), and MERIDIAN SPEEDWAY LLC, a Delaware limited liability company ("MSLLC"). NSR, MSLLC, and KCSR are referred to individually herein as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, KCS, KCSR, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, provided for the creation of MSLLC, the transfer from KCSR to MSLLC of the Subject Trackage as defined herein, the construction, at MSLLC's cost, of certain infrastructure improvement projects, and the grant by MSLLC to Norfolk Southern Railway Company and KCSR of certain rights over the entirety of the Subject Trackage; and

WHEREAS, pursuant to the Transaction Agreement, MSLLC has agreed to grant NSR certain trackage and haulage rights for NSR to transport NS Traffic over the Subject Trackage; and

WHEREAS, pursuant to the Transaction Agreement, MSLLC has agreed to grant KCSR local and overhead trackage rights as necessary for KCSR to continue to conduct railroad operations over the Subject Trackage and to fulfill its common carrier obligations with respect to all traffic except for the right to transport NS Traffic and Third Party Traffic over the Subject Trackage ("KCS Trackage Rights"); and

WHEREAS, the Transaction Agreement anticipates that, pursuant to an Operating Agreement, MSLLC will hire KCSR to perform as the designated operator ("Designated Operator") for all railroad operations on behalf of MSLLC, including MSLLC railway operations required pursuant to the KCSR Joint Use Agreement and the NSR Joint Use Agreement, and

WHEREAS, the route traversed by traffic moving pursuant to this Joint Use Agreement includes approximately four-tenths of a mile section of track in Jackson, Mississippi that is controlled by Canadian National (as successor to Illinois Central Gulf Railroad Company) (the "Jackson Trackage Rights Section") pursuant to that certain trackage rights agreement (the "MSR Trackage Rights Agreement"), as supplemented and amended from time to time, dated March 26, 1986, between Midsouth Rail Corporation and Illinois Central Gulf Railroad Company; and

WHEREAS, pursuant to the Transaction Agreement, KCSR shall provide haulage ("KCSR Haulage") for NSR over the Jackson Trackage Rights Section until either the MSR

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Trackage Rights Agreement is assigned to MSLLC or MSLLC constructs a "flyover" bridge to carry MSLLC's tracks over the tracks and real property of Canadian National Railway Company at Jackson, MS which establishes a continuous line of rail between Shreveport and Meridian (the "Jackson Flyover"); and

WHEREAS, the Parties intend that the MSR Trackage Rights Agreement will be assigned to MSLLC and the Parties desire to set forth the terms and conditions upon which MSLLC shall provide haulage services to KCSR and NSR over the Jackson Trackage Rights Section in the event of such assignment; and

WHEREAS, pursuant to an agreement of even date herewith between KCSR and MSLLC (the "Master KCSR-MSLLC Interchange Agreement"), MSLLC and KCSR have documented, among other things, the method for the physical interchange of traffic between KCSR and MSLLC at points on the Subject Trackage; and

WHEREAS, the Transaction Agreement anticipates that, pursuant to a haulage agreement, KCSR will provide haulage for NSR for certain traffic between Shreveport, LA, on the one hand, and an interchange point with BNSF Railway Company ("BNSF") in the Dallas, TX area, on the other hand (the "Western Haulage Agreement"); and

WHEREAS, the rights granted in this NSR Joint Use Agreement are intended to be connective with: (a) the Union Pacific Railroad Company (or its subsidiaries and its successors) at Shreveport; and (b) KCSR (or its subsidiaries and its successors) at Shreveport, either (i) moving traffic to a BNSF connection in the Dallas area or Shreveport; or (ii) hauling traffic for NSR under the Western Haulage Agreement; and

WHEREAS, pursuant to the Transaction Agreement, that certain Interchange Agreement between KCSR and NSR dated as of June 4, 1986, as supplemented as of January 24, 2003 (the "Meridian Interchange Agreement") has been assigned to MSLLC; and

WHEREAS, the Parties desire to set forth the terms and conditions upon which MSLLC has agreed to grant NSR certain trackage and haulage rights for NSR to transport NS Traffic over the Subject Trackage;

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS AND INTERPRETATION

(a) Interpretation Generally.

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

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(ii) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(b) Capitalized Terms.

All capitalized terms shall have the defined meaning set forth below:

"Abandonment Notice Period" shall have the meaning given to that term in Section 7(m)(iii).

"Abandonment Segment" shall have the meaning given to that term in Section 7(m)(i).

"Additional Compensation" shall have the meaning given to that term in Appendix B, Section 1.A(2)(b).

"Agreement" shall have the meaning given to that term in the introductory paragraph.

"AAR" shall have the meaning given to that term in Section 6(e).

"BNSF" shall have the meaning given to that term in the Recitals.

"Cars" means each loaded or empty railroad freight car (including platform and well rail cars) or similar equipment.

"Clearance File" shall have the meaning given to that term in Section 6(f).

"Cost Factor" shall have the meaning given to that term in Section 1.D.2 of Appendix B – Commercial Appendix.

"CTC" shall have the meaning given to that term in Section 6(a)(iv).

"Dallas Intermodal Terminal Traffic" means all domestic intermodal containers or trailers with an origin and destination in the United States, with a lift or drop at KCSR's Dallas Intermodal terminal, that moves over the Subject Trackage and over KCSR's tracks between Shreveport and the terminal, and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas / Ft. Worth, TX. Standard Metropolitan Statistical Area (SMSA) as published by the Office of Management and Budget (OMB).

"Dallas Terminal Marketing Agreement" shall mean that certain Dallas Terminal Marketing Agreement dated the date hereof by and between NSR and KCSR.

"Designated Operator" shall have the meaning given to that term in the Recitals.

REDACTED

"Effective Date" shall have the meaning given to that term in Section 7(f)(i).

"Election Notice" shall have the meaning given to that term in Section 2(a)(ii).

"End Points" shall mean: (1) Meridian, MS, M.P. 0.0; and (2) Shreveport, LA, M.P. V-169.85.

"EOTs" shall have the meaning given to that term in Section 2(b)(ii).

"Equipment" shall mean and be confined to hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery (other than locomotives) capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

"Exercise Notice" shall have the meaning given to that term in Section 7(l)(iii).

"FMV" shall have the meaning given to that term in Section 7(l)(iii).

"Foreign Railroad" shall mean a railroad that is not a party to this Agreement.

"Foreign Railroad Interchange Agreement" shall have the meaning given to that term in Section 3(b).

"Imbalanced Market" shall have the meaning given to that term in Section 3(b)(ii) of Appendix B – Commercial Appendix.

"Imbalance Threshold" shall have the meaning given to that term in Section 4 of Appendix B – Commercial Appendix.

"Jackson Flyover" shall have the meaning given to that term in the Recitals.

"Jackson Trackage Rights Section" shall have the meaning given to that term in the Recitals.

"JOC" shall have the meaning given to that term in Section 6(a)(ii).

"KCS" shall have the meaning given to that term in the Recitals.

"KCSR" shall have the meaning given to that term in the introductory paragraph.

"KCSR Haulage" shall have the meaning given to that term in the Recitals.

REDACTED

"KCSR Trackage Rights" shall have the meaning given to that term in the Recitals.

"Liquidated Damages" shall have the meaning given to that term in Section 2(b)(i) of Appendix B – Commercial Appendix.

"Management Committee" shall mean the Management Committee of MSLLC as provided in the LLC Agreement.

"Master KCS-MSLLC Interchange Agreement" shall have the meaning given to that term in the Recitals.

"Meridian Interchange Agreement" shall have the meaning given to that term in the Recitals.

"Monthly Statement" shall have the meaning given to that term in Section 7(b)(i).

"MSLLC" shall have the meaning given to that term in the introductory paragraph.

"MSR Trackage Rights Agreement" shall have the meaning given to that term in the Recitals.

"NS Traffic" shall mean all intermodal traffic that: (i) originates or terminates in the United States west of Dallas/Ft. Worth (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Subject Trackage at Shreveport; and (ii) originates or terminates in the United States at or east of Meridian and enters or exits the Subject Trackage at Meridian; and (iii) does not consist of traffic originating or terminating at any station on the KCSR system which includes the Texas Mexican Railway Company, (including any station where KCSR, or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement.

"NSC" shall have the meaning given to that term in the Recitals.

"NSR" shall have the meaning given to that term in the introductory paragraph.

"NSR Cars" shall mean Cars and Equipment in the revenue and/or car hire account of NSR.

"NSR Haulage Cars" shall mean NSR Cars being transported pursuant to NSR Haulage Rights.

"NSR Haulage Rights" shall have the meaning given to that term in Section 2(b).

"NSR Joint Use Agreement" shall have the meaning given to that term in the introductory paragraph.

REDACTED

"NSR Master Locomotive Run Through Agreement" shall have the meaning given to that term in Section 2(b)(iii).

"NSR Trackage Rights" shall have the meaning given to that term in Section 2(a).

"NSR Trackage and Haulage Rights" shall mean the rights granted in Sections 2(a) and 2(b).

"Operating Agreement" shall have the meaning given to that term in the Recitals.

"Parties" shall have the meaning given to that term in the introductory paragraph.

"Party" shall have the meaning given to that term in the introductory paragraph.

"Permitted Asset Transfer" shall have the meaning given to that term in the LLC Agreement.

"Qualifying Trains" shall have the meaning given to that term in Appendix B.

"Revenue Factor" shall have the meaning given to that term in Section 1.D.1. of Appendix B – Commercial Appendix.

"RPU" shall have the meaning given to that term in Section 1.E(i)(b) of Appendix B – Commercial Appendix.

"Service Reports" shall have the meaning given to that term in Section 2(a)(ii).

"Shortfall Damages" shall have the meaning given to that term in Section 3(a) of Appendix B – Commercial Appendix.

"STB" shall mean the Surface Transportation Board or any successor entity thereto.

"Subject Trackage" shall mean the certain lines of railroad generally running between Meridian, MS and Shreveport, LA as defined in the Transaction Agreement, together with the Jackson Flyover, as hereinafter defined, when constructed, and a bridge over the Mississippi River at Vicksburg.

"Third Party Traffic" shall mean freight rail service provided for a Foreign Railroad under a haulage or trackage rights agreement between MSLLC and the Foreign Railroad.

"Transaction Agreement" shall have the meaning given to that term in the Recitals.

"Triggering Event Notice" shall have the meaning given to that term in Section 2(a)(ii).

"UP" shall mean the Union Pacific Railroad Company or any of its subsidiaries.

REDACTED

"Use Invoice" shall have the meaning given to that term in Section 7(b)(i).

"Waiver Notice" shall have the meaning given to that term in Section 7(m)(v).

"Weighted Cost Adjustment Factor" shall have the meaning given to that term in Section 1.D. of Appendix B – Commercial Appendix.

"Western Haulage Agreement" shall have the meaning given to that term in the Recitals.

(c) Successor Laws.

A reference to any particular statute or regulation shall include a reference to any successor statute or regulation.

SECTION 2. OPERATING RIGHTS

(a) Trackage Rights.

(i) Pursuant to the Transaction Agreement and subject to the terms set forth in this Agreement, MSLLC hereby grants NSR trackage rights for the sole purpose of transporting NS Traffic over the Subject Trackage, excluding the Jackson Trackage Rights Section, and of fulfilling its common carrier obligations with respect to NS Traffic (collectively, "NSR Trackage Rights"). These rights include, but are not limited to, the right to operate its trains, locomotives, cars, and Equipment with its own crews over the entirety of the Subject Trackage, excluding the Jackson Trackage Rights Section. NSR's use of the NSR Trackage Rights shall be subject to the limitations and restrictions set forth in this Section 2(a).

REDACTED

(ii) NSR shall not exercise its trackage rights unless and until: (A) a Major Service Standard Failure, as defined in Appendix B to this Agreement, has occurred; or (B) a Permitted Asset Transfer as defined in the LLC Agreement has occurred. MSLLC shall provide NSR with monthly reports, quarterly reports and annual reports ("Service Reports") that will provide data to NSR sufficient to permit it to determine whether a Major Service Standard Failure has occurred. MSLLC shall provide NSR written notice ("Triggering Event Notice") of the happening of a Permitted Asset Transfer. NSR shall have sixty (60) days from the receipt of the Service Report that demonstrates that a Major Service Standard Failure has occurred, and sixty (60) days from the receipt of a Triggering Event Notice, as the case may be, to provide MSLLC written notice, a copy to KCSR, making an election to exercise its trackage rights ("Election Notice"), which such Election Notice will specify the date for beginning use of the trackage rights, such date may be up to six (6) months after the delivery of the Election Notice. Failure to exercise its rights under this subsection at any one time shall not prejudice NSR's rights to exercise its rights at any subsequent time.

(iii) NSR locomotives and crews operating over the Subject Trackage shall be equipped to communicate with MSLLC on radio frequencies normally used by MSLLC in directing train movements on the Subject Trackage.

(iv) NSR's operations over the Subject Trackage shall at all times be subject to the direction and control of the Designated Operator and comply in all respects with the safety rules, operating rules and other regulations of the Designated Operator.

(v) NSR shall make such arrangements with MSLLC as may be required to have all of its employees who shall operate its trains, locomotives, cars and Equipment over the Subject Trackage qualified for operation thereover. MSLLC shall provide reasonable cooperation and assistance in the qualification of NSR operating (train and engine) crews for service over the Subject Trackage upon request. NSR supervisory personnel who have been qualified to operate over the Subject Trackage may qualify other NSR employees for operation of trains over the Subject Trackage.

(vi) MSLLC shall allow NSR to, at NSR's sole cost, establish, locate and construct personnel facilities for changing crews on NSR trains that are moving pursuant to this Section 2(a), but shall not impose a lease fee for the property upon which such personnel facilities are located. The design and location of any such facility shall be pre-approved by MSLLC, said approval not to be unreasonably withheld or delayed.

(vii) The compensation for the trackage rights shall be typical in the industry for overhead intermodal trackage rights and consistent with STB decisional principles for the determination of the same.

(b) Grant of Haulage Rights.

Pursuant to the Transaction Agreement and consistent with the terms of this Agreement, MSLLC hereby grants NSR haulage rights for the sole purpose of transporting NS Traffic over the Subject Trackage, including the Jackson Trackage Rights Section (collectively, "NSR

REDACTED

Haulage Rights"). NSR's use of its Haulage Rights shall be subject to the limitations and restrictions set forth in this Section 2.

(i) NSR Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of NSR while moving over the Subject Trackage via the NSR Haulage Rights. MSLLC shall not be entitled to any line haul revenue for the handling of NSR Haulage Cars, nor shall MSLLC participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with, the movement of NSR Haulage Cars.

(ii) MSLLC's obligation to provide NSR Haulage Rights hereunder shall permanently cease in the event that NSR initiates its NSR Trackage Rights operations pursuant to Section 2(d)(vi) of this Agreement.

(iii) The Parties will execute an agreement (the "NSR Master Locomotive Run Through Agreement") consistent with, and with terms materially identical to, the Supplemental Agreement dated May 11, 2000, to the Master Locomotive Run Through Agreement of November 29, 1994, provided, however, that MSLLC shall not be responsible for providing any equipment (locomotives, cars, end of train units ("EOTs"), etc.), or fuel for the trains providing the NSR Haulage Rights. Locomotives on trains providing the NSR Haulage Rights shall be governed by the NSR Master Locomotive Run Through Agreement. .

(c) Use Of The Subject Trackage.

(i) NSR's use of Subject Trackage pursuant to Section 2(a) or Section 2(b) shall be in common with MSLLC and KCSR, and other than as explicitly set forth herein, MSLLC's and KCSR's right to use the Subject Trackage shall not be diminished by this Agreement.

(ii) NSR may operate trains pursuant to Section 2(a) or Section 2(b) in either direction over the Subject Trackage.

(iii) Except as may be elsewhere provided for herein, NSR may use its NSR Trackage and Haulage Rights for NS Traffic to interchange with UP at Shreveport, LA, and with KCSR at Shreveport, LA, for (i) hauling traffic for NSR under the Western Haulage Agreement; (ii) connectivity with a possible BNSF Shreveport Agreement, as defined in the Western Haulage Agreement; or (iii) moving Dallas Intermodal Terminal Traffic provided the Dallas Option, as each term is defined in the Dallas Terminal Marketing Agreement, is exercised.

(d) Restrictions on Use.

(i) NSR may use its NSR Trackage and Haulage Rights solely for the purposes of the movement of: (A) NS Traffic; and (B) moving Dallas Intermodal Terminal Traffic provided the Dallas Option, as each term is defined in the Dallas Terminal Marketing Agreement, is exercised.

REDACTED

(ii) The NSR Trackage and Haulage Rights shall be for the purpose of NSR using the Subject Trackage to operate its trains in overhead movements only and shall not include the right of ingress and egress to any tracks, switches, turnouts, or other track classifications that connect to any point along the Subject Trackage except the End Points.

(iii) Except as otherwise permitted in this Agreement, NSR's Trackage and Haulage Rights shall not include the right to enter or exit the Subject Trackage other than at the End Points, or at either end of the Jackson Trackage Rights Section.

(iv) Except as may otherwise be permitted by this Agreement, NSR shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or Equipment, or the making or breaking up of trains, except as necessary for the handling of locomotives or cars bad ordered en route; provided, that NSR shall use such auxiliary Subject Trackage as may be designated by the Designated Operator for such purposes.

(v) NSR may not, pursuant to this Agreement, grant haulage rights, trackage rights, or other operating rights of any nature on or over the Subject Trackage to any other party.

SECTION 3. INTERCHANGE

From time to time MSLLC and NSR shall consult as to the various interchange locations for the delivery and receipt of traffic being physically transferred between NSR and MSLLC. Unless otherwise mutually agreed, interchange operations shall be governed as follows:

(a) Interchange For NSR Haulage Cars

(i) MSLLC shall deliver eastbound NSR Haulage Cars to NSR at Meridian, MS, on such track(s) as shall be designated from time to time by local operating personnel or other designated representative in charge of such tracks at Meridian pursuant to the Meridian Interchange Agreement.

(ii) MSLLC shall deliver westbound NSR Haulage Cars to KCSR and UP and, if KCSR enters into a BNSF Shreveport Agreement as defined in the Western Haulage Agreement, with BNSF for continued westbound movement, at or near M.P. V-169.85 in Shreveport, LA on such track(s) as shall be designated from time to time by KCSR's dispatcher or other designated representative in charge of such tracks at Shreveport pursuant to the KCSR Master Interchange Agreement.

(iii) Nothing herein shall be interpreted as prohibiting the Designated Operator from transporting NSR Haulage Cars in a continuous movement operating over both the haulage routes covered by: (i) this Agreement and (ii) the Western Haulage Agreement.

REDACTED

(b) Interchange With A Foreign Railroad

Interchange operations between NSR and a Foreign Railroad shall be governed by the terms of the relevant interchange agreement between NSR and said Foreign Railroad ("Foreign Railroad Interchange Agreement"), which may not be inconsistent with this Agreement.

SECTION 4. PERMITTED SERVICE

(a) NS Traffic

NSR shall have the exclusive right to transport NS Traffic over the Subject Trackage.

(b) MSLLC's Retained Rights

(i) MSLLC may perform haulage services for, or provide trackage or operating rights to, KCSR or a Foreign Railroad provided the traffic moved for said carrier remains in that other carrier's revenue waybill account.

(ii) Notwithstanding the foregoing Section 4(b)(i), for NS Traffic only, MSLLC may not perform haulage services for any carrier other than NSR or grant trackage rights or operating rights to KCSR or any Foreign Railroad on the Subject Trackage for NS Traffic, absent the express written consent of NSR, which may be withheld in NSR's sole discretion.

(iii) MSLLC shall not permit trains moving NSR Haulage Cars to contain any traffic in the revenue waybill account of any carrier other than NSR.

(c) Rebilling.

It is the intent of the Parties that rebilling of traffic is not a permissible method of avoiding any direct traffic limitation, including those set forth in Section 4(a), or imposition of charges for services set forth herein.

SECTION 5. INFRASTRUCTURE

(a) Maintenance.

(i) MSLLC shall be solely responsible for the maintenance, repair, and renewal of the Subject Trackage. MSLLC shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, but MSLLC does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. MSLLC shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use commercially reasonable efforts to avoid such interruptions.

REDACTED

(ii) Existing connections or facilities shall continue to be maintained, repaired, and renewed by and at the expense of the party or parties responsible for such maintenance, repair, and renewal under applicable agreements.

(iii) Notwithstanding anything to the contrary herein, MSLLC shall maintain the main line of the Subject Trackage to a minimum of FRA Class 3 standards, capable of handling cars of 286,000 lbs.

SECTION 6. MANAGEMENT AND OPERATIONS

(a) Dispatching

(i) The Designated Operator shall have exclusive control over the management and dispatching of the Subject Trackage. Dispatching of the Subject Trackage shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Subject Trackage (or any portion thereof) the most economical and efficient movement of its traffic over the Subject Trackage consistent with the demands and needs of other authorized users.

(ii) Although the Designated Operator will be the dispatcher, the Joint Operating Committee ("JOC"), subject to the direction of the Management Committee, will develop and implement appropriate dispatching protocols and adjust those protocols from time to time as necessary to carry out this Agreement. In dispatching the Subject Trackage, the Designated Operator shall follow any protocols developed by the JOC, provided, that in the event of a conflict between the dispatching protocols and the need to economically and efficiently move the traffic over the Subject Trackage, the dispatcher shall be empowered to employ best practices to efficiently move all trains consistent with the principles of this Agreement.

(iii) NSR shall have the right to station an NSR employee or agent in the dispatch center operated by MSLLC or its Designated Operator in the event that it initiates its trackage rights pursuant to Section 2(a)(ii) herein. Said person shall be present solely as an observer, and shall have no authority to control the movement of trains or otherwise interfere with or adjust the operation of trains, Cars or Equipment operating on the Subject Trackage.

(iv) MSLLC shall cause its Designated Operator to provide NSR with read-only access to the Designated Operator's central traffic control ("CTC") screens for the Subject Trackage in the offices of NSR designated by NSR. As KCSR is MSLLC's Designated Operator, KCSR shall be responsible for the cost of modifying its system to the extent necessary to provide NSR access to its CTC screens, and NSR shall be responsible for the cost of the communications link with NSR and the costs to use such link incurred in NSR's offices.

(v) Notwithstanding anything in this Agreement to the contrary, all overhead trains of both KCSR and NSR will have dispatching priority over local trains.

REDACTED

(b) Capacity Rights

Notwithstanding any other provisions of this Agreement, the Parties acknowledge that there may be capacity constraints from time to time for traffic covered under this Agreement. Whenever capacity of the Subject Trackage is insufficient to handle the total traffic demands of KCSR and NSR, the following capacity allocation rules shall apply:

(i) Prior to the start of the calendar year following the earlier of (a) completion of the spending of the Capital Proceeds as defined in the Transaction Agreement; or (b) the fourth anniversary of the Closing as defined in the Transaction Agreement, KCSR and NSR will each have a minimum of five (5) daily overhead train starts over the Subject Trackage. For purposes of determining capacity rights, NSR's daily overhead train starts will include NS Traffic and Dallas Intermodal Terminal Traffic.

(ii) As incremental overhead train starts become available, NSR shall receive the first of every three (3) new daily overhead train starts, and NSR acknowledges that KCSR shall be allocated the second and third of every three (3) new daily overhead train starts. Following the start of the calendar year following the earlier of (a) completion of the spending of the Capital Proceeds as defined in the Transaction Agreement; or (b) the fourth anniversary of the Closing as defined in the Transaction Agreement, NSR will have a minimum of thirteen (13) daily overhead train starts. If through this allocation process NSR does not have at least thirteen (13) daily overhead train starts, then KCSR agrees to relinquish such daily overhead train starts as needed to provide NSR with thirteen (13) daily overhead train starts. Of the thirteen (13) total daily overhead train starts, a minimum of eight (8) may be utilized for traffic interchanged with parties other than the Union Pacific Railroad Company in Shreveport.

(iii) NSR acknowledges that, after providing for NSR's minimum guarantee of thirteen (13) daily overhead train starts, KCSR shall receive all additional incremental daily overhead train starts until KCSR has a total of twenty-one (21) daily overhead train starts. Thereafter, NSR shall be allocated the first of every three (3) additional new incremental daily overhead train starts, and NSR acknowledges that the second and third of every three (3) new daily overhead train starts shall be allocated to KCSR.

(iv) If the Foreign Railroad fails to supply all necessary capital required to accommodate its new train start, the first new daily overhead train start of any Foreign Railroad admitted to the Subject Trackage by MSLLC shall be considered to be a KCSR train start for the purpose of the allocation of daily overhead trains starts of under these capacity allocation provisions. If the Foreign Railroad supplies all necessary capital required to accommodate its new train start, the Foreign Railroad's train start shall count against neither KCSR's nor NSR's train start allocation.

(v) The maximum length of NSR trains (including locomotives and other motive power units) operating pursuant to this Agreement, whether pursuant to Section

REDACTED

2(a) or Section 2(b), shall be the greater of: (a) 7,500 feet or (b) the maximum train length as may be permitted from time to time for any other train regularly operated over the Subject Trackage. Upon substantial completion of the capital projects list found in Appendix C - Capital Improvement Projects to the KCSR-MSLLC Operating Agreement, the maximum length shall be increased to no less than 8,500 feet.

(c) Volume And Service Guarantees

(i) NSR commits to the Volume Guarantees set forth in Appendix B – Commercial Appendix, Section 5.

(ii) MSLLC commits to the Service Standards set forth in Appendix B – Commercial Appendix, Section 2.

(d) Defective Or Overloaded Cars

MSLLC may arrange for repairs to and adjustments to, or transfers of lading from bad ordered, defective or overloaded NSR Haulage Cars, as in MSLLC's judgment may be necessary to move such cars safely. NSR shall reimburse MSLLC for the cost of such work at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the Association of American Railroads ("AAR").

(e) Use Of A Clearance File

NSR shall have the right to operate all dimensional loads and excess clearance railcars for handling over the Subject Trackage, subject to a clearance file (the "Clearance File") applicable to traffic of NSR, KCSR, and MSLLC maintained by MSLLC. MSLLC shall promptly inform NSR of any changes made to the Clearance File.

(f) Modification of NSR Train Schedules.

NSR shall provide the Designated Operator reasonable notice of the schedules for regularly scheduled NSR trains operating over the Subject Trackage, as well as any proposed modifications, and shall coordinate train operations with the Designated Operator and its dispatcher.

(g) Compensation.

NSR shall compensate MSLLC for the use of the Subject Trackage in accordance with Appendix B – Compensation for NS Traffic.

(h) Mileage and Car Hire.

All mileage and car hire charges accruing on NSR Cars on the Subject Trackage shall be assumed by NSR and reported and paid by it directly.

REDACTED

SECTION 7. GENERALLY APPLICABLE PROVISIONS

(a) Compliance with Applicable Law and Rules.

(i) Each Party hereto shall comply with all applicable and lawful federal, state and local laws, rules, regulations and orders promulgated by any government or governmental agency that relate to the operations contemplated hereunder. If any fine, penalty, cost, or charge is imposed or assessed on or against either Party hereto by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, liability will be allocated in accordance with the Unified Liability Agreement.

(ii) Without affecting the generality of the foregoing Section 7(a)(i), the Parties shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other lawful federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and Equipment while such trains, locomotives, cars, and Equipment are being operated over the Subject Trackage. Liability for a violation of this section shall be determined in accordance with Unified Liability Agreement.

(iii) NSR's trains shall not include locomotives, cars or Equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as contained in the Clearance File maintained by MSLLC, and no train shall contain locomotives, cars or Equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by the Designated Operator's operating rules and regulations, without the prior consent of MSLLC. The JOC shall make proper accommodation for exceptions, should that be reasonable, necessary, and practicable. All NSR trains shall be operated by locomotives with horsepower sufficient to permit operation at posted speeds.

(iv) If any employee of NSR shall neglect, refuse, or fail to abide by MSLLC's rules, instructions and restrictions governing the operation on or along MSLLC's property, such employee shall, upon written request of MSLLC, be prohibited by NSR from working on MSLLC's property. If any party shall deem it necessary to hold a formal investigation to establish such neglect, refusal, or failure on the part of any employee of NSR, then upon such notice presented in writing, NSR shall promptly hold an investigation in which all parties concerned shall participate, with each party bearing the expense for its officers', counsel's, witnesses' and employees' participation. Notice of such investigations to NSR's employees shall be given by NSR's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between NSR and its employees. If the result of such investigation warrants, such employee shall, upon written request by MSLLC, be withdrawn by NSR from service on MSLLC's property and NSR shall release and indemnify MSLLC from and against any and all claims and expenses because of such withdrawal.

(b) Invoices and Payment of Bills.

REDACTED

(i) On or before the 15th day of each calendar month during the term of this Agreement, KCSR shall prepare on behalf of MSLLC a monthly statement setting forth the number of NSR Cars operated over the Subject Trackage during the month (the "Monthly Statement") and an invoice (the "Use Invoice"). The Monthly Statement shall be in electronic format, and shall contain a detailed list of the NSR Cars that moved during the subject month, which list shall include, for each Car, information relating to such cars that MSLLC may reasonably request in connection with accounting for the use of the services and rights provided hereunder. The Monthly Statement and the Use Invoice shall be delivered to NSR and NSR shall make payment to MSLLC within thirty (30) days after the date of receipt of such Use Invoice.

(ii) Any dispute regarding the amount of a Monthly Statement or Use Invoice shall be reconciled between the Parties pursuant to Section 7(i), and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice. If NSR disputes any portion of a Use Invoice, it shall nevertheless pay such Use Invoice in full subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement or Use Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

(iii) MSLLC and NSR shall each have the right, at its own expense, to audit the records of any other Party pertaining to the use of the Subject Trackage under this Agreement, and any Monthly Statement, Use Invoice or other invoice issued by MSLLC or KCSR, respectively, pursuant to this Agreement, provided such audit is initiated at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to this Agreement. All such audits shall be conducted at reasonable intervals, locations, and times. All such audits shall be prosecuted with reasonable due diligence. Each Party agrees that all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to an arbitrator in connection with an arbitration conducted pursuant this Agreement or as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 7(b)(iii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

(iv) Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices, shall include direct labor and material costs, together with the surcharges, overhead percentages, and Equipment rentals as specified by MSLLC at the time any work is performed by MSLLC for NSR, or shall include actual costs and expenses, upon mutual agreement of the Parties.

(c) Liability.

As between the Parties hereto, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of NSR or MSLLC) or other matters covered by the Uniform Liability Agreement, resulting from, arising out of, incidental to or occurring in connection with this Agreement shall be allocated as is set forth in the Unified Liability Agreement.

(d) Rerailing, Wrecking, Bad Orders and Repairs.

(i) Whenever one or more cars and/or locomotives in the account of NSR requires rerailing, wrecking service or wrecking train service, MSLLC shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. MSLLC shall promptly inform NSR of its intent to proceed with wrecking service or wrecking train service, and shall permit a NSR representative to be present on the scene, to work in concert with the employees of its Designated Operator to manage such wrecking service or wrecking train service. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 7(c) hereof. All locomotives, cars, Equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by NSR at the time of such wreck, shall be promptly delivered to it.

(ii) If any cars or locomotives of NSR are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars or locomotives shall, after being repaired, be picked up by MSLLC, or if agreed upon by the parties, MSLLC will transport them to a mutually acceptable location to be picked up by NSR. MSLLC may, upon request of NSR and at the expense of NSR, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered Cars or locomotives safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(e) Force Majeure.

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including flood, earthquake, hurricane, tornado, or other such severe weather or climatic condition, riot, accident, wreck, derailment, washout, explosion, Acts of God, act of terrorism and public enemy, war, blockage, insurrection, vandalism or sabotage, fire, strike, lockout or labor dispute, embargoes or AAR service orders, or governmental laws, orders or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse

for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

(f) Term and Termination.

(i) This Agreement shall become effective following the latest date of: (a) the date first written above; (b) receipt of any required regulatory approvals or exemptions; and (c) the expiration of any time periods required by the issuance of labor notices by NSR and/or MSLLC, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(ii) This Agreement shall commence on the Effective Date and shall continue until terminated by mutual agreement.

(iii) Termination of this Agreement shall not relieve or release any Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination hereof, nor shall it terminate any underlying right, or contingent right, of movement pursuant to the trackage rights grant.

(g) Successors and Assigns.

(i) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns. Third party beneficiary status shall inure to the benefit of KCSR and each of its successors and permitted assigns.

(ii) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

(iii) In the event of a sale of substantially all of the assets or business of NSR, or the merger or consolidation of NSR into or with a firm or corporation not controlled by NSC, NSR may, without the prior consent of MSLLC, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of NSR, or merging or consolidating with NSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of NSR under this Agreement that existed prior to such assignment.

(iv) In the event of a sale of substantially all of the assets or business of MSLLC, or the merger or consolidation of MSLLC, MSLLC may, without the prior consent of NSR, assign this Agreement to such firm or corporation acquiring

substantially all of the assets or business of MSLLC, or merging or consolidating with MSLLC; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of MSLLC under this Agreement that existed prior to such assignment.

(h) Notice.

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

(ii) If to MSLLC:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Senior Director – Joint Facilities
Norfolk Southern Corporation

1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

Either Party may provide notice of changes in the above addressees to the other Party by personal service or certified mail.

(i) Arbitration.

(i) Any dispute arising between the Parties with respect to an alleged breach of this Agreement shall be referred to the JOC for resolution and if the JOC is unable to resolve the dispute, it will be referred to the Management Committee, provided however, that any Member (as defined in the LLC Agreement) may submit the dispute for binding arbitration by a panel of three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall render a written decision on the controversy. The written decision of the arbitrators, reached upon a majority vote, shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs, and expenses of the three arbitrators, if any, shall be borne by NSR and MSLLC, with each paying 50 percent of such compensation, costs, and expenses. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the written decision of the arbitrators, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the written decision of the arbitrators.

(ii) As a third party beneficiary, KCSR may initiate and prosecute arbitration pursuant to Section 7(i)(i) on behalf of MSLLC. MSLLC shall cooperate with KCSR in the preparation for, and the initiation and prosecution of, such arbitration, at KCSR's expense.

(j) Confidentiality.

(i) Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or in connection with an audit by the Internal Revenue Service or other tax authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the term of this Agreement (including any extensions thereof), and for a period of three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than members, officers, employees, independent auditors, and attorneys, without the prior written approval of the other Party.

(ii) Notwithstanding the foregoing Section 7(j)(i), the Parties acknowledge and agree that in any STB proceeding, the Parties may be required to submit this Agreement into the record. The Parties will seek a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with certain confidential provisions redacted) may be entered into the public STB record and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

(k) Claims.

The Parties shall agree between themselves on the fairest, practical, and efficient arrangements for handling and administering freight loss and damage Claims. Such arrangements, and the allocation of responsibility for such Claims, shall be subject to the provisions of the Unified Liability Agreement.

(l) Abandonment.

(i) MSLLC shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon or discontinue service on the Subject Trackage or any portion thereof (the "Abandonment Segment") during the term of this Agreement. MSLLC shall provide NSR no less than ninety (90) days prior notice of its intention to seek to abandon or discontinue service over any Abandonment Segment.

(ii) If MSLLC elects to abandon or discontinue service over the Subject Trackage (or any portion thereof) pursuant to Section 7(l)(i), this Agreement shall continue to apply in all respects to any remaining portion of the Subject Trackage not abandoned or subject to discontinuance by MSLLC.

(iii) MSLLC shall, not less than 60 days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment or discontinuance) of an application or exemption for authority to abandon or discontinue service over an Abandonment Segment(s), first offer NSR the first right to purchase such Abandonment Segment(s) for fair market value ("FMV") of such Abandonment

Segment(s), and on such other terms and conditions as are customary with respect to line sales, which such notice shall specifically identify this Section 7(l) and the time periods for action hereunder. NSR shall have forty-five (45) days ("Abandonment Notice Period") within which to advise MSLLC that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to agree upon the FMV of the Abandonment Segment(s) that NSR wishes to purchase, either Party may refer the issue to arbitration pursuant to Section 7(i), which arbitration shall determine all other issues relating to terms and conditions for the sale not then (at the time of the initiation of the arbitration) agreed to by the Parties. Such arbitration shall be conducted on an expedited basis, with selection of the arbitrators within thirty (30) days of the initiation of arbitration, all submissions to be made by the Parties within ninety (60) days of the initiation of arbitration, and a written decision to be rendered within thirty (30) days following the final submissions of the Parties.

(iv) The Parties shall consummate the sale contemplated by this Section 7(l) within forty-five (45) days of the latest of: (a) the rendering of a written arbitration decision, should issues related to the sale proceed to arbitration; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(v) If NSR elects not to purchase the Abandonment Segment, it shall so advise MSLLC within the same forty-five (45) day Abandonment Notice Period by delivering to MSLLC a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of NSR to provide MSLLC with either an Exercise Notice or a Waiver Notice within the aforesaid forty-five (45) day period shall constitute a Waiver Notice.

(vi) In the event of a Waiver Notice and KCSR does not purchase the Abandonment Segment pursuant to its rights in the KCSR Joint Use Agreement, MSLLC shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the Abandonment Segment and for the discontinuance of KCSR's and NSR's (if any) trackage rights over the Abandonment Segment.

(m) MSLLC Liability.

For the purposes of this Agreement, MSLLC shall be liable for the actions and omissions of its Designated Operator for the performance of its duties as such as if such actions or omissions were those of MSLLC.

(n) Miscellaneous Provisions.

(i) This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(ii) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(iii) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing and signed by all Parties.

(iv) The division of this Agreement into articles, sections, and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to articles, sections or subsections are to articles, sections or subsections of this Agreement.

(v) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(vi) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(vii) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(viii) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between MSLLC and NSR.

(ix) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(x) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

REDACTED

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

_____
As to MSLLC

MERIDIAN SPEEDWAY LLC

By: _____

WITNESS:

_____
As to NSR

NORFOLK SOUTHERN RAILWAY COMPANY

By: _____

WITNESS:

_____
As to KCS

KANSAS CITY SOUTHERN

By: _____

WITNESS:

_____
As to KCSR

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By: _____

REDACTED

INDEX TO APPENDICES

APPENDIX B. COMMERCIAL APPENDIX FOR NS TRAFFIC

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APPENDIX B – COMMERCIAL APPENDIX

Section 1. Section 1. Pricing

A. NS Traffic – Initial Pricing:

(1) Interchange With KCSR

NSR shall pay to MSLLC the following as compensation for providing NSR with NSR Haulage Rights over the Subject Trackage to an interchange with KCSR at M.P. V-169.85 for subsequent interchange to/from BNSF.

[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]

(2) Other Interchange Compensation

(a) NSR shall pay to MSLLC the following as compensation for providing NSR with NSR Haulage Rights over the Subject Trackage to an interchange with UP at M.P. V-169.85:

[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]

(b) NSR shall also pay to MSLLC [ ] as "Additional Compensation".

B. Empties – Initial Pricing:

(1) NSR shall pay to MSLLC [ ] on an empty railcar moving in NSR Haulage Service between Meridian (M.P. 0.0) and Shreveport (M.P. V- 169.85) upon the following conditions:

(a) Empty cars ride on a haulage train consisting of [ ] [ ]. Empty cars will not be limited in number as long as the maximum train length allowable at that time is not exceeded. All empty cars will ride as one block at the end of the haulage train.

(b) The loaded cars meet or exceed[ ]. In the event NSR fails to maintain [ ], then the Parties agree

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to meet at MSLLC's request to establish rates to compensate MSLLC adequately for the excess empty wells and platforms.

(c) A "slot" is defined as any available rail car space that can minimally hold a 40' TOFC/COFC unit. There are (i) two slots per well of a single or multi-well stack car; or (ii) one slot per hitch on a single flat car or multi-platform conventional spine car. The following table serves as an example of pricing scenarios for empty rail car moves. There may be other pricing scenarios.

Empty Car Description	Number of Slots	Price per Car
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]

C. Adjustments to Pricing:

[

]

(1) [

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[

]

[

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[ ]

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Section 2. Service Standards.

A. The Service Standards contained in this Section 2 shall become effective beginning with the start of the calendar year following the earlier of (i)

completion of the spending of the Capital Proceeds as defined in the Transaction Agreement; or (ii) the fourth anniversary of the Closing of the Transaction.

B. For the purpose of this Section, Qualifying Trains are defined as: (i) trains carrying NSR Cars moving across the Subject Trackage between Meridian (MP 0.0) and Shreveport (MP V- 169.85), and Meridian (MP 0.0) and Metro Junction (MP D – 110.2) or other mutually-designated interchange locations in the Dallas, TX area; or (ii) KCSR trains moving traffic subject to the Dallas Terminal Marketing Agreement. In addition, Qualifying Trains must meet the following criteria to be included in the computation for Service Standards:

(1) The train must not have been delayed en route between the End Points directly as a result of:

(a) a crossing accident;

(b) the failure of locomotives in NSR's account on the train, unless said failure is intentionally caused by the acts of the crews, in the case of trains moving NSR Cars,

(c) trains carrying NSR Cars that undergo a 1,000 mile inspection between the End Points;

(d) concentrated FRA audits;

(e) a scheduled maintenance of way window where MSLLC or KCSR have given NSR at least [ ]advance notice, and, despite the good faith efforts of the Designated Operator, NSR and KCSR under the direction of the JOC to resolve potential conflicts in scheduling, said train delays could not be avoided;

(f) the failure of NSR to provide locomotive consists that meet the HPT requirements set forth from time to time by the JOC that apply equally to all carriers operating similar traffic on the Subject Trackage;

(g) or Force Majeure; or

(2) The train must not have begun its transit over the Subject Trackage on any of the following holidays: New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

C. At the time Service Standards become effective, the following transit times for Qualifying Trains will apply:

(1) The transit time for a Qualifying Train moving NSR Cars between the End Points will be [ ] from the time the train is actually available to

MSLLC, provided that the actual availability of such train is within [ ] on either side of its scheduled arrival time, and further provided that if said Qualifying Train is actually available to MSLLC more than [ ] before the scheduled arrival time, the transit time will be [ ] from the starting edge of the window (two hours before the scheduled arrival time), and provided further that if said Qualifying Train is not actually available to MSLLC until more than [ ]after the scheduled arrival time, then the transit time will be [ ].

(2) The transit time for a Qualifying Train moving traffic subject to the Dallas Terminal Marketing Agreement between the End Points will be [ ] from the time the train reaches the first End Point.

(3) The transit time for a Qualifying Train moving between Metro Junction (MP D – 110.2), or other mutually-designated interchange location in the Dallas, TX area, and Meridian (MP 0.0) that is actually available within [ ] on either side of its scheduled arrival time will be [ ] from the time actually available to MSLLC, KCSR or BNSF, as the case may be, provided however, if said Qualifying Train is actually available to MSLLC, KCSR or BNSF, as the case may be, more than[ ]before the scheduled arrival time, the transit time will be [ ] from the starting edge of the window (two hours before the scheduled arrival time), and provided further that if said Qualifying Train is not actually available to MSLLC until more than[ ] after the scheduled arrival time, then the transit time will be [ ].

(4) In the event that a train requires fueling en route over MSLLC, then a [ ] allowance shall be added to the relevant service standard.

(5) For the purpose of computing the Service Standard transit times, the origin time shall be the time that the Qualifying Train is actually available to the receiving carrier at the origin End Point (or, in the case of a run through train, when the train moves over the origin End Point) and the destination time shall be the time that the Qualifying Train is actually available to the receiving carrier at the destination End Point (or, in the case of a run through train, when the train moves over the destination End Point), unless the train is refused in interchange by the receiving carrier (other than KCSR), in which case the destination time will be the arrival time at the location on the delivering carrier where the train will be held awaiting acceptance for the interchange from the receiving carrier.

D. The Service Standard Transit Times provided for herein will not be amended or modified as a result of a change in control of KCSR.

Section 3. Liquidated Damages

A. Payment of liquidated damage by MSLLC to NSR will be triggered by the following conditions:

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(1) [

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[

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[

[

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[

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B. The dollar amounts set forth in Section 3.A shall remain constant until the calendar year following the initiation of service standards as provided in Section 2.A above. In each subsequent calendar year, the dollar amounts set forth in Section 3.A shall be subject to escalation by the Weighted Adjustment Factor.

Section 4. Major Service Standard Failure

A. A Major Service Standard Failure occurs when [

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[

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[

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[

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Section 5. Volume Guarantees.

The Volume Guarantees described in this section shall not apply until the first full calendar year following the year in which the service standards described in Section 2 are in effect. If NSR receives[ ] train starts by the third anniversary of the Closing (as defined in the Transaction Agreement), and [ ]trains starts by the fourth anniversary of the Closing (as defined in the Transaction Agreement), an additional year will be added to the contemplated initiation of the Volume Guarantees.

(1) NSR commits that [

].

(2) The Volume Guarantee shall be reduced if [

]. The percentage of such a decline will result in an equivalent percentage reduction to the Volume Guarantee for that calendar year.

(3) The Volume Guarantee shall be reduced by [ ]for any calendar year in which [

], and reduced by [ ]as well [

].

(4) The Volume Guarantee shall cease to be in effect [
] and shall not become effective again until[

].

(5) The Volume Guarantee shall cease to be in effect [
].

(6) The Volume Guarantee for any particular calendar year shall be reduced by [

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(7) In the event NSR fails to meet the Volume Guarantee in any calendar year, [ ]:

(a) [

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[

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Section 6. Imbalance Fees.

A. Imbalance Threshold

NSR will pay MSLLC[

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[

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[

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[

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[

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B. Shortfall

For each train below the Imbalance Threshold, [

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Section 7. Miscellaneous Provisions.

A. Either Party shall have the right to conduct an audit, by a third party acceptable to the other Party, with respect to any of the provisions of this Agreement, provided that the third party's report to the Party requesting the audit shall be limited to whether or not the Agreement has been complied with, and the extent of the inaccuracy, if any. However, the Party whose records are being audited shall receive a full report from the auditor concerning the findings from such audit.

B. Payments of any Shortfall Damage or the Imbalance Fee pursuant to this Agreement shall be made no later than[

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D

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EXHIBIT D
to Transaction Agreement

THE KANSAS CITY SOUTHERN RAILWAY COMPANY – MERIDIAN SPEEDWAY LLC -- JOINT USE AGREEMENT

THIS AGREEMENT (the "KCSR Joint Use Agreement" or "Agreement") is entered into as of this ____ day of _____, 200__, by and between KANSAS CITY SOUTHERN ("KCS") AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ("KCSR"), MERIDIAN SPEEDWAY LLC, a Delaware limited liability company ("MSLLC"), and NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSR"). NSR, MSLLC, and KCSR are referred to individually herein as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, KCS, KCSR, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, provided for the creation of MSLLC, the transfer from KCSR to MSLLC of the Subject Trackage as defined herein, the construction, at MSLLC's cost, of certain infrastructure improvement projects, and the grant by MSLLC to Norfolk Southern Railway Company and KCSR of certain rights over the entirety of the Subject Trackage; and

WHEREAS, pursuant to the Transaction Agreement, MSLLC has agreed to grant NSR certain trackage and haulage rights for NSR to transport NS Traffic over the Subject Trackage; and

WHEREAS, pursuant to the Transaction Agreement, MSLLC has agreed to grant KCSR local and overhead trackage rights as necessary for KCSR to continue to conduct railroad operations over the Subject Trackage and to fulfill its common carrier obligations with respect to all traffic except for the right to transport NS Traffic and Third Party Traffic over the Subject Trackage ("KCS Trackage Rights"); and

WHEREAS, the Transaction Agreement anticipates that, pursuant to an Operating Agreement, MSLLC will hire KCSR to perform as the designated operator ("Designated Operator") for all railroad operations on behalf of MSLLC, including MSLLC railway operations required pursuant to the KCSR Joint Use Agreement and the NSR Joint Use Agreement, and

WHEREAS, the route traversed by traffic moving pursuant to this Joint Use Agreement includes approximately four-tenths of a mile section of track in Jackson, Mississippi that is controlled by Canadian National (as successor to Illinois Central Gulf Railroad Company) (the "Jackson Trackage Rights Section") pursuant to that certain trackage rights agreement (the "MSR Trackage Rights Agreement"), as supplemented and amended from time to time, dated March 26, 1986, between Midsouth Rail Corporation and Illinois Central Gulf Railroad Company; and

WHEREAS, pursuant to the Transaction Agreement, KCSR shall provide haulage ("KCSR Haulage") for NSR over the Jackson Trackage Rights Section until either the MSR Trackage Rights Agreement is assigned to MSLLC or MSLLC constructs a "flyover" bridge to

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carry MSLLC tracks over the tracks and real property of Canadian National Railway Company at Jackson, MS which establishes a continuous line of rail between Shreveport and Meridian (the "Jackson Flyover"); and

WHEREAS, the Parties intend that the MSR Trackage Rights Agreement will be assigned to MSLLC and the Parties desire to set forth the terms and conditions upon which MSLLC shall provide haulage services to KCSR and NSR over the Jackson Trackage Rights Section in the event of such assignment; and

WHEREAS, pursuant to an agreement of even date herewith between KCSR and MSLLC (the "Master KCSR-MSLLC Interchange Agreement"), MSLLC and KCSR have documented, among other things, the method for the physical interchange of traffic between KCSR and MSLLC at points on the Subject Trackage; and

WHEREAS, pursuant to the Transaction Agreement, that certain Interchange Agreement between KCSR and NSR dated as of June 4, 1986, as supplemented as of January 24, 2003, (the "Meridian Interchange Agreement") has been assigned to MSLLC; and

WHEREAS, the Parties desire to set forth the terms and conditions upon which MSLLC has agreed to grant KCSR its KCSR Trackage Rights;

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS AND INTERPRETATION

(a) Interpretation Generally.

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(ii) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(b) Capitalized Terms.

All capitalized terms shall have the defined meaning set forth below:

"Abandonment Notice Period" shall have the meaning given to that term in Section 7(l)(iii).

"Abandonment Segment" shall have the meaning given to that term in Section 7(l)(i).

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"Agreement" shall have the meaning given to that term in the introductory paragraph.

"AAR" shall have the meaning given to that term in Section 6(c).

"Cars" means each loaded or empty railroad freight car (including platform and well rail cars) or similar equipment.

"Clearance File" shall have the meaning given to that term in Section 6(d).

"Dallas Intermodal Terminal Traffic" means all domestic intermodal containers or trailers with an origin and destination in the United States, with a lift or drop at the Terminal, that moves over the Subject Trackage and over KCSR's tracks between Shreveport and the Terminal, and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas / Ft. Worth, TX. Standard Metropolitan Statistical Area (SMSA) as published by the Office of Management and Budget (OMB).

"Dallas Terminal Marketing Agreement" shall mean that certain Dallas Terminal Marketing Agreement dated the date hereof by and between NSR and KCSR.

"Designated Operator" shall have the meaning given to that term in the Recitals.

"End Points" shall mean: (1) Meridian, MS, M.P. 0.0; and (2) Shreveport, LA, M.P. V-169.85.

"Effective Date" shall have the meaning given to that term in Section 7(f)(i).

"EOTs" shall have the meaning given to that term in Section 2(b)(iii).

"Equipment" shall mean and be confined to hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery (other than locomotives) capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

"Exercise Notice" shall have the meaning given to that term in Section 7(l)(iii).

"FMV" shall have the meaning given to that term in Section 7(l)(iii).

"Foreign Railroad" shall mean a railroad that is not a party to this Agreement.

"Foreign Railroad Interchange Agreement" shall have the meaning given to that term in Section 3(c).

"GTMs" shall have the meaning given to that term in Appendix B, Section 1.A.

"Jackson Trackage Rights Section" shall have the meaning given to that term in the Recitals.

"Jackson Flyover" shall have the meaning given to that term in the Recitals.

"JOC" shall have the meaning given to that term in Section 6(a)(ii).

"KCSR Cars" shall mean Cars and Equipment in the revenue and/or car hire account of KCSR.

"KCSR Haulage Cars" shall mean KCSR Cars being transported pursuant to KCSR Haulage Rights.

"KCSR Haulage Rights" shall have the meaning given to that term in Section 2(a).

"KCSR" shall have the meaning given to that term in the introductory paragraph.

"KCSR Master Locomotive Run Through Agreement" shall have the meaning given to that term in Section 2(b)(ii).

"KCSR Permitted Traffic" shall have the meaning given to that term in Section 4(a).

"KCSR Trackage and Haulage Rights" shall mean those rights granted in Sections 2(a) and 2(b) of this Agreement.

"KCSR Trackage Rights" shall have the meaning given to that term in Section 2(a).

"KCSR Trackage Rights Cars" shall mean KCSR Cars and Equipment transported pursuant to KCSR Trackage Rights.

"Management Committee" shall mean the Management Committee of MSLLC as provided in the LLC Agreement.

"Master KCS-MSLLC Interchange Agreement" shall have the meaning given to that term in the Recitals.

"Meridian Interchange Agreement" shall have the meaning given to that term in the Recitals.

"Monthly Statement" shall have the meaning given to that term in Section 7(b)(i).

"MSR Trackage Rights Agreement" shall have the meaning given to that term in the Recitals.

"MSLLC" shall have the meaning given to that term in the introductory paragraph.

"NS Traffic" shall mean all intermodal traffic that: (i) originates or terminates in the United States west of Dallas/Ft. Worth (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Subject Trackage at Shreveport; and (ii) originates or terminates in the United States at or east of Meridian and enters or exits the Subject Trackage at Meridian; and (iii) does not consist of traffic originating or terminating at any station on the KCSR system which includes the Texas Mexican Railway

Company, (including any station where KCSR, or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement.

"NSC" shall have the meaning given to that term in the Recitals.

"NSR" shall have the meaning given to that term in the introductory paragraph.

"NSR Cars" shall mean Cars and Equipment in the revenue and/or car hire account of NSR.

"NSR Haulage Cars" shall mean NSR Cars being transported pursuant to haulage rights granted in the NSR Joint Use Agreement.

"NSR Joint Use Agreement" shall meaning an agreement of even date herewith by which MSLLC grants NSR certain trackage and haulage rights to transport NS Traffic.

"Operating Agreement" shall have the meaning given to that term in the Recitals.

"Parties" shall have the meaning given to that term in the introductory paragraph.

"Party" shall have the meaning given to that term in the introductory paragraph.

"Permitted Transfer" shall have the meaning given to that term in the Transaction Agreement.

"Subject Trackage" shall mean the certain lines of railroad generally running between Meridian, MS and Shreveport, LA as defined in the Transaction Agreement, together with the Jackson Flyover, as hereinafter defined, when constructed, and a bridge over the Mississippi River at Vicksburg.

"Third Party Traffic" shall mean freight rail service provided for a Foreign Railroad under a haulage or trackage rights agreement between MSLLC and the Foreign Railroad.

"Transaction Agreement" shall have the meaning given to that term in the Recitals.

"UP" shall mean the Union Pacific Railroad Company or any of its subsidiaries.

"Use Invoice" shall have the meaning given to that term in Section 7(b)(i).

"Waiver Notice" shall have the meaning given to that term in Section 7(l)(v).

(c) Successor Laws.

A reference to any particular statute or regulation shall include a reference to any successor statute or regulation.

SECTION 2. OPERATING RIGHTS

(a) Trackage Rights.

Pursuant to the Transaction Agreement and subject to the terms set forth in this Agreement, MSLLC hereby grants KCSR Trackage Rights for KCSR to transport KCSR Permitted Traffic over the Subject Trackage, excluding the Jackson Trackage Rights Section, and to fulfill its common carrier obligations with respect to KCSR Permitted Traffic (the "KCSR Trackage Rights"). These rights include, but are not limited to, the right to operate its trains, locomotives, cars, and Equipment with its own crews over the entirety of the Subject Trackage excluding the Jackson Trackage Rights Section. KCSR's use of its KCSR Trackage Rights shall be subject to the limitations and restrictions set forth in this Section 2(a), Section 2(c) and Section 2(d). KCSR Trackage Rights Cars shall at all times remain in the revenue waybill and car hire accounts of KCSR while moving over the Subject Trackage.

(b) Grant of Haulage Rights.

Pursuant to the Transaction Agreement and consistent with the terms of this Agreement, MSLLC hereby grants KCSR Haulage Rights solely for the purpose of transporting KCSR Permitted Traffic over the Jackson Trackage Rights Section, connective only with the KCSR Trackage Rights ("KCSR Haulage Rights"), should the MSR Trackage Rights Agreement be assigned to MSLLC. KCSR's use of its KCSR Haulage Rights shall be subject to the limitations and restrictions set forth in this Section 2(b), Section 2(c) and Section 2(d).

(i) KCSR Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of KCSR while moving over the Jackson Trackage Rights Section via the KCSR Haulage Rights. MSLLC shall not be entitled to any line haul revenue for the handling of KCSR Haulage Cars, nor shall MSLLC participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with, the movement of KCSR Haulage Cars.

(ii) The Parties will execute an agreement (the "KCSR Master Locomotive Run Through Agreement") consistent with, and with terms materially identical to, the Supplemental Agreement dated May 11, 2000, to the Master Locomotive Run Through Agreement of November 29, 1994. The KCSR shall be responsible for providing any equipment (locomotives, cars, end of train units ("EOTs"), etc.), and fuel for the trains used in providing the KCSR Haulage Rights. Locomotives on trains providing the KCSR Haulage Rights shall be governed by the KCSR Master Locomotive Run Through Agreement.

(c) Use Of The Subject Trackage.

(i) KCSR's use of Subject Trackage shall be in common with MSLLC, and, other than as explicitly set forth herein, MSLLC's right to use the Subject Trackage shall not be diminished by this Agreement.

(ii) KCSR may operate trains in either direction over the Subject Trackage.

(iii) KCSR may use its KCSR Trackage and Haulage Rights solely for the purposes of the movement of KCSR Permitted Traffic.

(iv) The KCSR Trackage and Haulage Rights shall be for the purpose of KCSR using the Subject Trackage to operate its trains in overhead and local movements, including, where applicable, the right of ingress and egress to any tracks, switches, turnouts, or other track classifications that connect to any point along the Subject Trackage.

(v) KCSR Trackage and Haulage Rights include the right to serve all existing or future shippers and receivers, including any transload operations, ports, industrial facilities or facilities of any type, that connect to (or are located on, at, along, or near) the Subject Trackage.

(vi) Subject to Section 3 and except as they may otherwise be restricted by the MSR Trackage Rights Agreement, KCSR may use the KCSR Trackage and Haulage Rights to interchange with any railroad at any location along the Subject Trackage, whether or not such a railroad is a private or common carrier that connects to the Subject Trackage.

(vii) KCSR shall have the right to use the Subject Trackage for the purpose of switching, storing, and servicing Cars, locomotives and Equipment, and for the making or breaking up of trains in order to conduct its railroad operations.

(viii) KCSR shall have the right to establish rates, charges, service terms, routes, and divisions, and to collect freight revenues or other transportation charges relating to KCSR Permitted Traffic transported over all or any portion of the Subject Trackage.

(d) Restrictions on Use.

(i) KCSR shall not use the KCSR Trackage and Haulage Rights for the movement of NS Traffic or Third Party Traffic, and KCSR may not move traffic over the Subject Trackage in the account of any railroad other than KCSR.

(ii) KCSR may not, pursuant to this Agreement, grant haulage rights, trackage rights, or other operating rights of any nature on or over the Subject Trackage to any other party.

SECTION 3. INTERCHANGE

From time to time MSLLC and KCSR shall consult as to the various interchange locations for the delivery and receipt of traffic, if any, being physically transferred between KCSR, MSLLC, and a Foreign Railroad. Unless otherwise mutually agreed, interchange operations shall be governed as follows:

(a) Interchange Between KCSR and MSLLC

Interchange operations between and among KCSR and MSLLC shall be governed by the terms of the Master KCS-MSLLC Interchange Agreement.

(b) Interchange Between KCSR and NSR

Interchange operations between and among KCSR and NSR shall be governed by the terms of the Meridian Interchange Agreement.

(c) Interchange With A Foreign Railroad

Interchange operations between KCSR and a Foreign Railroad shall be governed by the terms of the relevant interchange agreement between KCSR and said Foreign Railroad ("Foreign Railroad Interchange Agreement"), which may not be inconsistent with this Agreement.

(d) Continuous Movement

Nothing herein shall be interpreted as prohibiting the Designated Operator from transporting KCSR Haulage Cars over the Jackson Trackage Rights Section in a continuous movement with KCSR operating over the Subject Trackage via the KCSR Trackage Rights.

SECTION 4. PERMITTED SERVICE

(a) KCSR Permitted Traffic.

KCSR Permitted Traffic shall consist of all commodities transported to and from all origins and destinations other than NS Traffic or Third Party Traffic, except that KCSR may not move traffic over the Subject Trackage or the Jackson Trackage Rights Section in the account of any railroad other than KCSR.

(b) Dallas Intermodal Terminal Traffic

As KCSR Permitted Traffic, KCSR shall have the exclusive right to transport Dallas Intermodal Terminal Traffic over the Subject Trackage, except as provided in, and subject to, the Dallas Terminal Marketing Agreement.

(c) MSLLC's Retained Rights

(i) MSLLC may perform haulage services for, or provide trackage rights or operating right to, NSR or a Foreign Railroad provided the traffic moved for that carrier remains in that other carrier's revenue waybill account.

(ii) Notwithstanding the foregoing Section 4(c)(i), for NS Traffic only, MSLLC may not perform haulage services for any carrier other than NSR or grant trackage rights or operating rights to KCSR or any Foreign Railroad on the Subject Trackage for NS Traffic, absent the express written consent of NSR, which may be withheld in NSR's sole discretion.

(d) Rebilling.

It is the intent of the Parties that rebilling of traffic is not a permissible method of avoiding any direct traffic limitation, including those set forth in Section 4(a), or imposition of charges for services set forth herein.

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SECTION 5. INFRASTRUCTURE

(a) Maintenance.

(i) MSLLC shall be solely responsible for the maintenance, repair, and renewal of the Subject Trackage. MSLLC shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, but MSLLC does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. MSLLC shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use commercially reasonable efforts to avoid such interruptions.

(ii) Existing connections or facilities shall continue to be maintained, repaired, and renewed by and at the expense of the party or parties responsible for such maintenance, repair, and renewal under applicable agreements.

(iii) Notwithstanding anything to the contrary herein, MSLLC shall maintain the main line of the Subject Trackage to a minimum of FRA Class 3 standards, capable of handling cars of 286,000 lbs.

SECTION 6. MANAGEMENT AND OPERATIONS

(a) Dispatching

(i) The Designated Operator shall have exclusive control over the management and dispatching of the Subject Trackage. Dispatching of the Subject Trackage shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Subject Trackage (or any portion thereof) the most economical and efficient movement of its traffic over the Subject Trackage consistent with the demands and needs of other authorized users.

(ii) Although the Designated Operator will be the dispatcher, the Joint Operating Committee ("JOC"), subject to the direction of the Management Committee, will develop and implement appropriate dispatching protocols and adjust those protocols from time to time as necessary to carry out this Agreement. In dispatching the Subject Trackage, the Designated Operator shall follow any protocols developed by the JOC, provided, that in the event of a conflict between the dispatching protocols and the need to economically and efficiently move the traffic over the Subject Trackage, the dispatcher shall be empowered to employ best practices to efficiently move all trains consistent with the principles of this Agreement.

(b) Capacity Rights

Notwithstanding any other provisions of this Agreement, the Parties acknowledge that there may be capacity constraints from time to time for traffic covered under this Agreement. Whenever capacity of the Subject Trackage is insufficient to handle the total traffic demands of KCSR and NSR, the following capacity allocation rules shall apply:

(i) Prior to the start of the calendar year following the earlier of (a) completion of the spending of the Capital Proceeds as defined in the Transaction Agreement; or (b) the fourth anniversary of the Closing as defined in the Transaction Agreement, KCSR and NSR will each have a minimum of five (5) daily overhead train starts over the Subject Trackage. For purposes of determining capacity rights, NSR's train starts will include NS Traffic and Dallas Intermodal Terminal Traffic.

(ii) As incremental overhead train starts become available, KCSR acknowledges that NSR shall receive the first of every three (3) new daily overhead train starts, and NSR acknowledges that KCSR shall be allocated the second and third of every three (3) new daily overhead train starts. Following the start of the calendar year following the earlier of (a) completion of the spending of the Capital Proceeds as defined in the Transaction Agreement; or (b) the fourth anniversary of the Closing as defined in the Transaction Agreement, KCSR acknowledges that NSR will have a minimum of thirteen (13) daily overhead train starts. If through this allocation process NSR does not have at least thirteen (13) daily overhead train starts, then KCSR agrees to relinquish such train starts as needed to provide NSR with thirteen (13) daily overhead train starts.

(iii) NSR acknowledges that, after providing for NSR's minimum guarantee of thirteen (13) daily overhead train starts, KCSR shall receive all additional incremental daily overhead train starts until KCSR has a total of twenty-one (21) daily overhead train starts. Thereafter, KCSR acknowledges that NSR shall be allocated the first of every three (3) additional new incremental daily overhead train starts, and NSR acknowledges that the second and third of every three (3) new daily overhead train starts shall be allocated to KCSR.

(iv) If the Foreign Railroad fails to supply all necessary capital required to accommodate its new train start, KCSR acknowledges and agrees that the first new daily train start of any Foreign Railroad admitted to the Subject Trackage by MSLLC shall be considered to be a KCSR daily overhead train start for the purpose of the allocation of daily overhead trains starts of under these capacity allocation provisions. If the Foreign Railroad supplies all necessary capital required to accommodate its new train start, the Foreign Railroad's train start shall count against neither KCSR's nor NSR's train start allocation.

(c) Defective Or Overloaded Cars

KCSR or, as to movement of KCSR Cars over the Jackson Trackage Rights Segment, MSLLC may arrange for repairs to and adjustments to, or transfers of lading from bad ordered, defective or overloaded KCSR Cars, as in KCSR's or MSLLC's judgment, as the case may be, may be necessary to move such KCSR Cars safely. KCSR shall reimburse MSLLC for the cost of such work done by or on behalf of MSLLC at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the Association of American Railroads ("AAR").

(d) Use Of A Clearance File

KCSR shall have the right to operate all dimensional loads and excess clearance railcars for handling over the Subject Trackage, subject to a clearance file (the "Clearance File") applicable to traffic of NSR, KCSR, and MSLLC maintained by MSLLC. MSLLC shall promptly inform KCSR of any changes made to the Clearance File.

(e) Radio Communication

KCSR locomotives and crews operating over the Subject Trackage shall be equipped to communicate with the Designated Operator on radio frequencies normally used by the Designated Operator in directing train movements on the Subject Trackage.

(f) Safety Rules

KCSR's operations over the Subject Trackage shall at all times be subject to the direction and control of the operating officer in charge of the Subject Trackage and comply in all respects with the safety rules, operating rules and other regulations of the Designated Operator.

(g) Training of KCSR Crews.

KCSR shall make such arrangements with MSLLC as may be required to have all of its employees who shall operate its trains, locomotives, cars and Equipment over the Subject Trackage qualified for operation thereover. MSLLC shall provide reasonable cooperation and assistance in the qualification of KCSR operating (train and engine) crews for service over the Subject Trackage upon request. KCSR supervisory personnel who have been qualified to operate over the Subject Trackage may qualify other KCSR employees for operation of trains over the Subject Trackage.

(h) Modification of KCSR Train Schedules.

KCSR shall provide the Designated Operator reasonable notice of the schedules for regularly scheduled KCSR trains operating over the Subject Trackage, as well as any proposed modifications, and shall coordinate train operations with the Designated Operator and its dispatcher.

(i) Compensation.

KCSR shall compensate MSLLC for the use of the Subject Trackage pursuant to this Section 6 in accordance with Appendix B – Compensation.

(j) Mileage and Car Hire.

All mileage and car hire charges accruing on KCSR Cars on the Subject Trackage and the Jackson Trackage Rights Segment shall be assumed by KCSR and reported and paid by it directly.

SECTION 7. GENERALLY APPLICABLE PROVISIONS

(a) Compliance with Applicable Law and Rules.

(i) Each Party hereto shall comply with all applicable and lawful federal, state and local laws, rules, regulations and orders promulgated by any Governmental Entity that relate to the operations contemplated hereunder, including but not limited to the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other lawful federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and Equipment while such trains, locomotives, cars, and Equipment are being operated over the Route. If any fine, penalty, cost, or charge is imposed or assessed on or against either Party hereto by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, such non-complying Party shall reimburse and indemnify the other Party for or on account of any such fine, penalty, cost or charge, and all expenses and attorneys fees incurred. As a part of the consideration hereof, each Party hereby agrees that the indemnity commitments in this Section in favor of the other Party hereto shall extend to and indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of their respective directors, officers, agents and employees.

(ii) KCSR's trains shall not include locomotives, cars or Equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as contained in the Clearance File maintained by MSLLC, and no train shall contain locomotives, cars or Equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by the Designated Operator's operating rules and regulations, without the prior consent of MSLLC. The JOC shall make proper accommodation for exceptions, should that be reasonable, necessary, and practicable. All KCSR trains shall be operated by locomotives with horsepower sufficient to permit operation at posted speeds.

(iii) If any employee of KCSR shall neglect, refuse, or fail to abide by MSLLC's rules, instructions and restrictions governing the operation on or along MSLLC's property, such employee shall, upon written request of MSLLC, be prohibited by KCSR from working on MSLLC's property. If any party shall deem it necessary to hold a formal investigation to establish such neglect, refusal, or failure on the part of any employee of KCSR, then upon such notice presented in writing, KCSR shall promptly hold an investigation in which all parties concerned shall participate, with each party bearing the expense for its officers', counsel's, witnesses' and employees' participation. Notice of such investigations to KCSR's employees shall be given by KCSR's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between KCSR and its employees. If the result of such investigation warrants, such employee shall, upon written request by MSLLC, be withdrawn by KCSR from service on MSLLC's property and KCSR shall release and indemnify MSLLC from and against any and all claims and expenses because of such withdrawal.

(b) Invoices and Payment of Bills.

(i) On or before the 15th day of each calendar month during the term of this Agreement, KCSR shall prepare and deliver to MSLLC a monthly statement (the "Monthly Statement"). The Monthly Statement shall be delivered to MSLLC's designee

in electronic format. MSLLC shall develop and present to KCSR an invoice (the "Use Invoice"). That Monthly Statement shall be in electronic format, and shall contain a detailed list of the KCSR Cars that moved during the subject month, which list shall include, for each Car, the following information: (A) the GTMs and, when applicable, the resistance miles; (B) the location that the Car entered the Subject Trackage; (C) the location that the Car exited the Subject Trackage; and (D) such other information relating to the cars that MSLLC may reasonably request in connection with accounting for the use of the services and rights provided hereunder. The Monthly Statement and the Use Invoice shall be delivered to KCSR and KCSR shall make payment to MSLLC within thirty (30) days after the date of such Use Invoice.

(ii) Any dispute regarding the amount of a Monthly Statement or Use Invoice shall be reconciled between the Parties pursuant to Section 7(i), and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice. If KCSR disputes any portion of a Use Invoice, it shall nevertheless pay such Use Invoice in full subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement or Use Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

(iii) NSR, MSLLC and KCSR shall each have the right, at its own expense, to audit the records of the other Party pertaining to the use of the Subject Trackage and the Jackson Trackage Rights Section under this Agreement, and any Monthly Statement, Use Invoice or other invoice issued by MSLLC pursuant to this Agreement, provided such audit is initiated at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to this Agreement. All such audits shall be conducted at reasonable intervals, locations, and times. All such audits shall be prosecuted with reasonable due diligence. Each Party agrees that all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to an arbitrator in connection with an arbitration conducted pursuant this Agreement or as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 7(b)(iii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

(iv) Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices, shall include direct labor and material costs, together with the surcharges, overhead percentages, and Equipment rentals as specified by MSLLC at the time any work is performed by MSLLC for KCSR, or shall include actual costs and expenses, upon mutual agreement of the Parties.

(c) Liability.

As between the Parties hereto, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of KCSR or MSLLC) or other matters covered by the Uniform Liability Agreement, resulting from, arising out of, incidental to or occurring in connection with this Agreement shall be allocated as is set forth in the Unified Liability Agreement.

(d) Rerailing, Wrecking, Bad Orders and Repairs.

(i) Whenever one or more cars and/or locomotives in KCSR haulage service requires rerailing, wrecking service or wrecking train service, MSLLC shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. MSLLC shall promptly inform KCSR of its intent to proceed with wrecking service or wrecking train service, and shall permit a KCSR representative to be present on the scene, to work in concert with the employees of its Designated Operator to manage such wrecking service or wrecking train service. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 7(c) hereof. All locomotives, cars, Equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by KCSR at the time of such wreck, shall be promptly delivered to it.

(ii) Whenever one or more cars and/or locomotives in KCSR Trackage Rights service requires rerailing, wrecking service or wrecking train service, KCSR shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. KCSR shall promptly inform MSLLC of its intent to proceed with wrecking service or wrecking train service, and shall permit a MSLLC representative to be present on the scene, to work in concert with the employees of the Designated Operator to manage such wrecking service or wrecking train service. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 7(c) hereof. All locomotives, cars, Equipment, and salvage from the same so picked up and removed which is owned by or under the management and control of or used by KCSR at the time of such wreck, shall be the responsibility of KCSR.

(iii) If any cars or locomotives of KCSR are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars or locomotives shall, after being repaired, be picked up by KCSR after receiving proper authority from MSLLC, or if agreed upon by the parties, MSLLC will transport them to a mutually acceptable location to be picked up by KCSR. MSLLC may, upon request of KCSR and

at the expense of KCSR, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered Cars or locomotives safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(e) Force Majeure.

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including flood, earthquake, hurricane, tornado, or other such severe weather or climatic condition, riot, accident, wreck, derailment, washout, explosion, Acts of God, act of terrorism and public enemy, war, blockage, insurrection, vandalism or sabotage, fire, strike, lockout or labor dispute, embargoes or AAR service orders, or governmental laws, orders or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

(f) Term and Termination.

(i) This Agreement shall become effective following the latter of: (a) the date first written above; (b) receipt of any required regulatory approvals or exemptions; and (c) the expiration of any time periods required by the issuance of labor notices by KCSR and/or MSLLC, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(ii) This Agreement shall commence on the Effective Date and shall continue until terminated by mutual agreement.

(iii) Termination of this Agreement shall not relieve or release any Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination hereof, nor shall it terminate any underlying right, or contingent right, of movement pursuant to the trackage rights grant.

(g) Successors and Assigns.

(i) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns. Third party beneficiary status shall inure to the benefit of NSR and each of its successors and permitted assigns.

(ii) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

(iii) In the event of a sale of substantially all of the assets or business of KCSR, or the merger or consolidation of KCSR into or with a firm or corporation not controlled by KCS, KCSR may, without the prior consent of MSLLC, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of KCSR, or merging or consolidating with KCSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of KCSR under this Agreement that existed prior to such assignment.

(iv) In the event of a sale of substantially all of the assets or business of MSLLC, or the merger or consolidation of MSLLC, MSLLC may, without the prior consent of KCSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of MSLLC, or merging or consolidating with MSLLC; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of MSLLC under this Agreement that existed prior to such assignment.

(h) Notice.

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

(ii) If to MSLLC:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

(iii) If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

Either Party may provide notice of changes in the above addressees to the other Party by personal service or certified mail.

(i) Arbitration.

(i) Any dispute arising between the Parties with respect to an alleged breach of this Agreement shall be referred to the JOC for resolution and if the JOC is unable to resolve the dispute, it shall be referred to the Management Committee, provided however, that any Member (as defined in the LLC Agreement) may submit the dispute for binding arbitration by a panel of three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall render a written decision on the controversy. The written decision of the arbitrators, reached upon a majority vote, shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs, and expenses of the three arbitrators, if any, shall be borne by KCSR and MSLLC, with each paying 50 percent of such compensation, costs, and expenses. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the written decision of the arbitrators, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been

fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the written decision of the arbitrators.

(ii) As a third party beneficiary, NSR may initiate and prosecute arbitration pursuant to Section 7(i)(i) on behalf of MSLLC. MSLLC shall cooperate with NSR in the preparation for, and the initiation and prosecution of, such arbitration, at NSR's expense.

(j) Confidentiality.

(i) Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or in connection with an audit by the Internal Revenue Service or other tax authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the term of this Agreement (including any extensions thereof), and for a period of three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than members, officers, employees, independent auditors, and attorneys, without the prior written approval of the other Party.

(ii) Notwithstanding the foregoing Section 7(j)(i), the Parties acknowledge and agree that in any STB proceeding, the Parties may be required to submit this Agreement into the record. The Parties will seek a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with certain confidential provisions redacted) may be entered into the public STB record and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

(k) Claims.

The Parties shall agree between themselves on the fairest, practical, and efficient arrangements for handling and administering freight loss and damage Claims. Such arrangements, and the allocation of responsibility for such Claims, shall be subject to the provisions of the Unified Liability Agreement.

(l) Abandonment.

(i) MSLLC shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon or discontinue service on the Subject Trackage or any portion thereof (the "Abandonment Segment") during the term of this Agreement. MSLLC shall provide KCSR no less than ninety (90) days prior notice of its intention to seek to abandon or discontinue service over any Abandonment Segment.

(ii) If MSLLC elects to abandon or discontinue service over the Subject Trackage (or any portion thereof) pursuant to Section 7(l)(i), this Agreement shall continue to apply in all respects to any remaining portion of the Subject Trackage not abandoned or subject to discontinuance by MSLLC.

(iii) MSLLC shall, not less than 60 days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment or discontinuance) of an application or exemption for authority to abandon or discontinue service over an Abandonment Segment(s), first offer NSR the first right to purchase such Abandonment Segment(s) in accordance with provisions of Section 7(l) of the NSR Joint Use Agreement. In the event NSR determines not to exercise its rights to purchase the Abandonment Segment(s), MSLLC shall then offer KCSR the right to purchase such Abandonment Segment(s) for the fair market value ("FMV"), and on such terms and conditions as are customary with respect to line sales, which such notice shall specifically identify this Section 7(l) and the time periods for action hereunder. NSR shall have forty-five (45) days ("Abandonment Notice Period") within which to advise MSLLC that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to agree upon the FMV of the Abandonment Segment(s) that KCSR wishes to purchase, either Party may refer the issue to arbitration pursuant to Section 7(i), which arbitration shall determine all other issues relating to terms and conditions for the sale not then (at the time of the initiation of the arbitration) agreed to by the Parties.

(iv) The Parties shall consummate the sale contemplated by this Section 7(l) within forty-five (45) days of the latest of: (a) the rendering of a written arbitration decision, should issues related to the sale proceed to arbitration; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(v) If KCSR elects not to purchase the Abandonment Segment, it shall so advise MSLLC within the same forty-five (45) day Abandonment Notice Period by delivering to MSLLC a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of KCSR to provide MSLLC with either an Exercise Notice or a Waiver Notice within the aforesaid forty-five (45) day period shall constitute a Waiver Notice.

(vi) In the event of a Waiver Notice and NSR does not purchase the Abandonment Segment pursuant to its rights in this Agreement, MSLLC shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the Abandonment Segment and for the discontinuance of KCSR's and NSR's (if any) trackage rights over the Abandonment Segment.

(m) MSLLC Liability.

For the purposes of this Agreement, MSLLC shall be liable for the actions and omissions of its Designated Operator for the performance of its duties as such as if such actions or omissions were those of MSLLC.

(n) Miscellaneous Provisions.

(i) This Agreement and each and every provision hereof is for the exclusive

benefit of the Parties hereto. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(ii) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(iii) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing and signed by all Parties.

(iv) The division of this Agreement into articles, sections, and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to articles, sections or subsections are to articles, sections or subsections of this Agreement.

(v) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(vi) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(vii) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(viii) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between MSLLC and KCSR.

(ix) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(x) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

MERIDIAN SPEEDWAY LLC

By: _____

_____
As to MSLLC.

WITNESS:

NORFOLK SOUTHERN RAILWAY COMPANY

_____
As to NSR

By: _____

WITNESS:

KANSAS CITY SOUTHERN

_____
As to KCS

By: _____

WITNESS:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

_____
As to KCSR

By: _____

REDACTED

INDEX TO APPENDICES

APPENDIX A. [Intentionally Omitted]
APPENDIX B. COMPENSATION

REDACTED

APPENDIX B – COMPENSATION

Section 1. Compensation for KCS Traffic

A. KCSR shall compensate MSLLC based upon [

].

B. As soon as practical after the end of each calendar quarter during the term of this Agreement, MSLLC shall prepare a statement setting forth the following:

[

]

From this information, an invoice will be prepared and delivered to KCSR specifying the compensation KCSR shall pay to MSLLC for use of the Subject Trackage for that time period. KCSR shall make payment to MSLLC within thirty (30) days after date of such invoice.

E

REDACTED

EXHIBIT E
to Transaction Agreement

NORFOLK SOUTHERN RAILWAY COMPANY
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
WESTERN HAULAGE AGREEMENT

THIS WESTERN HAULAGE AGREEMENT (this "Agreement") is entered into as of this ____ day of _____, 200__, by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSR"), and THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation ("KCSR"). NSR and KCSR are referred to individually herein as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, Kansas City Southern ("KCS"), KCSR, Norfolk Southern Corporation ("NSC"), and The Alabama Great Southern Railroad Company entered into a transaction agreement (the "Transaction Agreement") that, among other things, contemplated the creation of a limited liability company, Meridian Speedway LLC ("MSLLC"), the transfer from KCSR, a wholly-owned subsidiary of KCS, to MSLLC of the rail line generally between Meridian, Mississippi and Shreveport, Louisiana (the "Subject Trackage"), and the grant by MSLLC to NSR and KCSR of certain rights over the entirety of the Subject Trackage; and

WHEREAS, pursuant to a joint use agreement of even date hereof (the "NSR Joint Use Agreement"), MSLLC has granted to NSR certain overhead rights over the Subject Trackage; and further pursuant to which MSLLC has committed to perform certain haulage services for NSR; and

WHEREAS, pursuant to an operating agreement of even date hereof (the "Operating Agreement"), MSLLC will contract with KCSR to provide certain services as the designated operator ("Designated Operator") all railroad operations on behalf of MSLLC, including the railway operations of MSLLC required pursuant to the NSR Joint Use Agreement; and

WHEREAS, pursuant to the Transaction Agreement, KCSR has agreed to provide haulage for NSR for certain traffic between an interchange point with MSLLC in Shreveport, Louisiana, and an interchange point with BNSF Railway Company ("BNSF") in the Dallas, Texas area (the "Western Haulage Services"); and

WHEREAS, KCSR desires, within six (6) months of the date hereof, to enter into a haulage agreement with BNSF that would provide for an interchange between MSLLC and BNSF at Shreveport, Louisiana for NS Traffic, as hereinafter defined; and

WHEREAS, the rights granted to NSR under the NSR Joint Use Agreement are intended to be connective with the haulage service to be provided under this Agreement; and

WHEREAS, the Parties desire to set forth the terms and conditions upon which KCSR shall provide the Western Haulage Services to NSR.

REDACTED

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS AND INTERPRETATION

(a) Interpretation Generally.

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(ii) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(b) Capitalized Terms.

All capitalized terms shall have the meaning set forth as follows:

"Abandonment Notice Period" shall have the meaning given that term in Section 5(m)(iii).

"Abandonment Segment" shall have the meaning given that term in Section 5(m)(i).

"Agreement" shall have the meaning given that term in the introductory paragraph.

"AAR" shall have the meaning given that term in Section 2(b)(vii).

"BNSF" shall have the meaning given that term in the Recitals.

"BNSF Dallas Interchange Fee" shall have the meaning given that term in Appendix C, Section 1.A.

"BNSF Shreveport Agreement" shall have the meaning given that term in Section 2(a)(ii).

"Cars" means each loaded or empty railroad freight car (including platform and well rail cars) or similar equipment.

"Clearance File" shall have the meaning given that term in Section 2(b)(viii).

"Cost Factor" shall have the meaning given that term in Appendix C, Section 1.D(2).

"Designated Operator" shall have the meaning given that term in the Recitals.

"EOTs" shall have the meaning given to that term in Section 2(a)(iv).

REDACTED

"Effective Date" shall have the meaning given that term in Section 5(f)(i).

"Equipment" shall mean and be confined to hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery (other than locomotives) capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

"Exercise Notice" shall have the meaning given that term in Section 5(m)(iii).

"FMV" shall have the meaning given that term in Section 5(m)(iii).

"Governmental Entity" shall mean any federal, state, local or foreign court, administrative agency or commission or other governmental or regulatory authority or commission or any arbitration tribunal.

"Haulage Services" shall have the meaning given that term in Section 2(a)(i).

"Imbalance Threshold" shall have the meaning given that term in Appendix C, Section 2.

"JOC" shall have the meaning given that term in Section 5(i).

"MSLLC" shall have the meaning given that term in the Recitals.

"KCS" shall have the meaning given that term in the Recitals.

"KCSR" shall have the meaning given that term in the introductory paragraph.

"KCSR-MSLLC Master Interchange Agreement" shall mean that interchange agreement of even date hereof entered into by and among KCSR, MSLLC and NSR that governs interchange between KCSR and MSLLC.

"Minimum Availability" shall have the meaning given that term in Section 3(a)(iii).

"Monthly Statement" shall have the meaning given that term in Section 5(b)(i).

"NS Traffic" shall mean all intermodal traffic that: (i) originates or terminates in the United States west of Dallas/Ft. Worth (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Subject Trackage at Shreveport; and (ii) originates or terminates in the United States at or east of Meridian and enters or exits the Subject Trackage at Meridian; and (iii) does not consist of traffic originating or terminating at any station on the KCSR system which includes the Texas Mexican Railway Company, (including any station where KCSR, or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement.

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"NSC" shall have the meaning given that term in the Recitals.

"NSR" shall have the meaning given that term in the introductory paragraph.

"NSR Haulage Cars" shall mean cars transporting NS Traffic, and empty cars intended for moving such traffic.

"NSR Locomotives" shall mean locomotives supplied to provide the Haulage Service under the agreement referenced in Section 2(a)(iv).

"NSR Trains" shall mean trains containing NSR Haulage Cars.

"NSR Joint Use Agreement" shall have the meaning given that term in the Recitals.

"Operating Agreement" shall have the meaning given that term in the Recitals.

"Parties" shall have the meaning given that term in the introductory paragraph.

"Party" shall have the meaning given that term in the introductory paragraph.

"Revenue Factor" shall have the meaning given that term in Appendix C.

"Route" shall have the meaning given that term in Section 2(a)(i).

"RPM" shall have the meaning given that term in Appendix C.

"Subject Trackage" shall have the meaning given that term in the Recitals.

"Term" shall have the meaning given that term in Section 5(f)(ii).

"Transaction Agreement" shall have the meaning given that term in the Recitals.

"Use Invoice" shall have the meaning given that term in Section 5(b)(1).

"Waiver Notice" shall have the meaning given that term in Section 5(m)(v).

"Weighted Adjustment Factor" shall have the meaning given that term in Appendix C, Section D(3).

"Western Haulage Services" shall have the meaning given that term in the Recitals.

(c) Successor Laws.

A reference to any particular statute or regulation shall include a reference to any successor statute or regulation.

SECTION 2. GRANT OF HAULAGE SERVICES

(a) Haulage Services Generally.

(i) The haulage services to be provided by KCSR to NSR shall consist of, as applicable, the following (collectively, the rights granted herein are the "Haulage Services"):

(A) the transportation by KCSR of NSR Haulage Cars over the lines of KCSR from Metro Junction, or such other location in the Dallas/Ft. Worth area as the Parties may from time to time mutually designate, to an interchange with the lines owned by MSLLC at Shreveport, LA at or near M.P. V-169.85, said route being generally described and depicted in Appendix A – Map, (the "Route");

(B) the interchange of NSR Haulage Cars with BNSF in the Dallas/Ft. Worth, Texas area;

(C) the movement of bad order NSR Haulage Cars and NSR locomotives to or from repair tracks, provided, that NSR will be billed separately for repairs to such equipment performed by KCSR pursuant to Section 2(b)(vii) of this Agreement;

(D) such mechanical or other inspection of NSR Haulage Cars and locomotives as may be prescribed by regulation or KCSR's operating practices; and

(E) provision of supervision as required.

(ii) KCSR shall be relieved of its obligation to provide Haulage Services to NSR over the Route if, on or before[ ], KCSR and BNSF enter into an agreement ("BNSF Shreveport Agreement") with scheduled duration of at least [ ] whereby KCSR is obligated to provide haulage services or trackage rights to BNSF on commercially reasonable terms for the movement of NS Traffic between the Dallas, Texas area and an interchange point with MSLLC for the continued movement of NSR Cars or NSR Trains at or near Shreveport, Louisiana area.

(iii) Capacity Rights

Notwithstanding any other provisions of this Agreement, the Parties acknowledge that there may be capacity constraints from time to time for traffic covered under this Agreement. Further, the Parties acknowledge that NSR is allocated certain overhead train starts pursuant to the NSR Joint Use Agreement, and that a portion of those NSR overhead train starts are reserved for the overhead movement of traffic moving pursuant to this Agreement, the Dallas Terminal Marketing Agreement, and the BNSF Shreveport Agreement. Whenever capacity of the Route is insufficient to handle the total traffic demands of users of the line, the capacity allocation rules in the last sentence of Section 6(b)(ii) of the NSR Joint Use Agreement shall apply. Nothing in this Section 2(a)(iii) shall be interpreted as requiring NSR to pay for any service not used.

(iv) The Parties continue to be bound by the Supplemental Agreement dated May 11, 2000, to the Master Locomotive Run Through Agreement of November 29, 1994, attached hereto as Appendix B and the Amendment No. 1 to the Haulage Agreement dated February 1, 2002. KCSR shall not be responsible for providing any equipment (locomotives, cars, end of train units ("EOTs"), etc.), or fuel for the trains providing the Haulage Services.

(v) NSR Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of NSR while moving in Haulage Service on KCSR's lines. KCSR shall not be entitled to any line haul revenue for the handling of NSR Haulage Cars, nor shall KCSR participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with, the movement of NSR Haulage Cars. As between KCSR and NSR, NSR shall be responsible for all mileage and car hire charges accruing on NSR Haulage Cars, and NSR shall report and pay, or arrange to have reported and paid, all appropriate allowances and charges directly to the owner(s) of such cars.

(b) Conduct Of Operations.

(i) Unless and until NSR exercises its trackage rights pursuant to the NSR Joint Use Agreement, KCSR shall deliver eastbound NSR Haulage Cars to MSLLC, and shall receive westbound NSR Haulage Cars from MSLLC, at Shreveport, LA, on such track(s) as shall be designated from time to time by KCSR's dispatcher pursuant to the KCSR-MSLLC Master Interchange Agreement. Nothing herein shall be interpreted as prohibiting KCSR, as the Designated Operator, from transporting NSR Haulage Cars in a continuous movement operating over both the haulage routes covered by: (i) the NSR Joint Use Agreement and (ii) this Agreement.

(ii) In the event that NSR exercises its trackage rights pursuant to the NSR Joint Use Agreement, KCSR shall deliver eastbound NSR Haulage Cars to NSR, and shall receive westbound NSR Haulage Cars from NSR, at Shreveport, LA, on such track(s) as shall be designated from time to time by KCSR's dispatcher or other designated representative in charge of such tracks at Shreveport pursuant to the NSR-KCSR Master Interchange Agreement.

(iii) KCSR shall deliver westbound NSR Haulage Cars to BNSF, and shall receive eastbound NSR Haulage Cars from BNSF at Metro Junction or such other location in the Dallas/Ft. Worth area, as the parties may from time to time mutually designate, and on such tracks at such delivery location as shall be designated from time to time by KCSR and BNSF.

(iv) The party delivering NSR Haulage Cars to the receiving party shall provide, via EDI transmission (or by such other means as may be mutually agreed by said parties), information necessary for the further handling and movement of NSR Haulage Cars that are delivered by the delivering party to the receiving party. Such information shall include, for each car:

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(A) Car initial and number.

(B) Loaded or empty.

(C) All required hazardous materials information.

(D) Such other information as the parties may agree to be necessary or convenient for the safe and efficient exchange and further movement of such cars.

(v) KCSR shall have exclusive management and control over the movement of trains containing NSR Haulage Cars while on the Route.

(vi) KCSR shall not have the right to fill out any NSR Trains with the rail cars or Equipment in the revenue waybill or car hire account of any party other than NSR.

(vii) KCSR may arrange for such repairs to NSR Haulage Cars, and adjustments to or transfers of lading from bad ordered, defective or overloaded NSR Haulage Cars, as in KCSR's judgment may be necessary to move such NSR Haulage Cars safely. NSR shall reimburse KCSR for the cost of such work at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the Association of American Railroads ("AAR").

(viii) NSR shall have the right to tender all dimensional loads and excess clearance Cars for handling by KCSR over the Route, subject to a clearance file (the "Clearance File") applicable to traffic of both Parties maintained by KCSR. KCSR shall promptly inform NSR of any changes made to the Clearance File.

(c) Service Standards.

(i) It is the intent of the Parties that KCSR shall generally accord NSR Haulage Cars the same level of service as the KCSR provides to KCSR's traffic of the same type.

(ii) NSR shall provide KCSR with reasonable notice of the schedules for regularly scheduled NSR trains operating over the Subject Trackage and KCSR shall attempt to accommodate such schedules but does not guarantees that it will do so.

(d) Compensation.

NSR shall pay to KCSR, as compensation for Haulage Services provided pursuant to this Agreement as set forth in Appendix C – Haulage Compensation.

SECTION 3. INFRASTRUCTURE MAINTENANCE

(a) KCSR shall be solely responsible for the maintenance, repair and renewal of the Route. KCSR shall keep and maintain the Route in reasonably good condition for the use herein contemplated, but KCSR does not guarantee the condition of the Route or that operations thereover will not be interrupted. KCSR shall take reasonable steps to ensure that any

interruptions will be kept to a minimum and shall use commercially reasonable efforts to avoid such interruptions.

(b) Existing connections or facilities, which are jointly used by the Parties hereto under existing agreements, shall continue to be maintained, repaired and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements.

SECTION 4. MANAGEMENT OF THE ROUTE

(a) Control And Dispatching

(i) KCSR shall have exclusive control of the management and operation (including dispatching) of the Route. Operation and control, including train and crew dispatching, of the Route shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Route (or any portion thereof) the most economical and efficient movement of its traffic over the line.

(ii) KCSR shall have exclusive control over the dispatching of the Route. Dispatching of the Route shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Route (or any portion thereof) the most economical and efficient movement of its traffic over the line consistent with the demands and needs of other authorized uses.

(iii) The maximum length of NSR Trains (including locomotives and other motive power units) operating pursuant to Section 2 of this Agreement shall be the greater of: (a) 7,500 feet or (b) the maximum train length as may be permitted from time to time for any other train regularly operated over the Route.

(b) Loss of Use of the Route.

(i) Other than as specifically set forth in this Agreement, NSR shall not have, pursuant to this Agreement, any claim against KCSR for liability on account of loss or damage of any kind in the event the use of the Route by NSR is interrupted or delayed at any time from any cause.

(ii) If the Route is unavailable for service due to a derailment, line outage or other interruption of service, then KCSR shall cooperate and consult with NSR in order to address any resulting backlog of trains over a period of time following the resolution of such derailment or other interruption as may be required to reduce such backlog of NSR Traffic or NSR Trains.

SECTION 5. GENERALLY APPLICABLE PROVISIONS

(a) Compliance with Applicable Law and Rules.

Each Party hereto shall comply with all applicable and lawful federal, state and local laws, rules, regulations and orders promulgated by any Governmental Entity that

relate to the operations contemplated hereunder, including but not limited to the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other lawful federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and Equipment while such trains, locomotives, cars, and Equipment are being operated over the Route. If any fine, penalty, cost, or charge is imposed or assessed on or against either Party hereto by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, such non-complying Party shall reimburse and indemnify the other Party for or on account of any such fine, penalty, cost or charge, and all expenses and attorneys fees incurred. As a part of the consideration hereof, each Party hereby agrees that the indemnity commitments in this Section in favor of the other Party hereto shall extend to and indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of their respective directors, officers, agents and employees.

(b) Invoices and Payment of Bills.

(i) As soon as practical after the end of each calendar month during the term of this Agreement, KCSR shall prepare a statement setting forth the number of eastbound and westbound NSR Haulage Cars, the number of intermodal units in each, the total number of intermodal units handled in Haulage Service during the then-current calendar quarter, and the number of empty slots operated over the Route during the month (the "Monthly Statement") and an invoice (the "Use Invoice"). The Monthly Statement shall be in electronic format, and shall contain a detailed list of the NSR Haulage Cars that moved during the subject month, which list shall include, for each Car, the following information: (1) car initial and number, (2) whether the car exceeded ninety-six (96) feet in length (including, without limitation, articulated cars), (3) for each car exceeding ninety-six (96) feet in length, the number of axles on such car, and (4) any other information relating to such cars that NSR may reasonably request in connection with accounting for the use of the services and rights provided hereunder. The Monthly Statement and the Use Invoice shall be delivered to NSR and NSR shall make payment to KCSR within thirty (30) days after the date of receipt of such Use Invoice.

(ii) Any dispute regarding the amount of a Monthly Statement or Use Invoice shall be reconciled between the Parties, and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice. If NSR disputes any portion of an Use Invoice, it shall nevertheless pay such Use Invoice in full less disputed charges, subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement or Use Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

(iii) KCSR and NSR shall each have the right, at its own expense, to audit the records of the other Party pertaining to the use of the Route under this Agreement, and any Monthly Statement, Use Invoice or other invoice or notice of dispute thereof issued by KCSR or NSR pursuant to this Agreement, provided such audit is initiated at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to this Agreement. All such audits shall be conducted at reasonable intervals, locations, and times. All such audits shall be prosecuted with reasonable due diligence. Each Party agrees that all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to an arbitrator in connection with an arbitration conducted pursuant this Agreement or as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 5(b)(iii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

(iv) Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices, shall include direct labor and material costs, together with the surcharges, overhead percentages, and Equipment rentals as specified by KCSR at the time any work is performed by KCSR for NSR, unless the amount of such invoice is governed by Field and Office Manuals of the Interchange Rules of the AAR or unless the Parties otherwise agree to use actual costs and expenses.

(c) Liability.

As between the Parties hereto, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of NSR or KCSR), or other matters covered by the Unified Liability Agreement, resulting from, arising out of, incidental to or occurring in connection with this Agreement shall be allocated as is set forth in the Unified Liability Agreement.

(d) Rerailing, Wrecking, Bad Orders and Repairs.

(i) Whenever NSR Haulage Cars require rerailing, wrecking service or wrecking train service, KCSR shall arrange for the provision of such service, including the repair and restoration of roadbed, the Route and structures. KCSR shall promptly inform NSR of its intent to proceed with wrecking service or wrecking train service, and shall permit a NSR representative to be present on the scene, to work in concert with KCSR employees to manage such wrecking service or wrecking train service. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 5(c) hereof. All locomotives, cars, Equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by NSR at the time of such wreck, shall be promptly delivered to it.

(ii) If any NSR Haulage Cars or NSR Locomotives are bad ordered en route on the Route and it is necessary that they be set out, those cars or locomotives shall, after being repaired, be transported by KCSR to be picked up by NSR. KCSR may, upon request of NSR and at the expense of NSR, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered cars or locomotives safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(e) Force Majeure.

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including flood, earthquake, hurricane, tornado, or other such severe weather or climatic condition, riot, accident, wreck, derailment, washout, explosion, Acts of God, act of terrorism and public enemy, war, blockage, insurrection, vandalism or sabotage, fire, strike, lockout or labor dispute, embargoes or AAR service orders, or governmental laws, orders or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

(f) Term and Termination.

(i) This Agreement shall become effective following the latest date of: (a) the date first written above; (b) receipt of any required regulatory approvals or exemptions; and (c) the expiration of any time periods required by the issuance of labor notices by NSR and/or KCSR, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(ii) This Agreement shall commence on the Effective Date, and shall continue until terminated in writing jointly by the Parties (the "Term").

(iii) Termination of this Agreement shall not relieve or release any Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination.

(g) Successors and Assigns.

(i) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns.

(ii) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including

by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

(iii) In the event of a sale of substantially all of the assets or business of NSR, or the merger or consolidation of NSR into or with a firm or corporation not controlled by NSC, NSR may, without the prior consent of KCSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of NSR, or merging or consolidating with NSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of NSR under this Agreement that existed prior to such assignment.

(iv) In the event of any of the following, KCSR shall, without the prior consent of NSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of KCSR, or merging or consolidating with KCSR: (A) a sale of substantially all of the assets or business of KCSR; (B) a sale or lease or other change of control of all or substantially all of the Route to a party other than KCSR; or (C) the merger or consolidation of KCSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of KCSR under this Agreement that existed prior to such assignment

(h) Notice.

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

(ii) If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

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Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

Either Party may provide notice of changes in the above addressees to the other Party by personal service or certified mail.

(i) Arbitration.

Any dispute arising between the Parties with respect to an alleged breach of this Agreement shall be referred to the Joint Operating Committee ("JOC"), as defined in the NSR Joint Use Agreement, for resolution, and if the JOC is unable to resolve the dispute, it shall be referred to the Management Committee, provided however, that any Member (as defined in the LLC Agreement) may submit the dispute for binding arbitration by a panel of three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall render a written decision on the controversy. The written decision of the arbitrators, reached upon a majority vote, shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs, and expenses of the three arbitrators, if any, shall be borne by NSR and KCSR, with each paying 50 percent of such compensation, costs, and expenses. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the written decision of the arbitrators, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration.

(j) Confidentiality.

(i) Except as provided by law or by rule, order, or regulation of any Governmental Entity or the New York Stock Exchange, or in connection with an audit by the Internal Revenue Service or other tax authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Term, and for a period of three (3) years after termination of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than members, officers, employees, independent auditors and attorneys, without the prior written approval of the other Party.

(ii) Notwithstanding the foregoing Section 5(j)(i), the Parties acknowledge and agree that in any STB proceeding, the Parties may be required to submit this Agreement into the record. The Parties will seek a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with certain confidential provisions redacted) may be entered into the public STB record

and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

(k) Breach of this Agreement.

(a) Each Party acknowledges and agrees that the other Party would be irreparably damaged in the event any of the provisions of this Agreement were not performed by it in accordance with their specific terms or were otherwise breached. It is accordingly agreed that each Party shall be entitled to an injunction or injunctions to prevent further breaches of such provisions and to specifically enforce such provisions, in addition to any other remedy to which such entity may be entitled, at law or in equity.

(b) In no event shall either or KCSR or NSR (including, in each case, their affiliates) be liable to the other for any consequential, indirect, incidental, punitive or other similar damages including, but not limited to, lost profits for any breaches or defaults, or any act or omission arising out of or in any way relating to this Agreement, under any form or theory of action whatsoever, whether in contract, tort or otherwise.

(l) Claims.

The Parties shall agree between themselves on the most fair, practical, and efficient arrangements for handling and administering freight loss and damage Claims. Such arrangements, and the allocation of responsibility for such Claims, shall be subject to the provisions of the Unified Liability Agreement.

(m) Abandonment.

(i) KCSR shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon or discontinue service on the Route or any portion thereof (the "Abandonment Segment") during the term of this Agreement. KCSR shall provide NSR no less than ninety (90) days prior notice of its intention to seek regulatory authority to abandon or discontinue service over any Abandonment Segment.

(ii) If KCSR elects to abandon or discontinue service over the Route (or any portion thereof) pursuant to Section 5(l)(i), this Agreement shall continue to apply in all respects to any remaining portion of the Route not abandoned or subject to discontinuance by KCSR.

(iii) KCSR shall, not less than 90 days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment or discontinuance of service) of an application or exemption for authority to abandon or discontinue service over an Abandonment Segment(s), offer NSR the first right to purchase such Abandonment Segment(s) for fair market value ("FMV") of such Abandonment Segment(s) at the time of purchase, and on such other terms and conditions as are customary with respect to line sales at the time, which such notice shall specifically identify this Section 5(m) and the time periods for action hereunder. NSR shall have seventy-five (75) days ("Abandonment Notice Period") within which to advise KCSR that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to

agree upon the FMV of the Abandonment Segment(s) that NSR wishes to purchase, either Party may refer the issue to arbitration pursuant to Section 5(i), which arbitration shall determine all other issues relating to terms and conditions for the sale not then (at the time of the initiation of the arbitration) agreed to by the Parties. Such arbitration shall be conducted on an expedited basis, with selection of the arbitrators within forty-five (45) days of the initiation of arbitration, all submissions to be made by the Parties within ninety (90) days of the initiation of arbitration, and a written decision to be rendered within thirty (30) days following the final submissions of the Parties.

(iv) The Parties shall consummate the sale contemplated by this Section 5(m) within forty-five (45) days of the latest of: (a) the rendering of a written arbitration decision, should issues related to the sale proceed to arbitration; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(v) If NSR elects not to purchase the Abandonment Segment, it shall so advise KCSR within the same seventy-five (75) day Abandonment Notice Period by delivering to KCSR a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of NSR to provide KCSR with either an Exercise Notice or a Waiver Notice within the aforesaid seventy-five (75) day period shall constitute a Waiver Notice.

(vi) In the event of a Waiver Notice, KCSR shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the Abandonment Segment and for the discontinuance of its rights over the Abandonment Segment.

(o) Miscellaneous Provisions.

(i) This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(ii) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(iii) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties.

(iv) The division of this Agreement into articles, sections and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to articles, sections or subsections are to articles, sections or subsections of this Agreement.

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(v) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(vi) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(vii) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(viii) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between KCSR and NSR.

(ix) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(x) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:	THE KANSAS CITY SOUTHERN RAILWAY COMPANY
_____	By: _____
As to KCSR.	
WITNESS:	NORFOLK SOUTHERN RAILWAY COMPANY
_____	By: _____

REDACTED

As to NSR

REDACTED

INDEX TO APPENDICES

APPENDIX A.	ROUTE AND MAP
APPENDIX B.	MASTER LOCOMOTIVE RUN THROUGH AGREEMENT
APPENDIX C.	HAULAGE COMPENSATION FOR NS TRAFFIC

REDACTED

APPENDIX C – HAULAGE COMPENSATION

Section 1. Pricing For NS Traffic

A. NS Traffic – Initial Pricing

NSR shall pay to KCSR the following for Haulage Services in the movement of NS Traffic for transportation over the Route between the Dallas, TX, area and Shreveport (MP V – 169.85):

[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]

[

].

B. Empties – Initial Pricing:

(1) NSR shall pay to KCSR [ ] on an empty railcar moving over the Route between Shreveport (MP V- 169.85) and the Dallas, TX, area upon the following conditions:

(a) Empty cars ride on a haulage train consisting of [ ]. Empty cars will not be limited in number as long as the maximum train length allowable at that time is not exceeded. All empty cars will ride as one block at the end of the haulage train.

(b) The loaded cars meet or exceed [ ]. In the event NSR fails to maintain[ ], then the Parties agree to meet at KCSR's request to establish rates to compensate KCSR adequately for the excess empty wells and platforms.

(c) A "slot" is defined as any available rail car space that can minimally hold a 40' TOFC/COFC unit. There are (i) two slots per well of a single or multi-well stack car; or (ii) one slot per hitch on a single flat car or multi-platform conventional spine car. The following table serves as an example of pricing scenarios for empty rail car moves. There may be other pricing scenarios.

Empty Car Description	Number of Slots	Price per Car
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]

REDACTED

[ ]	[ ]	[ ]
[	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]

C. Adjustments to Pricing:

The pricing described in this Agreement shall be in effect as of the effective date of this Agreement, and shall continue in effect through December 31, 2006. Effective with trains that originate on January 1, 2007, an Adjustment Factor of [ ]will be applied to per train pricing, per unit pricing, and empty rail car pricing. Effective with trains that originate on January 1, 2008 a Weighted Adjustment Factor (as described below) will be applied to per train pricing, per unit pricing and empty platform pricing. The Weighted Adjustment Factor will be calculated as follows:

[

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[

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[

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[

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[

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[ ].

[

REDACTED

[

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[

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[

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[

].

(4) The Weighted Adjustment Factor will be applied to Calendar Year 2007 Prices to determine pricing for 2008. The same method will be applied to adjust prices for each subsequent year (by multiplying the then current prices by the new Weighted Adjustment Factor).

Section 2. Imbalance Fees.

[

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[

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[

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[

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[

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Section 3. Miscellaneous Provisions.

REDACTED

A. Either Party shall have the right to conduct an audit, by a third party acceptable to the other Party, with respect to any of the provisions of this Agreement, provided that the third party's report to the Party requesting the audit shall be limited to whether or not the Agreement has been complied with, and the extent of the inaccuracy, if any. However, the Party whose records are being audited shall receive a full report from the auditor concerning the findings from such audit.

B. Payments of any liquidated damages pursuant to this Agreement shall be made no later than [

].

F

EXHIBIT F
to Transaction Agreement

KCS MSLLC MASTER INTERCHANGE AGREEMENT

THIS AGREEMENT (the "KCS MSLLC Master Interchange Agreement" or "Agreement") is entered into as of this ____ day of _____, 200___, by and between MERIDIAN SPEEDWAY LLC, a Delaware limited liability company ("MSLLC"), and THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation ("KCSR"). MSLLC and KCSR are referred to individually herein as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, Kansas City Southern ("KCS"), KCSR, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, provides for the creation of MSLLC, the transfer from KCSR to MSLLC of the Subject Trackage, as defined in the Transaction Agreement, and the grant by MSLLC to KCSR and Norfolk Southern Railway Company ("NSR") of certain rights over the Subject Trackage; and

WHEREAS, on even date hereof, KCSR and MSLLC entered into the KCSR Joint Use Agreement, pursuant to which KCSR has been granted certain local and overhead trackage rights and haulage rights over the Subject Trackage; and

WHEREAS, the Transaction Agreement anticipates that, pursuant to an operating agreement, MSLLC will hire KCSR to perform as the designated operator ("Designated Operator") all railroad operations on behalf of MSLLC, including the railway operations required pursuant to the KCS Joint Use Agreement and the NSR Joint Use Agreement; and

WHEREAS, the Parties desire to set forth, among other things, the method for the physical interchange of traffic between KCSR and MSLLC;

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. INTERCHANGE LOCATIONS

Each Party shall deliver railroad cars and intermodal platforms, loaded and empty ("Interchange Cars"), and all other equipment and locomotives to be interchanged between the Parties ("Run-Through Equipment"), to the other Party, on tracks owned or controlled by one of the Parties along the Subject Trackage ("Interchange Tracks"), as shown on the map appended hereto as Appendix A – Map, as well as other locations that, from time to time, the Parties may designate.

SECTION 2. DEFINITIONS

In each case, the Party that owns or controls the relevant Interchange Tracks shall hereinafter be referred to as the "owner" of said Interchange Tracks or the "receiving carrier", and the other Party shall hereinafter be referred to as the "user" of said Interchange Tracks or the "delivering carrier." Designation of specific tracks for delivery to and from KCSR and MSLLC will be agreed upon between local KCSR and MSLLC operating officers. A "train" consists of at least one locomotive connected to at least one Interchange Car.

SECTION 3. USE AND RESTRICTION OF USE OF INTERCHANGE TRACKS

(a) KCSR's and MSLLC's use of the Interchange Tracks shall be in common with each other and neither Party's right to use the Interchange Tracks shall be diminished by this Agreement.

(b) Neither Party shall use any part of the Interchange Tracks for the purpose of switching, storage of cars, locomotives or equipment, or the making or breaking up of trains, except as necessary for interchange purposes, provided, however, that nothing contained herein shall preclude the emergency use by either Party, upon prior approval of the other Party, of such auxiliary tracks as may be designated by the owner for that purpose.

(c) Each Party hereby grants to the other Party the right to use so much of the Interchange Tracks and connecting trackage as may be necessary to accomplish such interchange between the Parties hereto.

(d) No compensation shall be payable by either KCSR or MSLLC to the other for use of the Interchange Tracks granted pursuant to this Interchange Agreement.

SECTION 4. INTERCHANGE

(a) Interchange Cars not accompanied by Run-Through Equipment shall be deemed interchanged from the delivering carrier to the receiving carrier when the locomotive consist is uncoupled from such Interchange Cars after such Interchange Cars are placed on the Interchange Tracks by the delivering carrier and proper notification and documentation sufficient to permit further movement of said Interchange Cars is delivered to the receiving carrier.

(b) Run-Through Equipment and Interchange Cars accompanied by Run-Through Equipment (in each case, a "Run-Through Train") shall be deemed interchanged when: (i) the Run-Through Train is placed on the interchange tracks and the delivering crew has disembarked from the Run-Through Train; or (ii) for a Run-Through Train that moves between KCSR owned or controlled track and MSLLC owned or controlled track, at the time the locomotives on the Run-Through Train cross the property line between the KCSR owned or controlled track and the MSLLC owned or controlled track. KCSR and MSLLC may jointly agree that data provided by Automatic Equipment Identification

(AEI) readers at specified locations will be used to identify the interchange time between KCSR and MSLLC.

(c) Except as may be provided in the KCSR Joint Use Agreement, once an Interchange Car or Run-Through Equipment is interchanged onto Interchange Tracks, it shall transfer to the account of the receiving carrier for, as may be relevant for said particular Interchange Car or Run-Through Equipment, the purpose of determining liability for car hire charges and liability under the provisions of Section 6. The interchange of Interchange Cars also shall be subject to the interchange rules adopted by the Association of American Railroads, as the same shall be amended from time to time (the "AAR Interchange Rules"). To the extent that the terms of this Agreement conflict with the AAR Interchange Rules, the terms of this Agreement shall control.

(d) Neither KCSR nor MSLLC shall have the right to permit or admit any third party to the use of all or any portion of the other Party's Interchange Tracks without the prior written approval of the other Party, which may be withheld in said other Party's sole discretion.

SECTION 5. MANAGEMENT AND OPERATIONS

(a) The locomotives and crews of the user when operating over the Interchange Tracks shall be equipped to communicate with owner of the Interchange Tracks on radio frequencies normally used by the owner in directing train movements on the Interchange Tracks.

(b) Procedures for qualification and occupancy of the Interchange Tracks by the user shall be arranged by the local supervisors of KCSR and MSLLC. The user's operations over the Interchange Tracks shall at all times be subject to the direction and control of the owner's operating officer in charge of the Interchange Tracks and to applicable provisions of owner's safety and operating rules.

(c) Locomotives providing the power as Run-Through Equipment shall be in good running order, properly serviced and equipped, and adequately fuelled.

(d) Interchange Cars and Run-Through Equipment shall not exceed the width, height, weight or other restrictions or capacities on the Interchange Tracks.

(e) The owner shall have exclusive control of the management and operation (including dispatching) of the Interchange Trackage. The owner shall exercise control over the Interchange Tracks in a fair, equitable and impartial manner in order to promote the most economical and efficient movement of all traffic over the Interchange Tracks.

(f) The owner shall be solely responsible for the maintenance, repair and renewal of the Interchange Tracks. The owner shall keep and maintain the Interchange Tracks in reasonably good condition for the use herein contemplated, but the owner does not guarantee the condition of the Interchange Tracks or that operations thereover will

not be interrupted. The owner shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use its best efforts to avoid such interruptions.

(g) The user shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of the its trains, Interchange Cars and Run-Through Equipment while such trains, Interchange Cars and Run-Through Equipment are being operated over the Interchange Tracks.

(h) The user in its use of the Interchange Tracks shall comply in all respects with the safety rules, operating rules and other regulations of the owner, and the movement of the user's trains, Interchange Cars and Run-Through Equipment over the Interchange Tracks shall at all times be subject to the orders of the transportation officers of the owner; provided, however, that such safety rules, operating rules, other regulations and orders of the transportation officers of the owner shall not discriminate between the Parties.

(i) If any employee of the user shall neglect, refuse or fail to abide by the owner's rules, the instructions and restrictions governing the operation on or along the Interchange Tracks or the associated owner's property, such employee shall, upon written request of the owner, be promptly withheld from working on the owner's property pending the results of a formal investigation of the alleged neglect, refusal or failure. After the foregoing request is given to the user, the user shall promptly hold an investigation, in which all parties concerned shall participate and bear the expense for its officers, counsel, employees and witnesses. Notice of such investigation to the user's employees shall be given by the user's officers. The investigation shall be conducted in accordance with any applicable terms and conditions of schedule agreements between the user and its employees. If the result of such investigation warrants, such employee shall, upon written request by the owner, be restricted by the user from service on the Interchange Tracks.

(j) The user shall not have any claim against the owner for liability on account of loss or damage of any kind in the event the use of the Interchange Tracks by the user is temporarily interrupted or delayed at any time from any cause.

SECTION 6. LIABILITY

As between the Parties hereto, liability for loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of KCSR or MSLLC), resulting from, arising out of, incidental to or occurring in connection with operations conducted pursuant to this Agreement shall be apportioned between the Parties hereto pursuant to the terms and conditions of the Unified Liability Agreement.

SECTION 7. TERM

(a) Effective Date.

This Agreement shall become effective following the latest date of: (i) the date first written above; (ii) following receipt of any required regulatory approvals or exemptions; and (iii) following the expiration of any time periods required by the issuance of labor notices by KCSR, KCS and/or MSLLC, should such labor notices be required ("Effective Date"). The Parties will determine the Effective Date through an exchange of written correspondence.

(b) Initial Term.

This Agreement shall commence on the Effective Date, and shall continue until terminated by mutual agreement of the Parties.

(c) Termination.

Termination of this Agreement shall not relieve or release either Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination hereof.

SECTION 8. ARBITRATION

Any dispute arising among the Parties with respect to an alleged breach of this Agreement shall be resolved pursuant to the arbitration provisions of the Unified Liability Agreement. As a Third Party Beneficiary, NSR may initiate and prosecute arbitration pursuant to this Section 8 on behalf of MSLLC. MSLLC shall cooperate with NSR in the preparation for, and the initiation and prosecution of, such arbitration, at NSR's expense.

SECTION 9. NOTICES

Any notice required or permitted to be given by one Party to another under this Interchange Agreement shall be sent to each of MSLLC, NSR and KCSR, and deemed given on the date sent by certified mail, or by such other means as the Parties may agree, and shall be addressed as follows:

If to MSLLC:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

With a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation

1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

With a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

Any of MSLLC, KCSR or NSR may provide changes in the above addresses to the others by personal service or certified mail.

SECTION 10. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including flood, earthquake, hurricane, tornado, or other such severe weather or climatic condition, riot, accident, wreck, derailment, washout, explosion, Acts of God, act of terrorism and public enemy, war, blockage, insurrection, vandalism or sabotage, fire, strike, lockout or labor dispute, embargoes or AAR service orders, or governmental laws, orders or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the

other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

SECTION 11. CONFIDENTIALITY

(a) Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Interchange Agreement, or as a result of an audit by the Internal Revenue Service or other taxing authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Interchange Agreement, during the term, the terms and provisions of this Interchange Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by any Party to any person other than such Party's respective, members, officers, employees, independent auditors, and attorneys without the prior written approval of the other Party.

(b) Notwithstanding the foregoing Section 11(i), the Parties acknowledge and agree that in any Surface Transportation Board ("STB") proceeding, the Parties may be required to submit this Agreement into the record. The Parties will propose to request a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with the highly confidential provisions redacted) may be entered into the public STB record and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

SECTION 12. SUCCESSORS AND ASSIGNS

(a) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns. Third party beneficiary status shall inure to the benefit of NSR and each of its successors and permitted assigns.

(b) Neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

SECTION 13. GENERAL

(a) This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party except NSR, which shall have standing to enforce the terms hereof. Other than the foregoing sentence, nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties and NSR.

(d) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(e) All words, terms and phrases used in this Agreement, and not otherwise defined, shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(f) All Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(g) This Agreement is the result of mutual negotiations between the Parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

(h) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(i) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between or among MSLLC, KCSR and NSR.

(j) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(k) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

MERIDIAN SPEEDWAY LLC

Per: _____

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

Per: _____

Acknowledgement:

NORFOLK SOUTHERN RAILWAY COMPANY

Per: _____

APPENDIX A
Map

General Guidelines - Asset Identification
KCSR / NSR Joint Venture

KCS will contribute assets to the Joint Venture subject to the following restrictions:

The single main line track will be included, (Highlighted in "green" on the attached SLIC charts) extending between Meridian, MS., at Milepost 0.0, and Shreveport, LA., at Milepost V - 169.85, and including the right of way extending from the center point of the track to the prevailing right of way line for that location on either side of the track. (Right of way not included is highlighted in "blue" on the attached track charts)

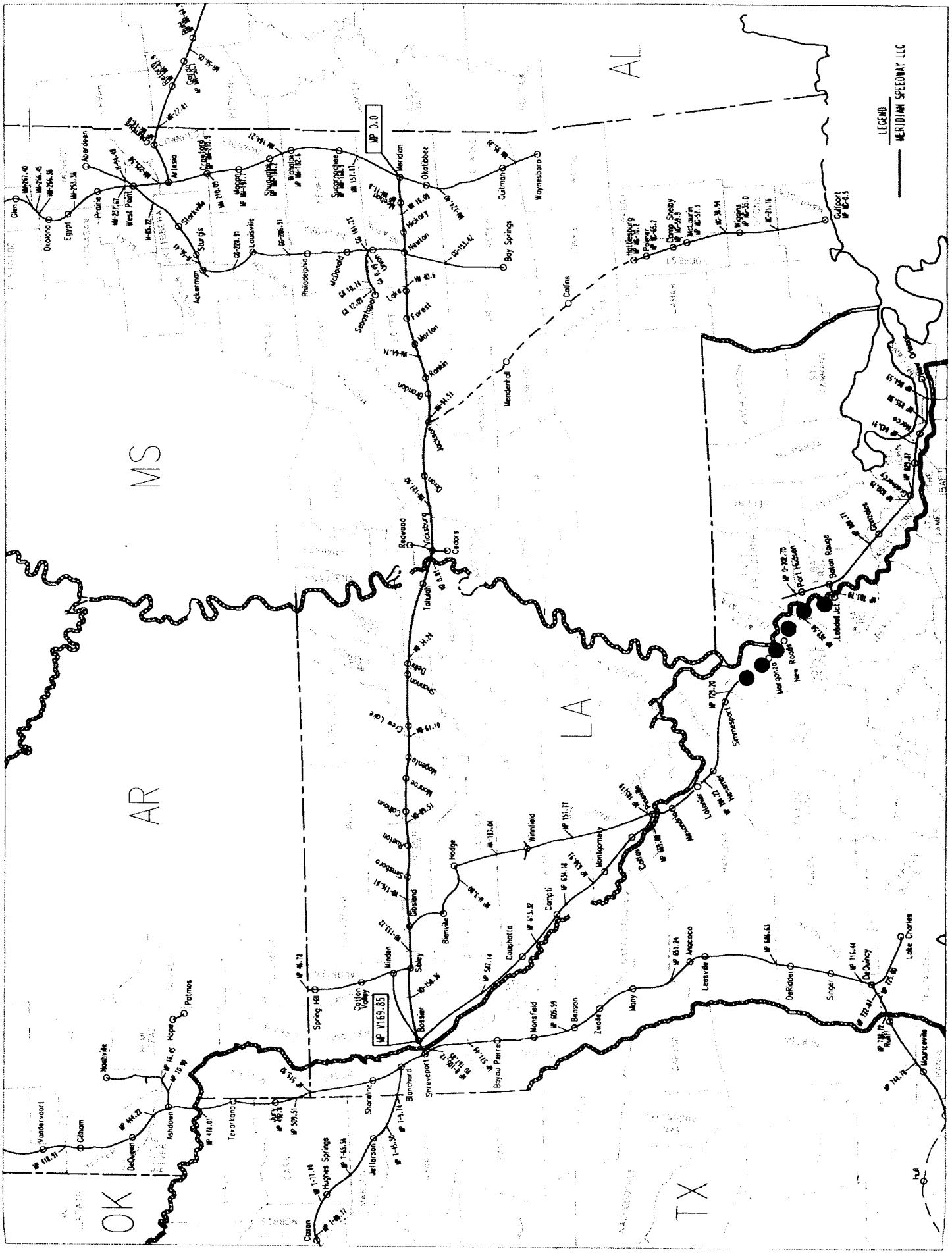
Sidings connected to and adjacent to the single main line track that are within the prevailing right of way line on either side of the track and whose primary use is to meet and pass trains will be included. Sidings can generally be identified on the Track Charts by the Control Point (CP) designation at each end of the siding. They may also be identified by their SLIC number, and are highlighted in "green" on the SLIC Charts.

All KCS owned tracks including but not limited to yard (see additional explanation below), branch line, industrial lead, intermodal or strip, interchange, mechanical, car repair or rip, and storage tracks; and all industry and privately owned tracks or leased branch lines that connect to the single main line are excluded. The Joint Venture will be responsible for maintaining to the clearance point any switches connecting such tracks to the single main line track. The attached SLIC charts and the MCS Track Identification Table below will be used to determine the status of each track along the route.

Where the single main line track runs through a yard only the single main line track will be included (Highlighted in "green" on the attached SLIC charts). Through yards the right of way line for the single main line track will be defined as the imaginary line running between the clearance points of switches connecting to the single main line track.

MCS Track Identification Table

1 – 199	Yard tracks
200 – 299	Intermodal / Strip tracks
300 – 399	Interchange tracks
400 – 499	Mechanical / Rip tracks
500 – 599	Main line / Main tracks
600 – 699	Sidings
700 – 799	Industry tracks
800 – 899	Storage tracks


LEGEND
MERIDIAN SPEEDWAY LLC
MP 0.0
MP V169.85
AR
MS
AL
LA
TX
OK

All Right of Way Highlighted
in Blue is Excluded From
the MSLLC

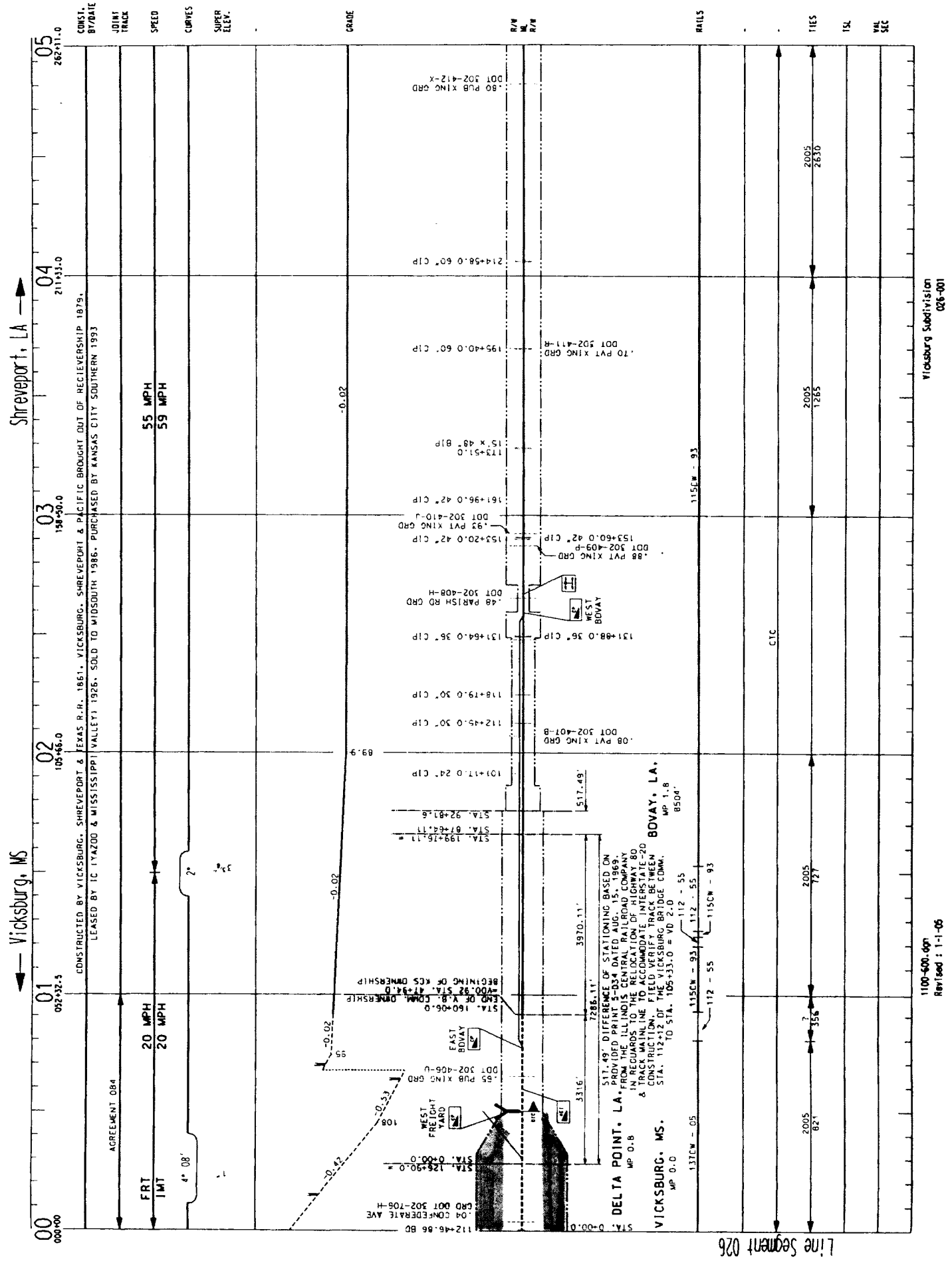
Vicksburg Subdivision

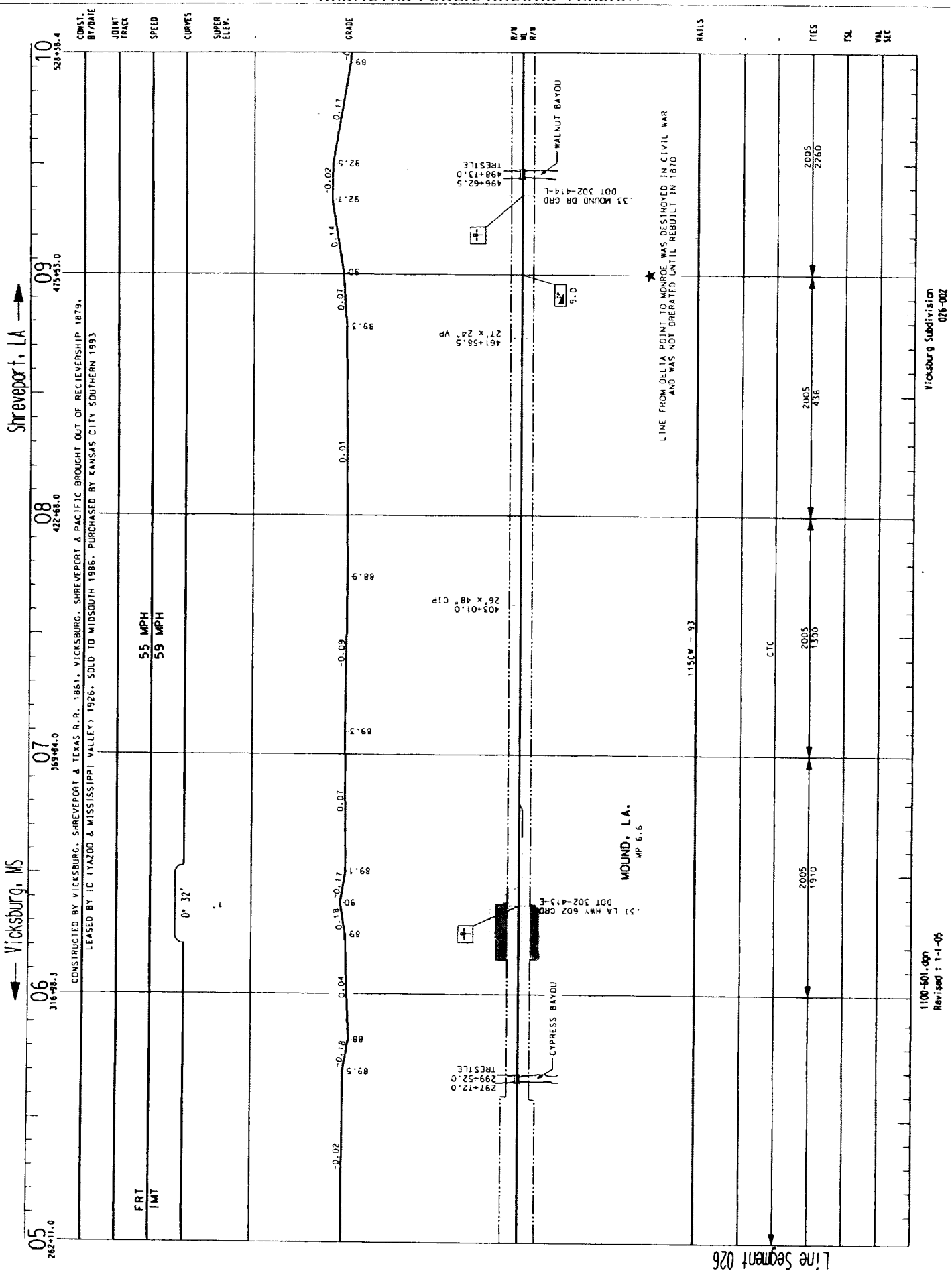
Vicksburg, MS (MP 0.0) to Shreveport, LA (MP 165.2)

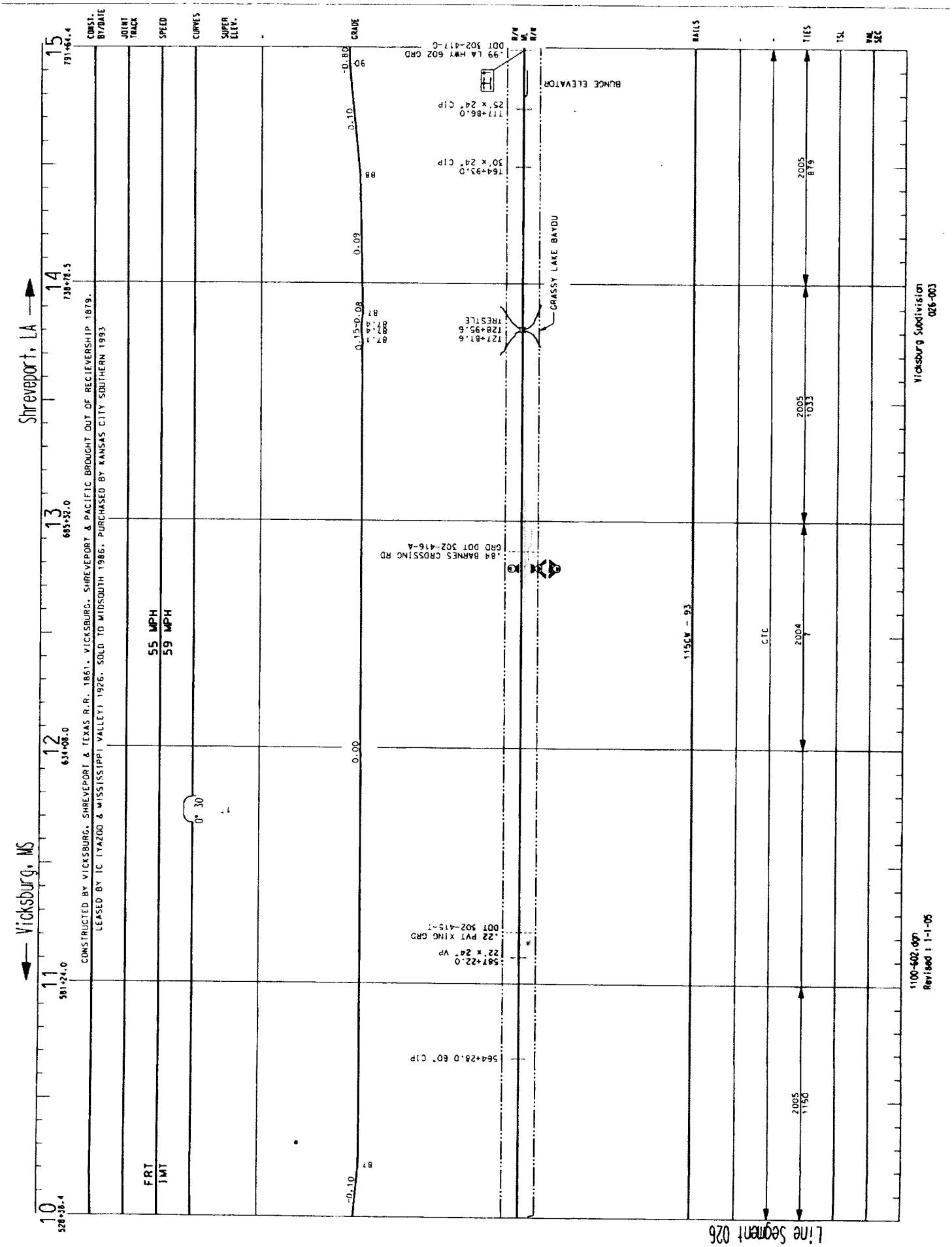
Vicksburg Subdivision
026

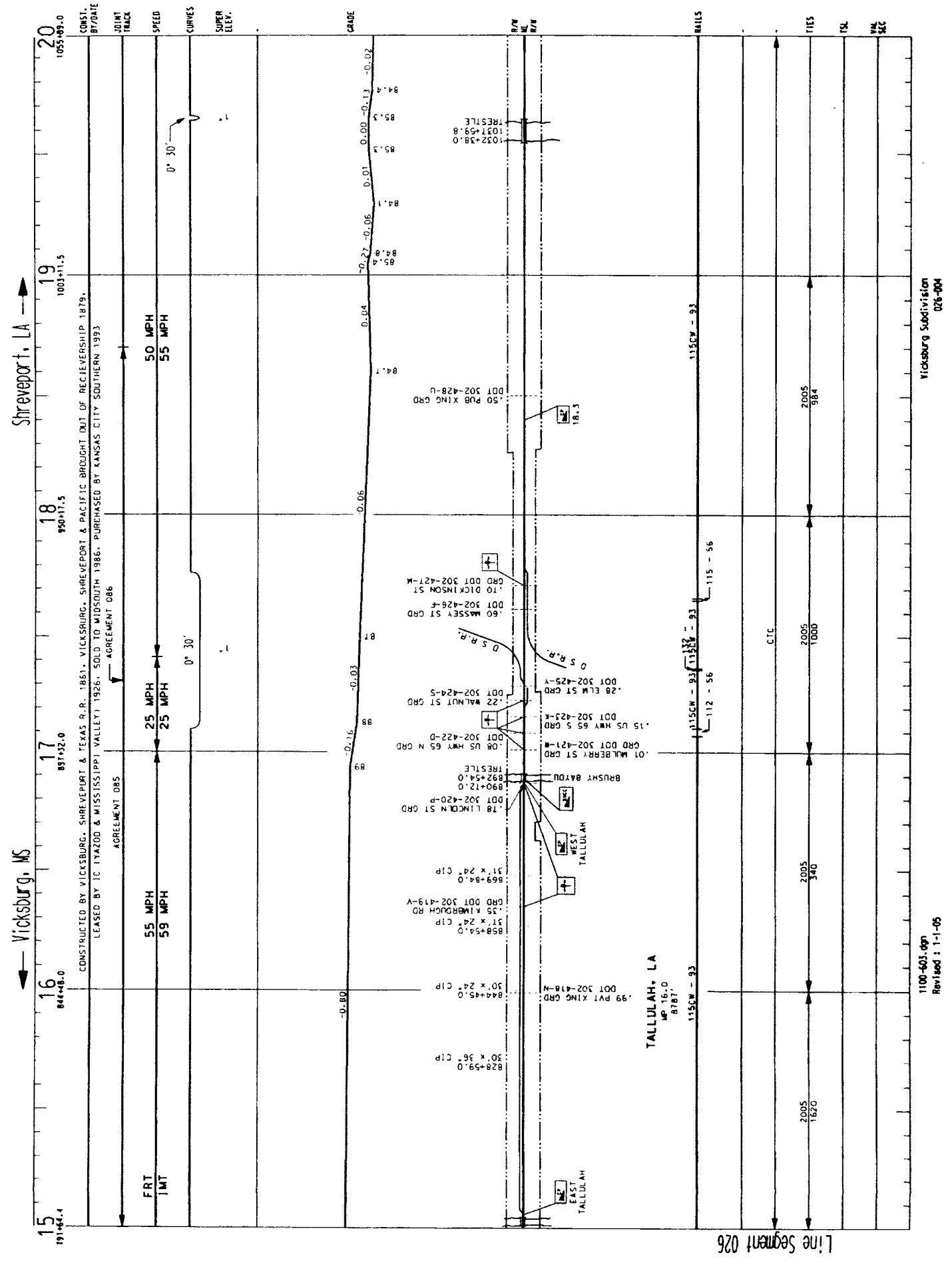
1100-598.dgn

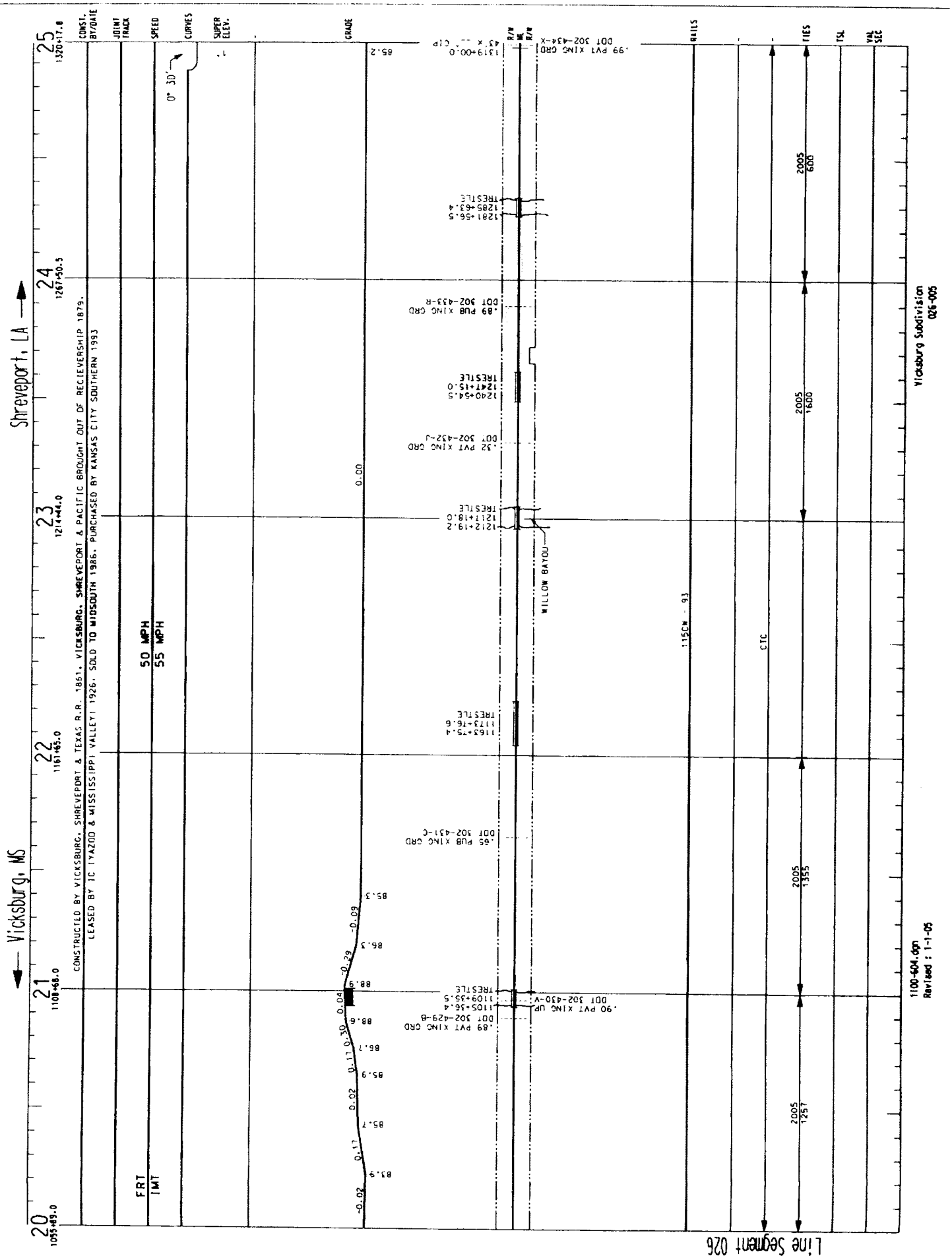
Line Segment 026

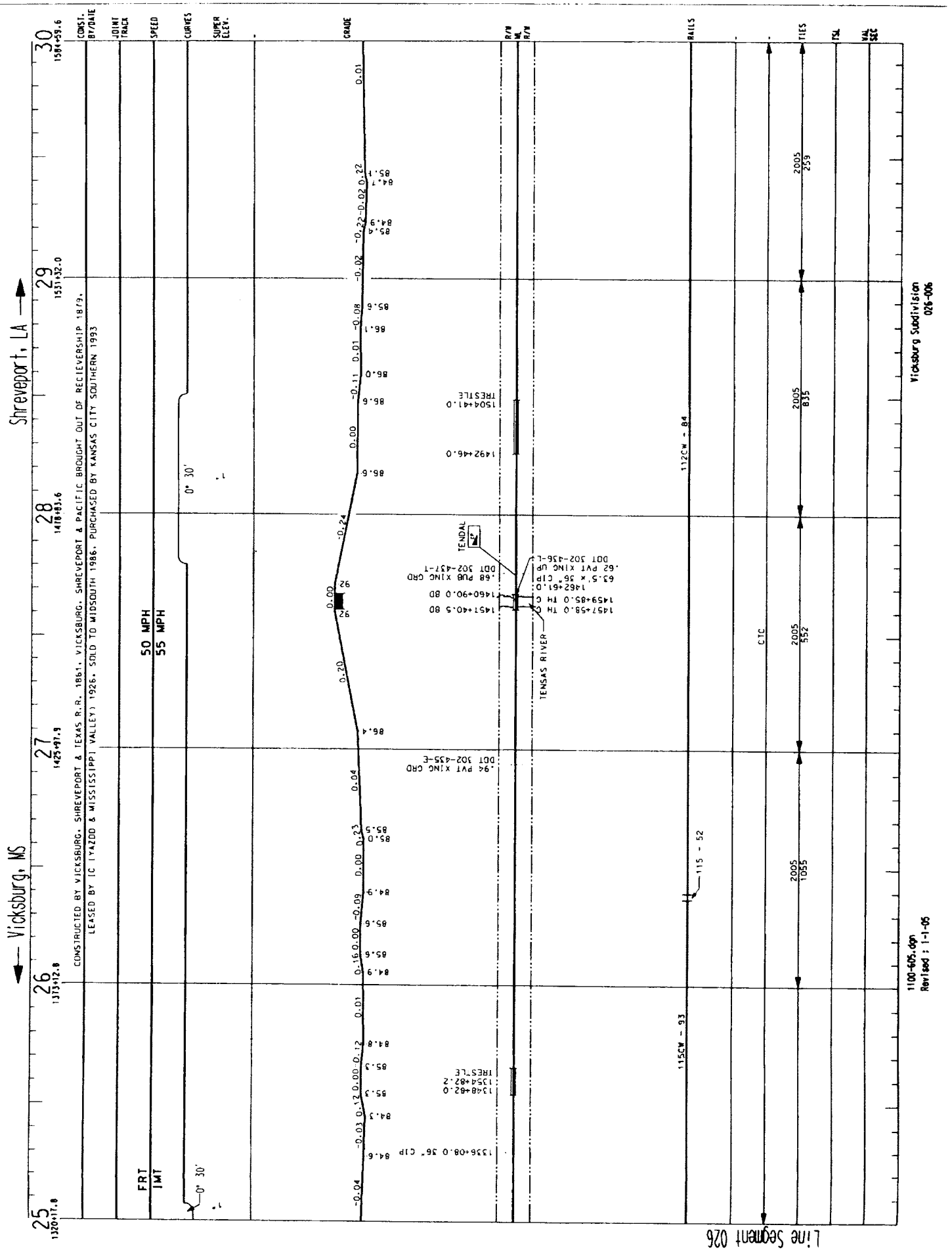

Shreveport, LA
Vicksburg, MS
Line Segment 026
Vicksburg Subdivision
026-001
1100-600.dgn
Revised : 1-1-06
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
AGREEMENT 084
FRT
PMT
55 MPH
59 MPH
20 MPH
20 MPH
DELTA POINT, LA.
MP 0.8
VICKSBURG, MS.
MP 0.0
BOVAY, LA.
MP 1.8
8504'
CTC
WEST BOVAY
EAST BOVAY
WEST FREIGHT YARD
517.49' DIFFERENCE OF STATIONING BASED ON PROVIDED PRINT S-334 DATED AUG. 15, 1969.
FROM THE ILLINOIS CENTRAL RAILROAD COMPANY
INTERCHANGE TO THE RELOCATION OF HIGHWAY 80
& TRACK MILLING TO ACCOMMODATE INTERSTATE-20
CONSTRUCTION OF NEW FIELD YARD TRACK BETWEEN
STA. 112+12.2 OF THE VICKSBURG BRIDGE COMM.
TO STA. 105+33.0 = VD 2.0
3970.11'
7286.11'
3316'
.80 PUB XING GRD
DOT 302-412-X
.70 PVT XING GRD
DOT 302-411-R
.93 PVT XING GRD
DOT 302-410-J
.88 PVT XING GRD
DOT 302-409-P
.48 PARISH RD GRD
DOT 302-408-H
.08 PVT XING GRD
DOT 302-407-B
.65 PUB XING GRD
DOT 302-406-U
.04 CONFEDERATE AVE
GRD DOT 302-706-H
214+58.0 60° CIP
195+40.0 60° CIP
173+51.0
15' x 48' BJP
161+96.0 42° CIP
153+20.0 42° CIP
153+60.0 42° CIP
131+64.0 36° CIP
131+88.0 36° CIP
118+19.0 30° CIP
112+45.0 30° CIP
101+11.0 24° CIP
112+46.86 BD
STA. 0+00.0
STA. 92+81.6
STA. 87+64.11
STA. 198+16.11 =
STA. 160+06.0
END OF V.S.P. COMM. OWNERSHIP
-V00.92 STA. 47+94.0
BEGINING OF KCS OWNERSHIP
STA. 125+90.0 =
STA. 0+00.0
-0.02
-0.02
-0.02
-0.53
-0.42
89.9
108
55
2"
4" 08'
115CW - 93
112 - 55
137CW - 05
2005
2630
2005
1285
2005
727
2005
821
356
7

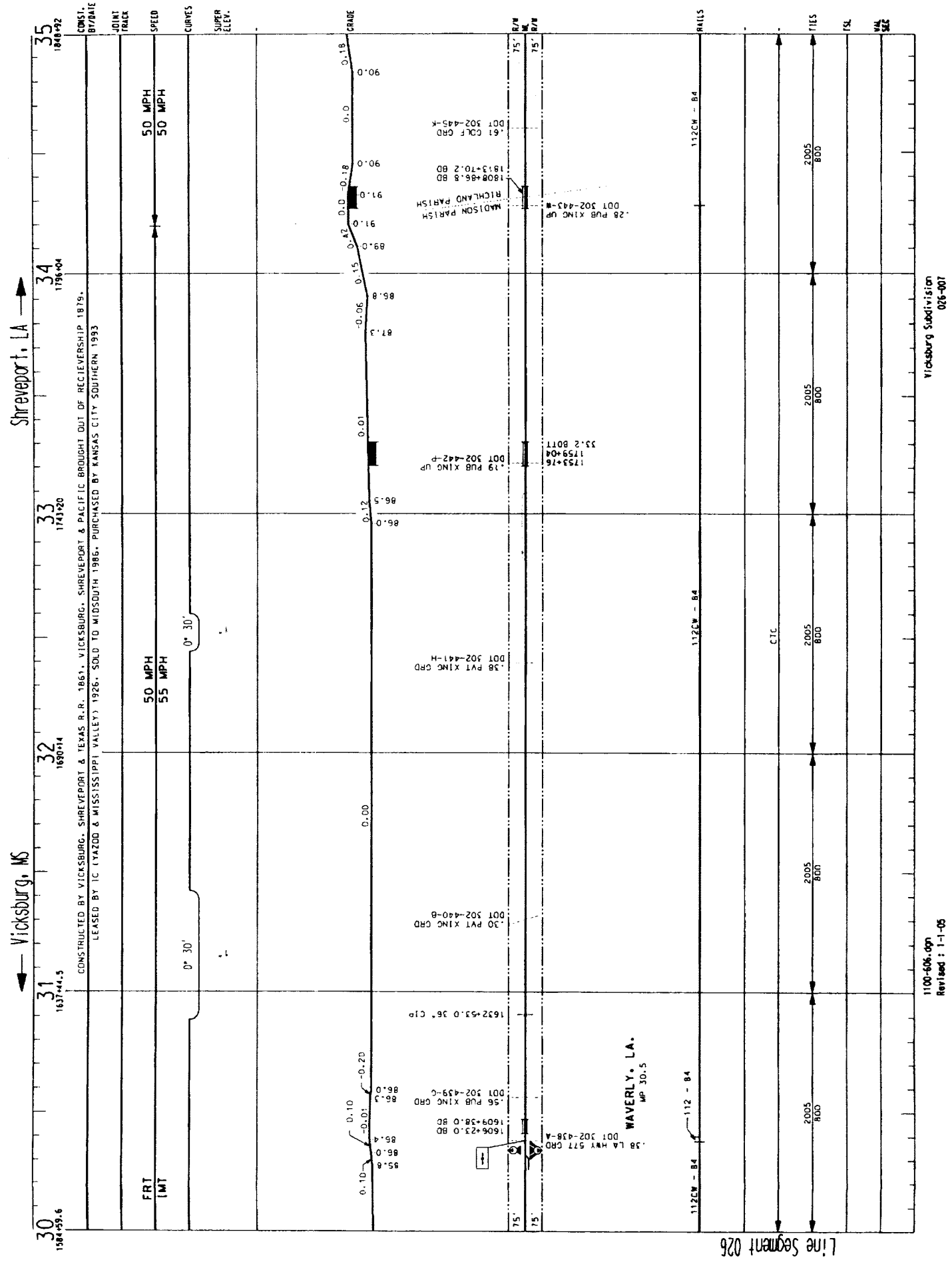

Vicksburg, MS
Shreveport, LA
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC ITAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
PMT
0° 32'
MOUND, LA.
MP 6.6
WALNUT BAYOU
CYPRESS BAYOU
LINE FROM DELTA POINT TO MONROE WAS DESTROYED IN CIVIL WAR AND WAS NOT OPERATED UNTIL REBUILT IN 1870
115CW - 93
CTC
Vicksburg Subdivision
026-002
1100-601.dgn
Revised : 1-1-05

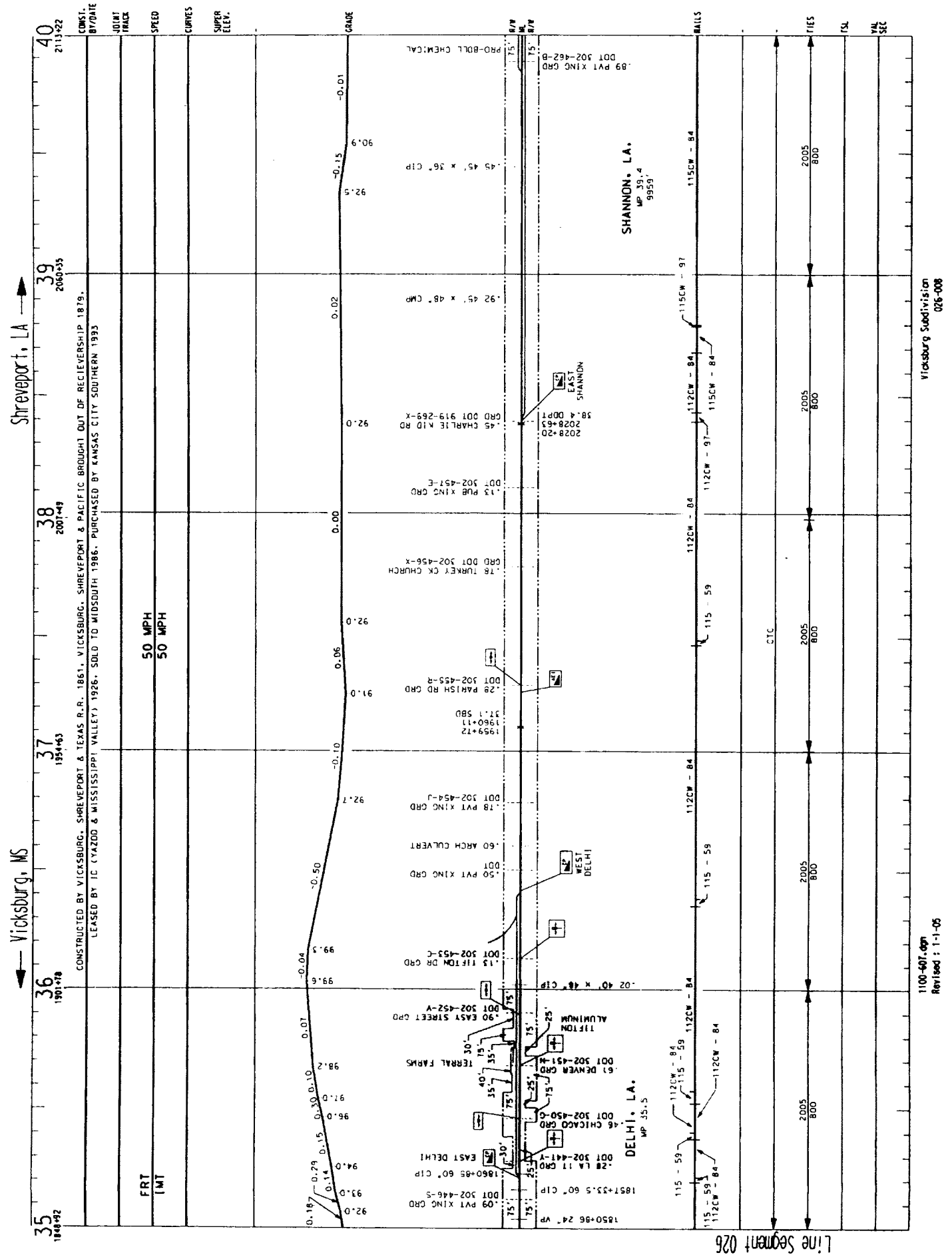

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
PMT
0° 30'
-0.80
-0.10
0.00
0.09
0.15-0.08
-0.10
.99 LA HWY 602 GRD
DOT 302-417-C
BUNGE ELEVATOR
25' x 24' CIP
717+86.0
30' x 24' CIP
164+93.0
GRASSY LAKE BAYOU
127+81.6
128+95.6
TRESTLE
.84 BARNES CROSSING RD
GRD DOT 302-416-A
.22 PVT XING GRD
DOT 302-415-?
581+22.0
22' x 24' VP
564+28.0 60° CIP
115CW - 93
CTC
2005
879
2005
1033
2004
2005
1150
Vicksburg Subdivision
026-003
1100-602.dgn
Revised : 1-1-05

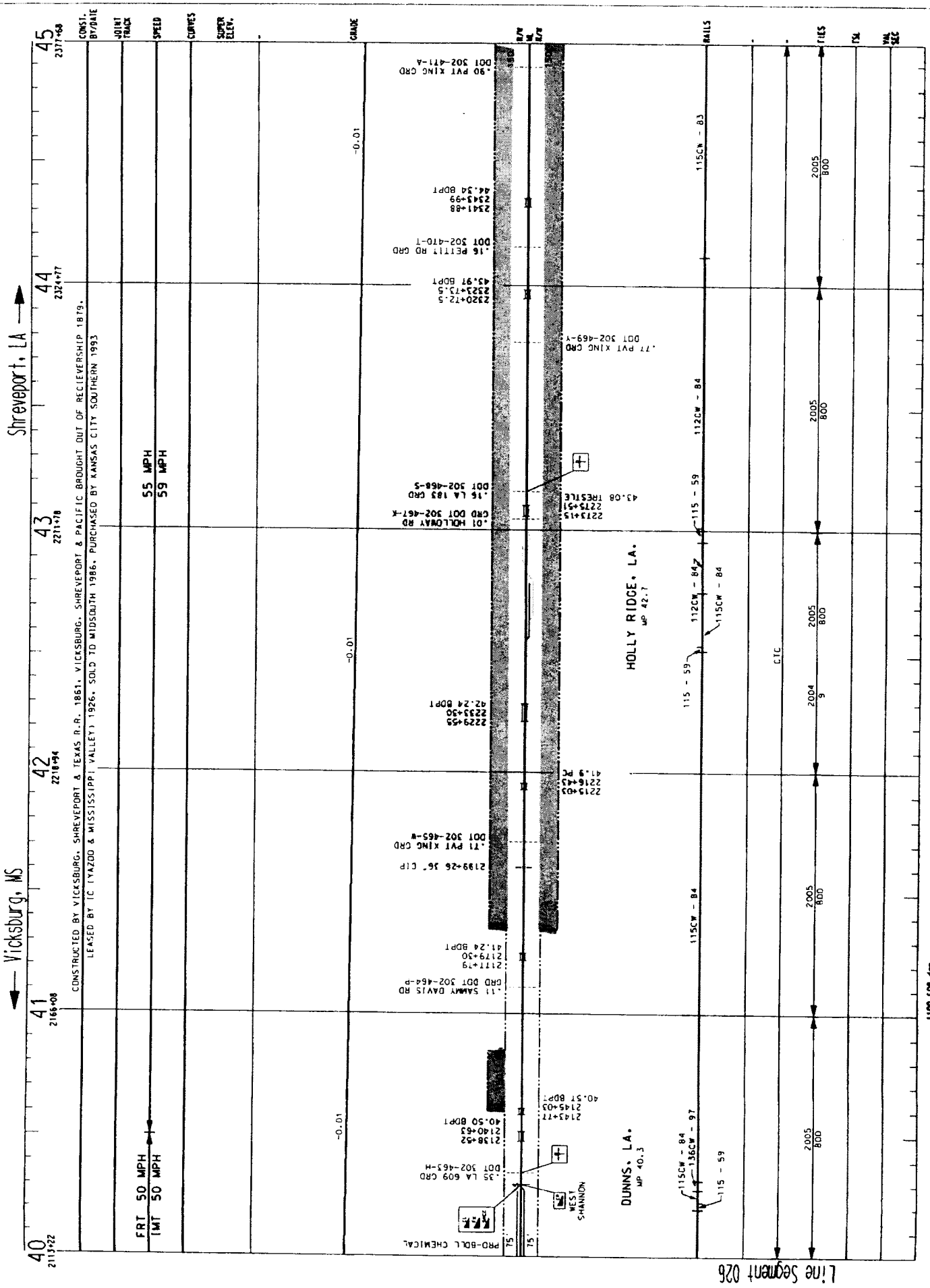

Vicksburg, MS
Shreveport, LA
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926, SOLD TO WIDSOUTH 1986, PURCHASED BY KANSAS CITY SOUTHERN 1993
AGREEMENT 086
AGREEMENT 085
50 MPH
55 MPH
25 MPH
55 MPH
59 MPH
FRT
TMT
0° 30'
TALLULAH, LA
MP 16.0
8787'
EAST TALLULAH
WEST TALLULAH
Vicksburg Subdivision
026-004
1100-603.dgn
Revised : 1-1-05

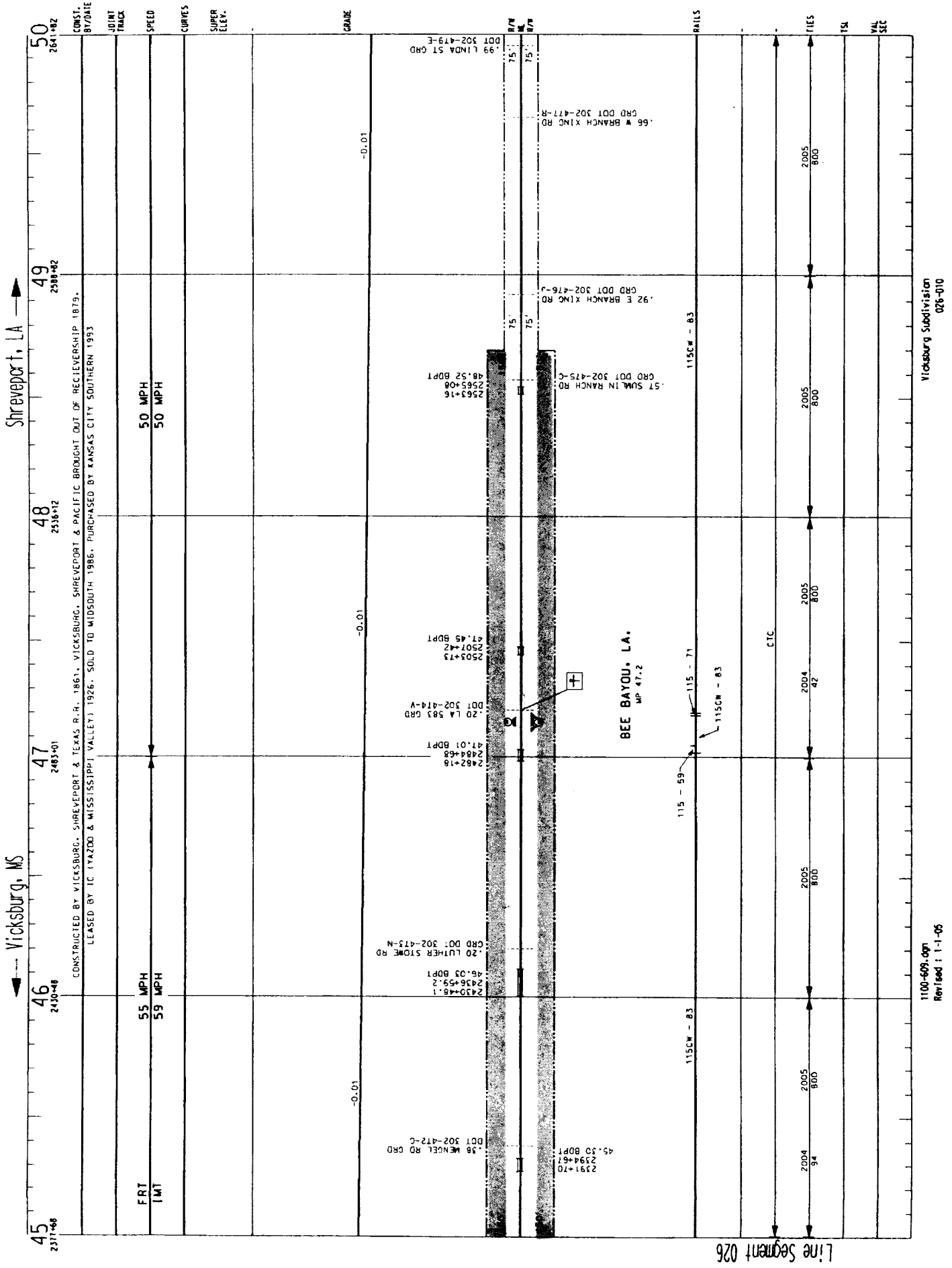

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1851. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
RAILS
TIES
TSL
VAL SEC
50 MPH
55 MPH
FRT
PMT
0.00
WILLOW BAYOU
CTC
Line Segment 026
Vicksburg Subdivision
026-005
1100-604.dgn
Revised : 1-1-05

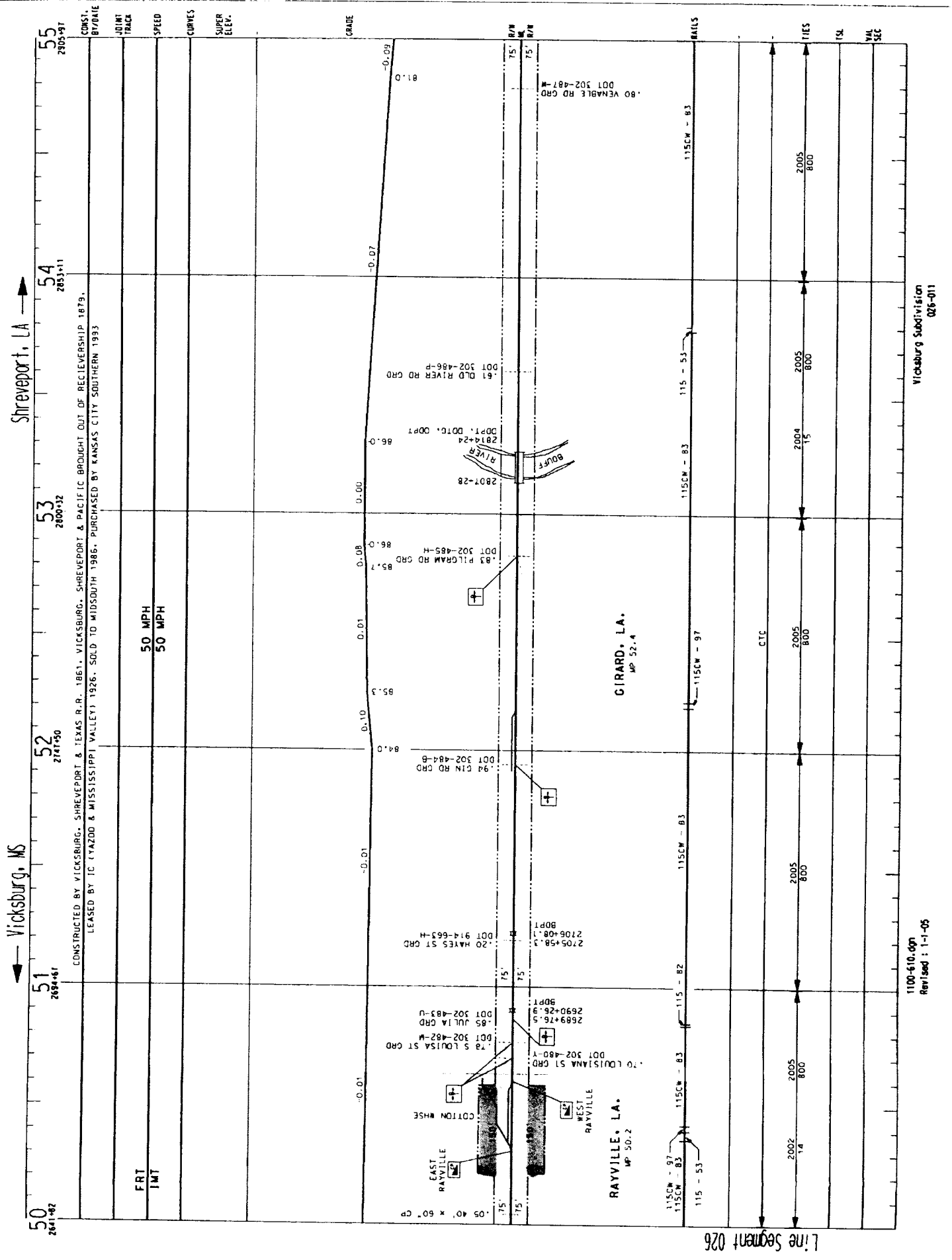

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879,
LEASED BY IC IYAZOO & MISSISSIPPI VALLEY) 1926, SOLD TO MIDSOUTH 1986, PURCHASED BY KANSAS CITY SOUTHERN 1993
50 MPH
55 MPH
FRT
IMT
TENDAL
TENSAS RIVER
CTC
Vicksburg Subdivision
026-006
1100-605.dgn
Revised : 1-1-05
Line Segment 026

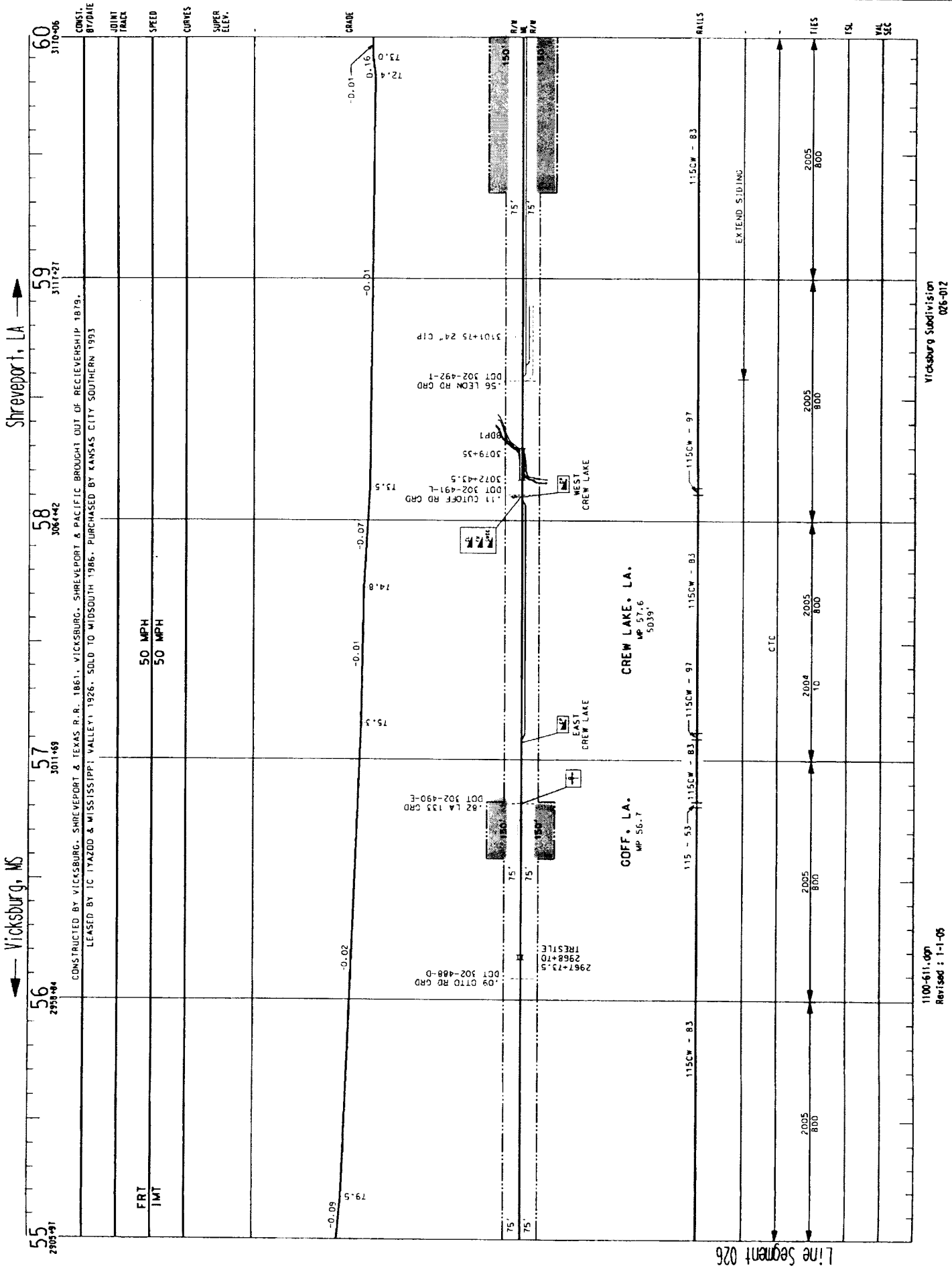

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
50 MPH
55 MPH
FRT
PMT
0° 30'
WAVERLY, LA.
MP 30.5
Vicksburg Subdivision
026-007
1100-606.dgn
Revised : 1-1-05
Line Segment 026

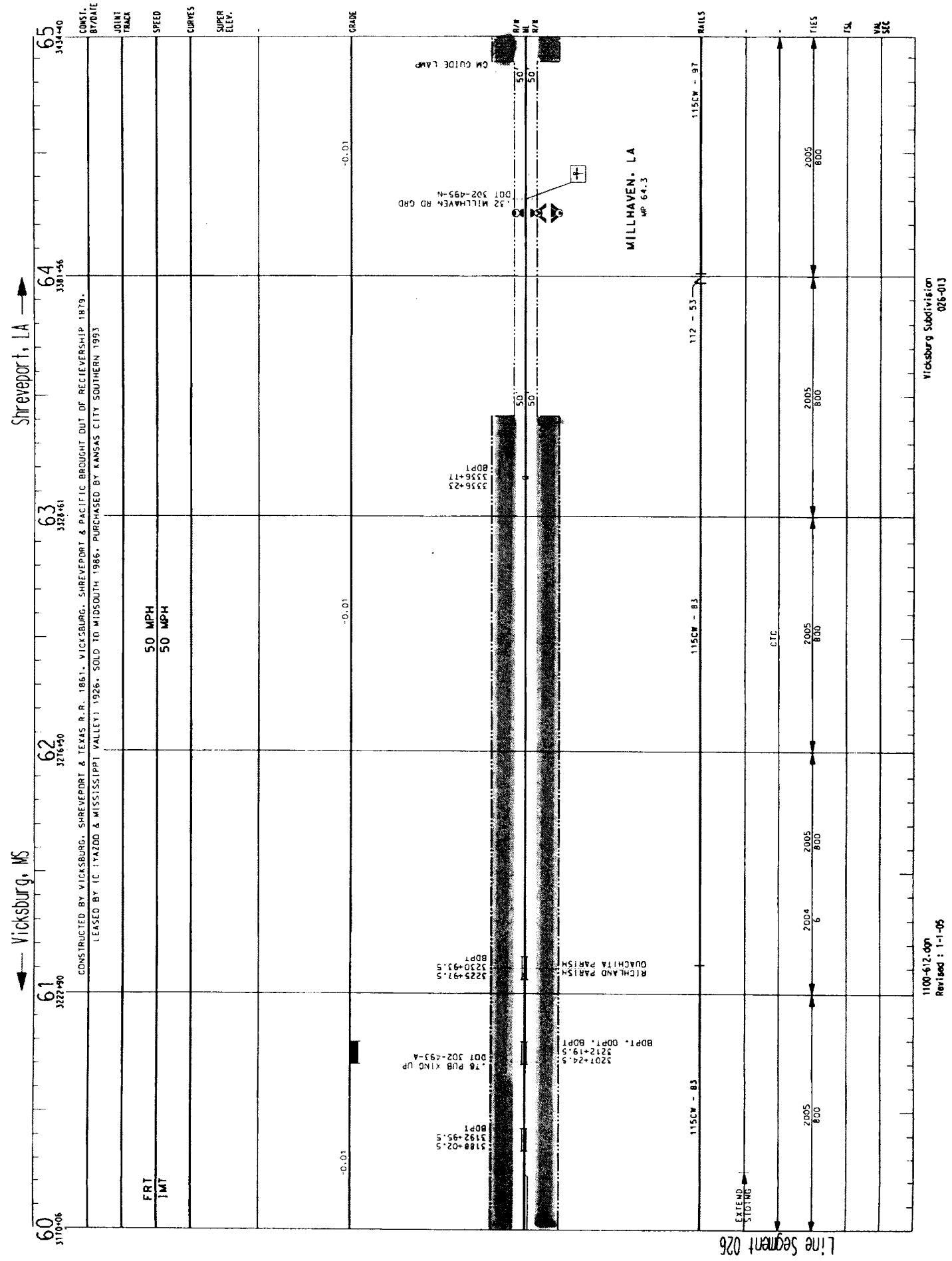

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
50 MPH
50 MPH
FRT
LWT
SHANNON, LA.
MP 39.4
9959'
DELHI, LA.
MP 35.5
EAST SHANNON
WEST DELHI
EAST DELHI
TERRAL FARMS
TIFTON ALUMINUM
CTC
Vicksburg Subdivision
026-008
1100-607.dgn
Revised : 1-1-05
Line Segment 026

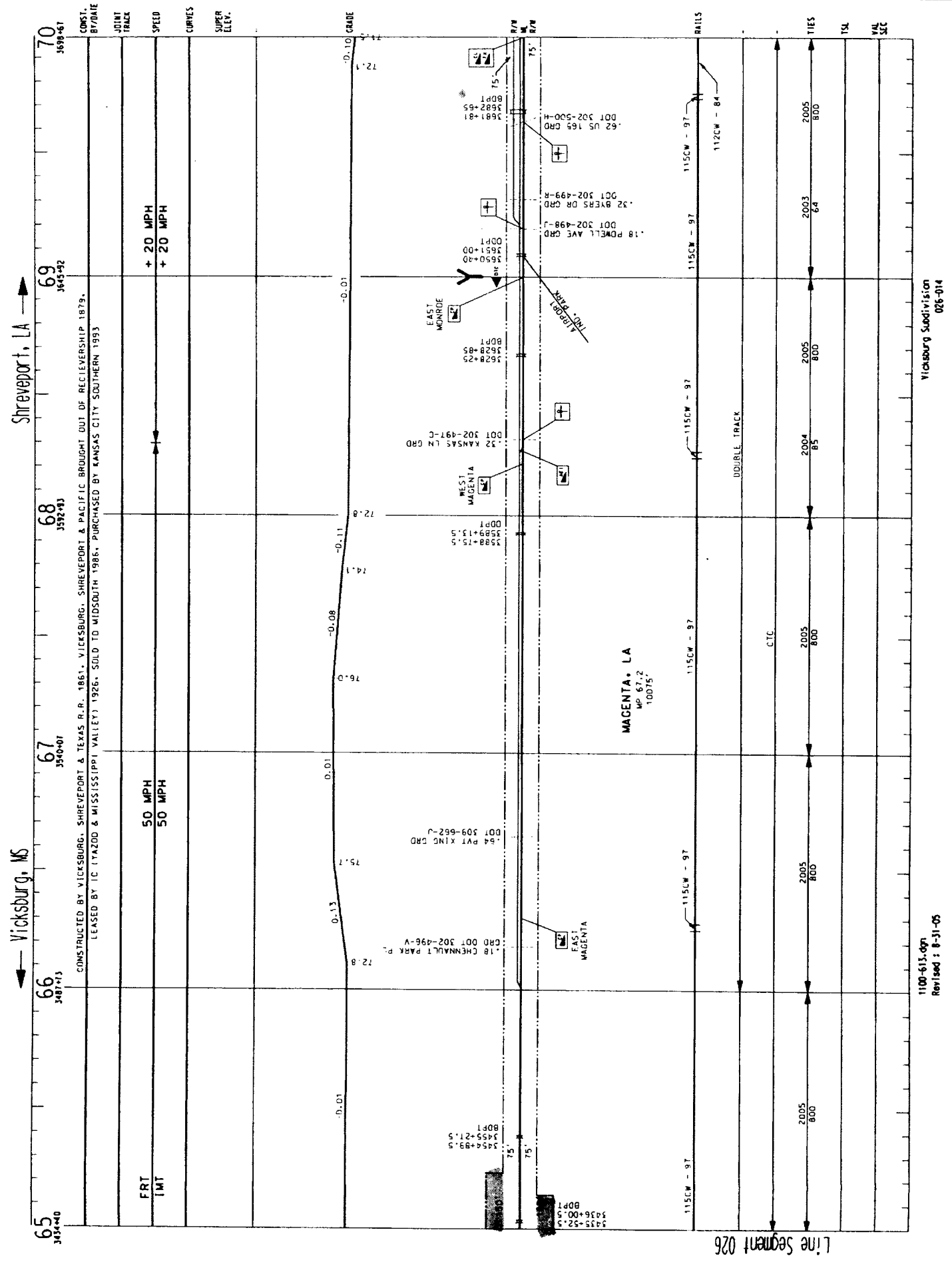

Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
FRT 50 MPH
IMT 50 MPH
55 MPH
59 MPH
HOLLY RIDGE, LA.
MP 42.7
DUNNS, LA.
MP 40.3
Vicksburg Subdivision
026-009
1100-608.dgn
Revised : 1-1-05
Line Segment 026

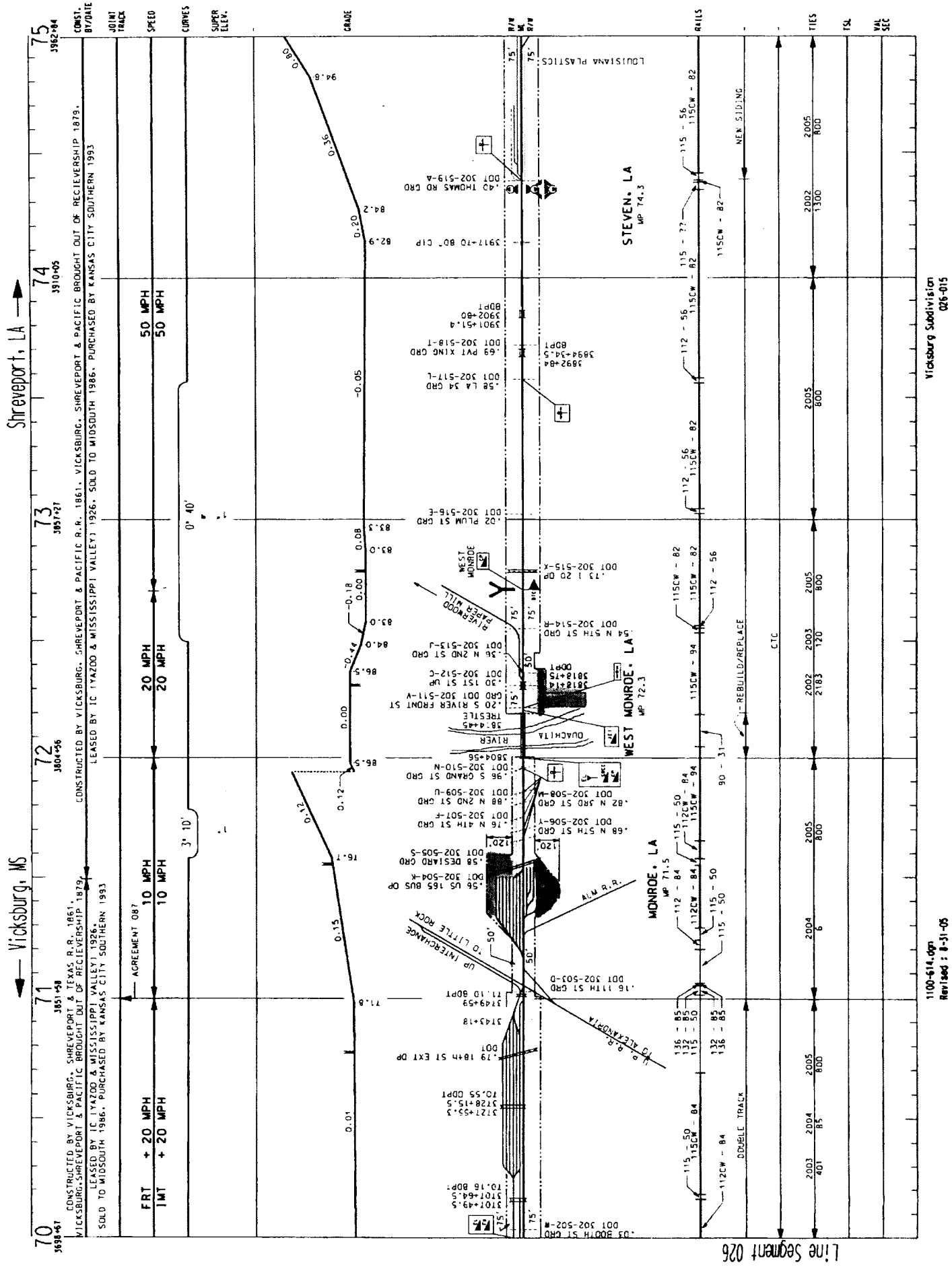

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
VAL SEC
FRT
IMT
55 MPH
59 MPH
50 MPH
50 MPH
-0.01
75'
115CW - 83
115 - 59
115 - 71
115CW - 83
CTC
2005
800
2004
42
2004
94
BEE BAYOU, LA.
MP 47.2
.99 LINDA ST GRD
DOT 302-479-E
.66 W BRANCH XING RD
GRD DOT 302-477-R
.92 E BRANCH XING RD
GRD DOT 302-476-C
.57 SUMLIN RANCH RD
GRD DOT 302-475-C
48.52 BDPT
.20 LA 583 GRD
DOT 302-474-V
47.45 BDPT
47.01 BDPT
.20 LUTHER STONE RD
GRD DOT 302-473-N
46.03 BDPT
.38 MENGEL RD GRD
DOT 302-472-C
45.30 BDPT
Line Segment 026
Vicksburg Subdivision
026-010
1100-609.dgn
Revised : 1-1-05

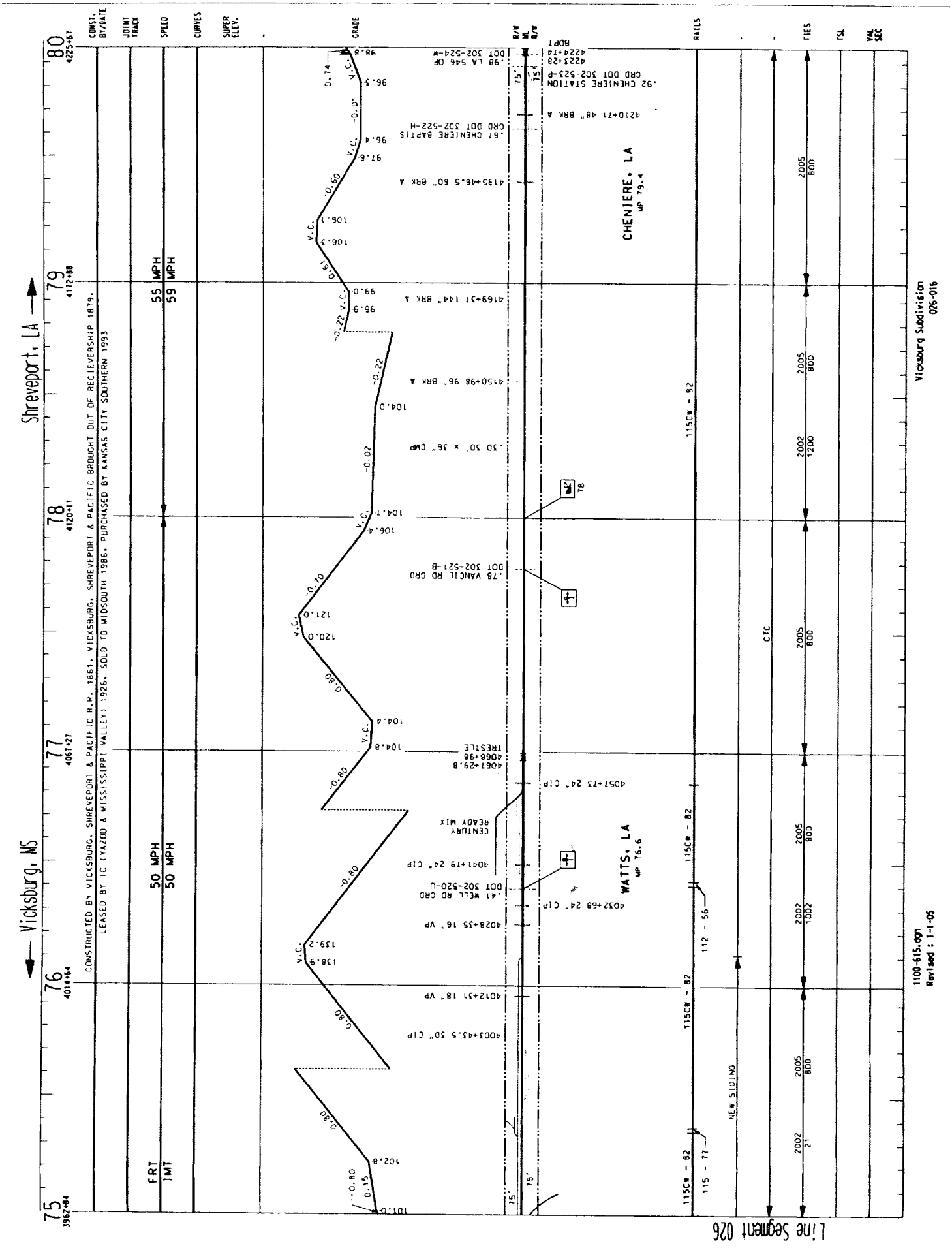

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
VAL SEC
FRT
IMT
50 MPH
50 MPH
CTC
GIRARD, LA.
MP 52.4
RAYVILLE, LA.
MP 50.2
COTTON WHSE
EAST RAYVILLE
WEST RAYVILLE
Vicksburg Subdivision
026-011
1100-610.dgn
Revised : 1-1-05

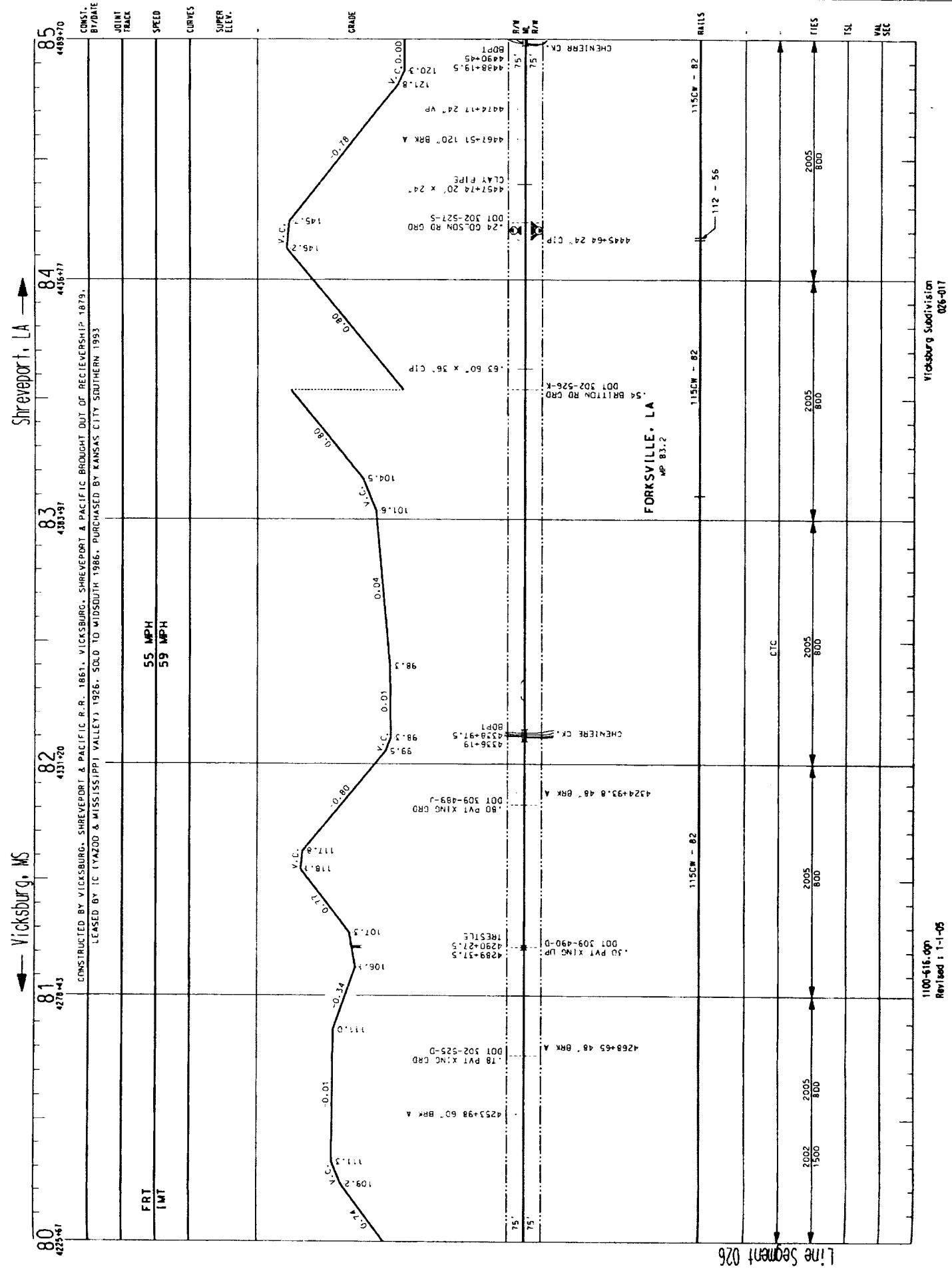

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC TYAZOO & MISSISSIPPI VALLEY 1926, SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
VAL SEC
50 MPH
50 MPH
FRT
IMT
EXTEND SIDING
CTC
CREW LAKE, LA.
MP 57.6
5039'
COFF, LA.
MP 56.7
WEST CREW LAKE
EAST CREW LAKE
.56 LEON RD GRD
DOT 302-492-T
.11 CUTOFF RD GRD
DOT 302-491-L
.82 LA 133 GRD
DOT 302-490-E
.09 OTTO RD GRD
DOT 302-488-D
3101+75 24" CIP
3079+35
3072+43.5
2967+73.5
2968+10
TRESTLE
Vicksburg Subdivision
026-012
1100-611.dgn
Revised : 1-1-05
Line Segment 026

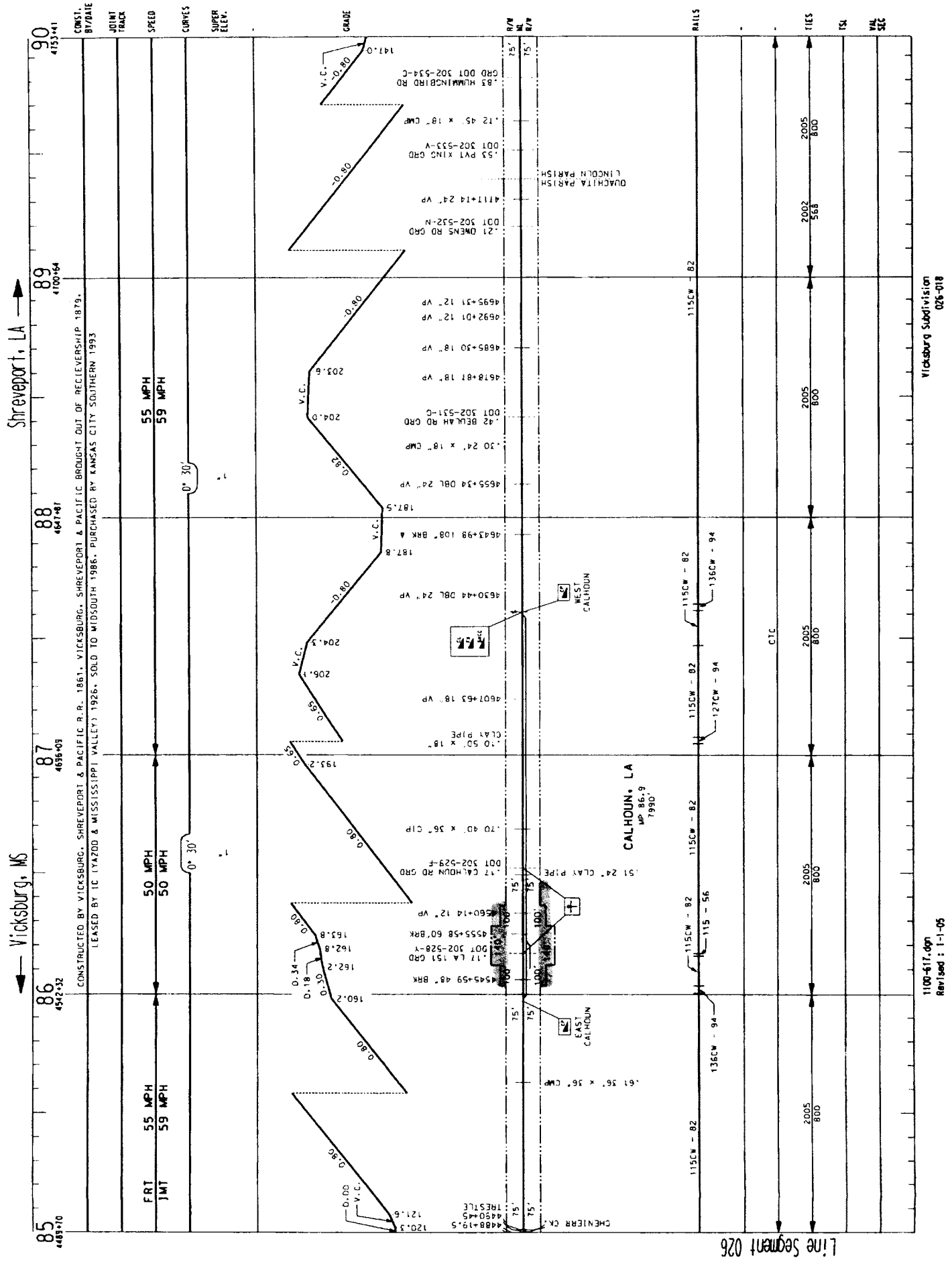

Vicksburg, MS
Shreveport, LA
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC YAZOO & MISSISSIPPI VALLEY) 1926, SOLD TO MIDSOUTH 1986, PURCHASED BY KANSAS CITY SOUTHERN 1993
50 MPH
50 MPH
MILLHAVEN, LA
MP 64.3
RICHLAND PARISH
OUACHITA PARISH
Vicksburg Subdivision
026-013
1100-612.dgn
Revised : 1-1-05

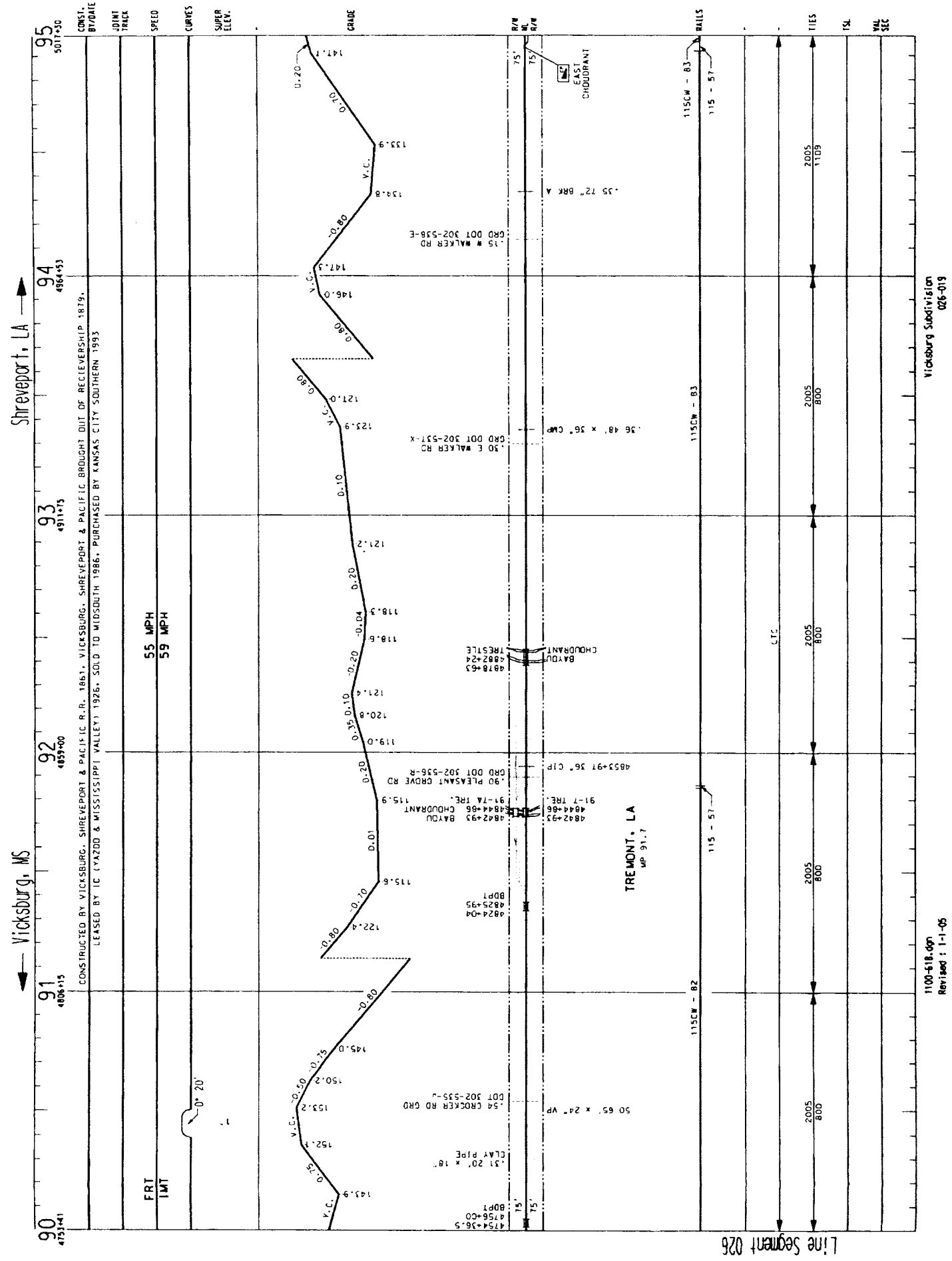

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
VAL SEC
+ 20 MPH
+ 20 MPH
50 MPH
50 MPH
FRT
PMT
MAGENTA, LA
MP 67.2
10075'
EAST MONROE
WEST MAGENTA
EAST MAGENTA
DOUBLE TRACK
CTC
Vicksburg Subdivision
026-014
1100-613.dgn
Revised : 8-31-05

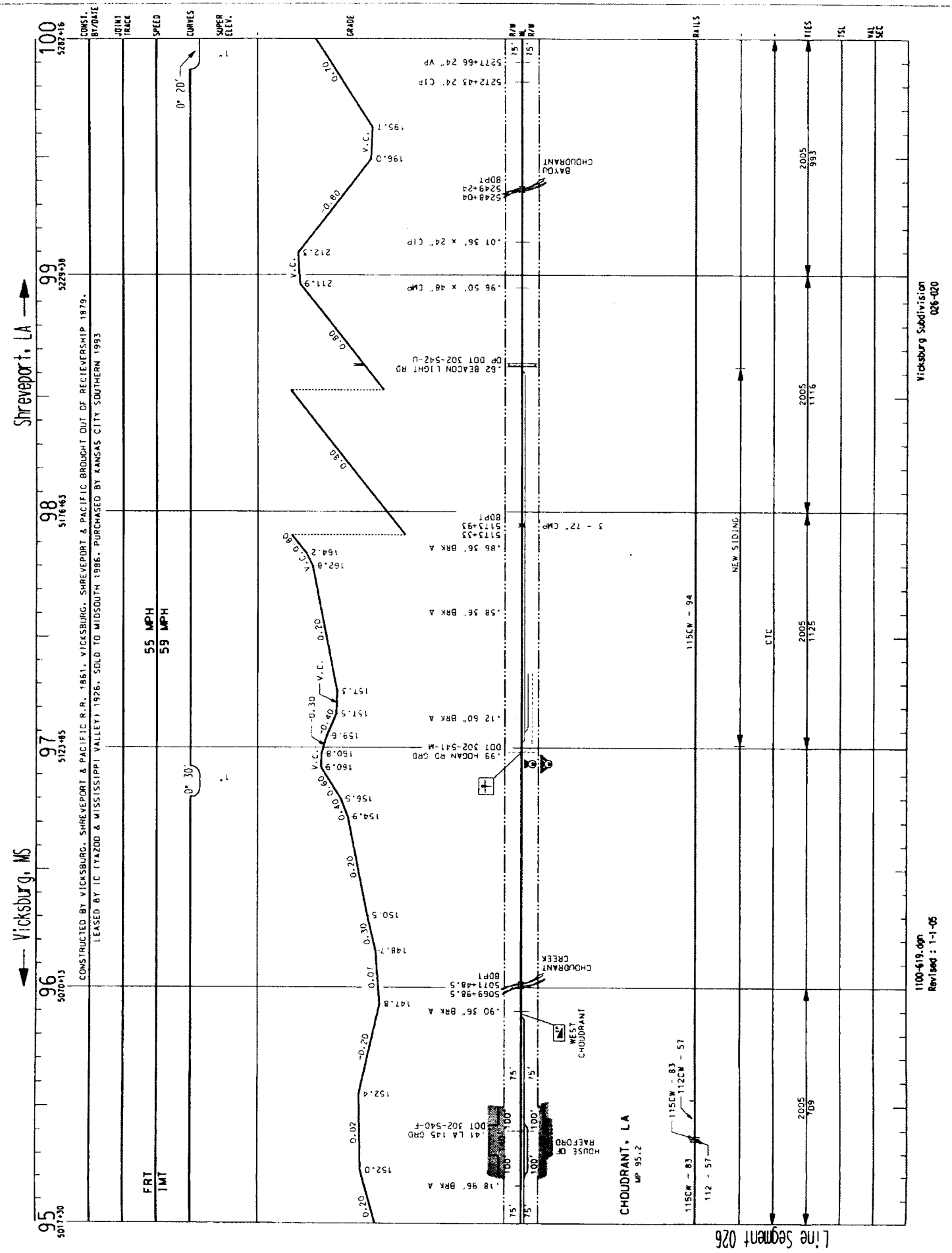

Vicksburg, MS
Shreveport, LA
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONSTRUCTED BY VICKSBURG, SHREVEPORT & TEXAS R.R. 1861.
VICKSBURG,SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926.
SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
AGREEMENT 087
FRT + 20 MPH
IMT + 20 MPH
10 MPH
20 MPH
50 MPH
3° 10'
0° 40'
STEVEN, LA
MP 74.3
WEST MONROE, LA
MP 72.3
MONROE, LA
MP 71.5
LOUISIANA PLASTICS
NEW SIDING
REBUILD/REPLACE
CTC
DOUBLE TRACK
Vicksburg Subdivision
026-015
1100-614.dgn
Revised : 8-31-05

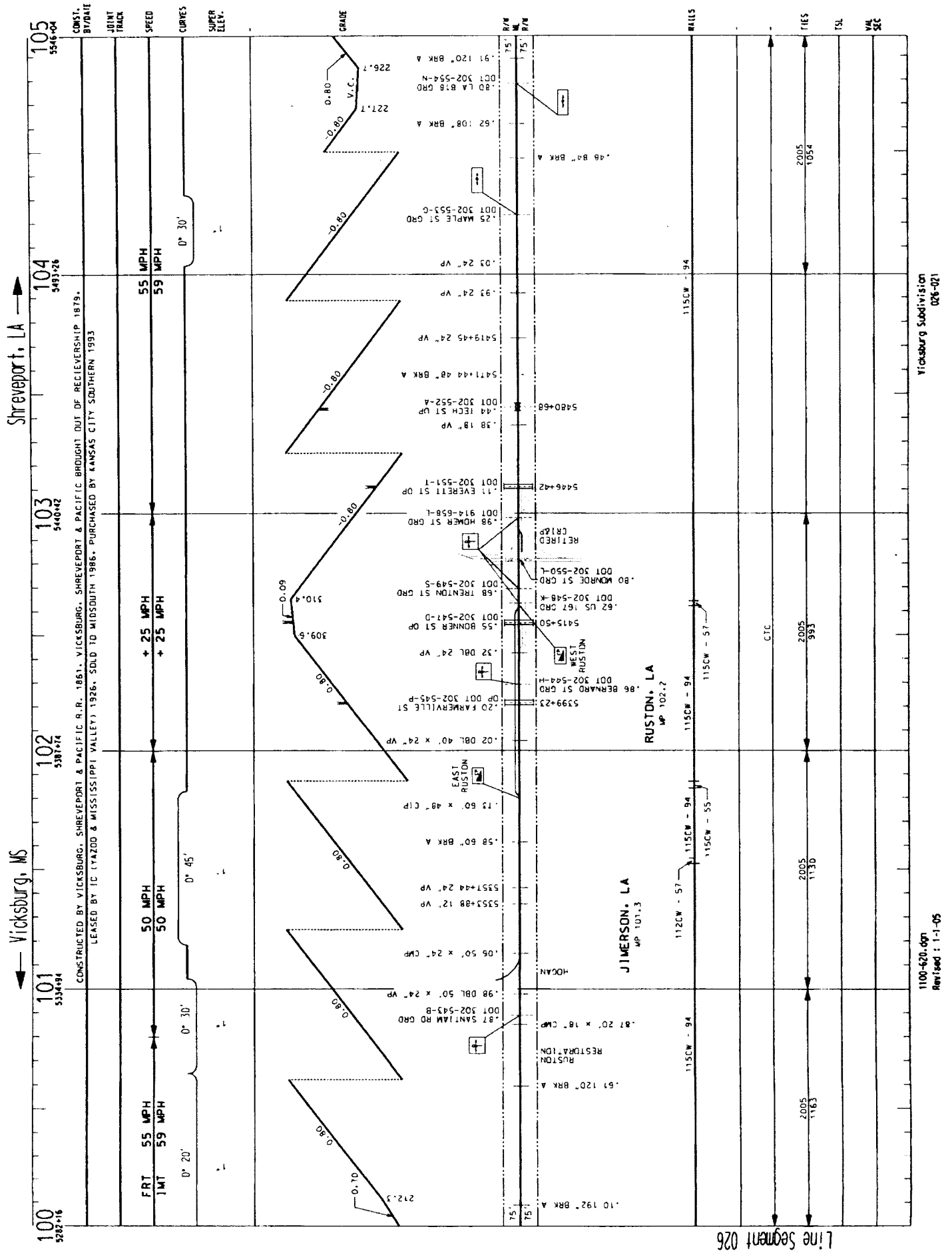

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CHENIERE, LA
MP 79.4
WATTS, LA
MP 76.6
NEW SIDING
Vicksburg Subdivision
026-016
1100-615.dgn
Revised : 1-1-05

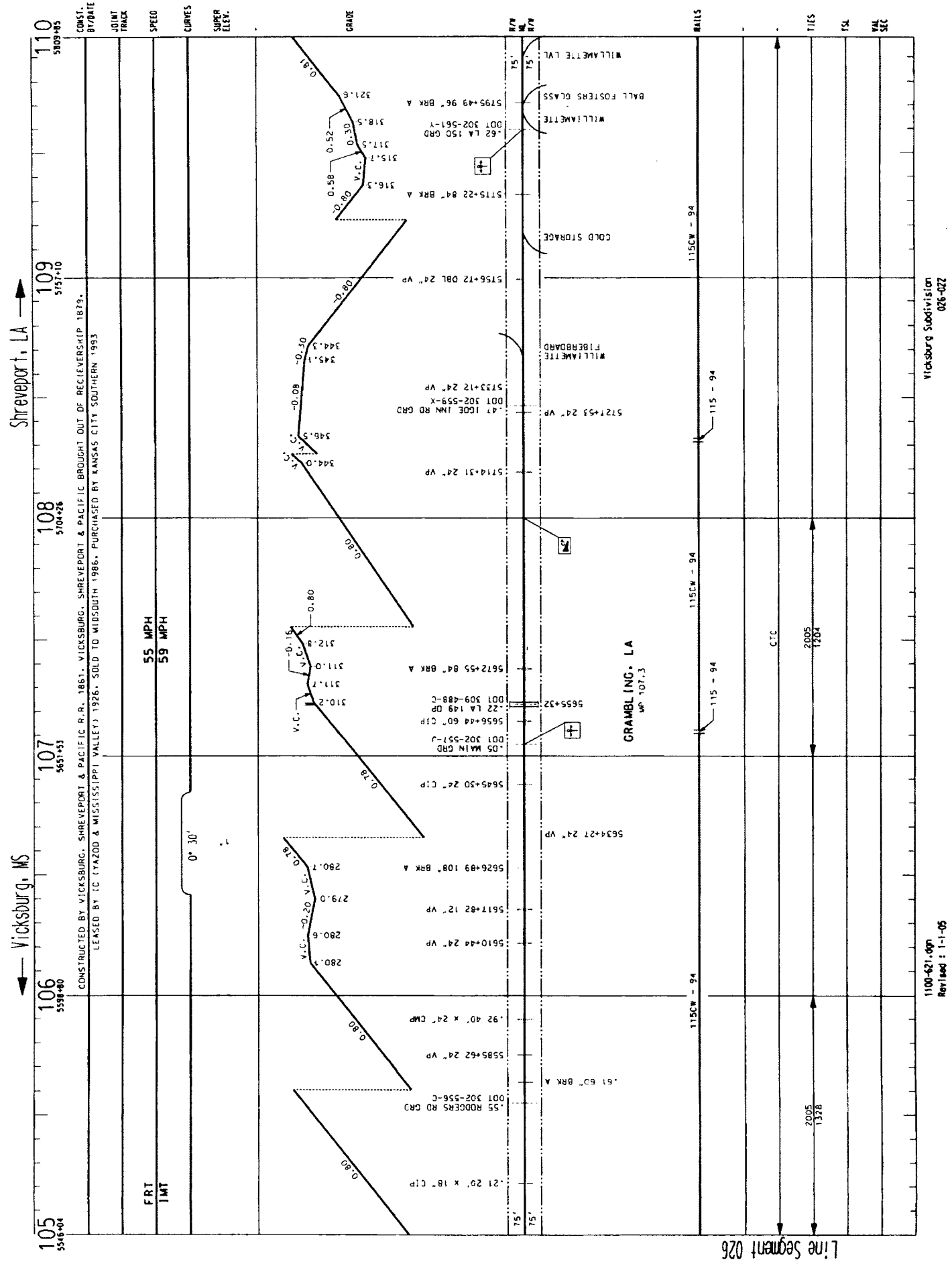

Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO WIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONSI. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
VAL SEC
FRT
IMT
55 MPH
59 MPH
FORKSVILLE, LA
MP 83.2
115CW - 82
112 - 56
CTC
2005
800
2002
1500
CHENIERE CK.
BOPT
.24 GOLDSON RD CRO
DOT 302-527-S
.54 BRITTON RD CRO
DOT 302-526-K
.63 60" x 36" CIP
.80 PVT XING CRO
DOT 309-489-J
.50 PVT XING UP
TRESTLE
DOT 309-490-D
.78 PVT XING CRO
DOT 302-525-D
4445+64 24" CIP
4474+17 24" VP
4461+51 120" BRK A
4457+74 20' x 24'
CLAY PIPE
4438+19.5
4490+45
4324+93.8 48" BRK A
4289+37.5
4290+27.5
4268+65 48" BRK A
4253+98 60" BRK A
4236+19
4238+97.5
Vicksburg Subdivision
026-017
1100-616.dgn
Revised : 1-1-05
Line Segment 026

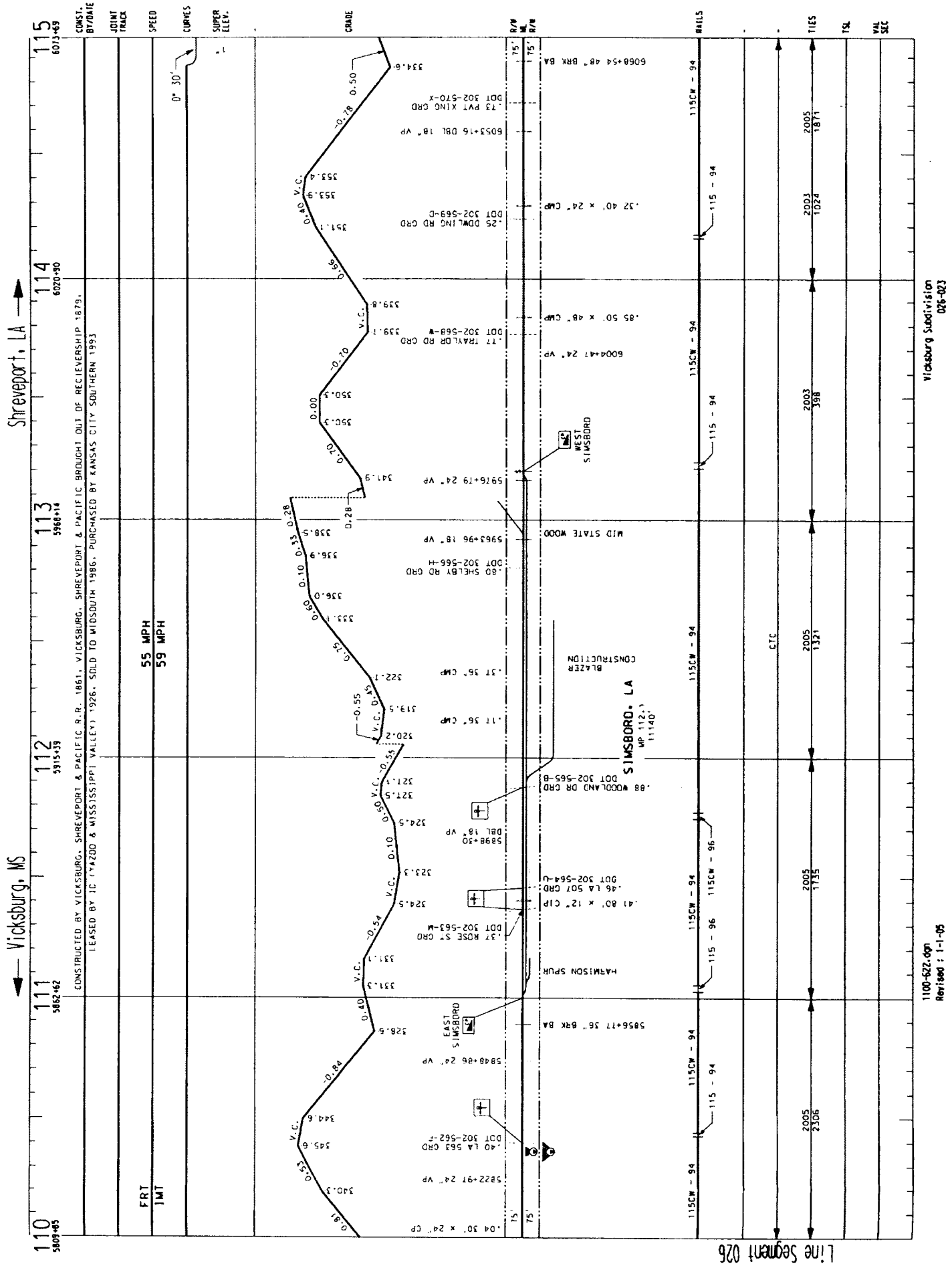

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO WIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CALHOUN, LA
MP 86.9
7990'
WEST CALHOUN
EAST CALHOUN
CHENIERR CK.
TRESTLE
Vicksburg Subdivision
026-018
1100-617.dgn
Revised : 1-1-05

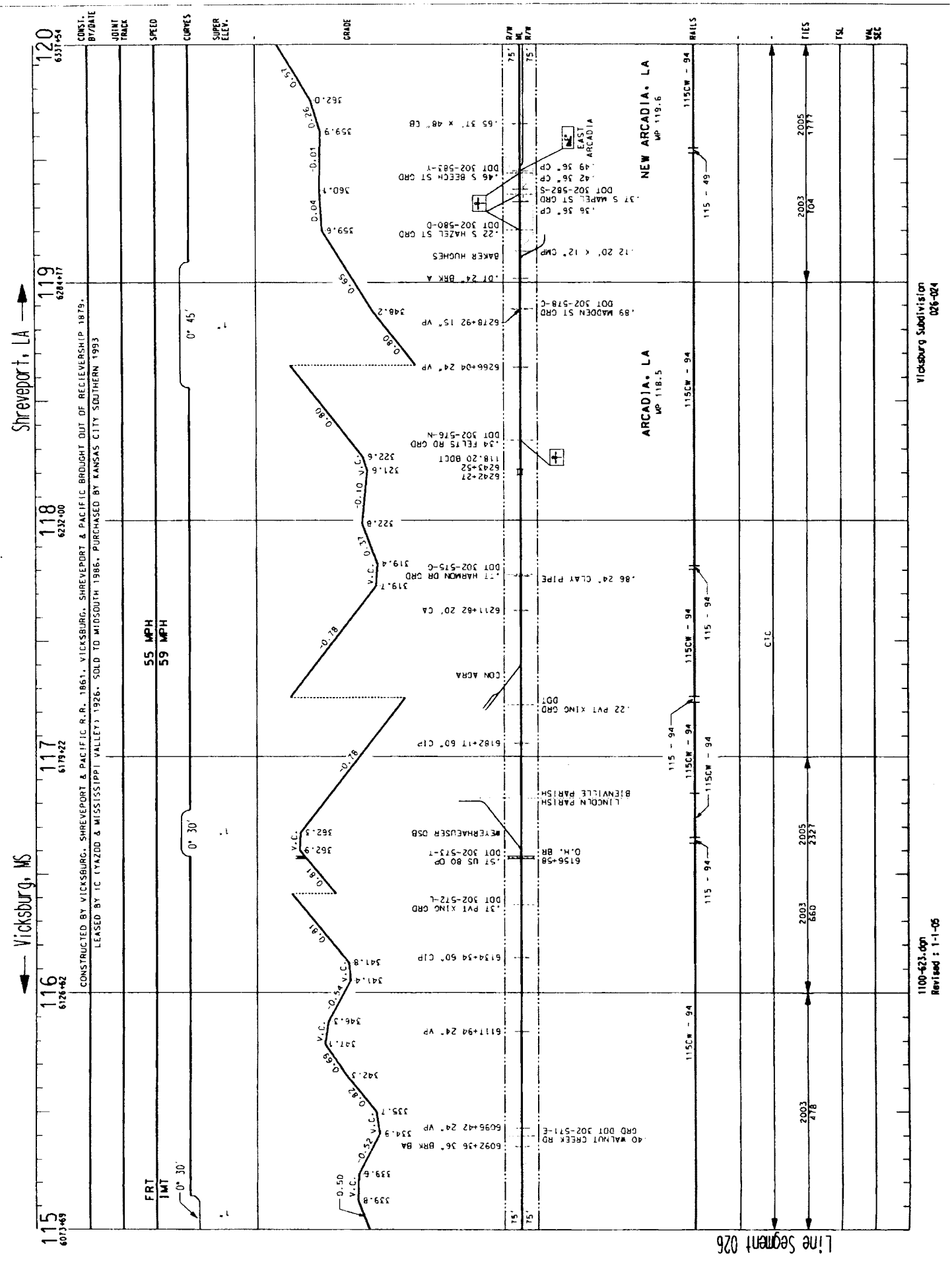

Vicksburg, MS
Shreveport, LA
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
PASS
TREMONT, LA
MP 91.7
Vicksburg Subdivision
026-019
1100-618.dgn
Revised : 1-1-05

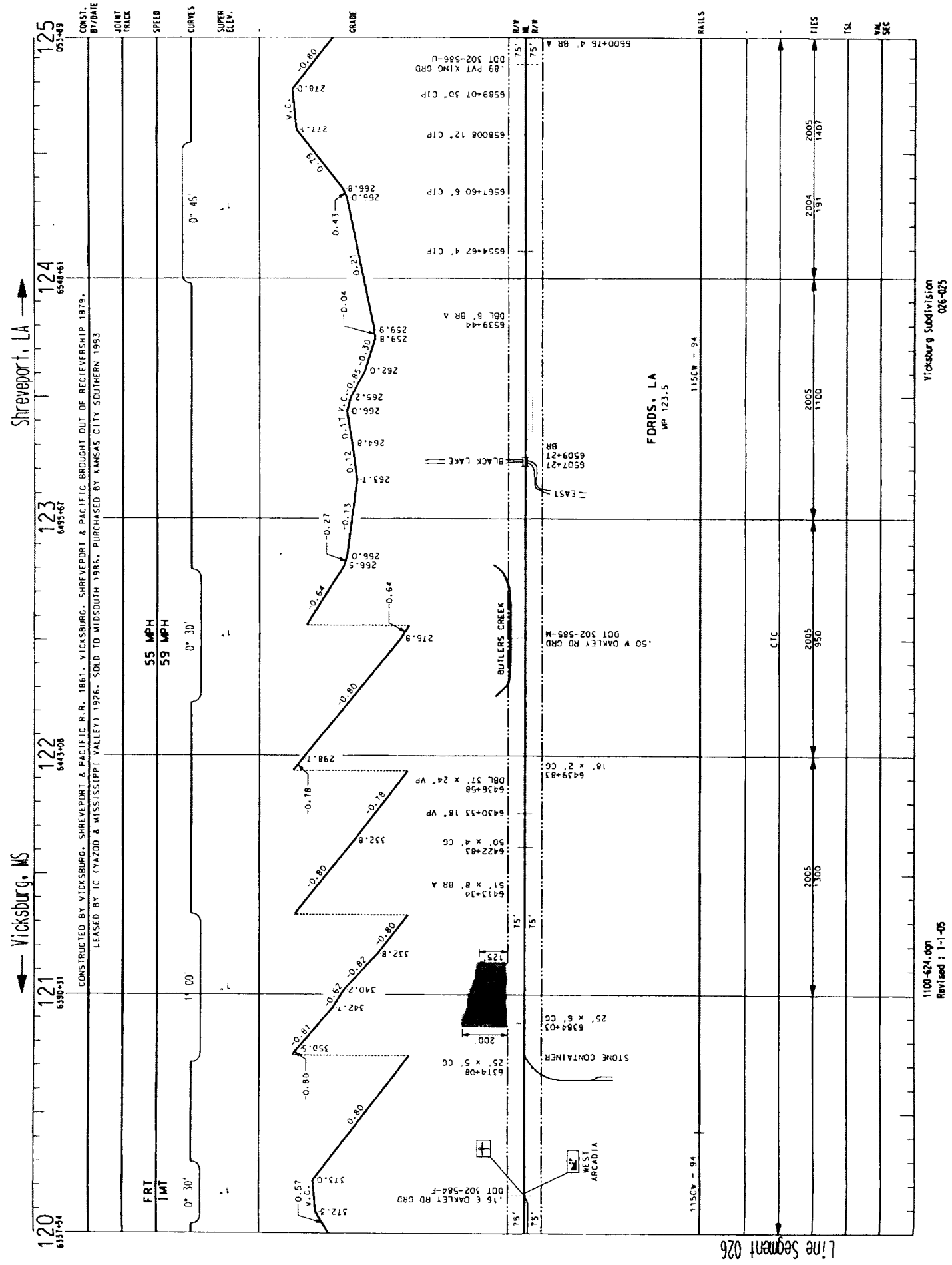

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
1MT
CHOUDRANT, LA
MP 95.2
Line Segment 026
Vicksburg Subdivision
026-020
1100-619.dgn
Revised : 1-1-05

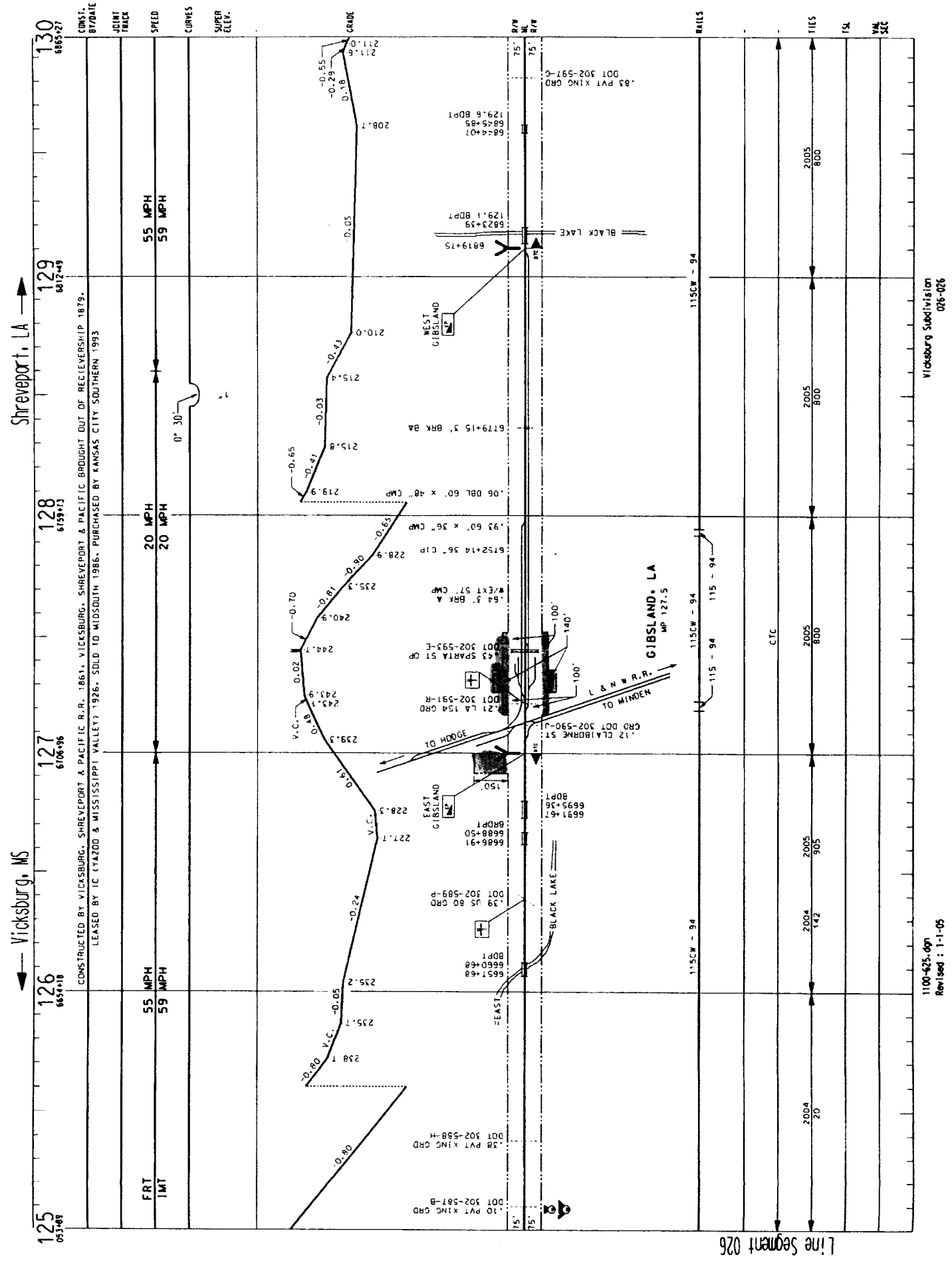

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
RUSTON, LA
MP 102.2
JIMERSON, LA
MP 101.3
Vicksburg Subdivision
026-021
1100-620.dgn
Revised : 1-1-05

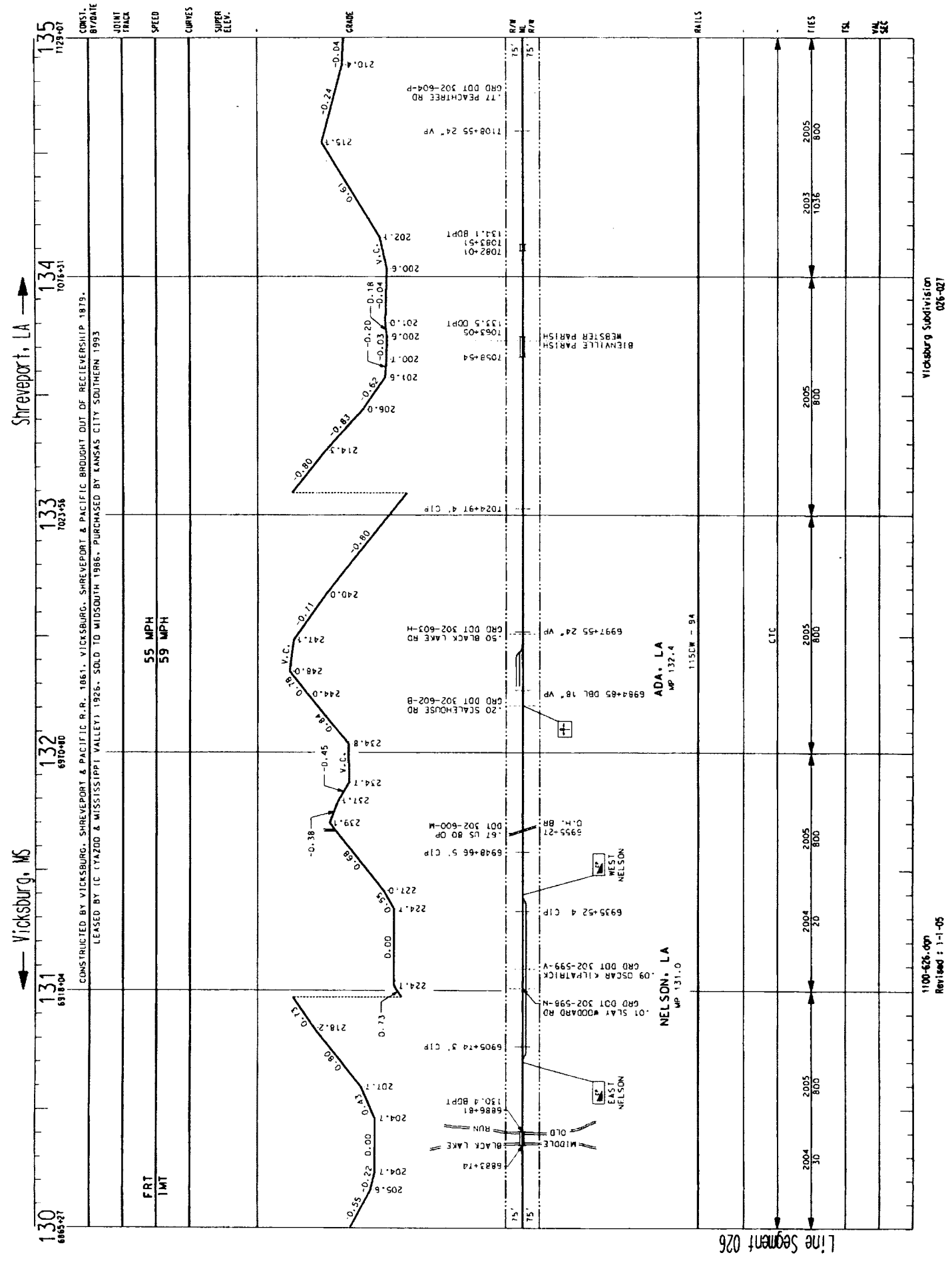

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO WIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
TMT
0° 30'
GRAMBLING, LA
MP 107.3
Vicksburg Subdivision
026-022
1100-621.dgn
Revised : 1-1-05
Reply Volume III, Page 3021

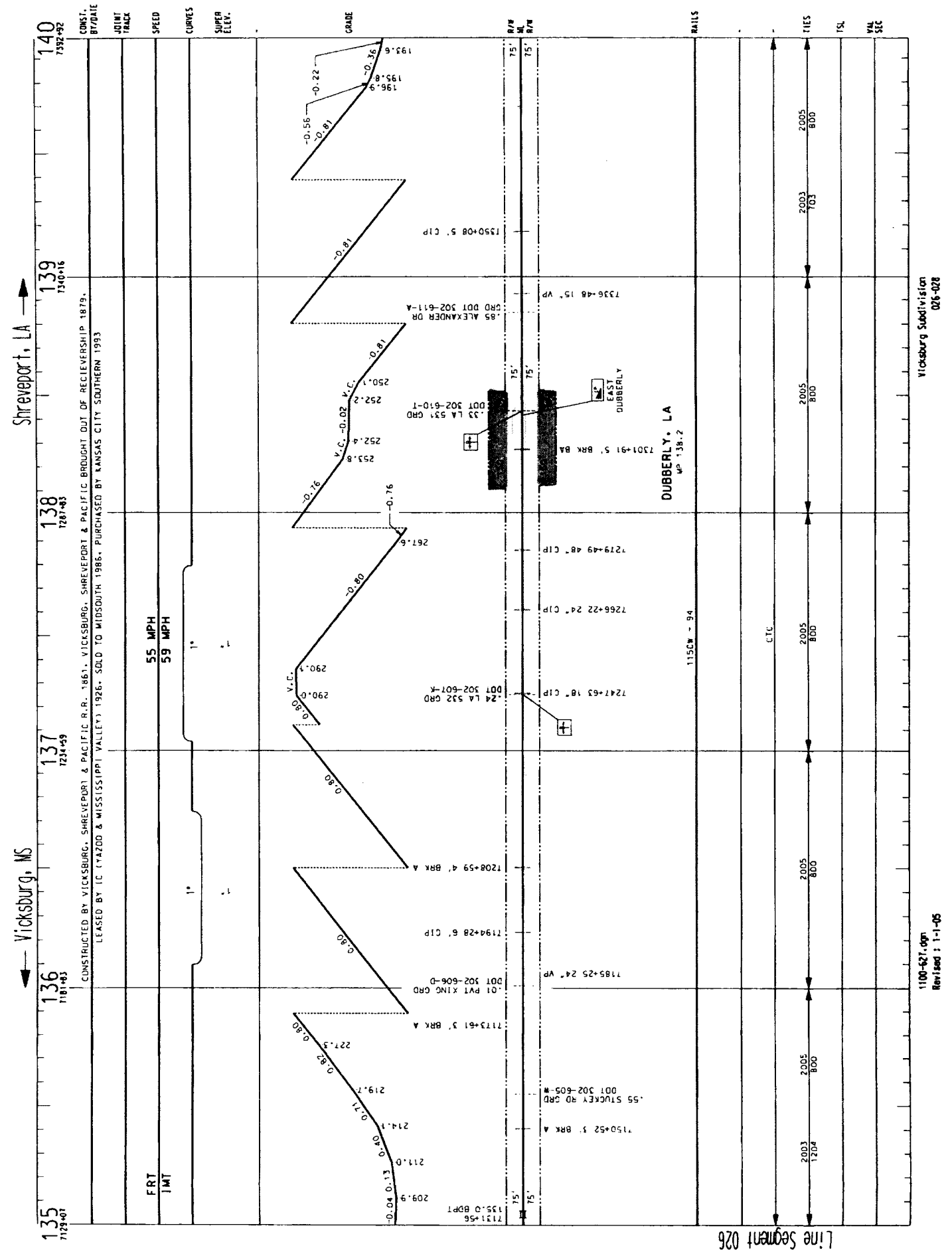

Vicksburg, MS
Shreveport, LA
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861, VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879, LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926, SOLD TO MIDSOUTH 1986, PURCHASED BY KANSAS CITY SOUTHERN 1993
SIMSBORO, LA
55 MPH
59 MPH
FRT
IMT
Vicksburg Subdivision
026-023
1100-622.dgn
Revised : 1-1-05
Line Segment 026

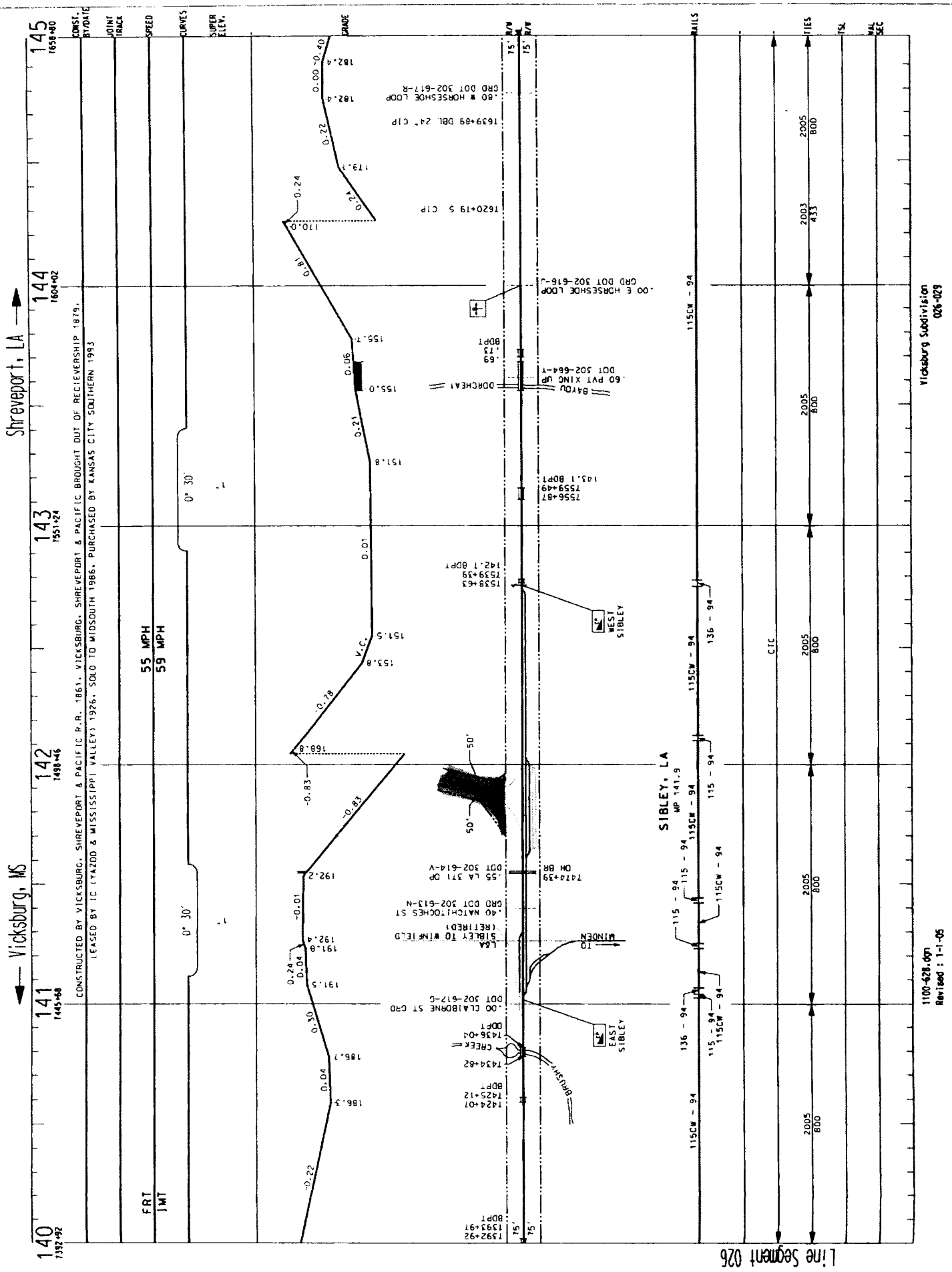

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
0° 45'
0° 30'
FRT LMT
NEW ARCADIA, LA
MP 119.6
ARCADIA, LA
MP 118.5
EAST ARCADIA
115CW - 94
115 - 49
115 - 94
C.T.C.
Vicksburg Subdivision
026-024
1100-623.dgn
Revised : 1-1-05

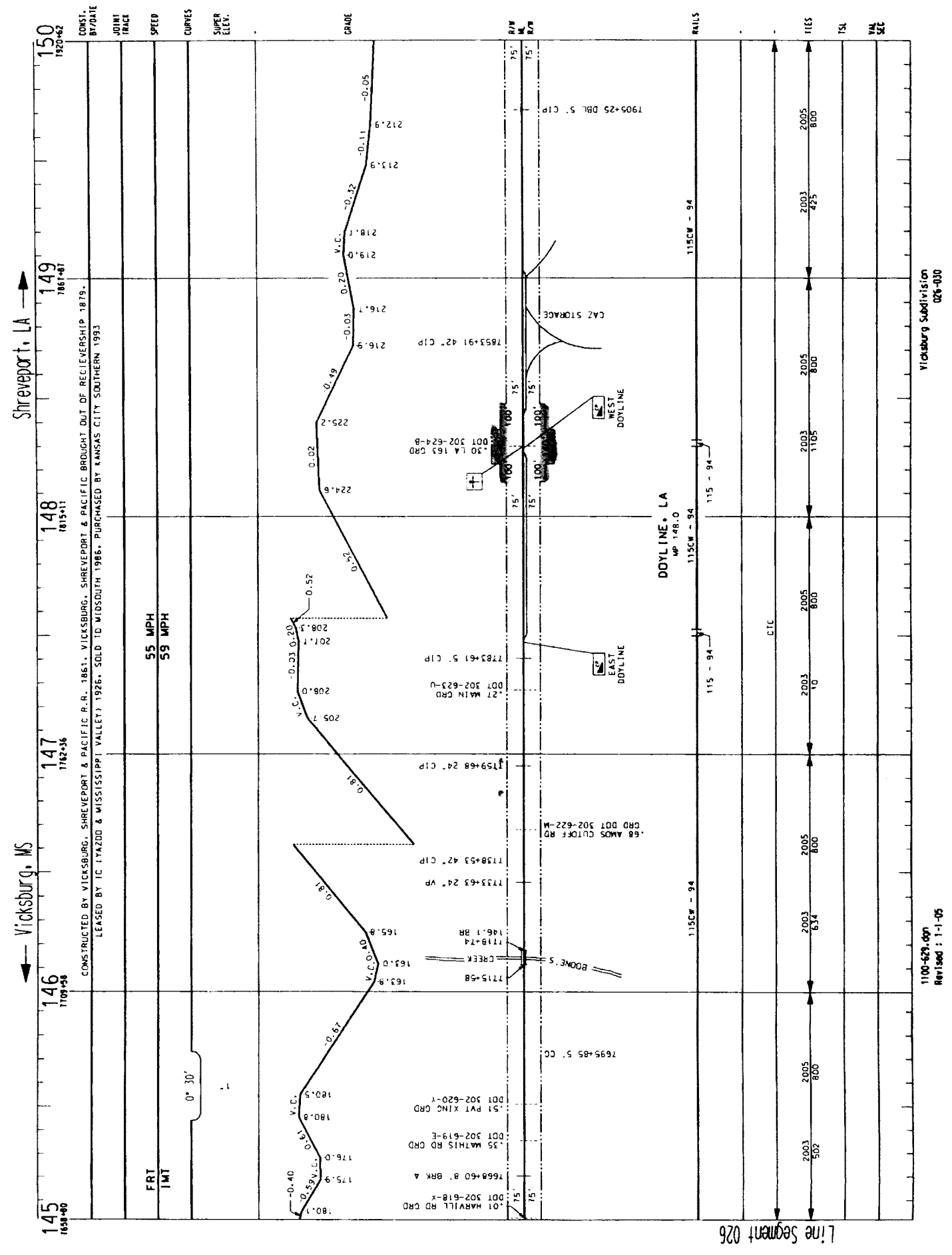

Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
TMT
FORDS, LA
MP 123.5
BUTLERS CREEK
BLACK LAKE
STONE CONTAINER
WEST ARCADIA
Vicksburg Subdivision
026-025
Line Segment 026
1100-624.dgn
Revised : 1-1-05

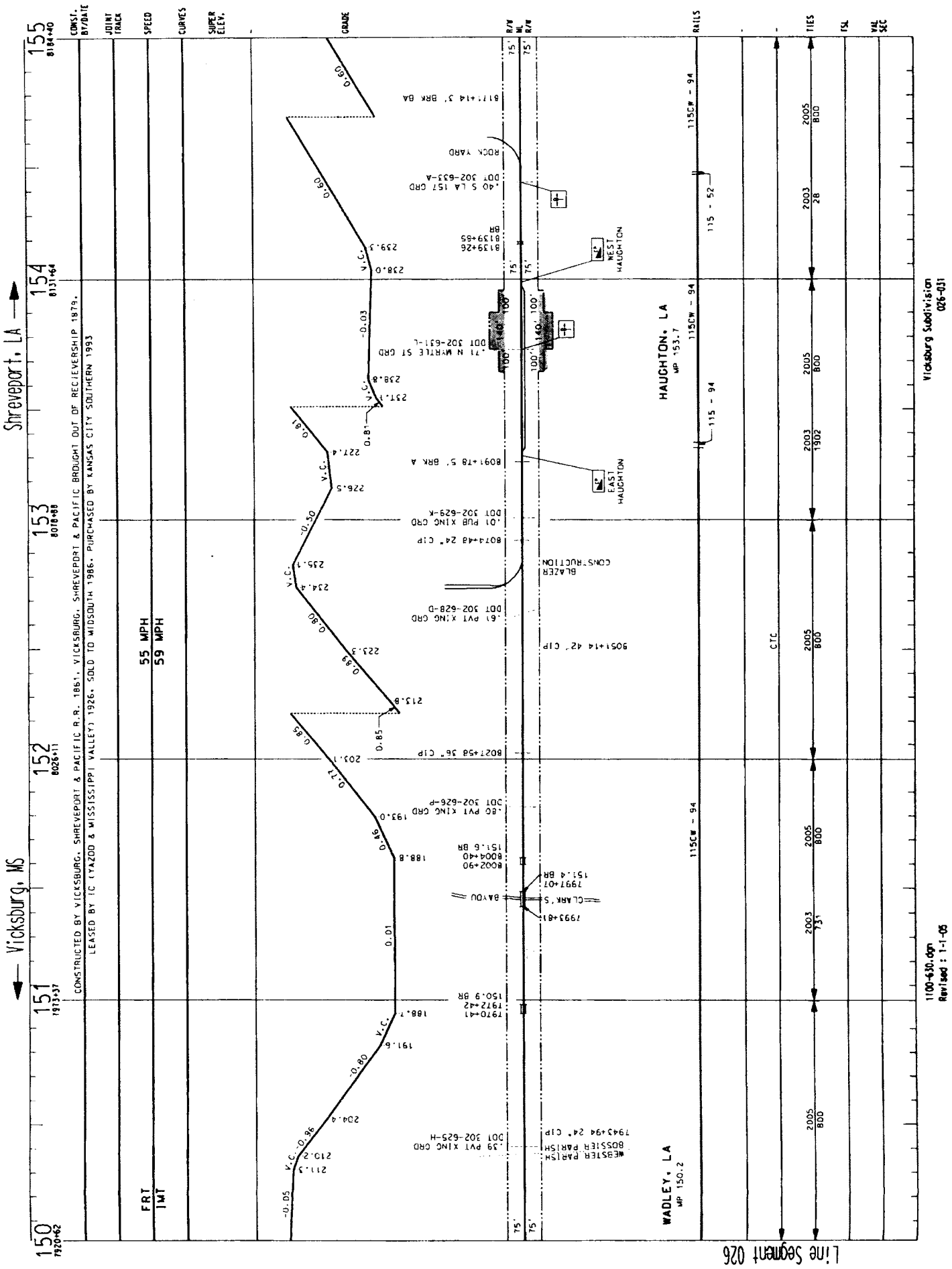

Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
YAL SEC
55 MPH
59 MPH
20 MPH
FRT
1MT
0° 30'
GIBSLAND, LA
MP 127.5
L & N W R.R.
TO MINDEN
TO HODGE
CLAIBORNE ST
SPARTA ST OP
WEST GIBSLAND
EAST GIBSLAND
BLACK LAKE
115CW - 94
115 - 94
CTC
Vicksburg Subdivision
026-026
1100-625.dgn
Revised : 1-1-05
Line Segment 026

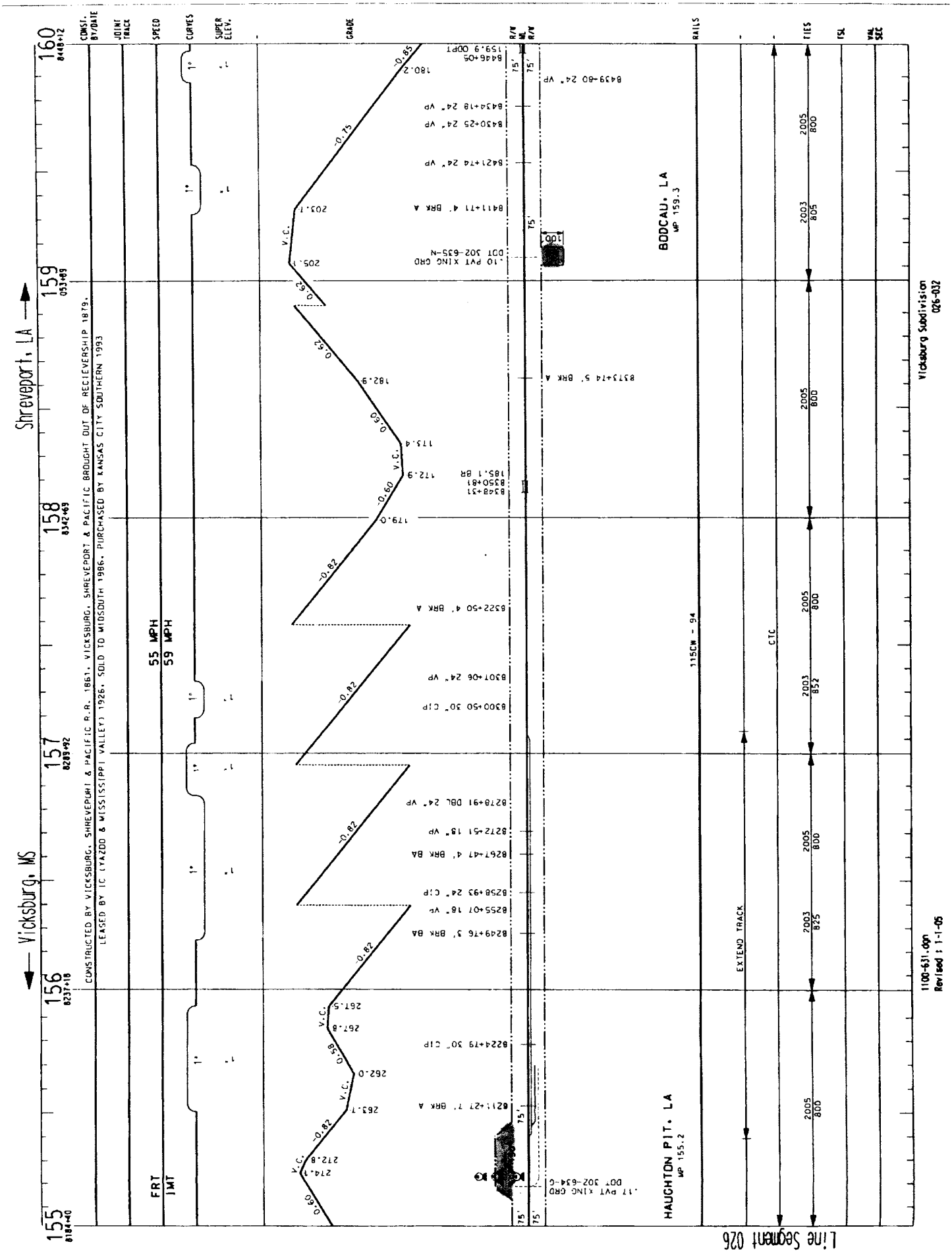

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
1MT
ADA, LA
MP 132.4
NELSON, LA
MP 131.0
CTC
Vicksburg Subdivision
026-027
1100-626.dgn
Revised : 1-1-05

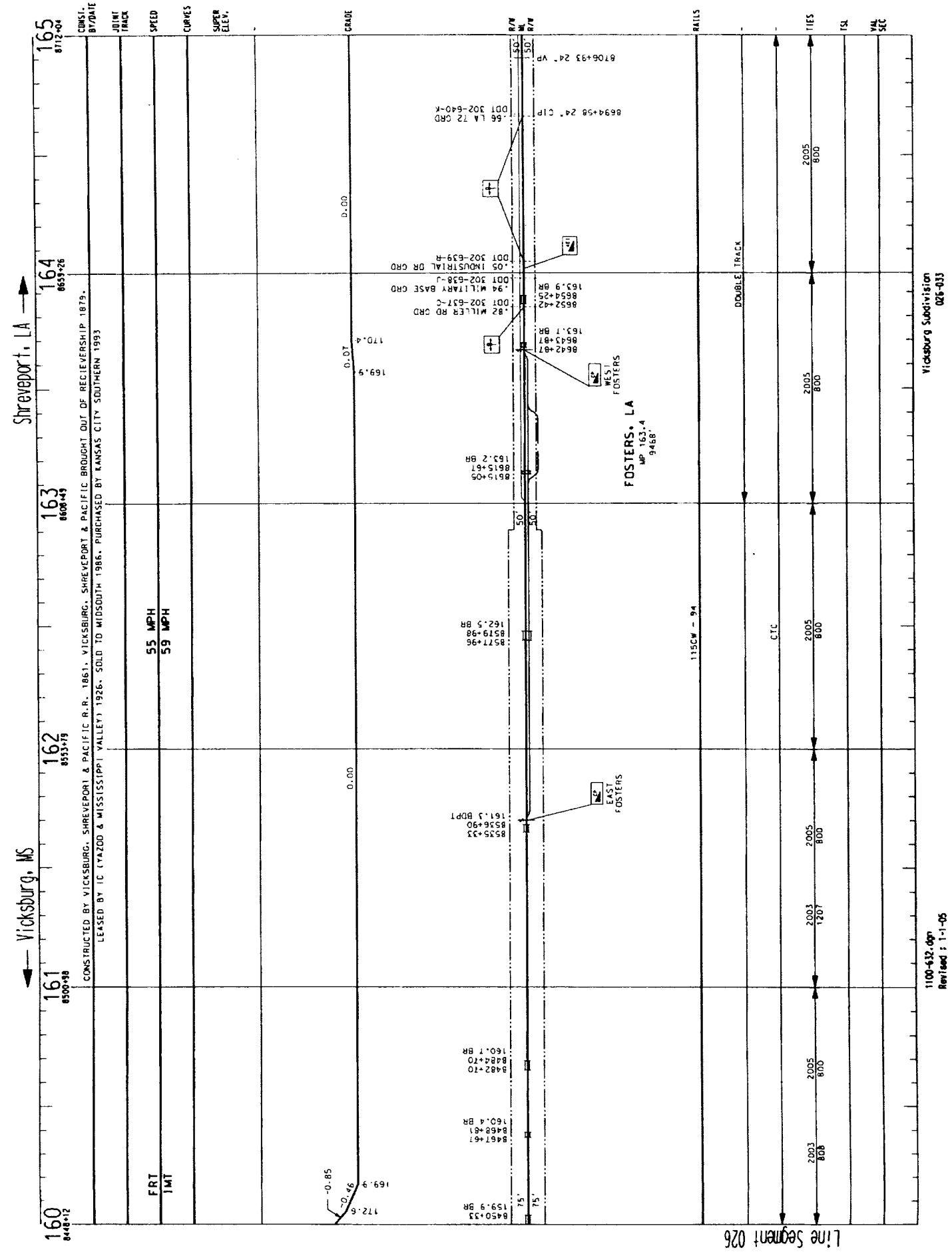

Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
DUBBERLY, LA
mp 138.2
55 MPH
59 MPH
FRT
1MT
CTC
Vicksburg Subdivision
026-028
1100-627.dgn
Revised : 1-1-05

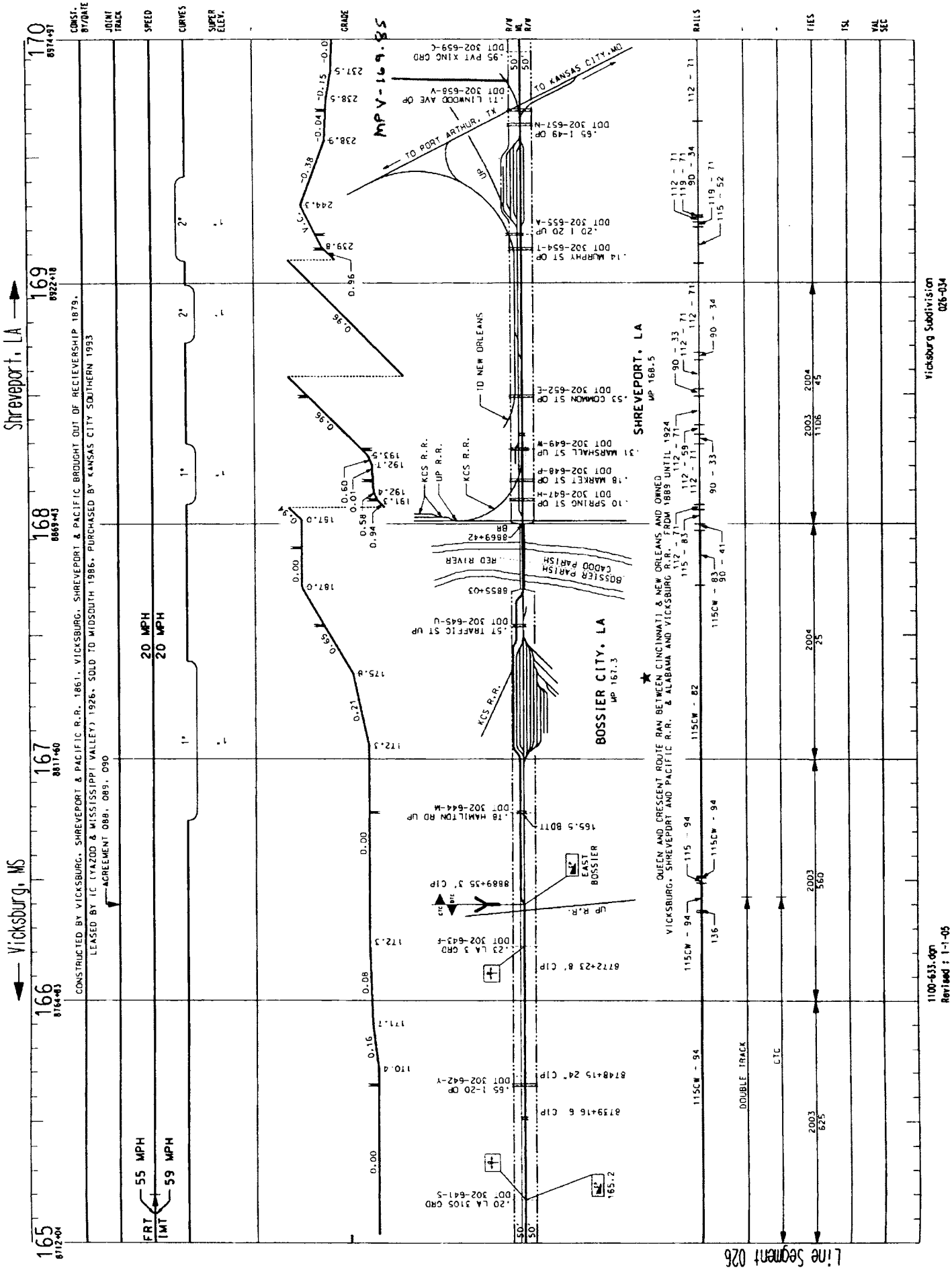

Shreveport, LA
Vicksburg, MS
Line Segment 026
SIBLEY, LA
MP 141.9
55 MPH
59 MPH
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
Vicksburg Subdivision
026-029
1100-628.dgn
Revised : 1-1-05


Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
DOYLINE, LA
MP 148.0
Vicksburg Subdivision
026-030
1100-629.dgn
Revised : 1-1-05
Line Segment 026


Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO WIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
1MT
HAUGHTON, LA
MP 153.7
WADLEY, LA
MP 150.2
ROCK YARD
WEST HAUGHTON
EAST HAUGHTON
BLAZER CONSTRUCTION
CLARK'S
WEBSTER PARISH
BOSSIER PARISH
CTC
Vicksburg Subdivision
026-031
Line Segment 026
1100-030.dgn
Revised : 1-1-05


Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
CONSTR. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
FSL
WAL SEC
55 MPH
59 MPH
FRT
PASS
BODCAU, LA
MP 159.3
HAUGHTON PIT, LA
MP 155.2
EXTEND TRACK
CTC
115CM - 94
Vicksburg Subdivision
026-032
Line Segment 026
1100-631.dgn
Revised : 1-1-05


Shreveport, LA
Vicksburg, MS
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
LMT
DOUBLE TRACK
CTC
115CW - 94
FOSTERS, LA
MP 163.4
9468'
WEST FOSTERS
EAST FOSTERS
Vicksburg Subdivision
026-033
1100-612.dgn
Revised : 1-1-05
Line Segment 026


Shreveport, LA
Vicksburg, MS
Line Segment 026
CONSTRUCTED BY VICKSBURG, SHREVEPORT & PACIFIC R.R. 1861. VICKSBURG, SHREVEPORT & PACIFIC BROUGHT OUT OF RECIEVERSHIP 1879.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
AGREEMENT 088, 089, 090
SHREVEPORT, LA
MP 168.5
BOSSIER CITY, LA
MP 167.3
QUEEN AND CRESCENT ROUTE RAN BETWEEN CINCINNATI & NEW ORLEANS AND OWNED VICKSBURG, SHREVEPORT AND PACIFIC R.R. & ALABAMA AND VICKSBURG R.R. FROM 1889 UNTIL 1924
TO KANSAS CITY, MO
TO PORT ARTHUR, TX
KCS R.R.
UP R.R.
RED RIVER
BOSSIER PARISH
CADDO PARISH
EAST BOSSIER
DOUBLE TRACK
CTC
20 MPH
55 MPH
59 MPH
FRT
TMT
Vicksburg Subdivision
026-034
1100-633.dgn
Revised : 1-1-05

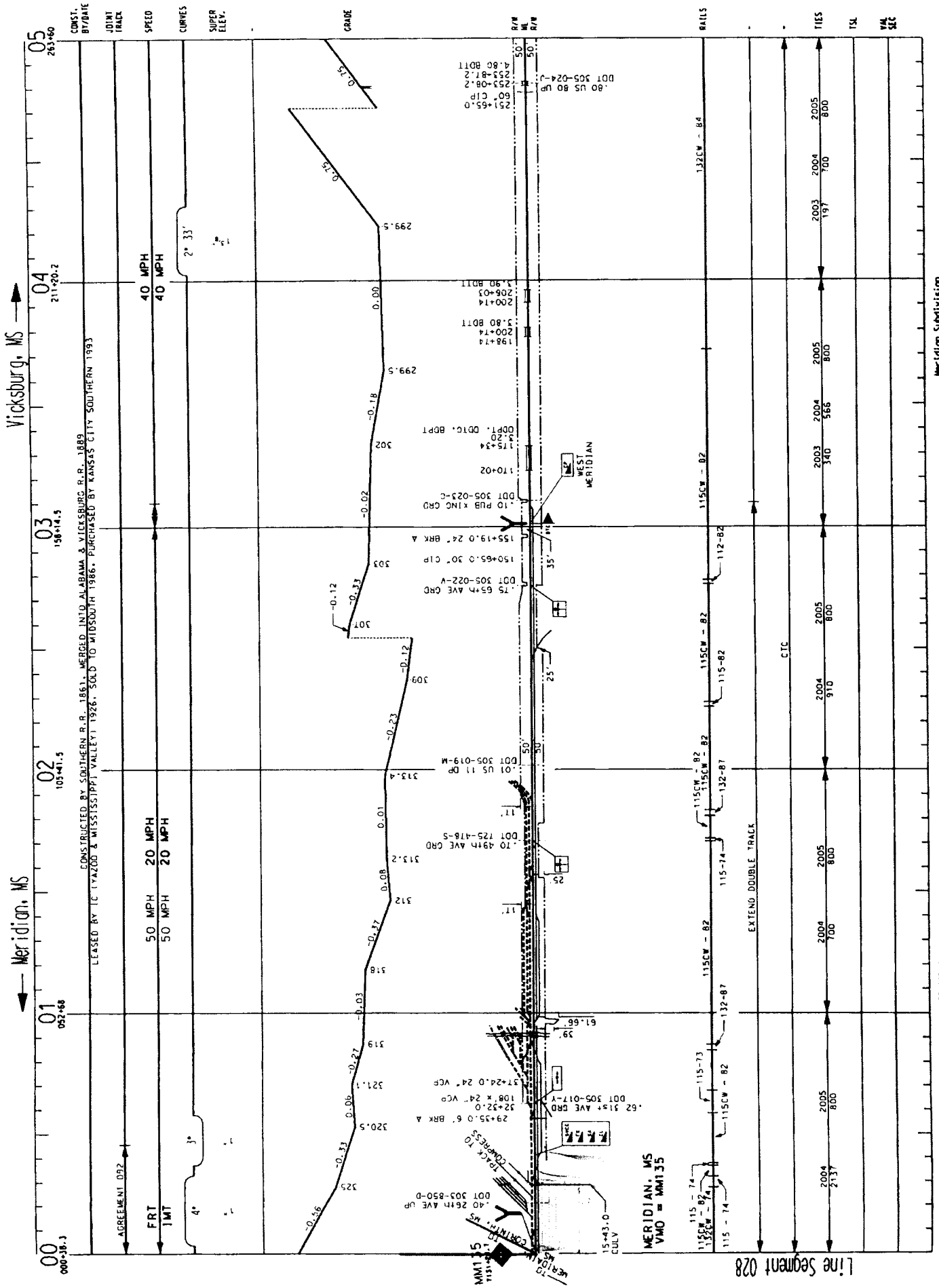
Meridian Subdivision

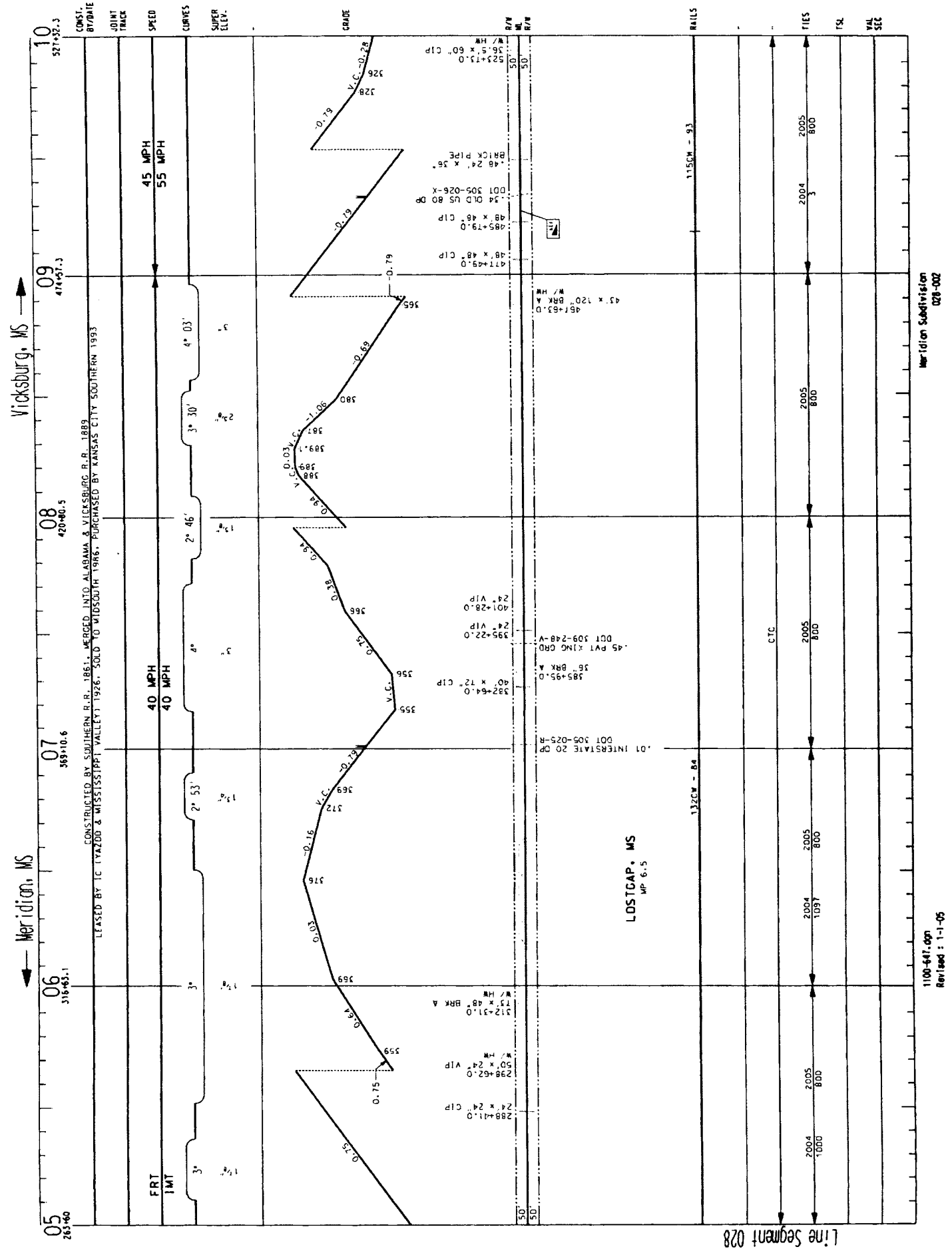
Meridian, MS (MP 0.0) to Vicksburg, MS (MP 140.6)

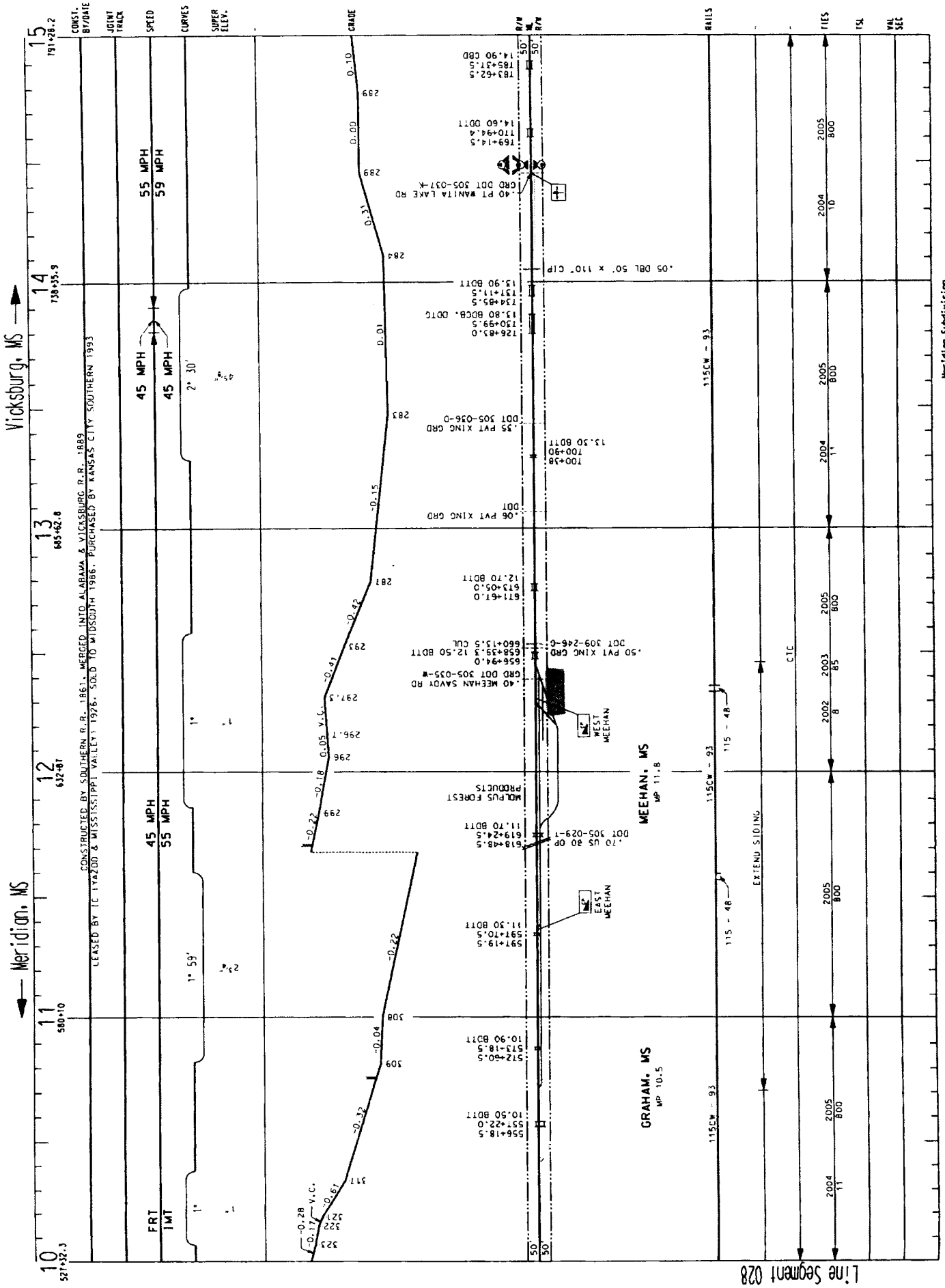
Meridian Subdivision
028

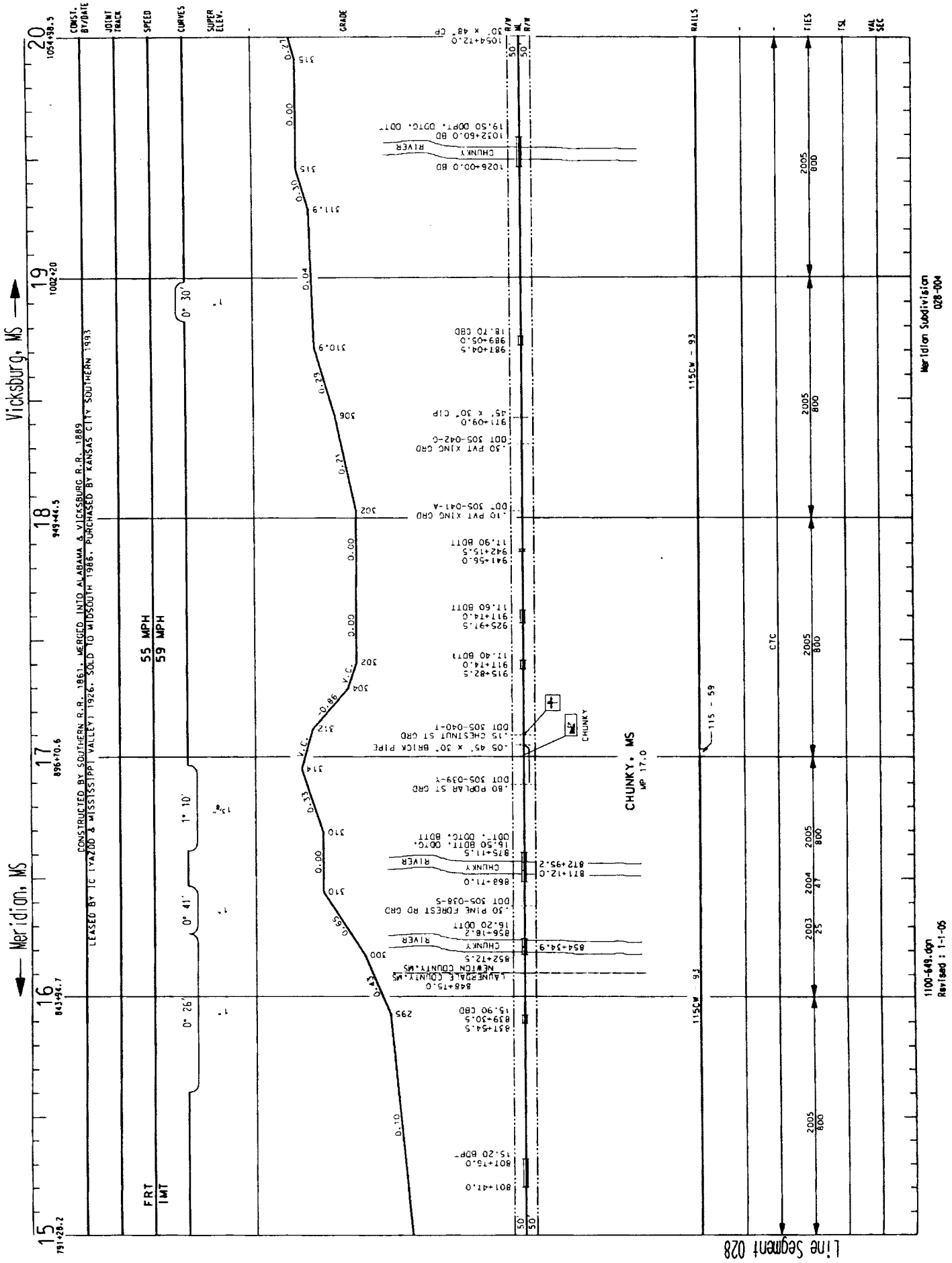
1100-644.dgn

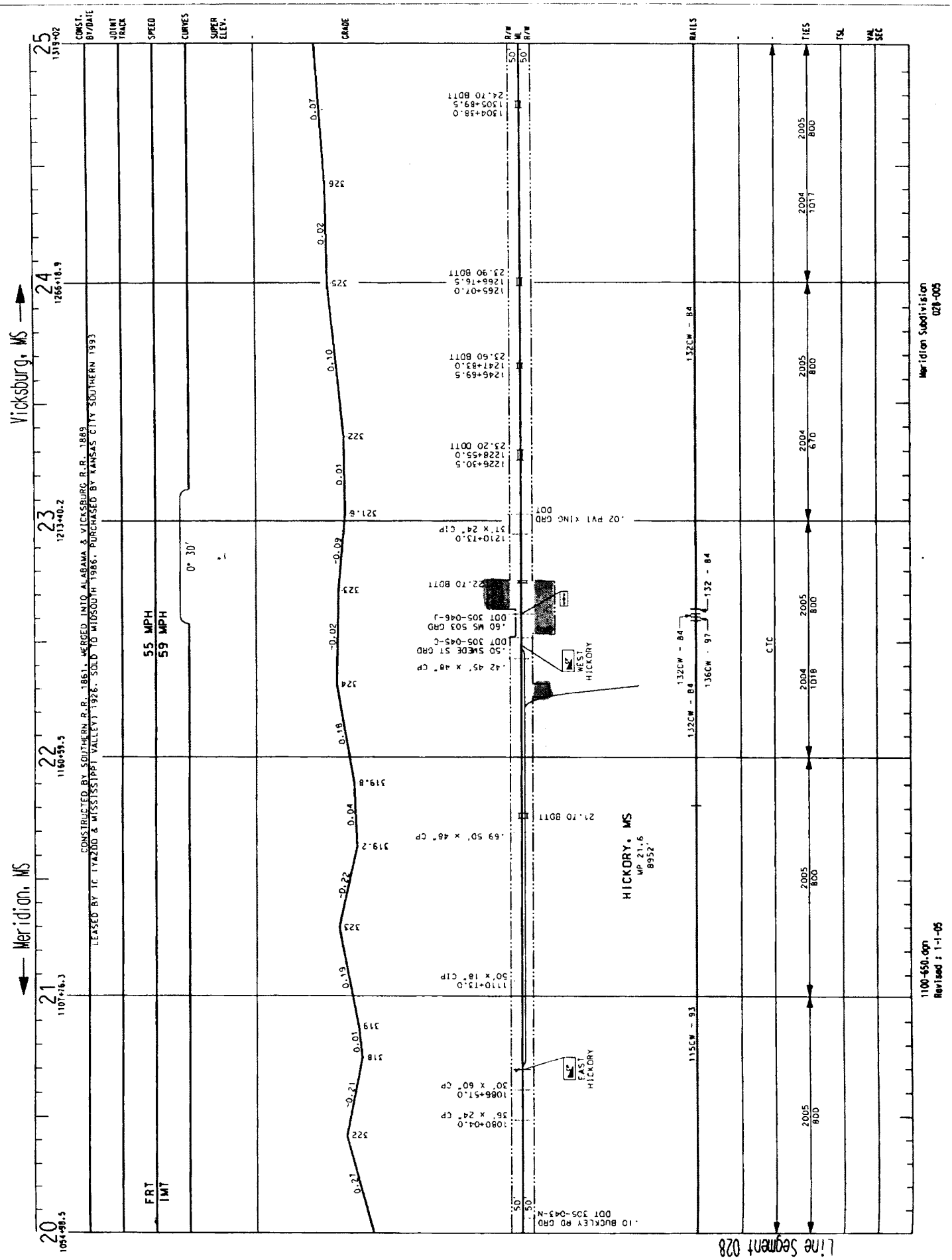
Line Segment 028

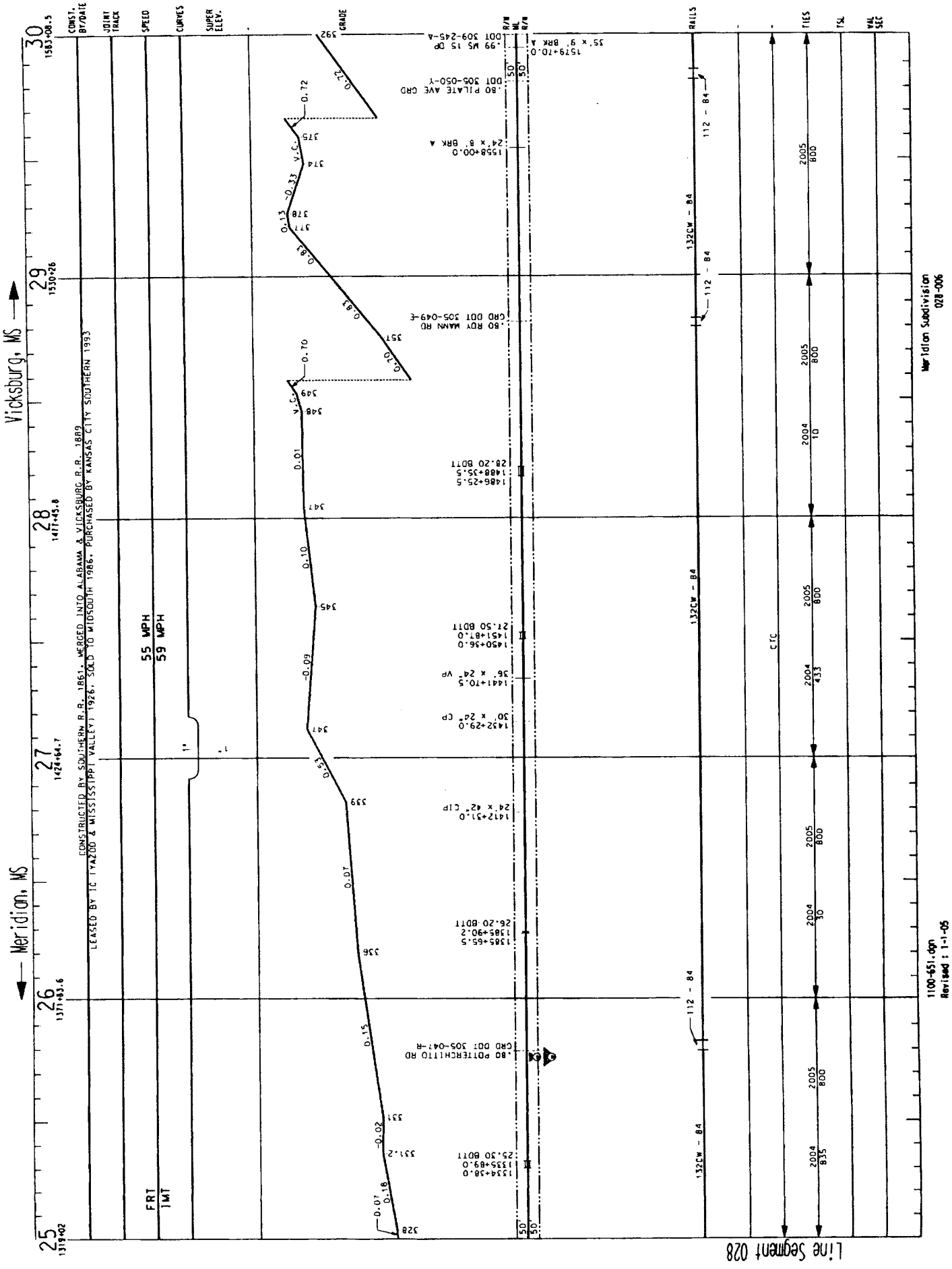

Meridian, MS
Vicksburg, MS
Line Segment 028
MERIDIAN, MS
VMO = MM135
MM135
CONSTRUCTED BY SOUTHERN R.R. 1861, MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
Meridian Subdivision
028-001
1100-646.dgn
Revised : 1-1-05
EXTEND DOUBLE TRACK
CTC
WEST MERIDIAN
40 MPH
50 MPH
20 MPH
FRT
1MT
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
ML
RAILS
TIES
TSL
VAL SEC

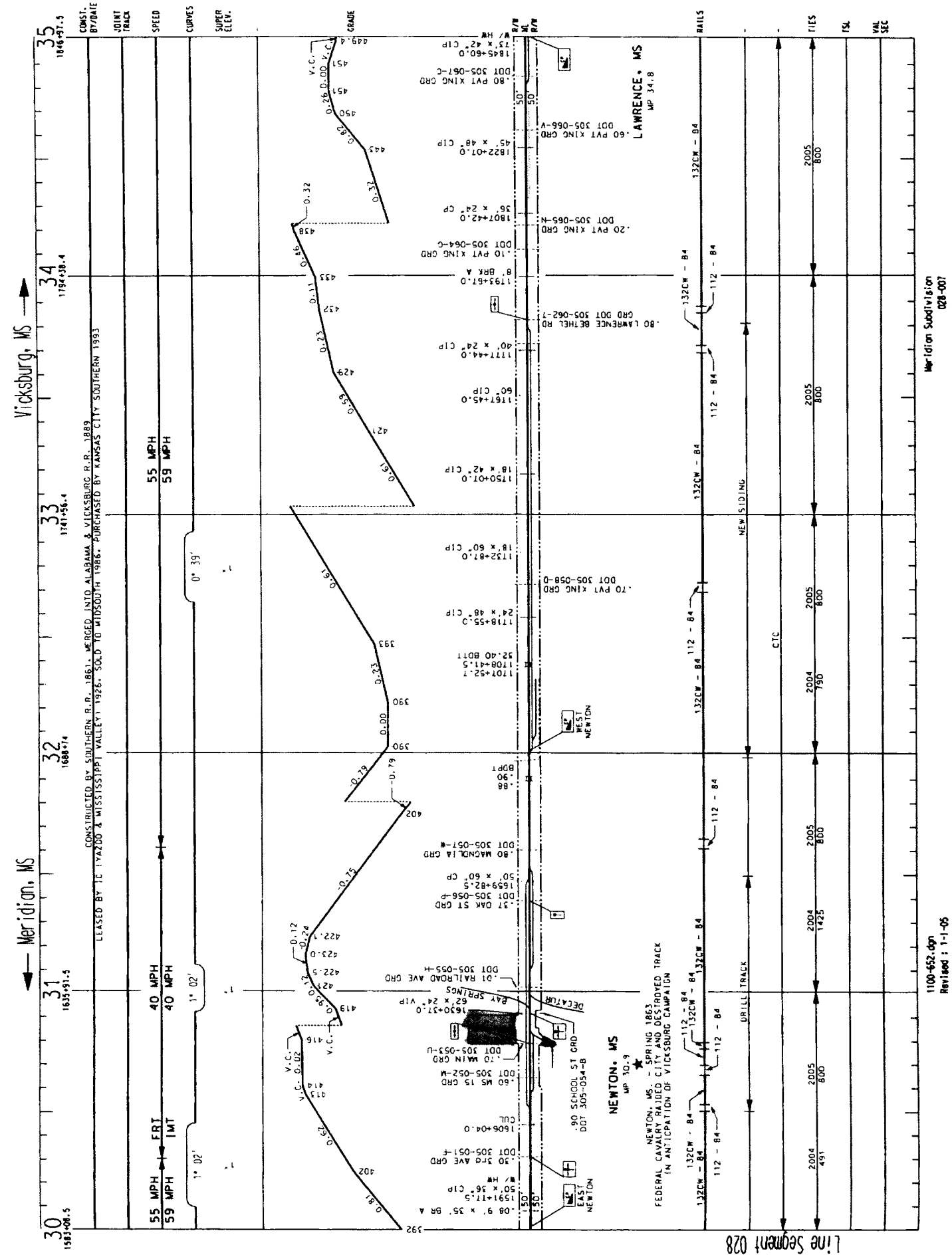

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO WIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
LOSTGAP, MS
MP 6.5
45 MPH
55 MPH
40 MPH
40 MPH
FRT
PASS
Meridian Subdivision
028-002
Line Segment 028
1100-647.dgn
Revised : 1-1-05

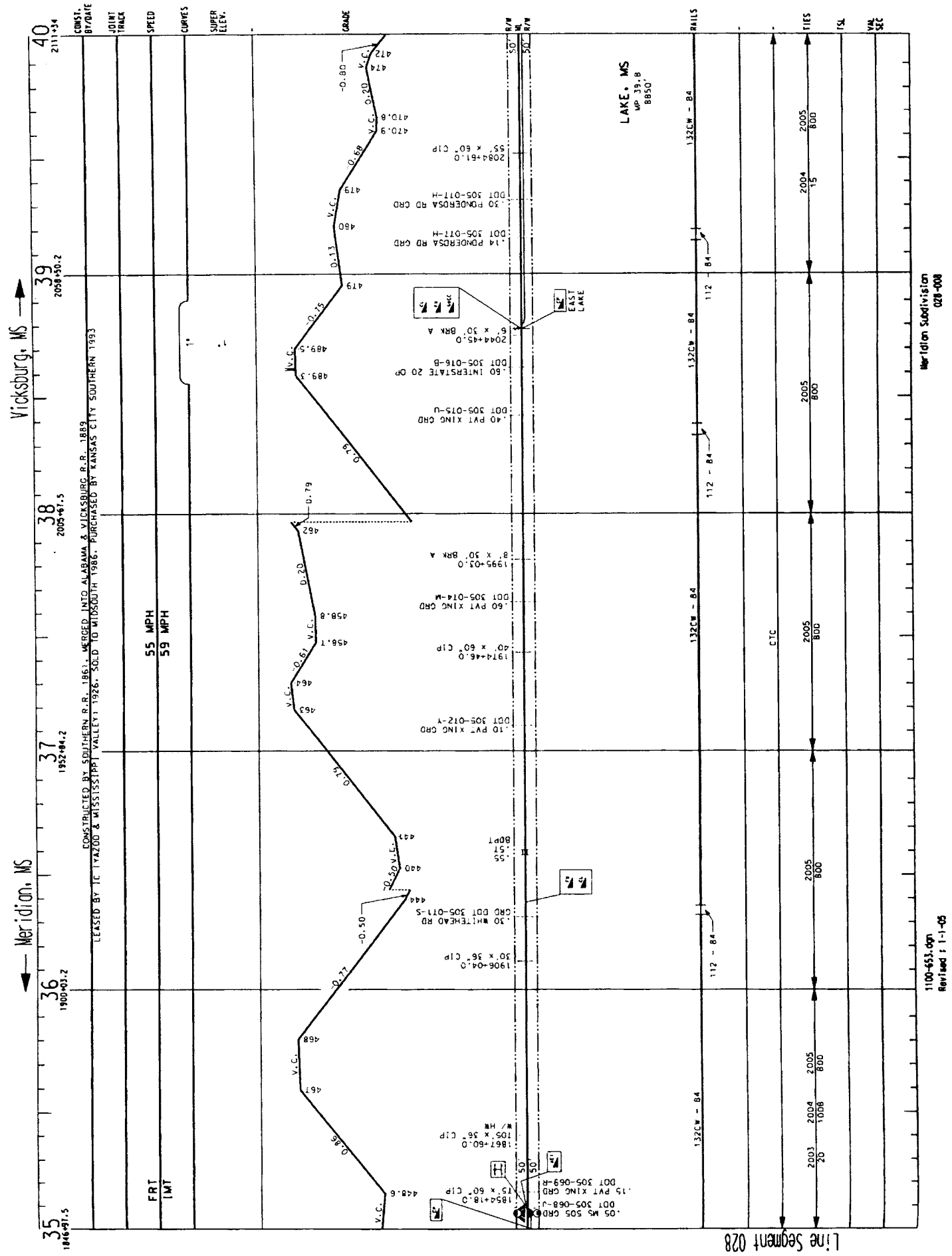

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1/1/2000 & MISSISSIPPI VALLEY 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
MEEHAN, MS
MP 11.8
GRAHAM, MS
MP 10.5
WEST MEEHAN
EAST MEEHAN
EXTEND SIDING
CTC
Meridian Subdivision
028-003
1100-648.dgn
Revised : 1-1-05

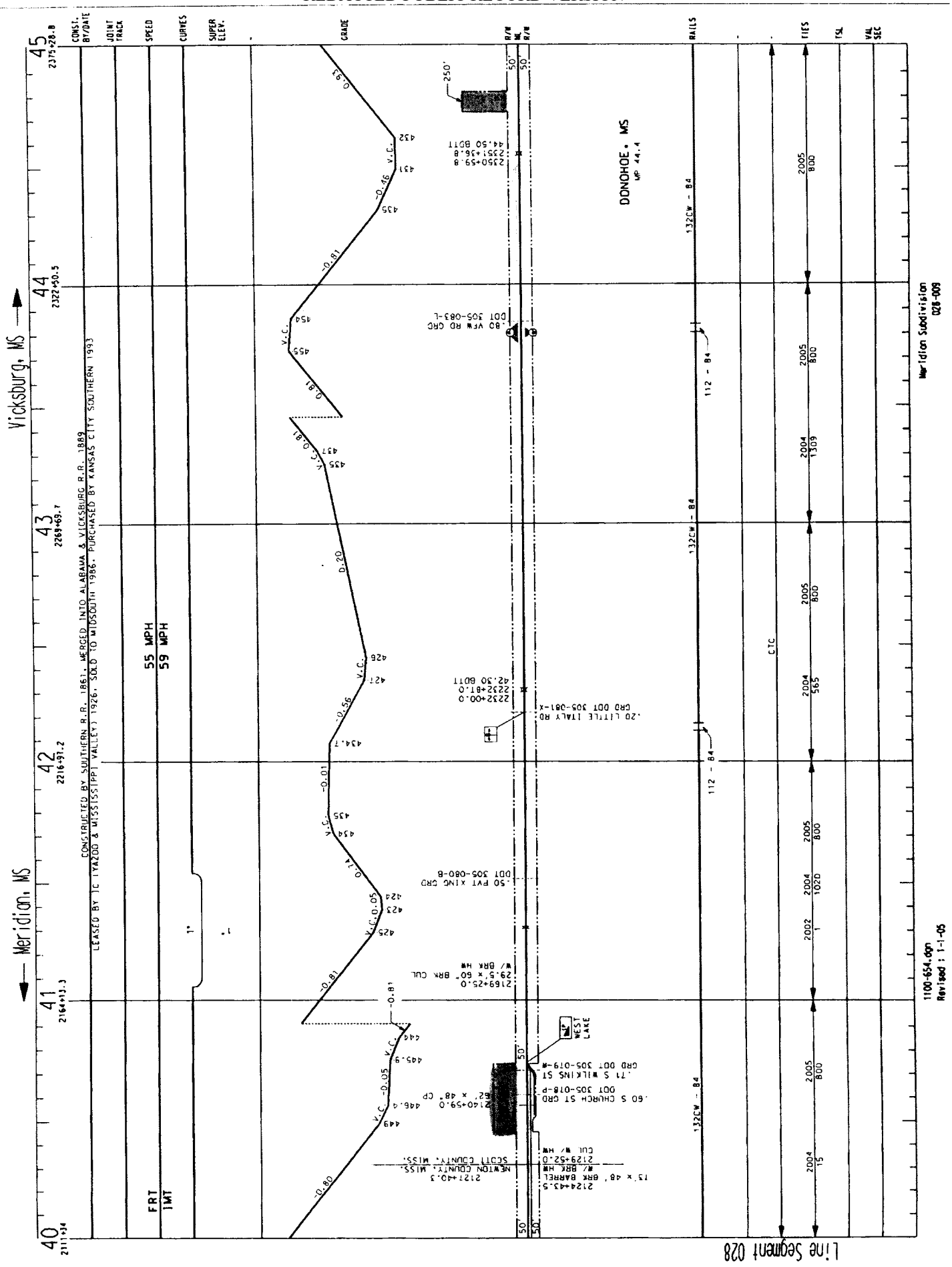

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (VA&MS & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
CHUNKY, MS
MP 17.0
Line Segment 028
Meridian Subdivision
028-004
1100-648.dgn
Revised : 1-1-06

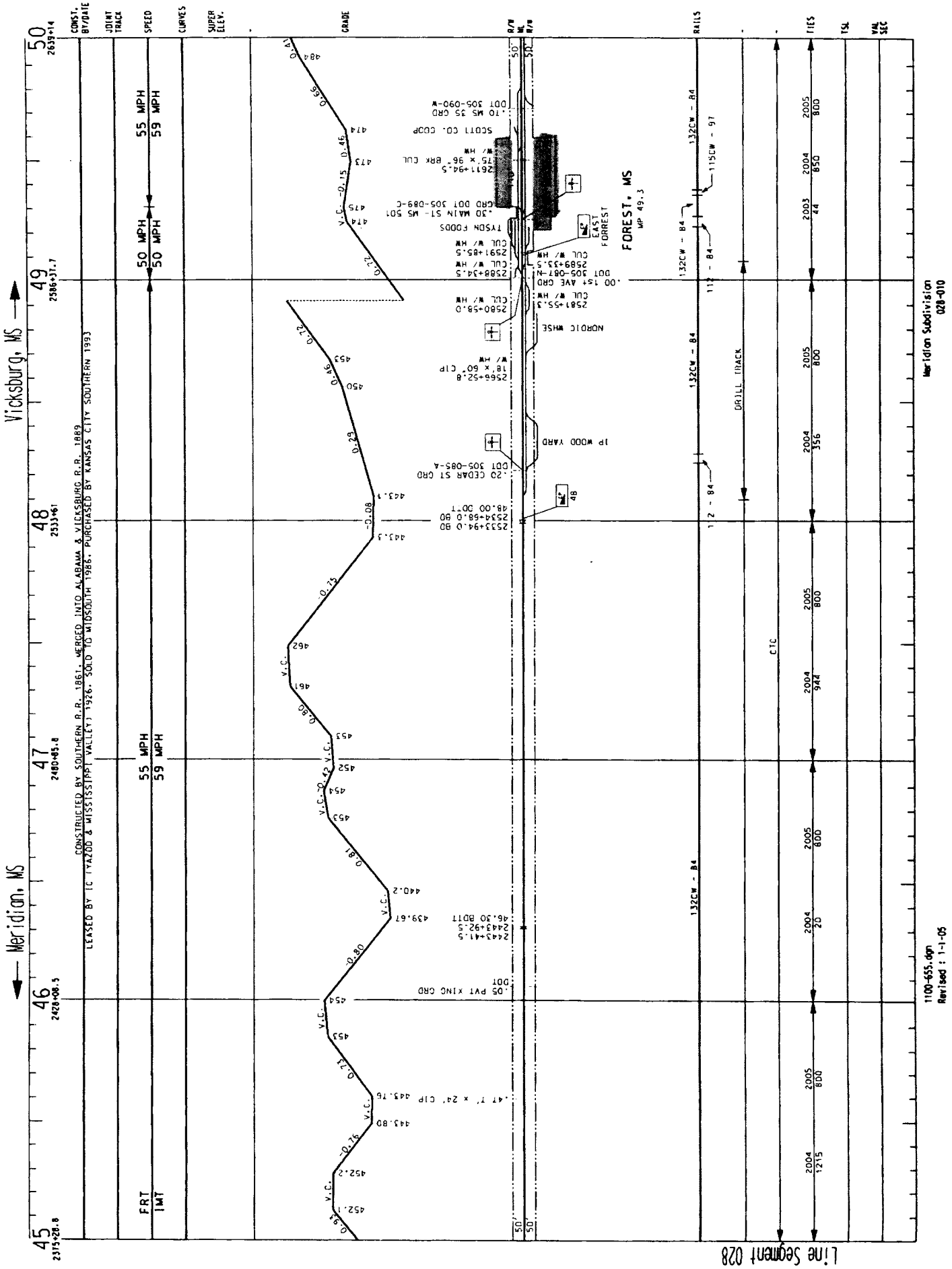

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
0° 30'
FRT
PASS
HICKORY, MS
MP 21.6
8952'
WEST HICKORY
EAST HICKORY
Meridian Subdivision
028-005
1100-650.dgn
Revised : 1-1-05
Line Segment 028

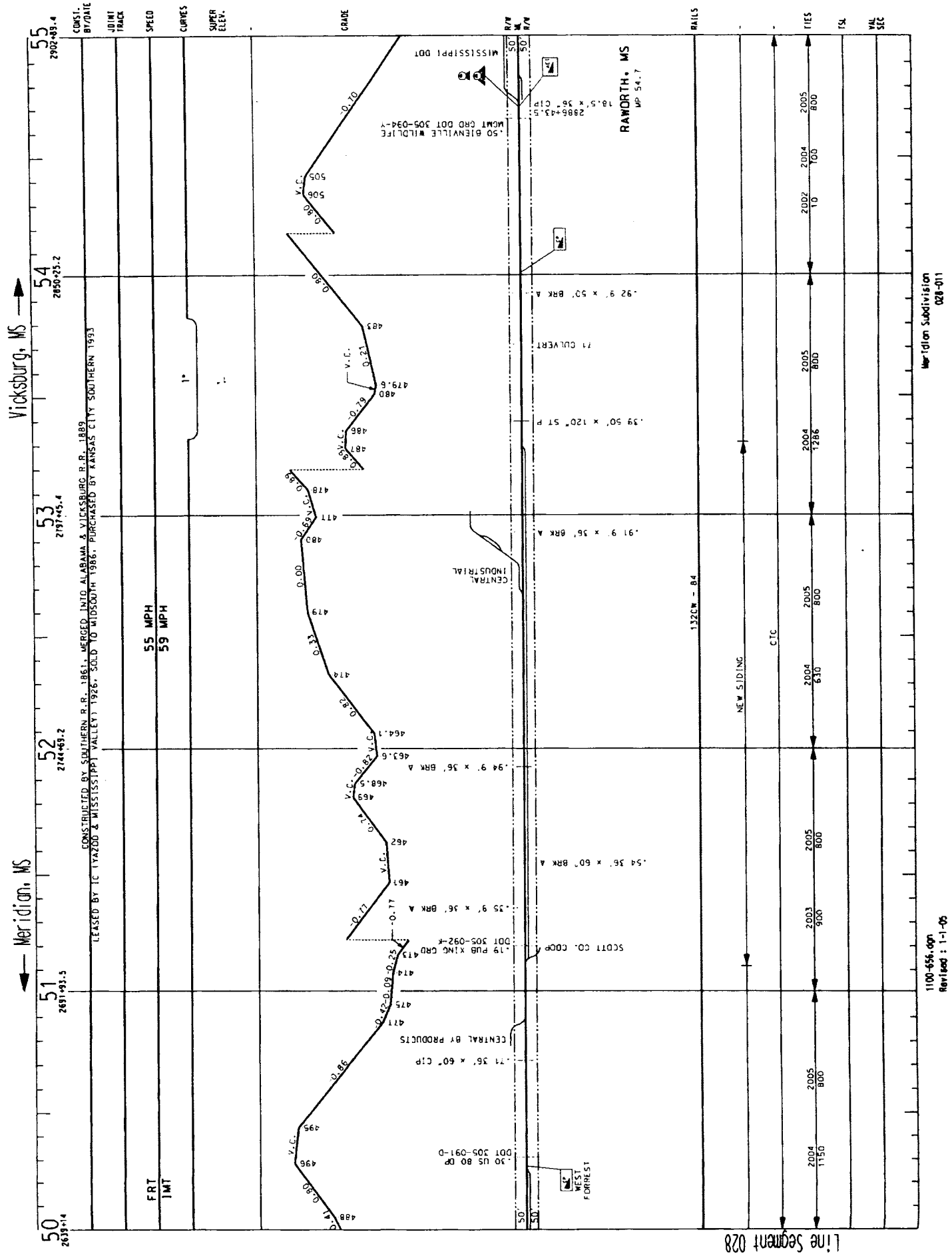

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY TC TYAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
1MT
Meridian Subdivision
028-006
1100-651.dgn
Revised : 1-1-05

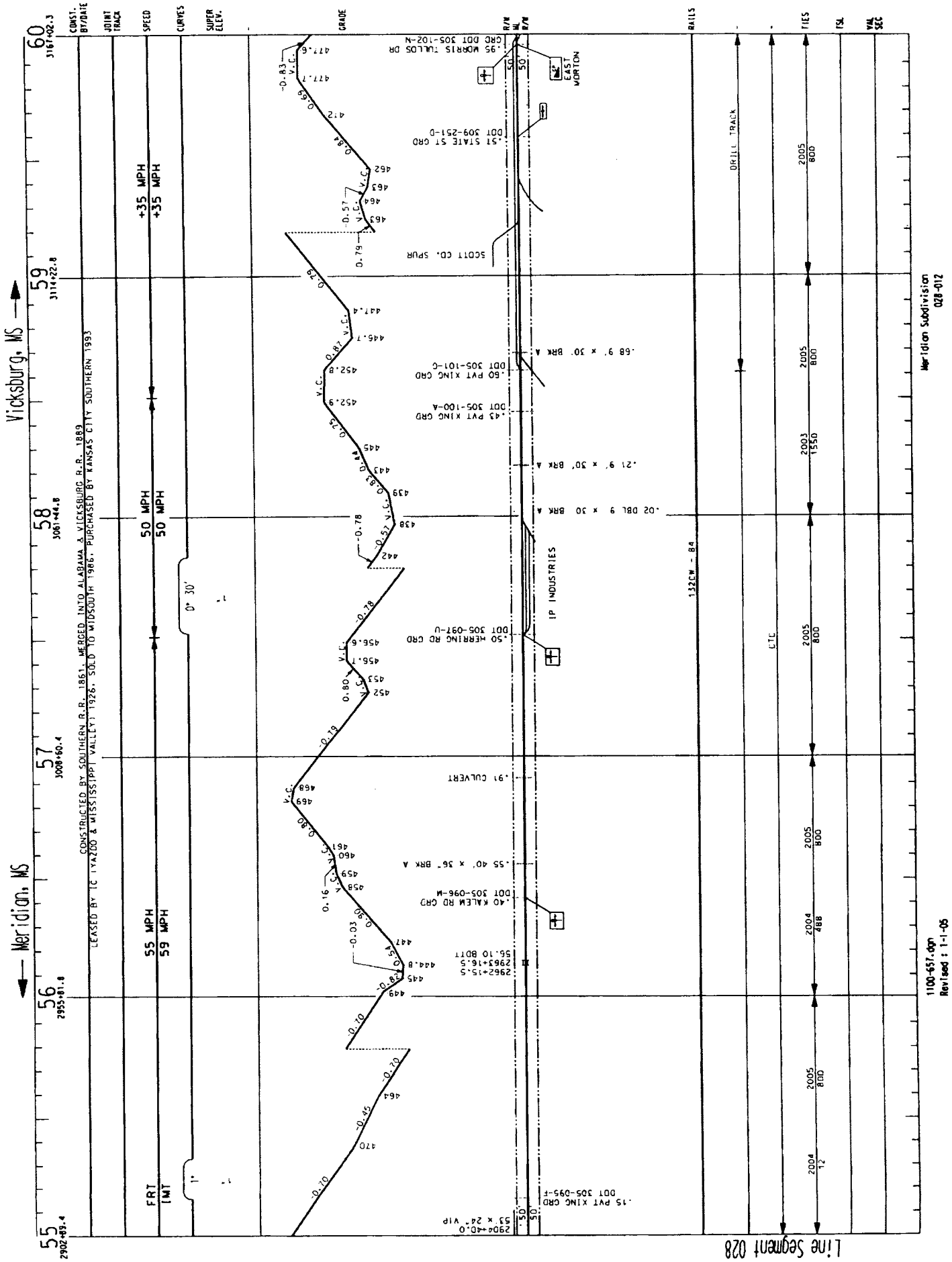

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
LAWRENCE, MS
MP 34.8
NEWTON, MS.
MP 30.9
NEWTON, MS. - SPRING 1863
FEDERAL CAVALRY RAIDED CITY AND DESTROYED TRACK
IN ANTICIPATION OF VICKSBURG CAMPAIGN
.90 SCHOOL ST GRD
DOT 305-054-B
WEST NEWTON
EAST NEWTON
NEW SIDING
CTC
DRILL TRACK
Meridian Subdivision
028-007
1100-652.dgn
Revised : 1-1-05
Line Segment 028

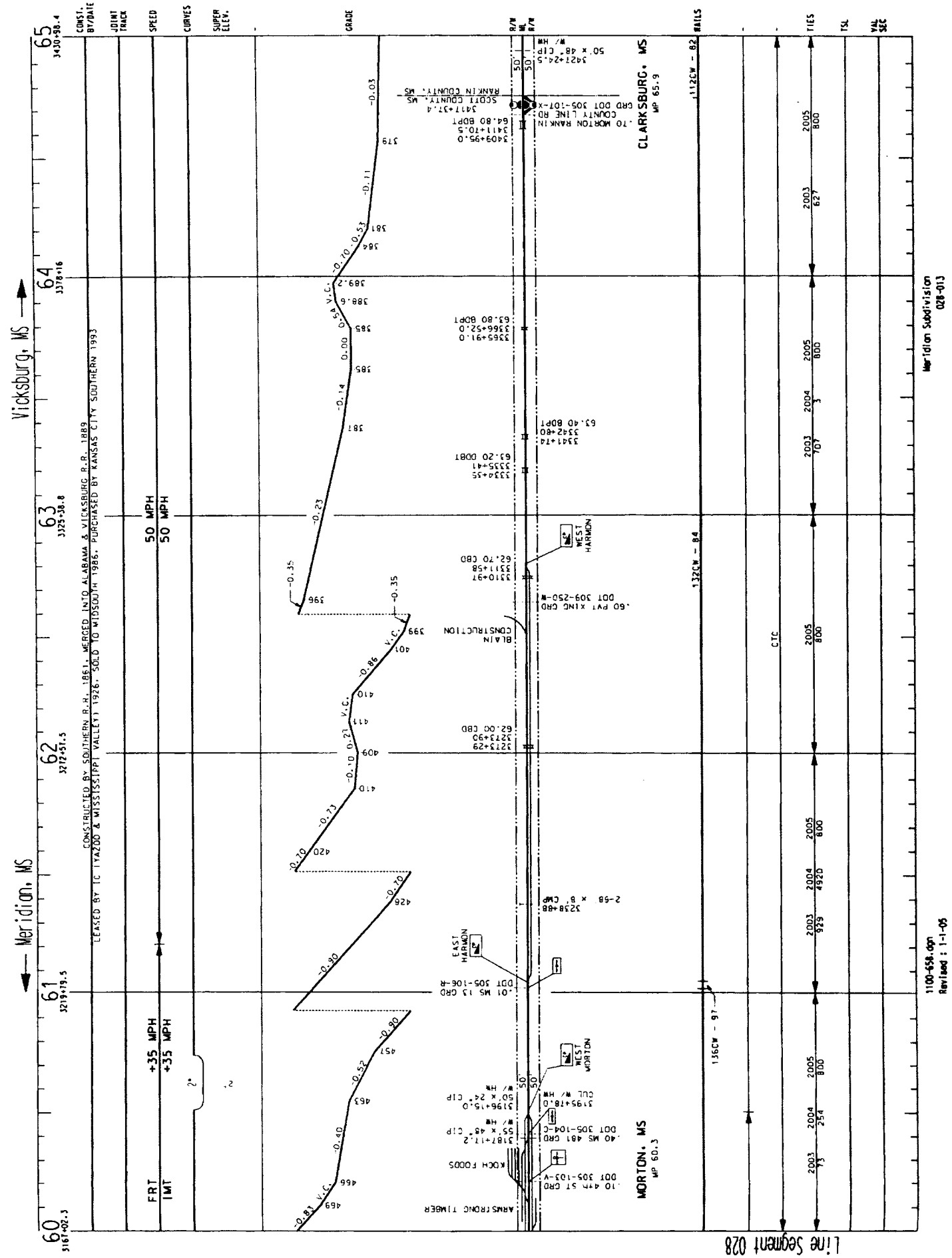

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
LAKE, MS
WP 39.8
8850'
EAST LAKE
55 MPH
59 MPH
FRT
I MT
CTC
Meridian Subdivision
028-008
1100-653.dgn
Revised : 1-1-05

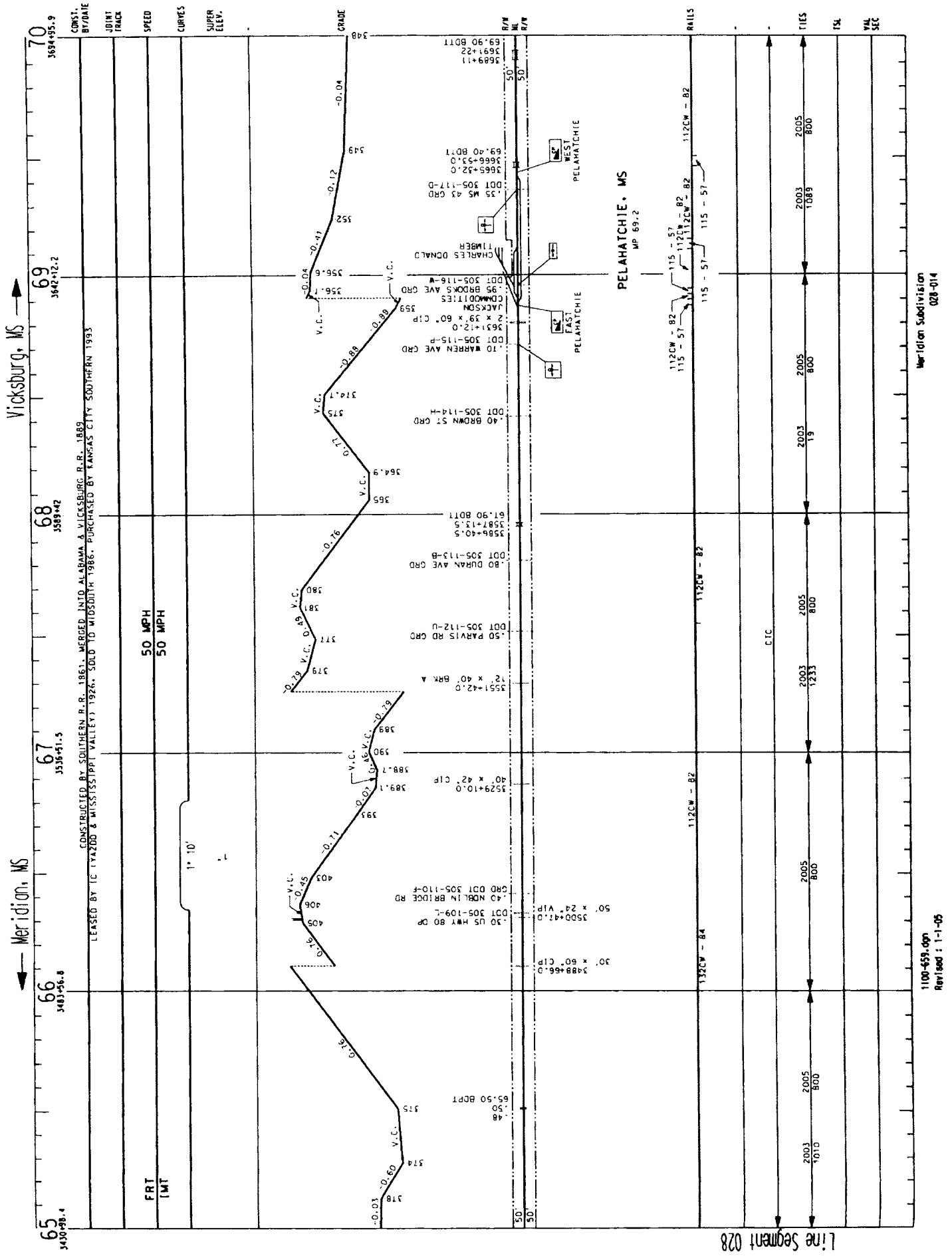

Meridian, MS
Vicksburg, MS
Line Segment 028
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
DONOHOE • MS
MP 44.4
55 MPH
59 MPH
FRT
1MT
CTC
Meridian Subdivision
028-009
1100-654.dgn
Revised : 1-1-05

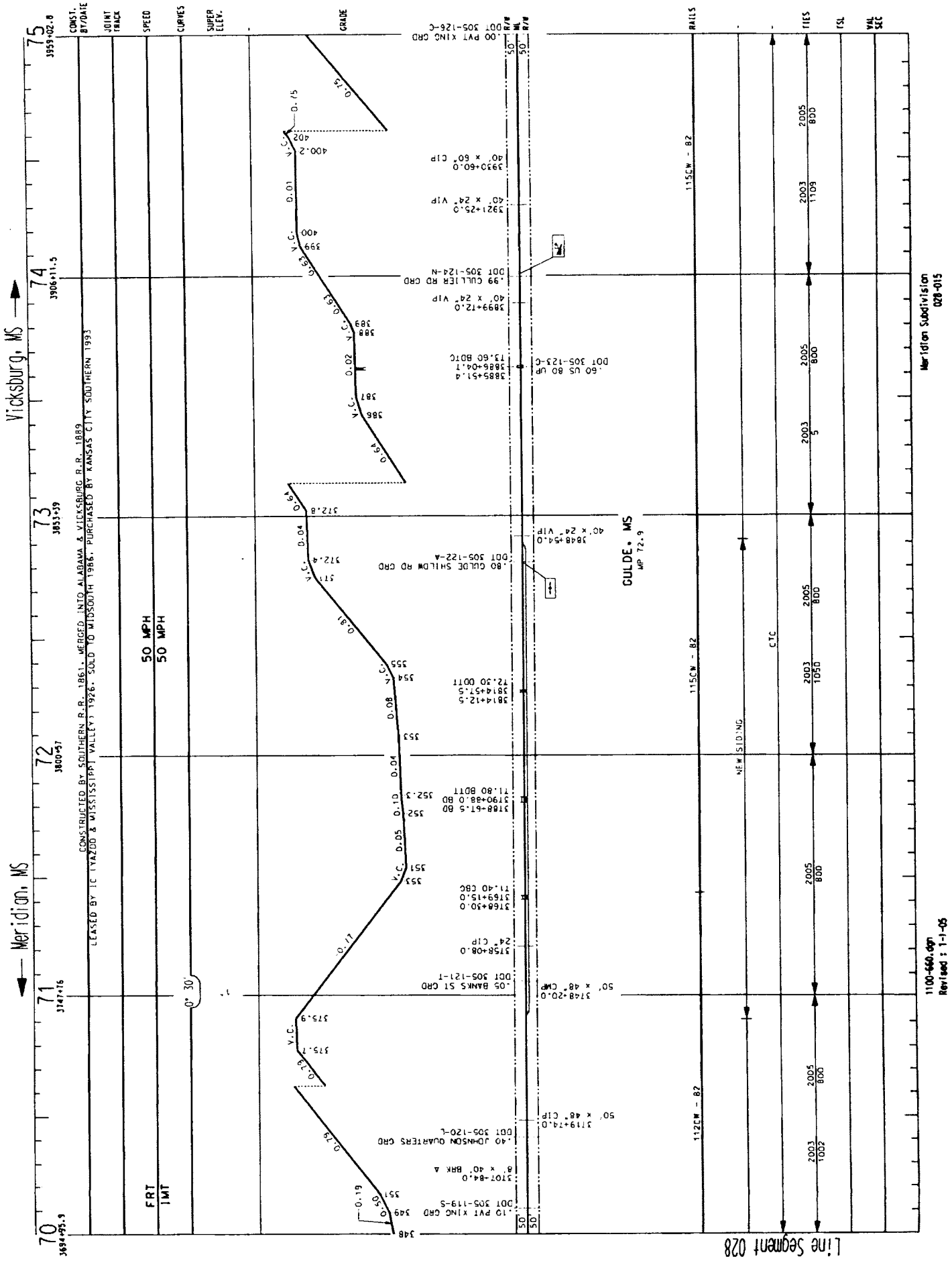

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
FOREST, MS
MP 49.3
Meridian Subdivision
028-010
1100-655.dgn
Revised : 1-1-05
Line Segment 028

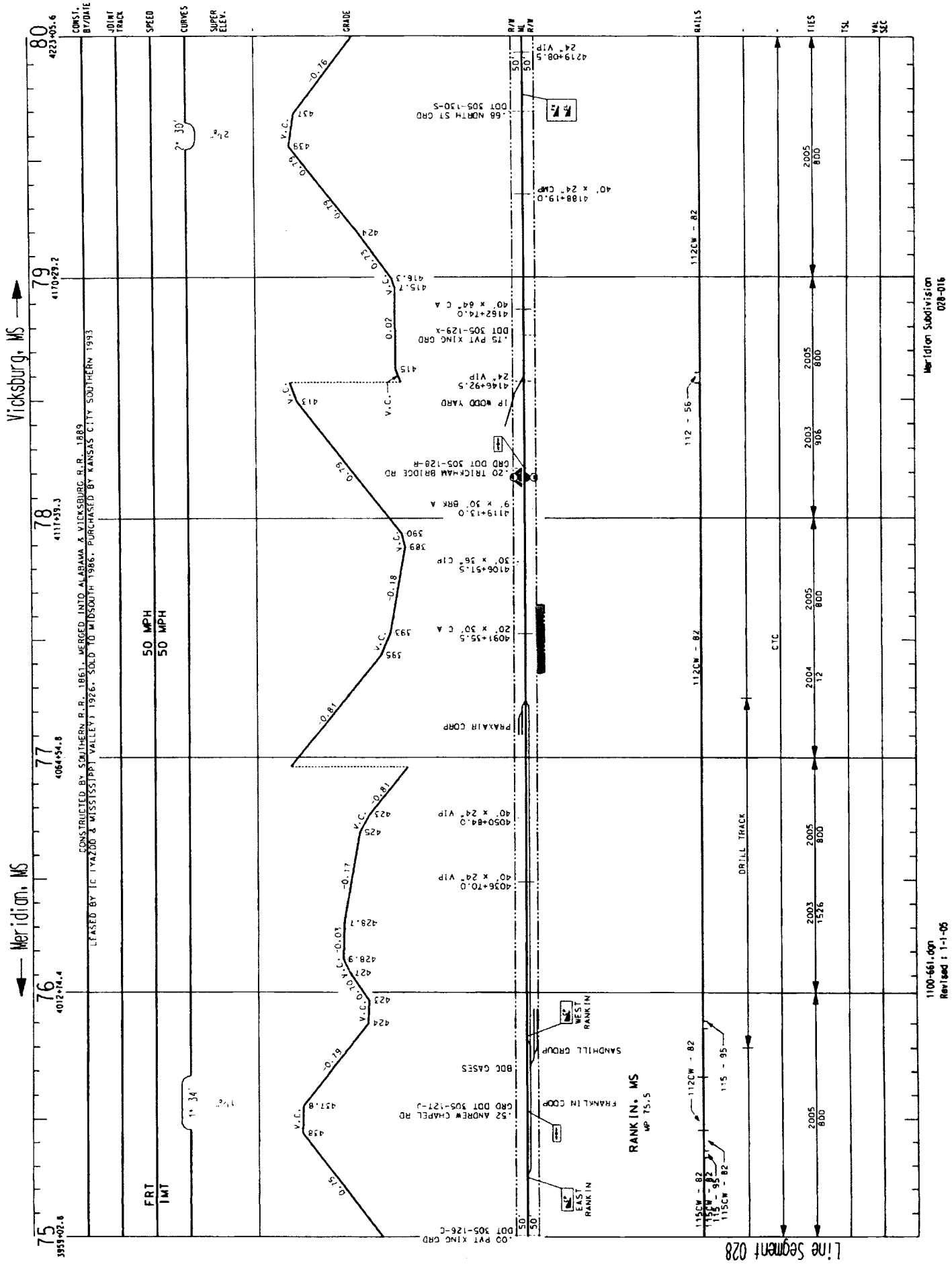

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY SOUTHERN R.R. 1861, MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1/1/1900 & MISSISSIPPI VALLEY 1926, SOLD TO MIDSOUTH 1986, PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
IMT
RANWORTH, MS
MP 54.7
1322CW - 84
CTC
NEW SIDING
Meridian Subdivision
028-011
1100-656.dgn
Revised : 1-1-05

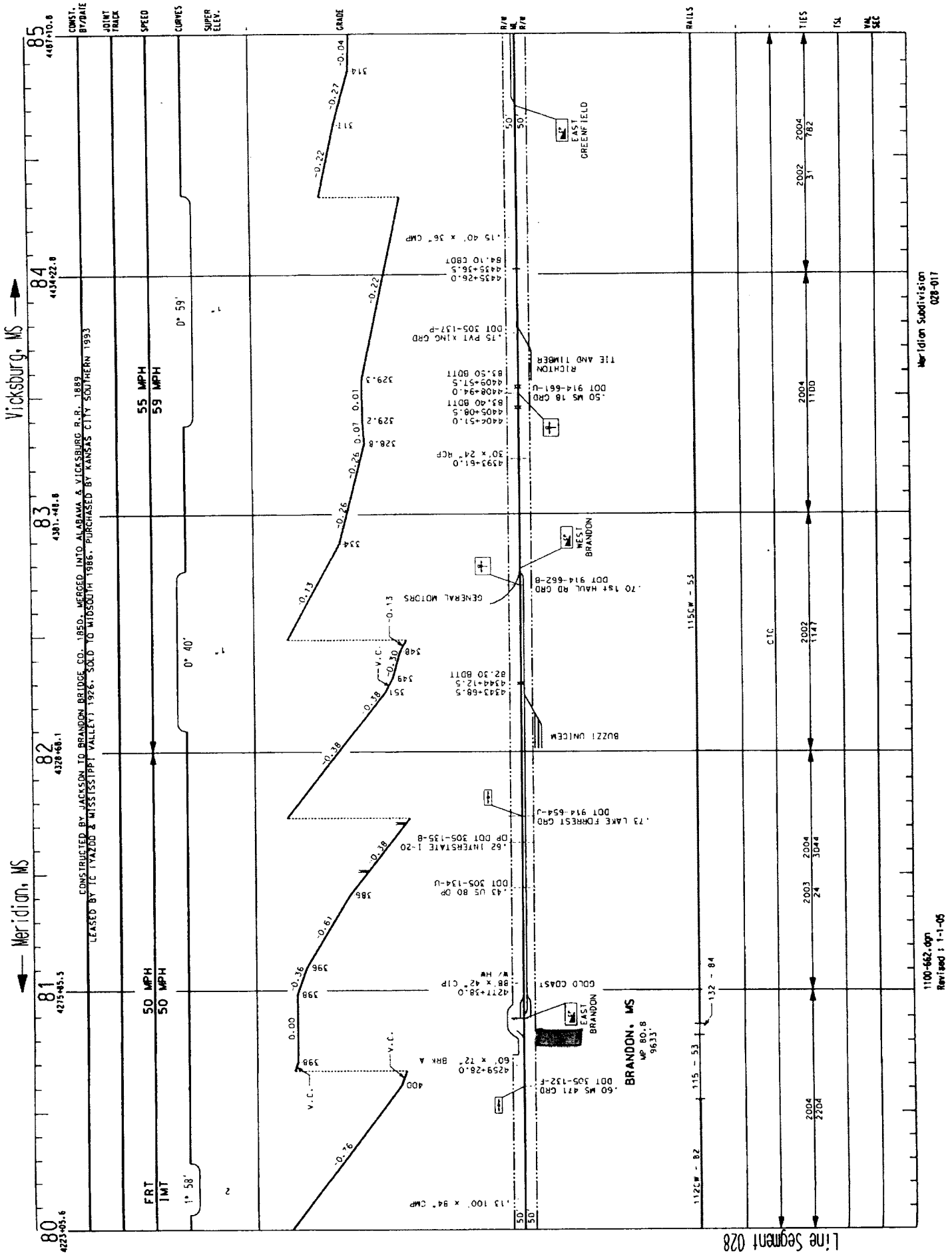

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1YA2100 & MISSISSIPPI VALLEY 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
+35 MPH
+35 MPH
50 MPH
50 MPH
55 MPH
59 MPH
FRT
I MT
DRILL TRACK
LTC
132EW - 84
IP INDUSTRIES
EAST WORTON
SCOTT CO. SPUR
Meridian Subdivision
028-012
1100-657.dgn
Revised : 1-1-05
Line Segment 028

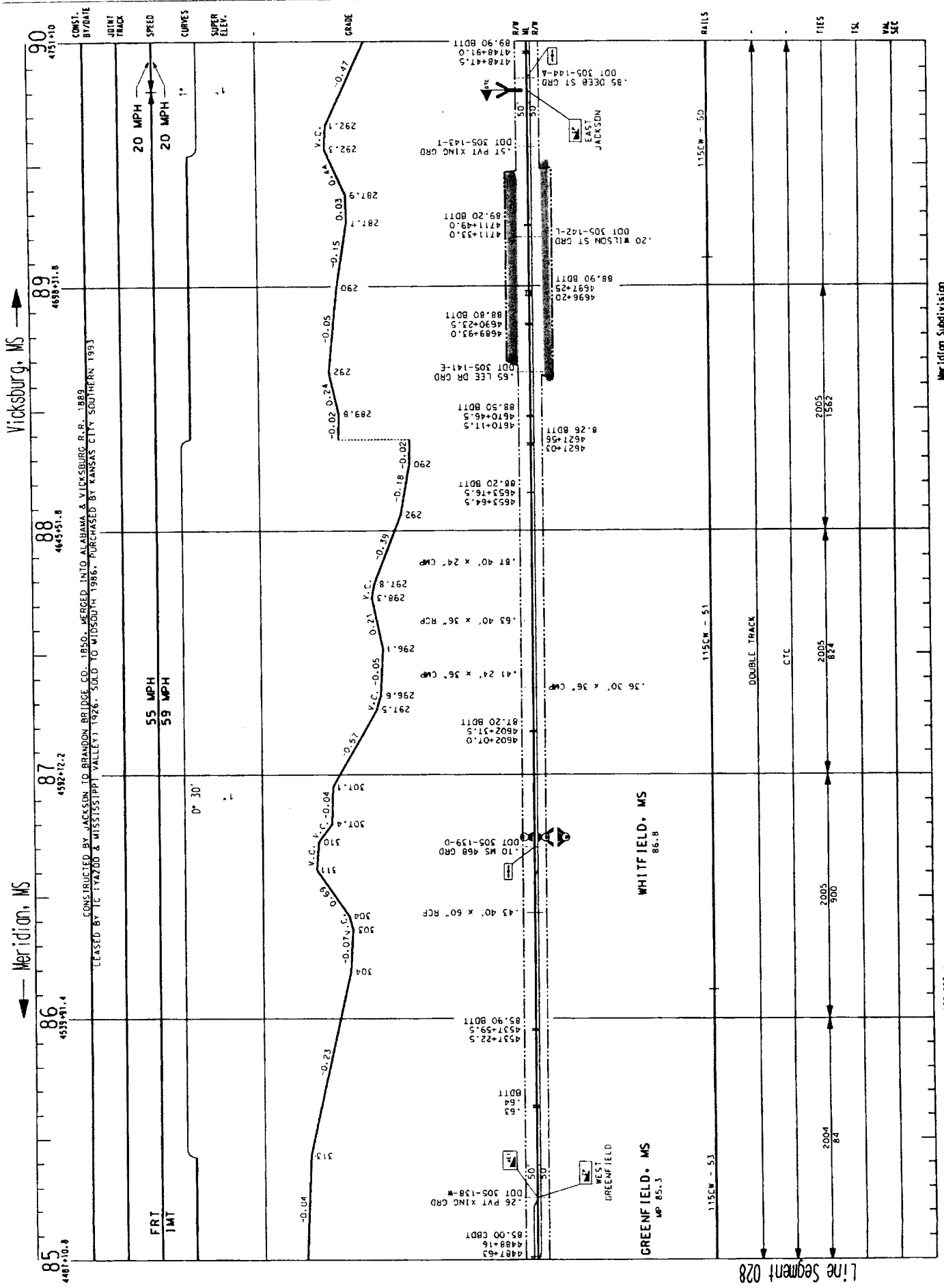

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY SOUTHERN R.R. 1861, MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY TC TYAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MISSOURI 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
50 MPH
50 MPH
+35 MPH
+35 MPH
FRT
IMT
CLARKSBURG, MS
MP 65.9
MORTON, MS
MP 60.3
Meridian Subdivision
028-013
1100-658.dgn
Revised : 1-1-05
Line Segment 028

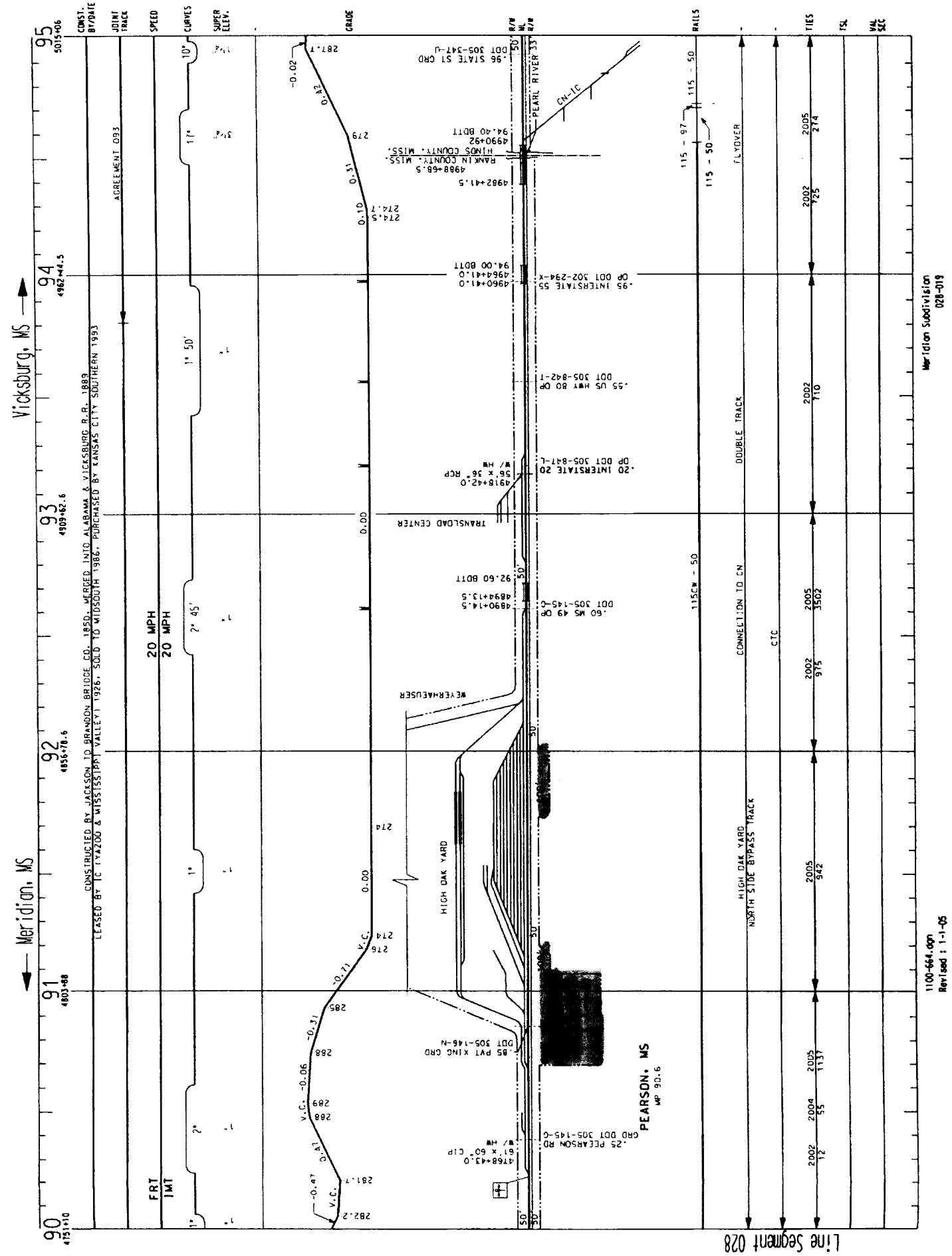

Vicksburg, MS
Meridian, MS
PELAHATCHIE, MS
MP 69.2
50 MPH
50 MPH
1° 10'
FRT
TMT
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
Line Segment 028
Meridian Subdivision
028-014
1100-659.dgn
Revised : 1-1-05
CTC
112CW - 82
112CW - 84
115 - 57
WEST PELAHATCHIE
EAST PELAHATCHIE
CHARLES DONALD TIMBER
JACKSON COMMODITIES
.95 BROOKS AVE GRD DOT 305-116-W
.10 WARREN AVE GRD DOT 305-115-P
2 x 39' x 60' CLP
.40 BROWN ST GRD DOT 305-114-H
.80 DURAN AVE GRD DOT 305-113-B
.50 PARVIS RD GRD DOT 305-112-U
12' x 40' BRK A
40' x 42' CLP
.40 NOBLIN BRIDGE RD GRD DOT 305-110-F
.30 US HWY 80 OP DOT 305-109-L
50' x 24" VLP
30' x 60' CLP
65.50 BDFT
.48
.35 MS 43 GRD DOT 305-117-D
69.40 BDFT
69.90 BDFT
61.90 BDFT
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
GRADE
R/W
RAILS
TIES
TSL
WAL SEC

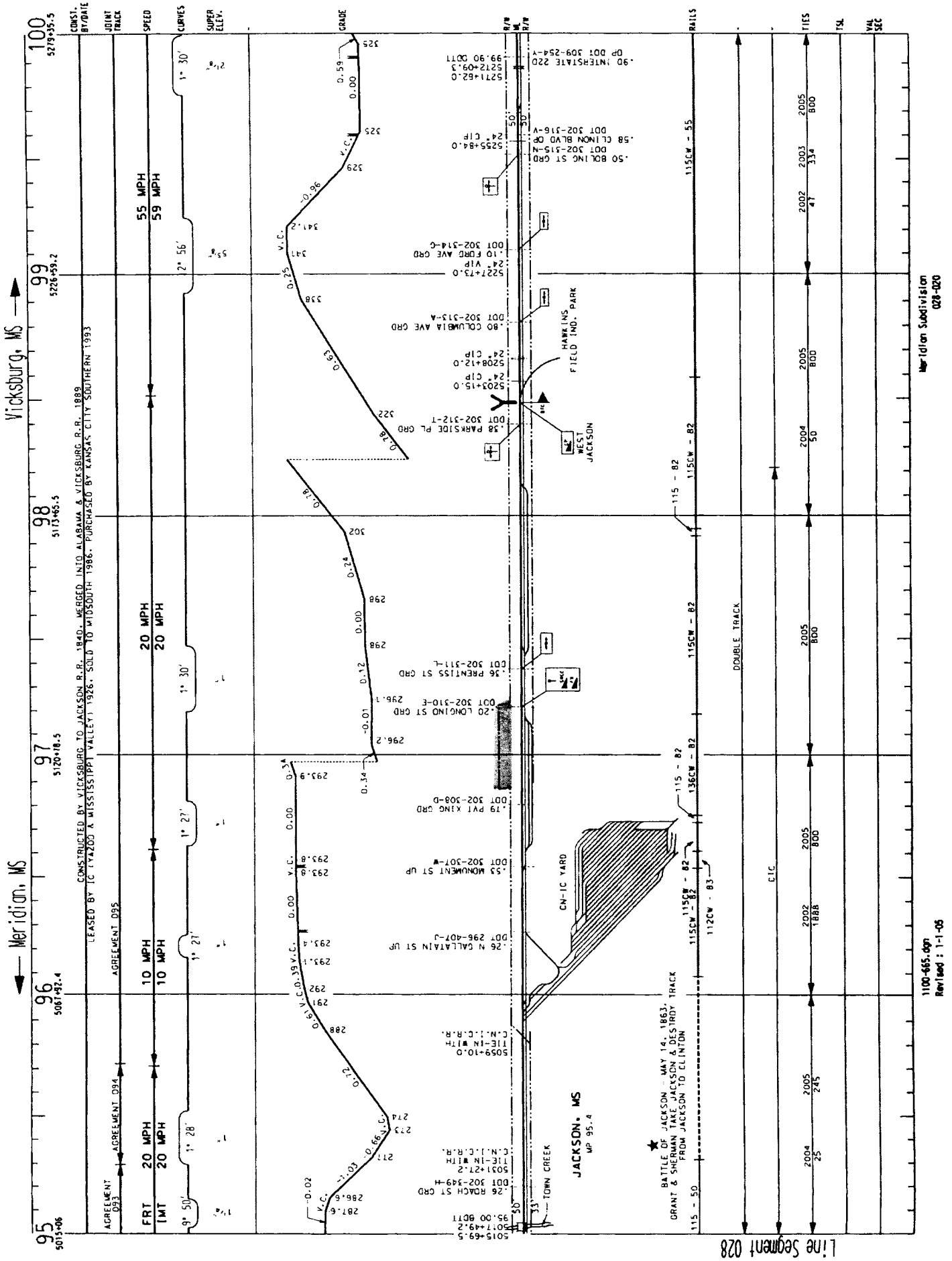

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
50 MPH
50 MPH
FRT
1MT
GULDE, MS
MP 72.9
NEW SIDING
CTC
Meridian Subdivision
028-015
1100-660.dgn
Revised : 1-1-05

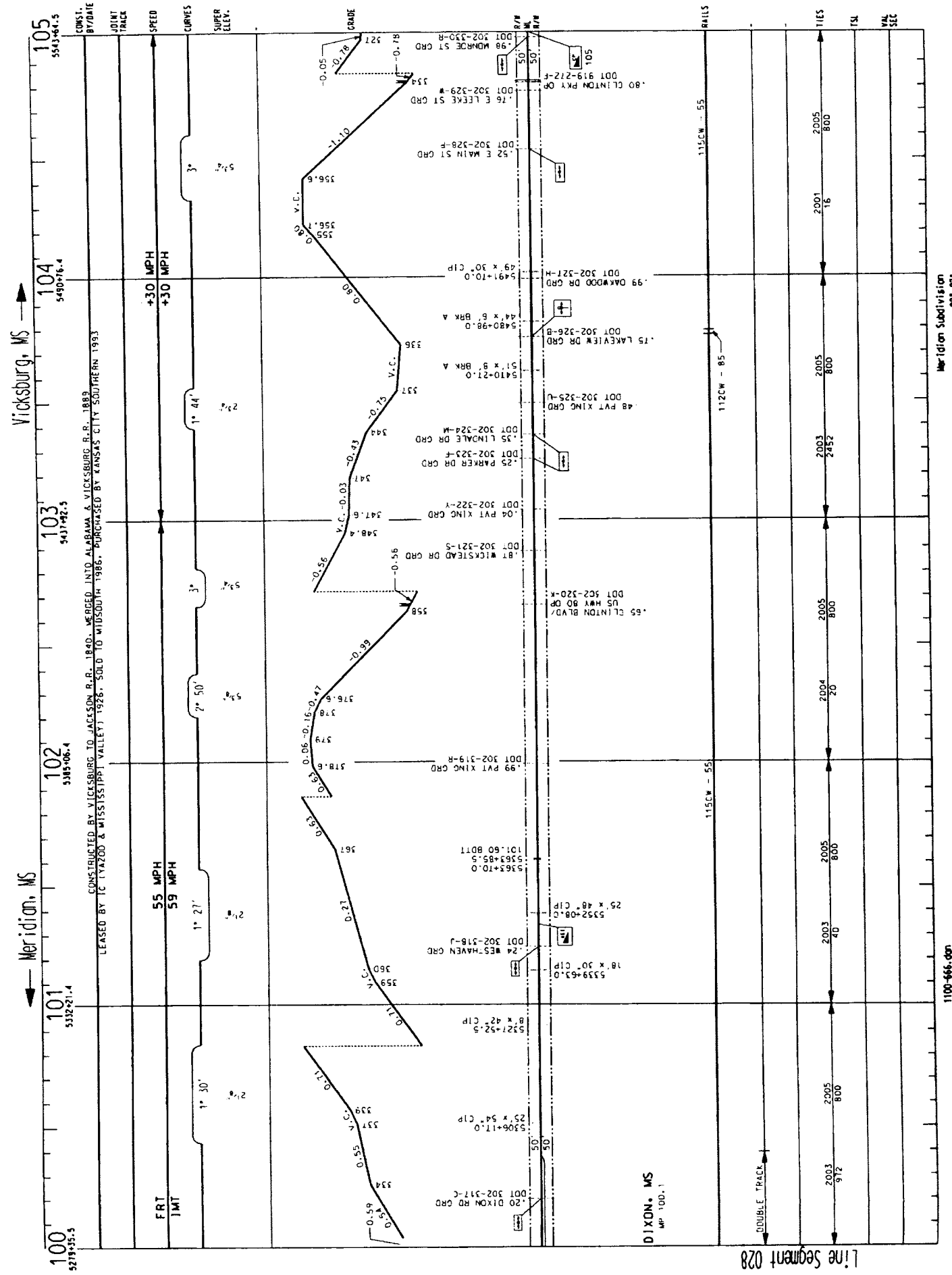

Vicksburg, MS
Meridian, MS
Line Segment 028
RANKIN, MS
MP 75.5
50 MPH
50 MPH
FRT
IMT
DRILL TRACK
CTC
Meridian Subdivision
028-016
1100-661.dgn
Revised : 1-1-05
CONSTRUCTED BY SOUTHERN R.R. 1861. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1YA200 & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
WEST RANKIN
EAST RANKIN
SANDHILL GROUP
FRANKLIN COOP
80
79
78
77
76
75

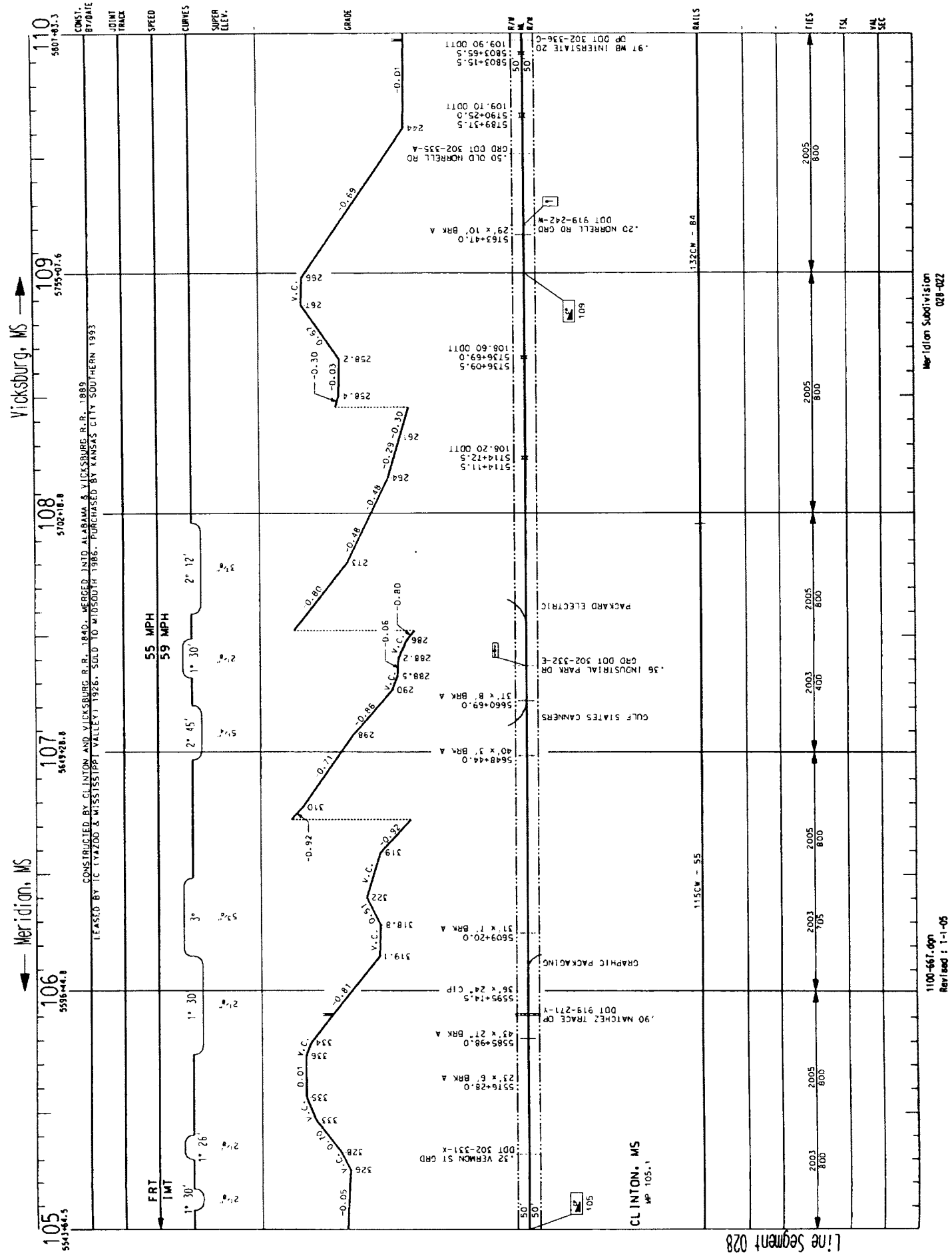

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY JACKSON TO BRANDON BRIDGE CO. 1850. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO WISCONSIN 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
50 MPH
50 MPH
FRT
1MT
0° 59'
0° 40'
1° 58'
EAST GREENFIELD
WEST BRANDON
EAST BRANDON
GENERAL MOTORS
GOLD COAST
BUZZI UNICEM
BRANDON, MS
MP 80.8
9633'
Meridian Subdivision
028-017
1100-662.dgn
Revised : 1-1-05

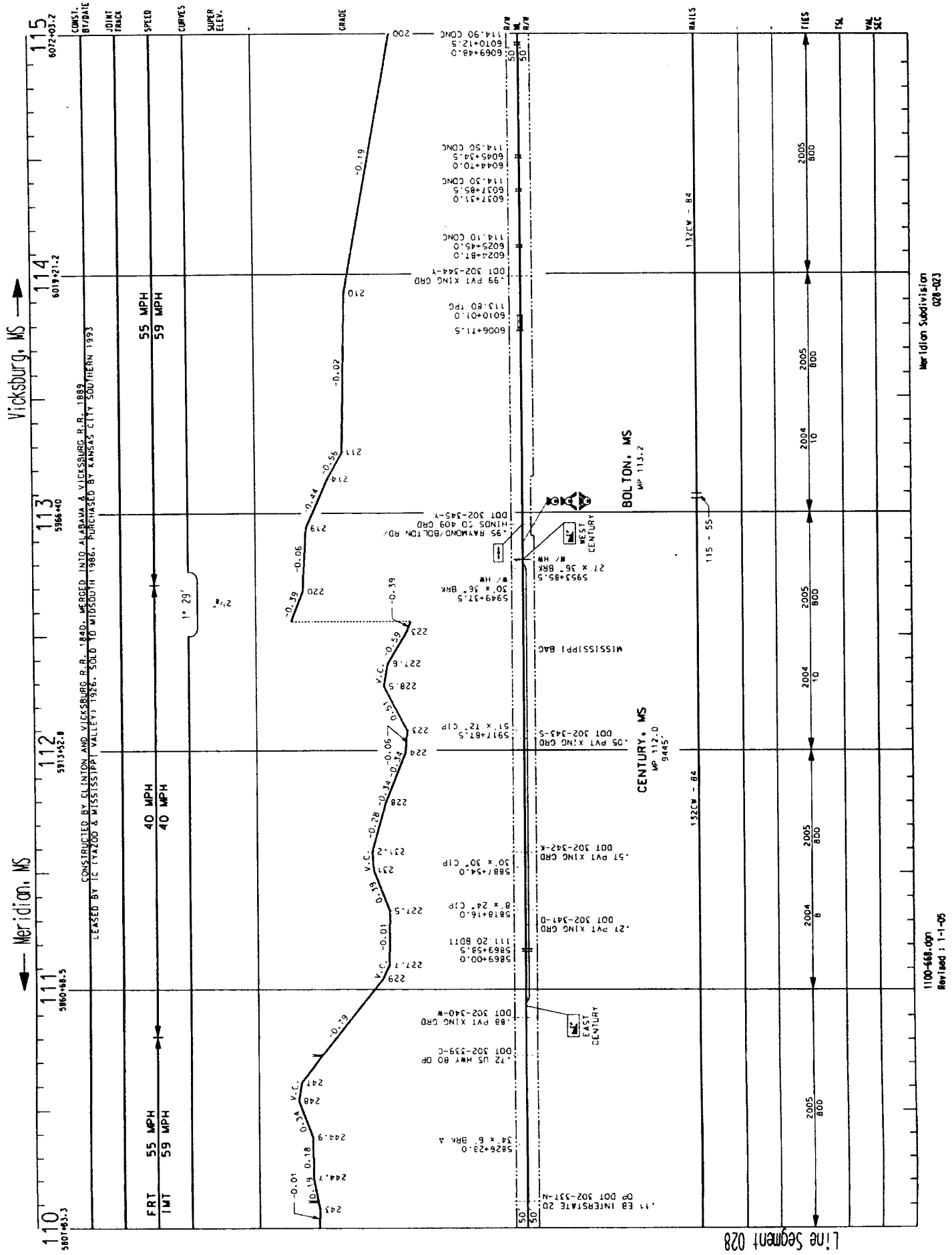

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY JACKSON TO BRANDON BRIDGE CO. 1850; MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1972; 00 & MISSISSIPPI VALLEY) 1926; SOLD TO WIDSOUTH 1986; PURCHASED BY KANSAS CITY SOUTHERN 1993
20 MPH
20 MPH
55 MPH
59 MPH
FRT
1MT
0° 30'
WHITFIELD, MS
MP 86.8
GREENFIELD, MS
MP 85.3
DOUBLE TRACK
CTC
Meridian Subdivision
028-018
1100-663.dgn
Revised : 1-1-05

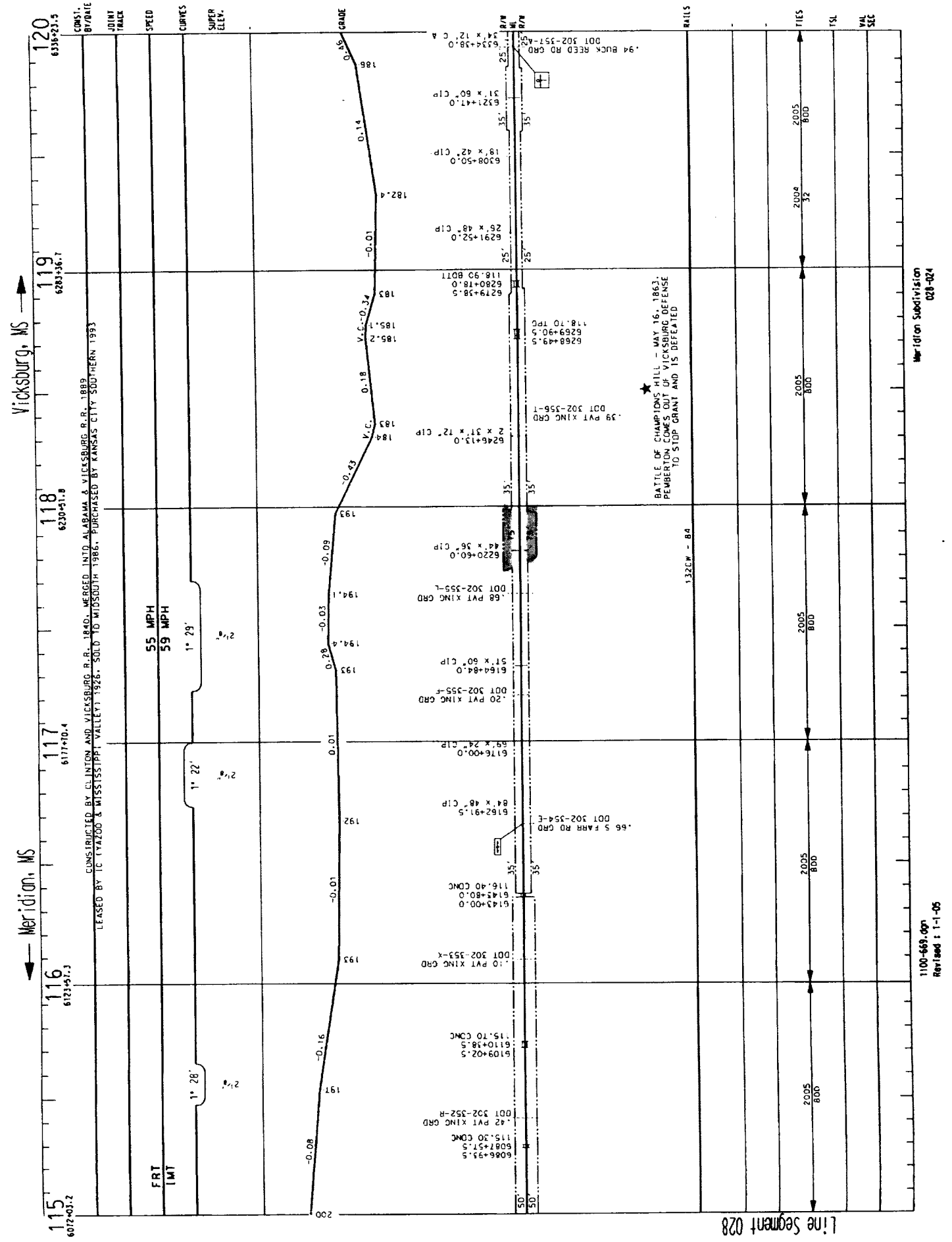

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY JACKSON TO BRANDON BRIDGE CO. 1850; MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (Y&200 & MISSISSIPPI VALLEY) 1926; SOLD TO MIDSOUTH 1986; PURCHASED BY KANSAS CITY SOUTHERN 1993
AGREEMENT 093
20 MPH
20 MPH
FRT
PASS
HIGH OAK YARD
NORTH SIDE BYPASS TRACK
CONNECTION TO CN
DOUBLE TRACK
FLYOVER
CTC
TRANSLOAD CENTER
WEYERHAEUSER
PEARSON, MS
MP 90.6
PEARL RIVER
CN-IC
Meridian Subdivision
028-019
1100-664.dgn
Revised : 1-1-05

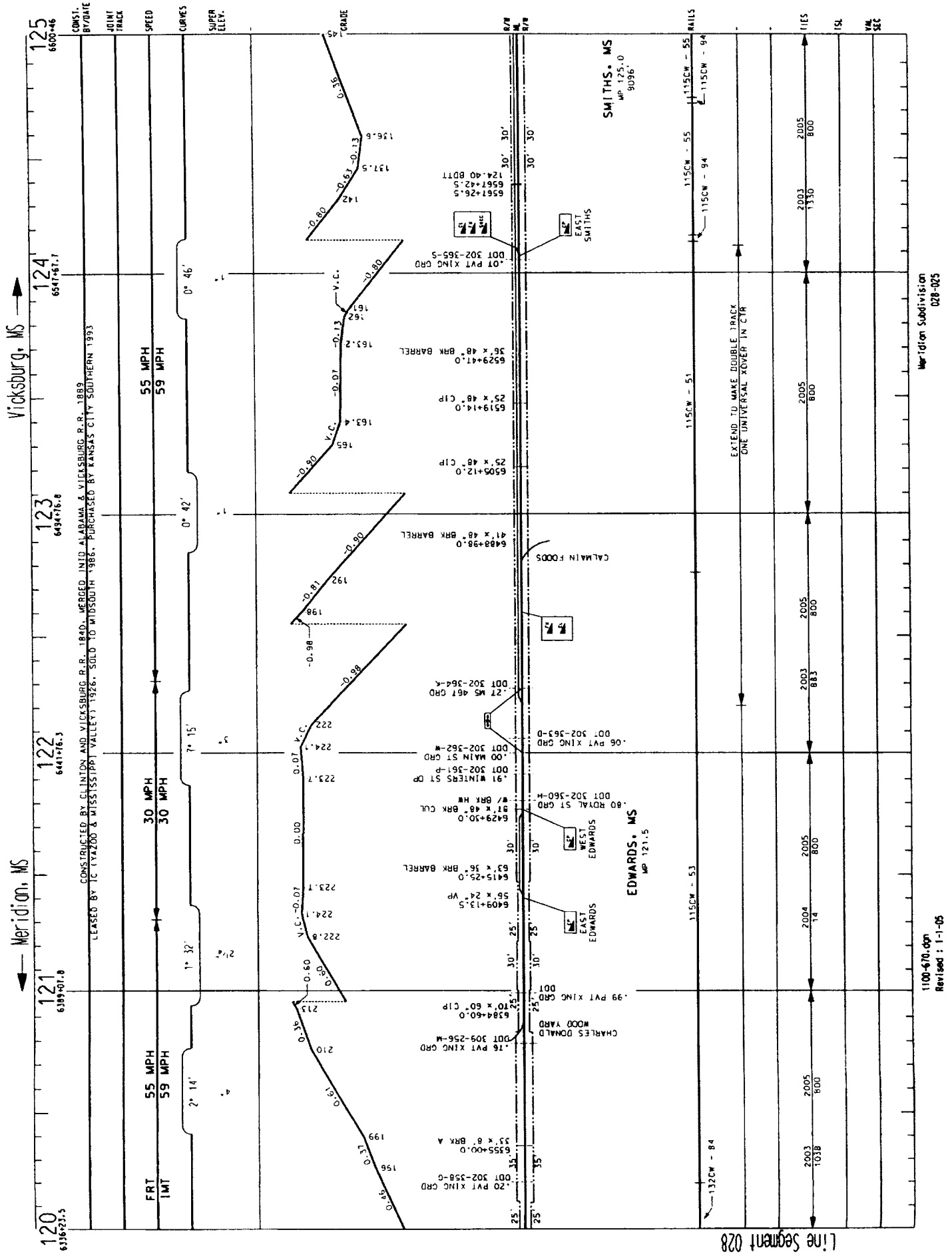

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY VICKSBURG TO JACKSON R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC 1/1/1900 & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
AGREEMENT 093
AGREEMENT 094
AGREEMENT 095
55 MPH
59 MPH
20 MPH
10 MPH
FRT 20 MPH
IMT 20 MPH
JACKSON, MS
MP 95.4
TOWN CREEK
DOUBLE TRACK
CIC
CN-IC YARD
HAWKINS FIELD IND. PARK
WEST JACKSON
BATTLE OF JACKSON - MAY 14, 1863.
GRANT & SHERMAN TAKE JACKSON & DESTROY TRACK FROM JACKSON TO CLINTON
Meridian Subdivision
028-020
1100-665.dgn
Revised : 1-1-05

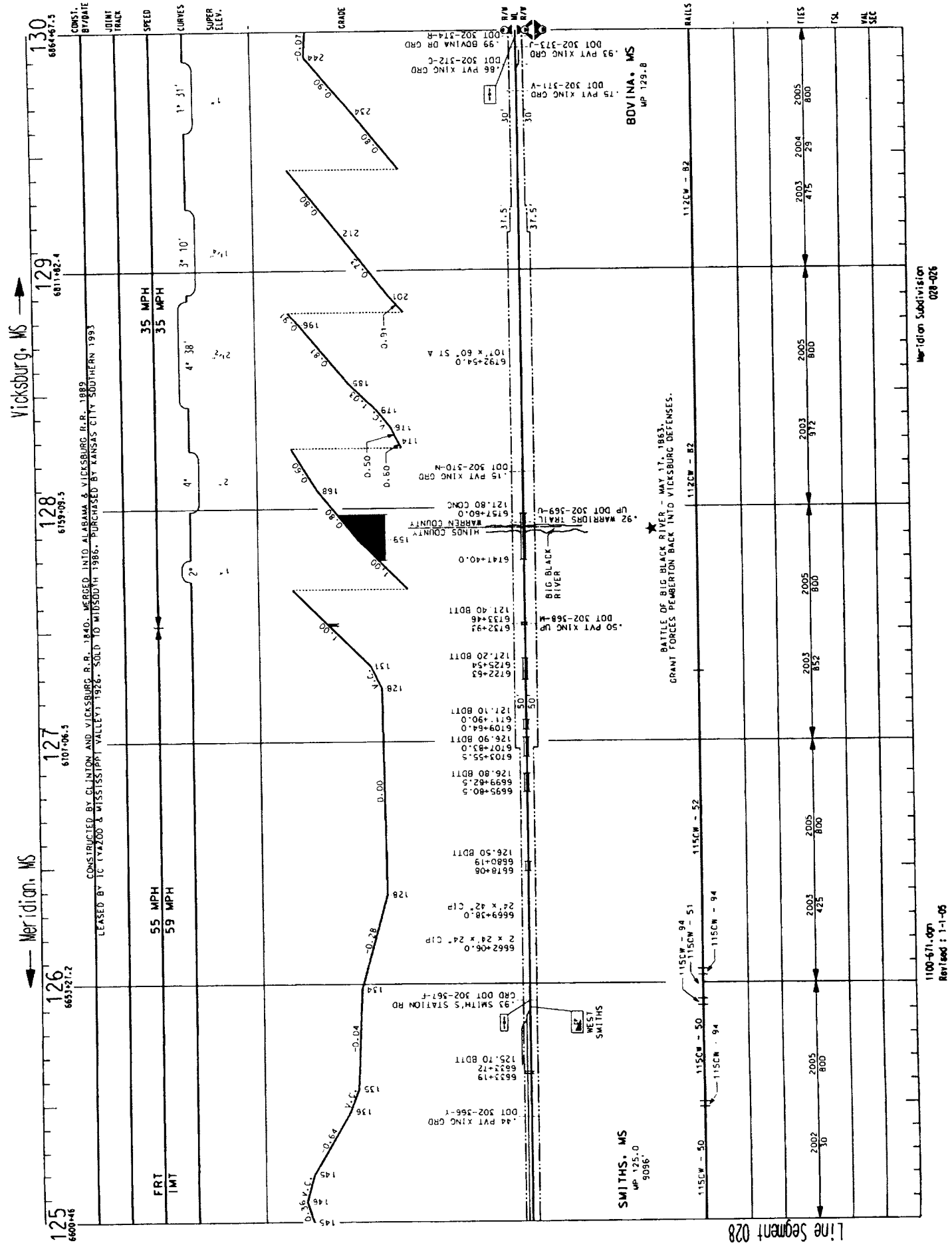

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY VICKSBURG TO JACKSON R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
+30 MPH
+30 MPH
55 MPH
59 MPH
FRT
PASS
DIXON, MS
DOUBLE TRACK
Meridian Subdivision
028-021
1100-666.dgn
Revised : 1-1-05
Line Segment 028

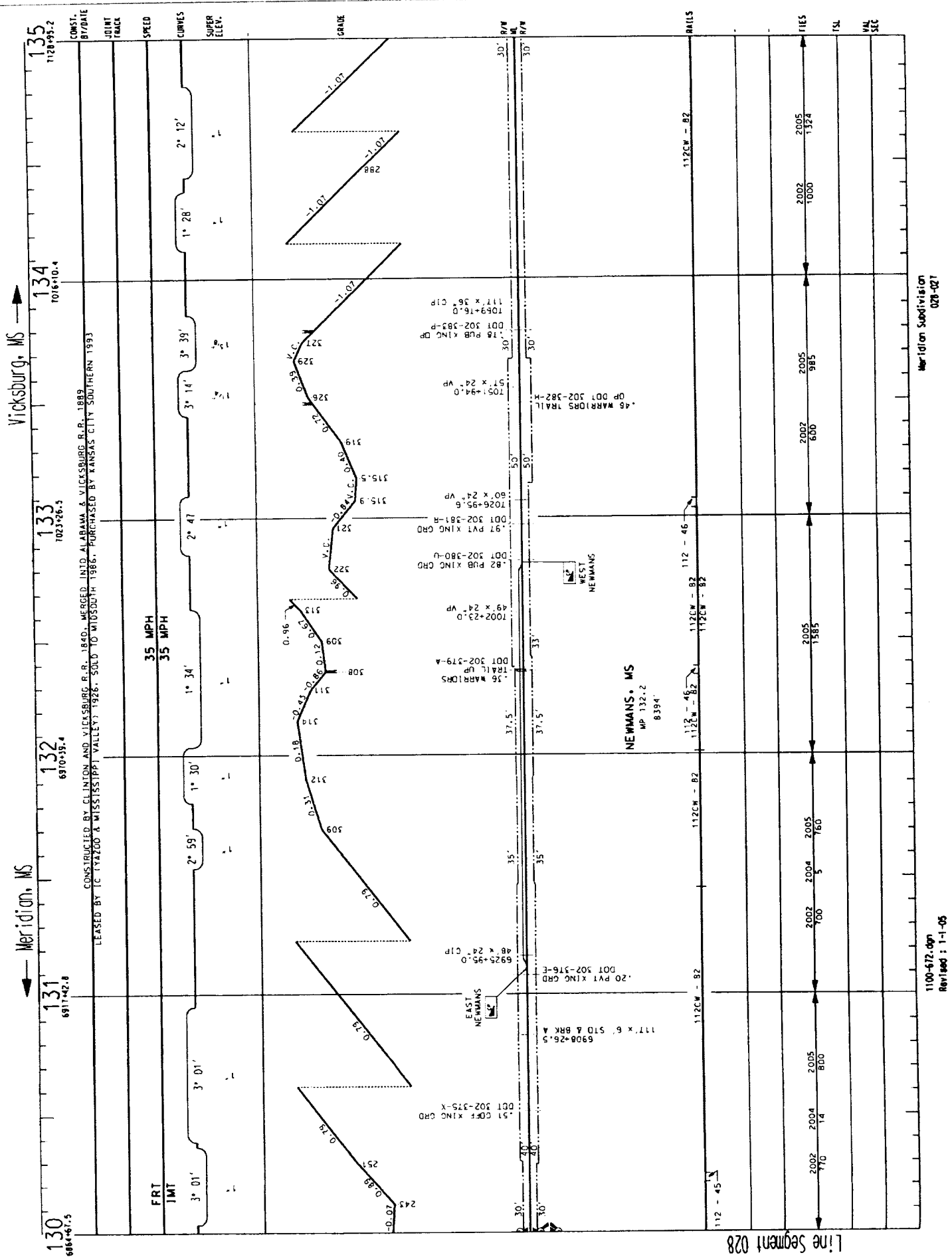

Vicksburg, MS
Meridian, MS
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889.
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
PASS
CLINTON, MS
MP 105.1
Meridian Subdivision
028-022
1100-667.dgn
Revised : 1-1-05
Line Segment 028

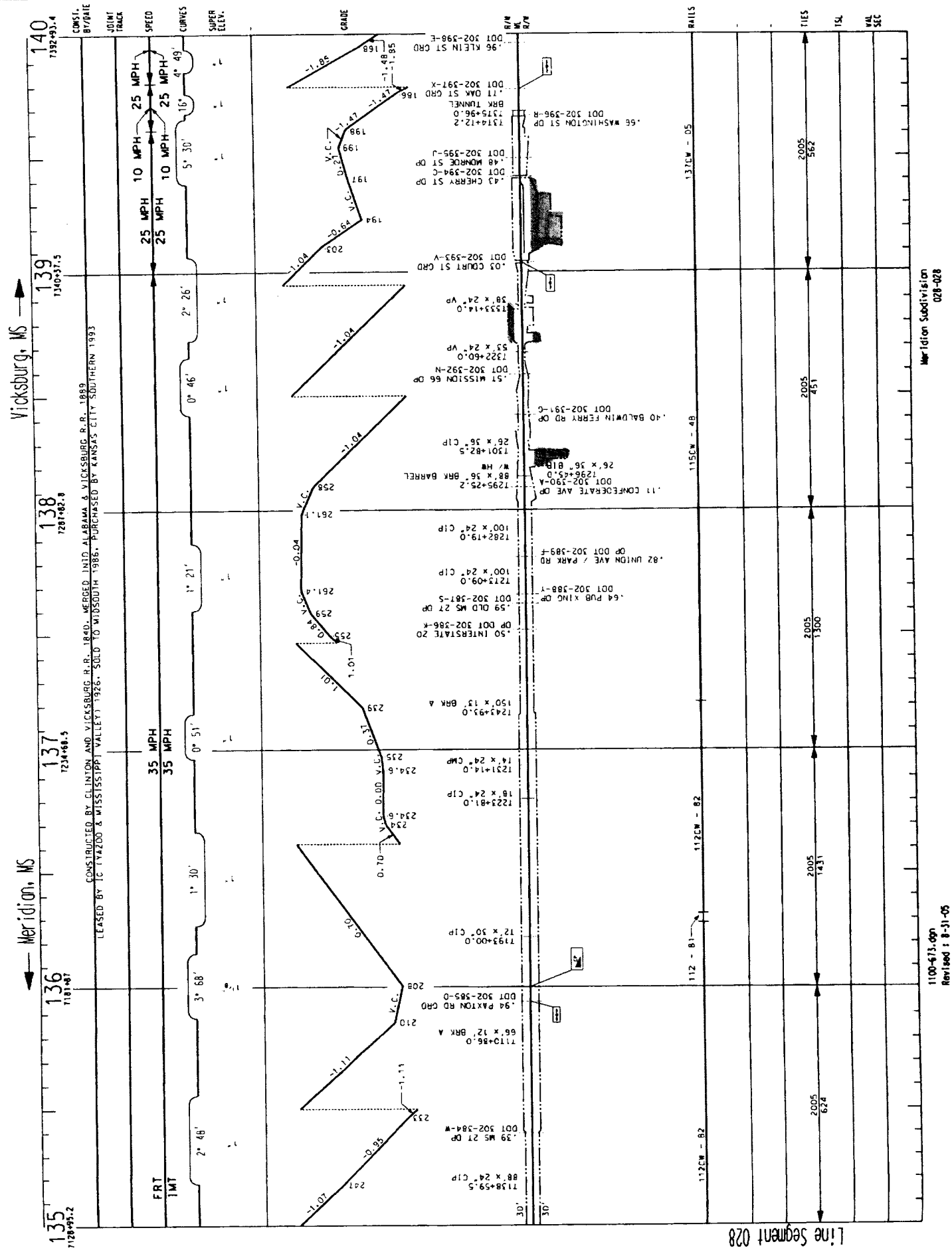

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889.
LEASED BY IC 1974200 & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
40 MPH
40 MPH
55 MPH
59 MPH
FRT
IMT
BOLTON, MS
MP 113.2
CENTURY, MS
MP 112.0
WEST CENTURY
EAST CENTURY
MISSISSIPPI BAC
Meridian Subdivision
028-023
1100-668.dgn
Revised : 1-1-05

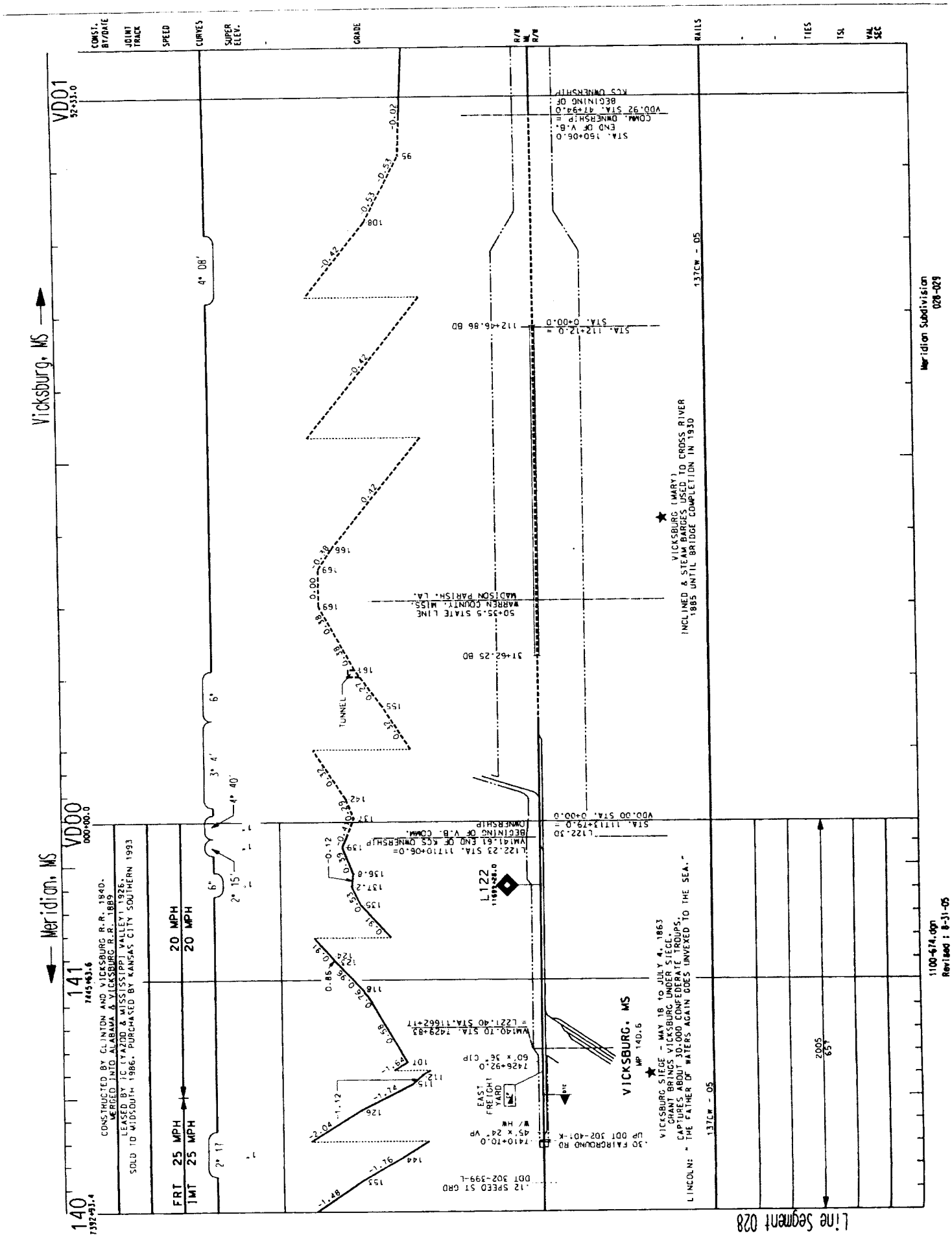

Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
FRT
PMT
1° 29'
1° 22'
1° 28'
BATTLE OF CHAMPIONS HILL - MAY 16, 1863.
PEMBERTON COMES OUT OF VICKSBURG DEFENSE
TO STOP GRANT AND IS DEFEATED
132CW - 84
Meridian Subdivision
028-024
1100-669.dgn
Revised : 1-1-05

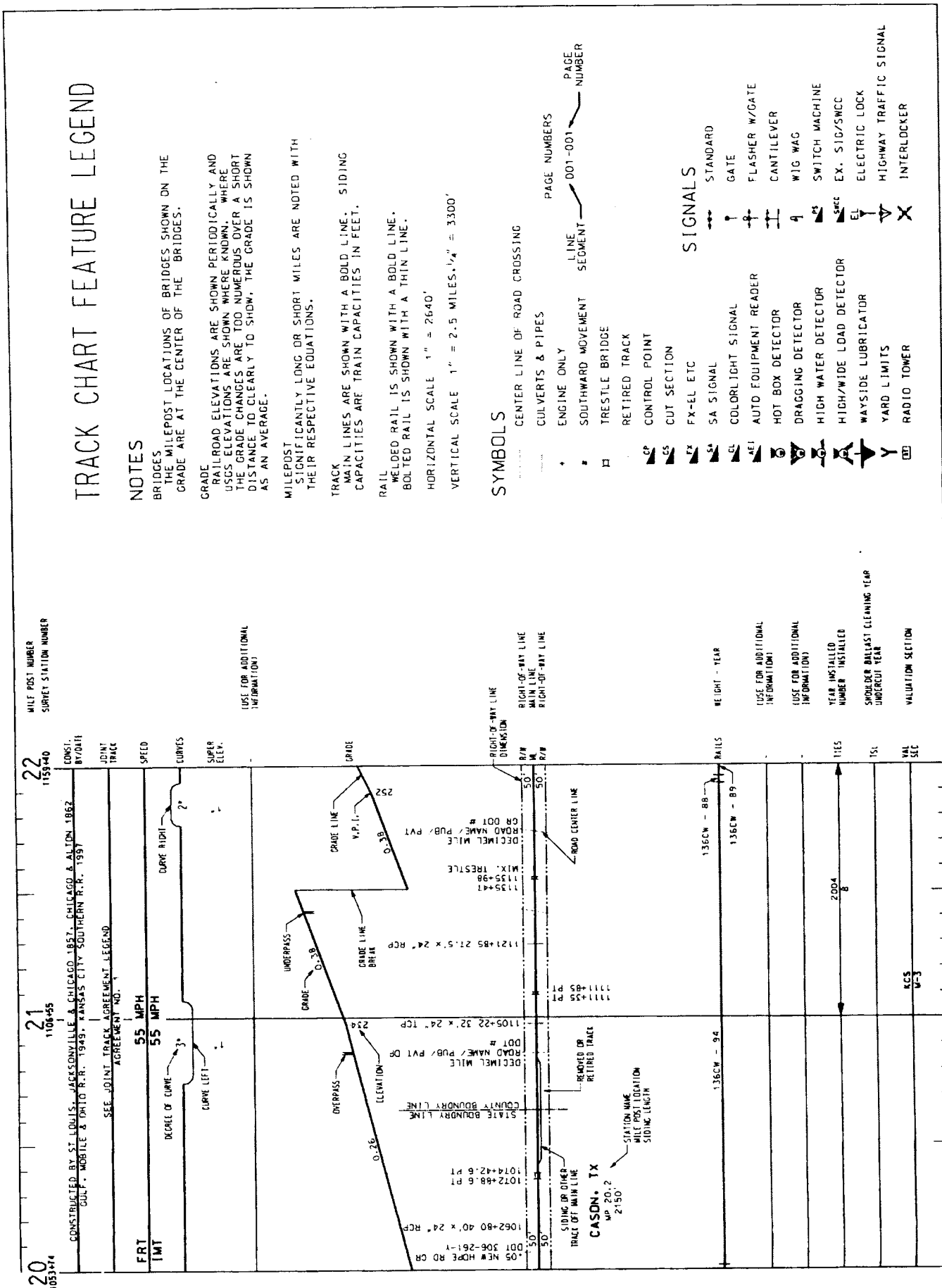

Vicksburg, MS
Meridian, MS
Line Segment 028
SMITHS, MS
MP 125.0
EDWARDS, MS
MP 121.5
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
55 MPH
59 MPH
30 MPH
30 MPH
55 MPH
59 MPH
FRT
IMT
EXTEND TO MAKE DOUBLE TRACK
ONE UNIVERSAL XOVER IN CTR
Meridian Subdivision
028-025
1100-670.dgn
Revised : 1-1-05


Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1889.
LEASED BY IC (VA&V) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
35 MPH
35 MPH
55 MPH
59 MPH
FRT
MT
BOVINA, MS
MP 129.8
SMITHS, MS
MP 125.0
9096'
BATTLE OF BIG BLACK RIVER - MAY 17, 1863.
GRANT FORCES PEMBERTON BACK INTO VICKSBURG DEFENSES.
BIG BLACK RIVER
WEST SMITHS
HINDS COUNTY
WARREN COUNTY
Meridian Subdivision
028-026
1100-671.dgn
Revised : 1-1-05


Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840; MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
NEWMANS, MS
MP 132.2
8394'
EAST NEWMANS
WEST NEWMANS
35 MPH
35 MPH
FRT
IMT
Meridian Subdivision
028-027
1100-612.dgn
Revised : 1-1-05


Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840. MERGED INTO ALABAMA & VICKSBURG R.R. 1899
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926. SOLD TO MIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
Meridian Subdivision
028-028
1100-673.dgn
Revised : 8-31-05


Vicksburg, MS
Meridian, MS
Line Segment 028
CONSTRUCTED BY CLINTON AND VICKSBURG R.R. 1840.
MERGED INTO ALABAMA & VICKSBURG R.R. 1889
LEASED BY IC (YAZOO & MISSISSIPPI VALLEY) 1926.
SOLD TO WIDSOUTH 1986. PURCHASED BY KANSAS CITY SOUTHERN 1993
VICKSBURG SIEGE - MAY 18 TO JULY 4, 1863
GRANT BRINGS VICKSBURG UNDER SIEGE.
CAPTURES ABOUT 30,000 CONFEDERATE TROOPS.
LINCOLN: " THE FATHER OF WATERS AGAIN GOES UNVEXED TO THE SEA."
INCLINED & STEAM BARGES USED TO CROSS RIVER
1885 UNTIL BRIDGE COMPLETION IN 1930
VICKSBURG (MARY)
VICKSBURG, MS
MP 140.6
TUNNEL
EAST FREIGHT YARD
L122
Meridian Subdivision
028-029
1100-6174.dgn
Revised : 8-31-05


TRACK CHART FEATURE LEGEND
NOTES
BRIDGES
THE MILEPOST LOCATIONS OF BRIDGES SHOWN ON THE GRADE ARE AT THE CENTER OF THE BRIDGES.
GRADE
RAILROAD ELEVATIONS ARE SHOWN PERIODICALLY AND USGS ELEVATIONS ARE SHOWN WHERE KNOWN. WHERE THE GRADE CHANGES ARE TOO NUMEROUS OVER A SHORT DISTANCE TO CLEARLY TO SHOW, THE GRADE IS SHOWN AS AN AVERAGE.
MILEPOST
SIGNIFICANTLY LONG OR SHORT MILES ARE NOTED WITH THEIR RESPECTIVE EQUATIONS.
TRACK
MAIN LINES ARE SHOWN WITH A BOLD LINE. SIDING CAPACITIES ARE TRAIN CAPACITIES IN FEET.
RAIL
WELDED RAIL IS SHOWN WITH A BOLD LINE.
BOLTED RAIL IS SHOWN WITH A THIN LINE.
HORIZONTAL SCALE 1" = 2640'
VERTICAL SCALE 1" = 2.5 MILES. 1/4" = 3300'
SYMBOLS
CENTER LINE OF ROAD CROSSING
CULVERTS & PIPES
ENGINE ONLY
SOUTHWARD MOVEMENT
TRESTLE BRIDGE
RETIRED TRACK
CONTROL POINT
CUT SECTION
FX-EL ETC
PAGE NUMBERS
LINE SEGMENT
001-001
PAGE NUMBER
SIGNALS
STANDARD
GATE
FLASHER W/GATE
CANTILEVER
WIG WAG
SWITCH MACHINE
EX. SIG/SWCC
ELECTRIC LOCK
HIGHWAY TRAFFIC SIGNAL
INTERLOCKER
RADIO TOWER
YARD LIMITS
WAYSIDE LUBRICATOR
HIGH/WIDE LOAD DETECTOR
HIGH WATER DETECTOR
DRAGGING DETECTOR
HOT BOX DETECTOR
AUTO EQUIPMENT READER
FLASHER W/GATE
CANTILEVER
WIG WAG
SWITCH MACHINE
EX. SIG/SWCC
ELECTRIC LOCK
HIGHWAY TRAFFIC SIGNAL
INTERLOCKER
MILE POST NUMBER
SURVEY STATION NUMBER
CONSTRUCTED BY ST LOUIS, JACKSONVILLE & CHICAGO 1857; CHICAGO & ALTON 1862
GULF, MOBILE & OHIO R.R. 1949; KANSAS CITY SOUTHERN R.R. 1991
SEE JOINT TRACK AGREEMENT LEGEND
AGREEMENT NO.
FRT
IMT
55 MPH
55 MPH
CURVE RIGHT
CURVE LEFT
DEGREE OF CURVE
CONST. BY/DATE
JOINT TRACK
SPEED
CURVES
SUPER ELEV.
USE FOR ADDITIONAL INFORMATION
GRADE
RIGHT-OF-WAY DIMENSION
RIGHT-OF-WAY LINE
MAIN LINE
RIGHT-OF-WAY LINE
ROAD CENTER LINE
RAILS
WEIGHT - YEAR
136CW - 88
136CW - 89
136CW - 94
TIES
YEAR INSTALLED
NUMBER INSTALLED
2004
8
TSL
SHOULDER BALLAST CLEANING YEAR
UNDERCUT YEAR
VAL SEC
VALUATION SECTION
KCS
M-3
CASON, TX
MP 20.2
2150'
STATION NAME
MILE POST LOCATION
SIDING LENGTH
SIDING OR OTHER TRACK OFF MAIN LINE
REMOVED OR RETIRED TRACK
ELEVATION
OVERPASS
UNDERPASS
GRADE LINE
GRADE LINE BREAK
V.P.I.
STATE BOUNDARY LINE
COUNTY BOUNDARY LINE
DECIMEL MILE
ROAD NAME/ PUB/ PVT OR DOT #
1074+42.6 PT
1072+88.6 PT
1062+80 40'x 24" RCP
1105+22 32'x 24" TCP
1121+85 21.5'x 24" RCP
1111+55 PT
1111+85 PT
1135+41
1135+98
MIX. TRESTLE
.05 NEW HOPE RD CR DOT 306-261-Y
tclgnd.dgn

TRACK CHART ABBREVIATION LEGEND

BRIDGES & CULVERTS

A	ARCH
AB	ABUTMENT
AP	APPROACH
ARM TL	ARMCO TUNNEL LINER
B	BOX
BASC	BASCULE
BD	BALLAST DECK
BDPT	BALLAST DECK PILE TRESTLE - WOOD
BIP	BOILER IRON PIPE
BR	BRIDGE
BRK	BRICK
C	CONCRETE
CA	CONCRETE ARCH
CB	CONCRETE BOX
CBG	CONCRETE BOX GIRDER
CCSP	COMBINATION CONCRETE & STEEL PIPE
CCTS	COMBINATION CONCRETE & TIMBER SLAB
CG	CONCRETE "I" GIRDER
CIP	CAST IRON PIPE
CMA	CURRUGATED METAL ARCH
CMP	CORRUGATED METAL PIPE
CTG	CONCRETE "T" GIRDER
CP	CONCRETE PIPE
CUL	CULVERT
DBL	DOUBLE
DG	DECK GIRDER
DPG	DECK PLATE GIRDER
DPLG	DECK PLATE LATTICE GIRDER
DPCT	DECK PIN CONNECTED TRUSS
DR SP	DRAW SPAN
DRT	DECK RIVETED TRUSS
DS	SWING SPAN
DT	DECK TRUSS
EXT	EXTENSION
FT	FRAME TRESTLE - WOOD
FTG	FOOTING
GCIP	GALVANIZED CORRUGATED IRON PIPE
GIP	GALVANIZED IRON PIPE
HW	HEADWALL
IB	"I" BEAM OR GIRDER BEAM SPAN
LG	LONG
LS	LIFT SPAN
MPP	MULTI-PLATE PIPE
MSY	MASONRY
O	OVAL
OCP	OVAL CONCRETE PIPE
OD	OPEN DECK
OMD	OVAL METAL DECK
ORCP	OVAL REINFORCED CONCRETE PIPE
PC	PRE-STRESSED CONCRETE
PCMP	PERFORATED CORRUGATED CONCRETE PIPE
PED	PEDESTAL
PRT	PONT RIVETED TRUSS
PT	PILE TRESTLE - WOOD
RCA	REINFORCED CONCRETE ARCH
RCB	REINFORCED CONCRETE BOX
RCP	REINFORCED CONCRETE PIPE
RCT	REINFORCED CONCRETE TRUSTLE
RD WD	REDWOOD
RSB	REINFORCED STONE BOX
RTB	RAIL TRACK BOx
RTCB	RAIL TOP CONCRETE BOX
RTSB	RAIL TOP STONE BOX
SA	STEEL ARCH
SBG	STEEL BOX GIRDER
SP	STEEL PIPE
SPP	STEEL PLATE PIPE
SSC	STEEL STRINGERS & CAPS
SSP	STRUCTURAL STEEP PIPE
STA	STONE ARCH
STB	STONE BOX
STO	STONE
T	TILE
T BX	TIMBER BOX
TL	TUNNEL LINER
TH G	THRU GIRDER
TH T	THRU TRUSS
TLG	THRU LATTICE GIRDER
TP	TILE PIPE
TPCT	THRU PIN CONNECTED TRUSS
TPG	THRU PLATE GIRDER
TR	TREATED
TR	T-RAIL
TRIP	TRIPLE
TRT	THRU RIVETED TRUSS
VP	VITRIFIED PIPE
VTP	VITRIFIED TILE PIPE
W	WOOD
WB	WOOD BOX
WF	WIDE FLANGE BEAM SPAN
WP	WOOD PIPE
WIP	WROUGHT IRON PIPE

TRACK & SIGNAL

ABS	AUTOMATIC BLOCK SIGNAL SYSTEM
APB	AUTOMATIC PERMISSIVE BLOCK
ATS	AUTOMATIC TRAIN STOP
AUTO GATE	AUTOMATIC GATE
B	BOLTED RAIL
BLK	BLOCK
BLT	BRANCH LINE TERRITORY
BP	BUMPING POST
BR SIG	BRIDGE SIGNAL
BRT	BLOCK REGISTER TERRITORY
C	CURVE/CONTROLLED SWITCH/CONCRETE
C SIG	CONTROL SIGNAL
CANT SIG	CANTILEVER SIGNAL
CAP	CAPACITY
CTC	CENTERALIZED TRAFFIC CONTROL
DC SW	CUAL CONTROL SWITCH
DE DET	DRAGGING EQUIPMENT DETECTOR
EQLAT	EQUILATERAL SWITCH
F	FREIGHT (SPEED)
FL LUB	FLANGE LUBRICATOR
FLSH SIG	FLASHING SIGNAL
HB DET	HOT BEARING DETECTOR
HB REFL BD	HOT BEARING REFLECTOR BOARD
HWDET	HIGH WATER DETECTOR
I	TOTAL CURVE ANGLE
I SIG	INTERLOCKING SIGNAL
I SW	INTERLOCKING SWITCH
INTLK	INTERLOCKING
L	LEFT
LS	LINE SEGMENT
M	MANUAL SWITCH
MN. M	MIDDLE MAIN
MP	MILEPOST
NB	NORTHBOUND
NM. N	NORTH MAIN
OCS	OCCUPANCY CONTROL SYSTEM
OH	OVERHEAD
P	PASSENGER(SPEED)/PREMIUM RAIL POWER SWITCH/POWER
PT SW	POINT OF SWITCH
R	RIGHT
RES LIM	RESTRICTED LIMITS
RG	RAIL GRINDING
RL	RAIL LUBRICATOR
SIGS	SIGNALS
SH	SECOND HAND RAIL
SBC	SHOULDER BALLAST CLEANING
SM. S	SOUTH MAIN
S SW	SPRING SWITCH
TO	TURN-OUT
TRK	TRACK
TWC	TRACK WARRANT CONTROL
UC	UNDERCUT
W	WELDED

FACILITIES

B	BOOTH TELEPHONE
C	OFFICE OF COMMUNICATION
CDR CV	CINDER CONVEYOR
COA CH	COAL CHUTE
EXP BLDG	EXPRESS BUILDING
F	FUEL
I TOWER	INTERLOCKING TOWER
LAV	LAVATORY
O COL	OIL COLUMN
OT	OIL TANK
R	RADIO COMMUNICATION
STK YRD	STOCK YARD
T	TURNTABLE
TT	TREATMENT PLANT
W	WATER
WCOL	WATER COLUMN
WT	WATER TANK
Y	WYE

MISCELLANEOUS

AVE	AVENUE
BCH	BRANCH
BLVD	BOULEVARD
CO	COUNTRY
CONN	CONNECTION
COMP	COMPUTED
CONST	CONSTRUCTED
CR	CREEK
DBL	DOUBLE
DIV	DIVISION
DOT#	DEPT OF TRANSPORTATION CROSSING NUMBER
E	EAST
EL	ELEVATION
EW	EASTWARD
F LT P	FLOOD LIGHT POLE
F LT T	FLOOD LIGHT TOWER
FRT	FREIGHT
GR	AT GRADE
HO	HOUSE
HWY	HIGHWAY
IND	INDUSTRY
JCT	JUNCTION
LT	LEFT
MAINT	MAINTENANCE
MAX	MAXIMUM
MTCE	MAINTENANCE
MIX.	MIXED
NO	MORTH
OH	OVERHEAD
OP	OVERPASS
PED	PEDESTRIAN
PO	POWER
PSGR	PASSENGER
PUB	PUBLIC
PVT	PRIVATE
RD	ROAD
RD XING	ROAD CROSSING
RESERV	RESERVOIR
RIV	RIVER
RR	RAILROAD
RS	RESUME SPEED
RT	RIGHT
RW	RIGHT-OF-WAY
RY	RAILWAY
SB	SOUTHBOUND
SEC	SECTION
SO	SOUTH
ST	STREET
STA	STATION
TPL	TRIPLE
UP	UNDERPASS
W	WEST
WW	WESTWARD
YD	YARD
UL	YARD LIMITS
XBUCKS	CROSSBUCKS
XING	CROSSING

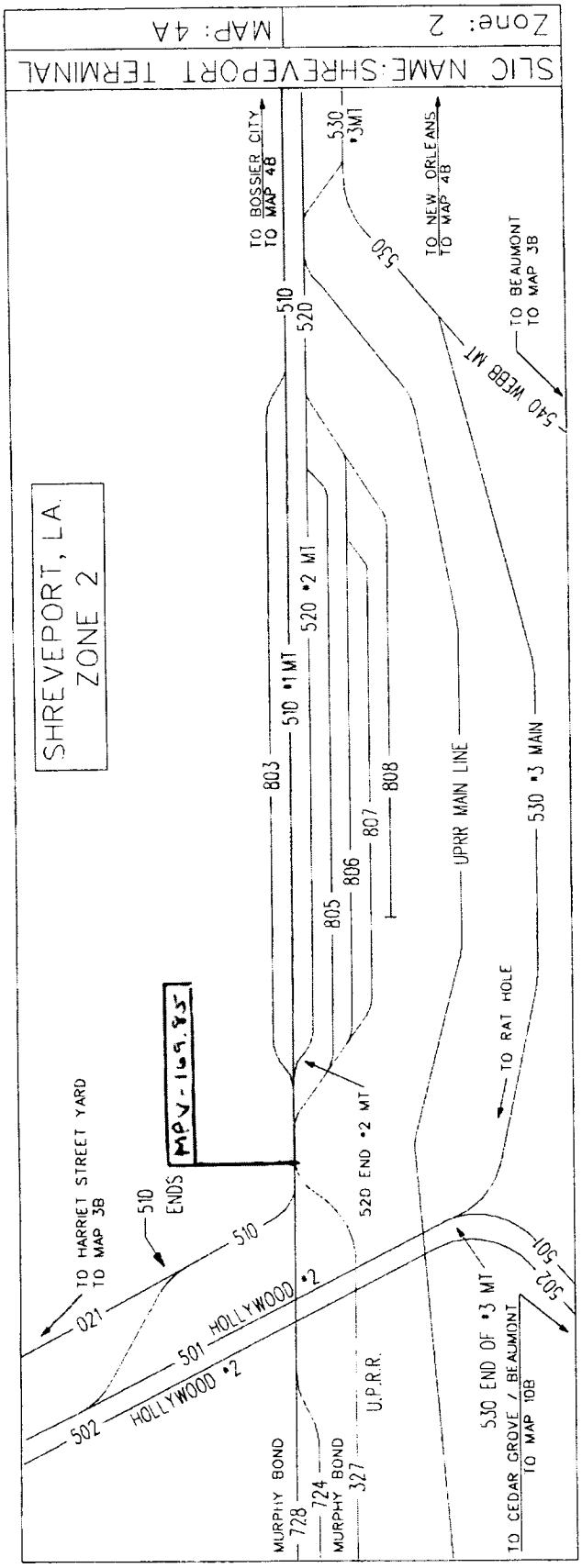
ablgnd.dgn

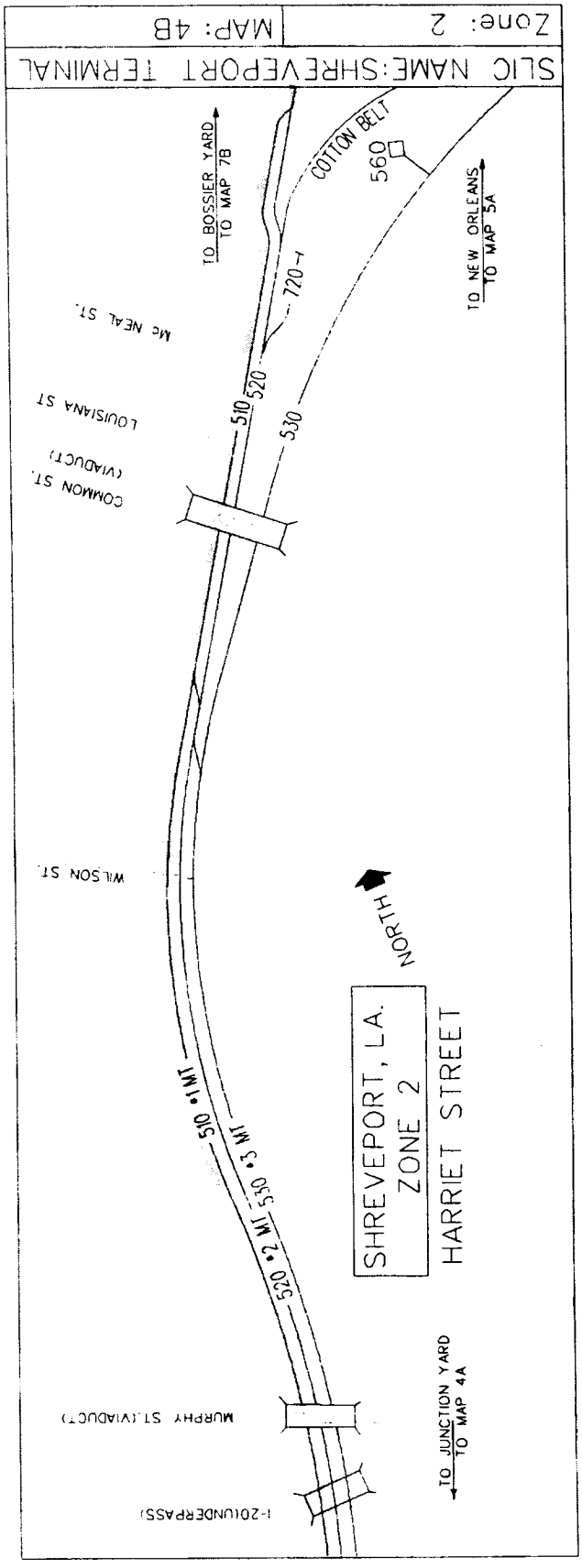
REDACTED PUBLIC RECORD VERSION

ALL TRACKS HIGHLIGHTED IN GREEN ARE INCLUDED

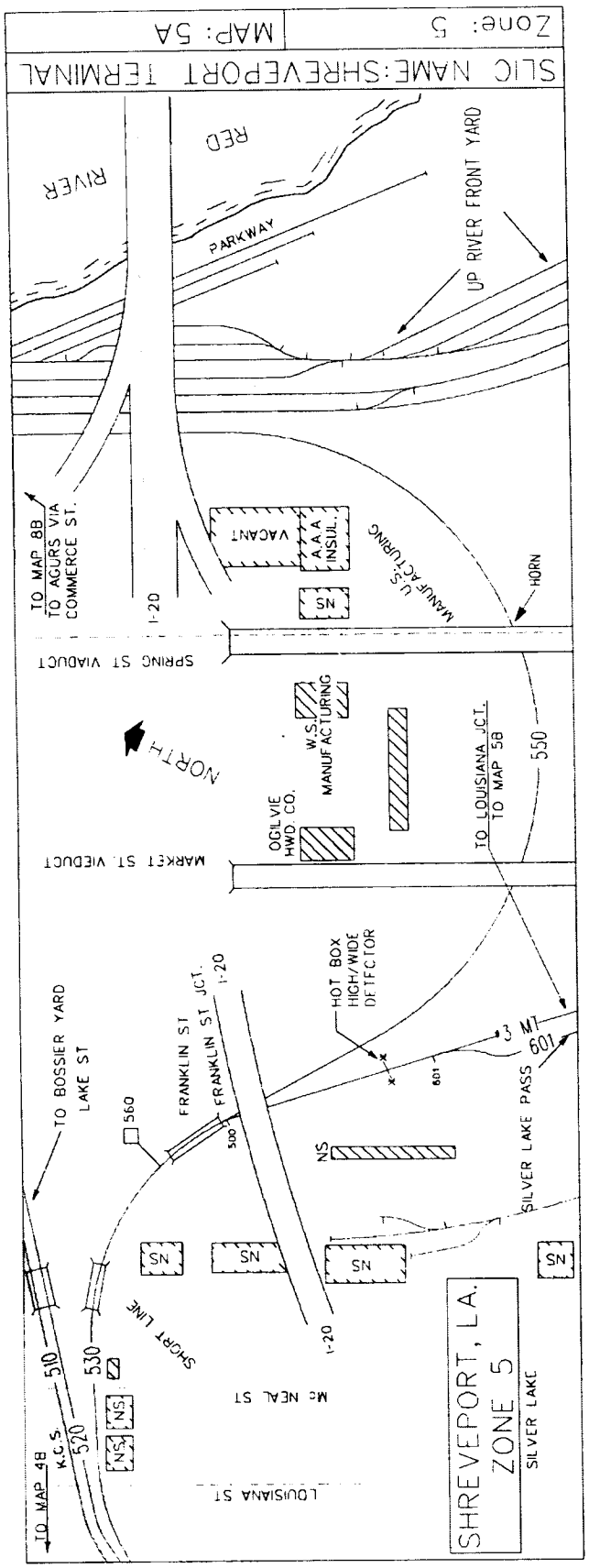
SHREVEPORT TERMINAL

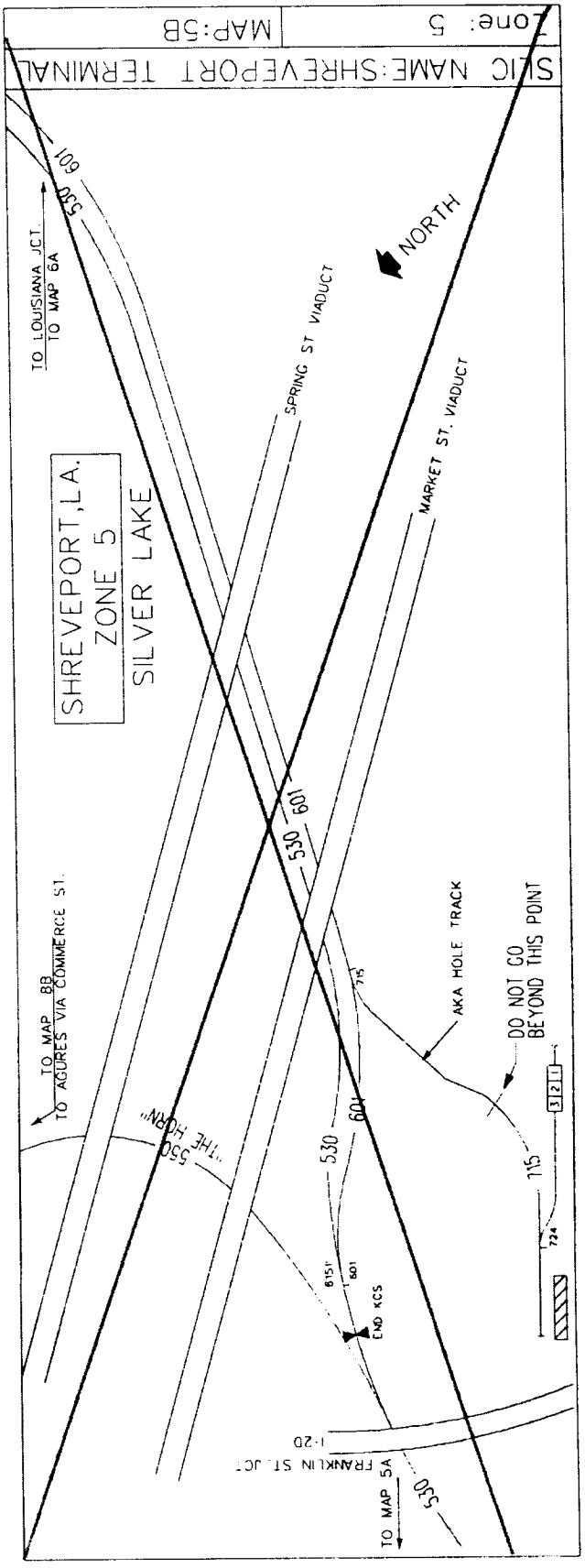
OCTOBER 31, 2001


SLIC NAME:SHREVEPORT TERMINAL
Zone: 2
MAP: 4A
SHREVEPORT, LA.
ZONE 2
TO BOSSIER CITY
TO MAP 4B
TO NEW ORLEANS
TO MAP 4B
TO BEAUMONT
TO MAP 3B
530 •3MT
510
520
530
540 WEBB MT
510 •1 MT
520 •2 MT
803
805
806
807
808
UPRR MAIN LINE
530 •3 MAIN
TO RAT HOLE
MPV-169.85
510 ENDS
520 END •2 MT
TO HARRIET STREET YARD
TO MAP 3B
021
510
501 HOLLYWOOD •2
502 HOLLYWOOD •2
501
502
530 END OF •3 MT
TO CEDAR GROVE / BEAUMONT
TO MAP 10B
MURPHY BOND
728
MURPHY BOND
724
MURPHY BOND
327
U.P.R.R.

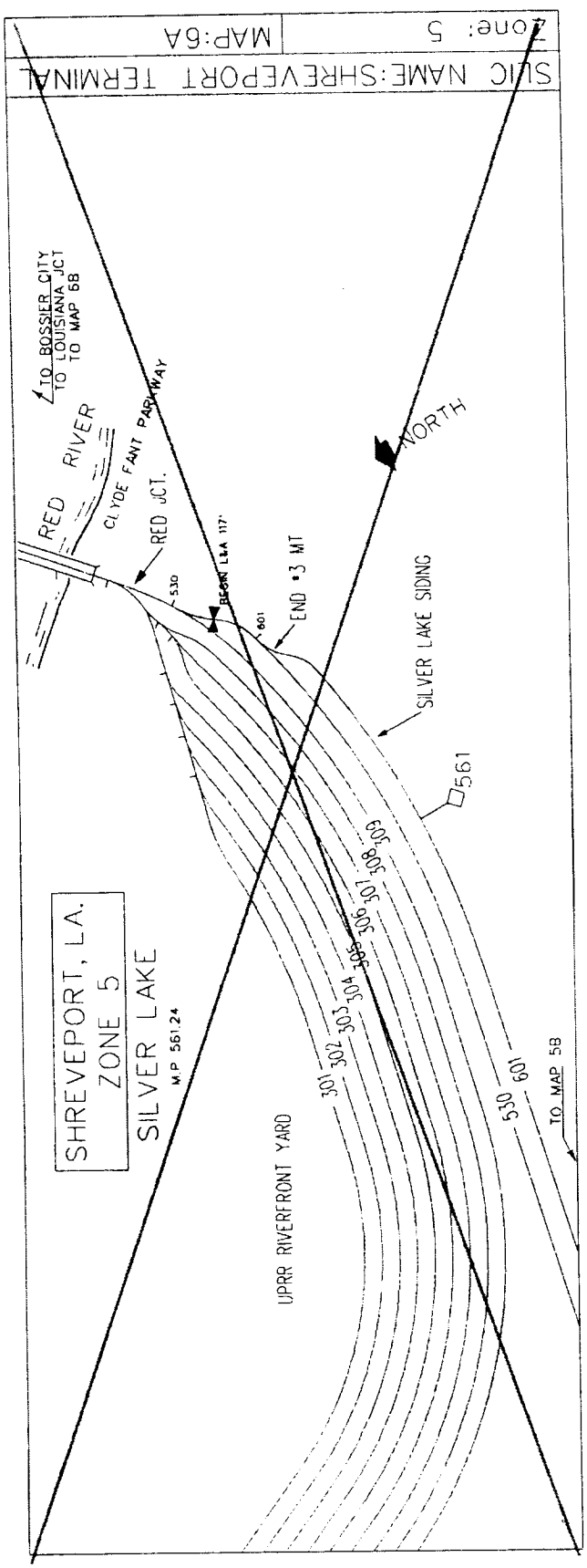

SLIC NAME:SHREVEPORT TERMINAL
Zone: 2
MAP: 4B
SHREVEPORT, LA.
ZONE 2
HARRIET STREET
NORTH
TO BOSSIER YARD
TO MAP 7B
COTTON BELT
560
720+
TO NEW ORLEANS
TO MAP 5A
Mc NEAL ST.
LOUISIANA ST
COMMON ST.
(VIADUCT)
WILSON ST.
510 •1 MT
520 •2 MT
530 •3 MT
510
520
530
MURPHY ST. (VIADUCT)
I-20 (UNDERPASS)
TO JUNCTION YARD
TO MAP 4A

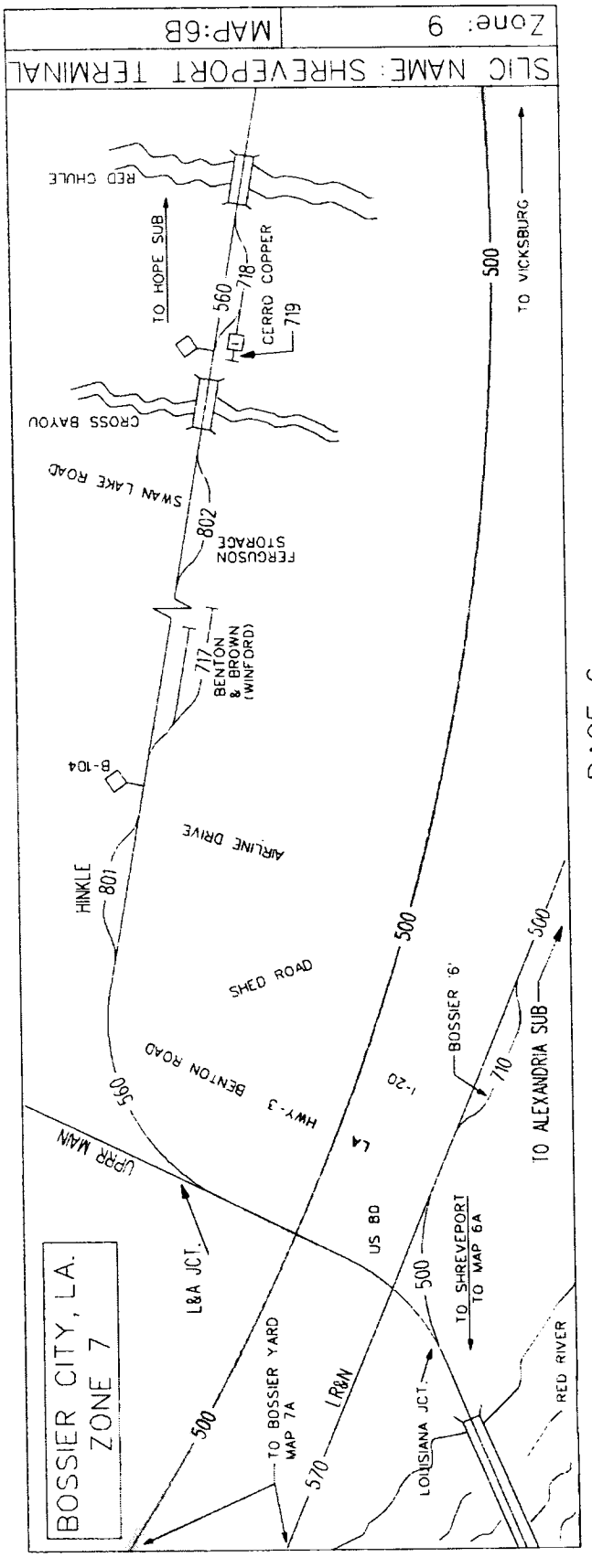
PAGE 4


Zone: 5
MAP: 5A
SLIC NAME: SHREVEPORT TERMINAL
RIVER
RED
PARKWAY
UP RIVER FRONT YARD
TO MAP 8B
TO AGURS VIA
COMMERCE ST.
I-20
VACANT
A.A.A.
INSUL.
MANUF ACTURING
HORN
SPRING ST VIADUCT
NORTH
W.S.
MANUFACTURING
OGILVIE
HWD CO.
TO LOUISIANA JCT.
TO MAP 5B
550
MARKET ST. VIEDUCT
HOT BOX
HIGH/WIDE
DETECTOR
3 MT
601
TO BOSSIER YARD
LAKE ST
560
FRANKLIN ST
FRANKLIN ST JCT.
I-20
500
NS
SILVER LAKE PASS
SHORT LINE
Mc NEAL ST
LOUISIANA ST
TO MAP 4B
K.C.S.
510
520
530
SILVER LAKE
SHREVEPORT, LA.
ZONE 5

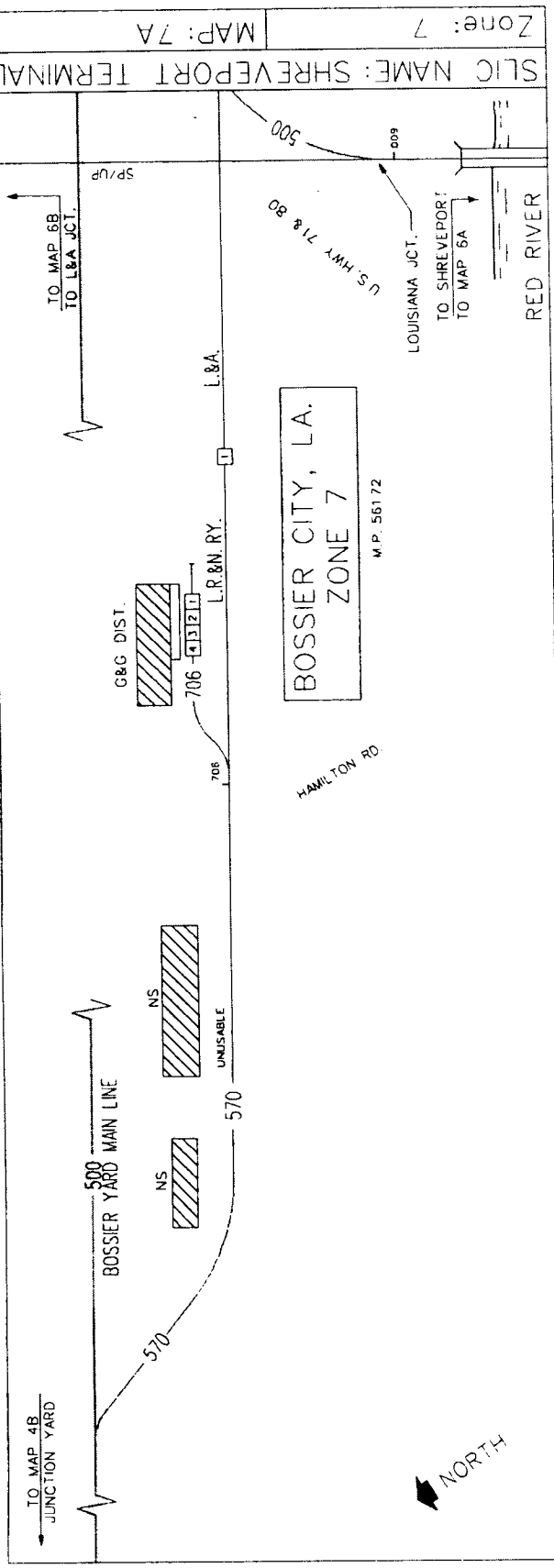

Zone: 5
MAP: 5B
SLIC NAME: SHREVEPORT TERMINAL
TO LOUISIANA JCT.
TO MAP 6A
550
601
NORTH
SPRING ST VIADUCT
MARKET ST. VIADUCT
SHREVEPORT, LA.
ZONE 5
SILVER LAKE
530
601
TO MAP 8B
TO AGURS VIA COMMERCE ST.
"THE HORN"
AKA HOLE TRACK
DO NOT GO
BEYOND THIS POINT
715
724
END KCS
FRANKLIN ST. JCT.
I-20
TO MAP 5A

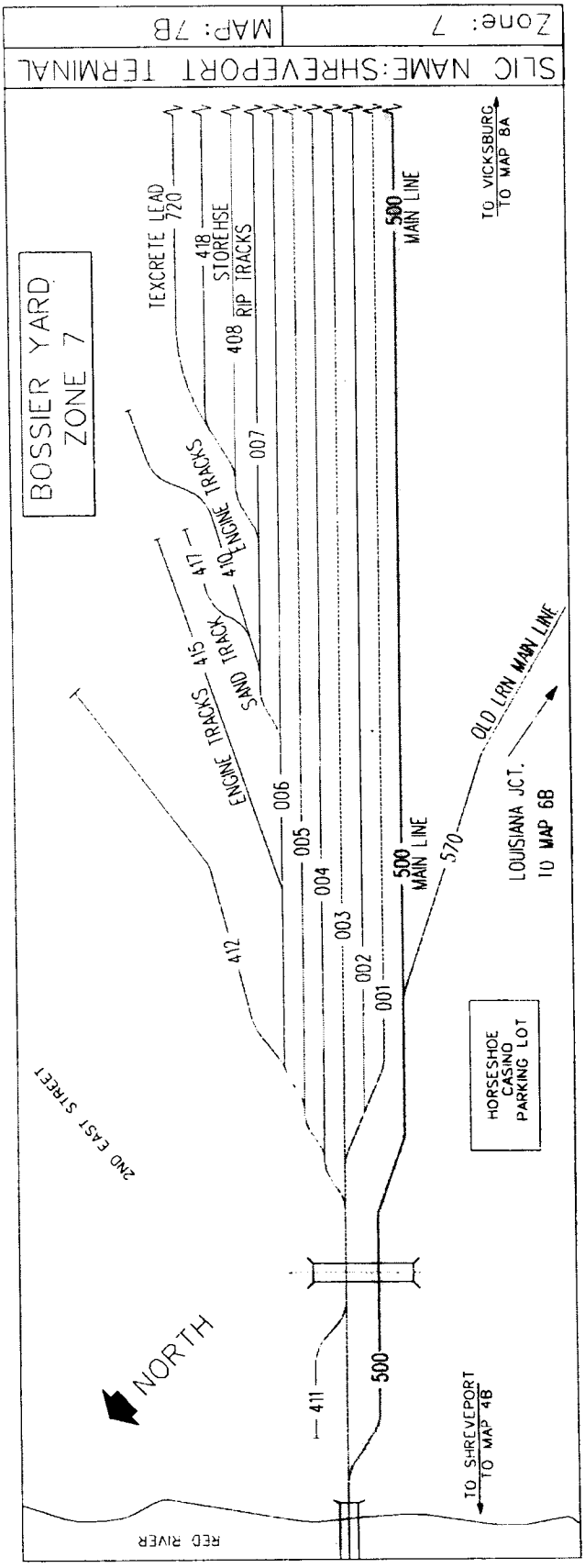
PAGE 5


Zone: 5
MAP:6A
SLIC NAME:SHREVEPORT TERMINAL
TO BOSSIER CITY
TO LOUISIANA JCT
TO MAP 6B
RED RIVER
CLYDE FANT PARKWAY
RED JCT.
NORTH
530
BEGIN L&A 117
601
END .3 MT
SILVER LAKE SIDING
561
SHREVEPORT, LA.
ZONE 5
SILVER LAKE
M.P 561.24
301
302
303
304
305
306
307
308
309
530
601
TO MAP 5B
UPRR RIVERFRONT YARD

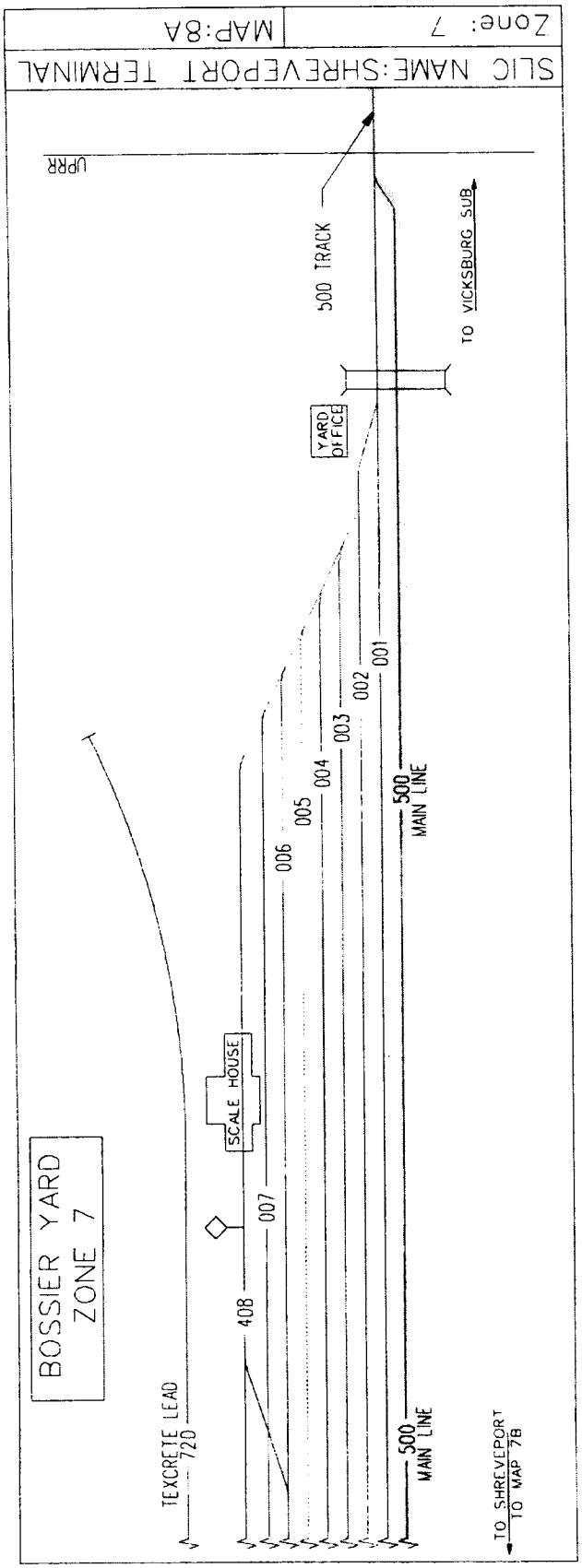

Zone: 9
MAP:6B
SLIC NAME: SHREVEPORT TERMINAL
RED CHULE
TO HOPE SUB
560
718
CERRO COPPER
719
CROSS BAYOU
SWAN LAKE ROAD
802
FERGUSON STORAGE
717
BENTON & BROWN (WINFORD)
B-104
AIRLINE DRIVE
HINKLE
801
SHED ROAD
BENTON ROAD
595
HWY-3
LA
I-20
BOSSIER '6'
710
TO ALEXANDRIA SUB
500
TO VICKSBURG
UPRR MAIN
L&A JCT.
US 80
TO SHREVEPORT
TO MAP 6A
TO BOSSIER YARD
MAP 7A
I R&W
570
LOUISIANA JCT.
RED RIVER
BOSSIER CITY, LA.
ZONE 7

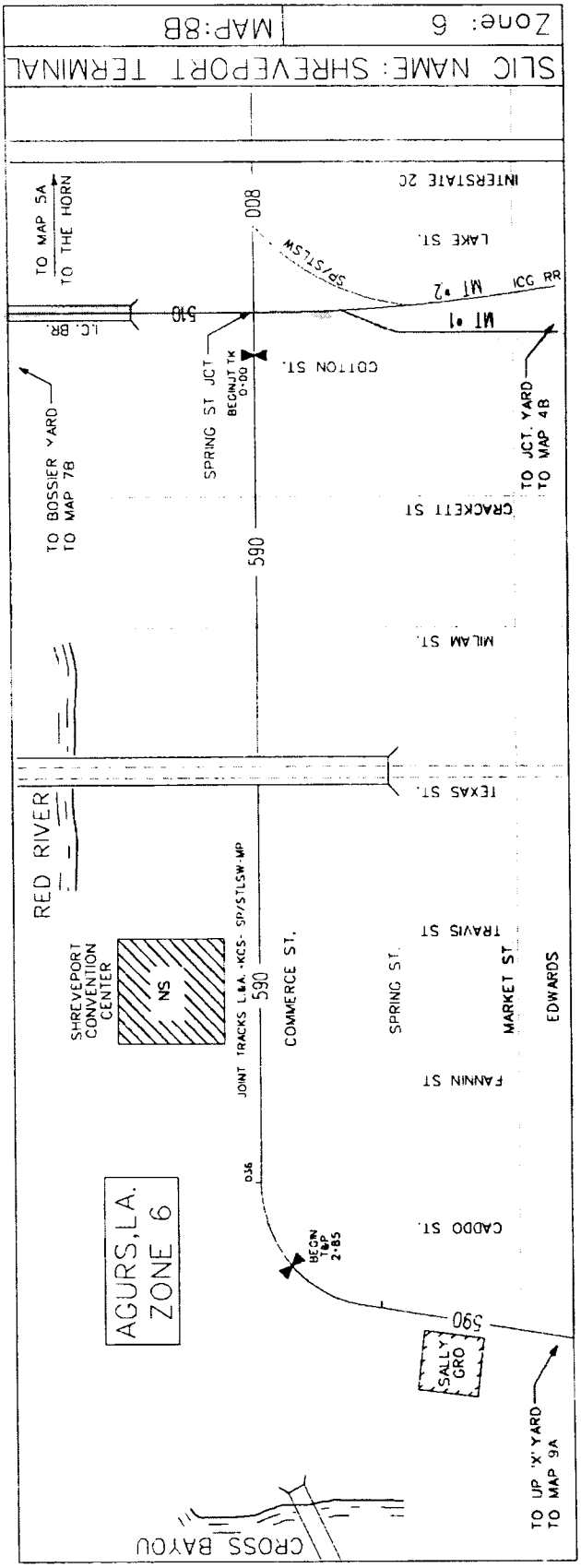
PAGE 6


Zone: 7
MAP: 7A
SLIC NAME: SHREVEPORT TERMINAL
TO MAP 6B
TO L&A JCT.
SP/UP
500
609
U.S. HWY 71 & 80
LOUISIANA JCT.
TO SHREVEPORT
TO MAP 6A
RED RIVER
L&A.
BOSSIER CITY, LA.
ZONE 7
M.P. 561.72
G&G DIST.
L.R.&N. RY.
706
708
HAMILTON RD
NS
UNUSABLE
570
500 BOSSIER YARD MAIN LINE
TO MAP 4B
JUNCTION YARD
NORTH


Zone: 7
MAP: 7B
SLIC NAME: SHREVEPORT TERMINAL
BOSSIER YARD
ZONE 7
TEXCRETE LEAD
720
418
STOREHSE
408
RIP TRACKS
007
417
410
ENGINE TRACKS
415
SAND TRACK
ENGINE TRACKS
006
005
004
003
002
001
412
500
MAIN LINE
570
OLD L&N MAIN LINE
LOUISIANA JCT.
TO MAP 6B
TO VICKSBURG
TO MAP 8A
2ND EAST STREET
HORSESHOE
CASINO
PARKING LOT
411
500
TO SHREVEPORT
TO MAP 4B
RED RIVER
NORTH

PAGE 7


SLIC NAME: SHREVEPORT TERMINAL
Zone: 7
MAP: 8A
UPRR
500 TRACK
TO VICKSBURG SUB
YARD OFFICE
SCALE HOUSE
BOSSIER YARD
ZONE 7
TEXCRETE LEAD
720
408
007
006
005
004
003
002
001
500
MAIN LINE
500
MAIN LINE
TO SHREVEPORT
TO MAP 7B


SLIC NAME: SHREVEPORT TERMINAL
Zone: 6
MAP: 8B
TO MAP 5A
TO THE HORN
INTERSTATE 20
LAKE ST.
SP/STLSW
ICG RR
MT #2
MT #1
I.C. RR
510
COTTON ST.
SPRING ST JCT
BEGNUT TK
0-00
TO BOSSIER YARD
TO MAP 7B
TO JCT. YARD
TO MAP 4B
CRACKETT ST
590
MILAM ST.
TEXAS ST.
RED RIVER
SHREVEPORT
CONVENTION
CENTER
NS
JOINT TRACKS L&A.-KCS- SP/STLSW-MP
590
COMMERCE ST.
SPRING ST.
TRAVIS ST
MARKET ST
EDWARDS
FANNIN ST
AGURS, LA.
ZONE 6
036
CADDO ST.
BEGIN
MP
2.85
590
SALLY
GRO
TO UP 'X' YARD
TO MAP 9A
CROSS BAYOU

PAGE 8

VICKSBURG

MERIDIAN

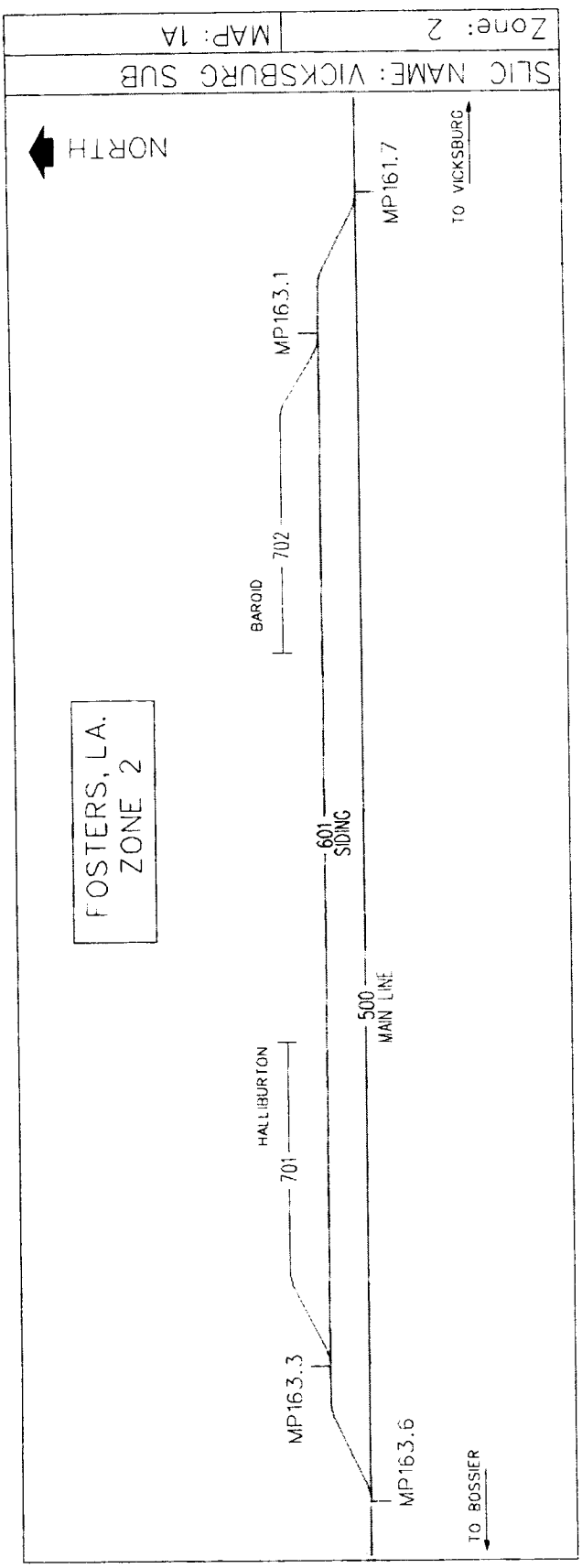
HOPE

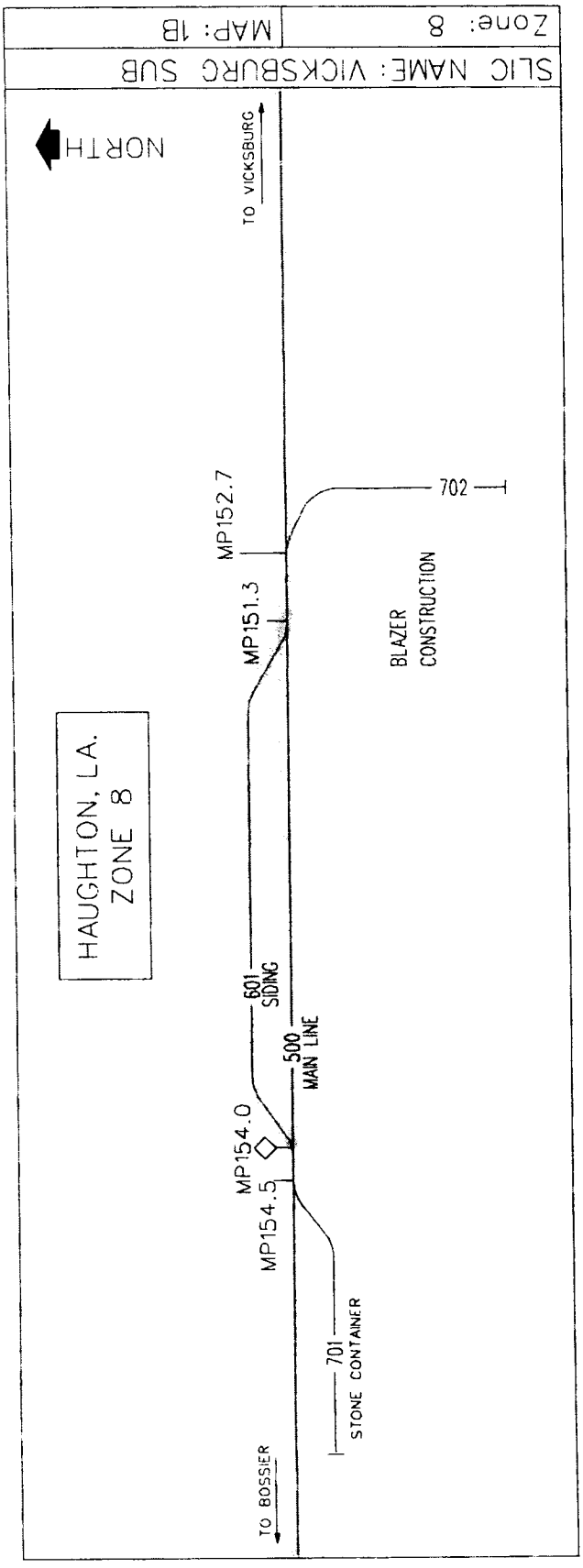
HODGE

REDWOOD

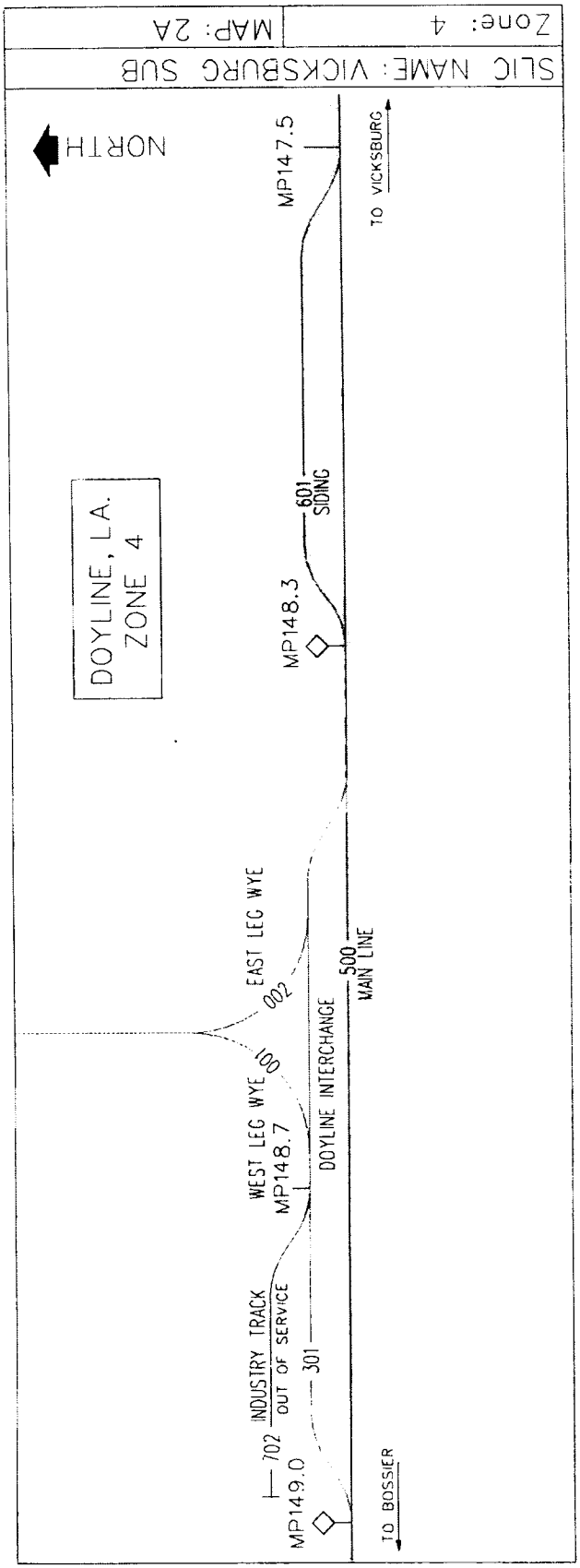
GULFPORT

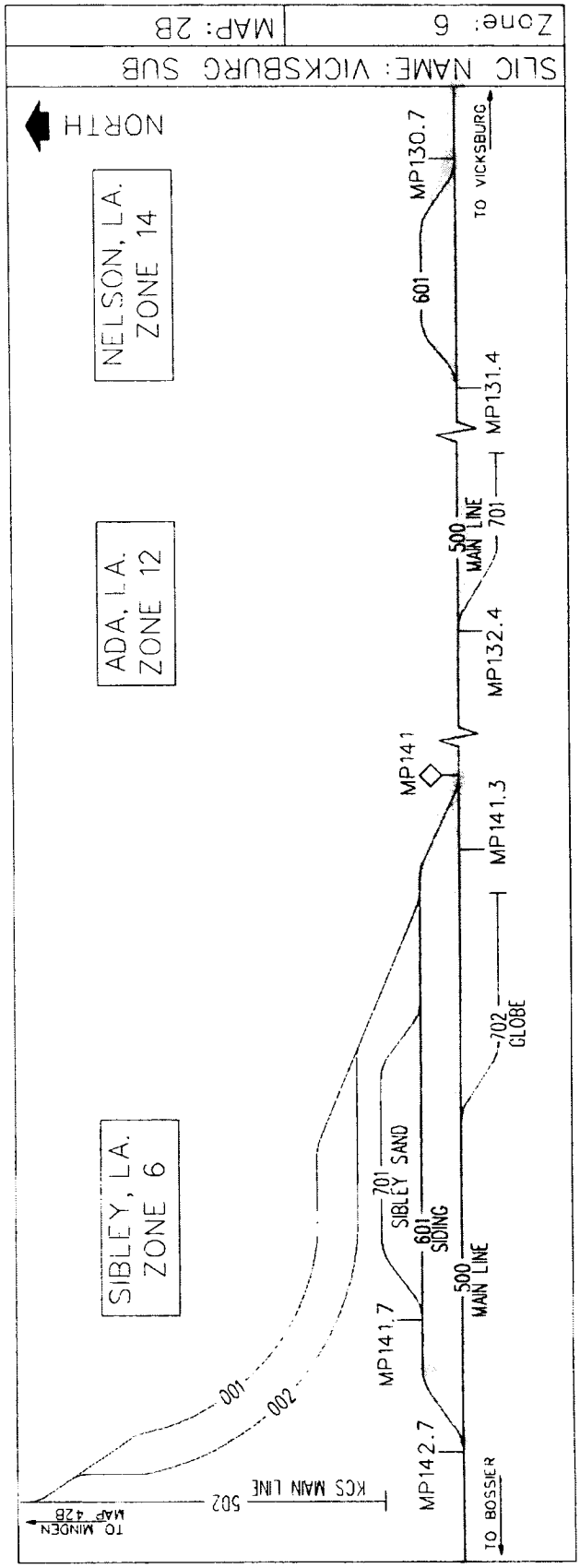
OCTOBER 31, 2001


SLIC NAME: VICKSBURG SUB
Zone: 2
MAP: 1A
NORTH
FOSTERS, LA.
ZONE 2
TO VICKSBURG
MP161.7
MP163.1
BAROID
702
601
SIDING
500
MAIN LINE
HALLIBURTON
701
MP163.3
MP163.6
TO BOSSIER

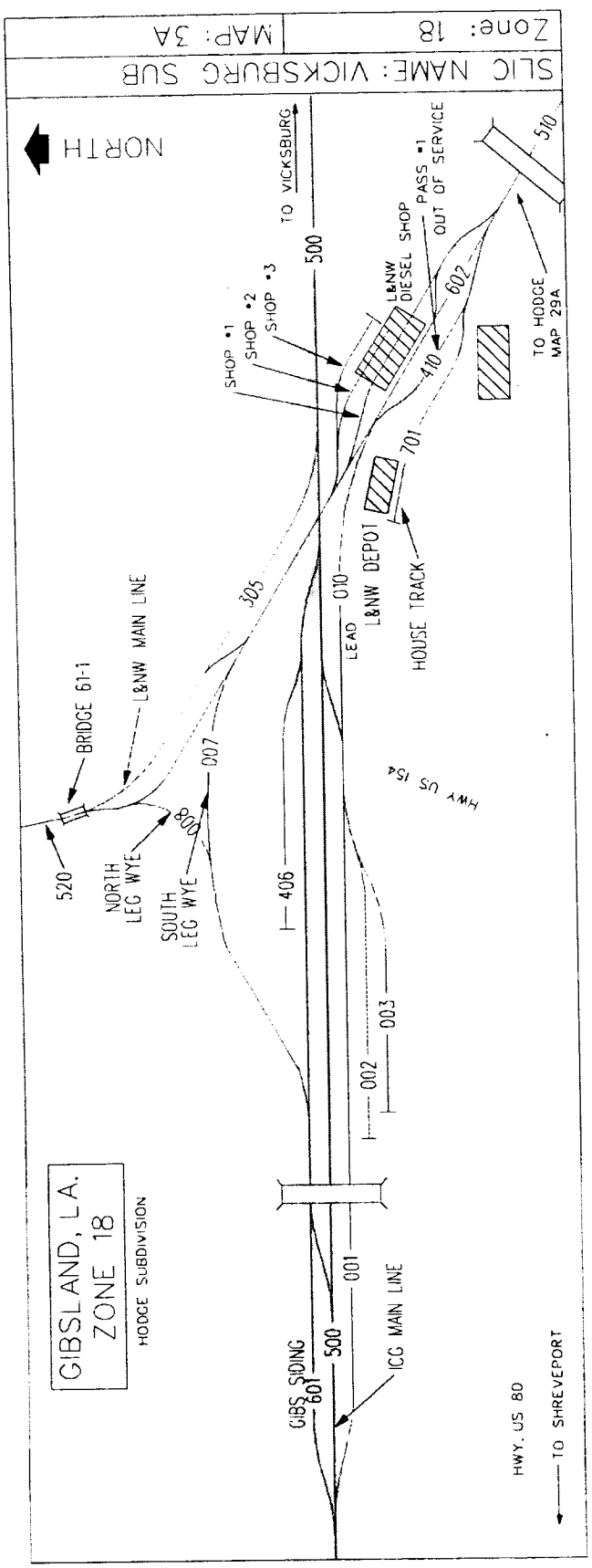

SLIC NAME: VICKSBURG SUB
Zone: 8
MAP: 1B
NORTH
HAUGHTON, LA.
ZONE 8
TO VICKSBURG
MP152.7
702
MP151.3
BLAZER
CONSTRUCTION
601
SIDING
500
MAIN LINE
MP154.0
MP154.5
701
STONE CONTAINER
TO BOSSIER

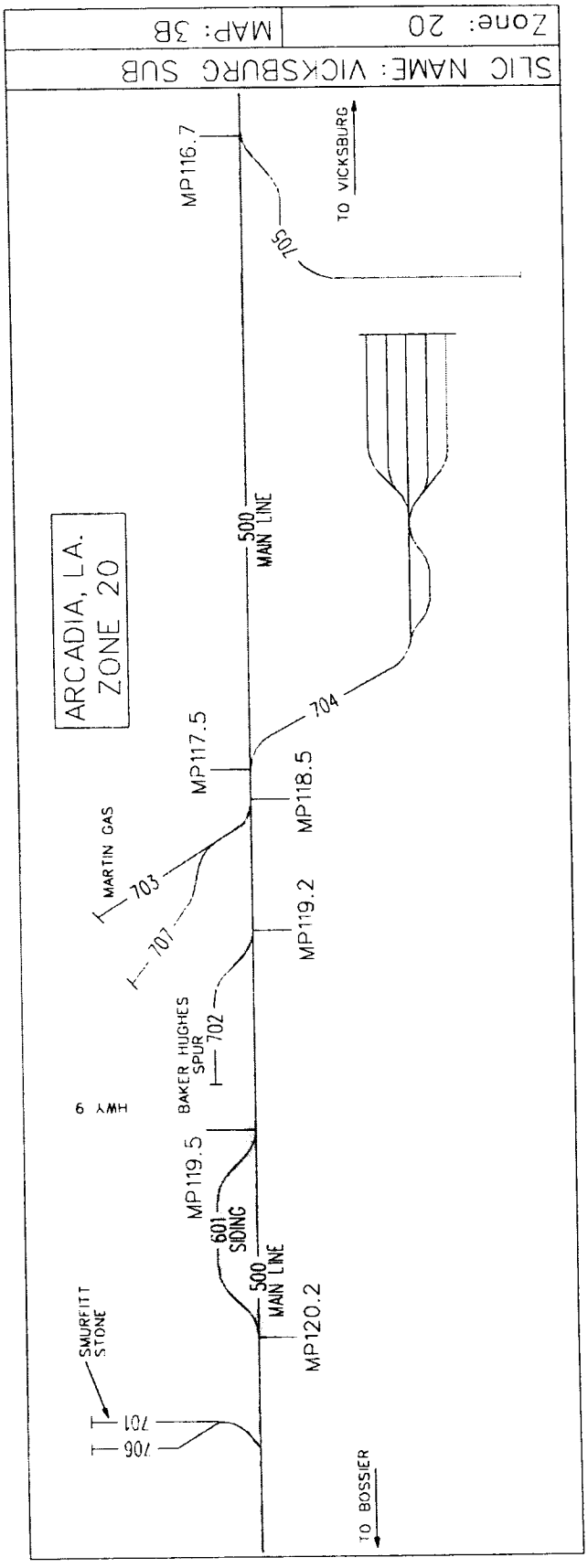
PAGE 1


Zone: 4
MAP: 2A
SLIC NAME: VICKSBURG SUB
NORTH
DOYLINE, LA.
ZONE 4
MP147.5
TO VICKSBURG
601
SIDING
MP148.3
EAST LEG WYE
002
100
WEST LEG WYE
MP148.7
DOYLINE INTERCHANGE
500
MAIN LINE
INDUSTRY TRACK
OUT OF SERVICE
702
301
MP149.0
TO BOSSIER

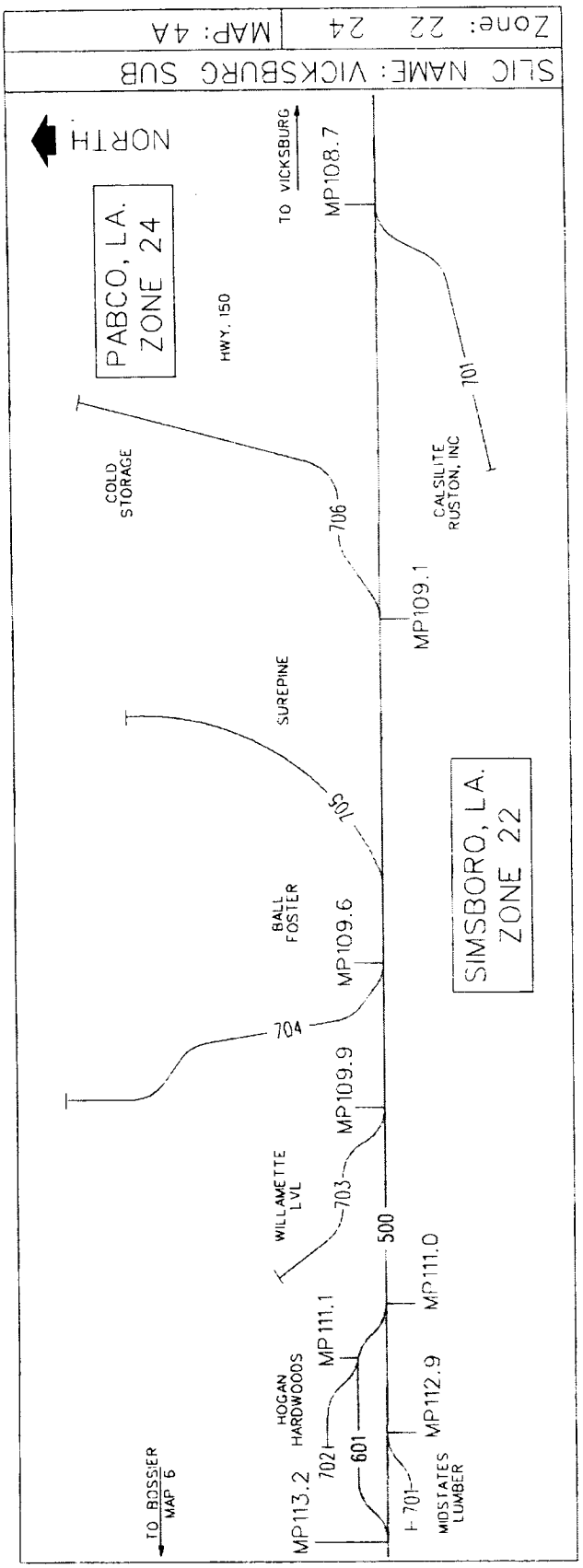

Zone: 6
MAP: 2B
SLIC NAME: VICKSBURG SUB
NORTH
NELSON, LA.
ZONE 14
ADA, LA.
ZONE 12
SIBLEY, LA.
ZONE 6
MP130.7
TO VICKSBURG
601
MP131.4
500
MAIN LINE
701
MP132.4
MP141
MP141.3
702
GLOBE
701
SIBLEY SAND
601
SIDING
500
MAIN LINE
MP141.7
001
002
MP142.7
TO BOSSIER
502
KCS MAIN LINE
TO MINDEN
MAP 42B

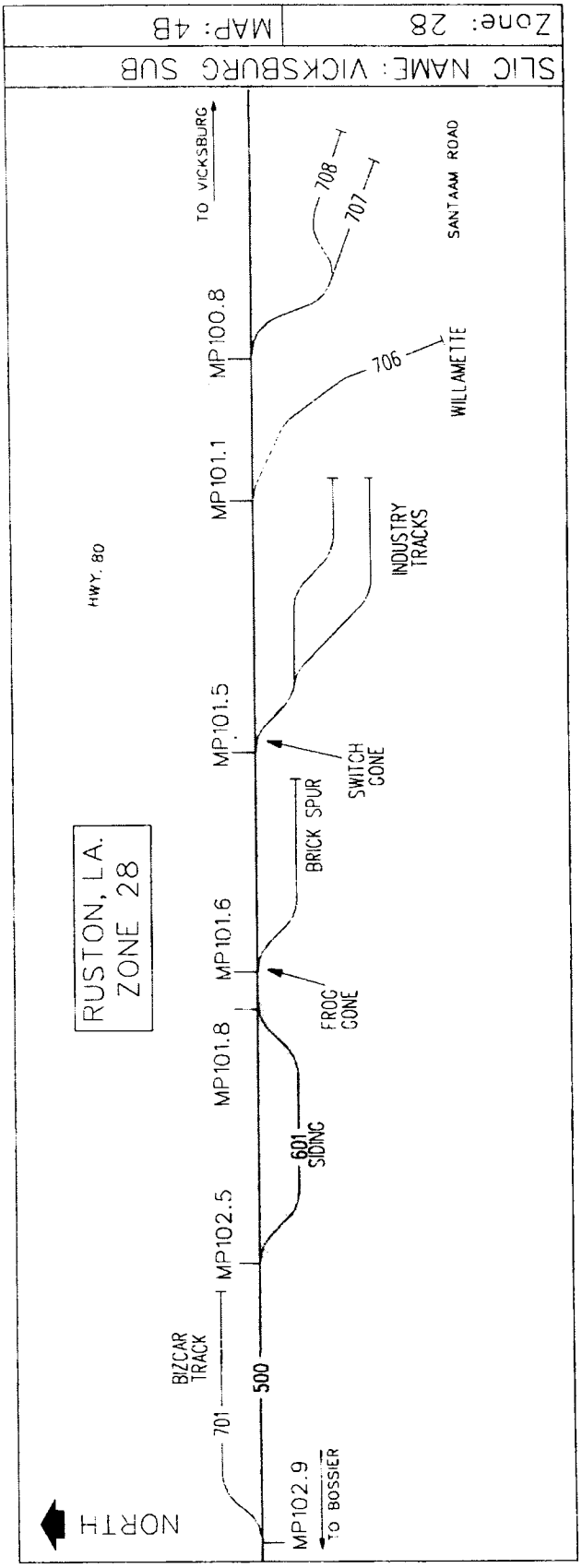
PAGE 2

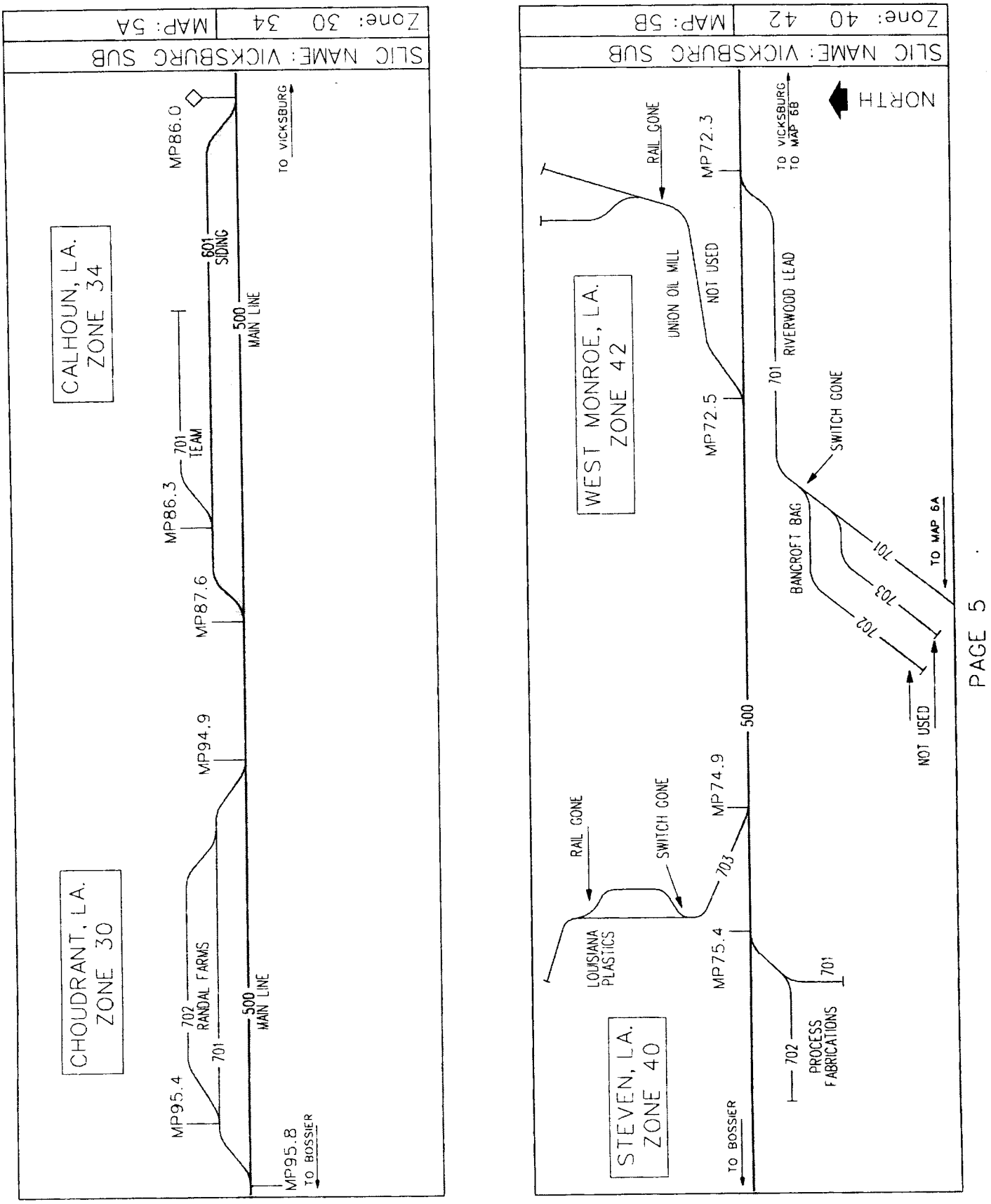

SLIC NAME: VICKSBURG SUB
Zone: 18
MAP: 3A
NORTH
TO VICKSBURG
500
SHOP •1
SHOP •2
SHOP •3
L&NW DIESEL SHOP
PASS •1
OUT OF SERVICE
510
602
410
TO HODGE
MAP 29A
701
L&NW DEPOT
HOUSE TRACK
LEAD
010
305
BRIDGE 61-1
L&NW MAIN LINE
007
800
520
NORTH
LEG WYE
SOUTH
LEG WYE
406
HWY US 84
003
002
GIBSLAND, LA.
ZONE 18
HODGE SUBDIVISION
GIBS SIDING
601
500
001
ICG MAIN LINE
HWY. US 80
TO SHREVEPORT


SLIC NAME: VICKSBURG SUB
Zone: 20
MAP: 3B
MP116.7
TO VICKSBURG
101
500
MAIN LINE
ARCADIA, LA.
ZONE 20
704
MP117.5
MP118.5
MARTIN GAS
703
707
MP119.2
BAKER HUGHES
SPUR
702
HWY 9
MP119.5
601
SIDING
500
MAIN LINE
MP120.2
SMURFITT
STONE
701
706
TO BOSSIER

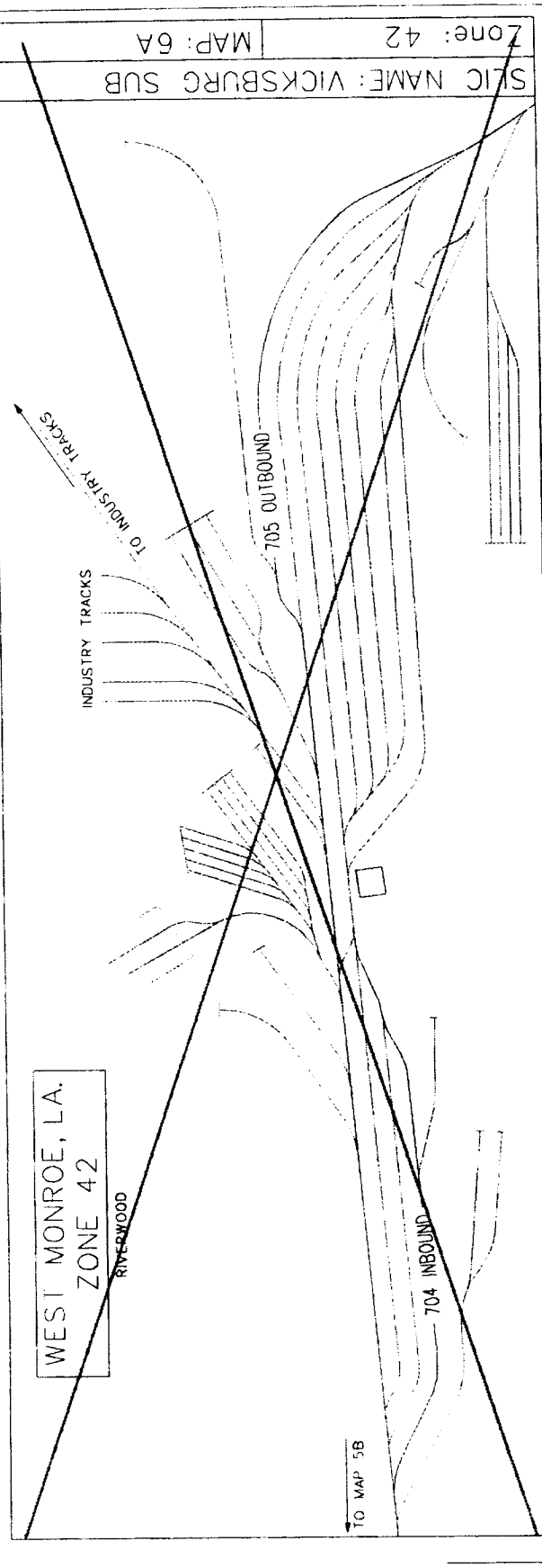
PAGE 3

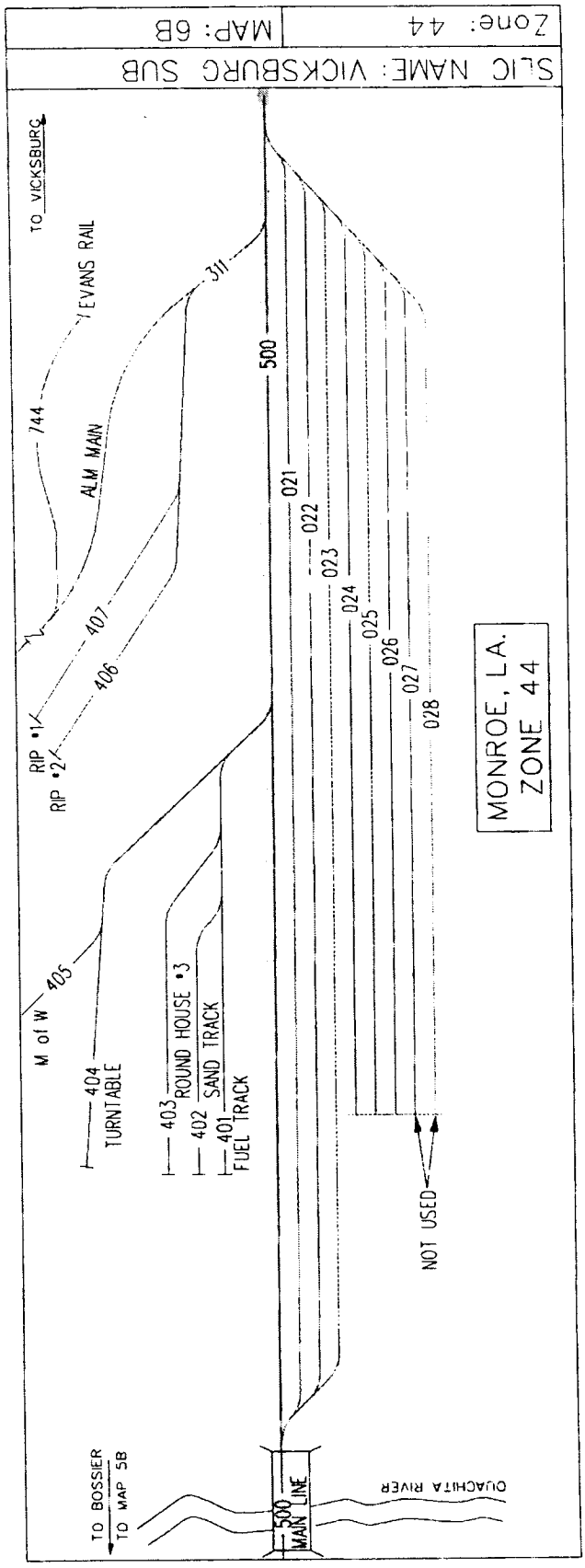

SLIC NAME: VICKSBURG SUB
Zone: 22 24
MAP: 4A
NORTH
PABCO, LA.
ZONE 24
HWY. 150
TO VICKSBURG
MP108.7
COLD STORAGE
706
CALSILITE RUSTON, INC
701
MP109.1
SURepine
705
BALL FOSTER
MP109.6
704
SIMSBORO, LA.
ZONE 22
MP109.9
WILLAMETTE LVL
703
500
MP111.0
MP111.1
HOGAN HARDWOODS
702
601
701
MP112.9
MIDSTATES LUMBER
MP113.2
TO BOSSIER MAP 6

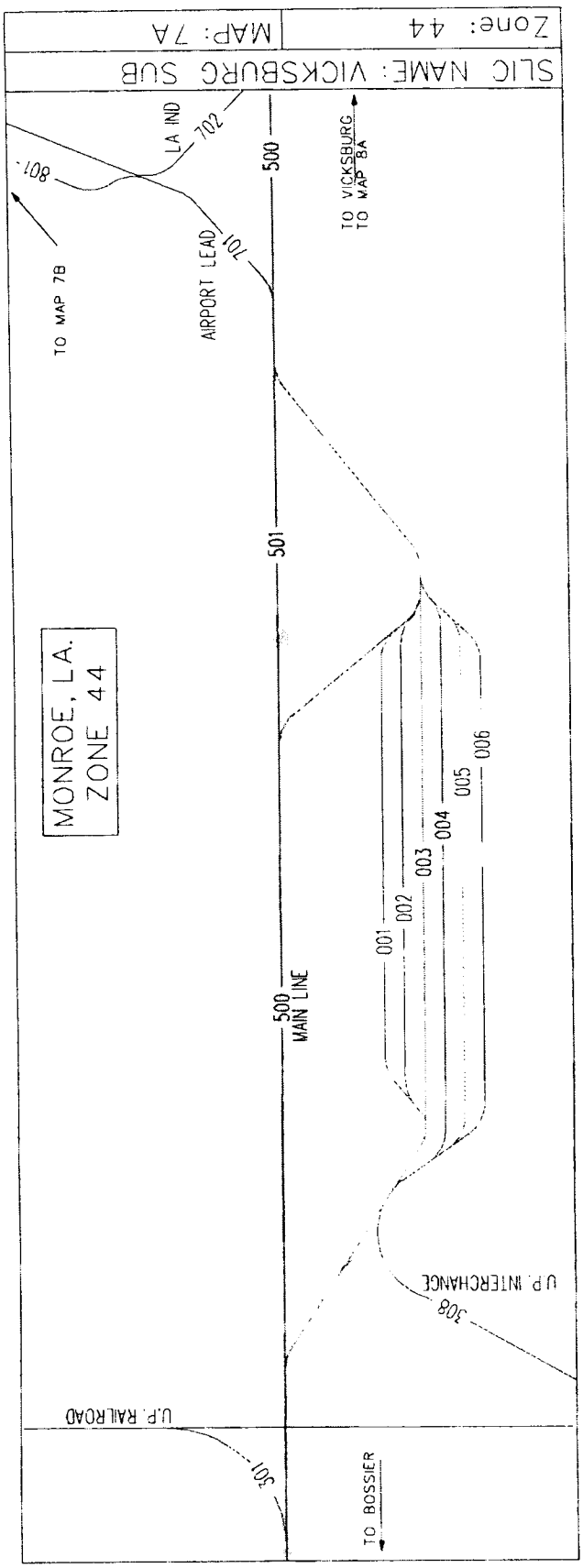

SLIC NAME: VICKSBURG SUB
Zone: 28
MAP: 4B
NORTH
RUSTON, LA.
ZONE 28
HWY. 80
TO VICKSBURG
MP100.8
708
707
SANTAAM ROAD
706
WILLAMETTE
MP101.1
INDUSTRY TRACKS
MP101.5
SWITCH CONE
BRICK SPUR
MP101.6
FROC CONE
MP101.8
601 SIDING
MP102.5
BIZCAR TRACK
701
500
MP102.9
TO BOSSIER

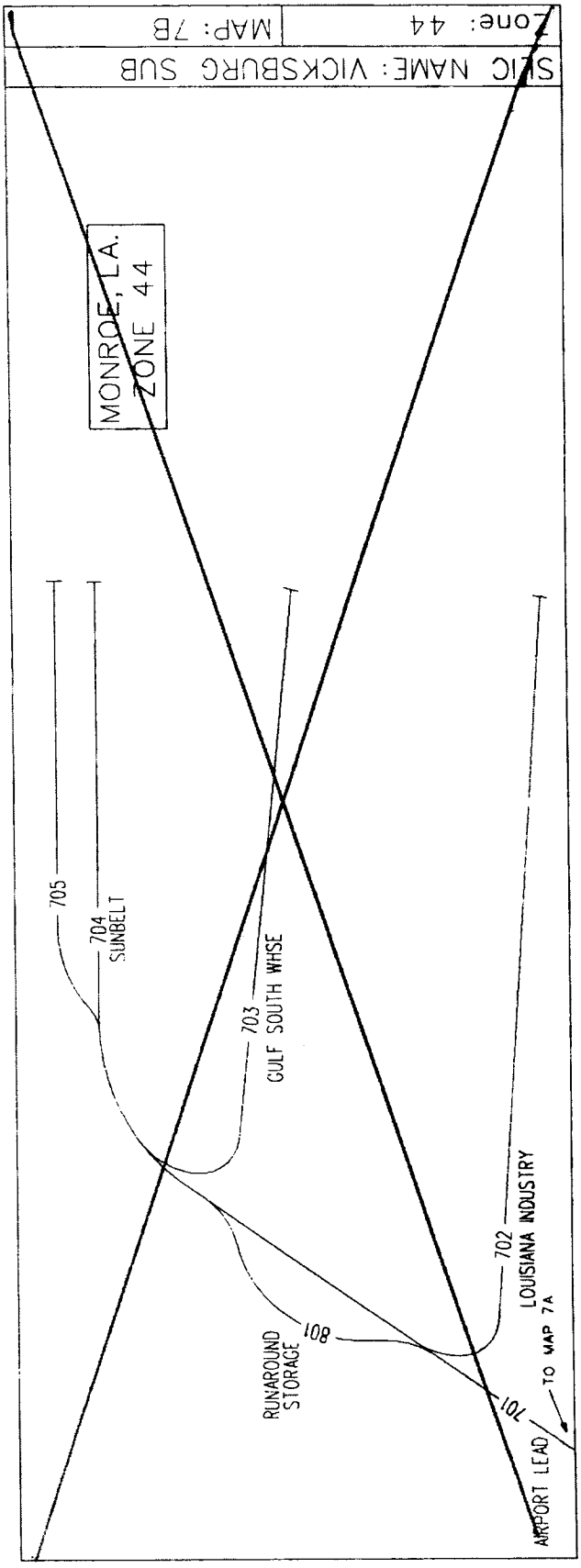

SLIC NAME: VICKSBURG SUB
Zone: 30 34 MAP: 5A
CALHOUN, LA.
ZONE 34
CHOUDRANT, LA.
ZONE 30
MP86.0
TO VICKSBURG
601
SIDING
500
MAIN LINE
MP86.3
701
TEAM
MP87.6
MP94.9
MP95.4
702
RANDAL FARMS
701
500
MAIN LINE
MP95.8
TO BOSSIER
SLIC NAME: VICKSBURG SUB
Zone: 40 42 MAP: 5B
NORTH
WEST MONROE, LA.
ZONE 42
STEVEN, LA.
ZONE 40
RAIL GONE
UNION OIL MILL
NOT USED
MP72.3
TO VICKSBURG
TO MAP 6B
MP72.5
701
RIVERWOOD LEAD
SWITCH GONE
BANCROFT BAG
701
703
702
TO MAP 6A
NOT USED
500
RAIL GONE
SWITCH GONE
MP74.9
703
LOUISIANA PLASTICS
MP75.4
701
702
PROCESS FABRICATIONS
TO BOSSIER

PAGE 5

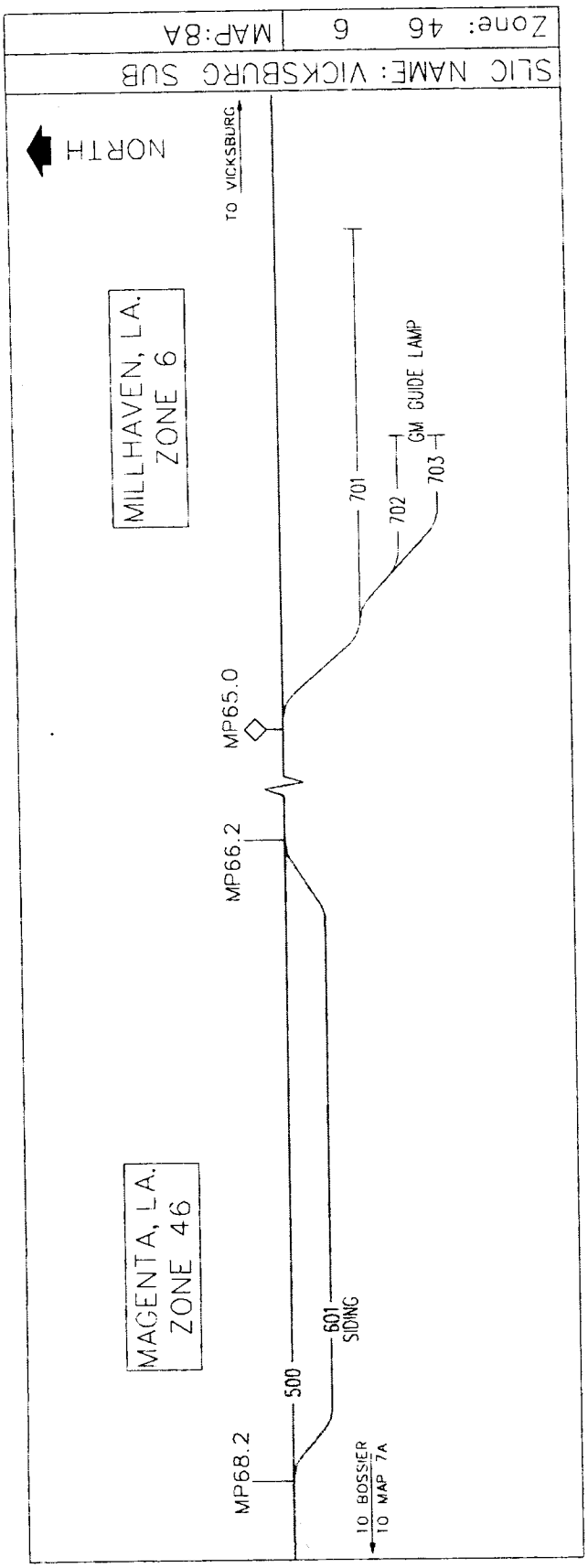

SLIC NAME: VICKSBURG SUB
Zone: 42
MAP: 6A
WEST MONROE, LA.
ZONE 42
TO INDUSTRY TRACKS
INDUSTRY TRACKS
705 OUTBOUND
704 INBOUND
TO MAP 5B
REDWOOD

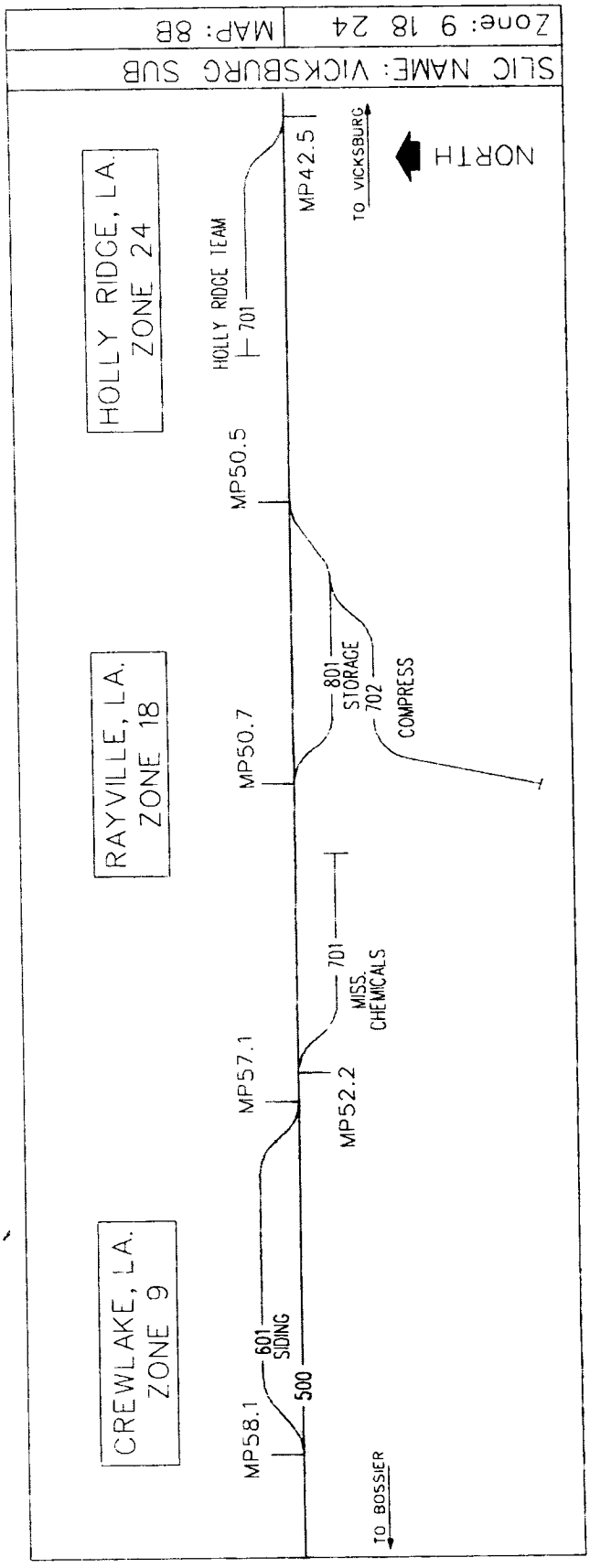

SLIC NAME: VICKSBURG SUB
Zone: 44
MAP: 6B
MONROE, LA.
ZONE 44
TO VICKSBURG
EVANS RAIL
ALM MAIN
744
311
500
021
022
023
024
025
026
027
028
RIP #1
RIP #2
407
406
M of W
405
404
TURNTABLE
403
ROUND HOUSE #3
402
SAND TRACK
401
FUEL TRACK
NOT USED
TO BOSSIER
TO MAP 5B
500
MAIN LINE
OUACHITA RIVER


SLIC NAME: VICKSBURG SUB
Zone: 44
MAP: 7A
MONROE, LA.
ZONE 44
TO MAP 7B
LA IND
702
801
AIRPORT LEAD
101
500
501
TO VICKSBURG
TO MAP 8A
001
002
003
004
005
006
500
MAIN LINE
U.P. INTERCHANGE
308
U.P. RAILROAD
301
TO BOSSIER

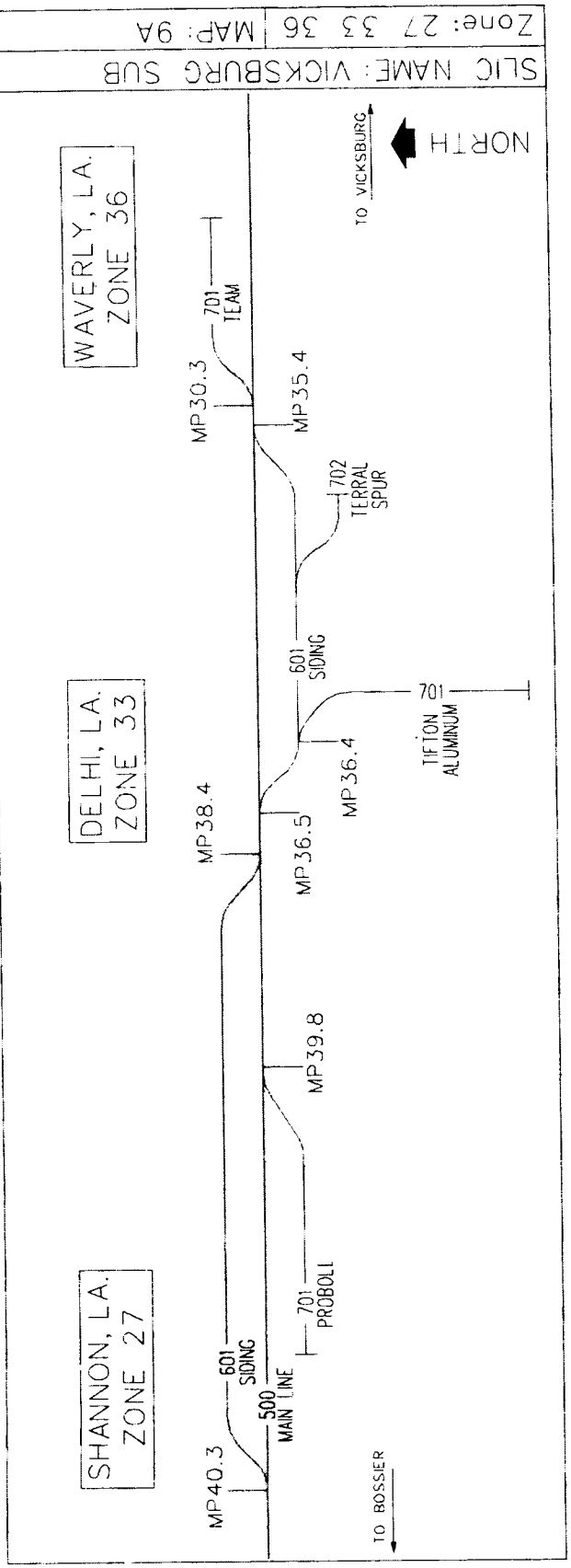

SLIC NAME: VICKSBURG SUB
Zone: 44
MAP: 7B
MONROE, LA.
ZONE 44
705
704
SUNBELT
703
GULF SOUTH WHSE
RUNAROUND
STORAGE
801
108
702
LOUISIANA INDUSTRY
TO MAP 7A
101
AIRPORT LEAD

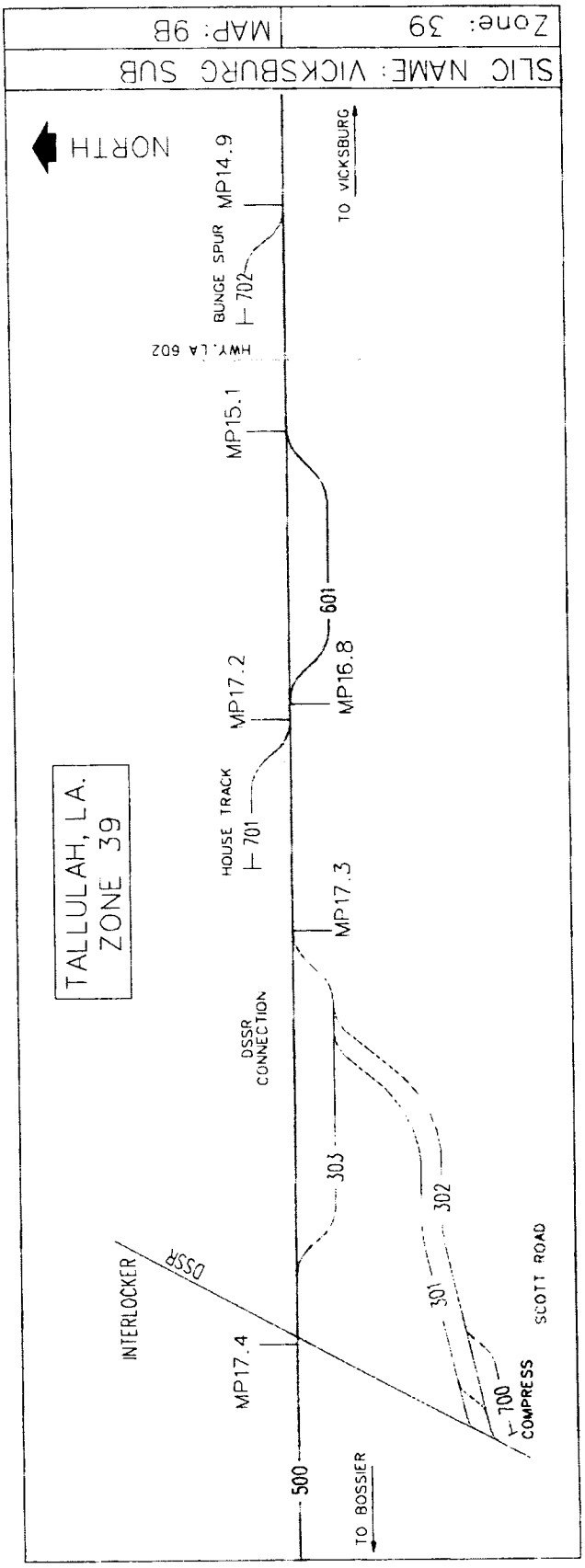
PAGE 7


Zone: 46 6 MAP:8A
SLIC NAME: VICKSBURG SUB
NORTH
TO VICKSBURG
MILLHAVEN, LA.
ZONE 6
MAGENTA, LA.
ZONE 46
MP65.0
MP66.2
MP68.2
701
702
703
GM GUIDE LAMP
500
601
SIDING
TO BOSSIER
TO MAP 7A

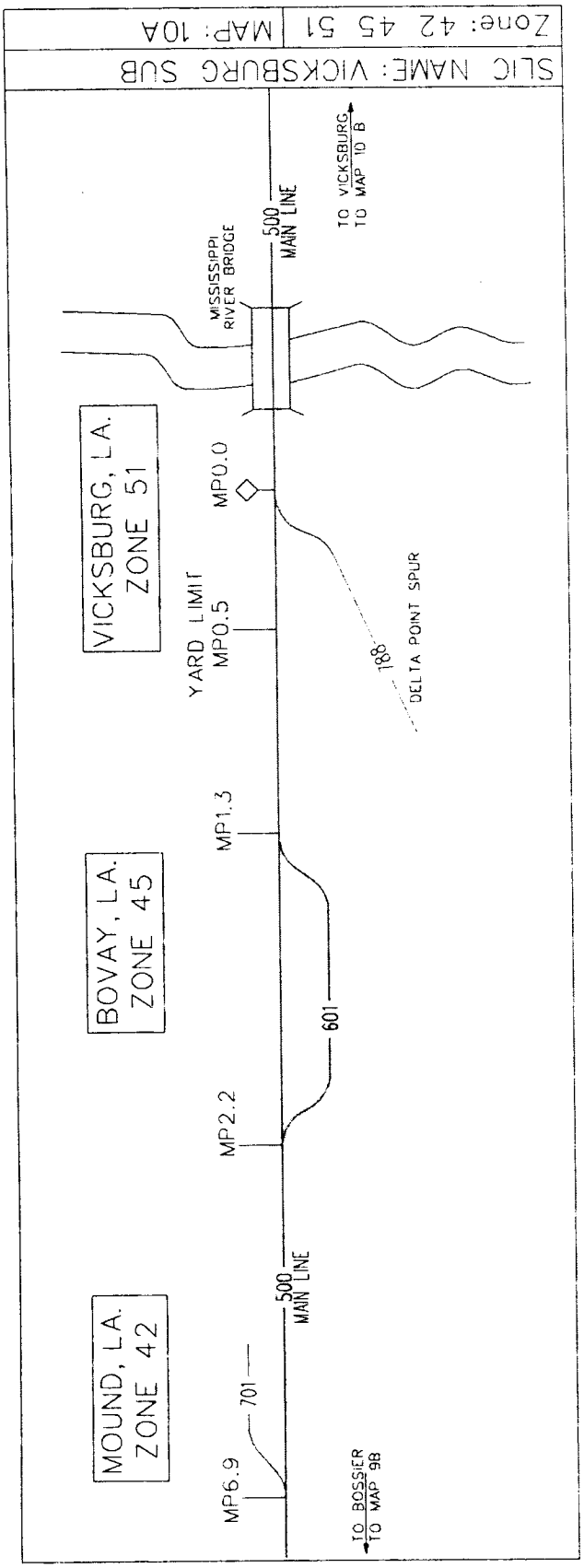

Zone: 9 18 24 MAP: 8B
SLIC NAME: VICKSBURG SUB
NORTH
TO VICKSBURG
HOLLY RIDGE, LA.
ZONE 24
RAYVILLE, LA.
ZONE 18
CREWLAKE, LA.
ZONE 9
MP42.5
MP50.5
MP50.7
MP57.1
MP52.2
MP58.1
HOLLY RIDGE TEAM
701
801
STORAGE
702
COMPRESS
701
MISS.
CHEMICALS
601
SIDING
500
TO BOSSIER

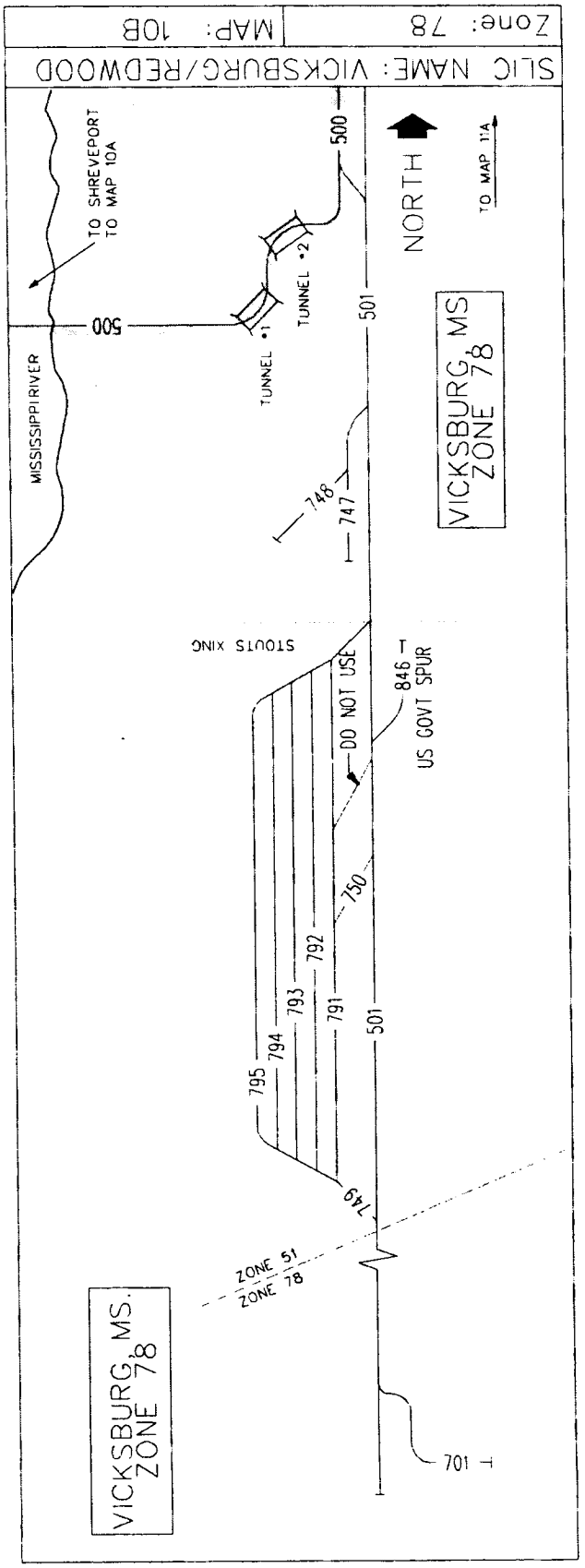
PAGE 8


Zone: 27 33 36 MAP: 9A
SLIC NAME: VICKSBURG SUB
NORTH
TO VICKSBURG
WAVERLY, LA.
ZONE 36
701
TEAM
MP30.3
MP35.4
702
TERRAL
SPUR
DELHI, LA.
ZONE 33
601
SIDING
701
TIFTON
ALUMINUM
MP36.4
MP38.4
MP36.5
MP39.8
SHANNON, LA.
ZONE 27
601
SIDING
500
MAIN LINE
701
PROBOLI
MP40.3
TO BOSSIER

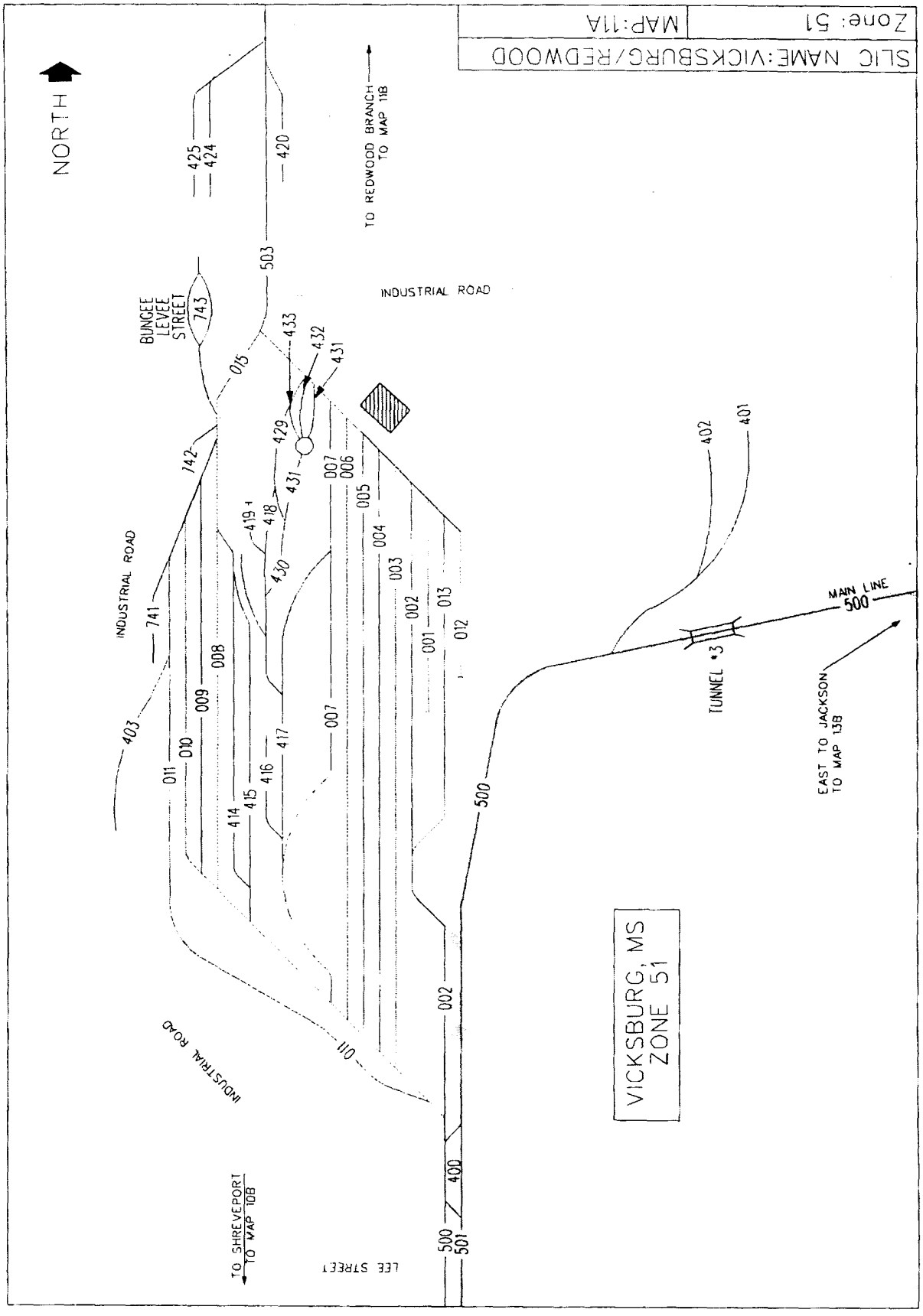

Zone: 39 MAP: 9B
SLIC NAME: VICKSBURG SUB
NORTH
TO VICKSBURG
MP14.9
BUNGE SPUR
702
HWY. LA 602
MP15.1
601
MP16.8
MP17.2
HOUSE TRACK
701
MP17.3
TALLULAH, LA.
ZONE 39
DSSR
CONNECTION
303
302
301
INTERLOCKER
DSSR
MP17.4
100
COMPRESS
SCOTT ROAD
500
TO BOSSIER

PAGE 9

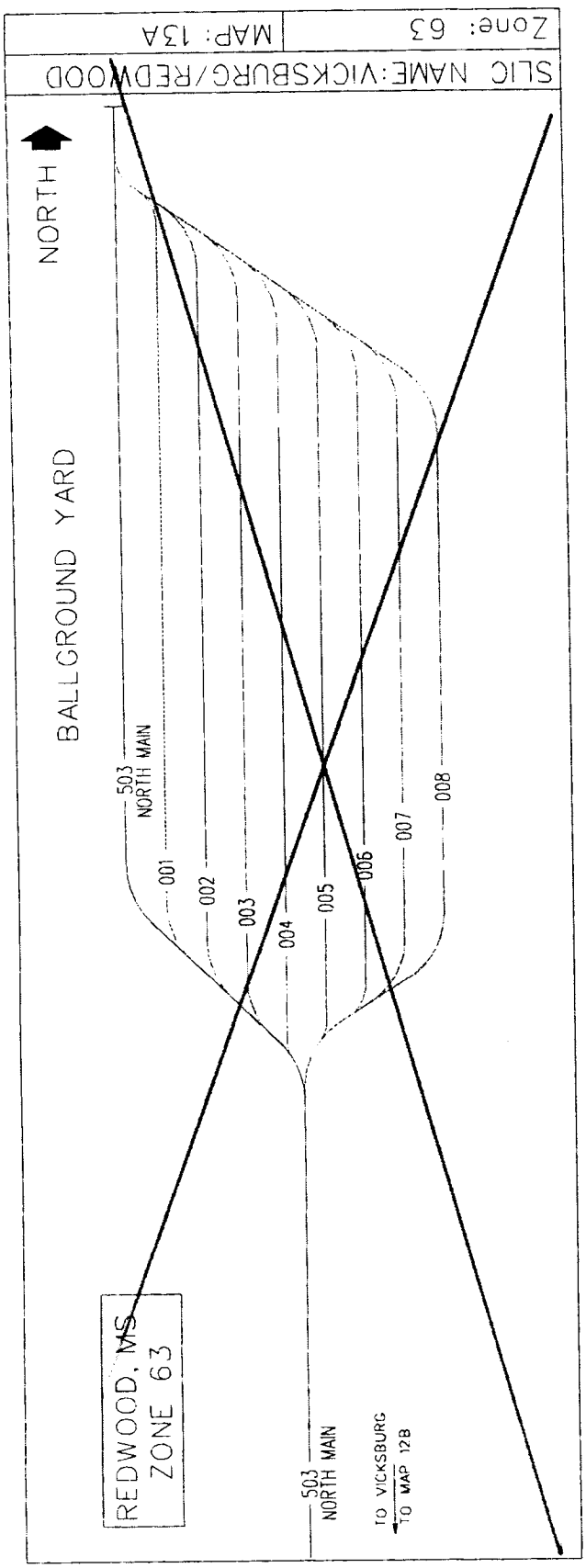

SLIC NAME: VICKSBURG SUB
Zone: 42 45 51
MAP: 10A
VICKSBURG, LA.
ZONE 51
BOVAY, LA.
ZONE 45
MOUND, LA.
ZONE 42
MISSISSIPPI
RIVER BRIDGE
500
MAIN LINE
TO VICKSBURG
TO MAP 10B
MP0.0
YARD LIMIT
MP0.5
DELTA POINT SPUR
188
MP1.3
601
MP2.2
500
MAIN LINE
701
MP6.9
TO BOSSIER
TO MAP 9B

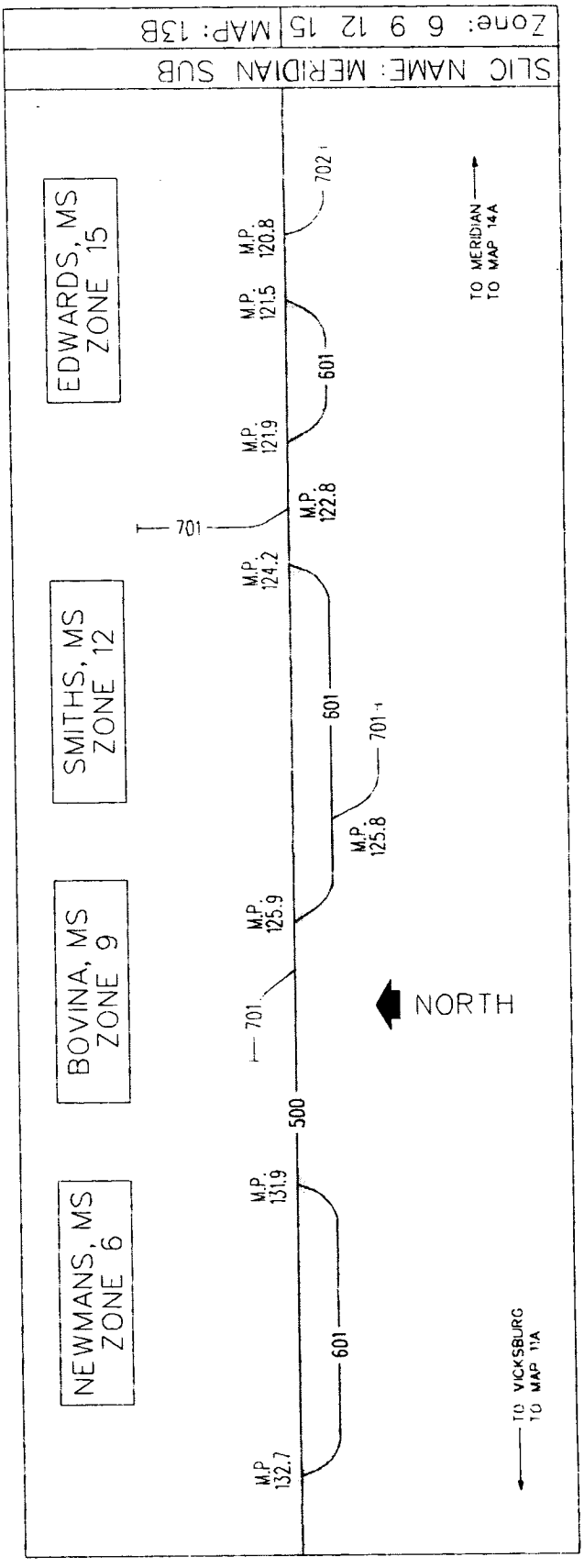

SLIC NAME: VICKSBURG/REDWOOD
Zone: 78
MAP: 10B
TO SHREVEPORT
TO MAP 10A
MISSISSIPPI RIVER
500
TUNNEL #1
TUNNEL #2
500
501
NORTH
TO MAP 11A
VICKSBURG, MS
ZONE 78
748
747
STOUTS XING
846
DO NOT USE
US GOVT SPUR
750
792
793
791
794
795
501
749
ZONE 51
ZONE 78
VICKSBURG, MS.
ZONE 78
701

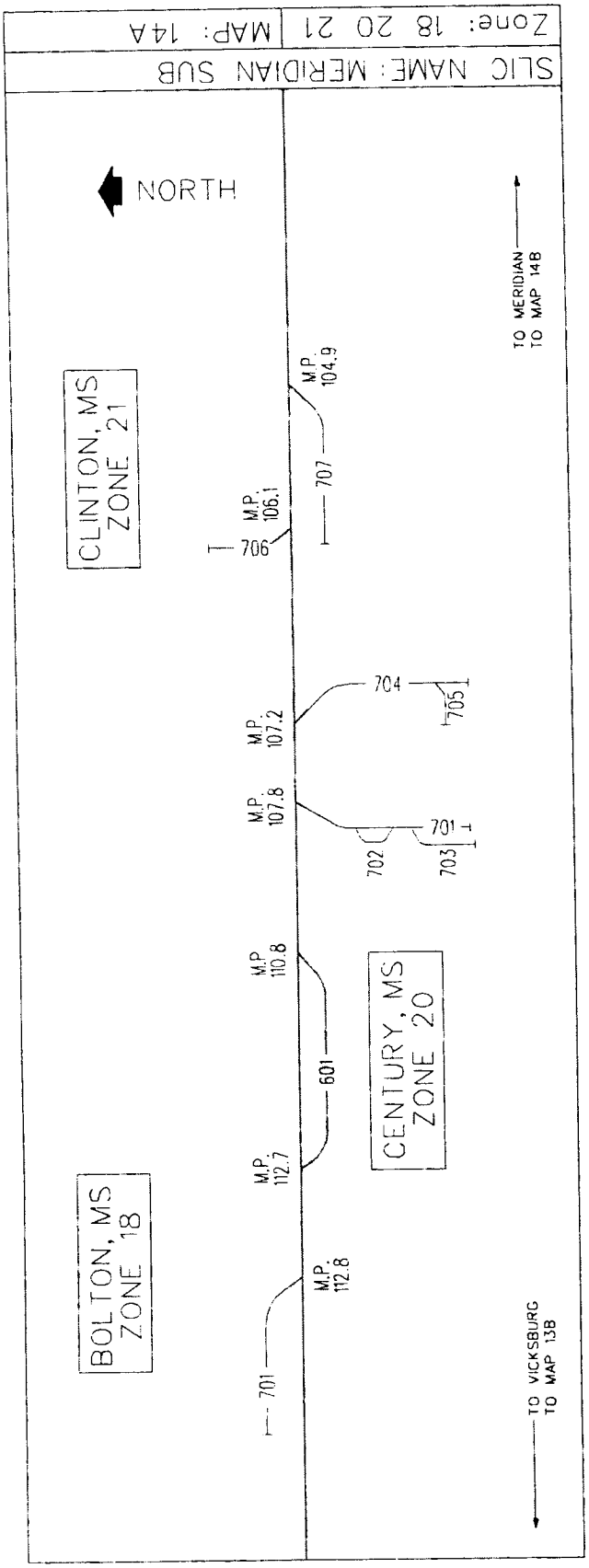
PAGE 10

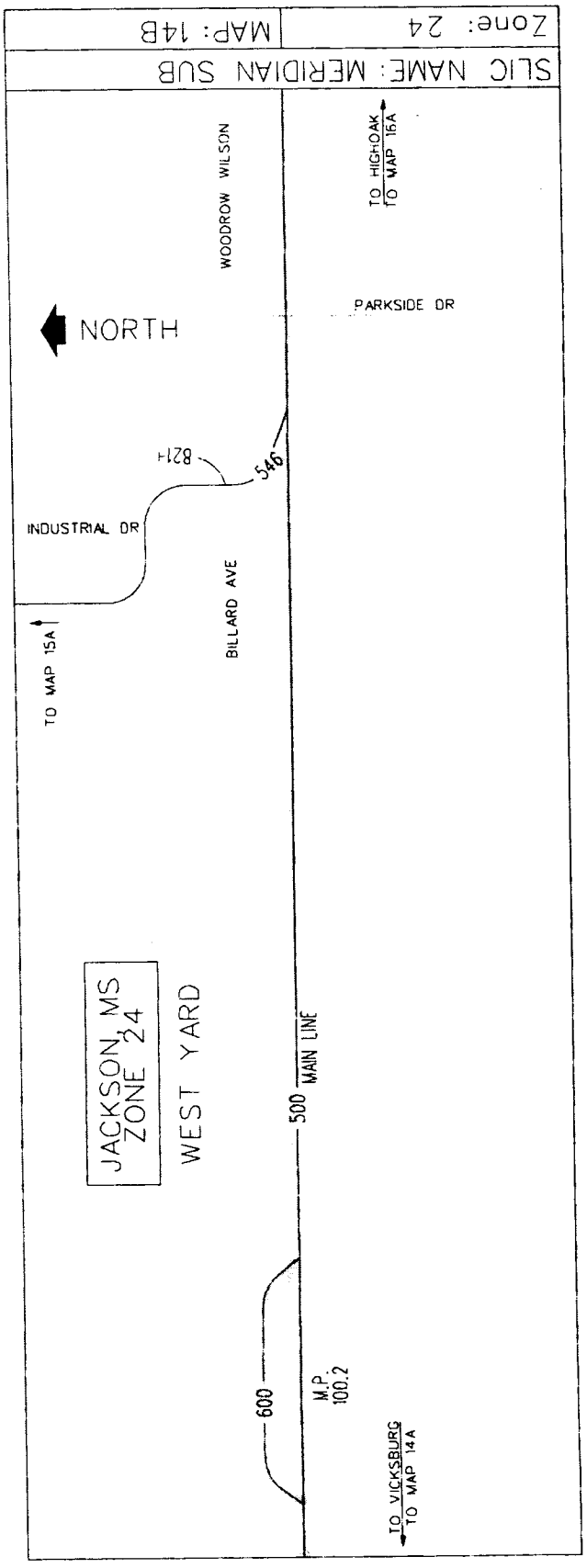

SLIC NAME:VICKSBURG/REDWOOD
Zone: 51
MAP:11A
NORTH
TO REDWOOD BRANCH
TO MAP 118
INDUSTRIAL ROAD
BUNGEE
LEVEE
STREET
INDUSTRIAL ROAD
MAIN LINE
500
TUNNEL #3
EAST TO JACKSON
TO MAP 138
VICKSBURG, MS
ZONE 51
INDUSTRIAL ROAD
TO SHREVEPORT
TO MAP 108
LEE STREET

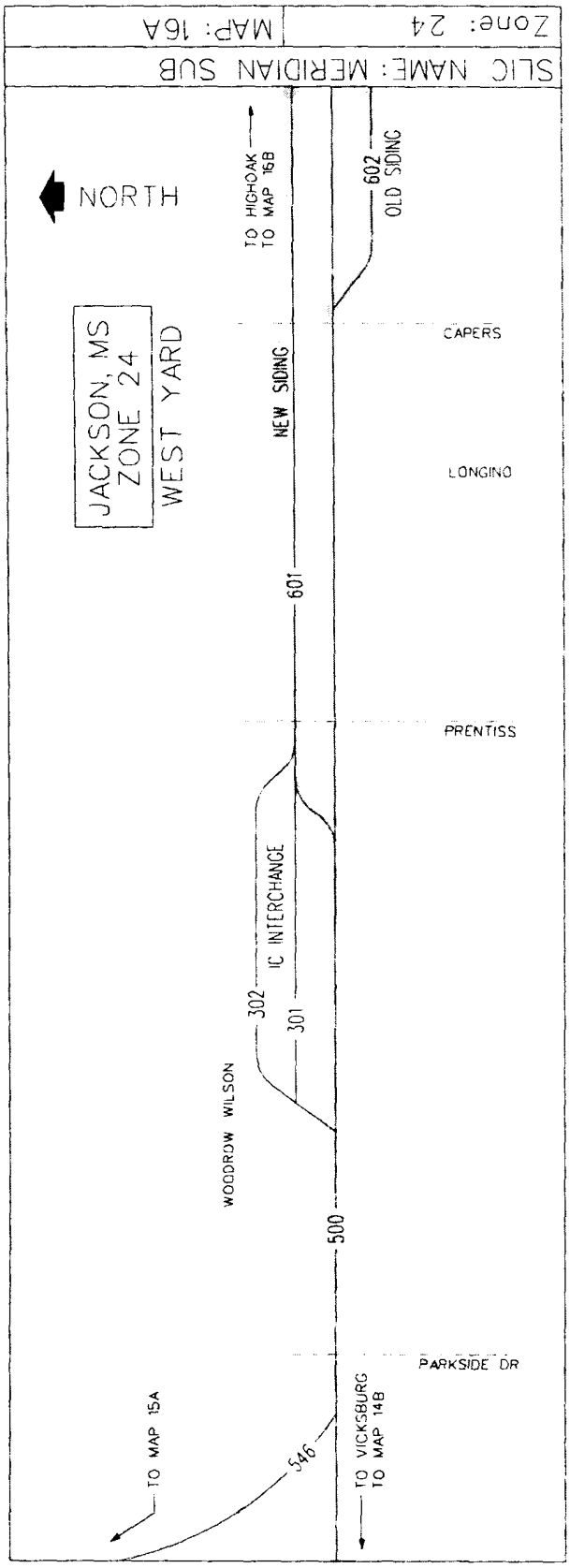
PAGE 11A

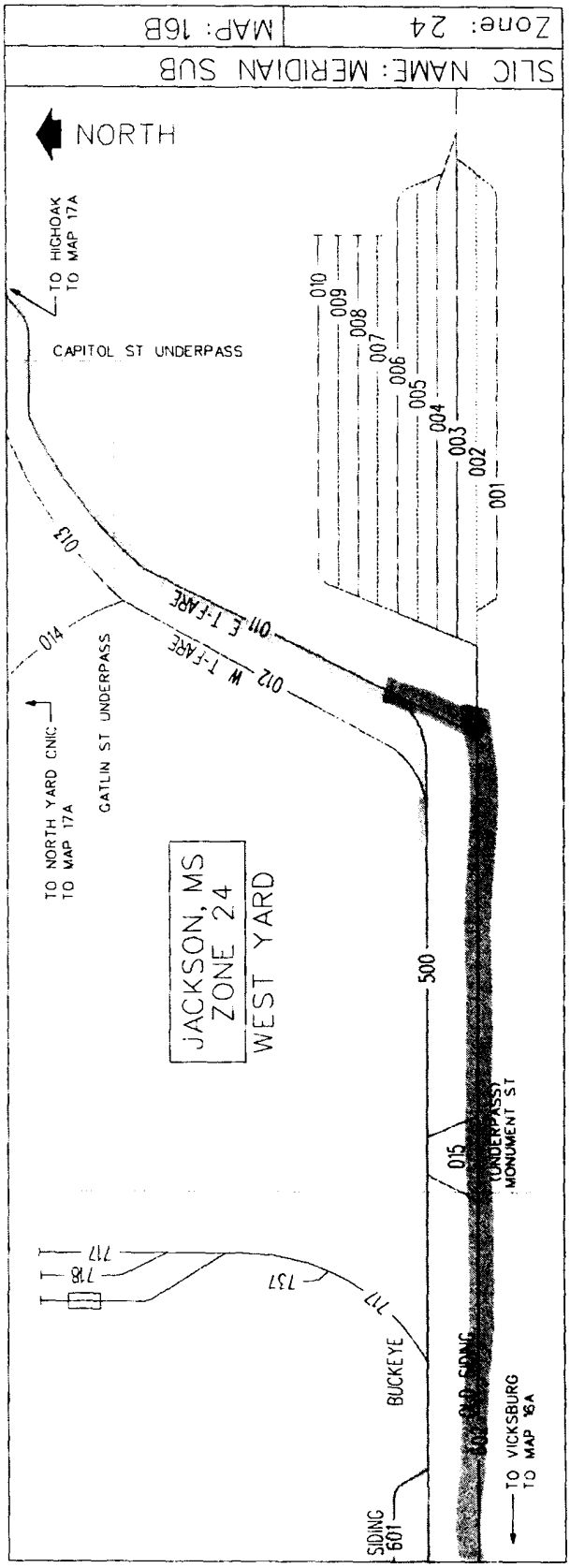

Zone: 63
MAP: 13A
SLIC NAME: VICKSBURG/REDWOOD
NORTH
BALLGROUND YARD
REDWOOD, MS
ZONE 63
503
NORTH MAIN
001
002
003
004
005
006
007
008
503
NORTH MAIN
TO VICKSBURG
TO MAP 12B

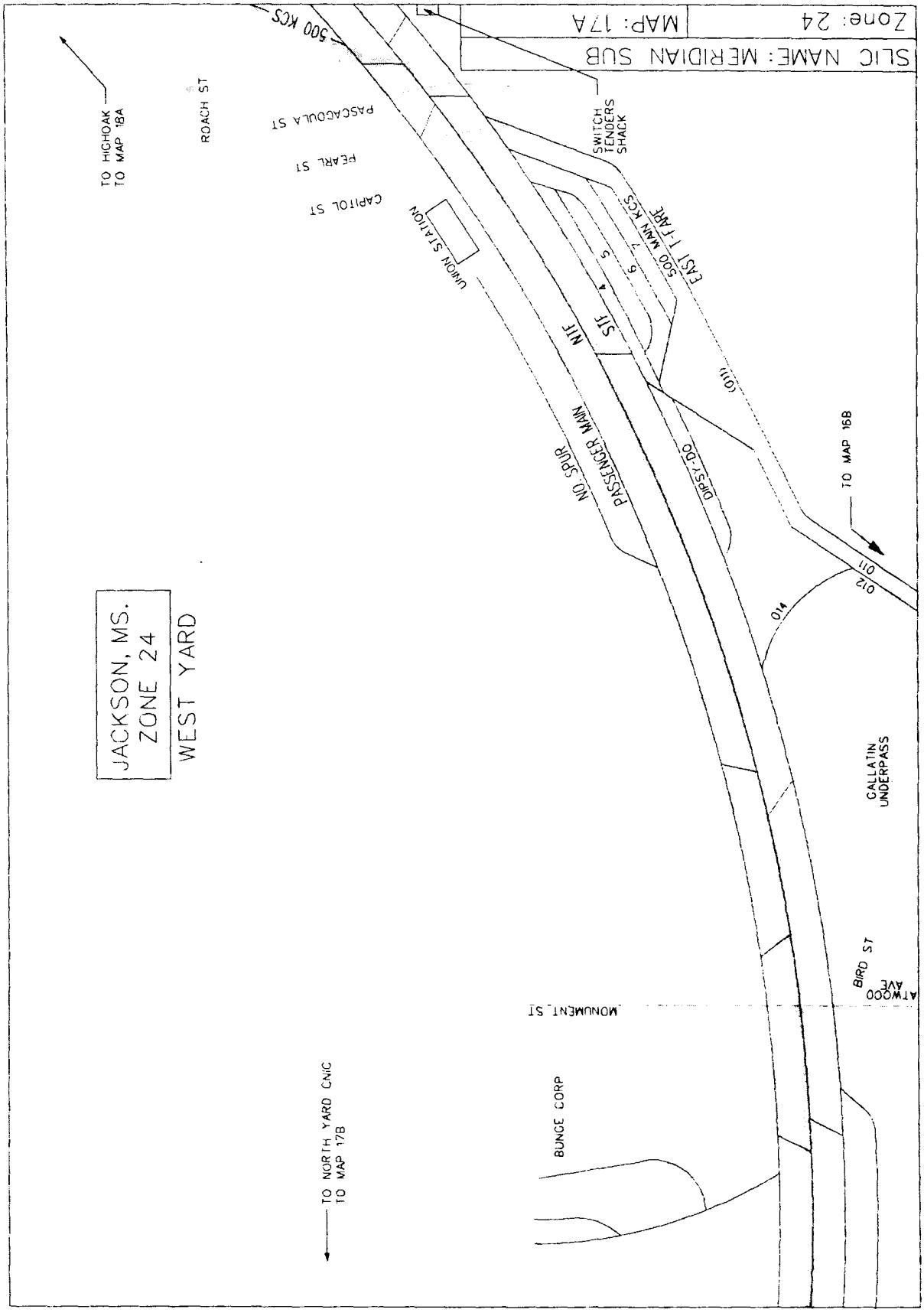

Zone: 6 9 12 15
MAP: 13B
SLIC NAME: MERIDIAN SUB
EDWARDS, MS
ZONE 15
SMITHS, MS
ZONE 12
BOVINA, MS
ZONE 9
NEWMANS, MS
ZONE 6
M.P. 120.8
M.P. 121.5
M.P. 121.9
M.P. 122.8
M.P. 124.2
M.P. 125.8
M.P. 125.9
M.P. 131.9
M.P. 132.7
702
601
701
701
601
601
500
NORTH
TO MERIDIAN
TO MAP 14A
TO VICKSBURG
TO MAP 11A

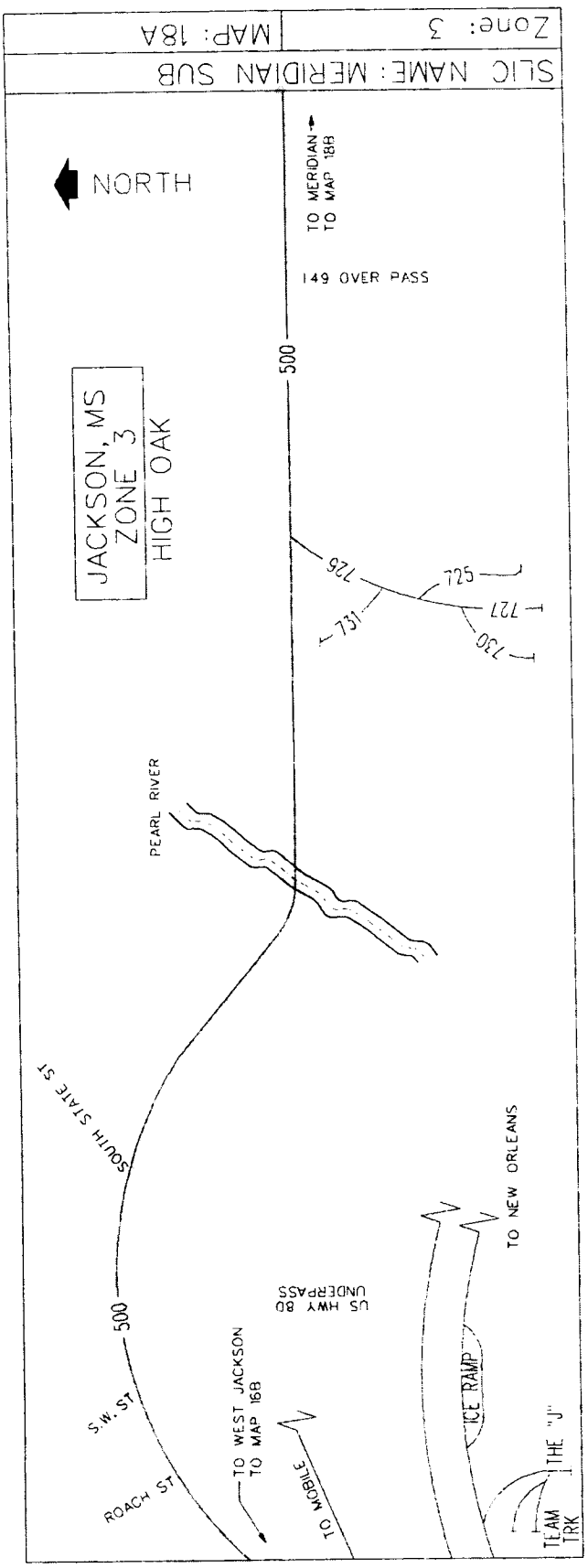

Zone: 18 20 21 MAP: 14A
SLIC NAME: MERIDIAN SUB
NORTH
CLINTON, MS
ZONE 21
BOLTON, MS
ZONE 18
CENTURY, MS
ZONE 20
M.P. 104.9
M.P. 106.1
M.P. 107.2
M.P. 107.8
M.P 110.8
M.P. 112.7
M.P. 112.8
706
707
704
705
701
702
703
601
701
TO MERIDIAN
TO MAP 14B
TO VICKSBURG
TO MAP 13B

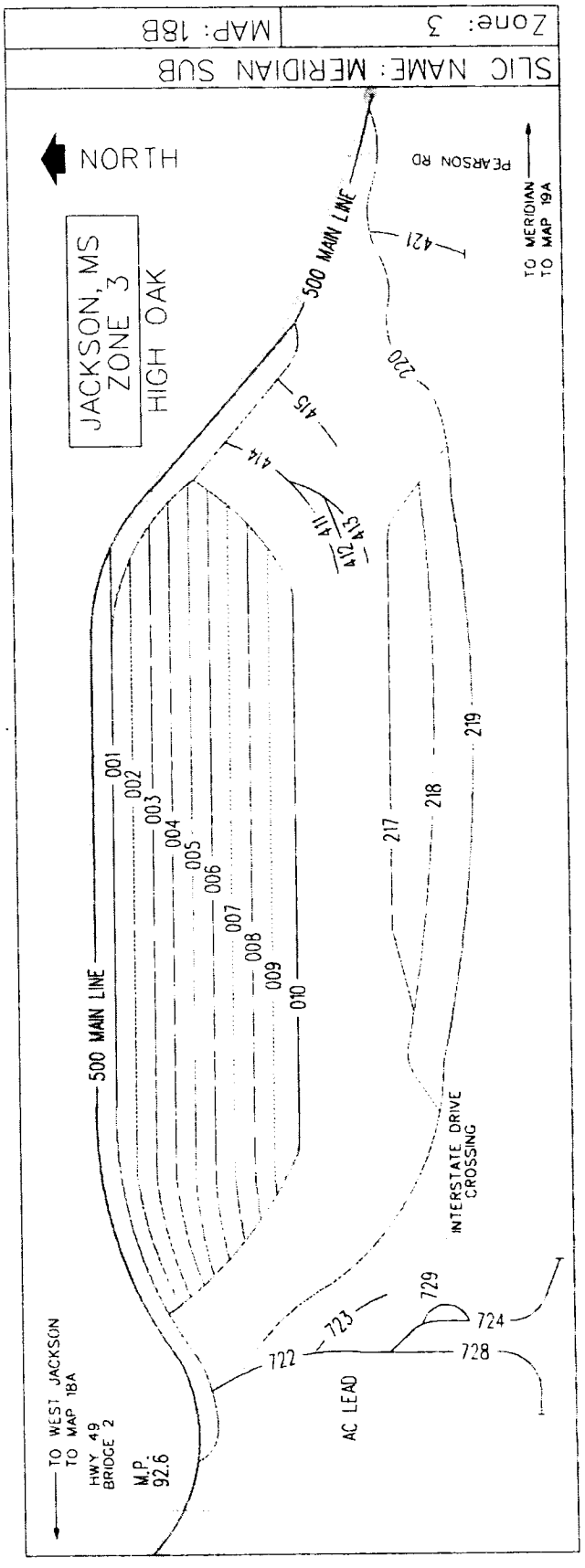

Zone: 24 MAP: 14B
SLIC NAME: MERIDIAN SUB
NORTH
WOODROW WILSON
PARKSIDE DR
TO HIGHOAK
TO MAP 16A
INDUSTRIAL DR
821
546
BILLARD AVE
TO MAP 15A
JACKSON, MS
ZONE 24
WEST YARD
500 MAIN LINE
600
M.P. 100.2
TO VICKSBURG
TO MAP 14A


Zone: 24
MAP: 16A
SLIC NAME: MERIDIAN SUB
NORTH
TO HIGHOAK
TO MAP 16B
602
OLD SIDING
JACKSON, MS
ZONE 24
WEST YARD
NEW SIDING
CAPERS
LONGINO
601
PRENTISS
IC INTERCHANGE
302
301
WOODROW WILSON
500
PARKSIDE DR
TO MAP 15A
546
TO VICKSBURG
TO MAP 14B

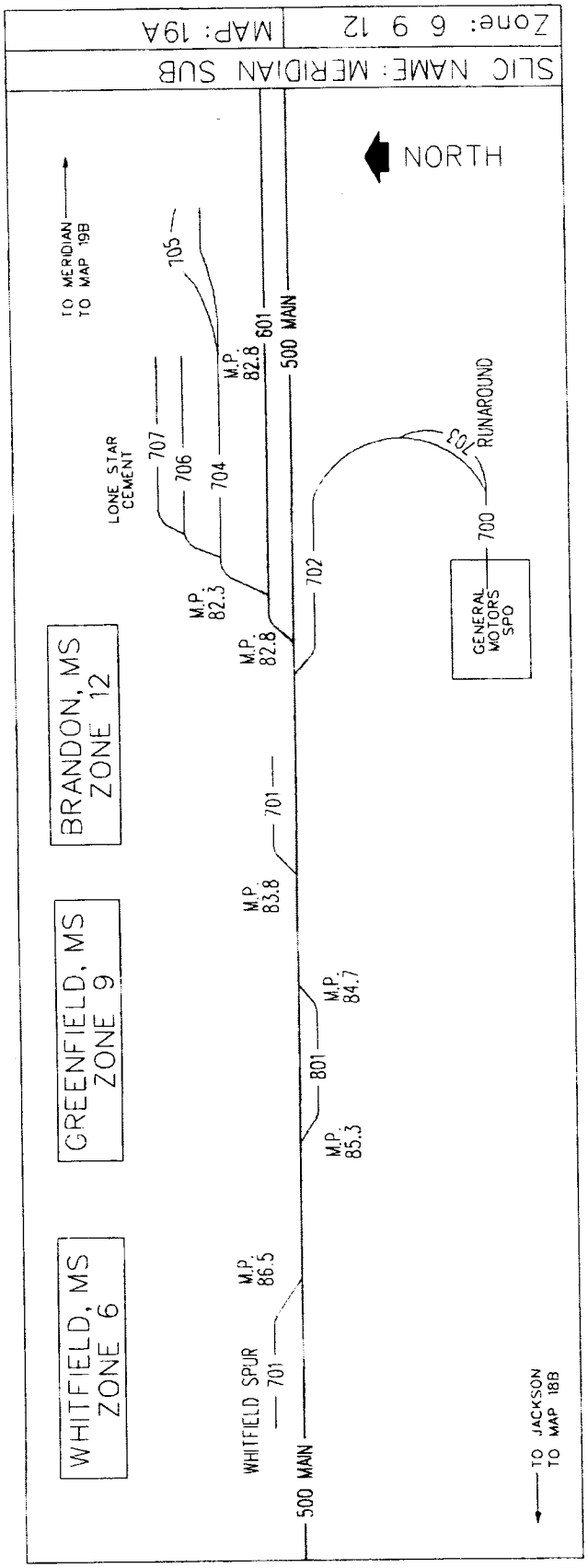

Zone: 24
MAP: 16B
SLIC NAME: MERIDIAN SUB
NORTH
TO HIGHOAK
TO MAP 17A
CAPITOL ST UNDERPASS
010
009
008
007
006
005
004
003
002
001
013
E I-FARE
011
W I-FARE
012
014
TO NORTH YARD CNIC
TO MAP 17A
GATLIN ST UNDERPASS
JACKSON, MS
ZONE 24
WEST YARD
500
015
(UNDERPASS)
MONUMENT ST
717
718
737
717
BUCKEYE
SIDING
601
TO VICKSBURG
TO MAP 16A

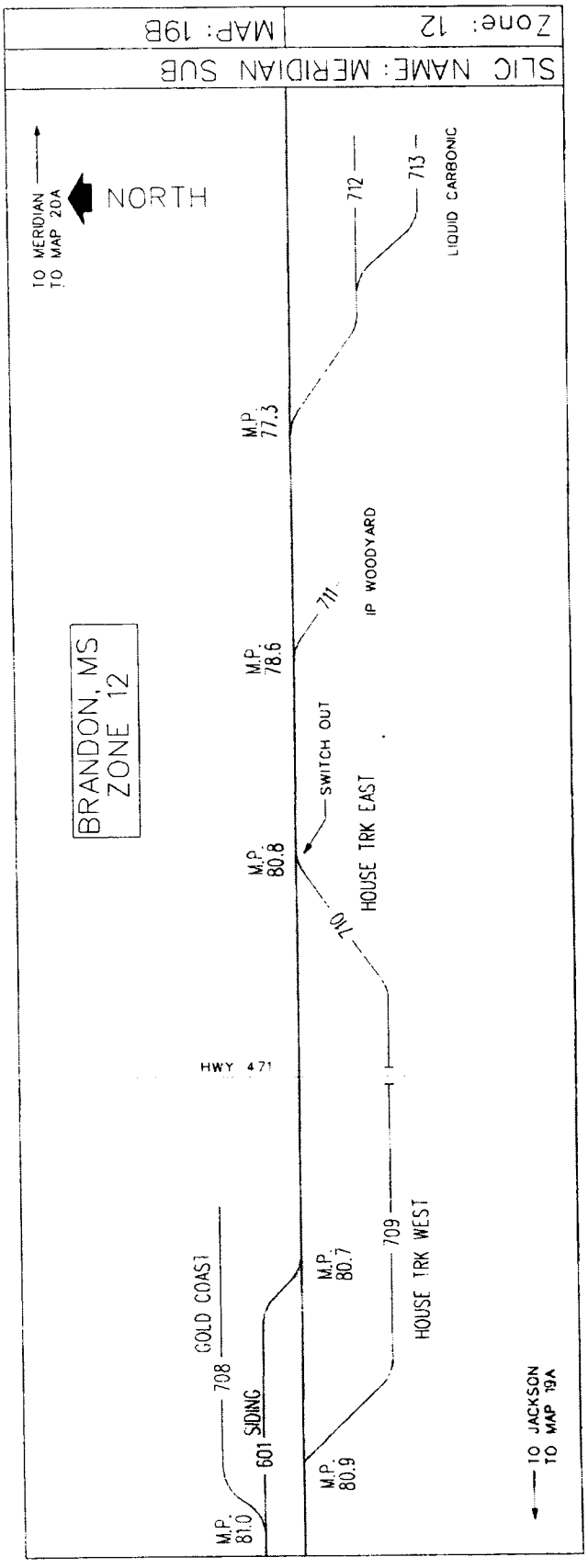

JACKSON, MS.
ZONE 24
WEST YARD
SLIC NAME: MERIDIAN SUB
Zone: 24
MAP: 17A
TO HIGHOAK
TO MAP 18A
ROACH ST
PASCAGOULA ST
PEARL ST
CAPITOL ST
500 KCS
UNION STATION
SWITCH TENDERS SHACK
EAST T-F APE
500 MAIN KCS
NTF
STF
NO. SPUR
PASSENGER MAIN
GRADE-SEP
TO MAP 16B
GALLATIN UNDERPASS
BIRD ST
ATWOOD AVE
MONUMENT ST
BUNGE CORP
TO NORTH YARD CNIC
TO MAP 17B

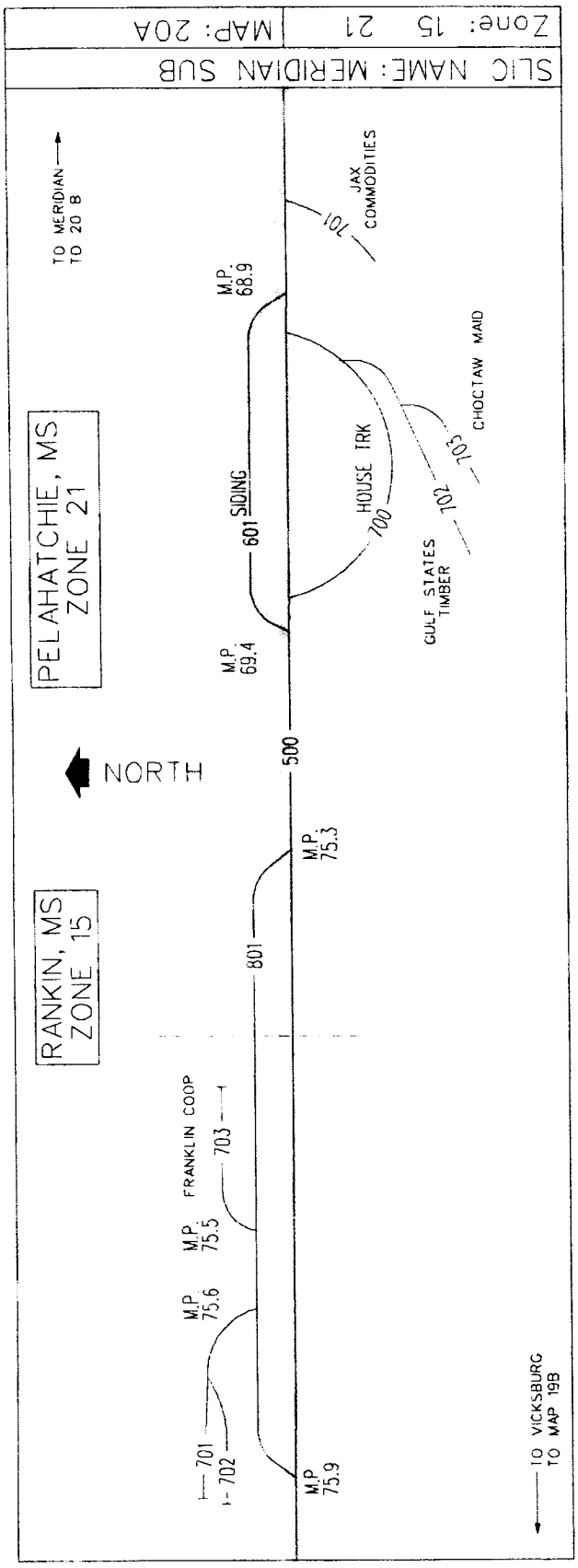

Zone: 3
MAP: 18A
SLIC NAME: MERIDIAN SUB
NORTH
TO MERIDIAN
TO MAP 18B
149 OVER PASS
JACKSON, MS
ZONE 3
HIGH OAK
500
726
725
727
730
PEARL RIVER
SOUTH STATE ST
500
S.W. ST
ROACH ST
TO WEST JACKSON
TO MAP 16B
TO MOBILE
US HWY 80
UNDERPASS
TO NEW ORLEANS
ICE RAMP
TEAM TRK
THE "J"

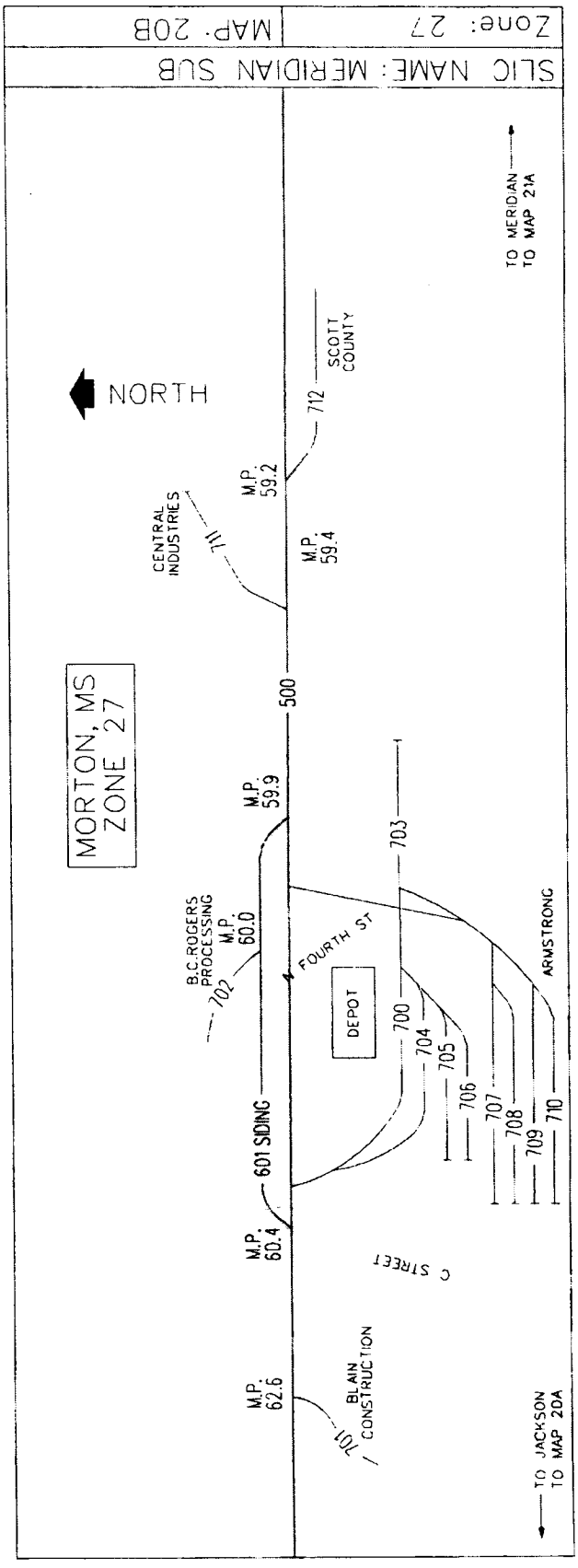

Zone: 3
MAP: 18B
SLIC NAME: MERIDIAN SUB
NORTH
PEARSON RD
TO MERIDIAN
TO MAP 19A
JACKSON, MS
ZONE 3
HIGH OAK
500 MAIN LINE
421
220
415
414
411
413
219
001
002
003
004
005
006
007
008
009
010
217
218
219
500 MAIN LINE
INTERSTATE DRIVE
CROSSING
729
724
723
728
722
AC LEAD
TO WEST JACKSON
TO MAP 18A
HWY 49
BRIDGE 2
M.P.
92.6

PAGE 18

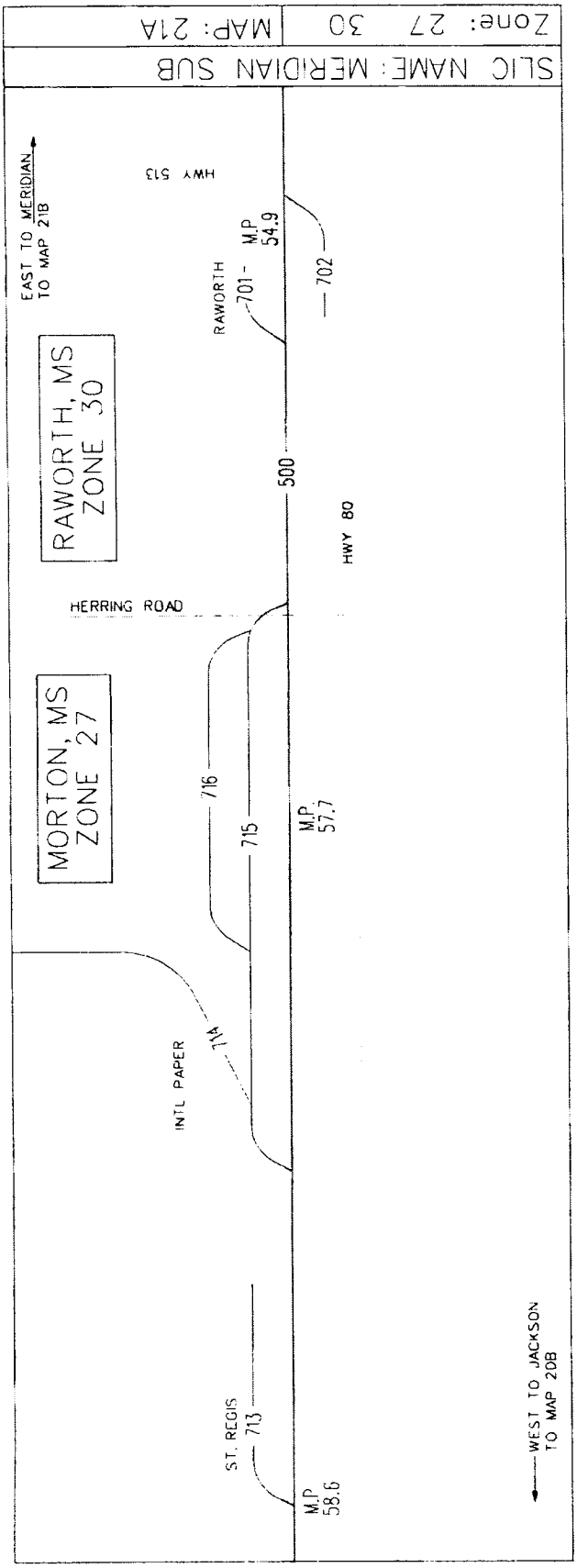

SLIC NAME: MERIDIAN SUB
Zone: 6 9 12
MAP: 19A
NORTH
TO MERIDIAN
TO MAP 19B
WHITFIELD, MS
ZONE 6
GREENFIELD, MS
ZONE 9
BRANDON, MS
ZONE 12
WHITFIELD SPUR
701
M.P. 86.5
500 MAIN
M.P. 85.3
801
M.P. 84.7
M.P. 83.8
701
M.P. 82.8
M.P. 82.3
LONE STAR CEMENT
707
706
704
105
601
500 MAIN
702
703
RUNAROUND
700
GENERAL MOTORS SPO
TO JACKSON
TO MAP 18B

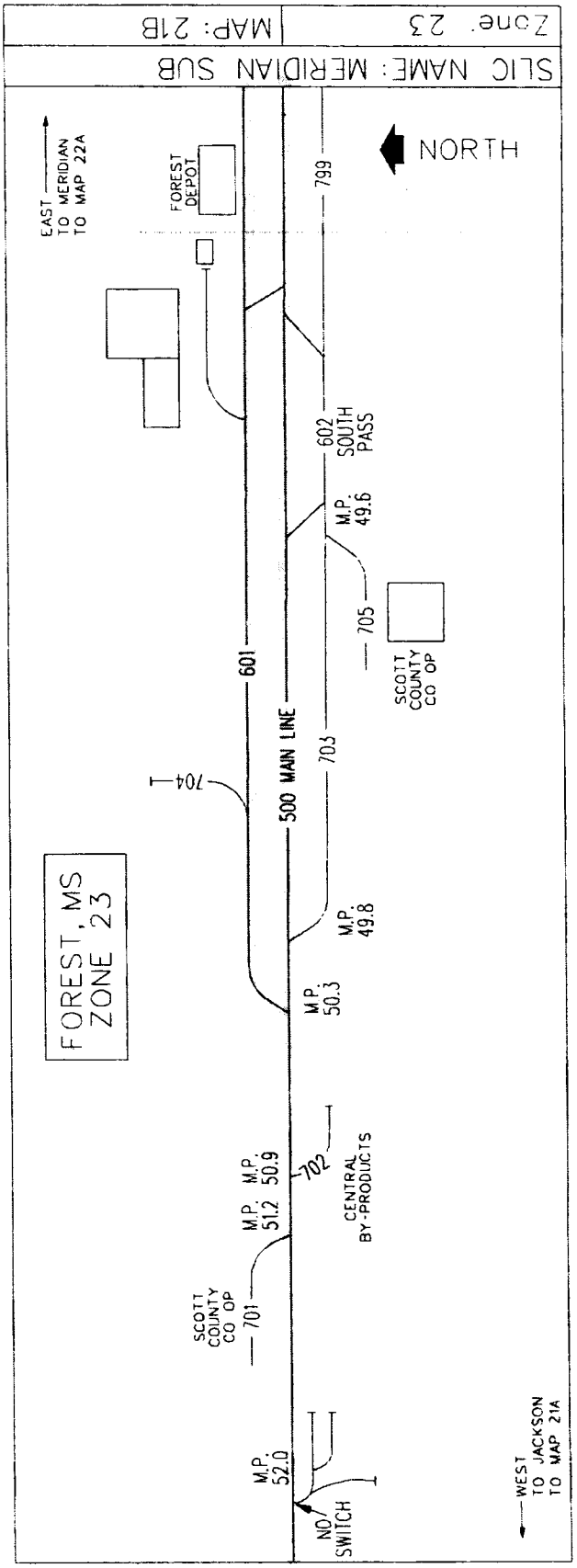

SLIC NAME: MERIDIAN SUB
Zone: 12
MAP: 19B
NORTH
TO MERIDIAN
TO MAP 20A
BRANDON, MS
ZONE 12
M.P. 77.3
712
713
LIQUID CARBONIC
M.P. 78.6
711
IP WOODYARD
M.P. 80.8
SWITCH OUT
710
HOUSE TRK EAST
HWY 471
M.P. 80.7
709
HOUSE TRK WEST
M.P. 80.9
601 SIDING
708
GOLD COAST
M.P. 81.0
TO JACKSON
TO MAP 19A


SLIC NAME: MERIDIAN SUB
Zone: 15 21
MAP: 20A
TO MERIDIAN
TO 20 B
PELAHATCHIE, MS
ZONE 21
NORTH
RANKIN, MS
ZONE 15
500
601
801
M.P. 68.9
M.P. 69.4
M.P. 75.3
M.P. 75.5
M.P. 75.6
M.P. 75.9
SIDING
JAX COMMODITIES
101
HOUSE TRK
700
GULF STATES TIMBER
102
103
CHOCTAW MAID
FRANKLIN COOP
703
701
702
TO VICKSBURG
TO MAP 19B

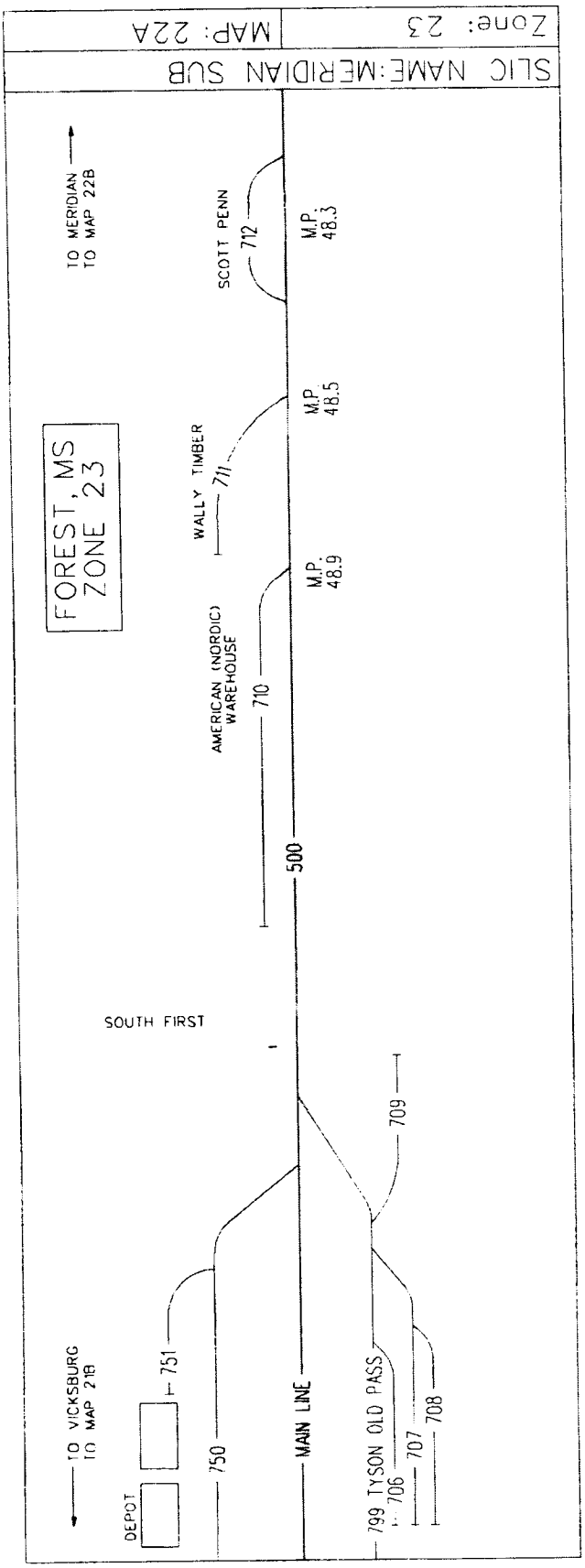

SLIC NAME: MERIDIAN SUB
Zone: 27
MAP: 20B
TO MERIDIAN
TO MAP 21A
MORTON, MS
ZONE 27
NORTH
500
601 SIDING
M.P. 59.2
M.P. 59.4
M.P. 59.9
M.P. 60.0
M.P. 60.4
M.P. 62.6
712
SCOTT COUNTY
CENTRAL INDUSTRIES
711
B.C.ROGERS PROCESSING
702
FOURTH ST
DEPOT
C STREET
703
700
704
705
706
707
708
709
710
ARMSTRONG
101
BLAIN CONSTRUCTION
TO JACKSON
TO MAP 20A

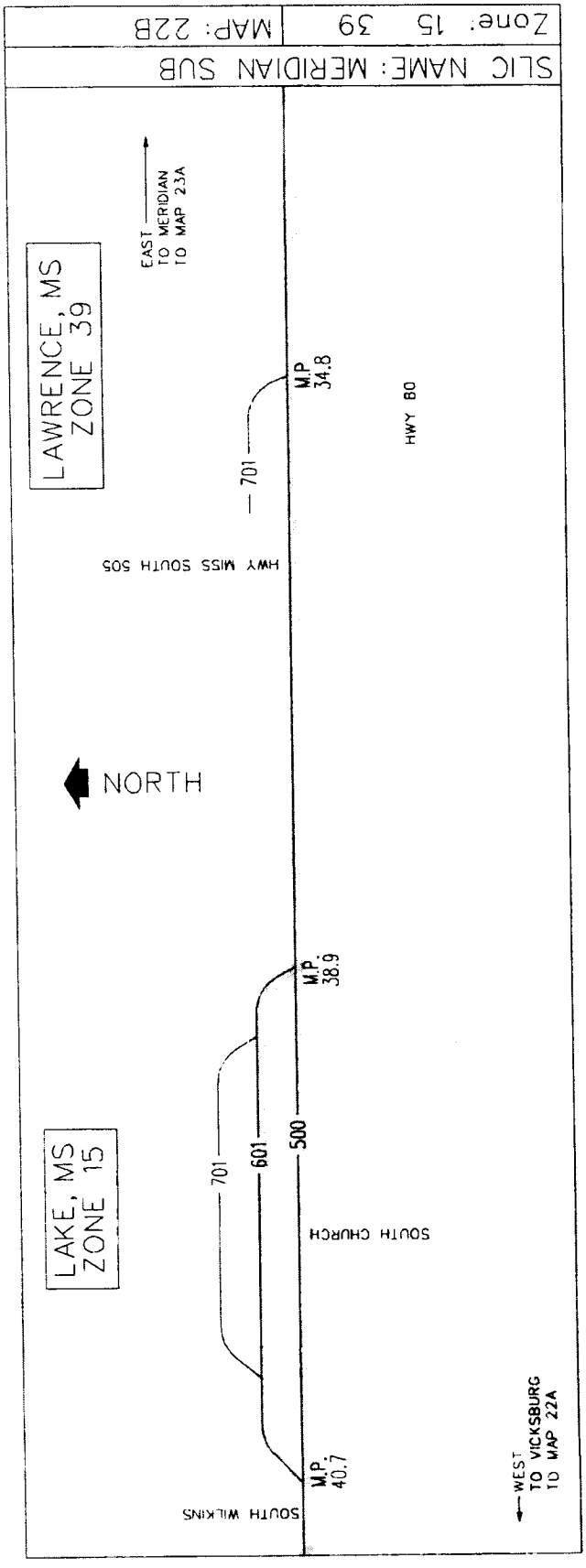
PAGE 20


Zone: 27 30
MAP: 21A
SLIC NAME: MERIDIAN SUB
EAST TO MERIDIAN TO MAP 21B
HWY 513
RAWORTH
701
M.P. 54.9
702
RAWORTH, MS ZONE 30
500
HWY 80
HERRING ROAD
MORTON, MS ZONE 27
716
715
M.P. 57.7
INTL PAPER
714
ST. REGIS
713
M.P. 58.6
WEST TO JACKSON TO MAP 20B

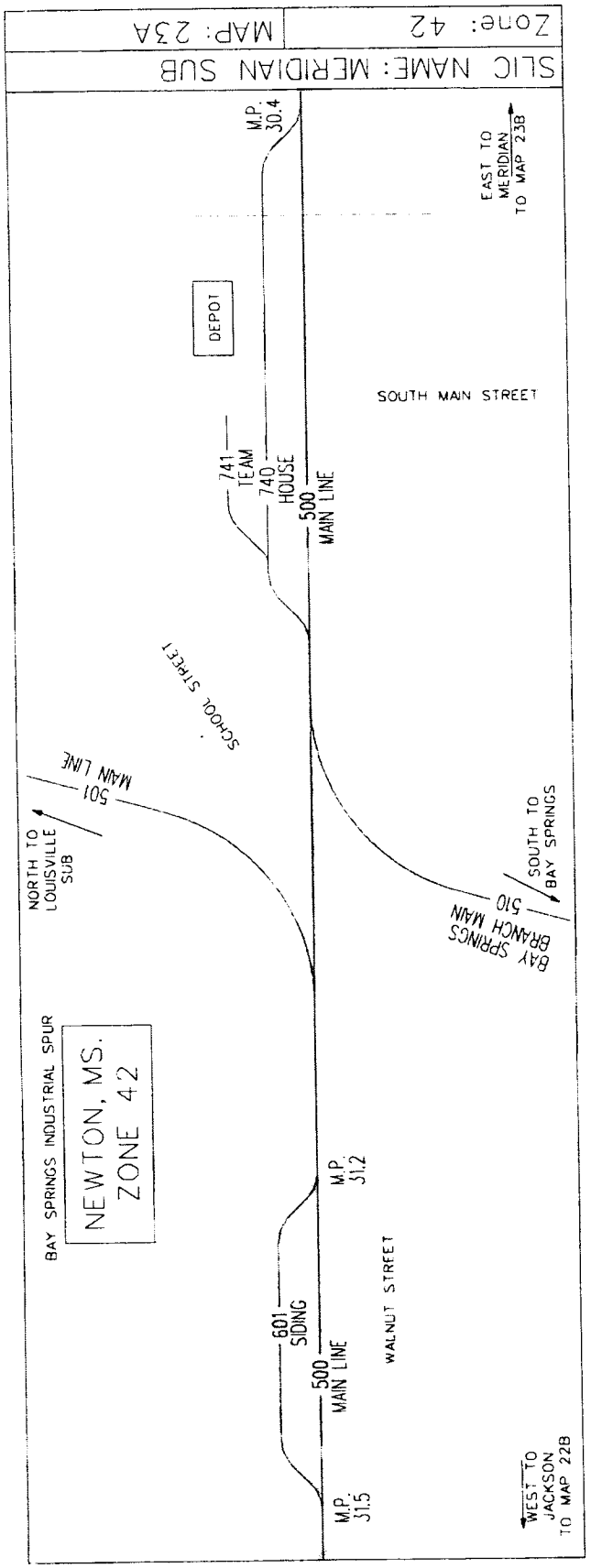

Zone: 23
MAP: 21B
SLIC NAME: MERIDIAN SUB
NORTH
EAST TO MERIDIAN TO MAP 22A
FOREST DEPOT
799
602
SOUTH PASS
M.P. 49.6
705
SCOTT COUNTY CO OP
601
704
500 MAIN LINE
703
M.P. 49.8
FOREST, MS ZONE 23
M.P. 50.3
M.P. 51.2
M.P. 50.9
702
CENTRAL BY-PRODUCTS
SCOTT COUNTY CO OP
701
M.P. 52.0
NO SWITCH
WEST TO JACKSON TO MAP 21A

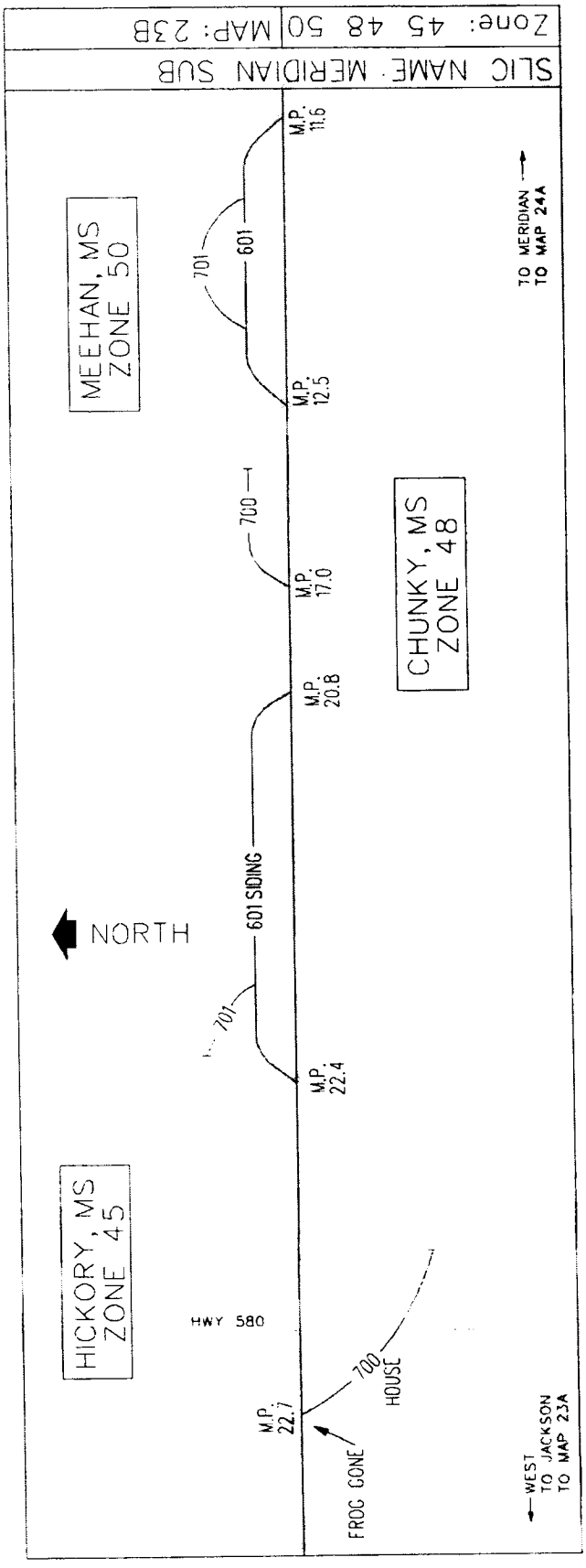
PAGE 21


SLIC NAME: MERIDIAN SUB
Zone: 23
MAP: 22A
FOREST, MS
ZONE 23
TO MERIDIAN
TO MAP 22B
SCOTT PENN
712
M.P.
48.3
WALLY TIMBER
711
M.P.
48.5
AMERICAN (NORDIC)
WAREHOUSE
710
M.P.
48.9
500
SOUTH FIRST
709
TO VICKSBURG
TO MAP 21B
DEPOT
751
750
MAIN LINE
799 TYSON OLD PASS
706
707
708

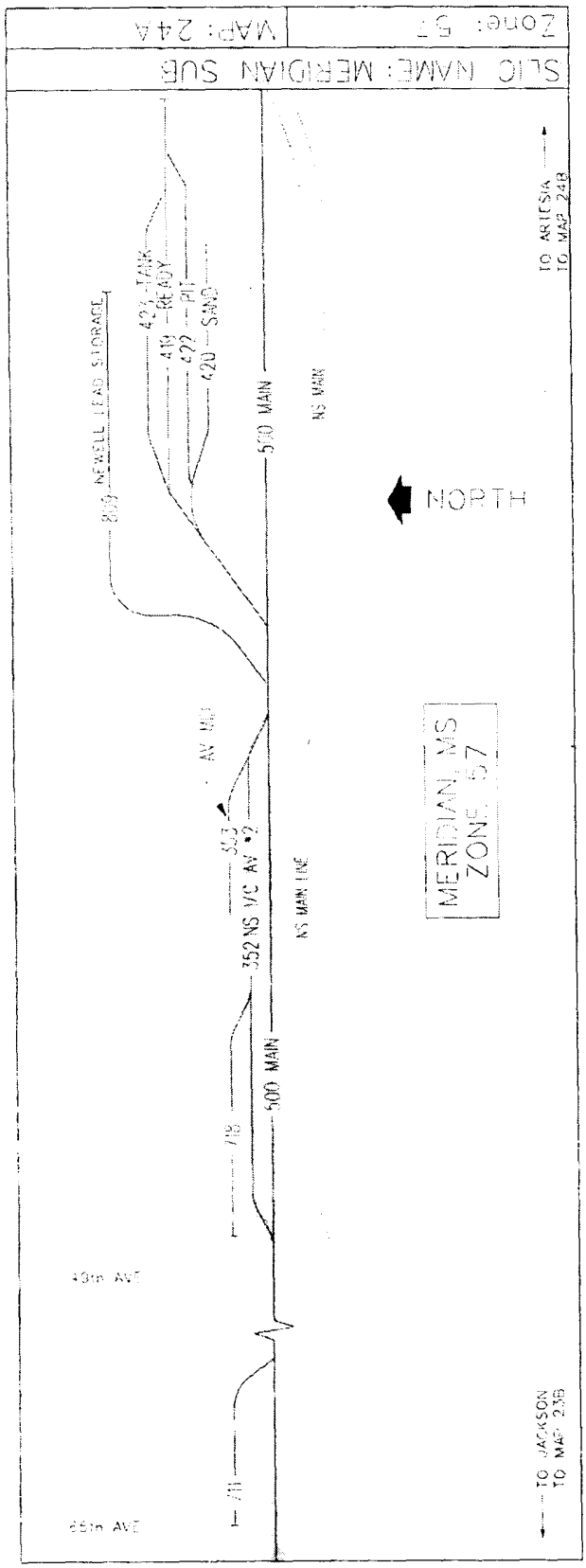

SLIC NAME: MERIDIAN SUB
Zone: 15 39
MAP: 22B
LAWRENCE, MS
ZONE 39
EAST
TO MERIDIAN
TO MAP 23A
M.P
34.8
HWY 80
701
HWY MISS SOUTH 505
NORTH
LAKE, MS
ZONE 15
M.P.
38.9
701
601
500
SOUTH CHURCH
M.P.
40.7
SOUTH WILKINS
WEST
TO VICKSBURG
TO MAP 22A

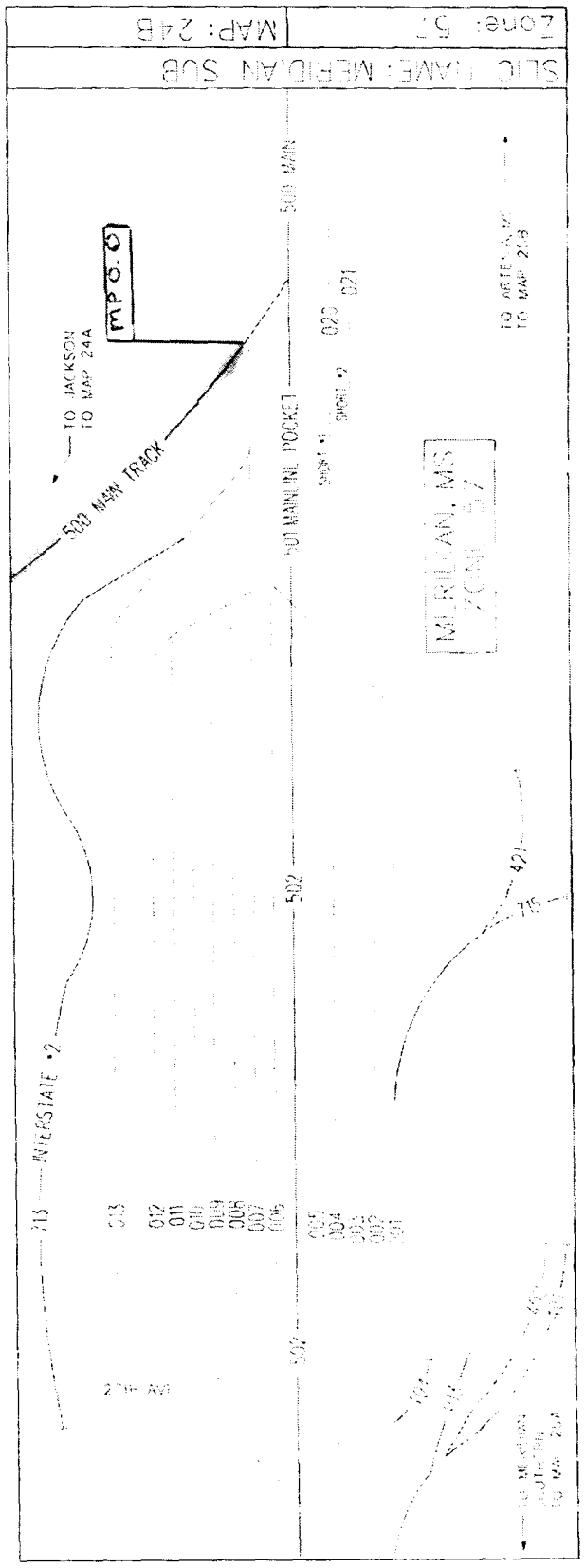
PAGE 22


Zone: 42
MAP: 23A
SLIC NAME: MERIDIAN SUB
M.P. 30.4
EAST TO MERIDIAN TO MAP 23B
DEPOT
SOUTH MAIN STREET
741 TEAM
740 HOUSE
500 MAIN LINE
SCHOOL STREET
501 MAIN LINE
NORTH TO LOUISVILLE SUB
BAY SPRINGS BRANCH MAIN 510
SOUTH TO BAY SPRINGS
BAY SPRINGS INDUSTRIAL SPUR
NEWTON, MS. ZONE 42
601 SIDING
500 MAIN LINE
M.P. 31.2
WALNUT STREET
M.P. 31.5
WEST TO JACKSON TO MAP 22B


Zone: 45 48 50
MAP: 23B
SLIC NAME: MERIDIAN SUB
M.P. 11.6
TO MERIDIAN TO MAP 24A
701
601
MEEHAN, MS ZONE 50
M.P. 12.5
700
M.P. 17.0
CHUNKY, MS ZONE 48
M.P. 20.8
NORTH
601 SIDING
701
M.P. 22.4
HICKORY, MS ZONE 45
HWY 580
700 HOUSE
M.P. 22.7
FROG GONE
WEST TO JACKSON TO MAP 23A

PAGE 23


SLIC NAME: MERIDIAN SUB
Zone: 57
MAP: 24A
NEWELL LEAD STORAGE
42½ - TANK
48 - READY
422 - PIT
420 - SAND
500 MAIN
NS MAIN
TO ARTESIA
TO MAP 24B
NORTH
MERIDIAN, MS
ZONE 57
AV MS
352 NS I/C AV #2
NS MAIN LINE
500 MAIN
49th AVE
45th AVE
TO JACKSON
TO MAP 23B


SLIC NAME: MERIDIAN SUB
Zone: 57
MAP: 24B
MPSO
TO JACKSON
TO MAP 24A
500 MAIN TRACK
501 MAIN LINE POCKET
500 MAIN
TO ARTESIA
TO MAP 24B
MERIDIAN, MS
ZONE 57
INTERSTATE #2
502
27th AVE

G

EXHIBIT G
to Transaction Agreement

UNIFIED ASSIGNMENT AND ASSUMPTION AGREEMENT

This UNIFIED ASSIGNMENT AND ASSUMPTION AGREEMENT, dated as of the ___ day of _____, 200__ (the "Unified Assignment and Assumption Agreement"), is by and among The Kansas City Southern Railway Company ("KCSR"), a Missouri corporation, Kansas City Southern, a Delaware corporation ("KCS") (KCS and KCSR are collectively referred to herein as "Assignors"), and Meridian Speedway LLC (MSLLC), a Delaware limited liability company ("Assignee"). KCSR, KCS and MSLLC are referred to individually here as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, KCS, KCSR, The Alabama Great Southern Railroad and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, contemplated the creation of Assignee, and the transfer from KCSR, a wholly-owned subsidiary of KCS, to Assignee of the Subject Trackage, as defined in the Transaction Agreement; and

WHEREAS, the Transaction Agreement anticipates that, pursuant to the Operating Agreement, the form of which appears as an appendix to the Transaction Agreement, Assignee will hire KCSR to perform as the designated operator ("Designated Operator") all railroad operations required pursuant to the KCSR-MSLLC Joint Use Agreement and the NSR-MSLLC Joint Use Agreement, and all general and administrative services, including claims handling, accounting, legal services, human relations and labor relations services, and other like services, on behalf of Assignee; and

WHEREAS, Assignors and Assignee desire to enter into an assignment and assumption agreement pursuant to which Assignors assign, and Assignee assumes, certain agreements pursuant to which third parties have rights with respect to the Assets, generally consisting of public, private and pedestrian grade crossing, interlocking track, interlocking signal, joint use, and joint facility agreements, and such other like agreements associated with the usage of the Subject Trackage (the "Ancillary Agreements"); and

WHEREAS, Assignors agreed to contribute, transfer and assign to Assignee all of Assignors' right, title and interest in and to the Assets. For the avoidance of doubt, the Assets include without limitation (i) all Permits reasonably necessary to operate the Subject Trackage, (ii) Assignors' rights under the Ancillary Agreements, (iii) the right to review and copy all architectural, mechanical, engineering and other plans and specifications relating to the Assets and in Assignors' possession and control, (iv) all deposits under all contracts, agreements, leases and licenses relating to the Assets and (v) all warranties, guarantees, contract rights and miscellaneous rights relating to the Assets, except in the case of each of (i) – (v) for the portions thereof relating to assets that are not included in the Assets; and

WHEREAS, Assignee desires to accept assignment of the Ancillary Agreements and the Assets, and to assume the Assumed Liabilities, but only on the terms and conditions contained herein.

NOW, THEREFORE, the Parties hereto, for and in consideration of the premises, the mutual covenants and agreements contained herein and in the Transaction Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, agree as follows:

Section 1. Assignments.

(a) Subject to the terms of the Transaction Agreement, and for value received, Assignors do hereby transfer and assign unto Assignee, to the fullest extent that they lawfully may, all of Assignors' rights, titles and interests in those various Ancillary Agreements indicated on Exhibit A, attached hereto and made a part hereof; to the extent that said instruments affect the Subject Trackage. Assignors further partially transfer and assign unto Assignee, to the fullest extent that they lawfully may, the respective rights, titles and interests of Assignors, if any, in those various Ancillary Agreements indicated on Exhibit A, attached hereto and made a part hereof; to the extent that the instruments affect property only partially within the Subject Trackage, it being the intent to transfer and assign only so much of the instruments indicated on Exhibit A as affects the Subject Trackage. Notwithstanding anything to the contrary in this Unified Assignment and Assumption Agreement, Assignors withhold from assignment each and every agreement listed on Exhibit B hereto.

(b) Subject to the terms of the Transaction Agreement, for value received, Assignors do hereby transfer and assign unto Assignee, to the fullest extent that they lawfully may, all of Assignors' rights, titles and interests, in the Assets and the Assumed Liabilities.

Section 2. Assumption.

Subject to the terms of the Transaction Agreement, Assignee does hereby accept and assume, to the extent of the interest hereby assigned, all of the rights, titles, interests, covenants, promises and obligations of Assignors contained within the Ancillary Agreements (listed on Exhibit A), the Assets, and the Assumed Liabilities.

Section 3. Delivery of Assigned Agreements.

After the effective date of this Unified Assignment and Assumption Agreement, Assignors will make available for inspection and copying by Assignee the documents indicated on Exhibit A and Exhibit B. Assignee reserves the right to reject and refuse to accept assignment of any of the aforesaid instruments if and/or to the extent that they do not affect the Subject Trackage by giving Assignors notice within thirty (30) days of the date of delivery of same to Assignee. Subject to Section 4 hereof, failure of Assignee to reject or refuse to accept assignment will constitute assumption by Assignee of the rights, titles, interests, covenants, promises, and obligations of Assignors under said instruments as of the effective date of this Unified Assignment and Assumption Agreement.

Section 4. Erroneous Assignment.

It is the intent of Assignors to assign their interest in only those instruments affecting, and only to the extent that they affect, the Subject Trackage. Should any instruments that do not affect the Subject Trackage be included on the instruments provided herein to Assignee, and notwithstanding anything to the contrary herein, this Unified Assignment and Assumption Agreement shall be void and of no effect as to those instruments. Upon determination by either party that any instruments have been erroneously included in this Unified Assignment and Assumption Agreement, the instruments shall be promptly returned to Assignors, if already in the custody of Assignee.

Section 5. After-Discovered Agreements.

The instruments listed on the exhibits hereto constitute all of such instruments known to Assignors affecting the Subject Trackage. If subsequent to the effective date of this instrument, Assignors discover any additional instruments which affect the Subject Trackage, said instruments shall be automatically assigned as if included herein upon Assignors' mailing by Certified Mail copies of said instruments to Assignee.

Section 6. The Transaction Agreement.

This Unified Assignment and Assumption Agreement is subject to the terms and conditions of the Transaction Agreement. Nothing herein shall be deemed to amend, modify, alter, expand or diminish the terms and conditions of the Transaction Agreement, including the covenants, representations, warranties and indemnity obligations contained therein.

Section 7. Governing Law.

The laws of the state of Delaware shall govern the validity of this Unified Assignment and Assumption Agreement, the construction of its terms, and the interpretation of the rights and duties arising hereunder, without regard to the laws that might otherwise govern under the applicable principles of conflicts of law thereof.

Section 8. Counterparts.

This Unified Assignment and Assumption Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

Section 9. Successors and Assigns.

This Unified Assignment and Assumption Agreement shall be binding upon and inure solely to the benefit of each Party hereto and their respective successors and permitted assigns, and nothing in this Unified Assignment and Assumption Agreement, express or implied, is intended to or shall confer upon any other person any rights, interests, benefits or remedies of any nature whatsoever under or by reason of this Unified Assignment and Assumption Agreement.

Section 10. Further Assurances.

Assignors shall, from time to time upon the reasonable request of Assignee, execute and deliver all such further documents and instruments, and take all such further acts as shall be reasonably necessary or desirable to give full effect to the intent and meaning of this Agreement.

The effective date of this instrument is _____, 200__.

DATED this _____ day of _____, 200__.

ATTEST:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

_____
Assistant Corporate Secretary

By_____

ATTEST:

MERIDIAN SPEEDWAY LLC

_____
Assistant Corporate Secretary

By_____

ATTEST:

KANSAS CITY SOUTHERN

_____
Assistant Corporate Secretary

By_____

Exhibit A

Agreements Assigned to MSLLC:
Private Grade Crossings
Public Grade Crossings
Pedestrian Grade Crossings
Interlocking Track
Interlocking Signal
Joint Use
Joint Facility
Fences and other encroachments
Drainage
Temporary Right of Way
Non-Mainline Track Leases that take capacity for overhead rail movements

Exhibit B

Agreements Retained by KCSR

Microwave facility

Crossing and parallel:

- Pipeline
- Wireline (electrical, telephone, cable TV)

Utility Bridges

Fiber Optic

Easements/Licenses for:

- Minerals
- Oil
- Gas
- Signboards
- Foresting Rights
- Non-Mainline Track Leases, other than those taking capacity for overhead rail movements

H

EXHIBIT H
to Transaction Agreement

OMNIBUS BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS THAT **KANSAS CITY SOUTHERN**, a Delaware corporation, and **THE KANSAS CITY SOUTHERN RAILWAY COMPANY**, a Missouri corporation (together, "Sellers"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has contributed, bargained, sold, conveyed, transferred, assigned and delivered to Meridian Speedway LLC, a Delaware limited liability company ("Buyer"), and by these presents does hereby contribute, grant, bargain, sell, convey, transfer, assign and deliver unto Buyer, its successors and assigns, all of Sellers' right, title and interest, in and to all personal property (the "Personal Property") included in the Assets (as that terms is defined in the Transaction Agreement by and among Sellers, Norfolk Southern Corporation and The Alabama Great Southern Railroad Company, the "Transaction Agreement"), including, without limitation, machinery, equipment, supplies and fixtures.

TO HAVE AND TO HOLD, all and singular the Personal Property by these presents contributed, bargained, sold, conveyed, transferred, assigned and delivered unto Buyer, its successors and assigns, forever.

This Omnibus Bill of Sale is subject to by the terms and conditions of the Transaction Agreement. Nothing herein shall be deemed to amend, modify, alter, expand or diminish the terms and conditions of the Transaction Agreement, including, without limitation, the covenants, representations, warranties and indemnification obligations contained therein. This Omnibus Bill of Sale shall be binding upon each of the Sellers and their respective successors and permitted assigns.

This Omnibus Bill of Sale may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

Sellers shall, from time to time and upon the reasonable request of Buyer, execute and deliver all such further documents and instruments, and take all such further acts, as shall be reasonably necessary or desirable to give full effect to the intent and meaning of this Omnibus Bill of Sale.

The laws of the state of Delaware shall govern the validity of this Omnibus Bill of Sale, the construction of its terms and the interpretation of the rights and duties arising hereunder, without regard to the laws that might otherwise govern under the applicable principles of conflicts of law thereof.

IN WITNESS WHEREOF, Sellers have caused this Omnibus Bill of Sale to be executed this ___ day of _____, 200__.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____
Name:
Title:

KANSAS CITY SOUTHERN

By:_____
Name:
Title:

I

REDACTED

EXHIBIT I
to Transaction Agreement

UNIFIED LIABILITY AGREEMENT

THIS AGREEMENT (the "Agreement") is entered into as of this ____ day of _____, 200__, by and among **NORFOLK SOUTHERN RAILWAY COMPANY**, a Virginia corporation ("NSR"), **THE KANSAS CITY SOUTHERN RAILWAY COMPANY**, a Missouri corporation ("KCSR"), and **MERIDIAN SPEEDWAY LLC**, a Delaware limited liability company ("MSLLC"). NSR, KCSR and MSLLC are referred to individually herein as a "Party" and collectively as the "Parties."

RECITALS:

WHEREAS, on December 1, 2005, Kansas City Southern ("KCS"), KCSR, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, provided for the creation of MSLLC, and the transfer from KCSR, a wholly-owned subsidiary of KCS, to MSLLC of certain lines of railroad generally running between Meridian, MS and Shreveport, LA; and

WHEREAS, pursuant to Norfolk Southern – MSLLC Joint Use Agreement, MSLLC has agreed to grant to NSR haulage rights between Meridian, MS and Shreveport, LA, and an additional grant of trackage rights over that same track, which may be exercised only upon the happening of certain events; and

WHEREAS, pursuant to The Kansas City Southern Railway Company – MSLLC Joint Use Agreement, MSLLC has agreed to grant to KCSR certain haulage and trackage rights between Meridian, MS and Shreveport, LA; and

WHEREAS, pursuant to the NSR-KCSR Western Haulage Agreement, KCSR has agreed to grant to NSR haulage rights between Shreveport, LA and the Dallas, TX area; and

WHEREAS, pursuant to The Kansas City Southern Railway Company – MSLLC Operating Agreement, MSLLC will hire KCSR for the duration of the joint venture to perform as the Designated Operator for MSLLC for all railroad and other operations of MSLLC, including MSLLC railway operations pursuant to the KCSR Joint Use Agreement and the NSR Joint Use Agreement, as well as, to perform all general and administrative services required by MSLLC; and

WHEREAS, pursuant to the KCS – MSLLC Master Interchange Agreement, MSLLC and KCSR have agreed to terms governing the interchange of traffic between them; and

WHEREAS, pursuant to The Kansas City Southern Railway Company – NSR Haulage Agreement, KCSR may perform haulage services over the Jackson Gap, as that term is defined therein; and

WHEREAS, the Parties desire to set forth the terms and conditions pursuant to which liability shall be apportioned by and among MSLLC, KCSR, and NSR under the Norfolk

Southern – MSLLC Joint Use Agreement, The Kansas City Southern Railway Company – MSLLC Joint Use Agreement, the NSR-KCSR Western Haulage Agreement, the KCS MSLLC Master Interchange Agreement, The Kansas City Southern Railway Company – NSR Haulage Agreement, and The Kansas City Southern Railway Company – MSLLC Operating Agreement (collectively the "Various Agreements"); and

WHEREAS, under the Norfolk Southern - MSLLC Joint Use Agreement and The Kansas City Southern Railway Company - MSLLC Joint Use Agreement, MSLLC will provide certain haulage and trackage rights to NS and KCS, as further defined in those agreements. The Parties intend in this Agreement to set forth the basis for allocating various liabilites between and among them related to those agreements; and

WHEREAS, under the NSR-KCSR Western Haulage Agreement and the KCS MSLLC Master Interchange Agreement, the Parties have arranged for the efficient operation of MSLLC and defined the relationship among the Parties. The Parties intend in this Agreement to set forth the basis for allocating various liabilities between and among them related to those agreements; and

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS AND INTERPRETATION

(a) "Account" shall mean a revenue waybill or car hire account

(b) "Agreement" shall mean this Unified Liability Agreement

(c) "Cars" shall include all rail cars and intermodal cars (including trailers and containers loaded thereon), and lading contained therein, if any.

(d) "Environmental Loss" shall mean damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, or death or injury to third parties or damage to or destruction of property, as a result of the release of a hazardous substance, waste or material as said terms are defined in any Federal, State or local law.

(e) "Equipment" shall mean any on-track vehicle of any type whatsoever not otherwise a Car or Locomotive.

(f) "Gross negligence or willful or wanton misconduct" shall mean the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

(g) "Locomotive" shall have the meaning assigned by the Federal Railroad Administration.

(h) "Loss or Damage" shall mean loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of NSR, KCSR or MSLLC), resulting from, arising out of, incidental to or occurring in connection with the Agreements.

(i) "Trains" shall mean one or more Locomotives, whether or not coupled to one or more Cars.

(j) "Various Agreements" shall mean the Norfolk Southern – MSLLC Joint Use Agreement, The Kansas City Southern Railway Company – NSR Haulage Agreement, The Kansas City Southern Railway Company – MSLLC Joint Use Agreement, the NSR-KCSR Western Haulage Agreement, the KCS MSLLC Master Interchange Agreement, and The Kansas City Southern Railway Company – MSLLC Operating Agreement.

SECTION 2. LIABILITY

(a) Except as provided for elsewhere herein, whenever any Loss or Damage occurs in connection with the operation of Trains or Equipment provided for under one or more of the Various Agreements, the Party under whose control a Train or Equipment is operating (which shall be KCSR for trains operating under KCSR's trackage rights and for trains operating under the Western Haulage Agreement, MSLLC for NS haulage trains and third party traffic, KCSR or MSLLC for all trains operated under the KCS MSLLC Master Interchange Agreement depending on the status of the train under that Agreement at the time of the loss or damage, and NSR for trains operating under NSR trackage rights) shall assume and bear all liability, cost, and expense for claims, demands and exposures, including attorneys' fee incurred in defending such claims, demands, and exposures arising therefrom, with the exception that the Party in whose Account the Cars in a Train are traveling shall be solely responsible and shall assume all liability (including consequential, special and incidental damages) for loss, destruction or damage to Cars (including contents).

(b) Notwithstanding Section 2(a), if the Loss or Damage is caused by track conditions, the Party responsible for track maintenance (MSLLC for the trackage between Meridian and Shreveport, and KCSR for the track west of Shreveport) shall assume[ ] of the liability (including consequential, special and incidental damages) for the damage to Cars (including contents) pursuant to this Section, and if the Loss or Damage is caused by Train handling (which shall be KCSR for trains operating under KCSR's trackage rights and for trains operating under the Western Haulage Agreement, MSLLC for NS haulage trains and third party traffic, and NSR for trains operating under NSR trackage rights), the Party responsible for Train handling shall assume [ ] of the liability (including consequential, special and incidental damages) for the damage to Cars (including contents) pursuant to this Section.

(c) Whenever Loss or Damage occurs with more than one Train and more than one controlling Party involved, then said Loss or Damage (other than Loss and Damage to Cars, including contents) shall be allocated equally among the Parties controlling such Trains, then, for each train, pursuant to Section 2(a) and 2(b).

(d) For the purposes of assigning responsibility for Loss and Damage under this Agreement, as to liability arising from operations over trackage other than that covered by the Western Haulage Agreement, the Trains and Cars and crew of a party not a Party to this Agreement shall be considered to be the Trains and Cars and crew of MSLLC, and the actions or inactions of any person when acting as the Designated Operator for MSLLC shall be considered the actions or inactions of MSLLC, and for and in the account of MSLLC, regardless of whether the Designated Operator is also a Party to this Agreement. For the purposes of assigning responsibility for Loss and Damage under this Agreement, as to liability arising from operations

over the trackage covered by the Western Haulage Agreement, the Trains and Cars and crew of a party not a Party to this Agreement shall be considered to be the Trains and Cars and crew of KCSR.

(e) Notwithstanding anything to the contrary in Section 2(a) and 2(b), if Loss or Damage is attributable solely to the gross negligence or willful or wanton misconduct of KCSR's managers (defined herein as all non-union personnel) under The Kansas City Southern Railway Company – MSLLC Operating Agreement, KCSR shall assume all liability, cost and expense in connection with such Loss or Damage. Except for such occurrence, and notwithstanding anything to the contrary in Section 2(a) and 2(b), if Loss or Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties to this Agreement, the Party to which such gross negligence or willful or wanton misconduct is attributable shall assume all liability, cost and expense in connection with such Loss or Damage.

(f) Notwithstanding anything to the contrary in Sections 2(a) through 2(d) above, when any Environmental Loss occurs from substances transported in cars or contained in locomotives occurs, with one or more than one Train involved, and one or more than one controlling Party involved, then, as between themselves, (i) NSR shall be solely responsible for any Environmental Loss which results solely from a substance transported in Cars and Equipment in NSR's Account which was released, (ii) KCSR shall be solely responsible for any Environmental Loss which results solely from a substance transported in Cars and Equipment in KCSR's Account which was released, and (iii) responsibility for Environmental Loss which results from one or more substances which was (or were) being transported in the Cars and Equipment in the Accounts of both NSR and KCSR which was (or were) released shall be shared by the Parties in proportion to the total number of such Cars and Equipment in the Account of each Party from which there was such a release of said substance.

(g) Notwithstanding any other provision contained in this Unified Liability Agreement, any liability arising from any agreement affecting the Assets and not assigned by KCSR to MSLLC shall be borne solely by KCSR.

(h) If any suit or action shall be brought against any Party for Loss or Damage which under the provisions of this Agreement are in whole or in part the responsibility of any other Party or Parties, said responsible Party or Parties shall be promptly notified in writing by the Party sued, and the Party or Parties so notified shall have the right and be obligated to take part in the defense of such suit and shall pay its or their share of the judgment and the costs and expense incurred in such suit in accordance with the terms of this Section 2.

(i) In every case of death or injury suffered by an employee of any of the Parties hereto, when compensation to such employee or employee's dependents is required to be paid under any present or future state or federal worker's compensation, occupational disease, employers' liability or other law or settlement, and one or more of the Parties under provisions of this Agreement is or are required to pay same or a portion of same in installments over a period of time, said Party or Parties shall not be released from paying any such future installment(s) by reason of the expiration or other termination of this Agreement prior to any of the respective date(s) upon which any such future installments are to be paid.

REDACTED

(j) **WHENEVER ANY LIABILITY, COST OR EXPENSE IS ASSUMED BY OR ALLOCATED TO A PARTY UNDER THIS SECTION 2, THAT PARTY SHALL (i) FOREVER DEFEND, INDEMNIFY AND SAVE HARMLESS THE OTHER PARTIES FROM AND AGAINST THAT LIABILITY, COST AND EXPENSE, REGARDLESS OF WHETHER SUCH LIABILITY, COST AND EXPENSE WAS CAUSED IN WHOLE OR IN PART BY THE FAULT, FAILURE, NEGLIGENCE, MISCONDUCT, MALFEASANCE OR MISFEASANCE OF THE PARTIES INDEMNIFIED, OR THEIR DIRECTORS, OFFICERS, AGENTS OR EMPLOYEES, AND (ii) DEFEND SUCH PARTIES AGAINST SUCH CLAIMS WITH COUNSEL SELECTED BY THE RESPONSIBLE PARTIES AND REASONABLY ACCEPTABLE TO THE INDEMNIFIED PARTIES.**

(k) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions of this Section 2; provided, however, that salaries or wages of full-time agents, full-time attorneys and other full-time employees of any Party engaged directly or indirectly in such work shall be borne by such Party.

(l) No Party shall settle or compromise any claim, demand, suit or cause of action for which any other Party has any liability or proportionate share liability under this Agreement of at least [ ] without the concurrence of such other Party or Parties. The foregoing amount of [ ]shall be adjusted from time to time by agreement of the Parties.

(m) Should any non-party railroad be admitted to operate via haulage or trackage rights on all or any portion of the railroad generally running between Meridian, MS and Shreveport, LA referenced in the first Whereas clause above, the Parties agree that said non-party railroad shall provide full and complete defense and indemnity to the Parties for all Loss and Damage incurred as a result or in connection with said operations.

SECTION 3. INDEMNITY COVERAGE

(a) As a part of the consideration hereof, each Party hereby agrees that each and all of its commitments to defend, indemnify and hold harmless in this Agreement in favor of the other Parties hereto shall extend to the parent corporation, subsidiaries and affiliates of such other Parties, and all of their respective directors, officers, agents and employees.

(b) NSR, KCSR and MSLLC shall defend, indemnify and hold harmless one another against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the Parties' intention that MSLLC, KCSR, and NSR each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees.

REDACTED

SECTION 4. TERM

This Agreement shall become effective upon execution and shall remain in force and effect so long as any of the Various Agreements are in force and effect.

SECTION 5. ARBITRATION

Any dispute arising among the Parties with respect to this Agreement or any of the Various Agreements shall be referred to their respective senior operating officers. In the event such officers are unable to resolve the dispute, any Party may submit the dispute for binding arbitration by three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall render a written decision on the controversy. The written decision of the arbitrators, acting by majority rule, shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs and expense of the arbitrators, if any, shall be borne by the Parties, with each Party paying an equal share of such costs. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the written decision of the arbitrators, there shall be no interruption in the transaction of business under this Agreement or the Various Agreements, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision of the arbitrators.

SECTION 6: MISCELLANEOUS PROVISIONS

(a) This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and, not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties.

(d) The division of this Agreement into articles, sections, and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to articles, sections or subsections are to articles, sections or subsections of this Agreement.

(e) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(f) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(g) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(h) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking among MSLLC, NSR, and KCSR.

(i) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(j) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

_____
As to MSLLC

MERIDIAN SPEEDWAY LLC

By:_____

Title:_____

WITNESS:

_____
As to KCSR

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____

Title:_____

REDACTED

WITNESS:

NORFOLK SOUTHERN
RAILWAY COMPANY

_____
As to NSR

By:_____

Title:_____

J

REDACTED

EXHIBIT J
to Transaction Agreement

DALLAS TERMINAL MARKETING AGREEMENT

THIS DALLAS TERMINAL MARKETING AGREEMENT (the "Agreement") is entered into as of this ____ day of _____, 200__, by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSR"), and THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation ("KCSR"). NSR and KCSR are referred to individually herein as a "Party" and collectively as the "Parties."

RECITALS:

WHEREAS, on December 1, 2005, Kansas City Southern ("KCS"), KCSR, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation ("NSC") entered into a transaction agreement (the "Transaction Agreement") that, among other things, provided for the creation of Meridian Speedway LLC, a Delaware limited liability company ("MSLLC"), the transfer from KCSR to MSLLC of the Subject Trackage, as defined herein, and the grant by MSLLC to NSR and KCSR of certain rights over the entirety of the Subject Trackage; and

WHEREAS, KCSR and NSR desire to set forth the terms and conditions pursuant to which NSR will have commercial access for the movement of certain intermodal freight between Meridian, MS and KCSR's existing or future intermodal facility in the vicinity of Dallas, TX, handling Dallas Intermodal Terminal Traffic as defined herein, and to further provide the terms and conditions pursuant to which NSR may exercise an option to purchase KCSR's existing or future intermodal facility in the vicinity of Dallas, TX, with a corresponding change in NSR's commercial access to said facility.

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS

(a) Interpretation Generally.

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(ii) Unless otherwise defined herein, each capitalized term in this Agreement shall have the same meaning given to said term in the Transaction Agreement.

(iii) The division of this Agreement into sections and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to sections or subsections are to articles, sections or subsections of this Agreement.

(b) Capitalized Terms.

All capitalized terms shall have the defined meaning set forth below:

"Abandonment Notice" shall have the meaning given that term in Section 4(a).

"Agreement" shall have the meaning given that term in the introductory paragraph.

"Dallas Intermodal Terminal Traffic" means all domestic intermodal containers or trailers with an origin and destination in the United States, with a lift or drop at the Terminal, that moves over the Subject Trackage and over KCSR's tracks between Shreveport and the Terminal, and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas / Ft. Worth, TX. Standard Metropolitan Statistical Area (SMSA) as published by the Office of Management and Budget (OMB).

"Fair Market Value" shall have the meaning given that term in Section 3.

"Foreign Railroad" shall mean a railroad not a Party to this Agreement.

"Indentures" shall mean, collectively, the Indenture, dated as of September 27, 2000, among KCSR, KCS, certain Subsidiaries of KCS and The Bank of New York, as trustee, governing the terms of KCS' 9½% Senior Notes due 2008 and the Indenture, dated as of June 12, 2002, among KCSR, KCS, certain Subsidiaries of KCS and U.S. Bank National Association, as trustee, governing the terms of KCS' 7½% Senior Notes due 2009, as they may be amended from time to time in a manner not prohibited by the Transaction Agreement.

"Independent Terminal Appraiser" shall have the meaning given that term in Section 4(e).

"**Joint Operating Committee**" shall have the meaning given that term in the Meridian Speedway LLC – Kansas City Southern Operating Agreement.

"JOC" shall mean the Joint Operating Committee.

"Notice" shall have the meaning given that term in Section 4(b).

"Notice Trigger Period" shall be the one (1) year period beginning on the earlier of: (i) the eighteenth (18th) anniversary of the Closing (as defined in the Transaction Agreement); and (ii) the date that KCSR gives written notice to NSR through the service of an Abandonment Notice of its intent to abandon, discontinue the use of, sell, lease or otherwise transfer control or use of the Terminal.

"Option" shall have the meaning given that term in Section 3.

"Party Terminal Appraiser" shall have the meaning given that term in Section 4(c).

"Rate Quote" shall be an offer to a potential shipper for transportation of Dallas Intermodal Terminal Traffic under certain specified terms, conditions and divisions.

"SMSA" shall mean a Standard Metropolitan Statistical Area as may be defined from time to time by the United States Office of Management and Budget.

REDACTED

"Subject Trackage" shall have the meaning set forth in the Meridian Speedway LLC – Kansas City Southern Operating Agreement

"STB" shall mean the Surface Transportation Board or successor agency.

"Terminal" shall mean the intermodal facility owned and operated by KCSR in the vicinity of Dallas, TX, now or in the future handling Dallas Intermodal Terminal Traffic, the current location of which is near Zacha Junction, including all of KCSR's right, title and interest in land, buildings and improvements (including but not limited to rail improvements) but not including any main line track or right of way adjacent to said facility.

"Terminal Appraisal Report" shall have the meaning given that term in Section 4(g).

SECTION 2. RELATIONSHIP PRIOR TO EXERCISE OF OPTION

(a) From and after the Closing (as defined in the Transaction Agreement), and thereafter for the term of this Agreement until NSR exercises the Option, KCSR and NSR shall jointly work to market the movement of Dallas Intermodal Terminal Traffic [

]

(b) Rates and rate increases for the interline movement of Dallas Intermodal Terminal Traffic shall be established jointly by KCSR and NSR on the basis of [
]. KCSR shall publish the pricing from the Terminal. NSR shall publish the pricing to the Terminal. All containers and trailers and their contents handled under this Agreement shall be subject to KCSR's intermodal rules circular while on KCSR (including any trackage rights over MSLLC), and subject to NSR's intermodal rules circular while on NSR. Any charges due from customers for ancillary or incidental services or any charges set forth in the intermodal rules circular of the railroad authorized to assess such charges shall be payable to the railroad assessing and collecting such charges, and will not be divided pursuant to this Agreement, unless, in accordance with established intermodal practice such charges (for example, fuel surcharges) are split among the carriers, in which case established intermodal practice shall govern. All costs for operations, equipment, fuel and other costs to provide the services hereunder shall be borne by the carrier incurring those costs.

(c) Nothing in this Agreement shall be construed as requiring or effecting a modification or amendment of any of the terms, conditions or customary business practices (including rates, blocking, movement of empty cars, and service), if any, that apply to the movement of intermodal containers and trailers between KCSR and NSR as of the date of this Agreement. Notwithstanding the foregoing, KCSR and NSR agree to add and/or amend train schedules as may be required to efficiently and effectively respond to the market conditions and effectuate the intent of this Agreement, as expressed in Section 2(a). Nothing herein shall be construed to impose any obligation on KCSR to add capacity to its trackage between Shreveport, LA and the Terminal in excess of that provided for in the NSR Joint Use Agreement.

(d) KCSR shall develop a Rate Quote based upon Section 2(b), and shall offer a potential movement to NSR utilizing such developed Rate Quote, for any Dallas Intermodal Terminal Traffic. KCSR shall not enter into a transportation agreement involving a Rate Quote in conjunction with a Foreign Railroad unless KCSR first offers such a potential movement to NSR and NSR declines the offer to participate in such movement. NSR shall have[ ] from the receipt of the offer to accept or decline the offer. Failure to decline the offer within the [ ] shall be deemed an acceptance. Should NSR decline the offer to participate in such movement, KCSR may then offer to enter into a transportation agreement involving a Rate Quote with a Foreign Railroad for the same traffic for movement between the same SMSAs, upon the same terms, conditions and divisions (for all parties in the route) as offered to NSR.

(e) Unless specifically agreed upon by both Parties, Dallas Intermodal Terminal Traffic will [

] Neither Party may move Dallas Intermodal Terminal Traffic by means of a haulage arrangement with any Foreign Carrier other than is set forth hereinafter as to haulage performed by KCSR for NSR following the exercise of the Option.

SECTION 3. GRANT OF OPTION

Subject to the provisions of Section 4 herein, KCSR hereby grants to NSR an option to permit it or any of its subsidiaries or affiliates to purchase, at Fair Market Value as defined below, all of KCSR's right, title and interest in the Terminal, together with all of the buildings, improvements and other fixtures located on the Terminal, but only upon the terms and conditions stated herein (the "Option"). The Option is an interest that shall run with the land and shall continue in effect without regard to the identity of the owner of the Terminal, including following any conveyance of any interest in the Terminal by KCSR or a change in control of KCSR or KCS. For purposes of this Agreement, "Fair Market Value" shall be the appraised value of the real estate on which the Terminal is located plus the net liquidation value of the components of the Terminal, determined in accordance with Section 4 herein.

SECTION 4. EXERCISE OF OPTION

(a) KCSR shall give written notice to NSR of its intent to abandon, discontinue the use of, sell, lease or otherwise transfer control or use of the Terminal ("Abandonment Notice").

(b) NSR may exercise the Option only by serving, at any time during the Notice Trigger Period, a written notice to KCSR ("Notice") declaring NSR's intent to exercise the Option. In the event that NSR elects not to exercise the Option or fails to exercise the Option during the Notice Trigger Period, then: (i) the Option shall expire and be of no further effect, and (ii) NSR shall use commercially reasonable efforts to indicate the expiration of the Option in the same manner as provided for in Section 4(l) herein.

(c) Within [ ] days of receipt of the Notice from NSR, each of KCSR and NSR shall engage a reputable, independent M.A.I. designated appraiser with at least ten (10) years of experience in valuing: (i) real property in Texas and (ii) commercial values for rail yard property ("Party Terminal Appraiser"), and notify the other Party thereof in writing of the name of the Party Terminal Appraiser chosen. KCSR and NSR shall each cooperate with each Party Terminal Appraiser and promptly provide all records and files, correspondence, properties and personnel, as well as all other information relating to the Terminal reasonably requested by each Party Terminal Appraiser in connection with its appraisal. Each Party Terminal Appraiser shall develop an appraisal report which shall set forth the basis for the respective Party Terminal Appraiser's appraisal, together with such information as is customary in the industry for such a written appraisal report including, but not limited to, the supporting working data and appraisal approach. Within sixty (60) days after their selection by KCSR and NSR, each Party Terminal Appraiser shall provide both NSR and KCSR with its written appraisal report of such Fair Market Value, which for all purposes in this Section 4 shall be based upon the asset value of the assets subject to the Option rather than the going concern value of the Terminal as part of the KCSR railroad system or any other railroad system.

(d) In the event that either NSR or KCSR fails to select a Party Terminal Appraiser, or if a Party Terminal Appraiser fails to timely provide its appraisal report with its determination of Fair Market Value to both NSR and KCSR, then the only appraisal report timely submitted by a Party Terminal Appraiser shall be final and binding on both NSR and KCSR.

(e) If the Fair Market Value of both appraisal reports are within [ ] of each other, the Option price shall be an average of Fair Market Values of both Party Terminal Appraisers. If there is more than [ ] difference in the Party Terminal Appraisers' Fair Market Values, then each Party Terminal Appraiser will submit to the other Party within fifteen (15) days of receipt of the other Party's Party Terminal Appraiser's appraisal a critique of the other Party Terminal Appraiser's appraisal. If KCSR and NSR cannot agree on the Fair Market Value of the Terminal within fifteen (15) days after the date the critiques are delivered, such Party Terminal Appraisers shall consult with each other in good faith and select a third independent M.A.I. designated appraiser (A) with at least ten (10) years of experience in valuing real property in Texas and commercial values for rail yard property, (B) who is not an affiliate, employee or agent of either party or either Party Terminal Appraiser and (C) who shall not at such time be engaged by either Party to perform any work and shall not have performed any work for either Party for at least two (2) years prior to engagement hereunder (the "Independent Terminal Appraiser").

(f) If neither appraisal report is timely delivered, or if both appraisal reports are timely delivered but the Party Terminal Appraisers do not timely select an Independent Terminal Appraiser, then both NSR and KCSR shall have the right, upon written Notice to the other Party, to cause the American Arbitration Association to appoint the Independent Terminal Appraiser.

(g) The Independent Terminal Appraiser shall, within forty-five (45) days of the selection thereof, (i) review each Party Terminal Appraiser's appraisal report, critique, statements provided by the Parties and the respective proposed Fair Market Value, and (ii) issue a report selecting one or the other proposed Fair Market Values which has been submitted to it (the "Terminal Appraisal Report") as best reflecting the Fair Market Value of the Terminal. In

the event that neither Party Terminal Appraiser's appraisal report is timely delivered, the Independent Terminal Appraiser shall deliver a Terminal Appraisal Report reflecting its determination of Fair Market Value. The determination of Fair Market Value by the Independent Terminal Appraiser set forth in the Terminal Appraisal Report shall be final and binding on NSR and KCSR.

(h) Each of NSR and KCSR agrees to execute, if requested by the Independent Terminal Appraiser, a reasonable engagement letter in customary form. Each of NSR and KCSR shall cooperate with the Independent Terminal Appraiser and promptly provide, and shall cause its respective Party Terminal Appraiser to promptly provide, access to all records and files, correspondence, properties and personnel, as well as to all other information, in each case, relating to the Terminal reasonably requested by the Independent Terminal Appraiser in connection with its appraisal.

(i) Each Party shall bear its own expenses as to its respective Party Terminal Appraiser, and the appraisal expenses associated with the Independent Terminal Appraiser shall be borne equally by the Parties.

(j) For a reasonable period of time following KCSR's receipt of the Notice, KCSR shall allow, to the extent not prohibited by applicable Law, the officers, attorneys, accountants and other duly authorized representatives of NSR reasonable access during regular business hours to any books, records, files, correspondence, audits, properties, personnel and other information of KCSR and its affiliates and subsidiaries relating to the Terminal that is reasonably requested by NSR or its representatives.

(k) Within forty-five (45) days of the final determination of the Fair Market Value, as provided above, if NSR elects to proceed with the facility purchase transaction in light of such Fair Market Value determination, NSR (or, at NSR's sole discretion, a subsidiary) shall purchase, and KCSR shall sell, the Terminal at a price consistent with the methodology set forth in this Section 4, and each shall effect, or shall cause their respective subsidiaries, as applicable, to effect, the necessary transactions pursuant to customary documentation reasonably acceptable to the Parties, the transfer by quitclaim deed of all of KCSR's right, title and interest in the Terminal to NSR (or its designated subsidiary), which shall include representations, warranties, covenants and indemnities with respect to the Terminal with terms at least as favorable to NSR (and/or its subsidiaries) as set forth in the Transaction Agreement with respect to the transfer of the Subject Trackage. If the Indentures remain in effect at the time of the purchase of the Terminal, the terms and conditions of such purchase shall comply with the requirements of the Indentures. If KCSR and NSR are unable to agree upon the agreement containing the terms and conditions of purchase of the Terminal, then both NSR and KCSR shall have the right on written notice to the other Party to cause the American Arbitration Association to select between the agreement proposed by KCSR or the agreement proposed by NSR and that selection shall be final and binding upon KCSR and NSR, except that the compensation to be paid for the Terminal shall be determined as otherwise provided for in this Section 4.

(l) NSR shall be responsible for the payment of all transfer, filing and recording taxes in connection with the purchase and sale of the Terminal pursuant to this Section 4.

(m) Nothing set forth in this Section 4 or elsewhere in this Agreement shall restrict or prohibit, nor shall the rights provided in this Section 4 be triggered by, any transfer of any portion of the Terminal by KCSR, or a change in control of KCSR or KCS, provided however, that such transfer or change of control, as the case may be, shall be subject to this Agreement.

(n) NSR may record a memorandum or short form of this Agreement in the local land records setting forth the essential terms of this Option.

(o) If NSR exercises the Option pursuant to part (i) of the definition of "Notice Trigger Period," then NSR (or, for all purposes of this Section 4(o), the designated subsidiary through which NSR purchases the Terminal), at the closing of its purchase of the Terminal, will grant KCSR an option to repurchase the Terminal on the following terms: within [ ] following the date on which NSR purchased the Terminal, if NSR wishes to sell all or any interest in the Terminal and receives a bona fide offer to purchase the Terminal, or NSR wishes to discontinue intermodal operations at the Terminal, NSR shall notify KCSR of its intent in writing, and KCSR shall have [ ] to submit a written offer to repurchase the Terminal at a price to be set pursuant to the procedures provided for in this Section 4. If KCSR submits such an offer, NSR shall reconvey the Terminal to KCSR within thirty (30) days of receipt of payment of the repurchase price. KCSR shall be responsible for the payment of all transfer, filing and recording taxes in connection with the repurchase and resale of the Terminal pursuant to this Section 4(o).

SECTION 5. POST-OPTION

(a) If NSR exercises the Option pursuant to Section 4:

(i) all NSR Dallas Intermodal Terminal Traffic shall move between Shreveport and the Terminal pursuant to [

] and duration (which shall be until terminated by mutual agreement of the Parties).

(ii) NSR agrees to provide to KCSR, for KCSR intermodal traffic, other than traffic to be interchanged at Meridian, on a nondiscriminatory basis with its own traffic and pursuant to agreements typical to the industry, all services normally provided by an intermodal rail terminal to a third party railroad, including but not limited to: inbound and outbound gate inspections, inspection of seals, removal of trailers and containers, with or without chassis, from intermodal cars, loading and securing of trailers and containers on intermodal equipment, loading and unloading of containers, chassis, and trailers from trackside to designated parking space, loading and unloading of containers to chassis to ground, ground to chassis, and

ground, inbound and outbound rail running inspections of trailers and containers under the applicable AAR rules, physical security for KCSR trailers and containers, intermodal cars and chassis to the same general level and quality as KCSR provides for its own equipment and business at the Terminal, storage for containers, trailers and chassis, onsite repair services for trailers, container, chassis, and intermodal rail cars, and reasonably suitable and sufficient office space for two KCSR employees.

(b) NSR charges for services provided to KCSR pursuant to Section 5(a)(ii) shall be [

] If NSR employs a third party independent contractor at the Terminal, KCSR charges assessed by NSR shall be [

]

SECTION 6. TERM AND TERMINATION

(a) Effective Date.

This Agreement shall become effective only if the Transaction, as defined Transaction Agreement referenced in the Recitals hereto, closes, and following the latest date of: (i) the date first written above; (ii) receipt of any required regulatory approvals or exemptions; and (iii) the expiration of any time periods required by the issuance of labor notices by KCSR and/or NSR, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(b) Term.

This Agreement shall commence on the Effective Date, and shall continue until terminated by the Parties hereto.

SECTION 7. REMEDIES AND INSURANCE

(a) Breach of this Agreement.

Each Party acknowledges and agrees that the other Party would be irreparably damaged in the event any of the provisions of this Agreement were not performed by it in accordance with their specific terms or were otherwise breached. It is accordingly agreed that each Party shall be entitled to an injunction or injunctions to prevent further breaches of such provisions and to specifically enforce such provisions, in addition to other remedies available at law or in equity.

(b) Insurance.

KCSR shall ensure that the Terminal and all services provided by KCSR pursuant to this Agreement are at all times covered by insurance to the same degree and in the same manner as maintained from time to time by KCSR and its affiliates for comparable property and operations.

SECTION 8. PROVISIONS OF GENERAL APPLICATION

(a) Force Majeure.

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

(b) Successors and Assigns.

(i) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns.

(ii) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party, provided however, consent to assignment will not be required for assignment to a majority owned subsidiary of either Party, however any subsequent transfer or assignment by such subsidiary shall require prior written consent of the other Party, not to be unreasonably withheld or delayed.

(iii) In the event of a sale of substantially all of the assets or business of KCSR, or the merger or consolidation of KCSR into or with a firm or corporation not controlled by KCS, KCSR may, without the prior consent of NSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of KCSR, or merging or consolidating with KCSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation under this Agreement that existed prior to such assignment.

(c) Invalid or Unenforceable Provisions.

If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this

Agreement in all material respects, unless the provisions determined to be unenforceable or invalid substantially affect the value of this Agreement to either of the Parties and the Parties are unable to agree upon terms which would be substantially equivalent to the terms found to be invalid or unenforceable, in which event this Agreement shall terminate.

(d) Arbitration.

(i) Except as otherwise provided in this Agreement, any dispute arising between the Parties or between KCSR and NSR with respect to the alleged breach of this Agreement shall be initially referred to the JOC for informal dispute resolution. In the event the JOC is unable to resolve the dispute, KCSR or NSR shall submit the dispute to the Management Committee, provided, however, that any Member (as defined in the LLC Agreement) may refer the issue to binding arbitration by a panel of three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall issue a written decision on the controversy. The written decision of the arbitrators, reached upon a majority vote, shall be final and conclusive upon KCSR and NSR. Each Party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs and expenses of the three arbitrators, if any, shall be borne equally by the Parties. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the written award of the arbitrators, there shall be no interruption in the transaction of business under this Agreement, and thereupon such payment or restitution shall be made as required by the written decision of the arbitrators.

(e) Notice.

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

(ii) If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

KCSR or NSR may provide changes in the above addresses to the others by personal service or certified mail.

(f) Confidentiality.

(i) Except as provided by law or by rule, order, or regulation of any Governmental Entity or the New York Stock Exchange, or in connection with an audit by the Internal Revenue Service or other tax authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Term of this Agreement, and for a period of three (3) years after termination of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than officers, employees, independent auditors and attorneys, without the prior written approval of the other Party.

(ii) Notwithstanding the foregoing Section 8(f)(i), the Parties acknowledge and agree that in any STB proceeding, the Parties may be required to submit this Agreement into the record. The Parties will propose to request a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with the highly confidential provisions redacted) may be entered into the public STB record and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

(g) Third Party Beneficiaries.

This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party.

(h) Entire Understanding.

This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(i) Waiver.

No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties. No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(j) Drafters.

This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(k) Choice of Law.

This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(l) Execution in Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

REDACTED

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

_____
As to KCSR

By: _____

WITNESS:

NORFOLK SOUTHERN RAILWAY COMPANY

_____
As to NSRC

By: _____

REDACTED

K

EXHIBIT K
to Transaction Agreement

VICKSBURG ASSIGNMENT AND ASSUMPTION AGREEMENT

This **VICKSBURG ASSIGNMENT AND ASSUMPTION AGREEMENT** (this "Agreement") is dated as of the ____ day of _____, 200__ by and among The Kansas City Southern Railway Company, a Missouri corporation ("Assignor"), and Meridian Speedway LLC, a Delaware limited liability company ("Assignee"). All capitalized terms used but not otherwise defined in this Agreement shall have the meaning ascribed to such terms in the Transaction Agreement by and among Kansas City Southern, Assignor, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation, dated December 1, 2005 (the "Transaction Agreement").

RECITALS:

WHEREAS, there exists that certain Bridge Lease between Vicksburg Bridge and Terminal Company (predecessor in interest to the Warren County Bridge Commission) and The Yazoo and Mississippi Valley Railroad Company (predecessor in interest to Assignor), dated February 11, 1928, as amended from time to time (the "Vicksburg Bridge Lease"); and

WHEREAS, on the terms and subject to the conditions set forth in the Transaction Agreement, Assignor agrees to assign the Vicksburg Bridge Lease to Assignee, and Assignee desires to accept such assignment; and

WHEREAS, the Warren County Bridge Commission has consented to such assignment.

NOW, THEREFORE, for and in consideration of the premises, the mutual covenants and agreements contained herein and in the Transaction Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

Section 1. Assignment. Assignor hereby contributes, assigns, sets over and transfers to Assignee, its successors and assigns, all of Assignor's right, title and interest, in, to and under the Vicksburg Bridge Lease.

Section 2. Assumption. Subject to the terms and conditions of the Transaction Agreement, Assignee hereby accepts the assignment of all of Assignor's right, title and interest in, to and under the Vicksburg Bridge Lease and the Assumed Liabilities related to the Vicksburg Bridge Lease and agrees to observe, pay, perform and discharge such Assumed Liabilities, in accordance with their respective terms, as and when due.

Section 3. The Transaction Agreement. This Agreement is controlled by the terms and conditions of the Transaction Agreement. Nothing herein shall be deemed to amend, modify, alter, expand or diminish the terms and conditions of the Transaction Agreement, including,

without limitation, the covenants, representations, warranties and indemnification obligations contained therein.

Section 4. Further Assurances. Assignor shall, from time to time upon the reasonable request of Assignee, execute and deliver all such further documents and instruments, and take all such further acts as shall be necessary or desirable to give full effect to the intent and meaning of this Agreement.

Section 5. Governing Law. The laws of the state of Delaware shall govern the validity of this Agreement, the construction of its terms and the interpretation of the rights and duties arising hereunder, without regard to the laws that might otherwise govern under the applicable principles of conflicts of law thereof.

Section 6. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

Section 7. Successors and Assigns. This Agreement shall be binding upon and inure solely to the benefit of each party hereto and their respective successors and permitted assigns, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any rights, interests, benefits or remedies of any nature whatsoever under or by reason of this Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____
Name:
Title:

MERIDIAN SPEEDWAY LLC

By:_____
Name:
Title:

L

EXHIBIT L
to Transaction Agreement

JACKSON ASSIGNMENT AND ASSUMPTION AGREEMENT

This **JACKSON ASSIGNMENT AND ASSUMPTION AGREEMENT** (this "Agreement") is dated as of the ____ day of _____, 200__ by and among The Kansas City Southern Railway Company, a Missouri corporation ("Assignor"), and Meridian Speedway LLC, a Delaware limited liability company ("Assignee"). All capitalized terms used but not otherwise defined in this Agreement shall have the meaning ascribed to such terms in the Transaction Agreement by and among Kansas City Southern, Assignor, The Alabama Great Southern Railroad Company and Norfolk Southern Corporation, dated December 1, 2005 (the "Transaction Agreement").

RECITALS:

WHEREAS, there exists that certain MSR Jackson Trackage Rights agreement between Illinois Central Gulf Railroad Company and MidSouth Rail Corporation (predecessor in interest to Assignor), dated March 26, 1986, as amended from time to time (the "MSR Jackson Trackage Rights"); and

WHEREAS, on the terms and subject to the conditions set forth in the Transaction Agreement, Assignor agreed to assign the MSR Jackson Trackage Rights to Assignee, and Assignee desires to accept such assignment; and

WHEREAS, Canadian National has consented to such assignment.

NOW, THEREFORE, for and in consideration of the premises, the mutual covenants and agreements contained herein and in the Transaction Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

Section 1. Assignment. Assignor hereby contributes, assigns, sets over and transfers to Assignee, its successors and assigns, all of Assignor's right, title and interest, in, to and under the MSR Jackson Trackage Rights.

Section 2. Assumption. Subject to the terms and conditions of the Transaction Agreement, Assignee hereby accepts the assignment of all of Assignor's right, title and interest in, to and under the MSR Jackson Trackage Rights and the Assumed Liabilities related to the MSR Jackson Trackage Rights and agrees to observe, pay, perform and discharge such Assumed Liabilities, in accordance with their respective terms, as and when due.

Section 3. The Transaction Agreement. Nothing herein shall be deemed to amend, modify, alter, expand or diminish the terms and conditions of the Transaction Agreement,

including, without limitation, the covenants, representations, warranties and indemnification obligations contained therein.

Section 4. Further Assurances. Assignor shall, from time to time upon the reasonable request of Assignee, execute and deliver all such further documents and instruments, and take all such further acts as shall be necessary or desirable to give full effect to the intent and meaning of this Agreement.

Section 5. Governing Law. The laws of the state of Delaware shall govern the validity of this Agreement, the construction of its terms and the interpretation of the rights and duties arising hereunder, without regard to the laws that might otherwise govern under the applicable principles of conflicts of law thereof.

Section 6. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

Section 7. Successors and Assigns. This Agreement shall be binding upon and inure solely to the benefit of each party hereto and their respective successors and permitted assigns, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any rights, interests, benefits or remedies of any nature whatsoever under or by reason of this Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By:_____
Name:
Title:

MERIDIAN SPEEDWAY LLC

By:_____
Name:
Title:

M

REDACTED

EXHIBIT M
to Transaction Agreement

JACKSON HAULAGE AGREEMENT

THIS JACKSON HAULAGE AGREEMENT (this "Agreement") is entered into as of this ____ day of _____, 200__, by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSR") and THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation ("KCSR"). NSR and KCSR are referred to individually herein as a "Party" and collectively as the "Parties".

RECITALS:

WHEREAS, on December 1, 2005, Kansas City Southern ("KCS"), KCSR, Norfolk Southern Corporation, and The Alabama Great Southern Railroad Company entered into a transaction agreement (the "Transaction Agreement") that, among other things, provided for the creation of Meridian Speedway, LLC ("MSLLC"), the transfer from KCSR, a wholly-owned subsidiary of KCS, to MSLLC of the rail line generally between Meridian, Mississippi and Shreveport, Louisiana (the "Subject Trackage"), and the grant by MSLLC to NSR of certain rights over the entirety of the Subject Trackage pursuant to the NSR Joint Use Agreement; and

WHEREAS, pursuant to an agreement of even date herewith between KCSR and MSLLC (the "Master KCSR-MSLLC Interchange Agreement"), MSLLC and KCSR have documented, among other things, the method for the physical interchange of traffic between KCSR and MSLLC at points on the Subject Trackage; and

WHEREAS, the route traversed by traffic moving pursuant to the NSR Joint Use Agreement over the Subject Trackage includes approximately four-tenths of a mile section of track in Jackson, Mississippi that is controlled by Canadian National (as successor to Illinois Central Gulf Railroad Company) (the "Jackson Trackage Rights Segment") pursuant to that certain trackage rights agreement (the "MSR Trackage Rights Agreement"), as supplemented and amended from time to time, dated March 26, 1986, between Midsouth Rail Corporation and Illinois Central Gulf Railroad Company; and

WHEREAS, pursuant to the Transaction Agreement, KCSR shall provide haulage for NSR over the Jackson Trackage Right Segment until either the MSR Trackage Rights Agreement is assigned to MSLLC or MSLLC constructs a "flyover" bridge to carry MSLLC's tracks over the tracks and real property of Canadian National Railway Company ("Canadian National") at Jackson, MS which establishes a continuous line of rail between Shreveport and Meridian (the "Jackson Flyover"); and

WHEREAS, the Parties desire to set forth the terms and conditions upon which KCSR shall provide haulage services to NSR over the Jackson Trackage Rights Section until either the MSR Trackage Rights Agreement is assigned to MSLLC or MSLLC constructs the Jackson Flyover.

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS AND INTERPRETATION

(a) Interpretation Generally.

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(ii) Unless otherwise defined herein, each capitalized term in this Agreement shall have the same meaning given to said term in the Transaction Agreement.

(iii) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(b) Capitalized Terms.

All capitalized terms shall have the meaning set forth as follows:

"Agreement" shall have the meaning given that term in the introductory paragraph.

"AAR" shall have the meaning given to that term in Section 2(b)(vii).

"Canadian National" shall have the meaning given that term in the Recitals.

"Cars" means each loaded or empty railroad freight car (including platform and well rail cars) or similar equipment.

"Clearance File" shall have the meaning given that term in Section 2(b)(viii).

"Discontinuance Notice Period" shall have the meaning given that term in Section 6(m)(i).

"Discontinuance Segment" shall have the meaning given that term in Section 6(m)(i).

"Effective Date" shall have the meaning given to that term in Section 76(fe)(i).

"End Points" shall mean the end points of the MSR Trackage Rights Agreement.

"EOTs" shall have the meaning given to that term in Section 2(b)(ii).

"Equipment" shall mean and be confined to hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery (other than locomotives) capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

REDACTED

"Exercise Notice" shall have the meaning given that term in Section 6(l)(iii).

"Governmental Entity" shall mean any federal, state, local or foreign court, administrative agency or commission or other governmental or regulatory authority or commission or any arbitration tribunal.

"Haulage Services" shall have the meaning given that term in Section 2(a)(i).

"Jackson Flyover" shall have the meaning given to that term in the Recitals.

"Jackson Trackage Rights Segment" shall have the meaning given the term in the Recitals.

"JOC" shall have the meaning given to that term in Section 6(i).

"KCS" shall have the meaning given that term in the Recitals.

"KCSR" shall have the meaning given that term in the introductory paragraph.

"Master KCSR-MSLLC Interchange Agreement" shall have the meaning given that term in the Recitals.

"MSLLC" shall have the meaning given that term in the Recitals.

"MSR Trackage Rights Agreement" shall have the meaning given that term in the Recitals.

"NSR" shall have the meaning given to that term in the introductory paragraph.

"NSR Cars" shall mean Cars and Equipment in the revenue and/or car hire account of NSR.

"NSR Haulage Cars" shall mean NSR Cars being transported pursuant to NSR Haulage Rights.

"Parties" shall have the meaning given that term in the introductory paragraph.

"Party" shall have the meaning given that term in the introductory paragraph.

"STB" shall mean the Surface Transportation Board or successor agency.

"Subject Trackage" shall have the meaning given that term in the Recitals.

"Term" shall have the meaning given that term in Section 6(f)(ii).

"Transaction Agreement" shall have the meaning given to that term in the Recitals.

"Unified Liability Agreement" shall mean that contract of even date herewith entered into among NSR, KCSR and MSLLC governing the apportionment of liability and other matters.

"Waiver Notice" shall have the meaning given that term in Section 6(m)(v).

(c) Successor Laws.

A reference to any particular statute or regulation shall include a reference to any successor statute or regulation.

SECTION 2. GRANT OF HAULAGE SERVICES

(a) Haulage Services Generally.

(i) The haulage services to be provided by KCSR to NSR shall consist of, as applicable, the following (collectively, the rights granted herein are the "Haulage Services"):

(A) the transportation by KCSR of NSR Haulage Cars over the Jackson Trackage Rights Segment;

(B) the movement of bad order NSR Haulage Cars and NSR locomotives to or from repair tracks, provided, that NSR will be billed separately for repairs to such equipment performed by KCSR pursuant to Section 2(b)(v) of this Agreement;

(C) such mechanical or other inspection of NSR Haulage Cars and Locomotives as may be prescribed by regulation or KCSR's operating practices; and

(D) provision of supervision as required.

(ii) Nothing in this Section 2(a) shall be interpreted as requiring NSR to pay for any service not used.

(iii) NSR Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of NSR while moving in Haulage Service on the Jackson Trackage Rights Segment. KCSR shall not be entitled to any line haul revenue for the handling of NSR Haulage Cars, nor shall KCSR participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with, the movement of NSR Haulage Cars. As between NSR and KCSR, NSR shall be responsible for all mileage and car hire charges accruing on NSR Haulage Cars, and NSR shall report and pay, or arrange to have reported and paid, all appropriate allowances and charges directly to the owner(s) of such cars.

(b) Conduct Of Operations.

(i) NSR shall deliver and receive, or shall cause MSLLC to deliver and receive, NSR Haulage Cars to and from KCSR at the endpoints of the Jackson Trackage Rights Segment pursuant to applicable interchange terms and conditions as may from

time to time govern, in the case of delivery by NSR, or pursuant to the Master KCSR-MSLLC Interchange Agreement, in the case of delivery by MSLLC.

(ii) NSR shall make available, or shall cause MSLLC to make available, via EDI transmission (or by such other means as may be mutually agreed by said parties), information necessary for the further handling and movement of NSR Haulage Cars. Such information shall include, for each car:

(A) Car initial and number.

(B) Loaded or empty.

(C) All required hazardous materials information.

(D) Such other information as the parties may agree to be necessary or convenient for the safe and efficient exchange and further movement of such Cars.

(iii) The Parties continue to be bound by the Supplemental Agreement dated May 11, 2000, to the Master Locomotive Run Through Agreement of November 29, 1994, attached hereto as Appendix B and the Amendment No. 1 to the Haulage Agreement dated February 1, 2002. KCSR shall not be responsible for providing any equipment (locomotives, cars, end of train units ("EOTs"), etc.), or fuel for the trains providing the Haulage Services.

(iv) Subject to Canadian National's management of the Jackson Trackage Rights Segment, as between NSR and KCSR, KCSR shall have exclusive management and control over the movement of trains containing NSR Haulage Cars while on the Jackson Trackage Rights Segment.

(v) NSR may operate trains pursuant to Section 2(a) or Section 2(b) in either direction over the Subject Trackage.

(vi) KCSR shall have no right to fill out any trains carrying NSR Haulage Cars with any Cars or Equipment while on the Jackson Trackage Rights Segment.

(vii) KCSR may arrange for such repairs to NSR Haulage Cars, and adjustments to or transfers of lading from bad ordered, defective or overloaded NSR Haulage Cars, as in KCSR's judgment may be necessary to move such NSR Haulage Cars safely. NSR shall reimburse KCSR for the cost of such work at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the Association of American Railroads ("AAR").

(viii) NSR shall have the right to tender all dimensional loads and excess clearance Cars for handling by KCSR over the Jackson Trackage Rights Segment, subject to a clearance file (the "Clearance File") applicable to traffic of all Parties maintained by KCSR. KCSR shall promptly inform NSR of any changes made to the Clearance File.

(ix) NSR may use the haulage rights granted hereunder solely for the purpose of bridging traffic between the End Points of the Jackson Trackage Rights Segment, and such rights do not include the right of ingress and egress to any tracks, switches, turnouts, or other track classifications that connect to any point along the Subject Trackage except the End Points.

(x) NSR may not, pursuant to this Agreement, grant haulage rights, trackage rights, or other operating rights of any nature on or over the Jackson Trackage Rights Segment.

(c) Service Standards.

(i) It is the intent of the Parties that KCSR shall generally accord NSR Haulage Cars the same level of service as KCSR provides to all other traffic of the same type moving over the Jackson Trackage Rights Segment.

(ii) NSR shall provide KCSR with reasonable notice of the schedules for regularly scheduled haulage trains operating over the Jackson Trackage Rights Segment and KCSR shall attempt to accommodate such schedules but does not guarantees that it will do so.

(iii) Nothing herein shall be interpreted as prohibiting KCSR from transporting NSR Haulage Cars in a continuous movement operating over both the haulage routes covered by: (i) this Agreement and, as Designated Operator for MSLLC under the Operating Agreement, (ii) the NSR Joint Use Agreement.

SECTION 3. INFRASTRUCTURE MAINTENANCE

(a) KCSR does not guarantee the condition of the Jackson Trackage Rights Segment or that operations thereover will not be interrupted. KCSR shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use commercially reasonable efforts to avoid such interruptions.

(b) Existing connections or facilities, which are jointly used by the Parties hereto under existing agreements, shall continue to be maintained, repaired, and renewed by and at the expense of the Party or Parties responsible for such maintenance, repair, and renewal under such agreements.

SECTION 4. MANAGEMENT OF THE JACKSON TRACKAGE RIGHTS SEGMENT

(a) Control And Dispatching

(i) Subject to Canadian National's management of the Jackson Trackage Rights Segment, as between KCSR and NSR, KCSR shall have exclusive control of the management and operation (excluding dispatching) of the Jackson Trackage Rights Segment. Operation and control of the Jackson Trackage Rights Segment shall be conducted in a manner as to afford each of the Parties, and any other present or future

user of the Jackson Trackage Rights Segment (or any portion thereof) the most economical and efficient movement of its traffic.

(ii) The maximum length of NSR Trains (including locomotives and other motive power units) operating pursuant to this Agreement shall be the greater of: (a) 7,500 feet or (b) the maximum train length as may be permitted from time to time for any other train regularly operated over the Jackson Trackage Rights Segment.

(b) Capacity

Notwithstanding any other provisions of this Agreement, the Parties acknowledge that there may be capacity constraints from time to time for traffic covered under this Agreement. Further, the Parties acknowledge that NSR is allocated certain overhead train starts pursuant to the NSR Joint Use Agreement. Whenever capacity of the Jackson Trackage Rights Segment is insufficient to handle the total traffic demands of users of the same, the capacity allocation rules in the NSR Joint Use Agreement will apply with equal force over the Jackson Trackage Rights Segment, subject to Canadian National's management of the Jackson Trackage Rights Segment. Nothing in this Section 4(b) shall be interpreted as requiring NSR to pay for any service not used.

(c) Loss of Use of the Jackson Trackage Rights Segment.

(i) Other than as specifically set forth in this Agreement, NSR shall not have, pursuant to this Agreement, any claim against KCSR for liability on account of loss or damage of any kind in the event the use of the Jackson Trackage Rights Segment by NSR Haulage Cars is interrupted or delayed at any time from any cause.

(ii) If the Jackson Trackage Rights Segment is unavailable for service due to a derailment, line outage or other interruption of service, then KCSR shall cooperate and consult with NSR in order to address any resulting backlog of trains over a period of time following the resolution of such derailment or other interruption as may be required to reduce such backlog of NSR Traffic or NSR Trains.

SECTION 5. ASSIGNMENT

The terms and provisions of this Agreement contemplate that the MSR Trackage Rights Agreement have not been assigned by KCSR to MSLLC. If the MSR Trackage Rights Agreement is lawfully assigned from KCSR to MSLLC as contemplated by the Transaction Agreement, or should the Jackson Flyover be constructed and become operational, then this Agreement shall terminate, except that any liability accruing while this Agreement is in effect shall not be extinguished or diminished by such termination.

SECTION 6. GENERALLY APPLICABLE PROVISIONS

(a) Compliance with Applicable Law and Rules.

(i) Each Party hereto shall comply with all applicable and lawful federal, state and local laws, rules, regulations and orders promulgated by any government or

governmental agency that relate to the operations contemplated hereunder. If any fine, penalty, cost, or charge is imposed or assessed on or against either Party hereto by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, liability will be allocated in accordance with the Unified Liability Agreement.

(ii) Without affecting the generality of the foregoing Section 6(a)(i), the Parties shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other lawful federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and Equipment while such trains, locomotives, cars, and Equipment are being operated over the Subject Trackage. Liability for a violation of this section shall be determined in accordance with Unified Liability Agreement.

(b) Compensation.

The compensation payable by NSR to KCSR for the services provided hereunder shall be [ ].

(c) Liability.

As between the Parties hereto, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of NSR or KCSR), resulting from, arising out of, incidental to or occurring in connection with this Agreement shall be allocated as is set forth in the Unified Liability Agreement.

(d) Rerailing, Wrecking, Bad Orders and Repairs.

(i) Whenever NSR Haulage Cars require rerailing, wrecking service or wrecking train service, KCSR shall arrange for the provision of such service, including the repair and restoration of roadbed, the Jackson Trackage Rights Segment and structures. KCSR shall promptly inform NSR of its intent to proceed with wrecking service or wrecking train service, and shall permit a NSR representative to be present on the scene, to work in concert with KCSR's employees to manage such wrecking service or wrecking train service. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 6(c) hereof. All Locomotives, Cars, Equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by NSR at the time of such wreck, shall be promptly delivered to it.

(ii) If any NSR Haulage Cars or NSR locomotives are bad ordered en route on the Jackson Trackage Rights Segment and it is necessary that they be set out, those Cars or locomotives shall, after being repaired, be transported by KCSR to be picked up by NSR. KCSR may, upon request of NSR and at the expense of NSR, unless otherwise

provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered cars or locomotives safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(e) Force Majeure.

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including flood, earthquake, hurricane, tornado, or other such severe weather or climatic condition, riot, accident, wreck, derailment, washout, explosion, Acts of God, act of terrorism and public enemy, war, blockage, insurrection, vandalism or sabotage, fire, strike, lockout or labor dispute, embargoes or AAR service orders, or governmental laws, orders or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

(f) Term and Termination.

(i) This Agreement shall become effective following the latest date of: (a) the date first written above; (b) receipt of any required regulatory approvals or exemptions; and (c) the expiration of any time periods required by the issuance of labor notices by NSR and/or KCSR, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(ii) This Agreement shall commence on the Effective Date, and, except as provided in Section 5, shall continue until terminated in writing jointly by the Parties (the "Term").

(iii) Termination of this Agreement shall not relieve or release any Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination.

(g) Successors and Assigns.

(i) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns.

(ii) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

(iii) In the event of a sale of substantially all of the assets or business of NSR, or the merger or consolidation of NSR into or with a firm or corporation not controlled by NSC, NSR may, without the prior consent of KCSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of NSR, or merging or consolidating with NSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of NSR under this Agreement that existed prior to such assignment.

(iv) In the event of any of the following, KCSR shall, without the prior consent of NSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of KCSR, or merging or consolidating with KCSR: (A) a sale of substantially all of the assets or business of KCSR; or (B) the merger or consolidation of KCSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of KCSR under this Agreement that existed prior to such assignment.

(h) Notice.

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to KCSR:

Chief Operating Officer
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

with a copy to:

Senior Vice President and General Counsel
The Kansas City Southern Railway Company
P.O. Box 219335
Kansas City, MO 64121-9335

(ii) If to NSR:

Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation

1200 Peachtree Street, N.E., Box 158
Atlanta, Georgia 30309

Either Party may provide notice of changes in the above addressees to the other Party by personal service or certified mail.

(i) Arbitration.

Any dispute arising between the Parties with respect to an alleged breach of this Agreement shall be referred to the Joint Operating Committee ("JOC"), as defined in the NSR Joint Use Agreement, for resolution, and if the JOC is unable to resolve the dispute, it shall be referred to the Management Committee, provided however, that any Member (as defined in the LLC Agreement) may submit the dispute for binding arbitration by a panel of three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules, who shall render a written decision on the controversy. The written decision of the arbitrators, acting by reached upon majority vote, shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, experts, and counsel. The compensation, costs, and expenses of the three arbitrators, if any, shall be borne by NSR and KCSR, with each paying 50 percent of such compensation, costs, and expenses. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the written decision of the arbitrators, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the written decision of the arbitrators.

(j) Confidentiality.

(i) Except as provided by law or by rule, order, or regulation of any Governmental Entity or the New York Stock Exchange, or in connection with an audit by the Internal Revenue Service or other taxing authority, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Term, and for a period of three (3) years after termination of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than members, officers, employees, independent auditors, and attorneys, without the prior written approval of the other Party.

(ii) Notwithstanding the foregoing Section 6(j)(i), the Parties acknowledge and agree that in any STB proceeding, the Parties may be required to submit this Agreement into the record. The Parties will seek a protective order to protect the payment provisions of this Agreement. Following issuance of a protective order, a copy (with certain confidential provisions redacted) may be entered into the public STB record and a highly confidential unredacted copy of this Agreement may be entered into the STB record subject to the provisions of the applicable protective order.

(k) Breach of this Agreement.

(i) Each Party acknowledges and agrees that the other Party would be irreparably damaged in the event any of the provisions of this Agreement were not performed by it in accordance with their specific terms or were otherwise breached. It is accordingly agreed that each Party shall be entitled to an injunction or injunctions to prevent further breaches of such provisions and to specifically enforce such provisions, in addition to any other remedy to which such entity may be entitled, at law or in equity.

(ii) In no event shall either or KCSR or NSR (including, in each case, their affiliates) be liable to the other for any consequential, indirect, incidental, punitive or other similar damages including, but not limited to, lost profits for any breaches or defaults, or any act or omission arising out of or in any way relating to this Agreement, under any form or theory of action whatsoever, whether in contract, tort or otherwise.

(l) Claims.

The Parties shall agree between themselves on the most fair, practical, and efficient arrangements for handling and administering freight loss and damage claims. Such arrangements, and the allocation of responsibility for such claims, shall be subject to the provisions of the Unified Liability Agreement.

(m) Discontinuance of Operations.

(i) KCSR shall have the right, subject to securing any necessary regulatory approval or exemption, to discontinue operations over the Jackson Trackage Rights Segment or any portion thereof during the term of this Agreement. For any portion of the Jackson Trackage Rights Segment that requires regulatory authority for the discontinuance of operations ("Discontinuance Segment"), KCSR shall provide NSR no less than ninety (90) days prior notice ("Discontinuance Notice Period") of its intention to seek regulatory authority to discontinue operations over any Discontinuance Segment.

(ii) If KCSR elects to discontinue operations over the Jackson Trackage Rights Segment (or any portion thereof) pursuant to this Agreement, the provisions of this Agreement shall continue to apply in all respects to any remaining portion of the Jackson Trackage Rights Segment not discontinued by KCSR.

(iii) KCSR shall, not less than 90 days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said discontinuance) of an application or exemption for authority to discontinue operations over any Discontinuance Segment(s), offer to assign this Agreement to NSR without charge, and KCSR shall use all commercially reasonable efforts to effect an assignment of the MSR Trackage Rights Agreement to NSR if NSR shall so elect. NSR shall give KCSR written notice ("Exercise Notice") of its decision to accept the assignment of this Agreement and the MSR Trackage Rights Agreement within the Discontinuance Notice Period.

(iv) The Parties shall consummate the assignment contemplated by this Section 6(m) within forty-five (45) days of the latest of: (a) the delivery of the Exercise

Notice; and (b) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(v) If NSR elects not to take an assignment of this Agreement, it shall so advise KCSR within the Discontinuance Notice Period by delivering to KCSR a notice of waiver of right to take the assignment ("Waiver Notice"). Failure of NSR to provide KCSR with either an Exercise Notice or a Waiver Notice within the Discontinuance Notice Period shall constitute a Waiver Notice.

(vi) In the event of a Waiver Notice, KCSR shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the discontinuance of its operations over the Jackson Trackage Rights Segment.

(n) Miscellaneous Provisions.

(i) This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(ii) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(iii) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties.

(iv) The division of this Agreement into articles, sections and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to articles, sections or subsections are to articles, sections or subsections of this Agreement.

(v) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(vi) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(vii) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to

be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(viii) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between KCSR and NSR.

(ix) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(x) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

REDACTED

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:	THE KANSAS CITY SOUTHERN RAILWAY COMPANY
As to KCSR.	By: _____
WITNESS:	NORFOLK SOUTHERN RAILWAY COMPANY
As to NSR.	By: _____

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

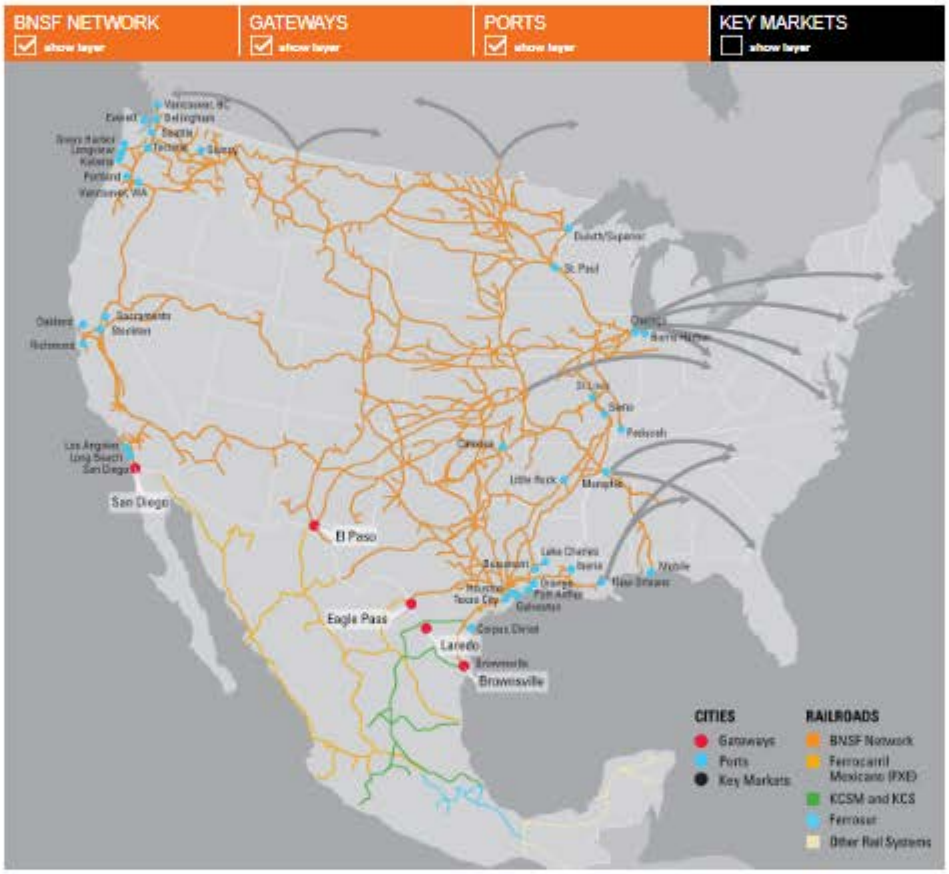
HYNES V.S. EXHIBIT 80

BNSF NETWORK MAP, BNSF RAILWAY, HTTPS://WWW.BNSF.COM/SHIP-WITH-BNSF/MAPS-AND-SHIPPING-LOCATIONS/MEXICO/NETWORK-MAP.HTML (LAST VISITED MAY 12, 2022)

REDACTED PUBLIC RECORD VERSION

BNSF Network Map

Looking for the opportunity to reach key markets and ports? Searching for a transportation partner who can handle the capacity you need to ship? BNSF Mexico is here to help. Mexico freight. U.S. freight. Canadian freight. BNSF Mexico handles North American freight like no other railway. We can get what you need to ship where it needs to go.



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

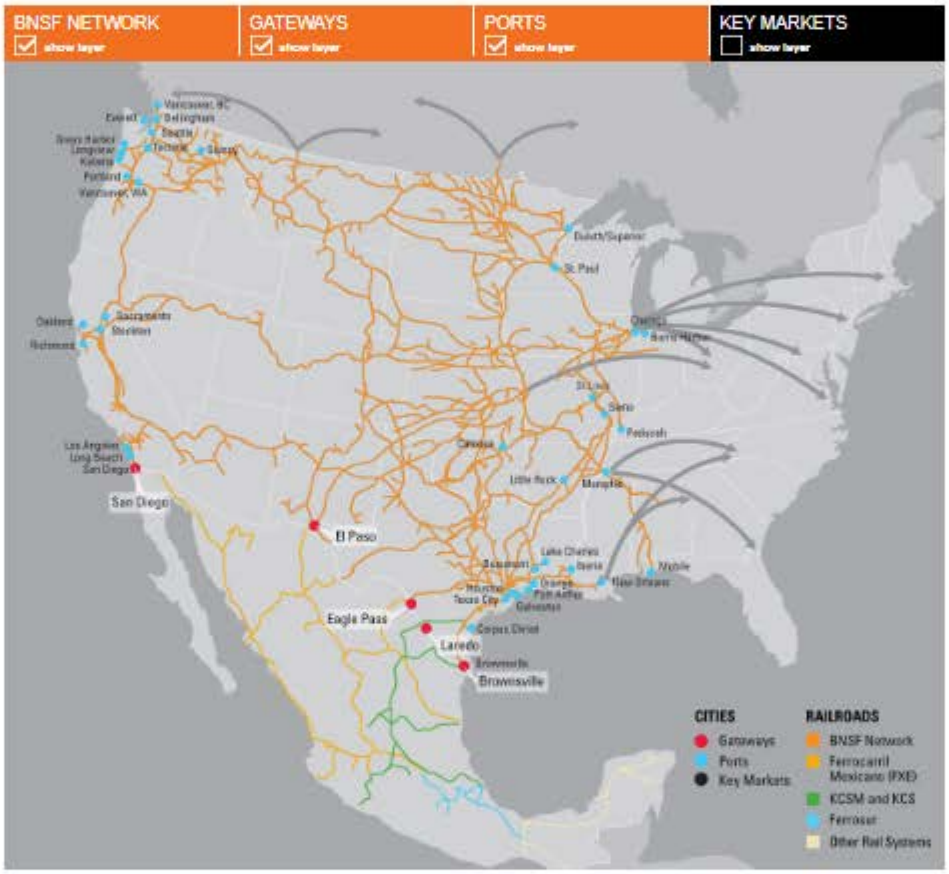
HYNES V.S. EXHIBIT 81

BNSF Network Map

REDACTED PUBLIC RECORD VERSION

BNSF Network Map

Looking for the opportunity to reach key markets and ports? Searching for a transportation partner who can handle the capacity you need to ship? BNSF Mexico is here to help. Mexico freight. U.S. freight. Canadian freight. BNSF Mexico handles North American freight like no other railway. We can get what you need to ship where it needs to go.



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 82

HIGHLY CONFIDENTIAL – BNSF0000151

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 83

HIGHLY CONFIDENTIAL - BNSF0003259

BEFORE THE
SURFACE TRANSPORTATION BOARD

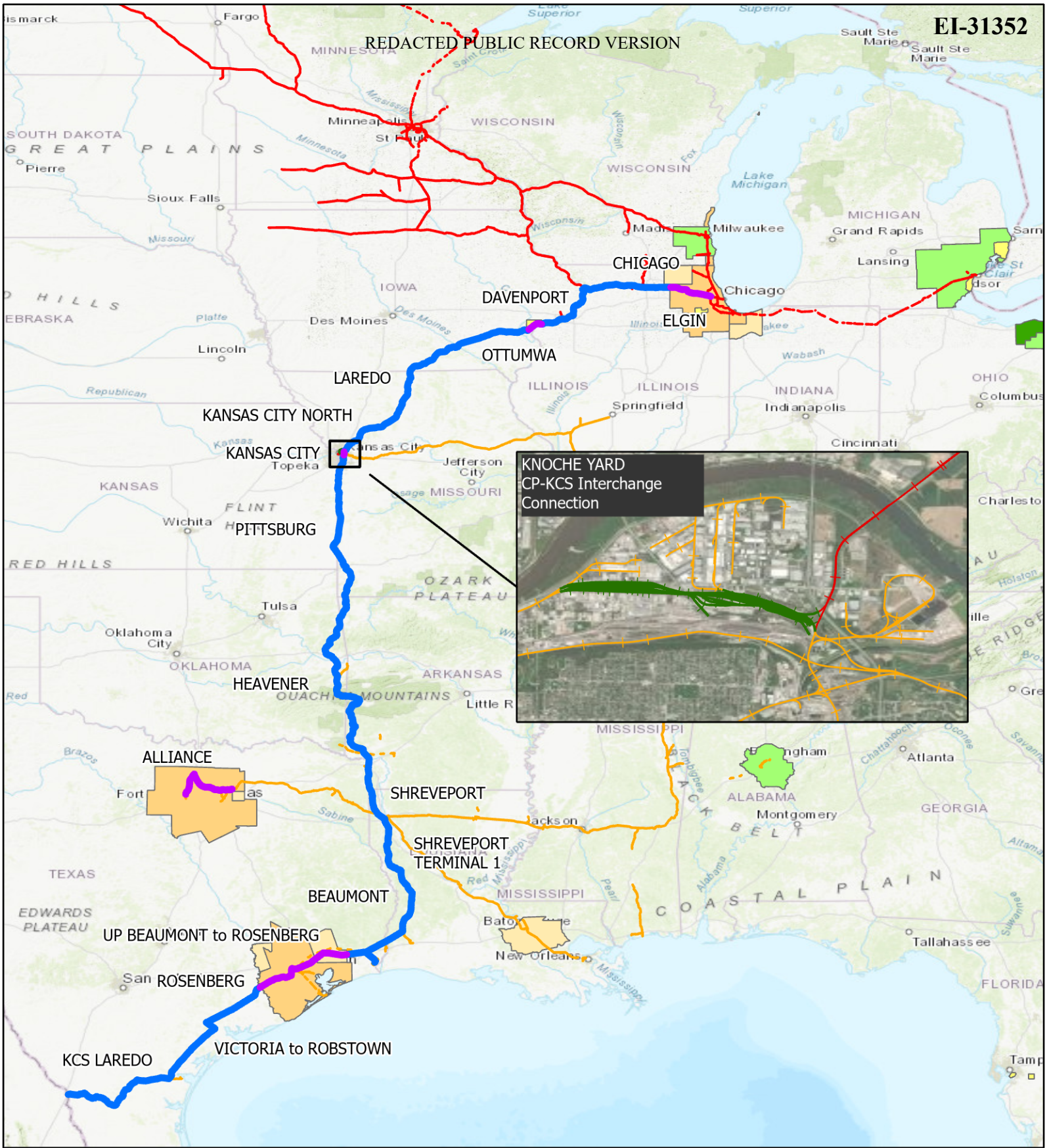
FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 84

CP Response to Information Request No. 1, EI 31352 (Oct. 28, 2021)

REDACTED PUBLIC RECORD VERSION



OEA Information Request 1 - A1 A2
Network Overview: Segments That Exceed STB Threshold

N

REV 5.0

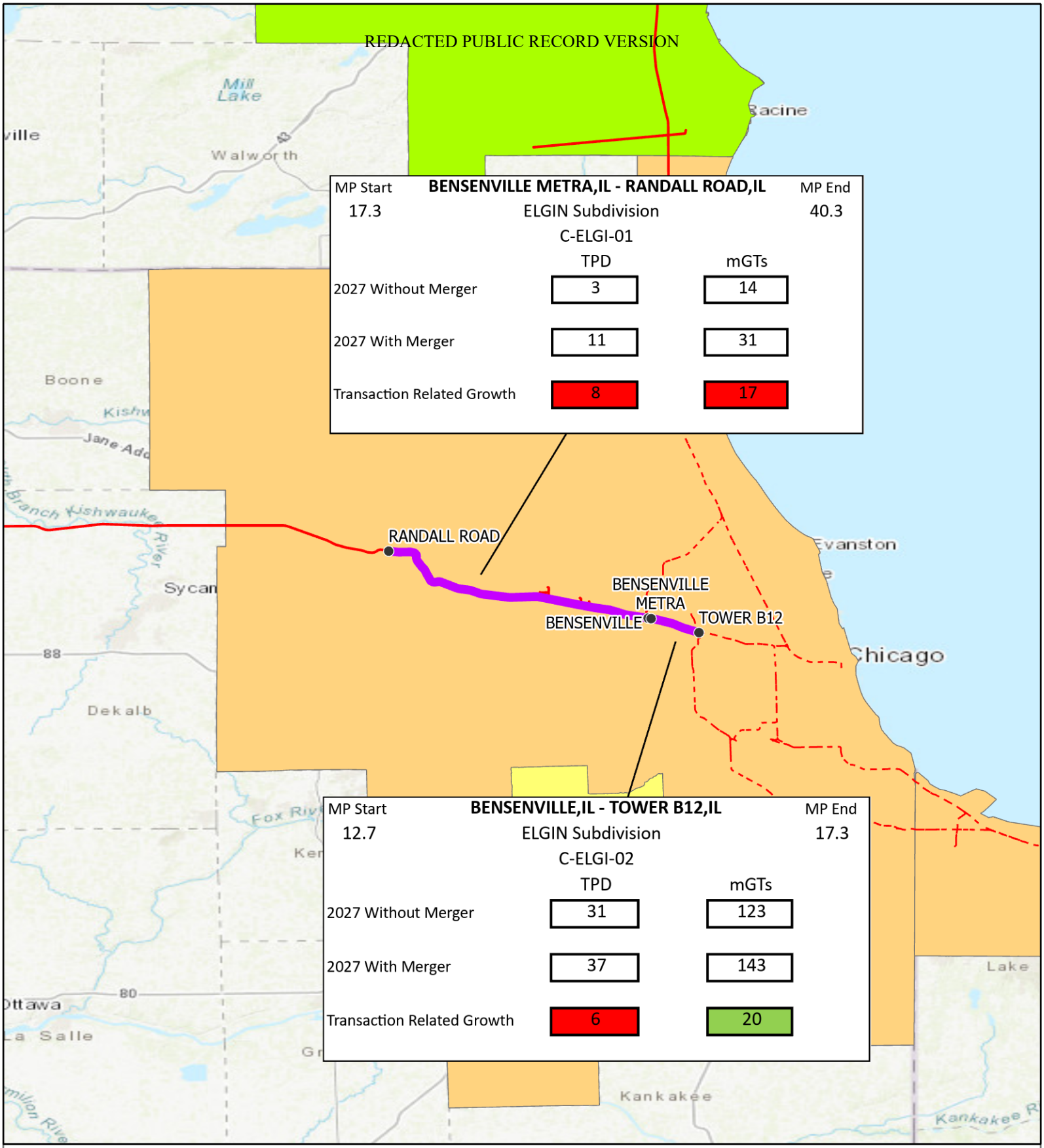
Train Data

- Exceeds STB Attainment Threshold
- Exceeds STB Non-Attainment Threshold
- Joint Agency CP-KCS Ownership
- KCS Track
- KCS Trackage Rights
- CPRS Track
- CPRS Trackage Rights

EPA Nonattainment Areas

- Sulfur Dioxide (2010 Standard)
- PM-2.5 (2012 Standard)
- PM-2.5 (2006 Standard)
- 8-Hour Ozone (2015 Standard)
- 8-Hour Ozone (2008 Standard)

0 75 150 Miles



OEA Information Request 1 - A2
Elgin Subdivision
Tower B12, IL to Randall Road, IL
Segments C-ELGI-01, C-ELGI-02

N
REV 5.0

- Stations
- Exceeds STB Non-Attainment Threshold
- CPRS Track
- CPRS Trackage Rights
- Sulfur Dioxide (2010 Standard)
- PM-2.5 (2006 Standard)
- 8-Hour Ozone (2015 Standard)
- Exceeds Threshold

15 Miles

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 85

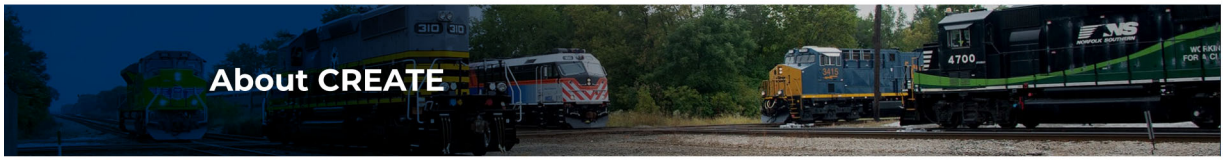
CREATE: KEEPING THE GO IN CHICAGO

REDACTED PUBLIC RECORD VERSION

Chicago Region Environmental and Transportation Efficiency Program

CREATE
KEEPING THE GO IN CHICAGO

About CREATE | What We Do | Doing Business with CREATE | Get Involved | Latest News | Resources



Homepage About CREATE

- About CREATE
- History
- Our Partners
- Our Mission
- Careers
- Final Feasibility

CREATE Overview

The CREATE Program is a public-private partnership that has worked since 2003 to improve the way passengers and goods move over rail. We are making Chicago's railroad network safer, more efficient and better able to accommodate growth in freight and passenger traffic.

One of every four U.S. freight trains passes through Chicago. That's about 500 freight trains and 800 passenger and commuter trains every day. The U.S. rail network depends on our region, and growth is on the horizon. The CREATE Program is stepping up to modernize our rail network to better handle our region's freight and passenger needs, both today and in the future.

We are focusing on efficiency, safety and communities while untangling North America's busiest rail hub, making the CREATE Program a project of both national and regional significance.

Along four rail corridors throughout our region, we are investing $4.6 billion in 70 projects to:

- Increase capacity and efficiency and reduce travel times for freight and passenger trains
- Eliminate or reduce railroad crossing delays for motorists and emergency vehicles
- Benefit the local communities in which CREATE projects are located
- Reduce train idling, emissions and horn noise

70+	30+	$31.5	44,000
Projects	**Year Benefits**	**Billion**	**Jobs**
across the Chicago region	of national and regional significance	generated in economic benefits	estimated job years created

Newsletter Sign-Up
Sign-Up to receive latest news and events from CREATE

Enter email address SIGN UP

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 86

LETTER FROM C. ANNE ERGO TO A. GIORDANO (MAY 24, 2022)

Village of Bartlett

Village of Bensenville

City of Elgin

Village of Hanover Park

Coalition TO STOP CPKC

www.StopCPKC.com

Village of Itasca

Village of Roselle

Village of Schaumburg

Village of Wood Dale

DuPage County

Arielle Giordano
Canadian Pacific Railway
1341 G St NW, Suite 100
Washington, DC 20005

May 24, 2022

Dear Ms. Giordano:

By your letter dated April 1, 2022, Canadian Pacific Railway, on behalf of itself and its affiliates (CP), submitted a written version of the oral settlement offer CP made to the communities making up the Coalition to Stop CPKC during our meeting on March 28, 2022. Pursuant to the offer, as set forth in your letter, CP would make a "voluntary community investment" of a total of $10 million to the eight Coalition member community members, in exchange for the Coalition's agreement to not seek any mitigation conditions before the STB in Docket No. FD 36500, and to not otherwise oppose the proposed merger of CP and Kansas City Southern Railway.

Considering that the estimated total cost of the mitigation conditions the Coalition believes will be required to attempt to protect their communities from the harm CPKC will inflict on them post-merger is over $9 billion, CP's offer to pay the coalition members a lump sum of merely $10 million is clearly not a serious attempt to reach a mutually acceptable settlement. This letter therefore officially rejects CP's offer.

The health, safety and wellbeing of our residents, businesses, and property owners is our number one priority. Our Metra stations connect our commuters to the City of Chicago and bring them home to the quality of life they enjoy. The CPKC merger as proposed would destroy that quality of life and drastically make our citizens less safe.

Despite this very discouraging start, we are receptive to serious negotiations aimed at adequately addressing the significant adverse impacts your proposed merger would cause. In the meantime, the Coalition will continue to oppose the merger as proposed and we are gaining support daily from community organizations and concerned citizens.

Sincerely,

Carie Anne Ergo
Chairperson, Coalition to Stop CPKC
Village Administrator, Itasca, IL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 87

CANADIAN PACIFIC, CP'S COMMITMENT TO FIGHT CLIMATE CHANGE, CP SUSTAINABLY DRIVEN (2020)

REDACTED PUBLIC RECORD VERSION



CP's Commitment to Fight Climate Change

A changing climate is the challenge of our generation and, if left unabated, will increasingly disrupt the environment and our society. Canadian Pacific (CP) is already confronting this challenge as we experience more frequent disruptions across our network and CP is committed to further rise to this challenge by adapting our business and operations going forward. Since industrialization, our planet has seen a dramatic rise in greenhouse gas (GHG) emissions, which over the next 30 years may significantly increase global temperatures to unsustainable levels. Over the next decade, we believe climate change represents a fundamental threat to the planet and provides potential opportunities for our business. For nearly 140 years, CP has embodied strategic, long-term thinking and, as we look ahead to turning 150 in 2031, we remain committed to planning for the long term and confronting the challenges created by climate change. We are committed to serving North America and the world through efficient and sustainable rail transportation for the next 150 years, and beyond.

Our Stance

The transportation sector is a major source of GHG emissions in North America, accounting for 28 percent of Canadian and U.S. emissions in 2018[1,2]. While transport by rail represents only 2.2 percent of GHG emissions from the transportation sector, the rail industry plays a major role in helping reduce overall transportation-related GHG emissions. Railways represent the most energy-efficient method of moving freight over land. A single-unit train keeps more than 300 trucks off of public roads and is four times more fuel efficient than highway transport, helping our customers further reduce greenhouse gas emissions. At CP, we have improved our fuel efficiency by more than 40 percent since 1990 (currently 13.8 percent better than the North American Class 1 freight railway average). As CP continues to strategically grow its business, we must continue to curtail our own emissions, while supporting further emissions reductions across the broader transportation sector.

We acknowledge that fuel efficiency improvements alone are not enough and we are looking to emerging technologies, renewable fuels, partnerships and innovative ways of running our business. Not only must we take steps to mitigate the risks of climate change, it is critical that we adapt our business and operations to changing conditions in order to avoid the worst of escalating major disruptions.

[1] *US EPA (2020) Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 -2018. Retrieved from: https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks*

[2] *Canada (2020) Greenhouse Gas Sources and Sinks: 2020. Retrieved from: https://www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/inventory.html*

A SINGLE-UNIT TRAIN KEEPS MORE THAN

300

TRUCKS OFF OF PUBLIC ROADS

4x

MORE FUEL-EFFICIENT

75%

LESS GHG EMISSIONS

Our Vision

We believe transportation of freight by rail will continue to play an integral role in the low-carbon future for North America and CP is transitioning to be a leader in this transformation. We accept and welcome this responsibility and will continue to create long-term sustainable value for our shareholders and the broader economy. From transporting goods and materials that will drive the energy transition to continuously optimizing our operational and energy efficiency, CP will continue to build on our legacy of innovation, leadership and precision scheduled railroading to provide the highest standard of transportation solutions to rise to the serious challenge of climate change. We are proud to be embarking on this challenge and to take a leading role as our industry moves toward decarbonization.

Alignment

Climate change transcends our business, our industry and our continent. In recognition of the global nature of the fight against climate change, CP continually aims to align with recognized initiatives that bring governments, sectors and companies together, such as the Pan-Canadian Framework on Clean Growth and Climate Change and the resulting *Greenhouse Gas Pollution Pricing Act* (Canada), to the extent that they apply to CP's operations, as well as the Task Force on Climate-related Financial Disclosures (TCFD). This includes a commitment to leverage our leadership role within the rail industry to support the goals laid out in the Paris Agreement and emerging best practices to limit global temperature rise to well below 2°C. CP will also strengthen its resilience and adaptive capacity through cooperative approaches. CP will continue to support public policy aimed at reporting and reducing emissions and lowering the impact of the freight rail sector on the environment. Since 1995, we have actively engaged with industry peers and government agencies to pursue voluntary emissions reductions in the railway sector. We remain committed to promoting positive change both within CP and beyond.

Read CP's Commitment to Fight Climate Change online here

"At CP, we have achieved significant emissions reductions through efficient operations and investments in technology and innovation. We recognize that long-term sustainable growth requires an ambitious vision. As we look towards the next stages of our growth, we are building on our culture of innovation to adapt our business and continue to work together with all stakeholders, to position CP for a Sustainably Driven future."

Keith Creel, President and CEO

13.8%

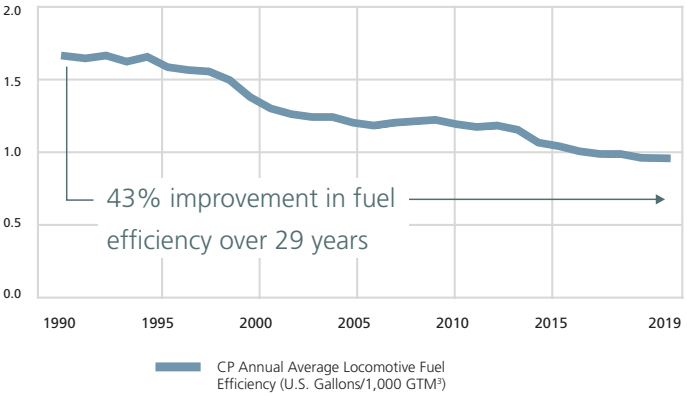
In 2019, CP's fuel efficiency was 13.8% lower than the North American Class 1 freight railway average

Our Commitment

We know that ambitious goals require diligent action, and we are engaging in a number of strategies to understand climate risk and drive significant emissions reductions. CP is committed to set a science-based target within the next year to reduce our emissions in line with the Paris Agreement. To further mitigate climate risks and embrace opportunities, CP is conducting scenario analysis to understand the full range of possible impacts from climate change as they relate to our business. Through this process, we plan to formalize the integration of climate-related risks into our enterprise risk-management mechanisms and develop strategies for mitigation of risk and pursuit of opportunity.

These strategies will necessitate actions that require regular assessment and further planning, and CP commits to continually explore available tools to drive this transition. We believe the only way to be a leader in smart and sustainable climate action—while continuing to deliver high-quality transportation solutions that connect Canada and the United States to the world—is to understand the full scope of limitations and the opportunities we can seize as part of our low-carbon transition.

CP Locomotive Fuel Efficiency (U.S. Gallons/1,000 GTM[3])[4]



[3] Gross ton-mile (GTM) is the movement of one toan of train weight per mile. GTMs are calculated by multiplying total train weight by the distance the train moved. Total train weight comprises the weight of the freight cars, their contents and any inactive locomotives.

[4] Certain statistical highlights and safety indicators figures have been updated to reflect new information or have been revised to conform with current presentation.

Central to this transition is the need for ambitious progress in innovation, development of new business practices and deployment of emerging transportation technologies. To support and guide this work across our organization, CP will implement internal carbon pricing mechanisms to help meet our climate-related objectives. Carbon pricing analysis will occur over time.

Operational Excellence and Innovation

CP's locomotive operations consume more than 92 percent of the energy needed to run our operations. While CP regularly outperforms industry averages for fuel efficiency, we are committed to further improving the carbon footprint of our locomotives. Whether through our fleet modernization program or technology upgrades such as installing trip optimizers on 85 percent of our high-powered line locomotives by 2025, CP is committed to evaluating and piloting new technologies, as they emerge. This commitment extends across our business and has resulted in energy saving initiatives beyond our locomotive fleet, including upgrades CP has done to lighting fixtures to save millions of kilowatt-hours of electricity and reduce carbon emissions, as well as many more innovative solutions and efficiency projects to reduce energy consumption across our network, yards, facilities and operating equipment.

Climate Leadership and Influence

Given the magnitude and complexity of combatting climate change, we know that greater leaps in fuel alternatives and technology development are needed to help us reach our goals. CP is committed to take a leading role in working collaboratively with regulators, suppliers, trade associations and other partners to push for greater deployment as emerging low carbon transportation solutions become available.

CP recognizes that our ability to influence GHG emission reductions extends beyond our own operations. We must also advocate and partner across our network of suppliers and value chain in ways that drive for positive change outside the CP network.

Our commitment to address climate change is a journey and we intend to be a leader in transforming both CP and the transportation sector to meet this challenge.

NOTE ON FORWARD-LOOKING INFORMATION

This climate statement contains certain forward-looking information within the meaning of applicable securities laws relating to Canadian Pacific's operations, priorities and plans for the establishment and achievement of certain environmental and sustainability targets for reductions in GHG emissions. Forward-looking information is indicated by words such as "commitment", "anticipate", "believe", "expect", "plan", "will", "must", "target", "should" or similar words suggesting future outcomes. Forward-looking information also includes, but is not limited to, statements concerning expectations, beliefs, plans, goals, objectives, assumptions and statements about possible future events, conditions, and results of operations or performance. Undue reliance should not be placed on forward-looking information as actual results may differ materially from the forward-looking information. Forward-looking information is not a guarantee of future performance.

By its nature, the forward-looking information in this climate statement involves numerous assumptions, inherent risks and uncertainties that could cause actual results to differ materially from those expressed or implied by the forward-looking information, including but not limited to the fuel efficiency of railways and CP's operations, CP's ability to implement certain initiatives, including emissions targets, scenario analyses, risk mitigation strategies, changes to enterprise risk management and internal carbon pricing mechanisms, future investments in and the availability of carbon emissions-reduction tools and technologies including through CP's fleet modernization program and technology upgrades, the impacts of existing and planned capital investments, and CP's ability to work with governments and third parties to mitigate the impacts of climate change, as well as additional factors detailed from time to time in reports filed by CP with securities regulators in Canada and the United States. Reference should be made to "Management's Discussion and Analysis of Financial Condition and Results of Operations" in CP's annual and quarterly reports filed on Form 10-K and 10-Q, respectively, including CP's annual report filed on Form 10-K for the period ended December 31, 2019 and quarterly report filed on Form 10-Q for the period ended June 30, 2020.

Forward-looking information is based on current expectations, estimates and projections and it is possible that predictions, forecasts, projections, and other forms of forward-looking information will not be achieved by CP. Except as required by law, CP undertakes no obligation to update publicly or otherwise revise any forward-looking information, whether as a result of new information, future events or otherwise.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 88

CANADIAN PACIFIC, CP'S CLIMATE STRATEGY, CP SUSTAINABLY DRIVEN (2021)



CP CLIMATE STRATEGY

Contents

Statement From the CEO 3
Statement From the Board Chair 4
Introduction 5
Our Approach 7
Our Strategy 10
Investment 20

Note on Forward-Looking Information

This climate statement contains certain forward-looking information and forward-looking statements (collectively, "forward-looking information") within the meaning of applicable securities laws. Forward-looking information includes, but is not limited to, statements concerning expectations, beliefs, plans, goals, objectives, assumptions and statements about possible future events, conditions, results of operations or performance. Forward-looking information may contain statements with words or headings such as "commitment", "anticipate", "believe", "expect", "plan", "will", "must", "target", "should" or similar words suggesting future outcomes.

This climate statement contains forward-looking information relating, but not limited, to Canadian Pacific's operations, priorities and plans for the establishment and achievement of certain environmental and sustainability targets for reductions in GHG emissions and related matters.

By its nature, the forward-looking information in this climate strategy involves numerous assumptions, inherent risks and uncertainties that could cause actual results to differ materially from those expressed or implied by the forward-looking information, including but not limited to the fuel efficiency of railways and CP's operations, CP's ability to implement certain initiatives, including emissions targets, scenario analyses, risk mitigation strategies, changes to enterprise risk management and internal carbon pricing mechanisms, future investments in and the availability of carbon emissions-reduction tools and technologies including through CP's fleet modernization program and technology upgrades, the impacts of existing and planned capital investments, and CP's ability to work with governments and third parties to mitigate the impacts of climate change, as well as additional factors detailed from time to time in reports filed by CP with securities regulators in Canada and the United States. Reference should be made to "Management's Discussion and Analysis of Financial Condition and Results of Operations" in CP's annual and quarterly reports filed on Form 10-K and 10-Q.

Forward-looking information is based on current expectations, estimates and projections and it is possible that predictions, forecasts, projections, and other forms of forward-looking information will not be achieved by CP. The forward-looking information contained in this climate statement are made as of the date hereof. Except as required by law, CP undertakes no obligation to update publicly or otherwise revise any forward-looking information, whether as a result of new information, future events or otherwise.

STATEMENT FROM THE CEO



The transition to a low-carbon economy is already underway and Canadian Pacific (CP) is proud to be taking a leadership role in our industry. At CP, we believe this transition presents significant opportunities for our company and the industry as a whole. We accept the challenge and the responsibility of finding new ways of doing things that will position us for a sustainably driven future, and have already taken steps to drive positive impact. For example, we installed a large solar field at CP's Calgary campus, which generates more than enough electricity to power our headquarters building. We are also working on a globally significant project that involves converting a diesel locomotive to a zero-carbon emissions propulsion system powered by hydrogen fuel cells.

As we envision our future, we recognize that the transportation sector represents nearly 30 percent of North America's greenhouse gas (GHG) emissions.[1,2,3] Transitioning the sector to low-carbon alternatives is a critical part of the global effort needed to reduce GHG emissions and address the challenges of climate change. Railways account for approximately two percent of GHG emissions from the transportation sector. As the rail industry is a relatively efficient mode of freight transport, it is therefore an essential part of the effort to meet the goals of the Paris Agreement. Freight railways have already improved fuel efficiency by more than 40 percent in the U.S.[4] and Canada[5] since 1990, but there is much we can do as an industry to advance new technology and energy sources to support further decarbonization.

Issued in July 2020, CP's Climate Statement clearly outlines our intention to lead and our commitment to take action. To support these objectives, CP has been investing in robust accounting and reporting of GHG emissions, identifying and effectively managing risks and opportunities over time, and evaluating emerging technologies such as hydrogen-powered locomotives that will support the decarbonization of our business.

CP's Climate Strategy builds on our existing climate commitments and will help drive innovation, collaboration and thought leadership across our business both now and in years to come. It is informed by research, science and an appreciation of where we can make the greatest impact. CP completed a comprehensive, quantitative climate scenario analysis to support our understanding of potential physical impacts to our operations posed by a changing climate, as well as the risks and opportunities associated with the global transition to a low-carbon economy. These insights help us understand how the future may unfold so we can plan accordingly and position CP for success in a low-carbon economy. Building on this information, our science-based targets provide a clear marker against which we can measure our progress as we work toward longer term and more significant decarbonization. Achieving these ambitions will require a variety of actions to reduce our carbon footprint, and we recognize that further technology advancement, business integration and purposeful engagement with our stakeholders will be required.

CP's Climate Strategy is ambitious, but we feel this appropriately reflects the urgency of the fight against climate change. We also look forward to collaborating with government, industry and research partners to find and test new solutions. CP has been in business for more than 140 years, and I am proud to see the company adapt and continue to demonstrate strong leadership for a sustainable future.

Sincerely,

Keith Creel

Keith Creel, President and CEO

[1] US EPA (2021). Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019. Retrieved from: *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks*

[2] Government of Canada (2020). Greenhouse Gas Sources and Sinks: 2020. Retrieved from: *https://www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/inventory.html*

[3] Government of Mexico (2018). National Emissions Inventory of Gases and Compounds of Greenhouse Effect 1990-2015. Retrieved from: *https://unfccc.int/sites/default/files/resource/Mexico-NC6-BUR2-1-NIR_INEGYCEI%201990%20a%202015%20A_0.pdf*

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[5] Railway Association of Canada (2020). Railways 101: Rail is Green Transportation. Retrieved from: *https://www.railcan.ca/101/rail-is-green-transportation*

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STATEMENT FROM THE BOARD CHAIR



In 2020, the World Business Council for Sustainable Development stressed the urgency for a global transition to a low-carbon economy and highlighted the role of businesses in driving this change.[6] As a responsible business, CP is committed to creating long-term sustainable value for our shareholders and other stakeholders, including our employees, customers and suppliers and the communities in which we operate. We recognize the need to accelerate the transition to a low-carbon future and are well-positioned to be an essential part of the solution. On behalf of CP's Board of Directors, we are pleased to join other leading businesses from around the world in developing a comprehensive Climate Strategy to guide our climate ambitions.

We view CP's commitment to responsibly address its GHG emissions, respond to transition and physical risks from climate change, and invest in research, development, communications, and organizational change as fundamental for near-term success and a resilient future. We are confident that the direction set by this Climate Strategy will help CP strengthen our resolve and position us as a forward-focused transportation solutions provider. Starting in 2022, CP will annually report to shareholders on updates and progress towards our climate strategy. Our shareholders are encouraged to provide feedback on our efforts through an advisory vote at our annual general meeting.

As a responsible business that is committed to creating long-term sustainable value for its shareholders and other stakeholders, CP recognizes the need to accelerate the transition to a low-carbon future and is well-positioned to be part of the solution.

Although the freight rail sector already provides one of the most fuel-efficient means of freight transport, systemic and technological advances will be required to decarbonize the industry effectively. The Board is actively engaged in and supports CP's leadership on this front, and looks forward to providing oversight of the company's meaningful and measurable progress toward its climate-related objectives.

Sincerely,



Isabelle Courville, Chair of the Board

[6] SOS 1.5: The road to a resilient, net-zero carbon future. World Business Council for Sustainable Development, 2020.

INTRODUCTION

Climate change is the challenge of our generation, and it presents both risks and opportunities to CP and the global supply chain. Physical risks, including heavy precipitation, flooding, temperature extremes and powerful storm events have the potential to disrupt CP's network, and are expected to intensify due to climate change. Meanwhile, market fluctuations, emerging regulations, and technological changes driven by stakeholder expectations for lower carbon goods and services present both risks and opportunities to CP's global supply chains. Mitigating climate risks while capitalizing on emerging low-carbon opportunities will require strategic and decisive action as businesses rise to the challenge.

This Climate Strategy builds on CP's Climate Statement and outlines our approach to manage potential climate-related impacts across the business. The objective of this Climate Strategy is to position CP as a leader as the transportation sector transitions to a low-carbon future. We recognize that a changing climate and related economic impacts can have significant ramifications for our business. To be proactive, we need to understand possible implications, identify market opportunities and build climate mitigation and adaptation investment measures into our planning processes.

"We believe transportation of freight by rail will continue to play an integral role in the low-carbon future for North America and CP is transitioning to be a leader in this transformation. We accept and welcome this responsibility and will continue to create long-term sustainable value for our shareholders and the broader economy."

CP RAIL CLIMATE STATEMENT

CP's business and this Climate Strategy are built on the belief that we are Sustainably Driven. In other words, we are committed to embedding sustainability priorities across all parts of our business: to ensure the safety of all stakeholders, maintain operational excellence throughout our network and manage the social impact of our work. We understand that climate leadership within the rail industry will require a diverse range of actions and expertise, from alternative fuels and emerging technologies to customer engagement, business integration and improved resilience of our physical assets. By sharing our Climate Strategy, we look forward to engaging with our stakeholders and providing updates on our progress during the coming years.



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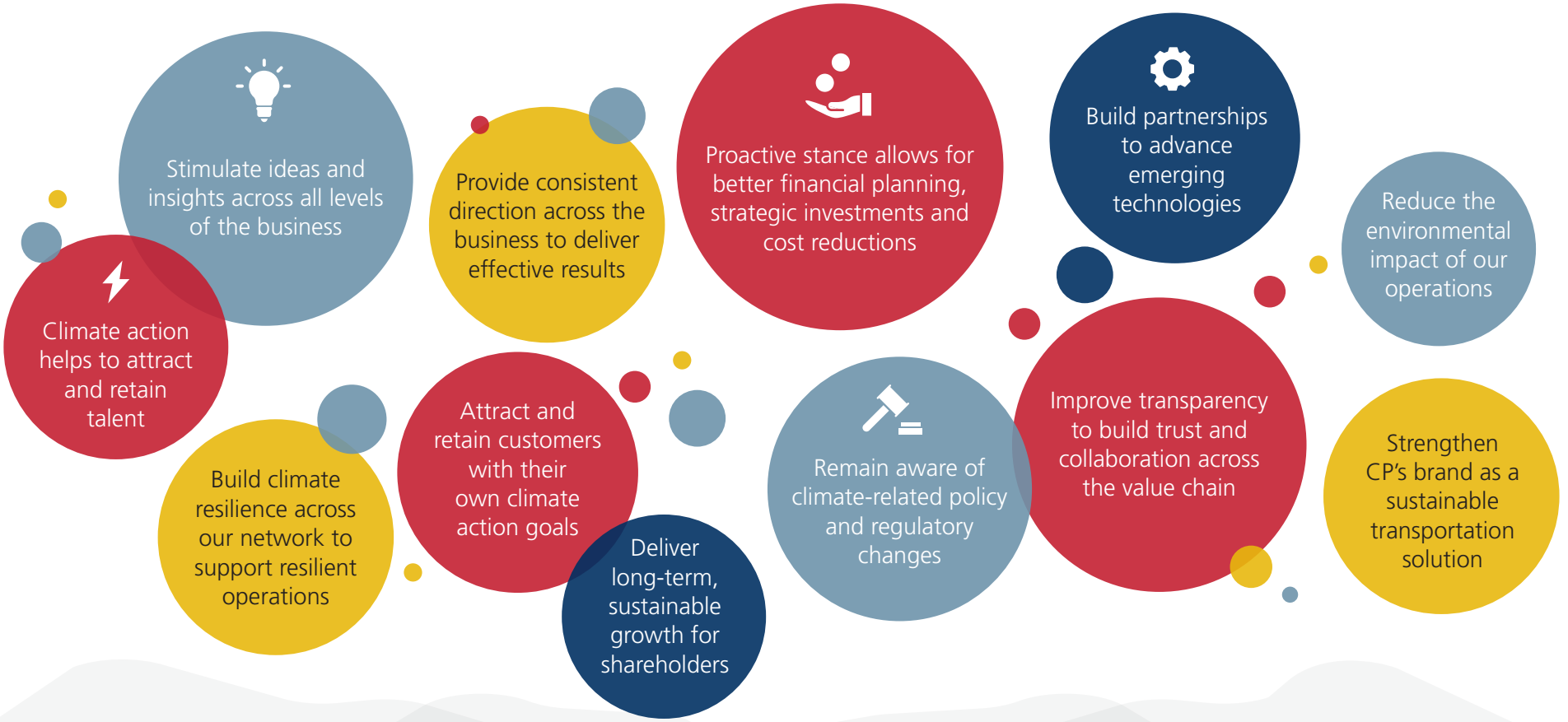
Why is a Climate Strategy Important to CP?



OUR APPROACH

Scope and Alignment

CP's Climate Strategy encompasses and applies to all of its business operations in Canada and the United States, and where relevant, contemplates collaboration and engagement with a number of stakeholders within and outside of our value chain. It addresses CP's carbon footprint, in terms of both direct and indirect GHG emissions (Scope 1 and Scope 2 emissions, respectively), as well as the emissions in our value chain (Scope 3) to the degree we can influence them.

The main source of CP's GHG emissions is associated with the operation of the diesel-powered fleet of locomotives that drive our business. CP has long focused on locomotive fuel efficiency as a means to lower operating costs and reduce the environmental impact of our operations. Since 1990, the fuel efficiency and associated GHG emissions intensity of our locomotive operations has improved by more than 40 percent. This has been accomplished through an ongoing commitment to best practices for operations and maintenance, regular locomotive upgrades, the deployment of leading fuel-efficient technologies, and rail network enhancements. The need for a substantial reduction of locomotive GHG emissions, as outlined in this Climate Strategy, will require new and emerging approaches. Innovative solutions and technological advancements are needed to support the availability and reliability of low-carbon and alternative fuel options, and advanced propulsion systems for locomotives. This cannot be achieved by CP alone. Rather, it will require significant collaboration and concerted effort beyond CP's direct operations and broader value chain.

To ensure relevance and comparability within and outside of our sector, our Climate Strategy has been developed to align with internationally recognized frameworks, including the Task Force on Climate-related Financial Disclosures (TCFD); the Paris Agreement (within the United Nations Framework Convention on Climate Change) on climate change mitigation, adaptation and finance, and the Pan-Canadian Framework on Clean Growth and Climate Change.

Managing Our Impact



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Timeframe

The challenges presented by climate change require immediate and sustained action during the coming decades. To align our approach with leading scientific and policy guidance, this Climate Strategy establishes a science-based emissions reduction target to guide our activities until 2030. CP also acknowledges the importance of the 2050 time horizon in the response to climate change, and will continue its leadership in the pursuit of technology and other means that have the potential to deliver more significant decarbonization beyond our 2030 target.



THE FIRST HORIZON

2030

The Intergovernmental Panel on Climate Change (IPCC) has projected an almost 3°C rise in temperature by the end of the century, should global GHG emissions remain at current levels. Scientists have identified the need for substantial curtailment of GHG emissions by 2030 to stave off the worst effects of climate change. Leading organizations, corporations and national governments are setting science-based targets to rapidly decarbonize all sectors of the economy.

Leading up to the 2030 horizon, CP will focus on the efficient use of existing technology and market-ready renewable fuels, while evaluating alternative propulsion technologies — particularly hydrogen-based solutions — that are necessary to longer-term reductions in GHG emissions from the freight rail industry.

CP recognizes the importance of the 2030 horizon and has established science-based targets to align our climate ambitions with a well-below 2°C pathway.



THE SECOND HORIZON

2050

Climate experts agree that global emissions need to continue to fall beyond 2030, reach net-zero by 2050, and become carbon negative thereafter. CP recognizes that collective action to decarbonize must continue without pause during the coming decades.

As a leader in the North American transportation industry, CP will continue its efforts to decarbonize beyond 2030 and after achieving its science-based target. We realize that more significant decarbonization beyond 2030 will require a focused effort by CP and other stakeholders, and is dependent on emerging technologies and other solutions.

As a company, we will continue our leadership to support and facilitate the collaborative efforts needed to drive technological advancements. We will also continue to build resiliency across our operations to address the anticipated physical impacts of climate change.

Reducing carbon and improving infrastructure resiliency requires long term strategic planning. To support this work, CP has completed a thorough climate scenario analysis, providing insight into transitional and physical risks and opportunities through 2050. Measures to increase CP's resiliency to these risks and to pursue the opportunities of a low-carbon economy are described in this Climate Strategy.

Strategic Pillars

To respond to the risks and opportunities posed by climate change, and meet our decarbonization commitments, our Climate Strategy includes actions across five strategic pillars.



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OUR STRATEGY

Understanding Our Climate-Related Risks and Opportunities

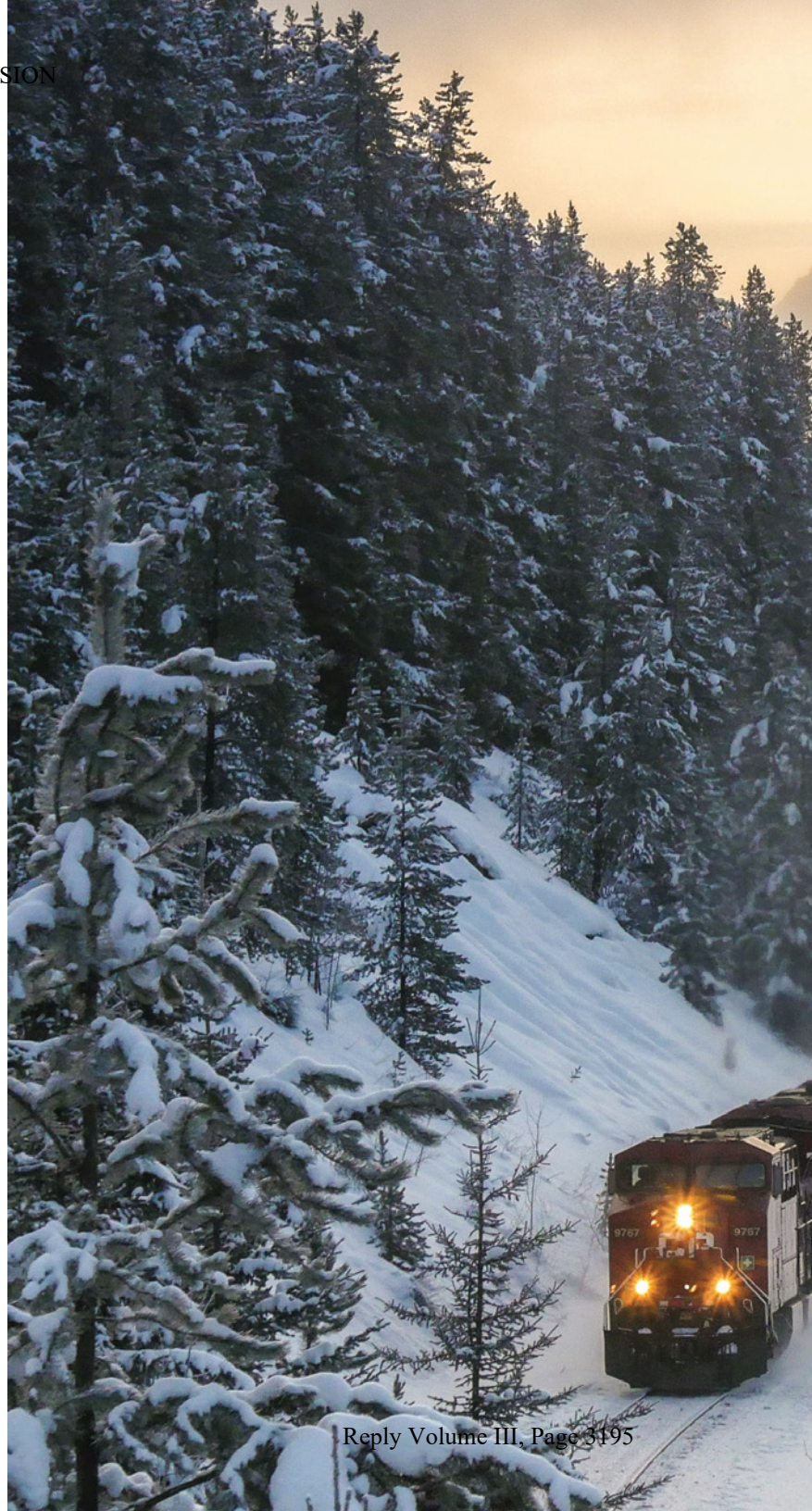
A clear understanding of the risks and opportunities related to climate change and our business is fundamental to effectively managing potential impacts. CP's awareness of these issues, and measures to mitigate climate risks, is subject to increasing focus by the financial community and other stakeholders. To support this understanding, we undertook our first in-depth climate scenario analysis in 2020.

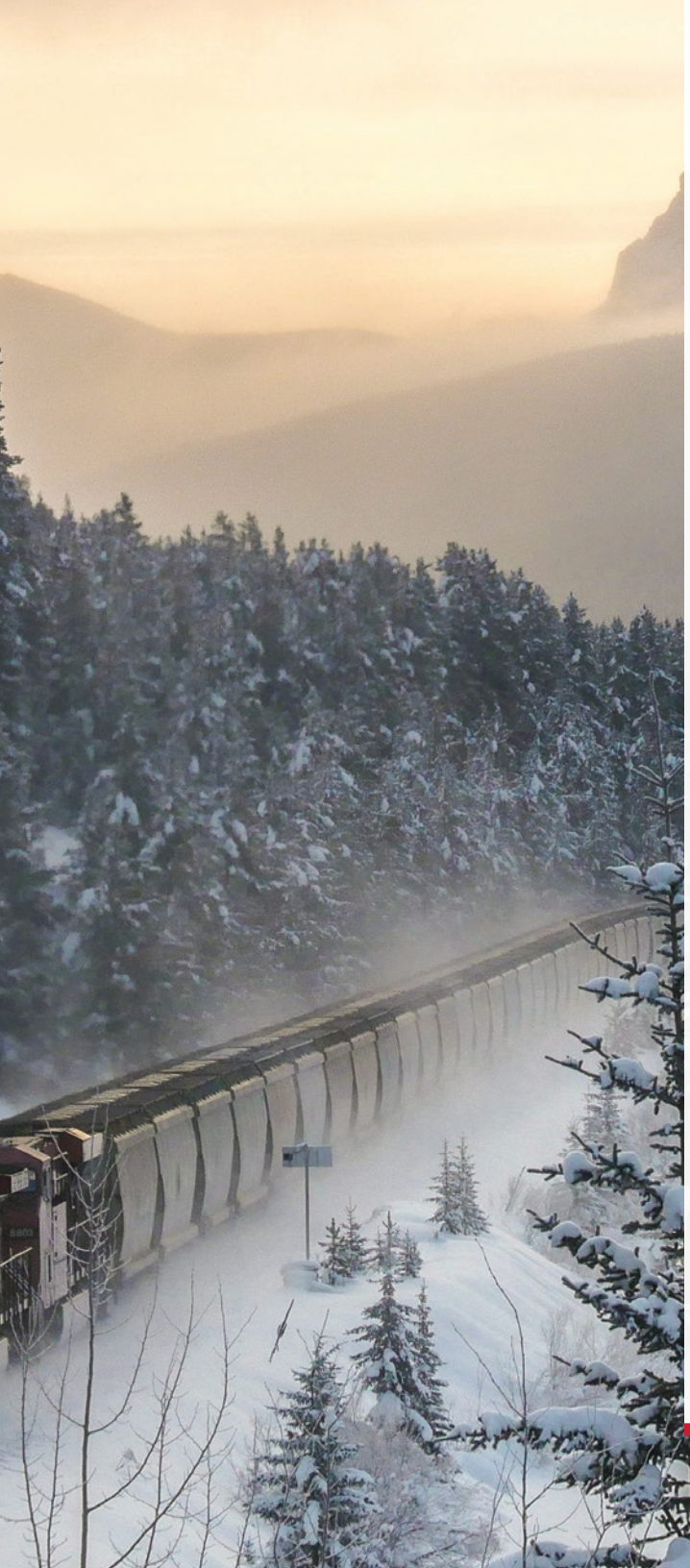
Climate scenario analysis is a core recommendation of the TCFD and provides a rigorous and quantitative assessment of the climate-related risks and opportunities the company may face in the future under a range of potential climate scenarios. CP's analysis integrated a number of factors to represent plausible future pathways based on credible science, developed by experts at the International Energy Agency (IEA) and other reputable organizations. These scenarios reflect combinations of potential policy changes, technological advancements, market shifts and changes in consumer behaviours. For CP, each scenario represents a trajectory under which the climate, economy and rail industry may change during the coming decades.

The results of CP's scenario analysis are intended to inform our understanding of our business' material climate-related risk and opportunities, and will support planning and investment decisions. Through this analysis, we sought to answer the following questions:

How will climate-related risks and opportunities affect our business?

Where can we best invest to counter climate change risks and capture opportunities?





CP's Priority Climate Impacts

Through engagements with a wide range of cross-functional stakeholders (alongside expert assessment and literature review, and with reference to the priorities of our suppliers and customers) we identified eight priority climate impacts for further exploration and detailed financial modelling. These potential risks and opportunities were more generally characterized as impacts in recognition that some may be a risk under one scenario and an opportunity under another. These eight potential impacts are also aligned with the TCFD's categories of policy, technology, market and physical risks.[7]

Policy

Carbon Pricing
New or additional carbon pricing could lead to increased costs to CP, which may impact CP's advantage over competitors.

Fuel Efficiency
Rail's inherent efficiency advantage over trucking may be amplified by regulations such as carbon pricing.

Technology

Fuel Switching
Considering electrification as a proxy for alternative locomotive fuels, fuel switching has the potential to provide medium and long term fuel and carbon cost savings.

Trucking Competition
Technology leading to decarbonization of trucking may make it more cost effective to operate these vehicles over long distances and lead to increased competition from trucking in North America.

Market

Coal Markets
CP's revenue may be impacted by a decrease in thermal coal demand and an increase in metallurgical coal demand.

Energy Markets
Changes in demand for different energy products (petroleum products, crude oil, biofuels, and wind) may increase or decrease revenues from those sectors.

Freight Rail Demand
A focus on decarbonization of the broader transport sector may increase demand for lower carbon transport options, expanding freight rail and increasing revenue.

Physical Impact

Physical Impacts
Changing physical conditions, such as higher temperatures, intense rainfall, and more extreme storms, may increase (or decrease in some cases) costs to CP due to delays, disruptions, derailments and other events.

[7] For more information surrounding climate-related governance, risks, opportunities and financial disclosures, please see CP's TCFD Index.

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Climate Change Scenario Analysis

As part of a robust scenario analysis, the TCFD recommends including a scenario aligned with a 2°C future in order to stress-test the business and assess its resilience in a low-carbon economy — a future scenario that looks very different from the world today. Under the well-below 2°C scenario that CP assessed (IEA's Sustainable Development Scenario), the world embraces climate action and pushes for changes in regulations, markets and technologies to transition to a more decarbonized global system. Under this scenario, our business could see several significant financial impacts by 2030, including both risks and opportunities.

Although the well-below 2°C scenario represents a high degree of change, it is also important to understand how this future may differ from other potential scenarios. Our climate scenario analysis also considered how policy, market, technology and physical impacts may manifest under a more modest degree of change (aligned with IEA's Stated Policies Scenario), where climate action is slow and warming amounts to 3 to 3.5°C and a business as usual scenario where no (or limited) action is taken and warming reaches 5 to 6°C. Together, the comparison of these scenarios supports our understanding of where risks and opportunities exist and how they may materialize based on broader social, economic and political changes.

Whether CP is benefitting as a low-carbon freight transport provider under a well-below 2°C scenario driving faster decarbonization, or experiencing physical impacts associated with shifting temperatures under a business as usual scenario, the company needs to consider the impacts of a changing climate as part of business planning and decision-making over the long term. In understanding the potential future changes depicted in our scenario analysis, we are working to pursue opportunities and mitigate risks with an informed view of potential future developments. These findings will help CP prioritize climate-related impacts against other business risks and opportunities, ultimately supporting integration of climate risks and opportunities within existing business processes and cross-functional decision-making structures.

In a well-below 2°C scenario, where the world transitions to a lower-carbon economy:

Key risks include:

- Technological advances aimed at reducing emissions associated with road freight (truck transport) could displace business for CP.
- Rising carbon pricing could increase CP's operating costs for locomotive fuels.
- Changing energy markets, including decreased demand for oil and coal products CP transports, could result in decreased freight revenue.

Key opportunities include:

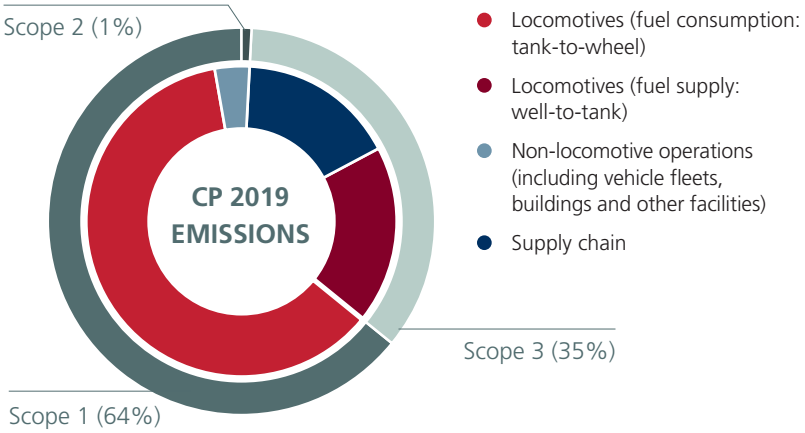
- CP's fuel efficiency advantage across other modes of transport, including truck transport, could provide a competitive advantage as fuel costs rise.
- Use of lower-carbon fuels could provide for significant cost savings.
- New and emerging markets for low-carbon products, such as biofuels and wind infrastructure, provide new or expanded opportunities for freight revenue.
- An overall increase in freight rail demand as a low-carbon transportation solution could increase CP's overall revenues and deliver reputational benefits.

Reducing Our Carbon Footprint

Baseline Carbon Footprint

Locomotives represent CP's greatest source of GHG emissions. In 2019 (our baseline year), emissions from locomotives comprised 96% of our Scope 1 emissions and 80% of our combined Scope 1, 2 and 3 emissions.

CP's GHG Emissions Footprint



How are CP's emissions classified?

- Scope 1 emissions are from CP's direct combustion of fuel, including fuel that powers our locomotives and company vehicles and facilities.
- Scope 2 emissions are associated with the electricity we purchase across our extensive Canada and U.S. network.
- Scope 3 emissions are associated with other parts of our value chain, such as purchased goods and services, other fuel- and energy-related activities, business travel, and employee commuting.

Science Based Targets

Setting clear, ambitious and science-based targets is vital to reducing our carbon footprint and delivering on this Climate Strategy. CP has set two science-based emissions reduction targets, including an ambitious target to reduce our locomotive emissions, complemented by a non-locomotive target to address other parts of our business. Our targets are aligned with a well-below 2°C scenario and provide a vision for our company's future intended to drive innovation and spur the adoption of new technologies and operational practices.

What is a science-based target?

Science-based targets are used by many companies to establish a pathway for GHG emissions reduction across their organizations. Emissions reduction targets are considered science-based if they align with both current climate science and the objectives of the Paris Agreement. Science-based targets aim to limit global warming to well-below 2°C above pre-industrial levels.

For companies like CP, there is a strong business case for setting a science-based emission reduction target. Science-based targets demonstrate a company's commitment to sustainability. They boost investor confidence, spur innovation, provide resilience against changing regulations, and generate long-term savings. The Science Based Targets initiative (SBTi) works with the private sector to set and validate science-based emissions targets, and align corporate ambitions with global goals and investor expectations for business resilience in a net-zero economy. The SBTi has developed standardized tools, resources and sector-specific methodologies to support company-specific emissions reduction targets.

The SBTi is a partnership of the World Resources Institute, CDP, United Nations Global Compact, and the World Wildlife Fund for Nature.

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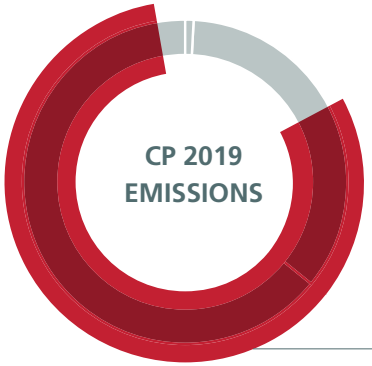
Our science-based targets address **100% of our Scope 1 and Scope 2 emissions, and more than half of our Scope 3 emissions.** These targets are based on the most current approach available to the transportation sector through the SBTi.[8]

Locomotive Target

We will reduce our well-to-wheel GHG emissions intensity (grams per revenue ton-mile[10]) from locomotive operations by **38.3%** by 2030.

Locomotives represent CP's greatest source of emissions. Recognizing the magnitude of this target for our operations, we have worked with the SBTi to validate our approach and calculations.

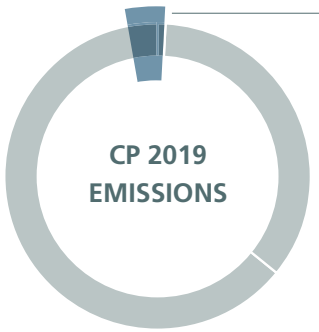


80% of CP's **TOTAL GHG EMISSIONS** are addressed through our Locomotive Target, **INCLUDING 96%** of our Scope 1 emissions **PLUS 53%** of our Scope 3 emissions.

Non-locomotive Target

We will reduce our absolute Scope 1 and 2 GHG emissions from non-locomotive operations (including emissions associated with our buildings and facilities) by **27.5%** by 2030.

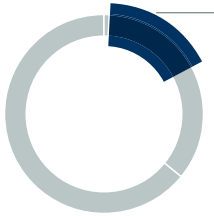
This target is directed at a relatively small but critical proportion of our GHG footprint. While this target has not been submitted to the SBTi for validation, CP followed a similarly robust and science-based methodology to calculate this target.



3.4% of CP's **TOTAL GHG EMISSIONS** are captured by this target, **INCLUDING 100%** of our Scope 2 and 4% of our Scope 1 emissions.

An emissions reduction target that supports business growth

CP's locomotive target establishes a GHG-intensity objective for well-to-wheel[9] emissions per revenue tonne-kilometer by 2030. By following an intensity-based approach for our target-setting pathway, CP can confidently accommodate future business growth. As a low-carbon mode of freight transport, the volume of goods transported by the rail sector, and by CP, is expected to grow in the years to come. The growth of freight transportation by rail is an essential component of the broader decarbonization and modal optimization within the transportation sector.



Beyond these targets, we are working with our supply chain to further improve our Scope 3 impact and reduce the GHG emissions of our suppliers and contractors.

Engaging With Our Stakeholders provides more information about how we will work with suppliers and other stakeholders to support this strategy.

[8] All targets are calculated with reference to base year emissions for 2019.
[9] Well-to-wheel emissions include all emissions related to fuel production, processing, distribution and use including (where applicable) Scope 1, 2, and 3 emissions. This metric effectively captures the entire energy process, from mining of the fuel source to powering our locomotives.
[10] Revenue Ton-Miles (RTMs) refers to the movement of one revenue-producing ton of freight over a distance of one mile. RTMs measure the relative weight and distance of rail freight moved by the Company.

Greenhouse Gas Reduction Levers

For CP to meet our science-based target for 2030, and continue further decarbonization toward mid-century, we recognize we must evaluate a wide variety of levers, including commercially ready and emerging options. New approaches are necessary, including systematic ways to:

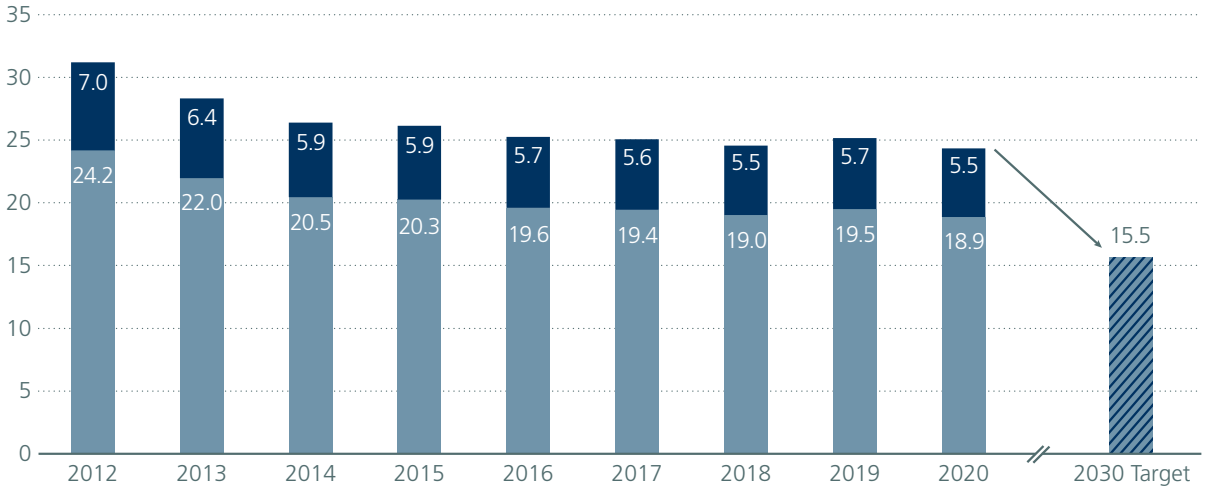
- Identify potential carbon-reduction levers
- Rigorously assess new levers in terms of carbon reduction potential, feasibility for the rail sector and costs to CP
- Conduct bench-scale and pilot testing
- Successfully deploy promising alternative fuels and propulsion methods
- Engage and collaborate with others to progress this work

In pursuing these goals, we will foster an enterprise-wide innovation mindset that encourages creative thinking and collaborative problem-solving to lower or potentially eliminate carbon emissions associated with the operation of CP's assets, facilities and rolling stock. In recent years, CP has made impressive strides to increase fuel efficiency (and reduce GHG emissions) by improving existing locomotives, rolling stock, components, and tracks; optimizing train configuration; using software for route and speed optimization and automation; improving fuel conservation from behavioral changes; and several other initiatives. We will continue our focus on fuel efficiency efforts in the near-term as we support the advancement of alternative fuels and emerging technologies, as these will require further validation and development before being deployed across our business.

Moving forward, we plan to establish a Carbon Reduction Task Force to lead our internal focus on decarbonization. CP's industry-leading engineers and operations experts will evaluate potential levers that could reduce our GHG emissions. Levers may involve factors such as internal carbon pricing, alternative fuels, renewable energy sources (such as on-site solar power, green power purchasing), use of electric vehicles and equipment, network modifications, and alternative propulsion for locomotives. CP will also consider other means to drive research and development, and we are committed to attracting and developing the best and brightest talent to work on these challenges.

The benefits that can be gained from CP's GHG reduction levers, including emerging low-carbon technologies, extend beyond CP. Many of our customers have their own climate action goals, and care about the changes we make as part of their value chains. Our decarbonization efforts provide an opportunity to build long-lasting and effective partnerships with technology providers in an emerging marketplace. This collaboration is essential to support the development and field testing of new technologies under the challenging conditions Class 1 railways face generally, through daily operations, but also across CP's extensive North American network. These and other opportunities are explored further in the stakeholder engagement pillar of this Climate Strategy.

CP Locomotive GHG Emissions Intensity (g CO_2e/RTM) Performance and Target Projection[11]



[11] Scope 3 emissions for 2012 to 2018 have been proportionally estimated based on fuel consumption data for these years. The 2030 target value reflects Scope 1, 2 and 3 emissions.

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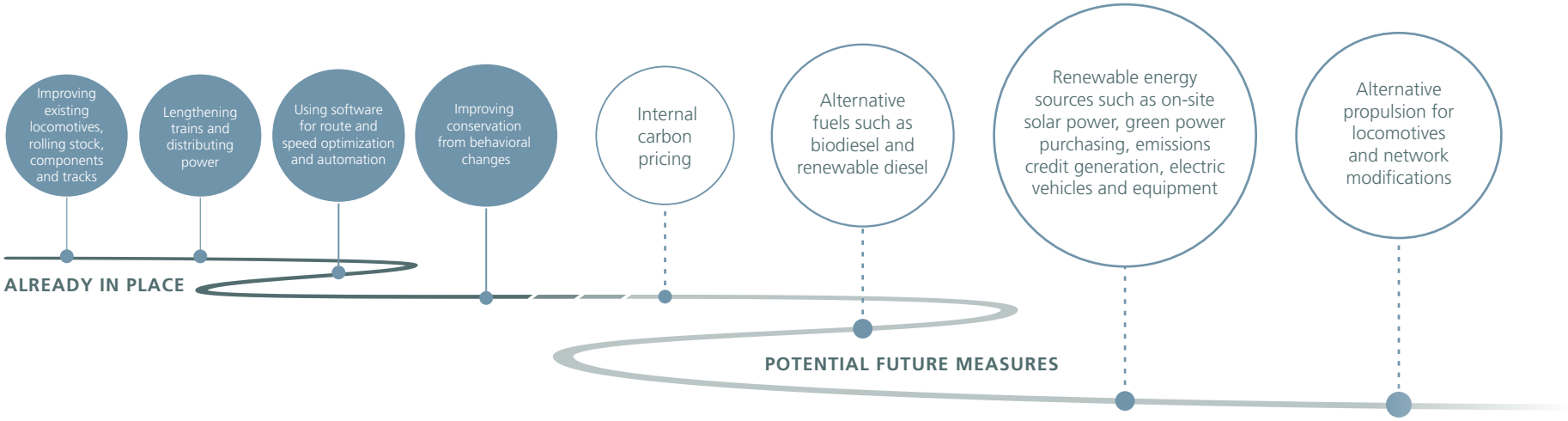
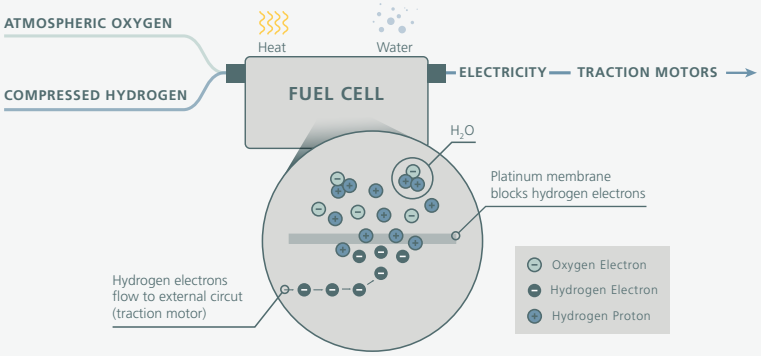
Actions to Reduce Emissions





Spotlight on Hydrogen Power

Hydrogen fuel cell/battery hybrid propulsion technology is being tested worldwide as a viable alternative fuel for the transportation sector with particular promise for long-haul heavy freight transportation systems including rail. This technology may be capable of eliminating GHG emissions for railway locomotives. In addition to zero-GHG emissions, hydrogen power may offer other benefits, such as reducing operational noise and vibration generated by diesel-electric engines.

CP has initiated a program to convert three different types of diesel-electric locomotives into zero-emissions hydrogen-powered locomotives using fuel cells and batteries to power electric traction motors. Supported by a $15 Million grant from Emissions Reduction Alberta, the project will include installing hydrogen production and fueling facilities at two CP rail yards in Alberta. This program will demonstrate and evaluate the technical performance of hydrogen-powered locomotives and fueling infrastructure in real-world rail operations and is, thus, expected to generate critical industry knowledge and experience to inform potential commercialization and future development.

Responding to Physical Risks from Climate Change

A changing climate presents both chronic and acute physical risks to CP's network and assets. Throughout our 140-year history, CP has been challenged by remarkable changes in operating practices, technology advancements, transportation policy, and transformation across the industries we serve. We believe that our continued success necessitates being well-equipped to meet the multifaceted challenges of climate change. CP's success is founded on our proven ability to adapt and innovate, including the recent expansion of our network and ongoing improvements to our infrastructure and operating practices. We actively manage our network to ensure continuity in our operations, and invest in hardening our assets to ensure our infrastructure is resilient to future change.

To support the resilience of our business, we are aligning our technical expertise and network management systems with leading climate science. Using current climate models under a range of future scenarios, with analysis tailored to CP's business, we have reviewed the potential physical risks of climate change at a strategic level. We have also identified areas where new or different data are required to support additional predictive studies. This will help us assess and understand potential risks and opportunities that may arise, strengthen data collection, monitor changes and prioritize our mitigation efforts.

Continually improving our physical risk identification and assessment mechanisms will inform CP's climate-related strategies and guide investments in our network and assets. Together, these activities support CP's resilience in the face of a range of potential climate outcomes.

Due to the vast distances and remote nature of CP's rail network, and the infrastructure required to operate the freight transport business, severe weather conditions can pose a risk to our business. Reputable climate models indicate that these weather events and associated risks are likely to increase. It will be important to be proactive, and we have been evaluating various ways to mitigate climate-related risks to our network through active monitoring and focused efforts to harden our infrastructure.

For example, in 2019 a major flood along the Mississippi River affected our rail network around Davenport, Iowa. In response, and to keep our trains operational during future flood events, CP raised approximately three miles of track by three feet at a cost of approximately $11 million (CAD). These measures have reduced the potential impact on rail operations from future flooding events at this key location.



SLOW SPEED AHEAD: A CP freight train passes over newly raised tracks in downtown Davenport, Iowa, on April 3, 2019. CP has elevated signal bungalows in downtown Davenport to keep wiring and circuitry dry during flood events.

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Integrating Climate Factors Across Our Business

The implementation of this Climate Strategy will require leadership and coordination to cascade its commitments across CP's business and our value chain. Although this commitment comes from the top, successful execution requires a broad understanding of the risks and opportunities of climate change and the company's commitment to climate action. Raising organizational awareness and fostering understanding of climate risks and opportunities is essential to ensure climate factors are integrated into planning and decision-making processes across our business.

CP recognizes the need for incorporating climate change risks and opportunities into business planning, and we are enhancing our governance to drive effective management of our climate change commitments and actions. Our business integration plans are aligned with the practices recommended by the TCFD.

To support the execution of this Climate Strategy, we are strengthening roles and responsibilities for climate governance. The Risk and Sustainability Committee of our Board of Directors provides oversight and reviews climate-related risks and opportunities. We plan to integrate the climate-related risks and opportunities identified to date into relevant business processes, including (but not limited to) enterprise risk management, capital expenditures and strategic planning. Integrating climate factors could include the creation of specific low-carbon budgets and inclusion of a shadow price on carbon in our capital expenditures process. Integration will also involve building awareness and capacity related to the other pillars identified in this Climate Strategy.

Whether they are directly involved in testing emerging technologies (e.g., through our hydrogen locomotive program), developing more sustainable operating practices or finding other ways to contribute to our goals for GHG emissions reduction across the business, CP's Board of Directors, the Risk and Sustainability Committee, members of the senior leadership team and our employees are excited to be a part of this journey. We look forward to sharing and celebrating our progress with our workforce, at all levels of our organization.



Engaging With Our Stakeholders

Internal and external stakeholder engagement will be a key success factor as CP implements this Climate Strategy. CP will drive internal alignment while engaging suppliers, customers, rail transportation peers and policymakers to help lead industry-wide change.

The core components for our stakeholder climate engagement include education, partnerships, policy and disclosure. These efforts will support the preceding pillars, helping CP to better understand climate-related impacts, stay connected with emerging scientific and engineering advances that support emissions reductions and infrastructure hardening, and intentionally build capacity and awareness to integrate climate considerations across our business. Underpinning this, we recognize that sharing experiences and insights with our external stakeholders will also add value to CP's climate programs, supporting collaboration and learning from different perspectives.

Education

Building internal and external awareness of climate risks and opportunities associated with CP's value chain is essential to driving change. Internal education will promote an understanding of roles, challenges and the underlying value in executing CP's Climate Strategy, with the goal of ensuring commitments are supported throughout our organization. External to CP, dialogue will focus on opportunities for CP's climate ambitions to support our customers' climate objectives. Ongoing engagement with our investors and communities can demonstrate CP's leadership position as we stay informed of evolving expectations.

Partnerships

CP is well-positioned to pursue partnerships with industry associations, other railways, equipment manufacturers, communities and other stakeholders. Through strategic partnerships, there are opportunities for collaboration to drive innovation, advance and improve the accessibility of emerging technology and take action to decarbonize the rail sector. CP is currently working with the Railway Association of Canada, the Association of American Railroads and Transport Canada to promote climate resilience in the rail sector. As a leader in this field, we are open to new pathways for partnerships, including existing and prospective suppliers, academia, railway peers and other institutions.

Policy

Globally, climate-related legislation and regulations are emerging in response to growing scientific evidence and societal awareness of climate change. As one of seven Class 1 North American railroads, CP frequently engages on regulatory issues that impact our business and the rail transportation sector in Canada and the U.S. Our strategic engagements support our Climate Strategy, including topics related to cap-and-trade, carbon taxes, fuel efficiency standards, renewable fuel standards and emissions reporting programs.

Disclosure

CP benefits from strong sustainability disclosure through our Sustainably Driven website, which includes CP's Climate Statement, CDP responses and efforts to manage energy efficiency and emissions. With a keen interest in climate planning, action and disclosure, CP recognizes the importance of keeping the investment community informed as this Climate Strategy is implemented and advanced. In line with the recommendations of the TCFD, CP has conducted its scenario analysis and issued this Climate Strategy, and will further enhance its climate-related financial disclosures in 2021 and beyond. Starting in 2022, CP will annually report to shareholders on updates and progress towards our climate strategy. Our shareholders are encouraged to provide feedback on our efforts through an advisory vote at our annual general meeting.

REDACTED PUBLIC RECORD VERSION

INVESTMENT

In order to position CP as a leader in the transition to a low-carbon economy and fully execute this Climate Strategy, we recognize that new approaches will be required to deploy capital, operating budgets and people in the most efficient and effective ways possible. CP currently expends significant amounts of capital to maintain and upgrade our locomotive fleet and network, to improve overall efficiency and ensure system reliability. We anticipate that new approaches to deploy these resources will be necessary to assess and utilize the new data systems, technologies and fuels required to mitigate GHG emissions in the coming years.

Evaluating resource needs associated with each of the pillars in this Climate Strategy, as well as accessing low-cost capital, will be part of ensuring successful outcomes. Ultimately, we recognize that our most valuable asset is our people. To fully execute this Climate Strategy, our leadership is dedicated to our continued investment in attracting, retaining and developing the best talent and providing them with a work environment that supports diversity, inclusion, innovation and creativity. We believe that approach has already resulted in CP being a railroad industry leader and that it will continue to deliver strong results as CP executes this Climate Strategy.

List of Acronyms

GHG – greenhouse gas
TCFD – Task Force on Climate-related Financial Disclosures
IPCC – Intergovernmental Panel on Climate Change
IEA – International Energy Agency
SBTi – Science Based Targets initiative
RTM – revenue ton-mile



Reply Volume III, Page 3205



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 89

HIGHLY CONFIDENTIAL – EMAIL FROM D. MEYER TO A. HIRSCHKORN (FEB. 25, 2022)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 90

HIGHLY CONFIDENTIAL – JA-HC-000001

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 91

EX PARTE NO. 711, COMMENTS OF LYONDELLBASELL (FILED FEB. 14, 2022



Ms. Cynthia T. Brown
Head, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

303874

ENTERED
Office of Proceedings
February 14, 2022
Part of
Public Record

February 14, 2022

Subject: Comments on EP 711 (Sub-No. 1), Reciprocal Switching

Dear Ms. Brown:

As the Director of Supply Chain Americas, I oversee the operations and commercial aspects of rail transportation and logistics for Lyondell Chemical Company, Equistar Chemicals, LP, LyondellBasell Acetyls, LLC, and LyondellBasell Advanced Polymers Inc. (collectively, "LyondellBasell"). Competitive rail transportation services facilitate LyondellBasell's operations and allow LyondellBasell to compete for business in both the United States and global markets. LyondellBasell supports a broad implementation of competitive switching across the United States, and thanks the Surface Transportation Board for its attention to the matter and moving the long-standing EP 711 rulemaking forward.

These comments provide the Board with LyondellBasell's observations, based on its experience using reciprocal switching at multiple facilities in the United States, that reciprocal switching provides significant benefits without creating service issues. They also explain that LyondellBasell urgently needs access to reciprocal switching at other captive facilities where it is not available.

As a member of the American Chemistry Council, LyondellBasell also supports ACC's written testimony being filed contemporaneously with these comments and ACC's past comments in this proceeding.

Scope of LyondellBasell's North American Rail Operations

LyondellBasell has 19 rail-served manufacturing facilities located in Iowa, Illinois, Indiana, Louisiana, Tennessee, Texas, and Virginia. These facilities receive service from all 7 Class I railroads via either single-carrier access service, multi-carrier access service, or reciprocal switching. From these facilities, LyondellBasell originates approximately 70,000 rail shipments per year of polyolefins and liquid chemicals, including hazardous materials and toxic inhalation hazard (TIH) materials. To support this rail operation, LyondellBasell operates 18,000 private railcars comprising covered hopper cars and tank cars. And more than half of LyondellBasell's North America logistics expenses arise from rail logistics.

LyondellBasell's Multi-Carrier Access and Experience Relating to Reciprocal Switching

Eight LyondellBasell facilities spread across the U.S. Gulf Coast and Midwest have access to rail competition through reciprocal switching. Reciprocal switching at these facilities has not posed any special operational issues, likely because it generally awards the reciprocal-switch traffic under multi-year contracts that provide predictability to LyondellBasell and the railroads, the railroads establish and follow operating plans to serve the traffic, and the railroads coordinate as necessary, producing an efficient operation. Reciprocal switching has even proven less complex than the multi-carrier direct service[1] that LyondellBasell receives at another facility since reciprocal switching involves less coordination between the carriers and LyondellBasell. In sum, reciprocal switching has produced efficiencies for LyondellBasell without any operational dysfunction.

[1] Multi-carrier direct service involves two carriers directly accessing a facility over shared track. It is a close cousin of reciprocal switching insofar as it provides a facility with access to multiple rail carriers.

When awarding traffic that is open to reciprocal switching or multi-carrier direct service, LyondellBasell conducts a full cost-benefit analysis in which operational impacts play a significant role. This analysis includes consideration of at least the following factors:

- Operational impacts

    - Route efficiency: An origin-destination routing over the incumbent carrier may be significantly longer in distance or duration than the routing via a reciprocal switch. This often is the case for joint-line movements and increases LyondellBasell's private car fleet and supporting infrastructure needs, rail-network congestion, the potential for service disruptions, and the environmental footprint of shipments. LyondellBasell thus has a strong preference for efficient routing.

    - Gross rail weight limitations: Although railroads continue to make significant investments to upgrade gross rail weight across the network, bridge and track restrictions still exist and produce inefficiency. One carrier may be able to accommodate 286,000-pound gross rail weight shipments for certain traffic, while another only 263,000-pound gross rail weight shipments for the same traffic. LyondellBasell prefers routings with higher railcar gross weight limits because they reduce the number of railcars required to support a given volume of business and thus reduce rail congestion and LyondellBasell's private-car fleet and associated infrastructure needs.

    - Infrastructure support: Polyolefin producers, such as LyondellBasell, generally require significant storage-in-transit to manage inventory needs. Thus, when considering reciprocal switch options, LyondellBasell evaluates railroad and private storage options on each carrier's line. By using carriers who offer or have access to railcar storage facilities, LyondellBasell is able to reduce the risk of congesting local yards and incurring associated storage charges.

    - Reliability Risk: Reliable rail service is critical to LyondellBasell and its customers. It reduces the need for a safety buffer of railcars and inventory. It also reduces the risk of supply disruptions and, thus, the need to use premium truck transportation to cover delayed shipments, which typically involves four trucks for a single railcar. For these reasons, LyondellBasell favors routing traffic over the most reliable route.

- Commercial offers: Commercial offers from an incumbent and competing railroad typically are similar. But in some cases, LyondellBasell may realize a rate benefit in excess of 30%. These rates do not, however, translate to negative operational impacts since even a minor degradation in service or reliability typically places a high burden on LyondellBasell.

The benefits of reciprocal switching and rail competition are so significant that, over the past ten years, LyondellBasell has added more than 2,200 storage-in-transit car spots across four facilities to allow access to the reciprocal switching and multi-carrier service options available at those facilities. These investments reflect that the competition afforded by reciprocal switching and multi-carrier direct service provides a strong incentive for LyondellBasell to make rail-infrastructure investments. In many cases, these investments reduce the investments that carriers involved in a reciprocal switch or multi-carrier direct service would need to make to provide service to LyondellBasell's traffic.

Carriers also are investing in traffic that is open to reciprocal switching. For example, BNSF Railway built its Lacassine yard to serve traffic around Lake Charles, LA, which it accesses via reciprocal switching. Thus, reciprocal switching does not appear to have materially reduced carrier investment.

Further, reciprocal switching provides important flexibility to address rail-service disruptions, which arise often. Railroads may experience service disruptions from myriad issues, including the railroad's operational missteps and external forces, like extreme weather events. Where available, LyondellBasell has used reciprocal switching and multi-carrier direct service to change routing and move traffic to alleviate service disruptions. This helps reduce LyondellBasell's railcar fleet

requirements and avoid premium truck shipments, which would otherwise be necessary if a car was delayed.

LyondellBasell's Need for the Proposed Reciprocal Switching Rules

While LyondellBasell currently has multiple facilities open to reciprocal switching, it still has ten facilities that are captive to a single railroad and have a nearby interchange with a competing carrier, but are not open to reciprocal switching. Many of its customers' facilities are also captive and have a nearby interchange to a competitor. LyondellBasell's captive traffic involving these LyondellBasell and customer facilities is subject to operational inefficiencies and risks similar to those that reciprocal switching, where available, has helped LyondellBasell mitigate, as described above. Also, this traffic cannot be shifted around disruptions on the line of the carrier who holds it captive unless LyondellBasell uses truck shipments. Thus, even though LyondellBasell has several facilities open to reciprocal switching, it still has an urgent need for revised reciprocal switching rules.

Additional Reciprocal Switching Considerations

Reciprocal switching promises many benefits, but "paper barriers" (i.e., contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad) may deprive many shippers of those benefits by imposing penalties on a railroad for engaging in a reciprocal switch. Also, in LyondellBasell's experience, paper barriers often lead to irrational or absurd results. For example, one current LyondellBasell facility can originate interstate traffic with two railroads via a reciprocal switch, but the same switch is unavailable for intrastate shipments. The Board thus should make clear that a reciprocal switching order supersedes any paper barrier involving the switch.

Closing Comments

LyondellBasell anticipates that shippers will realize significant benefits from reciprocal switching, and LyondellBasell's experience with reciprocal switching at its facilities demonstrates that railroads can implement reciprocal switching without adverse operational impacts. Further, rail competition from reciprocal switching will enable LyondellBasell and other rail shippers to remain competitive in the global marketplace. LyondellBasell thus asks the Board to immediately adopt its proposed reciprocal switching rules.

Sincerely,

/s/Scott Campbell
Scott Campbell
Director of Supply Chain Americas

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 92

HIGHLY CONFIDENTIAL - NS00005474

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

HYNES V.S. EXHIBIT 93

HIGHLY CONFIDENTIAL - NS00004912

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VOLUME III, EXHIBIT A

HIGHLY CONFIDENTIAL – DEPOSITION OF PAUL HIRSCH (JUNE 3, 2022)

(EXCERPTS)

BEFORE THE SURFACE TRANSPORTATION BOARD

- - -

FINANCE DOCKET NO. 36500

- - -

CANADIAN PACIFIC RAILWAY LIMITED, ET AL.

- CONTROL -

KANSAS CITY SOUTHERN, ET AL.

- - -

FRIDAY, JUNE 3, 2022

HIGHLY CONFIDENTIAL

- - -

Remote Zoom Videotaped Deposition of PAUL HIRSCH, taken pursuant to Notice, in Fort Worth, Texas,commencing at approximately 9:06 a.m., Central Time, on the above date, before Rose A. Tamburri, RPR, CM, CCR, CRR, USCRA Speed and Accuracy Champion and Notary Public.

- - -

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1801 Market Street, Suite 1800
Philadelphia, Pennsylvania 19103

APPEARANCES: (Via Zoom)

STEPTOE & JOHNSON, LLP
BY: JOHN J. KAVANAGH, III, ESQUIRE
PETER DENTON, ESQUIRE
1330 Connecticut Avenue NW
Washington, D.C. 20036
(202) 429-3000
kavanaghj@steptoe.com
dentonp@steptoe.com

and

MAYER BROWN, LLP
BY: ADRIAN L. STEEL, JR., ESQUIRE
1999 K Street, Northwest
Washington, D.C. 20006
(202) 263-3237
asteel@mayerbrown.com
Representing BNSF Railway

SULLIVAN & CROMWELL, LLP
BY: JASON O. HEFLIN, ESQUIRE
JULIA PREZIOSO, ESQUIRE
SAMANTHA HYNES, ESQUIRE
1700 New York Avenue NW, Suite 700
Washington, D.C. 20006
(202) 956-7500
heflinj@sullcrom.com
preziosoj@sullcrom.com
hyness@sullcrom.com

and

LAW OFFICE OF DAVID L. MEYER
BY: DAVID L. MEYER, ESQUIRE
1105 S Street, Northwest
Washington, D.C. 20009
(202) 294-1399
david@meyerlawdc.com
Representing Canadian Pacific

APPEARANCES, Continued:

SIDLEY AUSTIN, LLP
BY: MARC A. KORMAN, ESQUIRE
1501 K Street, Northwest
Washington, D.C. 20005
(202) 736-8996
makorman@sidley.com
Representing Canadian National Railway

COVINGTON & BURLING, LLP
BY: MICHAEL L. ROSENTHAL, ESQUIRE
One CityCenter
850 Tenth Street, Northwest
Washington, D.C. 20001
(202) 662-5448
mrosenthal@cov.com
Representing Union Pacific Railroad

BAKER & MILLER, PLLC
BY: WILLIAM A. MULLINS, ESQUIRE
2401 Pennsylvania Avenue, Northwest
Suite 300
Washington, D.C. 20037
(202) 663-7823
wmullins@bakerandmiller.com
Representing Kansas City Southern

HARKINS CUNNINGHAM, LLP
BY: JILL COLLINS, ESQUIRE
1750 K Street Northwest, Suite 300
Washington, D.C. 20006
(202) 973-7601
jc@harkinscunningham.com
Representing CSX Transportation

APPEARANCES Continued:

WEIL, GOTSHAL & MANGES, LLP
BY: DANIEL BAQUET, ESQUIRE
CARRIE MAHAN, ESQUIRE
2001 M Street NW, Suite 600
Washington, D.C. 20036
(202) 682-7197
daniel.baquet@weil.com
carrie.mahan@weil.com
Representing Norfolk Southern

ALSO PRESENT:

TYLER WHITE, ESQUIRE
WARREN EDWARDS, LAW CLERK
SCOTT FORMAN, Videographer
PETER CURRAN, Video Concierge

DEPOSITION SUPPORT INDEX

DIRECTION TO WITNESS NOT TO ANSWER

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PREVIOUSLY MARKED EXHIBITS REFERRED TO

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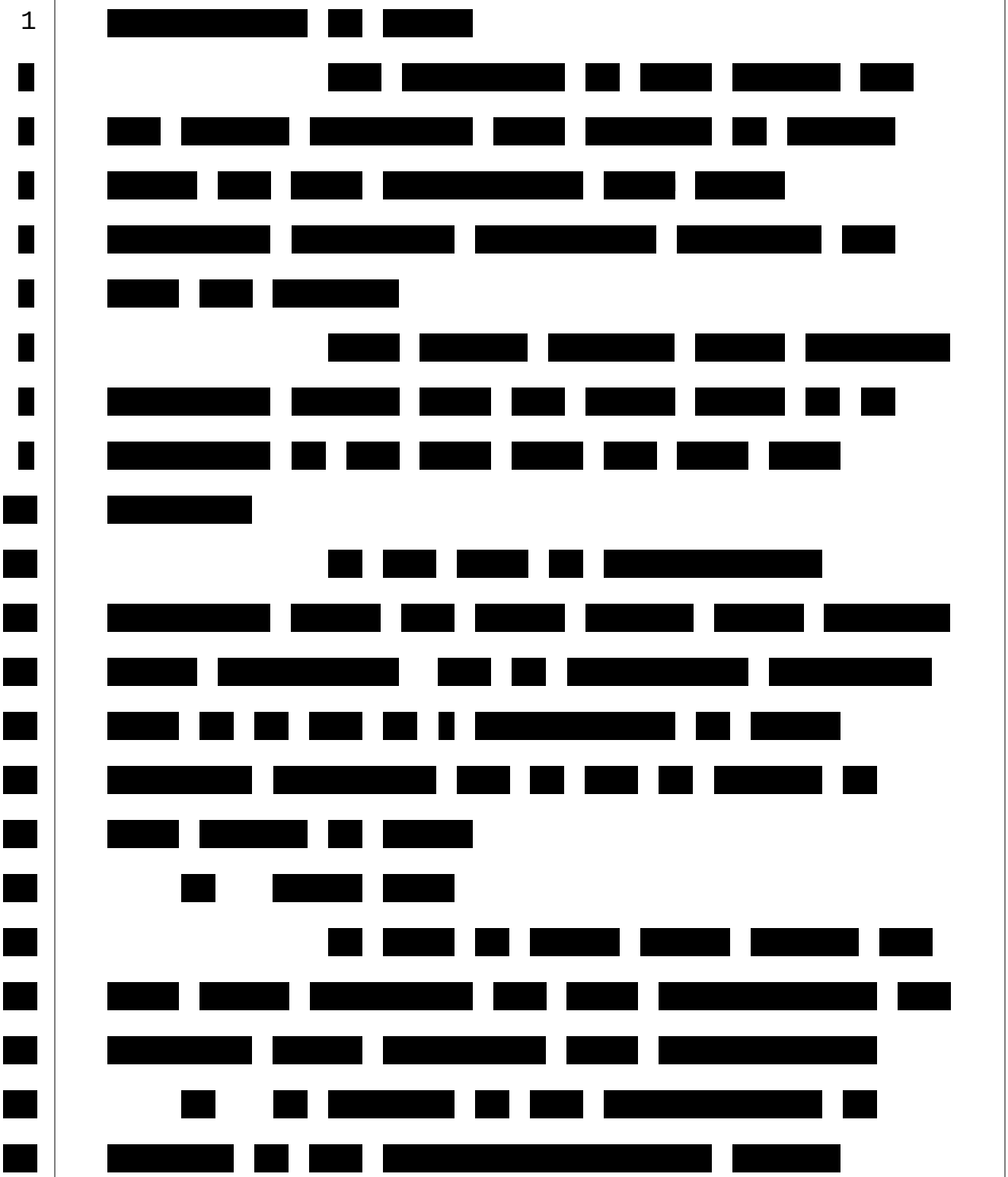
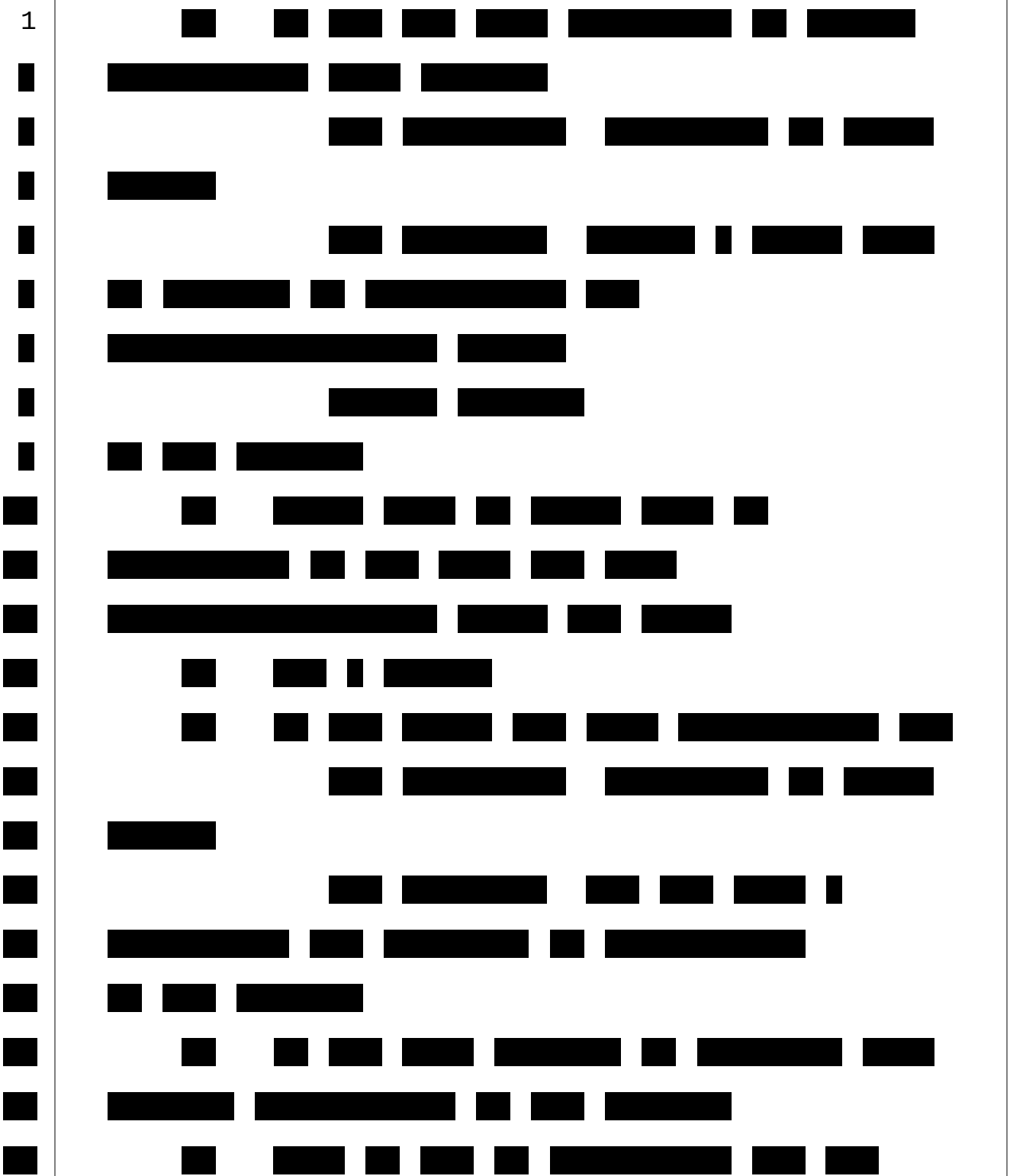
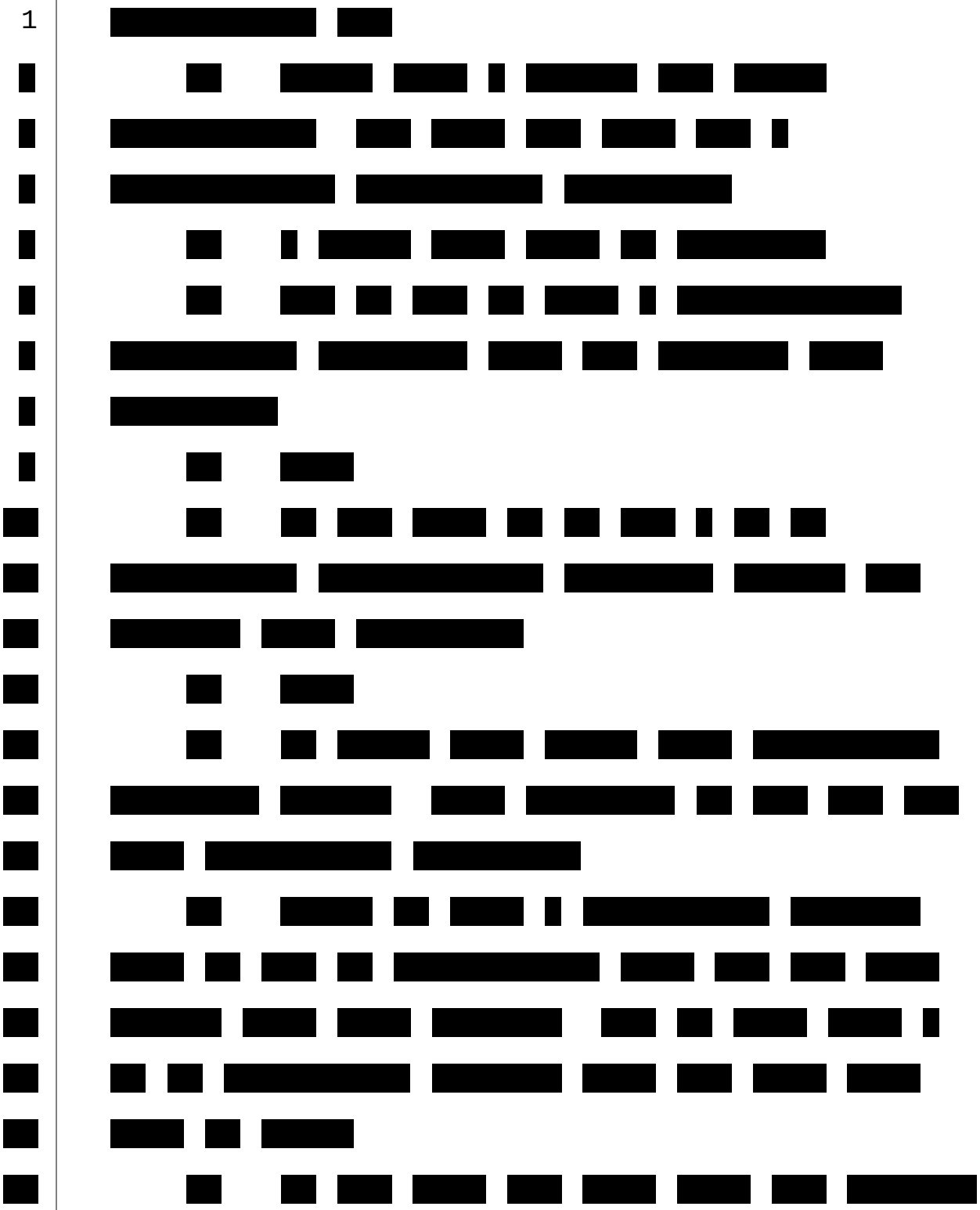
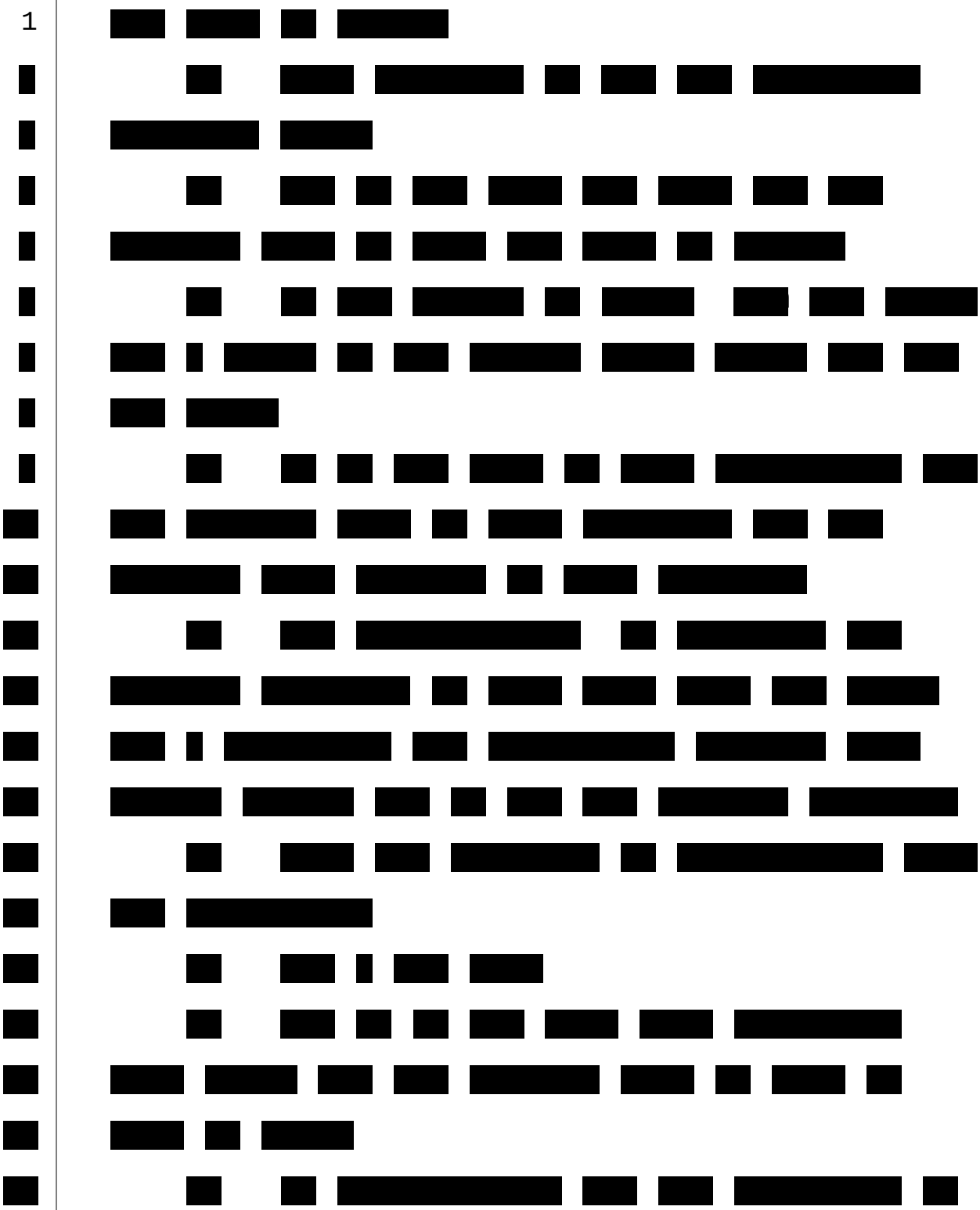
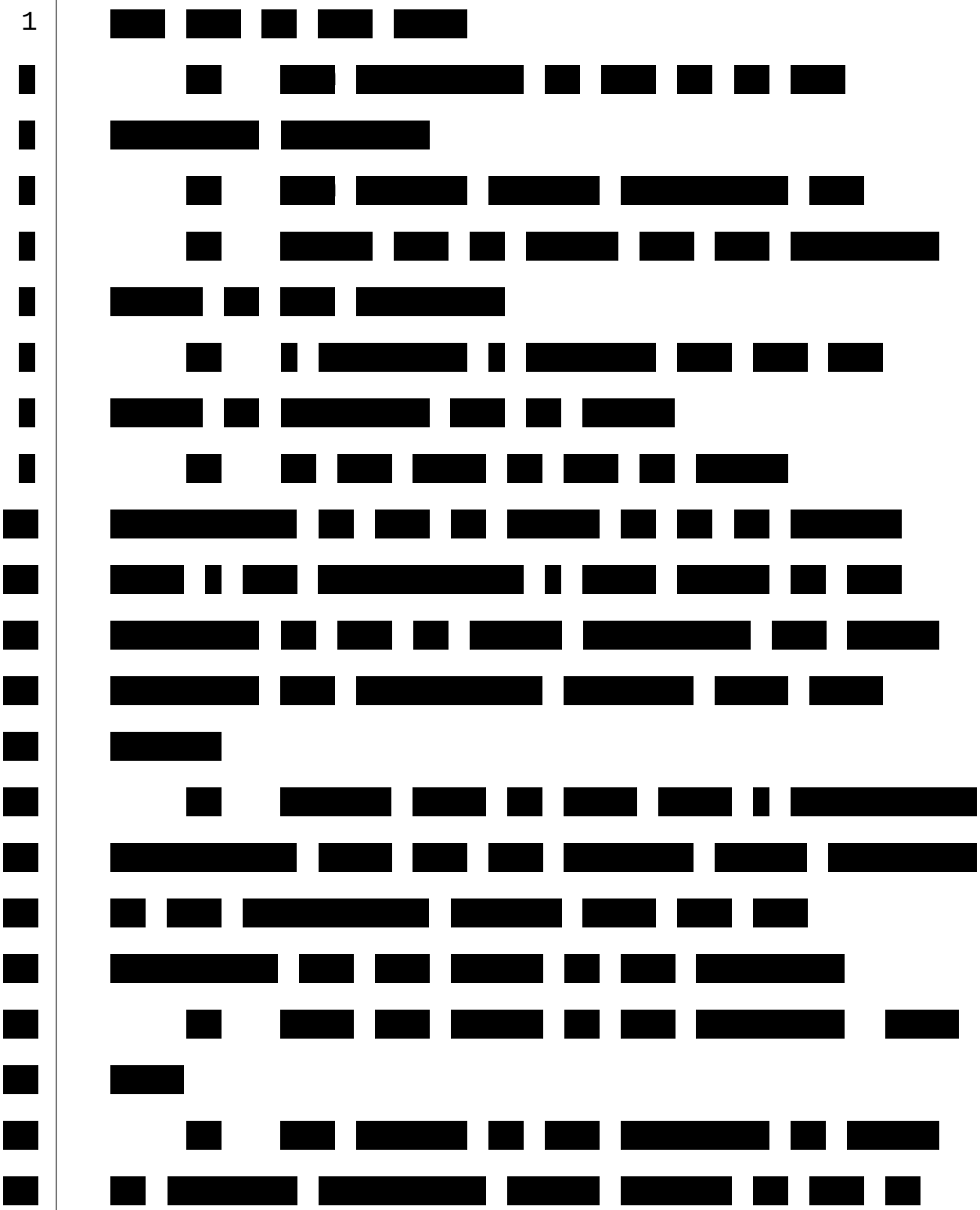
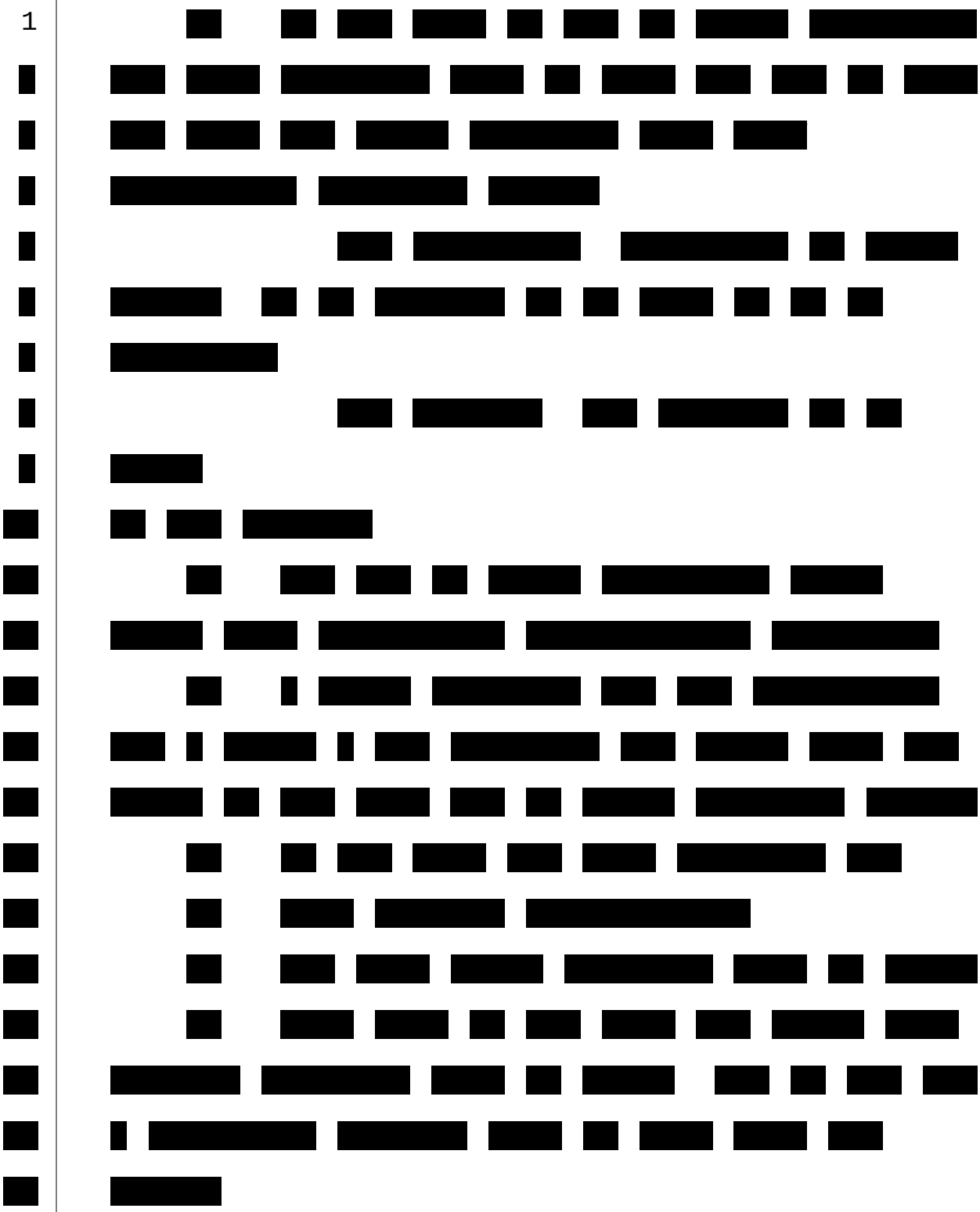


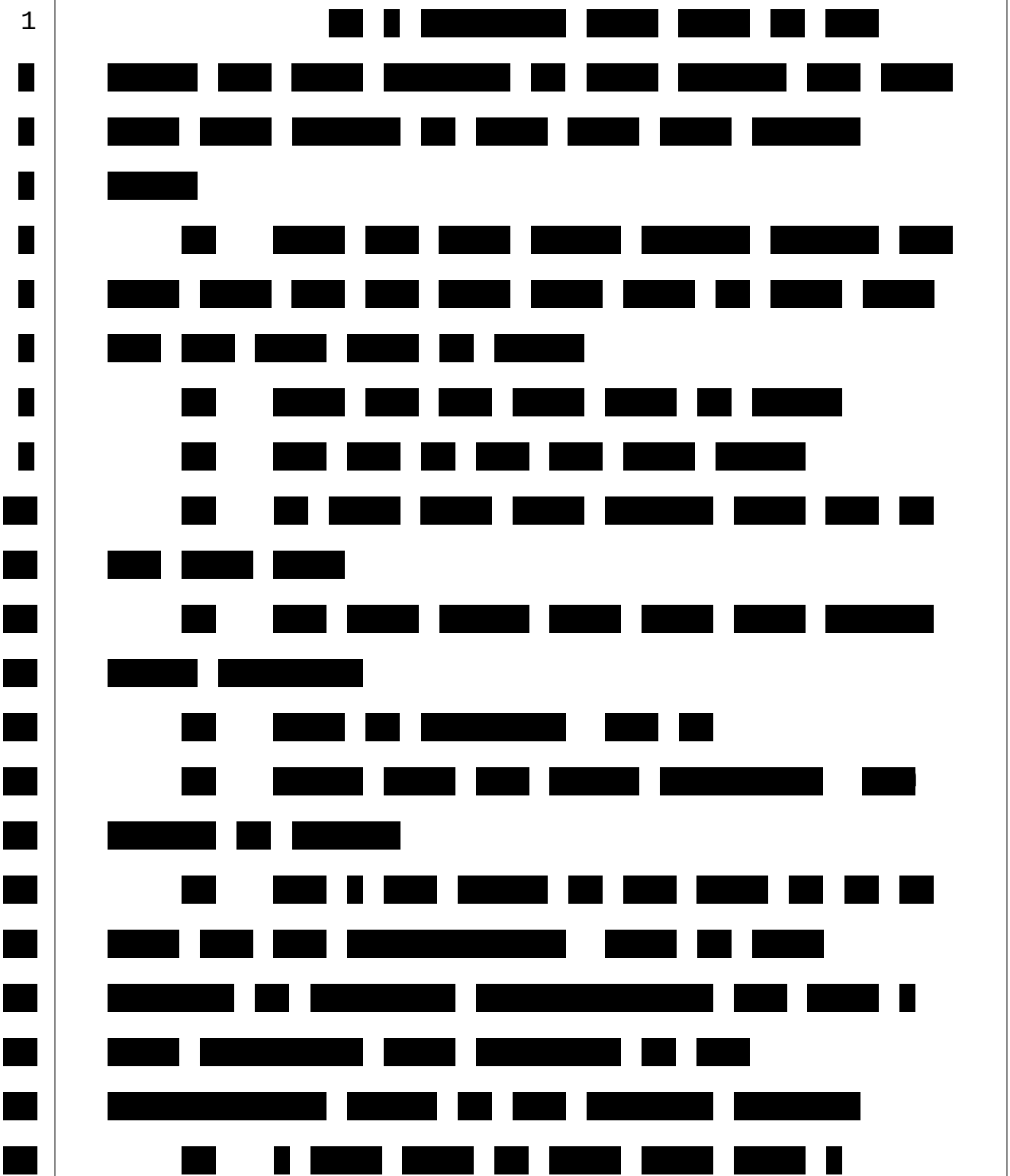


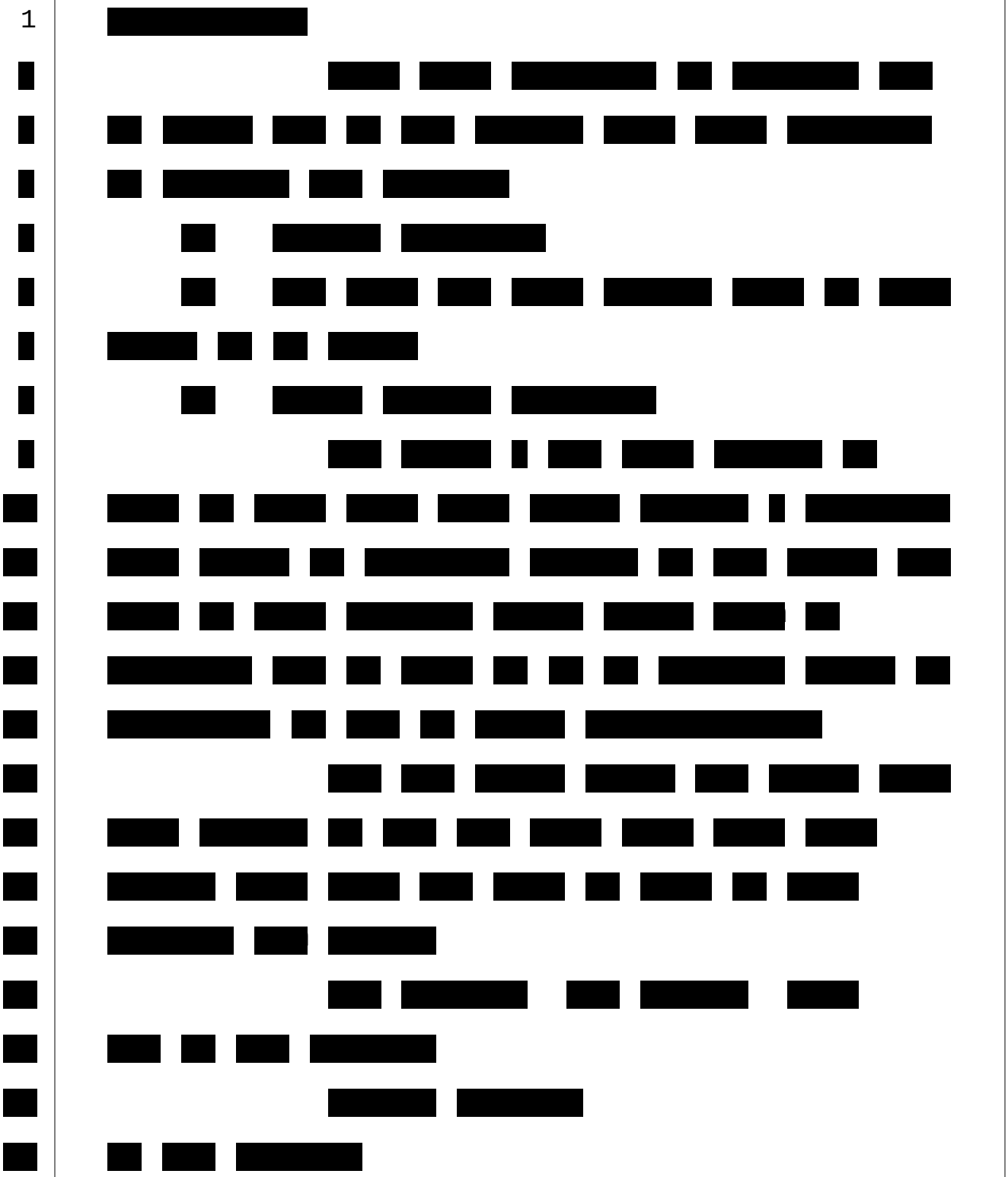


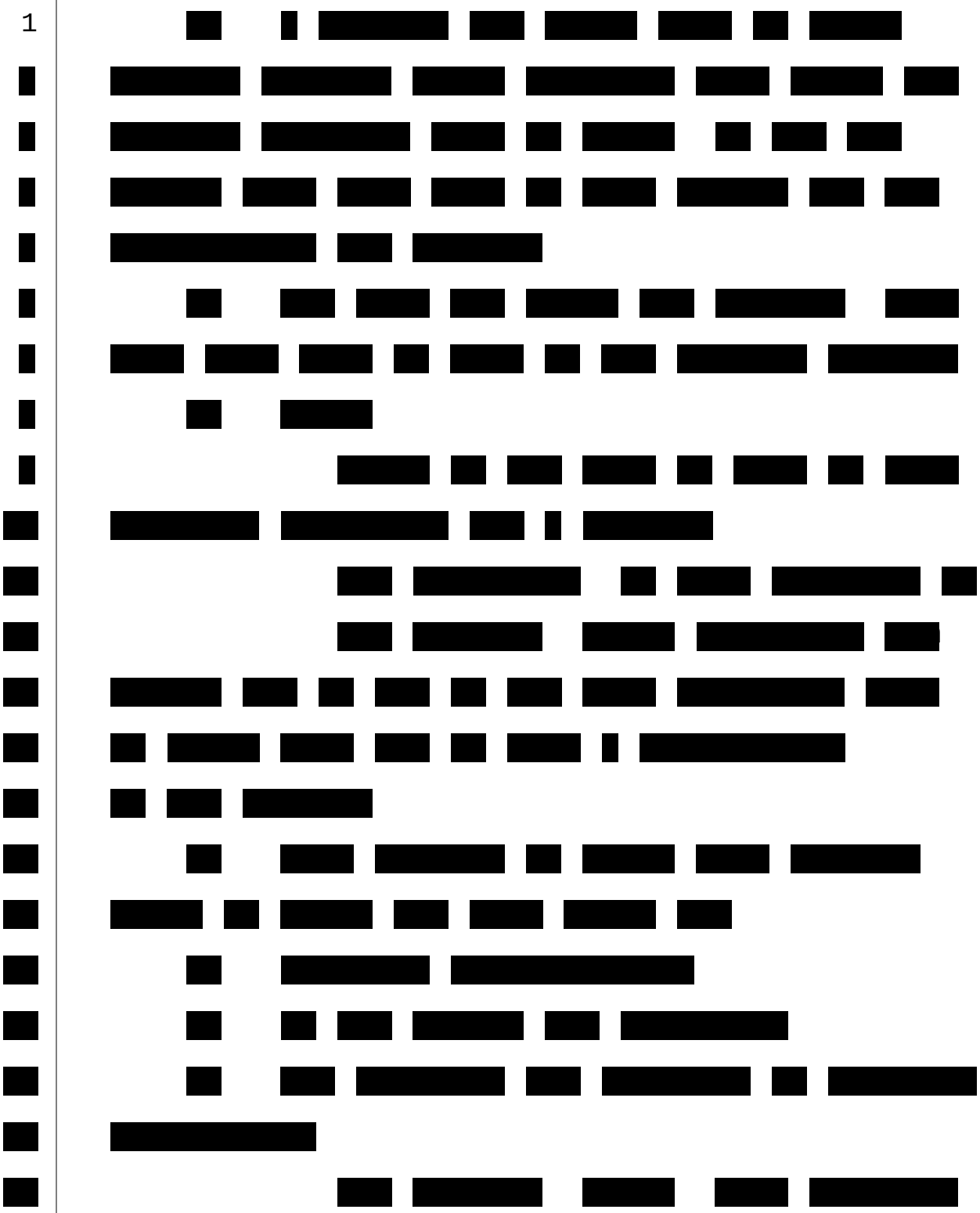


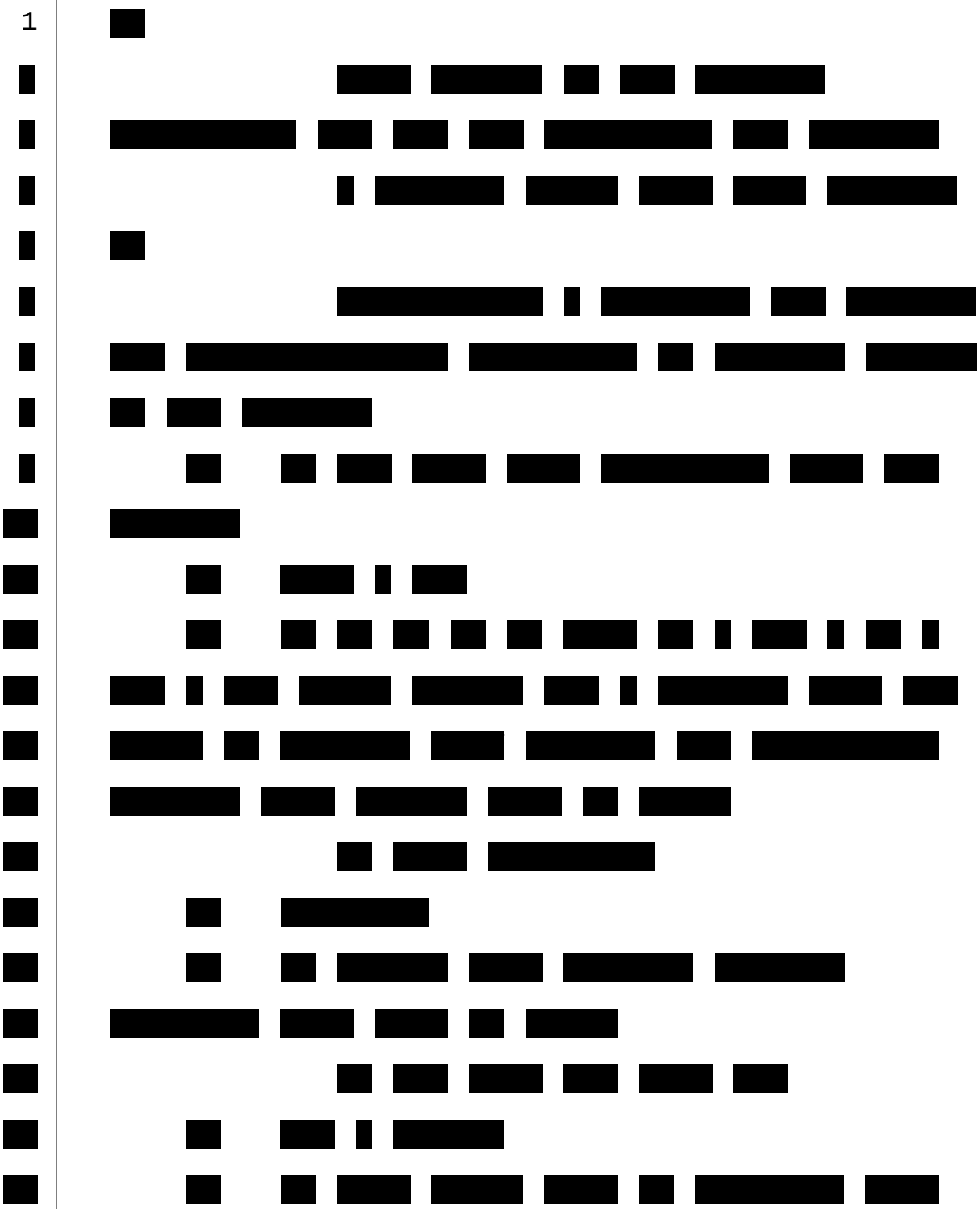










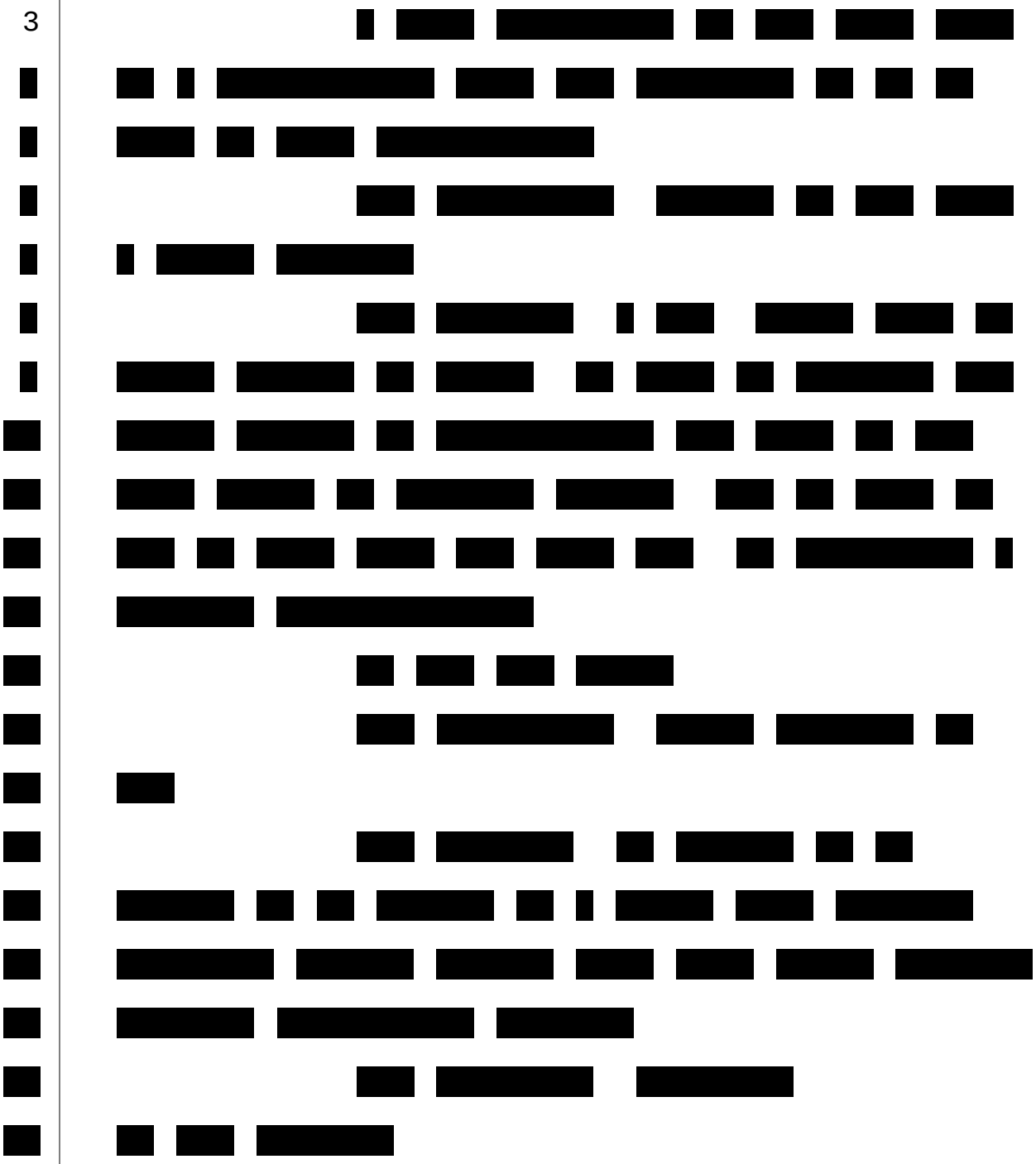


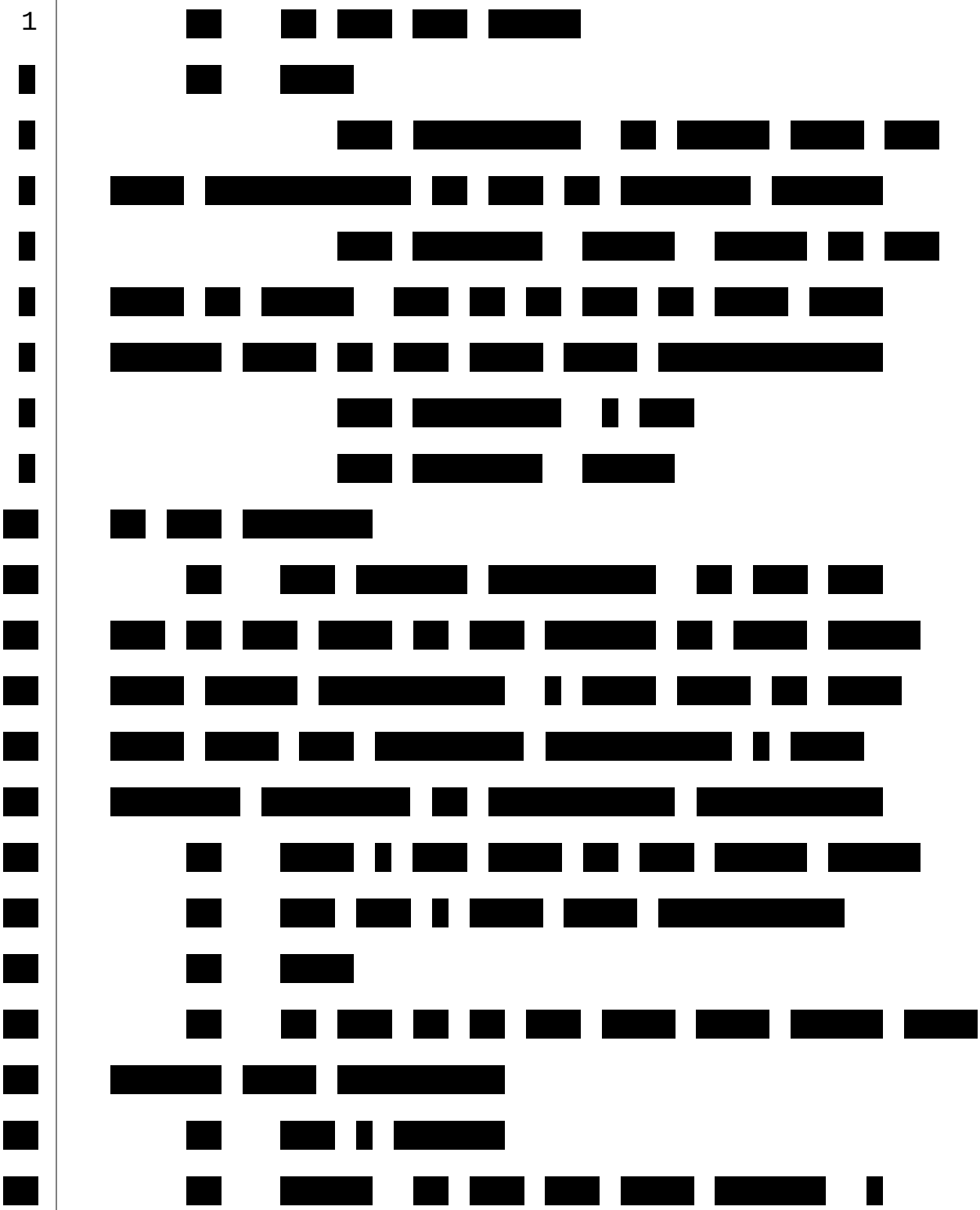
[redacted]

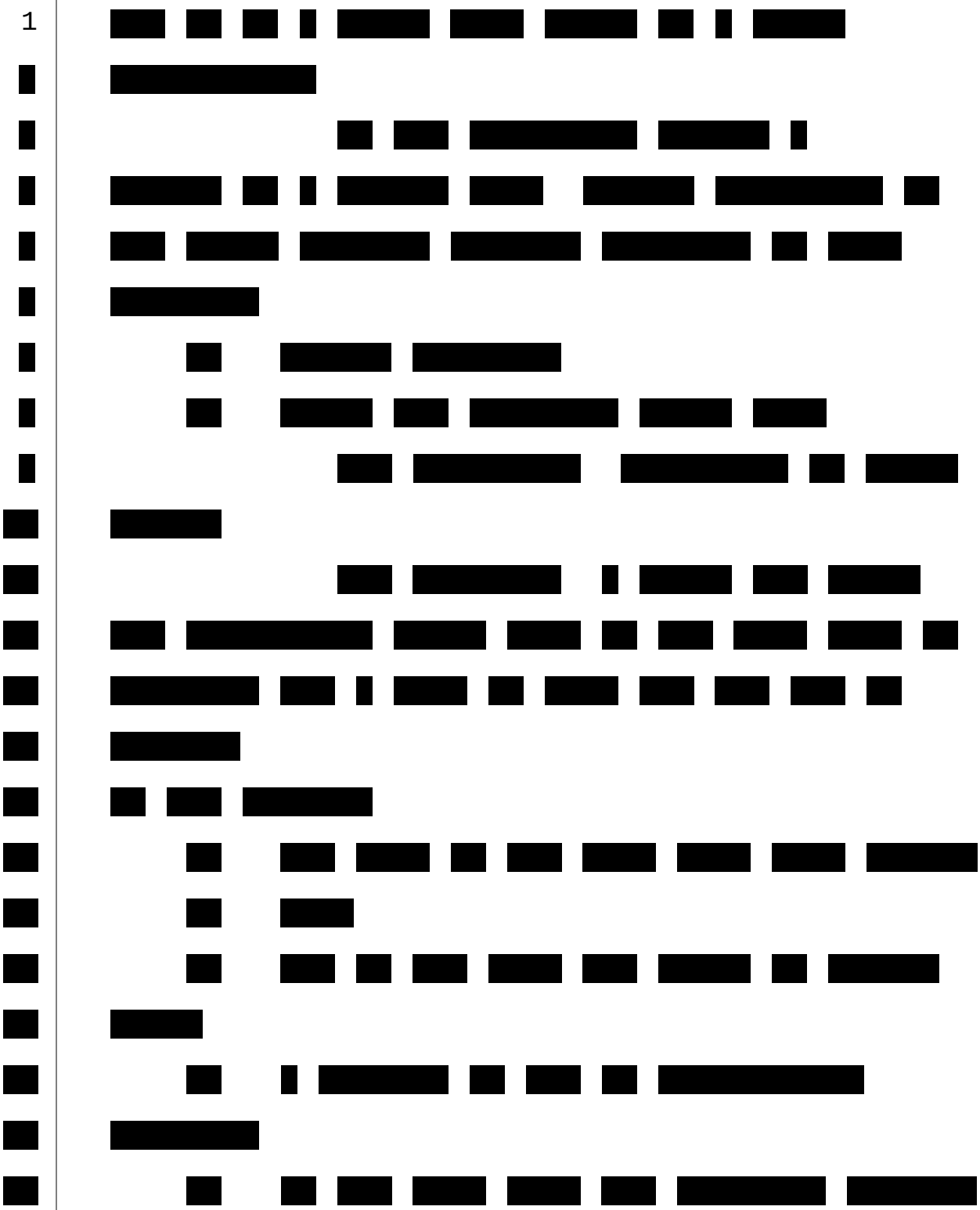
Q. This will be a quick digression, but can we look at Envelope J, Exhibit 2.

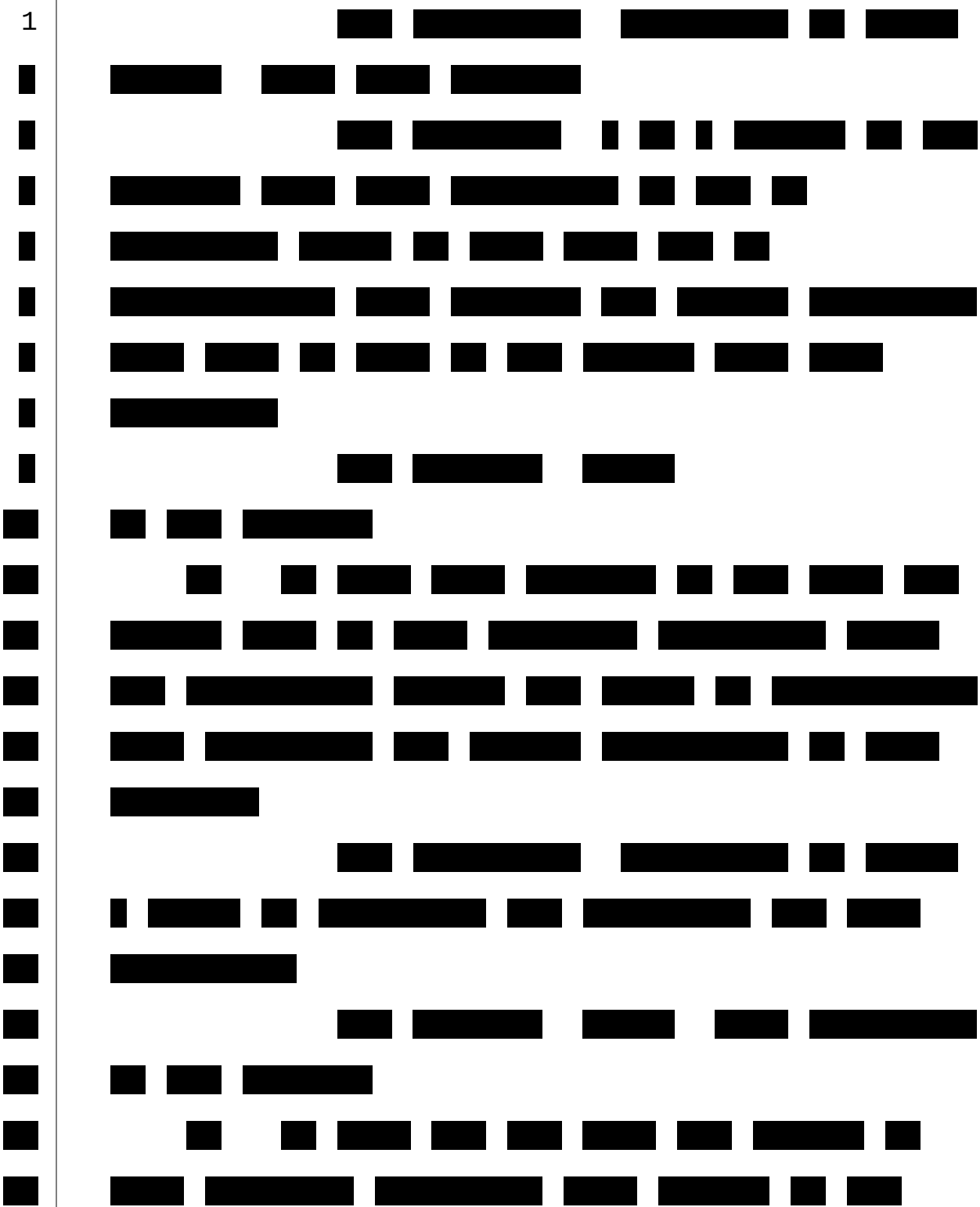
(Whereupon, a document was marked, for identification purposes, as Exhibit 0002.)

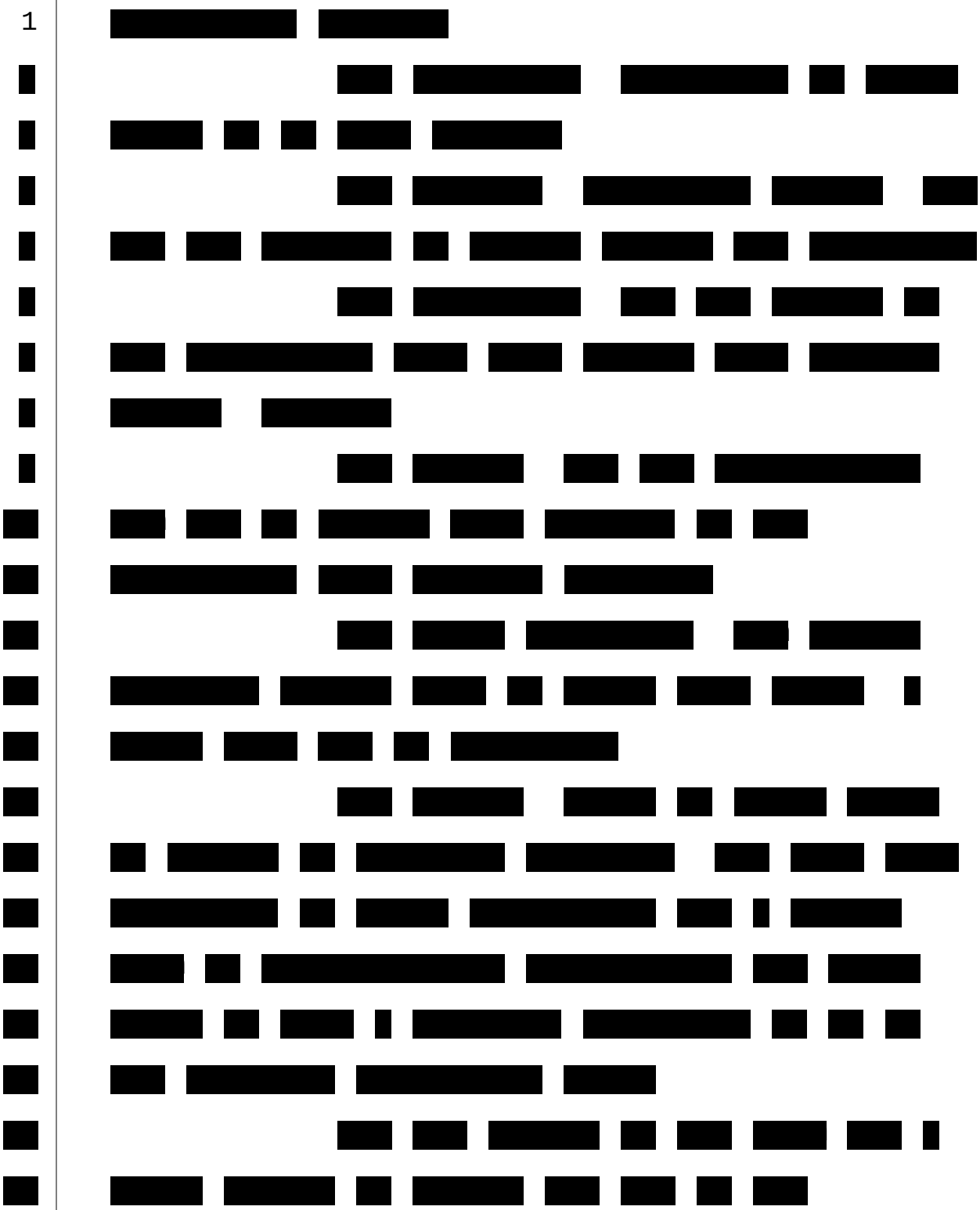
MR. HEFLIN: And Julia will introduce it in Exhibit Share.

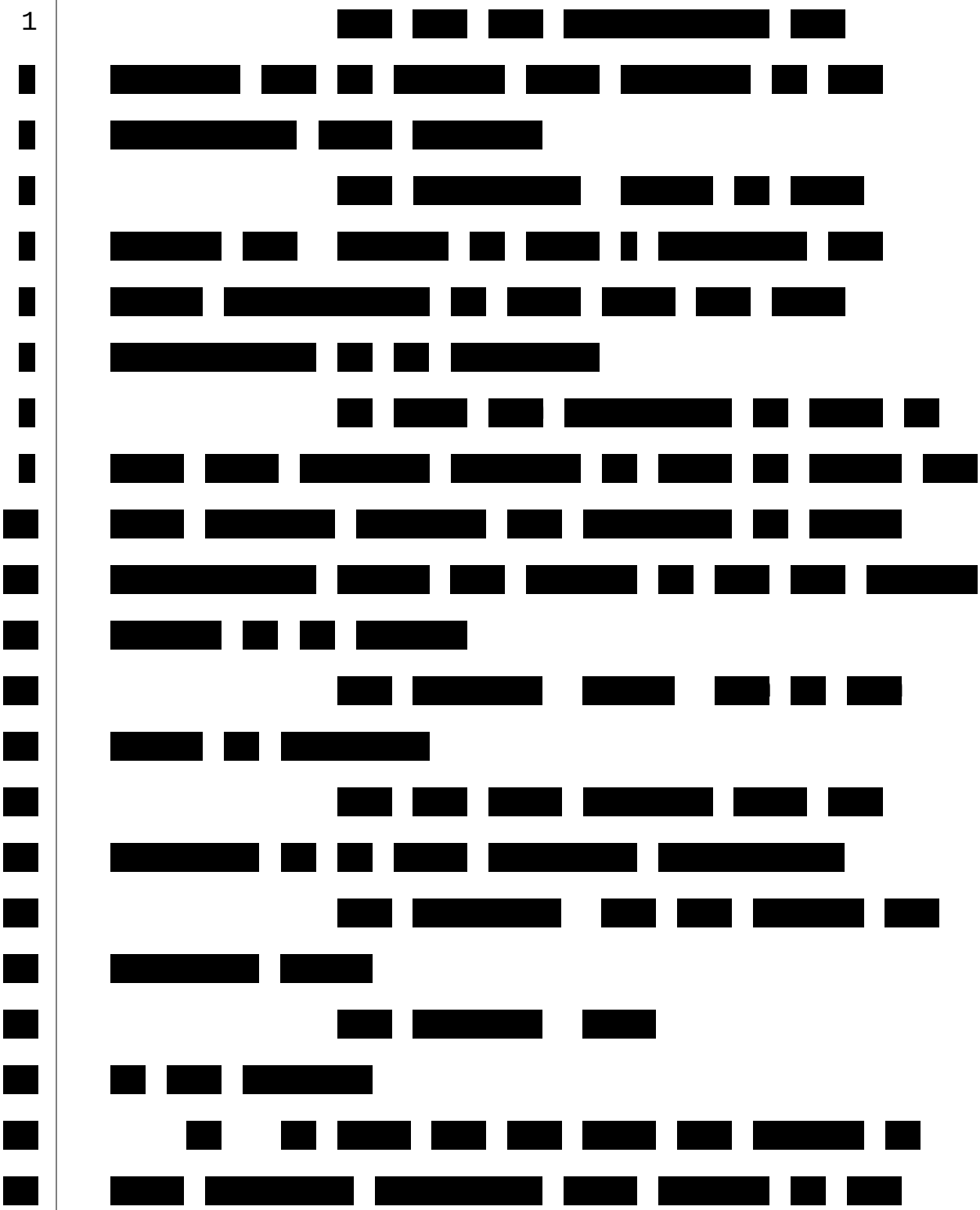


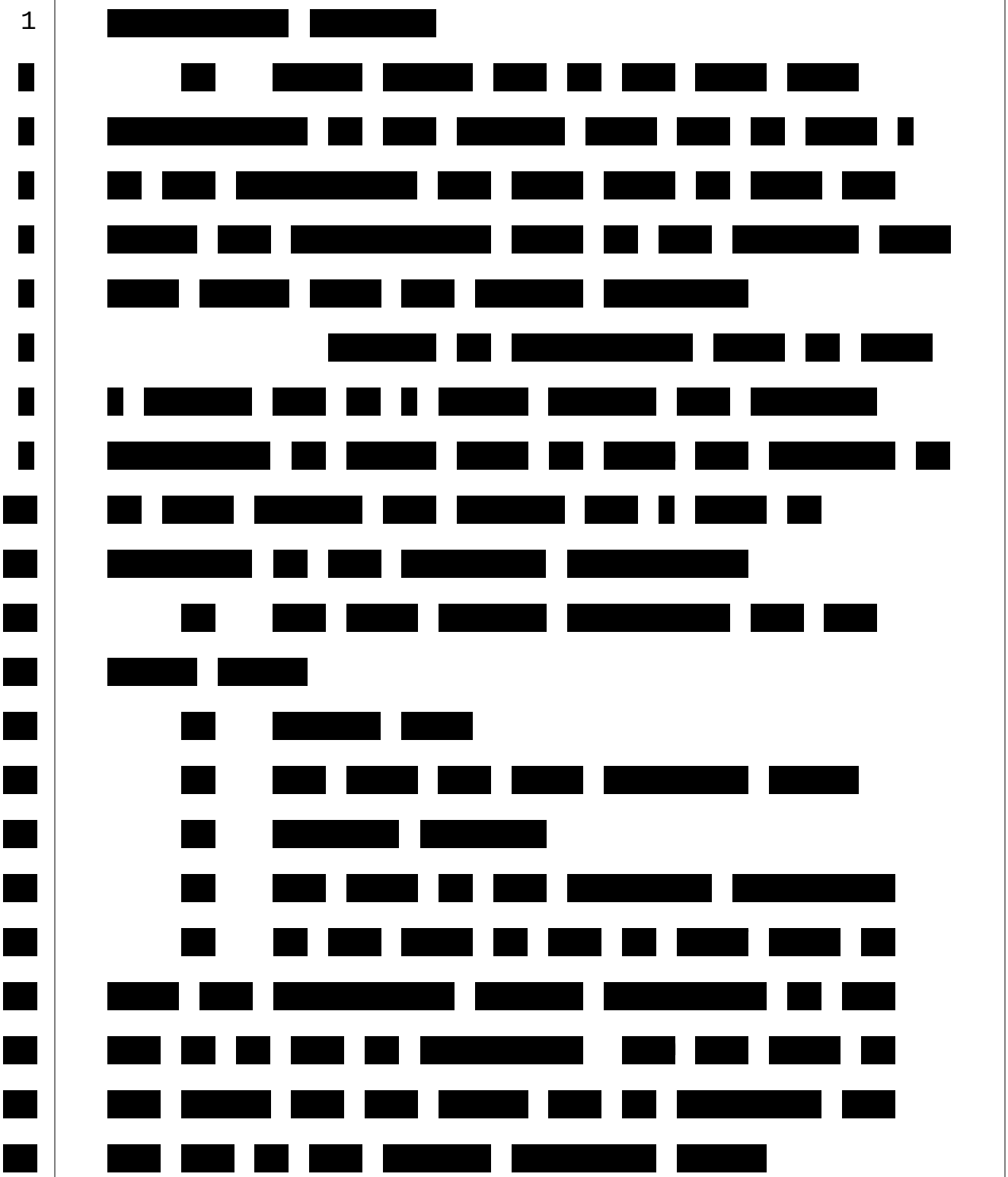


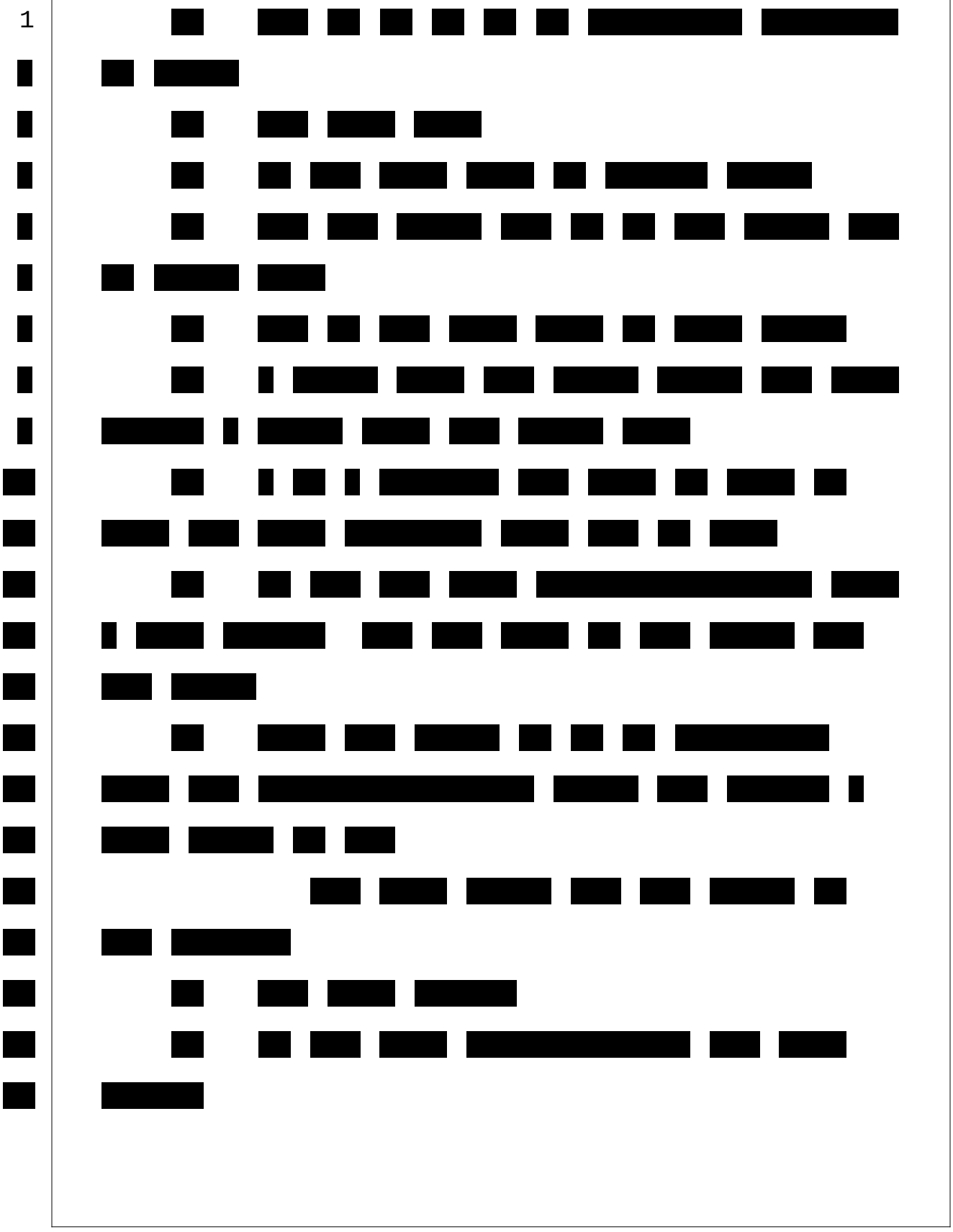


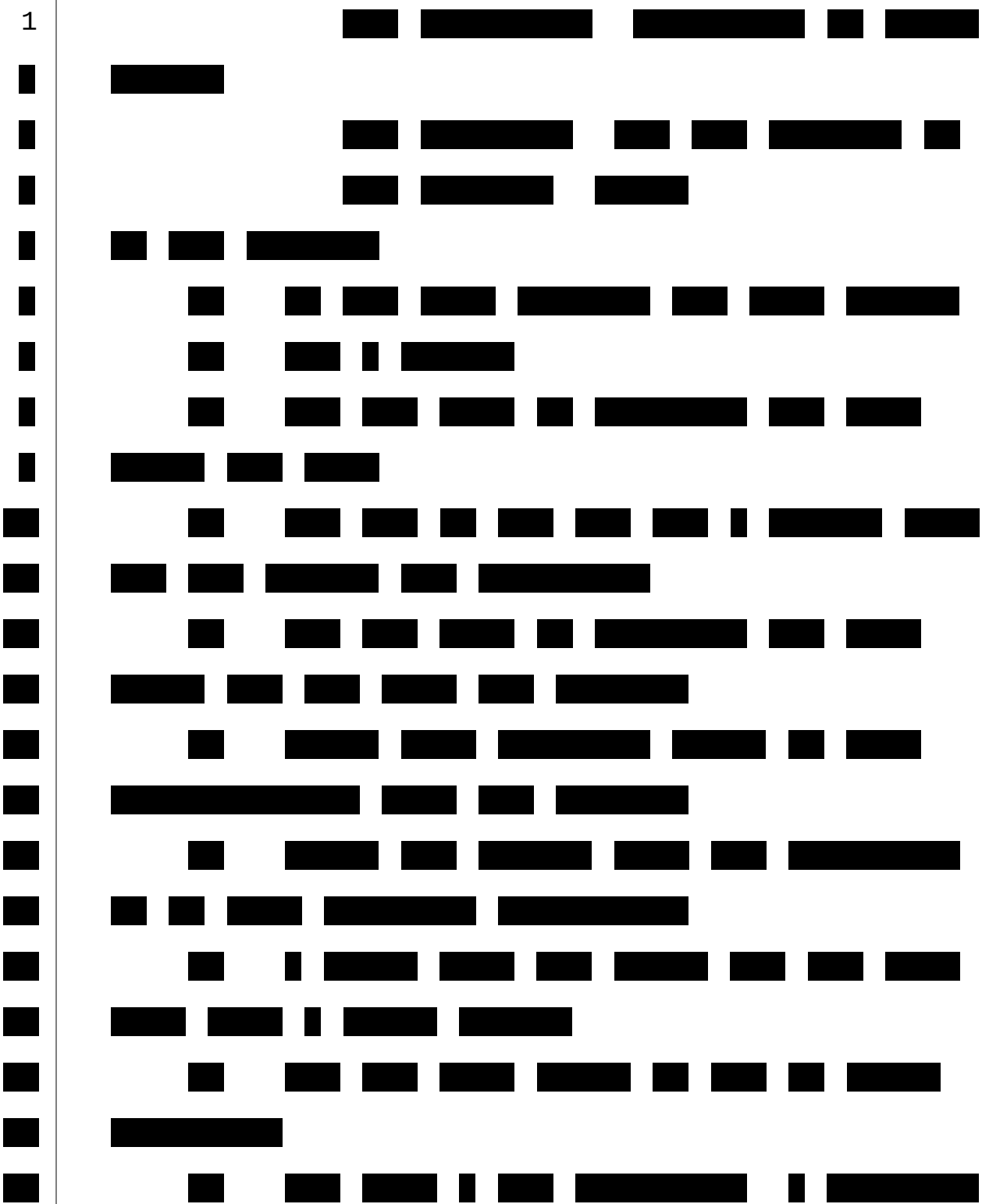


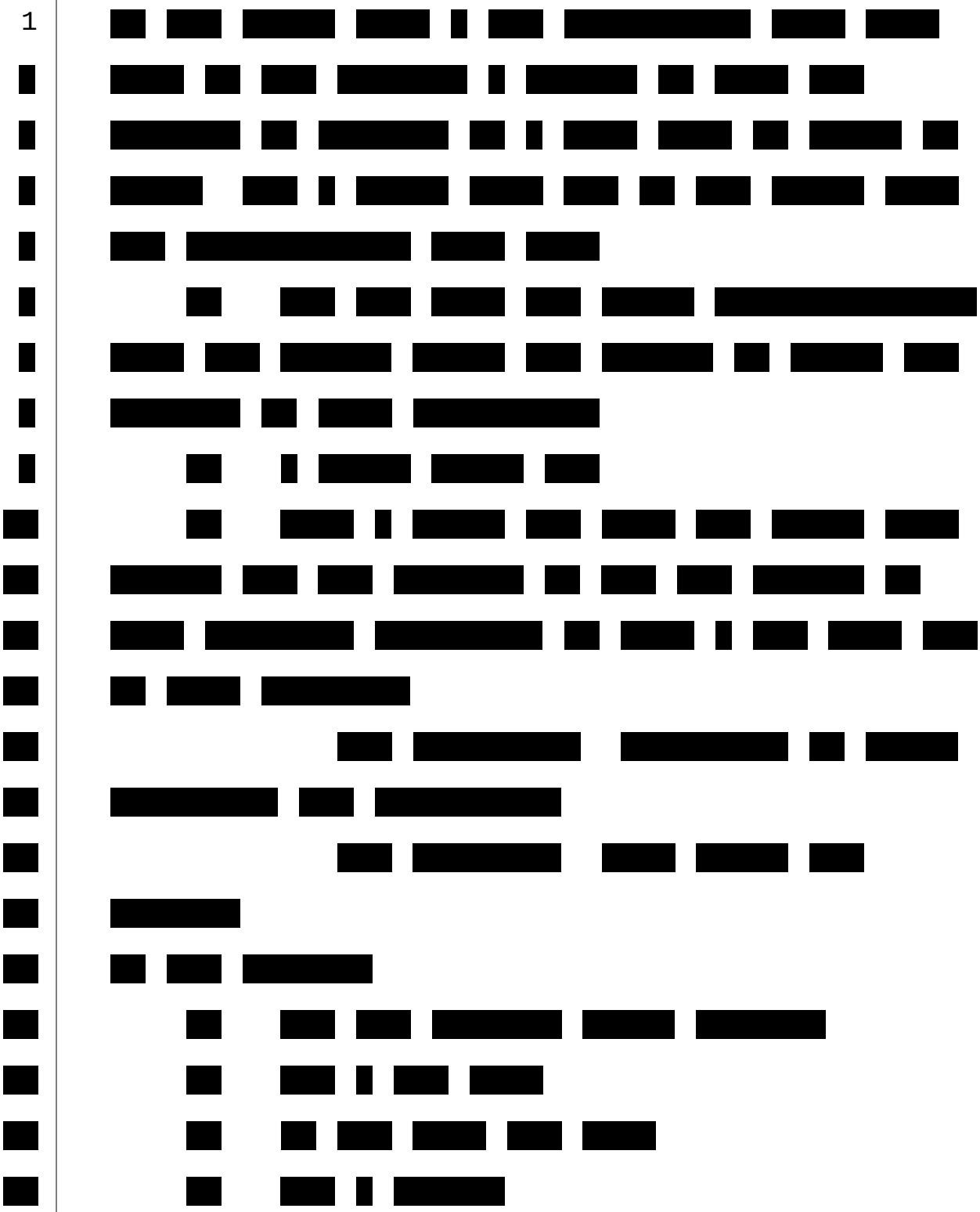


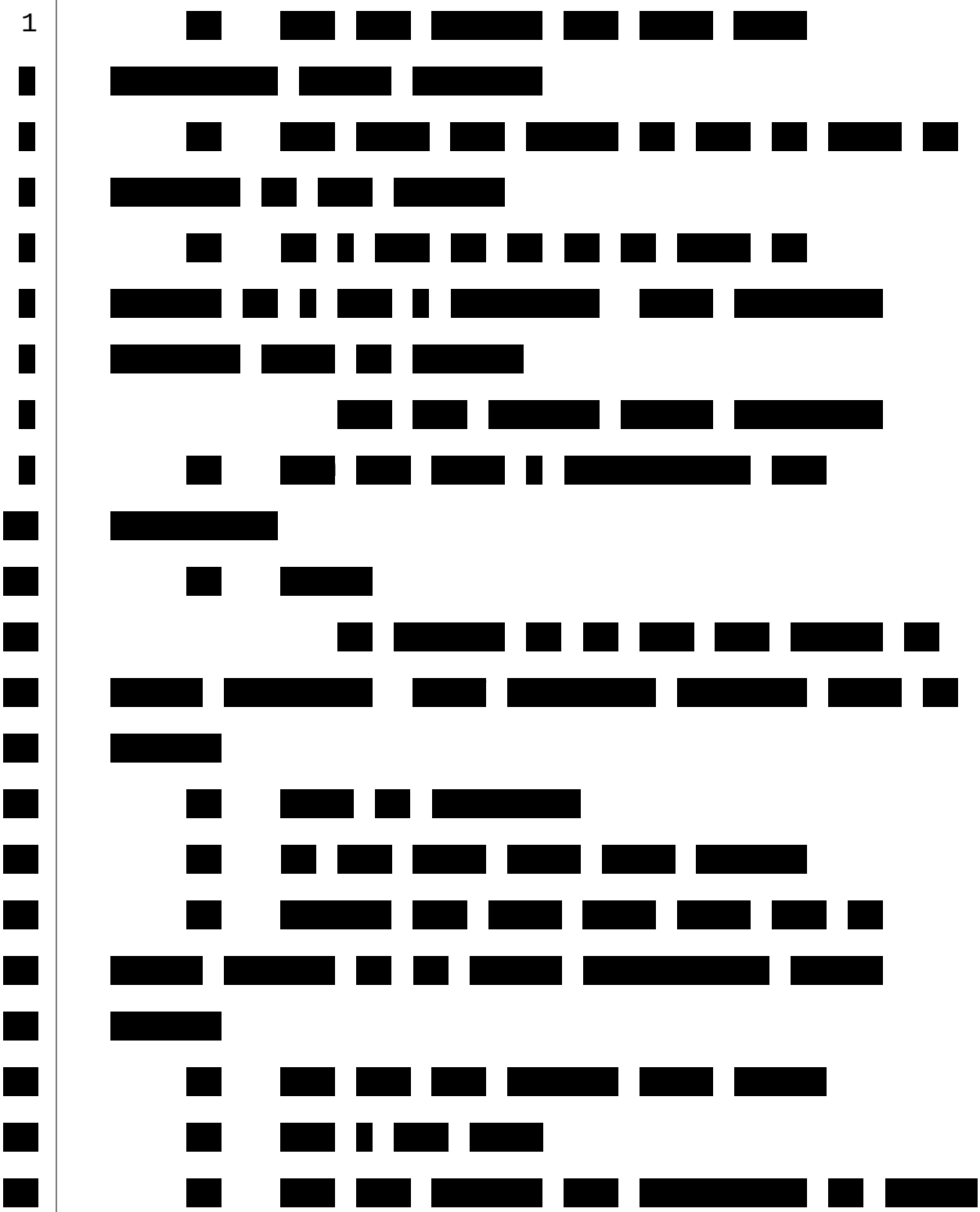


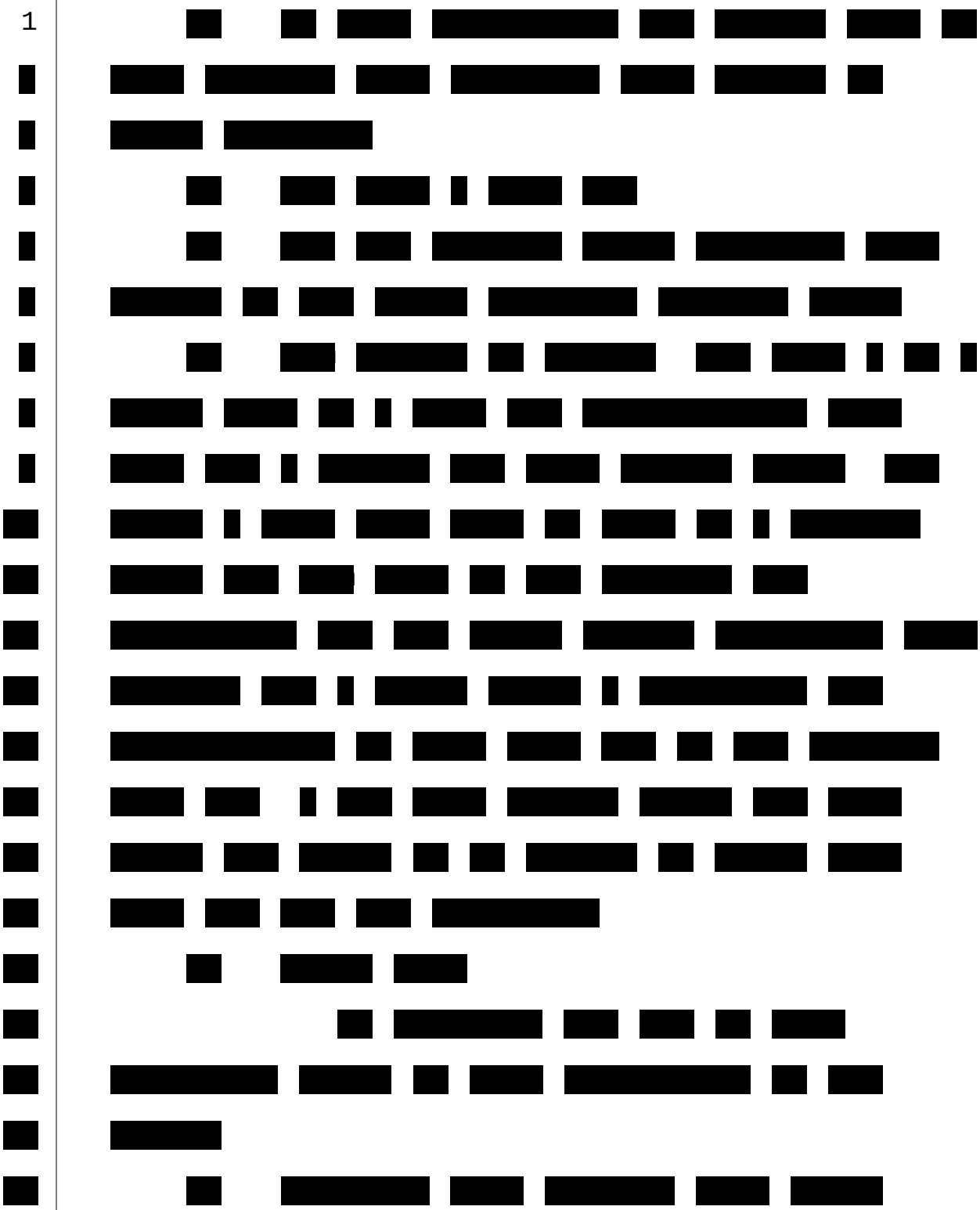












[redacted]

MR. HEFLIN: I think we've been going about an hour. Are you okay to keep moving forward or would you like a break?

THE WITNESS: I'd rather have a quick break if we can.

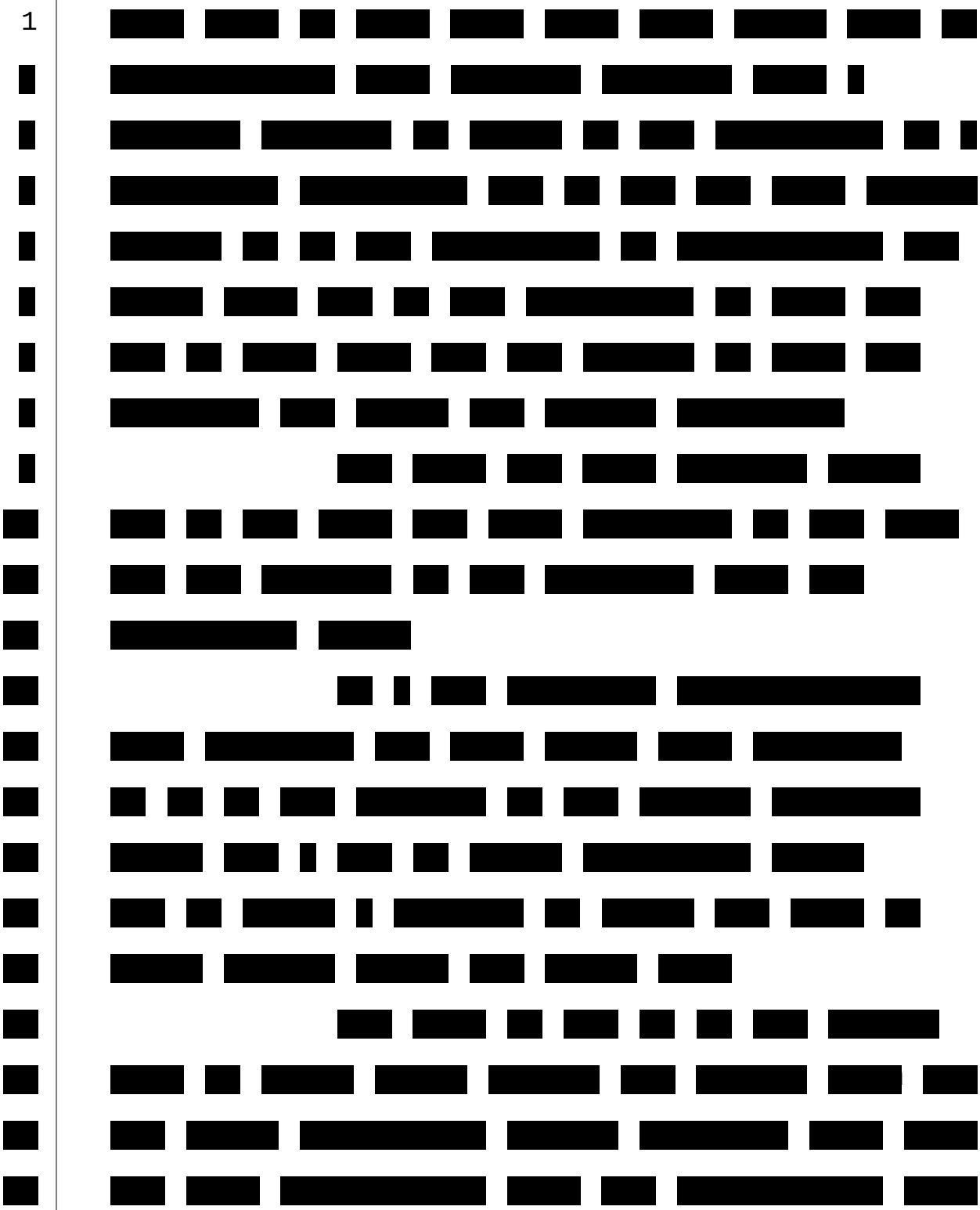
MR. HEFLIN: That's fine with me.

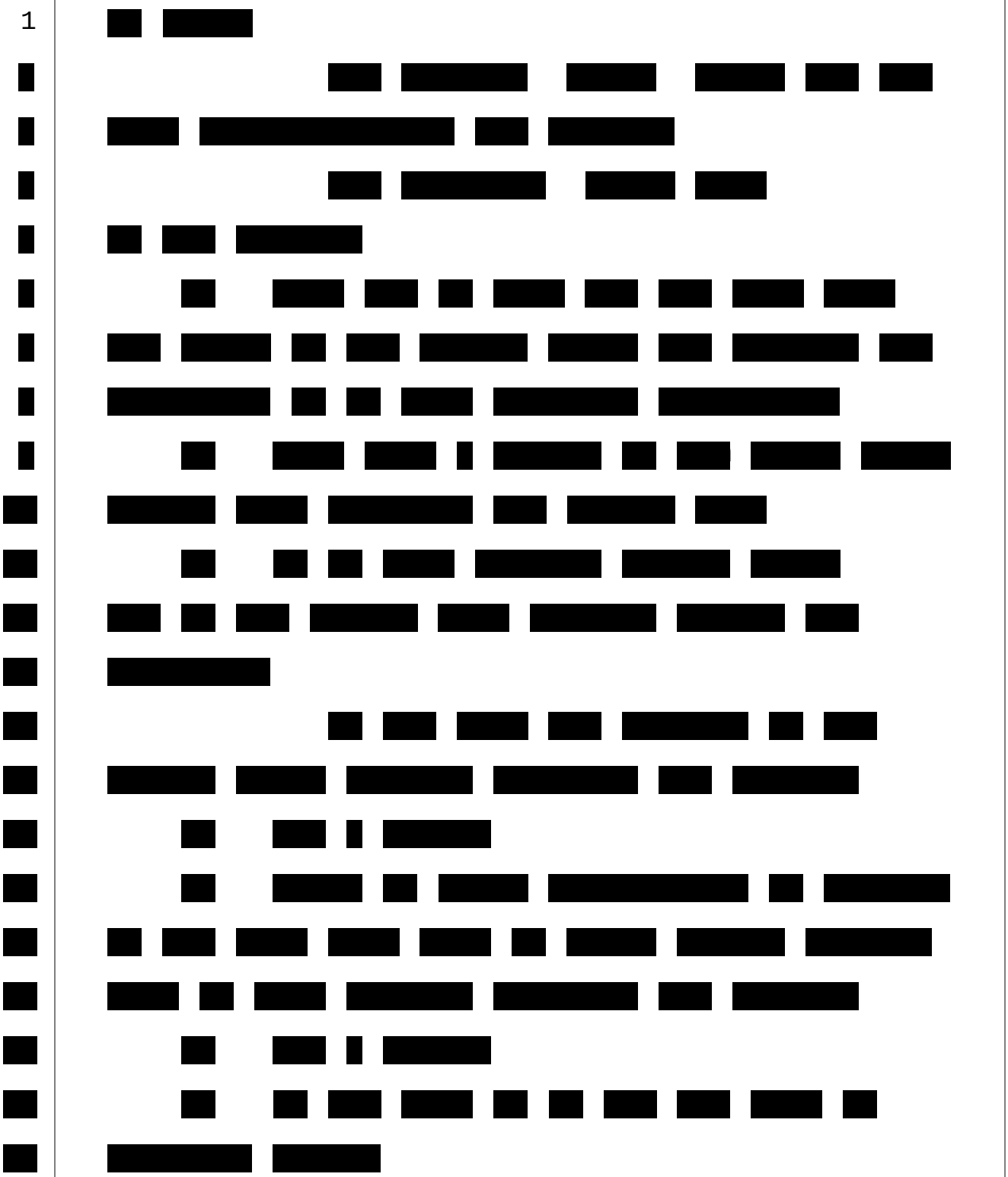
THE VIDEOGRAPHER: We're going off the record. The time is 10:18 a.m.

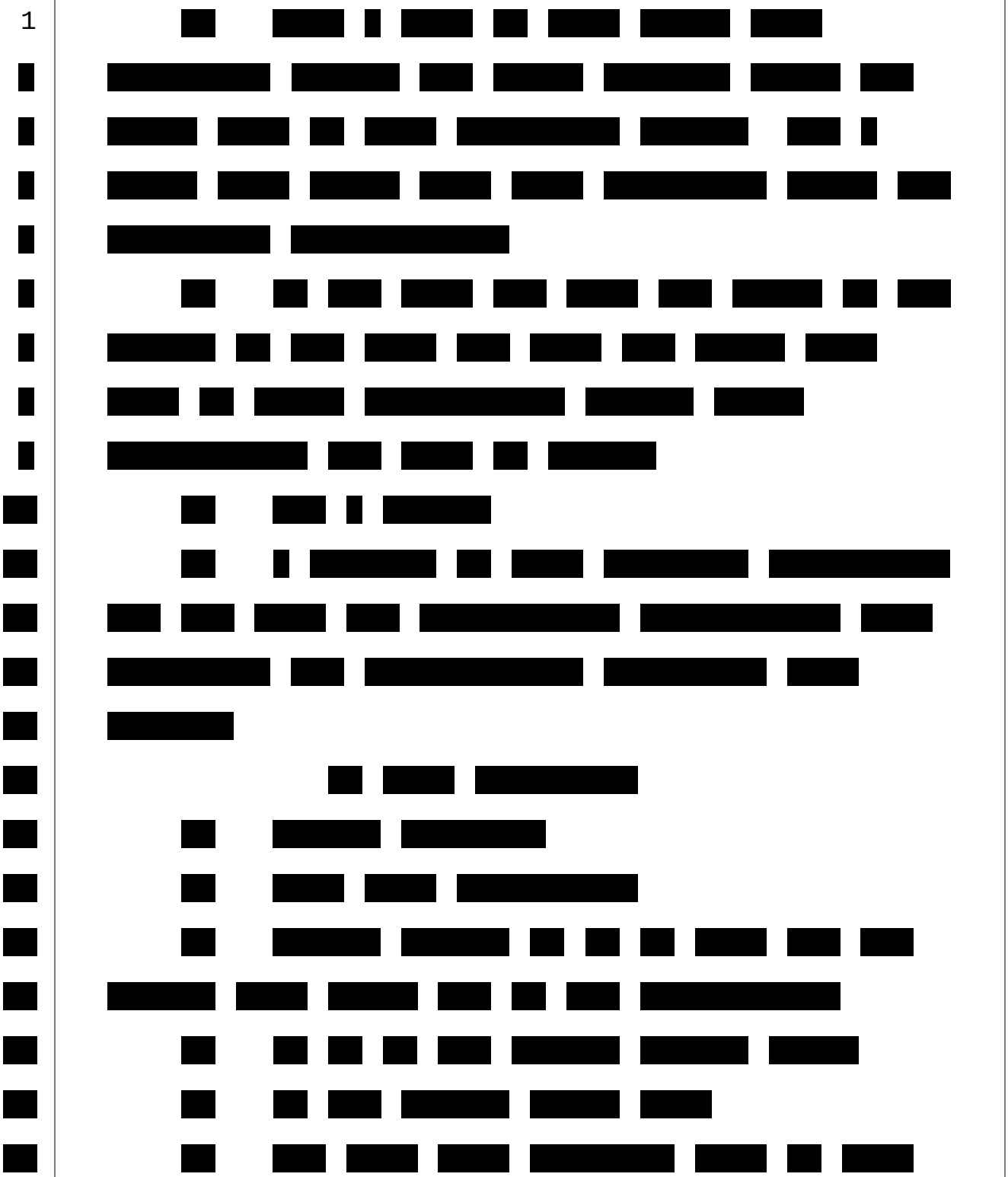
(Whereupon, a recess was taken at the above time.)

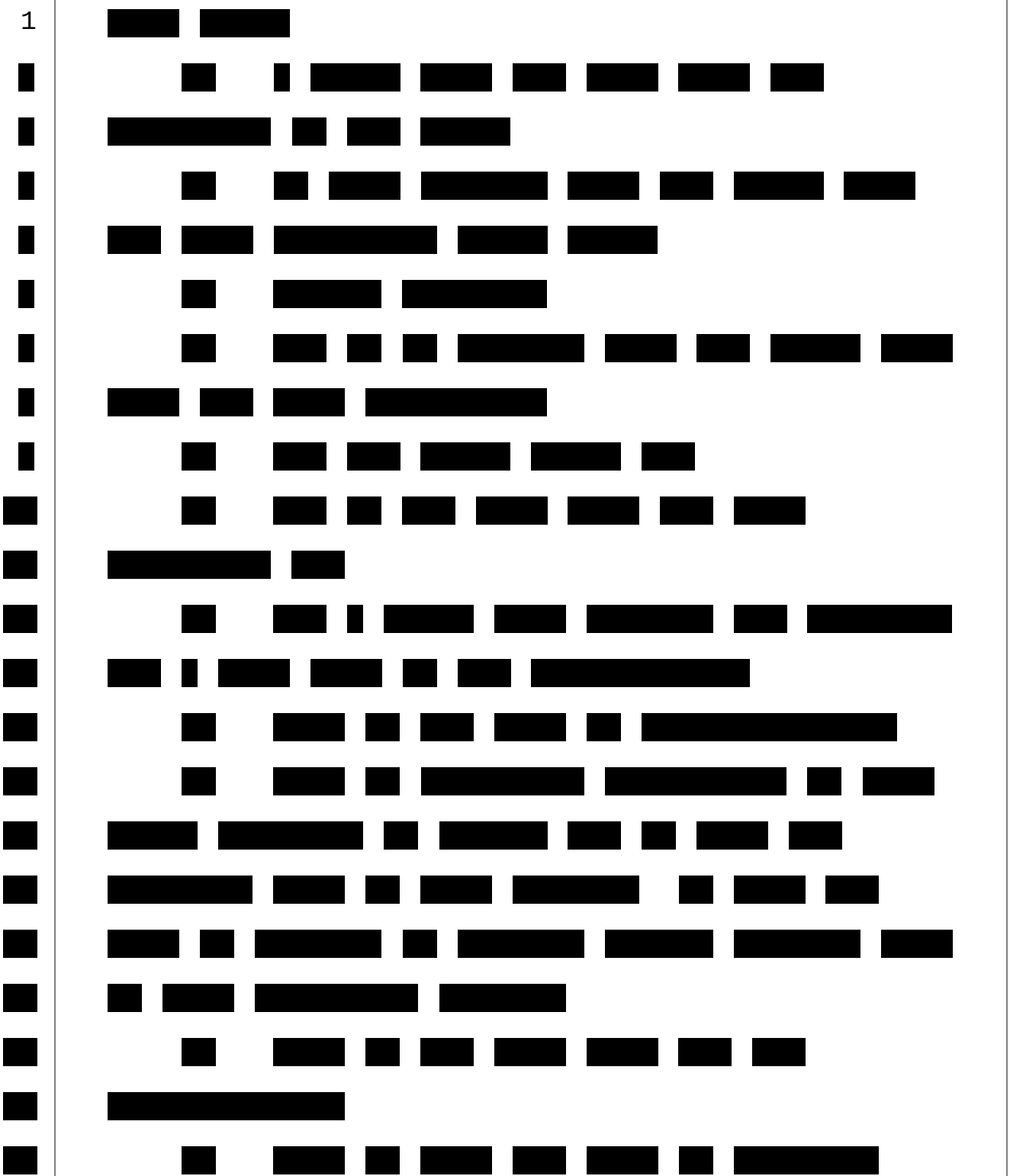
THE VIDEOGRAPHER: We are back on the record. The time is 10:30 a.m. Thank you.

[redacted]









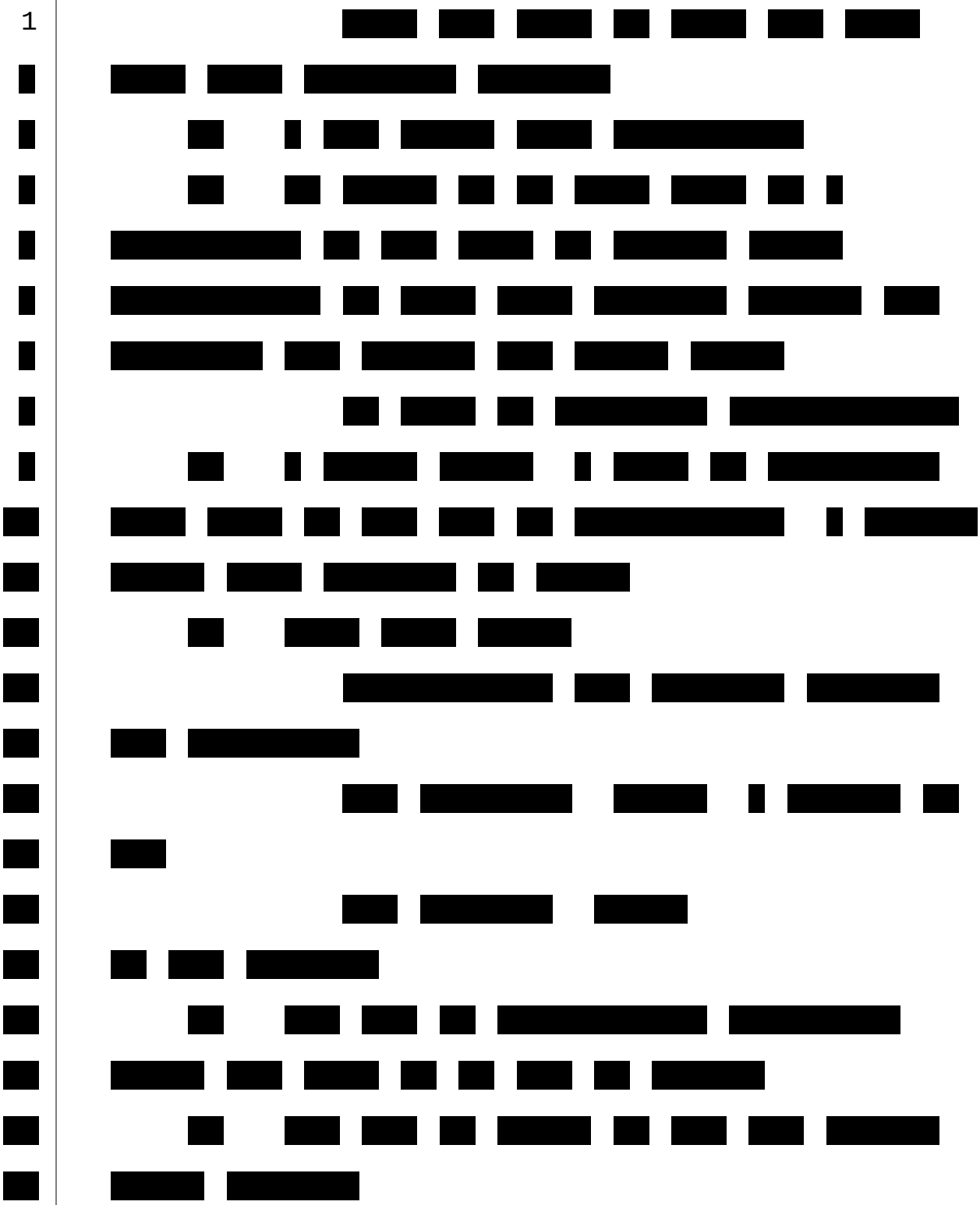
Q. I'd like to go to another document. This is one that you should have in Envelope G.

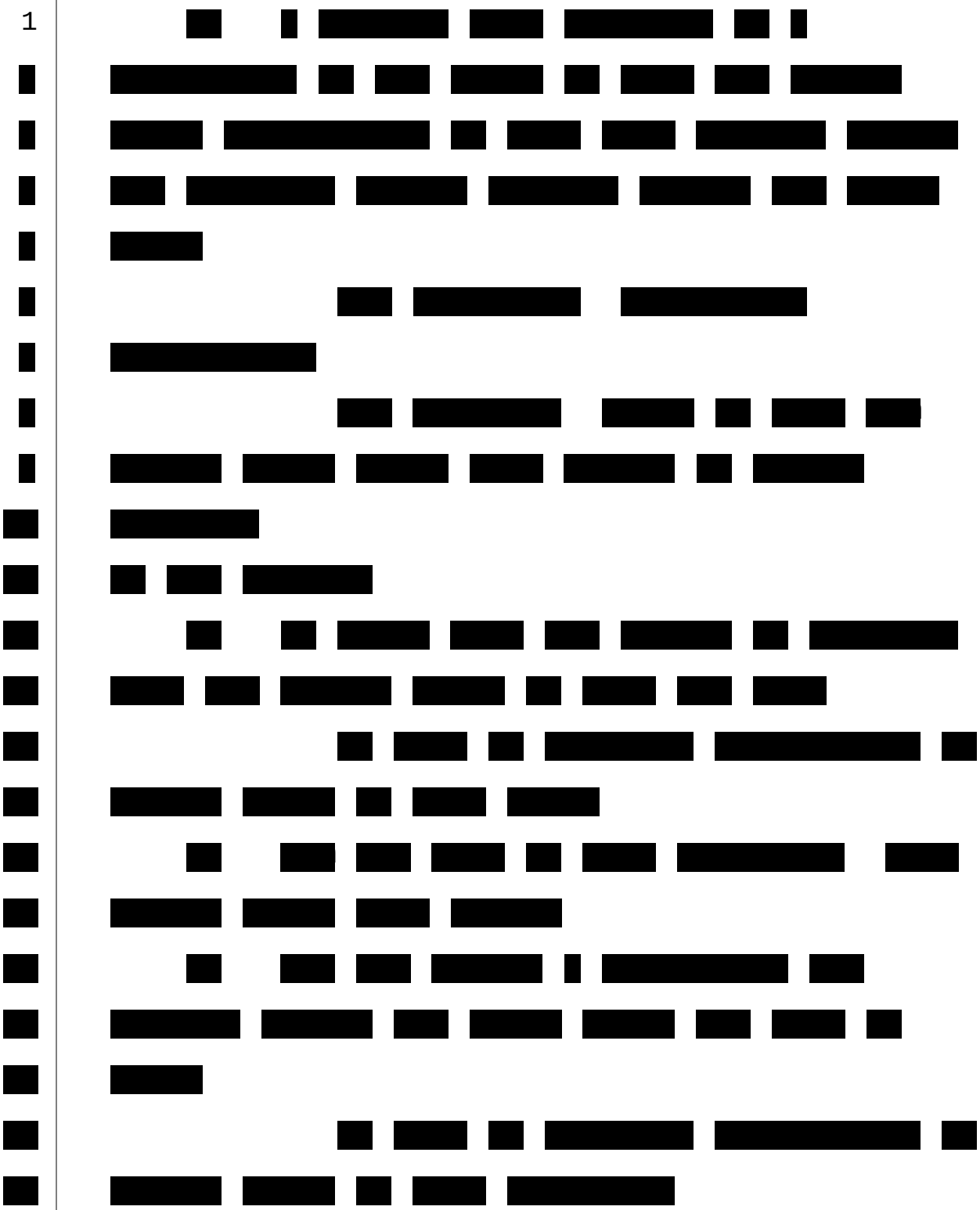
MR. HEFLIN: And, Julia, can you put that up on Exhibit Share, please.

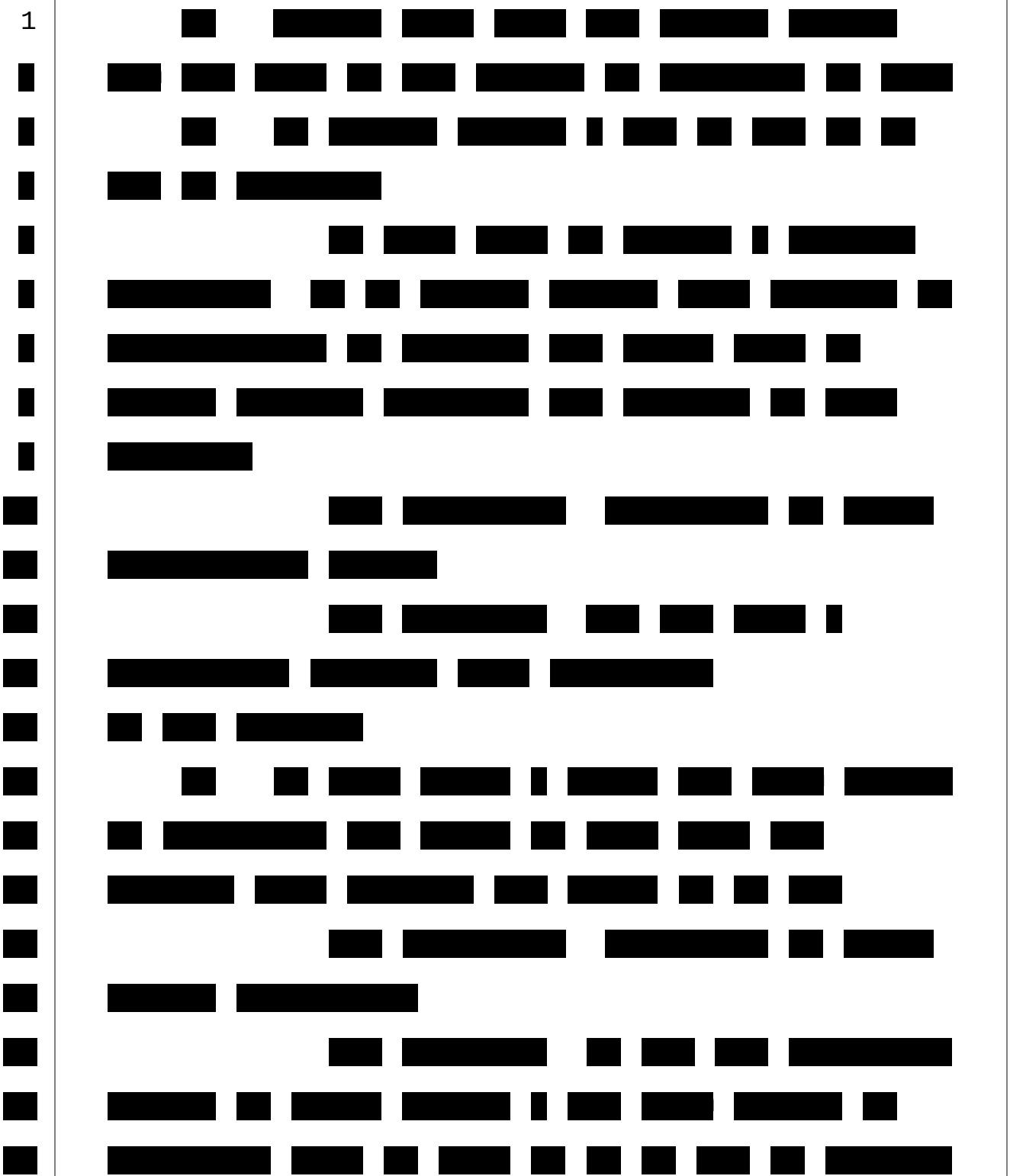
(Whereupon, a document was marked, for identification purposes, as Exhibit 0003.)

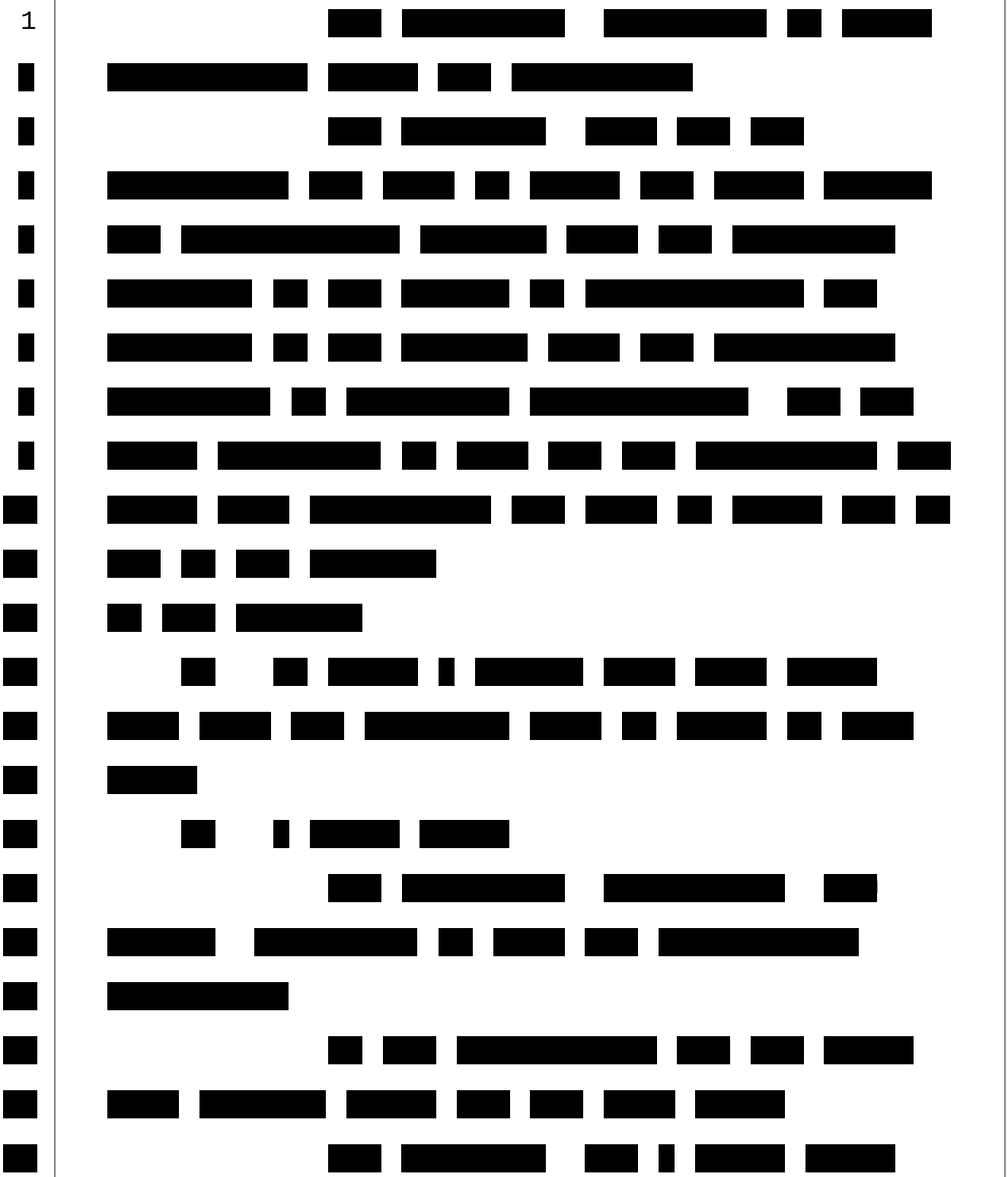
MR. HEFLIN: Let me know when you have the document.

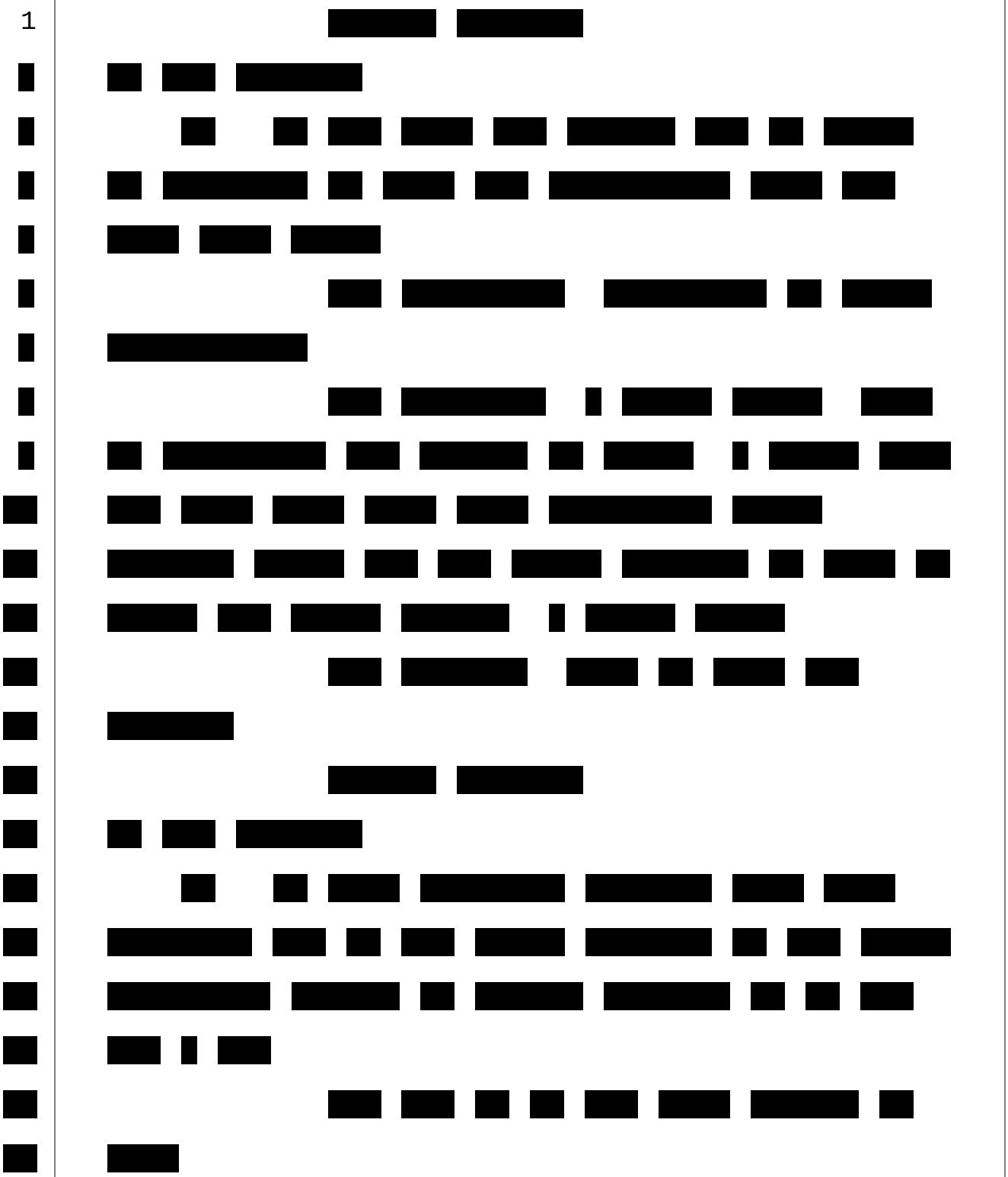
[redacted]











[redacted]

Q. Okay.

I'd like to look at another document. And this is one that we did not

receive until late Wednesday night, so you don't have a physical copy of this, but we're going to put it in Exhibit Share.

MR. HEFLIN: Julia, can you put up Bates ending 3021, please.

MR. KAVANAGH: I'm not getting the -- what do I have to do to cue up the exhibits?

THE WITNESS: You need to -- the ones that were marked again, I can show you.

MR. KAVANAGH: You're an expert on it.

THE WITNESS: I need to rotate.

MR. KAVANAGH: So do I have 3? There should be a fourth exhibit coming up?

THE WITNESS: No, I think that's the last one.

MR. HEFLIN: There should be a fourth one coming up.

THE WITNESS: Okay. I'm on the wrong one then. Okay.

MR. KAVANAGH: Got it.

(Whereupon, a document was marked, for identification purposes, as Exhibit 0004.)

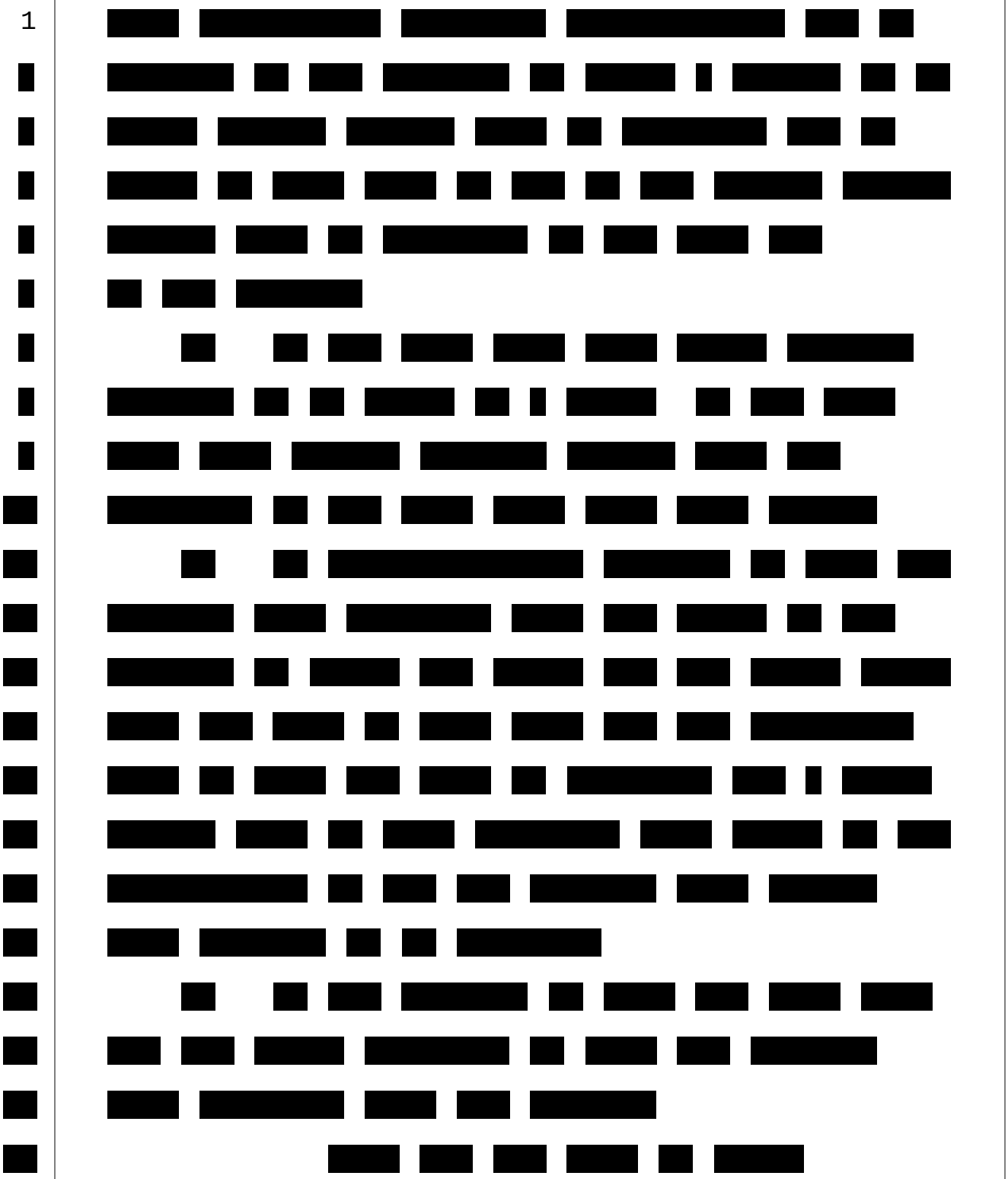
BY MR. HEFLIN:

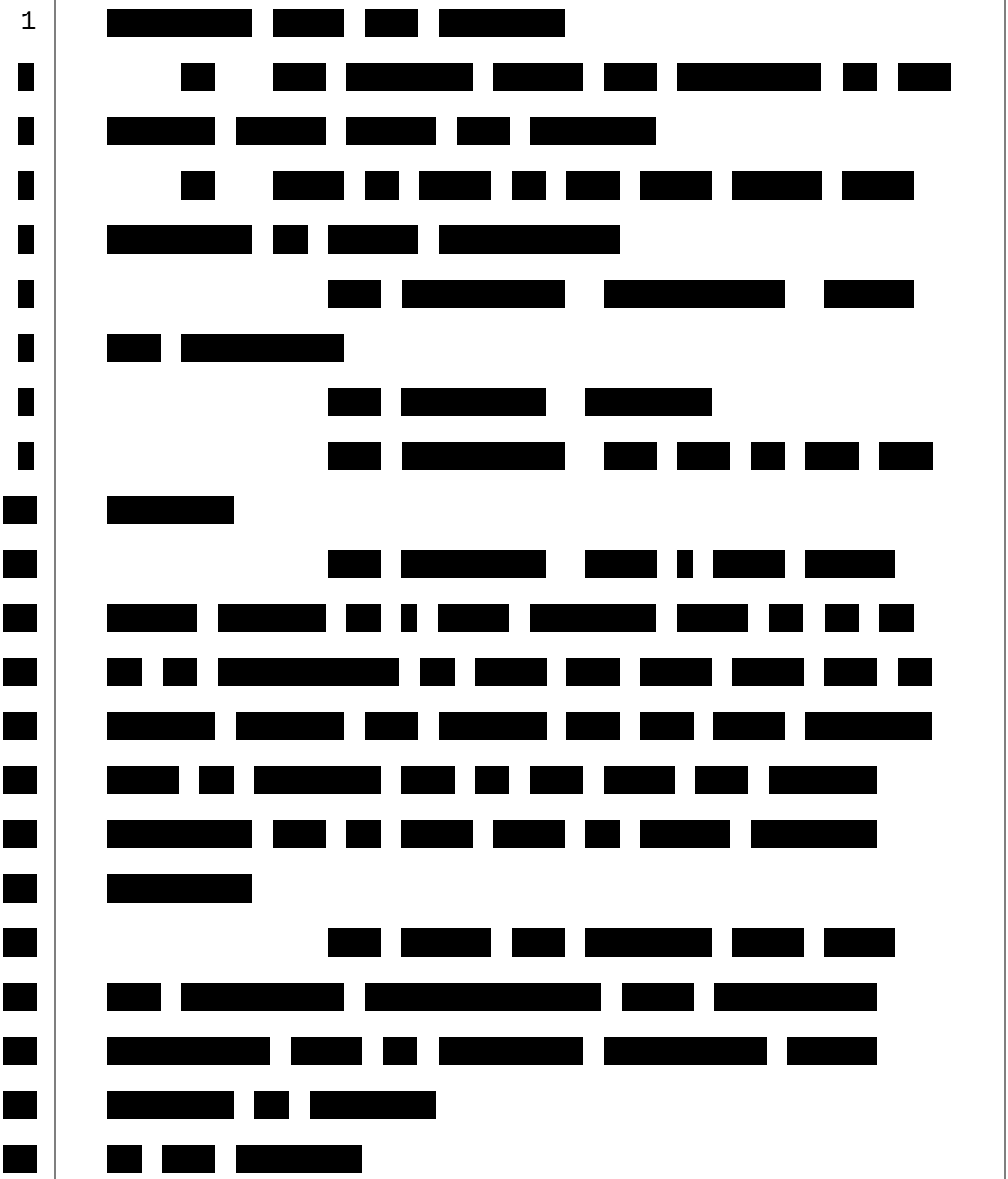
Q. Let me -- do you have the document?

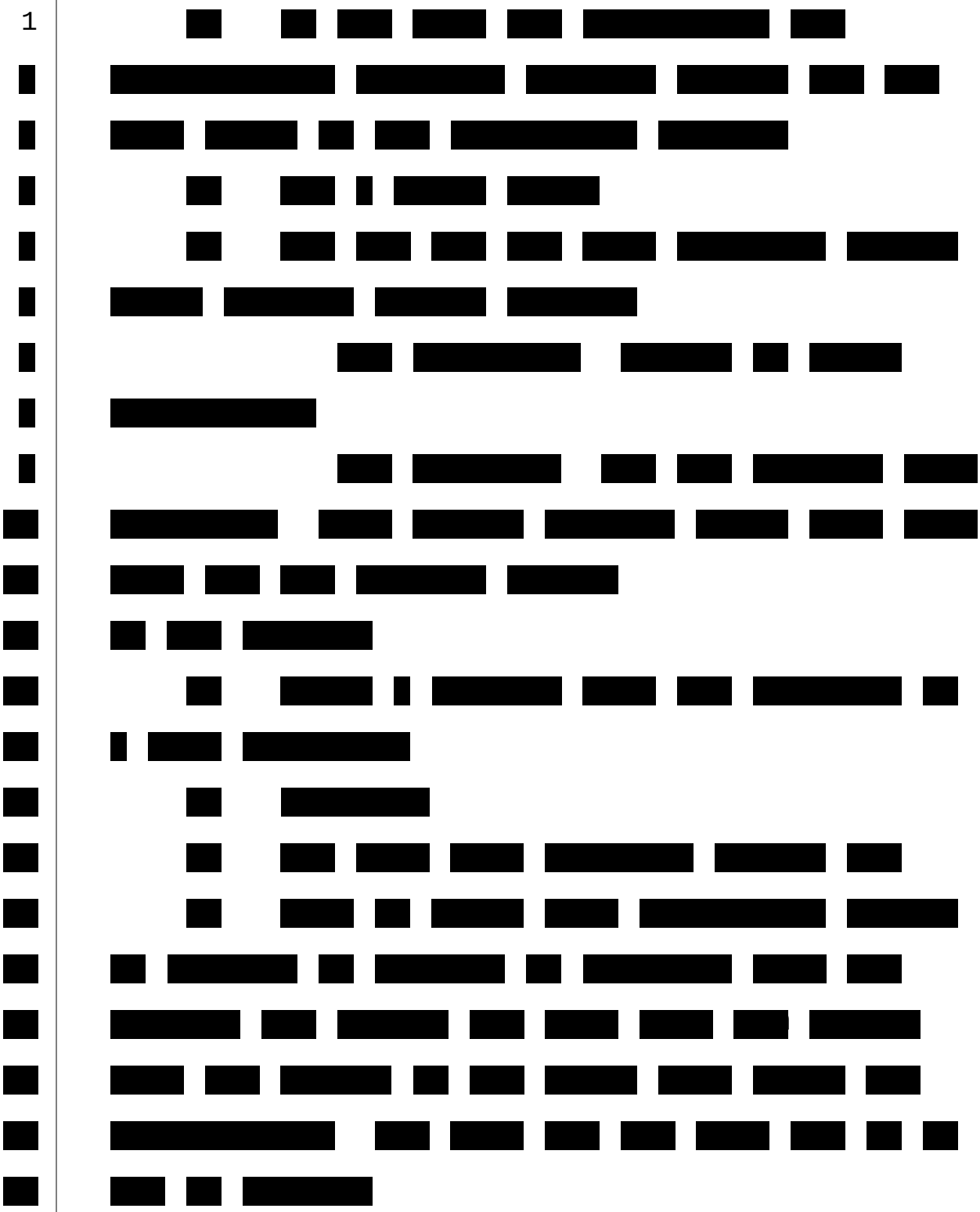
A. It's not coming in yet.

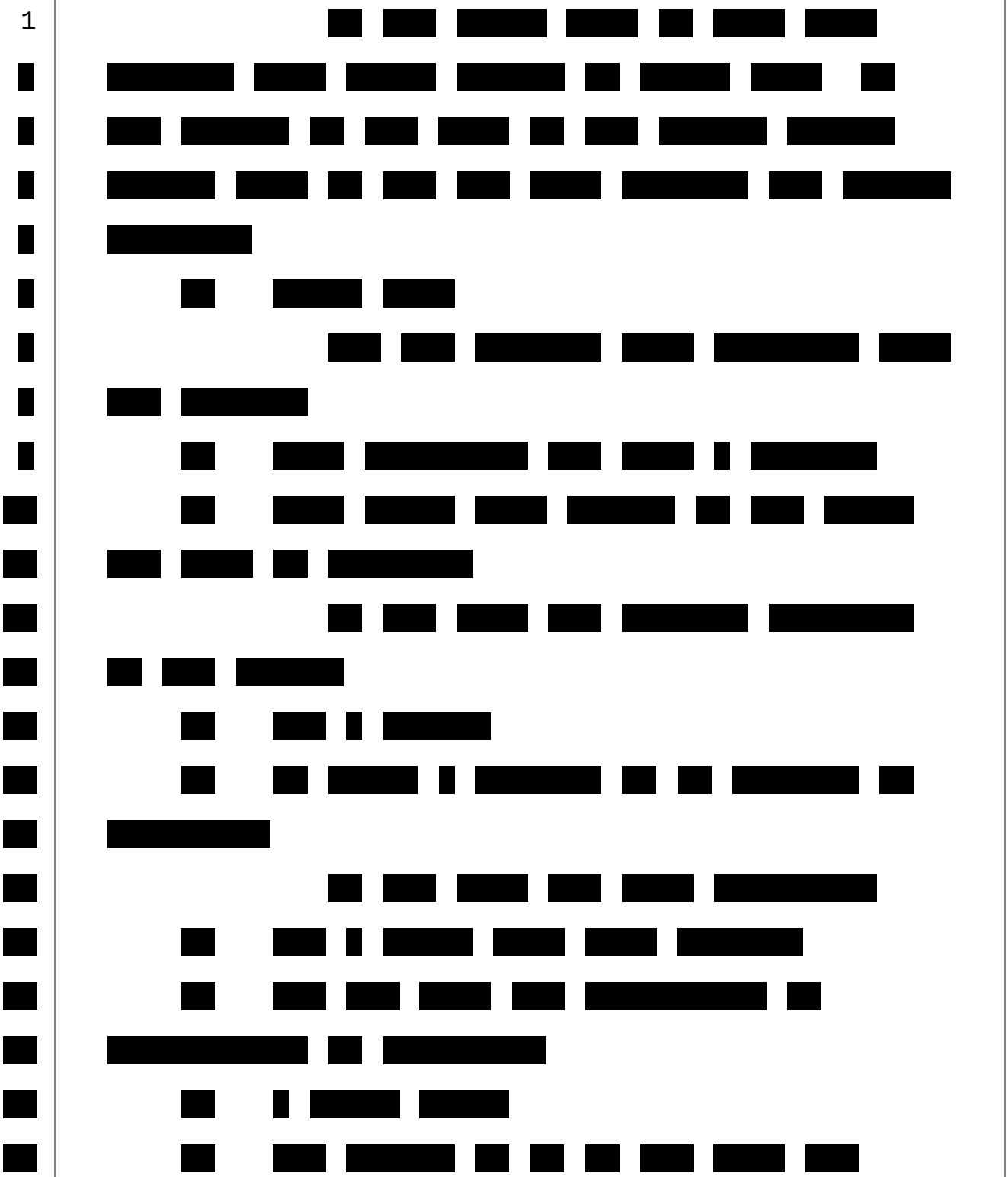
I have it now.

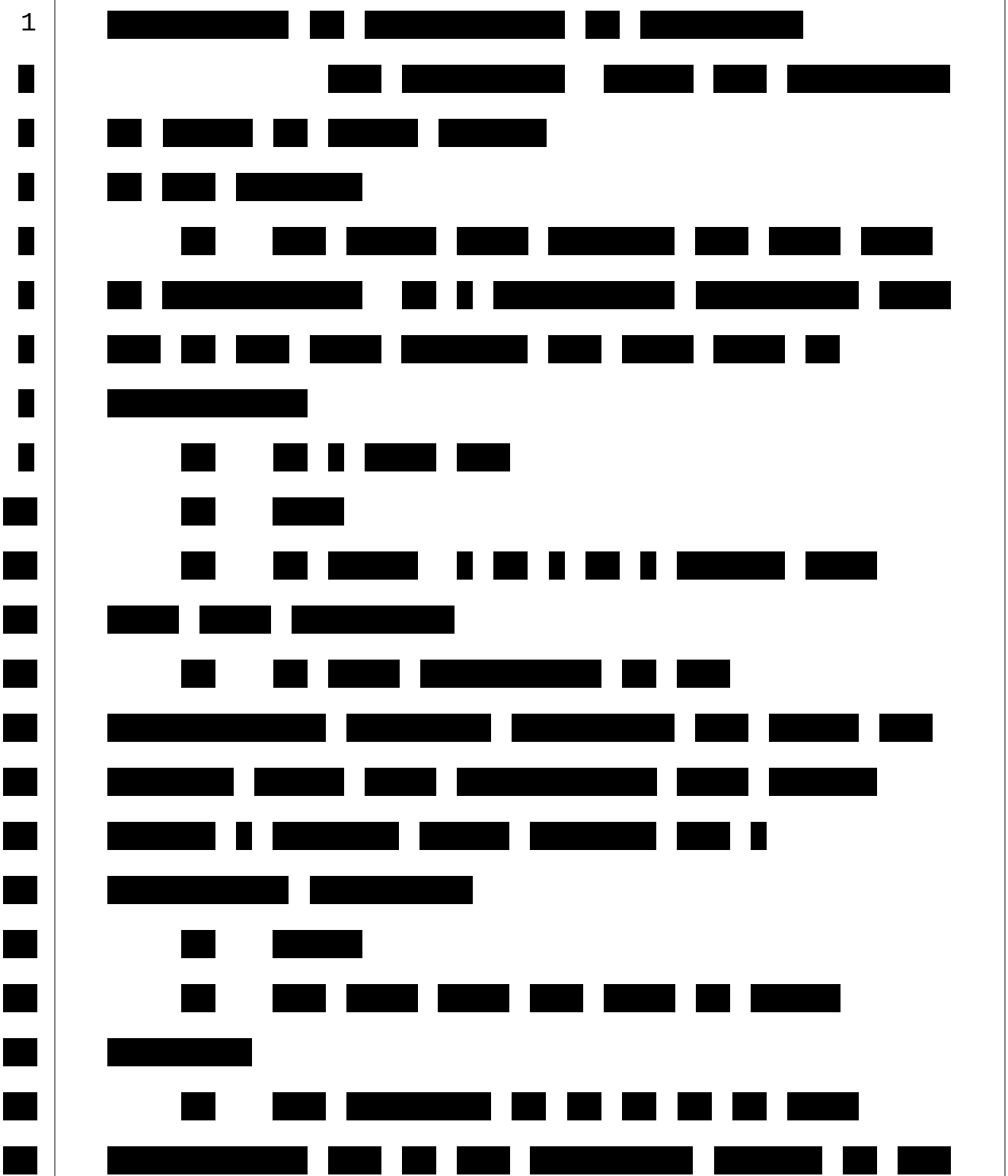
[redacted]

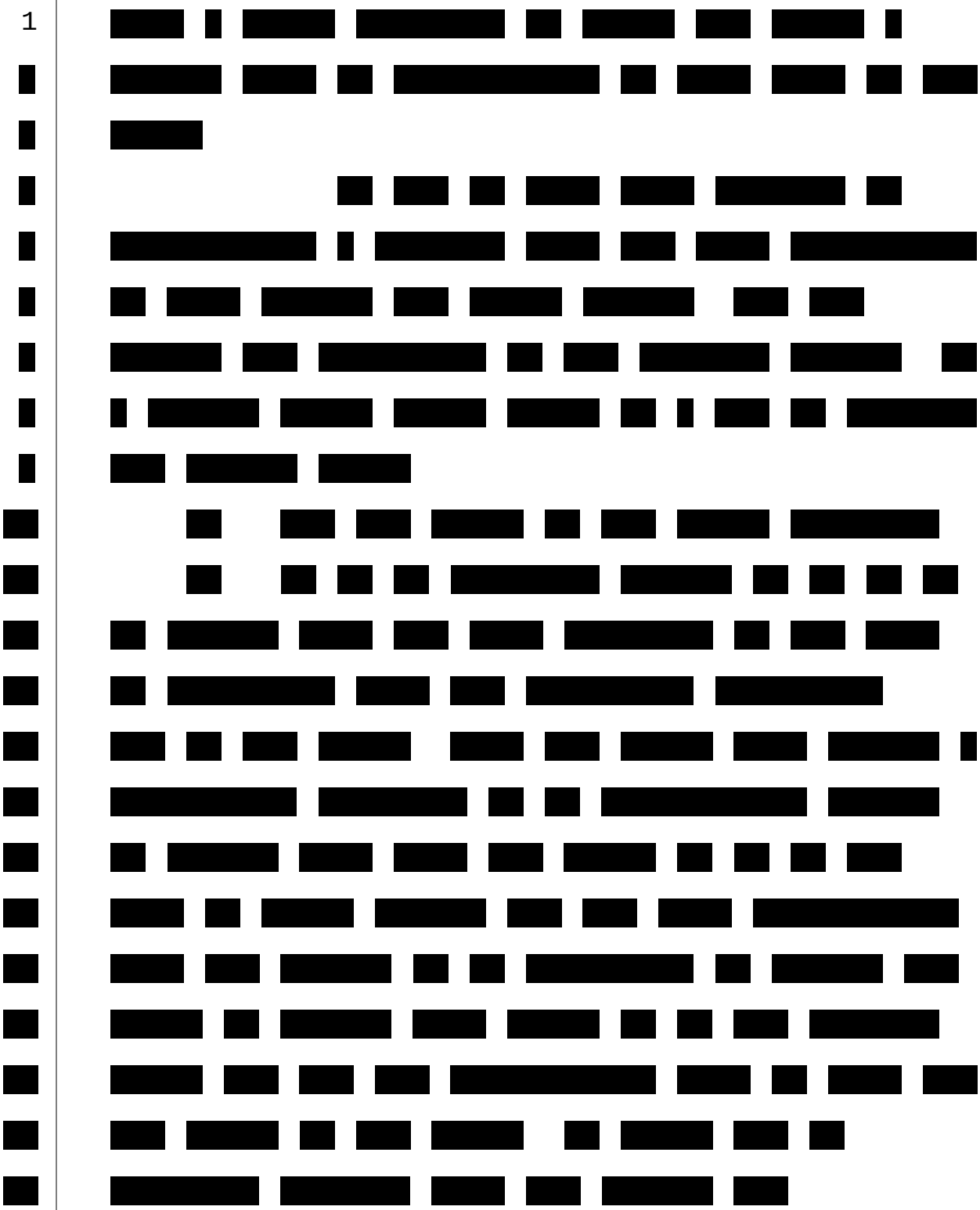


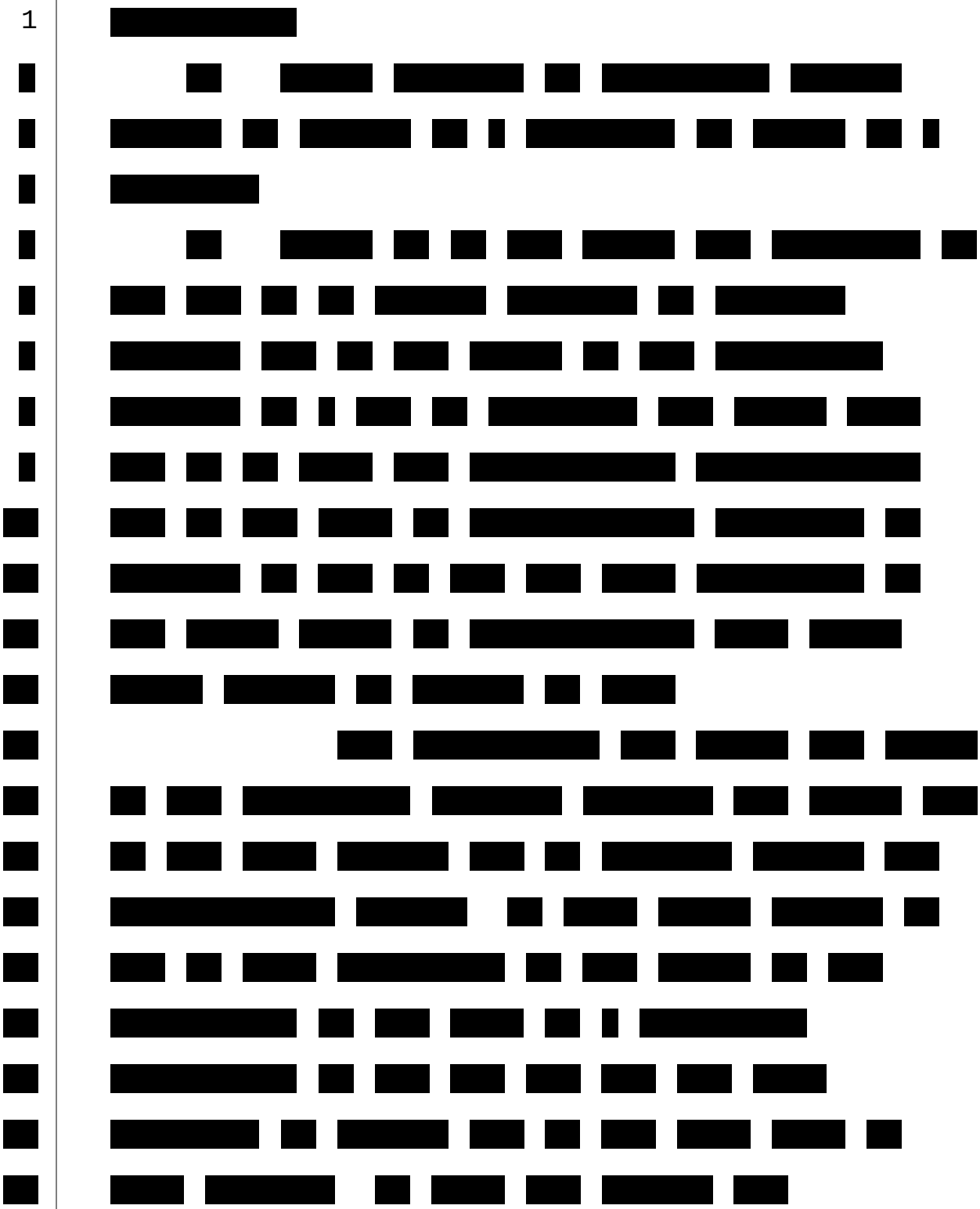


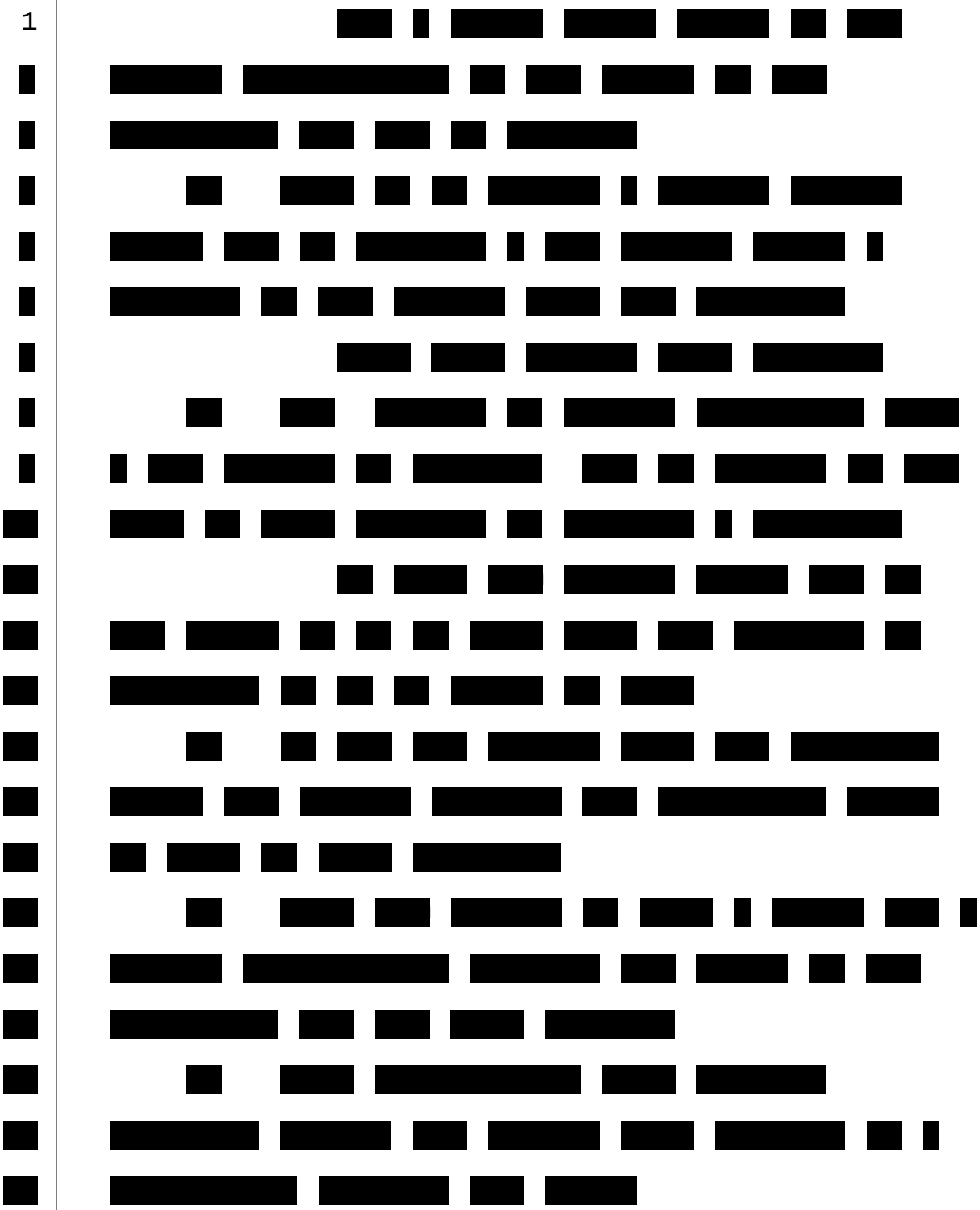


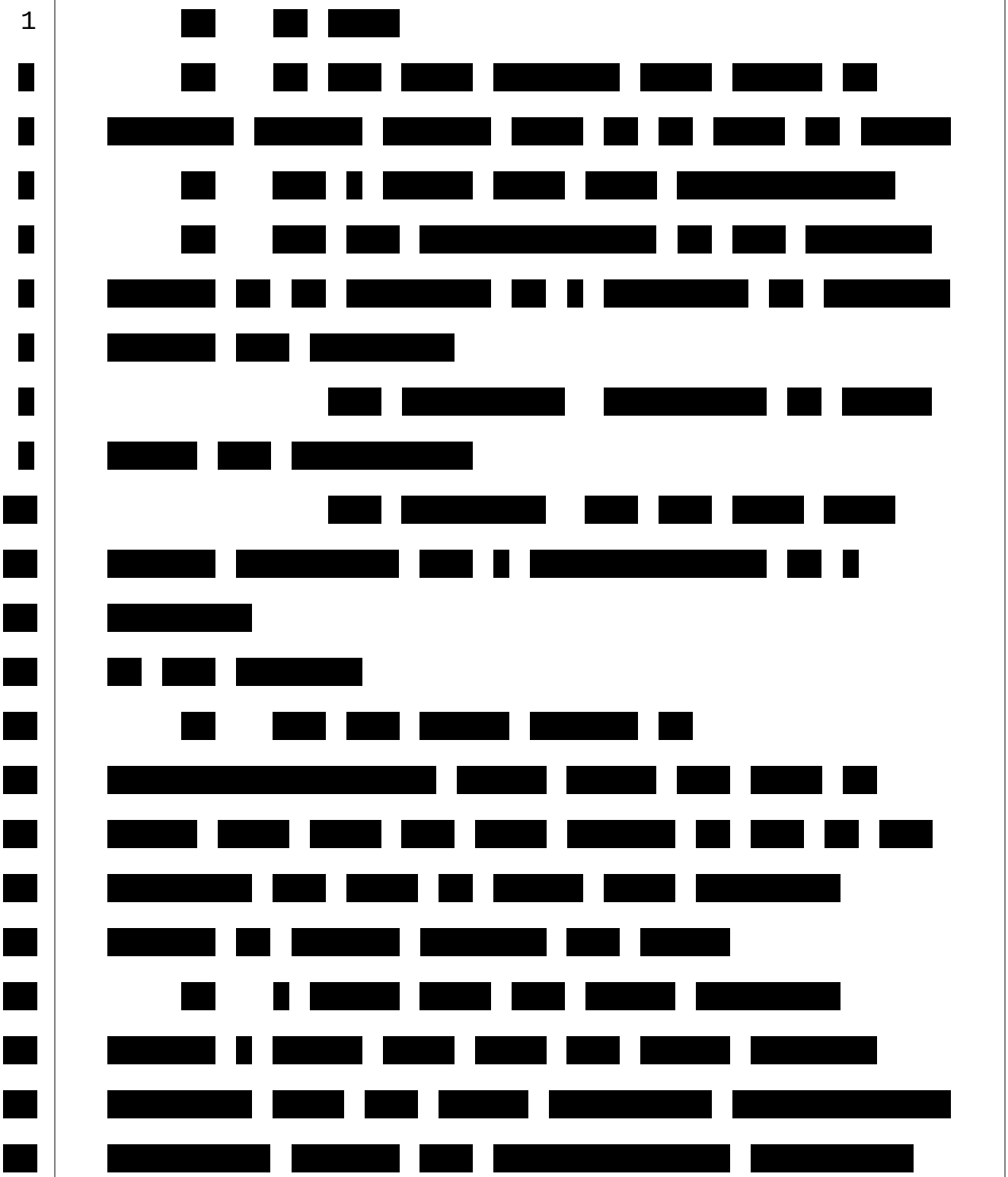


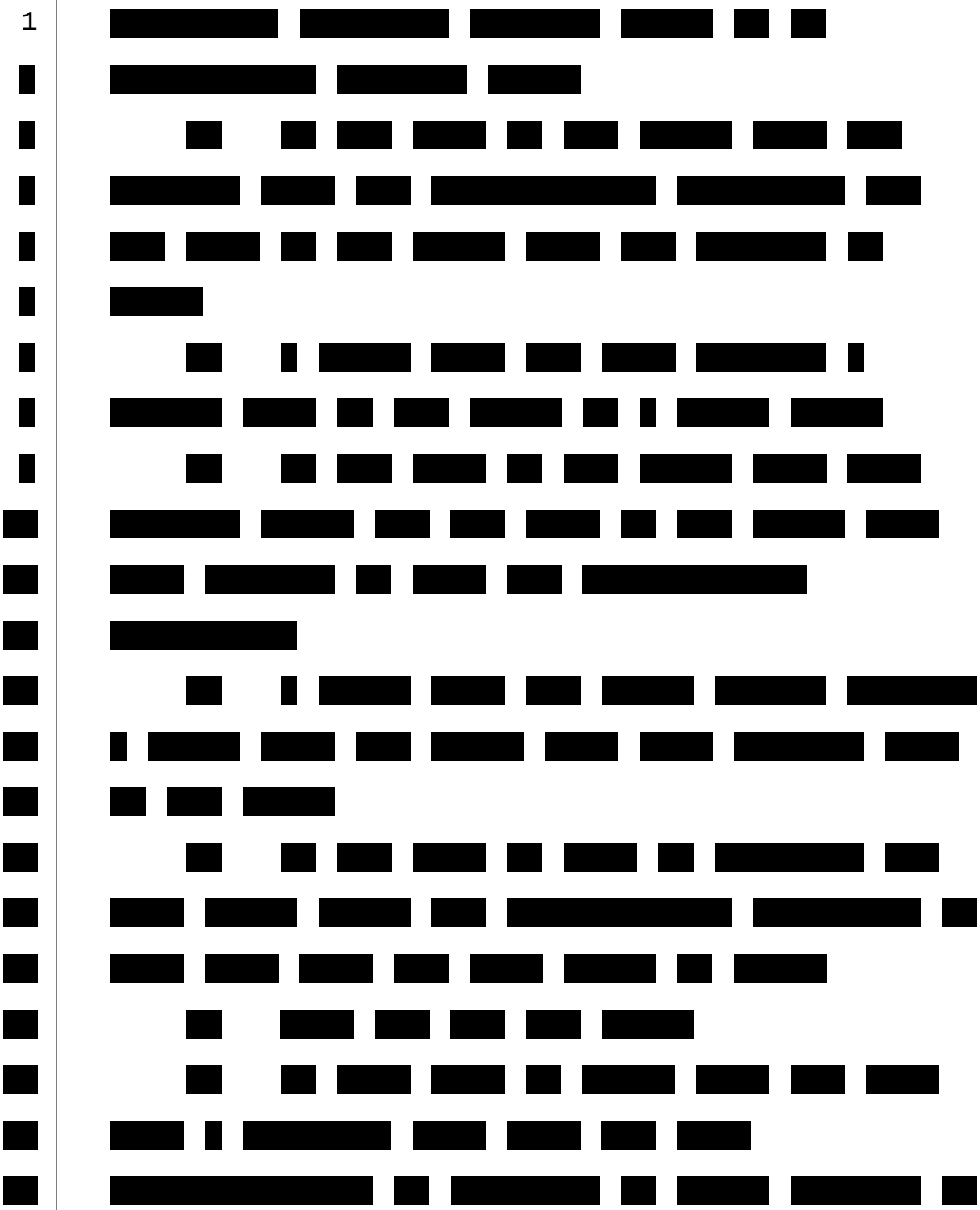


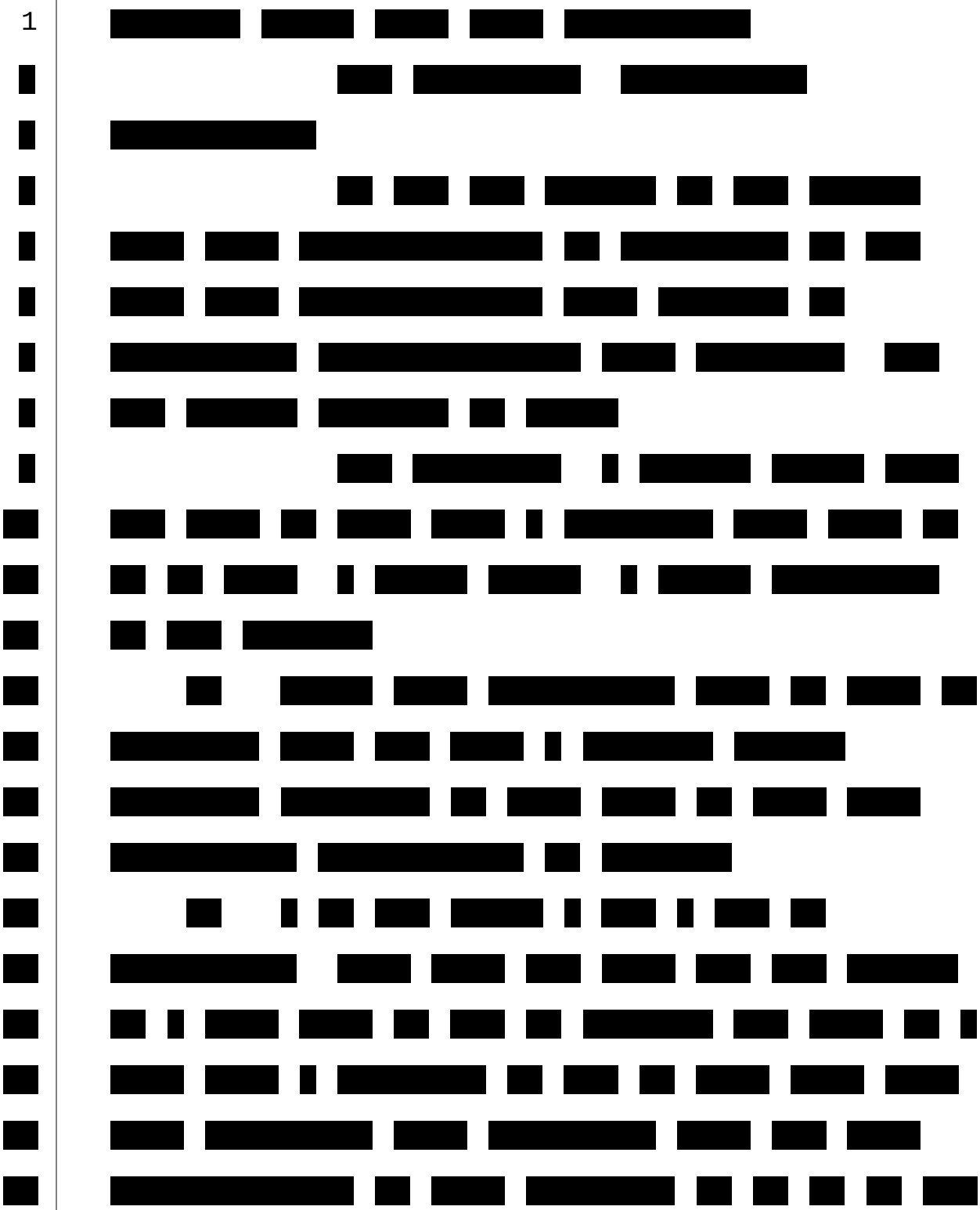


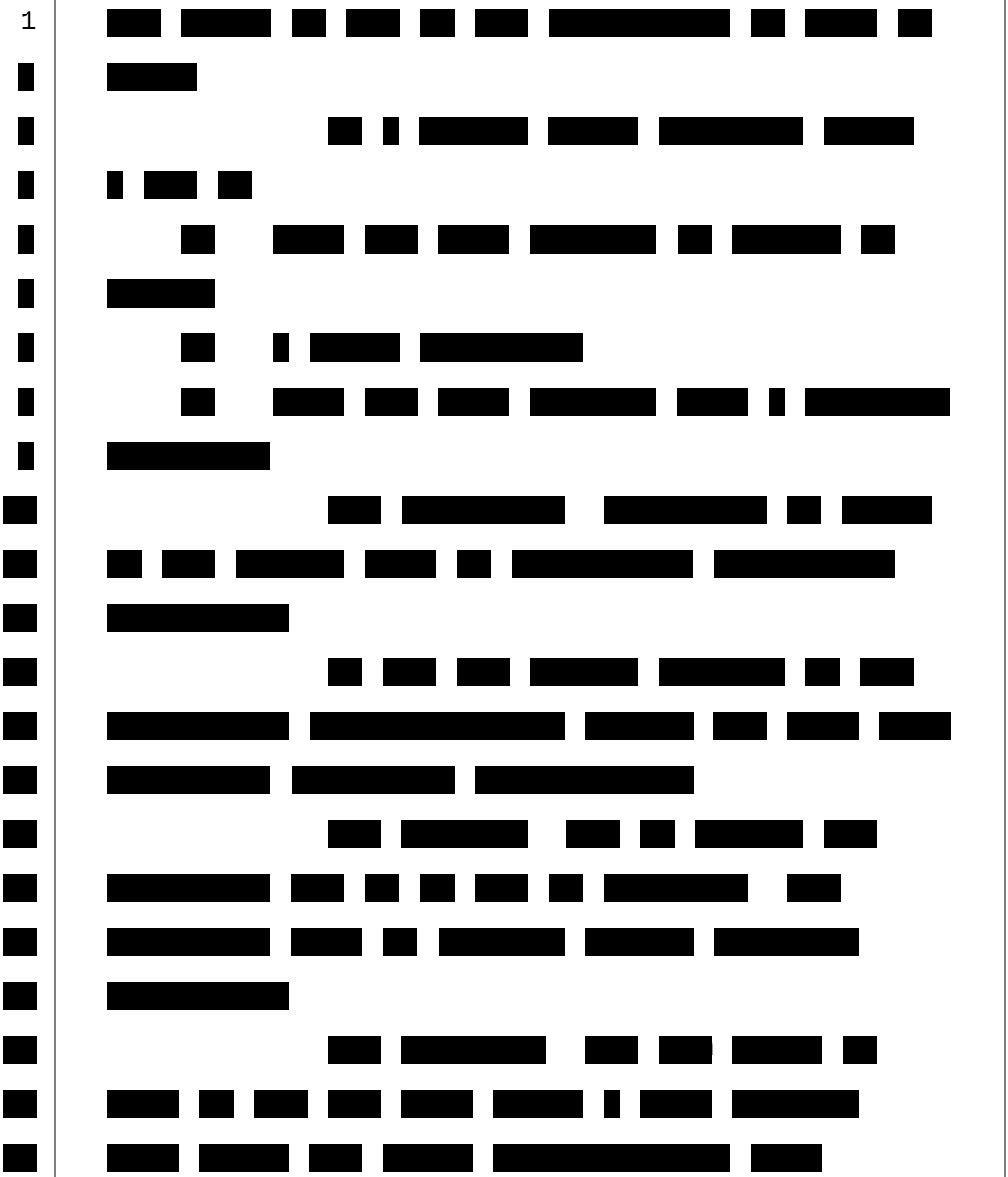












[redacted]

BY MR. HEFLIN:

Q. Let's go back to your Verified Statement just for a second. Do you still have that in front of you?

A. Yes, I do.

[redacted]

[redacted]

A. Someone -- yes, someone bringing lunch has opened the door and that's -- John is telling them where to go.

(Brief pause.)

MR. HEFLIN: I don't know where we are on the video. We can take a lunch break when evaluating --

THE WITNESS: John is coming back.

MR. HEFLIN: -- or we can power on.

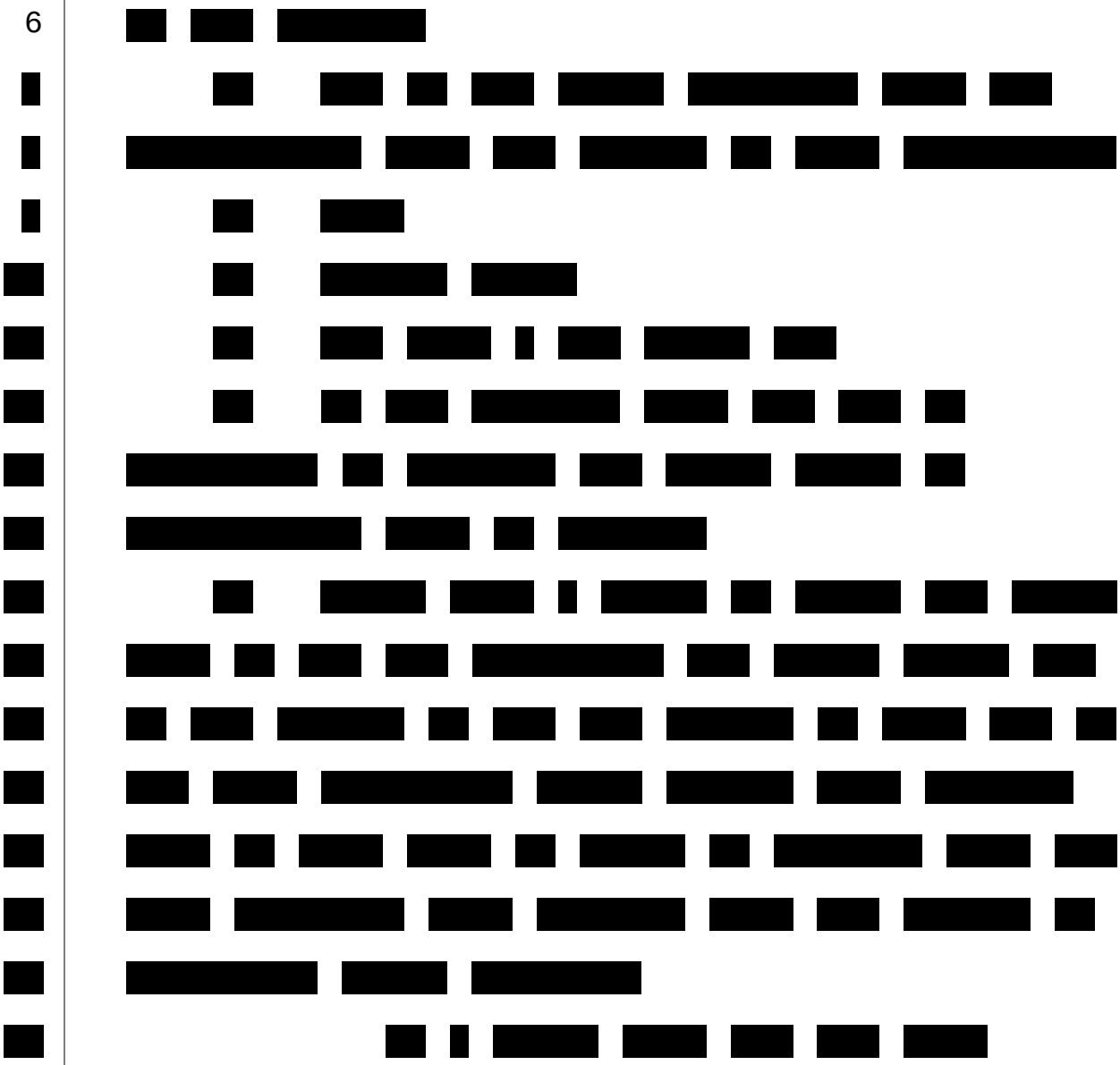
MR. KAVANAGH: Sorry about that. Somebody marched in.

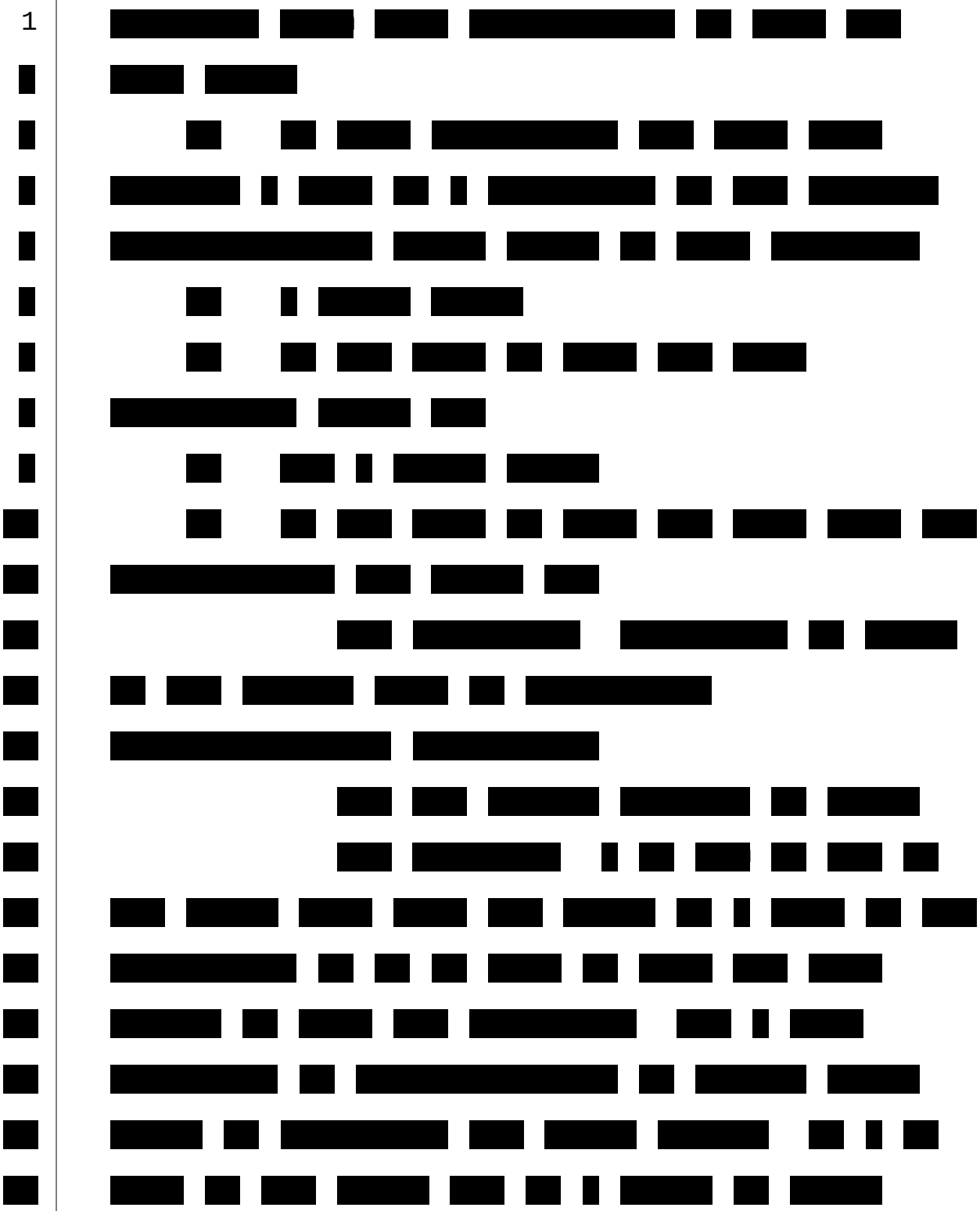
MR. HEFLIN: No worries. Shall we continue or do you want to take lunch now?

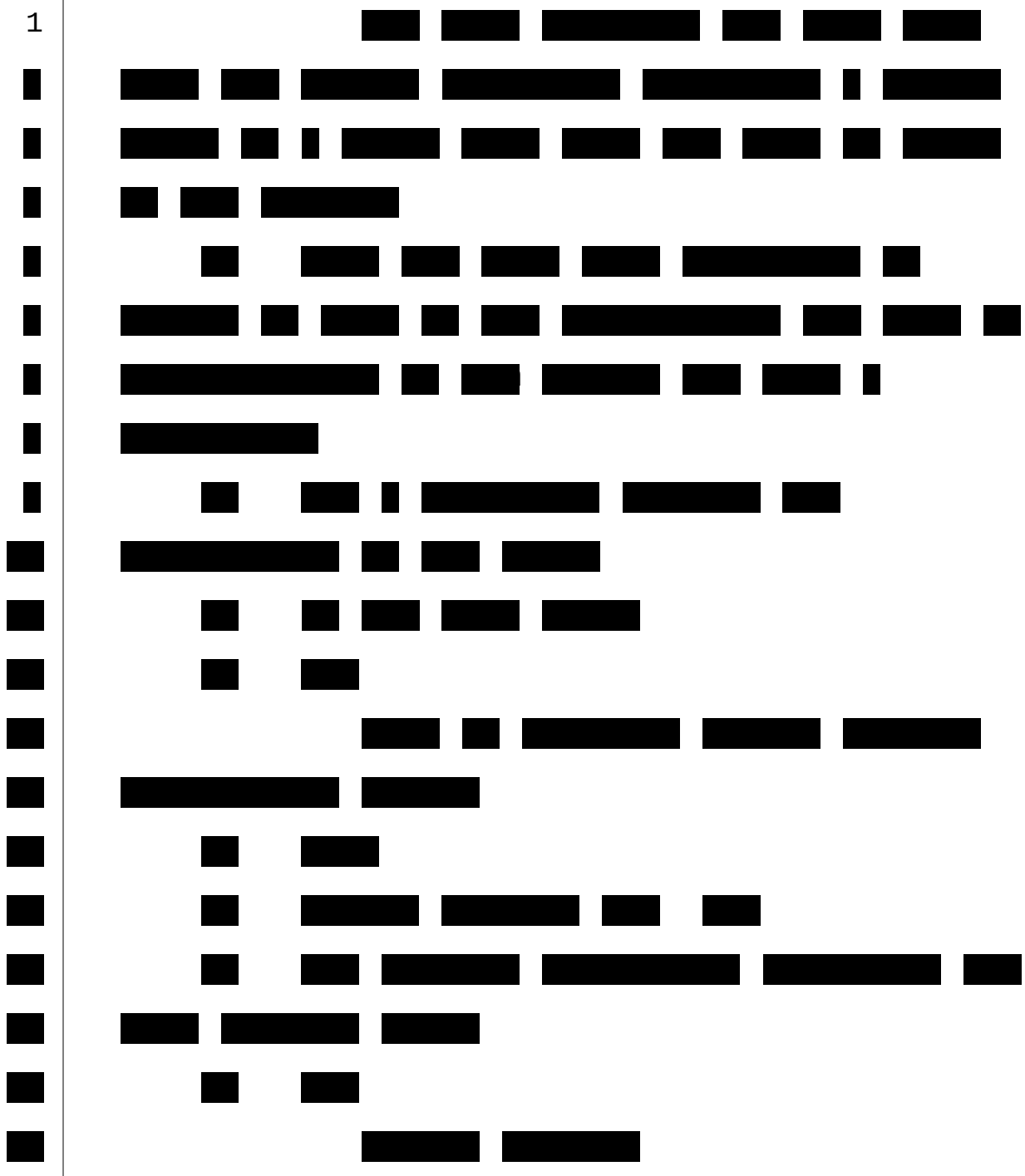
MR. KAVANAGH: Well, that was

lunch, so we can go for another 15 minutes if you'd like.

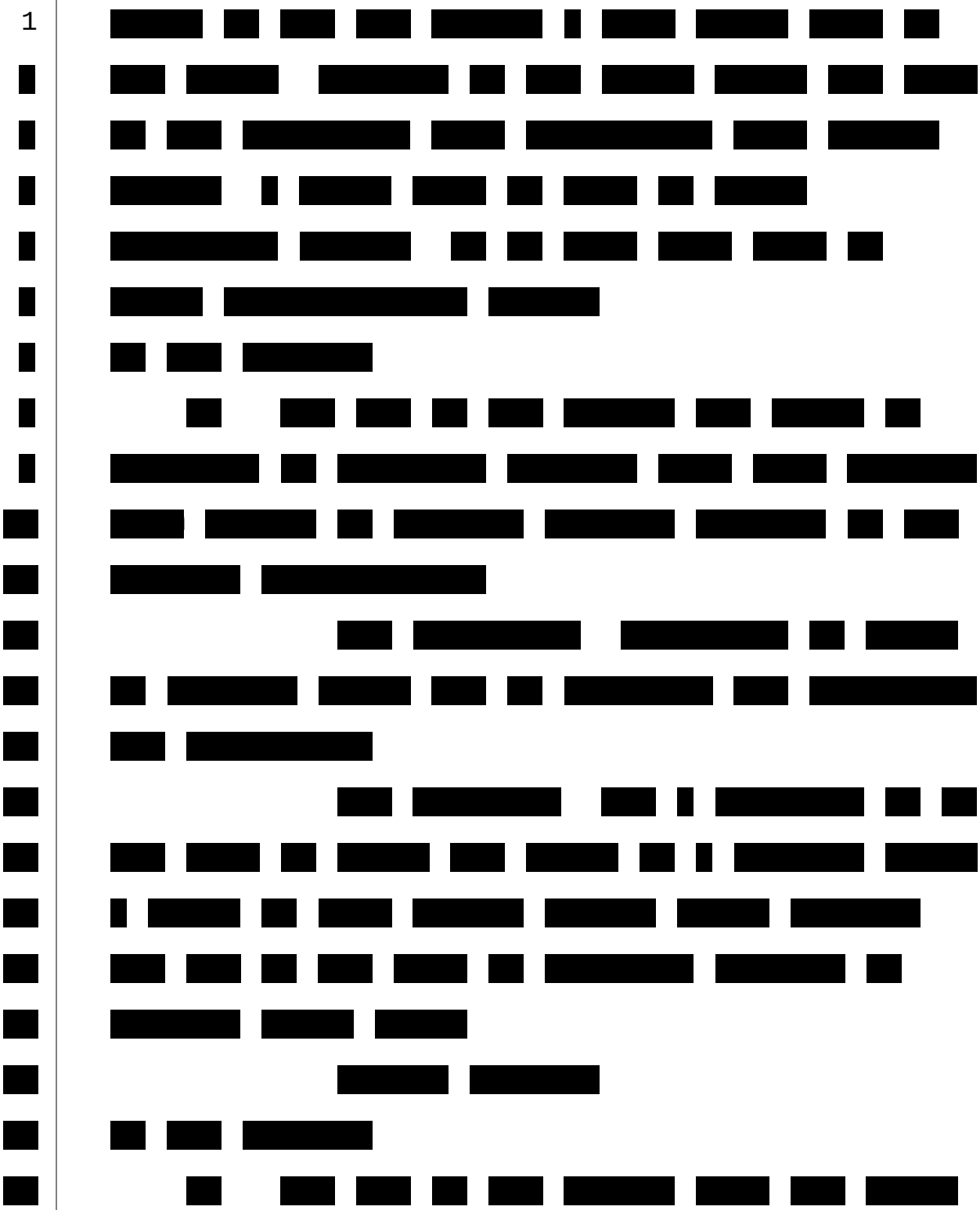
MR. HEFLIN: Sure, yeah. Let's talk for another 15 minutes and then we'll -- I believe we have burritos downstairs.

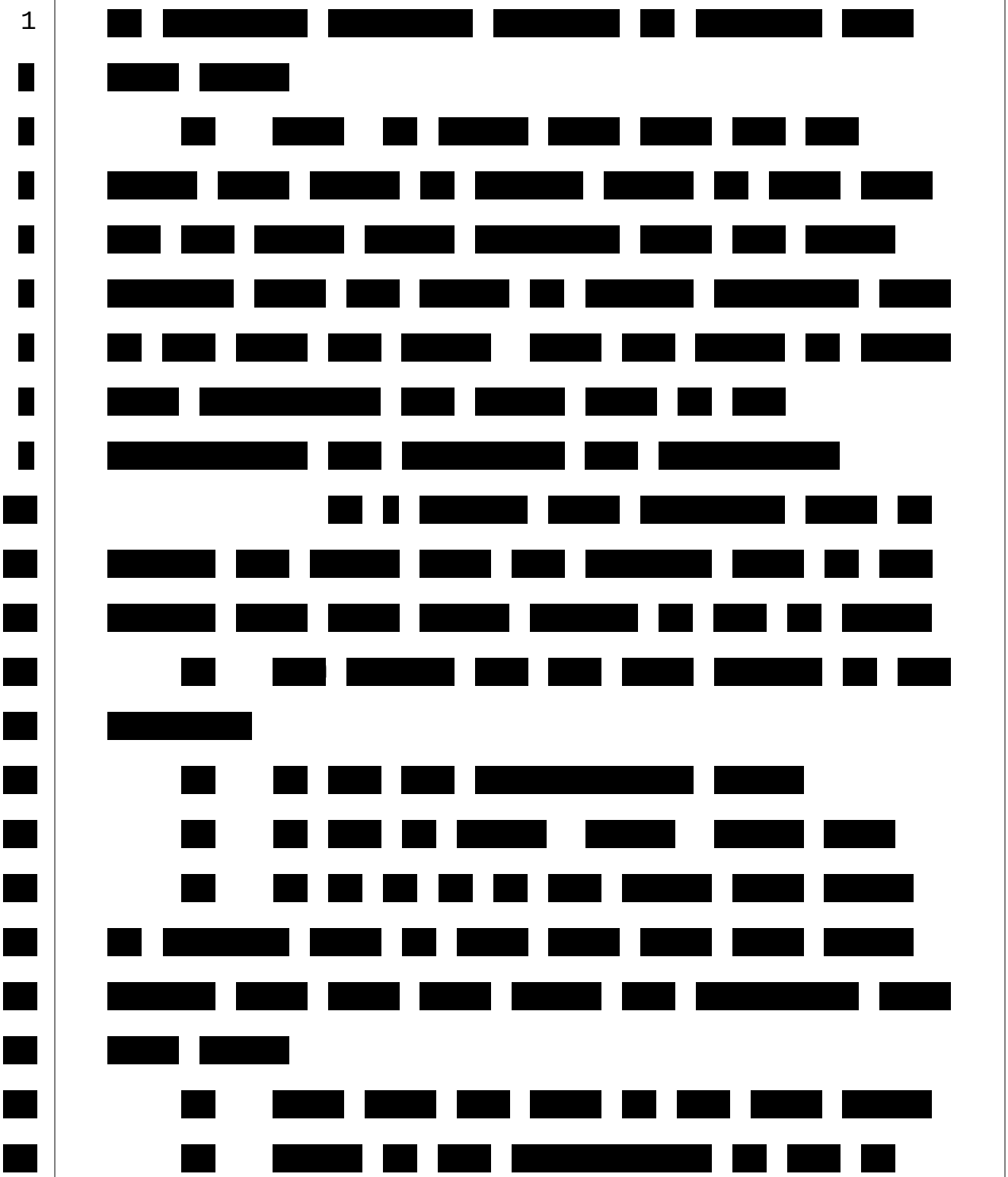


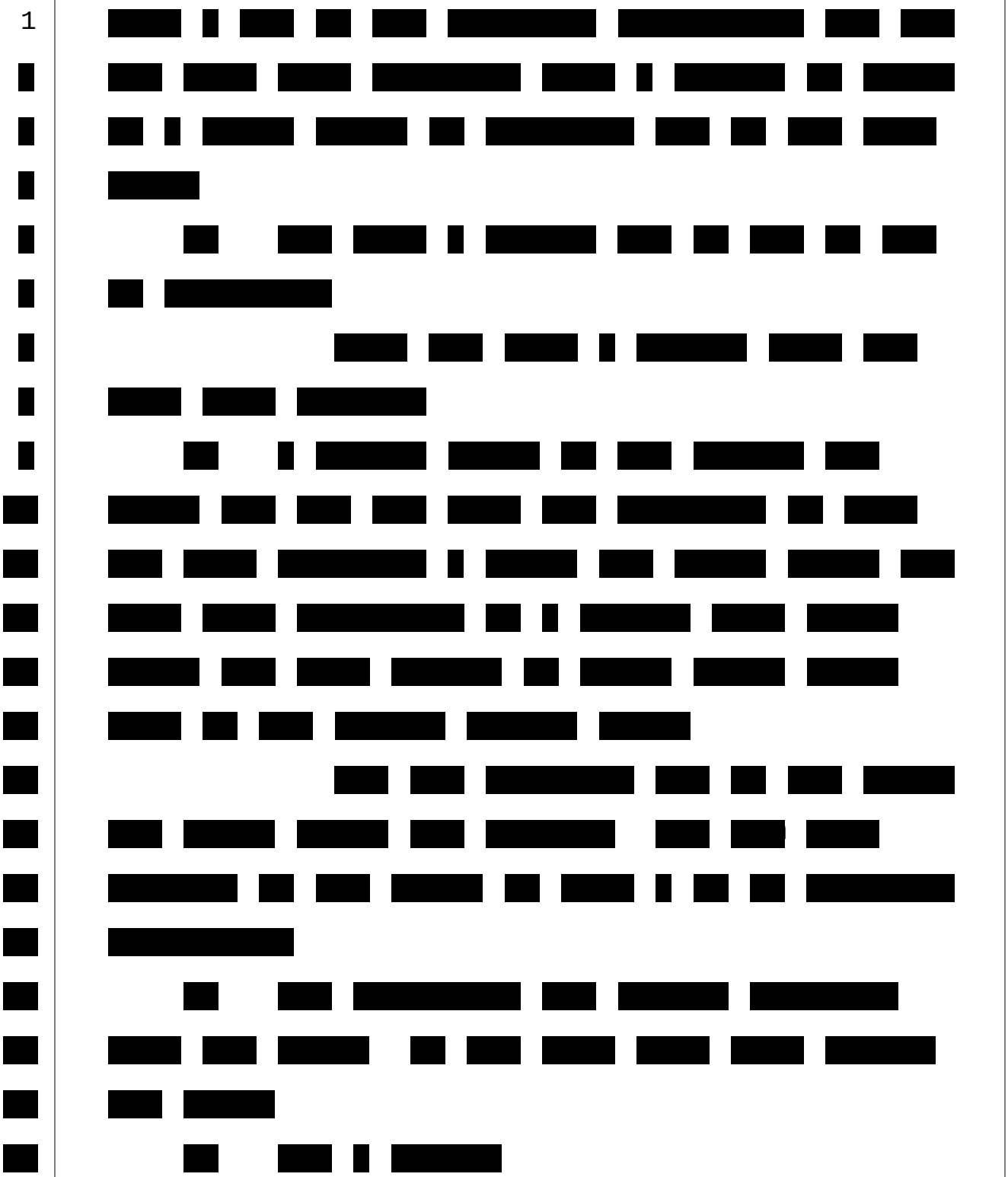


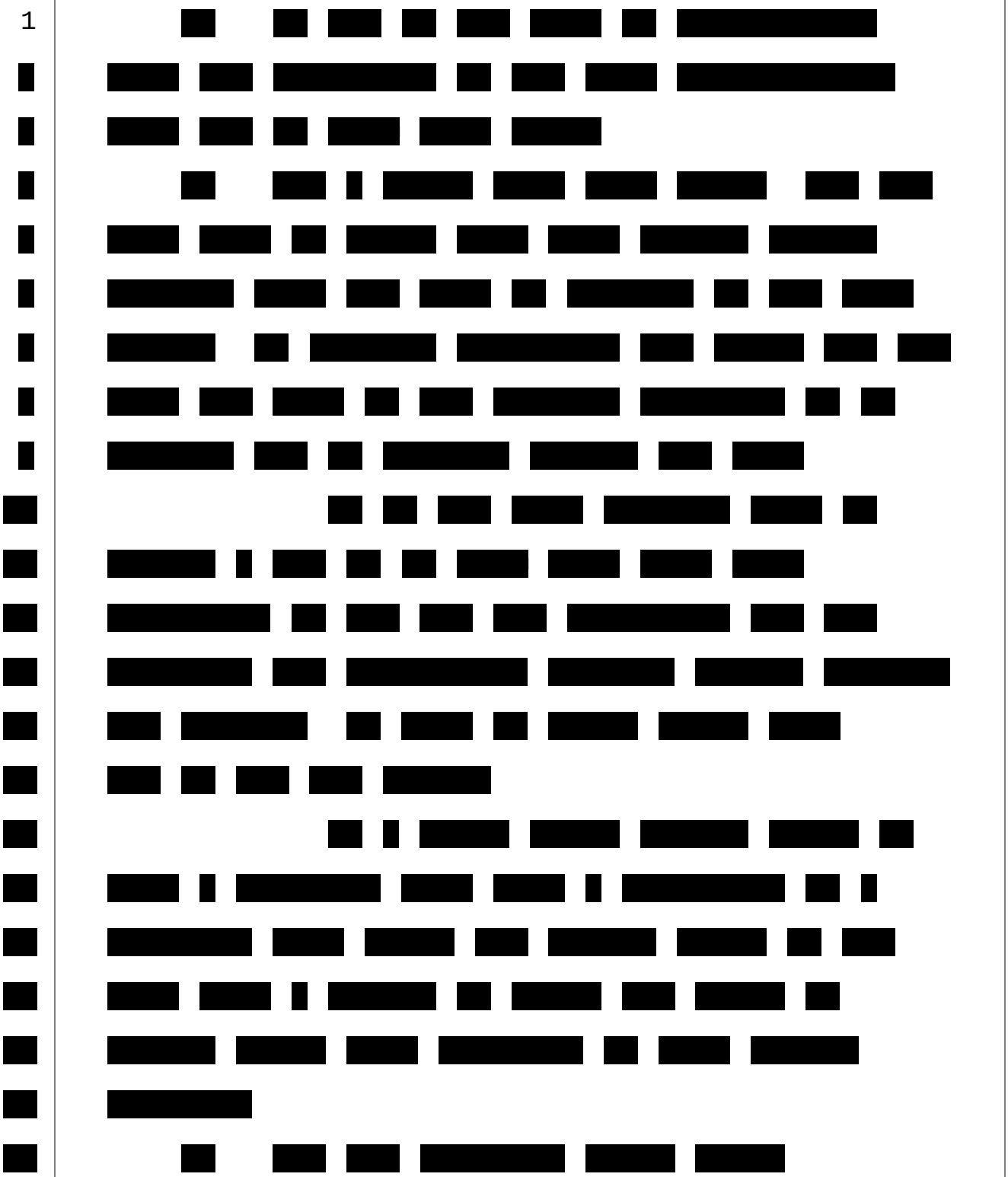


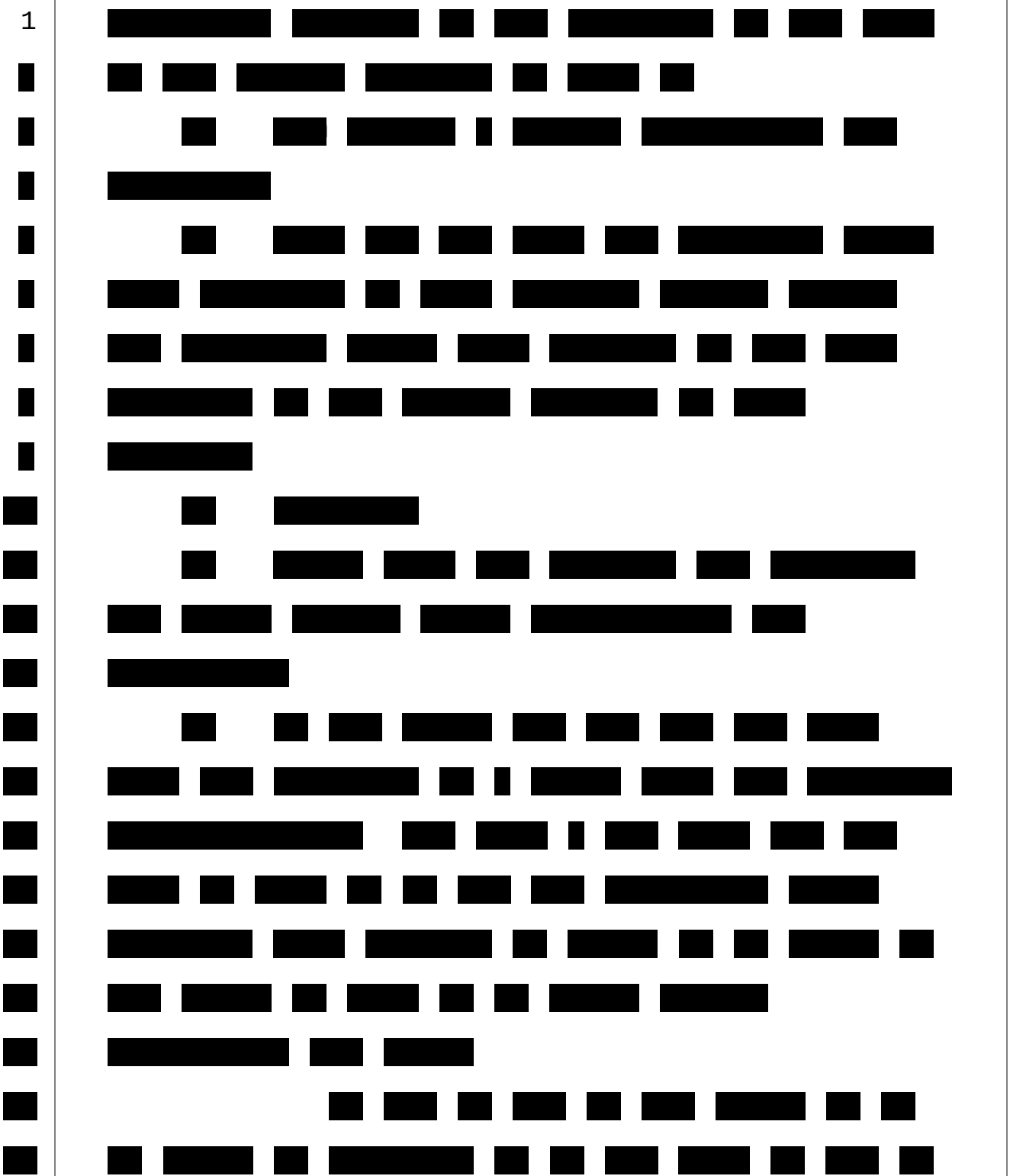
MR. HEFLIN: You know what, I think I'm going to shift topics, so is it okay







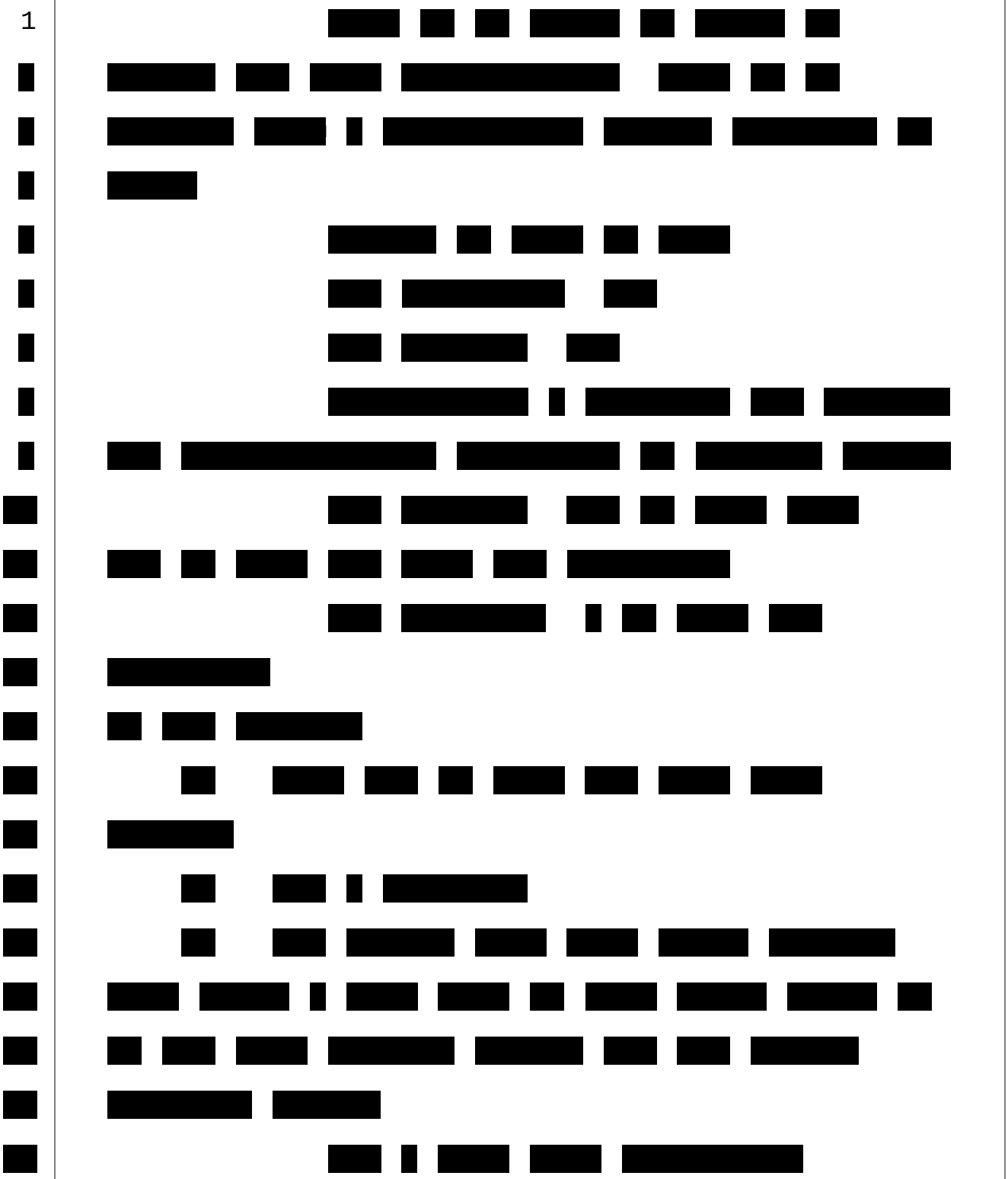


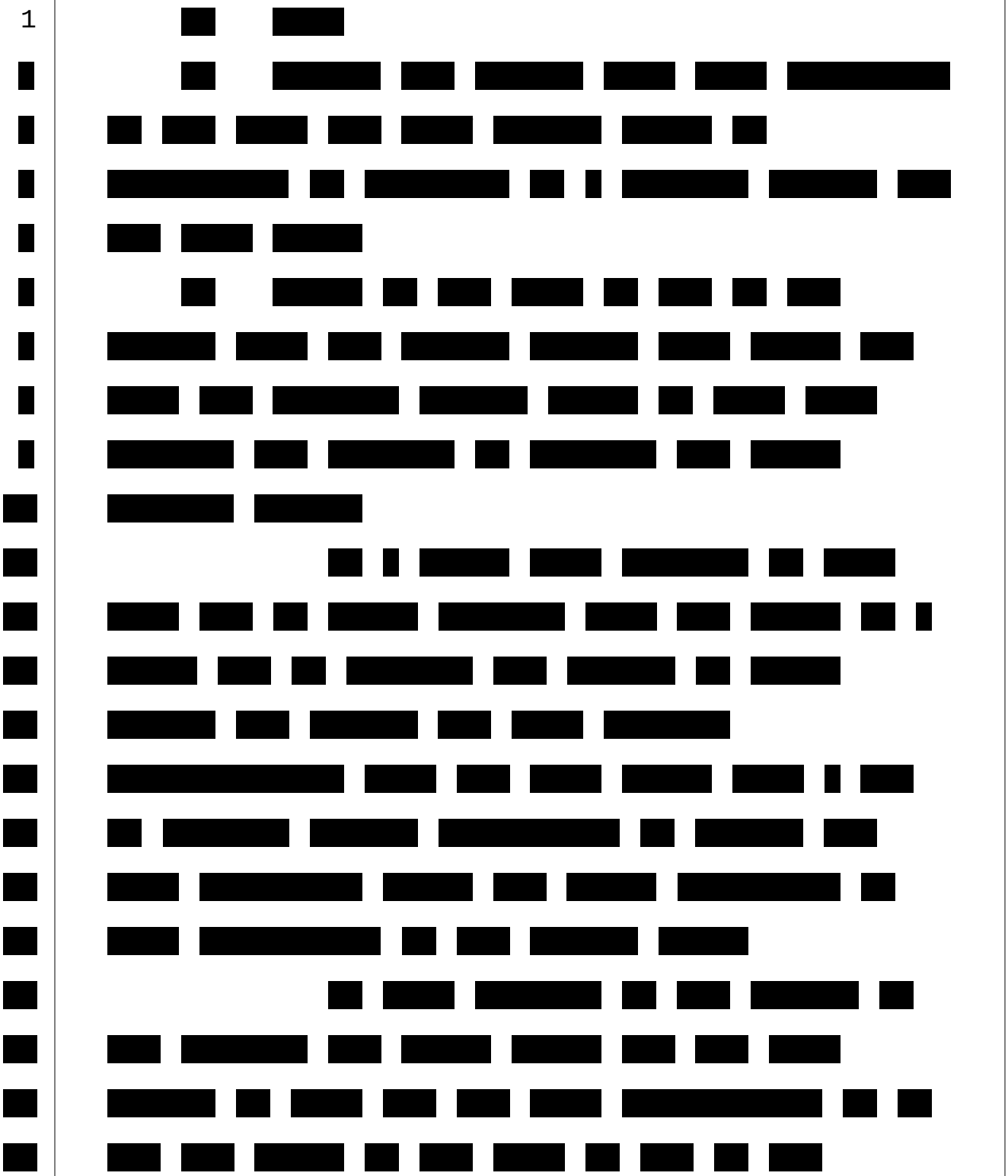


[redacted]

MR. HEFLIN: Okay. I think we can skip this one.

Let's look at Envelope M.





[redacted]

Okay. That's all I had with that exhibit. We can set that aside.

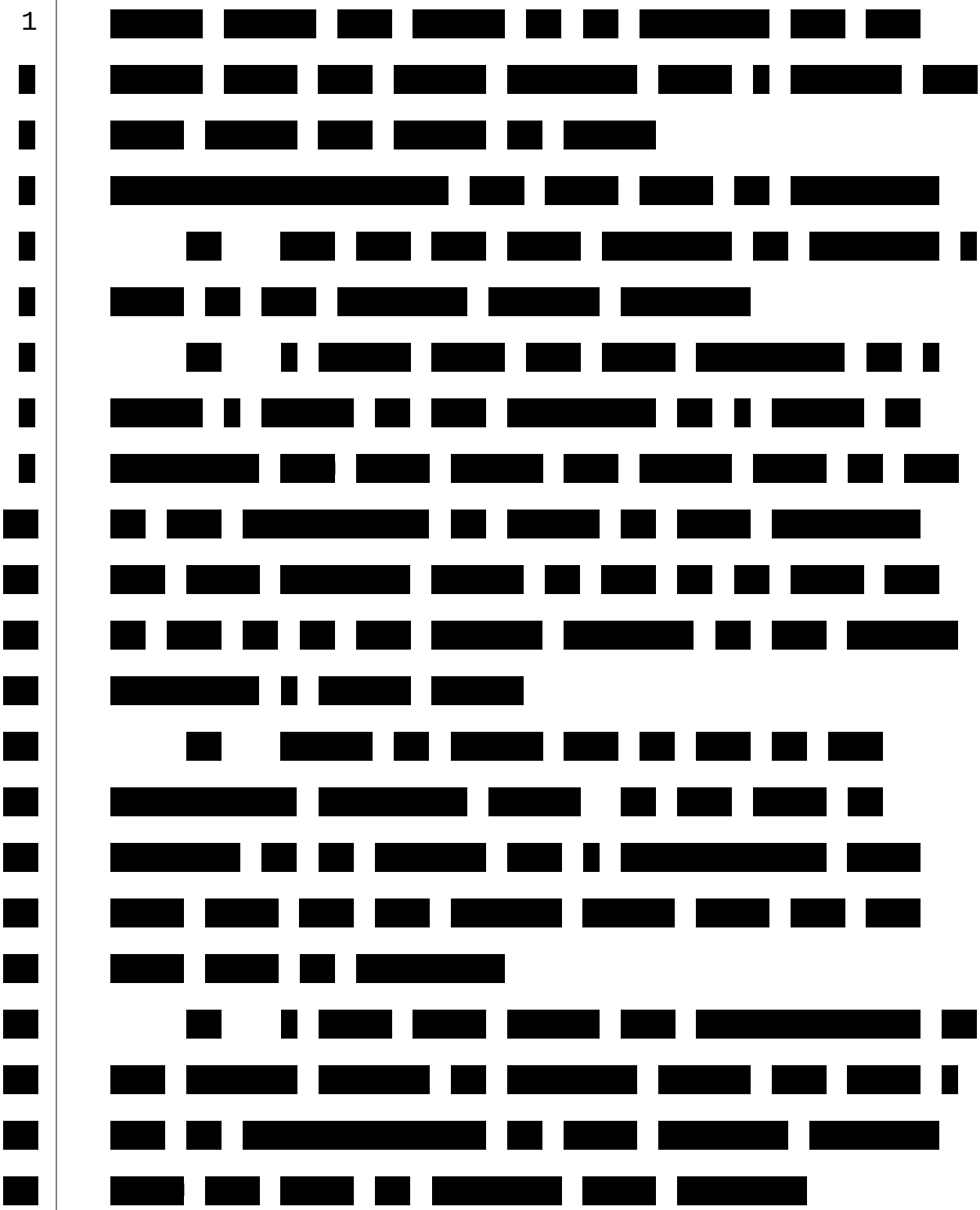
MR. KAVANAGH: Can we take a break?

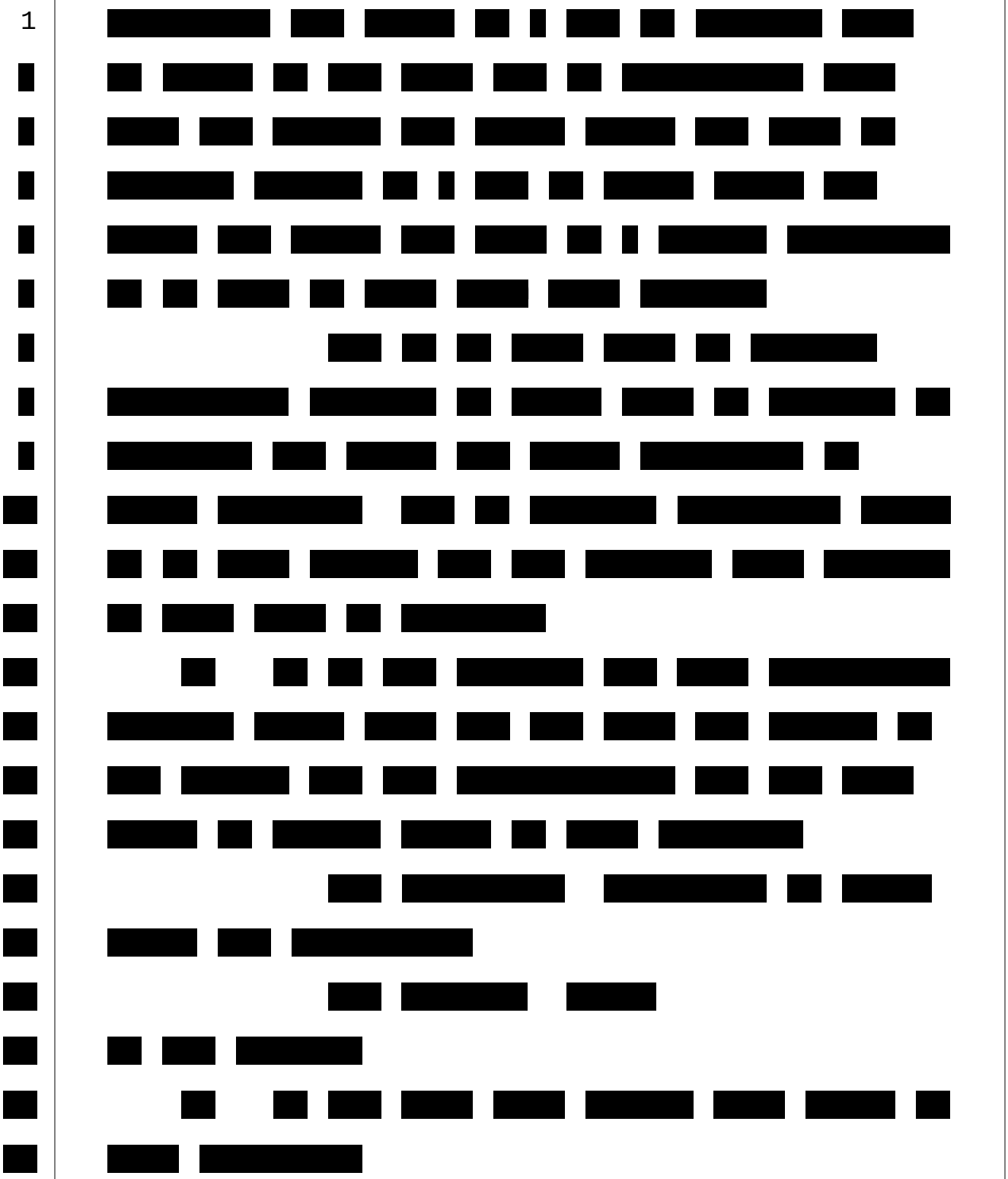
MR. HEFLIN: Sure. How long?

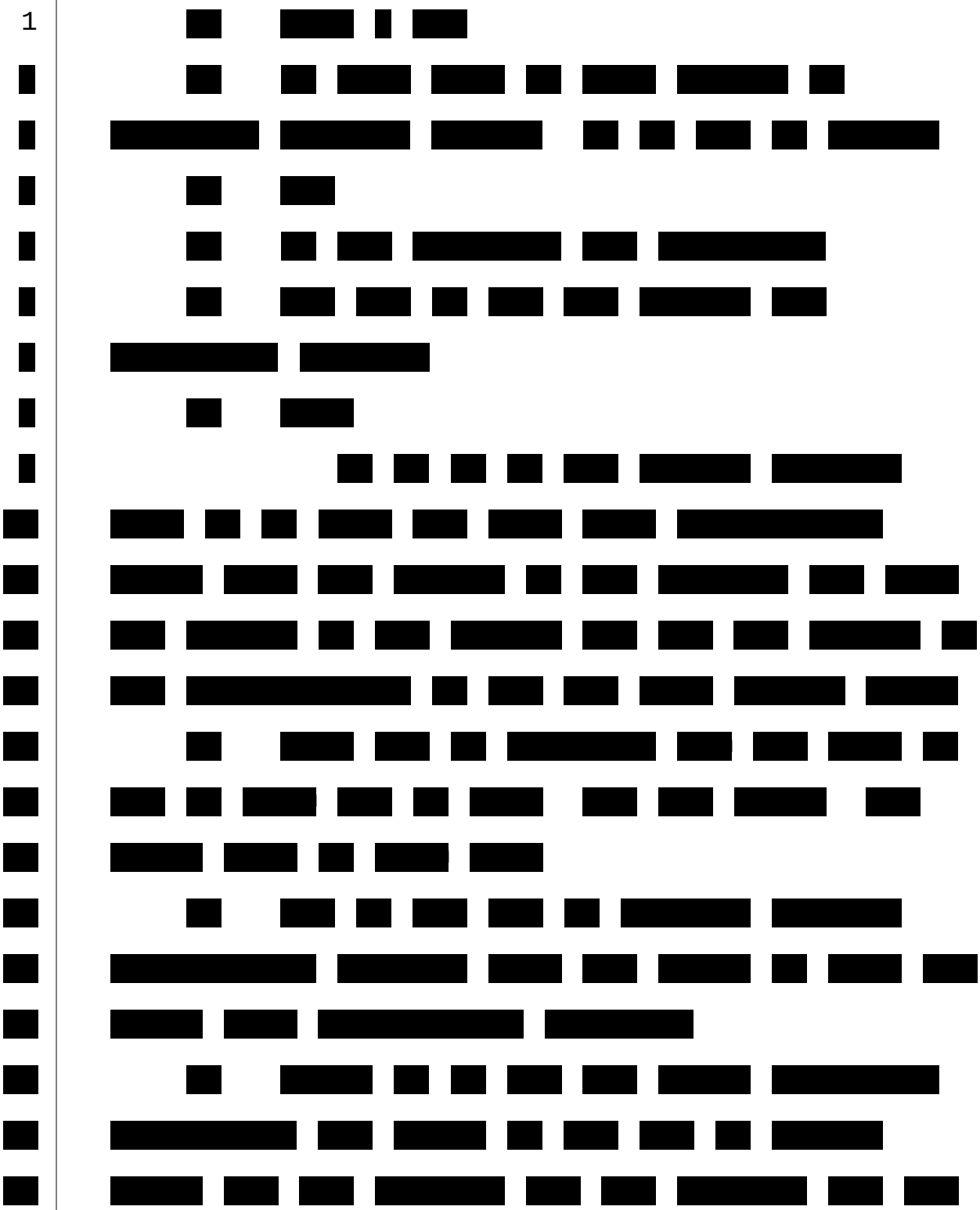
THE VIDEOGRAPHER: We are going off the record. The time is 1:30 p.m.

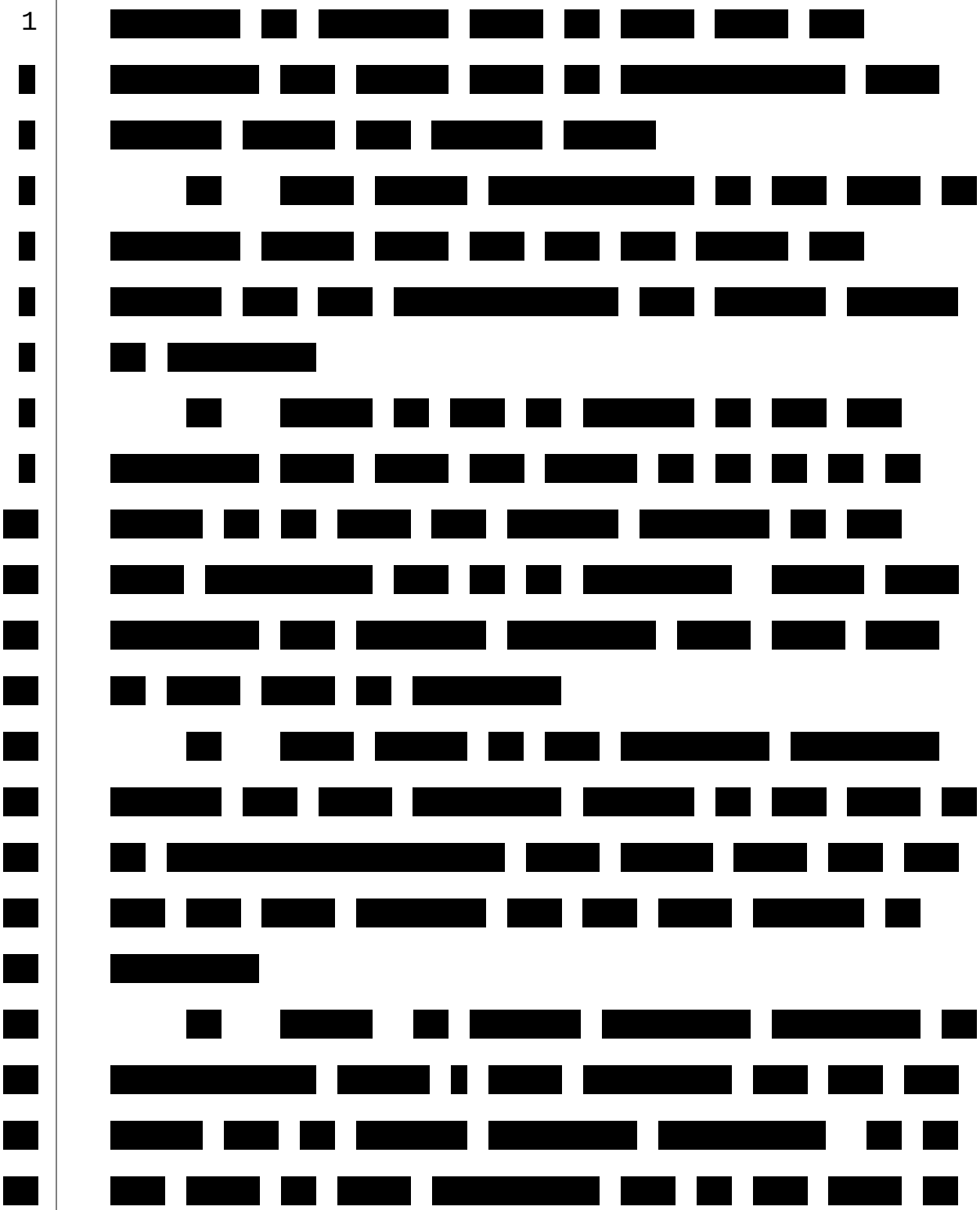
(Whereupon, a recess was taken at the above time.)

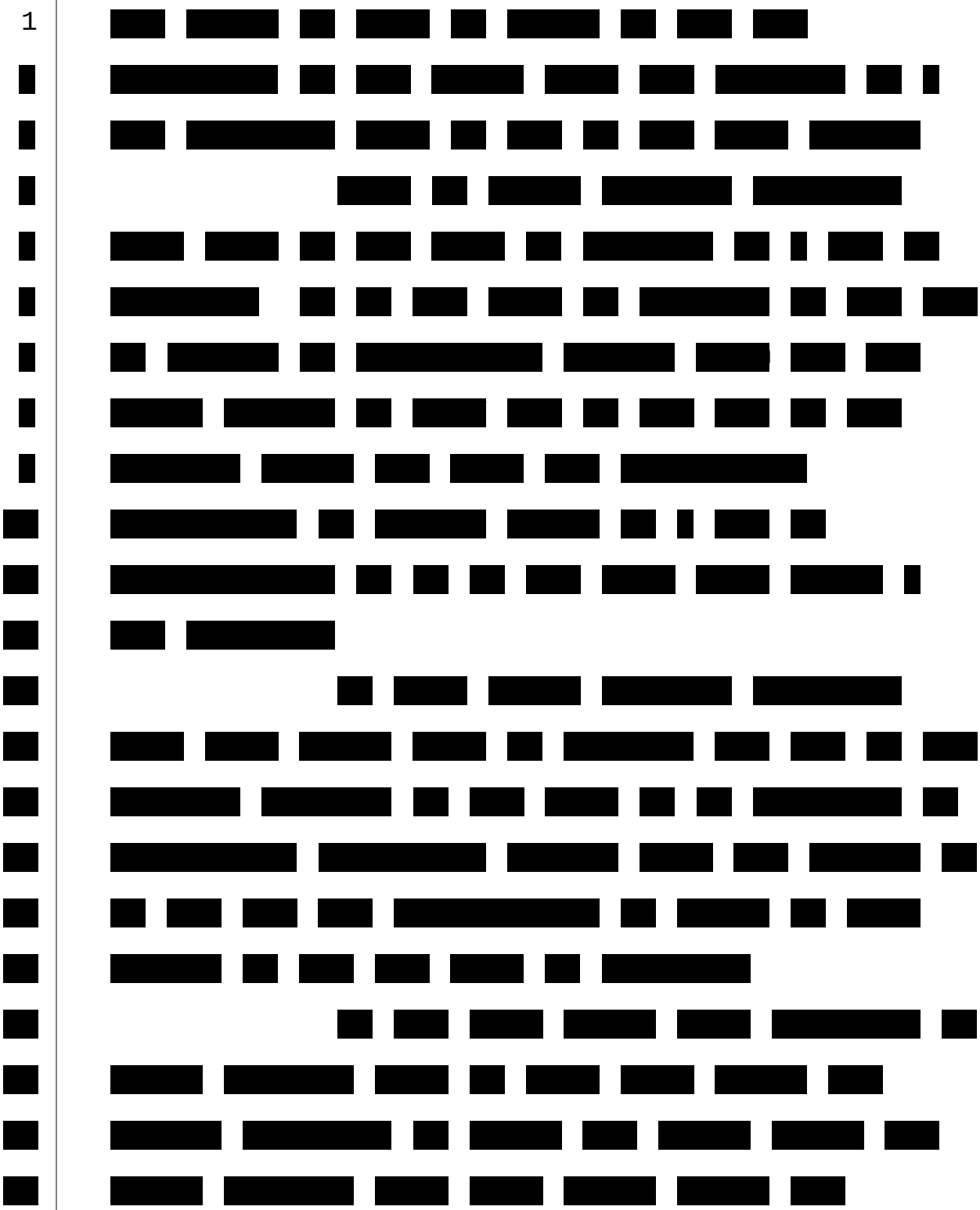
THE VIDEOGRAPHER: We are back on the record. The time is 1:42 p.m.

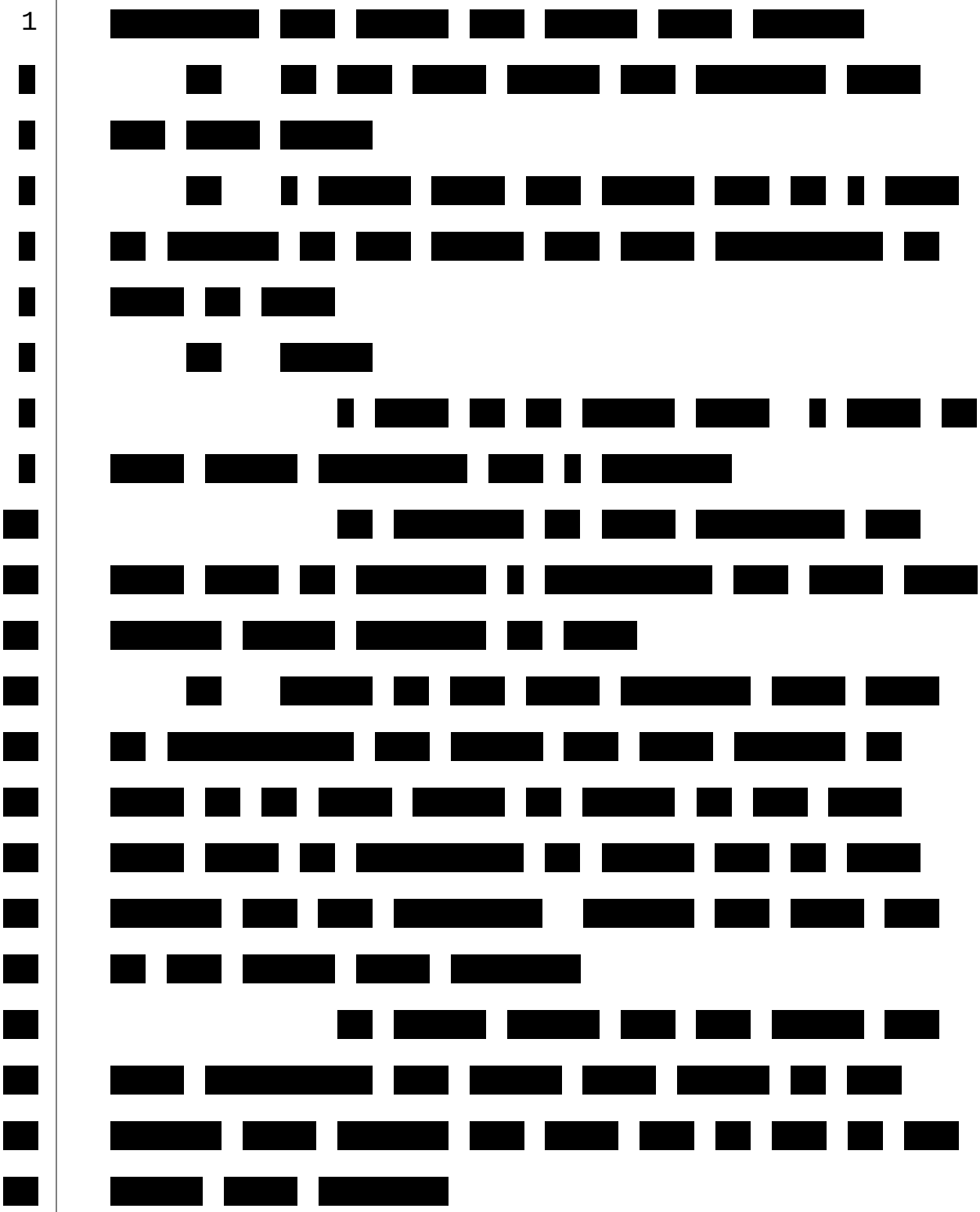


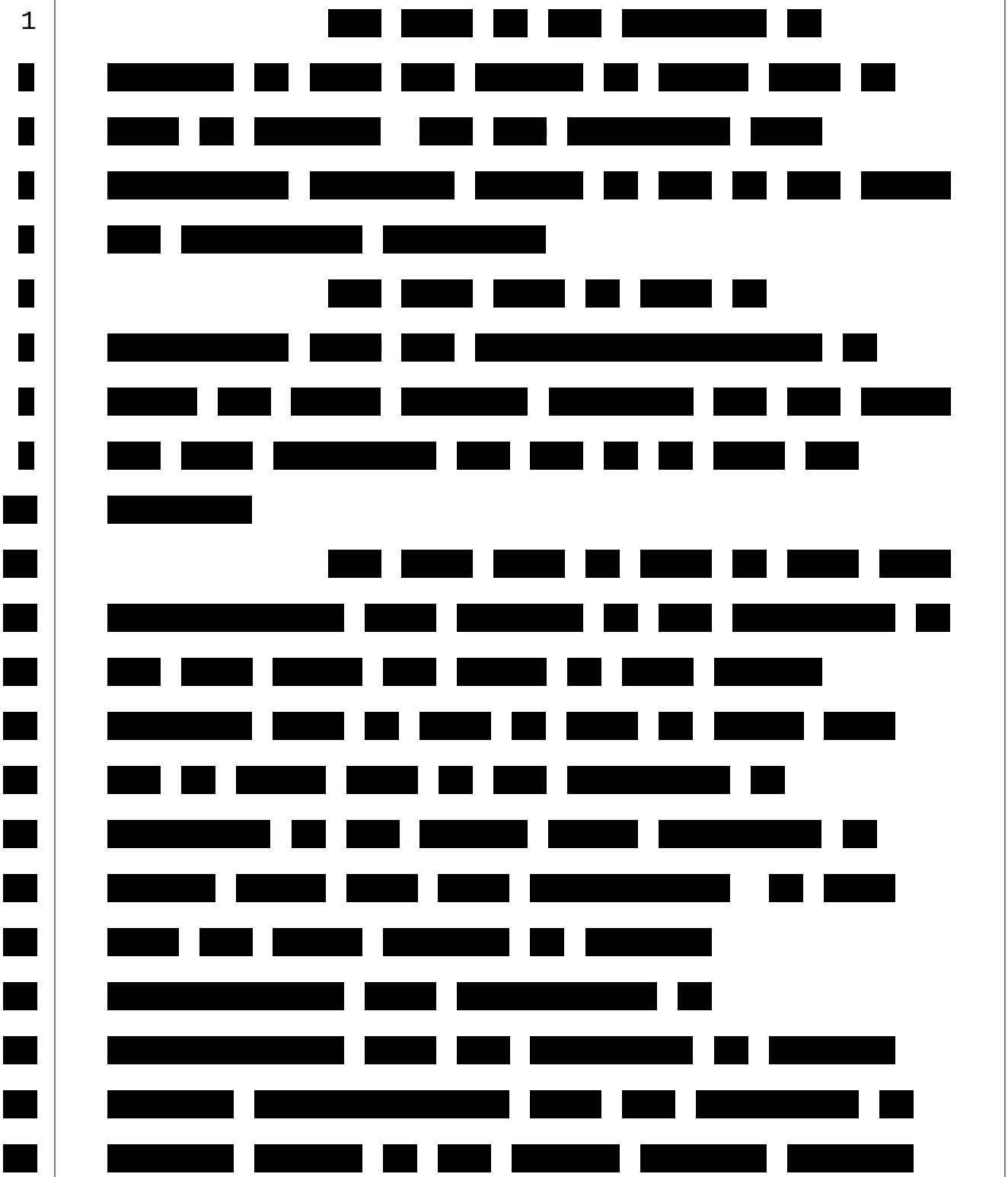


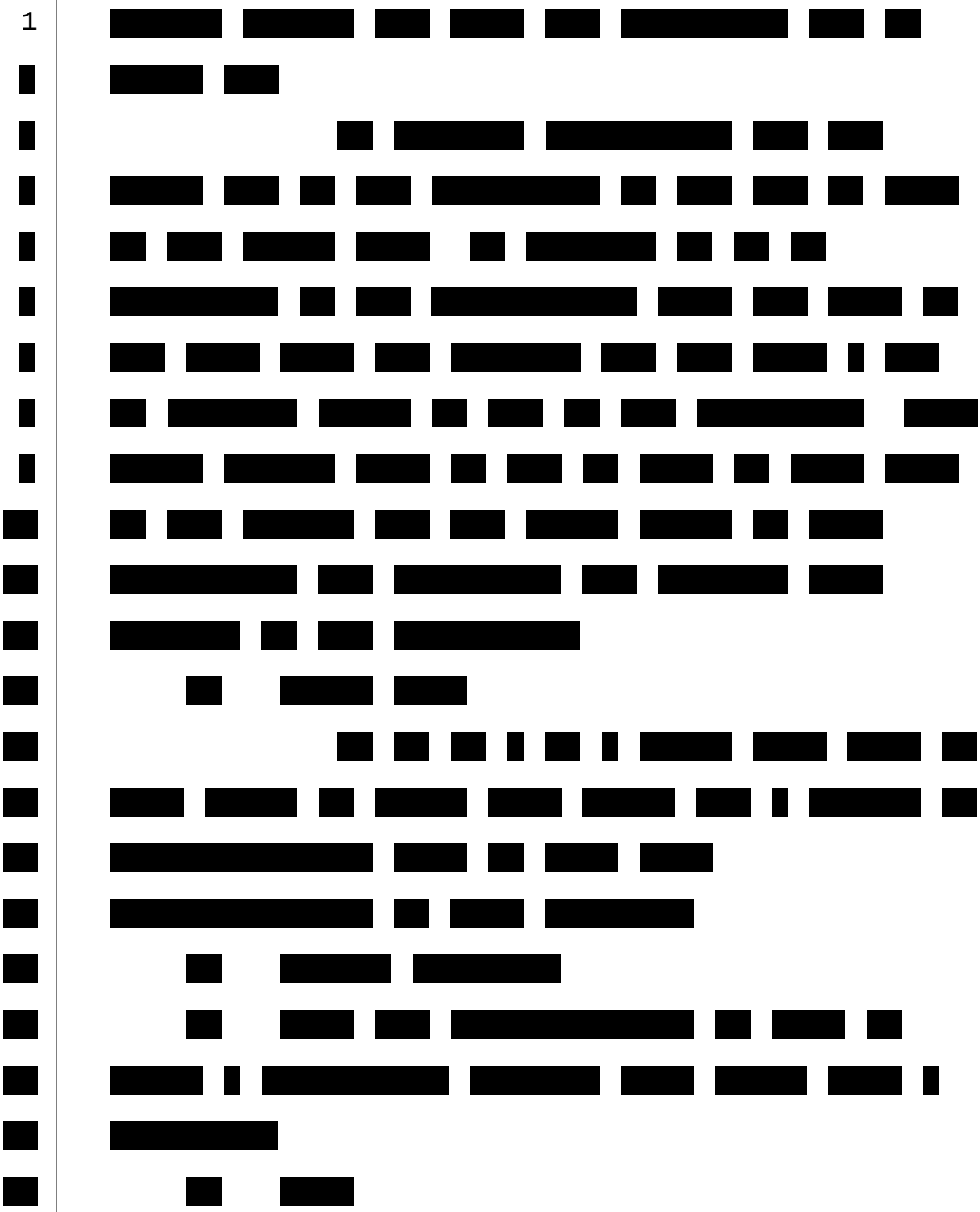


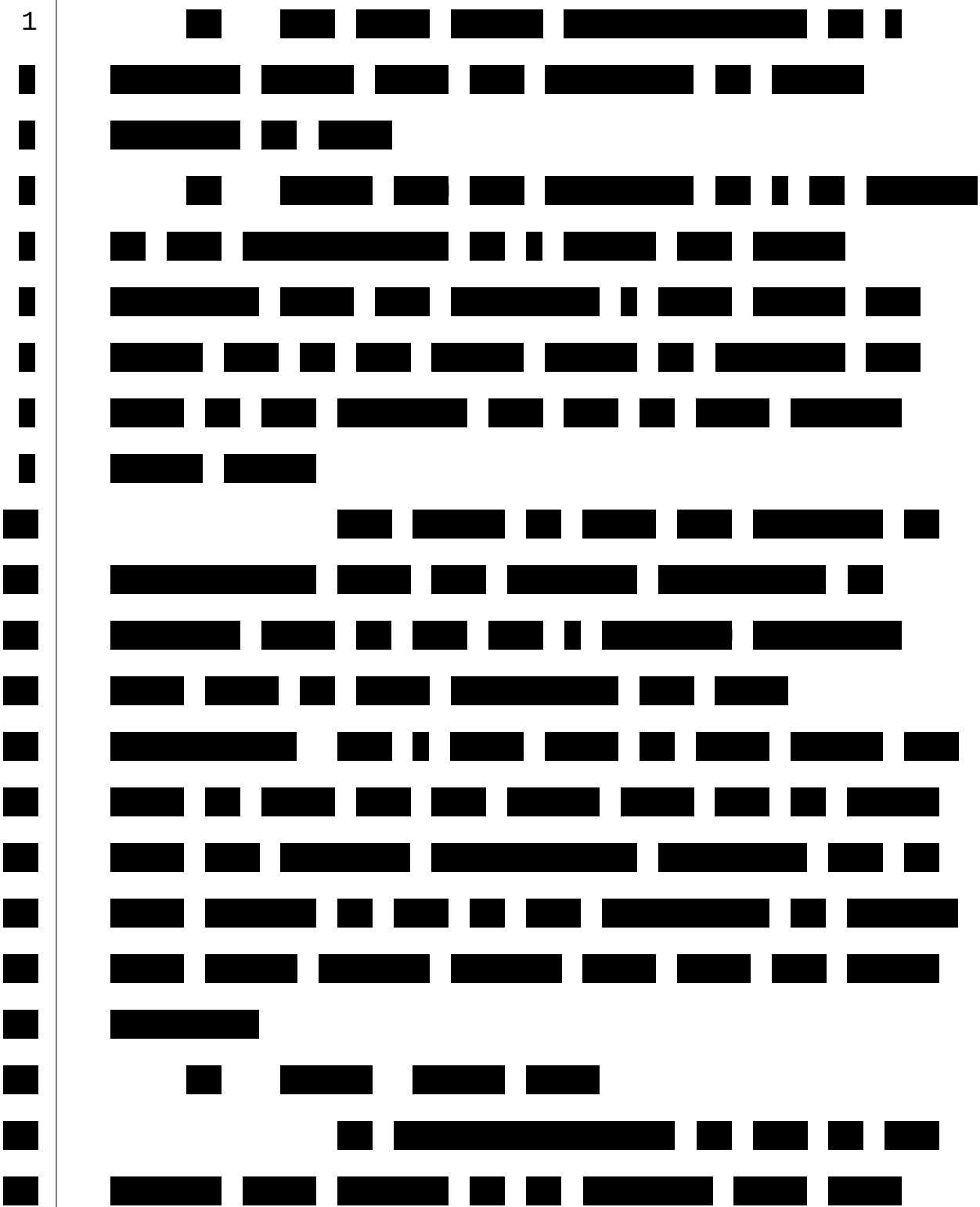












[redacted]

MR. HEFLIN: We're getting closer to the end, I promise.

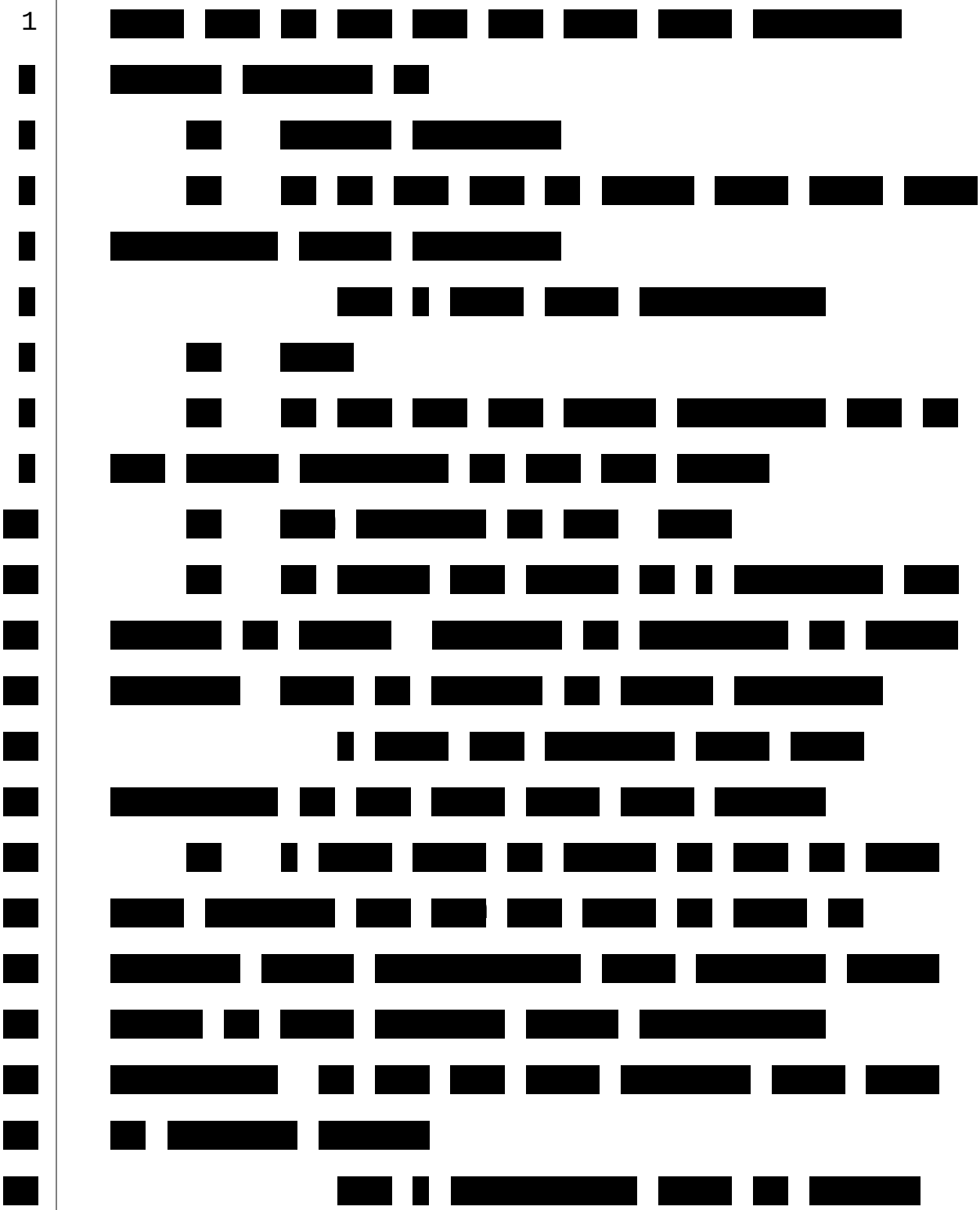
Okay. Let's look at the document in Envelope G.

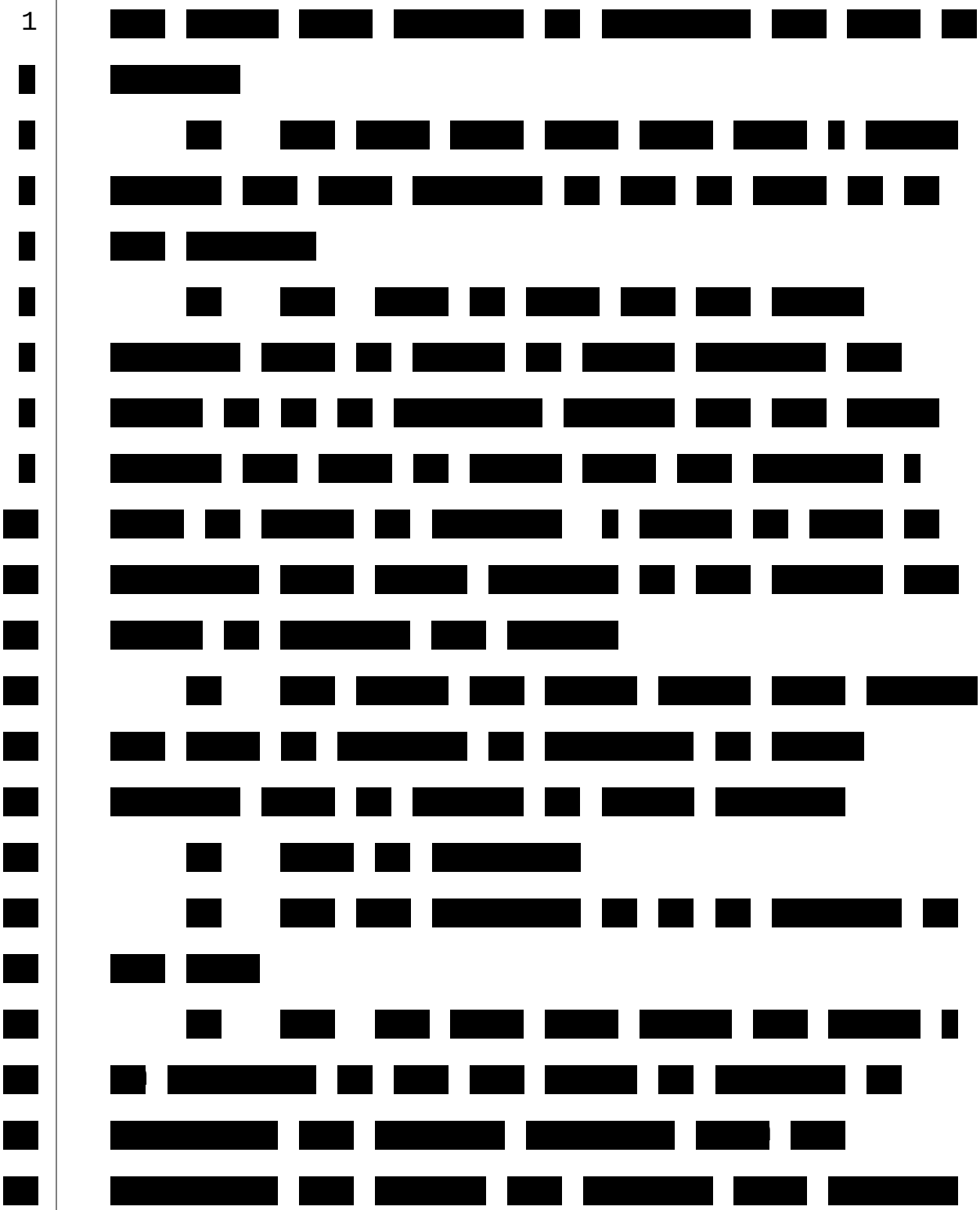
MR. KAVANAGH: I think you used -- did you use that already?

MR. HEFLIN: Oh, we did use G already. Okay. That makes it easier.

Exhibit 3, I meant to say. I just want to come back to this for a couple of quick questions.

[redacted]





[redacted]

MR. HEFLIN: Now, I do want to introduce another document. This should be Envelope H, Exhibit 12.

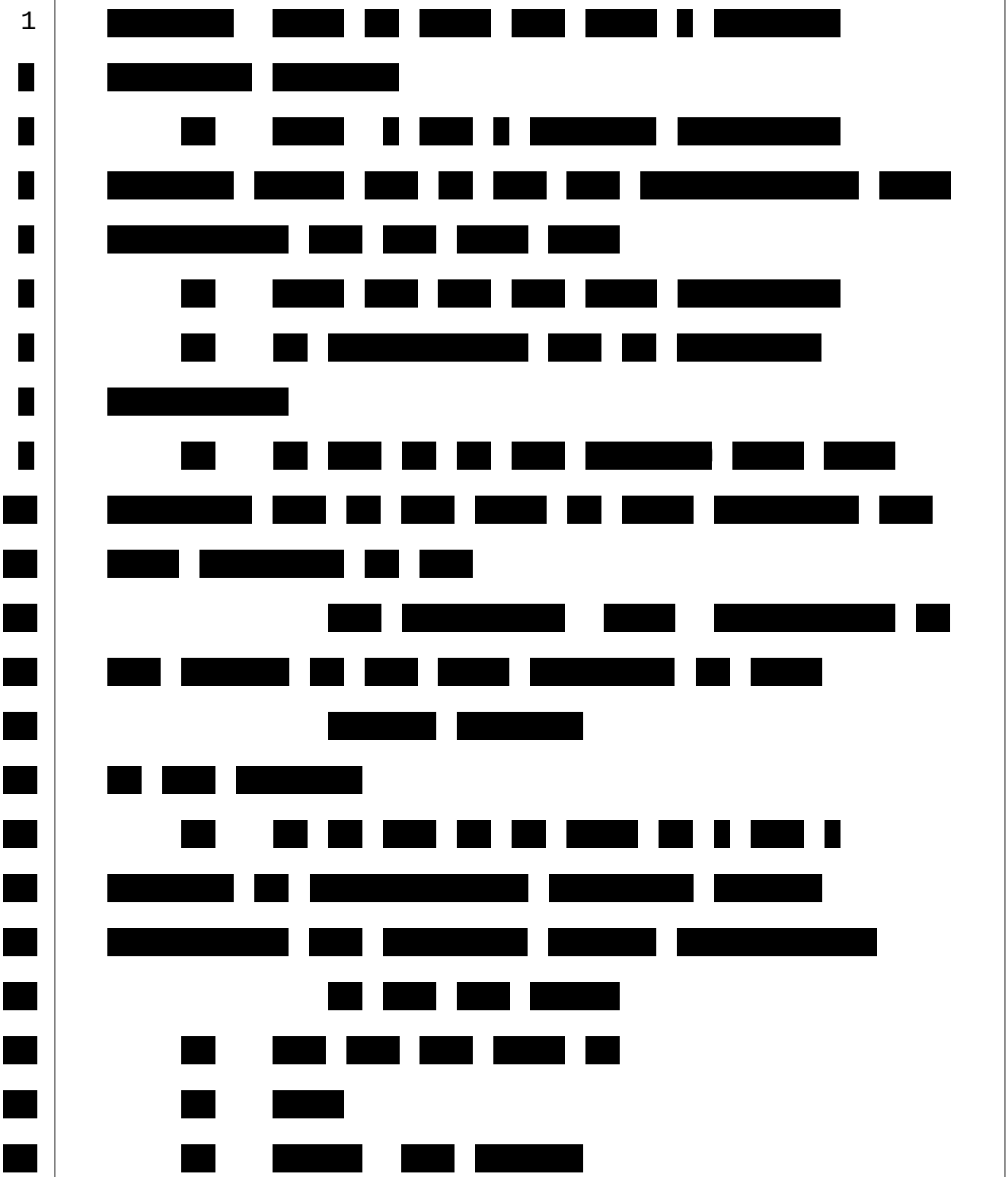
(Whereupon, a document was marked, for identification purposes, as Exhibit 0012.)

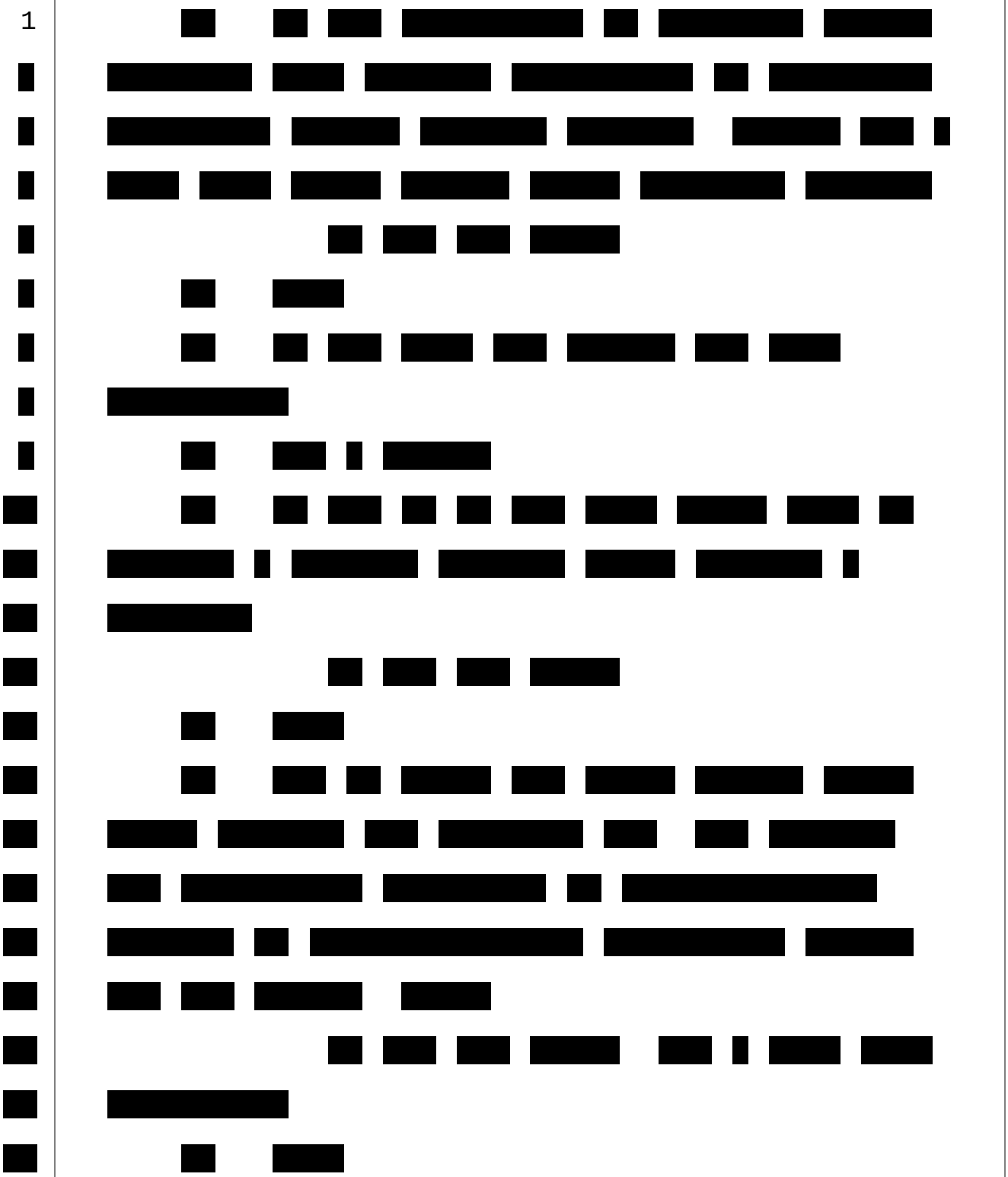
MR. KAVANAGH: 12.

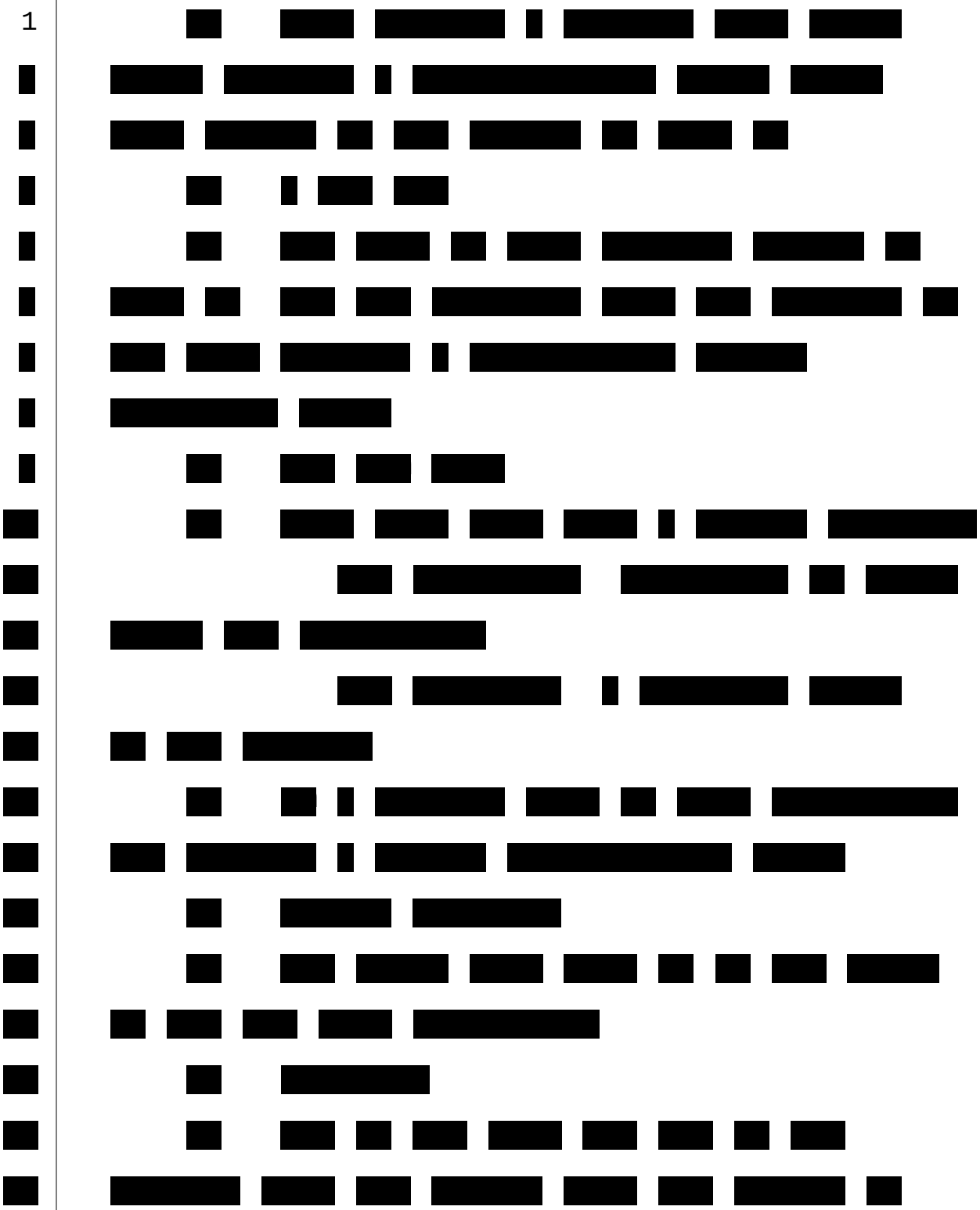
MR. HEFLIN: Let me know when you have the document, please.

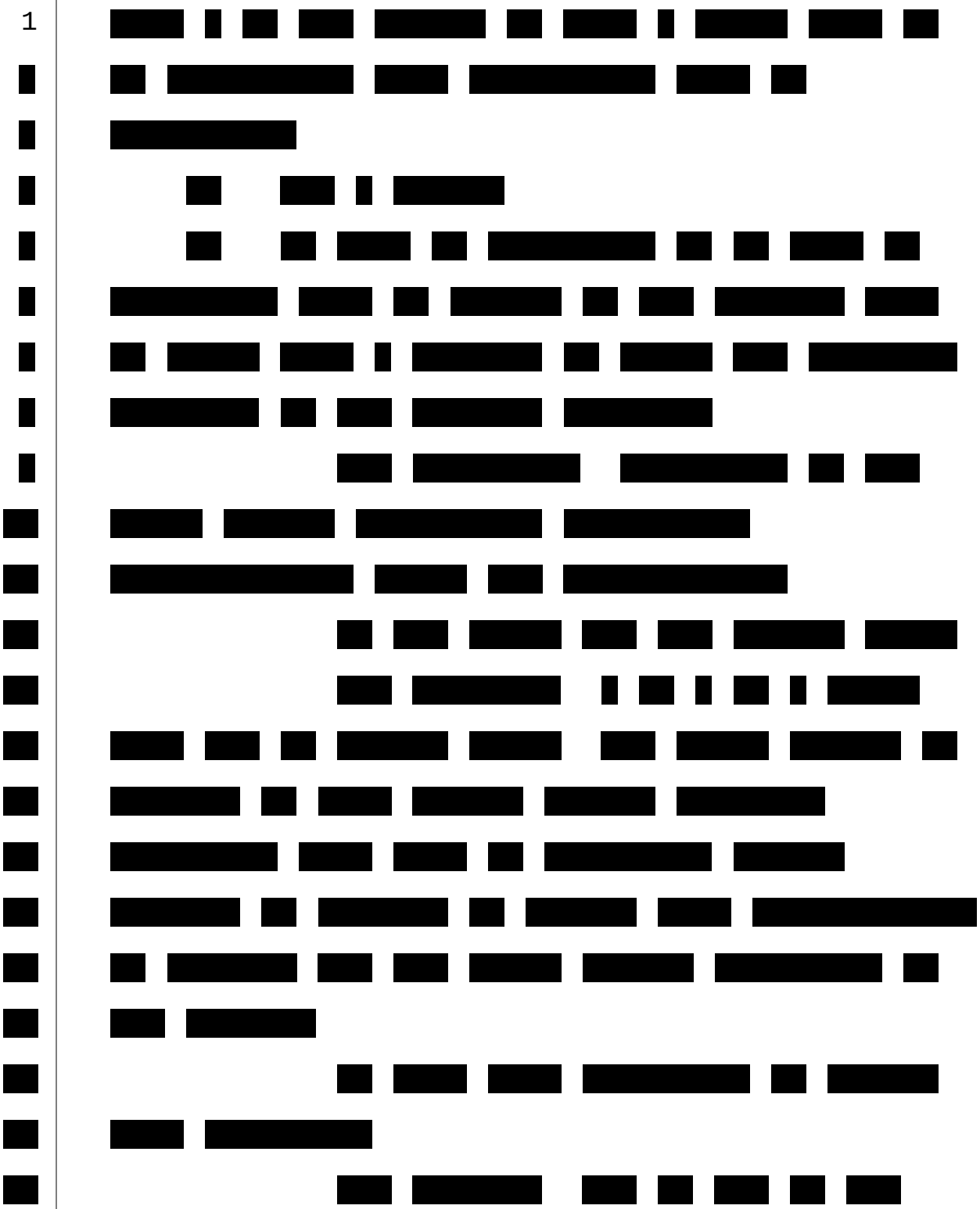
THE WITNESS: I do.

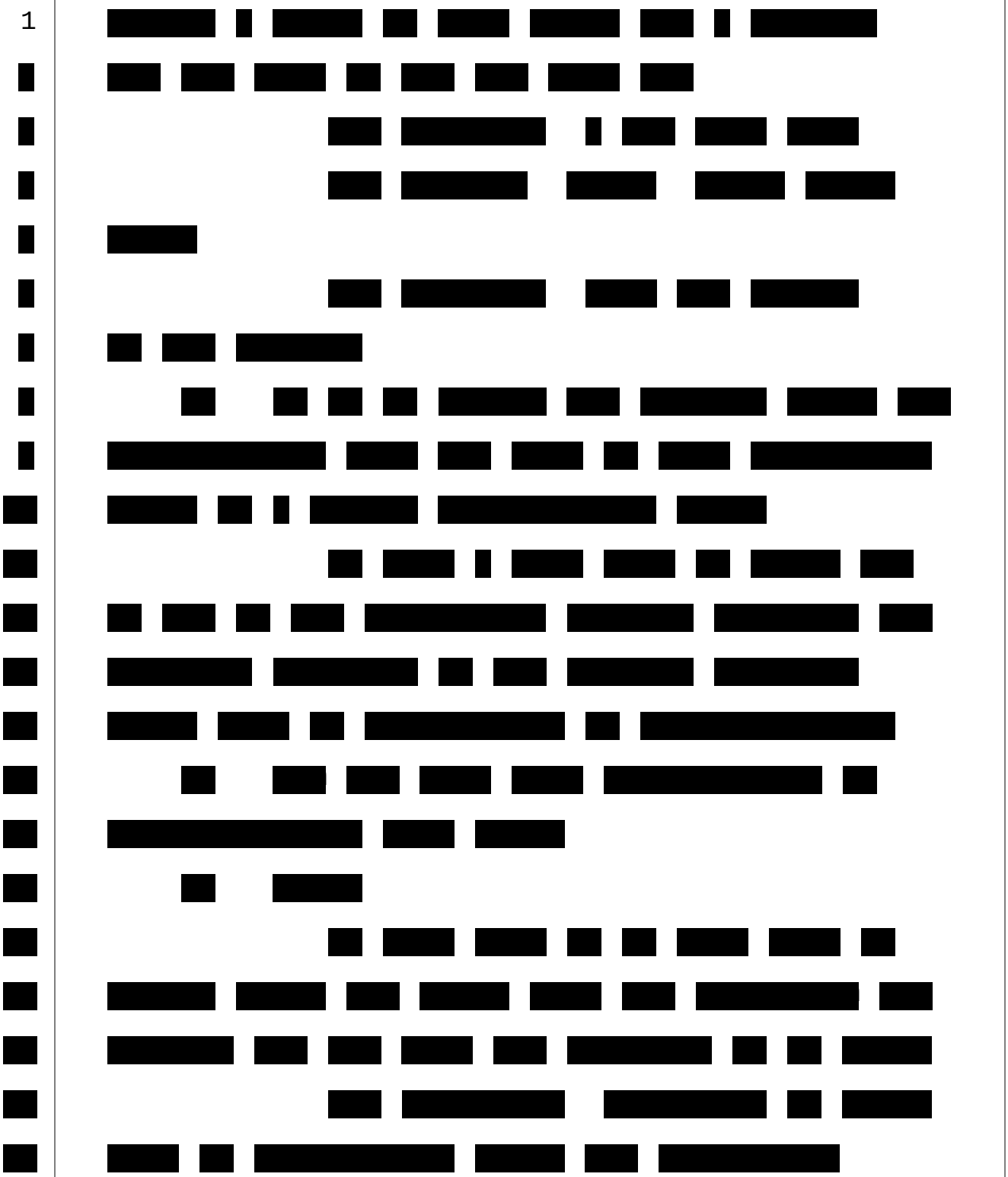
[redacted]

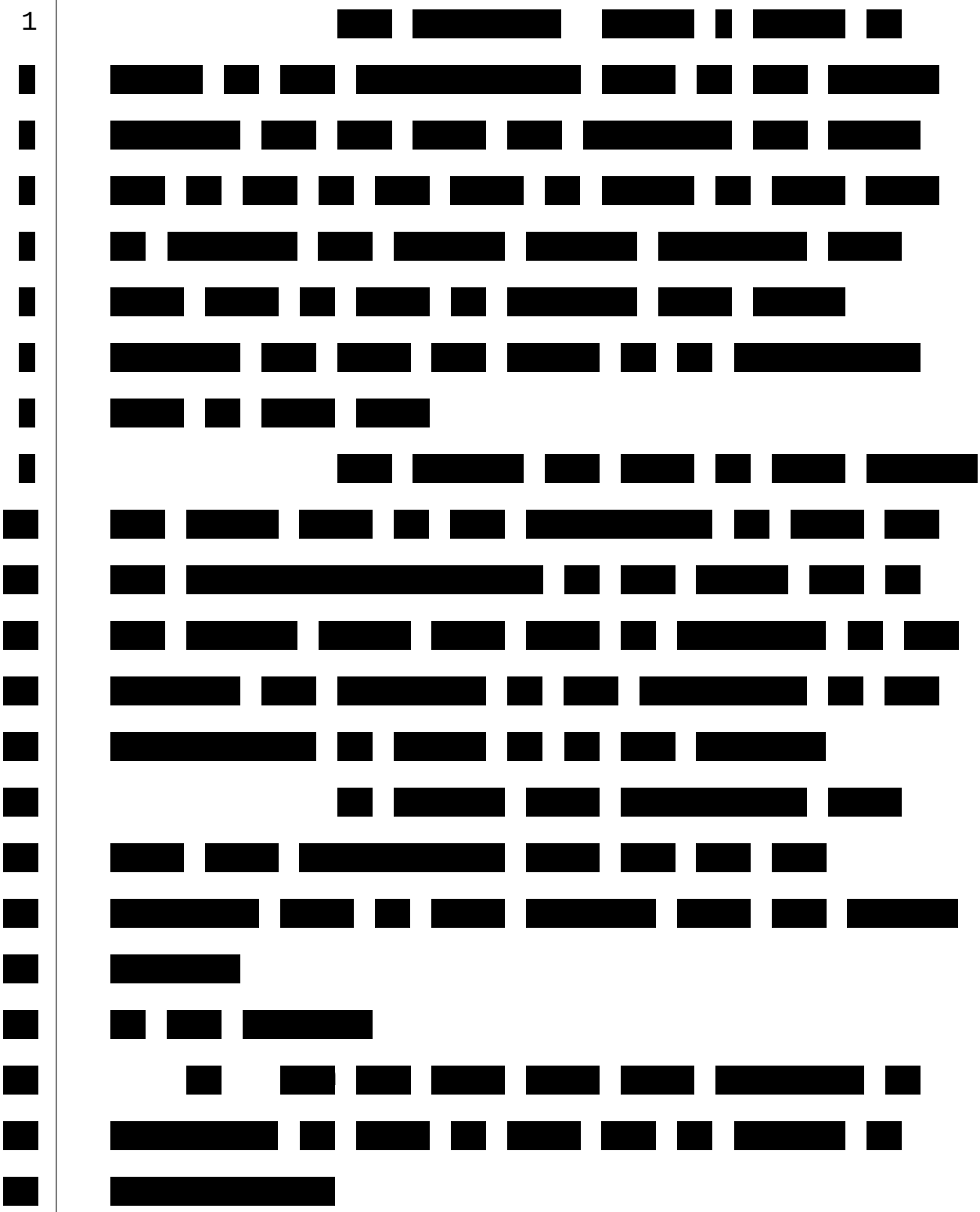


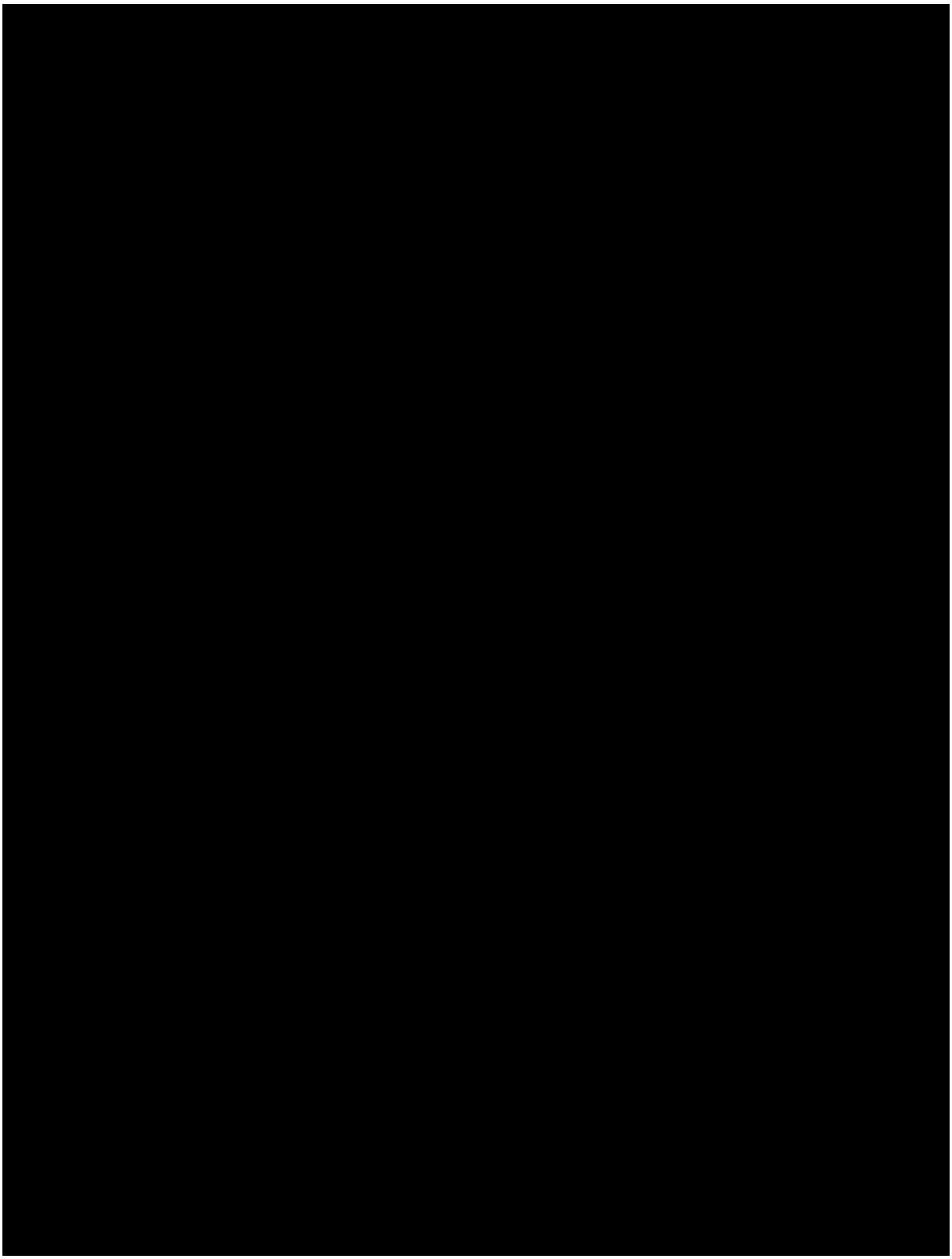












BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VOLUME III, EXHIBIT B

DEPOSITION OF GREG GODFREY (JUNE 9, 2022)
(EXCERPTS)

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, et al.

- CONTROL -

KANSAS CITY SOUTHERN, et al.

HIGHLY CONFIDENTIAL PORTION

VIDEOTAPED DEPOSITION OF

GREG GODFREY

DATE: June 9, 2022

TIME: 7:08 a.m. (Central)

PLACE: Embassy Suites, Columbus Drive, Chicago

JOB NO: June 9, 2022

PAGES: 1 to 148

REPORTED BY: Cynthia J. Conforti, CSR, CRR

A P P E A R A N C E S:

ON BEHALF OF CANADIAN NATIONAL RAILWAY:
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, Illinois 60603
312.853.7000
BY: MARA E. KLEBANER, Esq.
mklebaner@sidley.com

ON BEHALF OF METRA:
KAPLAN KIRSCH & ROCKWELL LLP
1634 Eye Street, NW
Suite 300
Washington, DC 20006
202.955.5600
BY: CHARLES A. SPITULNIK, Esq.
cspitulnik@kaplankirsch.com

A P P E A R A N C E S: (Continued)

ON BEHALF OF CANADIAN PACIFIC RAILWAY:

LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
202.294.1399
BY: DAVID L. MEYER, Esq.
David@MeyerLawDC.com

- also -

SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
310.712.6600
BY: NATHAN H. GOLDEN, Esq.
ngolden@sullcrom.com

ALSO PRESENT:

Sonia Gupta, Sullivan & Cromwell
Jeremy Mangan, Videographer
Sue-Ann Rosen, Esq., Metra

INDEX

TESTIMONY OF GREG GODFREY	PAGE
Examination by Mr. Meyer:	6
Examination by Mr. Spitulnik:	128
Further Examination by Mr. Meyer:	137

GODFREY DEPOSITION EXHIBITS

NUMBER	DESCRIPTION	PAGE
Exhibit 1	Verified Statement of Greg Godfrey	9
Exhibit 2	GC_CP_Analysis_Final_3_15_22 MODDATA	52
Exhibit 3	GC_CP_Analysis_Final_3_15_22 MODDATA	78
Exhibit 4	Podcast document "Commuter Rail Coalition , Metra Executive Leadership: Rail Group On Air Podcast"	105
Rodriguez Exhibit 1 - Previously marked	Verified Statement of GREG GODFREY	49

THE VIDEOGRAPHER: We are now on the record. Today's date is June 9th, 2022, and the time is 7:08 a.m.

This is the video deposition of Greg Godfrey in the matter of Canadian Pacific, et al., versus Kansas City Southern, et al. This deposition is taking place at 511 North Columbus Drive, Chicago, Illinois.

Will attorneys please identify themselves.

MR. MEYER: David Meyer, Law Office of David L. Meyer, for Canadian Pacific.

MR. GOLDEN: Ethan Golden, Sullivan & Cromwell, also for Canadian Pacific.

MR. SPITULNIK: Charles Spitulnik, Kaplan Kirsch & Rockwell, for Metra.

MS. KLEBANER: Mara Klebaner, Sidley Austin, for Canadian National.

MS. ROSEN: Sue-Ann Rosen for Metra.

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

(Witness sworn.)

GREG GODFREY,

having been duly sworn, was examined and testified as follows:

If you have other things you want to say, your lawyer can ask you at the end of the day if he has time.

MR. SPITULNIK: Mr. Meyer, he's answering your question. If you would let him answer --

MR. MEYER: No, I --

MR. SPITULNIK: If you would rephrase the question, if he's not answering it, that's fine, but he is answering your question.

MR. MEYER: Well, I think the record will speak for itself about whether the witness is answering the question. I asked -- I was referring to lines used by Metra and I think the witness decided to talk about ownership, and that's fine --

MR. SPITULNIK: Perhaps --

MR. MEYER: -- he can talk about anything he wants but not in response to my questions --

MR. SPITULNIK: Perhaps your question wasn't clear. If you could try again, then he'll answer your question.

BY MR. MEYER:

Q At some point, CP decided to adopt/install TMDS software for the PTC systems on the lines that Metra and Canadian Pacific share?

A Correct.
Q Okay. Do you know when that was?
A That was -- that predated my arrival at Metra.
Q Okay.
A I don't have a specific date.
Q Okay. And was there a date by which that TMDS system needed to be active?
A There was, and there was a transition because of -- it's a critical safety system, so several systems at CP/Metra were in service at the same time as we made a critical safety transition and validated all the data, so I was part of that transition. I don't recall the exact date. We got rid of, quote, the old computers.
Q Okay. As a critical safety system, I assume you would agree that it was important for Canadian Pacific to install TMDS on its systems in a way that ensured that it would be operated safely?
A Yes.
Q Did CP and Metra spend considerable time working together to provide for TMDS to function safely on CP's dispatching systems?
A Absolutely.

Q And CP invested significant resources in doing that; is that correct?

A Yes.

Q And is TMDS working today on CP's dispatching systems?

A It is.

Q And are there still glitches in the way PTC functions on CP's dispatched lines that Metra uses?

A I believe we are less than five open tickets as my -- out of my last memory, so I wouldn't call them glitches. They're what they're called tickets.

I just want to clarify that CP and Metra have worked very hard to prioritize anything that could potentially have a safety impact. So there are five open tickets that we are working with CP on closing with our vendor.

Q And that vendor would be Wabtec?

A Correct.

Q And so some of the -- well, strike that.

This process of implementing TMDS on CP's dispatching systems involved close cooperation between CP and Metra and also Wabtec?

A Yes.

Q Has -- in -- with respect to Metra's own installation of TMDS on its dispatching systems, are there any open tickets?

A There are.

Q How many?

A 27.

Q Okay.

A May -- may I caveat my remark?

Q I suppose you will.

A I want to stress that in the partnership for safety, because it is hard to manage between two large organizations, Metra and CP worked to reduce their safety or the perceived or the potential safety defects in the system first.

The remaining tickets where we're currently at, Metra allowed, preferred -- whatever term you choose -- to resolve all the CP defects first because they were a partner in the safety component.

The balance of the 27 on our end are not as -- were not as important as the CP tickets, so even though there's a disparity in the number, Metra acted as -- in -- in the best interests of both parties and both of our customers, and of course the neighborhoods that we go through, to

to -- the part I have access to, I can pull delays from.

Q Okay. And are you able to pull delays from the TOPS database relating to any cause category associated with those delays?

A Yes.

Q So delays for any reason --

A Yes.

Q -- you have access to them?

A Yes.

Q So I want to ask some questions specifically about the Milwaukee District North and Milwaukee District West lines.

You refer to them as MD-W, and MD-N.

So let's start with MD-N or metro -- Milwaukee District North. Roughly, how many trains are operated by Metra on that line in a month? And I know this number changes over time. So I'll ask you, you know, today, this month, approximately how many trains is Metra operating over that line?

A Oh, I don't -- I'd have to calculate that. I use Excel for all that sort of thing, so I know we run some-odd-40 trains a day type of thing between both lines but I don't have that off the

top of my head. We'd had so many COVID schedule changes that I just don't have that off top of my head on a monthly basis.

Q Okay. And how would you -- you're familiar with the pattern of -- strike that.

So let's go back to when you arrived from HDR at Metra. That was before COVID?

A Before COVID, yeah.

Q And Metra was operating its pre-COVID schedule.

A [Nonverbal response.]

Q Do you know approximately how many trains it was operating on the Milwaukee District North line at that point in time?

A I don't have the figure off the top of my head. You have to understand, I am responsible for 680-some-odd trains. To go break down all these trains each day, it's -- I'm in a volume business, right, so...

Q So when you -- when you referred earlier today to work that you did in connection with this deposition to calculate a percentage, the percentages you were calculating weren't percentages that involved the percentage that certain delays represented to all of Metra's train

movements on a particular line, were they?

A I calculated counts of trains in my graph. They weren't percentages. So these are counts of delays. So you're -- yes, yes, yeah.

Q So when you referred to -- I think you referred earlier today to having come up with a percentage of -- or a ratio. That wasn't a ratio that involved going to look at how many trains Metra operated?

A Correct.

Q You were only looking at delays.

A Correct.

Q And so I think this is fairly clear, but when you went to the TOPS database for purposes of building Figure 1, you only went to that database to get data on delays?

A Correct.

Q And what specific delays did you pull from the TOPS database?

A What we call D delays and D-1 delays.

D delays are freight priority delays. D-1 delays are cascading delays that resulted from those freight delays.

Q And by "cascading," and I think this is fairly clear in your testimony, well, I got -- so

a D-1 delay is a delay that someone at Metra has assign the D-1 code to?

A Correct.

Q You don't do the assignment of delay codes, do you?

A I have input on them, not final decision.

Q And so a D-1 is referring to a situation where that -- the train was delayed because of something that happened previously to another train?

A Correct.

Q So if what you were looking for was the number of times a bad dispatching decision delayed -- a bad dispatching decision was made, you wouldn't look at the D-1 delays to ask -- to answer that question, would you?

A Which is exactly why I separated out D-1 and D so we can get an accurate picture of the core versus the echo.

Q So the word "echo" that you just used was referring to the D-1 category?

A Yes. Cascading.

Q Thank you.

When you did this analysis reflected in your verified statement of the TOPS data, did you

look at any other freight railroads?

A At the time, no.

Q And did you look at any other delay causes?

A At the time, no.

Q Okay. And you agree it would be possible to go to the TOPS data and add to your graph or prepare a new graph reflecting not just D delay causes but other causes?

A Yes.

Q Would it also be possible to go to -- this graph on page 4 of your verified statement, was that prepared in Excel?

A Yes.

Q And it would be possible to go into the Excel spreadsheet underlying this graph and add a field for the total number of trains that were not delayed by D causes and replot the graph; is that right?

A And that would equal 88 percent of the other causes and the D and D-1s are 12 to 13 percent of the causes, yes.

Q Okay.

A So, yes, it's possible.

Q My question may have been imprecise, and I

apologize, but let me follow-up on what you answered, which is -- I think what you just said was that if you were to put into your graph delays during -- delays for causes other than D, those other causes would represent 88 percent of all of the delays?

A Yes.

Q And that the Ds would represent approximately 12 percent of all of the delays?

A Correct.

Q So of all the trains on MD North and MD West lines that are delayed for any reason, 88 percent of the delays are for reasons other than D?

A Correct.

Q Now, my question was actually asking something different, which is if you knew the total number of trains that Metra operated on those lines in that same period, okay, you could plot that on the graph too?

A Yes, you could.

Q And so you could see what the graph would look like if you saw the entire landscape of Metra trains and how the -- the portion that were delayed for D reasons represent -- looked relative

to that?

A Correct.

Q But you haven't done that?

A I have not done that.

Q Because you didn't look at trains that weren't delayed at all?

A Correct.

Q So you were in Chicago at Amtrak in 2014. I think we established that?

A Yes.

Q 2014 was a bad year in Chicago, wasn't it?

A For everyone, yes.

Q And freight railroads suffered a great deal in the winter of 2014?

A If -- if I may, passengers and freight and customers suffered a huge deal. The railroads tried to service their customers, and we tried to service our passengers. It was a horrible year for customer service for all partners.

Q So is that one of the reasons, if you know, why the freight delay shown on Figure 1 had this spike in 2014?

A I do not know the cause of the spike in 2014 on this graph, if that particular --

Q Okay. If you don't know, that's fine.

A Yes.

Q Okay. In paragraph 10, you talk about a different source of data from the TOPS data that we have been discussing and you refer to it as, in quotes, CP delay data.

A Uh-huh.

Q What is that data?

A We accumulate a variety of reports in-house to my office as well as through other staff members, and so it's a general bucket. It's compiled of my trained dispatchers' interactions with the Canadian Pacific dispatchers.

So, for example, if there's circumstances where they're asked to put a freight train ahead of a passenger train or route a train differently or for whatever reason, my train dispatchers usually send out a note to a group message that includes like our passenger notification center so we can, you know, notify customers if they're delayed.

There is, of course, Mr. Oppenheim and his full staff. All of them are out and do their job every day, and so when we get information that we're waiting on a freight delay, they'll share that with us, and then we'll also message it out

on their behalf.

And then Dave Rodriguez, who is on my team, he'll do his best to compile the real-time alerting as well as some of the TOPS data as well as the staff messages and try to compile that in the spreadsheets which I believe he provided as part of his review of -- of the CP delays. We do that for all partner railroads. It's a collection of general information that we hear organizationally.

Q Okay. And I think you're referring to a -- you referred to a spreadsheet just now, and your testimony refers to this data being recorded in a spreadsheet. That's referring to what Mr. Rodriguez provided?

A Yes. So if my staff or Rich puts out an -- Mr. Oppenheim puts out a note, Dave, who is on my team, is responsible for grabbing that information and then trying to assimilate it into something that's hopefully usable by the partners, because ultimately the objective is, when we see something that is controllable, and respectfully such as freight priority, we would like to minimize controllable delays.

Q The court reporter yesterday marked

Mr. Rodriguez's statement as an exhibit, and I am trying to see if I can find that so I can hand it to you.

MR. MEYER: There's two. I don't see where we did one. Oh, here it is.

(Rodriguez Exhibit 1 is referred to.)

BY MR. MEYER:

Q I'll show you the document marked Exhibit 1. It's Mr. Rodriguez's verified statement and the materials accompanying it that were labeled Exhibit D-1 by -- by Metra's counsel, I believe.

Are those the spreadsheets that you were referring to?

A Yes, that is correct.

Q And so you, for purposes of your statement, you reviewed those spreadsheets?

A Yes, I review all these spreadsheets, this is -- this is a common business product that my office produces so we review these regularly. Their -- their purpose is wholly constructive. We aim to go into weekly or biweekly meetings with the various partners and say: These are our issues. Can we work on controllable components, et cetera.

Q Okay. And do you regard these spreadsheets as better data on train delay than the TOPS data?

A No.

Q Why not?

A The audience is different. These are compiled reports for discussion. The TOPS data is a raw warehouse of information for which to provide analysis and future analysis. They're simply different.

Q Okay. You -- you refer to these spreadsheets as including delays that aren't in the TOPS database --

A Yes.

Q -- is that right?

A Correct. Or operational impacts.

Q What -- are you referring to operational impacts that are different from delays?

A Yes. So, for example, if a freight train is blocking a customer boarding their normal platform -- and so, for example, I suffer customer anxiety, right, or traveler's anxiety, and so I know what that is; and so if our customer base goes to a train station and sees a freight train, and they don't know how to get to their passenger

I didn't want to give you a freight delay on Canadian National or Union Pacific. The goal was to isolate out the analysis to the discussion.

Q And is it possible -- I'm not talking about these delays in particular, but, you know, in the TOPS database, a freight delay can occur on a line that is owned or dispatched by a freight railroad. But the delay isn't necessarily the responsibility of that freight railroad; it might be the responsibility of a different freight railroad; is that right?

A Can you rephrase the question. I don't want to create a misleading answer because it's Chicago, and it's a complex environment. So I just want to understand the question.

Q You can have -- you can have a delay that occurs to a Milwaukee District West train that may be the responsibility of the Indiana Harbor Belt.

A If I'm aware of that and the discussion is present.

Q But that would be -- it would still show up as a Milwaukee District West delay because the train is still operating on the service?

A Correct.

Q But it wouldn't necessarily be the

responsibility of Canadian Pacific in every instance necessarily?

A That is not necessarily correct.

Q It could be correct in some cases?

A It could be in some cases, it could not in others.

Q Right. Understood.

So the train number is the Metra train number, I assume?

A Correct.

Q Date is the date that the --

A Correct.

Q -- operated?

A Correct.

Q I'm hoping Year is self-explanatory.

A Yeah; and in transparency, for graph purposes, I added that Year column to extract out the year so I could simplify the graphical display.

Q Oh, I see. So you aggregated all of the 2020s --

A And 2018s. I created a basic Excel capture formula just to make the graph pretty, unquote.

Q Okay. That way you didn't have to

Q Okay. The next is Sub Group.
A Don't I don't know what that -- that column is.
Q The next is Controllable.
A That means whether or not on Metra's delay code matrix, Metra's delay, the committee that reviews the delay codes believes that is something that a human factor or human influence could have mitigated.
So if -- I'll give a non-CP example for example.
If a conductor is brand-new and he or she may have trouble opening the doors quick enough, and is getting used to that, they may take an extra minute to do so, and if that delays the train, well, then that, to us, is controllable because that employee was brand-new and could have done it -- done the work a little bit more efficiently.
Q And so am I right in understanding that each delay code will have associated with it some judgment by Metra whether that was controllable or not controllable?
A According to our agreed-to delay matrix.
Q So if it's a D, do you know what the

corresponding entry would be in the controllable field?

A It's controllable. Whereas DE -- so if Canadian Pacific has a locomotive failure, we understand that Canadian Pacific has locomotives, as do all railroads, and occasionally locomotive failures occur. That's a DE code. We understand that that is not necessarily controllable, so that's not controllable, and we don't count that against anyone because while you can generally predict lifecycle failure, you can't always predict operational immediacy failure.

Q So you would not want dispatchers making dispatching decisions on the assumption that a locomotive was going to fail in that, like, next ten minutes when something was supposed to happen?

A They -- all dispatchers should assume all infrastructure and trains are working as intended. We do not -- we do not hold accountable the train dispatcher or the railroad accountable if there is a noncontrollable.

Caveat to that is if you're railroad X and you have 16 locomotive failures that month, well, something else is going on and we're going to want to have a dialogue.

Q Okay. Have you ever seen the Controllable field associated with delay code D filled in?

A Yes, in the previous years. The same testimony I gave earlier with the export and some data not being exported to me, it is there. It's just in a larger archive that has the additional fields, and so I was navigating through. So I -- to be clear, it is there. It's just not in the raw data here.

Q And it's your understanding that for any given delay code, there would either be a controllable or a not controllable?

A Correct.

Q Nothing else?

MR. MEYER: Let's mark this as Godfrey Exhibit 3.

(Godfrey Exhibit 3 is introduced for the record.)

BY MR. MEYER:

Q Mr. Godfrey, I'm showing you a document that's been marked by the court reporter as Godfrey Exhibit 3, and I will represent that it is an extract from the same database, same Excel file as Exhibit 2.

This one is for an earlier period, January

of 2016, and as you were suggesting, many of the fields that were blank in the prior version are filled in in this particular extract. I think the field we have just been talking about is on the second page, all the way to the right, under Controllable.

You see -- you see that?

A Yes, I do.

Q It says here for these trains, all of which have delay codes D or D-1, in the controllable field it says, semi-controllable?

A Yes, it does.

Q So is that refreshing your recollection of what this field contains for delay codes D and D-1?

A It is. I'm referencing our current -- when I said controllable, not controllable, I'm referencing our current delay matrix. I'd have to -- I don't recall why it says semi-controllable in this case. I just don't recall.

Q So you think today Metra regards Ds as "controllable," is that what you're saying?

A Yeah, because -- yes.

Q But at some point Metra regarded those

delays as "semi-controllable" as reflected on Exhibit 3, correct?

A I'm not seeing that. So the data here is stating semi-controllable. I am not going to comment on what that "semi" means without further understanding from the data pool experts that assigned those codes in the system.

Q Okay.

A Just to refer back to my point about controllable and not controllable, is Metra does fairly extract out what is beyond a human being's direct control from what is not. And so, you know, we can't control when an engine is going to fail. We can control the discussion that occurs when a freight needs priority.

Q Well, let me make sure -- you used the word "priority." Not every time that a Metra train is -- let me back up and start the question over.

Do you agree with me that a Metra train can be delayed by a freight train? And let's assume that the freight train wasn't subject to a mechanical failure, so we're not in the whatever code that would be; DE, I think you said earlier.

A Correct.

Q There can be a delay of the sort that I'm positing where the freight train wasn't given priority over the Metra train; isn't that right?

A Can you rephrase? I just don't understand. Sorry.

Q Isn't it possible for there to be a delay caused by the presence of a freight train where there was not a mechanical failure to the freight train and there was no priority given to the freight train over a Metra train?

A It would be good to know that from Canadian Pacific when that occurred, but that real-time understanding or even the post facto understanding of that is not there consistent with the other freight railroads. So I don't know that.

Q Well, I'm not talking about a Canadian Pacific freight train necessarily.

I'm talking about a freight train somewhere in the Chicagoland area on any Metra line. There can be situations where a Metra train is delayed by the presence of freight trains, where if you went and looked, you wouldn't find that a dispatcher made a decision to give a freight train priority, but there were freight

trains that Metra had to be run around?

A Actually, I have specifically instructed my staff to hold Metra trains for freight trains.

Q So your answer is yes?

A My answer is absolutely yes, because it's a network decision, not a train-based decision.

Q And what do you mean by "a network decision"?

A So a network decision means that under the Chicago protocols, there is prioritization of trains that basically goes, you know, passenger operations, and then there's a list of other types of freight priorities. But because the Chicagoland network is so complicated, it is possible if Metra and the partner railroads don't have dialogue in order to manage the network correctly, that one -- not delaying one Metra train, let's say at 9:00 a.m., could result in delaying six Metra trains at 1:00 p.m.

And so with respect to this conversation, all of the partner railroads and Metra, and again, respectful to CP except until recent time, literally talk in real time about how to manage the network so we protect the health of Chicago, so freight services their customers; Metra

services their customers.

So it is a good decision to manage the network under the protocol so that the network management manages capacity. With respect to CP, especially the vicinity of Bensenville, you're quite right.

It's possible that another partner railroad causes that delay on to Canadian Pacific track, but the dialogue of understanding why needs to generally improve, especially in light of the B-1 project at Franklin Park West, where I was recently asked to provide external support for the project, that it was a success for freight and passenger.

Out of respect for the Canadian Pacific, because the delays actually got 1 percent worse, because I believe in the Chicago protocols and the general integrity of the network, I told this external party, I cannot comment, because the relationship with CP was that important to me to figure out how to better use Franklin Park.

But with due respect, 1 percent worse at Franklin Park may be another railroad. I just don't know that.

Q Okay. I think you were describing -- and

I'm not intending to ask this question about Bensenville in particular or Canadian Pacific in particular, but if I understood your testimony a minute ago about decisions being network decisions, not ones about an individual train only, do I understand correctly that the appropriate dispatching decision in a particular case about a particular train needs to consider the implications of a particular move, not just for that train but for consequences that may occur later to other trains?

A Correct.

Q And the consequences that could occur later to other trains could include consequences from activity that at the time of the dispatching decision is geographically somewhere else on the network, but will end up affecting or could end up affecting the same part of the network where the dispatching decision was made. Or it could affect operations on a different part of the network?

A That is correct. And that is why partnerships absolutely matter in Chicago because there's always joint benefits. And I have for ten -- I actually celebrated ten years in Chicago, and I've always gone to bat for another

railroad when we know another railroad partner is not there.

But I say this with the greatest level of respect. We've not heard those reasons and needs from CP.

Union Pacific, who is struggling tremendously right now, has told us their get well program, they have shared where they need to go. We discuss the challenges daily. We need to get back to partnership.

Q Fair enough.

The kinds of dispatching -- strike that.

The dynamics or the factors that go into a good dispatching decision associated with an individual train, as I was describing in my prior question, and I think you confirmed, also apply, do they not, even when the factors relate to other things going on on a single railroad's network?

A Correct.

Q So to know whether a dispatcher made the right decision in a particular case, you would need to know about things going on elsewhere on that network, and things that might happen later in the day as a result of a different decision being made in a particular case?

A Respectful to CP, they're the only partner, capital P, that is not having that dialogue, so we don't know. So you're exactly correct.

Q But their -- their decisions are the dispatching decisions that need to take into account these factors, correct?

A They are, but we are also a partner, we own the line. We should understand what is going on.

Q Going back to the Exhibit 3, I think we got as far as the controllable column. And we are nearing the end, fortunately, I think.

The next -- and maybe it would be helpful to look at Exhibit 3, since more of the fields are filled in and that might help us understand what's in this spreadsheet.

The next column is Delay Location, and in the Exhibit 3 version of this, I see some of the rows have dashes and some have numbers.

Do you know what that represents?

A There's a table that I do not have access to. It's on our corporate intranet. Those locations correspond to either passenger stations or what we call interlocking or control point

stations. They're like basically where we switch the tracks. There's a -- there's a database of what that means, so you can generally figure out where. If the dashes are there, that means the conductor did not enter that data point into their trip report.

Q I see.

And do you know if the delay location is intended to be the location where the Metra train was when it was delayed or the location where the freight train was when the Metra train was delayed?

A That is subject to the interpretation of the conductor filling out that portion of the report, which is why Metra is looking and deploying a more improved system to track delays. It's called our Acorn system. This column in the future will be substantially more granular because technology has changed.

Q You'll have a GPS coordinate for the train, for example?

A We'll know exactly where it is.

Q So when you adopt the Acorn system, will the field be intended to represent where the Metra train was paused?

A Yes.
Q Not necessarily where the freight train was located?
A Correct.
Q Okay. I think you testified earlier that Max/Mins is the maximum number of minutes, so that's the length of the delay?
A The max/min is the maximum amount that train was delayed at a given -- any location on the line, not the final arrival time.
Q So it's intended to say there was some station where the train was this many minutes late?
A Correct.
Q And then Max Delay Formula, I see some alphanumeric.
A I don't know what that is. That is a corporate formula system in our system and the -- the TOPS experts would be better suited to answer that.
Q Okay. Fair.
Next is Delay Explanation.
A Those are the notes that either the train dispatcher or the train crew or through final resolution -- Metra has a monthly meeting called

Gripes. We review all the -- the data for accuracy as managers, and we make edits as -- as when we say, no, that's not quite right. For example, that freight train had an engine failure that day; and a D can become a DE. That is the explanation from a variety of parties on what occurred with that train.

Q Okay. And the next column says Original Delay Data, and it looks like it's mostly the same, at least for the entries that are showing on this page, but could you explain what original delay data is?

A That is, again, according to TOPS experts. We've had several evolutions of the system over time. I believe that is some legacy column that either replicates, but I -- other experts would be better suited.

Q So you - you would rely on the Delay Explanation column?

A Correct.

Q The next column is Date Type.

A That's whether it's a weekday or a weekend or a holiday.

Q And Peak 2 is, I assume, the same information as would have been in the Peak column?

A Correct. I believe the earlier column is a Y or an N, and this is off-peak/peak --

Q So --

A -- scaled down.

Q Let's go -- let's go back to that column on Exhibit 3, and I just want to ask you if you know what -- in the Peak column, I see Ns and I see Ys, and I think we all understand Ns are no and Y is yes.

What is an R?

A That's interesting. I don't know the answer to that question.

Q Okay.

A Oh. But I can suspect it. That was on January 4th. That means it was probably a holiday, and 19 of January is Martin Luther King Day so that's an R. So by deduction, I can let you know that's a holiday code. You wouldn't have had a peak on the holidays.

Q I see.

So it's a weekday without a peak?

A Exactly.

Q Okay. Then the next column from Peak 2 is Minute Grouping.

And is that an indication of whether the

Q Are you sure about that?
A I'd have to go consult my data pool, but...
Q Why don't we look at Mr. Rodriguez's spreadsheet for 2020.
A Sure. You're referencing February 2020?
Q February 2020, yes.
A Okay.
Q So you say in paragraph 13 that in February of 2020, there were 22 freight-related delays on 11 different days. You see that?
A I do.
Q And when I look at the spreadsheet for February of 2020, in Rodriguez Exhibit 1, count the number of days that have delays -- one, two, three, four, five, six, seven, eight, nine, ten, 11 -- that matches the 11 in your paragraph 13, correct?
A Yes.
Q And if I look at the number of delays to freight trains -- or excuse me -- number of delays to Metra trains, that number is 22, correct?
A Yes.
Q Okay. So does that refresh your recollection that you used this table for purposes

of paragraph 13?

A I -- I don't, I don't want to say conclusively either yes or no.

Q Well, conveniently, Godfrey Exhibit 2 is the period from February of 2020 from the TOPS database that you relied upon.

And we can -- we can count the number of days and the number of delays there as well, correct?

A Yes, we can.

Q And what number of --

A It's 19 versus 22, and so by deduction I can potentially agree with you, so yeah, if I got my dates, numbers right.

Q And how many different days had delays according to the TOPS data?

A Nine.

Q Okay. So I think earlier you said you can potentially agree with me. Can -- can we in fact agree that the data that supports paragraph -

A I can now conclusively say yes.

Q Finishing my question:

We can say -- we can agree that the data that supports your statement in paragraph 13 is the data on the February 2020 spreadsheet from

Mr. Godfrey -- I mean Mr. Rodriguez?

A Yes, sir.

Q Thank you. Get the record clear. All right.

So when you tallied up the numbers for paragraph 13, you included every delay that's reflected on the Rodriguez Exhibit 1, February 2020 page, correct?

A Correct.

Q And that includes the delays that are shown in blue, blue shading?

A Correct.

Q That have, in the far right, in the column C/NC, the indication NC?

A Correct.

Q And can we agree that that refers, that NC refers to the fact that these delays were not controllable?

A Correct.

Q In fact, involved equipment-related issues on freight trains?

A Correct.

Q So those were not examples of Canadian Pacific's dispatchers prioritizing freight trains ahead of Metra's trains, correct?

A Correct.

Q So it was your --

A My statement says freight related. I don't -- I understand the general spirit and intent.

You're correct. I used a number that states 22, and some of those were noncontrollable.

When you factor in line experience of our customers, freight-related delays were -- it -- a customer doesn't always question whether or not it's an engine failure versus not.

The point is they were delayed due to some reason. And, yes, I agree with you, I'm trying to focus on controllable; and, yes, I agree with you, those engine codes are certainly not controllable.

Q Okay. So in the next paragraph of your verified statement, paragraph 14, you refer to an incident that occurred on March 28th, 2020.

And do you know whether you were referring to the reporting of that incident in the Rodriguez tables or in the TOPS data?

A I believe -- let me say this:

That incident, I believe -- I'm going from recollection -- was in discussions with Mr. Oppenheim, because, again, we were at the

point where Franklin Park West was coming online, we were trying to manage traffic in the area.

Why were we changing a crew on the line? It was -- there was no phone call that said, you know:

Dear Metra: We really have no crew, we're going to need your help to manage the network.

It was purely reactionary. And that is the spirit and intent of line 14, is we want to get out of reacting to network problems and crew shortages. All of us are always going to have operational limitations.

In this case, a phone call in advance:

Dear Metra, we got a real bad problem. Can you do some fancy footwork here?

Q Uh-huh.

A That is the spirit and intent, because in that case, that didn't happen.

Q So the spirit and intent is to suggest that more communication would be desirable?

A It's needed.

Q But that is the spirit and intent?

A That is the spirit -- absolutely.

Q So this particular CP train changing crews outside the Bensenville Yard, do you have an

earlier today, and -- and is there in the PTC or the dispatching world, a meaning to the terms "control" and "authority"?

A There is.

Q And what is the meaning of those terms, and let me start by asking:

Is that -- are those terms used in the dispatching world separate from PTC?

A They are. And to be -- to not -- to not put like a watercolor brush on this, each railroad has slightly different terms concerning what I believe you are referencing.

Q Okay. So what -- what's your understanding of the meaning of those terms as they would apply to the Canadian Pacific?

A So Canadian Pacific has timetable authority through -- through legacy agreements that it is the timetable railroad of record on the lines that Metra owns that we are discussing.

So that means that their rule book governs the operating rules and protocols on that line and that they become the timetable, if -- if you like. The rules, the operating safety rules, we will use as Metra, their rules or anybody going on the territory that, like I said, we own but they have

authority on, they will use their authority types. Those authorities can be anywhere from an inch to two inches because the rules are extensive. So that's "authority."

In terms of "control," that is a train dispatching term generally that means the employee that has final say and authority as to when a switch is thrown, when a signal is displayed, when an operating instruction is issued to a train, that authority can be delegated as it is currently in terms of some of the sections that Metra oversees. So we have two employees that assist the Canadian National train dispatcher to execute their authorities and control.

Q Okay. And so on -- I think I've learned this, but you can correct me if I've misunderstood.

On at least a portion of the MD West Line, there are locations where CP has authority and Metra has control as we have been using those terms just now.

A No, actually. It's the opposite.

So, for example, there's switching stations called A-4, A-5, A-6 and like B-6. That is -- we have -- on our TMDS workstation, we have

programmed it as the Canadian Pacific Rule Book that my train dispatcher can control, but under the authority only of the Canadian Pacific train dispatcher, so that means that dispatcher can tell my employee to put a freight train ahead of a passenger train.

And by law, by federal law, I have to reply and be respectful of and be governed by the Canadian Pacific because that is what the law says.

Q So in that -- in that setting that you just described, and again, just to make sure we're using the vocabulary the same way, Canadian Pacific's dispatcher has the authority. The Metra operator or dispatcher --

A Because we call it train dispatcher, but correct.

Q Essentially -- this is a tower operator essentially?

A Correct.

Q The tower operator is the one who does the keystrokes or whatever physical activity is involved in lining the track and controlling the signal?

A That is correct.

Q That's what the word "control" means in the vernacular we have been discussing?

A Correct. But it also means who has final decision authority.

So there's authority, and then there's control. If -- if -- respectful to this conversation, if our dispatchers were dispatching and controlling the lines we own, we would make different decisions than Canadian Pacific.

Q Are you sure?

A We certainly wouldn't put a freight train ahead of a passenger train without dialogue and discussion with the Canadian Pacific as a partner.

Q You might make different decisions in circumstances where your judgment about the right dispatching decision might have been different?

A Correct.

Q Okay. Well, you don't know whether all of the dispatching decisions that Canadian Pacific makes would be made differently by a Metra dispatcher.

A We certainly know that the lion's share of decisions of the D and D-1 -- correction, the D delays would have been made differently.

Q You don't know what percent of all of the

decisions that CP dispatchers make affecting Metra are in that category?

A Correct. In this analysis, I did not calculate the -- again, getting back to our OTP, I did not calculate that percentage, correct.

Q So going back -- coming back to the discussion we have had about authority versus control, the responsibility for exercising the dispatching judgment about which trains should move at a particular point on a line and across the network, as you described earlier, that's a set of decisions that goes along with authority and the dispatching authority; is that right?

A If I understand your question, there's no other railroad that owns the track that doesn't control and have the authority in a commuter setting.

Q That doesn't sound like that's responsive at all to my question. I'm asking just a building block question really. Which is:

The way you've been defining the term "timetable authority," that goes along with dispatching responsibility?

A Yes, and it's usually -- and what is -- why I'm trying to just understand your

question is all of that is usually attached to ownership. So there's authority, control, and ownership usually in one section of track.

Q Have you canvassed dispatching arrangements across the U.S. rail network to assess whether there are circumstances where one railroad owns the track that another railroad dispatches?

A I have not canvassed it, but certainly in a commuter setting, my general knowledge of the industry is it's not -- it's it is not a common arrangement.

Q Okay. It's not common. But, again, I'm really asking a different question.

A Okay.

Q Which is, the job of the person who has the control is to safely line the route in accordance with the instructions and the judgments made by the dispatcher who has the authority; is that correct?

A That is correct.

Q That's what it means for there to be -- strike that.

Okay. So I want to turn your attention to paragraph 16 of your verified statement.

A You said 16?
Q 16.
A Oh, wait, you mean 6.
Q 16.
MR. SPITULNIK: On page 6.
THE WITNESS: Oh, number 16. Excuse me. I was looking for pages.
BY MR. MEYER:
Q Sorry, sorry. Yes. Paragraph 16.
So looking at the last sentence of paragraph 16, that sentence is talking about timetable authority in the same sense we have just been talking about timetable authority here, right?
A That is correct.
Q And so when you say:
Sometimes Metra train dispatchers are forced or even forced and required by CP to follow these instructions, what you're describing is the relationship between authority and control?
A Respectfully, authority is the rule book, control is who is actually making the decisions in the dispatching office.
Q Well --
A But the point -- generally the answer is

yes. They have authority and control -- CP has authority and control of the line.

Q But -- okay. So the Metra train dispatchers in this case are the dispatchers who have the physical control over lining the route and displaying the signals, which we discussed as representing what control means in the prior colloquy; is that right?

A Yes.

Q Okay. So when you say:

Metra's dispatchers follow these instructions to display signals for freight trains, their job is to line routes that the dispatcher selects as the appropriate dispatching decision?

A Correct.

Q Okay. So when you say "forced and required," you're really just saying that the CP dispatchers had authority over those decisions?

A The debate is that a Metra dispatcher is not going to ordinarily make that decision without a dialogue, because it is incongruent to the Chicago protocols, which says a passenger train shall be go -- shall be routed first. Or have a dialogue about why we are doing a freight train

first.

Q Understood. But those Metra dispatchers aren't the people who have responsibility for considering the entire network perspective involving the factors that go into making a dispatching decision, correct? Their job -

A From the --

Q -- is to line the route?

A From the word "authority," you are correct. From the overall management of Chicago's network, that's not correct.

Q Those Metra dispatchers, as you refer to them, aren't the ones who are deciding what dispatching decisions to make on a day-to-day basis.

A Correct.

Q They're not looking at the broader CP network on a day-to-day basis?

A Correct.

Q And they're not interacting with Bensenville Yard regarding conditions in the yard on a day-to-day basis?

A Correct.

Q I'd like to direct your attention to the previous sentence in paragraph 16.

You refer to:

A number of recent occasions when my staff and I have witnessed CP dispatchers who are able to prioritize or avoid delay to Metra being directly told by senior management to move CP trains, regardless of the impact on the network?

Do you see that?

A I do.

Q Do you have personal firsthand knowledge of any of those occasions?

A I received calls from Rich Oppenheim, and then I went around and verified, so yeah. But I -- did I look at it specifically? No.

Q So you weren't --

A I have a phone call from a colleague, and then we're looking at it on the screen and with a freight train ahead of a passenger train where it's...

Q Okay. So you weren't involved personally in seeing any CP management issue instructions or hear any CP manager issue instructions?

A I heard it because I was managing a scenario and I was in it with Rich and my staff, like trying to figure out what was going on. Did I physically hear the instruction? No.

Q Okay. And so let's -- let's start the occasions that you're referring to in this sentence are occasions that were brought to your attention by Rich Oppenheim.

A Yes.

Q Are there any other occasions that were outside of that scope?

A There -- I don't fully recall, but we may have discussed this at one or two of our weekly meetings with CP. I just don't recall those -- those meeting dates.

Q Okay. In terms of the occasions you're referring to, these are ones where Rich Oppenheim contacted you to alert you to the existence of a situation?

A Exactly.

Q And when you say "my staff and I have witnessed," you're referring to Rich Oppenheim as part of your staff?

A No, I'm referring to Rich and I as colleague, and then I go to my staff to see if there's anything we can do, how do we manage the network, what's going on, and then you're now in an operating environment where you're trying to figure things out.

So from that standpoint, that's where I'm saying I witnessed this whole -- what is going on, I get a phone call, I run out of my office, what's going on and that sort of thing.

Q And how many specific occasions are you referring to in this sentence?

A I recall at least one or two, but I don't recall the dates.

Q Okay. And do you recall -- well, strike that.

When you say "being directly told by senior management," who was senior management?

A I don't recall the name at this time. I know a name was mentioned.

Q For one incident?

A For at least one incident.

Q And so what's -- let me break this down.

I think you said you recall one or two incidents?

A Generally, yeah.

Q And do you have a recollection of the job description of the CP person who issued the instructions that you're referring to in paragraph 16?

A It was higher than a mid-level manager.

So it goes like train dispatcher, chief, and then either director of the office -- I -- I'm almost certain it was from above that level that that came from.

Q So someone in the dispatching office?

A Or -- or higher.

Q But you don't know?

A I don't know specifically the title of that person.

Q That's -- that's one incident you're referring to?

A That would be the two incidents that I'm referring to.

Q And do you recall approximately when this occurred?

A I do not.

Q Okay. You don't have any records of this of your own?

A I -- I do not. These -- these are experiential operating office. It's like an operating emergency room, like what's going on.

And again, the -- to go back to spirit and intent is every railroad reserves the right to make decisions, but a senior officer should then call a senior officer, and it should cascade and

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VOLUME III, EXHIBIT C

DEPOSITION OF DAVID RODRIGUEZ (JUNE 8, 2022) (EXCERPTS)

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, et al.

- CONTROL -

KANSAS CITY SOUTHERN, et al.

HIGHLY CONFIDENTIAL PORTION

VIDEOTAPED DEPOSITION OF

DAVID RODRIGUEZ

DATE: June 8, 2022

TIME: 9:32 a.m. (Central)

PLACE: Embassy Suites, Columbus Drive, Chicago

JOB NO: June 8, 2022

PAGES: 1 to 120

REPORTED BY: Cynthia J. Conforti, CSR, CRR

A P P E A R A N C E S:

ON BEHALF OF CANADIAN NATIONAL RAILWAY:
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, Illinois 60603
312.853.7000
BY: MARA E. KLEBANER, Esq.
mklebaner@sidley.com

ON BEHALF OF METRA:
KAPLAN KIRSCH & ROCKWELL LLP
1634 Eye Street, NW
Suite 300
Washington, DC 20006
202.955.5600
BY: CHARLES A. SPITULNIK, Esq.
cspitulnik@kaplankirsch.com

A P P E A R A N C E S: (Continued)

ON BEHALF OF CANADIAN PACIFIC RAILWAY:

LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
202.294.1399
BY: DAVID L. MEYER, Esq.
David@MeyerLawDC.com

- also -

SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
310.712.6600
BY: NATHAN H. GOLDEN, Esq.
ngolden@sullcrom.com

ALSO PRESENT:

Sonia Gupta, Sullivan & Cromwell
Jeremy Mangan, Videographer
Sue-Ann Rosen, Esq., Metra

INDEX

TESTIMONY OF DAVID RODRIGUEZ	PAGE
Examination by Mr. Meyer:	6
Examination by Mr. Spitulnik:	118

RODRIGUEZ DEPOSITION EXHIBITS

NUMBER	DESCRIPTION	PAGE
Exhibit 1	Metra Fact Book 2019 No Bates numbers - 20 pgs	7
Exhibit 2	Metra Milwaukee West Line Schedule - Effective 7/12/2021	50
Exhibit 3	(Oppenheim - previously marked) March 2022 Metra document On-Time Performance	23

THE VIDEOGRAPHER: We are now on the record.

Today's date is June 8th, 2022, and the time is 9:32 a.m. This is the video deposition of David Rodriguez in the matter of Canadian Pacific et al., v. Kansas City Southern, et al.

This deposition is being held at 511 North Columbus Drive, Chicago, Illinois.

Will attorneys please identify themselves.

MR. MEYER: David Meyer, with the Law Offices of David L. Meyer, for Canadian Pacific.

MR. GOLDEN: Nathan Golden, Sullivan & Cromwell, also for Canadian Pacific.

MR. SPITULNIK: Charles Spitulnik, Kaplan Kirsch & Rockwell, for Metra.

MS. KLEBANER: Mara Klebaner, from Sidley Austin, for Canadian National Railway.

MS. ROSEN: Sue-Ann Rosen, Metra.

THE VIDEOGRAPHER: Would the court reporter please swear in the witness.

(Witness sworn.)

DAVID RODRIGUEZ,

having been duly sworn, was examined and testified as follows:

statement in this proceeding, which she'll hand you, and that copy includes both the two-page written portion of your verified statement and Exhibit D-1, which is described as a spreadsheet of 2020 to 2021 CP delays.

A Is that the third sheet?

Q Well, my understanding is that exhibit --

A Oh, the whole --

Q -- D-1 is the third sheet and then everything after it.

A Okay.

Q Does this look to be a complete copy of your testimony in this case?

A Yes.

Q Okay. We'll -- we'll be talking about this during the course of the day. But before I get us there -- and maybe we can start by referencing paragraph 1 of the -- of the statement.

I gather your current position is manager of train operations/CTCO?

A Correct.

Q What does that position entail?

A So the manager of train operations/CTCO, in that role, I -- my primary role is to work with

the other freight carriers on systemic issues, fluidity issues, any type of issues that may delay Metras or may have delayed Metras, try and figure out what could be done better in the future. If there's something that we need to do on our side communication-wise, if there's something that the freight carriers can convey to us as to why a specific delay occurred.

And then the CTCO part of that is that each one of the railroads -- not each one, most of the railroads that operate in Chicago have a representative. That CTCO stands for Chicago Terminal Coordination Office. And so I'm Metra's representative in that office. That's why the CTCO at the end.

Q So you work -- during the day you work in the CTCO?

A Yes.

Q And is your role in interfacing with other freight carriers to address systemic issues, fluidity issues, and so forth, as you just described, is that part of the CTCO --

A Yes.

Q -- role?

A Yes.

Q And do you interface with all of the freight carriers serving Chicago?

A To -- in various degrees, yes. Through CTCO, I interface with the railroads that are represented in CTCO. If there's not -- there are a couple of railroads that aren't represented at CTCO, and in those cases, it's mostly dealing with people in the yards or in the operation at those railroads.

Q So if a railroad doesn't have a representative at CTCO, you -- you still interface with them by reaching out and contacting them directly?

A Correct.

Q Okay. And the railroads in CTCO, you interface with their representative at CTCO?

A Yes.

Q And do you also interface with other operation -- operational personnel for those railroads?

A Yes.

Q And does this experience, interfacing with the railroads serving Chicago, give you an understanding of the sources of delays to Metra trains --

A Yes.
Q -- as a result of freight operations?
A Yes. Sorry, didn't mean to cut you off.
Q And do you have an understanding of which freight railroads' trains interfere with Metra most often?
A Yes.
Q Which railroad would that be?
A The Union Pacific.
MS. ROSEN: Are you talking about currently?
BY MR. MEYER:
Q Did you have an understanding of the time frame with respect to which my question was addressing?
A Was there a specific time frame?
Q When you answered Union Pacific, what time frame --
A I was talking about currently.
Q Okay. Has that been true over any period of time?
A I can recollect the last 18 months that has been true.
Q Okay. Do you have a recollection that precedes the last 18 months?

A It may have been a different railroad at some point, but for the last 18 months it's been consistently UP.

Q And -- and where -- where in the Chicago area do UP's operations most often cause delay for Metra transit?

A Around the Proviso Yard area and that -- the Geneva line, the West line.

Q Okay. And the -- we marked an exhibit yesterday at Mr. Oppenheim's deposition that was Oppenheim Exhibit 1, and it has a helpful system map that I will hand to you. Feel free to look at any part of this exhibit that you -- that you wish.

I really, at the moment at least, just have a question about --

A Okay.

Q -- the map. Not so much a question about the map, but interested in using the map to help orient myself --

A Sure.

Q -- about the Geneva line, and you mentioned Proviso Yard.

So do I understand correctly that Proviso Yard -- well, first, I'm sorry, let's back up.

So there's the line heading straight west from Chicago that's labeled UP-W. Is that -- that's the UP-West line you were referring to?

A That is the UP-West line, correct.

Q Okay. And the Proviso Yard is -- it's very small print. I'm not sure -- I'm not sure whether I can see what station is closest to Proviso Yard here, but it's -- Proviso Yard is approximately where the IHB crosses the Union Pacific?

A That's correct. Just west of there.

Q And what Metra station is closest to that?

A I really can't see these.

MR. SPITULNIK: If you don't know --

THE WITNESS: Yeah, I would have to...

BY MR. MEYER:

Q Not particularly important but -- and so the delays -- the types of delays you're talking about involve operations of freight trains into and out of Proviso Yard, is that -- is that what you're telling --

A Proviso, yes.

Q -- me?

And who dispatches that railroad?

A The UP dispatchers.

Q Okay. Are there delays caused to Metra trains on all of the lines that Metra operates?

A No. The Metra Electric, we don't -- there are delays, yes. Is that the question? Delays or freight delays?

Q Well, let's -- let's start with delays caused by freight trains.

A Okay.

Q And you -- I think you started to answer my question --

A I did.

Q -- about freight train-caused delays, and if I understand correctly, Metra electric lines don't have any freight trains on them; is that right?

A That is correct.

Q Do all the other Metra lines have freight trains on them?

A Give me one second to just go through them and make sure.

There is an element of freight impact on every other line.

Q Okay. So at least to some degree, freight trains cause delays to Metra trains on every one of the lines that Metra operates?

what happened and determine whether the codes were accurately assigned?

A Yes.

Q Okay. So while we've got this document open in front of us, the -- if you turn to page 8, you'll see there's a table that reports -- it's Table 3 that reports weekday trains less than 85% on time?

A Yes.

Q Okay. And then it looks like -- I'm tempted to go to the next page and -- because you mentioned the UP-West line, and talk about a train 36.

A Do you want me -- did you want me to go to 8 -- page 8 or page --

Q Sure. Go to page 9.

A Which train were you referencing?

Q So the top row is -- if I'm reading this correctly, and one of the things I'd like you to confirm is that I'm reading this correctly, that this row refers to a train, Train 36, that's scheduled to operate on the UP-West line, and -- and then there is a bold indication that that train was 65 percent on time.

I think OT is on time; is that right?

A That is correct.
Q And -- and that's referring to the month of March.
So in the month of March the train arrived late -- get the math right -- 35 percent of the time.
A That's correct.
Q And "on time" meaning within 5 minutes and 59 seconds of its schedule 65 percent of the time?
A Correct.
Q And then do I understand that what this table is doing is it's listing the days when the train was late?
A It's listing the occurrences during that month where the train was reportable.
Q And then it's tell -- it's indicating how late it was, minutes late. Is that -- that's minutes late at destination?
A Correct. That's the minutes after the scheduled arrival time.
Q Okay. And then there's a delay code associated with each one of those instances?
A That's correct.
Q And these are all -- well, it's actually not all codes that we've talked about already, so

let me -- let me ask about those.

A Sure.

Q So I see a D code, and the delay explanation is negative 15 minutes, freight train interference, okay.

And I see -- just, by the way, I see that in that case 15 minutes matches the number of minutes the train was late, but I see other instances where the delay was either more or fewer minutes than the number of minutes late. Is that --

A That's correct.

Q So the TOPS system is recording the number of minutes of delay associated with the event?

A Based on the information that's put in by the clerk or whoever did the entry, yes.

Q So in a case where -- and I'm not sure any of these are examples of that, so I'm not -- I'm not trying to be specific about a particular train, but in a case where a train encounters a certain number of minutes of delay for freight train interference and then a certain number of minutes of delay because of accommodating an ADA passenger or some other problem, is more than one code assigned?

A No. Whatever the purp- -- the greatest number of delay is, that's what the code goes under.

So the example you gave, if it was five minutes for freight, three minutes for an ADA, three minutes for a single issue, that would be coded for freight.

Q Even though the predominant number of minutes is from things that weren't freight train interference in that example you just gave?

A That's correct.

Q Okay. But it's whichever delay code is the -- accounts for the largest number of minutes by itself.

A Correct.

Q Okay. So what is a D-1 code?

A So when a train is delayed, the first train encounters the delay, there's a potential for subsequent routes or subsequent runs from that same equipment to then be delayed at their departing, because in some cases we have trains that arrive and then depart right out as another assigned train.

So in a circumstance where a train is scheduled to leave 5 minutes after it arrives, but

it arrives 17 minutes late, it's obviously going to depart late.

Now, that train wasn't delayed for freight, but it was late as a result of a train that was delayed for freight.

So the subsequent, the secondaries in those are coded with a 1, so we know that that's not the primary.

Q Okay. So -- so in a case where -- and let me know if it's important for this to be a more specific example, and I'm happy to try. I think I understand what you're saying.

In a case where there's a -- a dispatcher stops a freight train on a Metra track and that freight train sits there for an hour or two hours, every -- every single train that goes past that freight -- has to go around that freight train that may be delayed by a few minutes, every single time that happens that would be a D code?

A That would be a D code.

Q And then a D-1 code is if some of those trains get to their destination late, and so when they -- I think the term is "flip"?

A Flip.

Q Train -- they turn -- they go the other

way out of that station, if they're late, because of having started late --

A Uh-huh.

Q -- and you trace the started late back to the freight train, that's the D-1 code?

A Correct.

Q And you could have a -- you could have a 1 attached to other kinds of delays also?

A Yes.

Q So it could have been a mechanical breakdown that delayed a train, and then the train is delayed on its next run, not the -- the same train but the next train is delayed, and that would --

A You would assign a 1 to that.

Q Okay. So can I ask you to turn to Table 5?

A What page is that?

Q 11.

So I'm looking -- maybe -- maybe let me start just to orient us.

You see that this table is labeled Train Delays By Cause and Line for March 2022?

A Correct.

Q And then in the left-hand column there are

43rd Street, and then Metra dispatches mains 1 and 2 between 59th and 74th.

The NS dispatches the NS mains between 21st Street and CB518, which is approximately 43rd Street, and they also dispatch between 74th Street and Manhattan, which is 189th, I think.

Q So are -- are there freight trains on all the tracks that Metra dispatches?

A There are -- yes. We run Norfolk Southern trains on those tracks.

Q And so if a -- if I see a freight interference on the SouthWest Service line, what does that indicate?

A If you see a freight interference on the SouthWest Service line, it indicates that a SouthWest Service train was delayed at one of the locations that is physically controlled by another foreign carrier.

Could be the IHB at -- at Chicago Ridge, could be the CSX at Forest Hill, could be the NS at CB518, could be the BRC at Belt Junction.

So it's -- this is not going to break it down by carrier. This is just going to give you the collective total.

Q All right. So if you could turn to

your -- turn back to your verified statement. In paragraph 5, you say:

In response to instructions from my supervisor, from February 2020 to early November 2021, I collected data on freight-caused delays on the Met- -- Milwaukee District-North line and Milwaukee District-West line, as well as for the portion of the North Central Service that shares the MD-W.

What data are you referring to here?

A TOPS information, information out of TOPS, utilizing information provided to me via e-mail from dispatchers to again tell the whole story on as much as I can of each delay. And that's what you see in these exhibits.

Q Okay. So the exhibits reflect all of the data that you collected?

A Yes.

Q And you started collecting that data at the beginning of February 2020?

A Yes.

Q When did you receive instructions to do that?

A I don't remember -- to be honest, I don't remember the specific date. I know at some point

I was told that we needed to do it.

UNIDENTIFIED PERSON: We have a delivery.

MR. MEYER: Let's go off the record.

THE VIDEOGRAPHER: Off the record, 10:25 a.m.

(Recess taken from 10:25 a.m. to a.m.)

THE VIDEOGRAPHER: Going on the record at 10:40 a.m.

MR. MEYER: We went off the record because the court reporter's computer connection to power was being delivered.

BY MR. MEYER:

Q And just before that, I believe we were talking about paragraph 5 of your verified statement. And you said, I believe, that you did not recall when you were told to start collecting data on freight-caused delays on the Milwaukee District lines.

Does that bring us back to where --

A Yeah.

Q -- we left off?

A Uh-huh.

Q But those instructions came sometime before February?

percentages are automatically changed based on the number of freight delays attributed to any carrier. That isn't part of anything that's in here for whatever reason, but I could provide that.

Q And when did you start preparing that? Two years? Three years?

A Yes, yes.

Q Was it at the same time that you were asked --

A Yes.

Q -- to prepare the more detailed --

A Yes.

Q Strike that.

You were asked to embark upon the project that resulted in the tables that are in your exhibit --

A Yes.

Q -- detail?

And you didn't report any of the results of that in your testimony?

A No.

Q Okay. The -- where is BNSF responsible for freight interference delay?

A BNSF, it can be responsible for delays on

the BNSF. They can also be responsible for delays at core width on the Heritage Corridor because they control traffic across that line. So there are two locations where BNSF can impact us.

Q And where on Metra's services is UP responsible for freight interference?

A UP could be responsible on the Geneva Sub, they can be responsible on the UP North, they can be responsible on the UP Northwest, they can be responsible at Daval, delaying trains on the Milwaukee North. They could be responsible on the Heritage Corridor, delaying trains at Joliet.

Q You referred to something as "the val"?

A Daval, D-A-V-A-L. That's the name of the location.

Q Where is that, roughly?

A It's on the -- it's on the UP at -- I believe it's -- I -- I don't want to guess. I'm not sure exactly what the location is.

Q I think you mentioned it in connection with the Metra -- at the Milwaukee --

A It crosses the Milwaukee North line, yes.

Q Is that at A-20, by chance?

A I'd be guessing.

Q Okay. But in any event, UP controls --

A Yes.
Q -- some point that is a crossing with the Milwaukee District North line.
A Correct. And so when there's a delay on the Milwaukee North at Daval, we attribute that to the UP, not to the CP.
Q Okay. So if I were to look back at the Metra District North row in the Table 5 from the prior exhibit, where there's freight interference on the Metra Milwaukee District North line --
A Correct.
Q -- that -- some of that freight interference might theoretically be the responsibility of Union Pacific, not Canadian Pacific?
A That's correct, because that table breaks it down by line, not by carrier.
Q Okay. Where can CN be responsible for or where is CN responsible for freight interference?
A It's a long list. The North Central Service. They can be responsible on the -- they can delay trains at the Barrington on the Milwaukee North. They can be responsible for delaying trains on the Heritage Corridor because they dispatch it.

They can be responsible for delaying trains at Joliet, even though the Rock Island dispatcher dispatches that because, like I explained earlier, there are circumstances in time where we give them a window to clear and they don't. They can -- it's the same opportunity at 16th Street on the Rock Island. I think I hit them all.

Q I just want to make sure that --

A Sure.

Q -- you didn't misstate something, and -- and I -- it may reflect my lack of understanding of the Chicago area. You mentioned Barrington --

A That's right.

Q -- as a -- as a place where Canadian National can cause interference, and I think you mentioned in connection with the Milwaukee District North line?

A Correct.

Q Is Barring- -- my understanding was that Barrington was located along the EJ&E, former EJ&E line of Canadian National?

A That's correct.

Q And at least my understanding was that that wasn't close to the Milwaukee District North

line, so perhaps there's some connection I'm not understanding.

A Milwaukee North crosses the UP Northwest at that location. The Milwaukee North crosses the UP Northwest at that location.

Q And Canadian National is responsible for dispatching that?

A They control the signals at Barrington, yes.

Q Okay. So the pie chart on this page, again, I'm not asking you about the numbers but just the identity of the slices, so it -- the next smaller slices here on this particular pie include Norfolk Southern.

We talked a bit about this before, but just for completeness, where does Norfolk Southern -- where is Norfolk Southern responsible for freight interference?

A There's three locations where the Norfolk Southern comes into like Metra for freight.

The first one is head-room moves at Landers. The Landers operator controls those. And that line is -- that portion of the SouthWest Service is dispatched by the NS.

They can delay us at CB518, which is

around 43rd Street. On the SouthWest Service, they can delay us at Brighton Park on the Heritage Corridor. Those three locations.

Q Okay. The next pie slice on this chart is Metra. So can Metra be responsible for freight interference?

A Metra can be responsible for freight interference on the Rock Island. If a dispatcher were to run an Iowa train or a CRL or a CSX on the Rock Island without an adequate window or without adequate coordination and that delayed, that would be a Metra delay.

Q That's an example of --

A Right.

Q -- what we were talking about earlier?

A Exactly.

Q And then IHB. I think you mentioned IHB a few times, but for completeness again --

A Two locations the IHB can delay us, CB Canal on the Heritage Corridor and Chicago Ridge on the SouthWest Service.

Q CSX?

A CSX can delay us at Forest Hill on the SouthWest Service, could potentially delay us on the Rock Island if they committed to clearing at a

specific time and did not.

Q What about situations -- well, let me ask about the last one, and then I'll come back to that.

A Sure.

Q The last -- last one here is BRC.

A BRC can delay us at Des Moines on the Heritage Corridor, and they can delay us at Bell Junction on the SouthWest Service.

Q What about a situation where a train, a freight train interferes with Metra or causes a delay to a Metra train because the train is not allowed on to the BRC at tower -- well, at the point on the Milwaukee District West line where BRC connects to the Milwaukee District West line?

A So that's part of what I do in my investigation in talk -- communicating with the railroads.

The assumption would be that the train got stopped on the Milwaukee West at -- I think that's Galewood We- -- Galewood East.

If the train got stopped, a freight train got stopped there because the BRC wouldn't allow them on, we would look at how that was coordinated.

So if there was a commitment from the BRC to take the train and they didn't take the train, I would assign that to the BRC. That's rare, but it happens. I would assign it to BRC.

If there's -- if there wasn't clear communication and the train was run with an assumption that they were going to be able to take them and then they couldn't take them, that would be assigned to the CP because they are the dispatchers of that territory.

Q And the same -- would the same be true of a train that caused a delay on the Milwaukee District West line heading to the IHB?

A Correct.

Q Same principles --

A Same principles --

Q -- for allocating responsibility?

A -- same principles for allocating responsibility, yes.

Q And what about a train that caused delay at Tower B-17, a freight train that caused delay at Tower B-17 because the dispatcher wouldn't allow it to occupy UP track at Bryn Mawr?

A We'd do the same thing. We'd try to determine how it was -- how it was coordinated,

and there's a certain number, length of train that can fit between Bryn Mawr and the Milwaukee West line.

If there wasn't clear communication, and that train is stopped across the line delaying Metra on the Milwaukee West, then it's assigned to the CP. If the UP made a commitment and then did not honor the commitment, we would assign it to the UP.

Q Okay.

A But, again, just depend -- that's where the more information we have, the better we are at assigning those things.

Q You could set this one aside. Thank you.

A This one?

Q Yes.

So your compilation of monthly data ends in October of 2021?

A It ends in October 2021 in the submission. I continue these chart -- these every month.

Q Do you know why the submission concludes with --

A I have --

Q -- October 2021?

A I have no idea.

Q You haven't stopped doing this?
A No.
Q And you do the same thing for every carrier?
A Correct. Every carrier's breakdown.
Q And is this -- are the individual trains reported in these tables all ones where you have assigned the delay responsibility to CP?
A No. Oh, in these? Yes. In these? Yes. In these tables, these are CP tables, yes.
Q So that the tables you have for each of the carriers reflect -- for every carrier in Chicago, all the tables you've created, they're broken down into which carrier was assigned the responsibility.
A Correct. So this says -- I'm looking at March -- CP - 2020 March. This was -- and so in it you've got UP -- I'm sorry, Milwaukee North, Milwaukee West and NCS.
There's also, in what I keep, a UP table which also has Milwaukee West and North Central Service because they can be delayed at Daval.
So anywhere that there's a potential, then you'll see this carrier on those tables also.
Q So -- so UP -- so on UP's report there

would be a Milwaukee West?

A Yes, Milwaukee North.

Q Milwaukee North. And other lines.

A Yes.

Q So let's -- did Mr. Godfrey, when he, prior to February of 2020 asked you to keep track of CP delays, explain why he was asking you to do it at that point in time?

A Prior to or at -- or on -- in February?

Q Well, you testified earlier, I think, that you were asked by Mr. Godfrey sometime prior to February.

A Right. But I also testified that I kept those prior to then.

So I want to clarify whether you're talking about prior or you're talking about those instructions in February.

Q Well, so why don't -- what I'm trying to understand is whether Mr. Godfrey told you why he was asking you to do something different from what you were already doing.

A No, he didn't tell me exactly why he wanted it. He just told me to make sure that I was documenting everything.

Q Okay. And these tables were -- are only

or more, then it would have shown up in the on-time reporting.

A Correct.

Q Okay. And something that was less than negative 6 would not show up in the on-time reporting?

A Correct.

Q So just going back to the -- we talked about the duration column, and then I think minutes is self-explanatory. I assume that's the number of minutes between the beginning and end of the delay?

A Yes.

Q And then there's a column for cause?

A Yes.

Q Where did the contents of that column come from? Did you write that or did that come from somewhere else?

A Comes from TOPS.

In some examples, I may have been able to secure additional information after the fact. Maybe I got the length of a train, and I would insert that into here. But predominantly if it came out of TOPS, that's what I put in here.

Q Okay. And then type, it looks like all of

these are, at least on this particular page, all of them are FRT. I assume that means freight?

A Correct.

Q And is that -- is it the case that -- we could check this, but if I understood -- well, no, I apologize.

In April there's a -- there's a DISP. That's dispatcher error?

A April? Yeah, DISP is dispatcher.

Q So those are RF codes --

A Yes.

Q -- which you talked about earlier.

A Correct.

Q Okay. So but -- we have freight and we have dispatcher, and all of the types are going to fall into one of those two categories; is that right?

A Correct.

Q Okay. And then the code, that's the code from TOPS that corresponds to the table that we were looking at that has the delay codes?

A Yes.

Q And again, consistent with the testimony from earlier today, if there's a 1 at the end, that means it's a delay to a train that was --

that was not itself delayed but was delayed departing because of a prior delay to the equipment?

A Correct. We refer to those as secondaries.

Q Those are the secondaries.

A Right.

Q Okay. The ARR, I was going to ask you about that, but you've answered the question already. That's how late the train was when it arrived to its final destination?

A Correct.

Q And then the C/NC, I think you referred to controllable or not controllable?

A Correct. That's what that designates, yes, controllable or not controllable.

Q And is -- is the C always assigned -- if it's -- if it's a freight delay that's not equipment related, it's always going to be considered a controllable delay?

A Yes. Unless I have information of un- -- of, you know, unforeseen circumstances that delayed the move, it's coded as a controllable freight delay.

Q Okay. Are there any individual delays in

any of these tables that did not come from the TOPS database?

A No. There -- okay. Let's -- let's go back one second, though.

Any of these in the table that we are looking at in February, the answer is no because they're all highlighted red, which means they all -- they all arrived over six minutes late.

There are some cases where I do have information in here of trains that were delayed en route. Very few, to be honest with you.

If you look at September 2020, there's a train in here, 2209 -- I'm sorry -- Milwaukee West, date 23, 2209, location B-12, minutes delayed, 6. I don't have the duration because that information came from the dispatcher. They were delayed for a Q165, but they arrived on time. That won't show up in TOPS.

Q Which page are you referring to?

A I'm sorry. September 2020.

Q I see, yes. So --

A But the train was on time.

Q So it won't show up in TOPS because TOPS only contains trains that arrive more than six minutes late?

A TOPS doesn't only contain information on trains that arrived six minutes late. It contains all information that is put into it, and in some cases, information is automatically generated through our CAD system.

In some cases, information is put in manually for trains that are not reportable, not over six minutes late, but it's not a consistent practice. It doesn't happen a hundred percent of the time.

Q Okay. So this Train 2209 on September 2020 -- I'm sorry -- September 23rd, 2020, that train would have been in TOPS?

A This train would have been in TOPS.

Q It would have been in TOPS indicating an on-time arrival?

A Yes.

Q And -- but TOPS would not have indicated that there was a six-minute delay?

A There are thousands and thousands and thousands of entries in TOPS. I can't say unequivocally that that one is not in here, because in some cases information for trains that are delayed but not reportable at their arrival does end up in TOPS, but this particular

information I know for a fact came from the dispatcher.

Q Okay. And so the addition of this particular delay by you based on information from the dispatcher was part of the objective of yours to capture every single delay?

A To capture everything I'm aware of, yes.

Q Not just those that show up in TOPS.

A Correct.

Q Okay. And if I were looking for the other examples of that, I'd look for other places where the -- the entry is not in red; is that right?

A Correct. And there are not many in here. September of 2021, the second-to-last page.

Q Okay. So you gathered all of this information, put it in these tables. You did this for CP, but during the same time period you're doing it for every other carrier in Chicago?

A Correct.

Q It appears you've compiled certain of the information from these tables in a spreadsheet which is attached to Exhibit D-2. Is that work that you performed? It's actually called Exhibit D-1. Spreadsheet of 2020 to 2021 CP Delays.

Sorry. I was referring -- I think I misspoke when I was referring to your tables as D2. Your tables and the spreadsheet with the tabulations are all part of Exhibit D-1. So you see the table?

A I see it. I'm looking at it. I'm trying to remember if I did -- to be honest with you, I'm trying to remember if I did this.

I've done tables similar to this for all carriers. This one I don't particular -- I don't remember specifically if I did this one, to be frank.

Q Okay. Well, I want to try and understand what the -- what the numbers represent.

A Sure.

Q And since it's your table, I will ask you to help me.

The -- it appears that you have rows in this table for each of the months for which you have tables indicating delays --

A Uh-huh.

Q -- is that right?

A Yes.

Q And for each month -- take February right at the top -- you have number of days in the

THE VIDEOGRAPHER: Going on the record at 11:48 a.m.

BY MR. MEYER:

Q Okay. Mr. Rodriguez, I wanted to continue reviewing your Exhibit D-1 for various delays reflected in these tables, and the first thing I want to ask you about, we were looking at the table or the tables for February 2020, and I noticed starting in March -- in March, I'm not sure how consistent this is, but at least it appears consistent after February that the SAL column and the duration column are no longer filled in.

A That's correct.

Q Is there a reason for that?

A I'm not getting information.

Q It's not coming from TOPS any longer?

A Those columns are not in TOPS. Those columns are -- that's me asking dispatchers and asking people for information, and the sources where I was getting that information, I don't -- I don't have information any longer.

Q You don't have access to the same sources?

A No.

Q Why not?

A It's a great question.

People were providing this information to me, and they haven't been providing it to me, so I have a lot to do with all these other -- with every other carrier, and so I don't have that information.

Q And is that true for other railroads too?

A It is, yeah, correct.

Q And had your tables from the period prior to February of 2020, had those tables contained a SAL and operation information?

A Not a hundred percent, but a good number, yes.

Q Okay. So for February, we're able to see whether -- at a particular location where a delay occurred, whether the Metra train arrived at that location late relative to its schedule?

A Correct.

Q But for March, we can't tell?

A No.

Q And anywhere that the SAL, the SAL column is empty, we can't tell -- we can' whether the Metra train was already late when it was delayed --

A Correct.

Q -- for a reason in this table?
A Correct.
Q How did locations get assigned or particular delays get assigned to Milwaukee District North or Milwaukee District West?
A Based on what line they operate on.
Q So I just want to look at the table for August of 2021. And in the Milwaukee District West table --
A Uh-huh.
Q -- on August 3rd, you see there's a delay at a location called Rondout?
A August 2021?
Q August 2021.
A Sorry. I was looking at 2020.
That is an errant entry.
Q So the location is wrong?
A The location is incorrect.
Q The train is on -- Train 2212 is on the Milwaukee West line?
A Correct.
Q And Rondout is a location on the Milwaukee North line, right?
A Correct.
Q Do you know where the six-minute delay

actually occurred?

A Based on this table, no.

Q The location is coming out of the TOPS database?

A Yes.

Q So the TOPS database is wrong in this case?

A This is not -- it's me populating it. This is my error. It may be correct in TOPS. I may have put the wrong location.

Q Okay. So some of the causes for delay contain some indication of what happened. Some -- some just say "freight train interference."

A Correct.

Q Which doesn't provide a lot of information about what actually happened.

A That's correct.

Q Is that because you didn't have the information?

A That's correct.

Q So do we know in those cases whether CP's dispatchers did something inappropriate?

A I can't say unequivocally the answer is yes. My answer would only be that the CP dispatcher dispatches the railroad at those

locations and makes the decisions on when freight trains operate.

Q So freight train interference just means that there was a freight train?

A Correct.

Q There might have been no way for any dispatcher to avoid the interference?

A That's fair.

Q Some of the delays in here just refer to a particular -- what appears to be a particular freight train. An example actually was the one you referenced earlier today from September of 2020 on September 23rd, where the cause is listed as Q165 with 31 cars. Is Q165 a freight train?

A That's a freight symbol, correct.

Q Is that a CP freight train?

A I'm not sure whose freight symbol that is.

Q Okay. And the location here is listed as B-12?

A Correct.

Q Is that east of Bensenville Yard?

A Yes.

Q And my question about this is perhaps similar to my question about freight train interference.

The reference to a freight train just tells us that it was that freight train that was in the way of a Metra train?

A Correct.

Q It doesn't tell us whether a -- better dispatching could have avoided the delay?

A It does not.

Q So just to take another example, January of 2021, looking at the 18th of January, B-17, there's a reference to CP 470?

A Yes.

Q That's just a reference to a train. There's no --

A That's all the information I had, yeah.

THE REPORTER: I'm sorry, I didn't catch your answer.

THE WITNESS: That's all the information I had.

BY MR. MEYER:

Q And again, we don't know whether better dispatching could have avoided that delay?

A I do not know.

Q And if you look down at 27th of January of 2021, there's a reference to two trains, CP 286 and CP 473.

A Yes.
Q Any -- do you have any information on what happened with those trains?
A An 11,000-foot train and a 12,000-foot train running during p.m. peak, there's no window where those trains would fit without delaying Metra.
Q Okay. So that's -- that's an example of something that -- where a dispatcher should not have run those trains --
A Absolutely.
Q Would you be able to go through these delays and identify other cases where you know the dispatcher should not have run the train?
A Yes.
Q Do you know how many situ- -- how many cases there would be?
A Not off the top of my head. I'd have to go through it.
Q So let me ask you about July 2021. So I'm sorry, I was looking at the wrong page. July 2021 -- on the 21st of July, I see a reference to Metra Train 2242 at Spaulding?
A Yes.
Q Spaulding is where the CN crosses, right?

A Correct.
Q And there's a reference to CN freight traffic at Spaulding.
A Yes.
Q And then a type -- type code of dispatcher, RF code.
A Correct.
Q So that's a dispatcher error there, not a freight train interference delay?
A I -- for some reason it's coded RF. Just based on what's here, it should probably be coded DD, but I don't have any of the background information because it's not -- it's not included in here. There could have been a reason why we did it as an RF.
Q So RF is an error dispatching a Metra train?
A It's an error dispatching that doesn't involve -- it didn't -- that doesn't involve freight, a physical freight train. It's a dispatcher error. Did you ask me if DD or RF?
Q Well, I was asking about RF.
A Okay. RF is a freight dispatcher error that does not involve a physical freight train.
Q And then you -- you said perhaps it should

have been coded a DD. That's a dispatcher error involving a freight train?

A Yes.

Q But what made it a dispatcher error rather than a freight train delay?

A Based on this information, I couldn't answer that. Because this -- based on this information it should be coded DD.

Q So -- but it -- as a dispatcher error, a DD dispatcher error, it would still be a dispatcher error rather than a general freight interference?

A Correct.

Q And what made it a dispatcher error rather than a general freight error?

A The decision to run the freight train instead of the Metra train.

Q Which may have been an error?

A Yes.

Q By the dispatcher?

A Correct.

Q A mistake?

A Yes.

Q Not an intentional move?

A No.

Q Is it possible that delays caused by freight train interference that are coded D also reflect situations where the dispatcher was not intending to delay a Metra train?

A It's possible, but short of having that information, we code those D.

Q Okay. So if I'm looking at the tables here and the locations, is it possible for me to assess where -- which of these delays related to freight trains that were operating on the Milwaukee District West line originating at Bensenville and heading west or arriving and terminating at Bensenville from the west?

A For you to be able to determine that from this information?

Q Yeah.

A Only if we included it in the delay information.

Q Well, there's -- some -- some of the delays could be ruled out as involving those kinds of trains, right?

So, for example, Milwaukee North delays wouldn't have anything to do with a train between Bensenville and the west or between the west and Bensenville, would it?

A West of Bensenville?
Q Yeah.
A No.
Q And a North Central Service train wouldn't be delayed by a freight train that was moving between the west and Bensenville or between Bensenville and the west, would it?
A No. Unless that train came east of Bensenville, that would be the only way.
Q So a train would have to come east of Bensenville --
A Correct.
Q -- to delay an NCS train?
A Correct.
Q And -- and if we were to go through the locations here, we could identify locations that were east of Bensenville that would not be -- would not have involved a train that was operating only between Bensenville and the west?
A Correct.
Q So if I look at February 2020, the first -- the first line item in Milwaukee West is Bensenville. We can come back and talk about that later. There's B-17. That's west of Bensenville.
The next one's blank. Is that -- is there

a reason for there to be a blank location?

A It's -- it's blank because the location was not entered in TOPS. So when I took the information, I included it in the cause but didn't assign it a location.

Q Based on this information, we just don't know where that delay occurred. Well, actually, maybe we do.

A You do -- you do in cause between B-12 and B-17.

Q Okay. But just reading down -- further down in the column, B-12, if we see B-12, we know this was a delay that resulted from freight interference east of Bensenville; is that right?

A Yes, yes.

Q Similarly, if we see Galewood, we know it happened east of Bensenville?

A Correct.

Q A-5 is also east of Bensenville?

A Correct.

Q So if the question were how many of these delays were related to freight trains that were moving between Bensenville and the west, we could at least eliminate the ones that are at locations east of Bensenville from consideration.

A Correct.

Q Now, we wouldn't -- we wouldn't know solely from that -- like, it will -- if there's a location at Bensenville at B-17, we'd need more information to determine whether the freight train that caused the delay was operating between Bensenville and the west or was operating past Bensenville and heading north?

A Correct.

Q Or moving past Bensenville to the east and perhaps making a crew change at Bensenville?

A Correct.

Q So the only place we could look for that information is in the cause --

A Correct.

Q -- explanation?

So if we look at Bensenville -- the first item, date, February 1st, Bensenville location, there's a delay. It says:

Delayed for CP 286 yarding at Bensenville?

So we'd have to know whether CP 286 was a train that operated between Bensenville and the west or came from another location, the north, into Bensenville?

A We know that it's yarding. It's going

into the yard, right.

Q And do you know where the CP 286 train symbol operates?

A Not off the top of my head, no.

Q Okay. But if someone did know that --

A Yes.

Q -- they could assess whether it was a train from the west or a train from the north?

A Yes.

Q Similarly, the next line is at B-17, so that's, again, the control point west of Bensenville, and then what we know from the cause, single tracking around CP 681, an emergency, we'd have to know whether that particular CP 681 was a train that came from the west or was going to the west or going to the north?

A Okay. So the delay is to the westbound train. I could -- I could do this for you if you want.

The train is a westbound train.

Q You mean the 2717 is a westbound train?

A Yes.

Q Is that what you mean?

A Yes. 2717 is a westbound train. So they were delayed for CP 681, an emergency, 35 minutes.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VOLUME III, EXHIBIT D

HIGHLIGHLY CONFIDENTIAL – DEPOSITION OF RICH OPPENHEIM (JUNE 7, 2022)

(EXCERPTS)

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, et al.

- CONTROL -

KANSAS CITY SOUTHERN, et al.

HIGHLY CONFIDENTIAL PORTION

VIDEOTAPED DEPOSITION OF

RICHARD OPPENHEIM

DATE: June 7, 2022

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REPORTED BY: Cynthia J. Conforti, CSR, CRR

A P P E A R A N C E S:

ON BEHALF OF CANADIAN NATIONAL RAILWAY:
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, Illinois 60603
312.853.7000
BY: MARA E. KLEBANER, Esq.
mklebaner@sidley.com

ON BEHALF OF METRA:
KAPLAN KIRSCH & ROCKWELL LLP
1634 Eye Street, NW
Suite 300
Washington, DC 20006
202.955.5600
BY: CHARLES A. SPITULNIK, Esq.
cspitulnik@kaplankirsch.com

A P P E A R A N C E S: (Continued)

ON BEHALF OF CANADIAN PACIFIC RAILWAY:
LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
202.294.1399
BY: DAVID L. MEYER, Esq.
David@MeyerLawDC.com
- also -
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
310.712.6600
BY: NATHAN H. GOLDEN, Esq.
ngolden@sullcrom.com
SONIA GUPTA, Esq.
(Washington, DC office)

ALSO PRESENT:
Jeremy Mangan, Videographer
Sue-Ann Rosen, Esq., Metra

INDEX

TESTIMONY OF RICHARD OPPENHEIM	PAGE
Examination by Mr. Meyer:	5
Examination by Mr. Spitulnik:	293
Further Examination by Mr. Meyer:	299
Further Examination by Mr. Spitulnik:	307

OPPENHEIM DEPOSITION EXHIBITS

NUMBER	DESCRIPTION	PAGE
Exhibit 1	Metra Fact Book 2019 No Bates numbers - 20 pgs	34
Exhibit 2	Metra Milwaukee District West Line Schedule - Effective 7/12/2021	48
Exhibit 3	March 2022 Metra document On-Time Performance	100
Exhibit 4	Summary of CP Delay Events 2016 - 2021 METR_FD36500_001156.01 - METR_FD36500_001156.22	154

THE VIDEOGRAPHER: We are now on the record. Today's date is June 7th, 2022. And the time is 10:03 a.m.

This is the video deposition of Rich Oppenheim in the matter of Canadian Pacific, et al., versus Kansas City Southern, et al.

Will the attorneys please identify themselves.

MR. MEYER: I'm David Meyer, Law Office of David L. Meyer, for Canadian Pacific.

MR. GOLDEN: Nathan Golden, Sullivan and Cromwell, also for Canadian Pacific.

MR. SPITULNIK: I'm Charles Spitulnik with Kaplan Kirsch & Rockwell for Metra.

MS. ROSEN: Susan Rosen, in-house Metra.

MS. KLEBANER: Mara Klebaner from Sidley Austin for International Airway.

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

RICHARD OPPENHEIM,

having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MEYER:

Q Good morning, Mr. Oppenheim.

that time?

A Yes, it was.

Q And those commuter trains, were they Milwaukee Road commuter trains or someone else?

A By 1980 -- you know, whether the office first opened in 1980, I believe they were still operated by Milwaukee Road at that point. Shortly thereafter, the State of Illinois intervened and Metra was established.

Q Okay. And the same was true on the MD North line?

A Yes.

Q And do you recall approximately how many freight trains there were on the MD West line at that point in time on -- on a daily basis?

A Yes, on a normal day, there were five westbounds, and I want to say seven or eight eastbounds fluctuating, you know, periodically, on business levels and that sort of thing, but I think there were five main primary trains that operated on the West line then.

Q So the westbounds -- well -- strike that.

The freight trains you're describing, the five westbounds and seven to eight eastbounds, were those scheduled manifest trains, or...

A They were -- there was a -- a -- an ideal -- an optimum schedule. There was a schedule that was approached. I don't think that in those days that people really considered them scheduled. You know, it was just when the trains ran and we knew when they would run, but -- and there was a fairly regular pattern to it, but I wouldn't call it a schedule, per se.

Q Fair enough. I was actually meaning to emphasize the aspect of schedule to mean these were manifest trains that would operate on a regular basis between Chicago and some point west or vice versa; is that -- is that right?

A That's right, yes.

Q And they included trains between Chicago and Kansas City?

A Yes.

Q And were there also trains between Chicago and other points that used the MD West line?

A Yes, we had a train that ran out to Davis Junction, and north towards Janesville at one point. Occasionally, there would be trains that ran on Milwaukee West that would, once they got to Savannah would go up the Dubuque line, Marquette to Mason City and so forth.

Q Okay. And if I were to take the number you gave me earlier, the five westbounds, and seven to eight eastbounds, if I -- would I -- would that include local trains?

A No, those were just the through trains. We also had a -- we also did have local trains. Took care of the various industries in the Chicago area that were located on that line.

Q Between, say, Bensenville and Elgin, how many trains operated local on a daily basis?

A On a regular day, it was -- it was just the one.

Q Okay. So that would be a local out from Bensenville and then back?

A Correct.

Q And then in addition to that, would there have been bulk trains, unit trains, other sort of unscheduled trains?

A Yes, yes.

Q How often would those run?

A There -- there was basically a grain season every year in the fall, and that's when you would see most of them.

Q And during grain season, how many trains would typically operate on a daily basis?

A I would say the -- in addition to the five and the seven I mentioned, there might be maybe two more, two or three more, possibly.

Q And would that be loaded trains, destined to market?

A Usually in one direction they would be loaded, in the other direction they would be empty.

Q But there's a two or three -- what I'm asking is does the two or three include both empties and loads, or is it two or three loads?

A I would say both, yeah, two to three -- make it two to four.

Q Okay. And when you were dispatching -- well, let me maybe establish some foundation.

When you were in the Chicago dispatching office that had responsibility in this time period for dispatching the MD West line, how did -- how did you dispatch those freight trains in connection with the passenger operations that were on the same line?

A Well, the good news was for the larger part of that period, the five westbound Kansas City trains operated late at night. The first

couple might -- may have come out when there were one or two Metra trains left out there running, but for the most part they were finished. There was one -- one freight train that did operate during the day every day around noon, and basically we would look for the Metra trains -- midday ran hourly, it ran hourly service, and we'd typically look for a window after a Metra train had passed and then have the freight train come out behind them.

Q And so let me see if I understand what you just said.

You're talking about a westbound train?

A Yes.

Q Departing Bensenville; is that correct?

A Um-hmm, um-hmm. Yes.

Q And so you would -- well, was the -- was the MD West line double track in that era?

A Except for about a mile crossing the Fox River, outside of Elgin. It narrowed to a single track across the Fox River, Tower B-35, and otherwise there were -- there were two tracks. We called it two main track centralized traffic control.

And then beyond Elgin, it was double track

your verified statement about the effect of the CP-KCS transaction on Metra.

A Right.

Q What I'm asking you is, what assumptions did you make?

A The assumptions that I made were that traffic between the Twin Cities and Kansas City would increase, which is essentially the point of the whole thing, from my perspective. That the traffic would increase, that CP would intend -- intentions would be to funnel all of the stuff up and down the Marquette Sub, that the Marquette Sub would be incapable of handling the increased traffic and that there would be an overflow that would wind up coming through Chicago. And I believe that -- well, that was the assumption.

Q So your assumption, the assumption in your testimony about the adverse impact at CP-KCS on Metra is predicated on the routing of Kansas City, Twin Cities traffic through Chicago?

A Partially, yeah, partially.

Q What about the other partially?

A The other partially is that there would -- it would be very odd to not have an

increase in other traffic to Kansas City from places like Portage and Milwaukee and Racine and anywhere up and down the line. I know it's not included in the -- in the submission, but we all know CP isn't going to turn down some business if it shows up and why wouldn't it? I guess that's part of my assumptions as well.

Q Help me understand what you mean when you say, "CP wouldn't turn down business between places like Portage and Kansas City."

What does -- how does that bear on your assessment of the impact of the transaction?

A It bears the assessment, in that, if there was an increase in traffic due to concerns, customers of CP that were already online and as a result of the merger wanted to send more of their products to Kansas City, that it would eventually -- not eventually. It would, by definition, wind up coming through Chicago.

Q So if a train that's coming to Chicago from Milwaukee has an extra car on it, does that affect Metra?

A Shouldn't unless it puts it over 10,000 feet. No. No. It shouldn't.

Q So really what you're saying is that

you're concerned that there would be additional trains?

A Yes.

Q And -- and you're concerned that there will be additional trains between Milwaukee and Chicago?

A Milwaukee and Chicago destined to Kansas City.

Q And why the latter component?

A I guess because the location of KCS. It's just basic logic that the point of the merger would be that additional traffic would be flowing to and from Kansas City as a result of going through all this to -- to merge the two railroads that didn't seem --

Q Okay. So -- so now let me --

A Too much of a stretch --

Q Let me unpack it.

A Yeah.

Q Let me -- let me make sure I've got -- I've got this right. I do not -- I do not want to mischaracterize your assumptions or your testimony. So I'm asking you, not trying to testify here.

Category 1, the assumptions that lead to

concerns are that there will be trains between Kansas City and St. Paul that operate via Chicago?

A Yes.

Q There are added trains because of the transaction?

A Yes.

Q Okay. And then the second category is that there will be growth in trains between points north of Chicago and Kansas City added because of the transaction?

A Yes.

Q Is there any other category?

A Well, you need to include -- just so I understand what you're asking me, are we talking just Milwaukee North or are we talking north --

Q Talking about the CP-KCS transaction --

A Yes.

Q -- causing impacts to Metra --

A Yes.

Q -- about which you're testifying?

A Yes.

Q Okay.

A And the other concern would be traffic that originates in Kansas City or is going to Kansas City and is going to the other railroads in

the Chicago area that CP interchanges with that would have to get to the IHB or the BRC and be in our way in so doing.

Q Okay. So third category, let's make sure I've got this right, this traffic that's going from Kansas City -- or between Kansas City and Chicago as a result of the merger -- they're trains between Kansas City and Chicago as a result of the merger where there are additional trains going east of Bensenville to BRC or IHB?

A Yes.

Q Okay. And that -- that would get in Metra's way, is what you're saying?

A Yes.

Q Okay.

That's the third category?

A Yes.

Q Okay. Anything else?

A There's always the unforeseen when you're talking about the future and what's going to happen in the future, I certainly can't predict all the possibilities. Yes, there's other possibilities.

Q But none of the other possibilities are what you're testifying about in --

A No, that is accurate, yes.

Q Okay. So a little bit earlier today we talked about on-time performance, and you're familiar with on-time performance reports that Metra provides to the public; is that right?

A Yes.

Q Okay. And I think maybe to facilitate our discussion about this topic, let me mark an exhibit.

(Oppenheim Exhibit 3 is introduced for the record.)

MR. GOLDEN: Oppenheim 3.

BY MR. MEYER:

Q Okay. I've asked the court reporter to mark as Oppenheim Exhibit 3 Metra's on-time performance document for March 2022. And I'll represent that that was pulled right off the website, Metra's website. Obviously, if there's something about what I'm showing you that doesn't look right, let me know, but... have you seen this report before?

A I have not.

Q You've seen monthly on-time performance reports that Metra produces for other months; is that right?

And then if you look at Table 5A, which is on page 11.

A Okay.

Q This table is labeled "Train Delays by Cause and Line, March 2022." We're looking at the same page?

A Yes.

Q Okay. And this table is providing a breakdown by cause category of the train delays that occurred during March of 2022 on each of the lines that Metra operates, correct?

A Yes.

Q And so if we look at the MD West column, I think the way to read this, and I'd ask you to confirm, is if you look all the way at the bottom, there are three rows at the bottom that are giving totals. The total trains delayed row shows 33 total trains delayed in March 2022 on the MD West line. That matches the 33 that was on the table that we just looked at for the MD West line in the column "Total Translate."

So that's the 33 late trains during March of 2022 on MD West, correct?

A As far as I can see, yes.

Q And then the entries in the various cause

categories are sort of breaking that 33 down into the various causes. And do you know who at Metra assigns causes to a delayed train?

A That -- that also involves a process in which the various departments discuss every morning the trains that arrive beyond tolerance and have to agree on a cause. And sometimes it's not clear what the cause was, or could be multiple causes, and somebody's got to take the blame for it, essentially.

Q So there's a team of people at Metra every day that discusses each of the delays and assigns a cause. Is that what you just said?

A Theoretically. I mean, essentially that is. And there is a conference call every morning in which the various lines and the transportation, engineering and mechanical people from each line discuss the trains that wound up on the report and come up with a code. And usually the code is fairly clear, but a lot of times it is not, and if it's not clear, there's a discussion.

Q Okay. So I just want to go back to that column on page 11 for MD West, since we have been talking about MD West, and go out all the way to the bottom, there are 33 total trains delayed.

And bottom two rows appear to break that 33 down into two different categories. One is total Metra/PSA delays and the other is total foreign carrier delays.

Do you see that?

A I see that.

Q Do you know what a Metra/PSA delay is?

A That would be the lines that are -- let me preface it by saying I'm not a hundred percent sure, but I -- my understanding is that this would be delays that were caused on the lines that Metra owns and dispatches, plus the delays that occurred on BNSF and UP, which are the PSA carriers.

Q Well, in MD-W there are 23 Metra/PSA delays in March of 2022.

Do you see that?

A Yes.

Q So MD West isn't a line dispatched by Metra, is it?

A No.

Q And it's not a line that has a PSA operator, is it?

A No.

Q So what are those 23 delays?

MR. SPITULNIK: If you know.

Q Someone in the legal department was tasked with reviewing that archive. What were the instructions that that reviewer had for purposes of that review? Do you know?

A I know they were -- they were supposed to be looking for e-mails that I sent directly to individuals responsible for -- for delays or -- delays or inconvenience or any situation that made us less than the service organization we would like to be. Any of those e-mails that were sent out in regards to handling by CP, outlining the situation, a lot of them contained suggestions of better ways to have handled it, in attempt to improve things moving forward. But the specific instructions, I don't remember, but it was something to that effect.

Q So something to the effect of look in the e-mail archive for any action by CP that caused any situation, including a delay, including inconvenience, that resulted in Metra not providing what -- would it be unfair to say perfect customer service?

A The desired customer service, that way.

Q Is desired customer service different from perfect customer service?

A Yeah, I don't believe we're ever going to get perfect. It's not going to happen.

Q But a one-minute delay would be the kind of thing that you believe would fall into this category of providing less than what Metra --

A It can, yeah, it can.

Q Just so I understand the scope of what was being asked --

A It would depend on the situation.

Q -- did you know what time period was covered by this archive?

A I think they went back to 2016.

Q And do you know if there was a reason for not going back farther?

A I do not, no.

Q Okay.

A All right.

Q So the intention was to capture 100 percent of the e-mails that you sent since January of 2016 addressing any of the situations within the scope of what you just described?

A I think that's probably accurate, yes.

Q Okay. And do you know how many separate instances of CP action or --

A I do not.

Q -- are reflected in your e-mails?
A I -- no, I do not know.
Q I'm going to ask you to look at the end of your e-mail compilation which is Exhibit B-2. There's the table, which is Exhibit B3, which you describe in your verified statement at paragraph 32 as a:
Spreadsheet documenting these events to better quantify the delays and interference recorded in these e-mails.
You see that?
A Is it from --
Q I was reading from paragraph 32. Take your time. It's farther back.
So your statement is right after tab 2. Here.
A Oh.
Q Too far forward, yeah.
A 32.
Q So I was reading from that paragraph what you testified to about what Exhibit B3 is. And now I'd like to ask you to go to Exhibit B3 and confirm for me if it's correct that you reviewed that Exhibit B3 for correctness as a summary or a documentation that quantifies the delays in

Q Heading to where?
A Heading toward A-5 in order to go toward Milwaukee.
Q Okay. And I think you said earlier that that northbounds via A-5 are only occasional?
A No, the southbounds are occasional. The old 281, which is 247, that's every day and they try to leave Bensenville, I think they're scheduled to leave at 10 o'clock or 10:30. So every single day they're out there when 2232 shows up at 11:10.
Q So when this happens, when this kind of thing happens where the train is -- a Metra train calls at a platform other than the one that you've described as typical, you'll send an e-mail off to Canadian Pacific complaining about --
A Yes, yes.
Q Every time.
A I'm sure I've missed more than I've documented, but yes, we try -- I try to.
Q You try to send it every time.
A Yes.
Q Okay. And let me ask you about the way Metra's stations are configured. I know there's an exception to this in Bartlett, I think, but we

can come back to that.

The platforms on the MD West line anyway are right across from each other at grade level, so you can cross from one side to the other, assuming there are no trains there, understand that.

A Right. Our passengers don't understand that sometimes, but yes, you're correct.

Q So let me just understand, so don't passengers all have to cross the tracks to get to the platform to get to and from Chicago?

A Not necessarily.

Q So, well, passengers get to Metra stations by foot or by car mostly?

A Yes.

Q And they come from either their home or a parking lot where they park their car?

A Yes.

Q And that's on one side of the tracks or the other, right?

A Yes.

Q So if their train is to Chicago in the morning, and they anticipate that would normally be on track 2, they come to the platform on track 2, maybe they parked south of the tracks, but when

they come home in the evening or midday, assuming they're coming back on the train, typically they will alight -- I think that's the right word, right --

A Sure.

Q -- on the platform of track 1?

A Yes.

Q Okay. And now they're home or their car is on the other side of the tracks?

A Yes.

Q Across the tracks?

A Yes.

Q And same would be true for someone coming to the station from the other side. They'd have to cross the tracks either in the morning or at night typically?

A Yes.

Q So it's kind of designed into the system that passengers are crossing the tracks.

A Okay. Yes.

Q You agree? "Okay" is not an acceptable answer.

A Yes, I wouldn't -- I would say that on a regular basis, passengers do cross the tracks.

Q Okay. Thank you.

So now, and again, we are going to talk about --

MR. SPITULNIK: Could you let him finish his answer.

MR. MEYER: It was a yes-no answer; yes-no question. You can follow-up on redirect if you want.

BY MR. MEYER:

Q The -- in situations where a train is going to come on the track, that as you've described it, wouldn't be typical, so if the eastbound in the morning to Chicago is going to come on track 1 instead of track 2, Metra would notify those passengers via a loudspeaker system at the station; isn't that right?

A We would attempt to notify them.

Q Well, there is a loudspeaker system at every station, isn't there?

A Right, but believe it or not, our passengers don't all get there ahead of time and paying attention. A lot of them sit in their cars until the very last minute and they wouldn't hear the announcements. We have some English-as-a-second-language folks that are -- don't understand the announcements.

Yes, we do make announcements, but it's not -- it's not a foolproof system.

Q Fair enough. If I'm -- strike that.

Would you say it's typical that there's only one person getting on a Metra train at a given station?

A It's not typical, no.

Q And so if -- if one person understands the loudspeaker and heads over to the proper platform, that's a pretty good indication that other -- other passengers will get the idea that the train's coming on a different platform from what they might have thought at first?

A You would think that would be true. However, I live in Deerfield, and for a lot of years rode the first train in in the morning. And periodically my train would be on the opposite track, and there would be an announcement, and three-quarters of the people would go over to the proper side where the train was coming, and at least a quarter of them would stand there holding their newspapers as if nothing had happened, waiting for their train to come in. And on occasions I had to go over and actually tap people on the shoulder and say, "go to the other side."

Q And so if I were to look at all the times 473 delayed Metra trains in the kind of scenario you're describing, what you're saying is I should look not just at 2225; I should look at 2227 and 2233 as well; is that what you're saying?

A Yeah, if you're looking at recent ones, yes. As far as going back, I mean, you got to understand that there were periods where documenting this stuff was more of a -- of a focus, shall we say. I mean, there are a lot of things that I get involved with, you know, new schedules coming up, events. I don't capture every delay, nor do I purport to capture every delay. I think, more accurately, this is a representative sampling of things that occur out there rather than a documentation of every single incident.

Q Well, it was intended to be a documentation that went beyond the TOPS data that you said is incomplete?

A That's true.

Q But the only way we can know what happened, if you didn't document it, is to look at the TOPS data, right?

A That's probably true.

Q And I think what you said is that there were situations where you wouldn't have recorded a delay if it didn't result in a five- or six-minute delay --

A There are -- there were periods of times -- time where that was our primary focus.

Q Okay. And what changed?

A What changed?

Q You said you had periods of time where it was your primary focus. Did something happen to cause you to document more delays?

A We have -- I don't want to bore you, but I guess this is the time to mention this. We have had a long history with CP and Metra trying to comingle on the same piece of real estate, and there are good periods, and there are bad periods, and a lot of the bad periods came about when new individuals would come over at the helm of CP and issue edicts and mandates to their dispatchers to handle traffic in a certain way.

In the most notable change, we had a big Metra supporter, very high ranking at CP for a number of years, that was on our side, went so far as to fire some of the dispatchers that were moving freight trains in front of Metra, and then

somewhere along the line just did a complete total about-face. And then -- now he was the one telling the dispatchers "move that freight train in front of Metra."

Q Okay. So you just made an allegation about a particular CP employee who was in a position that allowed him -- was it a he?

A It was a he.

Q To fire dispatchers?

A Yes.

Q Okay. Someone who worked where at CP?

A I think he was headquartered in Calgary, I believe.

Q And what was his position?

A I think he was either an assistant vice president or a vice president of operations.

Q And do you have a name?

A I don't know if that's appropriate.

Q I'm asking.

A I do have a name.

Q Tell me.

A Robert Johnson.

Q Okay. And you're saying that Robert Johnson fired dispatchers who dispatched Metra trains improperly?

A That did happen once or twice, yes, from my understanding. I mean, nobody sent me a piece of paper saying it happened, but I certainly heard about it.

Q And then you said that he was the one who did, I think you said, an about-face?

A Yes.

Q Okay. And issued instructions to dispatchers?

A Now, whether they were written or verbal, I couldn't tell you. But there was definitely a push to move the freight trains, irregardless of how it affected Metra and Amtrak.

Q So the instructions related to both Metra and Amtrak?

A As far as I understood, yes.

Q Okay. And when did this occur?

A I would have to go back and look.

Q Well, you testify about instructions in your verified statement.

A I don't remember the exact date. It would have been before 2018, I can tell you that.

Q Let's look at paragraph 35 of your verified statement if we may. Do see the paragraph that begins "troublingly"?

A Yes.
Q Okay. So the second sentence:
CP dispatchers who are able to prioritize or avoid delay to Metra have been recently directly told by senior management to move CP trains regardless of the impact on the network.
Do you see that?
A Yes, I do.
Q You wrote that?
A I did.
Q And is that referring to Mr. Johnson's instructions?
A It is not.
Q What is it referring to?
A It was a -- in response to another transportation officer at CP.
All right. So we're talking about 473, and I guarantee you, this has got to be documented in here somewhere.
Q I'm asking you about paragraph 35.
A Okay. I'm trying to explain.
Q Okay.
A And I don't -- it's really not appropriate for me to be throwing people's names out because --

Q Well, you testified under oath that this happened.

A Yes.

Q I'm entitled to ask about circumstances and try -- and try and see whether you have knowledge that's accurate and what that information is. We're entitled to respond to your allegations.

A So -- so the situation involves a 473 train on a weekday in the peak period that was moved out of Bensenville while trains -- no, back up, back up.

It was a 286 coming off the cutoff from Bryn Mawr, going into Bensenville Yard.

Q Can I pause you for one second?

A Yes.

Q Because I'm not -- I want you to continue that answer. I believe you're talking about a specific e-mail that's part of your compilation.

A Yes.

Q Is the e-mail 204? Is that right?

A I think I can find it here if you give me a minute. 204, you say?

Q Well, that's what you cite in your index.

A In the index? How do I find 204? That

would be helpful, certainly, to find it.

Q Yeah, they're numbered at the bottom.

MR. SPITULNIK: This one?

THE WITNESS: Yes, that's the one.

BY MR. MEYER:

Q You're welcome to remove it from the binder if it would be more convenient to have it in front of you.

A So -- so the person who directed this name was given to me in confidence. And I don't know -- if you feel it's important enough, I'm -- I mean, at this point I don't have any compunction about it, but somebody told me who this came from. A reliable source told me that.

Q Okay. So I'm going to ask a few questions, and I'll decide whether I want to ask you for the name.

A Okay.

Q And we can designate that part of the transcript highly confidential.

A Uh-huh.

Q At least as to the outside world. It won't be highly confidential as to my client --

A Okay.

Q -- if it's the name of someone at my

client. I think that's fair.
A Okay.
Q My judgment, okay?
So first question:
If I understand the sequence of events here, there was a 286 --
A Yes.
Q -- coming into Bensenville.
A Correct.
Q 286 is coming from the north, right?
A Correct.
Q So it has to cross over the B-17 interlocking plant to get into Bensenville?
A Correct.
Q It was going into the yard, right?
A Correct.
Q Okay. And there were -- I think what you say in this e-mail is that you didn't think there was enough time between Metra trains for that move to have occurred successfully?
A No, not with 11,500 feet, no way.
Q So the first thing that happened here is a dispatcher made a -- in your opinion, a bad judgment; is that fair?
A Or was directed to do something. I -- the

dispatcher --

Q Okay.

A -- intimated that he was directed to do this. It was not his decision.

Q So was that the Elgin dispatcher that would have given 286 --

A Yes.

Q -- the clearance or whatever the right word is --

A The Elgin --

Q -- to proceed?

A The Elgin dispatcher would have directed the operator, the tower operator at Tower B-17 to bring 286 in, regardless of whether there was enough time to do it or not.

Q So -- and this goes back to this question we had earlier today about what the tower operators do versus what dispatchers do, right? So in this case, the B-17 operator is a CP employee?

A Yes.

Q But in a B-12 situation, it would be a Metra employee?

A Yes.

Q Metra would follow the instructions of the

dispatcher in terms of what trains to allow through the plant, right?

A Yes.

Q And the operator implements that by lighting switches and doing things more tactically, right?

A Correct.

Q Okay. So in this case, 286 is coming from the north, it's crossing through B-17 to get to the yard. I think you say the windows were probably too tight, but at least had a chance of succeeding. Okay. You did say that?

A Okay.

Q You wrote that, right?

A I'll go -- I'll stick with it then, if I said that.

Q Well, you see it there, right? I'm just asking whether I'm reading this right.

MR. SPITULNIK: Can you give him second to read the document.

THE WITNESS: "... too tight, but at least had a chance of succeeding." On these windows...

BY MR. MEYER:

Q Those are --

A Right.

Q I'm reading your words --
A Yes.
Q -- from this e-mail, right?
A And if you like, in conference with CP management, that we did have occasionally, I was asked if I could provide a spreadsheet showing the windows or I may have offered to do it, and I did just that. I gave them a spreadsheet that showed windows between scheduled Metra trains and when those windows were, and I believe they had that at this time, if I remember correctly. I'm not going to swear that they did, but maybe that came after this happened.
Q Do you still have that document, sir?
A I don't have it with me, no.
Q Do you possess it?
A It's somewhere in my computer.
MR. MEYER: Chuck, could I ask if we could get a copy of that? Happy to followup with a formal discovery request if you think it's necessary.
MR. SPITULNIK: I don't think a discovery request is necessary, but if you put it in writing exactly what it is you're looking for, that would be useful. Just send an e-mail.

BY MR. MEYER:

Q And this is -- you're referring to a document that is on your computer that you shared with CP prior to 2021 that identified windows, right?

A Again, I'm not a hundred percent sure if that document was produced -- produced before or after this particular occurrence. Now that I'm looking at it, it says it was January 2021, so it may have been produced afterwards as an attempt to --

Q Provide clear instructions for CP to follow?

A Right, right. In other words, a way to move forward.

Q Okay. In any event --

A Yeah.

Q -- that's the document I'm asking for, whatever that is, and we'll follow-up with an e-mail. Thank you.

So then -- so 286 was moved in a 13-minute window?

A Correct.

Q Pardon?

A Yes.

Q We're just following -- just trying to follow the sequence of events here.

2237, that would be a westbound Metra train --

A Yes.

Q -- outbound. That was stopped at B-17, stopped to let 286 pass.

A Correct.

Q The dispatcher told that train to stop or --

A Well, in moving 286, it would have been physically impossible for the operator of B-17 to line the signal for 2237. It would have been physically impossible to do that because the interlocking would have prevented it.

So 286 is going across all the tracks, pulling into the yard --

Q Okay.

A -- and 2237 is here, and the eastbound train is here [Indicating]. They're both waiting at a red signal, waiting for 286 to clear so the operator can line them up.

Q Okay. So the first part of this e-mail and this concern has to do with the movement of 286 in a window that was, in your judgement, too

Bensenville Yard and whether there were other needs for that track?

A Nothing that -- that the --

Q I asked: Were you aware?

A Yes.

Q I asked: Were you aware?

A I am aware that there are no operating considerations or concerns going on in Bensenville Yard that waiting another five minutes for two Metra trains to go through the interlocking would have mitigated.

Q I'm not asking whether they would have mitigated. I'm asking:

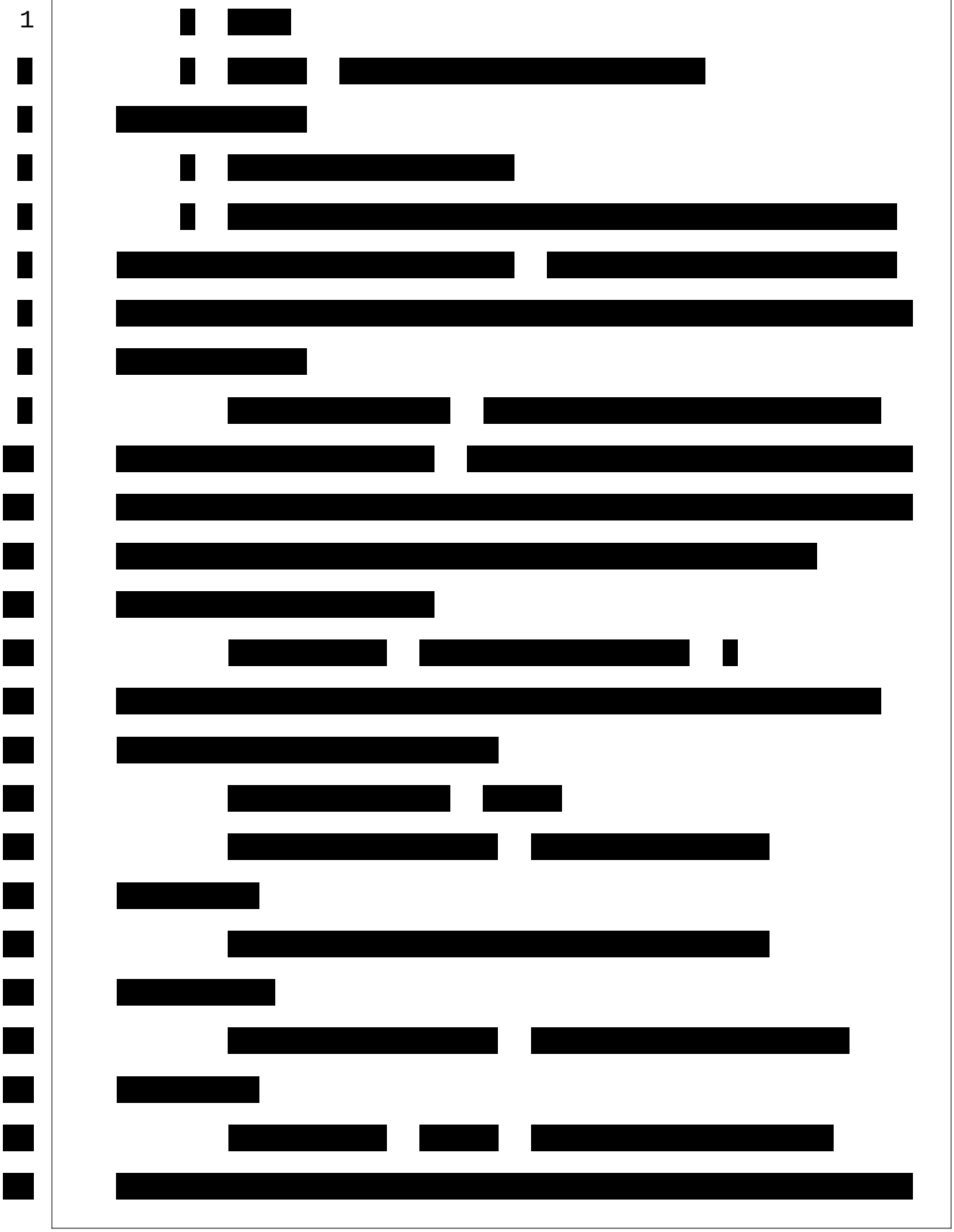
Do you know what operating circumstances were in Bensenville Yard? Period. Full stop.

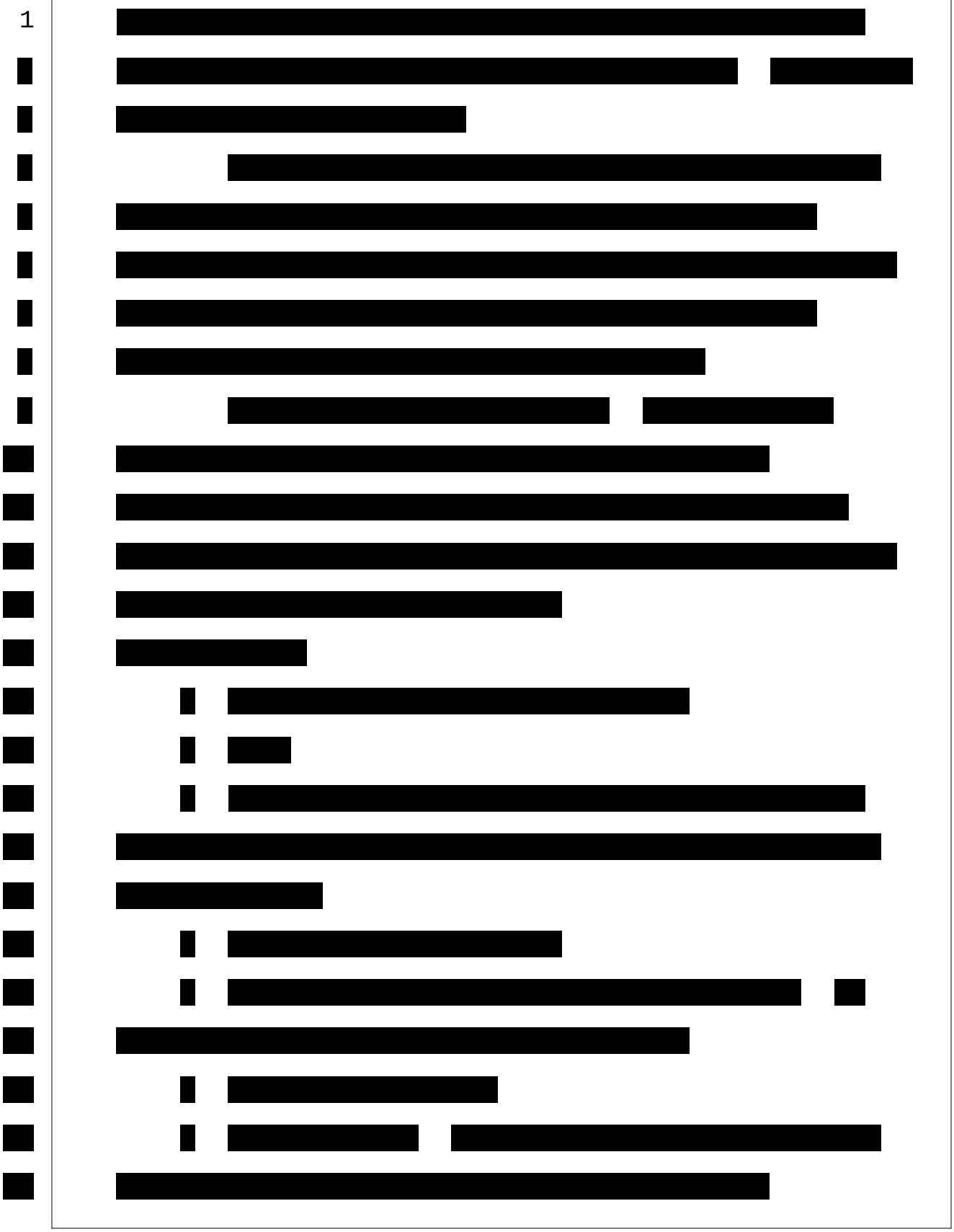
A I'm aware that there could not have been any circumstances in Bensenville Yard that waiting five more minutes would have interfered with.

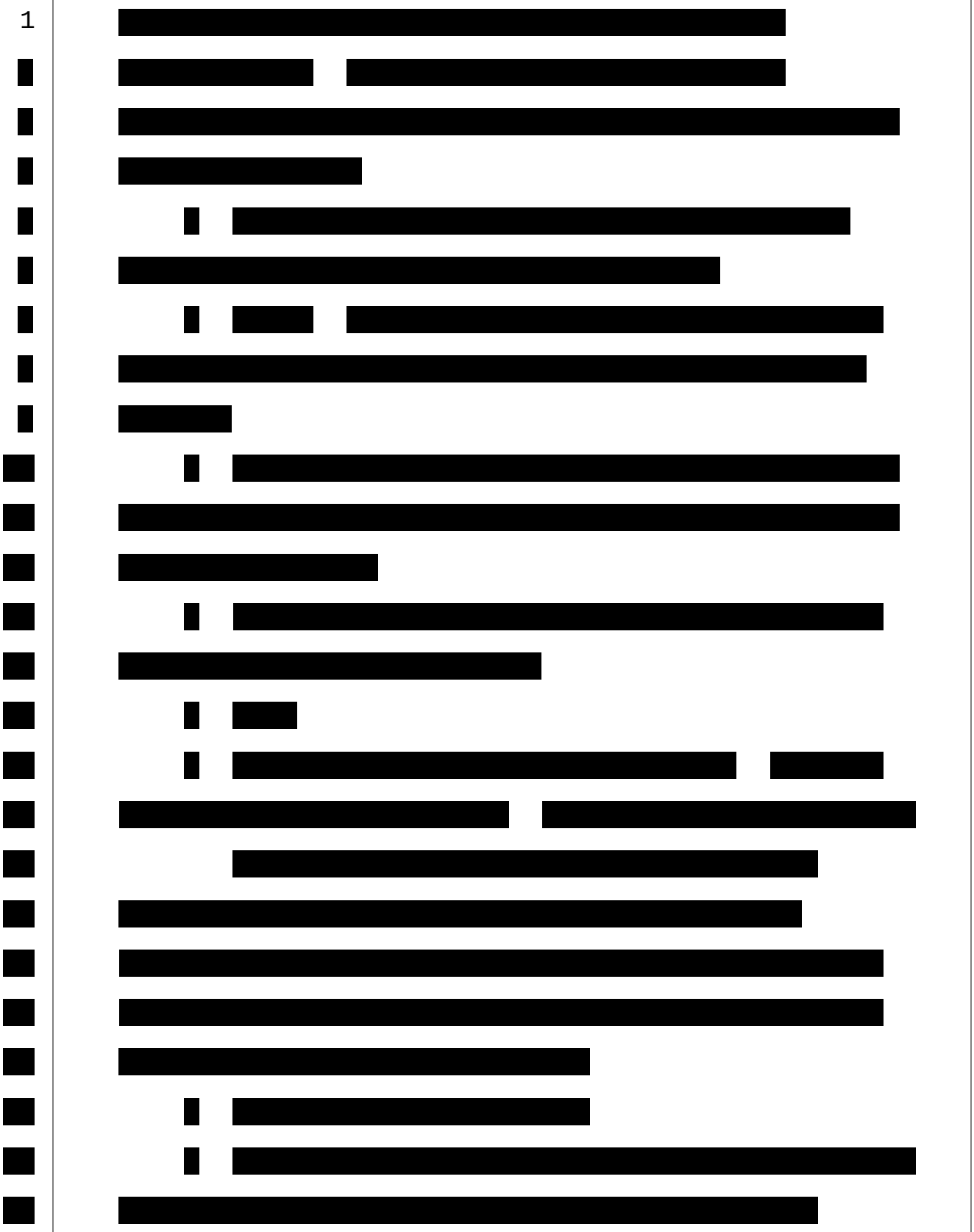
Q So you didn't know all of the circumstances. You just know that in your opinion nothing could have justified waiting five minutes?

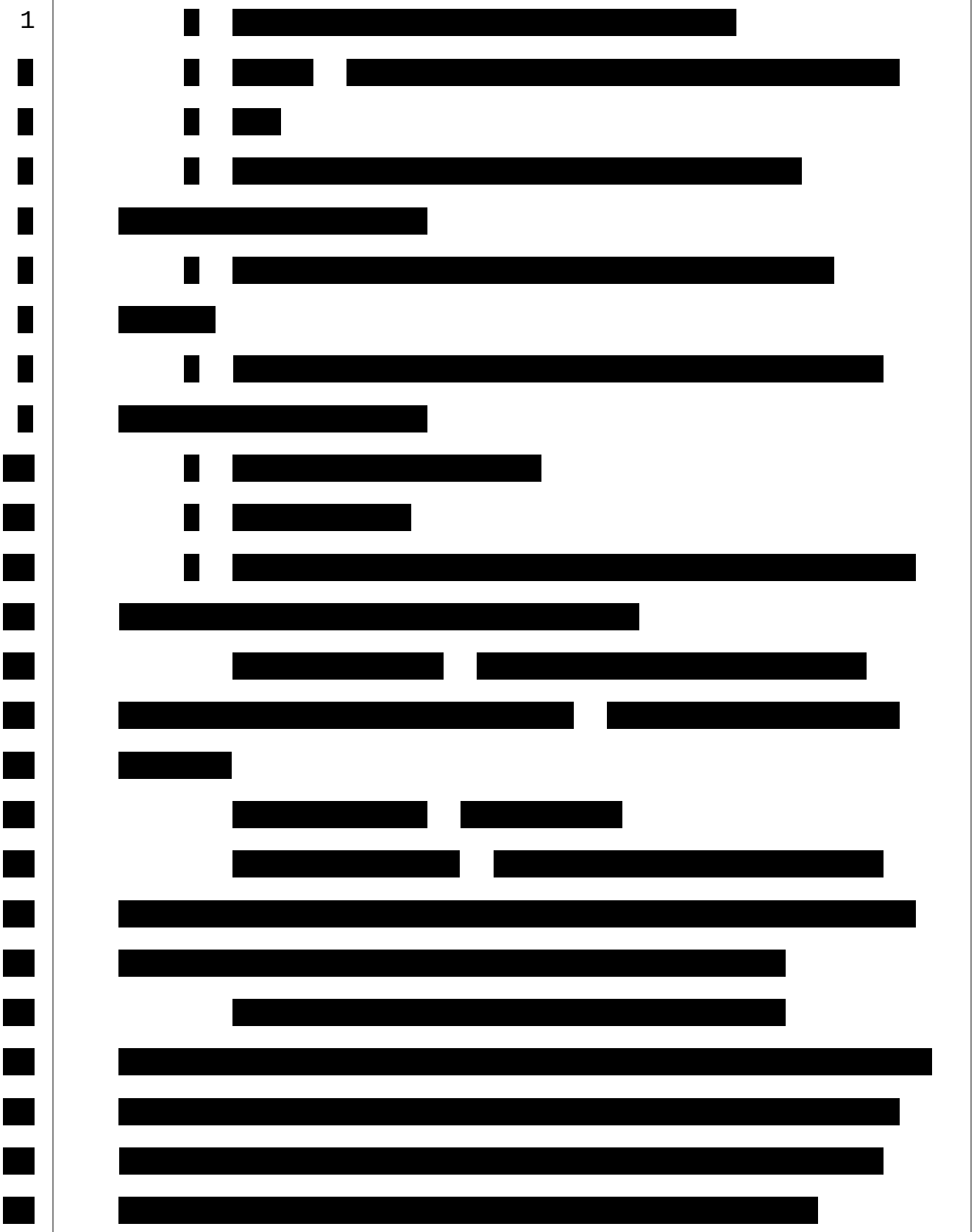
A Yes. Bingo, you got it.

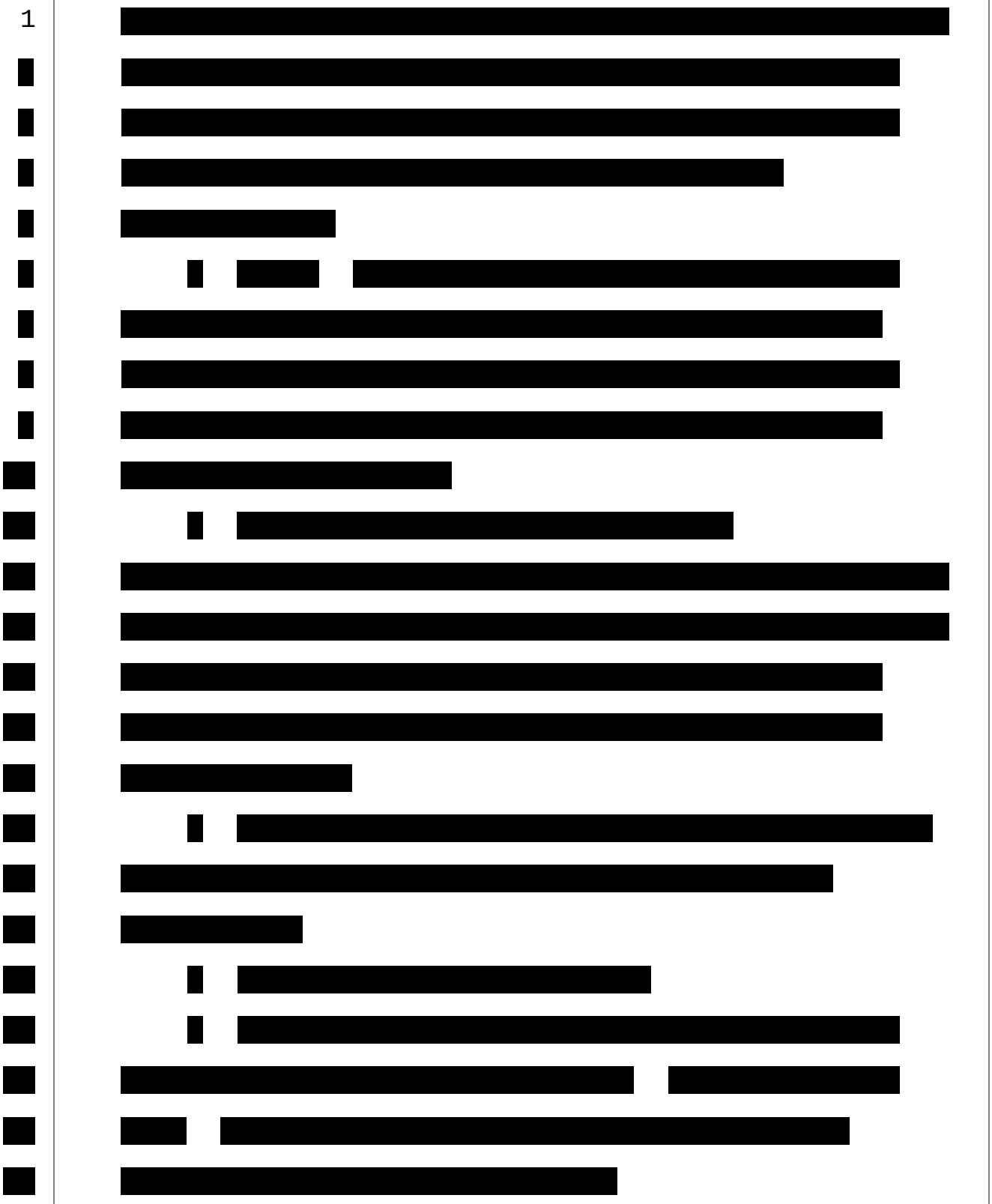
[redacted]











THE WITNESS: Find it?

(Document tendered to witness by Counsel.)

THE WITNESS: Okay. I don't believe this one involved a direct order from anybody but more a suggestion of how to fix the problem.

BY MR. MEYER:

Q So there's nothing in this e-mail that talks about an instruction from anybody, is there?

A No.

Q And you're making a suggestion about CP advising its crews which switches have to be lined and getting information about how long it will take them to do it --

A Yes.

Q -- as a good practice?

A Yes.

Q Do you think CP generally does follow that practice?

A I monitor the radio pretty much all day when I'm sitting at my desk. I have heard the -- I have heard dispatchers ask this question maybe 20 percent of the time. I'll be generous, I'll say 30.

Q On occasions when -- strike that.

So we asked the question of your counsel in discovery for any additional evidence of

instructions being given in support of the allegation in your verified statement, and we got a list of a couple of other instances --

A Okay.

Q -- that are in your e-mail compilation, okay. One was at 250-253.

And I'm trying to understand. This one looks like it's not about any particular dispatching decision but about an issue with CAD software?

A There is a PTC element to this, if I can elaborate a little bit --

Q That's what I'm asking, is --

A Yeah.

Q -- is there a dispatcher being told to --

A There was a dispatcher being asked to provide an upgrade from an Item 1 which requires trains to stop, a crew member to get out to go walk in the middle of traffic at a crossing and ensure that it's stopped and then motion the train across and then get back on it; a process that takes 10 to 15 minutes typically to do, versus an Item 2, which the -- which the they had been authorized to do, and the objection was that the current software for PTC would have required the

dispatcher to cancel the first restriction with the Item 1 on it and then issue a whole new one with an Item 2, as opposed to the pre-PTC procedure which would have merely involved getting on the radio and telling the crew that the Item 1 had been upgraded to an Item 2. This occurred in the morning, I guess that's not material, but...

Q I don't see an instruction given to this dispatcher by anyone.

A No, I don't believe this -- yes, last bullet point:

Even without this embellishment, the CP dispatcher did in fact have the ability to cancel the track bulletin that contained the Item 1, and issue a new one containing the Item 2. When asked, the dispatcher refused to do this.

I guess that's the issue.

Q Okay. Again, I don't see any instruction being given to the dispatcher by anyone in management.

A No. No, no. No.

Q Okay. Fair enough.

Then the next one given to us by counsel in the interrogatory response was 256.

So I see here an e-mail on December 10,

2021. I assume this is what is being referenced by counsel, but I'll -- if there's something different, by all means let me know.

"Worth mentioning that Bensenville terminal superintendents saw the problem with 12,000 foot 286 showing up at the same time as 13,000 foot 241. I knew there would be a problem. He says he called dispatching in Minneapolis and requested 286 be held back. He was overruled.

Was that the instruction?

A Yes.

Q The dispatching office is in Minneapolis?

A Right, the terminal superintendent was in Bensenville trying to avert -- trying to help us out essentially and evert what was unquestionably going to be a delay and --

Q I understand that part.

A Yeah, and --

Q But the dispatchers are in Minneapolis?

A Yes.

Q So we are talking -- so this is the Elgin dispatcher in Minneapolis?

A Right.

Q Making a decision to overrule the superintendent in Bensenville?

A I --
Q Is that right?
A I don't believe it is right. I believe it was one of the managers in Minneapolis above the Elgin dispatcher directing him to do this. I -- I --
Q That's not what's written here, is it? Just says -- all it says is dispatcher --
A The Elgin dispatcher could not override -- overrule the superintendent in Bensenville. That was a given. I -- I didn't realize at the time I wrote this that it was going to be scrutinized in a legal proceeding, in which case I would have --
Q Well, you submitted it in a legal proceeding, didn't you?
A All I'm saying is it goes without saying that if the Elgin dispatcher would refuse to stop 286, as instructed by the Bensenville superintendent, somebody above him was instructing him to do that. That's not something the Elgin dispatcher would have done on his own.
Q So someone in the dispatching office?
A Yes.
Q Okay. And you regard that as senior management at CP?

A I would say.
Q Yeah? So anyone above the line dispatcher is senior management?
A There's levels and levels, but it was definitely some -- some form of management that directed this move, which clearly the Bensenville terminal superintendent, who ought to have a little say over what happens in his yard --
Q Yeah --
A -- was overruled.
Q Sir, I think maybe stick to the question.
A The questions, I don't know who directed it.
Q Then that's the answer.
A Okay.
Q You don't know who directed it.
A I don't know.
Q Do you regard anyone who's a nonagreement person in the dispatching office as senior management?
A I would be very happy if you -- if you -- if you wanted to take the word "senior" out of that statement and just say it was management.
Q Okay. The next one in this list was 291.
So you tell me how to interpret this.

There's a reference here, saying:

Following from Train Master Marshall Beecher was received.

Who is Trainmaster Marshall Beecher?

A He is one of my trainmasters who works for Metra on the C West district who is -- works afternoons and tries to keep his finger on top of what's going on out there when I'm not personally able to do so.

Q Okay. So this is another -- this is another example, and we've seen this -- we've seen this actually quite a few times already today, where CP 286 is coming into Bensenville.

A Yes.

Q All right. Again, that's coming up from the north, crossing over the -- your tracks at B-17?

A And for the record, if an inbound train coming via that route is over 10,000 feet, the choice is move it -- keep it moving or stop it, in which case it's going to block the UP.

Remember, CP runs on UP between Bryn Mawr and Shermer and if they stop a train that's bigger than 10,000 feet at B-17, it's going to keep the UP blocked, and quite often, quite frequently, CP

was to pull down right into the control point with everything, cut off the cars, pull down by the hand throw, shove in, pull out whatever they were picking up, put the train back together, but that -- by positioning it there on the switch where you go into Spaulding Yard took away our ability to cross back over at Spaulding when we run around the train.

And that was what I was referring to when I answered this customer complaint, that yes, there was a way to avoid what you're saying and -- but we needed CP's cooperation to do that, and they weren't cooperating.

Q Huh, interesting, because I don't see that third option anywhere covered in this response.

A Way more detail than I would typically go into with a customer, and I try not to make their eyes glaze over.

I'm sure if somebody wanted to take the time to do it, you could find correspondence between myself and people at CP asking that they -- when switching at Spaulding they leave the train west of the -- of the control point. There were many conversations with the people that ran the operation at the time, and they did it a lot

of the times. A lot of the times they did leave their train back there.

Q But let me get this straight, though.

Either way -- well, this operation at Spaulding, if I understand the configuration of the trackage at Spaulding, the interchange tracks are on the south side of the main line, right?

A Correct.

Q So in order to switch there, track 2 is going to be blocked?

A Correct, it's just a question of if they block it in the interlocking or they block it west of the interlocking. If they block it west of the interlocking, we can come down on number 1, go through the crossover at Spaulding at number 2, hit Bartlett, Hannover Park, and Schaumburg on the right platform.

If they block the -- if they block the interlocking while they're doing their switching at Spaulding, now we're forced to stay on number 1 all the way to Roselle West.

Q Because that's the next crossover?

A That's correct, that is the next crossover, and it has the split Bartlett platform problem to contend with and all the other ones of

being on the wrong track.

Q But just -- just to focus on the dispatching question of whether to send a train from one track to another, either way, the right dispatching move is to cross the Metra train from track 2 to track 1 to avoid delay; isn't that right?

A No, if that is the only way -- the only option that you have to run, yes --

Q You're not going to leave the Metra train stopped on track 2 --

A No, no, we're not suggesting that. What I'm suggesting is there was a way to do this to satisfy Metra and take care of Spaulding, and the customer was told the truth. With CP's cooperation they would not have had to deal with getting their train a block to the -- a block to the west and on the wrong side. It was a very simple request to CP that could have prevented them from having to do that, and we'll keep asking them. That's basically what I told them.

Q So if we could go to page 233.

So I think this is an e-mail where you are talking about passengers having to cross tracks to board and having to dodge the freight train?

the MD West and MD North lines?

A It would not really make sense to split it up, no. I think Metra should dispatch trains on the territory that it owns and maintains and operates.

Q Why wouldn't it make sense to split it up?

Assuming -- if you -- if you assume with me for a moment, and I'm not asking you to agree with this, but assume with me for a moment that the only increase in the number of trains resulting with the -- from the transaction is west of Bensenville Yard?

A Well, I -- I'm having -- based on my knowledge of the operation, I do not believe that these -- these trains are going to materialize in Bensenville and disappear when they go into Bensenville. They're all going to go somewhere. They're going to go to the harbor, they're going to go to the belt, they're going to go north, they're going to go somewhere.

There's going to be more traffic on all the lines regardless of what the -- the projections may say, and I -- I would stake my 50 years on that statement.

Q And it's that belief that is motivating

the need to dispatch the entirety of Metra's own lines?

A It's a combination of the experiences that we have had on a regular basis, problems that affect our service that we need to have control over -- over, in order to prevent them from happening. And the problems will only be exacerbated with more freight trains out there.

There -- I always am amused when the statement is made, oh, you don't need to worry about, what is it, 7.1 more freight trains on the west line west of Bensenville?

I mean, right now CP is running essentially two trains on the line west of Bensenville, and we're still getting delayed every other day or having problems of some sort or another. It's -- it's just unrealistic to -- to say that that's going to be the only source of our problems though.

Q So I --

A Yeah.

Q I asked a question a few questions ago that I don't think you actually answered, which was:

Why -- if you -- if you assume with me

that the only increase in freight trains will occur west of Bensenville, and I understand you did disagree with that view.

A Yes.

Q Okay. But I'm asking you to assume with me that that's the case, why would it not make sense to split up the dispatching?

A It would just be very awkward, trying to hand things off.

Situations occur on one -- would occur, excuse me, on one side of the dividing line that would have to be rectified on the other side of the dividing line. It would just -- you know, our Metra -- Metra trains don't run from Elgin to Bensenville and end there. It's a through operation [indicating.] It needs to be handled as such.

Q Because dispatching that handles both sides of a divide is more efficient than dispatching that handles only one?

A In certain cases it would be. But, yeah, as far as splitting the Metra traffic, I mean, we could make it work. It just would be very awkward.

MR. MEYER: I think that's all I've got.

way to avoid interference during peak periods is to operate no freight trains at all during peak periods, are you?

A I'm going to go back to the statement I made at the time, and I truly sincerely believe this:

The agreement says that CP will not interfere with the operation of Metra peak period trains. So it doesn't say:

Well, we got about an 80 or 90 percent chance we're not going to interfere. Let's try this and see if it works. It doesn't say that.

So if the end result is a Metra train being interfered with by a CP freight train during peak periods, as far as I can see, CP has violated the terms of the operating agreement, and the violation is in the results.

Q If you were dispatching Metra's lines, does that mean that you would never allow a train onto Metra's lines -- a freight train onto Metra's lines during a peak period?

A It does not mean that, but it does mean that a lot of information and consideration would have to go into that decision of whether to run that train or not, and if it were 12,000 feet long

and we had a tiny window in there, no, I would absolutely not run that train.

If it were a 5,000-foot train with lots of power and a good crew, and I knew clearly what was going to go on, and I talked to Bensenville and determined ahead of time that the route was lined for them to pull into the yard, yeah, I would run that train.

MR. MEYER: Okay. I've got nothing further. Thank you.

FURTHER EXAMINATION

By MR. SPITULNIK:

Q I just want to make sure that you are not testifying today that if -- that there -- that there should be no freight train operations during peak -- during peak periods.

A Absolutely, I'm not saying that at all.

MR. SPITULNIK: Thank you. I have nothing further.

THE VIDEOGRAPHER: Going off the record 6:38 p.m.

(Ending time noted: 6:38 p.m.)

CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

I, Cynthia J. Conforti, Certified Shorthand Reporter No. 084-003064, CSR, CRR, and a Notary Public in and for the County of Cook, State of Illinois, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction; that reading and signing was requested; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 8th day of June, 2022.

My commission expires: October 30, 2023



_____

Notary Public in and for the
State of Illinois

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL*. – CONTROL – KANSAS CITY SOUTHERN, *ET AL*.

VOLUME III, EXHIBIT E

HIGHLY CONFIDENTIAL – DEPOSITION OF PATRICK OTTENSMEYER (FEBRUARY 22, 2022)

(EXCERPTS)

BEFORE THE SURFACE TRANSPORTATION BOARD

_____

FINANCE DOCKET NO. 36500

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CANADIAN PACIFIC RAILWAY LIMITED, ET AL.

- CONTROL -

KANSAS CITY SOUTHERN, ET AL.

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HIGHLY CONFIDENTIAL

- - -

Tuesday, February 22, 2022

- - -

Remote Zoom videotaped deposition of PATRICK J. OTTENSMEYER, beginning at 9:08 a.m. EST, before Christina S. Hotsko, RPR, CRR, when were present on behalf of the respective parties:

A P P E A R A N C E S (Via Zoom)

On behalf of BNSF Railway:
ADRIAN L. STEEL, JR., ESQUIRE
Mayer Brown, LLP
1999 K Street, Northwest
Washington D.C. 20006-11-1
(202) 263-3237
asteel@mayerbrown.com
LAUREN GOLDSCHMIDT, ESQUIRE
Steptoe & Johnson, LLP
1330 Connecticut Avenue, Northwest
Washington, D.C. 20036
(202) 429-3000
lgoldschmidt@Steptoe.com

On behalf of Canadian Pacific:
DAVID L. MEYER, ESQUIRE
Law Office of David L. Meyer
1105 S Street, Northwest
Washington, D.C. 20009
(202) 294-1399
david@meyerlawdc.com
ADAM S. PARIS, ESQUIRE
ALEXA M. COVER, ESQUIRE
Sullivan & Cromwell, LLP
1888 Century Park E
Los Angeles, California 90067
(310) 712-6663
parisa@sullcrom.com

On behalf of Canadian National Railway:
MATTHEW J. WARREN, ESQUIRE
JOSEPH V. CONIGLIO, ESQUIRE
Sidley Austin, LLP
1501 K Street, Northwest
Washington, D.C. 20005
(202) 736-8996
mjwarren@sidley.com

A P P E A R A N C E S (Continued)

On behalf of Allied Rail Unions
RICHARD S. EDELMAN, ESQUIRE
Mooney Green Saindon Murphy & Welch, P.C.
1920 L Street, Northwest, Suite 400
Washington, D.C. 20036
(202) 783-0010
redelman@mooneygreen.com

On behalf of Union Pacific Railroad:
MICHAEL L. ROSENTHAL, ESQUIRE
SAHEL SRA, ESQUIRE
Covington & Burling, LLP
One CityCenter
850 Tenth Street, Northwest
Washington, D.C. 20001-4956
(202) 662-5448
mrosenthal@cov.com

On behalf of Kansas City Southern:
W. TODD MILLER, ESQUIRE
WILLIAM A. MULLINS, ESQUIRE
ERIN GLAVICH, ESQUIRE
Baker & Miller, PLLC
2401 Pennsylvania Avenue, Northwest, Suite 300
Washington, D.C. 20037
(202) 663-7823
wmullins@bakerandmiller.com

On behalf of CSX Transportation:
PAUL A. CUNNINGHAM, ESQUIRE
JILL COLLINS, ESQUIRE
NEILL KLING, ESQUIRE
Harkins Cunningham, LLP
170 K Street Northwest, Suite 300
Washington, D.C. 20006
(202) 973-7601
pac@harkinscunningham.com

A P P E A R A N C E S (Continued)

On behalf of Norfolk Southern:

CHRISTOPHER ABBOTT, ESQUIRE
Weil Gotshal & Manges, LLP
2001 M Street, Northwest, Suite 600
Washington, D.C. 20036
(202) 6822-7197
christopher.abbott@weil.com

Also Present:

Scott Forman, Video Technician
Peter Curran, Veritext Tech
Cassandra P. Quach, In-House Counsel

